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# OVERVIEW OF TASK FORCE PROPOSAL ON MENTAL DISABILITY AND THE DEATH PENALTY

By Ronald J. Tabak

## A. WHY THE TASK FORCE WAS CREATED

In 2003, the American Bar Association (ABA) Section of Individual Rights and Responsibilities (IR&R) formed a Task Force to consider mental disability and the death penalty. The Task Force includes professionals knowledgeable in law, psychology, and psychiatry, some of whom are advocates for people with mental disability.

The impetus for the Task Force's creation was the Supreme Court's holding in *Atkins v. Virginia*<sup>2</sup> and the reactions thereto. In *Atkins*, the Court held that it is unconstitutional to execute people with mental retardation.<sup>3</sup> Within hours after the decision in *Atkins* was announced, the National Mental Health Association stated that the same principles and reasoning that *Atkins* applied to the mentally retarded were equally applicable to many with mental illness, who the Association said should also be categorically exempted from capital punishment.<sup>4</sup> Moreover, public opinion polling showed a strong majority opposing executions of people with mental illness.<sup>5</sup>

The ABA IR&R concluded that in view of these developments, serious consideration should be given to whether some people with mental illness should be exempt from execution and how to deal with several issues concerning mental illness of death row inmates.

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1. The Task Force's members are: Dr. Michael Abramsky; Dr. Xavier F. Amador; Michael Allen, Esq.; Donna Beavers; John Blume, Esq.; Professor Richard J. Bonnie; Colleen Quinn Brady, Esq.; Richard Burr, Esq.; Dr. Joel Dvoskin; Dr. James R. Eisenberg; Professor I. Michael Greenberger; Dr. Kirk Heilbrun; Ronald Honberg, Esq.; Ralph Ibson; Dr. Matthew B. Johnson; Professor Dorean M. Koenig; Dr. Diane T. Marsh; Hazel Moran; John Parry, Esq.; Professor Jennifer Radden; Professor Laura Lee Rovner; Robyn S. Shapiro, Esq.; Professor Christopher Slobogin; and Ronald J. Tabak, Esq.

2. 536 U.S. 304 (2002).

3. *Id.* at 321. In March 2005 the Supreme Court relied heavily on *Atkins* in holding unconstitutional the execution of anyone who was under eighteen-years-old at the time of the offense. *Roper v. Simmons*, 125 S. Ct. 1183, 1192, 1200 (2005).

4. Patty Reinert, *Death Penalty Debate Reopened by Court's Retardation Decision*, HOUSTON CHRON., June 22, 2002, at A17; see also Mike Tolson, *Ill Inmate Can Find No Escape*, HOUSTON CHRON., Nov. 4, 2002, at A1 (quoting Ronald Honberg, Legal Director of the National Alliance for the Mentally Ill).

5. DEATH PENALTY INFO. CTR., SUMMARIES OF RECENT POLL FINDINGS, <http://www.deathpenaltyinfo.org/article.php?scid=23&did=210> (last visited Apr. 17, 2005).

## B. THE LEGAL AND LEGISLATIVE BACKGROUND

Unlike mental retardation, there have not been serious legislative efforts to exempt people with serious mental illness from the death penalty. One likely reason for this legislative inaction is that those who might have wished to propose such legislation could not advocate that everyone with mental illness should be exempt from execution because there are various effects and differing degrees of permanency. Whereas mental retardation is essentially a permanent condition with certain basic effects, and everyone meeting one of the generally accepted definitions of mental retardation<sup>6</sup> is significantly less morally culpable than the “average” murderer, the same can not be said of everyone with mental illness. It was apparent to the ABA IR&R that to conceptualize *which* mentally ill people should not be executed and *under what circumstances* would require considerable additional thought. The ABA IR&R formed the Task Force in order to facilitate such conceptual thinking.

The ABA IR&R did not expect the Task Force to formulate proposals that would form the basis for an immediate constitutional challenge, such as that which ultimately succeeded in *Atkins*<sup>7</sup> (after having previously failed in the late 1980s in *Penry v. Lynaugh*<sup>8</sup>). Since an important basis for the Supreme Court’s holding in *Atkins* was the fact that eighteen states had passed laws barring execution of people with mental retardation,<sup>9</sup> it appeared far more likely to the ABA IR&R that the most immediate impact of adopting a proposal on this subject would be in the legislative arena. As with mental retardation (and juveniles), such legislative efforts could be supported by death penalty proponents as well as opponents.

Although the initial impetus for the Task Force’s creation came from the belief that there likely were categories of people with mental illness whose mental condition at the time of the crime should exempt them categorically from the death penalty, the ABA IR&R was also increasingly troubled by a growing number of instances in which people already on death row were getting executed despite troublesome facts about their mental state while on death row. These arose in three contexts. One concerned death row inmates who were “volunteering” to end legal and clemency proceedings and be executed, where this “decision” appeared to have been significantly influenced by serious mental illness. A second concerned people who were not mentally able

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6. See, e.g., AM. ASS’N ON MENTAL RETARDATION, THE AAMR DEFINITION OF MENTAL RETARDATION (2002), available at <http://www.aamr.org/Policies/pdf/definitionofMR.pdf>.

7. See *Atkins*, 536 U.S. at 310, 321.

8. See *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989).

9. *Atkins*, 536 U.S. at 314-15.

to assist counsel or otherwise participate meaningfully with respect to potentially meritorious issues following their initial appeal—where the post-conviction and habeas corpus proceedings nonetheless proceeded. The third context involved people who were being found “competent” for execution even though they did not truly understand why they were to be executed, or where, after having been found incompetent to be executed, an inmate was medicated for the sole purpose of enabling him to be executed.

An important point to recognize is that nothing that the Task Force was asked to consider, and nothing in the proposal it developed, would preclude anyone from being convicted of capital murder and being severely punished for it, up to and including life imprisonment without possibility of parole. Thus, the Task Force was addressing issues very different from insanity cases. Typically, someone who is found insane *cannot* be found guilty. Often, such people can be confined only as long as they remain insane.

### C. DEVELOPMENT OF THE TASK FORCE’S PROPOSAL, AND ITS CONSIDERATION BY PROFESSIONAL ASSOCIATIONS

After organizational meetings in late 2003 and early 2004, the Task Force began substantive work. By mid-2004, the Task Force had developed a proposal with three prongs. Later that year, the National Alliance for the Mentally Ill (NAMI) adopted the first two prongs of this proposal as policy.<sup>10</sup> In February 2005 so did the American Psychological Association.<sup>11</sup> In November 2004 the American Psychiatric Association adopted as policy prong two of the Task Force’s proposal.<sup>12</sup>

In the Spring of 2005, after further consultation with representatives of the American Psychiatric Association, the Task Force approved refined versions of prongs one and three of its proposal.<sup>13</sup> As of this writing, it is considered likely that later in 2005 the American Psychiatric Association

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10. See PUB. POLICY COMM. OF THE BD. OF DIRS. & DEP’T OF PUB. POLICY & RESEARCH, NAT’L ALLIANCE FOR THE MENTALLY ILL, PUBLIC POLICY PLATFORM OF THE NATIONAL ALLIANCE FOR THE MENTALLY ILL §§ 9.6.1.1-2 (rev. 7th ed. 2004).

11. See American Psychological Association, Exerpt from the Council of Representatives 2005 Meeting Minutes (Feb. 18-20, 2005) (on file with the Catholic University Law Review).

12. See AM. PSYCHIATRIC ASS’N, DIMINISHED RESPONSIBILITY IN CAPITAL SENTENCING: POSITION STATEMENT (2004), available at [http://www.psych.org/edu/other\\_res/lib\\_archives/archives/200406.pdf](http://www.psych.org/edu/other_res/lib_archives/archives/200406.pdf).

13. The latest version of the entire Task Force proposal, including the revised prongs one and three, are set forth in this Issue. *Recommendations of the American Bar Association Section of Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty*, 54 CATH. U. L. REV. 1115 (2005) [hereinafter *Task Force Recommendations*].

will adopt as policy the refined versions of prongs one and three and that either in late 2005 or early 2006 NAMI and the American Psychological Association will revise their policies to incorporate the refinements to prongs one and three. It is anticipated that in February 2006 the ABA House of Delegates will be asked to approve as policy the Task Force's entire proposal.

#### D. PRINCIPLE UNDERLYING THE FIRST TWO PRONGS OF THE TASK FORCE'S PROPOSAL

As noted above, the first two prongs of the Task Force's proposal make categorical exclusions from death penalty eligibility.<sup>14</sup> The first prong deals with people with mental retardation and with others who are functionally the same as those with mental retardation but whose disability did not commence during childhood years.<sup>15</sup> The second prong deals with people whose severe mental illness at the time of the crime makes them, in the Task Force's view, sufficiently less morally culpable for their actions than the "average murderer"<sup>16</sup> such that they should not be subject to the death penalty.<sup>17</sup>

With regard to those individuals covered by these prongs, the Task Force believes that important rationales in *Atkins* are equally applicable. As Ronald Honberg's article points out, the Court in *Atkins* said that concerns regarding retribution and deterrence, upon which it had relied in upholding the constitutionality of capital punishment in *Gregg v. Georgia*,<sup>18</sup> were of dubious applicability where the defendant has mental retardation.<sup>19</sup> The retribution rationale presupposes the absence of a compelling mitigating factor<sup>20</sup>—yet mental retardation is such a factor. As for deterrence, the Court doubted that capital punishment would deter people whose mental retardation lessens impulse control, planning capability, and the ability to formulate a calculated scheme to kill someone.<sup>21</sup>

Moreover, as Mr. Honberg points out, the *Atkins* Court also cited the danger that people with mental retardation would be more likely to make coerced or otherwise false "confessions," to have a demeanor caused by their disability that would make jurors less likely to vote

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14. *Id.* §§ 1-2.

15. *Id.* § 1.

16. *See Atkins v. Virginia*, 536 U.S. 304, 318-20 (2002).

17. *See Task Force Recommendations*, *supra* note 13, § 2.

18. 428 U.S. 153, 183, 187 (1976) (plurality opinion).

19. *Atkins*, 536 U.S. at 318-20; Ronald Honberg, *The Injustice of Imposing Death Sentences on People with Severe Mental Illnesses*, 54 CATH. U. L. REV. 1153, 1158 (2005).

20. *See Atkins*, 536 U.S. at 319.

21. *Id.* at 319-20.

against the death penalty, and to be less able to help counsel develop important mitigating evidence.<sup>22</sup> The Task Force feels that such dangers also exist with regard to those individuals covered by prongs one or two.

Professor Slobogin's article discusses a basis on which some would disagree with both of these prongs, just as they disagree with *Atkins*.<sup>23</sup> These people say that such categorical exclusions stigmatize everyone with mental retardation or severe mental illness by suggesting they lack certain key qualities of human beings.<sup>24</sup> However, as noted above, these prongs do not say that such people cannot form sufficient intent to make them guilty of capital murder.<sup>25</sup> Rather, these prongs are premised on the view that certain categories of people cannot be sufficiently depraved to warrant the death penalty—as opposed to other punishments, including life without parole.

It is important, in this connection, to recognize that this same issue was debated within the community of advocates for, and family members of, people with mental retardation during the legislative efforts preceding *Atkins*.<sup>26</sup> Ultimately, all of the leading groups took the position that people with mental retardation should be exempt from capital punishment.<sup>27</sup> Significantly, the first organization to support the Task Force's proposal was NAMI,<sup>28</sup> the leading grassroots advocacy group for those with mental illness.<sup>29</sup>

#### E. PARTICULAR POINT REGARDING PRONG ONE

As Professor Slobogin's article points out, prong one is designed, *inter alia*, to help jurisdictions better implement *Atkins* by providing a definition for mental retardation.<sup>30</sup> This definition is almost identical to that of the American Association of Mental Retardation and is consistent with that of the American Psychiatric Association.<sup>31</sup>

As Professor Slobogin also notes, prong one exempts from the death penalty anyone whose disability at the time of the offense is functionally the same as mental retardation, with the only difference being that the

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22. *Id.* at 320-21; Honberg, *supra* note 19, at 1158.

23. Christopher Slobogin, *Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations*, 54 CATH. U. L. REV. 1133, 1136-39, 1147-50 (2005).

24. *Id.* at 1136-37.

25. *See supra* Part B, p. 1125.

26. *See Atkins*, 536 U.S. at 316 n.21.

27. *See id.*

28. *See supra* note 10 and accompanying text.

29. *See Honberg, supra* note 19, at 1154.

30. *See Slobogin, supra* note 23, at 1134.

31. *Id.*

disorder causing great intellectual deficits arose after childhood.<sup>32</sup> An example is a significant loss of intellectual functioning, leading to an IQ in the mental retardation range, arising from a very serious head trauma.<sup>33</sup>

#### F. PARTICULAR POINTS REGARDING PRONG TWO

Prong two proposes exempting from the death penalty some of those who, at the time of the crime, have such serious mental illness that their culpability is as diminished as those with mental retardation.<sup>34</sup> This lesser extent of culpability arises from such effects of their mental illness as delusions, hallucinations, significant thought disorders, and highly disorganized thinking. This exemption would apply to those with such disorders as schizophrenia and psychosis, but not anti-social personality disorder.

However, having a severe mental disorder such as schizophrenia or psychosis at the time of the crime would not be sufficient to exempt an individual from capital punishment under prong two. In addition, the disorder must lead to one of three kinds of significant incapacity as of the time of the crime. As Professor Slobogin's article describes in greater detail, the disorder must (a) lessen the nature, consequences, or wrongfulness of the offense; (b) involve a significant incapacity "to exercise rational judgment in relation to conduct"; or (c) entail a significant incapacity "to conform their conduct to the requirements of the law."<sup>35</sup>

In any event, one would not come within the exemption provided by prong two if one's mental disorder were manifested primarily by repeated criminal conduct or were manifested solely by the acute impact of alcohol or drugs.

#### G. ADDITIONAL CONCERNS UNDERLYING PRONG TWO

The principle underlying prong two is discussed in Part D, above. Also of relevance in this regard are other, practical concerns. One such concern is the likelihood, as shown by the Capital Jury Project studies, that jurors will consider the severe mental illnesses covered by prong two to be *aggravating* factors,<sup>36</sup> i.e., factors making it more likely that they will vote for the death penalty, whereas the law requires that they be

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32. *Id.* at 1135.

33. *Id.*

34. See *Task Force Recommendations*, *supra* note 13, § 2.

35. Slobogin, *supra* note 23, at 1142-44.

36. See Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1165-66 (1997).

considered, if at all, as *mitigating* factors, i.e., factors making it less likely that they will vote for the death penalty. This is often the case because jurors frequently equate severe mental illness with a greater likelihood of being dangerous in the future.<sup>37</sup>

This problem is compounded by the fact that jurors often do not understand what the word “mitigating” means.<sup>38</sup> They often think that it means the same as “aggravating.”<sup>39</sup> They also often do not understand that the defendant does not have to prove a mitigating factor beyond a reasonable doubt—reasonable doubt being a concept that they are used to from the guilt phase.<sup>40</sup> They also often do not understand the instruction that even if only one juror finds a factor to be mitigating, that juror can consider it in his or her vote on the death penalty.<sup>41</sup> Most jurors believe, incorrectly, that *every* member of the jury must consider a factor to be mitigating in order for *anyone* to consider it.<sup>42</sup>

Some defendants forbid their attorneys from presenting evidence of mental illness at trial—sometimes due to the potential for embarrassment or the desire to shield their families from embarrassment, and other times because of their refusal or inability to believe that they have a severe mental illness. Obviously, even a juror who realizes that severe mental illness is relevant, if at all, only as a mitigating factor, and who recognizes what “mitigating” means and how to bring it to bear, cannot consider a defendant’s severe mental illness when no evidence about it is presented.

A factor that numerous jury studies have shown is crucial in capital sentencing is whether the defendant appears to show remorse.<sup>43</sup> Many people with certain kinds of mental illness do not—due to medication they are given to treat that mental illness—show much emotion of any kind about anything while in court.<sup>44</sup> This is often misinterpreted by the

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37. *See id.* at 1166.

38. *See* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1053-54 (1995).

39. *See id.*

40. Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 10-11 (1993); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1167 (1995).

41. Luginbuhl & Howe, *supra* note 40, at 1167.

42. *Id.*

43. Sundby, *supra* note 36, at 1560; *see also* Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599, 1616-17 (1998).

44. *See* *Riggins v. Nevada*, 504 U.S. 127, 143 (1992) (Kennedy, J., concurring).



jury, particularly if there is no expert testimony offered by the defense to explain to the jury why the defendant may not show remorse.<sup>45</sup>

#### H. SUMMARY OF PRONG THREE

The Task Force proposal's third prong deals with mental illness's impact on prisoners who have already been sentenced to death.<sup>46</sup> As Professor Bonnie's article discusses, these include prisoners who, as a result of their mental illness, seek to "volunteer" for execution; "[p]risoners whose mental illness impairs their ability to assist [counsel] or otherwise to participate meaningfully in post-conviction [or habeas corpus] proceedings;" and "[p]risoners whose impaired understanding of the nature and purpose of the punishment may render them incompetent for execution."<sup>47</sup>

Prong three would prevent the waiver of claims by inmates whose mental illness is a principal factor in their decision to "volunteer" for execution.<sup>48</sup> Also under prong three, post-conviction or habeas proceedings would be suspended if death row inmates cannot assist counsel or otherwise participate meaningfully on issues as to which they might secure relief from their conviction or death sentence.<sup>49</sup> Finally, under prong three, if a person facing a reasonably imminent execution is so mentally disabled that he does not understand why the state is going to execute him, his sentence would be reduced to a non-death sentence.<sup>50</sup>

#### I. PARTICULAR POINTS REGARDING PRONG THREE

Professor Bonnie's article summarizes the bases for prong three, and discusses how it would work.<sup>51</sup> The following are a few high points.

The Task Force believes it is unacceptable to permit death row inmates to forgo or drop post-conviction and habeas corpus proceedings challenging their convictions or sentences where their mental disorders significantly impair their ability to decide rationally whether to pursue such relief. As Mr. Honberg's article states, "the pain . . . of living with a severe mental illness is [sometimes] so [great] that death may seem like a better alternative," particularly in light of egregious death row conditions and, in some cases, the failure to provide them with medical treatment

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45. See Sundby, *supra* note 36, at 1558, 1595.

46. See *Task Force Recommendations*, *supra* note 13, § 3.

47. Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. U. L. REV. 1169, 1169 (2005).

48. See *Task Force Recommendations*, *supra* note 13, § 3(b).

49. See *Task Force Recommendations*, *supra* note 13, § 3(c).

50. See *Task Force Recommendations*, *supra* note 13, § 3(d).

51. Bonnie, *supra* note 47, at 1169-70.

for their severe mental disorder(s).<sup>52</sup> As he points out, such defendants usually change their minds after being medicated and stabilized.<sup>53</sup>

Under the Task Force proposal, a next friend acting on an inmate's behalf should be allowed to initiate or pursue post-conviction or habeas corpus remedies at times when the inmate is unable, due to mental disorder(s), from rationally deciding to begin or carry through with such litigation.

The Task Force also believes that where a mental disorder significantly impairs a death row inmate's ability to assist counsel, yet the inmate's participation is necessary for a fair and accurate adjudication of specific claims in post-conviction or habeas corpus proceedings, those proceedings should be suspended. It would be fundamentally unfair to decide claims adversely to a mentally disabled death row inmate who might have succeeded on those claims if he had been able to assist his counsel. Under the Task Force's proposal, an inmate's death sentence should be reduced if there is no significant likelihood of the inmate's becoming able to assist his counsel with regard to such claims in the foreseeable future.

Finally, the Task Force's proposal regarding people facing reasonably imminent execution is necessary because, although the Supreme Court held in *Ford v. Wainwright*<sup>54</sup> that it is unconstitutional to execute people who have become incompetent for execution,<sup>55</sup> it did not provide a clear definition of such incompetence. Although this issue does not arise in most cases, there are a wide variety of holdings in those cases in which it has arisen. Some of these are very troubling.

For example, in *Barnard v. Collins*,<sup>56</sup> the Fifth Circuit held that Mr. Barnard was competent to be executed even though he suffered from the delusion that he was chosen for execution as the result of a conspiracy of various societal groups and the Mafia.<sup>57</sup> In 2004, a Texas federal district judge relied on *Barnard* in holding that Scott Panetti was competent for execution—despite his delusion that the State and forces of evil were conspiring against him and that he was going to be executed for preaching the gospel.<sup>58</sup> Under the Task Force proposal, the death sentences of such people would be vacated, and a lesser punishment imposed.

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52. Honberg, *supra* note 19, at 1165.

53. *Id.*

54. 477 U.S. 399 (1986).

55. *Id.* at 409-10.

56. 13 F.3d 871 (5th Cir. 1994).

57. *Id.* at 876-78.

58. *Panetti v. Dretke*, No. A-04-CA-042-SS, at 16-18 (W.D. Tex. Sept. 29, 2004) (order denying writ of habeas corpus and staying execution pending appeal).

