The Next Strategic Step toward Abolishing the Death Penalty: Exempting Mentally Ill Persons?

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In the past few years the US Supreme Court has exempted entire categories of persons from execution: persons who are mentally retarded, and more recently persons who committed their crimes while under age 18. The Court's decision cited "evolving standards of decency."

As far back as 1958 in *Trop v. Dulles*, Chief Justice Earl Warren said that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

Over a period of years a growing number of states passed laws excluding mentally retarded persons from execution. The Supreme Court listened, recognized a national consensus against executing them, and provided nationwide protection in its 2002 *Atkins v. Virginia* decision.

On March 1 the Court ruled in *Roper v. Simmons* that persons who commit murder while under age 18 cannot be executed. Justice Kennedy's majority opinion recognized that state after state was protecting minors from execution, and that the US was virtually alone among the world's nations in allowing that. The majority found that the *Atkins* case had reflected a growing national consensus, and that this "evolving standard of decency" was a compelling reason to protect minors from execution. The *Roper* case also explicitly states the Court's criteria for evaluating "evolving standards of decency."

Here in Washington State, three of the four persons we've executed in the modern era have been "volunteers" – persons who actually wanted to be executed. Persons with mental illness are especially vulnerable to the death penalty for many reasons.

In past years when Washington State passed laws protecting retarded persons and juveniles, our efforts helped lay the groundwork for the nationwide *Atkins* and *Roper* cases. Is mental illness our next challenge? If a number of states were to pass laws excluding mentally ill persons from execution, could we not start laying the groundwork for further "evolving standards of decency" with nationwide victory down the road?

The day after David Kaczynski, the Unabomber's brother, spoke to the audience of the annual Abolition Day Dinner sponsored by the Washington Coalition to Abolish the Death Penalty (WCADP), some WCADP Steering Committee members spoke with him and explored this possibility. We agreed that it has strong potential for a number of reasons, including growing public understanding and compassion for persons with mental illness and a good number of advocacy groups and other potential allies.

Even if a state level bill does not pass right away, our efforts would still succeed in creating new opportunities for WCADP to reach out to potential allies and creating public awareness of yet another flaw in the death penalty.

From the standpoint of strategizing to abolish the death penalty, we could adapt a lesson developed by the people who oppose abortion. Until they can overturn *Roe v. Wade* altogether they have chosen a strategy of chipping away at bits and pieces of abortion rights, prohibiting it in certain situations, restricting access in various ways, etc. Similarly, until we can abolish the death penalty altogether, perhaps we can protect more kinds of people, impose other kinds of obstacles and restrictions, to reduce the number of cases that can qualify for death sentences.

Interested? Contact the Washington Coalition to Abolish the Death Penalty (WCADP) at (206) 622-8952 info@abolishdeathpenalty.org or www.abolishdeathpenalty.org