
COMMENTARY

Dementia-Related Behaviors: A Matter of Public Health, Not Criminal Prosecution

Marshall B. Kapp

In this issue, Arias and Flicker endeavor to deal with legal questions relating to criminal behaviors allegedly committed by individuals with dementia.¹ Until relatively recently, such questions rarely arose because, until the deinstitutionalization movement beginning in the 1960s and blossoming in the 1970s and 1980s led to a wholesale emptying out of large state mental hospitals,² a significant proportion of patients with at least moderate or severe dementia resided in such institutions segregated from the rest of society and therefore from most opportunities to engage in actions that might be classified as crimes. With the (often involuntary) exodus of residents from the state mega-mental hospitals, many older individuals with dementia were *de facto* trans-institutionalized to the burgeoning nursing home industry. Some opportunities for criminal behavior by nursing home residents (such as stealing the property of fellow residents or physically assaulting facility staff or other residents) certainly present themselves. However, the potential interplay of dementia and the criminal justice system has become more of a concern as a result of changes in long-term care policy and practice unfolding over the last couple of decades, enabling a growing percentage of individuals with serious, chronic physical and mental impairments (including dementia) to avoid or delay nursing home admission and reside and receive services and supports in home- and community-based settings (for example, in relatives' abodes or assisted living facilities).³

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Consequently, the contribution of Arias and Flicker is timely. A comprehensive analysis of the dementia/criminal behavior interplay, though, must take into consideration not only jurisprudential doctrine and procedural rules, but also and more importantly the roles of several kinds of key actors not discussed by Arias and Flicker: elder law attorneys; prosecutors; family members; professional service providers; and governmental and private payment sources.

Elder Law Attorneys

Elder Law is now well-developed and recognized in the US as both a practice specialty⁴ and academic discipline.⁵ At present, the practice of Elder Law is consumed mainly with financial matters like estate planning and public benefits, rather than client representation in criminal cases. Elder Law practitioners are likely to have a much better grasp of the realities surrounding dementia as an individual and public health challenge, including special needs of and resources available to individuals with dementia and their families, than attorneys in other specialties. Hence, efforts undertaken in terms of continuing professional education and otherwise to better equip and encourage Elder Law practitioners to act as counsel, or at the least as co-counsel with a criminal law specialist, in criminal cases involving defendants with dementia could be beneficial.

Prosecutors

Most situations entailing alleged criminal behavior by an individual with dementia should never reach a point at which affirmative defenses and sentencing options even become relevant. Because of the Separation of Powers doctrine, public prosecutors are allowed — indeed, expected — to exercise sub-

stantial discretion regarding the bringing of criminal charges in the first place, as well as the disposition of any charges filed.⁶ Efforts should be made to meaningfully inform prosecutors about the nature and consequences of dementia, including available resources, so that those prosecutors may responsibly use their permissible discretion to handle appropriate fact patterns involving persons with dementia outside of the traditional criminal justice system, ideally as a public health matter.⁷

Family Members

Most individuals with dementia who reside in home- and community-based settings are under the *de jure* (guardianship/conservatorship or durable power of attorney) or *de facto* control and supervision of a

in unnecessarily broad or harsh restrictions of persons with disabilities.”⁸ Secondly, the family’s engaged, continuous support and supervisory role will be central to the success of any non-criminal justice interventions initiated in response to the anti-social behavior of the person with dementia.

Professional Service Providers

The active involvement of family in supporting and supervising a relative with dementia usually is supplemented to a greater or lesser degree by the hiring of paid professional service providers. The potential tort liability, based on negligence doctrine, of a professional caregiver for the criminal act of a client with dementia has yet to be determined. For instance, what are the legal implications for the professional

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committed family. The role of involved family members vis-à-vis their relative with dementia is two-fold. Firstly, we need to delineate what potential criminal (or, more likely, civil) liability a family member is exposed to based on the criminal conduct of a relative with dementia. Take, for example, the case of Mr. A with dementia who lives with his son in the son’s home, where the son keeps loaded legal firearms unlocked, and Mr. A finds one of those guns and uses it to shoot a delivery person whom Mr. A mistakes as an intruder. Does the son have any potential criminal or tort liability based on Mr. A’s actions? If there is tort liability, will the son’s homeowner’s insurance policy pay the damages? If the son hires a professional caregiver to come into the home to help care for Mr. A and Mr. A assaults that caregiver, can the son be held liable? What if Mr. A has a known history of such conduct? The answers to these queries carry substantial policy implications: “[E]xpanding liability will increase the pressure on insurers and families to limit the freedom of persons with dementia, while limits on liability may leave deserving persons uncompensated and create a public backlash that will result

caregiver who takes the client with dementia for an outing to the grocery store if the client picks up a can of vegetables and throws it at a baby who is riding in the cart of another shopper? Or, what happens when, instead of throwing the can at someone else, the client attempts to hide it in her purse and is detected by a security alarm? Can the professional caregiver with the client be criminally convicted as an accomplice or abettor to the attempted theft? Even just a small handful of well-publicized criminal convictions or civil verdicts in cases like these could have important practical ramifications for families trying to hire professional caregivers to help keep the relative with dementia in the community rather than a nursing home.

Payment Sources

Any informed discussion of realistic public health-oriented dispositions for a person with dementia who has been accused of committing a criminal offense must include attention to ways of financing those dispositions. Such attention must necessarily commence with a thorough understanding of current payment sources for home- and community-based long-term

services and supports for individuals with dementia, specifically: Medicaid (primarily under various program waivers obtained by states from the federal Centers for Medicare and Medicaid Services);⁹ dedicated state appropriations; private long-term care insurance policies;¹⁰ and direct out-of-pocket payments made by family members of the individual with dementia. In all likelihood, the development of new programmatic alternatives when individuals with dementia are accused of crime will need to use and build incrementally on existing payment sources.

Arias and Flicker have usefully begun an important discussion. To expand this discussion, more careful attention must be paid to the larger social and economic contexts in which persons with dementia live and receive services, and to the other actors integrally involved in the care and support of those individuals. Such additional directions will help promote a policy regime that properly addresses dementia as a public health challenge rather than a matter for the criminal courts. Especially for people suffering from the scourge¹¹ of dementia, old age is no time to be doing time.¹²

Note

The author has no conflicts to disclose.

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