2005

Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations

Christopher Slobogin

MENTAL DISORDER AS AN EXEMPTION FROM THE DEATH PENALTY: THE ABA-IRR TASK FORCE RECOMMENDATIONS

Christopher Slobogin[†]

As explained by Ronald Tabak in his introduction to this Symposium, the Task Force on Mental Disability and the Death Penalty (Task Force) established by the Individual Rights and Responsibilities Section of the American Bar Association (ABA-IRR) has proposed that the ABA adopt three recommendations concerning the role of mental disability in capital cases. The first two recommendations call for a prohibition on execution of offenders whose mental disorder rendered them less culpable at the time of the offense, and the third would prohibit execution of those whose mental disability currently renders them incompetent to pursue appeals or to be executed. This Article discusses the first two, culpability-related, recommendations. With respect to each recommendation, this Article first presents the language of the recommendation, then provides the related commentary currently approved by the Task Force (which, as an unofficial reporter for the Task Force, I had a significant hand in writing), and finally engages in a brief discussion of some of the controversies that each recommendation might occasion.

I. INTELLECTUAL DEFICIENCY AND THE DEATH PENALTY

A. The Black Letter

The first recommendation of the Task Force's proposal reads as follows: "*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 from mental retardation, dementia, or a traumatic brain injury.*"[1] This recommendation is meant to exempt from the death penalty persons charged with capital offenses who have significant limitations in both intellectual functioning and

---

[†] Stephen C. O'Connell, Professor of Law, University of Florida Fredric G. Levin College of Law. The author was a member of the American Bar Association Section of Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty.

1. *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 , § 1 (2005) [hereinafter *Task Force Recommendations*].

adaptive skills. Its primary purpose is to implement the United States Supreme Court's holding in *Atkins v. Virginia*,[2] which declared that execution of offenders with mental retardation violates the cruel and unusual punishment prohibition in the Eighth Amendment.[3] The Court based this decision both on a determination that a "national consensus" had been reached that people with mental retardation should not be executed,[4] and on its own conclusion that people with retardation who kill are not even as culpable or deterrable as the "average murderer," much less the type of murderer who deserves the death penalty.[5]

B. Task Force Commentary[6]

While the *Atkins* Court clearly prohibited execution of people with retardation, it did not define that term. The recommendation embraces the language most recently endorsed by the American Association of Mental Retardation, which defines mental retardation as a disability originating before the age of eighteen that is "characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills."[7] The language of the recommendation is also consistent with the most recent edition of the American Psychiatric Association's (APA) *Diagnostic and Statistical Manual of Mental Disorders*, which defines a person as mentally retarded if, before the age of eighteen, he or she exhibits "[s]ignificantly subaverage intellectual functioning[,]" (defined as "an IQ of approximately 70 or below") and "[c]oncurrent deficits or impairments in present adaptive functioning . . . in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety."[8] Both of

---

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

3. *Id.* at 321.

4. *Id.* at 313-17.

5. *Id.* at 318-21.

6. Report, Task Force on Mental Disability and the Death Penalty, Established by the Section of Individual Rights and Responsibilities of the American Bar Association (approved as of date of publication, on file with the Catholic University Law Review) (additional footnotes have been added for reference purposes).

7. AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION 13 tbl.1.2 (10th ed. 2002).

8. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 49 (text rev. 4th ed. 2000). For further elaboration on how mental retardation should be defined and assessed in the capital sentencing context, see James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11, 11-19 (2003), and Richard J. Bonnie, *The American Psychiatric Association's Resource Document on Mental Retardation and Capital*

these definitions were referenced (albeit not explicitly endorsed) by the Supreme Court in *Atkins*,[9] and have been models for those states that have defined the term for purposes of the death penalty exemption.[10] Both capture the universe of people whom, if involved in crime, *Atkins* describes as less culpable and less deterrable than the "average" criminal;[11] as the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* indicates, even a person with only "mild" mental retardation has a mental age *below* that of a teenager.[12]

The language in this recommendation also encompasses dementia and traumatic brain injury, disabilities 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. Dementia resulting from the aging process is seldom treatable and is associated with a number of deficits in intellectual and adaptive functioning, such as agnosia (failure to recognize or identify objects) and disturbances in executive functioning connected with planning, organizing, sequencing, and abstracting.[13] The same symptoms can be experienced by people with serious brain injury. Of course, people with dementia or a traumatic head injury severe enough to result in "significant limitations in both their intellectual

---

Sentencing: Implementing Atkins v. Virginia, 32 J. AM. ACAD. PSYCHIATRY & L. 304, 305-08 (2004).

9. 536 U.S. at 308 n.3.

10. As of April, 2005, twenty-six states define mental retardation for purposes of the death penalty. DEATH PENALTY INFO. CTR., STATE STATUTES PROHIBITING THE DEATH PENALTY FOR PEOPLE WITH MENTAL RETARDATION, http://www.deathpenaltyinfo.org/article.php?scid=28&did=138 (last visited May 24, 2005) [hereinafter DEATH PENALTY INFO. CTR., PROHIBITING THE DEATH PENALTY]; DEATH PENALTY INFO. CTR., STATES THAT HAVE CHANGED THEIR STATUTES TO COMPLY WITH THE SUPREME COURT'S DECISION IN ATKINS V. VIRGINIA, http://www.deathpenaltyinfo.org/article.php?scid=28&did=668 (last visited May 24, 2005) [hereinafter DEATH PENALTY INFO. CTR., COMPLY WITH THE SUPREME COURT]. Fourteen of these states, like the American Association on Mental Retardation definition, have no IQ cut-off, although many of these do require "significantly subaverage" intellectual functioning. DEATH PENALTY INFO. CTR., PROHIBITING THE DEATH PENALTY, *supra*; DEATH PENALTY INFO. CTR., COMPLY WITH THE SUPREME COURT, *supra*. The remaining twelve states use a definition similar to the American Psychiatric Association's (usually requiring an IQ lower than seventy), although five of these states provide that a higher IQ leads only to a "presumption" that the person is not mentally retarded. DEATH PENALTY INFO. CTR., PROHIBITING THE DEATH PENALTY, *supra*; DEATH PENALTY INFO. CTR., COMPLY WITH THE SUPREME COURT, *supra*.

11. *Atkins*, 536 U.S. at 318-21.

12. AM. PSYCHIATRIC ASS'N, *supra* note 8, at 43 (stating that people with "mild" mental retardation acquire "academic skills up to approximately the sixth-grade level[,]" amounting to the maturity of a twelve-year-old).

13. *See* AM. PSYCHIATRIC ASS'N, *supra* note 8, at 171 (describing symptoms of dementia).

functioning and adaptive behavior" rarely commit capital offenses. If they do, however, the reasoning in *Atkins* should apply and an exemption is warranted, because the only significant characteristic that differentiates these severe disabilities from mental retardation is the age of onset.[14]

C. Possible Controversies

A number of controversies arise in connection with this recommendation. Although this Symposium is meant to focus on people with mental illness rather than people with mental retardation, these issues are worth canvassing here because a version of each also arises in connection with the prohibition on execution of people with mental illness, the subject of the second recommendation discussed in this Article.

Because it directly confronts the Court's decision in *Atkins*, the most fundamental objection to the ABA's first recommendation is the claim that the exemption it endorses is overinclusive. As Justice Scalia asked in his dissent in *Atkins*, "what scientific analysis can possibly show that a mildly retarded individual who commits an exquisite torture-killing is 'no more culpable' than the 'average' murderer in a holdup-gone-wrong or a domestic dispute?"[15] The concerns here are twofold: (1) culpability is an individualized assessment, not a categorical one; and (2) exempting an entire category of people from capital punishment stigmatizes everyone in the group, in this case people with mental retardation, because it suggests that they lack certain attributes of personhood that the rest of us possess.[16]

Both of these concerns are exaggerated. An exemption from capital punishment based on a category such as mental retardation is hardly a declaration that these people cannot be held accountable for their actions. Indeed, as the Task Force's recommendation makes clear, the provision only provides immunization from capital punishment; those covered may still be convicted and sentenced to a prison term, including a life sentence. Rather, the exemption merely states that no one with the designated mental disorder could possibly be so depraved that he or she deserves the ultimate punishment of death. As the Supreme Court has stated on several occasions, including *Atkins*, the death penalty is reserved for the worst of the worst.[17] People with significant mental

---

14. *Compare id.* (symptoms of dementia), *with id.* at 151 (symptoms of retardation).

15. *Atkins*, 536 U.S. at 350 (Scalia, J., dissenting).

16. For a good elaboration of this argument by a disability rights advocate, see Donald N. Bersoff, *Some Contrarian Concerns About Law, Psychology, and Public Policy*, 26 LAW & HUM. BEHAV. 565, 568-69 (2002).

17. *Atkins*, 536 U.S. at 319 ("[T]he culpability of the average murderer is insufficient to justify the most extreme sanction available to the State . . . ."); *see also* Godfrey v.

disorder at the time of the offense may often be culpable enough to deserve conviction for murder, but they are never as culpable as the consummately evil killer envisioned by the Supreme Court's death penalty jurisprudence.

Further, it is hard to see how endorsement of that sentiment dehumanizes people with retardation. A categorical exemption in the unique context of capital punishment says nothing about the capacity of people with retardation to function in other settings. If anything, the exemption described in this recommendation severs mental disability from the erroneous stereotype, described in more detail below,[18] that serious mental impairment and depravity somehow conjoin.[19]

A second controversy raised by *Atkins* and this first recommendation from the ABA Task Force is definitional: Precisely what is "mental retardation" for purposes of the death penalty exemption? While fixing the culpability cutoff at a particular IQ number, such as seventy, is alluring, the recommendation makes clear that something more is required. No current definition of mental retardation rests on IQ score alone; evaluation of the person's "adaptive functioning" is also crucial. Unfortunately, that concept, which looks at deficits in skill areas ranging from communication to leisure, is a very amorphous one.[20] Further, IQ tests themselves are not always reliable,[21] as evidenced by one capital case in which the same individual was found to have IQ scores of seventy-two, sixty-seven, sixty-nine, seventy, fifty-seven, sixty-five, and seventy-four within a several year period.[22] Finally, even assuming a

---

Georgia, 446 U.S. 420, 433 (1980) (setting aside a death sentence because the crime did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder").

18. *See infra* text accompanying notes 89-96.

19. For further discussion of the categorical approach taken by *Atkins*, see Christopher Slobogin, *Is* Atkins *the Antithesis or Apotheosis of Anti-Discrimination Principles?: Sorting Out the Groupwide Effects of Exempting People with Mental Retardation from the Death Penalty*, 55 ALA. L. REV. 1101, 1101-07 (2004).

20. *See, e.g.*, State v. Smith, 893 S.W.2d 908, 918 (Tenn. 1994) (expressing confusion over the definition of adaptive behavior because the legislature, when it banned execution of people with retardation, provided no definition of the term).

21. David L. Rumley, *A License To Kill: The Categorical Exemption of the Mentally Retarded from the Death Penalty*, 24 ST. MARY'S L.J. 1299, 1329-40 (1993) (discussing the unreliability of IQ tests).

22. State v. Grell, 66 P.3d 1234, 1239 (Ariz. 2003). Some of the "unreliability" in such cases may also be due to improvements in mental capacity. For instance, Daryl Atkins, whose pre-offense IQ was fifty-nine, scored seventy-four on his latest IQ test, apparently in part because of "'his constant contact with the many lawyers that worked on his case.'" Adam Liptak, *Inmate's Rising I.Q. Score Could Mean His Death*, N.Y. TIMES, Feb. 6, 2005, at 11 (quoting Dr. Evans Nelson). In such cases, the pre-offense IQ is the most relevant, since the *Atkins* decision is based on an assessment of capacity at the time of the

reliable IQ score can be obtained, the weight it should carry is unclear. As Douglas Mossman states:

> When conscientious mental health professionals interpret IQ scores and plan treatment interventions, they keep in mind that someone who scores 69 on an IQ test is practically indistinguishable from someone who scores 71, and that two persons with an IQ of, say, 67 and 73 have much more in common with each other than with a person who scores 88.[23]

In short, the courts have their work cut out for them in determining where death penalty-worthiness begins and ends. Clinical opinion on IQ assessments will have to be monitored closely, and the definition of adaptive functioning may need judicial fine-tuning. But courts and legislatures have already made significant progress in this regard.[24]

A third and final controversy that arises in connection with this recommendation has to do with procedure. When is the decision about mental retardation made, by whom, and using what standard of proof? Most states take the efficiency-optimal stance that the decision be made by the judge prior to trial, so as to avoid the expenditure of resources associated with a capital proceeding.[25] But, as James Ellis has pointed out, the Supreme Court's decision in *Ring v. Arizona*,[26] which interpreted the Sixth Amendment to require jury determination of sentencing factors that enhance punishment beyond what is required by a capital murder verdict,[27] may mean the retardation question must be put to a jury.[28] If

---

offense, not at the time of execution. *See* Atkins v. Virginia, 536 U.S. 304, 308-09, 308 n.4 (2002) (relying on evidence of Atkins's mental state at the time of initial incarceration).

23. Douglas Mossman, Atkins v. Virginia: *A Psychiatric Can of Worms*, 33 N.M. L. REV. 255, 268 (2003).

24. *See, e.g.*, NEB. REV. STAT. § 28-105.01 (Supp. 2004); N.M. STAT. ANN. § 31-20A-2.1 (Michie 2000); *In re* Hawthorne, 105 P.3d 552, 554-58 (Cal. 2005); Chase v. State, 873 So. 2d 1013, 1023 (Miss. 2004). *See generally* Nava Feldman, Annotation, *Application of Constitutional Rule of* Atkins v. Virginia *That Execution of Mentally Retarded Persons Constitutes "Cruel and Unusual Punishment" in Violation of Eighth Amendment*, 122 A.L.R.5TH 145 (2004). For further discussion of the difficulties of defining mental retardation for *Atkins* purposes, see Alexis Krulish Dowling, Comment, *Post-*Atkins *Problems with Enforcing the Supreme Court's Ban on Executing the Mentally Retarded*, 33 SETON HALL L. REV. 773, 788-97 (2003) and Note, *Implementing* Atkins, 116 HARV. L. REV. 2565, 2570-81 (2003).

25. Ellis, *supra* note 8, at 14.

26. 536 U.S. 584 (2002).

27. *Id.* at 609 (holding invalid a statute providing that the sentencing judge may determine the aggravating factors required for imposition of the death penalty, when those factors "operate as 'the functional equivalent of an element of a greater offense'" (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 n.19 (2000))).

28. Ellis, *supra* note 8, at 16.

so, the government will have to prove to a jury that the person is not retarded beyond a reasonable doubt.[29]

II. MENTAL ILLNESS AND THE DEATH PENALTY

A. The Black Letter

All of these issues also arise in some form in connection with the second recommendation proffered by the Task Force. This recommendation reads as follows:

> *Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences, or wrongfulness of their conduct; (b) to exercise rational judgment in relation to conduct; or (c) to conform their conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.*[30]

This recommendation is meant to prohibit execution of persons with severe mental disabilities whose demonstrated impairments of mental and emotional functioning at the time of the offense would render a death sentence disproportionate to their culpability. The recommendation uses the phrase "disorder or *disability*" because, even though those words are often used interchangeably, some prefer one over the other. However, it also indicates that only those individuals with "severe" disorders or disabilities are to be exempted from the death penalty, and it specifically excludes from the exemption those diagnosed with conditions that are primarily manifested by criminal behavior and those whose abuse of psychoactive substances, standing alone, renders them impaired at the time of the offense.

B. Task Force Commentary[31]

The rationale for this recommendation flows from long-established principles of Anglo-American law that the Supreme Court recognized

---

29. *Id.* Ellis also points out that states could leave the initial decision with the judge, as long as a finding of non-retardation by the judge can later be challenged in front of the jury. *Id.*

30. *Task Force Recommendations*, *supra* note 1, § 2.

31. Report, Task Force on Mental Disability and the Death Penalty, Established by the Section of Individual Rights and Responsibilities of the American Bar Association (approved as of date of publication, on file with the Catholic University Law Review) (additional footnotes have been added for reference purposes).

and embraced in *Atkins* and recently affirmed in *Roper v. Simmons*,[32] where it held that execution of juveniles who commit crimes while under the age of eighteen is also prohibited by the Eighth Amendment.[33] In reaching its holding in *Atkins*, the Court emphasized that execution of people with retardation is inconsistent with both the retributive and deterrent functions of the death penalty.[34] More specifically, as noted above, it held that people with retardation are both less culpable and less deterrable than the average murderer because of their "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."[35] As the Court concluded, "If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution."[36] Similarly, with respect to deterrence, the Court stated, "[e]xempting the mentally retarded from [the death penalty] will not affect the 'cold calculus that precedes the decision' of other potential murderers."[37]

The Court made analogous observations in *Simmons*. With respect to culpability, the majority in that case stated:

> Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.[38]

On the deterrence issue it asserted, "'[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.'"[39]

The same reasoning applies to people who, in the words of the recommendation, have "a severe mental disorder or disability that [at the time of the offense] significantly impaired their capacity (a) to appreciate

32. 125 S. Ct. 1183, 1190, 1198 (2005).
33. *Id.* at 1200.
34. Atkins v. Virginia, 536 U.S. 304, 318-20 (2002).
35. *Id.* at 318.
36. *Id.* at 319.
37. *Id.* (quoting Gregg v. Georgia, 428 U.S. 153, 186 (1976)).
38. *Simmons*, 125 S. Ct. at 1196.
39. *Id.* (quoting Thompson v. Oklahoma, 487 U.S. 815, 837 (1988) (plurality opinion) (alteration in original)).

the nature, consequences, or wrongfulness of their conduct; (b) to exercise rational judgment in relation to conduct; or (c) to conform their conduct to the requirements of the law."[40] Offenders who meet these requirements, even if found sane at trial, are not as culpable or deterrable as the average offender. A close examination of this recommendation's language makes clear why this is so.

1. The Severe Mental Disorder or Disability Requirement

First, the predicate for eligibility under this recommendation is that offenders have a "severe" disorder or disability, which is meant to signify a disorder that is roughly equivalent to disorders that mental health professionals would consider the most serious, "Axis I diagnoses."[41] These disorders include schizophrenia and other psychotic disorders, mania, major depressive disorder, and dissociative disorders—with schizophrenia being by far the most common disorder seen in capital defendants.[42] In their acute state, all of these disorders are typically associated with delusions (fixed, clearly false beliefs), hallucinations (clearly erroneous perceptions of reality), extremely disorganized thinking, or very significant disruption of consciousness, memory, and perception of the environment.[43] Some conditions that are not considered Axis I conditions might also, on rare occasions, become "severe" as that word is used in this recommendation. For instance, some people whose predominant diagnosis is a personality disorder, which is an Axis II disorder, may at times experience more significant dysfunction. Thus, people with borderline personality disorder can experience "psychotic-like symptoms . . . during times of stress."[44] However, only if these more serious symptoms occur at the time of the capital offense would the predicate for this recommendation's exemption be present.[45]

---

40. *Task Force Recommendations*, *supra* note 1, § 2.

41. *See* AM. PSYCHIATRIC ASS'N, *supra* note 8, at 27-28 (describing Axis I diagnoses and distinguishing them from Axis II diagnoses).

42. *Id.*; L. Elizabeth Chamblee, Comment, *Time for a Legislative Change: Florida's Stagnant Standard Governing Competency for Execution*, 31 FLA. ST. U. L. REV. 335, 367 (2004).

43. *See* AM. PSYCHIATRIC ASS'N, *supra* note 8, at 298-301 (schizophrenia); *id.* at 329 (delusional disorders); *id.* at 362 (mood disorder with psychotic features); *id.* at 136-37 (delirium); *id.* at 519 (dissociative disorders).

44. *See id.* at 708.

45. On this latter point, a recent statement by the Supreme Court in a case construing *Atkins* is worth noting. In *Tennard v. Dretke*, 124 S. Ct. 2562 (2004), the Court stated that "[n]othing in our opinion [in *Atkins*] suggested that a mentally retarded individual must establish a nexus between her mental capacity and her crime before the Eighth Amendment prohibition on executing her is triggered," *id.* at 2571-72. Perhaps this statement is merely meant to reflect the clinical reality that mental retardation is a

2. The Significant Impairment Requirement

To ensure that the exemption only applies to offenders who are substantially less culpable and less deterrable than the average murderer, the recommendation further requires that the disorder significantly impair cognitive or volitional functioning at the time of the offense. *Atkins* held that the death penalty is excessive for *every* person with mental retardation, and the Supreme Court therefore dispensed with a case-by-case assessment of responsibility.[46] The Task Force decided that for the disorders covered by this recommendation, however, preclusion of a death sentence based on diagnosis alone would not be sensible, because their symptoms are much more variable than those associated with mental retardation.

The first specific type of impairment that the recommendation recognizes as a basis for exemption from the death penalty (if due to severe disorder at the time of the offense) is a significant incapacity "to appreciate the nature, consequences, or wrongfulness" of the conduct associated with the offense (in section (a)). This provision is meant to encompass the many individuals with severe disorders who have serious difficulty appreciating the wrongfulness of their criminal conduct. For instance, people who, because of psychosis, erroneously perceived their victims to be threatening them with serious harm would be covered by this language,[47] as would delusional offenders who believed that God had ordered them to commit the offense.[48]

Section (a) also refers to offenders who fail to appreciate the "nature" and "consequences" of the crime. This language would clearly apply to offenders who, because of severe disorder or disability, did not intend to engage in the conduct constituting the crime or were unaware they were committing it.[49] It would also apply to delusional offenders who intended to commit the crime and knew that the conduct was wrongful, but experienced confusion and self-referential thinking that prevented them

---

relatively stable condition. In any event, the Task Force's second recommendation, in contrast to the Court's statement in *Tennard*, clearly would require the individual to establish "a nexus" between the mental disability and the crime.

46. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

47. This is a fairly common perception of people with schizophrenia who commit violent acts. *See* Dale E. McNiel et al., *The Relationship Between Aggressive Attributional Style and Violence by Psychiatric Patients*, 71 J. CONSULTING & CLINICAL PSYCHOL. 399, 401-02 (2003).

48. *Cf.* People v. Schmidt, 110 N.E. 945, 949 (N.Y. 1915) (stating that if a person has "an insane delusion that God has appeared to [him] and ordained the commission of a crime, we think it cannot be said of the offender that he knows the act to be wrong").

49. These offenders would not have the mens rea for murder, and perhaps not even meet the voluntary act requirement for crime. *See* WAYNE R. LAFAVE, CRIMINAL LAW 405-06 (3d ed. 2000) (describing the voluntary act requirement under the common law).

from recognizing its full ramifications. For example, a person who experiences delusional beliefs that electric power lines are implanting demonic curses, and thus comes to believe that he or she must blow up a city's power station, might understand that destruction of property and taking the law into one's own hands is wrong, but might nonetheless fail to appreciate that the act would harm and perhaps kill those who relied on the electricity.

The second type of impairment recognized as a basis for exemption from the death penalty under this recommendation (in section (b)) is a significant incapacity "to exercise rational judgment in relation to conduct" at the time of the crime. Numerous commentators have argued that irrationality is the core determinant of diminished responsibility.[50] As used by these commentators, and as made clear by the recommendation's threshold requirement of severe mental disability, "irrational" judgment in this context does not mean "inaccurate," "unusual," or "bad" judgment. Rather, it refers to the type of disoriented, incoherent, and delusional thinking that only people with serious mental disability experience. Furthermore, the recommendation requires that the irrationality occur in connection with the offense, rather than simply preexist the criminal conduct.[51]

Under these conditions, offenders who come within section (b) would often also fail to appreciate the "nature, consequences, or wrongfulness of their conduct." But there is a subset of severely impaired individuals who may not meet the latter test and yet should still be exempt from the death penalty because they are clearly not as culpable or deterrable as the average murderer. For instance, a jury rejected Andrea Yates's insanity defense despite strong evidence of psychosis at the time she drowned her five children.[52] Apparently, the jury believed that, even though her delusions existed at the time of the offense,[53] she could still appreciate the wrongfulness (and the fatal consequences) of her acts. Yet that same jury spared Yates the death penalty, probably because it believed her serious mental disorder significantly impaired her ability to exercise rational judgment in relation to the conduct.[54]

---

50. *See, e.g.*, HERBERT FINGARETTE & ANN FINGARETTE HASSE, MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY 218 (1979); MICHAEL S. MOORE, LAW AND PSYCHIATRY 244-45 (1984); ROBERT F. SCHOPP, AUTOMATISM, INSANITY AND THE PSYCHOLOGY OF CRIMINAL RESPONSIBILITY 215-16 (1991); Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15, 24 (1997).

51. *See supra* note 45.

52. Yates v. State, Nos. 01-02-00462-CR, 01-02-00463-CR, 2005 WL 20416, at *1-4 (Tex. Crim. App. Jan. 6, 2005).

53. *Id.* at *3.

54. For a description of the Yates case, see Deborah W. Denno, *Who Is Andrea Yates? A Short Story About Insanity*, 10 DUKE J. GENDER L. & POL'Y 1, 1-5 (2003).

The third and final type of offense-related impairment recognized as a basis for exemption from the death penalty by the recommendation is a significant incapacity "to conform [one's] conduct to the requirements of the law" (section (c)). Most people who meet this definition will probably also experience significant cognitive impairment at the time of the crime. However, some may not. For instance, people who have a mood disorder with psychotic features might understand the wrongfulness and consequences of their acts, but nonetheless feel impervious to punishment because of delusion-inspired grandiosity.[55] Because a large number of offenders can make plausible claims that they felt compelled to commit their crimes, enforcement of the recommendation's requirement that impairment arise from a "severe" disorder is especially important here.

3. Exclusions

In addition to the severe disability threshold and the requirement of significant cognitive or volitional impairment at the time of the offense, a third way the recommendation assures that those it exempts from the death penalty are less culpable and deterrable than the average murderer is to exclude explicitly from its coverage those offenders whose disorder is "manifested primarily by repeated criminal conduct or attributable solely to the acute effects of . . . alcohol or other drugs."[56] The recommendation's reference to mental disorders "manifested primarily by repeated criminal conduct" is meant to deny the death penalty exemption to those offenders whose only diagnosis is antisocial personality disorder or something similar.[57] This language is virtually identical to language in the *Model Penal Code*'s (MPC) insanity formulation that was designed to achieve the same purpose.[58] However, the recommendation uses the word "primarily" where the MPC uses the word "only" because Antisocial Personality Disorder consists of a number of symptom traits in addition to antisocial behavior, and therefore the MPC's language does not achieve its intended effect. Compared to the MPC's provision, then, the recommendation's language

---

Yates's conviction was recently overturned by an appeals court on the ground that expert testimony in the case was prejudicially misleading. *Yates*, 2005 WL 20416, at *1.

55. *Id.* at 362.

56. *Task Force Recommendations*, *supra* note 1, § 2.

57. AM. PSYCHIATRIC ASS'N, *supra* note 8, at 706 (defining as a symptom of antisocial personality disorder "failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest").

58. *See* MODEL PENAL CODE § 4.01(2) (1962) (stating that "'mental disease or defect'" as used in the insanity formulation "do[es] not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct"); *see also id.* § 4.01 cmt.4.

broadens the category of offenders whose responsibility is not considered sufficiently diminished to warrant exemption from capital punishment.

Similarly, this recommendation denies the death penalty exemption to those offenders who lack appreciation or control of their actions at the time of the offense due "solely to the acute effects of voluntary use of alcohol or other drugs."[59] Substance abuse often plays a role in crime.[60] When voluntary ingestion of psychoactive substances compromises an offender's cognitive or volitional capacities, the law sometimes is willing to reduce the grade of offense at trial, especially in murder cases,[61] and evidence of intoxication should certainly be taken into account if it is offered in mitigation in a capital sentencing proceeding.[62] However, in light of the wide variability in the effects of alcohol and other drugs on mental and emotional functioning, voluntary intoxication alone does not warrant an automatic exclusion from the death penalty.[63] At the same time, this recommendation is not meant to prevent exemption from the death penalty for those offenders whose substance abuse has caused organic brain disorders or who have other serious disorders that, in combination with the acute effects of substance abuse, may have impaired appreciation or control at the time of the offense.[64]

4. How This Recommendation Relates to the Insanity Defense

As any student of the insanity defense knows, the language proposed in the recommendation is similar to modern formulations of the insanity defense.[65] Nonetheless, in light of the narrow reach of the defense in

59. *Task Force Recommendations*, *supra* note 1, § 2.

60. *See, e.g.*, James K. Stewart, *Quid Pro Quo: Stay Drug-Free and Stay on Release*, 57 GEO. WASH. L. REV. 68, 69-70 (1988).

61. *See* LAFAVE, *supra* note 49, at 415-16.

62. Jeffrey L. Kirchmeier, *A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward a Disease Theory of Criminal Justice*, 83 OR. L. REV. 631, 679 n.237 (2004) (listing statutes and judicial decisions from over a dozen states that have recognized intoxication as a mitigating circumstance).

63. In *Montana v. Egelhoff*, 518 U.S. 37 (1996), a plurality of the Supreme Court held that the voluntary intoxication defense is not constitutionally required, *id.* at 56 (plurality opinion). At least thirteen states now reject the voluntary intoxication defense. *See* Molly McDonough, *Sobering Up*, A.B.A. J., Aug. 2002, at 28, 28. Another commentator has asserted that "[i]ntoxication [d]efenses [a]re [e]ssentially [u]navailable as [c]urrently [c]onstrued." Meghan Paulk Ingle, Note, *Law on the Rocks: The Intoxication Defenses Are Being Eighty-Sixed*, 55 VAND. L. REV. 607, 631 (2002).

64. *See, e.g.*, AM. PSYCHIATRIC ASS'N, *supra* note 8, at 170 (describing dementia due to prolonged substance abuse).

65. The language in 2(a) and 2(c), for instance, is almost identical to the language in the *Model Penal Code*'s insanity formulation. *See* MODEL PENAL CODE § 4.01(1) (1962).

most states (and its abolition in a few),[66] many offenders who meet these criteria will still be convicted rather than acquitted by reason of insanity. Even in those states with insanity formulations that are very similar to the recommendation's language, these individuals might be convicted, for a whole host of reasons;[67] in such cases, the recommendation would require juries and judges to revisit the extent to which cognitive and volitional impairment diminished the responsibility of the offender. This approach rests on the traditional understanding that significant cognitive or volitional impairment attributable to a severe disorder or disability often renders the death penalty disproportionate to defendants' culpability even if it does not exempt defendants from punishment altogether.[68] It also underlies the various doctrinal formulations of diminished responsibility that predated the contemporary generation of capital sentencing statutes.[69]

5. How This Recommendation Relates to Mitigating Factors

This recommendation sets up, in effect, a conclusive "defense" against the death penalty for capital defendants who can demonstrate the requisite level of impairment due to severe disorder at the time of the offense. It must be remembered, however, that the criteria in the recommendation do not exhaust the relevance of mental disorder or disability in capital sentencing. Those offenders whose mental disorder or disability at the time of the offense was not severe or did not cause one of the enumerated impairments would still be entitled to argue that

66. Today, five states do not have an insanity defense, Christopher Slobogin, *An End To Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1214 (2000), only about twenty states still recognize volitional impairment as a basis for the defense, RALPH REISNER ET AL., LAW AND THE MENTAL HEALTH SYSTEM 534-36 (4th ed. 2004), and many states define the cognitive prong in terms of an inability to "know" (as opposed to "appreciate") the wrongfulness of the act or, as is true in federal court, leave out the word "substantial" in the phrase "lack of substantial capacity to appreciate" in the MPC formulation, *see* MODEL PENAL CODE § 4.01(1) (1962).

67. *See generally* Michael L. Perlin, *"The Borderline Which Separated You From Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1383-1416 (1997) (exploring reasons for hostility to the insanity defense).

68. *See* Ellen Fels Berkman, Note, *Mental Illness As an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291, 297 (1989). Berkman notes:

> Nearly two dozen jurisdictions list as a statutory mitigating circumstance the fact that the defendant's capacity to appreciate the criminality of her conduct was substantially impaired, often as a result of mental defect or disease. An equally high number of states includes "extreme mental or emotional disturbance" as a mitigating factor.

Id. (footnote omitted).

69. *See generally* S. SHELDON GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW (1925).

their mental dysfunction is a mitigating factor, to be considered with aggravating factors and other mitigating factors in determining whether capital punishment should be imposed.[70]

C. Controversies

One objection to this recommendation might be that it describes offenders who are not as impaired as those exempted under *Atkins*.[71] In fact, however, an offender who meets the strict criteria in this recommendation is likely to experience *more* dysfunction at the time of the offense than the typical offender with retardation. Most of the people covered by the recommendation's language will be afflicted with some type of psychotic symptomatology at the time they commit their crime. Thus, their criminal behavior will be influenced by delusions, hallucinations, or other signs of gross irrationality that seriously diminish both culpability and deterrability.

But, some might object, people with psychosis and similar mental problems are still more "at fault" for their condition than people with mental retardation, because their conditions are more easily and effectively treated and thus could have been avoided.[72] In another article, I have debunked these kinds of arguments in detail.[73] As I said there:

> First, many people with psychosis are not capable of recognizing the benefits of medication or the risks of not taking it. Second, those who do have such capability may nonetheless resist medication because they know it can have serious side effects, requires long-term maintenance, and is unevenly successful. Finally, even those who might want medication can have good reasons for not being on it. As one study indicated, most people with mental disorders do not seek treatment because they "do not realize that effective treatments exist, . . .

---

70. *See* Penry v. Lynaugh, 492 U.S. 302, 328 (1989) (requiring instructions making clear that the jury can "consider and give effect to the mitigating evidence" of mental disorder).

71. Note that only one state, Connecticut, prohibits execution of an offender who experienced serious mental illness at the time of the offense. *See* CONN. GEN. STAT. ANN. § 53a-46a(h)(3) (West 2001) (prohibiting imposition of the death penalty when "the defendant's mental capacity was significantly impaired or the defendant's ability to conform the defendant's conduct to the requirements of law was significantly impaired").

72. Research shows that an offender's "culpability" for creating an excusing condition (e.g., failing to take medication) can significantly affect culpability assessments. *See* Norman J. Finkel & Christopher Slobogin, *Insanity, Justification, and Culpability Toward a Unifying Schema*, 19 LAW & HUM. BEHAV. 447, 462 (1995).

73. *See* Christopher Slobogin, *What* Atkins *Could Mean for People with Mental Illness*, 33 N.M. L. REV. 293, 309-11 (2003).

> fear discrimination because of the stigma attached to mental illness[, or are unable to] afford treatment because they lack insurance that would cover it."[74]

In any event, the culpability associated with failing to take medication, even if the failure is intentional, hardly equates to the type of culpability necessary to warrant a penalty of death. Only if a refusal to maintain treatment occurred with awareness that violence would likely result might one argue there is a link between nontreatment and criminal liability.[75]

A second likely concern about this recommendation stems from the perceived difficulty of accurately diagnosing the conditions it describes. As a general matter, psychosis and related conditions, all of which are associated with conspicuous symptoms, are no more prone to misdiagnosis than mental retardation, evaluation of which, as previous discussion noted, has its own challenges.[76] But there are three differences between the conditions described in this recommendation and those encompassed by the first recommendation that might increase the likelihood of mistake in implementing the provision under discussion. First, the mental disorders it describes are somewhat more easily feigned than mental retardation.[77] Second, because of the variability of those conditions, this recommendation requires much more of a speculative retrospective judgment than the recommendation regarding offenders with intellectual deficiency, which focuses primarily on an assessment of present mental status.[78] Finally, this recommendation requires not only evaluation of cognitive dysfunction (which is the primary focus of an

---

74. *Id.* at 311 (alterations in original) (footnotes omitted) (quoting Robert Pear, *Few Seek To Treat Mental Disorders Common, U.S. Says; Many Not Treated*, N.Y. TIMES, Dec. 13, 1999, at A1).

75. *See* Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, 31 (1985) (arguing that one who "causes" his defense should be denied it only when, "at the time that the actor engages in his initial conduct [e.g., failing to take medication] he has a culpable state of mind as to causing the conduct constituting the offense [e.g., the mens rea for first degree murder]").

76. *Compare supra* notes 20-23 and accompanying text (discussing the diagnosis of mental retardation), *with* REISNER ET AL., *supra* note 66, at 429 (describing research finding agreement rates of over eighty percent on the diagnosis of schizophrenia).

77. *Compare* Mossman, *supra* note 23, at 276 (stating that "examination of diagnostic criteria suggests that mental retardation is hard to fake successfully" because the evidence of retardation must pre-exist the crime), *with* Richard Rogers, *Models of Feigned Mental Illness*, 26 PROF. PSYCHOL.: RES. & PRAC. 182, 184 (1990) (examining studies in forensic settings which reveal a range of 3.2% to 17.2% frequency of malingered mental illness).

78. Of course, historical information is also necessary to make a diagnosis of mental retardation, given the age of onset requirement, *see supra* text accompanying note 8, and the possibility that IQ can change, *see supra* note 22.

assessment for retardation as well), but also, in section (c), of volitional dysfunction, which is a relatively more difficult enterprise.[79]

None of these differences mean that the assessments called for by this recommendation are impossible, however. Indeed, they are virtually identical to the evaluations carried out every day in the criminal justice system in connection with the insanity defense. Furthermore, the threat of malingering is, in practice, minimal,[80] and today numerous procedures exist for improving the reliability of judgments about past mental state.[81] In any event, if the evaluations required by this recommendation are more prone to error, a ready solution exists: the offender can be saddled with a heavier burden of proving mental disability. Even if *Ring* requires that the ultimate burden of proof be placed on the government,[82] the burden of *producing* evidence of disability should obviously be on the offender, and can be adjusted upward to ensure that his or her claims in this regard are not frivolous.

While to this point the discussion about the Task Force's second recommendation has focused on whether it is too broad, some might believe that it is too narrow, given its placement of the word "severe" in front of the phrase "mental disorder and disability." Even most *insanity* tests, such as the MPC's popular formulation,[83] do not require a severe mental disorder. The federal test for insanity does resort to that modifier,[84] but that provision was hurriedly enacted after the acquittal of John Hinckley on insanity grounds,[85] and despite strong evidence that the insanity defense is seldom abused.[86] In any event, the goal in the capital

---

79. *See* Seymour L. Halleck, *Clinical Assessment of the Voluntariness of Behavior*, 20 BULL. AM. ACAD. PSYCHIATRY & L. 221, 221 (1992) ("[C]linicians rarely have access to conceptual or practical guidelines for assessing voluntariness.").

80. *See* Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 715 (1990) (concluding that "malingering among insanity defendants is statistically low and is fairly easy to discover" (footnotes omitted)).

81. *See generally* GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS § 8.06, at 234-41 (2d ed. 1997).

82. *See supra* text accompanying notes 25-29.

83. *See* MODEL PENAL CODE § 4.01(1) (1962).

84. 18 U.S.C. § 17(a) (2000) (providing that "[i]t is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts").

85. On the genesis of the federal test and criticisms of it, see RITA J. SIMON & DAVID E. AARONSON, THE INSANITY DEFENSE 49 (1988).

86. The House Judiciary Committee recommended against adoption of the current provision on the ground that it represented "'a radical departure . . . not justified by the evidence of problems with the current operation of the defense.'" MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE 97 (1994) (omission in original) (quoting H.R. REP. NO. 98-577, at 15 (1983)).

sentencing context is to define when mental disability leads to diminished criminal responsibility, not, as with the insanity defense, its complete absence. Furthermore, it might be argued, the recommendation's exclusions for those whose mental disability is manifested primarily by antisocial behavior or is attributable solely to acute psychoactive substance abuse would ensure that uncabined use of the exemption would not occur.

These are worthy objections. But the Task Force wanted to emphasize that only serious disorder would lead to exemption from the death penalty. Particularly in light of the large numbers of offenders who might make plausible claims that they were "irrational," lacked "appreciation" of the wrongfulness of their conduct, or had difficulty controlling it,[87] the "severe" modifier was felt to be necessary.

III. CONCLUSION

In recent analysis of capital punishment, much emphasis has been placed, deservedly so, on the possibility that factually innocent people might be executed.[88] But there is also another kind of innocence, the type that stems from the diminished responsibility for criminal acts that is caused by serious mental disorder. The first two recommendations of the ABA Section of Rights and Responsibilities' Task Force on Mental Disability and the Death Penalty recognize that this brand of innocence should also lead to an exemption from sentences of death.

There is another justification for these recommendations, one that focuses on their role as a corrective for the insidious impact of "sanist" attitudes on the part of legal decision-makers in capital cases.[89] Juries and judges, like people generally, harbor hostile attitudes toward people with mental disability.[90] Numerous studies document that capital sentencing juries tend to devalue evidence of significant mental disorder, often treating it as an aggravating circumstance rather than a mitigating

87. *See* Christopher Slobogin, *The Integrationist Alternative to the Insanity Defense: Reflections on the Exculpatory Scope of Mental Illness in the Wake of the Andrea Yates Trial*, 30 AM. J. CRIM. L. 315, 320-21 (2003) (noting that offenders with impulse disorders, abnormal brain patterns, and poor upbringing might assert an insanity defense under these formulations, unless mental disorder is defined restrictively).

88. *See, e.g.*, Ursula Bentele, *Does the Death Penalty, by Risking Execution of the Innocent, Violate Substantive Due Process?*, 40 HOUS. L. REV. 1359, 1360-64 (2004); Elizabeth R. Jungman, *Beyond All Doubt*, 91 GEO. L.J. 1065, 1065-69 (2003); Charles I. Lugosi, *Punishing the Factually Innocent: DNA, Habeas Corpus and Justice*, 12 GEO. MASON U. CIV. RTS. L.J. 233, 234-36 (2002).

89. *See* Michael L. Perlin, *On "Sanism,"* 46 SMU L. REV. 373, 374 (1992). Michael Perlin coined the term "sanism" to describe irrational prejudice, akin to the prejudice encompassed with words like sexism and racism, against people with mental disability. *Id.*

90. *See id.* at 375-76.

one.[91] And prosecutors routinely play to this bias. In the recent case of *Tennard v. Dretke*, for instance, the prosecutor's closing argument emphasized, in the Supreme Court's words, "that Tennard's low IQ was irrelevant in mitigation, but relevant to the question whether he posed a future danger."[92]

This kind of reasoning is particularly prejudicial in the capital sentencing context. Whether or not it is specifically recognized as an aggravator,[93] dangerousness plays a significant role in jury and judicial decision-making in capital cases.[94] Yet, contrary to the apparent beliefs of juries and prosecutors, offenders with mental disorder do *not* pose a greater risk than their non-disordered counterparts.[95] And even if they did, Supreme Court case law strongly suggests that mental disorder may only be considered as a mitigator in capital sentencing proceedings.[96]

---

91. *See* Christopher Slobogin, *Mental Illness and the Death Penalty*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 667, 669-70 (2000) (describing studies that show juries treat mental disability as an aggravating circumstance). A recent study concludes that psychological evidence, especially of schizophrenia and retardation, "can have significant effects on sentencing outcomes in death penalty litigation." Michelle E. Barnett et al., *When Mitigation Evidence Makes a Difference: Effects of Psychological Mitigating Evidence on Sentencing Decisions in Capital Trials*, 22 BEHAV. SCI. & L. 751, 766 (2004). However, that study relied on undergraduate responses to vignettes, and simulated only the sentencing stage of the capital process, meaning that it cannot be known whether the subjects might have also found the individuals insane at trial. *Id.* at 765-66.

92. Tennard v. Dretke, 124 S. Ct. 2562, 2573 (2004).

93. Only one-sixth of those states with a death penalty (six out of thirty-six) make dangerousness an explicit aggravating factor. *See* REISNER ET AL., *supra* note 66, at 618 n.u.

94. *See* Aletha M. Claussen-Schulz et al., *Dangerousness, Risk Assessment, and Capital Sentencing*, 10 PSYCHOL. PUB. POL'Y & L. 471, 480 (2004) (finding, in a study using mock jurors, that concerns about future violent conduct accounted for more variance in the sentencing decision than other aggravating circumstance); Sally Costanzo & Mark Costanzo, *Life or Death Decisions: An Analysis of Capital Jury Decision Making Under the Special Issues Sentencing Framework*, 18 LAW & HUM. BEHAV. 151, 168 (1994) (finding, based on interviews of capital sentencing jurors, that jurors tended to spend most of their deliberation time deciding whether the defendant would be violent if not executed).

95. James Bonta et al., *The Prediction of Criminal and Violent Recidivism Among Mentally Disordered Offenders: A Meta-Analysis*, 123 PSYCHOL. BULL. 123, 139 (1998) (documenting a meta-analysis finding that the major predictors of recidivism were the same for mentally disordered offenders as for nondisordered offenders, and that psychopathology should be deemphasized as a predictor); Marnie E. Rice & Grant T. Harris, *A Comparison of Criminal Recidivism Among Schizophrenic and Nonschizophrenic Offenders*, 15 INT'L J.L. & PSYCHIATRY 397, 404 (1992) (finding that subjects with schizophrenia were less likely to commit offenses upon release than their nonschizophrenic counterparts).

96. Zant v. Stephens, 462 U.S. 862, 885 (1983) (stating, in dictum, that it would be constitutionally impermissible to give aggravating effect to factors such as "race, religion, . . . political affiliation, . . . or to conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness" (citation omitted)).

The ABA Task Force's two recommendations regarding mental disability at the time of the offense *ensure* that at least the most severe types of mental disorder are treated that way.