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In 2010, following intense controversy over the involvement of psychologists in military interrogations at U.S. detention centers such as Guantanamo Bay and Abu Ghraib, the American Psychological Association (APA) amended its Ethics Code Standard 1.02, Conflicts Between Ethics and Law, Regulations or Other Governing Legal Authority. The amended language made clear that psychologists were prohibited from engaging in activities, however lawful, that would "justify or defend violating human rights." The broad language of this modified standard raises new questions for ethical analysis of psychologists' participation in another kind of controversial legal proceeding; death penalty cases.

COURT RULINGS

Forensic psychologists—those with specialty training in psychological evaluation, treatment or consultation relevant to legal proceedings—have been increasingly involved in death penalty cases since the Supreme Court ruled in *Gregg v. Georgia* (1976) that capital sentencing must be tailored to the individual offense and the person who committed it. In practice this has meant that during the sentencing phase of a capital case courts must consider psychological factors that might influence a jury's recommendation for execution or life imprisonment such as whether the defendant is capable of understanding the State's reason for execution or is likely to engage in future violent behavior (DeMatteo, Murrie, Anumba, & Kessler, 2011).

The need for psychological assessment in capital cases intensified in 2002 when the Supreme Court decided that use of the death penalty for defendants with mental retardation is unconstitutional (*Atkins v. Virginia,* 2002). Consequently, prosecutors cannot bring a capital case against a defendant accused of murder if a forensic psychologist or other mental health expert gives the defendant a diagnosis of mental retardation. Similarly, the more recent *Panetti v. Quarterman* (2007) decision prohibits execution of criminal defendants sentenced to death if assessments indicate they do not understand the reason for their imminent execution. As a result of these decisions, in capital cases, psychologists' expertise plays an essential role in determining the legal grounding on which a defendant may be tried for a capital offense and sentenced to death.

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LEGAL FLAWS IN DEATH PENALTY CASES

Within the profession, psychologists' involvement in capital cases has drawn ethical debate as new evidence of the flaws in the death-penalty process has come to light (Birgden & Perlin, 2009). At least 102 innocent people in the U.S. have been released from death row since 1973. Moreover, still unknown is the number of innocent persons that have been on death row for years or executed. Consistent findings that racial minorities and defendants from lower socioeconomic levels are more likely to receive a death sentence than white, middle class defendants also point to inequities and unfairness of capital punishment procedures (Jacobs, Qian, Carmichael, & Kent, 2007). Additionally, the fallibility of eyewitness testimony, long documented by research psychologists, is increasingly recognized by law-enforcement agencies and the courts as a serious threat to fair conviction procedures (Liptak, 2011). That innocent people in the U.S. are being put to death or waiting on death row is indisputable.

Responding to these inequities in 2001 the APA issued a statement calling upon U.S. jurisdictions not to carry out the death penalty until localities develop policies and procedures that can be shown through psychological and other social science research to ameliorate capital case procedural flaws associated with incompetent counsel, inadequate investigative services, police and prosecutors withholding exculpatory evidence, and selection of conviction prone jurors (APA, 2001). Only a few states thus far have instituted such a moratorium.

FALLIBILITY OF PSYCHOLOGICAL TESTS IN CAPITAL CASES

The inherent fallibility of psychological tests may also contribute to arbitrariness and inequities in death penalty proceedings. Most test scores indicating cognitive disability and other psychological disorders are based on probabilities—the likelihood someone has a mental disorder is determined by the degree to which his or her score is similar to the scores of others diagnosed with the disorder.

In *Atkins* the Supreme Court did not define mental retardation, charging states to identify their own definitions. This has created potential inequities in diagnosis. First, although there is general agreement that a diagnosis of mental retardation requires that prior to age 18 an individual has demonstrated a combination of below-average general intellectual ability (e.g., a below-average IQ score) and lack of adaptive skills necessary for independent daily living (DSM-IV-TR, 2000), in law and forensic psychology there is variability across states on the specific legal definition of mental retardation (see for review, DeMatteo et al., 2011). Second, mental health practitioners disagree on whether an IQ score of 70 should be an absolute cut-off point for mental retardation, the relative weight that should be given to IQ versus adaptive functioning in reaching a diagnosis, and the validity and reliability of IQ scores over time (Cunningham & Tassé, 2010; Everington & Olley, 2008).

Socioeconomic and Cultural Inequities

Socioeconomic disadvantage constitutes a third factor contributing to diagnostic fallibility. A DSM diagnosis of mental retardation requires a documented history of intellectual disability in

childhood. Many defendants raised in economically and educationally disadvantaged neighborhoods were never evaluated for mental retardation prior to age 18 and their childhood school and medical records may be sparse. Lack of childhood evidence can lead to the default position that these defendants do not meet mental retardation criteria and can therefore be charged with a capital offense. Fourth, cultural bias of psychological tests used in death penalty cases continues to be a source of concern within the profession (Perlin & McClain, 2009). Many tests available to evaluate overall intelligence, adaptive behavior, and psychological disorders related to aggression, are based on test scores of white, English speaking, U.S. born, and middle class populations. Accordingly, in capital cases mental retardation and violence risk may be systematically over- or under-diagnosed in poorly educated, racial minority and immigrant persons lacking proficiency in English.

Predicting Future Acts of Violence

Finally, during the death penalty sentencing, forensic psychologists are often asked to provide expert testimony on whether the defendant is likely to engage in future violent acts. Psychological tests for violence risk are also probabilistic and research consistently shows that psychologists and other forensic practitioners cannot predict future dangerousness with any certainty, particularly because context appropriate base-rate data is only beginning to be developed (DeMatteo et al., 2011; Sorenson & Cunningham, 2010). Jury predictions are similarly unreliable. Research suggesting that juries are more likely to arrive at a death sentence when defendants have a diagnosed mental illness, based on the jurists' unfounded belief that individuals with psychological disorders are inherently more prone to future violence (Cunningham & Reidy, 2002).

In summary, a diagnosis of mental retardation and predictions of future violence are probabilistic at best and subject to test bias and state and practitioner idiosyncrasies at worst. By contrast, the ultimate decisions before a court are absolute: a defendant has or does not have mental retardation; is or is not likely to be violent in the future; is or is not guilty; should or should not be sentenced to death.

DOES FORENSIC PSYCHOLOGISTS' INVOLVEMENT IN CAPITAL CASES "JUSTIFY OR DEFEND VIOLATING HUMAN RIGHTS"?

Even as Americans continue to disagree on whether the death penalty in itself violates human rights, the unwarranted and inequitable killing of innocent persons by their government is a flagrant violation of the basic rights of individuals to life and liberty (Dieter, 2011).

As in the debate over psychologists' involvement in military interrogations, some might argue that the psychological assessment is neutral and does not determine whether a judge or jury will sentence a prisoner to death. However, given the current documented flaws in death penalty procedures, psychologists' contribution to legal decisions concerning competency and predictions of future violence places the defendant at the mercy of an imperfect and unjust system. Others might argue that despite the inexactitude of current diagnostic techniques, participation of well-trained forensic psychologists enhances the accuracy of mental health-based legal decisions and that to prohibit their services in capital proceedings will only lead to capricious and unprofessional assessments conducted by those without appropriate training. To be sure, the probabilistic

nature of forensic assessments does not over-ride their importance and usefulness to the courts. The U.S. legal system affords defendants and prisoners basic protections that can rectify flawed evaluations or jury decisions including the right to appeal, to receive psychological treatment and on-going psychological evaluations, and the possibility of entering new evidence into consideration following conviction. However, in capital cases, the usual human rights protections for continued evaluation and appeals can be cut short by death.

Moral questions about forensic psychologists' participation in capital punishment cases bears striking similarity to issues that drove the heated controversy over psychologists' participation in harsh military interrogations. The APA has taken a moral stance against psychologists' participation in military activities that justify human rights violations. It may be time to do the same for the death penalty, an inequitable legal process whose inconsistencies lethally violate the human rights of defendants in capital cases.

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