The Psychiatrist's Guide to Right and Wrong: Part IV: The Insanity Defense and the Ultimate Issue Rule

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In the wake of *Hinckley*, widespread public dissatisfaction with the role of psychiatrists in insanity defense litigation prompted Congress in 1984 to amend the Federal Rules of Evidence to prohibit psychiatric testimony on the ultimate legal issue of whether or not a defendant is insane. APA's *Statement on the Insanity Defense* served as the ably articulated premise for this evidentiary amendment. APA argued that in going beyond their psychiatric expertise by answering ultimate issue questions as to whether defendants are legally insane, experts are likely to confuse the jury and undermine public confidence in psychiatry. APA also asserted that there was an impermissible logical leap between scientific psychiatric inquiry and moral-legal conclusions on the ultimate issue of insanity. This article reviews the origins, history, and vicissitudes of the Ultimate Issue Rule and analyzes the *Statement on the Insanity Defense* from both a legal and psychiatric perspective on the issue of whether psychiatrists should answer the ultimate question in insanity cases. The analysis suggests that APA's conclusions are not supported on scientific or evidentiary grounds, but may be warranted as a policy consideration to safeguard the public image of psychiatry.

> The mist the gods drew about them on the battlefield before Troy was no more dense than the one enshrouding the origins of the [Ultimate Issue] Rule.[1]

The Ultimate Issue Rule holds that an expert witness is not permitted to render an opinion on the *ultimate issue* in the case (e.g., whether a defendant was "insane"), because, *inter alia*, this would invade the province of the jury. This limitation on expert testimony had been repudiated by most jurisdictions and by the Federal Rules of Evidence at the time of the Hinckley trial in 1982. However, prompted by public dissatisfaction with the "not guilty by reason of insanity" verdict in the Hinckley trial,[2] Congress amended Federal Rule of Evidence 704 in 1984,* specifically prohibiting

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* Rule 704 subparagraph (b) as amended reads as follows:

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal trial may state an opinion or inference as to whether the defendant did or did

psychiatric expert testimony in criminal cases on the ultimate legal issue of whether or not a defendant is insane.[3] The rationale for this limitation on psychiatric testimony in insanity cases, which the Senate Judiciary Committee cites as the basis for its action, is set forth in the American Psychiatric Association (APA) *Statement on the Insanity Defense*,[4] which argued that by going beyond their psychiatric expertise to make conclusory statements about whether defendants are legally insane, psychiatric expert witnesses are likely to confuse the jury and undermine public confidence in psychiatry. APA asserts that there is a "logical leap" between scientific psychiatric inquiry and moral-legal conclusions:

> it is clear that psychiatrists are experts in medicine, not the law. . . . When, however, "ultimate issue" questions are formulated by the law and put to the expert witness . . . [he] is required to make a leap in logic. He no longer addresses himself to medical concepts but instead must infer or intuit what is in fact unspeakable, namely, the probable relationship between medical concepts and legal or moral constructs such as free will. These impermissible leaps in logic made by expert witnesses confuse the jury.[4]

Under the amended rule, the psychiatric expert may testify as the the defendant's mental state, motivation, and diagnosis at the time of the alleged act, but is barred from drawing inferences from such data to connect it to the crime and reach conclusions about the ultimate issue of insanity.

This paper will discuss the origins and history of the Ultimate Issue Rule, its rejection by a majority of American jurisdictions and by Congress by 1975, and its resurrection in 1984 by amendment of Rule 704. APA's *Statement on the Insanity Defense*, the ably articulated premise for this evidentiary amendment, will be analyzed from both a legal and psychiatric perspective and alternative points of view will be explored on the issue of whether psychiatrists should answer the ultimate question in insanity cases.

The Vicissitudes of the Ultimate Issue Rule

The common law origins of the evidentiary doctrine known as the Ultimate Issue Rule are obscure.† The first appearance of the rule in American courts has been traced to an 1840 case, *Davis v. Fuller*,[5] in which a witness was barred from opining as to the cause of backwater in a river (which was the ultimate issue to be decided in the case). Thus, for example, in insanity defense cases, application of the rule would prohibit expert opinion on whether the defendant knew right from wrong with respect to the particular act charged. The basis generally assigned for the rule was that there was a danger that the witness might "usurp the province of the jury,"[6] which

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not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.[3]

Rule 704(b) applies in federal, not state, courts and extends beyond the insanity defense to any ultimate mental state of the defendant that is relevant to the legal conclusion sought to be proved, e.g., criminal intent, premeditation, and so on. Expert testimony embracing all such ultimate issues is prohibited. Many states (e.g., N.Y.) do not follow Rule 704(b).

† The rule does not appear to have English common law antecedents.[1]

might in turn unthinkingly accept the opinion of an influential witness without independently analyzing the facts at issue in the case. Wigmore characterized these concerns as mere "empty rhetoric,"[6] because the jury is always free to reject the opinion of any expert, no matter how respected and well-qualified. It became increasingly apparent that in practice neither the rule nor its rationale worked for a number of reasons:

> [t]he rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information.[7]

As a consequence of the restrictions imposed by application of the rule, juries were deprived of valuable expert testimony that would assist them to get the thrust of complex evidence of a technical nature and put it into the proper context. As a related issue, judges were often faced with difficult line-drawing problems, determining whether expert testimony consisted of acceptable opinions on mediate facts or unacceptable opinions on ultimate issues. Beginning in the 1930s, these difficulties resulted in a trend to abandon the rule altogether.

A majority of courts had already rejected the rule as ill-conceived and unnecessary by 1975, when Congress enacted Federal Rule of Evidence 704, which stated:

> [t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.[8]

Rule 704 specifically abolished the Ultimate Issue Rule and underscored the basic principle of the Federal Rules of Evidence regarding opinion testimony, i.e., to admit it whenever it is *helpful to the trier of fact.*‡

Less than ten years later, in response to the outcry of public criticism over the *Hinckley* verdict, Congress reversed itself and amended Rule 704 to resurrect the Ultimate Issue Rule *for psychiatrists only*!§

Rule 704 as amended now reads as follows:

> (a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
>
> (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.[9]

Congress justified this return to the discarded Ultimate Issue Rule by referring to the nature and limits of psychiatric expertise. It noted that psychiatrists have no special expertise enabling them to draw conclusions on the ultimate question of criminal responsibility. The amendment would

‡ Opinions on the ultimate issue, stated in a strictly conclusory fashion, for example, would not help the trier of fact and would be of little evidentiary value without exploration of the underlying factual basis and rationale, showing the path from the facts to the opinion. Thus an expert would not be permitted to express the opinion "I think the defendant is guilty." Such an opinion would not be helpful to the jury.

§ Although primarily affecting psychiatrists, the rule's restrictions would apply equally to all mental health experts, e.g., psychiatrists, psychologists, and so on. In this paper, references to psychiatrists in this regard should be understood to include members of the other mental health specialties who may be called on for expert testimony.

> eliminate the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier of fact.[10]

As amended, Rule 704 now singles out psychiatrists testifying in criminal trials on insanity and related mental states for special treatment, distinguishing between the testimony of those psychiatric experts and the testimony of any and all other experts in other cases.

Thus courtroom disagreement will be allowed and qualified experts will be allowed to testify on ultimate issues "in many areas, including medical malpractice, products liability, child abuse, highway safety, and antitrust,"[11] with the one and only exception of psychiatrists in insanity defense cases.‖

Analysis of the American Psychiatric Association's "Statement on the Insanity Defense" in Regard to the Ultimate Issue Rule

Insofar as it addresses the Ultimate Issue Rule, the *Statement on the Insanity Defense* of the APA recommends that psychiatrists

> be permitted to testify fully about the defendant's psychiatric diagnosis, mental state and motivation (in clinical and commonsense terms) at the time of the alleged act so as to permit the judge or jury to reach the ultimate conclusion about which they, and only they, are expert. Determining whether a criminal defendant was legally insane is a matter for legal factfinders, not experts.[4]

APA's position is predicated on four basic premises, each of which will be analyzed in depth in the following sections.

1. Contradictory Psychiatric Testimony on the Ultimate Issue Tends to Confuse and Mislead the Jury

The Federal Rules of Evidence espouse a generally liberal approach towards expert testimony, favoring admissibility whenever such testimony is "helpful to the trier of fact." However, even relevant evidence may be excluded if it is likely to be confusing and misleading. Federal Rule of Evidence 403 provides:

> [a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, *confusion of the issues or misleading the jury*, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.[12] [emphasis supplied]

APA has concluded that contradictory psychiatric testimony on the ultimate issue of insanity tends to confuse and mislead "less than fully understanding juries."[4]

In considering the same issue, just prior to the passage of the 1984 amendment to Rule 704, the United States Court of Appeals for the Second Circuit[13] reached a contrary conclusion, noting that

> the unique complexity of the insanity defense militates against excluding conflicting expert testimony solely in the interests of reducing confusion.[11] (p 632)

‖ It is the thesis of this article that the resurrection of the Ultimate Issue Rule solely in cases involving psychiatric testimony on the issue of criminal responsibility was basically a political decision, unsupported by a sound scientific basis. It will serve to deprive factfinders of helpful expert testimony, because it results in indirect and incomplete expert testimony. In all other types of cases, the Ultimate Issue Rule has been abolished for the reasons stated in the original FRE 704 (1975) Advisory Committee Note[7] (primarily because ultimate issue testimony by experts is helpful to the factfinder).

Demonstrating its faith in the jury's ability to understand and digest such testimony,¶ the court went on to state:

> In making this legal and moral judgment, the jury should not be shielded from differences of opinion in a profession that can never be entirely devoid of subjective disagreements. Psychiatric testimony should not be excluded solely as a result of an unfounded belief that "a jury will not be able to separate the wheat from the chaff."[13]

A number of commentators have argued persuasively that psychiatric testimony on the ultimate issue of insanity actually serves to clarify the import of the psychiatric evidence and reduces jury confusion. Rudolph Giuliani (then Associate Attorney General of the United States) stated:

> it would probably make no sense at all to a jury if you didn't have the psychiatrist in the long run drawing a conclusion. It would be all gobbledy-gook without the psychiatrist drawing a conclusion as to what he's saying.[14]

Ciccone and Clements, on clinical and philosophical grounds, differ with APA on the ultimate issue question. They observe:

> Expert testimony about behavior cannot be severed from expert testimony about the capacity to have and decide among options [e.g., to judge between right and wrong]. . . . In relating how a mental disease or defect relates to the NGRI defense, a psychiatrist is completing the scientific process.[15]

In an excellent and comprehensive overview of the issue from an evidentiary perspective, Braswell[11] argues that psychiatric experts should be allowed to testify on the ultimate issue of insanity for the following reasons:

> 1. it assists the factfinders to analyze and draw inferences about the mass of psychiatric data, which they as laymen would not be competent to draw;
>
> 2. it teaches the jury to evaluate the evidence before it, ensures that it gets the thrust of complicated psychiatric opinions, and provides guidelines on how to connect psychiatric findings to the crime;
>
> 3. it allows both cross examination and the jury's own skepticism to test the psychiatric opinions and to scrutinize the psychiatrist's reasoning process, supporting data and rationale for his conclusion.#

She concludes that Rule 704 as amended will actually increase jury confusion "because it encourages indirect and incomplete testimony"[11] erects an artificial barrier to critically important expert opinion, and deprives the jury of the most useful information the psychiatrist can contribute.

2. Psychiatric Experts "Usurp the Province of the Jury" When They Opine on the Ultimate Issue

Legal commentators have tended to dismiss the fear that ultimate issue testimony by expert witnesses might invade the province of the jury. Korn[16] regards such a fear as "a nonsensical objection" and Wigmore[6] characterizes it as "a mere bit of empty rhetoric." As noted above, the jury is free to reject the opinion of any expert if there is evidence to support a contrary finding. The jury knows full well that it alone has the power to render a verdict in the case:

¶ The court noted in the same regard: "Even in civil litigation, where non-perspicuous issues and abstruse evidence proliferate, we have never acknowledged a 'complexity exception' to the right to a jury trial."[13]

For example, "Cross examination might focus on the imprecision of an expert's definitions, other conclusions reachable on similar facts, and the shortcomings of the expert's evaluative techniques."[11]

> Once again, this opinion testimony is not a verdict. . . . 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.[15]

In other words, the determination of the ultimate issue of insanity remains the sole province of the jury; but psychiatric testimony (including an opinion on the ultimate issue) permits the jury to make a more informed decision as to the evidentiary weight that should be accorded to the psychiatric evidence presented by each side. The purpose underlying the testimony of the psychiatric expert is not to substitute his opinion on the ultimate issue for that of the jury. Rather, it is to provide a scientific perspective for the jury, according to which it can then discharge its inviolable legal responsibility to arrive at a more informed and intelligent verdict. Excessive fear of jury domination by experts who testify on the ultimate issue is unwarranted: such testimony will be tested by the jury's own skepticism, cross examination, and the persuasiveness of the opposing expert's testimony.** Fears that expert testimony because of its "aura of special reliability and trustworthiness"[17] might overawe jurors, who are not used to scrutinizing authorities, seem exaggerated and unfounded in the light of empirical studies which reached contrary findings:[18]

> Jurors were shown to process expert testimony in a reasoned and systematic fashion, feeling at liberty to disbelieve it when it is improbable, incredible, false, or mistaken.[19]

It would appear that there is little in the way of empirical support for the proposition that ultimate issue testimony will invade the province of the jury. Most legal authorities have dismissed this concern as unwarranted.††

3. The Public Image of Psychiatry as a Profession is Tarnished by the Spectacle of Competing Expert Witnesses Testifying to Directly Contradictory Conclusions on the Ultimate Issue

In the wake of *Hinckley*, commentators across the political spectrum and the public in general have questioned the usefulness of psychiatric expertise in criminal proceedings, revealing their general lack of confidence in forensic psychiatry.[2]‡‡ Public mistrust was linked to preconceptions that the insanity defense is a "loophole" that allows many guilty individuals to go free and the belief that conflicting expert testimony must mean that forensic psychiatry is inherently imprecise with no scientific consensus for the determination

** "Psychological and psychiatric conclusions do not have any magic potency, and those that are seen as unreasoned or unsupported by the trier of fact . . . can easily be dismissed if they are not convinced that evidentiary weight should be placed on it."[20]

†† Note, for example, the following: Wigmore[6] ("a mere bit of empty rhetoric"); Morgan[21] ("sheer nonsense"); Slough[22] ("It is a curious turn of mind that impels a judge to mistrust the ability of the juror to assay the opinion of an expert and simultaneously gives that same juror undeserved credit with respect to comprehension of an abstract, complex [jury] instruction."); Ladd[23] ("Because jurors realize that they are the final triers to determine the issues and are reluctant to part with that right, there isn't much danger in reality from the use of all-embracing questions."); Korn[16] "a nonsensical objection").

‡‡ Some were disdainful, e.g. "[T]he insanity defense [is] a true legal art form with high-priced psychiatrists used to parade confusing conjecture about the mental condition of a defendant.[20]

of insanity.[2] Slater and Hans, in an empirical study of adverse public opinion about forensic psychiatry following *Hinckley*, concluded that negative attitudes were complicated by the public's lack of knowledge of both psychiatry and law:

> The adversarial process within which forensic psychiatrists must operate can have a negative influence on the opinion of a public uninformed of the workings of the legal system and . . . the insanity defense[2]

Although courtroom disagreement among expert witnesses is certainly not peculiar to psychiatrists[24]§§ nonetheless public disenchantment with the "battle of the experts" in highly publicized and controversial trials involving the insanity defense is likely to undermine confidence in psychiatry.

Based at least in part upon concern for the integrity of psychiatry in the face of such unfavorable public attitudes, APA's *Statement on the Insanity Defense* would narrow the scope of psychiatric expert testimony to the defendant's mental state, motivation and diagnosis, thereby eliminating conflicting expert opinions about ultimate factual issues. Such concern may not be unfounded in view of the firestorm of criticism following *Hinckley*. According to Stone, whenever psychiatrists venture beyond the limits of their specific clinical expertise, especially in the glare of disproportionate notoriety in insanity defense trials, "psychiatry will always be the loser even when the verdict is legally just."[26]

APA's recommendation for a strategic retreat in insanity defense litigation is based on the major premise that psychiatrists cannot, within the scope of their effective clinical skills, provide a scientific answer to the ultimate question of insanity. When they exceed their limitations in this context, they frequently tarnish the image of the profession in the process. In the following section, this major premise will be analyzed in detail.

4. Psychiatrists are Experts Only Within the Scope of Their Clinical Skills; They Lack Expertise in Ultimate Legal or Moral Issues and Therefore Make Impermissible Logical Leaps when Opining on the Ultimate Issue of Insanity

Aside from APA's concerns about the impact of ultimate issue testimony on the judicial system or on the public perception of the psychiatric profession, this section will focus on the basic substantive contention in APA's *Statement on the Insanity Defense*, i.e., that there is a "logical leap" involved in giving opinions on ultimate issue questions, with the result that psychiatrists exceed the limits of their scientific expertise and make unwarranted claims of expertise in matters of law and morality which they do not in fact possess.

The definition of forensic psychiatry endorsed by the American Academy of Psychiatry and the Law and adopted by the American Board of Forensic Psychiatry, as propounded by Halpern, states in relevant part:

§§ Valid and legitimate disagreements occur in all fields: physics, engineering, architecture, medicine, and so on. "The experts are likely to disagree about the underlying facts, which are usually both complex and uncertain; they are even more likely to disagree about the inferences to be drawn from those facts."[25] (Judge Bazelon on experts in science and technology)

> Forensic psychiatry is a sub-specialty of psychiatry in which scientific and clinical expertise is applied to legal issues in legal contexts . . . "[27]

Epistemologic problems may arise at the interface between psychiatry and the law during the process of *application* of psychiatric expertise to "legal issues in legal contexts," because of fundamental differences in conceptualizations and models employed by the two disciplines.[28] The result of these disparities is that on occasion the law deals with the subject matter of psychiatry in terms that may be foreign to the conceptual system of the psychiatrist.[16]‖‖ The insanity defense offers a particularly striking illustration of this problem:

> the question whether a particular actor was responsible, even apart from its historical ingredient, is not a purely scientific one; that is, it cannot be resolved solely by reference to the learning of psychiatry. Policy and value ingredients have been superimposed on that learning and have produced a legal concept . . . that has no counterpart in the psychiatrist's conceptual system.[16]

The application of such mixed legal-scientific concepts will always involve an expert in his testimony attempting to bridge the gap between scientific and legal conception. Should the inferential jump required from psychiatric conceptions to legal ones suffice to preclude ultimate issue psychiatric testimony? Ciccone and Clements argue that such an inferential jump is "a logical step in the total process" of conducting a forensic psychiatric examination; denying the jury the expert's opinion on the ultimate issue deprives them of the opportunity "to directly hear the full scientific inquiry and assess its validity."[15] They go on to question whether there is any basis for APA's conclusion that there is an "impermissible" leap in logic in opining on ultimate issues or that such opinions should be characterized as legal or moral. They note that, although under certain circumstances the examination does not lead to sufficient data based on which an opinion may be reached on the ultimate issue, there are instances certainly where an opinion is possible:

> The inference or conclusion emerges from the initial question and examination and is part of the medical-psychiatric process. . . . In relating how a mental disease or defect relates to the NGRI defense, a psychiatrist is completing the scientific process. . . . Empirical data do not lead to logically necessary conclusions. They lead to probable inferences where there may be a range of agreement or disagreement.[15]

This viewpoint would be consistent with the full range of situations in which psychiatric expertise is applied to "legal issues in legal contexts;" e.g., in determining whether as a result of psychiatric illness an individual is competent to proceed to trial, is totally disabled under Social Security guidelines, or has the capacity to execute a will or a contract. In all of these situations, it is generally accepted that the psychiatric expert can effectively communicate from his conceptual system knowledge that is relevant and helpful in moving inferentially to the legal conception (without any objection or caveat to the effect that he is not an expert in criminal procedure, or in vocational counseling, or in estate or contract law).

‖‖ Bursten's book *Beyond Psychiatric Expertise*[29] provides a scholarly analysis of burdens placed on forensic psychiatrists by society when public policy requires answers to questions that may be beyond their expertise.

Previous articles in this series have attempted to explicate judicial and statutory standards of insanity and correlate them with the psychiatrist's findings of psychopathology.¶¶[30-32] A classificatory scheme of delusional subtypes was presented, correlating delusional content with lack of criminal responsibility within jurisdictions following various standards of insanity.[31] Similarly, the exculpatory effect of Postpartum Depression under the Model Penal Code approach was analyzed.[33] These articles concluded that

> by properly relating his clinical psychiatric findings to the relevant legal criteria for criminal responsibility that apply, the psychiatrist is better prepared to provide data and inferences to the factfinder that are needed to achieve the law's purpose.[30]

Varying Legal Standards of Wrongfulness The law does not recognize a transcendent constancy in the legal insanity status of psychotic individuals: insanity is a relative matter dependent not only upon the operative psychopathology at the time of the act, but also upon how specific symptoms comport with the law of the jurisdiction in which the defense occurred (the *lex loci delicti commissi*). The following brief examples are paradigmatic:

Example 1

A killed his wife by poisoning her. As a result of a paranoid illness (induced psychotic disorder), he sincerely believed that she suffered from an incurable illness that would inevitably lead to an overwhelmingly painful death. When informed by the police that his wife had died in the hospital, he stated "I suppose they will hang me for this?" The jurisdiction in question followed a cognitive insanity test, requiring that the accused knew that his act was *legally wrong* in order to be held criminally responsible for his act. In view of his admission to the police, the psychiatric expert opined that his psychotic illness did not rise to the level of exculpatory insanity, because he knew that his act was contrary to law (as well as realizing what punishment the law provided for murder).

Example 2

B had a history of numerous psychiatric hospitalizations and suffered from the delusion that she was *Jezreel, Lord God Woman*, feeling compelled to follow her own rules as opposed to those of society. She fatally stabbed her victim with a butcher knife, believing that she was her own judge of what was right and wrong and could operate under her own standard of morality, which applied only to her. She realized that she had acted against the law and against the commonly accepted standards of morality which prevail in the community. The jurisdication in question followed a cognitive insanity test, with an *objective* moral standard (i.e., moral wrongfulness is not to be judged by the moral standards of the accused, but by his awareness that society regards the act as wrong). The psychiatric expert concluded that she was criminally responsible for her conduct because she knew that she had acted contrary to public standards of morality.

Example 3

C suffered from paranoid schizophrenia. He believed that the Mafia was planning to kill him. When a policeman stopped him for going through a red light, he heard voices warning him that the officer was in fact a Mafia "hitman" who was about to shoot him. On the

¶¶ These articles considered only cognitive tests for insanity, not volitional ones. Even APA conceded that many psychiatrists believe that psychiatric information relevant to whether an individual understood the nature of his act or its wrongfulness (i.e., the cognitive test) is "more reliable and has a stronger scientific basis" than does psychiatric information relevant to whether he was able to control his behavior (i.e., the volitional test).[4] Any concern about volition testimony is moot however in federal court since Congress deleted the "irrestible impulse" prong of the legal test for insanity in 1984.[33] The author shares APA's skepticism in regard to volitional tests and will restrict the discussion to cognitive tests and various standards of "wrongfulness."

basis of this sincere but delusive belief, he shot and killed the policeman. In a jurisdiction following an insanity standard similar to Example 2 (i.e., a cognitive test, with an objective moral standard), the psychiatric expert testified that C was not criminally responsible. C suffered from a delusional psychosis. If the facts had been as he deludedly supposed them to be, he would have been acting in justified self-defense and would not have expected to be held culpable under those circumstances according to the standard of public morality. Accordingly, it could not be said that he knew his act to be wrong.

The thrust of Ciccone and Clements' work and the previous articles in this series is that by using standard clinical means of evaluation and, as a threshold issue, ascertaining and applying the appropriate legal insanity test (e.g., the appropriate specific legal standard of wrongfulness), the forensic psychiatrist may be able to "complete the full scientific inquiry," bridge the gap between scientific and legal conceptions, and draw "probable inferences" which embrace the ultimate legal issue of insanity.

A common objection among psychiatrists to the present chief criterion of responsibility is that it is couched in moral or ethical terms.[34] They maintain that they are experts in psychiatry and not morality;[##] that knowledge of right and wrong is a problem for the theologian, not the psychiatrist, and that such determinations necessitate value judgments that are of necessity taboo to clinicians.[34] They agree that when the psychiatrist

> is forced to adopt the vocabulary of morality and ethics, he is speaking in what to him is a foreign language and in an area in which he claims no expertise.[35]

This objection may reflect a basic misconception on the part of psychiatrists. They are not being asked to pass judgment on the moral standards of the accused or of society. Likewise, psychiatrists should not be concerned with whether defendants acted according to their own (psychiatrists') standards of morality. They are not even required to determine the functional status of some transcendental moral faculty of the defendant to determine right and wrong in general terms. What they are required to assess is the capacity or competency of the defendant to know (or appreciate) the wrongfulness (or criminality) of *the particular act as charged.* Such an assessment does not call for a moral pronouncement or judgment, but merely for a focused psychiatric evaluation of reality testing, ego function, and superego structure, well within the scope of acknowledged psychiatric expertise. The clinical findings are then correlated with the relevant legal criteria. In many cases (e.g., when individuals manifest delusions of persecution and believe they are acting in justified self-defense), there is no impairment of moral perceptions *per se.* Such individuals have correctly internalized the moral standards of society (i.e., they know it is morally permissible to act in justified self-defense). It cannot be said that they know the particular act to be wrong; however, the incapacity to

Actually psychiatrists may know more than they care to admit. Brenner states: "The superego corresponds in a general way to what we ordinarily call conscience. It comprises the moral functions of the personality."[36] The psychiatrist is no stranger to superego pathology, severity of the superego or lacunae in the superego. Fingarette asserts that "the identification and assessment of moral knowledge and moral attitudes play a systematic and central role in psychiatric doctrine."[37]

apprehend its wrongfulness is not because of a defective moral compass (their moral compass appears to be in good working order). What is deranged is the ego function of reality testing in regard to the surrounding circumstances, not superego functioning. To put it another way, they are capable of judging between right and wrong as a general principle. It is in regard to the particular act that they fail to draw the proper distinction. If the situation had in fact been as they deludedly believed it to be, they would have been acting acceptably in keeping with public standards of morality.*** Psychiatrists are not called upon to be moral philosophers (it is conceded that they are not) in order for them to analyze certain forms of psychopathology and move inferentially to the conclusion that there was or was not a lack of capacity to know that a particular act was wrong. This is not to say that such a determination can be made in all or even most cases to a reasonable degree of medical certainty. Devlin asserts that society has a right to have a public morality and to use the law to enforce it.[38] The public morality is determined by the moral judgments of the cross section of society represented by the 12 citizens in the jury box. In the discharge of their legal responsibility in returning a verdict, it is the jury that exercises a moral judgment, not the psychiatrist. Ciccone and Clements underscore this point: "[t]he 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."[15]

*** Not to put too fine a point on it, they apply the correct set of moral standards to the wrong (because delusionally distorted) set of facts.

Conclusion

The expressed rationale for the Ultimate Issue Rule made little sense; courts came to realize that the Rule could not be meaningfully or consistently enforced. Prior to its amendment in reaction to the *Hinckley* verdict, Federal Rule 704 was consistent with previous practice insofar as it continued the modern trend of abolishing the Ultimate Issue Rule. In 1984, with the amendment of Rule 704, the Ultimate Issue Rule was resurrected for psychiatrists in insanity defense cases only. The ably articulated basis for this evidentiary amendment, APA's *Statement on the Insanity Defense*, set forth a number of premises for its recommendation that psychiatrists should not be permitted to testify on the ultimate issue of insanity. Analysis of these premises does not support APA's contention that psychiatric testimony on the ultimate issue of insanity represents an "impermissible" leap in logic, that it exceeds the scope of effective psychiatric skills, or that it represents a moral and legal judgment as opposed to a clinical one. Likewise, there is no evidence that ultimate issue testimony serves to confuse the jury or usurp its prerogatives. In many instances psychiatrists can draw valid inferences which embrace the ultimate issue of insanity. Such expert opinions are "scientifically respectable"[15]. However, APA's concern about the unfavorable public attitude towards psychiatric participation in controversial insanity defense cases may be a valid basis for resurrec-

tion of the Ultimate Issue Rule in Federal Rule 704 as amended. APA's concern about the integrity of the profession and its public image may warrant a considered judgment that the expert's view regarding the inferential jump between the scientific and the legal conception is not wanted, on the grounds of policy (as opposed to scientific or evidentiary) considerations. It may be that such a strategic retreat is in the best interest of psychiatry. †††This view would suggest that the real issue after all may not be whether psychiatrists *can* answer the ultimate question, but whether they *should* answer it.

Appendix

Recently Decided Cases Which Interpreted FRE 704 as Amended *US v. Lyons,* 731 F.2d 243 (5th Cir. 1984)

US v. Brown, 776 F.2d 397 (2d Cir. 1985)

US v. Frisbee, 623 F. Suppl. 1217 (N.D. Cal. 1985)

US v. Prickett, 790 F.2d 35 (6th Cir. 1986)

US v. Pohlot, No. 86-1222 (3d Cir. Aug. 25, 1987)

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††† The American Academy of Psychiatry and the Law should consider an in-depth study of these issues and the formulation of an authoritative position paper which goes beyond APA's 1982 *Statement.* Until these issues are clarified, psychiatrists who do testify on the ultimate issue of insanity (as is the practice in a number of jurisdictions) do so under a shadow of sorts, conveying (at least to some) the appearance of impropriety, by performing in a way that APA has condemned as beyond the scope of their professional ability. Whenever they do so, theirs is the unfair burden of refuting an innuendo.

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