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Qualifying the Psychiatrist as a Lay Witness: A Reaction to the American Psychiatric Association Petition in *Barefoot v. Estelle*

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ABSTRACT: Organized psychiatry has recently begun to define limits to expert testimony. The American Psychiatric Association filed an amicus brief in the case of *Barefoot v. Estelle* urging legal curtailment of psychiatric testimony as to future dangerousness and prohibition on Constitutional grounds of expert psychiatric testimony solely based on hypothetical data. The Supreme Court refused relief on both questions. Psychiatric testimony to ultimate questions at law is limited by the inherent contextual variables of psychiatric clinical and experimental knowledge and practice. A forensic science model for psychiatric participation with explicit psychiatrically defined limitations is proposed using competence to stand trial as an example.

KEYWORDS: jurisprudence, psychiatry, witnesses, testimony, *Barefoot v. Estelle*, forensic psychiatry, dangerousness, hypothetical questions, competence to stand trial, expert witness

Psychiatrists in the United States have participated in legal processes since at least the early 19th century as evidenced by Isaac Ray's *Treatise on the Medical Jurisprudence of Insanity* [*1*]. The zenith of legal and psychiatric optimism concerning the usefulness of psychiatric involvement in legal proceedings was reached in *Durham v. United States* in which the Court intended to expand "... to the widest possible scope ... medical or psychiatric testimony" [*2*]. Since Bazilon's [*3*] and Menninger's [*4*] scathing criticisms of the quality of psychiatric testimony under the Durham rule, calls for modification or elimination of psychiatric participation have resounded in both the legal and psychiatric literature [*5*].

The *Barefoot vs. Estelle* case encompasses several of the most troubling conundrums facing contemporary law and psychiatry, however, the case may also be a seminal decision toward a more disciplined and self-reflective participation by psychiatrists in the legal process.

Summary of *Barefoot v. Estelle*

The Supreme Court decided in the case of *Barefoot vs. Estelle*, Director, Texas Department of Corrections on 6 July 1983. Barefoot had been convicted of first degree murder of a police officer and sentenced to death. Barefoot petitioned the court to reverse the death sentence on three grounds, the first two of which involved the standards and procedures used by the Court of Appeals to deny a stay of execution to a federal habeas corpus petition. The third was that

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the Court set aside the death penalty ruling because of the admission of prejudicial psychiatric testimony as to future dangerousness based on a hypothetical question violated due process and impaired the discretion of the jury in violation of the First, Eighth, and Fourteenth Amendments to the Constitution [6].

The matter before the jury was that Barefoot should be excuted if among other elements there was a probability that defendant would commit criminal acts of violence that would constitute a continuing threat to society. The state presented two psychiatrists, neither of whom had personally examined Barefoot, who were willing to testify to his future dangerousness based on hypothetical evidence. The first expert testified in essence, that the person described by the prosecution was a sociopathic personality and that such a man would be a danger to society and commit further crimes. The second psychiatrist gave his expert medical opinion that the person described in the hypothetical (Barefoot) was "a fairly classical, typical sociopathic personality disorder" of the 'most severe category." The psychiatrist then testified that he was "one hundred percent sure" that such a person would commit future criminal violent acts "in the penitentiary or whether he was free" [6].

The American Psychiatric Association (APA) filed an amicus brief in support of Barefoot's position on the issues of psychiatric prediction of future dangerousness and the use of hypothetical questions as to the basis of psychiatric testimony at capital sentencing hearings. The position of the APA, as stated in the brief, was that the Court should disallow psychiatric testimony as to long-term dangerousness because overwhelming evidence demonstrates that psychiatrists have no particular expertise in this area. The Association proffered research evidence concluding that lay persons, given actuarial data on past acts of violence, can predict future violent acts with the same 33% accuracy as psychiatrists. The APA further concluded that "by dressing up the actuarial data with an expert opinion the psychiatrists' testimony is likely to receive undue weight," and "... it permits the jury to avoid the difficult actuarial questions by seeking refuge in a medical diagnosis that provides a false aura of certainty." As to the use of hypothetical questions and data as the sole basis for expert opinion, the APA flatly rejected the validity of such a practice, voicing serious concern that the jury's deliberations would be gravely distorted by "inadequate procedures used in this case," to "allow a psychiatrist to masquerade his personal preferences as medical views" [6].

The majority opinion of the Court rejected the petition of Barefoot to set aside the psychiatric testimony on Constitutional grounds. The Court was not inclined to "disinvent the wheel" by disallowing psychiatric testimony as to future dangerousness, stating, "...if it is not impossible for even a lay person sensibly to arrive at the conclusion, it makes little sense, if any, to submit that psychiatrists, out of the entire universe of persons who might have an opinion on the issue, would know so little about the subject that they should not be permitted to testify." The Court was satisfied that a jury would not be unduly influenced by psychiatric testimony because the weight and validity of such testimony could be determined in light of contrary evidence and opinion presented in the adversarial process. The Court rejected the contention that expert opinion based on hypothetical questions is barred by the Constitution citing case law as to the admissibility of such evidence, "where it might help the factfinder do its assigned job" [7].

Discussion

We approach the issues of the Barefoot case as professionals concerned with the inherent limits of the applications of psychiatry to questions at law. Psychiatry evolved as a clinical discipline during the 18th, 19th, and 20th centuries concerned with the humane care and treatment of the insane, its evolution as a medical specialty drawing freely from diverse fields of enquiry such as physiology, medicine, philosophy, and psychology [8]. The goal has been the treatment and rehabilitation of patients afflicted by disorders of thinking, emotions, and behavior. The mode of enquiry has been the medical model, more recently, a bio-psycho-social model of mental illness, but secrets of the human mind have not yet yielded up to the systematic investiga-

tions by modern dynamic, behavioral, biological, existential, and other psychiatries and psychologies. The transition from a primarily descriptive to a more theoretical science has been notable. Although psychiatric nomenclature and taxonomy have become more reliable as clinicians and researchers accept standard definitions and criteria for diagnosis, much of psychyiatric theory and practice is still controversial, inferential, and arguably unverifiable.

The theories of human personality, behavior and psychological dysfunction evolved and were validated for application in treatment contexts. The psychotheraputic encounter presupposes a suffering patient willing to accept the guidance of the therapist with the expectation of relief from infirmity and pain. The patient accepts the psychotherapist as a teacher and healer and tends to validate both the therapist and psychotheraputic theory by achieving a remission of suffering.

If any general model of human psychology has validity it is that it provides a paradigm acceptable to both therapist and patient within a framework of implicit contextual variables of treatment. That the context of voluntary psychotherapy differs markedly from the context of legal enquiry is readily demonstrated. Models of human motivation and behavior that have proven so useful in a psychotheraputic situation are not directly applicable to human behavior as treated by the legal system. Judges, lawyers, and psychiatrists may generally agree to models of complex bio-psycho-social influences on the behavior of an individual, but to expect that psychiatrists can validly apply these general models to explain the particular acts of a particular individual at a particular moment in a legal-moral context must be considered an act of faith.

The Barefoot court is loath to "disinvent the wheel" [7] of psychiatric testimony. In its brief, the American Psychiatric Association flinched before the real issue for psychiatry in *Barefoot*: the pervasive misapplication of treatment-oriented models of human behavior to legal contexts for which they have no demonstrated validity, although to its credit, the amicus brief does call upon the Court to recognize the implications of the most stringent research regarding psychiartists' predictions of future dangerousness in the courtrooms of this country.

The proferring of psychiatric testimony has become a nontherapeutic application of psychiatric knowledge and experience in the form of the specifically solicited opinion of the expert psychiatric witness. Traditionally, the courts have turned to psychiatrists and psychologists for assistance because they command, by virtue of specialized training and experience, information, and understanding not ordinarily available to a layman. However, in the legal arena, the psychiatrist most often contextually, in fact, if not in theory functions as a layman. The 1954 report of the Committee on Psychiatry and the Law of the Group for the Advancement of Psychiatry reports,

> thus, the psychiatrist witness finds himself in a dual role, one as a scientist who brings technical information to the trial, in the outcome of which he must be disinterested [as a scientist]; the other, as a member of a social order who shares with his fellows its value judgments in answers to any questions of right and wrong [9].

Questions of morality and values are not the substance of psychiatric expertise qua psychiatrist. Therefore, when the psychiatric expert attempts to apply the scientific concepts of psychiatry to moral questions of law, the expert is implicitly functioning as a layman, disguising lay opinion as psychiatric theory or terminology. The shortcoming of the APA brief is its limited scope, in that only two particular limitations of psychiatric expertise based on the theoretical and empirical foundations of the clinical discipline of psychiatry are expostulated. Standards for forensic science applications of general psychiatric expertise should be explicitly promulgated and must encompass both the general limitations of psychiatry as a clinic profession in a treatment context and clearly restrict testimony in legal contexts where no specific psychiatric expertise has been evinced.

The psychiatric examination of a defendant toward a determination of competence to stand trial clearly demonstrates the transposition of an evaluative and diagnostic process used in treatment to a legal context. In its most common format, the psychiatrist performs an in-depth

examination, assesses a variety of functional capacities, arrives at a diagnosis, then determines the relationship between any functional psychiatric impairment and the abilities required for a fair trial by legal standards. The psychiatrist may also recommend appropriate treatment and estimate the prognosis for functional recovery as a result of such treatment. The Court weighs the report of the psychiatrist and other pertinent evidence against the legal criteria for competence to stand trial and renders a decision or, in our view, all too often simply accepts the psychiatrist's decision as to legal competence.

In a competence examination, the expert is first required to testify with "reasonable medical certainty" as to the presence and nature of a mental illness, as to the advisability of specific treatment and treatment setting, as to the particular manifestations of illness in the defendant, and to the functional deficits suffered by the defendant as a result of mental illness. This testimony is clearly within the bounds delimited under a "treatment context standard" although, since the defendant and examiner are not in a theraputic context, the testimony should be received with some caution.

The second requirement is that the psychiatrist estimate the ability of the defendant to function to the requirements of the law as that ability is affected by the manifestations of "mental illness." The requirements of the law are those set forth in the landmark decision *Dusky v. United States*: "(T)he test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him" [*10*]. The Laboratory of Community Psychiatry, Harvard Medical School, attempted to operationalize the "Dusky" criteria for psychiatrists in the form of a "Competency to Stand Trial Assessment Instrument" [*11*]. At this stage of opinion development, the psychiatrist is not yet clearly beyond the limits of psychiatric expertise imposed by a "treatment context standard." The expert should be able to explain to court how the abilities of the defendant in several areas of mental function may be impaired by mental disease or defect. The expert may then, with the assistance of defense counsel, determine the range of ability necessary for a defense to the charges, showing how the defective mental ability of the defendant would affect his performance of those tasks required for a defense against the charges. The psychiatrist at this stage may decline to testify on the basis of "reasonable medical certainty" if a valid translation from assessed psychological impairment to legal functional requirements cannot be made.

The third requirement in a competence evaluation is that the psychiatrist render a medical/psychiatric opinion as to the competence or incompetence of the defendant to stand trial. There exists no specialized theoretical, research, or empirical knowledge in medicine or psychiatry upon which the psychiatrist as a medical/psychiatric expert might base such an opinion which involves a calculation of fairness. A general standard delimiting psychiatry expertise would preclude an opinion as to the fairness of a legal proceeding as clearly beyond the professional scope of any psychiatrist, as a psychiatrist. The psychiatrist as a medical/psychiatric expert must not proffer such an opinion, but may, if required by the trier of fact, give such an opinion as a qualified lay person.

Conclusion

The courts of this country have enlisted the testimony of psychiatric experts to assist the trier of fact in the resolution of difficult questions of human motivation and behavior in moral/legal contexts. Psychiatry has accepted its enlistment into the forensic science domain without sufficient reflection on the limitations of clinical psychiatric practice. The heat from the crucible of adversarial jurisprudence must catalyze psychiatry to define explicitly its professional limits in both treatment and legal contexts. Psychiatry cannot look to the law for definition of the limits of acceptable psychiatric practice in legal contexts, as evidenced by the Supreme Court's opinion in *Barefoot*. Psychiatrists must practice within the limits imposed by the clinical and experimental foundations of their discipline in all contexts; to do otherwise is malpractice and

should be accordingly sanctioned. If the courts of this land are reluctant to disinvent the wheel of psychiatric testimony to ultimate questions at law, organized psychiatry and the individual psychiatrist may respond, but only as informed and concerned citizens, as qualified lay persons.

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