

Execute the Mentally Impaired?

The Eighth Amendment that Supports and Opposes Death Sentencing

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Using death as a legal form of punishment by the government is a practice that has been present since the beginning of ancient rule. During the 1700s, the ancient Babylonian civilization used the death penalty against trivial offenses such as the fraudulent sale of beer. This use of execution as punishment existed among many different civilizations, and even continued among the colonies established in what would eventually become the United States (Henderson, 2000, p. 90). However, as the Western world has begun to experience “evolving standards of decency”, questions as to the morality or “right” to execute another person have started to arise. Currently, the United States is the only western democracy in the world that still continues the use of the death penalty.

In 1972, the United States passed a ruling in the Supreme Court case *Furman v. Georgia*, which abolished the use of capital punishment for four years, until its reestablishment in 1976 with the case of *Gregg v. Georgia*. During the *Furman* case, the defendants argued that the death penalty was unconstitutional on the grounds that it was “cruel and unusual”. Although the Supreme Court ruled in favor of the defendants, there was no majority opinion that supported this ruling. Instead, two of the five justices believed that the Eighth Amendment prevented the death penalty, while the other three justices believed that it was “cruel and unusual” on the grounds that the punishment was performed in an “arbitrary and capricious manner” (Henderson, 2000, pp. 58-59). Nevertheless, this decision created widespread controversy, which resulted in the Supreme Court reinstating its use on the grounds that the Eighth Amendment did not prevent the use of capital punishment, and that the problems cited in the *Furman* case had been successfully addressed by the states. After the reestablishment of capital punishment, cases that challenged the use of the death penalty have questioned the constitutionality of its use through arguments of its procedures, mitigating evidence, jury knowledge, and violation of the constitutional amendments.

Many of these cases that argue the “morality” of the death penalty rely on the Eighth Amendment, which, in relation to capital punishment, prevents the use of “cruel and unusual” punishment according to “evolving standards of decency”. However, what complicates the use of this argument is determining what society currently deems as “cruel and unusual”. This is a concept that has never been clearly defined, but rather relies on the changing majority opinion to decide on whether a punishment is inhumane or disregards a person’s dignity. Therefore, because the Supreme Court bases their death penalty rulings society’s transforming views, the majority opinion regarding the death penalty must be constantly reevaluated to match the rulings of a Court ruling. Within the last several decades, the rulings upon the death penalty have been especially complicated, because the fairly consistent use of the death penalty in many states suggests that the majority opinion still seems to be in favor of capital punishment, but in the past few decades, there has been a growing opposition to the execution of particular classes of offenders.

While the debate regarding the use of capital punishment in the United States alone is a controversial topic, specific cases involving defendants who are or who claim to be mentally impaired have been argued to be especially “cruel and unusual”. In the past few decades, Supreme Court cases involving these two issues have significantly changed the way in which the death penalty can be applied to a person with mental impairment. The ruling made in *Ford v. Wainwright* addresses the insanity and mitigating evidence issue, while *Atkins v. Virginia* overturned the ruling concerning the mentally retarded made in *Penry v. Lynaugh*. In addition, the new “guilty but mentally ill” (GBMI) verdict that was created by the state of Michigan in the late 1970s has further complicated the sentencing of a mentally impaired defendant with the death penalty. However, when comparing the three cases and the “guilty but mentally ill verdict”, the reoccurring use of the Eighth Amendment is apparent. What differs between their individual uses is the degree to which the amendment is focused upon in some cases more than others. Yet, the Eighth Amendment is used in each analyzed Supreme Court case, the GBMI

verdict, and recent cases as an underlying argument in order to either support or argue against the use of the death penalty in regards to the mentally impaired defendant.

Within the legal system, there are three general definitions that classify who the mentally impaired in the United States are; although details and specifics may differ from state to state. The three general terms are: mentally ill offenders; legally insane offenders; and mentally retarded offenders. A defendant who is described as mentally ill is someone who suffers from a mental condition, that can “[range] from mild chronic depression to severe schizophrenia” (Thompson & Poole, 2006, p. 191). On the other hand, a defendant found to be legally insane is a defendant who suffers from a “mental condition...under which a person is incapable of understanding the moral significance of his or her actions, or...is incapable of controlling such actions” (Thompson & Poole, 2006, p. 191). This similarity between the two classes, in which both involve a type of mental condition, is a major factor that leads to the complication of how Supreme Court rulings can be applied in cases. One problem that arises is the non-specificity of what mental conditions would qualify a defendant as mentally ill or legally insane. While schizophrenia is often considered to be a part of the legal insanity spectrum, depending on the degree of mental illness that a defendant may suffer from, they may still be considered competent to receive capital punishment. The third class of offenders are the mentally retarded, who are described as having “rigid thought processes that lead to a difficulty or failure to learn from mistakes... [that] lead to impairments related to impulse control and difficulty in dealing with stress and frustration” (McGee & Menolascino, 1992, p. 58). Mentally retarded defendants differ from the other two categories in that this category focuses on the intellectual development instead of the emotional and behavioral aspects of a person. In addition, although the mentally ill and the insane have a possibility of being treated with medication, the mentally retarded cannot.

Following the reinstatement of the death penalty, *Ford v. Wainwright* became the first post-*Gregg* Supreme Court case that dealt with the capital punishment and the mentally impaired. This case

addressed two questions brought up by the defense: 1) whether the 8th Amendment prohibited the use of the death penalty; and 2) whether the procedure that was used in determining the competency of the defendant was sufficient (*Ford v. Wainwright*, 1986). These two questions were brought up by the defendant, Alvin B. Ford, and his counsel, in response to the death sentence that Ford received for the murder of a police officer. After receiving his first death sentence in 1974, he was placed in a Florida prison where he waited on death row. During this period, Ford's counsel was rejected multiple times for their appeals, and following the death sentence, Ford's mental health began to slowly deteriorate (Miller & Radelet, 1993, p. 13). Although Ford had not shown any signs of mental health disabilities during the initial trial in 1974, Ford's growing paranoia and delusions prompted his counsel to seek psychiatrists to diagnose him as mentally insane in hopes of repealing the death sentence.

Although Ford's counsel worked to provide evidence that he was suffering from a mental illness that interfered with his competency to receive capital punishment, there was a lack of standardization in how the lack of competency could be proven. If Ford's counsel were able to prove that Ford was suffering from legal insanity, he would have been, according to common law, exempt from being sentenced with to death. Under the common law that protects the legally insane, instead of a death sentence, defendants are sent to a mental hospital to undergo treatment until they are considered "cured". In June of 1983, Ford's defense team hired psychiatrist Dr. Jamal Amin, who conclude that "Mr. Ford [was] now suffering from... [what] closely resembles Paranoid Schizophrenia With Suicide Potential... [that can] affect Mr. Ford's ability to assist in the defense of his life" (as cited in *Executing the Mentally Ill*, 1993, p. 65). If a defendant cannot defend themselves due to a recognized mental illness, then according to the Eighth Amendment, it would act as a protection that the defendant can utilize to ensure that the punishment they receive is not "excessive" in relation to not only the crime committed, but circumstances surrounding the defendant. To further support Amin's claim, psychiatrist Dr. Harold Kaufman concluded that "Ford no longer understood the nature of the death penalty,...[or] why it was

imposed on him, and hence was mentally incompetent for execution” (Miller & Radelet, 1993, p. 68). These two claims that were determined by mental health professionals should have provided enough evidence for the governor of Florida to repeal the death sentence, but in response, the Governor hired three self-appointed psychiatrists to reevaluate Ford. The state-appointed mental health professionals spent a total of 30 minutes altogether to diagnose Ford as not mentally ill (Miller & Radelet, 1993, p. 74). Here, it would be safe to assume that a thorough and proper evaluation was most likely not conducted if it took three mental health professionals a total of 30 minutes to determine the eligibility of a death sentence.

After evaluating the trial, on June 26th, 1986, the Supreme Court majority opinion ruled: 1) that they will uphold the idea of the English Common law and find that the Eighth Amendment prohibits the execution of the insane; and 2) that the state of Florida must amend their procedure in determining the competency of a defendant who claims insanity (*Ford v. Wainwright*, 1986). For the latter ruling, the Supreme Court reasoned that the state of Florida had inadequate procedures, which did not take into consideration the Ford’s counsel’s findings of mental illness, and that spending only 30 minutes to evaluate Ford’s mental health in addition to leaving the final decision up to the governor of Florida violated the Due Process Clause (*Ford v. Wainwright*, 1986). In this case, the violation of the Eighth Amendment was not the primary issue that the Supreme Court addressed, but rather it was the procedure of how the state determined a defendant’s competency to conclude whether or not that defendant was a candidate of execution. This was due to the fact that because a majority of the states were already practicing the Common Law, determining that the Eighth Amendment prohibited the execution of the legally insane did not greatly impact the application of its use. However, by prohibiting the execution of a specific class of defendants, this ruling became an example that other cases would refer back to in order to help prevent the execution of another class of mentally ill defendants.

Several years after the ruling of *Ford*, another Supreme Court case challenged the constitutionality of executing a mentally impaired defendant. However, in this case, *Penry v. Lynaugh* (1989), the class of mental impairment addressed was the mentally retarded. On January 13th of 1986, John Paul Penry, who was 22 years old at the time of trial, was sentenced for the 1979 rape and murder of Pamela Carpenter (*Penry v. Lynaugh*, 1989). This case was brought up to the Supreme Court in January of 1989 on the grounds that the Eighth Amendment: 1) prevented the “cruel and unusual” punishment of executing the mentally retarded due to limited moral culpability; and 2) was in violation when jury instructions did not explain or ask the jury to take into consideration Penry’s mitigating evidence (*Penry v. Lynaugh*, 1989). This case of unconstitutionality is an example of complications within the legal system that deal with mentally impaired defendants, because although the *Ford* case ruled that the Eighth Amendment exempted legally insane offenders from being executed, it had not addressed whether that same idea would apply to other classes of mental impairment. It is interesting that most states followed the common law of prohibiting the execution of the mentally ill, because it was considered immoral if the insane could not even defend themselves, but they did not find that these same circumstances applied for the mentally retarded.

During trial in the lower courts of Texas, while trying to determine whether Penry was mentally retarded or not, it became apparent that the lack of standardized screening processes led to inconsistent conclusions by mental health professionals, and consequently the misdiagnosis of the defendant. The defense team brought in psychologist Dr. Jerome Brown, who determined that Penry had the mental age of a 6 ½ year old and was mentally retarded, while psychiatrist Dr. Jose Garcia testified that Penry suffered from an “organic brain disorder” which may have been present since birth or due to physical abuse” (*Penry v Lynaugh*, 1989). When a defendant is diagnosed as mentally retarded, there is little possibility that the defendant could fake their mental retardation, because evaluations involve an analysis of their intellectual development in the past. Therefore, these findings by the mental

health professionals should have been enough to provide evidence that Penry's mental retardation contributed to lessened competency, but the state disagreed. In response, the state hired two other mental health professionals who concluded that Penry simply had "limited mental ability... and had characteristics consistent with an antisocial personality" (*Penry v. Lynaugh*, 1989), but not mental retardation. According to McGee and Menolascino (1993), the reason why so many defendants are often not identified as mentally retarded is due the lack of standardized screening processes (pp. 64-68). This may be the reason why the conclusions drawn by the state and Penry's defense team differed, despite the fact that both described Penry as having "limited mental ability".

After reviewing the evidence presented by Ford's counsel, the Supreme Court ruled upon the constitutionality of the death sentence in Ford's case. In response to the mitigating evidence issue, the Supreme Court agreed with Penry's defense stating that in previous cases, *Eddings v. Oklahoma* (1982), and *Lockett v. Ohio* (1978), the state had to provide the jury with all information regarding background, character, or mitigating evidence that may affect the prevention of "excessive punishment" prohibited by the Eighth Amendment (*Penry v. Lynaugh*, 1989). It is vital for the jury to consider these factors, especially in cases involving mental retardation, because mental retardation can prevent the offender from properly defending and explaining themselves or their actions. However, in regards to the argument that the execution of the mentally retarded was "cruel and unusual", the *Penry* case used the Eighth Amendment to conclude that the execution of defendants with Penry's mental health level was not unconstitutional. Like the *Ford* case, the Supreme Court acknowledged that the English Common Law also prohibited the death penalty of the mentally retarded, but because Penry was found competent enough to stand trial by the jury, and the fact that Maryland was the only state at the time who planned on passing a legislation imitating the common law, the Court did not find the Eighth Amendment's "evolving standards of decency" aspect to apply in Penry's case (*Penry v. Lynaugh*, 1989). The rationale that Justice O'Connor provided on behalf of the majority opinion of the Court

demonstrates how the Eighth Amendment plays an important role in ruling for and against mentally impaired defendants.

The third court case, *Atkins v. Virginia* (2002), readdressed the issue of the *Penry* case: the constitutionality of the execution of the mentally retarded. In 1996, Daryl Renard Atkins committed armed robbery, capital murder, and abduction, for which he was consequently sentenced to for death in 2000. Atkins's argument, like in the *Penry* case, claimed that the Eighth Amendment prevented the execution of the mentally retarded due to "evolving standards of decency" (*Atkins v. Virginia*, 2002). In *Penry's* case, his arguments were rejected because the state did not consider his level of intellectual ability to correspond with their definition of mental retardation, and the court also ruled that the majority opinion of legislations in the United States did not exhibit any signs of "evolving standards". However, within several years of the *Penry* case ruling, many states began to enact their own legislations that prohibited the use of the death penalty against mentally retarded defendants (*Atkins v. Lynaugh*, 2002). What had occurred between the time of the *Penry* case and the *Atkins* case was that the population in the US began to reevaluate how the death penalty was being applied, and these changes in legislations showed that the majority opinion was beginning to shift away from what *Penry* had ruled under.

Similar to the *Penry* case, while determining whether Atkins had mental retardation, the mental health professionals hired by each party did not practice any standardized evaluation procedures. During trial, Atkins was diagnosed as "mildly mentally retarded" by the defendant-hired psychologist, Dr. Evan Nelson, through evaluations, interviews with those who held relationships with Ford, and reviews of past academic performances, while proclaiming that "the possibility that Mr. Atkins was malingering was considered and ruled highly unlikely" (as cited in *Minds on Trial*, 2006, p. 219). As stated in the analysis of the *Penry* case, although it may be possible for a defendant to fake insanity, if a mental health professional considered the circumstances and influences surrounding the defendant, there

would be a slim chance that someone could successfully fake mental retardation. However, because the state-appointed psychologist, Dr. Stanton Samenow, did not interview any of Atkins's relations or perform any intelligence tests, he concluded that Atkins was of "at least average intelligence" (Ewing & McCann, 2006, p. 221). After hearing both opinions and victim accounts, the jury sentenced Atkins to death, whereupon Atkins's defense team appealed the sentencing several times before bringing it up to the Supreme Court.

In order to assess whether the execution of the mentally ill was "cruel and unusual", the Court first evaluated the logic behind new legislations that prohibited the use of capital punishment in cases concerning mental retardation to determine the current opinion of society on the issue. Supreme Court Justice Stevens emphasized that "it [was] not so much the number of these States that [was] significant, but the consistency of the direction of the change" (*Atkins v. Virginia*, 2002). Through this statement, Justice Steven suggested that the Supreme Court was looking for a unifying reason and justification that all states were using within their new legislations to indicate a growing change within the majority opinion among the states. In addition, what the Court found interesting was that states were creating legislations that protected a person who was found "guilty of a violent crime", which therefore suggested a growing opinion that mentally retarded offenders were less culpable for their actions than others (*Atkins v. Virginia*, 2002).

Furthermore, the Supreme Court referred back to the case of *Gregg v. Georgia* (1976), which ruled that the use of the death penalty was only appropriate if it provided either deterrence or retribution (*Atkins v. Virginia*, 2002), in order to determine whether the use of the death penalty was appropriate in the case of a mentally retarded defendant. By analyzing the use of the death penalty from these two perspectives, sentencing a defendant with mental retardation would not have fulfilled either of these purposes that capital punishment was meant to achieve. In terms of retribution, the Court argued that retribution was only successful if the punishment matched the appropriate level of

the offender's culpability, and if execution was considered "excessive punishment" for the defendant in the *Coker v. Georgia* (1977) case, than "the lesser culpability of the mentally retarded offender surely does not merit that form of retribution" (Ewing & McCann, 2006, p. 224). Secondly, the Court addressed the deterrence argument by arguing that the mentally retarded defendant's low moral culpability "make[s] it less likely that they can process the information of the possibility of execution as a penalty..." (*Atkins v. Virginia*, 2002). These two justifications, paired with the conclusion that there was indeed a changing opinion within society, led the Supreme Court to conclude that the Eighth Amendment did prohibit the use of the death penalty on mentally retarded offenders on the basis of "evolving standards of decency".

Though these three cases have seemingly taken a strong stance regarding their rulings and use of the Eighth Amendment, recent cases and newly created verdicts prove that these decisions held "loopholes" that have allowed states to get around the implications of the Eighth Amendment. One example can be seen in the recently adopted verdict known as the "Guilty But Mentally Ill" (GBMI) verdict. This verdict, which was first enacted in 1976 by the state of Michigan, has become an alternative to the insanity defense in several states. Through this verdict, juries can acknowledge the offender's mental illness, but because the illness was not severe enough to have affected the defendant at the time of the crime, still find them guilty of their crimes (WGBH Educational Foundation, 2005, *The Insanity Defense*, para. 8). In a sense, it prevented the defendant from using the protection that the Insanity Defense offers, in which they cannot be found guilty and are simply sent to undergo treatment until they are "cured", while still allowing the jury to abide by the ruling made in *Ford* to not execute the defendant (Plaut, 1983, p. 431). Also, the GBMI verdict allows the court to justify the continued imprisonment of the mentally ill even after the defendant has been "cured" by forcing the defendant to carry out the remainder of their sentence.

However, what makes this verdict controversial is that by finding a defendant GBMI, in states like South Carolina, it can still qualify a person to be sentenced to death. This is because in states that use the GBMI verdict, their basic outline follows what the Michigan statute set forth in the Michigan Compiled Laws (1976): “If a defendant is found guilty but mentally ill...the court shall impose any sentence which could be imposed pursuant to law upon a defendant who is convicted of the same offense” (as cited in *Punishment Versus Treatment*, 1983, p. 1). It is also interesting to note, that while the *Ford* case used the Eighth Amendment to prohibit the execution of the mentally ill, the GBMI verdict used it to prove that the death penalty was neither an “excessive” nor “cruel and unusual” form of punishment, because the jury found the defendant to be competent during the act of the crime and trial. This verdict then becomes another example of how the use of the Eighth Amendment plays an integral part in both preventing and justifying the use of the death penalty.

A recent case that has made use of the *Ford* ruling and the Eighth Amendment to reinterpret the restriction of capital punishment against the mentally ill is the case of Charles Singleton. Although this case was never ruled upon by the Supreme Court, it was controversial in that the courts treated Charles Singleton with medication, a defendant who was diagnosed as legally insane, who consequently became competent enough to receive the death penalty that he was sentenced with. Singleton, who was sentenced to death in 1978 for the murder of a store clerk, showed deteriorating signs of his mental health in 1987 while awaiting his execution (Spring, 2005, p. 31). According to a decision made in *Washington v. Harper* (1990) decision, the Eighth Amendment allows the courts to treat a mentally ill defendant involuntarily if the illness presents a danger to the defendant or those around him (Stone, 2004, para. 10). Therefore, because Singleton showed symptoms of schizophrenia, the court began administering medication to Singleton, which eventually rendered Singleton ineligible for the insanity defense and eligible for the death penalty. Singleton’s defense team argued that the courts were only treating Singleton in order to carry out the death sentence, and that Singleton was being treated with

medication against his will (Spring, 2005, p. 31). In this case, the courts justified their actions by referring to a footnote included in the *Ford* case, where “if [Ford] is cured of his disease, the State is free to execute him” (as cited in Spring, 2005, 30). The courts argued that Singleton’s eligibility to be executed, due to his improving mental health, was not the motivating factor in administering the treatments, but that Singleton’s eligibility was an uncalculated effect of the medications. After two decades of fighting the death penalty, Singleton eventually gave into treatments voluntarily and was executed in January of 2004.

These examples of court cases, rulings, and verdicts mentioned are only a small portion of the debate that has surrounded the execution of the mentally impaired, but they exemplify some of the most significant changes regarding this issue since the reinstatement of the death penalty in 1976. In each example, the Eighth Amendment has been a key factor, especially the “cruel and unusual” punishment aspect, in justifying a decision or ruling that have helped determine new rulings. However, while these rulings were supposedly made in order to protect the mentally impaired defendant, the various reinterpretations of the Eighth Amendment has made proving mental impairment and the effects of lessened culpability more complicated for those who actually suffer from it. Although it is easy to say that the Supreme Court should simply specify the details of each ruling, or define exactly “cruel and unusual” implies, but by specifying rulings or amendments to apply to a certain class of defendants or case, it would conversely create another set of problems. If the Court were to overly specify a ruling to apply to a single case, it would be difficult for future cases to refer to past rulings and therefore even more difficult to pass new rulings quickly. Yet, like in the examples shown, if the Court doesn’t explicitly state specific conditions, it allows for open interpretations by both the defendants and the prosecutors. Thus, because this is a problem that has advantages and disadvantages no matter how it is addressed, perhaps it is a problem will never be completely resolved, and therefore will allow the continued use of the Eighth Amendment to rule for and against the death penalty.

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