The Insanity Defense: Asking and Answering the Ultimate Question

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The authors address the main questions in the insanity defense debate: Should it be abolished? Should psychiatrists participate as expert witnesses? Is the profession damaged by such testimony? Is there a logical leap between providing psychiatric findings and providing an opinion to the ultimate question? Because the free will/determinism model underlying the current insanity defense positions can be used to argue either side of the debate, it does not supply any rational answers. The authors reframe the discussion, using a systems approach, and suggest answers to these questions that are in line with the clinical realities and on a firmer philosophic ground.

In 1973, President Nixon proposed a criminal code that championed the cause of abolition of the insanity defense. In June 1982, following the Hinckley verdict, an ABC news survey found that only 21% supported the existence of the insanity defense.[1] These events should not be surprising because the insanity defense has never been very popular. An irate Queen Victoria, in 1843, joined the public outcry following McNaughton[2] being found not guilty by reason of insanity (NGRI). The 15 judges of the Queen's Bench were convened to provide answers to five questions regarding the law on insanity. Their responses to the second and third questions formed what is now known as the McNaughton Rule. One hundred and forty years later, the American Bar Association (ABA) reaffirmed its support for the maintenance of the insanity defense. The ABA rejected abolition as a "jarring reversal of hundreds of years of moral and legal history."[3] The ABA saw the penal law's moral imperative of blameworthiness as a precondition for criminal punishment. A few months earlier, in December 1982, the American Psychiatric Association (APA) position statement on insanity discussed the importance of the insanity defense and stated that its retention was "essential to the moral integrity of the law."[4] We have argued in a previous paper that it is a necessary component of the concept of justice.[5] Critics, including the American Medical Association (AMA), have said

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that the insanity defense should be abolished because it is an abuse of psychiatry with dangerous social consequences.[6-10] These critics assert that the defense is not essential to the legal system and the subsequent courtroom battles discredit psychiatry. We will review some of these suggestions for changing the insanity defense in the course of answering two major questions.

1. Should the legal system be asking whether or not a person is not guilty by reason of insanity? To answer this question we will take a look at the justification for the insanity defense which, according to both Roman law and English common law, is the assumption of free will and the capacity to morally choose. When we examine this free will/determinism controversy, we find it is a "red herring" because it can be manipulated to justify either retention or abolition of the insanity defense. We will use an alternative approach, general systems theory, to argue in favor of the insanity defense. This is a more powerful theory because it explains more of human behavior and provides a coherent theoretical justification for the way in which the legal system actually operates.

2. If the legal system asks this question, should psychiatrists participate and provide an opinion? We will argue for psychiatric participation in the legal system. We will demonstrate that giving an opinion to the ultimate question is a natural outgrowth of the psychiatric examination. It does not represent a leap into moral or legal matters or a leap in logic, but instead completes the scientific process.

Should the Question Be Asked?

Proponents of the insanity defense point out that our criminal code, as a prerequisite for punishment, usually calls for the capacity to morally choose. Both the APA and the ABA have based part of their arguments for the retention of the insanity defense on this traditional viewpoint.[11] The AMA and other opponents of the insanity defense base their arguments for radical change or total abandonment of the insanity defense on this same concept. Western culture's view of the capacity to make moral choices is historically derived from an acceptance of the doctrine of free will and the rejection of determinism. If this dichotomy of free will/determinism fails, theoretically or practically, arguments for or against the insanity defense based on it will also fail.

The Insanity Defense and the Free Will/Determinism Dichotomy Although few would take the position that all human behavior can be understood from a position of pure free will or strict determinism, for purposes of analysis and logical coherence we will explore these polar positions in order to understand why the dichotomy itself is unsatisfactory. Partisans of the free will/determinism dichotomy have argued that behavior may be considered free except for behavior that is caused by reasons which society may establish as grounds for nonresponsibility. However, this approach requires the proponent of free will to incorporate ideas from the determinist pole, i.e., all behavior is free except for that which is caused. In an either/or model, one cannot use con-

cepts from the opposite pole to justify one's position. If one does, one is left with arbitrary or irrational standards with which to make these distinctions, e.g., social force or fashion. As each pole requires numerous exceptions and incorporation of components of the other position, the free will/determinism model creates a convoluted and unsatisfactory foundation for decisions about the future of the insanity defense. These elaborations, exceptions, and attempts to rescue a free will/determinism dichotomy have become counterproductive, much like the elaborate orbits that failed to rescue Ptolemy's geocentric explanation of planetary motion.

There is no clear relationship between the retention or abolition of the insanity defense and the free will/determinism model. One can argue for or against an insanity defense from either the position of free will or from the position of determinism. If free will is assumed, proponents may argue that there must be a defense which allows for the possibility of impaired intent; opponents of the defense could argue that all human choice is free because it is human and the individual must be held accountable. A strictly deterministic view, ignoring intention and choice, could also form the foundation for arguing to either abolish or retain the insanity defense: proponents could argue that an action was caused in one case by $a + b + c$ and, in a second case, by $a + b + x$ and, in order to shape behavior, the first example would be excused and the second example would be punished; opponents of the insanity defense would argue that, because all behavior is determined, no distinction should be made. One can argue both sides of the question using the free will/determinism model and not get anywhere. The arguments on either side have the weakness of being unable to draw reasonable lines and having to make arbitrary distinctions. Without arbitrary distinctions, the positions become so all-inclusive as to be senseless. Something is seriously wrong when we try to fit our thinking about the insanity defense into one of the two pigeonholes of free will or strict determinism. This dichotomy is not useful in exploring, understanding, or solving the dilemma of the insanity defense. Perhaps this free will/determinism dichotomy would be useful if we focused on the purposes of the legal system, or at least this focus may bring into sharper view the logical problems in this dichotomy.

The Insanity Defense and the Purpose of the Legal System The concept of purpose, borrowed from general systems theory, may help us arrive at a conclusion about whether asking and answering the ultimate question can be justified. What is the purpose of the law and how may the insanity defense either assist or impede achieving that purpose? The purpose of the law may be justice (fairness to the individual or individual good), social control (benefit to the group or societal good), or both; in each case, one can use the polarity of free will/determinism to argue for or against the insanity defense. Although there are other stated goals of the legal system, e.g., simplicity and timeliness, they can be subsumed under the primary goals.

Systems theory tells us that there are levels of complexity. The concerns and welfare of the individual is one such level. Another, more complex level is the well-being of the group or the society. Because these levels are interdependent parts of the ecosystem, overemphasis on one level will lead to a disastrous imbalance. When law's only purpose is justice (being fair to the individual), one would have an unworkable legal system because it sometimes would require decisions in favor of the individual that would be unacceptably detrimental to society.

A legal system the only purpose of which is social control—concern with the communal or social good—will sacrifice justice for the individual whenever it is necessary to do so. Although a legal system based solely on social control is possible, in our view it is unacceptable. It would represent a totalitarian social structure and, to be successful, it would have to achieve a monolithic, controlled environment. It has been argued that such a social structure, preprogrammed and inflexible, is probably not adaptive over the long run for complex organisms.[12]

A legal system based on both social control and justice creates a dynamic balance between the individual good and the common good, and is workable.

If we examine the insanity defense and the possible purposes of the legal system using the free will/determinism dichotomy, the same pattern emerges, either side of the dichotomy can be used to argue for retention or abolition of the insanity defense:

1. Justice: the position of pure free will would hold that, because all internally motivated human behavior is freely chosen and accountable, there is no room for the insanity defense and every punishment should be based on the act and the act alone. It follows that intent need not be explored; it is assumed, because a person intends every act. Where every act is intended and there are no exceptions, no circumstances that excuse, every determination of guilt is just, by definition under the purist position, if it can be shown the individual committed the act. This broadens the concept of justice and narrows the parameters to be considered to the point of making justice meaningless because the individual facts and circumstances surrounding the event are irrelevant. On the other hand, an insanity defense can be argued to be essential to justice within a free will model if one arbitrarily assumes that some individuals will have marked impairments of their capacity to form intent. This is an arbitrary distinction because there is no basis within the free will model to actually justify excusing a particular act by a particular individual. A strict determinist can argue that because all behavior is caused it is not fair to hold anyone accountable. On the other hand, a determinist could argue that there is no way to make a defensible distinction between those who should be punished and those who should be excused; therefore, everyone should be held accountable.

2. Social controls: a social planner who believed that all men were free to choose their actions could hold everyone

responsible (no NGRI) as the best way to control their actions (overly broad meaning). On the other hand, the planner might stipulate that some individuals will be held responsible and some will not be held responsible (NGRI) as the best way to control behavior (an arbitrary distinction). If the social planner is a strict determinist, the status of the insanity defense would be determined by what would further social control. One position would assert that there should be no insanity defense, all or none should be punished for their actions (overly broad meaning). Another position would hold that the insanity defense is needed to further social control and some should be excused (an arbitrary distinction).

3. Both: Once again the free will position allows for either having or not having an insanity defense, but only at the expense of making justice a meaningless concept or making arbitrary distinctions. The strict determinist also could decide to include or exclude the insanity defense but only by once again making justice a meaningless concept or by making arbitrary distinctions. If we make distinctions, and we think we must in order to achieve social control and justice, these distinctions should be based on empirical knowledge of impaired capacity to integrate and monitor options.

Because drawing necessary distinctions cannot be done adequately within the free will/determinism dichotomy, is there a model that will explain human behavior with sufficient clarity to draw the necessary lines between responsibility and nonresponsibility? A systems model provides a scientific tool to integrate what is accurate from the free will and determinism models.[13] Like the example in physics of light at times considered to behave like a wave and at other times like a particle, leg movement may be the result of a knee jerk reflex or it may be the result of the individual choosing to move the leg. The reflex can be seen as the closed system component of the human organism. It is highly predictable, has much less option for variation, and is determined by a clear and specific event. The conscious movement of the leg is the result of a complex set of interactions, forces, and functions all influencing whether the leg will be moved and if so how. This open system of a person moving his or her leg involves the monitoring and integrating of options which is therefore less predictable and perhaps not predictable.[14,15]

The legal system tries, in practice, to incorporate portions of the concepts of free will and determinism but currently lacks the theoretical justification for doing so, which systems theory provides. A computer analogy may provide a way to think about an individual charged with a crime whose "hardware" may be significantly damaged or whose "software" may be significantly damaged.[16,17] This may be contrasted with the individual who is functioning with a reasonable capacity to choose at levels of indifference—options. In the former case, we would have a theoretical justification for legally excusing or holding the accused responsible for a lesser crime. In the latter case, holding the accused legally

responsible is neither arbitrary nor capricious.

Using general systems theory concepts, which emphasize the dynamic tension between levels of organization, the criterion to be used to determine what degree of impairment will excuse accountability will be *balance*—the balance between justice and social control. This is an ecological concept which argues that unnecessary or excessive sacrifice of the needs of either the individual or the communal level will, over time, so unbalance the system as to lead to its destruction. Because some frustration (trauma) can be expected to occur to everyone with some frequency, it would not further social cohesiveness and order to excuse every battering that arose from losing a job or getting a traffic ticket. Making the distinction between impaired and capable achieves the goal of justice (fairness to the individual, recognition of the real circumstances of an act). The interaction of this joint purpose maintains the balance between individual welfare and community welfare, an important insight in systems theory.[18] The insanity defense, then, is an important expression of the purpose of our legal system: the joint goals of meaningful justice and workable social control. Inasmuch as the legal system needs to, and should, ask the question represented by the insanity defense, we must turn our attention to the wording of the question.

Should Psychiatrists Testify?

In another paper, we have dealt with the objections to psychiatrists as expert witnesses.[19] Psychiatry is a medical specialty and part of the life sciences; as such, psychiatrists are within the population of scientific experts and meet the standards for the reliable scientific expert. The need for the participation of the psychiatrist as an expert witness is based on our view that a meaningful concept of justice requires empirical data on human behavior, which psychiatrists can provide. The question of damage to the profession as a reason for nonparticipation[7] requires rebuttal as it is often included in the list of reasons to abolish the insanity defense.

To describe our adversarial system as a three-ring circus that requires expert witnesses to make fools of themselves is to set the stage for the assertion that psychiatric expert witnesses inevitably damage the profession even when they are excellent and the verdict is legally just. The implicit argument must be made explicit in order to judge its validity: 1) If the public perception of the profession is damaged and this seriously damages the profession, then psychiatry must choose among the profession's good, society's good, or the individual's good; 2) a good reason must be supplied for choosing the good of the profession over the good of society or the good of the individual; 3) if such a reason can be provided, psychiatrists should not testify as expert witnesses.

It is not clear that psychiatrists in the courtroom seriously damage the perception of the profession. In fact, it can be argued that psychiatric testimony can go a long way toward educating the public about psychiatry. Even if the profession

were damaged, what would be the basis of justifying not participating in arriving at a just legal verdict and choosing the good of the profession over the societal good or the individual good?

There is little empirical evidence of damage to the perception of the profession or the profession itself and such evidence remains to be collected. We have argued that psychiatry has nothing to be ashamed of scientifically when competent psychiatric experts testify.[19] Choosing among levels of good (profession, society, individual) is a complex ethical question and and is best left to a flexible system that permits the choice to reflect the demands of the data. A balance between various levels is preferable to arbitrarily choosing in favor of one level or another. We are not aware of a persuasive, reasoned argument for choosing the profession's good over all other goods. In light of the deficiencies of this argument, we conclude that psychiatrists may ethically testify in court.

Should Psychiatrists Answer the Ultimate Question?

If the legal system asks the ultimate question of whether or not a person is not guilty by reason of insanity (not responsible because of mental disease), should the psychiatrist provide an opinion? To answer this question, we have to look at the nature of an expert's evaluation process. Conducting the forensic psychiatric examination is similar to conducting a general psychiatric examination. It is influenced by the background, training, views, and values of the examiner. It is shaped by the nature of the purpose of the examination and the questions to be answered. In this regard, the examination shares the scientific method, which has been characterized as initial question asking and identification of problems to be solved. This frames the data collection and allows inferences or answers to the initial questions. To bar the psychiatrist from providing an opinion about the relationship of the psychiatric illness to the person's capacity to make a choice and appreciate its consequences is to artificially separate the process of inquiry. There may be circumstances where the examination does not lead to sufficient data to arrive at a conclusion and, therefore, give an opinion. But there are instances where an opinion is possible. To deny the jury the expert's opinion is to deny the jury the opportunity to directly hear the full scientific inquiry and assess its validity.

For example, expert forensic medical testimony gave an opinion on the identity of the driver of a car involved in a fatal accident, when both teenagers at the scene denied they were driving. The question framing the physician's examination was which of the two teenagers was driving the car. The automobile and the injuries sustained by the two young men were examined in light of that question. The physician, an expert in accident trauma, related various injuries to structures in the car and possible location of each individual, and offered an opinion, based on those relationships, on which teenager was actually the driver. The inference (or opinion) was a logical step in the total process.

Is the offering of psychiatric opinion the same logical process? The APA position statement asserts that there is a logical leap involved in giving opinions in ultimate issue questions. The expert is no longer addressing medical concepts but must "infer or intuit the *probable* relationship between those concepts and legal or moral constructs . . . ." In neither the position statement nor the reference is there an argument to demonstrate that giving an opinion to the ultimate question is an "impermissible" leap in logic.

To have a logical leap, one must create a chasm between the inquiry and the conclusion. This is done by first characterizing the initial question that frames the inquiry and the data generated by that question as scientific (medical-psychiatric) and then characterizing the conclusions (inferences or probable answers) as moral and legal. However, the inquiry is not a pure, objective, untouched-by-human-hands endeavor; the asking of a question introduces intersubjective focus and direction to the inquiry. The inference or conclusion emerges from the initial question and examination and is part of the medical-psychiatric process. To characterize conclusions as moral and legal is to misunderstand the scientific process, which is synthetic. The unity of this process is evident in the above example from forensic medicine. Appreciating that there is no logical leap is easier in that example; for some reason it is considered problematic in NGRI testimony.

The ABA position, which would also prohibit the expert from answering the ultimate question, would also prevent the psychiatric expert's use of legally defined terms. The ABA invokes two arguments to support this position. The first is that there is a "logical leap" between scientific psychiatric inquiry and moral-legal conclusions. As we have demonstrated, the real difference is between opinion testimony and verdict; this difference emerges from the role difference between expert and juror. The second argument is that, unlike other expert opinions, the nonresponsibility issue involves the concept of "moral blameworthiness." Even if the issue of nonresponsibility involves "moral blameworthiness," an argument would have to be developed, and has not been, to demonstrate why the component of moral blameworthiness precludes the expert from giving an opinion. It is not obvious that it does. The expert indicates for the jury how the mental illness influenced the person's behavior and how it may or may not make sense to hold him responsible. Once again, this opinion testimony is not a verdict. For example, the expert in forensic genetics gives expert opinion about the paternity of a child. The jury gives a verdict about the paternity and may require the "legal" biological father, in part out of a notion of moral blameworthiness, to support the child he conceived.

The ABA document uses expressions such as "moral mistakes" and "moral blameworthiness," which are based on the implicit free will/determinism dichotomy. This dichotomy may be explicitly phrased as medical deterministic knowledge which the expert testifies to,

and moral-legal free will judgment which the jury makes. As we have discussed, this dichotomy is not an accurate way to understand how the legal system functions or how human beings behave. General systems theory provides a more inclusive explanation by providing a theoretical model which integrates choice and determinism, and synthesizes knowledge and judgment. Expert testimony about behavior cannot be severed from expert testimony about the capacity to have and decide among options. If it were, it would be irrelevant, useless, and confusing to the jury.

The psychiatrist provides a medical diagnosis and medical conclusions. In relating how a mental disease or defect relates to the NGRI defense, a psychiatrist is completing the scientific process. The jury must consider the nature and extent of the examination and the reasoning which supports the expert's opinion. The jury may accept or reject the psychiatrist's opinions. The expert's opinion is not the same as the jury's moral and legal decision and does not intrude upon or usurp the jury's function.

We are not saying that a psychiatrist may not be biased; to the extent that an expert's examination and conclusions are driven by bias, it is unfortunate, unscientific, and incompetent, but not the issue. There are examples throughout science of investigators being deceptive but we would not want to scuttle the scientific method—in fact the method often brings the deception to light. In court, the adversarial system provides for cross-examination of the expert and the presentation of contradictory expert testimony. Of course, where experts examining for opposing sides of a legal issue agree a courtroom battle is unlikely and where they disagree, the courtroom battle is not necessarily a bad thing. Empirical data do not lead to logically necessary conclusions; they lead to probable inferences where there may be a range of agreement or disagreement.

Conclusion

In examining the current basis for arguing for or against the insanity defense, the free will/determinism dichotomy, we found significant weaknesses in this polarization of human behavior. We suggest that general systems theory is a more accurate reflection of reality and a more powerful tool for examining an individual's capacity to choose. The law's dual purpose, social control and justice, not only requires an insanity defense but provides a basis for making necessary distinctions about capacity and seriousness of impairment. The well-prepared psychiatrist provides data and inferences which are needed to achieve law's purpose. These expert opinions are scientifically respectable, and participation by the psychiatric expert witness can achieve a balance among the professional, individual, and societal goods. Psychiatrists may answer the ultimate question and provide their medical opinion; this process does not involve a logical leap. The court must consider the complete inquiry, the data and opinions presented, and should not be restricted from learning the full proc-

ess. The jury must then discharge its responsibility to arrive at a legal finding.

In response to the two questions posed in the introduction, the legal system should ask whether or not a person is not guilty by reason of insanity, and psychiatrists should participate and provide their medical opinion.

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