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INTRODUCTION

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PROFESSIONALISM, MENTAL DISABILITY, AND THE DEATH PENALTY

INTRODUCTION

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There are several questions that inevitably arise and persist when legislation for capital punishment is considered philosophically. The most basic and pervasive of these is whether it is morally acceptable as punishment. Once legislated, questions surrounding its administration are certain to arise. If it is acceptable punishment for certain crimes, in which situations is it specifically unacceptable: To whom and for what reasons should the death penalty not apply?

When a defendant in a capital case has a mental illness, several specific questions become relevant during adjudication: Did symptoms of a mental illness interfere with responsibility for the crime? (Does the insanity defense apply?) Did mental illness serve to mitigate responsibility (and, therefore, punishment) for a capital crime? Does mental illness interfere with competency to be executed for a capital crime? States ask and answer these questions using varying criteria that depend upon statute and case law. However, when the issue of mental illness is raised, psychiatric expertise is usually sought.[1] Because the death penalty in and of itself is controversial, psychiatrist participation in the proceedings is complicated.

New York prepared for the reintroduction of capital punishment in early 1995,[2] coinciding with the early planning phase of the annual

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1. The idea that psychiatric expertise is usually sought in cases of suspected mental illness is raised in the three articles following this introduction.

2. New York's mandatory death sentence was declared unconstitutional almost twenty years ago. *See* People v. Davis, 371 N.E.2d 456 (N.Y. 1977). From then, until the current statute was enacted, the death sentence was not authorized in New York. On September 1, 1995, New York redefined first degree murder and reinstated the death sentence as possible punishment for that crime. *See* Executive Memoranda of Mar. 7, 1995, ch. 1, 1995 N.Y. Laws 2283 (memorandum from Governor George E. Pataki approving death penalty laws). New York's first degree murder statute is codified at section 125.27 of the penal law, and the procedure for determining sentence upon conviction of first degree murder is set forth in section 400.27 of New York's criminal procedure law. *See* N.Y. PENAL LAW § 125.27 (McKinney 1987 & Supp. 1996); N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 1996). Currently, under section 400.27 of the criminal procedure law, the available sentences for first degree murder are life imprisonment without parole and death. N.Y. CRIM. PROC. LAW § 400.27. *See*

meeting of the Tri-State Chapter of the American Academy of Psychiatry and the Law. This is typically an educational meeting that provides an opportunity for discussion of important issues facing forensic psychiatrists. The January 1996 meeting, entitled *Psychiatry and the Death Penalty: Dilemmas*, was co-sponsored by the Forensic Psychiatry Clinic of the First Judicial Department and took place at the Mount Sinai Medical Center in New York City. The three articles following this introduction are adaptations of papers presented at the meeting.

In introducing these articles, I will first provide a brief overview of each. One notable underlying issue is each author's criticism of colleagues for either substandard participation in the due process application of the death penalty, for lack of participation therein, or for their very decision to participate. In addition to criticism, each author either explicitly or implicitly suggests a remedy. I suggest that the origins of the criticisms are the authors' emotional responses to the death penalty. I will discuss the issue of objectivity in psychiatric legal evaluations of competency to be executed and analogize this to scholarship about the death penalty.

In *"The Executioner's Face is Always Well-Hidden": The Role of Counsel and the Courts in Determining Who Dies*,[3] Professor Michael Perlin discusses the two variables that most significantly affect the outcome of potential death penalty cases: the (in)adequacy of counsel and the (mis)use of mental disability evidence. In his examination of the evolution of mental disability evidence in the courts with respect to death penalty proceedings, Professor Perlin comments on the courts' emotional response to cases raising mental disability as an issue. The potential paradox of the introduction of mitigating evidence is highlighted and supports the premise that bias against mentally disabled defendants permeates the legal process and drives decision-making.

In *The Psychiatrist as Evaluator: Conflicts and Conscience*,[4] Dr. Robert Phillips addresses the dilemma psychiatrists face when considering participation in capital cases where mental illness is an issue. He states that there is no ethical prohibition from participation at any phase. While Dr. Phillips underscores the heavy reliance on psychiatric testimony in guaranteeing due process in competency to be executed hearings, he

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generally Michael Lumer & Nancy Tenney, *The Death Penalty in New York: An Historical Perspective*, 4 J.L. & POL'Y 81, 81 (1995).

3. Michael L. Perlin, *"The Executioner's Face Is Always Well-Hidden": The Role of Counsel and the Courts in Determining Who Dies*, 41 N.Y.L. SCH. L. REV. 201 (1996).

4. Robert T.M. Phillips, M.D., *The Psychiatrist As Evaluator: Conflicts and Conscience*, 41 N.Y.L. SCH. L. REV. 189 (1996).

suggests that because fact-finders determine the ultimate question the evaluator's role in the outcome is less powerful.

Drs. Abraham Halpern and Alfred Freedman trace the history (since 1980) of the positions held by organized medicine and psychiatry regarding physician participation in death penalty proceedings in *The Erosion of Ethics and Morality in Medicine: Physician Participation in Legal Executions in the United States*.[5] They state objections to the American Medical Association's 1995 Council on Ethical and Judicial Affairs (CEJA) report[6] because of a departure from previous prohibitions against physician participation.[7] Although the coauthors state clearly their objections to physician participation in evaluations of competency to be executed and to the restoration of competency (treatment), they do not directly address their opinions about physician participation in earlier (presentencing) phases of the proceedings.

While these articles approach the interface between psychiatric issues and the death penalty from different perspectives, each author is similarly critical of one or more aspect of the system to which he has been professionally devoted. Drs. Halpern and Freedman deconstruct the evolution of organized medicine's position and highlight contradictions and shortsightedness in policy-making. Dr. Phillips criticizes those psychiatrists who would abstain from participation as if they would disregard the needs of mentally ill defendants. Professor Perlin reflects on the court's seemingly random decision-making, the inadequacy of assigned counsel, and the irrational responses of juries.

Although there are many possible reasons for criticizing one's colleagues, it seems likely that these criticisms are emotionally generated. One's reaction to the death penalty may inspire anger either because of a belief that it is administered unfairly or that it is morally wrong. What more productive way to express this than by bringing to the foreground faulty components of a flawed system while suggesting appropriate responses?

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5. Alfred M. Freedman, M.D., & Abraham L. Halpern, M.D., *The Erosion of Ethics and Morality in Medicine: Physician Participation in Legal Executions in the United States*, 41 N.Y.L. SCH. L. REV. 169 (1996).

6. Council on Ethical & Judicial Affairs, American Med. Ass'n, *Physician Participation in Capital Punishment: Evaluation of Prisoner Competence to Be Executed; Treatment to Restore Competence to Be Executed*, CEJA Report 6-A-95 (1995) (on file with the *New York Law School Law Review*).

7. *See id.*; *Council Report: Physician Participation in Capital Punishment*, 270 JAMA 365 (1993) (referring to the American Medical Association's 1980 Council on Ethical and Judicial Affairs (CEJA) report, which prohibited physician participation in capital punishment).

In Dr. Phillips's article, his response is that physicians should participate, when needed, in capital cases. He suggests that psychiatrists must participate for fear of impeding due process. He assumes that the assistance of mental health experts will help fact-finders to better understand mental disability evidence. Drs. Halpern and Freedman implore individual physicians to abstain and urge organized medicine to return to earlier ethical standards when morality was uneroded.

Professor Perlin warns emphatically that the help of mental health experts in court may not be sufficient to overcome the deep systemic bias that is "sanism."[8] Educating others as to the use of the principles of "therapeutic jurisprudence" (with the possibility of systemic change) is his response to a flawed system.[9]

I have suggested that these articles betray emotion. It seems important, therefore, to examine what we know about individual expression in other work involving the death penalty. In order to extrapolate from what has been studied about the performance of competency for execution evaluations to observations about scholarly work on the death penalty, I note the following facts. Both result in a professional work product that taps into thoughts about the death penalty and neither one *requires* emotional expression or statement of opinion.

Mary Ann Deitchman et al. found that individual attitudes "affect forensic examiners' decisions to participate in competency for execution evaluations."[10] They found that "forensic examiners who oppose capital punishment are unlikely to participate in these evaluations."[11] They further suggested that self-selection factors operate and refer to previously stated concerns that examiner characteristics may bias outcome in competency for execution evaluations.[12]

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8. *See* Perlin, *supra* note 3, at 225 (stating that "'sanism' is an irrational prejudice of the same quality and character as other irrational prejudices that causes, and is reflected in, prevailing social attitudes of racism, sexism, homophobia and ethnic bigotry").

9. *See id.* at 234 (stating that "[t]herapeutic jurisprudence studies the role of the law as a therapeutic agent, recognizing that substantive rules, legal procedures and lawyers' roles may have either therapeutic or antitherapeutic consequences, and questioning whether such rules, procedures and roles can or should be reshaped so as to enhance their therapeutic potential, while not subordinating due process principles"); *see also* Michael L. Perlin, *What Is Therapeutic Jurisprudence?*, 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993).

10. Mary Ann Deitchman et al., *Self-Selection Factors in the Participation of Mental Health Professionals in Competency for Execution Evaluations*, 15 LAW & HUM. BEHAV. 287, 299 (1991).

11. *Id.*

12. *See id.*

One question posed to forensic examiners in Deitchman's study addressed ethical considerations related to participation in evaluations of competency. The responses showed a significant difference between those examiners willing to participate and those examiners unwilling to participate in the evaluations. Using a scale ranging from one (participation is in no way a violation of professional ethics) to seven (participation is a complete violation of professional ethics), the group means were significantly different: those unwilling to participate had a mean score of 4.2 and those willing to participate had a mean score of 1.8.[13] Quite remarkable, however, was the reported *modal* responses for the two groups: one was the most common answer for those willing and seven for those unwilling, suggesting that examiners have strong beliefs regarding the ethics of their participation in these evaluations.[14]

In Professor Richard Bonnie's 1990 article, *Dilemmas in Administering the Death Penalty*,[15] cited by Drs. Halpern, Freedman, and Phillips, he suggests that participation is ethically permissible.[16] He states, however, that "[a] mental health professional who believes that clinical objectivity is not possible in this context should undoubtedly decline, *on ethical grounds*, to conduct these evaluations."[17] The ability of mental health professionals to be objective has been questioned previously[18] and Deitchman's study supports these doubts.

Professor Bonnie also comments on "the emotional burden that is carried by those who administer the process."[19] I wonder whether an emotional burden such as this could be suppressed for the sake of objectivity. Are judges, lawyers, or evaluators able to transcend strong feelings when it is the nature of the work itself that stimulates such feelings?

One may also consider whether scholars are able to transcend emotion for the sake of objectivity. The emotions evoked when one considers participation in adjudication that may lead to execution are likely percolating when one writes about the issue. It is possible that self-

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13. *See id.* at 298.

14. *See id.*

15. Richard J. Bonnie, *Dilemmas in Administering the Death Penalty: Conscientious Abstention, Professional Ethics, and the Needs of the Legal System*, 14 LAW & HUM. BEHAV. 67 (1990).

16. *See id.* at 76.

17. *Id.* at 77.

18. *See, e.g.*, Stanley L. Brodsky, *Professional Ethics and Professional Morality in the Assessment of Competence for Execution: A Response to Bonnie*, 14 LAW & HUM. BEHAV. 91, 91-92 (1990).

19. Bonnie, *supra* note 15, at 90.

selection is at play for those who are engaged in scholarship about the death penalty. Are those with the strongest opinions about the death penalty those most likely to write about it? While this question is clearly less monumental in terms of the effect on those individuals facing death, it is relevant in that it serves as a backdrop to the words that follow.