

Commentary: The Insanity Defense and Youths in Juvenile Court

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Juveniles, like adults, should be afforded the right to raise an insanity defense. In this commentary on the article by Morse and Bonnie on the abolition of the insanity defense, we explain why so few juveniles across the United States are granted access to the insanity defense and the reasons that they should have that option. We also consider whether the *Delling* case was the best suited vehicle to argue for extending constitutional protection to the insanity defense nationwide.

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In this commentary, we will discuss two aspects of the article by Morse and Bonnie.¹ First, being child and adolescent psychiatrists, we paid particular attention to the population that the authors focused on and noticed that juveniles were not mentioned. We believe it is important to extend the authors' arguments for the insanity defense to this population as well. Currently, each year, hundreds of thousands of youths who appear in juvenile court do not have access to the insanity defense. Second, we discuss the implications of choosing the *Delling* case to carry forth the authors' arguments. The complete facts of the *Delling* matter led some to the conclusion, including those with lawmaking powers, that this case was not sufficiently persuasive to support the overturning of state-level authority in setting insanity defense statutes. *Delling* killed in a predatory fashion, planned to kill more victims, and exhibited some ancillary criminal behaviors not necessarily consistent with delusional thinking. We assert that being inclusive of juveniles and waiting for a more sympathetic case than *Delling* would have given the authors and their supporters a better chance of successfully arguing for the constitutional protection of the insanity defense.

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Juveniles and Human Rights

Morse and Bonnie argue that allowing criminal defendants to mount an insanity defense is a matter of fundamental fairness in a just society. Among other supporting arguments, they cite the widespread acceptance of the insanity defense in the United States, noting that 46 states and the federal system allow it. These data pertain only to adults, however. Only 10 or so states allow the insanity defense for youths in juvenile courts.^{2,3} If we are truly concerned about justice and fairness, then we also should advocate for the juveniles in the majority of states that do not allow access to the insanity defense, as opposed to focusing only on adults, who are denied access in four states. Indeed, the number of affected youths is astounding. More than 1.9 million juveniles were arrested in 2009, and juvenile courts handled nearly 1.4 million cases that year.⁴ The bulk of these children would not have had access to an insanity defense, no matter how appropriate it might have been for their case circumstances.

The discussion about juveniles and the insanity defense is not only about the enormous number of affected youths, it is also about the self-evident human rights that should be afforded to every youth in modern society. We need only look to Article 3 of the United Nations Declaration of Human Rights: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."⁵

In addition, according to Article 2 of UNICEF's 1989 Convention on the Rights of the Child, children should be brought up in societies that value and recognize their rights to "peace, dignity, tolerance, freedom, equality and solidarity."⁶ These two international bodies make clear that children have certain rights and that their best interests shall be met when public and private institutions protect them. This includes courts of law.

Turning to the United States, we see that most state courts deny minors the opportunity to raise the affirmative defense of insanity, a serious oversight that dismisses the fundamental rights of children. This prejudicial treatment of youths as a class is discriminatory and degrades their dignity. It is not in keeping with the ideas set out in the United Nations Declaration of Human Rights or the Convention of the Rights of the Child. Moreover, it defies common sense.

Denying the insanity defense to juveniles not only ignores many of their fundamental human rights, it also dismisses the fact that, like adults, children are affected by serious mental illnesses. Indeed, the age at onset of schizophrenia is before 19 years in 40 percent of men and 23 percent of women.⁷ Youths who have serious mental illnesses such as schizophrenia should have an equal right to raise an insanity defense and be free of wrongful culpability should they meet the legal standard for insanity at the time of a crime.

The Juvenile Justice System

There are fundamental differences between the juvenile and adult justice systems, and these differences have serious implications for youths to raise an insanity defense. The first juvenile justice court was established in Illinois in 1899, and soon thereafter, other states followed and created their own. In the courts' early period, we saw an initial movement toward creating a separate system for children with the goals of protection, guidance, and treatment.⁸ Because of this caretaker model, many of the protections afforded to adults were thought to be unnecessary for children because the goal of the court was not punitive but rehabilitative. As time went on and the end of the 20th century approached, the perception grew that juvenile crime was increasing and becoming more violent and that the rehabilitative philosophy was not working. As a result, by 1997, 43 states had toughened their juvenile laws and made them more punitive.⁸ This shifting of the balance from a mostly re-

habilitative stance to a more punitive approach led juveniles to be given many of the same punishments as adults.

Although the punitive philosophy of the adult system has increasingly characterized the juvenile justice system, certain important court protections afforded to adults have not followed, including the insanity defense. The court in *Kent v. United States* best described juveniles in this system as having the "worst of both worlds. . .neither [having] the protection accorded to adults nor the solicitous care and regenerative treatment postulated for children."⁹ This situation, we argue, is fundamentally unfair. To hold mentally ill juveniles criminally responsible for youthful behavior, yet not afford them the same legal defense tools that are available to nearly all adults (i.e., the insanity defense) strikes us as an even greater injustice than denying adults the use of this defense. Children, after all, lack the social power, financial means, and cognitive maturity to navigate a system that treats them like miniature criminals.

Juvenile Culpability

The idea that children have diminished culpability when compared with adults is not a new one. Plato opined in the 4th century BCE that children should not be held criminally responsible for many of their acts.¹⁰ Modern views of juvenile culpability are more developmentally informed, however. As a general rule, children aged six years and younger are viewed as incapable of forming the intent to commit a crime (infancy defense). From ages 7 to 13, they are presumed not criminally responsible, but the presumption is rebuttable if a child's immaturity does not cause him to be incapable of understanding the wrongfulness of the act. Children aged 14 and older are typically considered criminally responsible.¹¹ Juveniles waived to adult court are held to the same standard, or lack of one, for pleading not guilty by reason of insanity (NGRI), as adult defendants.

Even though older youths may be waived to the adult court for serious criminal acts, their immaturity still protects them from certain punishments (e.g., the death penalty). The American Medical Association (AMA), American Psychiatric Association (APA), and other leading professional organizations have filed *amici curiae* briefs pointing out that the average adolescent cannot be expected to act with the same control and foresight as a mature adult, because of the immaturity of the youthful brain.¹² This

added vulnerability further underscores the notion that youths with mental illness deserve equal access to the insanity defense.

The Juvenile Insanity Defense

In 1883, a time predating the first juvenile court, a Kentucky court made one of the first formal recognitions of the right of juveniles to raise an insanity defense. The judge in this case noted, "If the defendants broke into the store, as charged, but did so at the request of another, and in consequence of youth or mental infirmity, not perceiving the wicked character of the act or not knowing their responsibility, they should acquit them of the felony."¹³ Nonetheless, despite this 19th century moment of enlightenment, most states still have not embraced the right of youths in juvenile court to raise the insanity defense and thus to avoid being adjudicated criminally responsible. Certain states (for example, Arkansas, Ohio, Michigan, and Virginia), have explicitly denied the right to an NGRI defense in juvenile court.³ Other states have yet to confront the question, and whether the defense would be available if asserted remains to be answered.

The first state to adopt the juvenile insanity defense was Wisconsin,^{2,14} and a few other states later followed suit (California, Louisiana, Nevada, New Jersey, Oregon, and Texas). The process, however, has not always gone smoothly. The New Jersey Supreme Court initially decided against the juvenile insanity defense,¹⁵ but its decision subsequently was overridden by the legislature when it passed a law allowing it.

Arguments Against the Juvenile Insanity Defense

The goal of establishing the affirmative defense of legal insanity for all juveniles across the nation has its detractors. Opponents typically rely on the following arguments: the purpose of the juvenile system is rehabilitative and treatment-oriented, as opposed to punitive and adversarial, and thus there is no need for mentally ill children to have the ability to raise an insanity defense. Instead, the system will rely on the wise, benevolent judge-father at the head of the juvenile court to make sure such youths are treated and not penalized; few juveniles would meet the standard of legal insanity because of the lower frequency of major mental illness in younger populations; and the use of the insanity defense would pose a potentially greater loss of liberty for juveniles found NGRI and

committed to a psychiatric institution with no definitive release date, as opposed to being found guilty in juvenile court.² The term of one adjudicated a delinquent normally cannot extend beyond the age of majority (18 in many states).

Rebuttal to Arguments Against the Juvenile Insanity Defense

We believe that there are compelling counterarguments to the objections. First, it has become clear that ideals set forth in the juvenile justice system have not been realized and that this system has become increasingly similar to the adult system with time, now focusing more on community protection and punishment of youthful offenders than its original paternalistic ideals.^{2,8} Placement in a juvenile justice facility, supposedly for treatment, is simply not a reliable, realistic outcome for the mentally ill youth who has been adjudicated through the juvenile court, given the lack of access to an insanity defense. Adequate resources, appropriately trained personnel to care for mentally ill youths, multimodal treatment options, and therapeutic settings are in short supply in juvenile justice programs because of nationwide budgetary constraints. Nor do the severely antisocial youths with whom the mentally ill delinquents will be placed contribute to a healing milieu. The effect is quite the opposite. They put the vulnerable, mentally ill child at risk of exploitation, bullying, exposure to antisocial mores, and assault. This gap between treatment needs and reality jeopardizes the chances for adjudicated mentally ill children to be provided adequate opportunities for healthy development and rehabilitation. In addition, such outcomes fall below the standard held by juvenile courts to respect the best interests of the child.

Furthermore, those with serious mental illnesses who lack criminal responsibility for their acts deserve the right not to be branded juvenile delinquents, a designation that can be harmful to one's future standing in society. There have been growing exceptions to the confidentiality of juvenile court records, and the release of this information can lead to damaging stigmatization.¹⁶ The unspoken message about the youth who has been adjudicated for an offense is that he must have been bad, not mad, or the court would not have reached the conclusion that he was responsible for his actions.

Second, the argument that juveniles would rarely need the insanity defense and thus it should not be

made available to them is specious. Just as there are legally insane adults, so too are there legally insane juveniles. A growing body of research has shown that the major mental illnesses traditionally associated with adulthood actually have their onset in childhood.⁷ More specifically, the psychiatric morbidity found in juvenile detainee populations is striking. Research has shown that for detained youths (exclusive of conduct disorder), more than one-half of the boys and two-thirds of the girls have at least one impairing psychiatric diagnosis.¹⁷

Third, although it is true that juveniles found NGRI could spend more time in some form of commitment (e.g., a psychiatric hospital) than if adjudicated delinquent, they will be far more likely to get appropriate care for their mental illnesses. It is undeniable that the probability of being provided a therapeutic environment and quality treatment is greater if youths are placed in a psychiatric treatment facility, as opposed to a juvenile justice institution. The ultimate goal when representing a mentally ill child, as recently set forth by the *Trial Manual for Defense Attorneys in Juvenile Delinquency Cases*,³ should not be merely to obtain liberty as expeditiously as possible, but to put his treatment and health needs first. To do otherwise is to put his chances for a successful life at grave risk.

We close the discussion of juveniles and the insanity defense by asserting that a just society should not blame or punish someone who cannot appreciate the wrongfulness of his actions, regardless of age. Juveniles who are seriously mentally ill, commit crimes, and lack appreciation of the criminality of their actions are just as deserving as adults of being found NGRI and perhaps more deserving, given their immaturity, dependent status, and greater need for specialized care and protection. At a minimum, juveniles should have the same due process protections as adults and should not be subjected to cruel and unusual punishment.

The Delling Matter

In the preceding section, we extended the authors' arguments for the constitutional protection of the insanity defense to include juveniles. We now take a closer look at *Idaho v. Delling*¹⁸ to see whether the facts presented allow for an effective argument that there should be constitutional protections for and greater access to the insanity defense, goals we share with Morse and Bonnie.¹ Did the *Delling* case have

what it takes to inspire the highest court in the land to right the wrong allegedly being done to criminally charged but morally nonculpable mentally ill defendants who lack the right to raise an insanity defense? Let us be clear: we are not dismissing the seriousness of this unfortunate man's mental illness. The great Chinese general Sun Tzu cautioned us over 2,000 years ago in his military classic, *The Art of War*, to choose our battles wisely. "One who knows when he can fight, and when he cannot fight, will be victorious" (Ref. 19, p 100).

The facts established regarding Mr. Delling's violent acts¹⁸ toward those he thought were "stealing his powers" do not portray a particularly sympathetic defendant, despite their being attributable to the delusional thinking caused by schizophrenia. The authorities described Mr. Delling as traveling thousands of miles through various states on his killing spree, and the judge observed that his murderous behavior was the product of "abundant" premeditation. On March 20, 2007, he shot and injured former high school classmate Jacob Thompson in Tucson, Arizona. On March 30, 2007, he fatally shot another victim, his childhood friend David Boss, in Boss's Moscow, Idaho, apartment. On April 2, 2007, he shot and killed Bradley Morse in Boise, Idaho. Mr. Delling had met Mr. Morse through an on-line gaming site and apparently used the Internet to track him down. After killing him, Mr. Delling dumped his body in a nearby pond, which naturally raised the question in the minds of the fact finders as to why he hid the body if he believed he was acting in self-defense. The following day, he was arrested in Nevada driving Mr. Morse's car. Presumably, he thought the threat of having his powers stolen by his victims' supernatural powers did not extend to their vehicles.

This automobile theft conflated another rational act, that of obtaining transportation, with his allegedly psychotic homicidal behavior, and most likely further heightened the fact finder's confusion as to what was psychotic behavior and what was not. It is not difficult to imagine that laypersons might view with skepticism the proposition that an individual could experience such rapidly transitioning mental states between reality and unreality. Stacking the deck in an even more politically disadvantageous way, authorities discovered a list created by Mr. Delling that named additional victims whom he apparently intended to murder. Strictly speaking, he was a

serial murderer, in that he engaged in “the unlawful killing of two or more victims. . .in separate events” (Ref. 20, p 9).

The Roman goddess Lady Justice is blindfolded to show her impartiality to money, power, identity, and social class. However, in reality, courts are composed of human beings who are susceptible to emotions and biases like anybody else, and these forces can influence their decision-making.²¹ We believe a case with a more sympathetic fact scenario than *Delling* would have had a better chance of success in mustering judicial and public support to remedy the legal injustice at issue. Strategically speaking, mounting such an extensive, coordinated, and expensive advocacy effort as occurred in this campaign is not easily replicated. The costs of such societal warfare are not insignificant and include loss of time, spent political goodwill, strengthening of the opponents’ position through their having achieved victory, and a lessened chance of remustered defeated troops after a demoralizing outcome.²² The cause was righteous; the timing was wrong.

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