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## A Reasoned Argument against Banning Psychologists'

### Involvement in Death Penalty Cases

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Prompted by the involvement of psychologists in torturous interrogations at Guantanamo and Abu Ghraib, the American Psychological Association (APA) revised its Ethics Code Standard 1.02 to prohibit psychologists from engaging in activities that would “justify or defend violating human rights.” The revision to Standard 1.02 followed APA policy statements condemning torture and prohibiting psychologists’ involvement in such activities that constitute a violation of human rights (APA, 2010). Cogent questions have subsequently been raised about the involvement of psychologists in other activities that could arguably lead to human rights violations, even if the activity in question is legal. While this language was designed to be expansive in defining psychologists’ ethical responsibilities, it remains difficult to determine whether and how Standard 1.02 might apply to a particular situation. In the present analysis, we focus on the question of whether psychologists should be involved in death penalty cases.

We assert that the APA should not take an ethical stand against psychologists’ participation in death penalty cases. Our position is not intended necessarily to reflect approval or disapproval of the death penalty although we recognize that there are serious flaws in the American legal system with regard to capital punishment. Our perspective is that psychologists have an important role in the administration of due process in capital cases. We oppose a bright-line rule prohibiting psychologists’ involvement in death penalty cases for several reasons. We begin by considering whether the death penalty *per se* constitutes a human rights violation, move on to describe the basic functioning of the

legal system, analyze how the involvement of psychologists actually affects the capital trial process, and end with providing practical advice for psychologists' provision of ethical services in capital trials.

### **Does Capital Punishment Constitute a Human Rights Violation?**

Many argue that capital punishment violates the human rights of the person sentenced to death. Others argue that from a societal perspective the offender violated the human rights of the victim(s) and therefore must be held accountable. The American legal system, reflecting public opinion, holds that the death penalty *per se* is not a human rights violation. The U.S. Supreme Court has held that the death penalty is not cruel and unusual punishment (*Gregg v. Georgia*, 1976), even while narrowing the applicability of the death penalty in certain situations (*Atkins v. Virginia*, 2002; *Roper v. Simmons*, 2005). We point this out simply to note that there does not appear to be a consensus, at least in the United States, regarding whether capital punishment should be considered a human rights violation.

### **The Legal System is an Evolving Institution and has Built-in Procedural Safeguards**

“Human rights” is an evolving rather than a static concept. This mirrors the evolving nature of the legal system itself, which changes over the course of time reflecting changes in public opinion. Accordingly, ethical proscriptions need to acknowledge and account for this fluidity. And to the extent there are flaws with the theory, procedures, or application of the death penalty (see APA, 2001), those are flaws that the legal field is in a better position than the field of psychology to address.

For example, the law has instituted a number of mechanisms by which certain errors in a death penalty case can be rectified, such as by direct appellate review (*Poland v.*

*Arizona*, 1986), state collateral review (e.g., Fla. R. Crim. Proc. 3.850-3.851), and federal habeas corpus petitions (28 U.S.C. § 2241). Likewise, the law provides for the consideration of mitigating factors during the sentencing phase of a death penalty case (*Woodson v. North Carolina*, 1976; *Lockett v. Ohio*, 1978). While these procedural safeguards are imperfect mechanisms, they do allow for death penalty cases to be reviewed by a variety of legal authorities. In this sense, death penalty cases present a stark contrast to the torture situation that was the impetus for the revisions to Standard 1.02.

Accordingly, we feel a complete ban on psychologists' involvement in death penalty cases regardless of the particular circumstances is an ill-advised way to rectify problems in the legal process. Such a ban also does not fully recognize the role (more fully discussed below) that psychologists actually play in capital cases.

### **How do Psychologists affect Capital Trial Processes?**

Psychologists are involved in capital cases as fact or expert witnesses who provide relevant and useful information to juries and judges – the ultimate legal decision-makers in capital trials. Clinical psychologists are often involved as forensic evaluators and expert witnesses in capital trials, and may be asked to provide information about the mental state of the defendant at various times (i.e., at the time of the alleged crime, at interrogation, at trial, at sentencing, at execution). In addition, psychologists sometimes are asked to provide scientific research findings that are not necessarily related to the mental state of the defendant. For instance, psychologists sometimes provide information about the fallibility of eyewitness testimony so jurors and judges may evaluate the credibility of eyewitness evidence with appropriate skepticism.

It also may be useful to remember that when clinical psychologists evaluate

defendants, they are either retained by a neutral court or act in a neutral role while retained by one of the adversarial parties. In fact, forensic practitioners are advised to “manage their professional conduct in a manner that does not threaten or impair the rights of affected individuals” (APA, in press, Guideline 2.04). They observe the boundary between legal fact-finder and expert witness by providing useful information about the defendant’s mental state without answering the ultimate legal issue (Melton et al., 2007). In other words, psychologists in a death penalty case should not proffer an opinion on whether the death penalty should be imposed. Rather, they assist the triers-of-fact by providing data about the defendant to help them make informed legal decisions.

Even if one believes that the death penalty is a human rights violation, it does not necessarily follow that a psychologist involved in a capital case is defending or justifying that end result. A psychological assessment in which substantial psychopathology is found may divert defendants from the criminal justice process to a mental health system or may identify treatment needs in correctional settings. In addition, clinical psychologists who evaluate convicted defendants for mitigation in sentencing as well as sentenced defendants who may not be competent for execution may be seen as helping to prevent human rights violations. One may think of the aims of mitigation and Competence for Execution (CFE) assessments as potentially derailing the progress of a convicted person towards execution. Whether the individual ultimately is executed depends on the results of the evaluation as well as the decision by the final legal authority. However, these assessments represent instances in which findings of minimal psychological mitigating factors or CFE make no difference in an ongoing process and substantial mitigating factors or a not-CFE opinion slow or stop the process.

CFE may be the nexus of the most controversy about whether mental health professionals should be involved with the death penalty. There are two distinct options for psychological practice regarding CFE, each of which lead to markedly different conclusions: (1) psychologists who assist in restoration of incompetent condemned prisoners to become competent for execution and (2) psychologists who participate in competency assessments. Psychotherapeutic efforts to restore condemned prisoners to be competent for execution may be the only instance in which psychological efforts may lead directly and causally to execution of convicted persons. Note that it is almost impossible – perhaps actually impossible – to find psychologists who would be willing to undertake this task. Assessments are another matter. Our position is: treatment, *no*; assessment, *perhaps yes*.

### **How Psychologists can Provide Ethical Services in Capital Cases**

Given that the death penalty is a controversial issue over which reasonable people can disagree, it would be improper to create objective, clearly defined rules for or against psychologists' involvement in these assessments. The best way to address involvement in death penalty cases is to place the decision on the individual psychologist. Each psychologist needs to “recognize that their own cultures, attitudes, values, beliefs, opinions, or biases may affect their ability to practice in a competent and impartial manner” and when that occurs he/she must “take steps to correct or limit such effects, decline participation in the matter, or limit their participation in a manner that is consistent with professional obligations” (APA, in press, Guideline 2.07; see Neal, 2010).

Once a psychologist does decide to become involved in a capital case, methodology should drive the evaluations and not the attitudes of the examiner toward the issue of

capital punishment. The transparency of evaluation procedures serves as a partial safeguard against bias infecting professional conclusions and opinions. Evaluations should be based on standardized and known procedures accessible to viewing and critiquing by attorneys for both sides and by other psychologists. No matter what the attitudes of the examiners, their work should be known, visible, and accountable. Vigorous cross-examinations help hold psychologists accountable.

Finally, psychologists who conduct evaluations in capital cases should limit their reports and testimony to the functional abilities of defendants related to the legal standard (Neal, 2010; Small & Otto, 1991). For example, in the case of CFE, the legal standard addresses the prisoner's understanding of the nature of the sentence and penalty and his/her ability to assist and work with counsel (*Ford v. Wainwright*, 1986). This recommendation is consistent with forensic psychological evaluations of other legal competencies. As Packer and Grisso (2011) note, "Laws typically focus on narrow conceptualizations of functional abilities relevant to specific areas of competency. The same clinical status may have different implications for different legal competencies, such as competency to stand trial, criminal responsibility, competency to make treatment decisions, or competency to manage one's affairs" (p.28).

## **Conclusion**

It remains difficult to determine whether and how Standard 1.02 might apply, except in one circumstance: torture. The 2010 revision of this Standard was a direct response to the extreme situation of psychologists participating in torture associated with interrogations (APA, 2010). However, the APA has not identified any other situations that should be prohibited by the new language of Standard 1.02. Although the APA previously

has called for a halt of the death penalty until certain deficiencies in the legal process could be corrected (APA, 2001), it never suggested that the death penalty *per se* is a human rights violation, nor has it equated involvement in a death penalty case with involvement in torture.

We hold that the unequivocal banning of psychologists from participating in the capital legal process is not justified at the present time. Until a more universal view on capital punishment can be reached, a nuanced and psychologically responsible approach is arguably a better way to protect the human rights and dignity of defendants facing capital trials and punishment. It is important to remember that the defendant is in the hands of an imperfect system whether or not psychologists are involved in the process.



## References

28 U.S.C. § 2241

American Psychological Association. (2001). *The death penalty in the United States*.

Retrieved from <http://www.apa.org/about/policy/death-penalty.aspx>

American Psychological Association (in press). *Specialty guidelines for forensic*

*psychology*. Retrieved from <http://www.apa.org/practice/guidelines/forensic-psychology.aspx>

American Psychological Association, Ethics Committee. (2010). Report of the ethics committee, 2009. *American Psychologist*, 65, 483-492. doi: 10.1037/a0019515

Atkins v. Virginia, 536 U.S. 304 (2002)

Fla. R. Crim. Proc. 3.850-3.851

Ford v. Wainwright, 477 U.S. 399 (1986)

Gregg v. Georgia, 428 U.S. 153 (1976)

Lockett v. Ohio, 438 U.S. 586 (1978)

Melton, G. B., Petrila, J., Poythress, N. G., & Slobogin, C. (2007). *Psychological evaluations for the courts: A handbook for mental health professionals and lawyers* (3d ed.). New York: Guilford Press.

Neal, T. M. S. (2010). Choosing the lesser of two evils: A framework for considering the ethics of competence for execution evaluations. *Journal of Forensic Psychology Practice*, 10, 145-157.

Packer, I. K., & Grisso, T. (2011). *Specialty competencies in forensic psychology*. New York: Oxford University Press.

Poland v. Arizona, 476 U.S. 147 (1986)

Roper v. Simmons, 543 U.S. 551 (2005)

Small, M. A., & Otto, R. K. (1991). Evaluations of competency to be executed: Legal contours and implications for assessment. *Criminal Justice and Behavior*, 18, 146–158.

Woodson v. North Carolina, 428 U.S. 280 (1976)