# A Confusion of Tongues: Competence, Insanity, Psychiatry, and the Law

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**Psychiatrists share with the public some confusion and uncertainty about two highly visible forensic psychiatric examinations: competence to stand trial and criminal responsibility (insanity). The author reviews the content and context of these examinations, examines legal issues that define and underlie them, and clarifies commonly encountered areas of ambiguity and misunderstanding. The competence examination, which assesses a defendant's ability to participate in the trial process, focuses on the present state of the defendant's mental capacities. Two standards generally used are whether the defendant has a rational and factual understanding of the charges and penalties and has the ability to cooperate with the defense attorney. The examination for insanity is one of the most challenging and comprehensive in forensic psychiatry. The criteria in general address the defendant's awareness of the fact that the act was illegal, wrong, or a crime. Additional criteria address the defendant's ability to control behavior. (*Psychiatric Services* 50:767–773, 1999)**

The purpose of this article is to clear up widespread confusion, even among psychiatrists, about psychiatric examinations in criminal cases. Such confusion has been evident in several high-profile psychiatric examinations, including those performed for the trials of John Hinckley, who attempted to assassinate President Ronald Reagan; John Dupont, the millionaire who shot Olympic wrestler David Schultz; John Salvi, who killed two and wounded others at Boston abortion clinics; Vincent Gigante, a Mob boss in New York believed by some observers to be demented and by others to be malingering; and Theodore Kaczinski, the Unabomber.

Psychiatry, especially forensic or medicolegal psychiatry, contributes to the legal process most publicly in relation to two primary examinations, which are often confused with each other: competence to stand trial and criminal responsibility (the insanity defense) (1–4). Competence is an issue that may arise in medical settings in regard to consent to treatment, but insanity is always and only a legal concept.

This paper is designed to clarify the two concepts and provide some conceptual and historical background. Such understanding may be particularly important for psychiatrists because high-profile cases like those noted above typically generate great concern within the psychiatric profession about the impact of psychiatric testimony on the public's perception of psychiatry (5). In high-profile cases involving expert testimony, forensic psychiatry is generally painted as an embarrassment to the field, and cries for broad and often misguided reform arise (6). The discussion here may help prevent such an undesirable outcome by conveying some of the underlying reasoning for the sometimes curious interactions of psychiatry and law– reasoning that is often scanted, distorted, or ignored outright in media coverage of high-profile trials.

Although the performance of the two examinations usually requires specialized study and training, the understanding conveyed in this paper is meant to be available to all practitioners.

## Background on psychiatry and law

### *The perception of fairness*

Many see psychiatry as somehow intruding inappropriately into the smooth mechanism of the legal process, but few people realize that the legal system needs (or claims to need) psychiatry for certain specific goals. One of those goals is what is called "the perception of fairness"(1). This concept means that a court system that is not perceived as fair (perhaps whether it is or is not fair) has no credibility in, and is not respected by, the surrounding society. One famous jurist opined that having "drooling idiots on the witness stand" was not good for the credibility of the legal system (Judge David Bazelon, personal communication, May 1981).

A legal system that treats the incompetent and insane just like everyone else might well be seen to fail the test of fairness. Thus psychiatric testimony is requested to assist the court in understanding how mental illness, mental retardation, or organic brain disorders might affect a defendant's ability to participate fairly in the legal process. However, I emphasize that even with psychiatric input, the court's decision is the final rule.

### *The adversary system*

Another aspect of the law is the American use of the adversary system. This approach means that one arm of the law is an adversary to the citizen-defendant, trying to convict

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him or her. To be fair to a defendant who is facing such a formidable adversary as the state, the defendant should be in good and alert mental shape to grasp the complexities of the situation of being on trial; to understand the charges, the possible penalties, and the options; to answer questions meaningfully; to detect lies or errors by witnesses; and to keep the defense attorney continually informed about relevant facts as the trial progresses. In fact, these abilities are essential components of the threshold test for entering into the criminal trial process– competence to stand trial (1,2,7,8). Finally, the adversary nature of the legal system requires what many psychiatrists and members of the public view as the most problematic aspect of forensic psychiatric testimony: that there be opposing experts on the witness stand.

*The moral substrate*

Equally important to our courtrooms is the moral substrate on which the legal system rests. One can easily understand that if a child tips over a pile of blocks and injures a playmate, the child is not personally charged with a criminal act, even if it was done deliberately (although, of course, the parents may incur some liability). We allow for the fact that children do not understand well the consequences of their actions or which actions are right and which are wrong. Thus they should be exonerated from legal culpability.

Similarly, the law rests on a moral assumption that certain mental states should qualify an individual for exoneration. Those states would logically be the ones that impact on knowledge of right and wrong and of the consequences of one's actions. Indeed, those very issues are relevant to the insanity defense.

*The question of intent*

Finally, for nearly all crimes, an assessment and a prosecutorial proof of intent is required by the law. Psychiatrists may be asked to assist the court in determining whether certain mental problems affected a person's ability to form the intent necessary to make that person legally guilty of a crime.

To grasp this point, consider this true-or-false statement: "It is always a crime to shoot the President." The statement, of course, is false. For example, a Secret Service agent might shoot at a potential assassin, miss that target, and hit the President; or that agent might drop a gun that discharges, and the bullet might strike the President; or, less likely, the President might lethally attack someone and that person might shoot in self-defense. From these examples, we see that accidental and self-defense shootings, even of the President, are not crimes. What is missing is the intent (9).

The law considers a crime to be the combination of an *actus reus,* a Latin term for wrong or evil act, and a *mens rea,* an evil mind or intent. In the American legal system, wherein one is innocent until proven guilty, the burden falls on the prosecutor to prove all elements of the crime, including the requisite mental state.

But why are all of these seemingly straightforward notions so inflammatory and confusing when stirred up around a highly publicized trial? To answer this question, we must examine the scope of the problem.

## The scope of the problem

The American public appears to have an insatiable appetite for courtroom drama, especially the real-life versions now visible on both Court TV and the evening news. Cases and testimony are analyzed from the office water cooler to the family dinner table. However, along with this interest go a number of assumptions of varying validity.

**"He looks okay to me."** During the trial of John Hinckley, in which an insanity defense was raised, many commentators noted that he sat calmly for most of the proceedings. Viewers at home took his current calm as a refutation of his insanity years earlier when he shot President Reagan and when he later made two suicide attempts. The reasoning went something like this: "If he's so crazy, why is he just sitting there?" Presumably, if Hinckley had raved and flailed about, the insanity claim would have felt more valid.

Of course, a person's courtroom demeanor may have some bearing on the issue of competence to stand trial in the present, but it is quite irrelevant to insanity at the time of the act.

**"I'm a bit of a psychologist myself."** Laypersons ordinarily do not view themselves as fingerprint experts, ballistics experts, or DNA experts. However, the same is not true for mental issues. Average readers or viewers believe that although they are not formally trained in any of the mental sciences, they have great natural and instinctive psychological insight. Thus, despite the often painstaking data-gathering efforts, meticulous examinations, and solid credentials of examining experts who have interviewed the defendant, readers or viewers often feel that, watching from their living rooms, they understand the defendant better and more accurately than the examiners, especially insofar as they believe they are "not fooled" by insanity claims.

**"If experts disagree, the field is not valid."** In the American adversary system, it is important to the process itself to have testimony on both sides, including expert testimony. Thus a given case may have two fingerprint experts, one on each side, testifying that a fragment of a print found at a crime scene does or does not match the defendant's fingers. Such mandatory "disagreement" does not seem to shake the public's faith in the validity of fingerprint science (1,5,9).

In contrast, when psychiatrists give mandatory opposing testimony in an insanity case, the public often sees this disagreement as a weakness in the field itself. The naive view appears to be, "If psychiatrists cannot agree on who is insane, then psychiatry itself must be bogus."

It is interesting that psychiatrists on both sides of a case usually agree on the mental illness of the defendant but disagree only on the much more subtle point of whether the illness in its particular configuration meets the narrow legal criteria for insanity in this case. It has been suggested that more disagreement exists between Supreme Court justices about the meaning of a well-established law than exists between psychiatrists about a defendant whose mental state, after all, is in constant flux and evolution.

**"They are just trying to get him off."** In highly publicized trials, it is common for the public to lose sight of the adversarial process and to assume

that the only role that psychiatry has to play is to exonerate the defendant. Generally, however, another psychiatric witness is testifying for the prosecution. For the adversary system to work as intended, testimony must be given on both sides.

This point is critical and often neglected. Human beings are complex enough so that there might well be more than one way to understand them. In this sense, the role of a psychiatric witness on one side of a case is to bring out– from the human complexity before them– those factors that support, say, the sanity of the defendant and to present them to the jury. And the role of the comparable witness on the other (adversarial) side is to bring out those human factors in the defendant that support insanity and present them to the jury (9). The jury then weighs the arguments, chooses the one it finds more credible, and decides the case's outcome.

In fact, the last point is also often forgotten in the heat of publicity. No matter what the psychiatrist says, the jury is the ultimate arbiter in a case. Insanity, in the final analysis, is not a psychiatric view but an ultimate jury decision.

**"They are all hired guns; they are all bought and paid for."** The "hired gun"– a witness who does not reach an independent conclusion by examination but who sells testimony corruptly for money– is the bane of the forensic community. Ethical expert witnesses are paid for their time only; hired guns are paid to say what the attorney wants them to say. Hired guns are out there, we must admit, and we must watch for them (1,10,11).

To cloud the issue, members of the public all too often assume that any testimony that goes against their wishes, prejudices, or intuitions must therefore be hired-gun testimony. Even for seasoned forensic experts, detecting this kind of venality can be challenging. But the ultimate test of being a hired gun is not the conclusion reached, but the reasoning process that led to arriving at that conclusion. In any technical field, from psychiatry to DNA to economics, the attorney must obtain expert consultation because the material under consideration is not accessible to lay knowledge. Understanding the evidence requires specialized training and experience. For this reason, the attorney reviews the case with an expert in a specific field to check its validity as a case.

If an expert states "You have no case," the attorney has only a few options. One is to plea bargain, another is to give up representation, and a third is to seek another expert. The attorney is obligated by an ethical code to represent the client as zealously and aggressively as possible, even if it means searching through a dozen experts to find one to support the case. Because of the variability of expert views of human psychology, it may well be possible to find such an expert ethically; the attorney may then retain that expert for trial. However, the pretrial winnowing occurs out of public view. The expert who testifies is the one who may have honestly come to the opinion the attorney needs– or the expert might be a hired gun. How are we to know?

As noted, the answer is in the reasoning that led to the opinion. No ethical expert should state, or be allowed by the cross-examining attorney to state, a simple conclusion, such as "This defendant is competent to stand trial" and stop there. Instead, the expert must reveal the valid and relevant process by which that conclusion was reached. To clarify that process, we must finally turn to the details of the examinations for competence to stand trial and for criminal responsibility, or insanity.

## Competence to stand trial

Competence to stand trial, sometimes referred to as competence to proceed, is a threshold issue (1,2,7), which means it must be established as a matter of fairness to the defendant before any other procedures may take place. Initially every defendant is presumed to be competent unless a question is raised about that presumption. The most common event to trigger a question is some indication, such as speech or behavior, that the defendant is mentally ill. The competence examination must occur when a question is raised about the defendant's ability to participate in the trial process.

The judge, either attorney, or other parties may raise the issue. The examination may occur promptly in a court clinic, a mental health unit associated with a particular court. Alternatively, a defendant may be transferred to a psychiatric or forensic psychiatric hospital or similar institution for a length of time determined by statute. Typical lengths of such court-ordered commitments are ten to 20 days, with extensions possible under some statutes.

The defendant is usually examined by a psychiatrist or psychiatric team, which may be composed of psychologists, social workers, psychiatric nurses, or other professionals. Less commonly, psychologists alone perform the examination.

If the defendant's incompetence appears to be the result of a fixed process beyond the powers of instruction to remedy, such as severe organic illness or severe mental retardation, the patient is returned to court for disposition under the assumption that competence may never be attained. This event is relatively rare. Moreover, a finding of incompetence does not mean that the defendant is simply released. Usually some temporizing solution is found, such as transfer for long-term evaluation or retention on the basis of potential dangerousness (12).

When incompetence appears to be the result of a reversible mental illness, that illness is usually treated to restore the defendant to competence. Practically, this usually means treating symptoms such as psychosis or thought disorder that stand in the way of the person's natural competence.

An occasional ignorant advocate will refer to competence resulting from treatment as "artificial" or "synthetic" competence and challenge its validity (13). Rest assured, however, that one cannot be made more competent than one's own natural baseline level; nothing is artificial about it.

When the commitment expires or the examination is completed, the examinee is returned to the court for further proceedings. Documents recording the results of the examination accompany the defendant to court.

### *The Dusky standard*

The competence examination is guided by the conclusions in a United States Supreme Court case, *Dusky v. U.S.* (14), which articulated the two cardinal elements of competency to

stand trial. The so-called *Dusky* standard, used in almost all jurisdictions, defines a defendant as competent to stand trial if the defendant meets two criteria. First, the defendant must have a rational as well as factual understanding of the charges against him or her and the penalties associated with them. Second, the defendant must have the ability to cooperate with an attorney in his or her own defense.

Since *Dusky* a number of forensic practitioners have suggested operational approaches to determining if the defendant meets the two core requirements. They include structured forms and interviews to be filled out by the defendant or used by the examiner in a systematic inquiry (7,8,15–17).

In practice, the defendant is asked questions about his or her understanding of the meaning of the oath and perjury; the offense with which he or she is charged; the possible outcomes of the trial and the penalties that could accompany a finding of guilt; possible defenses; possible further steps available, such as appeals, after a finding; possible sentences; the appropriate responses when a witness appears to be testifying falsely or differently from the defendant; and the various personnel of the courtroom and their functions in the trial. The relationship with the defendant's attorney is also explored, as well as the defendant's willingness and ability to cooperate with the attorney.

In areas in which the defendant is simply ignorant, teaching about the facts takes place. Such teaching may be done by the examiner during the evaluation, or the defendant may be enrolled with others in live or videotaped teaching sessions. Some forensic institutions routinely provide instructional video sessions to all newly committed persons. Teaching is critically important because ignorance should never be confused with incompetence to stand trial. Incompetence means that the person cannot meet the criteria because of some lasting impairment that is not reversible by simple explanation or instruction or by treatment.

### *Forensic warnings and the forensic relationship*

The competence evaluation does not require that a defendant admit to the crime with which he or she has been charged– only that the defendant know the meaning of the charges and have an appreciation of their relative seriousness. Because forensic examinations are rarely confidential, and any information gleaned from them may be presented in deposition, report, or open court, a defendant may inadvertently admit to the crime in question (or, for that matter, to other crimes) without being aware that the communication is not protected by confidentiality rules. This scenario is particularly likely when the forensic expert has been retained initially by the defense attorney; because the defendant may regard the defense attorney as "my lawyer," he or she may feel the same freedom to talk to "my expert" (10).

To deal with this problem and the risk of self-incrimination, forensic practitioners are ethically bound to warn the examinee about the lack of confidentiality from the outset and to attempt to establish whether the defendant understands this point. Many defendants– and many laypersons– do not realize that although the examiner may be a physician, the forensic examination does not occur within the context of a doctor-patient relationship. Doctors examine and treat patients; forensic examiners examine, and usually do not treat, the examinee (10). Unless warned, defendants may confide freely in examiners to their own detriment. An analogous problem is when research subjects confuse the research with treatment (18). Also, unless the defendant is warned, the material gleaned from the evaluation might not be admissible in court (19).

### *A present-state examination*

Competence to stand trial belongs to a group of assessments sometimes called present-state examinations. That is, the essential feature of competence is the present state of the defendant's mental capacities. As discussed below, this examination differs from the examination regarding insanity, which focuses on the defendant's mental state at the time of the criminal act.

Undertaking a present-state examination has two implications. First, a defendant's competence may change; that is, through the natural progress of the defendant's mental illness, various stresses of the legal processes or conditions of incarceration, or response to treatment, the defendant may experience alterations of mental state that may affect competence. Reexamination may be necessary under such circumstances.

Second, in many cases, the examiner needs to know nothing about the defendant except what the charges are, although in complex cases a history may prove invaluable. This situation differs markedly from the situation with the examination for the insanity defense. In conducting a present-state examination, the examiner can go in "cold" and establish, simply by the nature of the defendant's answers to questions, whether the defendant has the requisite mental capacities to meet the standards.

Under these circumstances, the layperson's naïve question– "If he's so crazy, why is he just sitting there?"– has a more specific implication. If the defendant is not calm– if he or she is grossly disturbed, psychotic, flailing, and raving– the defendant might well be incompetent, and the trial may have to be called off.

### *Doctor proposes, judge disposes*

In light of the above discussion, competence to stand trial seems to be a classically psychiatric condition; it relates directly to a person's mental state, about which psychiatrists may be the best experts. However, psychiatrists who are expert witnesses are in the same position as all other witnesses: they give their testimony, and the judge or the jury decides. Judge or jury may reject or discount some or all of the psychiatrist's opinion and even come to the opposite conclusion. Psychiatrists, therefore, do not ultimately determine the defendant's competence to proceed (1).

### *Diversion and case building*

In a perfect world, the rational and logical factors described above would be the only ones that govern competence to stand trial. Alas, the real world provides some complications.

In recent years it has become harder to get people into mental hospitals. This state of affairs is neither entirely bad nor entirely good; it is a mixture of both. Judges or magistrates who see before them an obviously mentally ill

person, hauled in by the police for creating a disturbance, may lack legal methods to get the person into appropriate institutions for treatment. One method is to charge the person with some minor crime and transfer the person to a hospital, ostensibly for examination for trial competence. This process is called diversion.

The judge may in fact not care much about the crime. Indeed, the hospital staff may finish their examination and prepare the defendant for return to court, only to find that the charges have been dropped in the meantime. However, a judicial order guarantees admission to a hospital– managed care or no managed care, gatekeeper or no gatekeeper.

A second dubious use of the competence examination is known as case building. Asking for a competence exam is a ploy used by some attorneys who are attempting to build a case for a subsequent insanity defense. If the defendant is obviously mentally ill or incompetent, such an examination is fully justified. However, defendants who are apparently fully competent may be sent for an examination in order to begin a process of influencing public, and juror, opinion by creating a question about the defendant's mental health. The reality– that competence and insanity are totally different issues with totally different criteria– plays no role in this ploy.

## Criminal responsibility and the insanity defense

It may be useful to begin our discussion of insanity– also called insanity at the time of the act or criminal nonresponsibility– with a review of the true differences in the issues and criteria of these two examinations, trial competence and insanity.

Trial competence is a present-state, here-and-now examination; insanity is a retrospective, longitudinal, there-and-then examination focused on the time of the criminal act, which may have occurred years before. Only the defendant's present mental ability affects trial competence; the defendant's entire life may bear on insanity. The trial competence examination is a snapshot; the insanity examination is a movie. Assessing trial competence requires of the examiner no knowledge of the defendant except the charges; assessing insanity requires detailed knowledge of the defendant, especially of the mental state at the time of the act. A defendant's competence to stand trial may change as the defendant's condition changes; such changes do not affect insanity because it is based on a time fixed in the past. Competence is a concept sometimes used in clinical work– for example, competence to consent to psychiatric treatment; insanity is a wholly legal concept, occurring only in the criminal law context.

Finally, trial competence is a threshold to be crossed before anything else occurs; an examination for criminal responsibility usually occurs later in the process and sometimes does not occur at all (1,4,6,9).

### *Fundamental fairness*

As noted, the issue of criminal responsibility turns on the fact that all persons are considered responsible for all their behavior, including criminal behavior, except for certain categories of persons (3,8). These categories include children and those incapable of understanding the need for behaving responsibly or adhering to the tenets of responsible action, such as persons whose understanding is limited because of mental illness, retardation, or organic brain disease. In the jargon of the law, mental illness or mental disorder is called "mental disease," and organic conditions are unfortunately termed "mental defect."

The underlying rationale for considerations of insanity in the legal system is a matter of the perception of fairness and of preservation of the credibility of the courts. Arguably, the concept of insanity as exculpating someone from a crime is neither so much a legal nor a psychiatric issue, but rather a social or moral one. That is one reason the question of responsibility for a crime is ultimately left not to a psychiatrist or attorney but to a jury, representing a cross-section of the society at large.

This last point corrects another common misunderstanding of insanity in the courts: that psychiatrists determine insanity and thus decide exculpation. Here again, the jury or sometimes a judge alone finally decides the outcome of the battle between two or more psychiatrists. The psychiatrists serve the adversary system by offering the jury data on both sides of the case, inculpation and exculpation, as must occur in the American legal system.

### *The burden of proof*

Because one is innocent until proven guilty, the insanity defense requires the prosecution to prove all elements of the crime, including the mental state or intent. In practice, the defense might raise the insanity issue, but the prosecution would then need to prove sanity to meet its burden.

The prospect of affirmatively proving anyone sane may well seem daunting, and, indeed, during the wave of reforms after the Hinckley trial and other trials, some jurisdictions shifted the burden to the defense, a move that was popular though legally illogical (6). The various jurisdictions still differ on this point.

### *A matter of criteria*

"Nuts," "bonkers," "mad," "crazy," "psycho," "wacko," "bats"– there has never been a dearth of lay and slang terms for mental illness. These terms are freely applied to anyone, perhaps especially those who disagree with our views! The very ubiquity of these negative labels may contribute to what must be the fundamental lay misunderstanding about the insanity defense: that its essence has to do with mental illness.

This idea is simply wrong, but its simple wrongness doesn't keep it from being misapplied and misused in media reports of a criminal trial. The examination for criminal responsibility is a matter of meeting legally defined, statutory criteria for exculpation from criminal responsibility; mental illness, though relevant, is not determinative alone. Insanity is a legal concept, not a psychiatric one.

Although that statement appears simple enough, its application to a defendant requires one of the most challenging and comprehensive examinations in the forensic psychiatric repertoire. Because the examination is criteria driven, it is theoretically possible for a mild mental illness to impinge so precisely on the mental abilities de-

fined in insanity criteria as to qualify for legal insanity. It is equally possible for a severe mental illness to leave those same abilities unscathed, and thus leave the severely mentally ill defendant legally sane. Obviously, a distinction that may be this subtle requires careful examination.

*Insanity examinations*

A full description of the examination for criminal responsibility is beyond the scope of this paper, but some essentials are described.

First, as in all forensic examinations, one must consider malingering– feigning or faking an illness to avoid punishment (1). Indeed, detection of malingering is a burgeoning field of science. The examiner must determine what the defendant might have to gain from malingering, such as money.

Second, extensive interviews with the defendant are essential to the assessment, but, contrary to popular belief, the examiner cannot stop there. Other data about the defendant at or near the time of the crime must be obtained. Witnesses, victims, relatives, treating professionals, arresting officers, employers, friends, and lovers are sources of such data, as are past and present medical records. In short, any source of data that might contribute information that does or does not corroborate the defendant's story must be sought (10). Attention must be paid to the defendant's flight from the crime or efforts at concealment that might imply knowledge of the wrongfulness of an act.

Finally, the totality of information is assembled and measured against locally defined criteria, which are discussed below. Based on this comparison, the forensic expert offers an opinion, and the judge or jury decides.

*Standards for insanity*

To make the determination of insanity more complex, a variety of insanity criteria exist in the U.S. The local standard is used in state cases, and a federal standard in federal cases. The criteria in general address the defendant's awareness of the fact that the act was illegal, wrong, or a crime. Additional criteria in some standards consider whether the defendant could exercise sufficient control to prevent the criminal action.

To provide examples of how such criteria may be stated, consider the M'Naghten criteria used in several U.S. jurisdictions (20). These criteria state generally that a person is not criminally responsible at the time of an act if because of mental "disease or defect" that person did not know the nature and quality of the act, or, if the person did know it, he or she did not know that it was wrong.

Because this standard focuses on knowledge of right and wrong, it is sometimes referred to as a cognitive standard. Insanity criteria vary about whether to focus on the defendant's cognitive capacities alone or to address the question of the defendant's ability to control behavior, as in the following standards.

Another fairly widely used set of criteria are those proposed by the American Law Institute, a group of legal scholars who in 1955 designed a Model Penal Code that addresses insanity, among many other issues (21). These criteria propose that a person is not responsible at the time of the act if because of mental disease or defect he or she lacks substantial capacity to appreciate the wrongfulness (sometimes called "criminality") of his or her conduct or lacks substantial capacity to conform his or her conduct to the requirements of the law.

Unlike the M'Naghten rule, this standard has two components, a cognitive one– an appreciation of wrongfulness– and a volitional one relating to the capacity to conform one's behavior or conduct. The concept of "appreciate" is intended to reach farther than simply "know." Appreciate is intended to convey that the defendant must both know the factual wrongfulness of the act and be aware personally and emotionally that the act is wrong for him or her in that context.

In addition to insanity criteria, or sometimes instead of them, certain jurisdictions have enacted a standard called "guilty but mentally ill." This finding by a jury establishes guilt but recognizes that the defendant was mentally ill at the time of the crime. (An insanity finding, in contrast, means that the person is not guilty by reason of insanity.) In theory– but in our embattled and underfunded prison system, not always in practice– this jury finding permits treatment along with incarceration.

This standard offers two features that may make it desirable in some venues. First, the jury achieves the moral satisfaction of finding an alleged perpetrator guilty, and perhaps also of believing that the person will get needed treatment while in prison. Second, as nationally known forensic expert Phillip Resnick, M.D., has stated (personal communication, May 1997), the standard of guilty but mentally ill is popular with mothers, who can tell themselves that their sons' criminal acts occurred because they were ill, not evil. This standard is used in some jurisdictions as an acceptable alternative defense to insanity.

A far less acceptable finding, "guilty but insane," is popular with politicians who want to seem tough on crime and with uninformed journalists, because it seems to offer juries the chance to find perpetrators guilty but to throw a sop to those claiming insanity. However, unlike "mental illness," which has a clinical meaning, "insanity" has a legal meaning only: it means not responsible for what would otherwise be a crime. Thus guilty but insane is a complete paradox because the only function of the concept of insanity as a legal entity is to refute guilt. Indeed, "guilty but insane" is tantamount to saying "Guilty but not guilty"!

Logic aside, both these variants have in common the finding of guilt; thus a sentence to some form of incarceration usually follows. Treatment may or may not be offered, and if it is offered, it may not be adequate, accepted, or successful.

*Reform efforts*

Since these early criteria were developed, efforts at change and reform have been widespread. Such efforts are triggered almost every time a high-profile insanity trial is covered by the media. The bad news is that the media often ignore the distinctions noted here; the good news is that the cries for reform rarely accomplish anything substantial. It is not widely appreciated how the legal system needs the insanity concept to function credibly.

Also little appreciated are the num-

bers involved. Because no one really likes the insanity defense– not prosecutors, defense attorneys, judges, or juries– it is not used very often. When it is used, it is employed because nothing else is available. For example, because Hinckley was videotaped shooting President Reagan, an alibi defense was not possible. The insanity defense is not a gigantic loophole through which hordes of felons regularly pour to menace our society, despite public perceptions, fed by ambitious politicos, to the contrary. Rather, of the hundreds of cases that clog our court system, less than 4 percent raise the insanity defense, and the defense is successful in less than 1 percent of those cases.

The low rate of success is also evident in high-profile cases, in which much public outrage is expressed at the mere attempt to claim insanity– and much political hay is made of the alleged fact that the claim of insanity means that "the system isn't working." On the contrary, an insanity claim on occasion means that the system is working just as it should, by leaving room for moral exoneration when appropriate.

The amount of public outcry is thus vastly out of proportion to the actual volume of such cases relative to all criminal cases. As Harvard professor Alan Stone has commented (personal communication, 1998), "The insanity defense is a pimple on the nose of justice, while the patient is dying of congestive failure."

For perspective it should be noted that in a vast number of instances, mentally ill persons who are caught committing minor crimes, and who would clearly be eligible for an insanity defense based on their degree of disturbance, are taken by police directly to mental health facilities without even being entered into the criminal justice system.

It should also be noted that many politicians trained and practiced as criminal lawyers early in their careers and achieved a perfectly clear understanding of insanity issues. However, they find it expedient to forget this clarity in order to seem tough on crime and to fan public outcry during a high-profile case in an election year. They do so by supporting public misperceptions that "the insanity defense is a huge loophole," "the system isn't working," and "the experts are just trying to get him off."

*Back on the street?*

Public wrath at the insanity defense is partly based on the perception that someone found insane will promptly be back on the street to endanger the public. This deeply held notion is also usually incorrect, because defendants found insane, especially those who commit violent crimes, often spend more time behind walls than if they had been tried and found guilty and given a standard sentence with a length predetermined by statute (22). The walls may be those of a forensic hospital rather than a prison, but they are walls nonetheless.

This fact alone accounts for the reluctance of some defendants to use the insanity defense, even if they are "entitled" to it by their mental condition. They realize that if found insane, they may never be released, because public and judicial distrust of the mentally ill, fear of criminal recidivism, and perceptions of mentally ill defendants as inherently more dangerous than other criminals may conspire to prevent any agency from agreeing to a discharge. This disturbing situation highlights the law's own ambivalence about insanity, paralleling that of the general public (23).

## Conclusions

The interface of psychiatry and the law is an often cloudy realm, further befogged by the need to get two divergent disciplines to meet in a common language and conceptual framework. This paper is intended to help mental health professionals sort out the wheat of reality from the chaff of public misunderstanding, misdirected outrage, and misperception of the issues. ♦


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