Using Technology to Improve the Objectivity of Criminal Responsibility Evaluations

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Criminal responsibility (or insanity) evaluations require forensic clinicians to reconstruct a defendant's decision-making abilities, behavioral control, and emotional state at the time of the criminal act. Forensic evaluators are ultimately tasked to evaluate whether an individual had the capacity to understand right from wrong, and in some jurisdictions, determine whether the defendant lacked substantial capacity to conform his behavior to the requirements of the law as a result of a threshold condition (e.g., mental illness). Insanity evaluations are inherently complex, because they require the clinician to determine someone's mental state at some point in the past (weeks, months, or even years). Recent research on insanity evaluations underscores significant problems with the reliability and validity of these evaluations. However, technological advances including social media (e.g., Facebook and Twitter), mandating that law enforcement videotape interrogations, and the use of body and dashboard cameras can aid clinicians in improving the precision and quality of insanity evaluations. This article discusses practical guidelines and ethics-related concerns regarding the use of technology to improve the objectivity of criminal responsibility evaluations.

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Advances in technology have led to changes in health care practice, which in turn has improved the evaluation and treatment of individuals with mental disorders. As an illustrative example, advances in telecommunication have led to the proliferation of videoconferencing (i.e., real-time, audio-video communication) in delivering psychiatric and psychological services to increase availability of mental health care in rural areas that are often devoid of such services.[1] Available research suggests that in most instances, there is little diminution in overall quality of services when using telepsychiatry,[2] including for those individuals receiving forensic services.[3] Further improvements in technology will improve availability of mental health services within traditionally underserved areas. One such underserved area is correctional mental health[4]: the implementation of telepsychiatry has led to efficacious treatment of individuals with posttraumatic stress disorder[5] or depression[6] and of incarcerated adolescents.[7] The implications for mental health treatment have been fairly well researched with calls for the expansion of telepsychiatry in mental health services.

Even though there has been a proliferation of technologically based services for the treatment of mental disorders, the application of technology to improve the quality of criminal forensic evaluations has been understudied, and perhaps, underused. The use of technology in forensic evaluations offers several potential advantages including: cost savings, the ability to decrease the census in state forensic hospitals by facilitating the completion of the evaluation, greater access to a wider and more diverse range of experts and improving the flow of court dockets involving individuals with mental illnesses.[8] Some jurisdictions have reportedly been using various telecommunication methods to complete competency-to-proceed-to-trial evaluations.[9] Comparable results via telepsychiatry and in-person interviews were found using the Brief Psychiatric Rating Scale, MacArthur Competence Assessment Tool-Criminal Adjudication, and the Georgia Court Competency Test.[9,10] It

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seems, then, that by using technology in forensic evaluations, the quality of relevant and specialized assessment tools, along with greater accessibility for conducting interviews and gathering collateral information, would not be exchanged for improved timeliness of evaluations. In fact, the implementation of telepsychiatry has been proposed as a potential solution to a shortage of forensic evaluators in South Africa.[11]

Although videoconferencing is useful and likely an advantageous modality for gathering clinically relevant data (e.g., via interviews with defendants and third-party observers), the commentary that follows focuses primarily on addressing the potential benefits and ethics-related concerns regarding the use of technology, such as social media, mandated videotaped police interrogations, and body and dash cam videos, to obtain additional information about a defendant for the purpose of evaluating criminal responsibility. Reviewing and integrating collateral sources of information whenever possible is recognized as standard practice in conducting insanity evaluations.[12–14] Evaluating these data can provide a more comprehensive, retrospective picture of a defendant's mental state at the time of the offense. In discussing the value of collateral information, Melton and colleagues[15] highlighted its usefulness in corroborating statements provided by the defendant, which improves the validity of the examiners' findings and conclusions. Similar to a review of records or interviewing third parties, technology is considered collateral data, except that technology provides more proximal (either close-in-time or at-the-time) accounts of criminal offenses that would not otherwise be accessible to the forensic examiner. In many cases, technology-based information can offer a more objective view of a defendant's behaviors or thought processes. Information obtained from technology is not always unbiased (e.g., because of camera angle), but a surveillance video, for example, is likely to be more objective than someone's recalled account of an event. Yet, technology is not without perils, as unprecedented access to evidence through the use of technology can lead to a variety of clinical and ethics-related problems.

This article addresses problems related to the circumscribed use of new technologies, such as mandated video interrogations, police cameras, and social media in criminal responsibility evaluations. Some research has considered methodologies to improve the quality of forensic mental health evaluations,[16] including insanity assessments.[17,18] Specific methods include the use of standardized procedures and review of collateral information. Given documented problems with the reliability of insanity reports, methodologies, such as those involving technology, that are designed to improve the quality of reports are essential.[19]

Videotaped Interrogations

The use of videotaped interrogations has spiked as concerns about false confessions resulting from actual or perceived police coercion have increased among the public. Such coercion involves the use of overly long interviews during which defendants are deprived of sleep, food, or drink to enhance the likelihood of a confession to the alleged crime. Although there is no consensus on best practices relating to the administration of videotaped interrogations,[20] it has become routine, and in many cases, is mandatory. For instance, in 2014 the United States Department of Justice, which includes the Federal Bureau of Investigation; Drug Enforcement Agency; and the Bureau of Alcohol, Tobacco, Firearms, and Explosives, developed a policy stating that interrogations conducted by these agencies should be videotaped to protect the transparency of confessions and prevent claims of police abuse. In that same communication, the Department of Justice outlined the few occasions when videotaping may not be reasonable, including instances in which there are more suspects than video recording equipment, when the suspect refuses to provide information while being recorded, or when the information compromises national security.[21] It is not surprising that both the American Psychiatric and Psychological Associations support video-recorded interrogations in their overall mission to promote fairness.[22]

For the forensic clinician conducting an insanity evaluation, viewing an interrogation video provides an opportunity to observe the defendant's mental state shortly after the arrest. In recognizing this benefit, an Iowa court allowed the use of video-taped interrogations to evaluate a defendant's demeanor at the time of arrest, even though the content of the videotape was subsequently excluded in court because of Fifth Amendment privilege.[23] Unfortunately, courts have provided little other guidance. Such videos can offer further insight about a defendant's described motive and reasoning, as well as ac-

tive symptoms of a mental illness. In addition, behavioral data that are more proximal to the crime itself can serve as a reference point for later forensic interviews, thereby improving evaluators' ability to determine the presence of both genuine mental illness and malingering.

These questions were front and center in the trial of Eddie Ray Routh, who was convicted of killing Chris Kyle, the American Sniper, and Chad Littlefield. In a videotaped confession, Mr. Routh confessed to the murder of both individuals and acknowledged an awareness of the wrongfulness of his actions,[24] seemingly ruling out an insanity defense. However, his speech was rambling, often incoherent, with paranoid ideations. Both the defense and prosecution attempted to capitalize on this interrogation to bolster their respective positions related to mental illness and knowledge of wrongfulness. Forensic examiners can rely on videoed interrogations as one type of collateral source, given that information obtained from videotaped interrogations can include behavioral observations (e.g., content and speed of speech, unusual movements, responding to internal stimuli) of the defendant, statements he made immediately upon arrest that can then be compared with what was reported to the forensic evaluator after arrest, and statements more directly related to the ultimate question of insanity (e.g., statements suggesting an appreciation of the wrongfulness of his actions). Certainly, these questions have relevance to the determination of criminal responsibility.

Dashboard and Body Cameras

Recent events related to negative public interaction with police officers have resulted in a proliferation of the use of dash and body cameras by police departments. These cameras are intended to offer protection for all parties (police officers and civilians) should an incident be scrutinized, particularly when the legitimacy of an arrest or other police action is called into question. Dashboard cameras (dash cams; i.e., audio-video devices that attach to the dashboard of police vehicles and typically capture interactions with motorists) are used in most jurisdictions. Body cameras (body cams; i.e., devices worn on the officer's person that can capture a wider range of interactions with civilians) are used with less frequency. In a 2013 survey, only 25 percent of police departments indicated the regular use of body cams.[25] In light of high-profile cases (e.g., the police shooting of Philandro Castile[26]) the use of body cams by law enforcement agencies is likely to increase. Because the use of dash and body cams is relatively new, research is only beginning to determine their effectiveness in preventing crime, reducing complaints against police officers, and decreasing police force and misconduct.

In addition to these potential outcomes, police videos are frequently useful in legal proceedings. For example, videos are often reviewed for the purpose of evaluating the accuracy of a police report, justifying use of police force, or introduced as mitigating or aggravating evidence for arrest or conviction. In a state appellate case in Washington, the court allowed for the admissibility of body-cam evidence to support a conviction for burglary.[27] Such footage has also demonstrated relevance in insanity cases. For instance, in 2014, a woman in Colonial Heights, VA, was arrested after she engaged in a high-speed chase and allegedly pointed a gun in the direction of a police officer. She was shot two times by the officer. A review of the video from the officer's dash cam clearly indicated that the woman exited her vehicle and pointed her weapon. Ultimately, the woman survived and was charged with multiple offenses, the most serious being attempted capital murder of a police officer. In this case, the dash-cam video not only supported the officer's version of events, but also showed the woman exhibiting erratic behavior. The woman was eventually found not guilty by reason of insanity under Virginia law.[28] This video would be particularly relevant to the second prong of the American Law Institute (ALI) insanity defense, where a defendant is found not responsible for his criminal behavior if, because of a mental illness, he could not conform his conduct to the requirements of the law.

As was the case with the Virginia defendant, the use of police videos allows for a nuanced view of an individual's behavior at the time of his arrest, or even at the time of the offense itself. That is, the information obtained from police videos can have utility in evaluating potential links between psychopathology, behavior, and mental processes at or near the time of the offense. Information obtained from dash and body cams often includes a defendant's actions related to avoiding apprehension or facilitating escape, reactions to the presence of law enforcement, and other verbal and nonverbal behaviors that could inform an evaluator's opinion concerning criminal responsibility. Like videotaped interrogations, dash

and body cams improve comparative analyses between a defendant's behavior at or around the time of arrest and his behavior during the forensic examiner's interview. Such comparisons also require the evaluator to consider what intervening factors are responsible for change in the defendant's mental status and presentation.

Reviewing interrogation and police video before interviewing a defendant may also improve the evaluator's ability to generate specific lines of questioning based on the defendant's previous behaviors. Data gleaned from dash and body cams are relevant to evaluating the accuracy of the defendant's account of the offense and police account of the defense and may prove useful when considering response style. In the consideration of response style, it is usually assumed that a defendant is over-reporting, rather than under-reporting, symptoms of mental illness at the time of the alleged offense. As an illustrative example, in a recent insanity evaluation conducted by one of the authors, the defendant appeared to be under-reporting symptoms during a clinical interview conducted several months after the alleged offense. A review of the body-cam footage from the arrests indicated the presence of language consistent with significant delusional ideations that formed a rationale for the behavior. It is unknown whether the individual was purposefully downplaying psychotic symptoms during the clinical interview, had extremely poor insight into his mental health condition, or some combination of both. Regardless of the reason, if the video was not available, the severity of symptoms would have remained mostly unknown and the description of events would have been strongly influenced by the defendant's (erroneous) self-report of events at arrest.

Social Media

The rise of social media through Facebook and Twitter and other such applications provide opportunities to gather personal information about a defendant. The development of real-time video downloading, generally referred to as live streaming, is another mechanism through which in-the-moment accounts of an event may be accessed. As a point of emphasis, the most recent American Bar Association Model Rules of Professional Conduct[29] advises attorneys to rely on technology, including searching social media, to provide appropriate representation for their clients. The two senior authors of this article regularly receive printouts showing defendants' social media statements as part of discovery for both competency-to-proceed-to-trial and criminal-responsibility evaluations. The thought behind this practice is that such communication provides a snapshot of the individual's mental state at that given time.

Information obtained through social media is consistently permitted in court. As illustrative examples, postings to Facebook and other social media are routinely used as data sources when evaluating matters of employment termination[30] and are introduced in trials involving potential terrorism.[31] In a California[32] custody dispute, a child placement problem was complicated by the court's opinion that the father's posts on Facebook were inappropriate. Postings were also used recently to support a case in which the individual (Mr. Crowe) claimed he was unlawfully terminated from employment.[33] *Crowe* may underscore other uses for social media, including undercutting testimonial credibility. Access to social media postings and messages may indeed become routine; yet, it is incumbent on the examiner to disentangle messages and postings appropriately. Of course, any social media posting must be authenticated before it can be used by the forensic clinician or the court. Often individuals other than the defendant may have access to the social media account, which could easily complicate interpretation.

When assessing the relevance of social media to criminal responsibility, evaluators may find it helpful to classify social media interactions as neutral, prejudicial, or probative. In the context of social media, neutral information is that which does not typically engender strong emotional reactions from others (e.g., posting about an enjoyable meal). Prejudicial information is that which may bias the trier of fact, but is unrelated to the offense and the determination of mental state (e.g., showing support for certain political candidates or groups). Finally, probative information directly speaks to both mental state and the offense (e.g., apologizing and acknowledging wrongfulness or showing rationality). Of course, such information is not without limits. In addition to addressing the authenticity of the reports, one must be able to understand popular slang and abbreviations often used in social media communications.[34] For the evaluator with little knowledge about online vernacular, the simplest and most ethical course of action is to seek consultation with a peer who has

greater knowledge, and perhaps experience, with social media and can assist in translating questionable phrases.

Ethics-Related Concerns and Potential Pitfalls

Using technology-based information to reconstruct a defendant's mental state for the purpose of evaluating insanity is a complex proposition, given its relative newness. The use of technology produces new and unexpected challenges for the forensic evaluator who is attempting to synthesize this information along with other more traditional sources of data. Technology frequently changes faster than professional organizations can develop ethics guidelines; however, the speed with which technology advances does not render current such guidelines irrelevant. On the contrary, given the development of technologies that may be of particular relevance to forensic evaluations of criminal responsibility, it makes adherence to the principle of ethics more critical. The Specialty Guidelines for Forensic Psychology published by the American Psychological Association[35] emphasize the need for impartial and fair (§ 1.02) consideration and evaluation of collateral information when conducting forensic evaluations (§§ 8.03 and 9.02). These same concerns and safeguards are found in the Ethics Guidelines for the Practice of Forensic Psychiatry.[36] Likewise, both associations stress the importance of using collateral information when evaluating criminal responsibility.

Context is certainly critical when applying existing codes of ethics to the use of technological advances. For example, it has become increasingly common for therapists to search for client information via the Internet.[37] In therapeutic settings, invasions of a client's privacy via the Internet or otherwise are unnecessary excursions to satisfy a personal curiosity. However, the same is often not true when conducting forensic evaluations, including determining criminal responsibility. To a forensic evaluator, information contained on the Internet may provide useful collateral information for criminal responsibility evaluations. Before relying on such information, evaluators should carefully weigh its usefulness with concern about prejudice. There are several other matters that evaluators must be mindful of when using new technologies to inform their opinions about criminal responsibility.

When using collateral information to retrospectively evaluate a defendant's mental state, determining the veracity of sources is necessary. Determining veracity is especially pertinent with social media videos, as they are highly vulnerable to after-the-fact editing. Media sources that have been manipulated could have deleterious effects on the forensic evaluator's opinion. Similar to a collateral source who tells half-truths or is purposely misleading, an edited video or social media post places the evaluator at risk of misconstruing information. As a basic rule, evaluators relying on information obtained from social media should use only whole, unedited sources as collateral information. Edited versions can place the integrity of the sources, and ultimately the forensic evaluation and evaluator, at risk. It is important to consult with the prosecution and defense and possibly the court, to ensure that the video has not been edited. It is also necessary to remember that the actual author of the social media post is unknown. As noted earlier, even if a post appears on a defendant's Facebook or Twitter account, it is possible that it was authored by another individual. If the source of the information cannot be independently verified, the use of that information to inform an examiner's opinion in determining mental state is not recommended.

It should be routine to request all video related to the apprehension, arrest, and interrogation of a defendant. These videos allow for a view of the defendant's actions and words in close temporal proximity to the alleged event or arrest. Of course, there are times when relevant videos are difficult to obtain. We believe forensic evaluators should seek this information as a routine part of their criminal responsibility evaluations. The forensic examiner must also be aware that the viewpoint of the camera has been shown to influence opinions. Experimental research has consistently found that the person whose point of view is shown is typically favored.[38,39] Whether the camera's point of view influences opinions related to criminal responsibility has not yet been studied, but evaluators relying on video must be cognizant that angle and point of view of the camera are potential sources of bias for how the defendant is viewed.

Evaluators should also remain aware that not all actions or behaviors are likely to be caught on tape (e.g., the person may have gone off camera for a time). Critical moments may be missing, and details may be blurred or confusing. As an example, video of

a police shooting was recently publicized in which some people interpreted an object held by the suspect as a firearm whereas others interpreted it as something benign.[40] Evaluators should not make a guess, even an educated one, if something is unclear. Second opinions and consultations with independent evaluators may provide an important alternative interpretation of the video.

The final point to remember when obtaining data from technological sources is its time-limited nature. Like any other data point, data from technological sources provide only a brief glimpse into an individual's mental state. Compared with collateral interviews, the power of videos or information obtained from social media may be overvalued. When considering the value of data obtained from technology in the context of criminal responsibility evaluations, it is important to remember that it is but one source of data and a single data point. To that end, police videos and social media posts do not and should not take the place of well-structured clinical interviews, review of police information, and eye witness statements.[41] Even with the potential for technology to improve the quality of criminal responsibility evaluations, it should not take precedence over more time-tested techniques, especially clinical interviews.

Conclusion

Research evaluating the quality of criminal responsibility opinions has indicated the potential of examiner bias[42] and poor reliability for forensic opinions on insanity.[43] The use of the technological advances, despite pitfalls and ethics-related challenges, offers forensic evaluators the opportunity to improve the reliability and validity of their forensic evaluations. A careful evaluation of police interrogations, police cameras, and social media provides an opportunity to observe potential symptoms of mental illness and evidence of appreciated wrongfulness in more proximity to the criminal offense than clinical interviews and written records alone can provide. Although not dispositive of mental state, the inclusion of information obtained from the latest technologies should become standard collateral information reviewed when conducting insanity evaluations.

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