

SEVERE MENTAL ILLNESS AND THE DEATH PENALTY

Well-intentioned, professed advocates across the country have urged state legislatures to ban capital punishment for people with serious mental illness. There has been resistance from legislators and prosecutors on the basis of common assumptions and assertions, some fallacious, and some disingenuous.

The fallacious

Legislators have opposed this ban on the basis that there are already protections in place, incorrectly conflating intellectual disabilities with SMI. Prosecutors and legislators alike have expressed concerns that this type of exemption could be exploited by criminals to escape punishment. (Reference our position statement on 'Who We Stand Up For')

The disingenuous

'Prosecutors also don't want the burden to be on them to prove that a person wasn't suffering from a severe mental illness at the time of the crime.' "I don't know how we're supposed to show what was in his own mind and how it affected his judgment" – quoted in a recent media report by a prosecuting attorney's association.

It is very true that no human being can know what was in the mind of another, we can only draw conclusions, which in the case of acute psychosis is extraordinarily beyond the capacity of the lay person or prosecutor to comprehend. Yet, the supplication 'how we're supposed to know...', in light of the fact that prosecutors every day across this country, with resolute confidence, work fervently to convince juries and judges of what was in the minds of seriously mentally ill defendants charged with violent crimes and succeed in securing convictions.

Duejusticeproject has taken issue with the language in the position statements of some of the advocacy groups pressing for such legislation. Advocates may mean well, and can offer up a recitation of some of the symptomatic impairments that impact decision-making, self-control, and insight in SMI, but then go on to offer up sincerely held beliefs *or possibly placations* that life imprisonment without parole can be a just alternative to capital punishment. Activists for the ban may assert that severe mental illness is not an excuse for violent crimes, or that the mentally ill need to be held accountable for serious crimes. Anyone who truly comprehends psychosis (or neurological detachment from reality) would never make such unqualified angular statements.

DJP believes that many advocates, just like legislators and operators in the criminal justice system do not have deep insights into psychosis. Few of these individuals have ever been exposed on a very personal level to severe mental illness and therefore, will have great difficulty conceptualizing and comprehending the neurological detachment from reality that SMI can produce. DJP holds that the

case to be made for a ban on the death penalty is inextricable from the case for a robust application of an insanity defense that is based on medical/neuroscience, not fallacious definitions of insanity. M’Naghten’s Rule is an improper legal test to be applied to someone who retains executive functioning but is neurologically detached from reality. DJP asserts that conviction, let alone life imprisonment is unjust for a person who was neurologically detached (to be distinguished from “emotionally detached” or “psychologically detached”) from a normal waking reality.

The Supreme Court came to be persuaded by emerging and established brain science on the juvenile brain that capital punishment and life sentences without the possibility of parole for this class of people constituted cruel and unusual punishment. Yet, unless afflicted with severe mental illness or severe intellectual disability, the juvenile defendant is *neurologically*, although possibly, in some cases, not psychologically in touch with reality. The otherwise healthy juvenile knows his or her own identity and recognizes the identity of others. Objects in the visual field are not being replaced with gruesome constructs of the malfunctioning mind’s eye. The juvenile’s decision-making capacity may be adversely impacted by cognitive incapacities and/or diminished impulse control, but is not under the command and control (not influence, which is not too weak a descriptor) of psychosis or automatism (an acute and grave neurological phenomenon).

A person with severe mental illness may be afflicted with significant impairment of the mental faculties that are required for a person to conform their behaviors to the requirements of the law. Moreover, and of critical bearing on culpability, a very high percentage of people who are transiently or chronically psychotic are also afflicted with anosognosia, a neurological blockade that prevents the person from *knowing* (consider the “*knowing*” aspect of M’Naghten’s Rule) that they are ill. To *know* one is ill, in the case of SMI, means recognizing that the stream of consciousness, beliefs, impulses and perceptual or sensory experiences one is having are gravely disordered. There are some people with Schizophrenia who do have some insight into their illness and are able to recount vivid narratives about their experiences when they were psychotic. They may recognize that they are unable to distinguish what is real and what is not, but these individuals may not be at the highest level of risk for committing violent acts of harm against others or themselves.

Yet, the highest court has not seen fit to exempt the person afflicted with such severe neurocognitive impairments from capital punishment and moreover, has left it to the states to define insanity. Given that the cognitive incapacities or impairments caused by the brain disorders that we call mental illness can be so severe and so much more relevant to criminal culpability, the conclusion must be drawn the justices simply have a material lack of comprehension of severe mental illness. The failure of bills to ban capital punishment for people with SMI suggests that this is not going to be a matter that the states can be dealt with

by legislative action. This issue is clearly within the purview of the Supreme Court. What is it going to take to move the justices to seek understanding on this matter and act upon it?