THE SHAME OF THE STATES

MENTAL DISABILITY AND THE DEATH PENALTY

MICHAEL L. PERLIN

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Mental Disability and the Death Penalty

Preface

I started work as a public defender in August 1971. Some four months later, the New Jersey Supreme Court declared the state death penalty statute unconstitutional.[1] In the summer of 1972, in *Furman v. Georgia*, the United States Supreme Court declared *all* state death penalty statutes unconstitutional as applied.[2] In the summer of 1974, I became director of the New Jersey Division of Mental Health Advocacy in the newly created state Department of the Public Advocate, and I no longer represented criminal defendants at trial (although I continued to represent patients at the Vroom Building, the state psychiatric hospital for the criminally insane, a cohort that included individuals who had faced the death penalty over the prior half century). In 1982—some six years after the Supreme Court's decision in *Gregg v. Georgia*,[3] declining to find the death penalty unconstitutional in all circumstances—the death penalty was reinstated in New Jersey,[4] at the time when I was special counsel to the commissioner of the public advocate. In this position, I drafted legislative testimony for the state public advocate in opposition to the death penalty,[5] coauthored a law review article on the need for a proportionality review as an element of any death penalty legislation,[6] and "second sat" *Strickland v. Washington*[7] at the US Supreme Court.

I became a law professor at New York Law School in 1984 and soon thereafter created the Federal Litigation Clinic. Although the bulk of our work was civil—mostly appeals from administrative decisions involving SSI and SSDI benefits—we also did some appellate *amicus curiae* work in criminal cases. One of the cases in which we were involved was *Ake v. Oklahoma*,[8] in which the US Supreme Court ultimately held, in a death penalty case, that an indigent defendant is constitutionally entitled to psychiatric assistance when he makes a preliminary showing that his sanity "is [likely] to be a significant

factor at trial."[9] Among the classes that I have taught are Criminal Law, Criminal Procedure: Adjudication, and Criminal Law and Procedure: The Mentally Disabled Defendant. I began to write law review articles, treatises, and monographs, and in this literature, death penalty issues were always a major part of my focus, almost always from the perspective of the representation of a defendant with serious mental disabilities.[10] I consulted with legal aid and public defender offices providing legal services to this clientele, and I sometimes served as an expert witness—on *Strickland* issues—in cases involving defendants with mental disabilities.

In short, although I never represented a defendant at a death penalty trial, death penalty issues have always been part of my professional life. Thus, when I was approached to write this book, I eagerly accepted the invitation since it would give me an opportunity to put together all the thoughts that I had about this issue and to focus on some of the main reasons why the death penalty can never be administered in an equitable and rational way.

The death penalty is used disproportionately in cases of persons with serious mental disabilities, and there are multiple cases in which defendants who are factually innocent have been sentenced to death. Jurors misconstrue evidence introduced ostensibly in mitigation of punishment and instead perversely turn it into aggravating evidence. Invalid and unreliable testimony by alleged "experts" paints pictures of universal "future dangerousness." In spite of decisions ostensibly banning the practice, defendants with mental retardation and serious mental disabilities continue to be executed. The prosecutorial apparat is universally silent and turns its head in the face of gross evidence of prosecutorial misconduct. And there is no contradiction of Stephen Bright's aphorism that "[t]he death penalty will too often be punishment not for committing the worst crime, but for being assigned the worst lawyer."[11] In too many cases, the lawyers assigned to represent death penalty defendants are, in the immortal words of Judge David Bazelon, "walking violations of the Sixth Amendment."[12]

Why is this? I believe that we cannot hope to find the answers until we come to grips with the pernicious power of sanism[13] and pretextuality.[14] I have written frequently about how these factors have contaminated all aspects of the judicial process,[15] and I believe this contamination is nowhere more virulent—and, self-evidently, more deadly—than in the death penalty decision-making process. As I said in an article about counsel and the death penalty,

> [S]anism in the death penalty decision-making process . . . is often irrational, rejecting empiricism, science, psychology, and philosophy, and substituting in its place myth, stereotype, bias, and distortion. It resists educational correction, demands punishment regardless of responsibility, and reifies medievalist concepts based on fixed and absolute notions of good and evil and of right and wrong.[16]

But I do not believe that all is hopeless. As I discuss throughout this work, I believe that therapeutic jurisprudence[17] offers the best hope of redemption of all mental disability law,[18] including death penalty law.[19] And I explore that hope throughout this work.

I also call the reader's attention to the importance of international human rights law in this enterprise.[20] The United States stands shoulder to shoulder with many authoritarian and repressive nations in its support of the death penalty, a position rejected flatly by international human rights treaties and covenants. Although we have, for the most part, regularly ignored this body of law, the recent ratification of the UN Convention on the Rights of Persons with Disabilities[21] should force us to rethink our position from this fresh and new perspective—one that promises to infuse a measure of sadly lacking dignity[22] into the entire process.

Much of this book is entirely new, but parts of it draw upon articles and book chapters I have previously published.[23] I have also presented many of the ideas here at conferences over the years sponsored by the American Academy of Psychiatry and Law, the American Psychology-Law Society, the International Academy of Law and Mental Health, the Association of American Law Schools, the American College of Forensic Psychology, the Canadian Psychological Association, the Western Psychological Association, the American College of Forensic Psychiatry, Mt. Sinai Medical School, and the University of Pennsylvania Forensic Psychiatry Workshop Series; at symposia put on by New Mexico Law School, Akron Law School, Stanford University Law School, and the University of Miami Law School; in guest lectures hosted by National Taipei University and the University of Auckland Law School; and at multiple faculty workshops at New York Law School. Most recently, I presented a paper—"Mental Illness, Factual Innocence and the Death Penalty"—at National Chingchi Law School in Taipei, Taiwan, and at the Asian Criminological Society annual conference in Seoul, Korea, that became the centerpiece of the second half of chapter 1, and I am especially grateful to have had those opportunities.

My team of research assistants—Alison Lynch, Megan Crespo, Jessica Cohn, and Cambridge Peters—has been superb. I want to add my thanks to past research assistants who helped me so much in the preparation of earlier articles on which I've drawn in this book: Naomi Weinstein, Jeanie Bliss, Jayne South, Lori Kranczer, Ilene Sacco, Jennifer Burgess, Jenna Anderson, and Marisa Costales. I am so appreciative of all you have done for me. I also want to thank former New York Law School dean Richard A. Matasar, interim dean Carol Buckler, and associate deans Jethro Lieberman and Stephen Ellmann for their support and for the financial support of the NYLS Summer Grant program, and Sonja Davis for her excellent administrative assistance.

But most, of course, I wish to thank my family—my wife, Linda, my daughter, Julie, and my son, Alex—for their love and laughter and strength over all these years, and for keeping me "forever young." Alex, who was just one year old when I first wrote about the *Barefoot* and *Ake* cases,[24] is now an assistant deputy public defender in Trenton, New Jersey—the office in which I started my legal practice over four decades ago.[25] Luckily, he does not need to deal with death penalty issues.

It is to Linda, Julie, and Alex that this book is dedicated.

Michael L. Perlin
Trenton, New Jersey
September 4, 2012

Contents

• 1 •

An Introduction and the Dilemma of Factual Innocence

AN OVERVIEW

The story of the death penalty has been told many times.[1] But there is no single-volume work exploring the relationship between mental disability and the death penalty.[2] There is no question that the death penalty is disproportionately imposed in cases involving defendants with mental disabilities (referring both to those with mental illness and those with intellectual disabilities, more commonly referred to as mental retardation).[3] Estimates of those with mental retardation range from 10 to 30 percent,[4] and of those with mental illness from 10 to 70 percent.[5] Conservatively, over sixty persons with serious mental disabilities have been executed in the past three decades.[6] It is "a rare case in which the capital defendant has no mental problems."[7] All clinical studies report the frequent observation of neurological abnormalities and neurological deficits among death row prisoners.[8] Notwithstanding the bars against the execution of persons with mental disabilities,[9] there are multiple cases in which this has happened,[10] and many of the cases involving exonerations[11] involve defendants with mental disabilities (especially intellectual disabilities).[12] As Harold Koh points out, "The intellectually disabled rank among the world's most vulnerable and at-risk populations, both because they are different and because their disability renders them less able either to assert their rights or to protect themselves against blatant discrimination."[13] The American Bar Association has promulgated a resolution that "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";[14] yet such executions continue. There is clear bias, and it is systemic.[15]

Finally, none of this is a surprise; the state of Tennessee legislatively created a commission to study "[w]hether the law provides adequate protection for specific vulnerable populations such as the mentally retarded . . . and the mentally ill; whether persons suffering from mental illness constitute a disproportionate number of those on death row and what criteria should be used in judging the level of mental illness involved; and whether or not people with mental illness should be executed."[16] And all of this is made worse by the "arbitrary or capricious patterns" reflected in many states in which the death penalty is frequently sought in some counties and almost never sought in others.[17]

This is all problematic for many reasons:

- Execution of such persons flies in the face of a US Supreme Court decision *barring* the execution of persons with mental retardation.[18]
- Execution of such persons flies in the face of a US Supreme Court decision *barring* the execution of persons whose mental illness obstructs them from having a "rational understanding" of the reasons for their execution.[19]
- Execution of such persons reflects the reality that defendants with mental disabilities are more likely to be represented by ineffective counsel who fail miserably in providing the sort of vigorous legal advocacy envisioned by case law and legal standards.[20]
- Execution of such persons reflects the reality that, at the penalty stage of a death penalty prosecution, at the time when defense counsel is constitutionally obligated to introduce *mitigating* evidence,[21] jurors regularly misconstrue evidence of mental disability and view it as *aggravating* evidence,[22] making imposition of the death penalty more likely. In this context, jurors make gross—and often fatal errors—in evaluating whether the defendant appears to be sufficiently "remorseful,"[23] errors that flow from jurors' reliance on their self-referential (and flawed) "ordinary common sense."[24]
- Execution of such persons reflects the propensity of jurors to improperly see evidence of mental illness as evidence of "future dangerousness," again making a decision to impose the death penalty more, rather than less, likely.[25]
- Execution of such persons often reflects juror (and judicial) bias (that I elsewhere call *sanism*),[26] prosecutorial conduct that often borders (or crosses the border) of unethical behavior,[27] and cynical expert testimony that reflects a "high propensity [on the part of some experts] to purposely distort their testimony in order to achieve desired ends"[28] (that I elsewhere call *pretextuality*),[29] resulting in a system of constitutional, moral, and ethical flaws that fosters an atmosphere in which a significant percentage of the public believes that virtually *all* persons with mental disabilities involved in the criminal-court process

(at *any* level) are disproportionately dangerous, are immune to efforts at rehabilitation, and are deserving of more retaliatory punishment.[30]

- Execution of such persons flies in the face of international human rights standards[31] and is inimical to both the principles of therapeutic jurisprudence[32] and the concept of dignity.[33]
- Persons with serious mental disabilities generally have difficulties in obtaining a fair hearing in "regular cases."[34] The likelihood of unfairness is self-evidently increased in cases involving capital murders.[35]

The questions I raise in this book are underdiscussed—shockingly underdiscussed—in the literature.[36] I have chosen to write this book to explore the relationship between mental illness and the death penalty so as to explain why and how this state of affairs has come to be, to identify the factors that have contributed to this shameful policy morass, to highlight the series of policy choices that need immediate remediation, and to offer some suggestions that might meaningfully ameliorate the situation.[37]

This is a question of great legal, moral, political, and social significance. Assuming, as we must, that the death penalty remains constitutional in the United States,[38] the choices of whom we execute, how we exclude (or do not exclude) certain classes from the category of "potentially executable," the ways that mentally disabling conditions are constructed in the trial and penalty phases of death penalty cases, and the assumptions we make about individuals at every stage of the death penalty process are of significance to scholars, policy makers, students, and informed citizens alike.

The book will follow this road map. First, I will consider the reality that it is more likely that a person with a serious mental disability will be convicted and sentenced to death in a case in which he is factually innocent.[39] Then I will look at the ways that sanism and pretextuality dominate this entire area of law and social policy, and I will consider both the role that dignity should play in this consideration and the meaning of therapeutic jurisprudence in this context.[40] Then I will consider the role of mental disability in all aspects of the death penalty process. In this context, I will first consider substantive questions about which there is a corpus of US Supreme Court case law: the significance of the "future dangerousness" inquiry in death penalty decision making,[41] and the textures of the mitigation doctrine, paying special attention to the ways that mitigation evidence is often misunderstood and misapplied by jurors as *aggravation* evidence.[42]

I will next focus on questions of execution competency: first, I will look at the ways that Supreme Court case law that ostensibly bars the execution of some defendants with mental retardation is regularly ignored and trivialized by trial courts;[43] next, I will consider the ways that Supreme Court case law that ostensibly bars the execution of some defendants with serious mental illness is regularly ignored and trivialized by trial courts.[44] As part of this inquiry, I will

pay special attention to the question of whether a defendant with severe mental illness can be medicated so as to make him competent to be executed,[45] as well as to the potential role of neuroimaging evidence in such cases.[46]

I will then consider the roles of the participants in the death penalty litigation system: the ways that jurors, in general, tend to distort mental disability evidence at every stage of the death penalty case;[47] the impact of prosecutorial misconduct;[48] the ways that, in some states, judges—seeking to pander to voters in reelection campaigns—use a legislatively sanctioned "override" power to impose death sentences in cases in which jurors had voted to sentence the defendant to life imprisonment;[49] and the abject and global failure of counsel to provide effective assistance to this most vulnerable cohort of defendants.[50]

I will then consider how international human rights conventions and case law—although acknowledged by a bare majority of the Supreme Court—are ignored by trial courts in cases involving this same cohort of defendants, and in this context consider how this body of law might aid us in reconstructing this area of jurisprudence.[51] In all of these chapters, I will reconsider the issues that I raise in chapter 2 about sanism, pretextuality, the role of dignity, and the potential of therapeutic jurisprudence as offering us a way of (at least modestly) ameliorating the situation.

I will then conclude with some recommendations and some policy suggestions. These recommendations and suggestions will include the following:

- An acknowledgment of the ubiquity and the pernicious powers of sanism and pretextuality, especially in cases involving violent crime;
- A reexamination of the Supreme Court's pallid effectiveness-of-counsel decision of *Strickland v. Washington*,[52] in an effort to—finally—ameliorate the situation described some thirty-five years ago by Judge David Bazelon, who characterized lawyers appearing before him (in cases involving mentally disabled criminal defendants) as "walking violations of the Sixth Amendment";[53]
- A serious reevaluation of the roles of expert witnesses in testifying to "future dangerousness";
- The need for promulgation of a set of guidelines and standards to be employed in cases involving a defendant's competency to be executed; and
- Some strategies that would lead to a greater role for international human rights in this entire inquiry (especially the recently ratified United Nations Convention on the Rights of Persons with Mental Disabilities),[54] with a "readers' guide" as to how this body of law can and should be used in domestic death penalty cases.

My hope is that this book will call attention to this cluster of issues that, sadly, still remain "under the radar" (or perhaps more pessimistically but accu-

rately, "*off* the radar") for almost all participants in the criminal justice system, and that it will eventually lead to invigorated thinking and ameliorative action.

In 1948, the journalist Albert Deutsch wrote *The Shame of the States*,[55] an exposé of the state of American mental institutions at that time. In it he expressed sadness and outrage that this "rich, busy, idealistic, sympathetic, growing country"[56] could allow such a state of affairs to continue. Today, the same words that he used could be used about the way we have countenanced the imposition of the death penalty upon persons with severe mental disabilities. If anything, the word "shame" is an understatement.

ACTUAL INNOCENCE AND "DEATH WORTHINESS"

Introduction

The issue of innocence has had—and continues to have—"a profound impact" on the death penalty debate.[57] Any consideration of the topic that is central to this volume—the relationship between mental disability and the death penalty—reveals one undeniable truth that colors this entire investigation: that there are factors that make it significantly more likely that a person with a serious mental disability will falsely confess to a crime that he did not commit, and other factors that make it far more likely that such a person will seem "death worthy" because of his inability to "present" in ways that fact finders are likely to interpret as being remorseful or taking responsibility for the act in question. It is necessary to consider these factors at the outset of this inquiry.[58]

False Confessions

> When a defendant has confessed to committing a crime, the vast majority of police, prosecutors, and jurors see it as rock-solid evidence of guilt. Most people are baffled by the notion that someone would confess to a crime he or she did not commit. In 25 percent of all DNA exonerations, however, defendants have done just that—confessed to crimes that they did not commit.[59]

Mental disability is a significant confounding factor at every stage of the criminal justice system—from precontact to initial contact to intake and interrogation, to prosecution and disposition, and to incarceration.[60] In the context of capital punishment, these coalesce most vividly in the context of the false confession.[61]

William Follette and his colleagues point out,

> the *ability* to resist interrogative influence is derived from three broad sources: relevant knowledge, intact cognitive resources, and self-regulatory

> capacity—or the ability to control emotions, thinking, and behavior. In turn, ***motivation*** to resist interrogative influence can be enhanced or undermined by a variety of chronic or acute individual characteristics.[62]

A person must be able to exert self-control to resist the pressures of interrogation and "withstand the relentless pressures to confess."[63] Self-evidently, this is more difficult for a person with mental disabilities, especially if she is (1) uncertain what happened or what is true; (2) lacks confidence in her own memories or ability to understand—for example, due to long-standing subjectively known cognitive impairments; or (3) suffers impaired "reality monitoring."[64] Self-evidently, mental disorders render individuals more susceptible to suggestion through one or more of these mechanisms.[65]

There are many reasons why persons with mental disabilities are sentenced to death for murders they did not commit,[66] and other reasons why they are sentenced to death in cases in which individuals without mental disabilities might have been spared the death penalty. There are multiple case studies to consider. By way of example, Anthony Porter was convicted of murdering Marilyn Green and Jerry Hillard in Chicago in 1982. Largely from the investigative efforts of the Innocence Project, it was discovered that Porter was mentally disabled and innocent. Their investigative efforts resulted in an interview of the prosecution's chief eyewitness, who recanted his testimony and explained that he falsely accused Porter under police pressure.[67] The cases of Douglas Warney, a person with a history of mental disabilities who confessed falsely to his involvement in a murder after twelve hours of interrogation, and Earl Washington, a mildly mentally retarded man who gave a false confession that led to his wrongful conviction,[68] are not dissimilar.[69]

As the above cases suggest, the most prevalent issue is that of false confessions. Of the first 130 exonerations that the New York–based Innocence Project obtained via DNA evidence,[70] 85 involved people convicted after false confessions.[71] Mental impairment is a commonly recognized risk factor for false confessions.[72] There is no disputing that false confessors have been found to score higher on measures of anxiety, depression, anger, extraversion, and psychoticism, as well as being more likely to have seen a mental health professional or taken psychiatric medications in the year prior.[73] Defendants with mental retardation "have 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."[74] Go to the Internet and scan the websites of the various Innocence Projects. In every instance, mental impairment is listed as a major reason why innocent persons confess to crimes they did not commit.[75] On this point, the US Supreme Court is clear: "Mentally retarded defendants in the aggregate face a special risk of wrongful execution."[76]

Studies have repeatedly shown that a substantial proportion of adults with mental disabilities, and "average" adolescents below age sixteen, have impaired understanding of *Miranda* warnings when they are exposed to them,[77] often lack the capacity to weigh the consequences of a rights waiver, and are more susceptible to waiving their rights as a matter of "mere compliance with authority."[78]

Although false confessions cover the full gamut of crimes, over 80 percent occur in murder cases.[79] Of the false pleaders studied by the Innocence Project and independent scholars, more than one-quarter are either mentally ill or intellectually disabled.[80] Here are the sobering statistics:

> Sixteen of the 340 [Innocence Project] exonerees were mentally retarded; 69% of them—over two thirds—falsely confessed. Another ten exonerees appear to have been suffering from mental illnesses; seven of them falsely confessed. Among all other exonerees (some of who may also have suffered from mental disabilities of which we are unaware) the false confession rate was 11% (33/313). Overall, 55% of all the false confessions we found were from defendants who were under eighteen, or mentally disabled, or both. Among adult exonerees without known mental disabilities, the false confession rate was 8% (23/272).[81]

On average, these defendants served eleven to twelve years prior to their exonerations.[82]

But there are other reasons as well. In *Atkins v. Virginia*,[83] the US Supreme Court's 2002 decision that executing a person with mental retardation violated the Cruel and Unusual Punishment Clause of the Constitution, Justice John Stevens explained the concerns that were among the motivating factors leading to the Court's conclusion:

> First, there is a serious question as to whether either justification that we have recognized as a basis for the death penalty [retribution and deterrence] applies to mentally retarded offenders. . . .
>
> The reduced capacity of mentally retarded offenders provides a second justification for a categorical rule making such offenders ineligible for the death penalty. The risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty" is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.[84]

In spite of the *Atkins* decision, there are still countless cases of defendants with mental retardation who are sentenced to death. Consider these cases:

- The Court in *Howell v. State*[85] speculated that the defendant did not exert enough "effort" on those of his IQ tests on which he scored under 70,[86] and that the jury could have thus concluded he "functioned at a higher level" [87] (a case which might be read hand in glove with *State v. Strode*,[88] which approvingly cited legislative testimony that retardation was a "birth defect" that you are "born with for the most part"). [89]
- In the same vein, the Court in *State v. Grell*[90] stressed the "risk of malingering" as justification for imposing the burden of proving mental retardation on the defendant by clear and convincing evidence, reasoning that defendants had "significant motivation to attempt to score poorly on an IQ test."[91]

In short, the *Atkins* decision has *not* been a palliative for the resolution of this issue.

The Trial Presentation of Persons with Mental Disabilities

Inappropriate Demeanor Recall what the Supreme Court said in the *Atkins* case: the demeanor of a defendant with mental disabilities "may create an unwarranted impression of lack of remorse for their crimes."[92] Professor Blume and his colleagues have noted, "[D]evelopmentally disabled people typically lack social skills and have not had the same opportunities or peer group contact so critical in the development of appropriate social behavior that normal individuals have had."[93] The cognitive limitations of individuals with mental retardation often result in poor impulse control and inattentiveness, which may lead the defendant to be perceived as cold, aloof, and avoidant. Finally, if a defendant with mental retardation is trying to hide his disability behind a "cloak of competence," he may adopt a "tough guy" persona by bragging about his physical strength and intellectual prowess—or by assuming posture and expressions that are read as braggadocio."[94] All of these make it more likely that such a defendant will be subjected to the death penalty in spite of actual innocence.

Vulnerability to Exploitation Finally, Professor Blume considers how vulnerability to exploitation makes it more likely that such a person will "invent" participation in a crime, "particularly if a trusted 'friend' is urging such an account of the crime." Likewise, when it comes time to make a deal, the person of normal intellectual ability is likely to be the one to turn state's evidence in exchange for reduced charges. Finally, all of these vulnerabilities