

# The Complexities of Criminal Responsibility and Persons With Intellectual and Developmental Disabilities: How Can Therapeutic Jurisprudence Help?

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## **Abstract**

This article examines issues regarding legal capacity and criminal responsibility relating to persons with intellectual and developmental disabilities (IDD). We examined the case of a 28-year-old male identified as having the mental age of an 8-year-old, accused of four counts of possessing child pornography in Ontario, Canada. If convicted, the offenses carried a minimum mandatory sentence of 1-year imprisonment. The defense attorney argued that since persons are not criminally responsible when they are chronologically less than 12 years old, the same ought to be extended to those with a mental age of less than 12. The Crown prosecutor asserted that the defense's connection of disability to a lack of capacity reverts our conceptualization of persons with IDD back to a time when they were infantilized. Using therapeutic jurisprudence as a framework, we examined whether problem-solving courts (e.g., mental health court) could be used to address the needs of a person with IDD and offer a different understanding and potential solution to nonjudicial decision makers that satisfies the principles of both criminal responsibility and public safety.

## **Keywords**

criminal responsibility, legal capacity, persons with disabilities, therapeutic jurisprudence

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The criminal law presupposes a number of important characteristics about humans, including intentions, legal capacity, autonomy, agency, and criminal responsibility. In Canada (Canadian Criminal Code [CCC], 1985, s. 13) and in 18 of the U.S. states (Barnert et al., 2017), the chronological age of 12 years has been determined as the minimum age for reduced legal capacity in criminal law and the ability to make decisions—both important components of determining moral blameworthiness under the criminal law. While there is variation by state or by Western countries regarding the exact age, what is consistent is that we punish individuals differently within systems that have been defined by age—youth or adult.

Additionally, most legal systems have constructed a category for reduced moral blameworthiness for adults who are not able to form the requisite *mens rea*—those who have diminished capacity to understand the nature and consequences of their actions. In these cases, these individuals are considered to have a mental disorder and may not face the full brunt of the law, either because they cannot participate fully in their defense and are found unfit to stand trial (CCC, 1985) or may be found incapable of understanding their actions at the time of the offense and are given a verdict of Not Criminally Responsible on Account of Mental Disorder (NCRMD; CCC, 1985). The defense of NCRMD is equivalent to the insanity defense in the United States (18 U.S.C. § 17). In the CCC, mental disorder is defined as “disease of the mind” and includes a wide range of mental impairments including mental illness, intellectual, and developmental disabilities (IDD), and organic brain injuries (CCC, 1985). Due to their unique profile, including impairments that cannot be addressed by traditional psychiatric treatments, persons with IDD may not be adequately represented within the concept of mental disorder or a mental health framework (Hamelin et al., 2012).

In cases involving persons with IDD, therapeutic jurisprudence may provide an opportunity to increase the ability of the law to address their needs since justice may not be served if they are tried with the assumption that they share the capacity, moral blameworthiness, and criminal responsibility of someone who does not share their cognitive and adaptive functioning impairments. Therapeutic jurisprudence examines “the extent to which substantive rules, legal procedures, and the roles of lawyers and judges produce therapeutic or antitherapeutic consequences” (Wexler & Winick, 1991, p. 981). Using the metaphor of bottles and liquids, Wexler (2013) suggested that therapeutic jurisprudence could be used to address the practices and techniques used by legal actors (the liquid) or the legal rules and procedures governing their behavior (the bottle). For persons with IDD, therapeutic jurisprudence may help reconcile some of the challenges created by current laws and legal practices by ensuring that lawyers seeking to represent the interests of their clients while providing solutions that are a just response (the liquid), or by addressing some of the legal rules and procedures found within the Criminal Code by ensuring that the law is broad enough to accommodate the breadth of conditions that may impact an individual (the bottle).

In this article, using the legal submissions for a case involving a person with an IDD who was accused of possession of child pornography, we will examine how the concepts of legal capacity, moral blameworthiness, and criminal responsibility are constructed within legal subjects who are adults with IDD. The case acts as a springboard

to discuss the challenges within the law that are created when legal actors characterize adults as not having the same legal capacity—that is, due to cognitive impairments they are thinking “like a child.” Criminal justice systems throughout the Western world categorize individuals as adults based on chronological age; however, at times, there are adults whose cognitive capacity may be diminished and are viewed by legal actors as having the legal capacity equivalent to children. These legal actors are left with an ethical dilemma or a double-edged sword: how does one argue that the same consequences that apply to adults with “adult” capacities should not be applied to other adults with IDD without reducing their legal capacities, human rights and promoting an ableist attitude within the law? We will argue that the principles of therapeutic jurisprudence—with an enhanced focus on person-centeredness and human rights—can be used as a framework for understanding the complexities of these concerns for persons with IDD and offers options that may be feasible for legal actors.

## **Background Information**

### *Intellectual and Developmental Disabilities*

Intellectual disability is a clinical definition that is used to describe impairments in cognitive functioning (i.e., intelligence) and adaptive functioning (i.e., social skills) that originates in childhood and/or adolescence (typically before the age of 18 years; American Psychiatric Association, 2013; World Health Organization, 2018). In contrast, developmental disability is an umbrella term that is used to describe an array of disabilities that originate in the childhood or adolescence but may not have an accompanying intellectual disability (e.g., fetal alcohol spectrum disorder [FASD]). It is important to note that there may be some regionalized differences in what constitutes a developmental disability (Y. Lunsy, personal communication, May 31, 2020). For example, in Ontario, the term developmental disabilities is used to describe impairments that share the same criteria as the clinical definition for intellectual disability, but also allows for inclusion of broader etiology (e.g., genetic disorders) and cognitive and adaptive functioning (i.e., borderline cognitive ability; Lin et al., 2014; Peltopuro et al., 2014); whereas in the United States, the definition of developmental disabilities includes an even broader array of disabilities including physical disabilities (e.g., epilepsy) and other psychiatric diagnoses (e.g., ADHD, learning disabilities) in addition to intellectual and disabilities (American Association on Intellectual and Developmental Disabilities, 2019).

While it is important to recognize and understand the cognitive and adaptive functioning impairments associated with having an IDD, it is also important to recognize that focusing only on these impairments can lead to significant impacts on their human rights, including infantilization and denial of legal capacity (Arstein-Kerslake & Black, 2020; Degener, 2016). Historically, based on the belief that disability was “a deviation from normal health status” (Degener, 2016, p. 3), persons with IDD were institutionalized, segregated, sterilized, or socially, economically, and/or politically marginalized based on the grounds that their cognitive impairments made them

child-like and in need of protection. This infantilization suspended their rights not only for their own benefit but also for society since it was assumed that persons with mental disorders (including IDD) were somehow responsible for many of the societal problems of the time (Brown & Radford, 2015; Simmons, 1982). This biomedical discourse regarding persons with IDD, focusing on curing or rehabilitating ailments, remained dominant until the mid-20th century.

The 1960s and 1970s marked the advent of the rights movements who identified that disabilities resulted from societal discrimination and stigma, and a lack of accommodation for persons with physical and cognitive impairments (Degener, 2016; Simmons, 1982). As such, the social model of disability became an alternative framework for understanding how disability was an interaction between impairments (i.e., physical or cognitive impairments) and environmental conditions (e.g., lack of accommodations and societal attitudes) that led to detrimental outcomes for persons with IDD (e.g., unemployment, social exclusion; Shakespeare, 2013). The result of this new model for understanding disability is strategies that address the systematic barriers and discrimination that prevent inclusion. For persons with IDD in Ontario, this paradigm shift resulted in the creation of policies and resources that focused on community living and accommodations that promoted participation through social inclusion, rather than segregation through institutionalization (Simmons, 1982). In practice, the social model highlighted the importance of understanding how the social, cultural and systemic factors create or exacerbate the experiences of having a disability. As such, legislation and policies identified the importance for community-based accommodations for persons with IDD that enhanced person-centeredness and human rights. In the context of the legal system, this meant that accommodations were incorporated not only into the practices of legal professionals (e.g., accessible language) but also into the construction of laws and legislation to ensure that persons with IDD are afforded the same rights and protections as other citizens.

More recently, scholars have proposed a shift to the human rights model of disability, which builds on the social model of disability by focusing on the implementation of rights and the creation of mechanisms for monitoring, adapting, and implementing rights that transcend the emphasis on anti-discrimination and focus on the universality and comprehensive nature of human rights (Degener, 2016; Series & Nilsson, 2018). For countries that ratified the United Nation Convention on the Rights of Persons with Disabilities (UNCRPD), this meant ensuring a legal framework that aligns with Article 12, which ensures that persons with disabilities (including IDD) were afforded equal recognition before the law, and with Article 13, which ensures access to justice (The United Nations, 2007), including the right to legal capacity.

### ***The Legal Framework: Mental Disabilities, Legal Capacity, and Moral Blameworthiness***

The most robust form of diminished moral blameworthiness in criminal law relates to insanity. This defense or verdict has historical roots in the case of Daniel McNaughtan in 1843. McNaughtan was charged with the murder of Sir Robert Peel's secretary

Edward Drummond. McNaughtan was deemed not to be able to understand right from wrong and was found not guilty “on the ground of insanity” (Bloom & Schneider, 2017). In addition, there are lesser forms of reduced blameworthiness relating to other social groups. In Canada, for example, the Supreme Court of Canada articulated in the case of *R. v. D.B.* (2008) that young people should be presumed to have diminished moral blameworthiness as a principle of “fundamental justice.” For those who commit offenses under the age of 12 years, each province has a number of responses that ensures that child welfare, mental health services, and alternative accountability responses are addressing the underlying circumstances and causes of the behavior that contributed to the offense.

These laws that address the moral blameworthiness of persons with IDD can be placed within both international and national legal frameworks. Combined, these different levels of the laws work towards ensuring the inclusion and accessibility of persons with disabilities within public institutions such as the criminal justice system. Internationally, the rights of persons with disabilities are enshrined in UNCRPD, which includes provisions that acknowledge legal capacity and assume legal personhood (Series & Nilsson, 2018). For example, in Article 12, persons with disabilities are recognized as having “. . . legal capacity on an equal basis with others in all aspects of life” (The United Nations, 2007). The UNCRPD requires that ratified countries are critical in ensuring persons with disabilities are assumed to have the capacity and autonomy to make decisions within their own best interests. In addition, the UNCRPD recognizes persons with disabilities as rights-holders like other human beings. As Arstein-Kerslake and Black (2020, p. 3) explain, “neither a person’s legal agency nor legal personhood can be denied on the basis of disability.” As one of the nations that have ratified the UNCRPD, Canada has agreed to uphold the rights encompassed within this document and implement policies and procedures that ensure persons with disabilities’ rights are protected.

Canadian criminal law, like other Western legal systems, constructs a relationship between capacity to understand the nature and consequences on one’s actions and criminal responsibility. It sets out a system that is age-based, which states, “no person shall be convicted of an offence in respect of an act or omission on his part while that person was under the age of twelve years” (CCC, 1985, s. 13). The legal doctrine of *doli incapax* guides the criminal law in allocating moral blameworthiness and therefore criminal responsibility. The doctrine means “incapacity to do wrong,” which is based on mental and moral capacity to be blameworthy (*R. v. D.S.*, 2017). In addition, under the Youth Criminal Justice Act (2002), a federal legislation addressing the treatment of youth involved with the law in Canada, identifies that young people can be held criminally responsible with reduced capacity and moral blameworthiness between the ages 12 and 17 years. The adult system begins for those at age 18.

Several other sections of the CCC recognize that apart from age, others may not have the mental or moral capacity to be held criminally responsible or ought to be held responsible to lesser degrees. Section 16 of the CCC provides for the verdict of NCRMD, a verdict that is neither a finding of guilty nor an acquittal but that can be handed down when it is believed that an individual did not appreciate the nature and

quality of their actions at the time of the offense (CCC, 1985). That is, if the judge finds that the individual was not capable of understanding the nature of their behavior at the time of the offense, then the individual cannot be held criminally responsible. Often, in these cases, the individual is not held accountable due to the presence of symptoms of a psychiatric disorder that influenced their behavior at the time of the offense. To be found NCRMD, persons must show an “inability to appreciate the nature and quality of actions . . .” (CCC, 1985, s. 16). For many people with mental disorders (including persons with IDD), this may not be a suitable strategy because an impairment may play a role in their offense but it does not alter their ability to appreciate the nature of their actions (Hall & Jones, 2020). This leaves plenty of space and gaps for persons with mental disorders to slip through or be vulnerable to inadequate responses within the criminal justice system. At the same time, many accused choose not to pursue a verdict of NCRMD, even though they may meet the criteria because it can lead to an indefinite sentence in the forensic system and on-going assessment by review boards until the risk of reoffending is mitigated (Whittingham, 2020). Finally, the sentencing stage is another key point of the process whereby lawyers may raise evidence of cognitive impairment in pursuit of reduced blameworthiness and mitigation. However, lawyers may also confront a double-edged sword because arguments about cognitive impairments as a result of brain damage or disability that are not amenable to improvement or treatment might be interpreted as support for future risk of reoffending, dangerousness, or a lack of alternatives to prison (Chandler, 2015).

To address underlying circumstances that are contributing to the offense, problem-solving courts have thrived as an alternative to the traditional judicial processes over the past two decades both internationally and in Canada (Schneider et al., 2007). Therapeutic jurisprudence attends to both process and outcome (Wexler & Winick, 2008). Founded on the principles of therapeutic jurisprudence, problem-solving courts resolve to reduce the risk of recidivism by ensuring that the law acts as a therapeutic agent by redirecting individuals to more appropriate community services (Marinos & Whittingham, 2019). Specifically, in the case of mental health courts (MHCs), persons diagnosed with a mental disorder who have engaged in less serious offenses can be diverted to specialized courts that have dedicated, trained staff who develop a community-based plan for treatment intended to reduce the risk of recidivism. It is important to note that in Canada, these courts are reserved typically for less serious offenses and offenses that are of a violent or a sexual nature are excluded. Once the terms of the court are fulfilled, there is, typically, a withdrawal of the charge(s).

Finally, there have been recent developments in accessibility legislation. Both federal, the Accessible Canada Act (2019), and provincial legislations clearly outline how businesses, organizations, and government institutions are to address the barriers to inclusion for persons with disabilities (including persons with IDD) and suggest how to provide accommodations. In Ontario, the Accessibility for Ontarians with Disabilities Act (2005) explicitly identifies the historical and contemporary importance of equity for persons with disabilities and resolves to ensure that all citizens have access to goods, services, and structures (e.g., buildings, facilities) through appropriate accommodation and modifications to current structures. This piece of legislation

has been used provincially to inform many accommodations, including within the legal system for persons with disabilities (including IDD). Its emphasis is on persons with disabilities having the capacity, autonomy, agency, and rights is meant to ensure that they are included in the development of solutions for accessibility in all facets of public and community life. As such, the legal system is required not only to provide access to persons with disabilities to legal buildings (e.g., the courthouse) but also to be able to participate fully within both criminal and civil proceedings as the accused, victim or witness.

## The Case: Reflections on a Legal and Social Quandary

The submissions from a criminal case in Ontario, Canada acts as springboard to examine the legal, social and ethical dilemmas posed for lawyers representing clients with IDD. In 2017, D.S.,<sup>1</sup> a 28-year-old male with a moderate intellectual disability, was seen before the Ontario Court of Justice having been charged with four counts of possession of child pornography (CCC, 1985). Under the CCC, this offense is punishable by a mandatory minimum sentence of 1 year (CCC, 1985). Given the nature of these charges and the mandatory minimum sentence of imprisonment, diversion to a MHC was not an option in this case (Legal Aid Ontario, n.d.). The allegation against the accused was that the individual had posted pictures of a child's genitalia on a social media site. In the submission, the defense lawyers brought about a constitutional challenge on the grounds that Section 13 of the CCC states, "[n]o person shall be convicted of an offence in respect of an act or omission on his part while that person was under the age of twelve years." In addition, the defense argued that Section 13 of the CCC was a violation of the accused's Section 7 (the right to life, liberty and security of the person) and Section 15 (the right to be equal before the law) rights under the *Canadian Charter of Rights and Freedoms* because his mental capacity was found to be equivalent to someone under the age of 12 years. Specifically, the accused in this case was found to have the mental age of an 8-year-old on a psychological assessment.

The defense depended on the doctrine of *doli incapax*, which deems children incapable of being prosecuted because they are morally innocent (*R. v. D.S.*, 2017). The defense argued that Section 13 was a constitutional violation given that Canada has laws indicating that children younger than age 12 cannot be held criminally responsible; and because there is a separate youth system for persons between the ages of 13 and 17 years to account for reduced blameworthiness. As a result, it was argued that Section 13 should apply not only to chronological age but also to those with intellectual disabilities since it creates a distinction based on mental capacity that widens the gap for persons with intellectual disabilities and other cognitive disorders. Specifically, the defense stated,

Like children, adults with a mental age under 12 years old are less mature and less capable of moral judgment compared to adults with normal cognitive functioning. Like children, adults with a mental age under 12 years old may not appreciate that their criminal conduct is morally wrong. And like children, adults with a mental age below 12 years old are

unable to develop cognitively to such a state in which they can sufficiently appreciate the morality of their conduct. (*R. v. D.S.*, 2017 at para 12)

With regard to the suitability of NCRMD, the defense counsel submitted that this verdict was not applicable to their client with IDD as there is no “cure” for cognitive disability and the assumption behind this verdict was a presumed improvement in the individual’s state through treatment that reduced the likelihood that the individual is a danger to society.

The Crown opposed this submission and argued that there is a binding authority on the Court from previous case law (*R. v. D.S.*, 2017 at para 14 & 15) that addressed the points raised by the defense and confirmed that Section 13 applies to chronological age and not mental age. The Crown prosecutor also expressed that if the judge found Section 13 of the CCC was unconstitutional in this case, it would set a problematic standard in future cases of like-situated offenders. Specifically, he stated,

To allow him [the accused] to do so [not be charged with a criminal offence] by virtue of s. 13 of the Code . . . essentially absolves him of any criminal liability for any offence that he may commit. Respectfully it is a dangerous precedent to set and may “open the floodgates” to similar types of frivolous applications. (*R. v. D.S.*, 2017 at para 8)

Additionally, the Crown prosecutor questioned the assumption made by the defense that mental age is an accurate indicator of diminished capacity, offering research findings about the importance of considering not only chronological age, but also the role that maturation and life experience played in assessing capacity (Marinos et al., 2008; Valenti-Hein & Schwartz, 1993). The Crown suggested that it was the defense lawyers’ choice to not pursue NCRMD because this was an option and would result in the accused being supervised by a forensic Review Board which may lead to an absolute discharge if there was no risk to the public (Bloom & Schneider, 2017). The judge in this case was left to determine whether protection against criminal responsibility is limited to chronological age or whether it should be extended to include mental age.

## Reflections on Embodiment and the Legal Subject

In reading this case, we were struck by the issues and dilemma it raised for legal professionals who must ethically represent their clients, but who may also be forced to rely on an ableist construction of the law in order to adequately represent their client who is chronologically an adult, but should also be considered of diminished criminal responsibility due to cognitive impairment. In the case of *R. v. D.S.* (2017), the lawyers’ conceptualization of the accused as not having the legal capacity is an interesting way to conceptualize this ethical dilemma; however, is also very troubling for personhood. As Perlín and Gallagher (2018) submitted, it is critical that lawyers are aware of the implications that the different models of disability have on the legal system—the medical model of disability that is used in health care law should not be translated into the criminal justice system.

What we see in this case is a dichotomy between the body and the mind in law, and not simply a distinction between *actus reus* and *mens rea*. The relationship between chronological age and legal capacity in assessing blameworthiness is severed within this case. The defense separated the accused's physical age from the legal capacity in mind, with the latter being viewed as static and not eligible for criminal responsibility. They also depended on the doctrine of *doli incapax* that deems children incapable of being prosecuted because they are morally innocent. In this way, he conceptualized persons with IDD as having reduced maturity, reduced moral capacity and reduced moral judgment—contrary to what is laid out in Section 12 of the UNCRPD (Peay, 2015). Furthermore, the notion of adults with IDD being characterized as “eternal children” and therefore not morally responsible has been recognized as a long-standing discourse that has been used to discriminate against persons with IDD, including with sterilization and segregation (Shoemaker, 2009).

Research has demonstrated that mental age, with a reliance on IQ is inadequate because it fails to capture a holistic approach to the individual, including the crucial role that life experience and adaptive skills play (Marinos et al., 2008; Marinos et al., 2014). When IDD is conceptualized this way by legal actors, there can be a gap in the law for persons with IDD, particularly if NCRMD is not a suitable defense. Often, NCRMD is not a suitable defense because persons with IDD can often appreciate the nature and quality of their actions; however, perhaps not to the same degree of that of a neurotypical peer. As Justice Stevens' opening remarks in *Atkins v. Virginia* (2002, p. 307) revealed:

[t]hose mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the same level of moral culpability . . .

Finally, there is growing recognition that persons with autism spectrum disorder and FASD are at least two diagnostic groups that may have an intact IQ (i.e., the mental equivalency of an adult), yet the case for diminished responsibility ought to be considered (Hall & Jones, 2020; Chandler, 2015).

Clearly in the context of persons with IDD, and despite the progression in international and national legislation change, the law remains incapable—at this point in history—to reconcile the human rights progress we have made for persons with disabilities in the areas of education, healthcare, and so on, and to extend it to criminal responsibility in criminal law. At the same time, we recognize it may be dangerous to do so. We also recognize as authors, that as more focus is placed on person with IDD and their impairment and the more they are described as having mental “deficiencies” by justice professionals, the more biomedical assumptions are reinforced. As such, the risk increases that we return to a time in which these individuals faced undue stigma and discrimination (Devlin & Pothier, 2006).

What appears from the legal analysis and the issues raised by the case is there are gaps between the law and the existing models of diminished culpability that exist for

many persons with IDD. Many accused do not appreciate the nature and quality of their acts to the extent of the high threshold of a verdict of NCRMD, are not eligible for diversion to a MHC due to the nature of the offense<sup>2</sup> or do not desire or require to be in under the control of a review board for a possible indeterminate length of time. In addition, the characterization of the accused as child-like contravenes section 12 of the UNCRPD regarding the right to be assumed to have legal capacity. Internationally and domestically, we have developed legal frameworks that advance the autonomy, agency and rights of persons with disabilities, but still struggle to find appropriate, respectful solutions for the criminal justice system as promised by this legislation. That is, while rights-based accommodations and supports for persons with disabilities have developed in multiple areas of social life like community-based supports and education, we need to be cognizant not to apply the same logic to all areas. In fact, as Craigie (2015, p. 6) argued, “. . . legal capacity in the context of personal decisions and criminal acts should not be thought of as two sides of the same coin.” As this case demonstrated, there is a lack of conceptual and practical space for options within the criminal law for legal professionals trying to defend persons with IDD who are in conflict with the law.

## **Reimagining Options for Persons With IDD Through the Influence of Therapeutic Jurisprudence**

In this case, the defense lawyers were faced with the dilemma of having to represent a client who may not have the same moral blameworthiness or culpability as a neurotypical peers for an offense that has been deemed by society to be so reprehensible it has a minimum mandatory sentence of one year in prison. This resulted in the lawyers needing to find a way to meet both the needs of a client with diminished culpability (or that is “child-like”), while also ensuring that there was accountability.

As previously identified, therapeutic jurisprudence can affect the criminal justice system in two ways. First, it can alter the ways that the law is constructed to ensure that it is broad enough to accommodate the needs of all citizens or secondly, it can alter the practice and techniques used by legal actors (Wexler, 2013). Ideally, consistent with the social model of disability and the principles of mainstreaming therapeutic jurisprudence, modifications would be made to the current CCC to address the structural and attitudinal ableism that is embedded within it, including the assumptions associated with chronological age and moral blameworthiness. However, recognizing the temporal challenges associated with changing a legal framework, we propose that therapeutic jurisprudence can provide alternative practices and techniques that enhance the ability of law and nonjudicial officers to support the justice needs of persons with IDD. The flexibility that is provided by therapeutic jurisprudence may either provide new ways of representing clients with IDD within the traditional adversarial process or as an opportunity to referring them to a MHC, a diversionary court that specializes in resolving matters in a way that provides accountability by ensuring that the social determinants associated with the offense are being addressed (e.g., taking medication, participating in therapy; Legal Aid Ontario, n.d.).

This approach is appealing for a number of reasons. First, it opens up new possibilities within the criminal justice system for persons with IDD who warrant status as a person with diminished culpability, but due to the nature of the crime must be held accountable. Scholars have proposed counterfeit deviance as one reason why persons with IDD have diminished capacity. Counterfeit deviance recognizes that persons with IDD should “be understood in the context of lives lived resulting from attitudes, practices and protocols” (Griffiths et al., 2013, p. 472). In this way, offenses (particularly sexual offenses) could be understood as a result of the many structural and social factors that does not absolve the individual of accountability; however, it does provide context for what has contributed to diminished capacity and suggest therapeutic targets that can be better addressed by diversion to a MHC. In the case of D.S., this would have allowed the defense to suggest diversion to MHC on the grounds that it would reduce the likelihood of reoffending through rehabilitation.

Furthermore, the structure of most MHCs enables the accused to be an active participant in the proceedings. This often includes staff and legal actors who are specially trained in matters related to mental health and other related issues (Legal Aid Ontario, n.d.). In MHC, there is a focus within the legal process that ensures emphasis is placed on rights, capacities, and voice. For example, often judges will address the accused in addition to the legal counsel throughout proceedings (Marinos & Gregory, 2016). By emphasizing human-rights and person-centeredness, lawyers are required to ensure that the individual with IDD is included within decision-making processes and/or are consulted in creating a treatment plan that is oriented towards needs. In this case, the therapeutic elements of diversion to MHC would be the increased focus on voice, destigmatization, and meaningful processes and outcomes—key components of not only therapeutic jurisprudence but also the promises of Section 12 of the UNCRPD.

Arstein-Kerslake and Black (2020, p. 3) identified that one criticism of therapeutic jurisprudence is that it fails to adequately protect the right to legal capacity. They warn that treatment without the active and fully informed consent of individuals with IDD risks leading to their marginalization and the disability community more broadly. Nonetheless, they submit:

The solution is not necessarily the abandonment of therapeutic models. Instead, it may be possible to transform therapeutic models into emancipatory tools. However, such a transformation is only possible if both the disabled body and the disabled mind are respected. This respect can only be achieved by viewing the disabled body and mind as inherently whole and making therapeutic resources available based on the desires of disabled people themselves—not as interventions that are imposed on disabled people.

In the case of D.S., having the option to divert to MHC would have allowed for greater flexibility for the defense to provide a rationale for accountability without the custodial sentence (and assuming there was no mandatory minimum sentence of imprisonment). Training for lawyers about disabilities would increase the effectiveness of their interactions with clients with IDD and enhance their ability to ensure that individuals are included within decision-making processes and/or are consulted in creating a

treatment plan that is oriented towards their needs. In essence, as Perlin (2017) notes, it ensures that persons with IDD are provided with the means for a fair trial in accordance with both national and international laws.

Finally, therapeutic jurisprudence provides an opportunity to provide flexibility in interpreting the law, to reconceptualize the relationship between the person and moral blameworthiness, and to move away from ableist assumptions that dichotomize the mind and the body. Therapeutic jurisprudence principles with robust attention to the rights of the individual and diversity would negate the need for legal actors to make constitutional arguments and enable them to focus on the necessary educative and destigmatizing outcomes for the accused. As Greenspan et al. (2015) identified there has been a heavy reliance on IQ scores to identify persons with IDD; however, IQ is but one factor that can be used to understand the impact of cognitive impairments on an individual and it should not be used in a way to limit the individual's autonomy, agency, and legal capacity. In fact, Greenspan et al. (2015) argued that heavy reliance on IQ cut-offs is an unethical practice; and reminded us of the important 2014 U.S. Supreme Court decision in *Hall v. Florida* (2014, p. 2001) that "intellectual disability is a condition, not a number." In D.S.' case, the defense in attempt to provide an ethical defense to his client, crafted his argument on the equivalency of mental age to a child to avoid his client receiving a mandatory minimum sentence of 1 year. There was in the face of no other legal recourse for the accused to argue for diminished culpability. Again, incorporating the principles of therapeutic jurisprudence or MHC would allow for alternative options to ensure that D.S. received appropriate treatment as an alternative to incarceration while ensuring accountability.

## Conclusion

Having heard both sides, the judge in D.S. ruled there was no constitutional violation, stating,

Parliament clearly expressed the test for criminal accountability in terms of chronological age and there was no basis upon which the Court could import a test based on mental capacity. [The accused] was excluded from the protection afforded by section 13 of the Criminal Code because he was older than 12, not because he had a mental disability. He was in no different position than the many children aged 13 or 14 who were virtually indistinguishable from a 12-year-old in terms of physical, mental, cognitive, moral or emotional development. (*R. v. D.S.*, 2018, p. 2)

The judge appeared to agree with the Crown that it was a dangerous precedent to set. The lawyers' conceptualization of the accused as child-like is troubling for human rights and the progress made under the UNCRD and other legislative frameworks.

Regardless of the judge agreeing with the Crown attorney, the case of D.S. reflects a number of important issues regarding persons with IDD and the concept of criminal responsibility. The central issue addressed within this article is how best to conceptualize persons with IDD with diminished culpability without negating their autonomy, agency,

legal capacity, and human rights. The vast majority of persons with IDD involved in the justice system appreciate the nature and consequences of their actions but not to the same degree as their neurotypical peers (Jones, 2007). At the same time, they can be fit to stand trial and not eligible for verdicts of NCRMD or the insanity defense. Persons with disabilities are guaranteed rights to legal capacity under Section 12 of the UNCRPD; however, this can conflict with arguments about reduced criminal responsibility by non-judicial actors. In some cases, persons with IDD may not have access to diversionary courts or programs or are ineligible because of the seriousness of the offense. The case of D.S. illustrates the “perfect storm”—he was excluded from any options except the traditional adversarial system and left to face a mandatory minimum sentence of 1-year imprisonment if found guilty. The lawyers were faced with a dilemma: to assert that the same consequences that apply to adults with adult capacities should *not* be applied to other adults with intellectual disabilities, while at the same time avoid reducing their legal capacities, human rights, and reinforcing ableist legal structures, or to assert arguments about reduced legal capacity and reduced moral blameworthiness, which in doing so would reinforce the biomedical and ableist assumptions and that contravene the individual’s human rights. The lawyers in D.S.’s case argued whether a constitutional argument that the law prohibiting criminal responsibility for persons less than 12 years old is discriminatory against persons with a mental age of less than 12 years.

We suggest that the principles of therapeutic jurisprudence—with an enhanced emphasis on agency and human rights—would lead to better processes and outcomes for people with IDD facing criminal charges. The flexibility that is provided by therapeutic jurisprudence may either provide new ways of representing clients with IDD within the traditional adversarial process or within a MHC. As a framework, therapeutic jurisprudence is valuable because it can provide flexible, individualized, and destigmatizing responses to individuals.

To conclude, our curiosity and concern about D.S.’s final sentence led us to follow up with the Crown prosecutor. Through the process of preparing the case, it was discovered that the photos uploaded onto the social media site, as it turned out, were taken by D.S. of himself. The Crown prosecutor withdrew the charges and was relieved that a miscarriage of justice was averted.

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## Notes

1. We have identified the case using initials in order to protect his identity.
2. In some jurisdictions (e.g., NY), any felony case can be transferred to a MHC.

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