Commentary on "The Mental State at the Time of the Offense Measure": Should We Ever Screen for Insanity?

William E. Foote, PhD

J Am Acad Psychiatry Law 28:33–7, 2000

Rogers and Shuman[1] raised a number of issues in their review of the Mental State at the Time of the Offense Measure or, as they refer to it, the MSE-Offense (MSE). The MSE was designed to screen defendants during assessments of criminal responsibility:

> . . . the format is designed to enable evaluators to determine, in the course of a brief interview, whether a person's actions at the time of the alleged offense were affected by "significant mental abnormality" (a term to be defined later). As the name of the format implies, it acts merely as a screening device: if the evaluators believe the defendant clearly did not have a significant mental abnormality at the time of the offense, they are supposed to conclude that no further evaluation of the defendant is required; if they believe he/she may have been suffering from such an abnormality, they should so indicate and report whether further evaluation is necessary to reach a definitive conclusion on the issue.[2]

Rogers and Shuman note that no insanity determination is "obvious" because the assessment of insanity is almost always difficult. This article will examine whether it is appropriate to "screen" for criminal responsibility or insanity determinations. A determination in this regard would render moot the issue addressed by the Rogers and Shuman paper. If it is never appropriate to screen for insanity, then a professional should not utilize any method purporting to address that task, no matter how practical, reliable, or valid. To explore the question, I will begin with a comparison of screening techniques used in competency and insanity evaluations. Next, I will examine why insanity evaluations are inherently complex and difficult. Finally, I will review the elements necessary to conduct an adequate insanity evaluation.

Competency Screening

A number of authorities have argued that it is appropriate to screen competency to stand trial or competency to proceed.[3–7] This initial filtering process would result in a saving of professional time and expense because these evaluations often occur in hospitals that require a protracted inpatient stay. Several aspects of evaluating competency would make a screening method practical. First, these evaluations assess legal capacities that are either contemporaneous or prospective. That is, the evaluation centers on the defendant's ability to function in a trial setting at a time proximate to the evaluation. Such assessments are almost always simpler, as will be discussed below.

Second, competency assessments address issues of function: are the capacities of the defendant sufficient to the demands of the legal system?[8] To a large extent, diagnosis, personal history, and even most psychological test scores are irrelevant to this determination. Many examiners will screen for malingering to rule out distortion of the examination results.[9] However, the forensic examiner need not employ

Dr. Foote is in independent practice as a forensic psychologist in Albuquerque and is a member of the adjunct faculty at the University of New Mexico School of Law. Address correspondence to: William E. Foote, PhD, 215 Gold SW, Suite 202, Albuquerque, NM 87102.

extensive evaluative procedures to determine the defendant's capacities to understand his legal situation, to reason through decisions commonly encountered in a trial, and to appreciate how the legal system applies to that defendant's case. These are the domains assessed by the recently developed MacArthur Competence Assessment Tool–Criminal Adjudication, which holds great promise as a psychometrically robust method of assessing adjudicative competence.[10, 11]

The Complexity of Insanity Determinations

In contrast, an examination to assess a defendant's criminal responsibility at the time of the offense is a more complex and error-fraught enterprise. This complexity arises from a number of sources. First, criminal responsibility evaluations address a psycholegal phenomenon that has a low base rate. Second, the evaluations are retrospective. Third, the evaluations require the application of a complex legal framework. For all of these reasons, the assessment of criminal responsibility must be thorough and thoughtful and should bring to bear the best tools that mental health professionals may employ.

Low Base Rate

The public and many state legislators believe that the insanity plea is a frequently used and largely successful trial tactic.[12] However, insanity adjudications are quite rare. In a study reviewing 586,063 felony indictments from California, Georgia, Montana, and New York,[12] researchers determined that less than one percent (5,302) of these defendants resorted to the use of the insanity plea. Of these, only 1,375 (.23%) of the indicted defendants were actually acquitted on the basis of lacking criminal responsibility at the time of the offense. These figures are very close to data generated in other research.[13, 14] In assessments using the Rogers Criminal Responsibility Assessment Scales (RCRAS), Rogers and Shuman[15] found that of 413 defendants referred for criminal responsibility assessments, about one-fourth (23.5%) were determined by the clinician to be insane.

The assessment of a phenomenon with a low base rate mandates that the methods used in the process must possess a high level of accuracy.[16] By their very nature, screening measures inherently have some degree of inaccuracy; most are designed to carry a low false negative rate and a high false positive rate. As with the MSE,[2, 17] the cost of a high false positive rate (e.g., determinations that a defendant is insane when he is not) would be an unnecessary referral to a subsequent examiner of a defendant who will not prove to be insane. Clearly, however, a false negative (e.g., a determination that an insane defendant *is* sane) would result in the premature ending of a possibly (though not probably) effective defense strategy. Given the stakes of these evaluations, I would argue that any method resulting in a false negative rate greater than zero would be unacceptable.

Insanity Evaluations Are Retrospective

Rogers and Shuman[1] as well as Golding and Roesch[18] noted that professionals evaluating the defendant's criminal responsibility must contend with the fact that most sanity evaluations occur weeks, months, or even years following the actual offense. This delay occurs for a number of reasons. First, approximately 40 percent of those who plead insanity are found unfit for trial.[19] Following a finding of unfitness, the defendant is usually committed to a forensic hospital for treatment to restore competence. The duration of this treatment varies, but it may last several years. Second, because of the complexity of potential insanity cases, the counsel for a possibly insane defendant may spend considerable time investigating the case before referring the defendant to a mental health professional.

This delay in evaluation further complicates an already complex evaluation picture. The condition of the defendant may change considerably in the interval between the offense and the evaluation. While a worsening of the defendant's condition could occur because of the stresses of incarceration,[19] it is more often the case that the relative safety of jail, the stability of routine, and the provision of mental health services, including medications, result in an improvement of the defendant's condition.

This improvement has several adverse effects upon the accuracy of insanity evaluations. When assessed later, the defendant is no longer in a mental state comparable with his or her mental state at the time of the offense. This change in mental state makes the assessment of ongoing mental disorder more difficult because the more florid symptoms of the defendant's disorder may have resolved. Also, the assessment of the impact of the disorder on the client's ability to make critical distinctions and decisions is hindered.

A less disoriented, confused, and irrational defendant may have difficulty reconstructing his state of mind at the time of the offense.[19]

Also, "no relatively neutral record of his or her pretreatment behavioral, perceptual, cognitive, affective and judgmental capacities at the time of the offense will exist"[19] (p. 428). Police and correctional personnel may have little interest in preserving data concerning the presence of symptoms of serious mental disorder and even less investment in relating these symptoms to the defendant's actions at the time of the offense. Most assessments of competency to stand trial do not include gathering data on issues directly germane to the assessment of criminal responsibility (but see Golding *et al.*[20]). Thus, the mental health professional attempting an insanity evaluation must often rely upon data that are incomplete or irrelevant.

Insanity Evaluations Are Inherently Complex

As Rogers and Shuman[1] noted, the evaluator must also contend with ". . . the retrospective application of a multifaceted insanity standard." Many writers have observed that insanity standards not only differ considerably across legal jurisdictions[8, 12, 21, 22] but also may be subject to variable interpretation within the same jurisdiction.[23] Most existing insanity standards require the presence of a mental disorder as a prerequisite (or threshold) for the consideration of other issues.[24]

While available assessment techniques may accurately address the contemporaneous assessment of mental states,[25] the assessment of past mental states is much more difficult. As Grisso[26] noted, ". . . we have not yet demonstrated our ability even to make these retrospective inferences reliably and validly, and we have not developed specialized data collection methods that will improve our abilities to do so" (p. 98).

Even if the mental health professional can accurately assess the defendant's past mental state, the examiner must then determine whether the defendant was aware of the wrongfulness of his or her conduct or whether the defendant knew what he or she was doing at the time of the offense or whether the defendant was able to control his or her behavior at the time of the offense. Just translating these legal and moral standards into psychological terms can be a formidable task.[18, 24, 27, 28] Relating the psychological constructs related to insanity to a pattern of observable behavior and reported subjective emotional and cognitive states is even more daunting.[8]

The Minimal Criminal Responsibility Evaluation

If screening for insanity at the time of the offense is problematic, then a full evaluation must surely be more comprehensive and complete. Grisso[8] outlined seven types of data that should be gathered as part of a criminal responsibility evaluation. These begin with the defendant's account of the offense. While the defendant may have a number of reasons (as noted above) to forget or naturally distort the account, it is still essential to obtain the defendant's perspective. Next, the examiner observes the defendant's behavior and symptoms during the assessment. Although the defendant's condition may have changed since the time of the offense, chronic mental illnesses such as schizophrenia may be evident in observable verbal or motor behavior. The examiner can gain additional perspectives by reviewing others' reports of behaviors. Documentary sources such as witness interviews or police reports may contain information concerning the defendant's behavior at the time of the alleged offense. Additionally, treating mental health professionals, family members, neighbors, clergy, and other "collateral sources" may add substantially to a comprehensive picture of the defendant before, during, and after the offense.[29] Gathering a history of the defendant's life as well as other historical data (school, medical, mental health, military, employment, jail, or criminal records) can add substantially to an understanding of the course of the defendant's condition. A review of physical evidence gathered by the police may allow for a cross-validation of the defendant's account of the offense. Integration of psychological test data can add substantially to the accuracy of the diagnostic and inferential process. Borum and Grisso[30] conducted a survey of forensic psychologists and psychiatrists and noted that 68 percent of the former and 61 percent of the latter viewed the use of psychological testing as either "essential" or "recommended" as part of a criminal responsibility evaluation. Grisso[8] also recommended that the examining professional review empirical research on the issue being evaluated. This database (even more important in the era of *Daubert*)[31] can provide a link between the observed and measured behaviors and the legal constructs relevant to the case.

In addition, any assessment of criminal responsibility must include measures of malingering. While some psychological tests include malingering measures,[32, 33]

direct measures of symptom feigning, such as the Structured Interview of Reported Symptoms (SIRS),[34] or measures of inadequate effort, such as the Test of Memory Malingering (TOMM),[35] have been recommended for all forensic evaluations.

The spirited controversy between MSE and RCRAS advocates should not overshadow the utility of a structured method for assessing criminal responsibility. Less impassioned observers[5,26] have commented that the use of a structured technique is preferable to the use of clinical opinion based upon nonstandardized methods. This utility has not gone unnoticed. Some 78 percent of psychologists who use forensic instruments reported using the RCRAS as part of an assessment of criminal responsibility.[30]

Conclusion

While Rogers and Shuman[1] were not the first to examine the suitability of the MSE for use as a criminal responsibility assessment tool,[5, 8, 29] the issue of whether it is ever appropriate to screen for insanity has been discussed only in passing. Because of the relative rarity of insane defendants, the complexity of retrospective diagnosis, and the complications involved in applying a sometimes elusive legal standard, the assessment of criminal responsibility requires all the tools that psychologists and psychiatrists can bring to bear on the process. Most forensic professionals recognize the high stakes of their work in the criminal justice system. In many cases, the accuracy and fairness of the evaluation process may have a profound impact on the liberty or even the life of the defendant and the receipt of justice for crime victims and their families.

Grisso[8] addressed the screening issue from a broad perspective as well. He noted: "A screening system of any type, though, might meet with opposition from some defense attorneys. One could argue that regardless of the empirical validity of the screening instrument, the principles of due process or equal protection are violated when the defendant is not provided the benefit of a full or comprehensive evaluation, especially when it is provided for some defendants and not for others" (p. 176).

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