

Evaluating Criminal Defendants: Responsibility and Competence to Stand Trial

WILLIAM H. REID, MD, MPH

When I tell people I'm a forensic psychiatrist, they generally think of criminal cases (right after confusing us with television's Quincy and asking "How can you do psychiatry with dead people?"). This month, we'll talk about a criminal, rather than a civil, topic.

One of the most important differences between criminal and civil law is the chance that the defendant will lose his or her liberty (i.e., go to jail or prison). The Constitution takes loss of liberty very seriously. It accords far greater legal protections to criminal than to civil (e.g., malpractice) defendants. For the latter, the stakes are, in the words of some jurists, "mere money." Only the government (not private parties) may prosecute a criminal action, and the elements of the case against the defendant must be proved beyond reasonable doubt (instead of the usual civil burden of a simple preponderance of the evidence). The

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government (prosecution) normally gets only one shot at the defendant; it cannot appeal a "not guilty" verdict (cf. "double jeopardy"). The defendant, though, has a series of avenues through which to appeal if found guilty. The Founding Fathers believed that it is better to let many guilty people go free than to imprison one who is innocent.

The most common criminally-related forensic activities undertaken by practicing psychiatrists and psychologists are evaluations of criminal responsibility and of competence to stand trial. We'll discuss some general principles of this important work, then briefly describe the determination processes themselves.

WHAT QUALIFIES ONE TO BE AN EXPERT?

In trials, a person is an expert if the court says he or she is an expert. The side that wants to offer your opinions describes your education and experience for the judge,

then the other side has a chance to object to your being allowed to testify, and the judge either admits ("qualifies") you or not. If there is no objection from the other side, the judge is likely to accept nearly anyone. If the issues are highly technical and the other side gives reasons to prevent your testimony, you may not be allowed to testify (or may be limited to specific topics). Being "qualified" isn't always a function of one's education and experience; experts are often disqualified because their comments will not be legally relevant to the case at hand, because the other side has not been properly notified, or because their testimony lacks sufficient scientific foundation.

FUNCTION, NOT DIAGNOSIS, IS THE POINT

Relying on diagnosis is a common error of clinicians who are helping to determine criminal responsibility or trial competence. There is virtually no psychiatric diagnosis that always renders a defendant incompetent or unable to be held responsible for his or her acts. The person's specific symptoms at the time in question and, more to the point, his or her ability to do certain things at the time (e.g., understand the nature of an act) are the important legal issues. People with schizophrenia or bipolar illness should not be considered incompetent or not responsible *per se*, nor should those with less serious diagnoses always be assumed to be competent and responsible. Thus, the job of recreating a defendant's mental condition at the time of an alleged crime (and relative to some legal questions, not just clinical ones) may be difficult. There is often room for disagreement.

UNDERSTAND THE QUESTION THE COURT IS ASKING

We embarrass ourselves, and don't help the cause of justice, when we believe we have been brought into the proceedings to pass along "The Truth According to Me, the Doctor." Your state or federal jurisdiction has specific laws

Dr. Reid is a forensic psychiatrist in Horseshoe Bay, Texas, and a past president of the American Academy of Psychiatry and the Law. His most recent book, *The Treatment of Psychiatric Disorders, 3rd Edition*, will soon be followed by *Legal Issues for Psychotherapists*. His website, *Psychiatry and Law Updates*, may be found at www.reidpsychiatry.com. This column contains general clinical and clinical-forensic opinions which should not be construed as applying to any specific case, nor as any form of legal advice.

that spell out the legal (not the clinical, remember) requirements for finding a person not guilty (or “not responsible”) by reason of insanity (NGRI) or incompetent to stand trial. Most of the time, the questions and eventual answers are fairly simple, although the evaluative process may not be. Ask the lawyer who retains you to give you a copy of the legal question(s) being asked and then limit yourself to them—the court will.

UNDERSTAND THAT YOU ARE THERE TO GIVE AN OPINION, NOT TO MAKE THE COURT’S DECISION

Years ago, a young psychiatrist, anonymous except for the fact that he now writes a forensic psychiatry column for a journal whose initials are JPPBH, once testified that a patient “meets civil commitment criteria according to New Mexico law.” At that point, the judge leaned toward him and said, far too loudly, “I’ll be the judge of that, doctor.”

Although judges sometimes ask experts for a definitive comment about the “ultimate legal question” (such as whether or not the defendant is competent to stand trial), for the most part, one should give opinions only about the questions asked (e.g., “Does the defendant understand the general trial process in which he will participate?” rather than whether or not he is competent to stand trial). Don’t presume to be the judge or jury.

CLINICAL WORDS ARE NOT JUDICIAL WORDS

Clinicians must not use professional jargon in legal reports or testimony without knowing how the law views the terms. Clinical-sounding words in the law relating to mental competence and limitations on responsibility (such as “insanity”) are not really “clinical” at all. The statutes are not crafted by doctors or mental health professionals, but by ordinary lawmakers who are trying to protect society and be fair to defendants. They knew psychiatric symptoms could interfere with competence and responsibility, but when they used psychological-sounding terms, they were not looking at a textbook, much less DSM-IV.*

CRIMINAL RESPONSIBILITY

First, a criminal-sounding act is not a crime until a judge or jury says it is a crime. The law says almost all crimes have two parts: the potentially criminal physical act and the mental intent to behave criminally. Both the physical and the mental (intent) parts have to be proved in order to convict the defendant.

*cf. the “Cautionary Statement” in DSM-IV about using its terms and concepts in legal settings.

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That was too easy to explain; let’s say it again. Not every taking is “stealing” (a criminal taking), and not every killing is “murder” (a criminal killing). If I take your book while believing it belongs to me, or if I kill someone who I believe is seriously threatening my life, then I probably haven’t committed a crime because I didn’t “intend” to do something illegal. It may be tragic, but it’s not criminal (well, it would have to be a very rare book to be tragic). There are nuances, of course, and you can think of other examples for yourself.

The Defense of Insanity

Every state and federal jurisdiction has a provision for considering whether or not a “mental disease or defect”[†] (that’s the wording in many insanity defense laws) has interfered substantially with a defendant’s ability to “intend” to break the law (that is, to have the “guilty mind” behind the act). In all jurisdictions in the United States, a defendant is judged unable to intend a criminal act if, at the time of the act *and* because of the mental disease or defect, he or she couldn’t understand[‡] the nature or consequences of the act, or understand that it was wrong. In some states, even if the defendant understood all that, he can be found not responsible if the disease or defect rendered him, at the time of the act, unable to stop himself from committing it.

A Few Nuances

Here are a few considerations in evaluating people with histories of mental illness who may or may not meet the criteria for being found NGRI:

- A psychotic person may “know” the nature of his or her act, but not “appreciate” its meaning or consequences: “I knew he would die, but God could resurrect him anytime,” *or* “I had to kill him because his evil thoughts were destroying my brain.”
- On the other hand, a person may be delusional or hallucinating and a prosecutor may still be able to argue (but

[†]“Defect” usually refers to mental retardation, but in some jurisdictions includes structural brain damage, for example, from head trauma or neurosurgery.

[‡]“Know” or “appreciate” is used instead of “understand” in many jurisdictions.

not necessarily prove) that the act was criminally intentional: "I had to kill her; she kept walking by my house and causing my milk to spoil and my meat to rot." (Note that, psychotic or not, causing food to spoil is not sufficient reason to kill someone.) "The voices said I had to kill her, and I can't sleep when I don't follow the voices' instructions." (The defendant's penalty for resisting the hallucinations was not very great; dreading a poor night's sleep doesn't justify following a murderous command.)

- Sometimes a poor-but-psychotic reason for committing a crime is sufficient, if the defendant has exhausted reasonable remedies:

A man with chronic paranoid psychosis complained that his neighbor was throwing garbage into his yard and stealing from him. He called the police several times, but they stopped responding to his complaints after finding no support for the allegations. He eventually took matters into his own hands and set the neighbor's house on fire. At his arson trial, the prosecutor noted that the proper response to harassment or theft is to call the police, not to take the law into one's own hands. The defense was able to show, however, that the defendant *had* tried to involve the police, and set the house on fire only after the police, in his view, repeatedly refused to help. He was found NGRI.

The Evaluation Procedure for Criminal Responsibility

The procedure for evaluating criminal responsibility is complex (much more so than for trial competence; see below). One must try to recreate the defendant's mental state and behavior around the time of the alleged crime, which may have occurred months earlier, and understand the probable symptoms, course, and prognosis of any mental illness or defect that is likely to have been present. That means reviewing psychiatric and other medical records; getting history from people who knew or observed the defendant before, during, and after the alleged crime; reviewing police arrest and witness reports; interviewing the defendant at some length; obtaining testing and subspecialty consultation as necessary; and so on. The assessment procedure should not be abbreviated, even if the lawyer or court says there are few resources to pay for it. It is unethical to knowingly do a substandard job, especially when a person's liberty may be at stake. (I cringe when I see criminal sanity evaluations that consist merely of a jail-cell interview.)

Consultants retained for forensic purposes often see defendants who need clinical treatment. One should not prescribe such treatment, but may recommend to the retaining lawyer or court that a clinical professional see the person. Psychiatrists and psychologists may be asked to evaluate defendants just after they are arrested, before

they are represented by counsel. If you do so, it should be solely for clinical purposes (e.g., to assess or manage suicide risk); you *should not* become involved in, or testify about, the forensic issues. It is unethical to evaluate a defendant for forensic purposes before an attorney has been appointed, been informed of the assessment, and been given a chance to respond.

Unless a court order specifies the recipient(s) and style of your report, or to whom you may speak, you should communicate only with the person or court that retained you (and then only verbally unless you are asked for a written report).[§] Do not take it upon yourself to write an effusive report or communicate with the court. If attorneys for the other side contact you and you are not sure they are entitled to speak with you, politely refer them to the lawyer or judge who retained you.

Trial competence refers to current ability to understand and participate in the trial process. Criminal responsibility (the "insanity defense") refers to one's state of mind at the time of the alleged crime.

COMPETENCE TO STAND TRIAL

Trial Competence Is Different from Criminal Responsibility

Trial competence refers to *current* ability to understand and participate in the trial process. Criminal responsibility (the "insanity defense") refers to one's state of mind at the time of the alleged crime. The distinction sounds simple, but the two are constantly confused, even by lawyers. For example, a person could be psychotic and nonresponsible when assaulting someone sometime in 1997, but be nonpsychotic and fully competent for his trial on, say, November 21, 1998. Similarly (but less commonly), a person could be mentally capable of (and thus responsible for) intending to rob a bank in 1997 but be unable to

[§]Note that the attorney who retained you may have gotten authorization, or even an order and funding, from the court; however, the other side is not entitled to talk to you or receive a report unless or until the court says it is proper. Unless a judge says otherwise, speak only with the party to whom you are consulting. Let them instruct you about whether or not they want a report, what questions to address, and to whom to send it.

understand the trial process a year later (perhaps because of decompensating psychiatric illness or head trauma).

Why Bother to Evaluate Trial Competence?

The Constitution says a person accused of a crime must have an opportunity to be present at his trial, to face his accusers. Physical presence is not sufficient; mental presence is required as well. The specific criteria vary by state and federal jurisdiction, but if a defendant doesn't understand (in general, but not necessarily in detail) the charges against him, the nature of the trial process and participants, and the potential outcomes of the trial or if he or she cannot reasonably assist in his own defense, he is considered incompetent to stand trial. At that point, the trial is usually postponed until such time as the person is judged competent or, if it is anticipated that competence cannot be (re)gained (e.g., in the case of some people with mental retardation or structural brain impairment), the case is dismissed for lack of a trial. People found psychiatrically incompetent for trial are usually sent somewhere to be treated to regain competence (even if against their will). If competence cannot be (re)gained within a reasonable time (usually a few months, but it varies by state), there is no choice but either to release him (after all, he hasn't been found guilty of anything) or to seek civil commitment.

Either side (or the judge) can raise the question of trial competence and move to have it determined via evaluation, expert testimony, and eventually judicial ruling. Questioning competence is not just a legal strategy (although it often is, of course); any lawyer or judge who doubts the defendant's competence must raise the question as a matter of the defendant's civil rights.

The Evaluation Procedure

Evaluations of trial competence require some review of psychiatric history, but it need not be as exhaustive as that for an NGRI evaluation. The defendant's condition or functioning at the time of the alleged offense is, strictly speaking, irrelevant. Each jurisdiction has a set of relatively simple criteria for trial competence, and the examiner need only determine that the defendant does, or does not, meet them at the time of the evaluation (thus the interview is very important, and the history less so). One may also be asked to deal with whether or not the competence or incompetence will last until the trial, which may

be several weeks in the future and/or whether or not an incompetent defendant can be expected to become competent with some sort of treatment. (Note also the earlier note about communicating only with the side that retained you.)

The possibility of malingering is quite relevant, even when there is a history of severe mental illness. Do not make the mistake of saying (much less believing) that you can always tell when a defendant is malingering. Specific actuarial tests for dissimulation, the validity scales of some common psychological instruments, and some interview procedures can increase our ability to recognize exaggeration of symptoms and malingering. The psychometric instruments and actuarial procedures are often better administered by an experienced psychologist than a psychiatrist. See Rogers¹ and Hall and Pritchard² for more detailed discussion of the assessment of malingering. (*Editor's Note: Phillip J. Resnick, M.D., discusses malingering of posttraumatic psychiatric disorders in an article in this issue, see p. 329.*)

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CONCLUSION

The take-home lesson this month: Be sure you know and follow the legal rules as you perform forensic consultations in criminal matters.

References

1. Rogers R, ed. Clinical assessment of malingering and deception, 2nd Edition. New York: Guilford; 1997.
2. Hall HV, Pritchard DA. Detecting malingering and deception: Forensic distortion analysis (FDA). Delray Beach, FL: St. Lucie Press; 1996.