Commentary: Competence Assessment Practices in England and Australia Versus the United States

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The adversarial process cannot even begin until the accused enters a meaningful plea. In medieval times those accused of offenses against the Crown could avoid confiscation of their property, if not save their lives, by refusing to enter a plea. If they refused to plead, the accused could be starved or literally pressed for an answer by the placement of increasingly heavy weights onto his chest until a plea was entered or he was crushed.[1,2]

The specific criteria for unfitness to plead emerged in England during the 19th century in the form of case law. The case of *R. v. Frith*[3] established a general commitment to procedural fairness to the effect that accused individuals must be able to understand and participate in criminal proceedings against them. This was further developed in the 1831 trial of Ester Dyson (as reported by Walker in 1968)[2] a deaf woman who killed her illegitimate child. This decision was in its turn further clarified in *R. v. Pritchard*,[4] which continues to form the basis of the common law criteria for fitness, although the procedures and outcomes pertaining to findings of unfitness are now defined by legislation.[5]

In the United States, a somewhat similar course was followed with regard to what became known as competency to stand trial. Influential decisions in the 19th century were superseded, not by legislation but by Supreme Court decisions beginning with *Dusky v. U.S.*[6] and proceeding through *Pate v. Robinson*[7] and *Drope v. Missouri*.[8]

In Australia, the common law of England and Wales was gradually modified in a number of local decisions, the most influential of which was *R. v. Presser*.[9] In the past few years, several states have introduced legislation governing both the criteria and procedures for fitness to stand trial (e.g., Ref. 10). The different historical routes to establishing criteria for competency and fitness have produced differences in both the form and the content of the procedures used to establish these matters.

In the United States, the emphasis has been on what are regarded as the two main components of competency, the cognitive capacity to comprehend relevant legal concepts and procedures, and the volitional element of being able to use such information appropriately in the legal environment to assist in one's defense and advance one's own case.[11] This approach emphasizes broad mental capacities of which the competencies in the legal arena are specific instances. In practice, it often leads to a requirement that the accused be able to acquire relatively detailed knowledge about the judicial process and its relevance to his own defense. I was surprised when visiting a forensic hospital in the United States to find that patients awaiting competency hearings were receiving quite detailed lessons on court procedures and were even provided the opportunity to participate in mock trials in a fully equipped stage set of a court. In England and the commonwealth countries such as Australia, the criteria for fitness are expressed in terms of narrow and specific abilities rather than in broad capacities. For example the specific criteria for fitness to plead are laid down in the State of Victoria's legislation as:

1. Understanding of the nature of the charge
2. Ability to enter a plea
3. Ability to understand the nature of the trial and follow its course

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4. Ability to understand the substantial effect of any evidence
5. Ability to challenge jurors or the jury
6. Ability to give instructions to their legal practitioner

The standard of fitness both in England and the Australian States is in practice set at the level of a basic understanding of court procedures. Thus, knowing that a plea of guilty amounts to the defendant's agreeing he or she committed the crime, and that a plea of not guilty amounts to denying the offense, is sufficient. Similarly, a rough notion of the role of judge, jury, and counsel is usually considered adequate. Defendants' perception of the judge's role (e.g., "the one in charge," "the umpire," or "the chap who sentences you") would often be considered sufficient for the defendant to be deemed fit in this area of ability.

The different approaches are not simply reflections of separate histories but in part reflect a pragmatic adaptation to the realities of findings respectively of unfitness or incompetency in the different jurisdictions. A finding of unfitness, at least until recently, was little short of disastrous in British or Australian jurisdictions. In my own State of Victoria, it led to detention without limit of time at what was known archaically as the governor's pleasure. Detention took place either in prison or a secure hospital, and, until 1992, it was almost always in prison. An effective life sentence had few appeals, particularly after the abolition of the death penalty. Defense counsels and most courts would go to great lengths to avoid a finding of unfitness in all except the most extreme circumstances. Though the implications for a finding of unfitness are now far less dire, the defense bar continues to treat the issue with great caution. In the United States, in contrast, a finding of incompetency may well have considerable advantages for an accused, and the issue therefore becomes a matter of lively debate in the adversarial process. In the United States, seeking advantage through an incompetency finding and seeking to avoid giving that advantage without proper justification drive a far more scrupulous examination of the relevant issues.

Dr. Akinkunmi's excellent study of the use of the MacArthur Competence Assessment Tool in an English context is therefore of particular interest. The MacArthur instrument was developed to test the broad capacities relevant to the U.S. approach, not the specific and limited abilities of the English one. That the two approaches appear to have been in broad agreement is therefore, at first glance, surprising. Care must be taken, however, in interpreting Dr Akinkunmi's data. He does not compare scores on the MacArthur instrument that would suggest incompetence in a U.S. jurisdiction with the scores of those deemed unfit in an English context. What the article shows is that those deemed unfit by an English psychiatrist also have significantly higher scores on the MacArthur instrument. That is, specific difficulties with the narrow abilities demanded by English law are related to the broader capacities that interest U.S. jurists.

Dr. Akinkunmi concludes that these data represent "an important step toward the goal of creating objective methods of assessing fitness to plead in the United Kingdom." If only different histories and different social realities could so easily be overcome. This article may have gone some way toward suggesting fitness and competence are not chalk and cheese, but not that the differences can be ignored. English and Australian law already have specific and relatively objective criteria, even if they are *ad hoc* and without much basis in modern psychology. It is the United States that has to struggle with wide and ill-defined issues of capacities, which then have to be related to specific performances. The current English enthusiasm for importing North American risk-assessment instruments with little concern for their applicability to, or even standardization on, local populations may, however, stretch to trying to convert fitness into competency. As an alternative, perhaps the U.S. Supreme Court might like to consider introducing the simpler and more pragmatic approach to fitness developed in the English courts and save everyone a lot of box ticking, form filling, and unproductive agonizing.

References

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