Mental retardation and the death penalty

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This paper attempts to summarise the issues arising from the practice of executing prisoners who have mental retardation. It draws mainly on the US experience but makes reference to other jurisdictions. The following three vignettes from the USA illustrate some of the issues arising from a discussion of mental retardation and the death penalty and help us understand the terminology of the discussion.

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2 The Congress was organized by Ensemble Contre la Peine de Mort [ECPM: Together against the death penalty] in collaboration with Amnesty International French Section, Federation Internationale des Ligues des Droits de l'Homme, Penal Reform International, Hands Off Cain, Sant'Egidio Community, and with the support of the Council of Europe and the European Parliament. A full list of supporting organizations and partners is given at the ECPM web-site:
The first is the case of Anthony Porter, a mentally retarded black prisoner first scheduled to be executed on 23 September 1998 for a double murder committed in 1982. In August 1998, Anthony Porter’s Intelligence Quotient (IQ) was measured at 51. This would have made him the most severely mentally retarded inmate to be put to death in the USA since executions resumed there in 1977. However, two days before the scheduled execution date, the Illinois Supreme Court ordered a stay to allow investigation of his mental state. Porter’s life was saved by journalism students from Northwestern University who obtained evidence pointing to the guilt of another man.

The second case is that of Rickey Ray Rector, a black man executed in Arkansas during the 1992 presidential campaign of then Governor Bill Clinton. Rector had shot himself at the time of his arrest and had sustained organic brain damage that reduced his intellectual capacity dramatically. He is reported to have spoken of deferring eating part of his last meal until “later” -- after the execution.

The third case is that of Jay Scott, a black man executed in the Southern Ohio Correctional Facility shortly after 9pm on 14 June 2001. In recent weeks he had twice come within minutes of execution before stays were granted. He was sentenced to death in 1984 for a murder carried out during an attempted robbery in Cleveland in May.

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2 In the USA the term “mental retardation” is widely used in legal discussion. Elsewhere terms such as “mental handicap”, “intellectual disability”, “learning disorder” and variations of these are used. In this paper, I use “mental retardation” as it is the expression frequently encountered in the literature of the death penalty.

1983. Jay Scott had been diagnosed as suffering from schizophrenia. He had exhibited severe symptoms of mental illness in recent years. Scott received visits from family members on his last day and, at one point, reportedly told relatives that he was "looking forward to the basketball game", apparently referring to a match due to be played the day following his execution.

These three cases illustrate three forms of mental disability which have been a focus for those working for reform of the death penalty.

Definitions

Anthony Porter showed signs of mental retardation. He suffered from a developmental disorder which manifested itself though his childhood and adolescence and was marked by low IQ and low adaptive skills. Rickey Ray Rector also had difficulties with adaptive functioning. However, his development through his childhood and adulthood were apparently unexceptional and his mental deficit arose at the time of the self-inflicted shooting which caused organic brain damage.

Jay Scott was suffering from schizophrenia, a mental illness marked by characteristic disturbances of thinking, perception, emotion and behaviour, but which is often amenable to medical treatment. It is unrelated to mental development and intelligence. It is thus conceptually different from mental retardation or organic brain damage.

There is a widely observed principle of sparing from execution those who are “insane” (to use the legal term) -- at the time of the crime or of the execution. It is held that such people are not responsible for their crime because severe mental illness impaired their judgement or their ability to exercise self-control at the time of their offense or caused a lack of understanding of the reason for their
punishment⁴. This practice should apply in the USA after the Supreme Court held, in *Ford v. Wainwright*⁵, that it is cruel and unusual punishment under the Eighth Amendment of the US Constitution to execute a person whose mental state renders them lacking in “competency to be executed” – that is, being unable to understand the meaning of their punishment. However, both in the USA and elsewhere, the mentally ill can be sentenced to death and executed⁶.

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⁴ Not all mental illness would give rise to a plea of “insanity” which is a legal rather than a medical term. Increasingly the concept of “diminished responsibility” is being used in courts.


⁶ Larry Robison, diagnosed as a paranoid schizophrenic more than 20 years previously, was executed on 21 January 2000 in Texas. He never denied the crimes for which he was sentenced but always claimed that they were the result of his mental illness. His mother maintained that she had attempted, unsuccessfully, to get him appropriately treated by the state before he turned violent (AI. The Death Penalty Worldwide. Developments in 2000. AI Index: ACT 50/001/2001). Thomas Provenzano, executed in Florida in June 2000, had a history of serious mental illness, including paranoid schizophrenia. On 20 June, with needles already attached to his body, he was granted a stay of execution 11 minutes before he was scheduled to be put to death. He was executed the following day (AI Report, 2000). In Yemen, Hussein bin Hussein Al-Ma’mari’s, who has been diagnosed in the past as suffering from schizophrenia, was sentenced to death for murder in December 1998. The verdict and sentence were upheld by the Appeal Court in September 2000 and by the Supreme Court in mid-2001. The courts ruled that there was no evidence adduced to show that the convicted man was suffering from schizophrenia at the time of the crime. At the time of writing the sentence is awaiting ratification by the state President. (AI Index: MDE 31/005/2001, 13 June 2001.)
However this paper is about those who have learning disabilities or handicaps -- mental retardation, in the terminology used in US jurisprudence -- and additional people who have had a normal developmental profile but who acquired organic brain damage and whose intellectual capacities mimic those of people with mental retardation.

Vulnerability of the mentally retarded

The mentally retarded have multiple vulnerabilities which can mean that when they enter the justice system they are dealt with less sensitively and with a worse outcome than able-minded people. A recent Human Rights Watch report summarised the ways in which those with mental retardation can find themselves on death row. These included waiving rights as a suspect (and, for example, answering police questions in the absence of a lawyer or adviser), risks of coerced answers or behaviour being perceived by courts as having been “voluntary”, the risk of false confessions, and the risk of having unchecked ineffective assistance from a lawyer. In murder cases involving mentally retarded and mentally able defendants, the mentally disabled defendant lacks the insight and skills to plea-bargain or otherwise negotiate a non-capital sentence while the mentally able prisoner avoids the death penalty.

Their demeanour does not help their case. As Human Rights Watch noted,

They may act in ways that seem suspicious, even when they have done nothing wrong. When questioned by police or other authority figures, they often smile inappropriately, fail

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7 Mental illness may be a concern where a prisoner has mental retardation. In a significant fraction of cases, mentally retarded prisoners also suffer some form of mental illness.

to remain still when ordered to do so, or act agitated and furtive when they should be calm and polite.\textsuperscript{9}

Combined with a desire to be accepted and to please, the mentally retarded prisoner can agree to interrogators’ statements that incorrectly attribute to them criminal behaviour. The case of David Vasquez, a man who confessed in 1984 to a crime he did not commit, illustrates this. While being interviewed about the strangulation of a woman, he responded to police leading questions by progressively accepting that he did not use ropes, he did not use his belt, he did not use the clothesline. Even when led to “admit” he used the venetian blind cord he responded, “She told me to grab the knife, and, and, stab her, that’s all.” The police expressed exasperation and told him that he had hung the victim. “Okay, so I hung her”, he responded\textsuperscript{10}.

\textbf{Mental retardation and the death penalty world-wide}

\textit{Practice}

\textsuperscript{9} Ibid. page 8.

\textsuperscript{10} Cited in Human Rights Watch. Beyond Reason. p.27. Vasquez was pardoned in 1989 when the real murderer was identified. Similar cases continue to occur. In 2001, Earl Washington Jr was released from eighteen years’ imprisonment, including nearly a decade on death row, for a crime which Washington was shown by DNA evidence not to have committed. (Beyond Reason p.55.) Various studies provide “substantial empirical evidence” to support the view that mentally retarded people are more suggestible than the average person, though Gudjonsson stresses that this cannot be presumed in all cases. (Gudjonsson GH. The Psychology of Interrogations, Confessions and Testimony. Chichester: Wiley, 1992, pp.284-5.)
Since 1995 only three countries in the world are reported to have carried out executions of mentally retarded defendants: Kyrgyzstan\textsuperscript{11}, the USA and Japan\textsuperscript{12}. In the 2000 report of the UN Secretary General on the death penalty\textsuperscript{13}, only Togo was reported to permit by law the imposition of a death sentence for a person with mental retardation, although no executions of such people have been reported in Togo\textsuperscript{14}. Given the poor response to the questionnaire from retentionist countries, this figure cannot be taken as definitive; the number could well be higher.

In the USA, at least 35 prisoners with mental retardation or significant organic brain damage have been executed since the reapplication of the death penalty in 1977\textsuperscript{15}. A further significant number of mentally ill prisoners have also been executed making the USA a world leader in executing the mentally disabled.

\textbf{Legal standards}

The UN Economic and Social Council (ECOSOC) adopted, in 1984, the Safeguards Guaranteeing Protection of the Rights of those Facing the

\textsuperscript{13} Economic and Social Council. Crime Prevention and criminal justice. Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty. Report of the Secretary-General. UN Document E/20001/3. The report is based on a five-yearly survey of countries about the use of the death penalty. Typically more abolitionist countries reply to the survey than retentionist.
\textsuperscript{14} Ibid. at para. 96.
Amongst other things they protected “the insane” from execution (safeguard 3). The Safeguards were endorsed by the General Assembly in the same year. In 1989, ECOSOC clarified that Safeguard 3 includes elimination of the death penalty for “persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution.” Finally, in 1996, ECOSOC reiterated its call for full implementation of the Safeguards, in part because of concerns for the lack of protection from the death penalty of those who are mentally retarded.

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Since 1997, the United Nations Commission on Human Rights, has called on countries that maintain the death penalty to observe the UN Safeguards\textsuperscript{20}. The resolution has, since 1999, included additional wording urging retentionist countries not “to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person.” \textsuperscript{21}

Since 1982, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution, has had a mandate which includes scrutiny of those countries which still apply the death penalty. In 1991, the Special Rapporteur called on the USA to end the use of the death penalty for people with mental retardation\textsuperscript{22}. Each annual report from the Special Rapporteur since 1992 has discussed the execution of mentally retarded defendants in the USA, calling for abstention from applying the death penalty in such cases\textsuperscript{23}. Following a mission to the USA in 1997, the Special Rapporteur stated that the practice of executing the mentally retarded was contrary to international standards and called on the authorities to end its use\textsuperscript{24}.

Advocacy bodies have argued against the appropriateness of the death penalty for mentally retarded people convicted of serious crime. The American Association on Mental Retardation policy on justice and fair treatment asserts that “the presence of mental retardation, by definition, places a defendant beyond the level of culpability required

for the imposition of the death penalty in the American criminal justice system.”

International non-governmental bodies such as Amnesty International, and an inter-governmental body, the European Union (EU), have appealed in individual cases involving mentally retarded prisoners under threat of execution. The EU has contributed an amicus curiae brief in the case of McCarver (see below) in which it argues that executing the mentally disabled is contrary to international standards.

Two recent cases have led to optimism that change in US practice is imminent. In the US Supreme Court in June 2001, Penry v Johnson was decided in favour of John Paul Penry -- a mentally retarded offender whose execution was quashed for a second time by the Supreme Court -- though the Court again did not pronounce on the underlying issue of the constitutionality of executing the mentally retarded.

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27 Penry v Johnson (00-6677) 215 F.2d 504, 4 June 2001. In 1989, the Court (in Penry v. Lynaugh, 492 U.S. 302) had quashed the death sentence on Penry on the grounds that the jury had not been given adequate information to allow them to consider his mental retardation as a mitigating factor, but had decided that mental retardation was not an automatic block against executions.
More significantly, the appeal of Ernest McCarver, on death row in North Carolina, will seek to establish in the Supreme Court later in 2001 that executing the mentally retarded is unconstitutional. In doing so he will try to establish that there is a growing consensus in US society that “evolving standards of decency that mark the progress of a maturing society” do not accept execution of those with mental retardation. Supporting his argument will be briefs from the EU (see above) and former US diplomats who argue, among other things, that executing the mentally disordered damages the international standing of the USA.

Although at the time of the 1989 Penry decision legal exemption on the basis of mental retardation was not widely established in law, by June 2001, some 15 US states plus the Federal Government have legislation prohibiting execution of the mentally retarded, including Florida where the Governor, Jeb Bush, signed a new bill into law on 12 June 2001. A week later, the Governor of Texas, Rick Perry, vetoed a bill which would have prohibited executing the mentally retarded. His predecessor as Governor of Texas, George W Bush, was widely quoted during his travels in Europe in June 2001 as opposing the execution of the mentally retarded (despite such executions being carried out during his period of office). The UN High Commissioner for Human Rights, Mary Robinson, welcomed his statement and in a letter

28 The words come from Trop v Dulles 356 U.S. 86, 100-101 (1958) indicating the way in which the meaning of “cruel and unusual punishment”, prohibited by the Eighth Amendment, should be understood.


to him urged him “to intervene in several cases where persons with mental disabilities are awaiting execution in the United States”33.

Conclusion

There is little information about the execution of the mentally retarded internationally. Almost all available information relates to the USA. The lack of explicit evidence that mentally retarded offenders are executed in most retentionist countries does not indicate that such executions do not happen. More research is needed on this issue. In the USA, evidence suggests that mental retardation is not, in practice, a bar to execution. However the climate is changing and it remains to be seen if the Supreme Court perceives and reflects that change in their decision in the appeal of Ernest McCarver.

Politically, the reason for concession of small reforms of the death penalty is unlikely to indicate a desire or willingness on the part of legislators to move towards abolition. It is, rather, a concession at the perimeter to protect the central principle of capital punishment. While all restrictions on the death penalty are to be welcomed, the ending of the execution of the mentally retarded needs to be followed by measures leading to abolition of this cruel punishment.

Late news

On 2 July 2001, Bob Holden, Governor of Missouri, signed into law a bill preventing the imposition of the death sentence on those convicted of first degree murder if they are mentally retarded. Missouri becomes the 16th US state to prohibit executing the mentally retarded.

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34 St Louis Post-Dispatch 2 July 2001. Available at: