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Ronald S. Horberg

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THE INJUSTICE OF IMPOSING DEATH SENTENCES ON PEOPLE WITH SEVERE MENTAL ILLNESSES

Ronald S. Honberg**

I wanted to approach this issue in a different way and explain why we believe that it is so grievously inappropriate to execute people with mental illnesses, particularly people with severe mental illnesses. There are hundreds of people with schizophrenia and other severe mental illnesses on death row around the country.¹ If you look at these cases, you recognize that there frequently are major problems in the way the cases were handled, in the way mental illness was presented to judges or juries, and in the way the impact of mental illness on criminal culpability was evaluated.² Although there is today increasing public concern about whether the death penalty is administered fairly, relatively few concerns have been raised about the potential impact of mental illnesses on the fairness of the court proceedings in capital cases. Since this is an area where the potential for error is compounded, I want to make the case that the existence of a severe mental illness should be per se a mitigating factor in capital cases.

I want to start by putting a little bit of a face on capital defendants with severe mental illnesses, because when we hear about capital cases we assume that the defendants are monsters—just people with no redeeming social value. I have had the chance to be fairly involved in some of these cases over the years, and I have gotten to know the families and a little

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** J.D., M.Ed. Ronald S. Honberg is the National Director for Policy and Legal Affairs at the National Alliance for the Mentally Ill (NAMI). Mr. Honberg also serves on the Task Force on Mental Disability and the Death Penalty convened by the American Bar Association's Section on Individual Rights and Responsibilities. The author gratefully acknowledges the talented group of editors and staff members of the *Catholic University Law Review* for their contributions to this article.

1. See Rhonda K. Jenkins, Comment, *Fit To Die: Drug-Induced Competency for the Purpose of Execution*, 20 S. ILL. U. L.J. 149, 149 (1995).

2. See Ellen Byers, *Mentally Ill Criminal Offenders and the Strict Liability Effect: Is There Hope for a Just Jurisprudence in an Era of Responsibility/Consequences Talk?*, 57 ARK. L. REV. 447, 530-31 (2004); Michael L. Perlin, "The Executioner's Face Is Always Well-Hidden": *The Role of Counsel and the Courts in Determining Who Dies*, 41 N.Y.L. SCH. L. REV. 201, 225-27 (1996); Ronald J. Tabak, *Striving To Eliminate Unjust Executions: Why the ABA's Individual Rights & Responsibilities Section Has Issued Protocols on Unfair Implementation of Capital Punishment*, 63 OHIO ST. L.J. 475, 486 (2002).

bit of the histories of some individual defendants. I know that when it comes to some defendants, certainly defendants with serious mental illnesses on death row, they are not monsters.

The National Alliance for the Mentally Ill (NAMI) is the leading grassroots advocacy organization for people with severe mental illnesses around the country.³ NAMI's members are primarily people, or family members of people, with severe mental illnesses.⁴ NAMI has about 220,000 members around the country, and affiliates in every state that are very much involved in grassroots advocacy in their communities.⁵ Over the years, the advocacy efforts of many of our members have become focused on criminal justice systems as these systems have assumed more and more responsibility for housing people with serious and persistent mental illnesses.

On any given day, there are more than four times as many people with schizophrenia, bipolar disorder, and major depression in our nation's jails and prisons as there are in hospitals.⁶ The Los Angeles County Jail, the Cook County Jail in Chicago, and Riker's Island in New York all incarcerate more people with mental illness on any given day than any private or public psychiatric hospital in the country.⁷ Police departments and police officers have become front line respondents to mentally ill people in crisis in this country.⁸ Most individuals with severe mental illnesses who become involved in the criminal justice system are nonviolent criminals. Many have committed nonviolent crimes,⁹ or no

3. *Mental Health in Children and Youth: Issues Throughout the Developmental Process: Hearing Before the Subcomm. on Substance Abuse and Mental Health Servs. of the Comm. on Health, Educ., Labor, and Pensions*, 108th Cong. 44 (2004) [hereinafter *Hearing*] (statement of Linda Champion, Member, National Alliance for the Mentally Ill).

4. See NAT'L ALLIANCE FOR THE MENTALLY ILL, MISSION STATEMENT, http://www.nami.org/Content/NavigationMenu/Inform_Yourself/AboutNAMI/About_NAMI.htm (last visited May 15, 2005).

5. See *Hearing*, *supra* note 3, at 44.

6. TREATMENT ADVOCACY CTR., CRIMINALIZATION OF AMERICANS WITH SEVERE MENTAL ILLNESSES 1, available at <http://www.psychlaws.org/GeneralResources/Fact3.htm> (last visited May 15, 2005).

7. E. Fuller Torrey, *Reinventing Mental Health Care*, CITY J., Autumn 1999, http://www.city-journal.org/html/9_4_a5.html.

8. TREATMENT ADVOCACY CTR., LAW ENFORCEMENT AND PEOPLE WITH SEVERE MENTAL ILLNESSES 1 (2005), available at <http://www.psychlaws.org/BriefingPapers/BP16.pdf>; see also COUNCIL OF STATE GOV'TS, CRIMINAL JUSTICE/MENTAL HEALTH CONSENSUS PROJECT 34 (2002), available at http://www.consensusproject.org/the_report/downloads.

9. COUNCIL OF STATE GOV'TS, PEOPLE WITH MENTAL ILLNESS IN THE CRIMINAL JUSTICE SYSTEM: ABOUT THE PROBLEM, available at http://www.consensusproject.org/downloads/fact_about-the-problem.pdf (last visited May 15, 2005).

crime at all, but engaged in behaviors attributable to their illnesses that attracted the attention of police.¹⁰

The science of treating people with severe mental illness has evolved, and today there are psychosocial treatments, medications, and support that work to alleviate the most profound symptoms of these illnesses.¹¹ However, very few people in this country access even minimal mental health treatment; specifically, fewer than fifty percent of all people with schizophrenia seek out such treatment.¹² So it's really not surprising at a time when there are no options for someone in psychiatric crisis that some of these people end up in the criminal justice system. It is important to put that into context, even though most people with mental illnesses have not committed the kinds of violent crimes that would raise questions or issues about the death penalty.

However, if you look at the death penalty cases that I have seen, you will see that at some point in the defendant's history there was a profound and desperate need for mental health treatment that was not provided. Let me give you an example of a recent, highly publicized case involving a defendant with a severe mental illness—a case where the death penalty is potentially still at issue.

In 1998, in Washington, D.C., Russell "Rusty" Weston burst through a security checkpoint in the U.S. Capitol and, after triggering a metal detector, opened fire with a handgun he was carrying.¹³ When all was said and done, Weston had killed two Capitol police officers and allegedly wounded a tourist.¹⁴ This was a prominent national news story.

The story that was not told was what had happened with Mr. Weston in the years prior to the shootings. This is a man who had a twenty-year history of schizophrenia.¹⁵ He had grown up in southern Illinois on a

10. See COUNCIL OF STATE GOV'TS, *supra* note 8, at 34.

11. NAT'L INST. OF MENTAL HEALTH, U.S. DEPT OF HEALTH AND HUMAN SERVS., NIH PUB. NO. 02-3929, MEDICATIONS 1-2 (4th ed. 2002), available at <http://www.nimh.nih.gov/publicat/NIMHmedicate.pdf>.

12. NAT'L INST. OF MENTAL HEALTH, U.S. DEPT OF HEALTH AND HUMAN SERVS., NIMH PUB. NO. 00-4500, SCHIZOPHRENIA RESEARCH (2000), available at <http://www.nimh.nih.gov/publicat/NIMHschizresfact.pdf>.

13. See Michael Grunwald & Cheryl W. Thompson, *Weston Charged with Murder in Rampage*, WASH. POST, July 26, 1998, at A1; Martin Weil, *Gunman Shoots His Way into Capitol; 2 Officers Killed, Injured Suspect Held*, WASH. POST, July 25, 1998, at A1; see also Elana H. Margolis, *The Failure of Civil Confinement: How Russell E. Weston Jr. Slipped Through the Cracks and the Potential for Many More To Follow*, 26 N. ENG. J. ON CRIM. & CIV. CONFINEMENT 129, 144 (2000).

14. Grunwald & Thompson, *supra* note 13.

15. See Bill Miller, *Capitol Slaying Suspect to Undergo More Tests*, WASH. POST, Jan. 29, 1999, at A11 [hereinafter Bill Miller, *Capitol Slaying*]; Bill Miller, *Therapists To Evaluate Suspect in Hill Killings*, WASH. POST, July 31, 1998, at C5.

rural farm, and at some point migrated to Montana.¹⁶ During this period, Mr. Weston never engaged in any violent acts, but did engage in a series of bizarre acts that attracted the attention of law enforcement.¹⁷ He was finally committed to the Montana state psychiatric hospital, where he spent fifty-three days.¹⁸ There, he was diagnosed with schizophrenia.¹⁹ Although medication alleviated some of the symptoms, he was still severely disabled.²⁰

After fifty-three days, he was released from the state hospital, given a month's supply of medication, and referred to the community mental health center near his parents' home in southern Illinois.²¹ No effort was made to contact his family to let them know he was coming, let alone what his diagnosis was or what his treatment needs were.²² After his initial visit, Weston never returned to the community mental health center.²³ His condition continued to deteriorate over the next two years.²⁴ His family became alarmed by his behavior, and unsuccessfully tried to persuade him to take his medication.²⁵

Weston actually came to Washington, D.C. twice.²⁶ First, he went to the Central Intelligence Agency (CIA) Headquarters wearing a suit and looking quite convincing.²⁷ The CIA actually granted him an audience, to whom he told a story about a Ruby Satellite System that he had helped develop for the Federal Government.²⁸ Weston believed that the Ruby Satellite would protect the United States from cannibals and the diseases they spawned.²⁹ He was there to tell the CIA about this because it needed to do something about it.³⁰ The agent interviewing Weston quickly realized Weston was quite disoriented, and that his story was not

16. Margolis, *supra* note 13, at 142.

17. Michael Powell & Anita Huslin, *Suspect Described As Loner*, WASH. POST, July 25, 1998, at A1.

18. Margolis, *supra* note 13, at 143.

19. See Miller, *Capitol Slaying*, *supra* note 15.

20. Anne Hull, *A Living Hell or a Life Saved?*, WASH. POST, Jan. 23, 2001, at A1.

21. *Id.*

22. See *id.*

23. *Id.*

24. *Id.*

25. *Parents Say Accused Shooter's Mind 'Worked Overtime'*, CNN.COM, July 27, 1998, at <http://www.cnn.com/us/9807/27/cap.shooting.weston.02>.

26. Hull, *supra* note 20.

27. *Id.*

28. *Id.*

29. See Erik Luna, *Citing the Mind To Kill the Body*, AM. PROSPECT ONLINE, May 15, 2001, at <http://www.prospect.org/web/printfriendly-view.ww?id=360>.

30. See Hull, *supra* note 20.

plausible.³¹ Mr. Weston left, came back to Washington, D.C. two years later, burst into the Capitol with a gun, and the rest is history.³²

Mr. Weston has been in the Federal Correctional Institute in Butner, North Carolina since May 1999.³³ His mental capacity has never reached the point where he has been found competent to stand trial.³⁴ Interestingly enough, the government has provided Weston with the treatment he needs by obtaining orders to involuntarily medicate him in an attempt to make him competent to stand trial.³⁵ Even with that treatment, he might not obtain sufficient stability so that he can be brought to trial.³⁶ Nevertheless, the government is not taking the death penalty off the table.³⁷ It has steadfastly insisted that it would like to bring Weston to trial.³⁸ While the government does not talk about the death penalty, it has not ruled it out either.³⁹ It is a distinct possibility in this case that if Weston ever becomes competent to stand trial, which may never happen, the government will seek the death penalty against him.

Weston's case is not an aberration. Our nation's prisons are full of individuals who committed crimes while highly delusional and psychotic.⁴⁰ Despite the efforts of many learned jurists and leading forensic psychiatrists and psychologists, we have never developed a wholly satisfactory way of evaluating the impact of mental illness on criminal culpability—nor have we developed a way to evaluate mental illness when the illness, while perhaps not reaching the level of “insanity”

31. *See id.*

32. *Id.* For an excellent summary of the events leading up to Russell Weston's arrest, see Aimce Feinberg, Note, *Forcible Medication of Mentally Ill Criminal Defendants: The Case of Russell Eugene Weston, Jr.*, 54 STAN. L. REV. 769, 769-70 (2002).

33. *United States v. Weston*, 134 F. Supp. 2d 115, 117 (D.D.C.), *aff'd*, 255 F.3d 873 (D.C. Cir. 2001); Jennifer Yachnin, *Judge Sends Weston to N.C. for Commitment Proceedings*, ROLL CALL (Washington, D.C.), Nov. 22, 2004, at 3.

34. *See United States v. Weston*, Crim. No. 98-357 (EGS), 2004 U.S. Dist. LEXIS 23579, at *3 (D.D.C. Nov. 22, 2004) (order extending involuntary medical treatment).

35. *See Weston*, 134 F. Supp. 2d at 138. The court has granted subsequent motions extending Weston's medication. *See United States v. Weston*, 211 F. Supp. 2d 182, 183 (D.D.C. 2002) (order extending involuntary medical treatment); *United States v. Weston*, 260 F. Supp. 2d 147, 155-56 (D.D.C. 2003) (order extending involuntary medical treatment); *United States v. Weston*, 326 F. Supp. 2d 64, 68 (D.D.C. 2004) (order extending involuntary medical treatment).

36. *See Weston*, Crim. No. 98-357 (EGS), 2004 U.S. Dist. LEXIS 23579, at *3 (order extending involuntary medical treatment).

37. *See Yachnin, supra* note 33.

38. *Id.*

39. *See id.*

40. *Cf. supra* notes 6-7 and accompanying text.

in a legal sense, should nevertheless be recognized as mitigating against the death penalty.

*Atkins v. Virginia*⁴¹ is obviously very significant to this discussion because it represents an attempt to develop a way to make these evaluations in the context of mental retardation. In *Atkins*, the Supreme Court struck down the death penalty, categorically, for defendants with mental retardation.⁴² The Court cited characteristics of mental disorders that act to diminish the capacities of defendants with mental retardation to formulate criminal intent or to carry out criminal acts in cold-blooded, calculating ways.⁴³ In *Atkins*, the Court appeared concerned specifically with two issues. First, it questioned whether the traditional justifications for the death penalty, retribution and deterrence, applied in cases of mental retardation.⁴⁴ After all, with regard to retribution, the death penalty is justified only in cases involving the most deserving of criminals—those who have committed particularly heinous crimes where there are no compelling mitigating factors to consider.⁴⁵ The *Atkins* majority also questioned whether the prospect of the death penalty would deter others with cognitive impairments which diminish impulse control, the ability to plan, and the ability to weigh right from wrong—maybe not to the point where they would meet the insanity defense, but the ability to engage in the sort of cold, calculated plan to commit a heinous act.⁴⁶

The Court's second concern was the potentially adverse impact of mental retardation on the fairness of capital proceedings.⁴⁷ This consideration is a particularly important part of the *Atkins* decision. The Court cited the possibility of coercion, false confessions, and the potentially prejudicial impact of demeanor evidence.⁴⁸ I will return to the issue of demeanor evidence when I discuss mental illness and the lesser ability of defendants with mental illness to make persuasive showings of mitigation or to meaningfully assist their attorneys in making persuasive showings of mitigation in capital cases.

41. 536 U.S. 304 (2002).

42. *Id.* at 321.

43. *Id.* at 308 n.3, 317-21.

44. *Id.* at 318-20.

45. *See id.* at 319.

46. *Id.* at 320.

47. *Id.* at 306-07, 320-21.

48. *Id.* at 320-21.

Currently, the Court has an aversion to judicial activism, particularly when it comes to issues concerning civil rights.⁴⁹ But the Court's decision in *Atkins* seemed to be guided by the recognition that when it comes to the death penalty, there is no room for error.⁵⁰ The Court's decision to strike down the death penalty was certainly influenced heavily by the fact that eighteen states had, in effect, provided it with cover.⁵¹ Eighteen states have enacted statutes barring the execution of defendants with mental retardation.⁵² There was a concerted, well-organized, nation-wide effort engineered by a number of advocates for people with mental retardation to systematically get these state statutes passed. To some degree, this showed the Court a mounting wave of public opinion recognizing that defendants with mental retardation should not be executed. By contrast, only one state has barred the execution of people with mental illness.⁵³

According to the Death Penalty Information Center, there are currently thirty-eight states that allow the death penalty.⁵⁴ In 2004, courts in two of these states, New York and Kansas, declared their death penalty statutes to be unconstitutional.⁵⁵ Currently, no states that recognize the death penalty prohibit the execution of people with mental illness. Despite this fact, compelling arguments can be made advocating that laws prohibiting execution of people with mental illness should exist. The same concerns can be applied to people with mental illness as the Court cited for people with mental retardation. Mental illness is certainly quite different from mental retardation. Severe mental illnesses do not necessarily result in diminished IQs, for example. They do not necessarily decrease intelligence, although the cumulative effects of years of a severe mental illness, particularly when untreated, can negatively impact cognitive skills, such as memory, concentration, and communications.

49. See Christopher P. Banks, *Reversals of Precedent and Judicial Policy-Making: How Judicial Conceptions of Stare Decisis in the U.S. Supreme Court Influence Social Change*, 32 AKRON L. REV. 233, 247 (1999).

50. *Atkins*, 536 U.S. at 317-21.

51. *Id.* at 314-16.

52. *Id.*

53. Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness*, 33 N.M. L. REV. 293, 297-98 (2003).

54. DEATH PENALTY INFO. CTR., STATE BY STATE INFORMATION, <http://www.deathpenaltyinfo.org/state> (last visited May 18, 2005). The Death Penalty Information Center is a wonderful resource for statistics, articles, and other information about the death penalty.

55. *People v. LaValle*, 817 N.E.2d 341, 367 (N.Y. 2004); *State v. Marsh*, 102 P.3d 445, 459 (Kan. 2004)

Let me pause at this point to briefly discuss what I mean by severe mental illnesses. These are biologically based brain disorders. There is clear evidence that the roots of schizophrenia, bipolar disorder, major depression, and some other disorders are found in the complex biochemistry of the brain.⁵⁶ We do not really know what causes these disorders and there are a lot of theories—some genetic, some viral, as well as other theories—but none of these theories have been conclusively proven yet.⁵⁷ There certainly appears to be a strong genetic component.⁵⁸ Death penalty lawyers working with mentally ill defendants go to great lengths to examine family history. Invariably these lawyers find that others in the family had mental illnesses, perhaps the grandmother, or several siblings, or cousins, or other relatives across multiple generations, so there definitely appears to be a genetic link. There is great hope that some of the genetic research taking place today will one day yield significant discoveries about the root causes of severe mental illnesses and how to effectively treat them.

The good news is that today, schizophrenia and other brain disorders can be effectively treated.⁵⁹ The bad news is that most people do not have access to treatments.⁶⁰ Self-medication in the form of alcohol or drug abuse is quite common among people with severe mental illnesses,⁶¹ particularly among people who are caught up in the criminal justice system.⁶² Xavier Amador, a forensic psychologist, talks frequently about a phenomenon known as Anasognosia. He has done a lot of research on people with untreated schizophrenia who come through his clinic in New York City and discovered that a significant percentage of those people lack insight about their illnesses, do not think they are sick, and do not think they need help.⁶³ Certainly we can speculate about factors that contribute to this, including the pervasive stigma that surrounds these

56. See MENTAL HEALTH CARE, CAUSES OF SCHIZOPHRENIA, <http://www.mentalhealthcare.org.uk/schizophrenia/causes> (last updated Feb. 10, 2005).

57. See *id.*

58. See e.g., Laura Lee Hall, *The Start of a Real Revolution: Genetics and Psychiatric Illness*, NAMI ADVOCATE, Summer/Fall 2003, at 28; see also Thomas R. Insel & Francis S. Collins, *Psychiatry in the Genomics Era*, 160 AM. J. PSYCHIATRY 616, 617-18 (2003).

59. See *supra* note 11 and accompanying text.

60. News Release, National Mental Health Association, People with Schizophrenia and Caregivers Recognize, Speak Out About Barriers to Quality of Life (May 19, 2003), <http://www.nmha.org/newsroom/system/news.vw.cfm?do=vw&rid=520>.

61. See NAT'L INST. OF MENTAL HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVS., NIH PUB. NO. 02-3517, SCHIZOPHRENIA 8 (1999), available at <http://www.nimh.nih.gov/publicat/NIMHschizoph.pdf>.

62. COUNCIL OF STATE GOV'TS, *supra* note 8, at 260.

63. See NAT'L INST. OF MENTAL HEALTH, *supra* note 61, at 23. Dr. Amador has served as a consultant to the National Institute of Mental Health. See *Biography*, at <http://www.xavieramador.com> (last visited June 19, 2005).

illnesses. For a twenty-two-year-old diagnosed with schizophrenia, the social connotations are devastating. There are many reasons why people under these circumstances do not want to participate in treatment, but Dr. Amador and others suggest that the research they have done indicates that it is more than that—Anasognosia is actually a symptom of the illness itself.⁶⁴ Schizophrenia impacts the part of the brain that we use to make judgments about our illnesses and our need for help.⁶⁵ Frequently I hear about individuals who take medications for years and then stop medications and eventually relapse. At such times, when these individuals need treatment the most, they may be least willing to participate in treatment. And, they may be convinced that the profound delusions and hallucinations they experience at such times are reality—and that those who are trying to convince them to take their medications are the ones who are sick.

It has also been suggested that alcohol and other substance abuse can have a somewhat sedating and soothing effect on the profound symptoms that people with severe mental illnesses experience.⁶⁶ This may be one of the reasons why there are such high rates of what we call comorbidity—co-occurring mental illness and substance use or abuse.⁶⁷ Individuals with co-occurring disorders are particularly disproportionately represented in our nation's jails and prisons.⁶⁸

There are two aspects of severe mental illnesses, particularly with schizophrenia, which may impact personal culpability in criminal behavior. The first is profound delusions or hallucinations that are frequently experienced during periods of exacerbation of symptoms. For example, individuals with schizophrenia may experience paranoid delusions and auditory or visual hallucinations, so vivid and profound that they appear real.⁶⁹ At such times, they may be unable to distinguish between delusions and reality and, therefore, act on their delusions, behaving in ways that seem bizarre and incomprehensible to others.⁷⁰ Although it is a virtually impossible task, we ask juries and judges to do the impossible in cases where they are evaluating mental illness. They are faced with the monumental task of passing judgment on the

64. See NAT'L INST. OF MENTAL HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVS., NIH PUB. NO. 01-4599, WHEN SOMEONE HAS SCHIZOPHRENIA (2001), <http://www.nimh.nih.gov/publicat/schizsoms.cfm> (last updated Oct. 14, 2004).

65. See NAT'L INST. OF MENTAL HEALTH, *supra* note 61, at 6, 23.

66. *Id.* at 8.

67. See Stephanie Hartwell, *Triple Stigma: Persons with Mental Illness and Substance Abuse Problems in the Criminal Justice System*, 15 CRIM. JUST. POL'Y REV. 84, 87 (2004).

68. See *id.* at 85.

69. See NAT'L INST. OF MENTAL HEALTH, *supra* note 61, at 4-5.

70. *Id.*

culpability of defendants who commit crimes while psychotic. They have to impose logic on brain disorders that create illogical, confused patterns of thought; a bright-line test between right and wrong does not work when it comes to evaluating the dark, unbridled confusion and psychotic delusions and hallucinations. There are other factors as well, even when there are positive symptoms of schizophrenia and other severe mental illnesses. There are also negative symptoms that often involve cognitive deficits. Studies have shown that the cognitive functions most significantly impacted in schizophrenia include attention, abstract thinking and problem solving, memory, verbal fluency and the ability to perceive and respond effectively to social situations.⁷¹ It is very difficult for someone who has not experienced psychosis first-hand to understand it. Explaining this experience in an understandable way is a very difficult challenge for defense attorneys and their experts.

Therefore, the application of the death penalty in cases involving severe mental illnesses is highly problematic. Problems arise because of the heightened risk of mistakes in these cases. Recent revelations of mistakes in death penalty cases have led to the exoneration of more than one hundred people on death row since 1973.⁷² Due to the growing concern about mistakes in death penalty cases, some states have debated the death penalty,⁷³ and Illinois went so far as to impose a moratorium on the death penalty.⁷⁴ Many states are reviewing their policy regarding the death penalty in cases involving defendants with severe mental illnesses.⁷⁵ The risk of a mistake is significantly increased by a combination of factors, including diminished capacity of many defendants with these illnesses, lack of knowledge and understanding on the part of overburdened public defenders about how to raise mental illnesses effectively in capital cases, and the fears of some prosecutors of being labeled soft on crime. Prosecutors may, therefore, be loathe, particularly in highly publicized cases like the Weston case, to take the death penalty off the table as a consequence.

Traditional due process protections that one might assume would lessen the risk of these errors are frequently lacking in cases involving

71. See, e.g., *id.* at 2-3, 6-7.

72. See DEATH PENALTY INFO. CTR., CASES OF INNOCENCE 1973-PRESENT, <http://www.deathpenaltyinfo.org/article.php?scid=6&did=109> (last updated Mar. 15, 2005).

73. Sara Rimer, *Support for a Moratorium in Executions Gets Stronger*, N.Y. TIMES, Oct. 31, 2000, at A18.

74. See Steven A. Drizin & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois' Problem of False Confessions*, 32 LOY. U. CHI. L.J. 337, 381-83 (2001).

75. See RICHARD C. DIETER, DEATH PENALTY INFO. CTR., INNOCENCE AND THE CRISIS IN THE AMERICAN DEATH PENALTY (2004), <http://www.deathpenaltyinfo.org/article.php?scid=45&did=1149>.

mental illnesses. As a result, certain problems arise in these cases. The first problem concerns the defendant's competency, which can arise both during trial and after conviction. In criminal cases, a defense attorney is frequently asked to represent individuals who, due to mental illness, may not be cooperative or may not be fully able to participate in their own defense. Although the Constitution requires that the defendant be capable of participating knowingly in his or her own defense,⁷⁶ competency standards are quite low, often misunderstood, and unevenly applied.⁷⁷ History abounds with defendants who were allowed to represent themselves at trial despite serious questions about their competency to do so.

One such example is the case of Scott Panetti in Texas. Panetti, a man with a long history of paranoid schizophrenia, is currently on death row in Texas.⁷⁸ He was within hours of being executed last year before a stay was issued.⁷⁹ Although serious questions existed about his competency to stand trial, he was not only brought to trial, but was also allowed to represent himself.⁸⁰ At that trial, Panetti wore a cowboy outfit, sang cowboy songs, asked irrational questions, cited biblical passages, engaged in incoherent and confusing streams of consciousness, subpoenaed John F. Kennedy and Jesus Christ, and was unable to mount an effective defense.⁸¹ It was a fiasco. Yet the judge never halted the proceedings.⁸² The lawyers who had been representing him tried a variety of means to bring his competency into question, which the court rebuffed.⁸³ Ultimately, the jury in this case, having been faced with this spectacle, must have been very confused. They deliberated for less than two hours, found Panetti guilty, and recommended the death penalty, which was subsequently ordered by the judge.⁸⁴ Last year, Panetti came within hours of being executed before a federal court interceded and issued a stay because of questions about whether he was competent to be

76. U.S. CONST. amend. VI.

77. See *Godinez v. Moran*, 509 U.S. 389, 396-99, 402 (1993).

78. AMNESTY INT'L, AMR 51/011/2004, UNITED STATES OF AMERICA: "WHERE IS THE COMPASSION?" THE IMMINENT EXECUTION OF SCOTT PANETTI, MENTALLY ILL OFFENDER 1 (2004), available at [http://web.amnesty.org/library/pdf/AMR510112004ENGLISH/\\$File/AMR5101104.pdf](http://web.amnesty.org/library/pdf/AMR510112004ENGLISH/$File/AMR5101104.pdf).

79. *Panetti v. Dretke*, No. A-04-CA-042-SS, at 3 (W.D. Tex. Sept. 29, 2004) (order denying petition for writ of habeas corpus and granting stay of execution).

80. AMNESTY INT'L, *supra* note 78, at 5.

81. *Id.* at 5-9.

82. See *id.* at 1.

83. *Id.* at 5-7.

84. *Id.* at 10-11.

executed, and whether he even understood the nature and finality of death.⁸⁵

Another case that illustrates this problem is that of Colin Ferguson, the Long Island Railroad Shooter.⁸⁶ One of the people killed in his unprovoked attack on the Long Island Railroad was the husband of Congresswoman Carolyn McCarthy, now a leading gun control advocate in Congress.⁸⁷ Despite questions about his competence, Ferguson was also allowed to fire his attorneys and represent himself in a way equally bizarre to Panetti's display.⁸⁸ One might think that in cases like this there is no problem, that these defendants are going to be found incompetent to stand trial and are not going to be allowed to represent themselves. Unfortunately, this does not appear to be true.

A second problem involves defendants who forbid their attorneys from presenting evidence of mental illness at trial. It is common for defendants with mental illnesses to deny that they are sick or need treatment, resulting in a refusal to allow mental illness to be raised as a defense or as a mitigating factor.⁸⁹ This hamstringing defense attorneys because almost all states prohibit them from overriding the defendant's wishes in such cases.⁹⁰

A third problem is juror prejudice based on the demeanor of the defendant. For example, take somebody who commits a crime while in the throes of psychosis, while not taking medication. They are heavily medicated prior to trial in order to make them competent to stand trial. They sit in court and do not act bizarrely. They may be very sedate, because they are over-medicated, which may cause them to appear remorseless. The jurors look at that person and say to themselves this "S.O.B" does not deserve mercy. Not only did the defendant do this horrible thing, but he does not even seem concerned about it. Yet, how can jurors evaluate what a defendant's state of mind was like at the time of the crime when they are faced with somebody, perhaps three or four years later, who may be in a very different state because he has been medicated? It is a real problem.

A related issue is the involuntary medication of a defendant to make him competent to stand trial in capital cases. Medicating a defendant in

85. See *supra* note 79.

86. See Francis X. Clines, *Gunman in a Train Aisle Passes Out Death*, N.Y. TIMES, Dec. 9, 1993, at A1.

87. Kimberly A.C. Wilson, *Md. Lawmakers Hear Gun-Ban Testimony*, BALT. SUN, Feb. 11, 2004, at B1.

88. Sylvia Adcock, *Advisors on a Runaway Train*, NEWSDAY (New York, N.Y.), Jan. 31, 1995, at A23, 1995 WLNR 485472.

89. See, e.g., *United States v. Kaczynski*, 239 F.3d 1108, 1111-13 (9th Cir. 2001).

90. See *State v. Bean*, 762 A.2d 1259, 1267 (Vt. 2000).

order to make him or her competent to be executed has been a real controversy in this country over the last few years. In *Sell v. United States*,⁹¹ the Supreme Court addressed the issue of whether it is appropriate to involuntarily medicate people for purposes of bringing them to trial—the Court said yes, under certain circumstances.⁹² Actually, the Court seemed less comfortable with the idea that involuntarily medicating a defendant is justified for purposes of proceeding to trial but felt that it may be more justified when in the interest of treatment.⁹³ It is hard to argue with the decision because it was grounded in treatment concerns.

More of a problem is the ludicrous notion that somebody should be medicated to make him or her competent to be executed. Ironically, states frequently go to great lengths to try to medicate people who do not understand the nature and finality of execution, so that states can make them sufficiently competent for execution. At the same time, there is frequently very little effort to treat these people before they commit the crimes.

Another problem is the proliferation of cases around the country involving defendants with mental illnesses who basically say they do not want to be defended at trial or appeal their conviction; they want to be executed. Is this irrational on their part? Often the pain of living with a severe mental illness is so profound that death may seem like a better alternative for some of these individuals. Moreover, the conditions that these people face in prison contribute to this conclusion. *Pike v. State*⁹⁴ is an example of a case where the defendant waived her post-conviction appeal.⁹⁵ The defendant, a woman with bipolar disorder, had been in solitary confinement for at least a year and a half and had not been receiving effective treatment for her bipolar disorder.⁹⁶ It is likely that she perceived death as a better alternative to the hell she was living in. Strikingly, these defendants frequently and almost invariably change their minds about appeal once they are medicated and stabilized.⁹⁷ This is another major problem that contributes to the difficulty of fairly adjudicating these cases.

A final issue of concern to NAMI is the use of “dueling experts” in our adversarial system. The Andrea Yates case is a good illustration of this

91. 539 U.S. 166 (2003).

92. *Id.* at 169.

93. *Id.* at 179-83.

94. No. E2002-00766-CCA-R3-PD, 2004 WL 1580503 (Tenn. Crim. App. July 15, 2004).

95. *Id.* at *2.

96. *Id.* at *1-6.

97. *E.g., id.* at *12.

problem.⁹⁸ In this case, the defense had nine psychiatrists and two psychologists take the stand and testify about how profoundly disabled Yates was, and how her delusions were so powerful that she was powerless to stop them.⁹⁹ On the prosecution's side was Dr. Park Dietz, a well-known psychiatric expert, who has made a living by providing expert testimony for the prosecution.¹⁰⁰ In this case, the jury found Yates guilty of killing her two children.¹⁰¹ A state court of appeals later declared a mistrial, finding that Dr. Dietz had likely persuaded the jury with false testimony.¹⁰²

My purpose here is not to attack Dr. Deitz or experts for the prosecution; my point is a bigger one. How can we ask a jury faced with complex and difficult questions—questions that psychiatrists can't agree on—to make judgments about the sanity of the defendants, let alone about the degree of their culpability? We are asking jurors to do the impossible. One potential solution is to do away with the adversarial expert system and have courts appoint experts. Even this is not a one hundred percent foolproof solution. There is no guarantee that court-appointed experts are truly going to be experts or qualified to function as such. But this is nevertheless an alternative to consider.

A final point concerns the proposed American Bar Association (ABA) formulation. Ideally, the members of NAMI would like to see a per se prohibition on executing people with mental illness. However, as a practical and political matter, this would be a difficult sell no matter how one defines mental illness. If we define mental illness diagnostically in a narrow way with just five or six discrete diagnoses, we would be under-inclusive. This would exclude some people who may not fit within the specified diagnostic categories, but who nevertheless may be profoundly disabled. One example is borderline personality disorder, an Axis II diagnosis that is profoundly disabling and can be every bit as disabling as schizophrenia.¹⁰³ The other extreme would be an approach that includes every diagnosis listed in the *Diagnostic and Statistical Manual of Mental Disorders*.¹⁰⁴ This would most likely be over-inclusive, as it would apply to hundreds of diagnostic categories.

98. *Yates v. State*, Nos. 01-02-00462-CR, 01-02-00463-CR, 2005 WL 20416 (Tex. App. Jan. 6, 2005).

99. *Id.* at *3.

100. *Id.*

101. *Id.* at *1.

102. *Id.* at *7.

103. See NAT'L INST. OF MENTAL HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVS., NIH PUB. NO. 01-4928, BORDERLINE PERSONALITY DISORDER 1 (2001), available at <http://www.nimh.nih.gov/publicat/NIMHbpd.pdf>.

104. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (text rev. 4th ed. 2000).

The ABA Task Force has done a very good job of trying to wade through these very tricky shoals and come up with a formulation that is both sensible, given the current state of knowledge, and politically viable. This task will not be easy and it will take many years. We are going to have to engage in a systematic effort state-by-state to get legislation passed. Certainly we are not expecting a Supreme Court decision any time soon. Perhaps there will be a favorable federal district court or appellate court decision, or maybe even a state court decision. Maybe after we persuade a significant number of states to prohibit the execution of people with mental illnesses we will have a better chance. It is going to take a long time, but we are well on the way. Our country's views regarding the death penalty may be turning. Concerns that we may be executing large numbers of people on faulty evidence are going to help us with this effort. I really appreciate all the great help we are getting from some of the leading scholars in this field, including the members of this panel. I appreciate your attention and hope that you will delve further into these disturbing yet fascinating issues.

