

## Psychiatry and the Death Penalty

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This month, I'd like to talk about three aspects of the death penalty that involve mental health professionals: the ethics of psychiatrists' and other clinicians' participation in the sentencing process, the probability of future violence in the context of the sentencing process, and the recent controversy about sentencing and executing persons with mental retardation. This column won't address participation in the execution itself—that's already well-covered in the American Medical Association's *Principles of Medical Ethics*,<sup>1</sup> the American Psychiatric Association's annotations,<sup>2, 3</sup> and other fora—nor will I be commenting on relieving symptoms in order to make a prisoner eligible (or "competent") for execution.

Since this column focuses on court testimony, it might be good to remind readers of the definition of "expert witness" and the difference between such a person and other witnesses. An expert witness is nothing more than a person the judge allows to give *opinions* that the jury or judge may consider. The other common kind of witness, a "fact witness," is allowed to report only what he or she knows from observation of some kind and is not (or should not be) permitted to offer opinions. Thus a doctor who has treated a defendant and is called as a *fact* witness might be asked about observations, diagnosis, or treatment, but should not be asked, for example, whether people with that diagnosis are more violent than others. Most expert witnesses have reviewed the case more broadly than fact witnesses, understand something about the legal proceeding, and do not have the conflicts of interest that a clinician-patient relationship can introduce into a treating doctor's testimony.<sup>4</sup> If you are asked to testify, ask the lawyer which role you should anticipate.

### ETHICS OF PARTICIPATING IN THE SENTENCING PROCESS

Some clinicians believe it is unethical to participate in a sentencing process—especially for the prosecution—when the death penalty is a possibility. One can always decline, and should if it offends one's sensibilities, but participation in itself is not, in my view, unethical. As I've said several times in this column, our legal system needs expert guidance in order to carry out its function and be fair to both litigants (including criminal defendants) and the public. Helping a court find the truth is rarely unethical.

The role of the psychiatric or psychological forensic expert witness is to perform an adequate review and/or evaluation and try to come to an opinion about those matters that are within his or her expertise. One may express those opinions forcefully without becoming an "advocate" for one side or the other (that's the lawyer's job). Thus the task doesn't involve arguing for or against a sentence (the lawyer's job, again), but rather serving as a source of valid, reliable information for the court to consider. It would be unfair to deprive defendants of access to expertise (psychiatric or otherwise) in complex cases. By the same token, crime victims and the public are not well served if the prosecution cannot use experts as well.

Of course, the attorney who retains the expert hopes his or her findings will support the lawyer's side of the case. If they don't, the expert is unlikely to be asked to testify. If the opinions do support the lawyer's case, then the expert's testimony may sound as if he or she is advocating for one side or the other, but in actuality merely appears skewed because of the questions asked. The other side has an opportunity to ask questions, too ("cross-examination"), and to elicit answers that support its position. Testimony is, after all, simply a responding to questions designed to elicit (truthful) answers that support the questioner's position.

There are at least three important pitfalls for clinician-witnesses in this process: bias caused by one's moral or ethical philosophy, outright dishonesty, and witnesses' misunderstanding or lack of sophistication. Like everything else that's interesting, these pitfalls overlap a little.

### Philosophical Bias

Everyone has some philosophical bias, but it is important to assess, and control, its interference with one's objectivity. There are lots of appropriate places in which to voice one's opinions about social, moral, or political aspects of the death penalty, but if one has been asked to give psy-

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#### Dishonesty

Some people, including a few psychiatrists, feel so strongly about their views that they are willing to lie to get their point across. The death penalty is heavy stuff, and a defense expert may be tempted to say anything to help the defendant avoid execution (particularly if one is opposed to the death penalty or believes justice isn't being done). This is different from being influenced by a bias; this is lying. It's unethical. It's illegal. Don't do it.

#### Misunderstanding or Lack of Sophistication

Lots of clinicians who provide expert testimony have little experience in the legal arena. It is very important to understand one's role, its limitations, the broader aspects of the case at hand, and how the various lawyers may try to manipulate one's review, evaluation, testimony, or other important activities. Lawyers, after all, are extremely focused on their clients' goals and interests. Although they should never ask a witness to lie, most are not above other methods of getting the expert to come to a helpful opinion and word it in a helpful manner. This should not come as a surprise; every litigant, prosecution or defense, is entitled to a dedicated and vigorous advocate. Knowledge of the forensic arena helps the expert understand what is going on, stay objective, and express his or her opinions in a convincing manner while advocating for the findings, not the litigant.

#### TESTIFYING ABOUT FUTURE VIOLENCE OR DANGEROUSNESS

My home state of Texas isn't the only center of controversy about psychiatric experts who testify about future dan-

gerousness in death penalty cases, but we seem to be way ahead of whoever is in second place. Several states that allow the death penalty have cases in which a prosecution psychiatrist or psychologist is accused of doing a substandard evaluation (e.g., spending too little time or not sufficiently interviewing the defendant), letting his or her bias unfairly shape testimony predicting future dangerousness, or even acting out of some vigilante-style motivation. Some of this criticism is overblown; some is simply part of the appeals process, in which a defendant's lawyer must explore every possible avenue for avoiding execution. Some, however, is justified. Cases have been overturned on such grounds, and clinicians have been expelled from professional organizations for unethical forensic conduct.

State death penalty statutes generally include allowances for factors that mitigate for or against its imposition. One factor in most or all jurisdictions is the defendant's potential for future violence. Juries in Texas and some other states, for example, must consider, among other things, whether or not a defendant is likely to engage in *any* future violence. The consideration is not limited to lethal danger, nor must the probability be extreme ("more likely than not" or "substantial likelihood" is a common threshold).

It may seem odd to anticipate future violence when the only sentencing alternatives are death and a very long prison sentence (often life without parole). Prisons are communities, however, and the laws are designed to address danger to prison personnel and other inmates. Jurors also think about the possibility of escape, whether realistic or not, and about potential violence if the defendant is eventually released 25 or 50 years hence.

The evaluation necessary to reach opinions in death penalty matters must be a comprehensive one. Let's take a look at some of the important components, without attempting to describe the entire assessment process.

It is simply insufficient to review a few arrest documents and spend half an hour with the defendant. This is not the time to skimp on resources, nor to accept a financially-strapped county's offer of a preset, modest fee for the evaluation (especially the defense evaluation) unless one believes one can pursue the case wherever it goes even without compensation (a lofty goal, but one that can't be met very often).

The evaluating expert should request, and receive insofar as possible, broad and uncensored information about the defendant's criminal, mental, social, vocational, educational, medical, and family background. All of the arrest and post-arrest information, including jail records, should be reviewed. If some items are to be considered irrelevant or unimportant, that judgment should usually be made by the forensic expert, not the attorney (although some material may be unavailable to the attorney, and thus cannot be reviewed). Relevant and accessible family members,

treating clinicians, or other persons should often be contacted and interviewed, at least by telephone.

If psychiatric or psychological testimony is anticipated, and the defendant and defense lawyer will allow interviews, the defendant should be examined in person (sometimes the court orders the defendant to be available for interview). The examination should be comprehensive, often taking more than one interview, and relevant psychological (or other) testing is often recommended. The defendant must be clearly told the evaluator's identity and purpose, the person who retained the evaluator, the fact that the findings will be shared with that attorney, and the probability that some of the findings will be revealed in court. This notification is a matter of information, not consent, but one should not attempt to "trick" the defendant or knowingly foster significant misunderstanding of the process. If the evaluator was not retained by the defense attorney, then the evaluation should not take place without the defense attorney's knowledge and opportunity to lodge an objection with the court.

Some defendants refuse evaluation by a prosecution expert, hoping their refusal will prevent convincing testimony (or leave room for appeal). This rarely works, in my experience, since 1) voluntary foiling of the prosecution is likely to backfire and simply irritate the jury, and 2) contrary to some ethics interpretations, it is quite appropriate to express opinions without seeing a defendant provided the expert believes there is sufficient other information to support the opinions and he or she offers an adequate disclaimer about the lack of an in-person examination.

Predicting violence is difficult under most circumstances. When a life may hang in the balance, and the prediction reaches years into the future, most forensic experts are careful not to overstate their findings and opinions, and to be certain the court understands that they are expressing opinions and probabilities rather than precise facts. There is nothing wrong with expressing, for example, a properly developed opinion about the likelihood that a person with a long history of violence will continue to have the same personality traits or impulsive tendencies in prison as outside; however, it is very important to note that this is an opinion rather than a certainty. We must leave the final decision to the people appointed for that role—the judge and/or jury.

## **SENTENCING AND EXECUTION OF MENTALLY RETARDED DEFENDANTS**

As I write this column, there is a case pending before the U.S. Supreme Court that challenges the death sentence of a man with mental retardation. I know little about the case or the defendant, but our discussion of the matter should go beyond the common knee-jerk response that people with mental retardation shouldn't be executed. First, why not? Second, if mental retardation *per se* is an

exempting factor, how should courts define it? Third, if factors like mental retardation can be exempting, what other conditions should qualify?

## **Individual Functioning**

One theme central to all three questions is the concept of differentiating individual functioning from diagnostic (or any other) status. Courts focus far more on functioning than on diagnosis when assessing defendants' abilities and competencies. Psychiatrists do too. For example, some people with major depressive disorder are vocationally disabled, but most are not, most of the time. Some people with schizophrenia can't consent to treatment, but most can, most of the time. Some people with mental retardation can't do meaningful work, but most can, most of the time. What matters is ability to function, and functioning is related to lots of things besides diagnosis.

The trial court is the place all of the relevant evidence related to functioning should be brought in a murder case. The jury and judge have an opportunity to consider mental retardation, its extent and limitations, as well as anything else the defendant's lawyer wishes to present. Our system relies greatly on that jury to weigh the evidence, highlighted or rebutted by lawyers, and perhaps explained by experts. If there is evidence that mental retardation significantly affected a defendant's ability to commit a crime (such as the ability to form intent or to plan the criminal act in advance), or evidence that should be considered in the sentencing phase of deliberations after the defendant has been convicted, the trial court is the place to raise it. If the defense lawyer fails to raise relevant issues of mental retardation, the defendant may later contend that his lawyer was inadequate and that the retardation should have been considered by a jury, but that's not the same as saying that mental retardation in itself, regardless of the defendant's ability to function, should exempt him or her from punishment.

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## **Rights**

I'm suggesting that people with mental retardation have the same right as any other adults to be tried and judged

on their own merits, not on a broad stereotype about their social or diagnostic status. The criteria for competence to sign a contract are based on ability, not diagnostic status, as are those for receiving a driver's license. Some discussants in this field are concerned that if people with mental retardation are denied the "right" to suffer the same consequences of their crimes as anyone else (assuming the jury has properly considered their abilities), then what other of their rights are vulnerable to being abridged or curtailed? Marriage? Child custody? Independence itself?

### Drawing the Line

People who are opposed to executing defendants based solely on mental retardation rarely say what level of intellectual function is "enough" and what level of retardation is "too much" for this heterogeneous group. It wouldn't help to set something like an IQ number or "mental age," since the lawyers for defendants who fell just above it would argue bad testing or arbitrariness, or simply re-test the defendant until he somehow reached the magic number. And prosecutors would argue just as loudly that IQ in itself is not a very precise index of ability to function. The controversy would rage, few answers would be found, and most important, either the same defendants would be exempted or sentenced as before, when juries were presented with individual characteristics and could make individual judgments about individual defendants, or more mentally retarded defendants might be sentenced to death, because juror judgment would have been replaced with a pseudo-valid "rule."

### Expanding the Pool

The same "status" argument applies to other defendants who have some group-identifying characteristic. Should all depressed people be exempt from the death penalty? How depressed is "enough"? How about people with less than a 10th grade education? What about those who received "social" promotions or special education diplomas? What about people with schizophrenia? Lots of psychiatrists quickly say people with schizophrenia shouldn't

even be found guilty, much less sentenced to death; but what if the illness had nothing to do with their crime? Or they've been symptom-free for years?

You get the idea: individual functional assessment is good. Lumping and stereotyping are bad. When the media headlines seem distressing (e.g., "Mentally Retarded Man Sentenced to Die"), consider learning the rest of the story.

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### THE LAST WORD

There are ethical ways for psychiatrists and other mental health professionals to participate in the death penalty process if they choose to do so. One should not participate or testify on the basis of some personal bias for or against execution and, if such biases are held, one should be willing to reveal them. Courts, and the judicial system they represent, need the help of honest, objective professionals who know how to do a good forensic evaluation and convey the results in testimony. Finally, individual functioning is much more important than group stereotypes.

### References

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