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Competence and Insanity

Chapter Outline

On a summer morning in 2001, Andrea Yates filled the bathtub in her home and called her children to the bathroom one by one. Her 3-year-old son Paul was the first to be called. She forced Paul into the bathtub and held his head underwater until he stopped breathing. She carried his soaked body to the bedroom, laid him down, and covered him with a sheet. Then her sons Luke, age 2, and John, age 5, were killed in the same way. Yates's 6-month-old daughter Mary—who was on the bathroom floor crying while her three brothers were killed—was the next to be held underwater. Just as Yates was lifting her daughter's lifeless body from the tub, her oldest child Noah (age 7) walked in and asked what was wrong with his little sister. When Yates tried to grab Noah, he ran away. She chased him down a hallway, dragged him to the bathroom, and drowned him next to his sister.

After killing all five of her children, Andrea Yates called 911 and told the operator that she was ill and that she needed an ambulance. She also called her husband Russell and told him to come home. "It's time," she told him, "I finally did it." Then she hung up. When police arrived at the scene, Noah was found floating face down in the tub; his brothers and sister were found laid out in the same bed. Mary's head was resting on the shoulder of her brother John. His mother had placed his arms around the body of his sister. She told police that she had been thinking about killing her children "ever since I realized that I have not been a good mother to them." She said that the children "weren't developing correctly." To the surprise of many, the grieving husband refused to condemn his wife. "I don't blame her a bit," he said, "If she received the medical treatment she deserved, then the kids would be alive and well. And Andrea would be well on her way to recovery" (Springer, 2002).

When Andrea Yates went on trial in 2002, two keys facts were undisputed: She had killed her five children, and she was mentally ill. Before the trial, a hearing was held to consider whether Yates was competent to stand trial on murder charges. Based on testimony by psychologists who had interviewed Yates and studied her history, she was deemed competent to stand trial. As the trial began, she entered a plea of not guilty by reason of insanity. Because Yates had confessed to the murders, and because the physical evidence against her was overwhelming, the trial focused on whether she was legally insane. After listening to weeks of complex expert testimony, a jury of eight women and four men deliberated for three hours and 40 minutes before finding

Andrea Yates guilty. They apparently agreed with the prosecutor in the case, who argued that Yates "made the choice knowing that it was a sin in the eyes of God and a crime in the eyes of the state" (Stack, 2002, p. A18). Her defense attorney reacted bitterly to the verdict, "If this woman doesn't meet the standard for insanity, nobody does. We might as well wipe it off the books" (p. A18). But all the expert testimony about Yates's mental illness may have influenced the sentence she received. When asked to choose between life in prison or the death penalty, jurors took less than an hour to decide to send Andrea Yates to prison.

In the trial of Andrea Yates and many other trials, decisions about "competence" and "insanity" are at the heart of legal proceedings. Because these decisions require judgments about the psychological functioning of a defendant, clinical psychologists—those who study and treat various forms of psychological dysfunction and mental illness—are often crucial to the legal process in such cases. But when clinical psychologists are called upon to evaluate competence or insanity, they must force their psychological diagnoses to fit into the specific categories provided by the law.

THE MEANING OF LEGAL COMPETENCE

Defendants have the most to lose during criminal proceedings. It is their liberty that is at stake. Consequently, it is important that they understand what is going on at every stage in the criminal justice process, from arrest to sentencing. A defendant charged with a serious crime has a right to a trial. But what if the defendant can't understand what is going on before or during trial? Perhaps the accused lacks the mental capacity to understand the complexities of a legal proceeding. Perhaps he or she is substantially impaired by mental illness. But if we judge some people to be too impaired to stand trial, how much impairment is too much? Does it matter if the defendant can understand much but not all of what happens in court? These are some of the difficult questions surrounding the legal concept of "competence."

There are several reasons to be concerned about competence. One set of concerns involves fairness to the defendant. Full participation of the defendant in his or her own defense improves the probability of a just verdict. In an adversarial system, defendants must be able to provide

their lawyers with information about the crime and about the witnesses who testify at trial. Without the assistance of the defendant, the attorney is less able to mount an effective defense. That makes mistaken convictions more likely. And, even though a lawyer handles the defense, the defendant remains ultimately responsible for several key decisions: whether to plead guilty, whether to waive a trial by jury, whether to testify, and whether to accept a plea bargain offered by the prosecution (Winick, 1996). A second set of concerns has to do with public respect for the criminal justice system. To use the full power of the state to try, convict, and punish defendants who do not understand the nature of the legal proceedings against them undermines the perceived legitimacy of the legal system. It would simply not seem fair. A related but less central concern is that unruly behavior in court by a mentally disturbed defendant disrupts the dignity of legal proceedings.

The legal doctrine of incompetence originated in English common law of the seventeenth century. Competence was considered critical because, at the time, defendants usually had to argue their own case. At present, the most frequently evaluated form of competence is called competence to stand trial (CST). It was defined by the U.S. Supreme Court in the 1960 case of *Dusky v. United States* and refers to the defendant's ". . . sufficient present ability to consult with his attorney with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him." Notice the word *present* in the definition. CST refers to the psychological state of the defendant *at the time of trial.* The defendant's psychological state at the time of the crime is not relevant to a determination of CST (although it is relevant to a determination of insanity). During the 1990s, the Supreme Court held that there should be a presumption of competence. That is, the defense bears the burden of proving that the defendant is incompetent. But the standard of proof is a "preponderance of the evidence." Using this standard, the defense must show that it is more likely than not that the defendant is incompetent (*Cooper v. Oklahoma,* 1996; *Medina v. California,* 1992).

It is essential to recognize that CST is a legal, not a psychological, concept. Being judged CST does not certify robust mental health or even normal mental functioning. It merely means that a defendant meets the minimal standard of being able to cooperate with an attorney, and is aware of the nature and possible consequences of the proceedings against him or her. Even people suffering from psychosis or mental retardation can be judged CST. In addition, CST is a somewhat flexible

standard—a defendant facing very serious charges in a case with complex facts may need to be more competent than someone facing less serious charges and a simpler legal proceeding. Also, if the defendant has many friends and family members who can provide information helpful to the defense, the competence of the defendant may be seen as less crucial.

Although CST is by far the most frequently assessed form of competence, issues of competence can arise well before and long after trial. The issue of competence may surface during a suspect's first encounter with the police. Children or adolescents, adults who are mentally impaired, or mentally ill suspects may not be competent to waive their Miranda rights or to provide a voluntary and accurate confession. Next, at arraignment, there may be an issue of whether the defendant is competent to decide to plead guilty. In an early decision (*Johnson v. Zerbst,* 1938), the Supreme Court held that a guilty plea must be "knowing, voluntary, and intelligent." In part, this means that defendants must understand the charges against them, as well as the potential consequences of a conviction (e.g., spending several years in prison). Judges are required to question the defendant to make sure he or she understands that by entering a plea of guilty, important constitutional rights are forfeited: the right to a trial by jury, the right to remain silent, and the right to confront one's accusers. Later, at the trial stage, a defendant may decide to serve as his or her own attorney. Here again the issue of competence can be raised. Do such defendants fully understand the consequences of waiving their right to an attorney? You have probably heard the old saying that "anyone who serves as their own lawyer has a fool for a client." Some lawyers argue that simply asking to represent oneself is evidence of incompetence. However, the law only requires that the decision to serve as one's own attorney is voluntary and made "with understanding" (*Faretta v. California,* 1975).

A rare situation involving the assessment of competence involves prisoners sentenced to die in the execution chamber. Although the Supreme Court has ruled that executions do not violate the Eighth Amendment's prohibition against cruel and unusual punishment, it has also ruled that it would be cruel and unusual to execute an incompetent prisoner who does not understand why he or she is being executed (*Ford v. Wainwright,* 1986). In some instances, mental health professionals have been enlisted in the ethically troubling process of restoring prisoners to competence so that they can then be executed (see Chapter 9).

Although courts and psychologists use somewhat different standards

to judge different forms of competence, in the 1993 case of *Godinez v. Moran,* the Supreme Court endorsed a single standard of competence. That decision permits states to develop separate standards for different types of competence but requires that the *Dusky* standard be used as the minimum requirement.

HOW THE CRIMINAL JUSTICE SYSTEM DEALS WITH INCOMPETENT DEFENDANTS

Even if a defendant does not want to raise the question of competence, ethical guidelines require lawyers to tell the presiding judge if they believe that a defendant may be incompetent. Usually the defense lawyer raises the issue, but prosecutors and judges are also ethically obliged to be vigilant for incompetent defendants. Further, if either attorney raises the issue of the defendant's competence, the presiding judge almost always orders a psychological evaluation. Unlike most other issues decided in court, there tends to be little dispute about providing a competence evaluation when it is requested. Prosecutors seldom object to requests for competency evaluations, and judges rarely deny such requests (Roesch & Golding, 1987).

The issue of CST is typically raised at a pretrial hearing but can be ordered by the judge at any time during the trial. At least one, and occasionally more than one, mental health professional—usually a psychiatrist, clinical psychologist, or social worker—is asked to serve as an evaluator. The evaluator (or evaluators) will usually interview the defendant, administer psychological tests, review the defendant's history, and write a report. That report will summarize the evaluator's findings and offer a conclusion about the defendant's ability to participate in his or her trial and cooperate with his or her attorney. The evaluation can be done on either an "inpatient" or an "outpatient" basis. Inpatient evaluations involve holding a defendant in a mental institution for a period usually ranging from a few days to a few weeks. An advantage of evaluations in institutional settings is that they provide multiple opportunities to observe the defendant's behavior over time. Outpatient evaluations are those that occur outside of mental institutions. They are usually conducted in jails or local clinics and are now much more common than inpatient evaluations. Usually, a written report is all that is required by

the court. But, it is not uncommon for a judge to ask a psychologist to testify about his or her findings.

It is estimated that somewhere between 25,000 and 39,000 criminal defendants are evaluated for CST every year (Zapf & Roesch, 2000). That is roughly 5% of all defendants. Of those defendants who are referred for a competence evaluation, only about 12% are actually found to be incompetent (Melton, Petrila, Poythress, & Slobogin, 1997). It is quite rare for a judge to reject the conclusion of an evaluator—especially if the defendant has been found incompetent. Research on defendants judged to be incompetent has revealed that such defendants tend to live on the fringes of society. As a group, they tend to have a history of treatment for mental illness, to show obvious symptoms of current mental illness, to have a history of drug abuse, and to be charged with a serious crime (about half are accused of violent crimes). They also tend to be socially isolated, unmarried, unemployed, poorly educated, and below average in intelligence (Nicholson & Kugler, 1991; Nestor, Daggett, Haycosck, & Price, 1999). If an evaluator reaches the conclusion that a defendant is incompetent, the report will usually contain recommendations for treatments that might restore the defendant's competence.

Prior to the 1972 decision in *Jackson v. Indiana,* defendants judged to be incompetent could be held in mental hospitals for indefinite periods. Indeed, just prior to that decision, researchers found that about half of people found incompetent spent the rest of their lives in mental institutions (McGarry, 1971). Hospital stays often exceeded the amount of time defendants would have served in prison if they had been found guilty of the crime. The *Jackson* ruling limited the period of confinement to the time necessary to determine if the defendant could be returned to competence in the "foreseeable future." As a result of the *Jackson* decision, most states now limit confinement to somewhere between four and 18 months. If, after that period, the defendant is still judged to be incompetent, an extension of several more months can be granted. Significant problems and uncertainties arise if, even after this extended hospital stay, the defendant has still not been restored to competence. Sometimes involuntary civil commitment proceedings are initiated. But to commit someone to an institution against his or her will using involuntary civil commitment laws is difficult. The person must either be shown to be "gravely disabled" (unable to care for him/herself and to provide for basic needs like food or shelter) or to be "imminently dangerous to self or others" (LaFond, 1996).

Even if an incompetent defendant is hospitalized, it is not certain that he or she will receive the kind of treatment that will restore competence. The quality of treatment at mental health facilities varies considerably and sometimes there is little emphasis on restoring legal competence. However, a study conducted by Alex Siegel and Amiran Elwork (1990) suggests that training specifically designed to explain courtroom rules and procedures can help to restore CST. Those researchers used two groups of defendants who had been judged to be incompetent and who were confined in psychiatric hospitals. The treatment group was given information about courtroom rules, personnel, and procedures by means of videotapes, lectures, and discussions. The control group received more standard forms of therapy. By the time the training ended, hospital staff judged 43% of the treatment group to be CST, but only 15% of the control group to be CST.

Occasionally lawyers may request competence evaluations for purely strategic reasons, that is, to gain some advantage. For example, a competence evaluation may be requested by either side to delay the trial. A competence evaluation may postpone trial for a few weeks and give attorneys more time to prepare. Also, prosecutors may request a competence evaluation to prevent the defendant from being released on bail, and either side may seek an evaluation to gain information about the feasibility of an insanity defense (Winick, 1996). Information gathered during a competency evaluation cannot be introduced at trial *unless* the defendant places his or her mental state into evidence, for example, by pleading not guilty by reason of insanity (*Estelle v. Smith,* 1981).

Judgments about competence may be especially sensitive when the defendant is under 18 years of age. One prominent forensic psychologist—Thomas Grisso—has argued that competence evaluations should be automatically triggered for juveniles if the defendant: is 12 years old or younger, has been previously diagnosed as mentally retarded or suffering from mental illness, has a learning disability, is of low or "borderline" intelligence, or if there are significant deficits in attention, memory, or understanding of reality (Grisso, 1997). If CST is controversial in a given case, two experts may be asked to perform evaluations and a formal competency hearing will be held. At such a hearing, both experts will be questioned by prosecutors and defenders.

An interesting issue related to competence was decided in the 1992 case of *Riggins v. Nevada.* David Riggins was mentally ill. While he was waiting to be tried for robbery and murder, he complained of hearing

voices and severe insomnia. A psychiatrist acting on behalf of the court prescribed an antipsychotic drug (Mellaril) and a relaxant (Dilantin). Riggins had suffered from similar problems in the past and had been treated before using these same medications. The drugs were successful in stabilizing Riggins's behavior and he was declared CST. However, because Riggins was relying on an insanity defense, he asked that he not be forced to take Mellaril during his trial. He argued that the drug made him unable to assist his defense lawyer and that the jury should be able to observe him in his unmedicated state—the state he was in when he committed the murder. The judge refused his request and the jury convicted him and sentenced him to death. However, on appeal, the U.S. Supreme Court ruled that forcing Riggins to take medication deprived him of due process. The ruling held that involuntary medication was only permissible to achieve essential state interests—such as a fair trial or safety of the defendant or others.

TESTS AND TECHNIQUES FOR EVALUATING CST

Because competence to stand trial refers to psychological states and mental capacities, it makes sense to consult clinical psychologists and other mental health professionals when trying to assess the competence of a particular defendant. But, because the law does not prescribe a particular method of evaluation, the specific assessment techniques used by a particular clinician tend to be a function of his or her training, orientation, experience, and sophistication. Up until the early 1970s, mental health professionals often attempted to measure CST through the use of techniques designed for other purposes. Then, beginning in 1971, researchers began to develop tests specifically designed to evaluate CST.

In 1971, researchers at the Harvard Laboratory of Community Psychiatry introduced the Competency Screening Test. People taking this test are asked to complete 22 sentence fragments such as, "When I go to court, the lawyer will _____" and "If the jury finds me guilty, I will _____." Responses are scored as "0" (incompetent), "1" (uncertain competence), or "2" (competent). One weakness of this early approach is that, because of the wide-open nature of the responses, significant training was required to interpret and score the responses of the person being examined (Lipsitt, Lelos, & McGarry, 1971). A second approach developed by the Harvard group (the Competency

Assessment Instrument) uses a systematic one-hour interview. The Competency Assessment Instrument was noteworthy for its attention to several components of CST including: the ability to communicate with an attorney; awareness of defenses that are realistically available; understanding of the roles played by people in the courtroom; understanding of the charges and their seriousness; understanding of the sequence and purpose of trial procedures; awareness of the likely outcome of the trial and the potential penalties if convicted; ability to inform the defense attorney of relevant facts and distortions in the testimony of prosecution witnesses; and the capacity to provide useful testimony on one's own behalf (if necessary).

Since the pioneering work of the Harvard Laboratory in the 1970s, several tests have been developed to improve the evaluation of competence. The Fitness Interview Test-Revised (FIT-R) was developed by researchers in Canada to assess both legal knowledge and psychopathology (Roesch, Zapf, Eaves, & Webster, 1998). The Computer-Assisted Determination of Competence to Proceed (CADCOMP) aims to provide a fuller assessment of a defendant's psychological functioning. A defendant's answers to 272 questions can be scored and distilled into a narrative report on competence by a computer program (Barnard et al., 1991). Because some studies have suggested that existing tests may have difficulty assessing mentally impaired defendants, Carol Everington (1990) devised a technique called the Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR). It uses both open-response and multiple-choice questions to assess basic legal requirements like the ability to assist defense counsel, and understanding of how a case moves through the criminal justice system.

The term "adjudicative competence" is often used to capture the various types of abilities needed to participate effectively in all stages of the legal process. In 1993, Richard Bonnie wrote an influential paper arguing that adjudicative competence consists of two underlying components. The first component—foundational competence—involves the capacity to assist counsel and is essential for ensuring the fairness, dignity, and accuracy of the criminal justice system. Foundational competence implies a basic understanding of the trial process as well as the capacity to provide a lawyer with information relevant to the trial. If a defendant is competent to assist counsel, then the second component—decisional competence—comes into play. This component has to do with the capacity to make informed, independent decisions. Based in

part on Bonnie's distinction, a national network of researchers (funded by the MacArthur Foundation) developed the MacArthur Structured Assessment of the Competencies of Criminal Defendants (MacSAC-CD). An unusual feature of this test is that most of its questions are structured around a hypothetical vignette involving a bar fight:

"Two men, Fred and Reggie, are playing pool at a bar and get into a fight. Fred hits Reggie with a pool stick. Reggie falls and hits his head on the floor so hard that he nearly dies" (Hoge et al., 1997). CST is assessed by presenting variants of this basic scenario and asking defendants to decide how Fred should respond to questions and assist his lawyer. If the defendant being evaluated can't answer a particular question correctly, he or she is told the correct answer and then asked more open-ended questions to see if the misunderstanding has been corrected. Following the open-ended questions, a few true-false questions are asked to further clarify which areas the defendant may not understand. Three abilities are assessed: understanding of the legal system, reasoning skills, and the defendant's appreciation of his or her own circumstances. Two versions of "Mac" are available. The 82-item MacSAC-CD takes about two hours and is used primarily for research purposes. The much shorter (22-item) MacArthur Competence Assessment Tool-Criminal Adjudication (MacCAT-CA) takes about 30 minutes and is designed to be used by clinicians who are often asked to make quick judgments about competence (Hoge et al., 1997).

Modern tests that focus on legal competence have several advantages over more general tests of psychological functioning. The newer, more focused techniques are able to assess understanding of specific legal issues and allow for efficient outpatient assessment of CST. Also, if the test is widely used, it can serve as a common frame of reference for professionals evaluating competence. In using such tests, many forensic psychologists have emphasized the importance of being guided by a "contextual" or "functional" approach when evaluating competence (Zapf & Roesch, 2000). Such an approach requires that evaluators keep in mind the specific demands of the particular legal case. For example, Stephen Golding and Ronald Roesch (1988) have argued that to be judged incompetent, a defendant must not only be severely disturbed:

> . . . it must be further demonstrated that such severe disturbance in *this* defendant, facing *these* charges, *in light of existing* evidence, anticipating the substantial effort of a *particular* attorney with a *relationship of*

> *known characteristics,* results in the defendant being unable to rationally assist the attorney or to comprehend the nature of the proceedings and their likely outcome (p. 79).

Sometimes psychologists or lawyers suspect that a defendant is faking incompetence to avoid going to trial. For example, a defendant who is facing a murder trial might claim to be suffering from amnesia. If that defendant really can't remember anything about the crime, he or she would have a very difficult time assisting his or her attorney. But some courts have held that because claims of amnesia may be fraudulent, severe memory loss alone does not mean that a defendant should be ruled incompetent (*Morrow v. Maryland,* 1982). The problem of faking mental illness or disability is known as "malingering." Specifically, malingering is the deliberate feigning of physical or psychological symptoms in order to gain something positive (e.g., an insurance payment or compensatory damages) or to avoid something negative (e.g., a long prison sentence). Malingering can be difficult to detect. Some psychological tests contain questions designed to expose malingering, and a few specific tests have been developed to help psychologists detect people who are faking their symptoms.

Just as it may be possible to fake incompetence, it may also be possible to fake insanity. One of the most extreme examples of malingering ever recorded involved a serial killer named Kenneth Bianchi. Over a period of five months in 1977 and 1978, Bianchi (who was dubbed the "Hillside Strangler") raped and strangled several young women and left their bodies on the hillsides above Los Angeles. When apprehended, Bianchi denied any involvement in the murders. However, while under hypnosis, his evil alter ego "Steve" surfaced and confessed to the murders. Two psychiatrists who examined Bianchi became convinced that he suffered from multiple personality disorder and that "Ken" was not aware of or responsible for "Steve's" horrible crimes. Eventually Bianchi exhibited a total of five separate personalities and his lawyers filed an insanity plea. It took an expert on hypnosis (Martin Orne) to discover that Bianchi was pretending to be hypnotized and consciously inventing multiple personalities (O'Brien, 1985). Bianchi changed his plea to "guilty" and was convicted of several murders in California and Washington.

THE INSANITY DEFENSE

Unlike competence, the concept of insanity refers to the criminal's state of mind *at the time the crime was committed.* Insanity is not a scientific concept used by modern psychologists. It is a legal judgment that is decided in court. Legal definitions of insanity are crafted not by psychologists or psychiatrists, but by legislators and judges. The label of "insanity" does not correspond to any established psychiatric diagnosis and many mental health professionals are deeply conflicted about being asked to decide whether or not a defendant was legally insane at the time the criminal act was committed.

Even people who clearly suffer from mental illness may not qualify as "insane" using the legal definition of insanity. Andrea Yates is a good example. There was ample evidence that Andrea Yates was psychotic. Following the birth of her first son, Noah, in 1994, Yates began to experience what she called "visions." Then, after the birth of her son Luke in 1999, the visions became stronger and more frequent. She had told psychologists that "there was a voice, then an image of the knife. I had a vision in my mind, get a knife, get a knife. . . . I had a vision of this person getting stabbed, and the after-effects" (Springer, 2002). The visions became so disturbing that, in 1999, Yates attempted to kill herself by swallowing more than 40 sleeping pills. On another occasion, she pressed the blade of a steak knife to her neck and threatened to cut her own throat before her husband managed to disarm her. Yates was diagnosed with postpartum depression with psychotic features. That is, she was severely depressed, her depression deepened following the birth of each child, she was plagued by feelings of overwhelming anxiety, and she was sometimes out of touch with reality. She had four stays in a psychiatric hospital because of severe psychological disturbance. Following a suicide attempt, Yates told a psychiatrist that, "I had a fear I would hurt somebody. . . . I thought it better to end my own life and prevent it" (Springer, 2002).

Andrea Yates was given a prescription for Zoloft, a powerful antidepressant. She improved, but not for long. She began staying in bed all day, she scratched four bald spots on her head, developed sores from picking at her nose, and scraped lines on her arms and legs with nails. She seldom spoke, even to her family, and psychiatrists described her as

"mute." Child Protective Services visited her home, conducted a brief investigation of the Yates family and concluded that the children were safe and adequately cared for. Russell Yates said that after the birth of Mary, their fifth child, the death of Andrea Yates's father "sent her spiraling down." She once attempted to scratch the number "666" (the sign of Satan) into her scalp, and sometimes she believed that cartoon characters were talking to her from the television programs she watched with her children. As she awaited trial, she could still hear Satan "growling" and she saw satanic images hidden in the walls of her jail cell (Roche, 2002). But, at trial, the crucial question was not whether Andrea Yates was mentally ill. Rather, in accordance with the legal definition of insanity used in many states, the crucial question was whether or not she knew the difference between right and wrong at the time she killed her five children.

THE EVOLUTION OF INSANITY LAW

To understand the evolution of the insanity defense, it is critical to appreciate two facts: First, the principle that people who commit crimes without full awareness should not be held fully responsible for their crimes can be traced back several centuries and is fundamental to most legal systems. The underlying logic is that it is immoral to convict and punish people who are not responsible for their criminal behavior. Second, to a much greater extent than other areas of criminal law, the laws surrounding insanity have been shaped and reshaped by sensational cases and public reaction to those cases.

As early as the Roman Empire, the law dictated that people found to be *non compos mentis*—without mastery of mind—should not be held blameworthy for their crimes. The modern form of "mastery of mind" is *mens rea,* or the "guilty mind" that must accompany wrongful behavior. Legal proceedings against a criminal defendant begin with the presumption that the defendant was sane and therefore responsible for his or her criminal acts. To be found guilty of murder, a killer must have been aware of the wrongfulness of the criminal behavior. Sometimes, a defendant's lack of awareness of "wrongfulness" is uncontroversial. For example, when a six-year-old finds his father's gun and shoots and kills a playmate, we recognize that he could not have fully understood the consequences of his actions. But other times—as in the case of Andrea

Yates—there may be considerable dispute about the defendant's state of mind at the time of the crime.

From the fourteenth through sixteenth centuries in England, a religiously inspired "good from evil" test was used. To be found guilty, the defendant had to understand the difference between good and evil. Because the capacity to freely choose evil behavior was "restrained in children, in fools, and in the witless who do not have reason whereby they can choose the good from the evil," the "witless" were sometimes found to be guiltless (Platt & Diamond, 1966). A significant shift took place in 1724. In the case of *Rex v. Arnold,* jurors were instructed to acquit the defendant (who had wounded a British lord in an assassination attempt) if they found him to be "totally deprived of his understanding and memory, and doth not know what he is doing, no more than a brute or a wild beast." This revised instruction meant that insanity had become less a moral failing (good versus evil) and more a cognitive failing—that is, a mental deficiency involving "understanding and memory." More than a century later, the case of *Regina v. Oxford* (in 1840) shifted the standard even further. In that case, it was held that, because of a "diseased mind," the defendant was "quite unaware of the nature, character, and consequences of the act he was committing" (p. 525).

THREE IMPORTANT CASES AND THEIR CONSEQUENCES

Most attempts to tinker with the insanity defense have occurred in a politically charged atmosphere. The three cases described below sparked important reforms in insanity law.

The McNaughton Case. Daniel McNaughton (sometimes spelled "M'Naghten") was tormented by paranoid delusions. He believed that people in the government were plotting to kill him. In 1843, he set out to kill the Prime Minister of England (Robert Peel) because he believed Mr. Peel was part of a conspiracy against him. By mistake, he shot and killed the Prime Minister's Secretary, Edward Drummond. At trial, nine medical experts testified that McNaughton was insane, and the jury found him not guilty by reason of insanity (NGRI) even though they were told that he would be sent to a psychiatric hospital instead of prison. He spent the rest of his life in Broadmoor insane asylum.

Queen Victoria was incensed by the sentence in the McNaughton case. She demanded that the House of Lords pass new laws to protect the public from "the wrath of madmen who could now kill with impunity" (Eule, 1978). The public was similarly displeased. Fifteen high court judges were directed to establish a new standard of legal insanity. The new rule—which came to be known as the McNaughton Rule—consisted of three components: (1) a presumption that defendants are sane and responsible for their crime; (2) a requirement that, at the moment of the crime, the accused must have been laboring "under a defect of reason" or "from disease of the mind;" and (3) a requirement that the defendant "did not know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong." The McNaughton Rule was eventually imported from English law into American law. It is sometimes referred to as a "cognitive test" of insanity because it emphasizes knowing and understanding whether an action is right or wrong.

But as many critics noted in the decades after the McNaughton Rule was established, cognition is only part of "insanity" and maybe not even the most important part. In an effort to capture the volitional aspect of insanity, some states added the term "irresistible impulse" to their definitions of insanity. Under this revised rule, a defendant could be acquitted if "his reasoning powers were so far dethroned by his diseased mental condition as to deprive him of willpower to resist the insane impulse to perpetrate the deed, though knowing it to be wrong" (*Smith v. United States,* 1929). Put differently, a mental disorder could produce an uncontrollable impulse to commit the offense, even if the defendant remained able to understand the nature of the offense and its wrongfulness. But the "volitional" amendment to the definition of insanity had a short life. The problem was that it was too hard to tell when an impulse was irresistible. That is, how could a jury decide whether the defendant *couldn't* resist the impulse or simply *didn't* resist the impulse? One attempt to clarify the revised definition was the "policeman at the elbow" test. It was suggested that the impulse had to be so overwhelming that the criminal would have committed the act even if a policeman stood beside him or her at the time of the crime. After much debate, the irresistible impulse standard fell away, leaving the McNaughton Rule largely intact.

The Durham Case. The second case to reshape the definition of insanity was not as sensational. It did not involve murder or a famous victim. Monte Durham was released from the U.S. Navy in 1945

because a psychiatric examination found him unfit to continue military service. After a suicide attempt two years later, he was committed to a psychiatric hospital where he remained for two months. His already disordered mental condition appeared to deteriorate even further during a prison sentence he served for car theft and writing bad checks. In 1951, he was arrested for breaking and entering an apartment. Despite being diagnosed several times as mentally ill, the trial judge refused to let Durham plead insanity. Durham was found guilty at trial but the U.S. Court of Appeals overturned his conviction in 1954.

Durham's initial conviction generated little controversy, but his appeal prompted a prominent judge to re-examine and reformulate the McNaughton Rule. Judge David Bazelon of the U.S. Court of Appeals reviewed previous court decisions, as well as the opinions of scientific experts. He concluded that the prevailing standard of legal insanity was obsolete and misguided. Judge Bazelon threw out Durham's conviction and ordered a new trial where a new standard of insanity would be used. According to this new rule—called the Durham standard—"an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect" (*Durham v. United States,* 1954). The more modern terms "mental disease or defect" inserted the notion of mental illness as a possible cause of criminal behavior. However, though most psychologists and psychiatrists welcomed the new standard, courts responded with suspicion or even hostility. Lawyers and judges feared that it shifted the balance too far—that it might lead jurors to attach too much weight to the testimony of mental health professionals. Verdicts might turn solely on expert testimony about whether or not the defendant suffered from a "mental disease."

In response to dissatisfaction with both the Durham and McNaughton rules, the American Law Institute (ALI), a committee of prominent legal scholars, proposed a revised standard: "A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law" (Model Penal Code, 1985). The ALI standard attempted to satisfy everyone—it included a McNaughton-like cognitive prong (inability to appreciate wrongfulness) and an irresistible impulse-like volitional prong (unable to conform his conduct). Much was made of other subtle changes in wording. The term "substantial capacity" was thought to allow greater flexibility in judging defendants, and

"appreciate" was thought to be better than the words "know" or "understand." The ALI standard enjoyed great success, being adopted by 26 states following the 1972 case of *United States v. Brawner.* A modified version was used in the federal courts.

The Hinkley Case. It was the ALI instruction that was read to the jury in the trial of John Hinkley—the third major case to reshape the insanity defense. John Hinkley, Jr. was a loner. In 1976, he dropped out of college at Texas Tech and set out for Hollywood in the hope of making it big in the music industry. During his time in California he became obsessed with the film *Taxi Driver* and one of the movie's stars, Jodie Foster. He traveled to Yale University, where Ms. Foster was a student. In a delusional attempt to reenact a scene from *Taxi Driver* and win the love of Ms. Foster, Hinkley attempted to assassinate then President Ronald Reagan. He shot and wounded four people, including the President. A videotape of the shootings was played and replayed on national television just after the assassination attempt and during Hinkley's 1983 trial. At trial, four psychological experts testified that Hinkley suffered from severe psychological disturbance. Psychologists testifying for the prosecution disputed these claims. A jury found Hinkley not guilty by reason of insanity.

For many Americans, the NGRI verdict in the Hinkley case seemed to epitomize all that was wrong with the insanity defense: Here was an obviously guilty (albeit disturbed) man whose crime was recorded on videotape. He had the presence of mind to stalk the President, purchase a handgun, and plan out the murder attempt. Yet he was able to avoid being held accountable for his actions because his wealthy parents bought him a high-priced lawyer and several psychological experts to testify on his behalf. At least that seems to be how the public saw it at the time. Of course, the real story was a bit more complicated. Even the prosecution experts had testified that Hinkley was plagued by a mental disorder of some kind. But the most important factor in Hinkley's acquittal was probably the judge's decision to use the federal standard of proof in the case. Instead of requiring the *defense* to prove that the defendant was insane at the time of the crime, the burden of proof was placed on the *prosecution* to prove (beyond a reasonable doubt) that the defendant was sane. This shift in the burden of proof probably had more to do with the NGRI verdict than the skill of Hinkley's lawyers or experts (Caplan, 1984).

Public outrage over the Hinkley verdict quickly translated into legislative action. The Insanity Defense Reform Act of 1984 turned back the clock on the insanity defense. The ALI standard was largely abandoned in response to changes in the law made in the aftermath of the Hinkley case. The Insanity Defense Reform Act required that there be a presumption of sanity and that defendants prove "by clear and convincing evidence" that they were insane at the time of the crime. In addition, the volitional prong was erased from the definition of insanity and experts were barred from giving "ultimate issue testimony" (also called "ultimate opinion testimony") about sanity. That is, although experts were still permitted to testify about a defendant's mental state, they would not be permitted to explicitly state their opinion about whether a defendant was sane at the time of the crime. The question of whether a defendant was legally insane at the time of the crime would be left to juries (Perlin, 1990). After months of hearings and tinkering by lawmakers, the insanity law that survived was little more than a slightly retooled version of the 160-year-old McNaughton Rule.

The matter of "ultimate issue" expert testimony remains controversial. It is worth noting that attempts to prevent psychological experts from offering ultimate opinion testimony may not be entirely practical. Several scholars have pointed out that, to be useful, experts must provide opinions that are relevant to the legal definition of insanity (Ogloff, Roberts, & Roesch, 1993). While an expert might be forbidden from using the words "sane" or "insane," lawyers will ask that same expert questions about the defendant's understanding of his or her crimes. Although the expert might avoid saying the forbidden words, any meaningful expert testimony is almost certain to reveal the expert's opinion on the issue of insanity. Indeed, in an experiment examining this issue, researchers found that even when experts avoided offering a conclusion about whether the defendant was insane, mock jurors mistakenly remembered that a conclusion had been offered (Fulero & Finkel, 1991). A potential solution to this dilemma, used in some states, is to permit experts to offer ultimate issue testimony, but to clearly instruct jurors that they may give such testimony as much weight or as little weight as they deem appropriate. This instruction makes explicit the role of jurors as the triers of fact.

There have also been attempts to "fix" the insanity defense by giving jurors alternatives to the NGRI verdict. The "guilty but mentally ill" (GBMI) verdict and the "diminished capacity" defense are attempts to

bypass the definitional morass of insanity. The GBMI verdict is permitted in 12 states, and is usually an additional alternative verdict to the three more standard options of guilty, not guilty, and NGRI. People who are found to be GBMI are sent to a mental hospital until judged to be sane, and are then transferred to prison to serve out the remainder of their sentence. However, a verdict of GBMI offers no guarantee that offenders will receive effective treatment for their mental disorders. The "diminished capacity" defense is also an attempt to circumvent legal definitions of insanity. A few states allow a defendant to plead diminished capacity if he or she lacks the capacity to "meaningfully premeditate the crime." Milder than insanity, diminished capacity might stem from a temporary mental condition that prevented a defendant from clearly considering his or her actions.

Like the insanity defense, the diminished capacity defense has been shaped by sensational trials. In 1978, Dan White, a former police officer and city supervisor, loaded his handgun and climbed through a window at San Francisco City Hall. He shot Mayor George Moscone several times, reloaded, and then killed Harvey Milk, his former colleague on the board of supervisors. Part of White's defense at trial was that his mental state was badly impaired by a deep depression exacerbated by his heavy intake of junk food. The press dubbed this the "Twinkie defense." The jury accepted White's diminished capacity defense and found him guilty of manslaughter instead of murder. His trial led to a ballot proposition in California to abolish the diminished capacity defense. That proposition passed by a wide margin in 1982. Dan White spent less than five years in prison, but killed himself in 1985.

TESTS AND TECHNIQUES FOR ASSESSING INSANITY

Several specialized tests have been developed to help clinicians assess whether offenders were aware of and responsible for their crimes. One such test, the Mental Screening Evaluation (MSE), attempts to screen out defendants whose crimes were not influenced by a significant mental disorder (Slobogin, Melton, & Showalter, 1984). If the MSE detects the presence of a mental abnormality that *may* have contributed to the crime, the defendant is referred for a full evaluation. The MSE requires that examiners gather and evaluate information about the

defendant's history of mental disorders, the offense itself, and the defendant's current mental state. While the MSE forces the examiner to focus on issues that are relevant to an insanity or diminished capacity defense, it has been criticized for lacking a clear scoring system and strict procedures for administering the test (Nicholson, 1999).

A more widely used alternative is called the Rogers Criminal Responsibility Assessment Scales (R-CRAS). The R-CRAS attempts to translate the legal standards of insanity into components such as the ability to control one's thoughts and the ability to control one's behavior. There are a total of 25 items, and each item is rated on a numerical scale. For example, one item directs the examiner to indicate whether the defendant was suffering from "delusions at the time of the alleged crime." The six possible responses are: (0) no information, (1) delusions absent, (2) suspected delusions (e.g., supported only by questionable self-report), (3) definite delusions that contributed to, but were not the predominant force in, the commission of the alleged crime, and (4) definite controlling delusions, on the basis of which the alleged crime was committed" (Rogers & Ewing, 1992). Judgments on each of the 25 items are based on an in-depth interview with the defendant, as well as a review of relevant documents such as mental health records and police reports. A clear advantage of the R-CRAS is that it guides and organizes clinical judgments about whether a defendant is criminally responsible for his or her crimes. It forces evaluators to make their judgments explicit and to attend to several aspects of the defendant's behavior before making a global decision. Although research supporting use of the R-CRAS is not yet persuasive, the test does appear to be a significant improvement over unstructured clinical interviews (Nicholson, 1999).

HOW JURORS DEFINE INSANITY

Although legal scholars and legislators have agonized about the difference between words such as "know," "understand," or "appreciate," and have argued long and vigorously about whether insanity should be defined as an irresistible impulse or the ability to distinguish between right and wrong, the important question is how actual juries interpret these definitions to reach a verdict. We can look at each new and presumably improved definition of insanity as a loose hypothesis. When lawyers and legislators attempt to craft new definitions of insanity, they

are predicting that changing a few words or a key phrase will cause jurors to consider different factors and reach "better" decisions. Although these loose hypotheses are seldom tested, they are testable. As noted above, most revisions in the definitions of insanity were intended to reduce the number of NGRI verdicts.

Rita Simon (1967) was one of the first researchers to investigate how jurors interpret different definitions of insanity. Using the same case, she had 10 juries deliberate using the McNaughton instructions and another 10 juries deliberate using the Durham instructions. Her findings were straightforward: The two instructions made no significant difference in verdicts. That is, the two instructions that legal scholars had regarded as dramatically different had no impact on verdicts. But why? Simon's main conclusion, based on her analysis of the audiotaped deliberations, was that jurors took the formal language presented in the insanity instructions and translated that language into concepts and meanings that were consistent with their own understanding of insanity and its effects. One of the jurors in the study explained the defendant's behavior this way: "He knew what he was doing in the sense that he knew how to get into the house, where to find the bedroom, what articles he wanted to take, but he still didn't know the full significance of what he was doing" (Simon, 1967).

In a more recent series of experiments designed to explore how jurors interpret the insanity defense, Norman Finkel and his colleagues presented groups of mock jurors with the full range of insanity instructions—including the McNaughton test, the irresistible impulse test, the Durham test, the ALI test, and even no test at all (jurors were instructed to simply use their own best judgment). Their findings echoed earlier findings: The content of the insanity instructions didn't seem to matter. The researchers reached the following conclusion:

> Tests with markedly different criteria failed to produce discriminably different verdicts, and failed to produce verdicts discriminably different from those produced by a no-test condition . . . jurors do not ignore instructions but they construe instructions, employing their constructs of "sane" or "insane" to determine their verdict, despite the working of the legal test given to them (Finkel, 1995, p. 282).

In explaining the ineffectiveness of insanity instructions as a means of guiding jury verdicts, Finkel does not lay the blame on jurors. It is not that jurors are too dense to understand legal subtleties, or that they are

careless, or that they are intent on ignoring instructions. Indeed, mock jurors made many distinctions. They made distinctions about the types of affliction the defendant was suffering from (e.g., epilepsy or stress disorder or schizophrenia), about issues of negligence (e.g., whether a defendant should be held accountable for deciding to stop taking the medication that reduced her paranoia), and about the sort of punishment that defendants should receive (i.e., hospitalization or prison). Jurors simply failed to respond in the ways that judges and legislators had predicted that they would respond. Instead of interpreting different instructions differently, Finkel argues that jurors use their preexisting commonsense notions of insanity to inform and interpret their judgments of a defendant's responsibility and intentions. Consequently, their reasoning about the mental condition of the defendant is not constrained by the narrow bounds of legal definitions. Their reasoning is more complex and contextual than the reasoning embodied in the insanity instructions. Jurors look beyond limited notions such as "irresistible impulse" or the capacity to "distinguish right from wrong" to ". . . an essence that lies in the defendant's capacity to make responsible choices. They also consider and weigh a dimension akin to negligence or recklessness that has been notably absent or conflated in insanity law: culpability for bringing about one's disability of mind" (Finkel, 1995, p. 297).

Based on this research, Finkel has developed an alternative test of insanity that takes into account how jurors actually make decisions. This alternative test requires juries to answer a series of questions about behavior, state of mind, and culpability. First, jurors are asked to decide whether the defendant's actions caused the harm. Next, they must determine whether the defendant was "at the moment of the act, suffering from a disability of mind that played a significant role in the defendant's criminal behavior." If the defendant's mental disability is judged to have played a significant role, jurors are then asked to decide if the disability was partial or total, and whether the defendant was "culpable to some degree for bringing about the disability." Finally, the culpability is rated as partial or total. Using this more systematic scheme, a NGRI verdict is only possible if the defendant is judged to have a total disability of mind and is not culpable for creating that disability (Finkel, 1995).

THE LARGER CONTEXT OF INSANITY LAWS

Debate about the insanity defense often occurs in the overheated atmosphere created by a sensational case like McNaughton or Hinkley. During such times, politicians have denounced the insanity defense in colorful terms. It has been called "a rich man's defense" that "pampers criminals" and a means of providing a "safe harbor for criminals who bamboozle a jury." Further, it has been claimed that trials involving the insanity defense are often "protracted testimonial extravaganzas pitting high-priced prosecution experts against equally high-priced defense experts" (Perlin, 1994, p.16). Former Attorneys General have said that "there must be an end to the doctrine that allows so many persons to commit crimes of violence, to use confusing procedures to their own advantage, and then have the door opened for them to return to the society they victimized." It has also been argued that abolishing the insanity defense will "rid the streets of some of the most dangerous people that are out there, that are committing a disproportionate number of crimes" (Perlin, 1994, p. 20). The gist of these declarations by politicians is clear: Unscrupulous lawyers are frequently using the insanity defense as a convenient loophole to help violent criminals escape their rightful punishment. Furthermore, gullible, unsophisticated juries can be easily convinced to find a defendant NGRI through the use of "hired gun" psychologists. Many of these beliefs are shared by the public at large.

Scholars have noted that much of what the public believes about the use of the insanity defense is simply mistaken. These scholars have described several myths surrounding the insanity defense. One myth is that the insanity defense is overused. In fact, the best available data suggest that it is used in fewer than 1% of all felony cases, and that, when it is used, it fails 74% of the time (Silver, Cirincione, & Steadman, 1994). Also, although surveys indicate that the public believes that NGRI is most commonly used in murder cases, less than a third of insanity pleas involve the death of a victim. Further, an insanity defense is no more likely to be successful in a murder case than in any other kind of criminal case. Contrary to prevailing views, insanity is not a low-risk strategy that can be easily employed to avoid guilt and gain a lighter sentence. Indeed, when defendants who plead NGRI are found guilty, they end up serving *longer* sentences than people convicted of similar crimes who do not use the insanity defense (Perlin, 1996). When defendants are

found NGRI, they end up spending nearly twice as much time in custody as defendants found guilty of the same type of crime. The difference is that for defendants found NGRI, the time is usually served in locked psychiatric hospitals instead of prisons.

Other false beliefs concern the psychological experts who must assess and testify about insanity. It is often asserted that these experts can't agree on whether a particular defendant qualifies as insane. However, in a study of defendants found NGRI over an eight-year period, there was agreement among psychological experts that the defendant was schizophrenic in 92% of cases. Indeed, most of the defendants found NGRI have a significant history of hospitalization in psychiatric facilities. Studies conducted in several states reveal that prosecutors agreed to an insanity verdict in 70% to 80% of cases in which the issue was raised (Perlin, 1996).

IN CONCLUSION

Jurors who must decide insanity cases and psychological experts who testify in such cases are asked to make an all-or-nothing, black-or-white judgment: Was the defendant legally insane or not? But jurors, like experts, want to make broader, more differentiated judgments about a defendant's mental condition and to think about degrees of impairment and degrees of responsibility. In the trial of Andrea Yates, jurors were asked to reach their verdict based on a narrow cognitive-prong-only definition of insanity. The only question was whether Yates knew the difference between right and wrong at the time she murdered her children. The prosecutor argued that, "She knew this was an illegal thing. . . . It was a sin. She knew it was wrong" (Associated Press, 2002). A psychiatrist testifying for the defense said that Mrs. Yates did not know the difference between right and wrong and that she felt she was helping her children by killing them. He testified that Yates believed she was possessed by Satan and that, "She believed that, by killing her children, she not only sent them to heaven, but saved them from an eternity in the fires of hell" (CNN, 2002).

The Yates trial highlighted three issues that continue to animate the debate over the insanity defense. The first is the conflict between the legal system's use of the old-fashioned term "insanity" with its pinched meaning and scientific psychology's use of the modern term "mental ill-

ness" with its more capacious meaning. The limited definition of insanity favored by the legal system survives, in part, because it restricts the possibility of a not-guilty verdict. A second issue concerns public uncertainty about what happens to insane defendants after trial. In the mind of the public, a central problem with use of the insanity defense is what to do with a defendant who is found NGRI. Until the myth that people found NGRI will go free or "get off easy" is dispelled, it may be difficult to move too far beyond the 160-year-old McNaughton Rule. Third, continuing tension between the desire to provide treatment for people who are mentally disturbed and the desire to punish those same people when they commit terrible crimes will continue to shape debate about the insanity defense.

Readings to Supplement This Chapter

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