# Commentary: Freedom and Function

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While the question of whether our actions are determined or are the result of free will is a deep one in philosophy, it does not need to be answered for forensic psychiatrists to give evidence in court. As Stephen Morse has pointed out, the absence of free will is not named as an excusing condition. The insanity defense, for instance, requires proof of functional impairment, to which psychiatrists can usefully testify. Of the approaches available to determinism, my own preference is that of Herbert Hart: until we know that determinism is true, we will continue to prefer a system that requires persons to have made proper choices to act as they did before we hold them responsible. This seems to resemble Dr. Felthous' preferred option, that mentally responsible choices are choices made in the presence of a relatively natural ability to have decided otherwise.

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Dr. Felthous[1] argues in the second part of his essay that forensic psychiatrists can help the criminal courts by describing the ways in which a mentally disordered defendant made his decisions and formed his intentions. I agree. This is, as Felthous points out, an essentially functional inquiry, and psychiatrists have knowledge of the ways in which mental disorders impair the functions concerned. I also agree with the conclusion of the first part of his article that to ask whether, and in what sense, human beings have free will is to dive into very deep waters.

Stephen Morse's[2] reassuring conclusion, in the paper that Felthous cites, is that while there may be questions about free will, it need not be a particular problem for forensic psychiatrists. The criminal courts are often said to assume that defendants have free will. If this were true, one might expect the absence of "free" to be a key element of the excuses that lie behind criminal defenses. Yet, current law does not describe lack of free will as an excusing condition. The insanity defense, in particular, could be expected to require that it be absent, or at least impaired, before the defendant could be treated differently. But the many versions of the insanity defense make little mention of freedom of the will. In addition to a mental condition, they usually require impairments of knowledge and sometimes of volition. They are, for the most part, functional tests. In general terms, they ask whether the defendant had the ability to choose normally when he decided to act as he did.[3]

There remains the nagging suspicion, however, that even normally made decisions cannot come out any other way.[4] The 18th-century Necessarians held that, "There is some fixed law of nature regarding the will, as well as the other powers of the mind, and everything else in the constitution of nature; . . . so that every volition, or choice, is constantly regulated, and determined, by what precedes it" (Ref. 5, pp 7–8). This is the position that became known as determinism. It seems not to allow for either free will or criminal responsibility. In fact, it did not lead the Necessarians to abjure punishment. Punishment of those obeying a "fixed law of nature" might seem harsh. But harshness seems to have been something the Necessarians took in their stride.

Determinism holds that we can act in no other way than that in which we do.[6] It seems to allow no distinction between those whose choice was "normal" and those whose choice was "impaired." To a determinist, choice, whether healthy or impaired, is essentially an epiphenomenon: we may think our choices affect what we do, but they don't. The choices are as predetermined as the actions. And, of course, if the choices we make don't affect what we do, it is difficult to see why we should be blamed when those actions turn out to be against the law.

This challenge to the practice of blaming people for the things they do and to the practice of forensic psychiatry in explaining why this is inappropriate in some cases but not in others, has been met in two ways. The first takes the position that free will and

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determinism are not as incompatible as they at first appear. Daniel Dennet[7] provides the example of the chess-playing computer whose next move we wish to predict. To do this, we can adopt a "physical stance," analogous to determinism, dismantling the computer and studying its components. Or we can adopt an "intentional stance," analogous to a belief in free will, making the assumption that the computer has been redesigned to play rationally. Dennett argues that both approaches are valid. It seems more difficult to see both approaches as equally valid explanations of human behavior, however. Dennet offers the example of a man who stopped using particular words. The intentional stance explanation, that he spoke the way he did because he chose to do so, seems to lose its appeal once a "physical stance" explanation, such as a cerebral hemorrhage, becomes available.

The second approach to the challenge of determinism is to say that for as long as determinism may or may not be true, we have to decide which type of legal system we prefer. We can have a legal system that is structured as if we have free will or one that is structured as if we do not. Hart[8] argued that we prefer to have a legal system that is structured as if we have free will because it allows us to take a further step. This further step ensures that we will be held responsible only for those actions whose costs and benefits we were aware of when we acted and that we could properly weigh in the balance. Criminal responsibility requires, broadly speaking, the same kinds of mental abilities that are required before someone can validly enter into a contract or make a will. Hart argued that this is no accident. Just as we want people to make a proper choice to enter into a will or contract, we want people to have been making a proper choice to act as they did before we hold them responsible, or, at least, fully responsible.

Most psychiatrists will want to avoid these waters in the evidence they give. They are more likely to be helpful to courts, as Felthous suggests,[1] by describing the ways in which the mentally disordered defendant made his decisions and formed his intentions. I have only one quibble with the "functional" argument that is presented in the second part of the paper. I have no particular difficulty with equating the will and the "intentional faculty," although I assume that others will continue to use the term differently. My difficulty is with equating the will, thus defined, with criminal responsibility. The law proscribes a range of forms of behavior for which the requisite *mens rea* is intention or something similar. But the criminal law often proscribes exactly the same behavior when *mens rea* takes other forms. Killing is against the law when it is done intentionally. But it is also against the law when it is done recklessly or negligently. Equating criminal responsibility with an "intentional faculty" seems not to make allowance for cases in which the *mens rea* of the offense charged is something other than intention.

But I suspect that Felthous himself provides the answer in his paper when he equates responsibility with the absence of an excuse. Indeed, acting in the absence of "a relatively natural ability to have decided otherwise" seems to cut so succinctly to the heart of the matter that it might form the central criterion of an as yet unwritten insanity defense. I am sure that we would end up arguing about what "natural ability to have decided" means. But the argument may seem more relevant to whether a defendant deserved punishment than whether he could "appreciate" the nature and quality of what he was doing or whether his act was the "product" of a mental disease or defect.[9]

## References


1. Felthous AR: The will: from metaphysical freedom to normative functionalism. J Am Acad Psychiatry Law 36:16–24, 2008
2. Morse S: The non-problem of free will in forensic psychiatry and psychology. Behav Sci Law 25:203–20, 2007
3. Morse S: Culpability and control. Univ Penn Law Rev 142:1587–660, 1994
4. Buchanan A: Psychiatric Aspects of Justification, Excuse and Mitigation. London: Jessica Kingsley, 2000
5. Priestley J: The Doctrine of Philosophical Necessity Illustrated. London: J. Johnson, 1777
6. Kupperman J: Philosophy. The Fundamental Problems. New York: St. Martin's Press, 1978
7. Dennet D: Mechanism and responsibility, in Essays on Freedom of Action. Edited by Honderich T. London: Routledge and Kegan Paul, 1973, pp 157–84
8. Hart H: Punishment and Responsibility. Oxford: Clarendon, 1968
9. Carter v. U.S., 252 F.2d. 608 (D.C. Cir. 1957)