Ethical and Professional Demands for Forensic Mental Health Professionals in the Post-Atkins Era

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Defendants with impairment in psychological functioning are the locus of considerable discussion, research, and practice debates in forensic mental health (see, e.g., Melton, Petrila, Poythress, & Slobogin, 1997). If the depth of psychological-legal impairment is not substantial, people with mental retardation may be deemed competent to participate in the legal process. However, in June 2002, the U.S. Supreme Court, in Atkins v. Virginia (2002), held that execution of retarded persons is cruel and unusual punishment, ruling that

Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial, but, by definition, they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others’ reactions. Their deficiencies do not warrant an exemption from criminal sanctions, but diminish their personal culpability.

In the majority opinion, Justice Stevens addressed this intellectual assessment aspect of the decision: “To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded.” In the Atkins case, the Commonwealth of Virginia disputed that Daryl Renard Atkins, having been convicted of abduction, armed robbery, and capital murder, suffered from mental retardation. Justice Stevens concluded, “Not all people who claim to be mentally retarded will be so impaired as to fall...
within the range of mentally retarded offenders about whom there is a national consensus.”

In nonlegal contexts, a typical evaluation for the nature and extent of mental retardation includes an assessment of intellectual and adaptive functioning. These assessments include accepted assessment procedures and measures administered in a standardized fashion, with appropriate normative data for the individual being assessed. The evaluation is conducted in the individual’s primary language and cultural factors affecting performance are taken into account.

Five interrelated ethical and legal concerns arise when one considers these forensic-intellectual evaluations in populations of alleged and convicted murderers. First, how should assessors best attend to and deal with the entrepreneurial pull engendered by the Court’s recent decision? Second, and closely related, how should evaluators maintain objectivity and avoid getting caught in the pull to affiliation with attorneys? Third, does one take into account the base-rate low IQs of correctional populations? Fourth, how do professionals evaluate the adaptive functioning of people who have been institutionalized and controlled in prisons or other institutions for many years? Fifth, how should assessors screen for malingering of cognitive impairment in this population?

AVARICE-COMPETENCE ISSUE

In light of the *Atkins* decisions, many forensic psychologists may find themselves drawn to evaluations of retardation in accused murderers (C. A. Hopewell, personal communication, July 25, 2002). Nonforensic intellectual assessors, as well, appear to be preparing to respond to the anticipated high demand following *Atkins* by the promotion of business income. It is fair to say that a pejorative judgment in the field of forensic mental health sometimes emerges in reaction to such intentions. The essence of the disapproval is that for some practitioners it can be exploitative and greedy to pursue this opportunity. The disapproval is directed at individuals who have conducted few evaluations for the court. This anticipated and newly found assessment and testimony of retarded offenders is first cousin to the movement of many clinical psychologists to forensic work for financial motives. The criticism is that novice evaluators move into areas for which they neither have been trained nor have been practicing. Such movement without adequate training harms the mental health professions in general and forensic psychology in particular.

Our assessment of the issue is that the financial motives issue is a red herring. It is not the earning issue but rather the competence issue that is central. Much like practitioners drawn to prescription privileges, the essential query is about the adequacy of the empirical foundations, the professional preparation, and the assessment and forensic adequacy of the individual. It demeans free enterprise concepts within professional psychology to dismiss forensic and nonforensic mental health professionals
who hope to improve their earnings. Indeed, a supply-follows-demand model of thinking may be understood and accepted.

The responsibility of professional associations and perhaps of licensing boards is to ensure that CEU courses and professional consultation are available. Furthermore, it is the responsibility of peers to ensure that professional immigrants know the legal-psychological terrain, professional language, and constructs and perform at an adequate level of competence in the forensic context (Brodsky & McKinzy, 2002).

In the avarice-competence dialectic, competence should never be compromised by economic motives. Neither, however, should professionals be prejudged because they have changed their practice to fill a perceived need and demand. In response to the classic question posed by Judge David Bazelon (as reported in Brodsky, 1973) of whether correctional psychologists were doing good for offenders or doing well for themselves, it is indeed possible to conduct competent professional Atkins evaluations while doing well for oneself.

HOW SHOULD EVALUATORS MAINTAIN OBJECTIVITY AND AVOID THE PULL TO AFFILIATION FROM DEFENSE ATTORNEYS?

In all court work by health professionals, the pull to affiliate with retaining attorneys can be both powerful and subtle. Of course, a preselection bias sometimes exists, with attorneys requesting assessments from experts who are perceived as having a likely tilt toward the attorneys’ desired outcome. Although selection bias may not be palpably visible to the evaluating experts themselves, affiliative influences may be identified in a number of ways. The experts sometimes find themselves in personal friendships with the attorneys. They may be aware of a desire to please retaining counsel. In situations in which interpretive decisions are ambiguous, experts may lean more in the direction of “their” side. We have elsewhere noted the nature of these problematic and compromising pulls to affiliation:

The expert may want the attorney to win in order that the expert’s findings be validated by the judge’s or jury’s findings. The expert may anticipate a rugged cross-examination, and the consequent anxiety may prompt affiliation with the employing attorney. A natural process of reducing cognitive dissonance can occur in which reservations and uncertainties about the findings fade as the commitment to the case and side become stronger. (Brodsky, 1991, p. 9)

The pull to affiliate has the potential for being intensified in instances in which the stakes are higher. Death penalty decisions by juries, judges, or appeal panels are arguably among the highest stakes in which mental health experts play an evaluative and testifying role. Capital case defense attorneys, in particular, often
enter their work with a passion and zeal to save their clients; these contagious emotions need to be observed and managed both objectively and dispassionately by the impartial and justice-committed expert.

THE SKEWED AND LOWERED IQs
OF INCARCERATED PERSONS

Compelling research information points to intelligence test results of the confined awaiting trial and the criminally confined being substantially lower than the distribution in the general population. However, these results have been substantially compromised by the use of entry-level group screening tests (Gendreau, Wass, Knight, & Irvine, 1976; Spruill & May, 1988). A logical interpretative question is whether one should seek out correctional norms versus existing national norms. The case for provision of correctional norms is that the approximately 1.7 million citizens in the United States who are confined at any one time compromise a substantial normative group in their own right. However, the normative data for these prisoners are unsystematic, almost always based on brief group-administered screening tests of intelligence, and of arguable use with individuals of low IQ.

We advocate use of general national norms viewed in the filtering/screening perspective. That is, Gottfredson and Hirschi (1990) suggested in their theoretical perspective, A General Theory of Crime, that poor judgment, low self-control, and ill-thought-out opportunistic actions lead to most offenses and arrests. In terms of intelligence, these behaviors are associated with likely lower intelligence levels. Our position is that norms are norms. Census representative norms have to have broadly applicable meaning. As such, if norms are actually representative of the general population, then such norms are appropriate for use with correctional populations. Practitioners should have no reservations about use of well-developed national norms and interpretations.

The low IQ score data for inmates are best viewed as a consequence of simplistic testing interacting with multiple layers of societal selection before inmates are tested in prisons. However, with the lower levels of education and reading abilities of many inmates, functional assessment becomes even more salient and even more problematic.

THE EVALUATION OF ADAPTIVE FUNCTIONING
IN INSTITUTIONALIZED PERSONS

The adaptive functioning issue is of substantial importance. In our experience in clinical psychology, many evaluated people produce scores on individual IQ measures that alone would have placed them in the range of retarded functioning. However, mental retardation was not diagnosed because the individual’s adaptive functioning
was above the range of mentally retarded persons. This bilevel assessment is common when considering the delivery of mental health services; however, the possible consequences become more serious and the accuracy of assessment more important when post-\textit{Atkins} sequelae of death sentence is a possible outcome.

No one germane instrument exists for measuring all adaptive functioning. Although institutions have adopted criteria as standard for their institutions (e.g., use of the Adaptive Behavior Scale–Residential and Community, 2nd ed. \cite{ABS-RC:2; Nihira, Leland, & Lambert, 1993} or the Vineland Adaptive Behavior Scales \cite{Sparrow, Balla, & Cicchetti, 1984}), no single consistent measurement device, no gold standard, is utilized across different institutions with different populations. Furthermore, there is latitude in defining what measure of adaptive functioning impairment actually constitutes impairment in the mental retardation range.

For example, the major institution for the retarded in Alabama has adopted the ABS and considers the result as its local standard, much as many forensic hospitals have adopted one primary competency-to-stand-trial assessment tool (e.g., MacArthur Competence Assessment Tool–Criminal Adjudication \cite{Hoge, Bonnie, Poythress, & Monahan, 1999}), although multiple competency assessment instruments exist. Our inquiries into what evaluators from institutions for the retarded would use with someone who has been in jail or prison for many years or on death row indicated that an assessment of adaptive functioning would be difficult. Indeed, adaptive functioning before incarceration is a reasonable target for assessment, assuming that cognitive functioning had not changed since incarceration. Furthermore, judging adaptive functioning is part of a total clinical decision and the scores on an adaptive functioning instrument are not the only criteria one should consider.

The challenging concern is how one evaluates the adaptive functioning of low-IQ individuals who have been long institutionalized in secure environments. There is no simple resolution to this problem. As noted, if the individuals’ mental status has not changed from the time they were incarcerated, then it might be possible to evaluate adaptive functioning retrospectively from prior to incarceration and extrapolate to current functioning.

Nevertheless, few measures of adaptive functioning have been designed or normed for use with institutionalized correctional populations. The immediate best professional choice appears to base adaptive functioning evaluations of capital case and death row inmates on a clinical synthesis of both preincarceration functioning and current functioning.

\textbf{POSSIBLE MALINGERING OF COGNITIVE IMPAIRMENT IN THIS POPULATION}

Because of the seriousness of the consequences in capital cases, special attention by the ethical and competent professional needs to be directed toward evaluation of deception and malingering. It is fair to say that assessment of malingering is the
number one priority in forensic assessment, preceding any professional conclusions in forensic evaluations (i.e., Rogers, 1997). For assessors who note efforts to mangle, these observations need to be viewed in the legal-social context. That is, malingering efforts do not rule out existing pathology or retardation. One of the challenging ethical tasks is to step back from the influences of the court, the attorneys, and the importance of the decisions to be made and to develop standardized approaches to sorting out real pathology and retardation that exist under the veneer of simulated pathology and retardation.

The research literature suggests that the base rate for deception or malingering among individuals claiming cognitive impairment may range from 20% (Griffin, Normington, May, & Glassmire, 1996) to 40% (Greiffenstein, Baker, & Gola, 1994). Considering that the Atkins decision allows for mentally retarded persons to avoid capital punishment, sufficient motivation may exist to feign cognitive impairment. Given that unaided clinical ability to detect malingering is poor, complete assessments should include the use of standardized instruments (e.g., Test of Memory Malingering [Tombaugh, 1996]; Validity Indicator Profile [Frederick, 1997]; Victoria Symptom Validity Test [Slick, Hopp, Strauss, & Thompson, 1997]) or empirically supported test batteries (see Schretlen & Arkowitz, 1990).

CONCLUDING COMMENTS

The recent Atkins decision provides new impetus for mental retardation assessment in court and correctional settings. Yet, these opportunities come with their own ethical and professional issues. This article has described some of the ethical and professional issues engendered by the recent Supreme Court decision. Atkins surely will promote more mental retardation assessments. Psychologists in forensic practice and those entering the field surely need to evaluate and to strengthen their knowledge base. The pull to affiliate with attorneys likely will be present and needs to be monitored so that experts remain objective and impartial. The assessment of adaptive functioning is potentially difficult. Assessors should extrapolate from preincarcerated functioning as well examine the state of current, incarcerated, adaptive functioning. Finally, malingering should be considered particularly carefully because the stakes are so high.

REFERENCES


