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Justice and the deconstruction of psychological jurisprudence:

The case of competency to stand trial

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Abstract

Critical psychological jurisprudence draws attention to the forces of ideology, power and violence embedded in the narratives of law and psychiatry, criminal justice and mental health. Application work in this area identifies how and for whom justice is served (or denied) by prevailing medicolegal decisions and practices. One method of discursive analysis comes from deconstruction. Indeed, as Derrida has proclaimed, 'deconstruction is justice.' To further this perspective, the author deconstructs psychological jurisprudence by examining the competency to stand trial (CST) phenomenon in the United States. To facilitate this investigation the precedent case law on the subject is presented and reviewed. In addition, selected principles from Derridean deconstruction are recounted and then applied to the medicolegal narrative of competency to stand trial. Given these observations, the author concludes by tentatively exploring the meaning(s) of deconstruction as justice in the domain of psychological jurisprudence.

Key Words

competency to stand trial • critical psychological jurisprudence • deconstruction • justice

Introduction

As a critically animated domain of inquiry, psychological jurisprudence attempts to establish a radical 'philosophy of law based on psychological

values' (Fox, 1997: 219). The aim of this enterprise is to cultivate a 'theory of legal action that is derived from an understanding of law's subjective significance in our lives' (Melton, 1988: 854; see also Haney, 1993; Ogloff, 2000). Underpinning this philosophical excursion is the search for the discursive meaning(s) of justice and the often embedded, implicit and unspoken values that inform the established, taken-for-granted terrain of medicolegal science (Arrigo, 2002a). Thus, the critical agenda in psychological jurisprudence reveals how the systems of mental health, law, juvenile justice, corrections, policing and the like function to privilege certain political ideas, ethical codes, social arrangements, modes of comportment and power relations, effectively denying alternative, more inclusive, expressions of the same (Fox, 1993a).[1]

The emphasis on critical theoretical inquiry as a worthwhile backdrop against which to unpack the layered, often covert, dimensions of ideology and violence lodged deep within psycholegal narratives should not be underestimated or dismissed. Indeed, radical scholars have appropriated the interpretive tools of various heterodox strains of thought to deepen our understanding of many topical and controversial domains of import. Selected studies in critical psychological jurisprudence include: the political economy of proxy decision making for persons civilly committed (McCubbin and Weisstub, 1998); anarchism and the critique of law's legitimacy in the psycholegal realm (see, for example, Fox, 1993b, 2001; Williams and Arrigo, 2001a); chaology and the non-linear interpretation of mental illness and dangerousness (see, for example, Arrigo and Williams, 1999a; Williams and Arrigo, 2001b, 2002); semiotics and sense making in clinicolegal discourse;[2] and constitutive criminology and the reality construction of the mentally ill 'offender' (Arrigo, 2001). These philosophical forays represent a vastly different approach by which to engage in the analysis of civil and criminal mental health law; one that charts a new and provocative direction for citizen justice and radical social change at the crossroads of law and psychology.[3]

One noteworthy and contentious topic in psychological jurisprudence, not yet subjected to the insights of critical theoretical analysis as described above, is the issue of competency to stand trial (CST). In the United States, the doctrine of trial fitness and the courtroom evaluations pertaining to it represent 'the most significant mental health inquiry pursued in the system of criminal law [today]' (see, for example, Winick, 1985: 922; Bardwell and Arrigo, 2002a). Researchers contend that CST determinations are highly suspect because of the vague and confusing Supreme Court language that informs decision making by lower court judges (Golding et al., 1984; Bonnie, 1992; Cruise and Rogers, 1998; Arrigo and Bardwell, 2000), and the inaccurate and unreliable psychological instruments that assess mental health status (Grisso, 1986, 1992, 1996; Hoge et al., 1997). Indeed, some law and social science scholars contend that the CST doctrine is so conceptually flawed that practitioners (i.e. lawyers and forensic mental health experts) lack 'a shared understanding about why (in)competency

matters' (Bonnie, 1992: 293). Given these concerns, the question is whether a philosophical excursion into the discursive meanings of competency to stand trial would help facilitate our understanding of trial fitness and further our regard for how justice is (or is not) served by CST determinations.

Accordingly, this article examines the CST doctrine[4] in the United States from the perspective of critical psychological jurisprudence. The method of analysis includes the interpretive insights of Derridean deconstruction.[5] In particular, this article demonstrates how concepts such as the reversal of hierarchies, *differance* and the trace, and arguments that undo themselves provide a fertile intellectual point of departure from which to reveal the covert and coercive forces of ideology, power and violence situated within the text of trial fitness. As such, the article concludes by tentatively exploring what deconstruction as justice signifies in the law–psychology realm, particularly given this philosophical foray into the competency to stand trial doctrine. However, before these matters are addressed, some background comments on the CST determination and how it functions in the United States are warranted.

At the outset, I note that critical psychological jurisprudence and Derridean deconstruction are relevant to theoretical criminology, to radical social science and to mainstream behavioral research, especially for those who study enduring and complex issues in law, crime and justice. In short, while critical psychological jurisprudence endeavors to establish a radically inspired philosophy of law steeped in the evolving wisdom of psychology, Derridean deconstruction, as a discursive method of inquiry, helps expose the cultural roots of intolerance that breed and sustain misguided policies, procedures and practices in civil and criminal mental health law. Thus, deconstructive analysis focuses on the taken-for-granted way in which narratives are pre-reflectively constructed, reinforced and legitimized. Regrettably, criminologists of various stripes have mostly failed to consider how legal discourse is (un)consciously manipulated to represent a certain view of criminal justice actors and institutions. In addition, they have generally neglected to assess what the practical implications are for this reality construction, especially when determinations about one's conviction and/or one's sentence hang in the balance. Thus, it follows that a deconstructive inquiry into the concealed forces at work (e.g. violence, ideology, power) in competency to stand trial matters deepens our regard for the utility of this methodological approach and its overall relationship to criminological *verstehen*.

Competency to stand trial and the US Supreme Court

The contemporary doctrine of trial fitness is derived from the case of *Dusky vs United States*.[6] Although rather brief, the *Dusky* decision represents the formula used in federal court, and many state jurisdictions follow the

opinion in substance or adopt some variation of it (see Grisso, 1996: 91). Thus, *Dusky* sets the practice standard by which lower court judges in the United States interpret trial competence. The test established in *Dusky* indicates that:

> It is not enough for the district judge to find that the defendant [is] oriented to time and place and [has] some recollection of events . . . [T]he test must be whether [one] has sufficient present ability to consult with [one's] lawyer with a reasonable degree of rational understanding and whether [one] has a rational as well as factual understanding of the charges against [oneself].
>
> (*United States vs Dusky*, 1960: 91)

Given the brevity of the *Dusky* standard regarding trial fitness, legal scholars have mostly relied upon inferential analysis to interpret the elements of criminal competency and to comprehend the doctrine's routine courtroom function (Roesch and Golding, 1980; Melton et al., 1997; Bardwell and Arrigo, 2002a). Summarily describing these assessments is useful as it sets the stage for the critical analysis that follows as developed through psychological jurisprudence and deconstructive inquiry. Broadly speaking, there are two such lines of inferential commentary: critiques that unpack the criminal law logic of *Dusky*; and critiques that explore the Court's underlying jurisprudential intent.

The criminal law logic of Dusky

According to legal scholars, there are five relevant criminal law components embedded in the *Dusky* opinion related to competency.[7] First, the case identifies a two-prong test by which to assess trial fitness. These include the ability of the accused to participate in the trial process, collaboratively working with counsel to establish a criminal defense and the accused's ability to comprehend the overall trial process, including the role of those involved in the case. Second, the two-prong standard set forth in *Dusky* makes evident that the Court focused on the defendant's *present* ability to understand and to assist, if called upon, in the trial process. Third, the defendant's comprehension is linked to cognitive abilities and not to volitional decisions. In other words, following *Dusky*, knowing what is at issue as a litigant rather than choosing to act a certain way as a litigant is sufficient to meet the bar as set forth by the Court.[8] Fourth, a CST determination requires that the defendant possess a 'reasonable degree of understanding' (*Dusky*, 1960: 402). This threshold is clearly lower than absolute understanding. As such, the reasonableness with which one understands the trial process and interacts with counsel merely amounts to sufficient comprehension.[9] Fifth, *Dusky*'s emphasis on cognitive abilities is related to the defendant's rational and factual understanding of the case and one's involvement in the trial process. In other words, the presence of mental disorder does not amount to an incompetency determination *sui generis*.

The jurisprudential intent of Dusky

According to social science commentators, the jurisprudential intent of *Dusky* is linked to several limits of the case. Generally speaking, scholars have identified three shortcomings. These include the Court's use of ambiguous wording, the judicial construction of the opinion itself and *Dusky*'s lack of overall specifics.[10]

Critics contend that the *Dusky* decision embodies vague, confusing and ambiguous language. Returning to the Court's opinion, legal constructions such as 'sufficient present ability', 'reasonable degree of understanding' and 'rational and factual understanding' represent difficult interpretive challenges for lower court judges and forensic psychiatric experts. Moreover, while *Dusky* does not equate mental illness with a CST finding, 'the "openness" of the competency [term] is a source of considerable confusion among mental health and legal professionals' (Golding et al., 1984: 323). Thus, researchers conclude that the meaning of *Dusky* and the intent of the United States Supreme Court was to establish a fluid but workable standard; one broad enough in application to address the problems posed by mentally ill defendants but not so untenable in effect as to thwart or undermine the basic clinical evaluation process.[11]

Critics of *Dusky* also argue that the opinion's judicial construction was itself problematic, raising more questions than it answered. Indeed, not only did the United States Supreme Court reach its decision *per curium*, but the High Court based its ruling exclusively on the Government's rationale regarding trial competence. Thus, not only have trial judges questioned the Supreme Court's failure to elaborate on its holding but they have questioned why the decision was completely driven by the test as articulated by the Solicitor General. As Federal Judge Oliver commented in the wake of the decision, 'no one quarrels with what the Supreme Court actually held in *Dusky*; unhappiness with [the case] is produced by the fact that the Supreme Court said so little as to why it held what it did' (Oliver, 1965). Critics therefore conclude that the jurisprudential intent of the case was to provide a minimalist remedy to a contentious and largely misunderstood psycholegal phenomenon (i.e. mental illness as cognitive impairment mitigating trial fitness), without significantly compromising or undermining the public's interests in the criminal trial's legitimacy and the individual's interest in courtroom (and constitutional) fairness.[12]

The third shortcoming of the *Dusky* opinion, significant for identifying the case's underlying intent, is the brevity of the decision and how the two-prong standard relates to the mental and legal functioning abilities of the defendant. The absence of detail associated with the Court's ruling produced the expression 'competence to stand trial'. However, this phrase collapses various aspects of criminal trial fitness (e.g. competence to stand trial, competence to plead, competence to waive the right to counsel), even though these legal matters are not intrinsically related to one another (Bonnie, 1992: 293). As a matter of practice, relevant inquiries concerning

trial competency entail the 'capacity to assist counsel, conduct an adequate investigation of the [matter], and to make whatever decisions a defendant is required or expected to make in order to defend and/or to resolve the case *without* a trial' (Bonnie, 1992: 293, emphasis in original). Thus, the CST doctrine is inherently misleading: 'it assumes all criminal cases will proceed to trial [even though 90 percent of trial defendants plead guilty], and it does not adequately calculate the relevant dimensions of the defendant's competence' (Bardwell and Arrigo, 2002a: 38). Given this limit, critics of the CST doctrine contend that the *Dusky* Court's underlying intent was to avoid articulating a substantive judicial position on the matter of trial fitness, preferring instead to address the procedural components of what mental illness as cognitive impairment signifies (e.g. establishing the two-prong test) without reaching beyond its scope of judicial expertise.[13]

In the wake of the *Dusky* decision, several issues were left unresolved. Perhaps the most pressing was whether, following a CST finding, a criminal defendant had a right to waive the assistance of counsel and proceed *pro se* to trial. This matter was ostensibly addressed in the case of *Faretta vs California* (1975: 806), and more fully developed in the case of *Godinez vs Moran*.[14] Given that the former opinion addressed the logic of self-representation for competent defendants, and given that the latter decision examined the competency standard that must be met when psychiatrically disordered, though fit-for-trial, defendants elect to waive their right to counsel, these cases will be reviewed somewhat simultaneously.[15]

Dusky *progeny:* Faretta *and* Godinez

Once an accused is found competent to stand trial, questions emerge about the optimal defense strategy and the extent to which the defendant can (and should) participate in the preparation of the case and the overall trial proceedings (Decker, 1996). One possible scenario is the desire of the accused to relinquish his or her right to the assistance of counsel and to pursue the course of self-representation.[16] Addressing this matter, the Court in *Faretta* maintained that:

> a defendant in a state criminal trial has a right to proceed without counsel when [one] voluntarily and intelligently elects to do so, and that the state may not force a lawyer upon [an individual] when [the defendant] insists that he [or she] wants to conduct [his or her] own defense.
>
> (*Faretta*, 1975: 806)

The decision in *Faretta* produced considerable speculation concerning its applicability to mentally ill defendants. Indeed, the absence of differentiation among possible litigants meant that, following *Faretta*, persons found competent to stand trial were held to the same standard as those whose trial fitness was not at issue (Shapiro, 1995; Corinis, 2000). Indeed, as long as the accused 'voluntarily and intelligently' relinquished counsel, the waiver was constitutionally permissible.[17]

Designed, in part, as a remedy to address the confusion created in the

aftermath of *Faretta*,[18] the Court in *Godinez* reviewed the issue of competency and the right to waive counsel. Specifically, *Godinez* considered whether the competency standard for pleading guilty or relinquishing the right to counsel, following a CST finding, was higher than the standard used to determine trial fitness (*Godinez*, 1993: 391). In brief, the Supreme Court held that the two standards were the same. As the Court explained:

> . . . there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights . . . It [is] clear that the defendant's legal knowledge is not relevant to the determination [of] whether [he or she] is competent to waive the right to counsel.
>
> (*Godinez*, 1993: 399–400)

Thus, the *Godinez* Court concluded that, following a CST determination, the competency standard for a mentally ill defendant who relinquishes intelligently and voluntarily his or her right to counsel means that the waiver must be based on the 'rational understanding' test developed in *Dusky* regarding matters of trial fitness (*Godinez*, 1993: 397).

Deconstruction and psychological jurisprudence

The relevance of Derridean deconstruction[19] as applied to the competency to stand trial doctrine principally rests in the explication of three discursive practices. These practices include the reversal of hierarchies; *differance* and the trace; and arguments that undo or unground themselves.[20] In this section, each of these principles is enumerated. However, before proceeding with this undertaking, the connections between deconstruction and psychological jurisprudence are generally described.

Making connections: deconstruction and psychological jurisprudence

Derrida's approach to deconstruction involves what he terms 'the metaphysics of presence' (Balkin, 1987: 746–51). The metaphysics of presence endeavors to expose the 'hierarchical oppositions implied or embedded in words or phrases used to convey meaning' (Arrigo and Williams, 1999b: 386). The text of mental health law is replete with examples of hierarchical oppositions: health/illness; normal/abnormal; competent/incompetent. In each of these instances the first term in the association is privileged and valued. Thus, we have the 'presence' of the first term in the hierarchical opposition. Correspondingly, the second term in each binary opposition is dismissed and devalued leading to the 'absence' of the second term.

However, the value positions occupied by both terms in each paired association are problematic. As Derrida reminds us, privileging one word or phrase in a binary opposition produces 'logocentricism'.[21] As an artifact

of western thought, logocentricism esteems limited interpretations of phenomena, subtending (even marginalizing) alternative readings of a text. Commenting on this notion and Derridean deconstruction, Balkin observes that there is a 'hidden premise that what is most apparent to our consciousness—what is most simple, basic, or immediate—is most real, true, foundational, or important' (Balkin, 1987: 747–8).

As applied to psychological jurisprudence, the metaphysics of presence and logocentricism produce (and affirm) unstated, though shared, forensic psychiatric beliefs about the primacy (and legitimacy) of valued terms *over and against* de-valued terms in a binary opposition. Thus, arriving at the meaning for various psycholegal controversies is already reduced to finite possibilities.[22] Indeed, defining mental illness, predicting dangerousness, administering forced psychotropic treatment over objection and executing psychiatrically disordered, though competent, death row prisoners all hinge, in part, on the unconscious and often unspoken values that inform (and limit) these complex decision-making practices.[23]

It follows, then, that deconstruction, as applied to psychological jurisprudence, can expose the often-hidden biases, unstated assumptions and unconscious preferences located within the simplest of practices (i.e. hierarchical oppositions).[24] To this end, deconstructive practice, as a method of critical inquiry, 'reveals and de-centers, although incompletely and temporarily, how legal arguments often disguise ideological positions'.[25] These are positions that signify power in discourse and violence in social consequence.[26]

Given the above observations, we can see how Derrida's insights might be illuminating for this investigation of the CST doctrine, especially as they direct our attention to the covert and/or unconscious intent of the United States Supreme Court on the matter of trial fitness.

Reversal of hierarchies

The practice of inverting value positions in binary opposition is instrumental. The principal aim is to ascertain what additional insights, if any, might be found in their reconstituted arrangement. Moreover, by switching or reversing the hierarchies, one can re-examine and re-think the mutual interdependence of both terms.

Consider the example of 'psychiatric illness', particularly as employed in the civil and criminal mental health law context. In the first instance, deconstructionists contend that psychiatric illness is a derivative concept generated from the other expressions against which it is compared: 'psychiatric health' or 'mental health'. Thus, we have a binary opposition. However, on closer inspection, ascertaining the mental health of person 'A' depends on ascertaining the psychiatric illness of person 'B', and vice versa. In other words, the meanings we assign to one term are dependent on the meanings we assign to the other term. Indeed, what appears as the privileged value (i.e. 'mental health') is itself dependent on the concept over

which it was esteemed (i.e. 'psychiatric illness'). In this context, neither expression is foundational; and moreover, both mutually rely on one other to express thought and invite action. Thus, one can reasonably question what alternative forms of logic and what additional forms of sense making might materialize if the hierarchical arrangement was truly reversed.

Differance *and the trace*

The notion of mutual interdependence generated from the two values in binary opposition is significant to Derrida and his concept of *differance*. As Balkin explains it, *differance* implies three distinct but related meanings:

> *Differance* simultaneously indicates that (1) the terms of an oppositional hierarchy are differentiated from each other (which is what determines them); (2) each term in the hierarchy defers the other (in the sense of making the other term wait for the first term); and (3) each term in the hierarchy defers *to* the other (in the sense of being fundamentally dependent upon the other).
>
> (Balkin, 1987: 752)

Returning to the example of 'mental health /mental illness' as a binary opposition helps illustrate the previous concept.

> *Differance* [indicates] how the two [expressions] are different from one another, how, given the metaphysics of presence and absence, the spoken or written term postpones, suspends, or represses the other, and how both values are mutually dependent on one another for their identities.
>
> (Arrigo and Williams, 1999b: 388)

Thus, the meaning of the binary opposition 'mental health/mental illness' emerges from the interplay of differences and dependencies simultaneously operating within the text of civil and criminal mental health law.

The concept of *differance* is relevant to the deconstructionist agenda for a related reason. Derrida's notion of trace signifies that the two terms in a hierarchical arrangement rely on the differentiation between the expressions for their 'clarity and cohesion'(Arrigo and Williams, 1999b: 388; see also Derrida, 1978: 46–7; Balkin, 1987: 752). This differentiation implies that each value in the binary opposition contains the trace of the other within it (i.e. mental *illness* in psychiatric health and psychiatric *health* in mental illness). Accordingly, the trace anchors *differance*, making the decentering of binary oppositions possible in the legal sphere. As Milovanovic aptly explains,

> in deconstructive strategies, one must start with the idea that any term (presence) always implies a hidden one (absence); both are essential to any meaning of each. The *trace* is that part that exists in each and maintains the relation. In many ways, it is the 'glue'. For those practicing [legal] deconstruction, the challenge is to identify the absent term which maintains the term that is felt as present.
>
> (Milovanovic, 1994: 101–2, emphasis in original)

Arguments that undo themselves

As previously described, inverting oppositional hierarchies can be quite revealing. In addition to gaining new or different insight about the meaning of the terms in question and their mutual interdependence, this practice can disclose how arguments supporting the dominance of the privileged value may be grounds for endorsing (and privileging) the value that is repressed or discounted. From the perspective of deconstruction, this is the logic of undoing or ungrounding established beliefs or justifications by disclosing the limits of the term identified as presence, given its likeness to the value that is identified as absence. In other words, what we take to be a justification for the dominance of one term or expression may be less certain and decided, especially when we examine how this term or expression is really similar to the one over which it is (falsely) privileged.[27]

To illustrate, consider the practice of mental health treatment, whether in the context of psychotropic medication, other forms of (forced) therapy and even civil commitment. Psycholegal intervention of this sort ostensibly functions to assist individuals perceived as 'diseased', 'ill', 'psychopathological' and 'in need' of assistance.[28] The aim is to reduce and/or to correct the suffering of others by legitimately and meaningfully addressing their psychiatric needs. However, the logic justifying mental health treatment is undone when examining more closely the act of refutation.

If the intervention is not embraced by the receiver,[29] then the treatment, as a genuine act of pain relief or management, can never fully accomplish what it intends. The giver forces the intervention upon the other, refusing to accept the recipient's (strong) disinclination to accept the intervention. However, the very activity of refusal on the part of the one who intervenes, is similar to the resistance from the one who is inclined to refuse the intervention. Neither party welcomes the other's perspective on mental health treatment. Thus, 'the limitations of giving [forced] treatment are much like the limitations of refusing treatment' (Arrigo and Williams, 1999b: 405). The logic justifying mental health intervention is therefore undone when questions of refutation surface.

Deconstruction and competency to stand trial: an application

Returning to the CST doctrine, we note that there are three legal constructs whose language, deconstructively speaking, warrants closer scrutiny. These legal constructs include 'competence to stand trial', 'voluntary and intelligent waiver' and 'rational understanding' test (i.e. the competency standard by which to relinquish one's right to the assistance of counsel). The first expression was articulated in the *Dusky* case; the second expression was contained in the *Faretta* opinion and the third expression was addressed in the *Godinez* decision. In what follows, each of these legal

constructs is explored separately through the lens of Derridean deconstruction as previously described.

Deconstructing 'competence to stand trial'

Reversing hierarchies

The notion of trial fitness is derived from the oppositional hierarchy of competence/incompetence. The dominant term assumes its position because of the mental health law conviction that one's understanding of the criminal charges and one's participation in the criminal defense must be 'rational', 'voluntary' and 'reasonable' (Bonnie, 1992: 305; Grisson, 1992: 357; Cruise and Rogers, 1998: 38). 'Thus, to be competent, under the law, is to be qualified or fit' (Arrigo and Williams, 1999b: 406).

However, the legal standard by which competency is defined is itself undecided; that is, determining trial fitness is somewhat fluid, informed by the relative precision of psychometrics and actuarial science.[30] Indeed, while such matters as adjudicative[31] and decisional[32] competence are rigorously assessed, many questions remain about the predictive capabilities of the instruments evaluators employ, especially with respect to their overall accuracy.[33] Thus, as a practical matter, to be fit-for-trial is to be unfit for trial. Again, this is because the psychometric and diagnostic bases on which competency is determined is itself somewhat undecided. In other words, there is a way in which competence under the law is, already and always, about incompetence. In this regard, trial fitness signifies the absence (or limit) of qualification to make rational, voluntary and reasonable decisions. Interestingly, however, this absence of fitness is what gives incompetence its specialized and differentiated meaning.

Reversing the values in question also discloses additional insight about the significance of the terms. The expression 'incompetence' to stand trial does not function as a privileged term, given the limits of the oppositional hierarchy to which it is connected and from which it takes on meaning. To be unfit does not preclude the articulation of certain actions in any criminal competency to stand trial case (e.g. waiving counsel and proceeding *pro se* to trial). This stance embodies a belief about the courtroom process, its legitimacy and one's right to be heard under the law.[34] This interpretation of incompetency returns us to the fuzzy logic found within the competence/incompetence binary opposition and its application to trial fitness. In short, when a person whose competence for standing trial is called into question clinically and psycho-diagnostically, and when the individual expresses a desire to exercise his or her constitutional right to waive counsel preferring instead the path of self-representation, can it be said that the defendant is categorically incompetent? The interpretation most favorable to a CST determination is that the accused is competent and incompetent simultaneously. Indeed, the litigant is at least sufficiently fit and qualified to understand the importance of having the case presented before a tribunal.

Thus, we see how the play of differences and dependencies are mutually at work, unconsciously embedded in the competence/incompetence to stand trial phenomenon. In mental health law, the significations we assign to one value depend on the meanings we assign to the other term. Thus, as Arrigo and Williams conclude in their assessment of competency:

> What we take to be the dominant value (i.e. competence) is itself dependent on the concept it was privileged over (i.e. incompetence). But this value (incompetence) can only take on social use and value if based on its binary opposite (competence). Neither term is foundational. The mutuality of both values is what makes thought and action possible [in] matters [of mental health law].
>
> (1999b: 407)

Differance *and the trace*

The interdependence of the terms in binary opposition as described above, is further explained by Derrida's notion of *differance* and the trace. The force of the terms as deployed in the medicolegal community signifies their differentiation. To illustrate, a defendant who asserts his or her right to a trial can be found, following the application of specific CST legal standards, incompetent to proceed. In this respect, competence and incompetence are distinguishable (i.e. different) and this is what determines their psycholegal meaning. In addition, given the metaphysics of presence and absence, the activated term postpones or silences the other in the sense of making the unspoken term wait. In other words, the term that is spoken (i.e. competence) suspends the significance of the term that is silent (i.e. incompetence). Finally, 'competence to stand trial' and 'incompetence to stand trial' defer to one another in that the presence of one value makes the absence of the other value manifest, and vice versa. Thus, the two terms are fundamentally dependent on each other to convey their respective meanings. This third interpretation of *differance* reminds us of the Derridean notion of trace: the whisper of incompetence lingers in the value of competence; the whisper of competence lingers in the value of incompetence.

Arguments that undo themselves

Ungrounding the logic of justification for the privileged value 'competence to stand trial' in mental health law is not difficult to discern. Arguments for supporting the dominant value are a function of endorsing, momentarily and incompletely, the term that is absent (i.e. incompetence). As previously described, trial fitness entails the absence of qualification; it is to be less than competent to proceed. This position obtains because: (1) the legal standard of competence, informed as it is by psychometrics and actuarial science, remains fluid, inconsistent and undecided; and (2) the absence of trial fitness does not preclude the very rational, voluntary and reasonable

assertion of other constitutional rights (i.e. waiving counsel, engaging in self-representation).

In both of these instances, the presence of the expression 'competence to stand trial' is undone by what it directs us to; namely, the value of 'incompetence to stand trial'. Here, too, the disappearance of the dominant term does not imply, deconstructively speaking, the privileging of what was previously felt as absence. Indeed, the reversal of the oppositional hierarchy takes place because incompetence can be temporarily and provisionally evaluated against and in relation to its binary opposite. Again, this is the play of dependencies and differences activated in the realm of trial fitness disclosing how meaning is generated through the mutuality of the terms.

Deconstructing 'voluntary and intelligent waiver'

Reversing hierarchies

Following the holding in *Faretta*, waiving the right to the assistance of counsel entails a free and knowing decision. Deconstructively speaking, the notion of a 'voluntary and intelligent waiver' derives from its binary opposite, 'involuntary and unintelligent waiver'. The dominant expression assumes its position because it implies that relinquishing a constitutional right of such magnitude (i.e. the right to an attorney's assistance giving rise to self-representation) is a choice that must be thoughtfully reasoned and competently pursued.[35]

However, the application of this standard in the context of persons identified as mentally ill, though fit-for-trial, produces a questionable legal test ripe for deconstructive inquiry.[36] Indeed, to be competent to stand trial does not, in and of itself, mean that one is without psychiatric disability. Rather, it means that notwithstanding mental illness, one can proceed to trial. It is in this context, then, that the privileged value of 'voluntary and intelligent waiver' takes on deconstructive significance. Indeed, to act freely and knowingly on the matter of the waiver is itself undecided. In other words, given the presence of mental illness, the choice making of the defendant is circumscribed: it is less than (other than) completely free and less than (other than) fully knowing.[37] Thus, to engage in a 'voluntary and intelligent waiver', following a CST determination, is to proceed involuntarily and unintelligently.[38] Relinquishing one's right to the assistance of counsel and proceeding *pro se* to trial entails the absence of elective and knowing choice making. It is, in part, the presence of unreasoned thought and incompetent conduct.[39]

Similarly, however, the binary value 'involuntary and unintelligent waiver' is not a privileged phrase, given the limits of the oppositional hierarchy. To not act altogether freely and/or completely knowingly does not preclude meaningful and reasoned decisions. The accused can mount a defense in the furtherance of one's case, notwithstanding one's mental illness. Again, according to the law, the presence of psychiatric disorder is

not synonymous with incompetence. Indeed, there are sensible explanations for pursuing the path of self-representation, hinging on the accused's right to control the overall defense strategy.[40] This very sentiment was expressed in *Faretta's* majority opinion, particularly in the context of valuing the accused's autonomy and promoting trial fairness. As Justice Stewart observed:

> [I]t is the defendant, therefore, who must . . . decide whether in [one's] particular case counsel is to [the person's] advantage. And although [the defendant] may conduct his [or her] own defense ultimately to his [or her] own detriment, [the] choice must be honored out of respect for the individual which is the lifeblood of the law.
>
> (*Faretta*, 1975: 834)

Thus, reversing the values in question shows us that an 'involuntary and unintelligent waiver' is dependent on its binary opposite for conveying meaning. As such, the play of differences and reliances mutually operate, unconsciously lodged within and between the dynamic interaction of the two phrases. The significations we assign to 'voluntary and intelligent waiver' depend on the significations we assign to 'involuntary and unintelligent waiver', and vice versa. Neither expression is foundational. Their mutuality makes psycholegal thought and action possible.

Differance *and the trace*

The interdependence of the oppositional hierarchy is further understood on the basis of Derrida's concept of *differance*. A legal finding that a criminal defendant 'voluntarily and intelligently' relinquished counsel is distinguishable from a legal finding in which a similar defendant did not act freely and knowingly. In this regard, the two expressions are quite different and it is this differentiation that determines their respective meanings in the courtroom. In addition, recognizing the metaphysics of presence and absence, the dominant value at play represses or suspends the other in the sense of making the other value's felt absence wait. Finally, a 'voluntary and intelligent waiver' and an 'involuntary and unintelligent waiver' defer to one another in that the articulation of one expression draws our attention to the other, making its absence more overt, active and present. Thus, the two phrases are mutually dependent on one another to communicate their respective meanings. Here, too, we note how the trace unconsciously and pre-thematically functions within and throughout this oppositional hierarchy. Involuntary and unintelligent decision making inform one's elective and knowing waiver of counsel; voluntary and intelligent choice making inform one's non-elective and unknowing waiver of counsel.

Arguments that undo themselves

Given the above observations on reversing hierarchies and *differance*, explaining how the mental health law logic justifying a 'voluntary and

intelligent wavier' is (or can be) ungrounded is now apparent. As previously described, free and knowing waivers entail reasoned and competent choices. However, this logic is undone in the psychiatric courtroom on at least two fronts.

First, mentally ill, though competent to stand trial, criminal defendants, can (and do) engage in unreasoned thought and incompetent conduct. In the extreme, their decision to proceed *pro se* to trial can result in their own courtroom demise. Second, when criminal litigants with the assistance of counsel are declared fit-for-trial and subsequently assert their right to self-representation, questions persist about whether the accused was competent in the first instance. In other words, to what extent was the defendant's behavior ever guided by lucid thinking and competent choice making?

In both of these circumstances, the dominant value 'voluntary and intelligent waiver' is undone by what it directs us to; namely, the expression 'involuntary and unintelligent waiver'. Again, following the deconstructive operation of ungrounding the logic of arguments, the silencing of the privileged phrase does not imply the dominance of the expression previously identified as an absence. Both phrases defer to the other in the sense of generating meaning through their mutuality. Thus, the play of differences and dependencies remains activated in the domain of trial fitness, especially when questions arise pertaining to the voluntary and intelligent manner in which a defendant waives counsel and charts the course of self-representation.

Deconstructing 'rational understanding' test

Reversing hierarchies

The competency standard by which to relinquish one's right to counsel was set forth in the *Godinez* decision. Recognizing the widespread confusion created in the wake of the *Faretta* ruling, the *Godinez* Court concluded that the competency standard for mentally ill though fit-for-trial criminal defendants who waive their right to the assistance of counsel is the 'rational understanding' test as developed in *Dusky*.[41] This formula is itself the subject of deconstructive inquiry in this section.

The hierarchical opposition to which the *Godinez* decision directs our attention is 'rational understanding/irrational understanding'. The dominant term assumes its status because of the medicolegal conviction that one's choice to discharge counsel must be based on a 'knowing and voluntary' comprehension of the waiver issue.[42] However, the legal standard for discharging counsel, following a CST finding, is itself undecided; that is, determining the accused's rational understanding for relinquishing counsel depends on the degree and type of mental disorder embodied by the defendant.[43] So significant is this matter that Justice Stevens, in his dissent, argued that the majority's decision in *Godinez* 'upholds the death sentence for a person whose decision to discharge counsel, plead guilty, and present no defense may well have been the product of medication or mental

illness'.[44] Thus, the waiver of counsel following a CST determination based on a rational understanding of counsel's discharge also entails an irrational understanding of counsel's discharge. In other words, there is a way in which the competency standard for relinquishing counsel asserted by fit-for-trial, though mentally ill, criminal defendants amounts to an in-competency standard.[45]

Further, reversing the values in question provides additional insight about the significance of the terms. The phrase 'irrational understanding' regarding the discharge of counsel does not operate as a privileged expression, given the limits of the oppositional hierarchy from which its meaning originates. Indeed, following a CST finding, to assert the right to waive counsel, absent free and knowing comprehension of the matter, does not require specialized training in criminal and constitutional law. The accused, having been found competent to proceed to trial, notwithstanding mental illness, does not need 'technical legal knowledge' to exercise competently his or her discharge of counsel (*Godinez*, 1993: 400). In this respect, the defendant is at least rational enough to make a decision on the matter of relinquishing counsel.[46]

Thus, inverting the values reveals how the two expressions rely on each other to convey meaning. 'Irrational understanding' depends on 'rational understanding' to communicate thought and action, and vice versa. The play of differences and dependencies mutually function, unconsciously embedded within and throughout the interaction of the phrases. Neither expression is foundational. Their mutuality makes thought and action in the medicolegal sphere possible.

Differance and the trace

The interdependence of the values in binary opposition is further understood by considering Derrida's notion of *differance* and the trace. First, a mentally ill, though fit-for-trial, criminal defendant who on the basis of a 'rational understanding' waives counsel, is distinguishable, under the law, from a similar defendant who on the basis of an 'irrational understanding' discharges counsel. The two expressions are different and this differentiation signifies their specialized meaning in the psychiatric courtroom. Second, given the metaphysics of presence and absence, the particular privileged value at play conceals or represses the other value in the sense of postponing it and making it wait. Third, a 'rational understanding' and an 'irrational understanding' on the matter of relinquishing counsel for competent to stand trial, though mentally ill, defendants defer to each other in that one value announces or discloses the other value. In this context, the mutuality of the two expressions reminds us of the deconstructive operation of the trace: an irrational understanding of the waiver issue for a CST determined, though psychiatrically disordered, defendant informs one's rational understanding of counsel's discharge; and a rational understanding

of the waiver issue for a CST determined, though mentally ill, defendant informs one's irrational understanding of counsel's discharge.

Arguments that undo themselves

Given the preceding comments on reversing hierarchies and *differance*, it is now possible to explain how the mental health law logic justifying the competency standard for relinquishing one's right to an attorney is (or can be) undone when one is mentally ill though fit-for-trial. According to Derridean deconstructive inquiry, arguments for endorsing the dominant value amount to support, although temporarily and provisionally, for the value that is absent (i.e. irrational understanding). As previously discussed, rational understanding entails knowing and voluntary comprehension regarding the discharge of counsel. However, this logic is ungrounded at the law–psychology divide.

Competent to stand trial, though mentally ill, criminal defendants experience their psychiatric disorder in specific contexts. In other words, for example, clinical depression is not the same as borderline personality disorder, and their distinct clinical and psycho-diagnostic meanings are differentially experienced by various criminal defendants. Thus, a competency test for waiving counsel, following a CST determination, cannot function monolithically. However, in the wake of *Godinez*, this test does operate uniformly. As a result, the application of the standard in specific contexts for particular individuals amounts to an incompetency test; knowing and voluntary comprehension of the waiver issue is homogenized, producing irrational understanding by fit-for-trial, though mentally ill, criminal defendants. Indeed, under these circumstances, questions surface as to whether the accused was ever competent in the first place.

We see, then, how 'rational understanding' as the competency test by which to assess the discharge of counsel for fit-for-trial, though mentally disordered, defendants directs our attention to 'irrational understanding'. However, following the logic of legal deconstruction and the ungrounding of justifications, the silencing of the dominant expression does not imply the privileging of the phrase now made manifest. Both values in hierarchical opposition mutually defer to one another, and it is through this mutual interdependence that meaning is generated and sustained. Thus, the play of differences and dependencies dynamically function in the realm of trial fitness, including those occasions when questions surface about the competency standard on which the discharge of counsel is entertained and asserted by mentally ill defendants, following their CST determinations.[47]

Deconstruction as justice: the case of psychological jurisprudence

This deconstructive inquiry on the matter of competency to stand trial raises a number of concerns about the relationship between justice and

psychological jurisprudence. In what follows, several of these matters are provisionally examined. In particular, mindful of Derrida's pronouncement that 'deconstruction is justice', at issue here is how the forces of ideology, power and violence, lodged within the competency to stand trial phenomenon, subvert the very possibility of justice in the medicolegal sphere. Based on the critique entertained throughout this article, two such notions are discernible and include: (1) the 'gift' of psychological jurisprudence; and (2) the territorialization of psychiatric illness.

Justice, the gift and psychological jurisprudence

Derrida explains that while law and justice are not the same they are inextricably related. As he puts it, 'Laws are not just as laws. One obeys them not because they are just but because they have authority . . . Justice is what gives us the impulse, the drive, or the movement to improve the law' (1992: 12–16). In this context, law is a thing. Indeed, 'the law is a physical, written, definable, and enforceable governing force that constitutes the judicial system in all its legality, legitimacy, and authorization' (Caputo, 1997: 130).

The status of justice differs from that of the law. Justice is not a thing. It is 'an absolutely (un)foreseeable prospect' (Caputo, 1997: 130). However, it is this (un)foreseeability that makes justice in the legal sphere (in) calculable. Indeed, 'it is through justice as an (im)possibility that the law can be criticized, that is, deconstructed' (Arrigo and Williams, 2000: 323). Thus, attempts at displacing or de-centering the law represent opportunities for retrieving justice and, correspondingly, for resuscitating law. This convalescence in the legal sphere, through the activity of 'justice as the possibility of deconstruction', directs our attention to the slippages or disjunctures between law and justice (Derrida, 1992: 15). More particularly, it is what makes the de-centering of psychological jurisprudence, as the 'spectre' of justice, (un)recognizable and (in)calculable.[48]

Derrida reminds us that justice is much like a gift. 'The gift is precisely, and this is what it has in common with justice, something which cannot be reappropriated' (Caputo, 1997: 18). Following the receipt of a gift, if any gratitude is extended in return or if the giver consciously and deliberately bestows the offering as a reward, then it becomes circumscribed in 'a moment of reappropriation' (Caputo, 1997: 18). Indeed, the gift is undone once the economy of gratitude and of reciprocation commences. Thus, for a gift truly to function as such, it must not appear as a gift.

The logic of the gift resonates with the (im)possibility of justice. As Derrida asserts: 'This "idea of justice" seems to be irreducible in its affirmative character, in its demand of gift without exchange, without circulation, without recognition of gratitude, without economic circularity, without calculation and without rules, without reason and without rationality' (1992: 25). Thus, for justice to be mobilized as an (im)possibility, it must avoid the circular economy of gift exchange. It is with this under-

standing of justice as the possibility of deconstruction and as the gift without reappropriation, that the logic of CST determinations, as an exemplar of psychological jurisprudence, can be de-centered.

A fitness-for-trial finding is a calculable, knowable gift and, to this end, it is not, deconstructively speaking, a just finding. The psychiatric courtroom renders decisions about the competency of defendants and their 'qualified and reasonable' comprehension of the proceedings, 'their voluntary and intelligent' decision to pursue the path of self-representation and the 'rational' standard by which they discharge counsel. Indeed, the medicolegal community deliberately endeavors to assign meaning to the speech, thought and behavior of psychiatric citizens, believing that it has the power to judge most absolutely who is and who is not fit-for-trial.[49] However, it is in this activity of rendering such opinions that the gift of psychological jurisprudence, as an impossibility, as the absence of justice, is most apparent.

The logic of the psychiatric courtroom is built around rules, strategies and calculations designed to produce outcomes that reward people for their reasoned and rational judgments. However, the bestowal of this gift as a foreseeable and knowable commodity; that is, as a gift worth possessing, is undone in the context of persons with mental illness. Indeed, their paradox is to endure as psychiatric citizens (e.g. to allow their paranoid delusions to represent, in part, their humanity; to allow their clinical depression to signify, in part, their humanity) yet succumb to a finding of incompetence to stand trial, or to conceal their true identity (i.e. to quash their humanity) and manufacture wellness according to the laws of medicolegal science so that the Court can reward them with a CST ruling. This is the presence of juridical ideology, powerfully mobilized and legitimized in discourse, producing harm in social consequence.[50] Thus, given how fit-for-trial determinations function, the slippage between law and justice in the realm of psychological jurisprudence amounts to a privileging of normative, homogenous and de-pathologized speech–thought–behavior, consistent only with the logic of the psychiatric courtroom. Calculable rewards (i.e. competency findings) follow but only under these limited conditions, and prospects for more genuine articulations of justice are denied.

The territorialization of mental illness

Not only are all non-normative modes of comportment in the psychiatric courtroom not rewarded by a CST finding; a ruling which, following Derrida's insights, does not function as a gift, but these same citizens find themselves subjected to the reward of psychiatric treatment.[51] However, the gift of mental health intervention is calculable; it is mobilized by the circular economy of exchange, and, thus, it does not advance the interests of citizen justice. Indeed, as previously explained, the logic justifying psychiatric treatment is undone.[52] The relationship between psychiatrist (i.e. giver) and patient (i.e. receiver) is not what it appears. The forensic

practitioner restores competency and this facilitates a return to the psychiatric courtroom. The implication is that the giver has something of currency worth possessing. The conviction is that the gift of treatment is in the patient's best interest. However, in these moments, the bestowal of the reward transforms itself into a display of discursive power and institutional authority.[53]

By restoring the defendant's competency, the presumption is that the consignor of treatment will provide the gift of reparation; that is, one's psychiatric illness will be corrected, the person will be made functionally well. Deconstructively speaking, what is the price for this gift? First, difference is reduced to sameness. In other words, the identity of the person is transformed: homeostasis and normativity prevail. But this very condition territorializes and vanquishes uniqueness, devouring it in favor of likeness and homogeneity.[54] The presence of individuality, and all the differentiated possibilities that it implies, are masked, corrected or destroyed.[55]

Second, if the intervention is resisted, the individual is further psychopathologized and the refusal is understood to be symptomatic of one's underlying mental disorder. In these instances, the giver of treatment, instead of assigning something of benefit for which the receiver presumably is indebted, offers something that is unwanted for which the receiver mostly is vilified (Arrigo and Williams, 1999b: 403–4). From the gift recipient's perspective, the bestowal of treatment is not a reward worthy of possession. However, in the psychiatric courtroom, this is of no avail. Forced medication over objection is administered.[56]

Third, if the treatment is not rejected and the restoration of competency takes place, the defendant is now prepared to conduct his or her affairs in a way that is consistent with the logic of the psychiatric courtroom. However, conferring the gift of treatment mobilizes the circular economy of reappropriation and reciprocation, and it is this activity that defers prospects for justice. The person who treats, instead of giving, receives (e.g. competency restoration generates gratitude), and the one who is treated, instead of receiving, is in debt (e.g. because the defendant's competency is clinically restored, the case proceeds to trial).

Mindful of how mental illness is territorialized in the psychiatric courtroom, the slippage between fitness-for-trial determinations and justice is in how the gift of intervention both constrains individual identities and/or punishes people for their lived differences. When meanings are assigned to mental health law constructs such as 'competence', 'voluntary and intelligent' or 'rational understanding' based on monolithic interpretations of psychiatric illness, the entire CST decision-making process is compromised and obfuscated. Indeed, the unique identities of psychiatric citizens are normalized, difference is reduced to sameness, individuality is vanquished in the name of trial fitness. However, the mental health treatment that follows given an incompetency finding represents the gift of justice as a calculable, knowable possibility. This gift is informed by medicolegal

ideology concerning health and illness and is mobilized by discourse that can and does foster harmful (and devastating) outcomes for some psychiatric citizens.[57] Indeed, as this article has argued, the logic justifying these practices is undone in the psycholegal sphere.

Conclusions

Psychological jurisprudence, as a critical theoretical approach, seeks to unmask the covert forces of ideology, violence and power lodged within the texts of civil and criminal mental health law. Deconstruction, as a method of discursive inquiry, facilitates this excursion, drawing attention to the implicit meanings, hidden assumptions and unconscious values that operate within and throughout various (legal) narratives. Both this approach and this method are relevant to theoretical criminologists and to social and behavioral science researchers. Indeed, as this article has demonstrated, the variable of discourse manufactures, sustains and reinforces a particular view of actors and events in mental health law, and this articulated version, when unreflectively privileged, can (and does) have deleterious consequences for psychiatric citizens in a court of law. These matters are pertinent to criminology proper and to related theoretical investigations concerned with justice and its administration.

Competency-to-stand-trial decisions are a specific example of how psychological jurisprudence operates in the United States. They are also a vivid reminder of how justice is postponed in the psychiatric courtroom. While the existing limitations of the CST doctrine (i.e. those based on the phenomenon's criminal law logic and jurisprudential intent) raise important questions about the misguided operation of trial fitness, they do not reveal the underlying linguistic practices that covertly sustain ambiguity and vagueness in the medicolegal sphere.

To address this matter, several notions found within legal deconstruction were critically applied to the CST phenomenon. Relying mostly on the insights of Jacques Derrida, concepts such as inverting oppositional hierarchies, *differance* and the trace and arguments that unground themselves were linked to the language of competency to stand trial. Not only did this critical theoretical analysis disclose the flawed nature of legal discourse on matters of trial fitness, it demonstrated why and how justice as an (im)possibility is denied in the realm of psychological jurisprudence. The bestowal of psychiatric treatment and the territorialization of mental illness inform the decision-making logic of CST determinations. As such, these values already and always impede prospects for justice as an (in)calculable gift at the law–psychology divide.

Future theoretical investigations on the matter of trial fitness would do well to assess how the domain of psychological jurisprudence could produce fuller, more complete expressions of justice as an (im)possibility. This task would not only require a reconsideration and, perhaps, a

reformulation of the various legal constructs that constitute the discourse on CST determinations (e.g. 'voluntary and intelligent waiver'; 'rational understanding'), but would entail a thoughtful and deliberate re-evaluation of Derrida's notion of the gift as applied to psychiatric treatment and the territorialization of mental illness. Admittedly, these are very thorny and complex considerations. However, these are the matters that await the attention of critical (criminological) theorists concerned with how decisions are enacted, enforced and institutionalized in forensic psychiatry. As this article has proposed, the philosophy of legal deconstruction represents a compelling approach by which to respond to the challenges that lie ahead.

Notes

1. In the extreme, these state apparatuses promote a form of symbolic violence that embodies and legitimizes only normative and homogenous constructions of reality, devastating in social effect for (psychiatric) citizens who embrace different styles of existence. See, for example, Arrigo (2002b).
2. For application studies relying on the literary insights of Roland Barthes, see Arrigo (1993). For application studies relying on the structural semiotics of Algirdas Greimas, see Jackson (1995). For application studies relying on the psychoanalytic semiotics of Jacques Lacan, see Arrigo (1996, 2000).
3. Although no systematic assessment of these and related works has been undertaken thus far, one tentative conclusion seems apparent: critical psychological jurisprudence dramatically reframes the debates in medicolegal science, challenging the field to re-evaluate many of its epistemological assumptions. This active re-engagement with the 'texts' of law–psychology is designed to produce fuller, more inclusive responses to the problems clinicolegal decision brokers routinely confront. These problems run the gambit from civil and criminal confinement, to forced medication over objection, to predictions of dangerousness, to expert courtroom testimony, to executing the mentally ill. For a more detailed review, examining the philosophy of critical psychological jurisprudence and its vision of reform, see Arrigo (2002c).
4. For purposes of the ensuing analysis, only the legal language employed by the United States Supreme Court on the matter of competency to stand trial will be examined. Thus, in principle three cases are worth noting: *United States vs Dusky*, 362 US 402 (1960); *Faretta vs California* 422 US 806 (1975); and *Godinez vs Moran* 509 US 389 (1993). Admittedly, this focus on the precedent case law alone does not fully capture the confusion and ambiguity that pervades the CST doctrine, especially in the context of the psychological assessment protocols utilized to evaluate mental status subsequently admitted into evidence in a courtroom proceeding. However,

an attempt to explore how forensic experts engage in their interpretive practices (given the legal standard) and testify about a defendant's mental state is beyond the scope of this article.

5. Efforts to apply deconstructive practices to topical areas in psychological jurisprudence have already been tentatively undertaken. See, for example, Arrigo and Williams (1999b); Williams and Arrigo (2000). Thus, there is something of a precedent for turning to Derrida in order to advance our understanding of law–psychology controversies.
6. The earliest formulations are traceable to 17th-century English common law. See Blackstone (1783: 24). The English Court articulated the basis of the CST doctrine with its decision in *Frith*. See *Frith's Case* 22 How. State Trials 307 (1790). By the 19th century, persuaded by English common law, the United States recognized the doctrine of incompetency in the case of *Youtsey*. See *Youtsey vs United States* 97 F. 937 (6th Cir. 1899). The *Youtsey* ruling gave the competency doctrine constitutional status, linking mental illness and trial decision making (e.g. inability to plead during an arraignment). For more detailed analysis of these matters see, for example, Foote (1960); Note (1973); Winick (1985); Boch (1993).
7. For a more thorough review of the criminal law logic of *Dusky*, see Melton et al. (1997: 121–2).
8. To be more precise, if 'rational' factors govern trial abilities (e.g. the accused *sensibly* chooses not to participate in the defense), then a CST finding is not warranted. However, if 'irrational' factors govern trial abilities (e.g. mental illness as cognitive impairment), then an incompetent-to-stand-trial determination is justified. See Bardwell and Arrigo (2002a: 35).
9. In relation to *Dusky*'s first prong, reasonableness signifies a broad test of understanding controlled by the severity and type of the alleged crime and one's comprehension of these factors. In relation to *Dusky*'s second prong, reasonableness does not equate with a 'meaningful' attorney–client relationship but an adequate one in which the accused's trial assistance facilitates the defense's courtroom preparation. See Melton et al. (1997: 122).
10. For a more detailed analysis concerning these limits and their association with *Dusky*'s underlying intent, see Bardwell and Arrigo (2002a: 36–40).
11. Indeed, several courts, subsequent to *Dusky*, endeavored to explore the connection between the legal construct and the mental health status examination process. See, for example, *Swisher vs United States*, 439 US 1115 (1979); *United States vs Wilson*, 382 US 454 (1966).
12. For a more thorough review of the justifications and purposes of the CST doctrine along these lines, see, for example, Note (1978).
13. For an analysis of how this logic operates in practice, producing harmful effects for defendants, see Arrigo and Bardwell (2000: 35–41).
14. In *Godinez*, the US Supreme Court held that the 'standard of competency for pleading guilty or waiving the right to counsel is the same as the competency standard for standing trial' (*Godinez*, 1993: 387).

15. The purpose of this article is not to chronicle the full contemporary legal history on CST determinations nor is it to outline completely the US Supreme Court case law on the issue of competency to stand trial. Rather, this article endeavors to identify the precedent case law on the matter and to review the specific legal language that informed these decisions. This exercise is instrumental in that it helps make possible the subsequent deconstructive investigation of the CST doctrine.
16. Perhaps the most vivid and recent instance of this scenario is the case of Colin Ferguson, the New York City railway shooter who was accused, and subsequently convicted, of several counts of murder. Mr Ferguson was found competent to stand trial, exercised his right to waive the assistance of counsel and proceeded *pro se* to trial. For a review of this case and the problems associated with it from a law, psychology and policy perspective, see Bardwell and Arrigo (2002a: 119–20). For a review of the CST doctrine, and its relationship to high-profile cases more generally, see Arrigo and Bardwell (2000: 33–8); Bardwell and Arrigo (2002b).
17. One of the more troubling matters not addressed by the *Faretta* decision was whether a person, found competent to stand trial *with* the assistance of counsel, was therefore competent to proceed to trial *without* such assistance, following the psychiatrically disordered person's waiver of counsel. See Bardwell and Arrigo (2002a: 43).
18. Justice Blackmun's dissent represents a scathing critique of the majority's opinion in *Faretta* and the Supreme Court's position on the issue of relinquishing the right to counsel. In short, he questioned the vague judicial language (i.e. 'voluntary and intelligent' waiver) employed by the Court and how it located this right in the Sixth Amendment, notwithstanding the fact that the right to waive counsel is not stated in the Constitution 'in so many words'. See *Faretta* (1975: 850). Similarly, Justice Burger opined that the Court's 'ultimate assertion that such a right is tucked between the lines of the Sixth Amendment is contradicted by the Amendment's language and its consistent judicial interpretation' (*Faretta*, 1975: 837).
19. Although rather simplistic, the philosophy of deconstruction is not synonymous with Derrida nor his deconstructive inquiries. Likewise, all of Derrida's ethico-philosophical investigations are not expressions of deconstructive logic and thought. For primary source applications in law, see Derrida (1992). For a useful critique along these lines, see Landau (1993).
20. Admittedly, there are many other concepts found within the philosophy of Derridean deconstruction. For example, a fourth concept worth mentioning is the logic of the supplement (Derrida, 1976: 141–64; Balkin, 1987: 758–9). Moreover, it is a bit of a misnomer to reduce the significance of Derridean logic to selected principles; however, the critique entertained here is targeted and the importance of relying on the isolated concepts will be made explicit within the subsequent application section.
21. Logocentricism assumes the centrality in thought (and action) of the first term in a binary association. The dominance of this value (i.e. its imagery,

logic and meaning(s)), conceals the interdependence of both terms. See Derrida (1978: 3).

22. According to Derrida, the problem with these limited interpretations is that they ignore the intrinsic 'undecidability' of a text (e.g. the text of mental health law). As he explains, 'the meaning of meaning is [of] infinite implication. [There is an] indefinite referral of signifier to signified . . . Its force is a certain pure and infinite equivocality which gives signified meaning no respite, no rest . . . it always signifies and differs' (Derrida, 1973: 43).
23. The radicality of deconstruction proposed in this article does not endorse the decoding of meaning ad infinitum. Rather, attention is drawn to the sedimented or taken-for-granted dominant values that inform medicolegal science, that assume legitimacy and that represent institutional authority. It is this process that denies alternative or different expressions of meaning, thereby limiting greater prospects for justice. For an accessible review of these matters in law, see Fuchs and Ward (1994).
24. Although not identified as deconstructive analysis per se, Michael Perlin's work on mental disability law, sanism and pretextuality suggests a similar line of critique. Perlin's thesis endeavors to posit how deep-seated and firmly entrenched values and beliefs harbored by psycholegal decision brokers undermine greater prospects for fairness and justice in the lives of the psychiatrically disordered. See generally Perlin (2001).
25. As Balkin notes:

> deconstruction by its very nature is an analytic tool and not a synthetic one. It can displace a hierarchy momentarily, it can shed light on otherwise hidden dependencies of concepts, but it cannot propose new hierarchies of thought or substitute new foundations. These are by definition logocentric projects, which deconstruction defines itself against.
>
> (Balkin, 1987: 786)

26. As this article will disclose, the competency-to-stand-trial doctrine in the United States is one such example of mental health law ideology, where power in discourse (i.e. the written, spoken or 'scripted' text on the subject) produces harm in social effect. See Arrigo (2002b).
27. Perhaps the best illustration of this phenomenon comes from Derrida himself and his description of speech and writing. Reviewing the work of Rousseau, Levi-Strauss and Saussure, Derrida observes that it is not coincidental that each philosopher assigns privileged value to the activity of speech over writing (Derrida, 1973: 29–44, 101–268). Derrida then proceeds to demonstrate that, notwithstanding the inadequacies of writing (e.g. inability to convey true meaning, clear intent, precise accuracy), speech suffers from the same limitations. Indeed, speech *is* a kind of writing. Thus, the logic that justifies privileging speech over writing is therefore undone by drawing attention to the limits of the former term through its likeness to the latter term. See also Balkin (1987: 757).
28. The literature of treatment in the medicolegal community is voluminous. However, the logic of treatment implies that the giver (e.g. doctor, lawyer)

has something of shared value worth assigning to another (e.g. pain management, protection from self-harm). However, the deconstructive question is whether the recipient of mental health treatment perceives and experiences the bestowal of this 'gift' in the way envisioned by the giver. For more on this matter, see Williams and Arrigo (2000: 229–231).

29. This is especially problematic in cases where treatment is administered over one's objection to it (e.g. involuntary civil commitment; coerced treatment for purposes of competency restoration so that the individual can be executed). For a detailed review of treatment refusal in mental health law, see Winick (1997). For a critical review of mental health treatment refusal consistent with deconstructive analysis, see Arrigo and Williams (1999b: 405–6).
30. Indeed, the development of the MacArthur Competence Assessment Tool-Criminal Adjudication (MacCAT-CA) was specifically conceived to improve assessment technology in such matters as CST determinations, 'given the absence of adequate measures of competence-related abilities, including decisional competence' (Hoge et al., 1997: 141). The prototype of the MacCAT-CA was the more elaborate MacArthur Structured Assessment of Competencies of Criminal Defendants (MacSAC-CD). The MacSAC-CD consists of a number of scales and items assessing both adjudicative and decisional competence. For more on the MacSAC-CD see, for example, Miller and Germain (1987); Bonnie (1993).
31. For example, the sixth scale of the MacSAC-CD is called 'Competence to Assist Counsel: Appreciation' (CAC:A). It is composed of six items, focusing the defendant's ability to appreciate specific circumstances surrounding his or her case. These six items include: (1) the criminal charges; (2) the likelihood of conviction; (3) the impartiality of the adjudication process; (4) the possible helpfulness of the defense attorney; (5) the possible benefits of disclosing information to the defense attorney; and (6) the severity of punishment. For more on this item and the adjudicative competence of criminal defendants, see Bonnie et al. (1997).
32. For example, the seventh scale of the MacSAC-CD is termed 'Decisional Competence- Appreciation' (DC:A). Similar to the sixth scale, the DC:A assesses the defendant's ability to appreciate his or her own situation; however, in this instance, appreciation relates to decisional abilities, including the decision to plead guilty and to relinquish counsel. For more on the psychometric properties of the MacCAT-CA, see Otto (1998).
33. See Hoge et al. (1997: 174–6). As these researchers observed:

> as a predominantly cognitive assessment devise, the MacSAC-CD does not attempt to assess a defendant's behavioral ability to conform his or her demeanor to standards appropriate for a courtroom, and it does not attempt to assess a defendant's interpersonal ability to cooperate with a specific defense attorney.
>
> (Hoge et al., 1997: 174)

These are matters that compromise the extent to which one is fit to stand trial.

34. This dilemma presented itself in the Theodore Kaczynski case. The Unabomber exercised his *Faretta* right to discharge counsel and to proceed to trial by way of self-representation. The Court rejected his request, which led to a questionable guilty plea and verdict and an appeal on constitutional grounds. Underpinning the case's development was the very weighty question of whether the defendant was even competent to stand trial. For more on the Kaczynski matter, see *United States vs Kaczynski*, 239 F. 3d 1108 (9th Cir. 2001); Bardwell and Arrigo (2002b: 336–67).
35. For example, in a prior case, the US Supreme Court was confronted with the issue of differentiating between a hearing to address one's competence to stand trial and a hearing to address one's competence to waive counsel (*Westrook vs Arizona* 384 US 150 (1966)). The Court asserted that there is 'a serious and weighty responsibility upon the trial judge [to] determine whether there is an intelligent and competent waiver by the accused' (*Westrook vs Arizona*, 1966: 150–74). See also Corinis (2000: 268–70).
36. As one commentator dubiously observed, 'a defendant's delusions borne of mental illness has no bearing on the knowing and intelligent choice to waive the assistance of counsel' (Corinis, 2000: 275). It is this very logic that is the source of speculation and critique in this section.
37. In the case of *Godinez*, Justice Blackmun clarified this very point. As he explained:

> A finding that a defendant is competent to stand trial establishes . . . that he [or she] is capable of aiding his [or her] attorney in making the critical decisions required at trial or in pleas negotiations. The reliability or even relevance of such a finding vanishes when its basic premise—that counsel will be present—ceases to exist.
>
> (*Godinez*, 1993: 413)

38. For example, consider the case of a criminal defendant who is clinically delusional. While the person may be able to relinquish the assistance of counsel competently and intelligently, this decision may be driven by irrational beliefs or thoughts, undermining the voluntariness of the person's actions. For more on this dilemma, see Arrigo and Bardwell (2000: 22–5). Thus,

> an accused found competent to stand trial based, in part, on the knowledge that the individual was able to consult with counsel during the CST proceeding, can, in the wake of *Faretta*, dismiss his or her attorney, thereby undermining and undoing the notion that the defendant was competent in the first place.
>
> (Bardwell and Arrigo, 2002a: 47)

39. The case of Colin Ferguson, the New York City railway shooter, aptly illustrates this point. Having been found competent to stand trial with counsel's assistance he exercised his right to proceed to trial without counsel's assistance, notwithstanding the presence of paranoid delusional themes. Ultimately, Ferguson was found guilty of his criminal charges. For more on the Ferguson case, see Blum (1995); Arrigo and Bardwell (2000: 27–8); Bardwell and Arrigo (2002b). For a more case law description of the problems associated with a CST determination and a defendant who

wishes to pursue the path of self-representation, see *United States vs Jennings*, 855 F. Supp. 1427 (M.D. Penn. 1994).

40. As Justice Stewart opined in the *Faretta* decision:

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. [However,] to force a lawyer on a defendant can only lead him [or her] to believe that the law contrives against [the accused].
>
> (*Faretta*, 1975: 833–4)

41. As the *Godinez* Court noted, 'we reject the notion that competence to plead guilty or waive the right to counsel must be measured by a standard that is higher than (or even different from) the *Dusky* standard' (*Godinez*, 1993: 398).
42. (*Godinez*, 1993: 400). The *Godinez* Court relied on a standard required of all criminal defendants who elect to waive counsel, consistent with *Faretta*. The *Godinez* Court also drew support for this position from other cases. See, for example, *Parke vs Raley*, 506 US 20 (1992: 28–9). In addition, the *Godinez* Court made clear that it was not addressing the competency standard for pursuing the path of self-representation. As the Court opined, 'the competence that is required of a defendant seeking to waive his [or her] right to counsel is the competence to waive the right, not the competence to represent himself [or herself]' (*Godinez*, 1993: 399).
43. Admonishing the Court's monolithic approach to competency, given the presence of psychiatric illness, Justice Stevens asserted that,

> [c]ompetency for one purpose does not necessarily translate to competency for another purpose . . . The majority cannot isolate the term competent and apply it in a vacuum, divorced from its specific context. A person who is competent to play basketball is not competent to play the violin.
>
> (*Godinez*, 1993: 413)

44. *Godinez* (1993: 409). Indeed, following evaluations by psychiatrists, they concluded that Moran (the defendant) was clinically depressed (*Godinez*, 1993: 409–10). Moran also testified to the numbing effects of the medication (*Godinez*, 1993: 409–10).
45. As Justice Blackmun observed in *Godinez*, 'the majority's attempt to extricate the competence to waive the right to counsel from the competence to represent oneself is unavailing because the former decision necessarily entails the latter' (*Godinez*, 1993: 416).
46. As Justice Thomas observed, writing the majority opinion for the Court, 'there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning that the decision to waive other constitutional rights' (*Godinez*, 1993: 399).
47. The tension embedded in the hierarchical opposition 'rational understanding/irrational understanding' draws attention to the troubling outcome in the *Godinez* case. The state court of Nevada sentenced Richard Moran, the defendant, to death. The Ninth Circuit overturned this decision, arguing that the level of competency required to stand trial was

different from the standard required to represent oneself. The United States Supreme Court disagreed with the Ninth Circuit, concluding that the standards for trial fitness and waiving one's right to counsel following a competency determination were identical. As such, Moran's death sentence was upheld. The application of Derridean deconstructive principles demonstrates the questionable basis on which such decisions are made in this complex criminal area of mental health law. This matter is explored more fully in the subsequent section.

48. This is a specific reference to mental health law practices (e.g. the phenomenon of competency to stand trial) and the (im)possibility such practices presently embody for rendering justice. The notion of the spectre is significant to Derrida's deconstruction. The spectre is 'that which is denied or repressed . . . , dislodg[ing] or creat[ing] tension in the existing legalistic system of self-enclosure . . . [Thus,] deconstruction as a spectre . . . haunts the prevailing system of domination . . . forcing injustice to the fore . . .' (Arrigo and Williams, 2000: 336, fn.10).
49. The actuarial assessments of psychometricians are increasingly designed to predict more accurately who is and who is not adjudicatively and decisionally competent. The logic of these practices is that with more and better 'science' one can better understand how mental illness cognitively impairs people, adversely impacting their decision making. See notes 30–32 and accompanying text.
50. The oppression borne of this activity has been well documented in the literature. See, for example, Arrigo (1996: 151–201). In addition, as tentatively delineated throughout this article, the troubling court outcomes for Richard Moran, Colin Ferguson and Theodore Kaczynski all reflect the limits of prevailing judicial decision making on competency to stand trial matters. See Bardwell and Arrigo (2002b).
51. If one is not found fit-for-trial, then, typically, treatment at a psychiatric facility follows until such time as the person is believed to be competent to stand trial. See Bardwell and Arrigo (2002a, 2002b).
52. See notes 27–9 and accompanying text and Arrigo and Williams (1999b: 405).
53. There are some psychiatric citizens who expressly want the gift of treatment or, retrospectively, having received it come to appreciate it. In some mental health law circles this has been termed 'thank you' therapy. See Stone (1975). However, there are also those who do not welcome the gift of treatment, even after competency restoration. See, for example, Beck and Golowka (1988). Both phenomena are the subject of some deconstructive inquiry here.
54. This theme of territorializing mental illness is derived from the work of Deleuze and Guattari. See, for example, Deleuze and Guattari (1987).
55. For a critical deconstructive assessment of this point in the realm of politics and philosophy, see Young (1990). For applications in mental health law, see Arrigo (2002b).

56. For a lucid and detailed accounting of this phenomenon and the various conditions under which forced medication is administered notwithstanding one's objection to it, see Winick (1997: 298–302).
57. As previously suggested, the outcomes in the respective cases of Theodore Kaczynski, Colin Ferguson and Richard Moran raised a host of questions related to these matters. See notes 34, 39 and 47 for more.

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