Human Rights and Involvement of Mental Health Practitioners in Death Penalty Cases

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Today's Topics

- Role Responsibilities of Forensic Psychiatry/Psychiatry [FP] in Death Penalty Case
- Human Rights and Psychiatrists/Psychologists [Psych] Involvement in Post 9/11 Detainee Interrogations
- Human rights and Psychiatrists/Psychologists involvement in Death Penalty Cases

Capital Punishment

The legally sanctioned practice of killing people as punishment for certain crimes: US death penalty cases are used almost exclusively for crime of murder

Arguments for the death penalty include

- Deterrence
- Public safety
- Retributive justice

Arguments against

- It is not a deterrence
- There are alternative mechanisms for public safety
- Intrinsic value of human life

Legal Challenges: 8th Amendment

8th Amendment: Prohibits the federal government from imposing cruel and unusual punishments

Supreme Court rulings

- 8th Amend applies to all states
- The death penalty is not a *per se* 8th Amend violation
- But does apply to how the death penalty is adjudicated and carried out

Capital Punishment: Key Supreme Court Decisions

- *Furman v. Georgia (1972)*
  - *Struck down all then existing death penalty laws as violative of 8th Amendment ban on cruel and unusual punishment based on standardless imposition without thought of circumstances of crime*
- *Gregg v. Georgia (1976)*
  - *During sentencing, capital cases must consider psychological factors that would affect jury decisions i.e. understanding reason for execution, probability of future violence*
- *Ford v. Wainright (1986)*
  - *Insane inmates cannot be executed*
- *Atkins v. Virginia (2002)*
  - *The use of the death penalty for defendants with intellectual developmental disorders (formerly "mental retardation") is unconstitutional*
- *Panetti v. Quarterman (2007)*
  - *Death penalty is prohibited if assessments indicate defendant does not understand reason for imminent Execution*
- *Hall v. Florida(2014)*
  - *Strict IQ cut-off point for MR/IDD in capita cases in unconstitutional.*

Forensic Roles in Capital Cases

The role of the forensic practitioner is to provide the trier of facts with psychiatric/psychological information relevant to the legal question at hand.

- Competence to stand trial, enter a plea, testify
- Voluntariness of confessions
- Meet criteria for insanity defense
- Sentencing considerations

Factors Influencing Sentencing

- Mitigating Factors
  - Under influence of extreme mental or emotional disturbance
  - Lack of capacity to appreciate criminality of conduct or to conform to such conduct
  - Lack of capacity to assist in his/her defense
- Aggravating factors
  - Future dangerousness

A verdict of death if aggravating and no mitigating factors or if aggravating factors outweigh mitigating factors

Clinical vs Forensic Practice

Who is the Client?

- Patient vs. Attorney, Court

What is the Goal of Services?

- To promote the mental health and best interests of the client through assessment, diagnosis, or treatment
- To inform the trier of facts on data relevant to the legal question at hand

Blurring of Roles:

- Treatment provided in correctional settings

Attorneys & Experts: Establishing Boundaries

Attorney

- Primary responsibility is to advocate on behalf of their client and present the best case possible before the court including controlling information placed in evidence.

Forensic Practitioner

- The primary responsibility to advocate for the facts by providing the triers of fact with information needed to make determinations about the legal question at hand.

Conceptual Framework for Forensic Roles

Rosner (2016)

- What is the specific legal issue defined by jurisdiction?
- What are the legal criteria and data collection techniques (including and distinct from clinical criteria) that must inform data collection, interpretation and reporting to address legal question?
- How can the relevant data be applied to the legal criteria to provide rationally convincing opinion?

The Insanity Defense: Mitigating Factors

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Insanity Defense: Legal Definition

Defendants are not responsible for their actions if at time of criminal act:

- An episodic or persistent psychiatric disease
- Inability to distinguish fact from fantasy or control impulsive behaviors

Defendants transferred to a psychiatric institution for treatment until such time as they can:

- Stand trial
- Can be found not guilty by reason of insanity
- Receive a less severe punishment

Insanity Defense: Assessment Challenges

- ≠ DSM diagnosis
- Gathering history to reconstruct mental state of defendant at time of alleged offense
- Poor communication skills of defendant or collateral informants
- Malingering
- Un-cooperation (on advice of attorneys)

Insanity Defense: Testimonial Challenges

- Testifying regarding the likely truthfulness of the defendant's comments
- Framing clinical data in a manner that addresses the legal definition—including testifying to the "truthfulness" of defendant's responses

Inability to collect relevant information can lead to under or over diagnosis and undermine defendant's rights or court responsibilities

Competency to be Executed

Ford v. Wainright 1986 “insane inmates cannot be executed”

- Do psychotic symptoms impair competency to be executed?
- A DSM diagnosis not necessarily acceptable evidence
- The Supreme Court has recognized the need to include symptomology
- State criteria vary: Can be limited to understanding fact of and reason for the execution is sufficient
- *“I am going to be executed because I murdered someone”*

Treatment of Death Row Inmates

Treating Death Row Inmates: Diagnostic Challenges

Are symptoms reflective of premorbid illness or current stressors of incarceration?

- Supermax confinement involves isolation and sensory deprivation
- "Death Row syndrome" anxiety, disassociation and psychosis
- Awareness of impending execution—US courts ruled that long periods on death row could be cruel and unusual punishment

Treating Death Row Inmates: Treatment v. Security Needs

The inmate indicates the intention to seriously harm inmate or guard

- *Will recording or reporting such intent increase the judgment of aggravating factors during sentencing?*

A death row inmate admits guilt while awaiting appeal

- In some states homicide confessions are considered unprivileged

Inmate develops a serious psychiatric disorder during confinement'

- Should attorney or court be informed?

Restoring the inmate to competence during imprisonment

- Progress note indicates increased competence to understand purpose and nature of execution?

Do Prisoners Have a Right to Refuse Anti-Psychotic Medication?

Patient dignity v. Treatment needs v. Security

- Developing irreversible neurological side effects
- Prison Safety
- Medicated defendants may be denied a fair trial if jurors do not see their "natural demeanor" at trial or execution decision stage

Forced medication of defendants pleading insanity

States criteria varies

- Treatment medically appropriate
- Necessary to restore defendant to trial competence
- Defendant can be fairly tried while under medication
- Side effects do not undermine trial fairness
- Trying defendant will serve an essential government interest

Court-initiated Medical Treatments: AMA 2016

- Therapeutically efficacious
- *Undoubtedly* not a form of punishment or *solely* a mechanism of social control
- Based on sound medical diagnosis and not court-defined behaviors
- Decision by physician(s) not responsible to the state
- Must decline if treatment is not consistent with nationally accepted guidelines
- Be able to conclude, in *good conscience* that to the *extent possible* the patient voluntarily gives informed consent that is un-coerced

Intellectual Developmental Disorders: Mitigating Factors

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Atkins v. Virginia (2002): Death penalty for defendants with IDD is unconstitutional

Cognitive limitations, limits on impulse control, suggestibility, and desire to please ➔

- Difficulty understanding legal boundaries of actions
- Vulnerability to demands to engage in criminal acts,
- Difficulty understanding Miranda rights,
- More willing to confess (sometimes falsely),
- Unable to work effectively with attorneys

Legal Definitions of MR/IDD

- Following Atkins, most states relied on fixed arbitrary IQ test cut-off scores: . ≥70 IQ = IDD; ≤ 71 not IDD
- Hall v. Florida (1986) Fixed IQ cut-off unconstitutional
- States expanded cut-off points to 85 – 70 and considered SD to avoid false positives or over-estimating minority -but adaptive score was ignored
- Others like Texas developed their own criteria
  - Did family/friends think person mentally retarded at the
  - Can the person defendant lie effectively
  - Have defendants shown leadership or are they led around by others

Moore v. Texas (2017)

- Atkins applies to any form of mental disability whether severe or mild
- Must use “legitimate medical diagnostic criteria”
- DSM-V: IDD diagnoses test score + clinical evidence of cognitive impairments + adaptive functioning

IDD Diagnosis for Capital Cases: Continued Challenges

- IDD persons have mixed cognitive profiles ≠ global cognitive impairment
- Some suggest that "risk unawareness" is core phenotype
- Use of neurocognitive tests for "executive functions"
- Tests may not assess cognitive functioning in real life situations and mastery of practical tasks
- Flynn effect: full scale mean scores on new tests lower

  "IQ Lottery"

Malingering:
System Validity Assessment [SVM]

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SVM Assessment Challenges

Intentional production of false (over-or under-exaggeration) symptoms to attain an identifiable external benefit (e.g. lack of cooperation, inconsistencies in responses)

- Diagnostic errors can impede justice when undetected or obscure adequate treatment when over-determined.
- Should testees be informed that malingering will be assessed?
- Current standards: Notification that measures will be used to assess honesty and efforts to do well
- Employing SVM tests only for detainees with suspected malingering ➔ inability to fairly distinguish between malingering and mental illnesses

Prediction of Future Violence: Aggravating Factors

Predicting Dangerousness: ClinicalCriteria

Scott & Resnick (2017)

- Magnitude of potential harm
- Likelihood (e.g. history of acting on violent thoughts)
- Imminence of harm
- Frequency of violent behavior
- Situational factors (access to weapons, exposure to substances, access to weapons)
- Demo factors: younger age groups, male

Prediction of Dangerousness: Challenges in Captial Cases

History of violence is best predictor (criminal, court, military records, disciplinary measures)

- Statistical and actuarial information are fundamentally non-medical in nature
- Individuals at risk for psychosis, poor, and ethnic/minorities more likely to be criminally charged
- Research indicates only moderate levels of prediction by experts

Forensic Assessment in Capital Cases: Legal and Ethical Challenges

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General Acceptance Standard

Expert testimony admissible only if methods & data are sufficiently linked to the legal question at hand

(Frye v. US, 1923; Daubert v Merrell Dow Pharm Inc, 1993; General Electric v. Joiner, 1997; Kumho Tire v Carmichael, 1999)

Inadmissible testimony:

- Clinical methods not validated for application to issues before the court
- Causation opinions without reliable or valid application to legal issue
- DSM criteria derived from "a process of consensus among a small group of professionals drawn from clinical experience or data not necessarily related to applicability in legal settings"

Beginners Errors in Forensic Assessment

- Seeking out information to confirm a litigant's argument or own theoretical view
- Relying largely on familiar diagnoses
- Over-or under attribution of behaviors to situational versus stable personal characteristics
- Failure to consider effort, deception and malingering
- Over reliance on assessment instruments which enhance objectivity and reliability but are not individualized, personal or contextual
- Preconceptions resistant to challenge by conflicting data

Beginners Errors in Testimony

- Reliance on memory to fill in gaps in evidence recorded
- Failure to answer legal question
- Equating diagnosis with incompetency—often incompetence is legally required to be the result of mental disease or deficit which can push psych into trying to fit evalution into a DSM5 category
- Using medical terms not understood by triers of fact
- Opinion with out support

Corrective Strategies for Forensic Assessment

- Use comprehensive batteries to generate and test alternative diagnoses
- Do not assume attorney has provided all relevant facts & ask for legal memorandum and competing perspectives of stakeholders
- Record all facts & state limitations to reduce bias and ensure objectivity
- Be familiar with judicial rules for correcting misstatements during testimony

Post 9/11 Involvement of Psychiatrists and Psychologists in "Harsh Interrogations"

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Pre- 9/11 Prohibition Against Psychiatrist/Psychologist Involvement in Torture

- UN Convention Against Torture (1984, effective 1987) prohibits torture including water boarding, exploitation of phobias & psychopathology
- Since 1985 both APAs prohibited members from actively participating in these activities
- Psychologists and psychiatrists traditionally worked with military to help train active personal to resist torture

Post-9/11 Challenge

- Bush administration determined some “harsh interrogations” were not torture and thus “lawful”
- Psychologists working for the CIA used torture resistance to design & supervised implementation of “harsh interrogation”
- Doctors working in detention centers provided medical information for interrogation purposes, force-feeding and were not able to provide detainees adequate medical care.
- **Health professionals were characterized as “safety officers” to undermine ethical obligations as health professionals**

Position Statement on Psychiatric Participation in Interrogation of Detainees 2006 - 2014

- Do not participate in*, or otherwise assist or facilitate*, the commission of torture or participate directly in interrogation.
- *However can provide training to military or law enforcement on effects of interrogation*
- Must report torture to persons to take corrective action
- Should provide appropriate medical care [*but] not disclose records to persons conducting interrogation*

AMA 2016

9.7.4 Physician Participation in Interrogation

- May not monitor, conduct nor directly participate in interrogation
- May develop effective interrogation strategies for general training if they do not threaten or cause physical or mental suffering and must be *humane and respectful of rights*
- May perform assessments to determine need for and provide medical care.
- Must disclose who will have access to medical records
- Treatment must never be conditional on patient's participation in interrogation
- Must report coercive interrogations to appropriate authorities or if they do not intervene must report to independent authorities with power to investigate.

American Psychological Association Controversy

- UN Convention does not include sleep or sensory deprivation
- APA policies did not have a definitive prohibition against indirect participation in interrogations *arguing that their consultative and information gathering role was ethical*
- 2002 Ethics Code Standard 1.02 Conflicts between Ethics & Law….if conflict is unresolvable…psychologists may adhere to the requirements of the law, regulations or other governing authority

When Laws are Immoral

- Any professional activity (direct or indirect) conducted in settings in which prisoners are denied basic human rights risks facilitating or endorsing such violations is is thus unethical
- 2010 Amendment to Conflict Between Ethics & Law: Psychologists are prohibited from engaging in activities, however 'lawful', that "would justify or defend violating human rights"

APA (2015) Statement on Harsh Interrogations

- Prohibits conducting, supervising, assisting, facilitating or being presence in any national security interrogation

- Can only provide services in settings in which torture and other cruel inhuman or degrading treatment or punish occurs if they work directly for persons being detained or an independent 3rd party seeking human rights protections

Professional Organization Positions on Capital Punishment

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World Psychiatric Association 1989 Madrid Declaration (1996 – 2011)

- Psychiatrists should not under any circumstances participate in legally authorized executions nor participate in assessments of competency to be executed for convicts receiving the death penalty

Prohibited Actions Constituting Direct Involvement in Execution AMA 2016

- Actions that would directly cause or assist another in death of condemned (e.g prescribing, administering lethal drugs).
- Evaluating competence to be executed
- Treating a condemned prisoner for the purpose of restoring competence to be executed

Actions Not Prohibited in Death Penalty Cases (AMA, 2016)

Testifying

- Medical history, diagnoses or mental state related to competence to stand trial
- Medical aspects of aggravating or mitigating circumstances during penalty phase of a capital case
- Medical diagnoses related to legal assessment of competence for execution

Treating

- Responding to voluntary request of condemned person to relieve acute suffering while awaiting execution
- Providing medical intervention to mitigate suffering of an incompetent prisoner due to psychosis or other illness

American Psychiatric Association

- Has not taken a specific position on competence assessments in death penalty cases
- Surveys of forensic psychiatrists show divided position, slight majority see no ethical problem

Calls for Moratorium

APAs joint Statement

- In light of the weaknesses and deficiencies of current sentencing the APAs endorses a moratorium on capital punishment until jurisdictions assure fair administration and impartiality in accord with the basic requirements of due process.

AMA

- Not taken a position…"The AMA's long-standing tradition to remain neutral on matters that are considered to be nonmedical but issues of society at large and that are highly divisive, such as capital punishment."

The Death Penalty and Human Rights

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Inequities in Death Penalty Cases

- As of 12/15 at least 156 innocent people on death row released (deathpenaltyinfo.org)
- Unknown number of innocent persons still on death row or executed
- Racial minorities and lower SES more likely to receive death sentence (Glaser et al., 2015)
- Fallibility of eyewitness testimony (Liptak, 2011)
- Continued variability across states on legal definition of and criteria for legal competency

Socioeconomic & Cultural Inequities

- Many defendants from poor communities were never evaluated for MR/IDD prior to age 18 → not able to provide diagnostic criteria

- DSM-V now permits diagnosis for onset cases in which brain impairment caused by accidents or disease → records may be lacking

- Standardized tests for intelligence and mental health based on white, English-speaking, U.S. born, middle class populations →cultural bias

- Test bias → over-or under diagnosed of poorly educated and cultural minorities

Moral Fallibility of Competency Tests in Capital Cases

- Most MR/IDD tests are relative *not* absolute
- Practitioners & states disagree on cut-off score and definition of MR/IDD
- DSM-V recommendations evaluations based on age, gender and socio-culturally matched peers; however whether this promotes or undermines social justice has not be studied

Moral Fallibility of Tests Predicting Future Violence

- Future violence an aggravating factor in 77% of capital prosecutions → 80% jury death sentence (1995 – 2006)
- Expert testimony only moderately predictive & jury decisions are unreliable
- Best predictor is past violence → unjust assumption that a guilty verdict is evidence of future crimes
- Inequities of arrest and prosecution of poor and ethnic minorities → increase data on past violence
- Probabilistic evidence → categorical decision →death sentence

Does Involvement in Capital Cases Violate Medical & Professional Ethics?

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Does Participation in Capital Cases Violate the spirit of the Hippocratic Oath

"I will follow that system of regimen which, according to my ability and judgment, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous."

If one's professional service may lead to execution, Is it ethical for a psychiatrist to:

- Conduct a competency assessment?
- Evaluate potential for future violence?
- Provide treatment during a murder trial or prior to sentencing to increase competence?

APA Ethics Code (2010)

APA Standard 1.02 Conflicts between Ethics and Law:

Under no circumstances may this standard be used to justify or defend violating human rights

Given the inequities and consequent human rights violations associated with conduct of death penalty cases in the U.S. does psychologists' participation in death penalty cases violate the Ethics Code?

Argument 1: US Law Provides Adequate Legal Protections

US criminal law is more protective than military law

- Right to an attorney
- Habeas Corpus
- Right against self-incrimination

This assumes that all capital case defendants irrespective of SES, race/ethnicity and mental status

- Have equal access to well qualified attorneys
- Courts fairly grant habeas corpus briefs
- Clearly understand and given fair opportunity to exert their rights during arrest & interrogation.

Argument 2: Assessment Neutrality

Assessments of intelligence and future violence though flawed, are "neutral" ➔ does not determine whether a judge or jury will sentence a prisoner to death

- Is this diffusion of responsibility deflecting the inhumane actions to the state?
- Is this naïve when the jury relies on the presumed expertise of expert to inform their judgments?

Argument 3: "If we don't do it, others will"

Despite flaws, psychiatric/psychological expertise enhances the accuracy of assessments which would otherwise rely on capricious and non-professional judgments

- Legal corrections to rectify flawed evaluations may be limited
  - Lack of funds for collecting evidence contradicting the testimony
  - Lack of funds for appeals
  - Lack of competent legal aid attorneys
  - Death

The Current Process is Unjust

- Even if Americans disagree on whether the death penalty itself is immoral
- The inequitable killing of innocent persons, the poor, racial/ethnic minorities, and those with mental disorders by their government is a violation of fair treatment in the basic rights of individuals to life and liberty

Does Participatio in Death Penalty Cases Justify or Defend Violation of Human Rights?

- Participation while often doing good can also do harm by leading to the execution of individuals under an unfair legal system
- Continued social inequities in arrests for capital crimes and death penalty sentencing creates a context in which participation helps to justify and defend the continued violation of human rights

Lessons from the Boycott of Death Penalty Drugs & the 8th Amendment

- In 2013 the European boycott of death penalty drugs lowered the rate of US executions
- In 2016 Pfizer blocked the use of its drugs in executions
- In 2017 Arkansas executions were halted due to lack of drugs

The Moral Question

- Should psychiatrists and psychologists refuse to participate in an inequitable legal process whose inconsistencies lethally violate the human rights of defendants in capital cases?

Questions & Discussion

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