



## **Neuroethics in Neuroscience Series: A Brief Examination of the Ethical Concerns Associated with Language and Communication Impairments in Legal Proceedings**

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### **Introduction**

The emergent “Neurolaw” field has generated a considerable amount of scholarship and discussion about a number of important ethical issues that spring from the intersection of neuroscience and the law. These issues include the use of neuroimaging techniques to detect lies (Farah et al., 2014; Brown & Murphy, 2010; Moriarty, 2008), the use of neuroscientific information to evaluate instances of pain and addiction (Volkow & Baler, 2014; Elman et al., 2013; Becker et al., 2012); and the use of neuroscience-related information to make decisions about criminal culpability (Steinberg, 2013). Generally (and conspicuously) absent from these issues, however, is a consideration of the ethical quandaries that can arise from language and communication impairments in individuals in legal proceedings. This paper, then, hopes to briefly discuss why the ethical and legal consequences of language impairments should be included within Neurolaw’s purview.

### **Ethical Concerns associated with Language and Communication Impairments in the legal system**

Language and communication are fundamentally important components of meaningful participation in the United States legal system, and many legal standards raise serious ethical concerns about the ability of an individual with language and communication problems to effectively participate in legal proceedings. The Constitution’s standard for competency to undergo criminal proceedings includes the ability to “communicate effectively with counsel” (Cooper v. Oklahoma, 1996), making language and communication critically important for due process consideration. The usual legal standard for waiving various legal rights, such as the so-called Miranda Rights and the right to enter legal pleas, is “knowingly and willingly,” (Miranda v. Arizona, 1966; Godinez v. Moran, 1993), which necessarily requires that the individual has language and communica-

tion skills that allow him or her to understand his or her due process rights. Language and communication are equally important considerations for civil law matters, which tend to use legal standards comparable to those of criminal law matters. For example, if an individual is to be found legally competent to make a contract or other binding legal transaction, then he or she will need to have the language and communication abilities necessary to understand the nature of the transaction (Guardianship of O'Brien, 2014). Similar abilities are generally required for creating wills or entering marriage (Wisconsin Statutes, 2013-2014; Estate of Laubenheimer, 2013). Because so many important legal outcomes rely on language and communication, then, it is not difficult to conclude that there is a real risk of serious ethical concerns when individuals with language and communication impairments undergo both criminal and civil proceedings.

Relatedly, professional and ethical standards for practicing lawyers also make language and communication impairments an important ethical consideration. The American Bar Association's Model Rules of Professional Conduct indicate that a lawyer has a duty to communicate with his client so that the client can participate in the legal matter (ABA Rules, 2014). The Model Rules also require a lawyer to provide reasonably competent legal representation and to make reasonable efforts to maintain a normal lawyer-client relationship with clients who have a "diminished capacity" to make decisions about the matter (ABA Rules, 2014). In combination, then, the Model Rules appear to suggest that competent lawyering requires a reasonable effort to accommodate individuals with language and communication impairments. Because violations of the professional rules can result in professional disciplinary proceedings, the ethical concerns associated with language and communication disorders affect not just clients but also their representing lawyers.

The legal and ethical concerns associated with language and communication impairment are clearly a problem in the abstract, but an increasing amount of scholarship indicates that they are a disturbingly prevalent phenomenon. Conservative estimates suggest that at least half of all criminal offenders (both adult and adolescent) have a diagnosable speech or language impairment (Gregory & Bryan, 2011; LaVigne & Van Rybroek, 2011). Many conditions that are likely overrepresented in offender populations, such as traumatic brain injury, psychopathy, and mental illness, can all affect an individual's ability to effectively communicate (Wszalek & Turkstra, 2015; Kiehl et al., 2004). To further compound these problems, there is compelling evidence to suggest that legal language is particularly difficult to understand, particularly for individuals with neuropsychological impairments, suggesting that the legal system presents inherently greater risks of language and communication mistakes (Rogers et al., 2008; O'Connell et al., 2005). It is clear, then, that the prevalence and challenges of language and communication impairments amongst individuals within the legal system is in direct conflict with the ethical and legal concerns established by the law's standards for language and communication.

Unfortunately, these concerns appear to slip through the cracks of the legal process, to the ethical detriment of both the individual with language and communication impairments and the lawyer. For example, competency evaluations often do not contain a dedicated language and communication assessment (Ryba, 2003). This suggests that legal proceedings not only are ill-equipped to even detect language and communication impairments, but also risk misinterpreting those impairments as a character flaw or a behavioral choice, which could further prejudice the individual. Relatedly, practicing lawyers generally bear the burden of ensuring that their clients can understand and participate in the proceedings, despite the fact that these law-

yers are generally not trained to deal with language and communication impairments and often lack the time and resources to do so. (LaVigne & Van Rybroek, 2014). In practice, then, legal proceedings can inadvertently force both lawyers and their clients into ethically challenging positions: a lawyer who is incapable of providing the professionally mandated level of representation because of the client's language and communication impairment must nevertheless represent the client even though the client's impairments likely create a greater risk of an undesirable outcome. This arrangement is obviously objectionable from an ethical standpoint, but it is, unfortunately, not uncommon practice within legal proceedings.

In summation, legal and professional standards create ethical concerns related to language and communication impairments for both adjudicated individuals and their lawyers. The likely prevalence of language and communication impairments within the legal system, and the difficult ethical situations in which both lawyers and clients are frequently forced to interact, all suggest that these ethical concerns are not mere hypotheticals but rather pressing ethical problems that directly affect legal outcomes. Because of the enormous societal costs associated with legal proceedings (Wszalek & Turkstra, 2015), and because of the fundamental importance of the legal rights that are implicated, it behooves the Neurolaw field to reflect upon these ethical concerns as it attempts to resolve pressing ethical issues relevant to both law and neurosciences.

## **Directions for Future Discussion**

In order for Neurolaw to successfully consider the ethical concerns associated with language and communication impairments in legal proceedings, however, there are three important factors that this consideration should contain. While these factors are by

no means exhaustive, they nevertheless will help Neurolaw's discussion of this important ethical issue by better reflecting the parallel interests of the adjudicated individual, the lawyer, and the legal system itself.

First, it is important to remember that the ethical concerns impact both the individual and the representing lawyer. Although there are many reasons why the adjudicated individual's rights and interests are generally of greater concern, particularly in a criminal case (e.g., because the individual's rights and freedoms are implicated, because the individual generally has less knowledge of the legal proceedings, and because of the resource imbalance between the individual and the state), Neurolaw must remember that language and communication impairments risk implicating professional rules that govern lawyer conduct as well. Because practicing lawyers generally do not have the training or resources to fully accommodate their clients' language and communication impairments, the rules and standards imposed on the lawyers risk forcing them into ethically problematic positions. Therefore, Neurolaw should keep in mind the ethical outcomes for both the individual and the representing attorney in order to fully consider the ethical concerns created by language and communication impairments in legal proceedings.

Second, it is important to remember that some of the applicable legal standards are less flexible than others. For example, the ABA Model rules are drafted by the legal profession and do not themselves represent binding legal authority, so it is comparably easier to amend or reconsider the professional rules that create ethical standards for lawyers. Constitutional standards and state laws, on the other hand, are binding legal authority and, as the product of the judicial and legislative branches of government, are comparably more difficult to amend or reconsider as a source of ethical standards. Therefore, certain legal standards and their correspond-

ing ethical concerns are more “permanent” than others, and any Neurolaw consideration of these ethical concerns should keep the dynamics of the various sources of “law” in mind in order to better reflect the nuances of the various legal standards.

Third and finally, it is important to remember that the legal standards discussed in this essay are applicable only within the United States. Nevertheless, language and communication impairments affect humans all around the world (Hyter, 2014). While the specific ethical concerns that arise from the United States’ legal standards are generally salient only within the United States, many of the underlying ethical notions (e.g., fairness, due process, the proper role of the lawyer, etc.) are salient in all legal jurisdictions. Therefore, while Neurolaw should be mindful of the specific ethical concerns that arise from the le-

gal standards in the United States, Neurolaw should be equally willing to consider similar ethical concerns in other legal jurisdictions as well.

## Conclusion

Although the nascent Neurolaw field has already begun to ponder a number of challenging and important ethical issues, the ethical concerns created by language and communication impairments within legal proceedings are not among the field’s foremost interests. This oversight ignores a series of ethical quandaries that can, and in all likelihood do, affect individuals with language and communication impairments and their lawyers, and the Neurolaw field is in a unique position to use and interpret neuroscientific data and research in order to address these important ethical concerns.

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## Biography

Joe Wszalek is the inaugural member of the Neuroscience and Public Policy Program's "Neuroscience and Law" JD/PhD program at UW-Madison. A licensed member of the State Bar of Wisconsin, he has a law degree with honors and Order of the Coif from the University of Wisconsin Law School, where he was a Wisconsin Idea Scholar, a US Department of Education Foreign Language and Area Studies Fellow through the Center for European

Studies, a member of the Moot Court Board, and Senior Articles Editor of the Wisconsin International Law Journal. His research work in the Communication and Cognition Lab under Dr. Lyn Turkstra focuses on the interactions between social cognition, traumatic brain injury, and language, with an emphasis on legal contexts. In his free time he enjoys competitive cycling, recreational swimming, and violin

## Editor's Column



This issue of the Kopf *Carrier* features an essay by Joseph Wszalek, JD of the University of Wisconsin-Madison. Mr. Wszalek is in the Neuroscience and Law JD/Ph.D program working in the Communication and Cognition Laboratory. He has a special interest in the ethical issues that stem from communication issues in people interacting with the law and lawyers. In his essay, Mr. Wszalek outlines the ethical concerns posed by communication issues for both individuals and lawyers. It is obvious that as the neuroscience community learns more about communication and how communications are understood by both those communicating and those receiving those communications, whether they be verbal, written, signed or typed, that the legal ramifications will be more and more complex.

How can we be sure that a person is competent to understand both his own issued communications and those he/she receives? How do we know that issued communications are received as they are meant? These and other questions will drive research in the neurosciences as we better understand the brain processes underlying human-to-human communications. This essay was one of two essay winners in the 2015 International Neuroethics Society meeting student essay contest held just prior to last year's Society for Neuroscience meetings. The second winner will be published in the *Carrier* just prior to this year's Neuroscience meetings.

It is coming to the end of the school year for most universities and other schools. Many of us will enjoy a summer during which laboratories can run full speed or when we can travel or relax. In a few days we plan to travel to our northern home in Dublin, Ohio for several months where we will visit grown children and growing grandchildren both there and at our oldest son's home north of Detroit. It is also our 50th anniversary this year, so we have planned an Alaska cruise in August to celebrate. However, the weather here in Florida is so beautiful that we are having second thoughts about leaving for the northland. We have had two weeks of almost perfect weather, with no end in sight. It has been in the low 80s, low humidity and almost cloudless skies. The West, Midwest and East Coast areas have had so much wild weather with snow, flooding rains and tornadoes that we wonder if we should stay here for awhile. But we will go up and hope the weather cooperates for us. Hurricane season starts here on June 1, so we will have to watch for hurricane warnings while we are gone. We hope the season is quiet as it has been here for several years.

If you want to pen an article for the *Carrier*, please contact me at the email below. There is an honorarium for each published article.

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