Grounds for Professional Abstention in Capital Cases

A Reply to Brodsky

Richard J. Bonnie

This article responds to Brodsky's critique of the author's views on forensic evaluation of capital defendants and condemned prisoners. It discusses whether objective assessment is possible in a context where personal values are so strongly held, and whether the criteria for assessing competency of condemned prisoners are too vague to permit objective application. And it concludes that evaluations of competency of condemned prisoners to waive opportunity for leniency are more problematic than evaluations of "competency to be executed."

Professor Brodsky has focused his comments on two issues concerning condemned prisoners that mental health professionals are expected to assess—competency to decide whether or not to file, or withdraw, judicial challenges to the legality of one's death sentence, and competency to be executed. Although he does not discuss clinical involvement in capital trials, I believe his observations are also applicable in that context and will respond accordingly.

At the outset, I want to emphasize that I never meant to characterize abstention by clinicians in any of these contexts as "an act of petulance [or] excessive avoidance of a pressing social responsibility." Indeed, as I noted several times, I fully agree with Brodsky's view that a belief in one's own "diminished objectivity" is a valid ethical reason for abstaining from participation in all phases of capital cases, not only assessments of the competency of condemned prisoners.
Are Brodsky and I in essential agreement? To this question, I suspect Brodsky would probably respond as follows: "Bonnie is missing the point altogether. He thinks abstention on grounds of 'diminished objectivity' is an exception to a practice that is generally ethically sound, but my point is that objectivity is impossible in this setting, and the 'exception' which Bonnie grudgingly acknowledges actually swallows the 'rule.'" This, I take it, is the point of Brodsky's rumination on the difference between the "psychological" (his) and "legal" (mine) points of view. Yet, I doubt that the distance between the "legal" and "psychological" ways of thinking about human behavior is as great as he implies—at least not if Bonnie and Brodsky are thought to be representative of their respective species.

Consider Brodsky's "principle" of subjectivity, which purports to represent the psychological point of view: "The less defined the situation, and the more strongly and emotionally an individual holds values, the more likely any individual will be to project his or her own values onto the situation." I do not disagree with this observation. Indeed, this very understanding of human behavior is implicit in the commitment of our legal culture to the rule of law. A basic supposition of modern legal discourse is that law establishes "objective" normative constraints on the "subjective" preferences of individual decision makers that would otherwise shape their decisions. Even in those institutional contexts where discretionary decision making is regarded as socially useful, the pronounced tendency of American law has been to subject discretion (i.e., subjectivity) to maximum feasible control. Moreover, precise normative constraint is thought to be especially desirable when an official decision maker is most likely to "project his or own values onto the situation"—for example, in contexts involving a danger of suppressing unorthodox political, religious, or social behavior.

Of course, some behavioral scientists may believe that subjectivity is inevitable and that adherence to objective prescribed norms is unattainable; this was the view of some legal realists and is now propounded by some contemporary proponents of critical legal studies. Yet Brodsky himself does not endorse this extreme "psychological" perspective: he specifically acknowledges the possibility of objectivity by mental health professionals whose "training can provide a higher threshold before values intervene"; the same can presumably be said of judges and other legally trained decision makers.

All this leads me to conclude that Brodsky and I, together with most "mainstream" forensic clinicians and lawyers, have more or less the same view about the possibility of objectivity and rationality in rule-governed decision making, notwithstanding the supposed contrast between "legal" and "psychological" points of view. The narrower question actually posed by Brodsky's critique is whether beliefs and attitudes about the death penalty are so strongly felt by such a large proportion of mental health professionals as to preclude objectivity in forensic assessment in capital cases. This is a critically important question which, as I see it, highlights the puzzle lying at the heart of the continuing constitutional controversy about capital punishment—whether widely varying attitudes about the death penalty (and other attitudes, including racial prejudices) are so strongly