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# Equal Protection from Execution: Expanding Atkins to Include Mentally Impaired Offenders

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# COMMENT

# EQUAL PROTECTION FROM EXECUTION: EXPANDING *ATKINS* TO INCLUDE MENTALLY IMPAIRED OFFENDERS

*"Once a substantive right or restriction is recognized in the Constitution . . . its enforcement is in no way confined to the rudimentary process deemed adequate in ages past."*[1]

In 2002, the United States Supreme Court announced that the execution of mentally retarded offenders is unconstitutional,[2] under the Eighth Amendment's prohibition on cruel and unusual punishment.[3] This decision purported to provide absolute protection against execution for such offenders, whom the Court characterized as "know[ing] the difference between right and wrong and [being] competent to stand trial . . . [but having] diminished capacities" and a corresponding reduced culpability for their crimes.[4] In practice, however, the *Atkins v. Virginia* decision has allowed states to narrow that protection because the Court failed to define the precise group its ruling encompassed. By "leav[ing] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction,"[5] including defining the term "mental retardation," *Atkins*

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[1] Ford v. Wainwright, 477 U.S. 399, 410 (1986).

[2] *See* Atkins v. Virginia, 536 U.S. 304 (2002).

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

[4] *Atkins*, 536 U.S. at 318.

[5] *Id.* at 317 (second alteration in original) (internal quotation marks omitted).

shifted the debate from whether to execute mentally retarded offenders to *who* qualifies as "mentally retarded." Not surprisingly, this debate has produced definitions of mental retardation that vary among the states.[6]

There is, however, one common element of states' mental retardation definitions: the requirement that symptoms manifest before adulthood. This Comment argues that the juvenile-onset requirement is inappropriate in the legal context and arguably violates the Equal Protection Clause because it requires different punishments for similarly impaired offenders based solely on the legally insignificant question of when their retardation began.[7] Part I provides background information on the *Atkins* decision itself. Part II explores potential ways to define mental retardation, the definitions that states have adopted, and the role of the juvenile-onset requirement in those definitions. Part III considers possible equal protection challenges to the juvenile-onset requirement, including the appropriate level of judicial scrutiny and possible rationales a state could proffer to justify the requirement.

## I. THE *ATKINS V. VIRGINIA* DECISION

In *Atkins*, the Supreme Court held that the execution of mentally retarded offenders is unconstitutional under the Eighth Amendment's prohibition on cruel and unusual punishment.[8] To reach its conclusion, the Court first sought and found a national consensus against the practice and then brought its "own judgment . . . to bear on the question of [the punishment's] acceptability."[9]

In the first prong of its analysis, the *Atkins* Court surveyed the number of states refusing, either through legislation or actual practice, to execute mentally retarded offenders,[10] and noted the "consistency

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[6] *See* John H. Blume, Sheri Lynn Johnson & Christopher Seeds, *An Emprical Look at* Atkins v. Virginia *and Its Application in Capital Cases*, 76 Tenn. L. Rev. 625, 629–36 (2009).

[7] This Comment uses the term "mental retardation" to refer to the clinical definition, including the age-of-onset component, and the term "mental impairment" to refer to the intellectual and adaptive deficits present in mental retardation, but without requiring juvenile onset. Also, this Comment uses the term "mental retardation" because *Atkins* attaches legal significance to that term. The phrase is, however, falling out of favor with the mental health community and being replaced by the term "intellectual disability." *See, e.g.*, Am. Ass'n on Intellectual and Developmental Disabilities, FAQ on Intellectual Disability, http://aaidd.org/content_104.cfm (last visited Apr. 7, 2010) [hereinafter AAIDD] ("Mental retardation and intellectual disability are two names for the same thing. But intellectual disability is gaining currency as the preferred term.").

[8] *See Atkins*, 536 U.S. at 321.

[9] *Id.* at 312.

[10] *See id.* at 313–15.

of the direction of change" away from the practice.[11] The Court found further evidence of consensus in the opinions of mental health organizations, religious groups, the international community, and the American public.[12] The Court concluded that a national consensus against executing mentally retarded offenders existed,[13] though it noted that "[n]ot 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."[14] As a result, though it had already cited two definitions widely used by mental health professionals,[15] the Court declined to define the term "mental retardation" and instead directed the states to adopt their own definitions.[16]

To complete its Eighth Amendment analysis, the Court then articulated its own reasons for finding capital punishment cruel and unusual for mentally retarded offenders. The Court explained that mentally retarded offenders possess a lesser culpability than other offenders because of their diminished capacity to understand and process information, communicate with others, abstract from mistakes, learn from experience, engage in logical reasoning, control impulses, and understand the reactions of others.[17] The Court also noted that mentally retarded individuals are more likely to act impulsively rather than according to a premeditated plan and to follow the suggestions of others in group settings.[18]

These characteristics, according to the Court, present two reasons why mentally retarded individuals should not be put to death. First, such executions do not serve capital punishment's penological goals of retribution and deterrence. The severe level of retribution exacted by execution is appropriate for only the "most deserving" offenders, not those with diminished culpability.[19] Likewise, deterrence cannot justify executing mentally retarded offenders because the same characteristics that reduce culpability also "make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that

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[11] *Id.* at 315.

[12] *Id.* at 316 n.21.

[13] *Id.* at 316 (noting that the execution of mentally retarded defendants "has become truly unusual, and it is fair to say that a national consensus has developed against it").

[14] *Id.* at 317.

[15] *Id.* at 308 n.3 (outlining the definitions of "mental retardation" used by the American Association on Mental Retardation and the American Psychiatric Association).

[16] *Id.* at 317.

[17] *Id.* at 318.

[18] *Id.*

[19] *Id.* at 319 (noting that "the lesser culpability of the mentally retarded offender surely does not merit [this] form of retribution").

information."[20] Second, these characteristics increase the danger of wrongful execution.[21] That risk takes the shape of false confessions, a reduced ability to persuasively show mitigating factors, an inaccurate but prejudicial appearance of remorselessness, the risk that jurors will view mental retardation as an aggravating factor of future dangerousness rather than a mitigating one, and the inability to effectively assist counsel and appeal to a jury.[22] Therefore, finding "no reason to disagree with the judgment of the legislatures that have recently addressed the matter," the Court held that the Eighth Amendment prohibits the execution of mentally retarded offenders as an excessive punishment.[23]

## II. DEFINING THE BOUNDARIES OF "MENTAL RETARDATION"

### *A. In Theory: Possible Definitions*

The Supreme Court's reticence to create a precise and uniform definition has left states, lower courts, and litigants to grapple with the question of exactly who falls within the exemption created by *Atkins*. It is possible to define the group protected by *Atkins* in three ways: using the clinical definitions of mental retardation; determining exactly what group is the subject of the *Atkins* Court's national consensus; or defining the group according to the Court's reasoning—that is, including all who bear the characteristics described by the Court in its rationale.

The first of these options, using a clinical definition, is relatively straightforward and therefore attractive to legislatures seeking to implement *Atkins*. The Court noted, but did not explicitly adopt, two well-known clinical definitions of mental retardation.[24] These definitions, promulgated by the American Association on Mental Retardation (now the American Association on Intellectual and Developmental Disabilities[25]) and the American Psychiatric Association, are largely identical and each contain three elements: significantly subaverage intellectual functioning, limitations in

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[20] *Id.* at 320.

[21] *Id.*

[22] *Id.* at 320–21.

[23] *Id.* at 321 (internal quotation marks omitted).

[24] *See id.* at 308 n.3.

[25] The organization changed its name and no longer uses the term "mental retardation," but stresses that "[m]ental retardation and intellectual disability are two names for the same thing. . . . It is crucial that 'mental retardation' and 'intellectual disability' should be precisely synonymous in definition and in all related classification because current federal and state laws contain the term 'mental retardation.'" AAIDD, *supra* note 7.

adaptive skills, and a manifestation of these deficits before age eighteen.[26] The Court also noted that state statutory definitions of mental retardation that were in place before *Atkins* generally conformed to these clinical definitions, though with some variation.[27] The Court declined, however, to adopt either of these definitions, instead directing the states to "develop[] appropriate ways to enforce the constitutional restriction."[28]

A second, and considerably more complicated, method of defining the protected group is to include everyone about whom there is a national consensus, the first prong of the *Atkins* analysis. The Court found a national consensus against executing mentally retarded offenders primarily in the number and trend of legislative enactments prohibiting such punishment and in the rarity of executions even in states that authorized it.[29] It explained that these legislative judgments "reflect[] a much broader social and professional consensus,"[30] as evidenced by opposition to executing mentally retarded offenders within relevant professional organizations, religious communities, the international community, and the

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[26] The American Association on Mental Retardation provides the following definition:

> *Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992). The American Psychiatric Association's definition, which appears in the fourth edition of the *Diagnostic and Statistical Manual of Mental Disorders*, is similar:

> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.

AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000) [hereinafter DSM-IV-TR].

[27] *Atkins*, 536 U.S. at 317 n.22.

[28] *Id.* at 317 (internal quotation marks omitted); *see also* Bobby v. Bies, 129 S. Ct. 2145, 2150 (2009) (explaining that *Atkins* "did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation 'will be so impaired as to fall [within *Atkins*' compass]'" (alteration in original)).

[29] *Atkins*, 536 U.S. at 314–16.

[30] *Id.* at 316 n.21.

American public.[31] The Court acknowledged, however, that while there is a national consensus against executing mentally retarded offenders, there may not be a consensus about *who* is mentally retarded.[32] In other words, while legislatures, religious and professional organizations, and the American public may agree in principle on the prohibition, they may not agree on how to define the protected group. And it was precisely because of the difficulty in determining which people fall within the group about whom there is a consensus that the Court declined to endorse a specific definition and therefore left open the boundaries of the exemption.[33] The Court's refusal to settle this debate is a strong indicator that defining the group using only the national consensus would be a difficult, perhaps impossible, task for states and lower courts to take on.

Additionally, because the national consensus is not static, society's belief regarding who should be subject to capital punishment may morph over time, leaving the issue open for litigation with each new case. So while this definition may be attractive in theory, it could be a logistical nightmare to implement.

The final option for defining the group that *Atkins* protects is to use the Court's own reasoning for finding these executions cruel and unusual, the second step in its two-part Eighth Amendment test. Under this method, any offender who fits within the Court's rationale for the exclusion would be exempt from execution. The Court pointed to a number of traits that render mentally retarded offenders undeserving of capital punishment: a diminished capacity to understand and process information, communicate with others, abstract from mistakes, learn from experience, engage in logical reasoning, control their impulses, and understand the reactions of others; and a greater tendency to act on impulse and follow the suggestions of others.[34] A jurisdiction adopting this approach could import these characteristics into its mental retardation definition, defining it by their presence. As with the clinical definitions, this method would require individualized assessment, using the same intellectual and adaptive skills tests employed to diagnose clinical mental retardation,[35] to determine if a particular offender's deficits place him within the scope of the *Atkins* exemption.

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[31] *Id.* 316–17 n.21.

[32] *Id.* at 317.

[33] *See id.* (observing that the only discord surrounding the propriety of executing mentally retarded offenders revolves around determining which offenders meet the definition and leaving to the states the responsibility of resolving that debate).

[34] *Id.* at 318.

[35] *See, e.g.*, DSM-IV-TR, *supra* note 26, at 39–40 (listing several standardized tests for intelligence and adaptive functioning).

### *B. In Practice: Wholesale Adoption of the Clinical Definitions*

In practice, almost every state allowing the death penalty has adopted a definition of "mental retardation" that closely tracks the clinical definitions noted in *Atkins*.[36] Such heavy reliance on these definitions is not surprising, given their relative ease of implementation and the fact that the Court cited them approvingly, thereby creating a "safe harbor" of sorts against challenges.[37] These definitions, however, contain a significant element that did not receive any attention in the *Atkins* decision: the requirement that symptoms of mental retardation manifest before age eighteen.[38] While some states use an age other than eighteen[39] and others require onset "during the developmental period"[40] in lieu of designating a specific age of onset, all but one require that the condition manifest before adulthood.[41]

### *C. The Result: A Definition Without a Legal Rationale*

The age-of-onset requirement is relevant in the clinical setting because mental retardation is classified as a developmental disorder, or one that first becomes obvious during infancy, childhood, or adolescence.[42] A person who later develops the same intellectual

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[36] *See* ARIZ. REV. STAT. ANN. § 13-753(K)(3) (2001 & Supp. 2008); ARK. CODE ANN. § 5-4-618(a)(1) (2006); CAL. PENAL CODE § 1376(a) (West 2000); COLO. REV. STAT. ANN. § 16-8.5-101(9) (West 2008) (using the term "developmental disability"); CONN. GEN. STAT. ANN. § 1-1g (West 2007); DEL. CODE ANN. tit. 11, § 4209(d)(3)(d)(2)–(3) (West 2006 & Supp. 2010); FLA. STAT. ANN. § 921.137(1) (West 2006 & Supp. 2010); GA. CODE ANN. § 17-7-131(a)(3) (Supp. 2009); IDAHO CODE ANN. § 19-2515A(1)(a) (2004 & Supp. 2008); 725 ILL. COMP. STAT. ANN. 5/114-115 (2006); IND. CODE ANN. § 35-36-9-2 (West 2004); KAN. STAT. ANN. § 21-4623(e) (2007); KY. REV. STAT. ANN. § 532.130(2) (West 2006); LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(1) (2008); MD. CODE ANN., CRIM. LAW § 2-202(b)(i)–(ii) (LexisNexis 2002); MO. REV. STAT. § 565.030(6) (Supp. 2009); NEB. REV. STAT. § 28-105.01(3) (2008); NEV. REV. STAT. ANN. § 174.098(7) (LexisNexis 2006); N.C. GEN. STAT. § 15A-2005(a)(1)(a) (2007); S.D. CODIFIED LAWS § 23A-27A-26.2 (2004); TENN. CODE ANN. § 39-13-203(a) (2006); UTAH CODE ANN. § 77-15a-102 (2008); VA. CODE ANN. § 19.2-264.3:1.1(A) (Supp. 2009); WASH. REV. CODE ANN. § 10.95.030(2)(a) (West 2002); *Ex parte* Perkins, 851 So. 2d 453, 456 (Ala. 2002); Chase v. State, 873 So. 2d 1013, 1029 (Miss. 2004); State v. Lott, 779 N.E.2d 1011, 1014 (Ohio 2002); Myers v. State, 130 P.3d 262, 266 (Okla. Crim. App. 2005); Commonwealth v. Miller, 888 A.2d 624, 631 (Pa. 2005); Franklin v. Maynard, 588 S.E.2d 604, 605 (S.C. 2003); *Ex parte* Woods, 296 S.W.3d 587, 589 (Tex. Crim. App. 2009), *cert. denied*, 130 S. Ct. 794 (2009).

[37] *See* Nita A. Farahany, *Cruel and Unequal Punishments*, 86 WASH. U. L.R. 859, 881 (2009).

[38] AM. ASS'N ON MENTAL RETARDATION, *supra* note 26, at 5.

[39] *See, e.g.*, IND. CODE ANN. § 35-36-9-2 (requiring manifestation by the age of twenty-two).

[40] *E.g.* NEV. REV. STAT. ANN. § 174.098(7).

[41] Nebraska is the only state that does not require the condition to manifest before adulthood. *See* NEB. REV. STAT. § 28-105.01.

[42] *See* DSM-IV-TR, *supra* note 26, at 37.

and adaptive deficits that characterize mental retardation is not classified as mentally retarded. As James Ellis, the attorney who represented Daryl Atkins before the Supreme Court, explained:

> The purpose of this third component of the definition is to distinguish mental retardation from those forms of brain damage that may occur later in life . . . from causes such as traumatic head injury, dementia caused by disease, or similar conditions. This distinction is considerably more relevant to clinicians . . . than it is to the criminal justice system.[43]

Even within the clinical setting, labeling a disorder "developmental" does not create a rigid distinction. For example, the DSM-IV states that

> [t]he provision of a separate section for disorders that are usually first diagnosed in infancy, childhood, or adolescence is for convenience only and is not meant to suggest that there is any clear distinction between "childhood" and "adult" disorders. Although most individuals with these disorders present for clinical attention during childhood or adolescence, the disorders sometimes are not diagnosed until adulthood.[44]

The *Atkins* decision, though noting the age-of-onset element in clinical definitions, provides no support for transplanting it into the legal setting. The national consensus the Court found relies on legislative enactments, state practices, and the views of organizations and the public. None of these components provides a ready explanation for requiring a certain age of onset, and some directly refute the idea that the requirement is part of the consensus the Court looked for and found. For example, the professional organizations with mental health expertise cited by the Court, as well as several other prominent organizations, advocate against requiring juvenile onset for the exemption and specifically acknowledge that similar cognitive impairments may arise from other causes, such as traumatic brain injury or dementia.[45] While the American Association

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[43] James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11, 13 (2003) (footnote omitted).

[44] DSM-IV-TR, *supra* note 26, at 39.

[45] *See* AM. BAR ASS'N, RECOMMENDATION AND REPORT ON THE DEATH PENALTY AND PERSONS WITH MENTAL DISABILITIES (2006), *reprinted in* 30 MENTAL & PHYSICAL DISABILITY L. REP. 668, 668 (2006) ("Defendants should not be executed or sentenced to death if, at the time of the offense, they had significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting

on Mental Retardation,[46] also cited in *Atkins*, continues to include juvenile onset as a prong of its definition, the organization's amicus brief focused on the reduced culpability associated with mental retardation, not its development or cause.[47] The group has also noted that those meeting the intellectual and adaptive skills components of the definition, but with a later onset after age eighteen, "do not have mental retardation within the meaning of the clinical definition" but may be entitled to the same protection as those that do.[48]

Additionally, the *Atkins* Court pointed to an amicus brief filed by a diverse collection of religious organizations as another indication of consensus;[49] it contains no mention of an age-of-onset requirement and supplies no justification for it. Instead, the groups echo the reasoning of the mental health community by focusing on the lesser culpability of mentally retarded offenders. They summarize their position by saying that "the death penalty . . . should not be imposed upon persons with mental retardation because of their diminished capacity,"[50] making no mention of when such deficits manifest.

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from mental retardation, dementia, or a traumatic brain injury."); *see also* PUB. POLICY COMM. OF THE BD. OF DIRS. & DEP'T OF PUB. POLICY AND LEGAL AFFAIRS, NAT'L ALLIANCE ON MENTAL ILLNESS (NAMI), PUBLIC POLICY PLATFORM OF THE NATIONAL ALLIANCE ON MENTAL ILLNESS § 10.9.1.1, at 57 (8th ed. 2009) [hereinafter NAMI PLATFORM], *available at* http://www.nami.org/TextTemplate.cfm?Section=NAMI_Policy_Platform&Template=/ContentManagement/ContentDisplay.cfm&ContentID=45722 ("Defendants shall not be sentenced to death or executed if they have a persistent mental disability, with onset before the offense, characterized by significant limitations in both intellectual functioning and adaptive behavior as expressed in their conceptual, social, and practical adaptive skills.").

[46] Now the American Association on Intellectual and Developmental Disabilities. *See* Press Release, Am. Ass'n on Intellectual and Developmental Disabilities, World's Oldest Organization on Intellectual Disability Has a Progressive New Name (Nov. 2, 2006), *available at* http://www.aamr.org/content_1314.cfm.

[47] *See* Brief for Am. Ass'n on Mental Retardation et. al. as Amici Curiae Supporting Petitioner, McCarver v. North Carolina, 533 U.S. 975 (2001) (No. 00-8727), 2001 WL 648605.

[48] Brief of Amici Curiae Am. Ass'n on Mental Retardation et al. at 17 n.8, Arizona v. Arellano, 143 P.3d 1015 (Ariz. 2006) (No. CV-05-0397-SA).

[49] *See* Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002).

[50] Brief for United States Catholic Conference et al. as Amici Curiae Supporting Petitioner at 21, McCarver v. North Carolina, 533 U.S. 975 (2001) (No. 00-8727), 2001 WL 648613 (emphasis added); *see also id.* at 14 ("Persons with mental retardation deserve special consideration and compassion; with less understanding of the consequences of their actions, they do not have the same level of responsibility as others."); *id.* at 20 ("Mentally retarded persons by definition have subaverage intellectual functioning with concurrent deficits in socially adaptive behavior. That is not to say such persons cannot tell right from wrong or should not be held responsible for criminal behavior. However, the death penalty is the most extreme sanction available to the state, and is therefore reserved for offenders who have the highest degree of blameworthiness for an extraordinarily aggravated crime. How can an individual who by definition is significantly intellectually impaired ever meet the highest standard of blame required for such a penalty? It is not a simple question of knowing right from wrong. It is rather an issue of proportionality and equity." (alteration in original)).

The Court's own reasoning is similarly based on the functional effects of mental retardation—that is, those deficiencies measured through intellectual and adaptive skills tests[51]—without discussing when those characteristics develop. The Court explains that the lesser culpability of mentally retarded offenders makes their execution a poor fit with the penological goals of retribution and deterrence and enhances the risk of wrongful execution.[52] This focus on an offender's cognitive shortcomings at the time of and after the crime suggests that, while it used "mental retardation" as a convenient label, the Court may have intended to exempt all offenders with the cognitive impairments it outlined in its rationale.

Even if the Court had no such intent, however, states would be wise to eliminate the age-of-onset requirement from their definitions as irrelevant to the decision's reasoning. The impairments and characteristics described in the opinion—rather than the term "mental retardation" and its clinical definition—are at the heart of the substantive protection *Atkins* recognized and should rightfully define the group it exempts. States would honor the substance of *Atkins* if they eliminated the juvenile-onset requirement and instead focused on the cognitive impairments that formed the foundation of the Court's holding.

## III. POTENTIAL EQUAL PROTECTION CHALLENGES TO THE JUVENILE-ONSET REQUIREMENT

Litigants in the states that retain the juvenile-onset requirement may have a viable claim that the mental retardation definition violates the Fourteenth Amendment's Equal Protection Clause. The Equal Protection Clause prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws"[53] and requires the government to treat similarly those who are similarly situated.[54] Because the juvenile-onset requirement appears irrelevant under the legal rationale for exempting mentally retarded offenders, a defendant who is functionally identical to a mentally retarded offender but whose impairments did not manifest until adulthood could challenge his death sentence as a denial of equal protection. As James Ellis suggests, in "a capital prosecution of an individual who met the definition of mental retardation except for the age of onset,

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[51] *See Atkins*, 536 U.S. at 318.

[52] *See id.* at 319–21.

[53] U.S. CONST. amend. XIV, § 1.

[54] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

principles of equality likely would require comparable exemption from capital punishment."[55]

For purposes of an equal protection analysis, the two classes that most mental retardation definitions create are mentally impaired offenders whose symptoms manifested before the cut-off age, usually eighteen, and mentally impaired offenders whose symptoms manifested after that age. As an illustration, two brothers, one seventeen years old and one eighteen years old, could suffer brain injuries in the same car accident, resulting in identical cognitive deficiencies. The younger brother has not yet passed the cut-off age and is protected under the *Atkins* definition of mental retardation. The older brother turned eighteen before the accident and is therefore eligible for the death penalty. This hypothetical scenario begs the question: is there any justification for treating them differently?

### *A. Level of Scrutiny*

The equal protection analysis begins by determining the appropriate level of scrutiny. This question has received very little attention in the case law involving mentally impaired defendants, and no court appears to have applied a heightened form of judicial scrutiny. The default form of scrutiny, therefore, is a rational basis review.[56]

#### *1. Rational Basis Review*

Any classification is subject to, at the very least, a rational basis review that asks whether the classification is rationally related to a legitimate government interest.[57] Under this form of review, which is generally very deferential to legislative decisions, a court would consider whether the state has a legitimate reason for exempting those with juvenile onset of mental impairments from execution but not those with identical deficits that develop during adulthood.

The Supreme Court of Louisiana analyzed this scenario in *State v. Anderson*, when a capital defendant challenged Louisiana's definition of mental retardation as unconstitutional under the Equal Protection Clause.[58] There, Henry Joseph Anderson argued that the juvenile-onset requirement is unconstitutional "because it fails to take

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[55] Ellis, *supra* note 43, at 21 n.33.

[56] *See City of Cleburne*, 473 U.S. at 440 ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

[57] *Id.*

[58] 996 So. 2d 973 (La. 2008), *cert. denied*, 129 S. Ct. 1906 (2009).

into consideration that a person can suffer a disability characterized by significant limitations in intellectual function and adaptive behavior after the age of eighteen."[59] Despite the defendant's assertion that strict scrutiny was warranted, the Supreme Court of Louisiana instead applied a rational basis review, giving great deference to the state legislature.[60] The court did so, it explained, because "[t]he United States Supreme Court has made clear that mental retardation is not 'a quasi-suspect classification calling for a more exacting standard of judicial review.'"[61] As support, the court cited *City of Cleburne v. Cleburne Living Center*,[62] a decision that has generated considerable debate over whether the Court actually applied a more stringent form of rational basis review to a law that discriminated against group homes for mental retarded individuals.[63] The Supreme Court itself, however, has since clarified that disabled individuals are not a suspect class and only the baseline review is appropriate for their equal protection claims.[64] The *Anderson* court used this rationale—that mentally retarded individuals do not comprise a suspect class—to justify analyzing, and denying, Anderson's equal protection challenge to Louisiana's mental retardation definition under rational basis review.

### 2. *Strict Scrutiny Due to a Fundamental Right to Life*

The *Anderson* court did not, however, address the defendant's argument that strict scrutiny is required because the law implicates a fundamental right.[65] Even in the absence of a suspect class, strict scrutiny applies if the law challenged under equal protection impinges on a fundamental right,[66] such as the right to procreation,[67] marriage,[68] or travel.[69] If a court were persuaded that a law defining

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[59] *Id.* at 985 (quoting *State v. Anderson*, 39-232 (La. App. 2 Cir. 7/29/04)).

[60] *See id.* at 987.

[61] *Anderson*, 996 So. 2d at 987 (quoting *City of Cleburne*, 473 U.S. at 442).

[62] 473 U.S. 432.

[63] *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-13, at 1444–45 (2d ed. 1988) (suggesting that "the 'rational basis' standard [had taken] on a new, more penetrating character").

[64] *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 365–68 (2001).

[65] *See Anderson*, 996 So. 2d at 986 (noting that the defendant's attorneys argued that the law "deprives an individual of his basic right to life . . . and cannot survive strict scrutiny").

[66] Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (per curiam) ("[E]qual protection analysis requires strict scrutiny of a legislative classification . . . when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." (footnote omitted)).

[67] *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (noting that procreation is "one of the basic civil rights of man").

[68] *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness . . . .").

an exemption from capital punishment affects a fundamental right, and therefore reviewed it under strict scrutiny, the exemption for mentally retarded but not mentally impaired offenders would be unconstitutional unless it were narrowly tailored to serve a compelling government interest.[70]

Both the Fifth and Fourteenth Amendments to the United States Constitution explicitly protect against deprivations of life and liberty absent due process of law.[71] Though life can be considered a form of liberty interest,[72] it is more straightforward to inquire whether there is a fundamental right to life itself and, if so, whether that right exists for those facing execution.[73]

The Supreme Court appears to have long ago answered the basic question whether there exists a fundamental right to life. As early as the 1870s, the Supreme Court labeled life a "natural right[] of man"[74] and explained that "[t]he [F]ourteenth [A]mendment prohibits a State from depriving any person of *life*, liberty, or property, without due process of law . . . [thereby] furnish[ing] an additional guaranty against any encroachment by the States upon the *fundamental rights* which belong to every citizen as a member of society."[75] Just a few years later, the Court broadly pronounced that "*fundamental rights to life*, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws."[76] Such sweeping language supports the common-sense view that the right to life is an essential pillar

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[69] *See* Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 254 (1974) ("The right of interstate travel has repeatedly been recognized as a basic constitutional freedom.").

[70] *See* Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (articulating the strict scrutiny standard).

[71] U.S. CONST. amends. V, XIV.

[72] *See* Daniel G. Bird, Note, *Life on the Line: Pondering the Fate of a Substantive Due Process Challenge to the Death Penalty*, 40 AM. CRIM. L. REV. 1329, 1346 (2003). The Court has frequently recognized certain fundamental liberty rights, and it could be said that the exercise of the right to life is a necessary prerequisite to the exercise of, and therefore implicitly included in, fundamental liberty interests. As one scholar has suggested, "[n]one of these [fundamental] rights, of course, would have any meaning without the right to life." Ursula Bentele, *Back to an International Perspective on the Death Penalty as Cruel Punishment: The Example of South Africa*, 73 TUL. L. REV. 251, 288 (1998).

[73] Finding that capital defendants or offenders have a right to life does not, in itself, mean that capital punishment is impermissible. It simply means that the punishment and procedure must satisfy strict scrutiny to comport with the Constitution's due process and equal protection requirements.

[74] United States v. Cruikshank, 92 U.S. 542, 553 (1875).

[75] *Id.* at 554 (emphasis added).

[76] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (emphasis added).

in American society. Since then, the Court has continued to refer to life, often alongside liberty, as a fundamental right in a variety of contexts.[77]

Lower courts and legal scholars also recognize the existence of a fundamental right to life. One federal appeals court, for example, found that the Due Process Clause explicitly recognizes a right to life and that Supreme Court precedent designates this right as fundamental.[78] The Massachusetts Supreme Judicial Court was equally unwavering in its recognition of life as a fundamental right:

> We believe that the right to life is fundamental and, further, that this proposition is not open to serious debate. Aside from its prominent place in the due process clause [of the United States Constitution] itself, the right to life is the basis of all other rights and in the absence of life other rights do not exist. . . . A denial of this fundamental concept would be tantamount to a denial of human existence.[79]

Many legal scholars are in accord, with one asserting that "the Court would have difficulty in plausibly declaring life to be less than fundamental."[80] It appears, then, that "there is no doubt life is an inherent and fundamental right."[81]

A seemingly more complicated question is whether those sentenced to death retain this fundamental right to life. The Supreme Court has noted that a capital conviction "single[s] out and strip[s]

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[77] *See, e.g.*, Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 281 (1990) (withdrawal of life-sustaining treatment); Roe v. Wade, 410 U.S. 113, 156–57 (1973) (abortion); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (requirement to salute the American flag and recite the pledge of allegiance in public schools); Gibson v. Mississippi, 162 U.S. 565, 582 (1896) (discrimination in selection of jury members); Powell v. Pennsylvania, 127 U.S. 678, 685 (1888) (state prohibition on the manufacture of imitation butter).

[78] *See* Mattis v. Schnarr, 547 F.2d 1007, 1017–18 (8th Cir. 1976) (en banc) (citing *Roe*, 410 U.S. at 157; Screws v. United States, 325 U.S. 91, 123 (1945) (Rutledge, J., concurring); Johnson v. Zerbst, 304 U.S. 458, 462 (1938); and *Yick Wo*, 118 U.S. at 370); *see also* Pleasant v. Zamieski, 895 F.2d 272, 276 n.2 (6th Cir. 1990) (noting the Court's mandate that all seizures be analyzed under the Fourth Amendment's "reasonableness" standard and observing that such an imperative "presumably . . . preserve[s] [F]ourteenth [A]mendment substantive due process analysis for those instances in which a free citizen is denied his or her constitutional right to life through [other] means").

[79] Commonwealth v. O'Neal, 327 N.E.2d 662, 668 (Mass. 1975) (citations omitted).

[80] N. B. Smith, *The Death Penalty as an Unconstitutional Deprivation of Life and the Right to Privacy*, 25 B.C. L. REV. 743, 752 (1984); *see also* Hugo Adam Bedau, *Interpreting the Eighth Amendment: Principled vs. Populist Strategies*, 13 T.M. COOLEY L. REV. 789, 812 (1996) (citing life as an example of a fundamental right).

[81] State v. Pierre, 572 P.2d 1338, 1359 (Utah 1977) (Maughan, J., concurring in part and dissenting in part). For an in-depth analysis of the fundamental right to life under the Supreme Court's *Glucksberg* formulation, *see* Bird, *supra* note 72, at 1346–60.

[an offender] of his fundamental right to life,"[82] but it is initially unclear whether the Court considered the sentencing or the actual execution to be the time at which a capital offender loses that fundamental right. The ramifications of this distinction are great. If it is the latter, the state may still carry out an execution, but the process it uses must comport with the heightened constitutional protection of due process and equal protection. If, however, the fundamental right to life is snuffed out at the time of sentencing, a state wishing to similarly extinguish a capital offender's life is constrained only by more modest constitutional protections.

The Justices' opinions in *Ohio Adult Parole Authority v. Woodard*[83] explore this question and highlight both sides of the issue. The case presented a civil claim by a death row inmate alleging that Ohio's clemency proceedings violated due process and his right to remain silent.[84] Chief Justice Rehnquist, joined by three other Justices, considered the question of the condemned man's protected interest in his life. He found that the offender only "maintains a residual life interest, *e.g.*, in not being summarily executed by prison guards."[85] Justice O'Connor, also joined by three other Justices, responded sharply to that suggestion, saying that a "prisoner under a death sentence remains a living person and consequently has an interest in his life."[86] Contrasting the death row inmate's situation with that of a person sentenced to life imprisonment, she stated that "[w]hen a person has been fairly convicted and sentenced, his liberty interest, in being free from such confinement, has been extinguished. But it is incorrect . . . to say that a prisoner has been deprived of all interest in his life before his execution."[87] Justice Stevens, the final Justice to weigh in on the matter, was unequivocal: "it is abundantly clear that [the offender] possesses a life interest protected by the Due Process Clause."[88] He explained that the Court's precedent, which asked whether a post-conviction proceeding "comported with the 'fundamental fairness mandated by the Due Process Clause,'"[89] demonstrated that a constitutional interest in life exists even after

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[82] Ford v. Wainwright, 477 U.S. 399, 409 (1986).

[83] 523 U.S. 272 (1998).

[84] *Id.* at 277.

[85] *Id.* at 281.

[86] *Id.* at 288 (O'Connor, J., concurring in part and concurring in the judgment).

[87] *Id.* at 289.

[88] *Id.* at 292 (Stevens, J., concurring in part and dissenting in part).

[89] *Id.* at 293 n.3 (quoting Pennsylvania v. Finley, 481 U.S. 551, 557 (1987)); *see also* Yates v. Aiken, 484 U.S. 211, 217–18 (1988) (holding that a state cannot refuse to apply federal due process law on the grounds that it had authority to establish the scope of its own habeas corpus proceedings).

an offender is sentenced to death.[90] Considered together, five Justices—Stevens, O'Connor, and the three Justices concurring with her—found that a death row inmate's fundamental right to life is not extinguished when he is sentenced.

An earlier equal protection case, *Skinner v. Oklahoma ex rel. Williamson*[91] provides further guidance. In *Skinner*, the Court reviewed an Oklahoma statute that imposed sterilization as punishment for certain repeated offenses.[92] The Court, under an equal protection analysis, applied strict scrutiny in reviewing the law because it "involve[d] one of the basic civil rights of man"—namely, procreation.[93] The Court also emphasized the severity and finality of the punishment to explain why strict scrutiny of a classification implicating a fundamental right is not only permissible, but essential.[94]

The *Skinner* logic applies directly and forcefully to mentally impaired capital offenders. *Skinner* recognized that conviction and sentencing does not eliminate an offender's fundamental rights or the ability to mount a challenge to the unequal deprivation of those rights. A mentally impaired offender, therefore, does not lose his fundamental right to life at the moment he is sentenced to death. Particularly for equal protection purposes, he retains a vital interest in seeing that his life is not lost—that he is not executed—unless his punishment comports with the basic requirement that he be treated substantially the same as those who are similarly situated. Even more so than in *Skinner*, the punishment here, execution, has "no redemption for the individual whom the law touches. . . . He is forever deprived of a basic liberty."[95] Justice Stevens articulated the need for even greater care when assessing capital punishment's deprivation of the fundamental right to life:

> The interest in life that is at stake in this case warrants even greater protection than the interests in liberty. . . . For 'death is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality.

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[90] *See Woodward*, 523 U.S. at 293 (Stevens, J., concurring in part and dissenting in part).

[91] 316 U.S. 535 (1942).

[92] *Id.* at 536. The statute required sterilization for any individual convicted of at least two crimes "amounting to felonies involving moral turpitude." *Id.* (internal quotation marks omitted).

[93] *Id.* at 541.

[94] *See id.* (observing that sterilization "may have subtle, far-reaching and devastating effects," in that it will deprive an individual "of a basic liberty").

[95] *Id.*

> From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.'[96]

It follows, then, that a classification that saves some offenders from execution while allowing the state to execute others with similar impairments necessarily implicates a fundamental right to life and is therefore subject to strict scrutiny.[97]

### *B. Possible Justifications for the Age-of-Onset Requirement*

To survive an equal protection challenge, the juvenile-onset requirement must be, at a minimum, rationally related to some legitimate interest. As the level of scrutiny becomes more stringent, a state must marshal more support and have a more compelling purpose for the classification. Some of the possible rationales discussed below could therefore justify the distinction under the deferential rational basis review but not the more critical strict scrutiny.

#### *1. Distinguishing Mental Retardation from Other Disorders*

The most basic reason a state could proffer for requiring juvenile onset is to distinguish between mental retardation and later-developing brain disorders, such as dementia or those resulting from traumatic brain injury. Indeed, the onset requirement exists within the clinical field precisely for this reason; for example, an older version of the *Diagnostic and Statistic Manual of Mental Disorders* explained that "[w]hen the [same] clinical picture develops for the first time after the age of 18, the syndrome is a Dementia, not Mental Retardation."[98]

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[96] Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 293–94 (1998) (Stevens, J., concurring in part and dissenting in part) (quoting Gardner v. Florida, 430 U.S. 349, 357–58 (1977) (plurality opinion)).

[97] A related, but likely more difficult, argument a defendant could make is that he has a fundamental right to be free from cruel and unusual punishment. Though the Supreme Court has never discussed such a right in the context of an equal protection challenge, it has done so in the context of the Fourteenth Amendment's Due Process Clause, calling various protections in the Bill of Rights, including the prohibition on cruel and unusual punishments, "fundamental safeguards of liberty." *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963). This precedent may open the door to the argument that the age-of-onset requirement of mental retardation is subject to strict scrutiny because it discriminates in who it allows to exercise the fundamental right to be free from cruel and unusual punishment.

[98] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 37 (3d ed. 1980); Christopher Slobogin, *Mental Disorder as an Exemption from the*

Several courts have accepted this distinction as a sufficient basis for applying differing legal treatment based on when intellectual and adaptive deficits manifest. In *State v. Anderson*, for example, the Louisiana Supreme Court considered an equal protection challenge to the state's age-of-onset requirement for its mental retardation exemption.[99] The court held that the state could differentiate between those who meet the clinical definition of mental retardation and the "far more diffuse and much harder to define" class of people "who function at the same mental and adaptive level as the result of other clinical disorders (including dementia caused by traumatic organic brain damage) not related to developmental disadvantages."[100] Similarly, in an involuntary commitment case, a California appeals court found that an age-of-onset requirement for mental retardation could be justified by the state's desire to distinguish "the mentally retarded from the mentally disordered for purposes of capital punishment."[101]

The logic behind this distinction, however, is circular. A government cannot draw a classification merely to create two groups; there must be some legally relevant reason to distinguish between the two classes. According to James Ellis, the attorney who argued *Atkins*:

> This distinction is considerably more relevant to clinicians designing habilitation plans and systems of supports for an individual than it is to the criminal justice system, since later-occurring disabilities, assuming that the disability developed during adulthood but prior to the commission of the offense, would involve comparable reduction in culpability for any criminal act.[102]

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*Death Penalty: The ABA-IRR Task Force Recommendations*, 54 CATH. U. L. REV. 1133, 1136 (2005) ("[D]ementia and traumatic brain injury [are] disabilities very similar to mental retardation in their impact on intellectual and adaptive functioning . . . . [T]he only significant characteristic that differentiates these severe disabilities from mental retardation is the age of onset."); *see also supra* text accompanying note 43.

[99] 996 So. 2d 973 (La. 2008).

[100] *Id.* at 987–88.

[101] People v. Middleton, No. G040565, 2009 WL 1816905, at *10 (Cal. Ct. App. June 25, 2009).

[102] Ellis, *supra* note 43, at 13; *see also* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 422–23 (1985) ("The origin of [the age-of-onset] requirement is obscure, and its relevance to criminal justice is limited. . . . The criminal law generally will be concerned with the manifestations and consequences of the individual's handicap and not the date of its origin.").

The psychiatric community recognized the possibility of clinical diagnostic definitions being misapplied in the legal setting, warning that "[t]he clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability determination, and competency."[103] It follows that the clinical need to differentiate between mental retardation and other impairments does not necessarily provide a legally significant basis for the distinction.

The Louisiana and California courts' acceptance of this explanation as sufficient, under a rational basis standard, reflects a highly deferential form of review. The *Anderson* court went so far as to acknowledge that the distinctions "can appear arbitrary when applied in a legal context, which should require a principled basis for distinguishing between" the two classes.[104] It then justified its decision on the grounds that "[a]ny rational system of classification may produce seemingly arbitrary anomalies."[105] The Supreme Court, however, has previously admonished, also in a disability-rights case, that the government cannot "rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."[106] The *Anderson* court appears to have disregarded the Court's warning. As such, it may have acted too deferentially to the legislature, even under a rational basis review, by upholding a classification that it acknowledged to be, at least in some circumstances, arbitrary.[107] Courts would be more aligned with the Supreme Court's warning against arbitrary classifications if they required a state to justify its juvenile-onset requirement not by the clinical need to differentiate between possible diagnoses but by a legally relevant distinction between the groups.

### *2. Preventing Malingering*

Perhaps the most frequently asserted justification for the juvenile-onset requirement is to prevent malingering: by requiring that an offender provide some evidence that he had cognitive deficits early in life, he will be unable to feign mental retardation as an adult

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[103] DSM-IV-TR, *supra* note 26, at xxxvii.

[104] *Anderson*, 996 So. 2d at 987.

[105] *Id.* at 988 (footnote omitted).

[106] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985).

[107] *See Anderson*, 996 So. 2d at 987; *see also* Farahany, *supra* note 37, at 911 ("One might disagree that even rational basis review could support such anomalous results, but it seems unassailable that the distinction would fail heightened or strict judicial review.").

simply to escape capital punishment.[108] Under a rational basis review, this justification may be sufficient, as the government appears to have a legitimate interest in assuring that only those who truly have a diminished culpability escape the death penalty under *Atkins*, and requiring juvenile onset appears to be rationally related to preventing any such fraud.

Under closer scrutiny, however, fear of malingering appears insufficient as a justification for the juvenile-onset requirement. First, James Ellis has noted that "malingering . . . has not proven to be a practical problem in the assessment of individuals who may have mental *retardation*," as opposed to mental illness.[109] If malingering is truly not a problem amongst those claiming mental retardation, then using the age-of-onset distinction to prevent it would not be justifiable.

Further, the issue of mental retardation is litigated like any other issue in a trial. An adversarial proceeding, rules of evidence, qualification of experts, and other requirements provide safeguards against inaccurate or misleading evidence. Just as these protections ensure the reliability of all evidence that reaches the fact-finder for a final weighing and determination, they can also provide for an accurate determination of mental impairments without requiring litigants to prove onset many years in the past. In light of these other protections and the suggestion that malingering is not a problem in mental retardation determinations, it seems unlikely that a court giving close attention to the issue would find the age-of-onset requirement to justify the narrowing of a constitutional protection.

### *3. No National Consensus*

A state might also point to the fact that the Supreme Court specifically found a national consensus against executing mentally *retarded*—not mentally *impaired*—offenders as a sufficient reason to distinguish between the two groups. Under this logic, the Eighth Amendment analysis performed by the *Atkins* Court is sufficient to distinguish between the two groups: society views one group, but not the other, as undeserving of capital punishment. Alternatively, the argument could be phrased as such: the two groups are entitled to equal treatment in that they both deserve a determination of whether

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[108] *E.g.*, Commonwealth v. Vandivner, 962 A.2d 1170, 1187–88 (Pa. 2009) (explaining that "the issue of malingering is also of concern" when discussing the rationales for requiring an age of onset).

[109] Ellis, *supra* note 43, at 13–14. Ellis also observed that "[t]here are no reports in the clinical literature indicating that [malingering] is a practical problem in the assessment of individuals who are thought to have mental retardation." *Id.* at 14.

their execution is cruel and unusual. The difference is simply that mentally retarded offenders are protected under that analysis, while mentally impaired individuals, with onset in adulthood, are not.

A litigant could respond to that rationale by arguing that there is also a national consensus against executing the mentally impaired. Although the Supreme Court did not specifically undertake such an analysis in *Atkins*, one might argue that many of the Court's findings in that case may in fact represent the existence of such a consensus. The Court recognized that the legislative, social, professional, and religious consensus it found "unquestionably reflects widespread judgment about the relative *culpability* of mentally retarded offenders, and the relationship between mental retardation and the [death penalty's] penological purposes . . . [and] it suggests that *some characteristics of mental retardation* undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards."[110] The consensus the *Atkins* Court discerned is that certain people should not be executed because of their mental impairments.[111] The only lack of consensus the Court noted—over the requisite severity of impairment[112]—concerns the degree of impairment and is unrelated to when those symptoms developed. In fact, several prominent mental health and legal organizations, including one cited in *Atkins*, advocate the removal of the age-of-onset requirement. These groups argue that defendants with "significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills," should be exempt from capital punishment.[113]

The difficulty with the national consensus argument is that the "clearest and most reliable objective evidence of contemporary values[,] legislation enacted by the country's legislatures,"[114] does not demonstrate a clear-cut national consensus. Fifteen states and the District of Columbia do not allow capital punishment at all,[115] a group

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[110] Atkins v. Virginia, 536 U.S. 304, 317 (2002) (emphasis added).

[111] *Id.*

[112] *See 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 . . . will be *so impaired* as to fall within the range . . . about whom there is a national consensus." (emphasis added)).

[113] *See* AM. BAR ASS'N, *supra* note 45, at 668; *see also* NAMI PLATFORM, *supra* note 45, § 10.9.1.1, at 57 ("Defendants shall not be sentenced to death or executed if they have a persistent mental disability . . . characterized by significant limitations in both intellectual functioning and adaptive behavior as expressed in their conceptual, social, and practical adaptive skills.").

[114] Penry v. Lynaugh, 492 U.S. 302, 331 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002).

[115] DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 1 (2010), http://www.deathpenaltyinfo.org/documents/FactSheet.pdf.

the Court included in its national consensus count in *Atkins* and other recent Eighth Amendment cases.[116] Only one state with the death penalty, Nebraska, does not have an age-of-onset requirement.[117] In total, then, only seventeen jurisdictions ban the execution of mentally impaired offenders. Additionally, every state to act since *Atkins* has included an age or "developmental period" onset requirement in its statute defining mental retardation.[118] These figures suggest a trend *in favor of* requiring juvenile onset, not against it.[119]

The Court also considers actual state practices, so a defendant might be able to rebut these numbers and trends if he could demonstrate that courts tend not to sentence mentally impaired defendants to death, even when capital punishment is an option, because the defendant cannot prove juvenile onset.[120] But without a strong showing that states do not actually impose or carry out the sentence, the numbers make it difficult for a defendant to successfully claim that there is an objective national consensus against executing the mentally impaired.

However, a defendant need not make an Eighth Amendment argument. In bringing an equal protection challenge, the defendant is claiming that once the law provides protection to one group, it cannot deny protection to a similarly situated group simply because the second group was not initially granted protection. In order to survive an equal protection challenge, a law must be based on a legally relevant distinction between the groups. For a state to claim that this difference exists simply because the *Atkins* opinion named one group but not the other would be a red herring because it fails to provide any legal basis for the distinction. A state must instead assert that there is some independent reason to grant protection to the mentally retarded and not the mentally impaired, rather than collapsing the two arguments, and constitutional protections, into one.[121]

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[116] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 564 (2005) ("[I]n this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but . . . exclude juveniles from its reach.").

[117] *See* NEB. REV. STAT. § 28-105.01 (West 2002).

[118] *See* Death Penalty Info. Ctr., States that Have Changed Their Statues to Comply with the Supreme Court's Decision in *Atkins v. Virginia*, http://www.deathpenaltyinfo.org/states-have-changed-their-statutes-comply-supreme-courts-decision-atkins-v-virginia (last visited Sept. 24, 2010).

[119] At least one Justice, however, has noted that such trends should not weigh heavily because states will attempt to ward off litigation by taking shelter in the dicta of Supreme Court opinions. *See* Kennedy v. Louisiana, 128 S. Ct. 2641, 2668 (2008) (Alito, J., dissenting) (discussing legislative enactments prohibiting capital punishment for all rape crimes after the Supreme Court found a death sentence for the rape of an adult woman unconstitutional).

[120] *Cf. Atkins*, 536 U.S. at 316 (explaining that the execution of mentally retarded was uncommon even in the states that allowed it).

[121] For a discussion of the Court's Eighth Amendment jurisprudence and how its

*4. Not Functionally or Cognitively Equivalent*

The final rationale a state could offer for distinguishing based on age of onset is that those who have a normal developmental period but later lose certain cognitive abilities do not suffer from the same functional deficits as those who never developed those skills in the first place. That difference, if it could be shown, would directly counter the concern that the two groups possess the same reduced culpability. Such a justification could likely survive even strict scrutiny, and may undercut a defendant's equal protection claim altogether, because it indicates that the two classes at issue are not similarly situated.

The problem with this rationale, of course, is proving it. A defendant's specific claims will affect the state's ability to provide such support. For example, a state can easily show that certain mental deficits, such as memory loss, do not result in the same loss of functioning as mental retardation. However, a challenge framing the burdened class as those having intellectual and adaptive deficits identical to mentally retarded individuals—in other words, satisfying the first two aspects of the mental retardation diagnostic test—will be harder for a state to fend off.

This is particularly true given that the scientific community appears to lend credence to the notion that particular injuries or diseases result in impairments like those of mental retardation. One organization, for example, has found that traumatic brain injuries can significantly impair information processing and communication with others and can cause individuals to act impulsively rather than according to a plan.[122] In addition, one legal scholar recently noted that conditions as wide-ranging as traumatic brain injury, dementia, autism, epilepsy, and bacterial meningitis can produce many of the same deficits that the Court noted as relevant to its *Atkins* holding: a reduced ability to engage in logical reasoning, process information, communicate with others, control impulses, abstract from mistakes, learn from experience, and care for oneself.[123] A recent newspaper article featuring soldiers who suffered traumatic brain injuries while

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abandonment of an intra-jurisdictional analysis in *Atkins* created the possibility, for the first time, that "its Eighth Amendment jurisprudence could create inequalities that might implicate the Equal Protection Clause of the Fourteenth Amendment," see Farahany, *supra* note 37, at 904.

[122] *See* American Speech-Language-Hearing Association, Traumatic Brain Injury, http://www.asha.org/public/speech/disorders/TBI.htm#Top (last visited Sept. 24, 2010).

[123] Farahany, *supra* note 37, at 886.

serving in the wars in Iraq and Afghanistan illustrates this point.[124] The soldiers bear many of the hallmarks of mental retardation as a result of their brain injuries: impulsiveness, difficulty curbing socially inappropriate behavior, and an inability to associate actions with their consequences.[125]

Perhaps most telling, however, is the recommendation of a group of influential mental health organizations, joined by the American Bar Association ("ABA"), that the age-of-onset requirement be dropped from the legal definition of mental retardation.[126] The comments to the ABA's recommendation explain that conditions like dementia and traumatic brain injury are "*very similar to mental retardation in their impact on intellectual and adaptive functioning* except that they always (in the case of dementia) or often (in the case of head injury) are manifested after age eighteen" and that "the only significant characteristic that differentiates these severe disabilities from mental retardation is the age of onset."[127]

As with any rationale, the showing required to support the claim that mentally impaired individuals do not have the same reduction in culpability as mentally retarded offenders depends on the level of scrutiny a court applies. Under a rational basis review, a court would likely defer to the state and allow it to make the judgment that the two groups have different culpability levels without requiring much, if any, proof. Any heightened form of scrutiny, however, would almost assuredly require a greater showing by the state, particularly in the face of scientific evidence suggesting that the two groups share the same cognitive deficits that, according to *Atkins*, render execution unconstitutional.

## CONCLUSION

The Supreme Court's decision in *Atkins* created an exemption from capital punishment based on the culpability level of mentally retarded defendants. The flexibility it gave the states to implement the constitutional protection, however, has resulted in a narrowly-drawn definition of which offenders are entitled to be spared that is unnecessary and perhaps unconstitutional. The juvenile-onset requirement used by mental health providers, while clinically significant, appears to have no real place in the legal system. Though

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[124] Christian Davenport, *Traumatic Brain Injury Leaves an Often-Invisible, Life-Altering Wound*, WASH. POST, Oct. 3, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/10/01/AR2010100106339.html?sub=AR.

[125] *See id.*

[126] *See* AM. BAR ASS'N, *supra* note 45.

[127] *Id.* at 669–70 (emphasis added).

few cases have addressed the constitutionality of these definitions, states that do not alter their statutes to remove the age-of-onset requirement will likely be forced to litigate the issue as it arises in the future. Additionally, it is possible that these states will find their statutory definitions subject to heightened scrutiny, forcing them to explain why they have allowed a definition of convenience to trump the protections guaranteed by the Eighth Amendment. A definition based purely on the mental deficits, and accompanying reduced culpability, that were central to the Supreme Court's holding would better honor the meaning of *Atkins* and the constitutional protection from cruel and unusual punishments.

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