

AAPL and the Death Penalty: A Historical Perspective on the Debate

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In regard to the articles discussing the debate within the American Academy of Psychiatry and the Law (AAPL) on adopting an official position on the death penalty,^{1–5} Norko states that the question has been considered by AAPL “since at least 1998” (Ref. 1, p 178). By way of a historical perspective, I want to point out that psychiatrists have been informally debating and expressing their opinions about the death penalty beginning with Benjamin Rush in the early 19th century. Similarly, some of the consequences of holding a public position on a sociopolitical issue not directly related to medicine or psychiatry, such as capital punishment, were also demonstrated in the 19th century, in the earliest years of development of the specialty of clinical and forensic psychiatry.

Rush, one of the leading physicians of his time, is widely regarded as the “father of American psychiatry.” He probably had more effect on medical thought and practice concerning the insane than any other American. His medical philosophy was derived from his liberal social and political outlook, which in turn was shaped by the humanitarian and humanist philosophies of the Enlightenment. This was a time when many believed that active social and political reform (and consequently, for physicians, medical reform) could result in an improvement of the human condition. Many, including Rush, felt that it was an individual’s moral obligation to engage in active attempts to bring about such reform, a belief

that led in no small part to the development of the specialty of psychiatry.

Halpern *et al.*,² in their advocacy of a formal stand against capital punishment, are following in the early traditions of social activism which gave rise to the profession of psychiatry. Rush urged his students to become involved in the courts as expert witnesses to assist the legal system in attaining more perfect justice. He urged them not to turn or shy away from becoming involved in what he described as a high calling that would greatly assist society. Nevertheless, Rush made one notable exception to this general advice:

There is but one objection [to providing expert medical opinions to the court]: and that is, conviction for several offenses, which are at present punished by death, will be rendered more certain and more general by it. But there is a sure and infallible method of obviating this objection: and that is, to abolish the punishment of death in all cases whatever; even for the crime of deliberate murder itself. . . . We bestow much study and great labor in restoring the wandering reason of our fellow creatures; but we neglect their erring hearts. . . with an unmerciful impatience, we consign persons, whom moral derangement has rendered mischievous, to the exterminating ax and halter. . . . By substituting expiatory confinement and labor, and the power of medicine, according to circumstance for capital punishments, . . . we shall. . . add greatly to the reputation of our courts, and to the order and happiness of society” [Ref. 6, pp 393–5].

In contrast to Halpern and colleagues’ clear call for social activism, O’Shaughnessy³ points out that AAPL members have expressed concern that adopting a formal position demanding abolition of the death penalty might “compromise the objectivity of AAPL or cause the members embarrassment if they were to be involved in a criminal case in which capital punishment was a potential outcome” (Ref. 3, p

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184). These concerns were also voiced by Rush: “In vain, therefore, shall we expect to hear the whole truth from witnesses in our courts of law, while its penalties [i.e., the death penalty] are opposed by the dictates of humanity and justice” (Ref. 6, pp 393–4).

Indeed, history demonstrates that members’ concerns about compromising objectivity are justified. In the 1700s and through the mid-19th century, England applied the death penalty to a wide range of 200 or so personal and property offenses. A felon could be convicted for the theft of any item exceeding the rather small amount of 30 shillings. Many individuals within the legal system as well as in society generally felt that levying the death penalty for stealing buttons or spoons was unjust. Thus, the English legal system developed a series of escapes from execution. For example, judges would guide juries to conclude that the value of the stolen property was less than 30 shillings, even when this was patently not the case, to avoid the necessity of imposing the death penalty.⁷

The plea of insanity was another method that could be used to escape the gallows. The specialty of forensic psychiatry was in large part born out of attorneys’ efforts to save their clients from death for crimes such as shoplifting by pleading not guilty by reason of insanity. Indeed, the great majority of crimes in which mental derangement was raised as a possible exculpatory defense were not lurid murders or attempted regicides, but consisted primarily of rather tedious and common property crimes.⁸ In the choice between death and indeterminate confinement in the madhouse, the latter prospect seemed more attractive, and the use of experts in such trials rose markedly in the early 19th century.

Many defense medical witnesses in these trials, the first modern forensic psychiatrists, were well known for their opposition to the death penalty. Some, such as one of the physicians who testified at the trial of Edward Oxford, openly admitted that he based his diagnosis on the possibility of the defendant’s incurring death for his crime.⁹ Hence, the concern about the effect that a strong personal or professionally endorsed opinion might have on the ability to strive for objectivity is well grounded.

The effects of a public opinion regarding the death penalty on the standing and reputation of the expert witness is also a reasonable concern, as the case of John Conolly, a 19th century opponent of the death penalty, demonstrates. Conolly was a preeminent early specialist in insanity. He was the author of one

of the earliest texts on the subject, *An Inquiry Concerning the Indications of Insanity* (1830) and the physician in charge of Hanwell Lunatic Asylum in Middlesex, England. His credentials were of the highest order, and he testified in many insanity trials, including the landmark case of Edward Oxford (1840). However, in part because of his widely known views on the death penalty, Conolly was one of the earliest psychiatrists to develop a reputation as a “hired gun” who would testify “that a person who suffered virtually any form of mental dysfunction, no matter how slight, was insane” (Ref. 9, p 364).

The debate about whether AAPL has a moral and ethical responsibility to endorse the abolition of capital punishment requires us to engage in a close examination of our personal and professional values. It is a debate deeply rooted in the historical origins and traditions of our profession. Nevertheless, as the series of articles in Volume 32, Number 2 of last year’s *Journal* demonstrates, the potential risks and benefits of adopting a formal organizational position on the death penalty should be carefully considered. Our own professional history offers both justification for continuing this debate and justification for concerns that adopting an official position on abolishing the death penalty may affect our professional credibility and our ability to provide opinions that strive for objectivity in cases involving the death penalty.

References

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