
THE PENRY PENALTY

*Capital Punishment
and Offenders with
Mental Retardation*

Emily Fabrycki Reed

UNIVERSITY
PRESS OF
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**To All Those Who Work to Prevent The Execution
of Offenders with Mental Retardation**

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Foreword

Dr. Emily F. Reed presents here a solid argument against the application of the death penalty to persons suffering from mental retardation who have been convicted of capital crimes. While there are those of us who may not share her very apparent general aversion to the death penalty as an aspect of our criminal justice system, it is hard to see how anyone, even the most convinced advocate of capital punishment, can fail to feel the impact of this information-packed, persuasive and passionate book.

Even before proceeding with Dr. Reed's argument, many readers may well wonder why it should even have to be made: it will appear to many to be self-evident that the law should deal with adult citizens whose retardation confines their mental and emotional development to that of a child of 12 or younger in the same way it deals with such a child. Unfortunately, the justice of that argument has not been self-evident to the United States Supreme court, which held in its 1989 *Penry v. Lynaugh* decision that convicted capital offenders with mental retardation may indeed be executed, provided judges and juries consider their mental retardation in arriving at the death sentence. The Court recognized that the case involved a general principle, but left it to individual judges and juries to apply that principle, as best they might, case by case. That, the justices held, was sufficient.

Dr. Reed disagrees, vigorously and vehemently, in a book that combines comprehensive, no-nonsense scholarship with an acutely human sensitivity to the effect applying the death penalty to persons with mental retardation has not only on that small but extremely vulnerable fragment of our population, but also on our very body politic and the sense of justice with which we endeavor to endow it. Dr. Reed makes, I believe, a valuable contribution to the dialogue, both because she has assembled an enormous body of fact and because she does not hesitate to express the feelings addressing those facts should arouse in the heart of any compassionate person who confronts them.

Over the past 20 or 30 years, writing on matters of public policy has become very nearly a major industry unto itself. The bookstalls and even the best-seller lists are replete with volumes of earnest, often very well-informed treatises on almost every subject that might conceivably become the object of government action, not to mention hundreds of books on other subjects we all may well hope never achieve their authors' aspirations for public-policy status: most of us today believe that government is already overburdened with objectives both beyond its jurisdiction and beyond its means.

But even when the policy objectives they espouse are well taken, these well-meant volumes too often display a defect that has, in my judgment, tended to infect the whole political dialogue in this country - an attempt to achieve, or at least project, "objectively" by subduing the natural human response to whatever problem is at issue. The result is a politics that takes

on the appearance, and all too often the character, of cold-bloodedness, the very opposite of what a healthy political system should encourage and express.

Obviously, a politics and a public policy long on passion and short on facts is certain to end in impertinence, frustration, injustice and downright despotism. The long span of human history and brutal annals of the century now drawing to a close provide us with incontrovertible evidence on that score. But I would argue, and I believe Dr. Reed makes the case here, that a coldly dispassionate politics that takes no account of the human spirit and human feelings is sure to produce even more inhumane consequences. If we can not feel, and if we can not engage our feelings in our politics, we are bound to fall short of the quality of justice we have historically aspired to as a nation and a people.

A special feeling about children and how we should treat them has long held a place of respect in our American tradition, and that attitude is reflected in our law. There is no reason we should withhold that feeling nor the benefit of the law when we consider those "children" fate has lodged in adult bodies but deprived of adult faculties, and there is every reason why our feelings should be engaged in the controversy over the death penalty and mental retardation. Dr. Reed has given us the facts and expressed the feelings we all should share about them. Her argument is scholarly, disciplined and factually complete, but in the end it appeals as much to the heart as to the head -- and that is very much as it should be.

Joseph R. Biden, Jr.
United States Senator
Chairman, Senate Judiciary Committee

September, 1992

Preface

The Supreme Court has long held a certain fascination for me. Almost three decades ago, as a young and idealistic undergraduate student, I had the pleasure of learning Constitutional Law and Civil Liberties from the Rev. Vergil Blum, a distinguished Jesuit lawyer, in a year long course taught at Marquette University. It was here that my now deep-seated senses of equality and justice, what I consider to be the most basic of American values, began to develop. The course also gave me a profound admiration for the role the Court plays in protecting these values. When the occasional juridical decision seems to stray from the role of protection of equality and justice to one of violation, then my enduring adherence to these values also seems violated. *Penry v. Lynaugh* is such a case.

The outrage that was expressed over the *Penry* decision at a President's Commission on Mental Retardation conference on mentally retarded offenders which I attended in Washington, D.C. in September, 1989 piqued my conscience and set my pen in motion. If nothing else, I would argue the case once more for an opposite outcome to this decision, and a subsequent universal ban on executions of offenders who suffer from mental retardation.

What started out as an article ended in a book length manuscript. The effort took more than two years. During that time, a small and scattered group of persons around the nation who shared a common purpose and my sense of violation has worked at great odds to pass legislation to remedy the injustice of the *Penry* penalty. I have participated in that struggle, although unsuccessfully, in the Delaware General Assembly during the last two legislative sessions. Perhaps this book will contribute to a different outcome this year or the next. I hope so.

As I put the finishing touches on this manuscript, I must stop to express my gratitude to those who have helped to make it possible. Many thanks go to Representative Jane Maroney (R-Talleyville) for her courage and tenacity in sponsoring and pushing for legislation in Delaware to ban the death penalty for persons with mental retardation; to Bob Cunningham of Senator Joseph R. Biden, Jr.'s staff, whose always discerning observations helped to keep me in focus and on track; to Robert Perske for his insightful comments on Chapter 1; and to Tom Reed for his infinite patience, understanding and support.

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