

SCHOLARS' DAY REVIEW

VOLUME 2

In the Land of Nod: A Failure of Justice for the Mentally Disabled

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ABSTRACT

In *Brother's Keeper*, and the *Paradise Lost* trilogy, documentary filmmakers Bruce Sinofsky and Joe Berlinger explore the influence of bias in two different murder trials: The West Memphis Three and the case of an elderly farmer named Delbert Ward in upstate NY. Jesse Misskelley, a defendant from West Memphis, and Delbert Ward both have IQs below 70, yet they were interrogated without counsel for over six hours in both cases. Community support for Ward and community condemnation for Misskelley separates the two cases most clearly, which were both weak from an evidentiary standpoint. The current prison population in the United States is 50-55% mentally ill, five times the percentage found in the general population. The presence of this many mentally ill citizens in prison suggests even more are going through the court system. What is allowing these individuals to slip through the cracks and end up on trial and in prison instead of receiving rehabilitation or medical attention? Berlinger and Sinofsky explore why innocent people, who do not operate at the sufficient level of mental competence legally required, can have such vastly differing experiences on trial.

MLA Citation

Mugnolo, Nia. "In the Land of Nod: A Failure of Justice for the Mentally Disabled." *Scholars' Day Review* 2 (2014): 33-39. Web. Date of access

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In the Land of Nod: A Failure of Justice for the Mentally Disabled

In the early 1990s, filmmakers Joe Berlinger and Bruce Sinofsky made two documentaries exploring the influence of community, fear, and prejudice in the cases of two different murder trials. *Brother's Keeper* follows the case of an elderly farmer named Delbert Ward, accused of killing his brother, and the *Paradise Lost* trilogy chronicles the two-decade-long ordeal of The West Memphis Three, a group of teenagers convicted of killing three eight-year-old boys. Community support for Ward and community condemnation for The West Memphis Three separates the two cases most clearly, although these cases have many other factors in common. Both lacked substantial physical evidence, included false confessions, and dealt with suspects who had below average IQs. Jessie Misskelley Jr., who confessed in West Memphis and implicated the other two men, and Delbert Ward, have IQs at or below seventy. Misskelley has an IQ between seventy and seventy-three, making him borderline intellectually disabled (Wilkins 3), while Ward's IQ ranges from sixty-three to sixty-eight making him legally intellectually disabled (Bogdan 303). Both men (Misskelley a teenager at the time) were subjected to over nine hours of questioning by the police without an attorney present, and both confessed to something they had not done.

In both films, the issues of prejudice against the poor, "outcasts" (*Brother's Keeper*), and outsiders (*Paradise Lost*), are openly addressed, but another kind of prejudice that is not directly dealt with sits in plain view throughout both films. According to the most recent study from The Bureau of Justice Statistics (BJS), 55-60% of The United States prison population suffers from a mental disorder (Glaze and James 1). That proportion is five times the rate of mental disability that exists in the general population (11%). If so many people with disabilities are ending up in jail instead of receiving medical attention or counseling, how many are being put through the court system without being convicted, and is the legal system failing them? The cases presented in the aforementioned documentaries serve as examples of the gross miscarriages of justice that can and do occur when

those with mental illness are abused by the courts, and used by the police.

The United States has a long history of misunderstanding and mistreatment towards those with mental disabilities. In 1876, prominent socialite and philanthropist Josephine Lowell Shaw began a eugenics campaign through a series of popular charities to eliminate the population of what were then called "feeble minded people." The definition of mental illness was quite different, and included destitute women: "inmates were weak minded women with numerous children. They depicted these women as doubly deviant: defective (mentally retarded), and dependent (unable to support themselves)" (Noll and Trent 233). Lowell helped to create a link in popular opinion between those who were poor, and propagandized the criminalized caricature of the "feeble minded" individual. It was believed, and even integrated into legal proceedings by policy makers, that "all mentally retarded people are by nature potential criminals" (Noll and Trent 238). "Feeble minded" people became a threat to themselves and others simply by nature, being "born" criminals; frequently, being poor, homeless, and having too many children became a characterization that thrived and made Lowell's ideas of population control even more popular. Noll and Trent explain that "Lowell's first major accomplishment to the charity board was to 'define feeble minded women as a biological threat to society'" (Noll and Trent 233). Another idea, circulating and engrained into society with the help of this propaganda machine, was that a disabled person's ability to make decisions was inhibited by their mental deficiency, unless they were to harm or affect others, circumstances under which these same people were considered responsible for their actions and in need of punishment or isolation from the rest of the population. This idea has permeated throughout American history and has still survived, shedding light on the recent and current treatment of the mentally disabled.

Both cases from the films went to trial, meaning that both defendants were considered to have the level of mental competency required to legally undergo a

trial, which also assumes that Misskelley and Ward were competent enough to experience the hours of solitary interrogation by the police. Considering that the questioning led to a false confession in both cases, there might have been a mistake in judgment about what kind of questioning would be effective, or even understood by the defendants. This is where legal details would play a major role in letting people slip into a trial they may not be able to mentally withstand. When a defendant's competency to stand trial is called into question, an appointed psychologist may administer a competency screening. A screening consists of a series of questions designed to gauge if the defendant understands the charges being brought against them, as well as the roles that the judge, jury, prosecutor, and lawyer play, and whether they can articulate these concepts themselves. It may also, but is not required to include an Intelligence Quotient (IQ) test. In order for the screening to be given at all, someone on either side of the case must make a request for one to be granted by the trial judge. A problem is presented, in that a defendant may be incompetent to stand trial, but if there is not an obvious need for a test one might never be asked for or given. The defense team is most commonly the side that asks for the screening, and until *Pate vs. Robinson* in 1966 defendants could even request a competency screening for themselves. In *Pate vs. Robinson*, the Supreme Court ruled, "it is contradictory to argue that a defendant may be incompetent and yet knowingly and intelligently 'waive' his right to have the court determine his capacity to stand trial" (Melton, Petrilla, Poythress, and Slobogin 132). If Delbert Ward were given a competency test, which he never was, he almost certainly would have failed, and the case may never have gone to trial.

In the following case study example of a failed competency test taken from Melton et al.'s *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals*, a perfect example of an incompetent defendant is given. He misses all the key points of understanding required to be found competent, and he is not able to articulate any of the ideas about court proceedings in his own words.

CASE STUDY 6.1 Donald is charged with six counts of arson. Each count charges him with intentionally setting fire

to a church. He has an IQ of 58. You are asked to evaluate whether he is competent to stand trial. During the evaluation, the following dialogue takes place:

Q: Do you know what you are charged with?

A: I dunno. What's "charged" mean?

Q: Do you know why you're here in this jail?

A: Yeah. Burnin' down stuff.

Q: What stuff?

A: Goddamn churches

Q: Have you talked to your attorney about this?

A: Those churches was wrong. They get in the way. I got them out of the way.

Q: Is that what you told your attorney?

A: Yeah.

Q: Do you like your attorney?

A: He doan like me.

Q: Why do you say that?

A: He doan talk to me or nothin'. He doan try to get me off.

Q: Do you want to get off?

A: Yeah.

Q: Is that because you think you're innocent?

A: I got good reasons for doing what I done. (Melton, Petrilla, Poythress, and Slobogin 125-126)

While they are not exactly the same, with Donald having less of a grasp on reality and a lower IQ than Delbert by about five to ten points, the following excerpt from Ward's trial demonstrates a similar line of questioning resulting in similar answers. The P indicates when the prosecuting attorney is speaking and W indicates Ward's response.

P: And do you remember them telling you that it was a crime-

W: Yes

P: In the state of New York to give a false statement?

W: Yes

P: And you understood that?

W: No I didn't understand it.

P: You didn't understand that it's a crime to lie?

W: No, 'cause I knew I didn't kill him

P: And then they said to you Delbert if
this is the truth, sign this statement,
remember him telling you that?

W: Yes, I remember him telling me that.

P: And you signed the statement

W: Yes I signed it

P: They say they read this to you about
four or five times?

W: 'bout that

P: and each time, you told them that was
the truth and those were your answers

W: Yes I thought that if I didn't cooperate
with 'em I'd get out of there but I
didn't. (*Brother's Keeper*)

In this exchange on the stand with the prosecutor, Delbert misses the same key points as Donald, not understanding what the job of the court is, and not understanding why it is illegal to lie about committing a crime. Delbert Ward characteristically speaks by parroting exactly what is said to him, usually without understanding or stopping to think about what was actually asked. He does this here on the stand, often repeating a question instead of answering it himself. He does not understand the gravity of legal repercussions of a false confession or the idea that saying what the police want him to would put him in jail instead of letting him go home. Ward believed that if he gave a pleasing answer, he would get to go home to his brothers, and even asserts that the police told him that if he signed the confession, he would be allowed to do so.

Jessie Misskelley Jr. would mirror this kind of childlike misunderstanding and motivation for a false confession. Unlike Delbert Ward, Misskelley did have a psychological evaluation as well as a competency screening, which found him fit to stand trial. Misskelley's evaluation was nine pages long and consisted of several kinds of tests, IQ results, a psychological history, and old school records. It found that Jessie had severe past physical abuse by his family, a history of violent outbursts, a history of failure in school, and had previously been given an IQ of 63 in a test given ten years previously (Wilkins 3). The final paragraph from the evaluation finds that Jessie is fit to stand trial, but comes with a serious warning about what actually putting him on the stand will mean.

In the strictest interpretation of the legal statute, Jessie appears to be able to distinguish between right and wrong. He also appears to be able to aid in his defense. Jessie also appears to have been in control of his faculties at the time of the alleged crime. However, it should be noted, there is important qualitative concern that needs to be raised at this point. While Jessie has an IQ in the low borderline range, he clearly demonstrates a significant deficit in his ability to do abstract reasoning and to comprehend a wide variety of information. Jessie consistently shows clear developmental deficits and impairments which occurred well before the age of 18. That is, we see Jessie is still doing problem solving and making moral decisions on a level comparable to a 5 to 8 year old. While it is true Jessie is able to differentiate between right and wrong, it is equally clear the criteria by which Jessie decides right and wrong and markedly different than what we would expect of an adult his age. For Jessie, decisions about right and wrong are made on the basis of the consequence of the action not in terms of any kind of intent. (Wilkins 9)

Dr. Wilkins warned the judge that while Misskelley legally can be found to know the difference between right and wrong, he is making those choices the way that a "five to eight year old" would. He is functioning on an entirely different moral and decision-making plane due to the mental age that he has reached. Putting seventeen-year-old Misskelley through a murder trial is equivalent to putting an average seven year old through a murder trial. If Jessie is functioning mentally like a child, it is reasonable to say that his interrogation without a parent or lawyer present was not something he could make a real decision to enter into, and the subsequent confession made under clear duress should have been thrown out. Since there are no rules regarding the age level of mental functioning when it comes to questioning or the court, Jessie and others like him can be charged, even if the questioning that got them there was irresponsible.

Misskelley and Ward both gave false confessions, a phenomenon that was very little understood at the time their trials were taking place, and is still

misunderstood by some. In the film Misskelley contends that "the police questioned me for eleven or twelve hours and finally I just got tired, you know. I wanted to go home and be with my dad. I was saying what the police wanted me to say" (*Paradise Lost*). Misskelley confessed and gave a time line, as well as a description of the scene that did not match up with any of the evidence presented, and was called in court "a false story" (*Paradise Lost*). Similarly, Ward was questioned alone for hours, and he asserts that the police told him the story of how he killed his brother and he said that he had done it so that he could go home. In Ward's case, a murder never took place (*Brother's Keeper*). Ward and Misskelley were not mentally ready for the stress of that kind of questioning and did not understand the consequences of just saying what they believed the police wanted them to say.

One important characteristic that sets Misskelley and Ward apart from people with more severe disabilities like Autism or Downs Syndrome is that their minor intellectual disability is far less visible and not socially debilitating or even that noticeable. Most people in the village of Munnsville, NY, either denied that Delbert was disabled, or at least "wouldn't call him retarded" (Bogdan 305). Jessie Misskelley Jr. is on the cusp of being intellectually disabled, but is one or two crucial IQ points over the legal limit of 70, making him a more legally reliable source of information for the court. These disabilities are not obvious to the public, and are easier to misrepresent. In addition, people with lower IQs are often highly suggestible, making them prime targets for police coercion and more likely to give a false confession. A study described by Everington and Fulero found that people with intellectual disabilities were more likely to give a "socially desirable" answer than a truthful one (213). For example, Everington and Fulero summarize that, when asking questions like "Did you make your bed this morning?" one would receive a "yes" response, while asking, "Do you ever forget to brush your teeth?" would produce a "no," no matter what the truthful answer was (213). Bennett and Brodsky elaborate that "When leading questions are asked, and indeed, they are virtually *always* asked in interrogations, retarded persons frequently seek to conform to the perceived desires of the interrogator. They seek to please" (363), indicating that the suggestibility of those with mental

disabilities is much higher than those without, leaving them more vulnerable to less ethical tactics in interrogation. In the courtroom, attorneys are prohibited from asking any question or making any statement to someone on the stand if it can be considered leading him or her to a specific conclusion, but in the questioning process this prohibition does not exist.

Another issue of competency is whether someone has the capacity to waive his or her rights. In Ward's case, he waived his right to counsel when he was initially being questioned, and there is an audio recording of it, but in later interviews with neighbors and even Ward himself it is clear that he did not understand what was happening. In an interview taken from *Brother's Keeper*, one of Delbert's neighbors explains:

And Delbert, to this day don't know what the hell to waive his rights means. It's just some words to him. I said 'What did you waive Delbert?' I asked him straight out, 'I don't know' that's his answer . . . That might have been somebody walking down the street he was waving at . . . How can you charge somebody like that? How can you take a statement to begin with like that without having a lawyer present? (*Brother's Keeper*)

It is irrelevant if Ward waived his rights if he has no concept of what Miranda Rights are. An adult operating at the mental level of a seven-year-old can legally be questioned by the police the same way that any mentally healthy citizen can be. There are no legal rules or guidelines for police questioning of the mentally disabled that differ from regular procedure. In the case of Delbert Ward, he was also illiterate, could barely write, and was deemed competent to sign a confession statement alone. Ward did not understand the consequences of just doing what the police told him to do. At trial, however, Delbert Ward was acquitted.

So why are these men, and thousands like them, being arrested, and in cases like Jessie Misskelley, serving serious sentences in prison instead of getting help? Prisons have been referred to as "the new asylums" (*Frontline*). With a disproportionate number of inmates suffering from mental issues that should qualify them for medical treatment, it is hard to argue

with the label. The United States imprisons more of their citizens than any country in the world. According to The International Centre for Prison Studies, the US imprisons 716 people for every 100,000, with the runner-up being St. Kitts and Nevis at 649 for every 100,000. Of those in prison, the BJS report indicates “56% of inmates in state prison suffer from ‘any mental health problem,’ 44% in federal prison, and 64% in local jail” (Glaze and James 3). While there are clearly other factors causing the United States’ rank, including race (for every 100,000 African Americans in the US 2,207 are in prison compared to only 380 for every 100,000 Caucasians) and drug laws, evidence points to jailing the mentally ill as a large source of the problem. If an alternative to prison for mentally ill offenders were offered it would cut down on prison overcrowding, as well as cutting down on repeat crime. According to the BJS special report, 61% of violent offenders with three or more incarcerations are suffering from mental health problems (Glaze and James 1). If these people were able to return to a safer environment after they leave prison, where they would be able to receive and afford to stay on their medications, the rate of repeat offenses would drop.

Misskelley’s attorney Dan Stidham said in the first *Paradise Lost* film, “Jessie is mildly retarded; it’s much easier to get a confession out of a seventeen-year-old who is functioning at the level of a six- or seven-year-old” (*Paradise Lost*). The key words in that statement are “get a confession out of.” Misskelley and Ward were not chosen by accident to be questioned, but were targeted for that exact purpose. An officer of the West Memphis police force interviewed in the film explains that Damien Echols (one of the other West Memphis Three men implicated, who would later be sentenced to death) was the first person he thought of for the crime when he first heard about the murders. Echols was not, however, the first person questioned. Misskelley, who had no substantial connection to Echols besides living in the same trailer park as him for a time, was picked up to be questioned because they thought he would be a good source of information. The intention by the police was not to accuse Misskelley of anything at first; it was to get him to implicate Echols (*Paradise Lost*). Why was Misskelley such a good source of information? After all, people were aware that he was slightly intellectually disabled, highly suggestible, easily

confused, and did not come across as a highly reliable witness in the interview process. They did not need Jessie Misskelley because he saw something; they needed him because they knew they could shape his interview into whatever they wanted it to be. He was easy to exploit.

Ward experienced a similar kind of coercion, but it was met with outrage from his community rather than the complacency and even celebration that took place in West Memphis. While Delbert Ward’s disabilities were not acknowledged for what they were in Munnsville, the citizens thought Ward and his brothers should be treated differently because they were different and uneducated. This was not mistreatment, for the people interviewed who helped raise money for Ward’s defense team were either certain of his innocence, or thought that if Delbert had killed his brother, he shouldn’t go to jail because he did not know any better. All of the townspeople interviewed in the film, and by Robert Bogdan, who covered the case and wrote about it while it was happening, had a bias favoring the Ward’s (who had lived in the town their whole lives), and a bias against the prosecutors, who were from a larger city. There is a protective atmosphere in the interviews in the film, and one DA is interviewed saying, “They were outcasts but they were *their* outcasts” (*Brother’s Keeper*). Even though there is acceptance in Munnsville, there is still misunderstanding, equating a psychological problem with being stupid or dim-witted.

Prison in the United States cannot be considered a successful system if it is populated by those with mental disabilities. Punishing the mentally disabled does nothing but create a cycle of misunderstanding and allows more innocent men like Misskelley to spend years in prison. Even those with mental illnesses who *have* committed crimes rarely belong in prison. There are, of course, other issues like funding and research that need to be concentrated on before the mental health and prison systems in the United States can be reformed, but they should not become one in the same while those issues are being explored. The root of the problem lies in the misunderstanding and ignorance of what having a mental disability actually means for the individual and those around them. There is a drive to make them alien, something “other,” much like the townspeople of Munnsville behave towards the city

folk and how West Memphis viewed the three. Misskelley's community, his family, and finally the criminal justice system abandoned him. Ward, luckily, had support from his community despite being wholly mishandled by the police. Those who have difficulty functioning normally in society due to a mental illness need help from society itself to learn how to comply with society's laws, and when society sweeps them under the rug and into prison it creates a two-fold problem of abandonment of dependent people and misuse of our prisons.

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