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Fellows' Corner

Navigating The Ethical Maze of Assessing Competency to be Executed

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When I began my still very young career in forensic psychiatry, I naïvely believed that I had solidly formed my ethical views on most topics. My views were quickly challenged when I learned about the concept of competency to be executed. Having never lived in a jurisdiction with capital punishment, this was not a topic I had paid attention to. I initially believed it was unethical for psychiatrists to perform competency to be executed evaluations, which stemmed from my conviction that any involvement in the death penalty was immoral. However, as I researched the topic, my views began to change.

The process of re-evaluating one's views or beliefs is difficult but important. Our world changes rapidly in almost every respect, and a single view or belief rarely holds in every situation. Operating within an evolving system requires an occasional re-evaluation of one's ethical stances when they cannot be applied to a new situation or when the circumstances have changed. This is a difficult task, especially in the case of capital punishment.

Professional organizations are not consistent in their stances on this topic. The World Psychiatric Organization (WPA) makes the following statement: "Under no circumstances should psychiatrists participate in legally authorized executions nor participate in assessments of competency to be executed." (1) The American Medical Association (AMA) takes a slightly different approach. Opinion 9.7.3 from the AMA says

that “a physician must not participate in a legally authorized execution” and that this includes “determining a prisoner’s competence to be executed.” However, the next sentence reads, “A physician’s medical opinion should be merely one aspect of the information taken into account by a legal decision maker, such as a judge or hearing officer.” (2) This wording falls short of condoning a psychiatrist’s participation in evaluations of competence to be executed, but allows the formulation of an opinion regarding competence to be executed. The American Psychiatric Association (APA) adopts language identical to the AMA. (3) The AMA and APA positions do not comment on how such evaluations should be performed.

AAPL stood explicitly in opposition to the death penalty between 2001 and the early 2010s, based on a referendum that passed by the narrowest of margins (167 votes to 166). (4) However, this stance had a caveat: it called for a moratorium on the death penalty until it could be administered “fairly and impartially.” This position is no longer held by AAPL, although it is not entirely clear when it expired. In contrast to the WPA, AMA, and APA, AAPL has not taken a stance on the ethical permissiveness of performing evaluations of competency to be executed. The absence of a stance is not due to the idleness of AAPL or its members; debate continues within the organization and members actively publish and present on the topic.

There is abundant literature analyzing the various landmark cases related to competency to be executed (most notably *Ford v. Wainwright* (6), *Panetti v. Quarterman* (7), and *Madison v. Alabama* (8)), and their implications on the technical aspects of performing evaluations, but comparatively little has been written regarding the ethical considerations. The most recent article analyzing this topic from an ethical standpoint is from 2010, (9) with the last substantial analysis before that being written in 1986. (10) Weinstock et al. (9) address ethical quandaries related to forensic psychiatry and capital punishment, ultimately concluding that forensic psychiatrists can ethically perform competency to be executed evaluations so long as they make a conscious effort to remain objective in their evaluation. They cite the philosopher Philippa Foot, who wrote that if all experts with concerns about the death penalty avoided participation in capital cases, then

those cases would be left to experts with no such concerns and who may be biased in favor of executions, or believe that executing a prisoner is an aid to society. They further argue that avoiding such cases precludes experts from helping those who "legitimately lack competence to be executed" and ultimately hold that performing such evaluations is within the realm of ethical conduct by forensic psychiatrists.

In the aftermath of *Ford v. Wainwright*, (6) Radelet and Barnard (10) cited the vagueness of the statutes governing competency to be executed and unclear reasoning for why the mentally incompetent should not be executed as barriers to an in-depth ethical discussion. They also highlighted the lack of guidelines for determining whether someone understands the nature of the sentence and the reasons for its imposition as a barrier to performing an effective evaluation. They also discuss the standards of proof required for deciding competency to be executed and argue that there should be a higher standard for a finding of competency than for *incompetency*. They point out the lack of available professional standards for performing these evaluations as a further barrier to objectivity and advocate for "some action by the psychiatric profession as a whole" to rectify the situation. These authors stop short of offering an opinion on whether performing these evaluations is ethical; rather, they write that "until the definitions and procedures are changed, a psychiatric evaluation which finds a person competent to be executed raises major ethical issues for both the evaluating psychiatrist and the profession as a whole." Without expert consensus and specific ethical guidelines, evaluators are left to their own devices in determining whether and how to perform evaluations of competency to be executed.

While evaluating my stance on this topic, I formulated the following question: at what point (if any) does participating in any legal process involving the death penalty become unethical? I spoke with one of my mentors, Susan Hatters-Friedman. She recalled an example where she opined that a defendant had malingered deficits in an attempt to be adjudicated Incompetent to Stand Trial. The defendant was charged with murder, but the prosecutors were not pursuing the death penalty. After Dr. Hatters-Friedman's report, the prosecutors re-filed the charges with death penalty specifications. If rendering such an

opinion can have such a result, does that mean participating in Competency to Stand Trial evaluations in potential capital cases is unethical? I would argue it does not, as the defendant is still entitled to a fair trial. The question can be reformulated for nearly every phase of capital proceedings. Is evaluating an alleged murderer for Insanity at the Time of the Act ethical? What about testimony regarding aggravating factors at sentencing? There is no clear line in the ethical sand.

Despite this lack of clarity, I have come to agree with Weinstock et al. (9) and believe that evaluating competency to be executed is ethical. While there is a clear separation between an evaluation of competency to be executed and the decision to proceed with the execution of a convicted person, my stance hinges on a different point: the prohibition of any involvement of forensic psychiatrists in evaluations of competency to be executed risks our replacement with others who do not have the same concern for objectivity and may be biased in favor of executing the people whom they evaluate. I also agree with Radelet and Barnard (10); even nearly 40 years after their article, there is still a lack of clarity surrounding what constitutes a rational understanding of the death penalty and how to establish it. While some authors, such as Updegrove and Vaughn, (11) have outlined minimal professional standards, AAPL, and other organizations have not formulated guidelines for performing evaluations of competency to be executed.

My views on this subject are solely my own and, as I have been so recently reminded, are subject to change in the face of new information. The purpose of this article is not to advocate for forensic psychiatrists to perform evaluations of competency to be executed. Instead, I urge AAPL to study this issue further and to consider formulating a position, as well as developing a practice resource for performing these evaluations.

Finally, I urge forensic psychiatrists, whether early in their careers or already well-established, to maintain a critical mindset regarding ethical issues. We must think critically about the principles that govern our practice so that we can effectively evaluate and, if necessary, change our viewpoints when confronted with new evidence.

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