

Chapter 13

CAPITAL PUNISHMENT AND THE MENTALLY RETARDED

In this chapter I focus not on the general debate regarding capital punishment, but on applying the death sentence to mentally retarded or mentally ill criminals.¹ The official position of the US Supreme court on this issue is as follows: “In 1986 the Supreme Court ruled that execution of the insane was unconstitutional under the Eighth Amendment, based on the nation’s ‘common law heritage’ in which the execution of the insane was considered ‘savage and inhuman’.”² A similar attitude toward this issue was expressed during the 1980s by the *Safeguard Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, which was adopted in March 1984 by the *UN Committee on Crime Prevention and Control*. “The 1984 ‘Safeguards’ has excluded the insane from the death penalty; the 1988 resolution added ‘persons suffering from mental retardation or extremely limited mental competence’.”³ William Schabas mentions that international law excluded certain categories of people from the death penalty, such as: persons under eighteen, pregnant women, the elderly, young mothers, the insane, and mentally handicapped.⁴

¹ I use the phrase “mentally retarded,” which together with the term “mentally deficient” became familiar in North America, while in Britain the more familiar term is “mentally handicapped.” On the differences between the different phrases see Byrne Peter. *Philosophical and Ethical Problems in Mental Handicap*. Palgrave Macmillan, Hampshire, 2000, p. 17.

² Vila Bryan and Morris Cynthia. *Capital Punishment in the United States*. Greenwood Press, Westport, 1997, p. 241.

³ Schabas William A. *The Abolition of the Death Penalty in International Law*, Second edition. Cambridge University Press, Cambridge, 1997, p. 166.

⁴ *Ibid*, p. 120.

There are more examples of similar practices in the United States, such as found in the Model Penal Code of The American Law Institute, section 210.6 (Sentence of Death for Murder; Further Proceedings to Determine Sentence), section 1 (Death Sentence Excluded). This code states that when a defendant is found guilty of murder, the court should exclude the death sentence if (paragraph E) the defendant's 'physical or mental condition calls for leniency.' In section 4 (Mitigating Circumstances), paragraph B, 'mitigating circumstances' are to be considered for a murder committed while the defendant was under the influence of extreme mental or emotional disturbance.⁵ Different states, such as Arkansas, Colorado, Florida, and Nebraska "specified mitigating circumstances that sentencers were required to weight against aggravating factors, such as mental impairment, youth, and extreme emotional disturbance at the time the crime was committed."⁶ Other states that have statutes forbidding execution of the mentally retarded are Georgia, Indiana, Kansas, Kentucky Maryland, New Mexico, New York, Tennessee, Washington, and the federal system.⁷

However, although it seems fairly obvious that mentally ill and mentally retarded offenders should not receive the death penalty in American courts, in point of fact they sometimes do receive verdicts of capital punishment, particularly in Texas. In this chapter I explain why I think that the imposing of such a punishment on mentally retarded or insane criminals is morally wrong.

R. J. Wallace connects the notion of responsibility to that of accountability. He says:

When we ask whether a given person is morally accountable for a given action, we are asking whether it would be fair to hold the person responsible for the action. Holding responsible is in turn an attitudinal stance that we adopt toward a person, involving a susceptibility to reactive emotions on account of what the person has done, and a disposition to respond to the person's in ways that express the reaction emotions. Thus, a person is blameworthy for having done something morally wrong when it would be fair to feel resentment or indignation in response of the person's conduct, and to engage in sanctioning behaviour that express such reactive sentiments.⁸

Wallace explains that the basis for accountability is "deliberative authority," which in turn has two aspects. The first aspect is whether a given agent has enough reasoning and insight to understand and comply with moral demands (such as not to steal or murder). The second aspect is whether an agent possesses the required measure of reason to comply with moral demands; whether the agent

⁵ These details were taken from: Zimring Franklin E. and Hawkins Gordon. *Capital Punishment and the American Agenda*. Cambridge University Press, New York, 1986, pp. 79–80.

⁶ Haines Herbert H. *Against Capital Punishment*. Oxford University Press, 1996, p. 46.

⁷ These details were taken from: O'shea Kathleen. *Women and the Death Penalty in the United States, 1900–1998*. Praeger, Westport, 1999, p. 31.

⁸ Wallace R. J. "Reason and Responsibility." In: Cullity Garrett and Gaut Berys. (eds.), Clarendon Press, Oxford, 1997, p. 321.