

Federal Judicial Center
Dementia and Law: Legal Perspective
Audio File: Dementia_Judge Rakoff interview_V4
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Interviewer: Judge Rakoff, thank you for joining us today to talk about how issues related to dementia can come before the courts. Now, when I use the word dementia, I don't just mean one thing. Instead, I'll use dementia to represent a variety of conditions related to cognitive impairment, including, for example, Alzheimer's disease. So, with that broad definition in mind, why should judges be thinking about dementia?

Judge Rakoff: Well, with an aging population, the number of people who have dementia in one or another of the forms you've just described is growing very rapidly. Here are some brief statistics. Worldwide, some 55 million people already have dementia.

In the United States alone, 6 million people already have been diagnosed with Alzheimer's. And that figure is expected to grow to no fewer than 14 million by 2060. And one result of this is that an increasing number of litigants have dementia in one form or another. And that presents all sorts of problems for the court that many judges have never encountered before.

I'll give you just a quick example from a case I had in the past year. So this was a commercial case, civil case, brought by a very wealthy but elderly gentleman. And he was beginning

to suffer from dementia. And I found it out in a funny way. Because he really could not understand what his lawyers were saying. And he thought this was their fault. And so, he kept firing them.

And after he had gone through three different sets of pretty competent lawyers, I got concerned because it was causing big delays. And so, I brought in the most recent lawyers and questioned them a little. And of course, a lawyer, particularly in a civil case, is very reluctant to say, Judge, my client is suffering from dementia. So, they sort of expressed it as a communication problem but one they were hoping to overcome and so forth. But eventually, it all came out.

And then the question was what to do about it. I must admit, I ducked the issue. I did what any federal judge does in a situation like that. I referred it to a magistrate judge. But that kind of problem was new to me. And I think it's going to come much more frequently in the future.

Interviewer: Thank you for the example. Let's start by discussing competency a little bit. So, judges might need to determine whether an individual is affected by dementia and whether dementia affects their ability to make decisions.

So, for example, this may come up in competency to stand trial proceedings. Could you briefly describe those types of proceedings as related to dementia?

Judge Rakoff: Yes. So, this, under the Constitution, comes up as a constitutional matter in criminal cases. The standard in general is whether the defendant can understand the charges against him and whether the defendant can reasonably assist his attorney in defending or assisting in his representation.

Here, unlike the civil case I just described, it's usually the attorney who brings it to the court's attention. And usually in the form of saying, Judge, I think we may need to have a psychiatric evaluation. And that's sort of a code word for saying, I think there's a dementia problem here or other psychological problems that people of a younger age, it may be psychosis or schizophrenia or something like that.

And in my experience, virtually every judge will then order a psychiatric examination. Now, usually judges do that from a list of psychiatrists who've been already certified by the courts used before. Sometimes, the defense will hire their own psychiatrist. In that case, you may get a contrary psychiatrist from the government. And then you get into real difficulties because now, you have to be a mini psychiatrist.

Moreover, psychiatrists themselves are not always comfortable in addressing the legal standard. They're very expert in addressing whether the person is suffering from memory loss or whatever. But when you ask them, "Well, can this person

reasonably assist in their representation," that's a legal standard. They're not always able to answer that question in a definitive way.

Interviewer: Thank you. You mentioned psychiatric evaluations. What types of evidence do judges generally look for when making competency decisions?

Judge Rakoff: Well, the first and foremost do a psychiatric report. But also, you look at the history. There are often medical records, sometimes extensive. The guy may have already been hospitalized for some mental problem in the past.

Because most dementia is gradual, there's a need to see what's the most recent situation. Has he been sufficiently forgetful that there've been incidents with his bank or incidents with his relatives or things like that?

And also, to some extent, there will be adversary showings, but usually not. Usually, this is left mostly to the judge to determine on his or her own.

Interviewer: And you mentioned that dementia is gradual. And we know that dementia is often progressive. So, do judges need to make different decisions when an individual presents mild dementia as compared to, say, severe dementia?

Judge Rakoff: Yeah. This is a real problem because supposing someone has mild dementia. And right now, he probably

is competent under the legal test. But the trial is not going to be for another 18 months. And you worry about deterioration. So, what you would normally do if there really were to have a trial would be to have another examination done maybe a week or two before the trial.

But that's not the way it usually works. Because these days, there are very few trials. Everything is settled by a plea bargain. So, the guy, 12 months later, gets up to plead guilty. And you know from your early examination that he has some dementia. You don't know how much it has progressed. And now, you start questioning him. And you're not a psychiatrist. And it's a little difficult even if you question him fairly intensely to figure out whether he is fully with it or not. He will always say he fully understands the proceedings. So, if you just rest on that, you're not really exploring the issue.

On the other hand, it's very hard to explore it. And of course, judges are busy, and they have other things. A guilty plea is something of a formalistic kind of proceeding. Mostly, you buy some of his rights and what he's giving up and all like that.

So, in my experience, I have occasionally, but only occasionally then required another psychiatric examination right then and there. A third place where it comes up all the time is for sentencing. But that's after the plea has already gone

down. So, it presents more mitigation issues than underlying issues of whether he has competency.

Interviewer: So traditionally, if the court finds that an individual is not competent, the court will order treatment to restore competency. But does that work in cases of dementia?

Judge Rakoff: Now, this is a terrible problem because we do not have a cure for most forms of dementia. Alzheimer's is a good example. People have been searching for decades for a cure for Alzheimer's. There are some drugs that mitigate the problems but none that really cure it. And it gets worse and worse over the years.

And so, here's the dilemma. This guy is suffering from Alzheimer's. Let's say he's been detained. If he was suffering from schizophrenia, you would say, give him treatment. Give him pills. That often will cure the problem and he'll be competent in a couple of months.

Now, you sort of know if you follow this stuff that, gee, they're not going to be able to cure him. So, what are you doing? Are you, in effect, saying, let's lock him up forever, even though he's never been tried? Or conversely, let's say he is out. And you find that he's got Alzheimer's and not competent. Are you giving him a free get-out-of-jail-free pass forever?

I have to say I don't know a good solution to this problem yet. I mean, the best solution would be finding a cure. But the literature is pretty clear that we don't have cures for most forms of dementia.

Interviewer: And dementia definitely raises a lot of questions related to competency. But let's shift now to talk about culpability. So, making decisions and determining an individual's mental state can be difficult in any situation. How do judges make mens rea determinations when an individual has dementia?

Judge Rakoff: Yes. It's funny and good that you use the term, mens rea. Because, as you know, back in the days of Blackstone and whatever, the criminal law was formed as being in most cases a question of reus actus, the misconduct, the physical misconduct; and mens rea, the mental intent.

And as the use of those Latin terms and their derivation shows, this was at a time we knew very little about psychiatry at all and about brain development, let alone what we know today. And so, it was a sort of simplistic approach that still plays a major, major role in criminal law.

So, let's take what is called a specific intent offense like mail fraud or wire fraud. So, to be guilty of fraud in the criminal and federal sense, you not only have to make misrepresentations that led to your obtaining money and

property, but also you have to intend to deprive your victim of money and property - a specific intent.

So, supposing someone is suffering from dementia. And they no longer are really fully aware that what they're saying in this business deal that they're involved in is really not accurate in all material respects. But if you had a picture of their brain, it wouldn't be because they had cleverly planned to deprive the other person, defraud the other person of their money and property, but rather just a function of this confusion.

But how do you find that out? And how do you determine in any given case? It is not easy. We tend, we judges, to, I think, pass the buck as much as we can to the psychiatrist. But there's not a one-to-one correlation between what psychiatrists do and what we're asking them to do here.

Psychiatrists will tell you that they're mostly good at diagnosing past problems or current problems. This guy has a memory problem. But they're not so good at saying - and this led to the following situation in the criminal case. But it is definitely an issue with respect to culpability.

It comes up most often these days at sentencing. But again, that's a function not of what the problem we just described, but the function of most cases results in guilty

pleas. In the federal system, over 97 percent of all felony charges result in guilty pleas.

So, the lawyer will present this as a mitigating factor at sentencing. But the reality is that it could well have been a defense. And the lawyer has made the determination that it's sufficiently hard for a jury to appreciate, sufficiently hard for a judge to assess in terms of admissibility, that it's not worth it. And we'll just raise it for mitigation. But that doesn't really speak to the ultimate issue.

Interviewer: Now, related to sentencing, in 2019, as you know, the U.S. Supreme Court addressed whether the Eighth Amendment permits the execution of individuals with dementia. Could you please describe that case and any lessons that judges can take from it?

Judge Rakoff: Yes. So that was the case of *Madison v. Alabama*, not *Madison v. Marbury*, but an important case, nevertheless. And the question there was the Supreme Court had previously held that someone who is delusional cannot be executed because they don't really appreciate why they're being killed.

And that was an Eighth Amendment, cruel and unusual punishment case. It was extended in the Alabama case to the dementia context but with a lot of uncertainty as to how it would play out in any given case.

What the court said was that if the guy cannot remember the misconduct that he did that led to the death penalty being imposed, that's not a reason to not impose the death penalty. Because he can still be explained and can still be told, "Look, whether you remember or not, you killed this person. And that's why you're killing."

But if he's so far gone that he doesn't even appreciate why he's being put to death so that his reaction is, "I don't know what I did, but I don't know why you're killing me," then the Supreme Court has said that precludes the death penalty.

Interviewer: What types of issues might come from carceral settings, from jails and prisons that involve dementia, issues that might come before the courts?

Judge Rakoff: An increasing percentage of the prison population, both state and federal, are people of advanced age. You go back 40, 50 years, this was not the case. It's partly a function of heavier sentences, partly a function of an aging population. And, unfortunately, prisons are even less able to deal with those than courts in cases like we've just discussed.

There are several reasons for this. The biggest reason is underfunding. Federal and state prisons are terribly underfunded. So the result is they have to focus their attention on everyday problems, discipline. They do have money

for treatment of some physical problems. But physical problems will always take precedent in the prison over mental.

So, if someone is suffering from a fever and a very bad case of COVID-19, that's going to get a lot of attention. If someone seems to be getting ever more forgetful, that will be not normally addressed and often will be viewed as a fake. And with good reason, prison guards are often very skeptical of some of the things that prisoners do.

And so, the bottom line is very little of this gets treated until it gets really so extreme that the person is not functioning at all. At that point, there are some at least potential ways of dealing with it, and some of it comes back to court. It will come back to court through the so-called compassionate release statute. It can come back to court through a habeas if it's a state situation. But it's usually only in the really extreme cases that it comes back to the court.

Interviewer: And can you describe that process of when there is a compassionate release?

Judge Jed Rakoff: Yeah. So, this was a statute just passed a few years ago. It deals with the situation where there is both an unusual and compelling circumstance warranting the prisoner's release. And also, that it is consistent with the

guidelines and with the federal statutes as to what should be considered in the sentencing.

So, you initially have to apply. If you're a prisoner and you think you qualify, you have to apply to the Federal Bureau of Prisons, which almost never grants these. The figure is well below 1 percent that the federal -- but Congress has foreseen that this might be the case. And if the Federal Bureau of Prisons has denied your petition or simply has failed to act over a period of 30 days, then you can apply to the federal courts.

So, I get it all the time. I would say federal judges probably average two or three days a week. Many of them are frivolous. Many of them are not. And the first thing you have to do is decide whether you want to appoint counsel because, particularly in the case of people with dementia, they desperately need counsel. They can't act even on a pro se basis in a way that's really going to do the job.

So, you often have to make an initial determination, often just from very limited knowledge, as to whether to appoint counsel. Once counsel is appointed, then good lawyers can do things like apply for a psychiatric examination. Often, there will be considerable prison records that will be very helpful.

But as I say, the prisons, for reasons I consider totally understandable, given the financial problems they have, tend to

focus on physical ailments as opposed to mental ailments. And that means the records may be ambiguous at best.

Interviewer: Now, you mentioned examinations and prison records. What specifically are you looking for in making decisions on whether or not to grant compassionate release requests?

Judge Rakoff: So, where I've granted it in cases involving dementia, what has persuaded me is, first, independent of the ailment, the fact that the person has already served a substantial part of their time. So, they're not getting off, so to speak.

Second, that they have gone so far as to no longer be able to function in a meaningful way, either because they are completely forgetful or because they go into moments of rage without any apparent reason.

I had a case of Alzheimer's. My mother-in-law died of Alzheimer's. A sweet woman until she developed Alzheimer's. And then she was so upset at how she was unable to function that she would periodically develop into a rage. And that happens with prisoners as well. But you have to be careful because prisoners will also go into rages for other reasons.

So, you have to make sure that this was not something that was prompted by either some fight among prisoners or something

else but was really just an expression of the deteriorating position.

Then you have to figure out what's going to happen to this person if he's released. Are there family members who are willing to take charge of it? Is he willing to go into an institution? Do you have the power to put him into an institution? Do you want to put him into an institution? Many such questions. In the cases I had, the family was willing to take responsibility for him.

I would say the statute – by its very nature, by saying it's going to be extraordinary and compelling circumstances – would not warrant a release for someone who has just early dementia. It would have to be fairly along the line. But let the guy then have some peace for his last few years.

Interviewer: So, we started with an example from a civil case. But we've been almost exclusively talking about criminal cases. Could you provide some examples of how dementia might come about in civil proceedings?

Judge Rakoff: Yes. Well, most often they come up in state cases in things like challenges to wills, where someone has filled out a new will. And the family members, who are no longer recovering as much as they did under the old will, challenge it on the ground that the person was suffering from

dementia. And the attorney who filled out the will should have known that. And so, it's not a valid will.

There was a famous case in New York just a few years ago involving the Astor family, where that was the big issue. The question was whether one family member had taken unfair advantage of an elderly rich person with dementia to get them to divert monies away from the family. So that's not uncommon in state court.

In federal court, it comes up more commonly but not that often in situations where you have to appoint either a *guardian ad litem* to carry out the civil case or a guardian to oversee the disbursements from a settlement.

Interviewer: Is there anything else that judges should be prepared for when interacting with individuals who have dementia?

Judge Rakoff: So, I think where you see non-sequiturs, where you're talking about X and the response you're getting from the defendant – assuming you're talking to him in one of these hearings – is Y. And if sometimes you may say, well, you know, maybe you misunderstood my question. But if even then you get a nonresponsive response or a response that seems to be addressed to something totally different, I often find that is at least a clue to this person that has a serious problem.

Interviewer: We appreciate your perspective. Is there anything else the judges should know about dementia?

Judge Rakoff: I think the most important thing for them to know is just how prevalent it is and how it's increasing. Our society is really changing through aging. In so many ways, we're seeing, for example, increases in old age diseases that used to be something that was very rare or was a death penalty when it did occur.

And now, just from everyday experience, we are encountering more and more people with dementia and other similar mental frailties. And we ignore that at our peril.

Interviewer: Thank you, Judge. You appreciate your time.

Judge Rakoff: My pleasure.

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