Commentary: Six Adoptees Who Murdered—Implications for Trial and Sentencing

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The work of Dorothy Otnow Lewis and her co-authors has important implications for the juvenile and criminal justice systems. Especially significant is the finding that abusive, rejecting caretakers contribute more to the genesis of criminal violence than the mere fact of adoption. In this commentary I discuss some of the implications of this study as a criminal lawyer who has represented adults and children accused of violent crime and as a law professor with a long-standing interest in crime and criminal responsibility.

Before proceeding, let me disclose that I have worked closely with two of the authors of "Six Adoptees Who Murdered": Dorothy Lewis, MD, and Catherine Yeager, MA. Dr. Lewis and Ms. Yeager were defense experts on behalf of a mentally retarded 15-year-old client whom the District of Columbia sought to prosecute as an adult. The case was not part of any research being conducted by Dr. Lewis and her associates.

A Note About Murder

Murder has a unique status in U.S. criminal law.[1,2] It is different, both because of the conduct of the offender and, especially, the harm caused by the offense (Ref. 2, pp 341–2). In this country, acts that cause loss of human life are deemed to be the most reprehensible crimes, warranting the harshest punishment.[3,4]

Still, as those of us who labor in criminal court will attest, the difference between a murderer and a mere felon is often a matter of luck and inches. In the past few decades, the popularity and availability of automatic and semiautomatic firearms have led to more and more homicides that might have been lesser crimes in a different time.[5] Although there is a long-standing fascination with murder in law, literature, and popular culture, the reality is that many people who have killed are less dangerous than those who have committed other crimes.[6] The range of murderous conduct and those who perpetrate it is enormous: murderers include low-level organized criminals for whom killing is part of the job description, mob bosses or drug lords who kill to assert control, street criminals who kill in the commission of other crimes, and ordinary people who kill for money, love, power—or all three. Of course, murderers also include women[7] and children[8]—two groups not included by Lewis *et al.*

However, loss of life changes everything; the charge of murder changes everything. The ripples of a murder charge can be felt in every aspect of a case, from the fact that almost all alleged murderers are held in jail until trial, to the increasingly harsh range of penalties they face, to the heightened emotions at trial.

Although it makes some sense for Lewis *et al.* to study murderers—no doubt there are more data on medical and family history in more serious cases, especially well-tried capital cases,[9] and the commission of murder is undeniably a crime of violence—it should be understood that the findings of this study apply well beyond those who kill. This study and others like it demonstrate a connection between neurologic and psychiatric damage and violence, whether or not that violence culminates in murder.

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Mary Bell, Gary Gilmore, and Other "Bad Seeds"

The question of whether there is such a thing as a "bad seed"—whether some people are simply "born bad"[10]—has been around for a long time. It was the title of a best-selling novel in the 1950s,[11] which was then made into a popular motion picture.[12] This question is often sparked by the occurrence of a horrific, inexplicable crime.[13] Is this person evil? What made him capable of doing the things he did? In a more mundane way, the question also hovers over every criminal sentencing. Can this person be changed, fixed, rehabilitated? The question erupts into public hysteria, resulting in demands to try children as adults and broaden the death penalty whenever a child kills.[14]

The notion of a bad seed is both comforting and discomfiting. On the one hand, we can say that there are isolated examples of "bad people," but they are not the norm, and there is really nothing we can do about these evildoers except contain and punish them. At least it is not a widespread problem; they are not really we, after all. Still, on the other hand, the idea that there is nothing we can do about certain kinds of violence in view of our knowledge, resources, and resolve is frustrating—and frightening. There must be an answer. We must be able to do something.

There are two interesting, trenchant examinations of murderers that ought to be read in conjunction with any study into the causes of violence: Mikal Gilmore's *Shot in the Heart*,[15] which explores the family life of his brother Gary, who was executed in Utah in 1977, and Gitta Sereny's *Cries Unheard*,[8] which tells the story of Mary Bell, who killed two small children in 1968 in Newcastle, United Kingdom. The books are about very different subjects but share a journalistic, yet intimate, approach.

Mikal Gilmore calls his story "a story of murders: murders of the flesh, and of the spirit; murders born of heartbreak, of hatred, of retribution" (Ref. 15, p ii). The childhood of his brother Gary was marked by unchecked violence in the name of "discipline," and primal rejection by his father:

> Frank Gilmore could love his sons until they defied or challenged his rule. Once that happened, he treated them as his worst enemies. It was as if my father perceived any act of defiance by his sons as a denial of their love for him. . . . [A]ny infraction or displeasing act was enough to invoke a punishment—but the methods of correction had changed considerably. Instead of spankings, my father now administered fierce beatings, by means of razor straps and belts, and sometimes with his bare, clenched fists. With each blow that was thrown, my father was issuing the command that his children love him. With each blow that landed they learned instead to hate, and to annihilate their own faith in love (Ref. 15, p 123).

Gary Gilmore went on to murder two young men (Ref. 15, p iii).

Gitta Sereny tells a story of a terribly abused, misused, and rejected child. The first thing Mary Bell's mother said after giving birth, when the hospital staff tried to put the baby in her arms was, "Take the thing away from me" (Ref. 8, p 324). When Mary was three years old, her mother took her to an adoption agency, pushed her toward a stranger and said, "You have her" (Ref. 8, p 326). On at least four occasions, Mary's mother gave her "pills," causing Mary to be rushed to the hospital where her stomach was pumped (Ref. 8, pp 324–8). From as young as age four or five, she was sexually abused. Her mother would hold her down and force her to perform oral sex on men:

> I had these little white socks on and just a little top and, um, a nappy, a nappy-type thing. . . and my mother. . . my mother would hold me, one hand pulling my head back, by my hair, the other holding my arms back of me, my neck back like, and. . . and. . . they'd put their penis in my mouth and when. . . when, you know, they. . . ejaculated, I'd vomit.
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> Sometimes she would blindfold me—she called it "playing blind-man's buff." And she would tie a stocking around my eyes and lift me up and twirl me around, laughing. And then she'd put a thing. . . a silky thing around my face to. . . to keep my mouth open. . . (Ref. 8, p 329).

Research that sheds light on the causes of violent crime is helpful to the criminal justice system in two important respects. First, it helps us to understand the individuals who commit these crimes in order to fashion an appropriate sentence—one that fairly appreciates the individual's dangerousness while also recognizing the circumstances that mitigate the offense. Second, it provides information on which sound social policy can be built to redress the circumstances that give rise to violence.[16]

On Diminished Capacity and Criminal Culpability

The term "diminished capacity" has become disfavored in criminal law.[17] It is often misunderstood.[18] Diminished capacity describes two categories of circumstances in which an accused's abnormal mental condition, short of insanity, will lead to his or

her exoneration or, more often, conviction for a less serious crime. First, there is a *mens rea* form of diminished capacity, in which evidence of mental defect is offered to negate an element of the crime charged and not to excuse the conduct. The second category of diminished capacity partially excuses or mitigates an accused's guilt, even if the accused has the requisite *mens rea* for the crime. The latter version of *mens rea*, also called "partial responsibility," is the more controversial and is now recognized in only a few states and only for the crime of murder (Ref. 19 pp 362–71). A successful diminished-capacity defense to a charge of murder results in a manslaughter conviction.

The controversy regarding diminished capacity is that, while the defense "brings formal guilt more closely into line with moral blameworthiness,"[20] it does so "only at the cost of driving a wedge between dangerousness and social control."[20] Indeed, as one commentator has noted, "the very factor that mitigates an actor's blameworthiness—his mental abnormality—aggravates his dangerousness" (Ref. 19, p 370). Those who are so mentally disabled that they cannot conform their conduct so as not to rape or kill, but who are not legally insane, are perhaps the most dangerous offenders.

Dr. Lewis and her associates have identified a group of offenders who could be argued to be only partially responsible for their crimes. These are terribly damaged offenders who did not "choose" to become murderers. Although they may deserve to be punished, their "mental condition, for which [they] were not culpable, rendered [them] less blameworthy than a 'normal' person, because it was harder for [these offenders] to avoid taking a life than for an ordinary person" (Ref. 19, p 370). The six adoptees who murdered had at least one psychotic biological parent, had endured perinatal trauma, had experienced early childhood brain trauma, and were raised by violent, rejecting parents.[9]

However persuasive the argument that this category of offenders lacks the agency or choice we attribute to the prototypical criminal defendant, it is still a difficult argument to make at trial. First, there are fewer and fewer jurisdictions that allow the defense of diminished capacity and partial responsibility. When viewed in conjunction with growing restrictions on the insanity defense (Ref. 19, pp 335–60), there is not much room for creative mental defenses. Second, there are limits on the admissibility of evidence about a defendant's personal background.[21] Evidence of idiosyncratic sensibilities of offenders is generally not relevant.[22] The criminal law assumes involvement of a reasonable person, not a person who is more likely to explode because of childhood trauma. Third, as noted earlier, most judges are likely to resist an argument that a defendant who is alleged to have committed an act of grievous violence should be seen as less culpable because of the mental defect that caused him or her to engage in the violence.

I am not suggesting that criminal defense lawyers reject out of hand using some form of diminished-capacity defense at trial—especially if there is no other viable defense. There is a sound argument that offenders as damaged as the ones in the study should not be held fully responsible for their actions. There is also a long-standing tradition in the common law that only those in their "right mind" should be held responsible for criminal conduct.

Implications at Sentencing

Sentencing is probably where Dr. Lewis' research will be most effectively used. The reasons for an offender's conduct are properly considered at a sentencing hearing and might mean the difference between life and death in a capital sentencing. Defense lawyers would be wise to obtain the services of an expert witness to conduct the sort of research that Dr. Lewis and her associates conducted in their study and present it at sentencing. It would be very useful to have a thorough investigation into family history (biological and nonbiological if the defendant is adopted) to uncover any history of psychosis or neurological problems. Of course, obtaining the medical and psychiatric history of the client, including any information about brain injury, is critical.

The Question of Competency

Although there is no discussion of whether the six adoptees studied were mentally fit to stand trial (or be sentenced), this is a question worth exploring. An accused who lacks the capacity to consult with his or her attorney "with a reasonable degree of rational understanding" or lacks "a rational as well as factual understanding of the proceedings"[23] is incompetent to stand trial. The criminal trial of an incompetent defendant is a violation of the due process clause of the United States Constitution.[24]

At least some of the subjects in the study probably should not have stood trial (or have been allowed to plead guilty). According to the results of the study, five of the six subjects had "severely compromised" central nervous systems at birth, five had sustained serious head injuries at various points before committing murder, and five had signs of central nervous system dysfunction.[9] All six subjects had been hospitalized for psychiatric reasons, detained for a psychiatric evaluation, or treated with antipsychotic medication before committing murder.[9] The diagnoses varied, but most were of a serious nature.[9] If the subjects had a mental disability at the time of trial—mental illness, mental retardation, or a serious cognitive impairment—that rendered them unable to assist counsel or fully understand the proceedings against them, the trial should not have been allowed to proceed. Instead, they should have been hospitalized until they were restored to competency, unless it was determined that the incompetency was permanent, in which case they would be released or committed pursuant to civil mental health commitment procedures.[25]

An Afterthought About Adoption

Although I am familiar with the David Berkowitz and Joel Rifkin cases, I wonder whether there is any generalizable public perception about adoptees and murder. Although there may be a public perception that people who have been adopted have "issues" that the nonadopted tend not to have, I am not sure that violence is one of these issues. In nearly 20 years of criminal law practice, I cannot recall representing any adoptee accused of murder—or any violent crime, for that matter. I have, however, represented many people accused of crime—too many to count—who essentially had no (functioning) parents. After I read this study, it became obvious that the fact that the subjects had been adopted had little or nothing to do with the crimes they committed. That they had been neurologically damaged and badly parented (reared in violence, erratically and harshly disciplined, rejected by their parents and/or caretakers) was much more telling (Ref. 16, pp 64–98). It is also worthy of note that the subjects of the study are all male.[26]

As to the consequences for adoption policy, I cannot help wondering whether too much knowledge might not be a dangerous thing. Although it makes good sense for adoption agencies and child welfare workers to do everything possible to ensure that neuropsychiatrically vulnerable children are not placed in abusive households, one would hope that no adoptee is knowingly placed in an abusive household. It is already difficult to place children with "problems," especially those born to drug- or alcohol-addicted mothers (a likely indicator of subsequent neurologic impairment in the child), or children who have been abused or neglected (again, an indicator of neurological impairment). The question is whether notifying prospective parents of a child's "vulnerability"—and consequent propensity to violence—might not scare away even the best-intentioned caretakers.

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