

Who and Why do we kill?

Rethinking the purpose of capital punishment for the execution of the mentally ill

I. Introduction

The general existence of the death penalty by itself, without even linking it to mentally disordered offenders, constitutes one of the most controversial and highly disputed forms of punishment in today's society.¹ It can be defined as "the deliberate, institutionalized taking of human life by the state"², which at the same time constitutes "the greatest conceivable degradation to the dignity of the human personality".³

The fact that most countries have repealed the death penalty in their domestic constitutions shows a general reluctance towards the use of this primitive form of punishment.⁴ Although still not prohibited in international law, one can speak of an increasing concession among intergovernmental organizations and states that the death penalty⁵ violates the value of human dignity and the right to life.⁶ This is supported by established international instruments aimed at the abolition, or at least limitation, of the death penalty, such as treaties and other resolutions adopted by UN bodies and intergovernmental organizations, e.g. Safeguard 1984 adopted by the Economic and Social Council to protect those facing execution.⁷

Such protection is even more crucial and needed, when dealing with mentally disordered offenders, including those dealing with mental impairment, mental illness and insanity. Mental disorder is common among offenders. Defendants who are already ill from the beginning often become worse on death row, and even those who are sane and healthy upon arrival will eventually become sick due to the circumstances they face while awaiting their execution.⁸ Mentally disordered offenders constitute a very vulnerable group of people who, according to several mental health experts, "would never have made it to death row in the first

¹ Clarence Watson, Spencer Eth, Gregory Leong, 'Commentary: Pursuing Justice in Death Penalty Trials', 2012, J. Am. Acad. Psychiatry Law, p. 50

² Stephen B. Bright, "The role of race, poverty, intellectual disability, and mental illness in the decline of the death penalty", 2014, University of Richmond Law Review, p.22

³ *ibid.*

⁴ Amnesty International report, "International Standards on the Death Penalty, August 1997, p.4

⁵ *ibid.* p.5

⁶ Benjamin S. Yost, "Kant's Justification of the Death Penalty Reconsidered", 2010, Kantian Review, Vol. 15, p.1

⁷ *supra* note , 4, p.3

⁸ Michael Mello, "Executing the Mentally Ill: When is someone sane enough to die?", 2007, Criminal Justice Vol. 22, p.2

place if they had been able to find treatment when they were free".⁹ This systematic failure should make us rethink not only the objective of the criminal justice system but also the purpose behind executing ill people. How we respond to such issues determines who we want to be as a society.

Deterrence and retribution are the principal justifications given by proponents for the approval of capital punishment.¹⁰ The doctrine of deterrence indicates that a person who is about to commit a crime would take into consideration what the likely punishment will be, once detected and convicted.¹¹ This is already highly disputed amongst scholars¹² and it is even more disputed if this notion applies to the mentally ill. Concerning the notion of retribution one can observe that due to public and political pressure, retribution has been often confused with revenge. Retribution differentiates itself from revenge "as legal constraints are placed upon its severity in the interests of justice and proportionality".¹³ How can it be proportional and just to execute someone who does not even understand the reason behind his punishment? Someone who has medically proven deficiencies? This "eliminates" an important factor as stated by the US Supreme Court that "both the seriousness of the crime and the character and background of the defendant must be considered in the sentencing decision".¹⁴ Executing someone who actually needs help does not seem to do so.

This essay argues that mentally disordered offenders should generally be excluded from the death penalty, because of several issues that will be discussed below. In the next paragraphs, it will look at the different forms of mental disorder, such as mental impairment and mental illness (including insanity), by considering different issues that might arise and examining important cases. Eventually, it will look at general issues when dealing with mentally disordered offenders.

⁹ Dan Malone, "Cruel and Inhumane Executing the Mentally Ill", amnesty international magazine, p.5

¹⁰ Peter Hodgkinson, Seema Kandelia and Lina Gyllensten, 'Capital Punishment: A Review and Critique of Abolition Strategies', Chapter 11 in Yorke, J. (ed.), *Against the Death Penalty: International Initiatives and Implications* (Ashgate 2008), p. 251

¹¹ *ibid.* p.250

¹² Adam Liptak, 'Does the death penalty save lives? A new debate', 2007,

<http://www.nytimes.com/2007/11/18/us/18deter.html?_r=0> accessed 26 April 2016

¹³ *supra* note, 10 p.251

¹⁴ *supra* note, 9, p.2

II. Main Body

It is important to distinguish between the different existing forms and stages of mental disorder, for the purposes of this essay, especially between mental impairment and mental illness. The latter is different from mental disability in that it does not result in diminished IQs and decreased intelligence, although the influence of untreated mental illnesses can have an impact on the cognitive skills of the individual, such as communication, concentration and memory.¹⁵ In contrast, mental impairment (or better intellectual disability) includes "significant limitations both in intellectual functioning and in adaptive behavior, which originates before the age of 18 and covers many everyday social and practical skills".¹⁶

The US Supreme Court's milestone decision to abolish the death penalty for the mentally disabled has been established in *Atkins v. Virginia* (2002). The fact that eighteen states had already enacted statutes which prohibited such practice proved the existing nation-wide consensus and supported this judgment.¹⁷ The Court, unfortunately, did not give the states important guidelines. Each state was supposed to define intellectual disability for itself, which resulted in differences between the ways in which individual states applied *Atkins*.¹⁸ However, the decision highlights very crucial and interesting questions concerning the death penalty and mentally disordered offenders. This essay will focus on the main two discussed by the Court.

The court first questioned whether the above mentioned justifications, namely deterrence and retribution, can be applied for the intellectually disabled. The notion of retribution only justifies the death penalty for the most "deserving" criminals.¹⁹ But how can someone deserve such punishment for an act that was out of his own control? Someone who simply is not able to behave in a way, which the society claims to be "normal" and someone who does not understand either his act or its consequences. Retribution concerning the death penalty for the intellectually disabled appears to be more like revenge. It can not be grounded on justice and proportionality. The same can be said about the principle of deterrence. It is already doubtful

¹⁵Ronald S. Honberg 'The Injustice of imposing death sentences on people with severe mental illnesses', 2005, Catholic University Law Review, p.1159

¹⁶ <<http://www.deathpenaltyinfo.org/intellectual-disability-and-death-penalty>> accessed 30 April 2016

¹⁷ supra note, 15, p.1159

¹⁸ Mina Mukherjee, Alexander Westpal, "Shifting Diagnostic Systems for Defining Intellectual Disability in Death Penalty Cases: *Hall vs. Florida*", 2015, *J Autism Dev. Disord.*, p.1

¹⁹ supra note, 15, p.1158

whether the death penalty constitutes a more effective deterrent than other punishments.²⁰ But especially concerning intellectually disabled defendants it is highly doubtful "whether the prospect of the death penalty would deter others with cognitive impairments which diminish impulse control, the ability to plan and to weigh right from wrong".

The Court further raised concerns about the "potentially adverse impact of mental retardation on the fairness of capital proceedings". This includes aspects of false confessions, coercion and the potentially impact of demeanor evidence.²¹ But since this can also occur with mentally ill defendants I will return to these issues when discussing general problems concerning mentally disordered offenders.

The Atkins judgment laid the foundation and correct conclusion that "murderers who are mentally disabled lack the capacity to engage in the logical reasoning necessary to connect their impulsive conduct with a future punishment of death".²²

In contrast extending such protection to mentally ill offenders could happen to be more complicated than one thinks. Intellectual disability is based on some agreement about its definition and scope. Mental illness is much more difficult to determine. It consists of a wide spectrum, which includes "everything from depression to bi-polar to post-traumatic stress syndrome, to paranoid schizophrenia".²³

The proposal to exempt the mentally ill from facing execution has been opposed by some, claiming that such defendants are adequately protected under the already existing law, such as the verdict of "found not guilty by reason of insanity". Therefore only offenders who lost the presentation of the insanity test are found guilty and receive the death penalty.²⁴ This argument ignores the fact that such cases carry a higher risk of mistakes and problems, such as "lack of knowledge and understanding of overburdened public defenders about how to raise mental illness effectively in capital cases, defendants who forbid their attorneys from presenting evidence of mental illness at trial etc." and therefore require more protection, which the insanity test does not provide.²⁵

²⁰ supra note, 10, p. 251

²¹ supra note, 15, p. 1158

²² Amy Dillard "Madness alone punishes the madman: The search for moral dignity in the court's competency doctrine as applied in capital cases", 2012, University of Baltimore Legal Studies Research Paper, p.506

²³ supra note, 9, p.3

²⁴ supra note, 9, p.4

²⁵ supra note, 15 pp.1162 and 1164

Another opinion raised suggests that it is best to continue to let a jury decide over the fate of the defendant.²⁶ Although letting a jury decide has its benefits, maybe we should rethink this for cases concerning mentally disordered offenders. The jury should not be confronted with such complex and difficult questions, which "psychiatrists can't even agree on to make judgments about the sanity of the defendant"²⁷ and eventually his or her life.

This intersection between mental disorder and capital punishment has already concerned the Courts more than two decades ago.²⁸ *Ford v. Wainwright* (1986) constitutes one of the first cases in which the Supreme Court theoretically prohibited the death penalty of those whose insanity is so severe that they are not able to understand their impending execution or the reasons for it.²⁹ The Constitution, which only proscribed "cruel and unusual punishments"³⁰, had to be extended to also forbid the execution of the insane.³¹ This proposal encountered interesting and highly controversial questions including, whether "it would not be less cruel to execute defendants who already had been residing in a world of delusions" and who were not aware "that they were about to be killed, since they would be free of the terror waiting for it?".³² The answer to this question is simply no. This does not have anything in common with what we call justice, proportionality and fairness. As correctly stated by Justice Marshall, the "execution of an insane person offends humanity, provides no example to others and serves no retributive purpose", as mentioned above, "we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life".³³

However, this decision left open more questions than it eventually answered³⁴, especially issues surrounding the defendant's competency and further important legal questions and problems.³⁵ Several cases have proven that the given competency standards by the Constitution are very low, unevenly applied and sometimes misunderstood.³⁶ Although

²⁶ supra note, 9, p.4

²⁷ Stephen B. Bright, "The role of race, poverty, intellectual disability, and mental illness in the decline of the death penalty", 2014, University of Richmond Law Review, p.688

²⁸ supra note, 8

²⁹ supra note, 9, p.3

³⁰ The Eighth Amendment to the United States Constitution

³¹ supra note, 8, p.3

³² supra note, 8

³³ supra note, 8 p.6

³⁴ supra note, 8, pp.8-9

³⁵ "Mental Illness and the Death Penalty", 2009, American Civil Liberties Union, p.1

³⁶ supra note, 15, p.1163

assigned a defense attorney, a lot of mentally ill defendants "may not be cooperative or may not fully be able to participate in their own defense".³⁷ It is shocking to see that defendants were even allowed to represent themselves at trial despite serious questions about their competency.³⁸ Such examples can be found in the cases of Scott Panetti and John Ferguson. Panetti, for example, was allowed to fire his attorneys and defend himself in a very bizarre way, although it should have been obvious that this man was not competent enough to do so. Both cases violated the principle that the defendant "must have a rational understanding of the reason for the execution"³⁹ in order for the punishment to serve a purpose.

In summary, it can be said that if it is cruel and unusual to execute intellectually disabled offenders because they are not capable of functioning on an specifically required level, one should logically also come to the conclusion to exempt the mentally ill from execution, if their illness impairs their ability to make moral judgments.⁴⁰

Nonetheless, there are a few other issues that should make us rethink whether the death penalty serves as an appropriate punishment for mentally disordered offenders.

Situations have proven that this group of people are more likely to waive very important rights, which they simply do not understand, e.g. miranda rights, and is more likely to falsely confess.⁴¹ Mentally disordered offenders are also confronted with juror prejudice based on their conduct, which at times might appear remorseless due to over-medication or lack of ability to form empathy. This constitutes a disadvantage for such defendants because remorse has proven to be a very helpful factor.⁴²

Although this paper will not be able to go into more depth on the matter, the last issue the Courts faced concerning mentally disordered offenders is whether they should be medicated to make them competent to be executed. Unfortunately, the US Supreme Court missed its chance to answer this question in the Singleton case. However, what needs to be said is that this should not even be an option. These people often have been refused treatment and

³⁷ supra note, 15, p.1163

³⁸ Richard J. Bonnie, "Panetti v. Quarterman: Mental Illness, the Death Penalty, and Human Dignity", 2007, Ohio State Journal of Criminal Law, Vol. 5, p.260

³⁹ supra note, 35, p.4 S

⁴⁰ supra note, 9, p.9

⁴¹ Andrew E. Taslitz, "Mental Health and Criminal Justice: An Overview", 2007, Criminal Justice, Vol. 22, p.2

⁴² supra note 1, p.1

appropriate help before committing the crime. Forcing medication upon them to kill them dehumanizes each individual defendant and deprives him of an appropriate humane exit.⁴³

III. Conclusion

The execution of the mentally ill, i.e. the crossing between mental disorder and capital punishment, should lead us to question the core and objective of our legal system: "Why and Who do we execute?".⁴⁴ Mentally disordered offenders, both suffering from intellectual disability and mental illness, constitute a very vulnerable group of people, who rather deserve more protection and treatment than just death, and therefore should be exempted from execution. It can never be proportionate and just to execute an individual who is not able to comprehend the reason behind his punishment. As seen, there have been major difficulties in the way the cases were handled, which resulted in a negative impact of mental illness on the fairness of the trial. But it is crucial, that "we should leave no room for error"⁴⁵ when it comes to the death penalty. As stated above, executing the mentally ill does not serve any purpose that could satisfy our society's need for justice. Retribution turns into revenge and deterrence simply does not have any significant effect. Executing the mentally disordered, therefore, seems to be more inappropriate than justified. Capital Punishment, especially in regards to mentally disordered offenders, should not be the only way that society has left of expressing itself.⁴⁶ It should rather acknowledge its responsibility towards the mentally ill and provide appropriate help, instead of reaching to such cruel and unusual punishment.

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⁴³ supra note, 35, p.4

⁴⁴ supra note, 8, p.2

⁴⁵ supra note, 15, p. 1159

⁴⁶ supra note, 10, p.251

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