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Should a Personality Disorder Qualify as a Mental Disease in Insanity Adjudication?

Richard J. Bonnie

In his accompanying article,¹ Dr. Kinscherff has convincingly demonstrated why a categorical exclusion of personality disorders from the definition of “mental disease” in insanity defense adjudication is arbitrary, both conceptually and clinically. He explains his position in the context of a vignette involving a hypothetical defendant, Wilhelmina Sykes, charged with ramming her car into another car obstructing her path, causing serious injury to its driver.² Dr. Kinscherff correctly points out that the determinative issue in applying the insanity defense in any case, including the hypothetical case involving Ms. Sykes, is whether the defendant experienced a legally relevant functional impairment at the time of the offense. In many states — and in the hypothetical jurisdiction in which Ms. Sykes is being prosecuted — the relevant functional impairments are those that could have affected her ability “to appreciate the wrongfulness of her conduct” or “to conform her conduct to the requirements of the law.”³ In the vocabulary of criminal responsibility, these are known, respectively, as the “cognitive” and “volitional” prongs of the defense. As he notes, the proper ruling by the court in Ms. Sykes’ case should turn not on the diagnostic label, but rather on what the expert witness was prepared to say regarding Ms. Sykes’ mental and emotional functioning at the time of the offense. Since the case description focuses solely on the expert’s testimony regarding the diagnosis, its legal sufficiency cannot be assessed.

But let us dig a little more deeply. Suppose that the state law in Ms. Sykes’ case does not recognize the so-called volitional prong of the defense, and recognizes only the cognitive prong. (Insanity “tests” in about half the states and in the federal courts do not include a volitional prong.) The only question in that situation would be whether she was able to “know the nature and quality” of her act or “to know that it was wrong,” or, in the more modern formulation, whether she was unable “to appreciate the wrongfulness of her conduct.” As traditionally understood and applied in these jurisdictions, the insanity defense focuses on delusions and other symptoms that affect the person’s grasp of reality and can impair their ability to exercise rational control over their behavior. In general, there are only a handful of conditions associated with impairments of reality-testing, such as schizophrenia, bipolar disorder, or major depression. However, as Dr. Kinscherff observes, it is the symptoms and resulting functional impairments that are most important, not the diag-

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nostic label and classification. In Ms. Sykes' case, for example, a person with a borderline personality disorder *could* have a psychotic episode that might affect her ability to appreciate the nature and consequences of the conduct, and that might be found by the judge or jury to have made her unable at the time of the offense to "appreciate the wrongfulness" of her conduct. For example, a person with a borderline personality disorder might experience transient stress-related paranoid ideation or might have a dissociative episode during which her conscious grasp of reality is suspended.

If the expert testimony in Ms. Sykes' case were along those lines, it should be admitted in support of the insanity claim. For this reason, a categorical exclusion of evidence of a defendant's borderline personality disorder without first considering the evidence of functional impairment would be unfair and arbitrary. In a few jurisdictions (California and Oregon,

gling with a fear of losing her husband and became angry and frantically fearful about being abandoned. Impulsive and 'hyper-reactive' behavior commonly occurs in such stressful circumstances, particularly when rejection or abandonment is feared. A hallmark feature of the condition is intense anger, sometimes directed toward oneself (manifested by suicidal gestures or self-mutilation) or, as happened here, toward others."

This sort of formulation essentially offers a description of Ms. Sykes' distinctive personality traits and behavior patterns and an account of how those traits and behavior patterns might "explain" her disordered and poorly controlled behavior at the time of the offense. A thorough expert witness would also point out the probable genetic underpinnings of the disorder. At the end of the explanation, the expert would be expected to tack on the conclusion that the defend-

ant was, by virtue of her mental disorder, "unable to appreciate the wrongfulness of her conduct." In this situation, it would be the role and responsibility of the trial judge to exclude the evidence because nothing in this presentation supports a finding that the defendant was unable to appreciate the wrongfulness of her behavior at the time of the offense as a result of her mental disorder. She may not have thought about whether her behavior was right

In a jurisdiction that recognizes only a "cognitive" test of insanity (as is true in most states, as well as in the federal courts), the problem faced by the defense, is not that the Ms. Sykes' diagnosis does not count, but rather that her emotional dysregulation, and deficits in behavior control are not legally relevant to her culpability under the test of insanity.

for example), the insanity statutes specifically exclude all personality disorders from the definition of mental disease. If testimony of the kind I just described were offered in support of an insanity claim, I suspect that the trial courts in these states would ignore the statutory exclusion, admitting the testimony and allowing the defense to go forward, by emphasizing that the dissociative episode itself established the necessary "mental disease" for purposes of the insanity defense.

However, nothing in the case vignette (describing Ms. Sykes' anger, frustration, and impulsive behavior) suggests that she was experiencing either paranoid ideation or a dissociative episode at the time she rammed the victim's car. It is much more likely that the testimony in her case would proceed along the following lines: "A person suffering from borderline personality disorder often has an unstable self-image, and her sense of self, including goals, values, and the like, may shift suddenly and dramatically. Ms. Sykes was dealing with suspicions of infidelity on the part of her husband, and she and her husband had just engaged in a fight. It is possible, even likely, that she was strug-

or wrong, but nothing in the hypothesized testimony about her disorder suggests that she lacked the capacity to recognize its wrongfulness.

In short, in a jurisdiction that recognizes only a "cognitive" test of insanity (as is true in most states, as well as in the federal courts), the problem faced by the defense, is not that the Ms. Sykes' diagnosis does not count, but rather that her emotional dysregulation, and deficits in behavior control are not legally relevant to her culpability under the test of insanity. Admittedly, she suffers from a significant mental disorder, and probably has difficulty on that account keeping her behavior within accepted social bounds. But she is nonetheless criminally responsible for her conduct, as are the many other people with mental disorders of one type or another who violate the criminal law. Indeed, as Dr. Kinscherff observes, many criminal offenders probably have multiple disorders. Again, to be clear, the impediment to the insanity claim in such a case is not the diagnosis, but the fundamental irrelevance of the proffered clinical narrative to the criteria for the insanity defense.

Let us now suppose, however, that the insanity test in the jurisdiction in which Ms. Sykes is being prosecuted includes a volitional prong, as the hypothetical problem states. Based on the hypothesized testimony summarized above regarding her identity disturbance, emotional hyper-reactivity and instability, and impulsivity, suppose that the expert witness opines that, as a result of her mental disorder, she lacked “substantial capacity to conform her behavior to the requirements of the law” at the time she rammed her car into the

of her conscious functioning. It omits the experience of choice. For this reason, a purely “causal” or explanatory account tugs against the fundamental premise of the law of criminal responsibility. When the courts first recognized the volitional prong of the insanity defense (under the rubric of “irresistible impulse”), they were responding to cases involving psychotic decompensation where the “cognitive” tests were so narrowly understood that they failed to take adequate account of the morally incapacitating effects of severe men-

If the test of insanity includes a volitional prong, some way must be found to limit the scope of the defense to the core cases to which it has traditionally been applied (cases involving psychotic conditions), and to prevent a shift toward a deterministic account of criminal conduct — i.e., “people can’t help being who they are and doing what they do.” The best way of accomplishing this is to limit the definition of mental disease to those severe disorders that are characterized by gross disturbances of a person’s capacity to understand reality.

victim’s car in a “randomly directed expression of her anger and frustration,” and that she was “fundamentally unaware of the real reasons for her conduct at the time of the offense.”

What are we to make of this testimony? Did Ms. Sykes lack “substantial capacity” to adhere to the law at the time of her offense? Could she have chosen *not* to ram the victim’s car? Did she have any capacity for choice at all? If she was unaware of the unconscious causes of her behavior, then how could she have chosen to do anything else? How can the expert answer these questions? How should the law respond to evidence of this kind?

In my opinion, this account of Ms. Sykes’ behavior highlights the underlying conceptual problem with the volitional prong of the insanity defense, especially if it is coupled with a broad definition of mental disease. In a word, testimony along these lines displaces the law’s vocabulary of choice with the vocabulary of causation.⁴ At bottom, the clinical narrative tells us that when Ms. Sykes rammed into the victim’s car, she was behaving in a predictable way and in conformity with her personality tendencies. The story is essentially a causal one: once you understand what sort of a person she is and what sorts of weaknesses she has, and you understand the acute circumstances of her life that had stirred up the anger and frustration, then you can explain her behavior even if she herself was unaware of her own unconscious motivations. What is missing from the narrative, of course, is any account

of her conscious functioning. It does no harm in that context. However, when the volitional prong is combined with a broad definition of mental disease (specifically encompassing personality disorders), it becomes a channel for purely causal accounts of criminal behavior.⁵

How should the law deal with this problem? One way that the criminal law can try to avoid that sort of testimony is to eliminate the volitional prong of the insanity defense altogether, as the federal government and most states have done. I happen to favor this approach.⁶ A second way is to adopt a narrow definition of “severe mental disease” as the threshold condition for an insanity claim (whether or not it includes a volitional prong). There are several ways to do this. One is to define the predicate “mental disease” as one characterized by gross disturbances of reality testing.⁷ Another possible strategy is to exclude conditions that are by their nature characterized by criminal behavior and/or by deficits in moral judgment or understanding (e.g., the American Law Institute’s exclusion of “abnormal conditions manifested only by repeated antisocial conduct”)⁸ or not characterized by disturbances of reality-testing. A third is to exclude personality disorders, as a few states have done. Although this is the least satisfactory approach, for the reasons explained by Dr. Kinscherff, it is not altogether implausible as a strategy for curtailing the reach of a volitional test of insanity.

To sum up, I agree with Dr. Kinscherff’s view that categorical exclusion of personality disorders from

the definition of mental disease is clinically and morally arbitrary. Nor is there any need to consider such an approach if the sole test of insanity is whether the defendant was "unable to appreciate the wrongfulness of his conduct at the time of the offense." However, if the test of insanity includes a volitional prong, some way must be found to limit the scope of the defense to the core cases to which it has traditionally been applied (cases involving psychotic conditions), and to prevent a shift toward a deterministic account of criminal conduct — i.e., "people can't help being who they are and doing what they do." The best way of accomplishing this is to limit the definition of mental disease to those severe disorders that are characterized by gross disturbances of a person's capacity to understand reality.

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