ETHICAL ISSUES IN FORENSIC PSYCHIATRIC RESEARCH ON MENTALLY DISORDERED OFFENDERS

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ABSTRACT

This paper analyses ethical issues in forensic psychiatric research on mentally disordered offenders, especially those detained in the psychiatric treatment system. The idea of a 'dual role' dilemma afflicting forensic psychiatry is more complicated than acknowledged. Our suggestion acknowledges the good of criminal law and crime prevention as a part that should be balanced against familiar research ethical considerations. Research aiming at improvements of criminal justice and treatment is a societal priority, and the total benefit of studies has to be balanced against the risks for research subjects inferred by almost all systematic studies. Direct substantial risks must be balanced by health benefits, and normal informed consent requirements apply. When direct risks are slight, as in register-based epidemiology, lack of consent may be counter-balanced by special measures to protect integrity and the general benefit of better understanding of susceptibility, treatment and prevention. Special requirements on consent procedures in the forensic psychiatric context are suggested, and the issue of the relation between decision competence and legal accountability is found to be in need of further study. The major ethical hazard in forensic psychiatric research connects to the role of researchers as assessors and consultants in a society entertaining strong prejudices against mentally disordered offenders.

Keywords

dual role dilemma,

ethics,

forensic psychiatry,

informed consent,

mentally disordered offenders

public good

research ethics

INTRODUCTION

Literature on ethical aspects of forensic psychiatric research is scarce whereas the ethics of clinical practice and consultancy in this field have attracted a great deal of attention.[1] Moreover, what literature there is tends to be quite brief, mostly exploring rather than analysing problems. It is, at the same time, a common notion that forensic psychiatry involves many peculiar ethical problems that may call for special solutions.[2] It has even been doubted that forensic psychiatric practice can be squared with defensible ethical standards.[3] Against this background, it is high time for applied ethicists to get to work on the particular area of forensic psychiatric *research*.

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[1] A very recent overview, covering also other branches of psychiatry, can be found in M.D. Robertson & G. Walter. Many Faces of the Dual-role Dilemma in Psychiatric Ethics. *Aust NZ J Psychiatry* 2008; 42: 228-235. See also the two textbooks P.D. Barnett. 2001. *Ethics in Forensic Science. Professional Standards for the Practice of Criminalistics.* Boca Raton & London: CRC Press; and P.J. Candilis, R. Weinstock, & R. Martinez. 2007. *Forensic Ethics and the Expert Witness.* New York: Springer Press.

[2] G. Adshead. Care or Custody? Ethical Dilemmas in Forensic Psychiatry, *J Med Ethics* 2000; 26: 302-304; G. Adshead & P.S. Sameer. Ethical issues in Forensic Psychiatry. *Psychiatry* 2007; 6: 420-423; P.S. Appelbaum. A Theory of Ethics for Forensic Psychiatry. *J Am Acad of Psychiatry Law* 1997; 25: 233-247; P.S. Appelbaum. Ethics and Forensic Psychiatry: Translating Principles into Practice, *J Am Acad Psychiatry Law* 2008; 36: 195-200; P.C. Gaughwin (2004), A Consideration of the Relationship Between the Rules of Court and the Code of Ethics in Forensic Psychiatry, *AustNZ J Psychiatry* 2004; 38: 20-25; N. Laor. The Poverty of Current Forensic Psychiatry, *Philosophy of the Social Sciences* 1987;17: 571-578; S. Piyal et al. Ethical Dilemmas in Forensic Psychiatry: Two Illustrative Cases, *J Medl Ethics* 2007; 33: 337-341; C. Regehr, M. Edwardh & J. Bradford. Research Ethics and Forensic Patients. *Can J Psychiatry* 2000; 45: 892-898; A.A. Stone. The Ethical Boundaries of Forensic Psychiatry: A View from the Ivory Tower. *Bull Am Acad Psychiatry Law* 1984; 12: 209-219; T. Tännsjö. The Convention of Human Rights and Biomedicine and the Use of Coercion in Psychiatry. *J Med Ethics* 2004; 30: 430-434.

[3] Stone *op.cit*.

In this paper, we will describe, analyse and, to some extent, propose solutions to some selected ethical problems encountered in forensic psychiatric research. Forensic psychiatric clinicians meet mentally disordered offenders (MDOs) across a range of settings; as subjects of psychiatric assessment requested by courts for use in trials and administrative proceedings and as patients in the prison system or in the special hospitals caring for patients committed by courts applying a legally prescribed prison exemption. We will refer to this last group as *selectively detained MDOs* to distinguish this subgroup from MDOs in general.[4] In one of the few publications addressing forensic psychiatric research ethics exclusively, selectively detained MDOs were held out as especially vulnerable.[5] However, due to the varying ways that the legal line of demarcation between selectively detained MDOs and other offenders is drawn, our findings are of relevance also for research on MDOs confined within the ordinary prison system[6] or undergoing court-ordered forensic psychiatric assessments.

[4] That is, selectively detained MDOs are offenders who have been found to (or are suspected to) fall within the sort of 'not guilty by reason of insanity' clause included in most criminal jurisdictions and as a result been subjected to special confinement. However, the actual term used in legal texts and decisions to denote this class of offenders varies considerably from jurisdiction to jurisdiction.

[5] Regehr et al., *op. cit*. note 1.

[6] This is of particular relevance in light of the many ethical challenges and rather poor track record of awareness and responsibile behaviour in research involving prisoners as research subjects (also in developed, liberal democratic nations). See, e.g., L.O. Gostin, C. Vanchieri & A. Pope (eds.). 2006. *Ethical Considerations for Research Involving Prisoners*. Washington, D.C.: The National Academies Press.

As a background, basic aspects of the regulation regarding MDOs in different countries are briefly described and some important variations and similarities are noted. We then present our findings under two main headings: research ethics and the ethics of using and communicating research results, and, finally, we summarise our conclusions.

THE MANAGEMENT OF MENTALLY DISORDERED OFFENDERS

All developed nations have in their legal systems special provisions for criminal offenders who commit their crimes under the influence of mental health problems or suffer such problems at the time of trial or while serving their sentence. In most countries, the classic legal-philosophical concept of *accountability* is applied, and if an offender is found to be unaccountable before a verdict has been reached, he will be moved out of the criminal justice system and into a compulsory psychiatric care system. Within this system, the form and period of detention will in turn be determined by further criteria, such as mental health status or perceived dangerousness, which may vary between jurisdictions. Accountability is a legal, not a medical concept. There are no psychiatric or psychological diagnostic methods assessing accountability, although psychiatric expertise may inform legal decisions regarding psychiatric and psychological capacities.[7] In a few cases, the criterion used to single out selectively detained MDOs is outspokenly *medical*, thus making forensic psychiatric expertise an *essential*

[7] This is, to some extent, an idealised picture. First, the exact legal criteria for unaccountability (i.e. for ruling 'not guilty by reason of insanity') vary between jurisdictions. Second, unfortunately, delineations between legal and medical competencies are often blurred in the practice of legal proceedings.

authority within the criminal justice system rather than mere suppliers of information to be assessed by courts, judges, jurors, prosecutors and defence lawyers.[8] Moreover, in at least one legal system, the offender is not declared unfit to stand trial or be the subject of a criminal law verdict, but tried regarding material guilt and, if found guilty, *sentenced* to forensic psychiatric care.[9]

In spite of the variations just noted, most serious ethical issues raised by forensic psychiatric research on selectively detained MDOs are similar regardless of how these offenders are singled out and handled in legal terms.[10] All jurisdictions, moreover, make ample use of forensic psychiatric expertise for a number of tasks, e.g. fitness and risk assessments in connection with pre trial proceedings, trials and other decisions, treatment design, and treatment performance. All regulations are, furthermore, built on the basic assumption that offenders suffering from (at least some sorts of) mental disorders are special in a number of respects (e.g. being less capable of acting responsibly, being unusually dangerous, being somewhat treatable with respect to their criminal tendencies, etc.), which justifies particular treatment by the criminal justice system. Finally, at least in the long run, the way that the legislation with respect to MDOs will eventually

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[8] Thus, in Sweden, the notion of *severe mental disorder* has served this purpose since the early 1990's, while psychosis, for instance, is mentioned explicitly in the law in Norway.

[9] Although changes have been declared to be forthcoming, this is the system that for about 45 years has been operating in Sweden.

[10] Regehr et al., *op. cit*. note 1, point out that many of the problems arising regarding selectively detained MDOs may be repeated in the prison environment, since several inmates may suffer severe mental health problems.

evolve, be revised, or stay the same (in details as well as in its general design) can be assumed to depend on the data and knowledge provided by forensic psychiatric research and how these are related to policy-making and communicated to the public.

Below, these common features will be shown to give rise to two classes of ethical issues: one falling within standard research ethics and one concerning the interaction of researchers with society.

RESEARCH ETHICS

Research on selectively detained MDOs can be useful to these patients as well as to society. Its basic aim is a better understanding of the connection between mental health problems of various types, other background factors, and criminal behaviour. Such knowledge may, for instance, be of use in criminal investigative work of the sort known as *profiling*. It may also contribute to the development of methods for *risk assessments* in connection with decisions about terms and forms of detention capable of making protection of the public against violent crime less ineffective.[11] Even more importantly, forensic psychiatric research is required to develop methods to prevent and/or treat both the propensity for criminal behaviour associated with mental ill health and the mental problems *per se* among MDOs. This group has special mental health care needs differing from other psychiatric

[11] The reason for speaking about less ineffective methods rather than more effective ones will become evident below.

patients, not least in the patterns of overlap between several different problem areas.[12]

Forensic psychiatric approaches may also interact with other scientific approaches (such as criminology, ethics, law and general philosophy) with a number of central aims. First, such interdisciplinary approaches are needed to clarify if and how the different mental health problems may be relevant for various legal decisions. Second, they can help to define ways to achieve a harmonisation of such assessments with basic legal requirements such as judicial security and important ethical standards. Third, such results may provide the basis for suggestions on how the managing of MDOs may be improved in relation to the proper functioning of the criminal justice system in society.[13]

At the same time, most research on MDOs implies some risk for the research subjects and for this category of offenders in general. Some of these risks are commonly noted in medical research, such as those involving the violation of integrity associated with inclusion in registers and data-bases, invasive biosampling and exposure to new treatments or placebo in controlled trials of treatment strategies. A special problem inherent in

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[12] See, e.g., H. Soderstrom, A.K. Sjodin, A. Carlstedt, A.Forsman. Adult psychopathic personality with childhood-onset hyperactivity and conduct disorder: a central problem constellation in forensic psychiatry. *Psychiatry Res* 2004; 121: 271-80, where the complex patterns of co-existing mental disorders among offenders referred for forensic psychiatric investigations is described.

[13] The authors of this paper are all involved in a collaborative venture of this sort at the University of Gothenburg. Some publications of results of this collaboration are forthcoming in the *International Journal of Law and Psychiatry*.

forensic psychiatric research is that the nature and duration of the detention depend on a combination of psychiatric assessments of the subject and the likelihood that he will relapse into criminal behaviour if released or paroled, which means that many studies also involve the risk of revealing factors (in the individual case or generally) that may affect the subject(s) negatively in the form of more restrictive and lengthy detention.[14] In addition, selectively detained MDOs are especially vulnerable, both since they are placed in a coercive institutional context where they to a large extent have to depend on the good will of its representatives and since their health status often has negative effects on their ability to protect and further their own interest.

Furthermore, when the results of research are taken out of their scientific context and communicated to the legal system, the policy-makers, the media, and the general public, not only the public image of MDOs but that of all people suffering from mental health problems may be at risk. Findings restricted to a very limited subclass of such offenders may easily be over-interpreted in terms of relevance and range of applicability and thereby cause harm to a wide range of people.

The 'place' of forensic psychiatric research ethics

One part of standard medical research ethics has to do with the balancing of benefits and burdens, chances and risks. The norm is that risks and harm to research subjects should be avoided at great length, that benefits capable of

[14] A condition may, for instance, be discovered to be more strongly connected to criminal behaviour than formerly assumed, or the ability of the offender to control such tendencies through drugs or other therapies may prove to be over-rated.

balancing such downsides to a study have to be substantial, and that such considerations are especially crucial when vulnerable populations are involved.[15] This, by itself, raises the question of 'where' to place forensic

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[15] It suffices to point to the following paragraphs of the *Declaration of Helsinki:*

> It is the duty of the physician to promote and safeguard the health of patients, including those who are involved in medical research. The physician's knowledge and conscience are dedicated to the fulfilment of this duty. [...]
>
> In medical research involving human subjects, the well-being of the individual research subject must take precedence over all other interests [...]
>
> Medical research is subject to ethical standards that promote respect for all human subjects and protect their health and rights. Some research populations are particularly vulnerable and need special protection. These include those who cannot give or refuse consent for themselves and those who may be vulnerable to coercion or undue influence. [...]
>
> It is the duty of physicians who participate in medical research to protect the life, health, dignity, integrity, right to self-determination, privacy, and confidentiality of personal information of research subjects. [...]
>
> Medical research involving a disadvantaged or vulnerable population or community is only justified if the research is responsive to the health needs and priorities of this population or community and if there is a reasonable likelihood that this population or community stands to benefit from the results of the research. [...]
>
> Physicians may not participate in a research study involving human subjects unless they are confident that the risks involved have been adequately assessed and can be satisfactorily managed. Physicians must immediately stop a study when the risks are found to outweigh the potential benefits or when there is conclusive proof of positive and beneficial results.
>
> Medical research involving human subjects may only be conducted if the importance of the objective outweighs the inherent risks and burdens to the research subjects.

World Medical Association (WHO). 2008. *World Medical Association Declaration of Helsinki. Ethical Principles for Medical Research Involving*

psychiatric research in relation to this standard medical research ethical context. Research may contribute to the development of more transparent and judicially secure assessments, but also to methods that will involve more coercive measures affecting both the subjects taking part in research and others with similar conditions. Viewed as an ordinary medical practice, forensic psychiatry is regularly accused of serving 'dual roles' in caring for patients, i.e., to care for patients as well as to serve the public good. This has bearing on research as well.[16] Standard readings of research ethical regulation show that chances of benefits that may balance risks to research subjects should have to do with (sufficiently substantial) health improvements[17] and ideally befall the same class of subjects. Moreover, in relation to especially vulnerable subjects, this last requirement is considered to be paramount.[18] Thus, it is doubtful if a number of forensic psychiatric research projects on selectively detained MDOs can be justified within standard interpretations of the existing regulatory framework. To the extent that it cannot, the further issue arises whether or not this should be accepted or taken as an incitement to introduce changes in the ethical regulations.[19]

Human Subjects. Available at: http://www.wma.net/e/policy/b3.htm [accessed 7 Nov 2008]).

[16] Concerns about this problem is a longstanding theme in discussions about the relation between forensic psychiatric clinical work and consultancy. See, e.g. Robertson & Walter, *op. cit*.

[17] In contrast to, for instance, improvements of the genetic composition of the population, national security or the state budget.

[18] See the quotation of the *Declaration of Helsinki* above.

[19] As in other cases of research on vulnerable subjects, a research ethics committee may, of course, prescribe various safeguarding procedures, such as monitoring by an independent reference group, rules or endpoints for abandoning a study, etcetera. The issues we are addressing here go beyond such *general* precautions in view of an ethical uncertainty as to the defensibility of a study.

In relation to the general 'dual role' discussion, Appelbaum has suggested that the most basic ethical value of forensic psychiatry should not be imported from clinical medicine but rather from the criminal justice system, since that is where the core of the forensic psychiatric professional identity is to be found. What should guide the *forensic* psychiatrist is thus not primarily the health and well-being of the patient, but justice of the sort protected by the law and meted out by criminal courts. As long as the forensic psychiatrist tells the truth and is guided by the same principle of respect for persons that justifies the very institution of criminal justice, there is in fact no ethical problem.[20] Appelbaum made this suggestion primarily with respect to the role of the forensic psychiatrist as expert witness, albeit mentioning the researcher role of such experts as an aside.[21] Nevertheless, the general underlying idea seems easy enough to translate into the research context: as long as the researcher does her best to find the truth according to scientific standards, the fact that her findings may be harmful for the research subjects is of no ethical concern, at least not as long as the subjects have been respected as persons according to standard research ethical regulation about informed consent.

We hold this analysis to be far too simplified to square with either coherent ethical theory or standard research ethical practice. First, Appelbaum is quite explicit in the assumption that people can take on and off professional

[20] Appelbaum, 1997. *op. cit*. note 1.
[21] *Ibid*.

hats[22] (in the present case, clinician, expert, researcher) and adjust the ethical requirements according to the current role. This, however, presupposes a view of normative ethics that, in fact, undercuts Appelbaum's own favourite value – justice. For, after all, if a society ceases to build its response to criminality on *justice*, the 'change of hat' theory seems to give ample room for the forensic psychiatrist to follow suit and revise her ethical standard without being faulted, whatever system society chooses to implement. In addition, since it seems doubtful that any professional, patient or anybody with which she interacts, could easily understand the 'hat-changes', an indefinite number of practical misunderstandings can be expected. Moreover, even if we were to accept the general idea that a singe person should follow different basic ethical standards merely depending on professional roles, the analysis simply ignores the *open recognition* in medical research ethics of the tension between the interests of patients/research subjects and the interests of science and society, and the resulting acknowledgement of the need to *balance* these considerations. That is, since research ethical regulations do not subscribe to any 'change of hats' theory, this does not fit the need for ethical guidance of a forensic psychiatric *researcher*.

Appelbaum is quite right about one thing, though. Forensic psychiatric research is not undertaken within an organisation solely devoted to

[22] The 'change of hat' metaphor was introduced in L. Strasburger, T. Guthiel & A. Brodsky A. On Wearing Two Hats: Role Conflict in Serving as both Psychotherapist and Expert Witness. *Am J Psychiatry* 1997; 154: 448-456.

promoting the health of patients. Serving the public good in a wide sense is an inescapable part of the underlying values of forensic psychiatric institutions, especially those for selectively detained MDOs. At the same time, just as in most other medical research, there is a clinical practice (and values connected to that) to relate to; in many cases carried out by people involved in the research. At least, since the research requires access to patients, clinics, records, samples, etc., the 'dual role' problem remains. We concede Appelbaum's general point that the presence of this sort of 'multi-contextuality' of certain branches of medicine indeed challenges standard medical ethical guidelines. However, denying the complexity (in line with Appelbaum's suggestion) does not seem a fruitful way to advance this issue. In a recent publication, Candilis et al. describe an approach for the individual forensic expert to relate to the ethical tensions and disagreements with regard to their resolution, building on narrative ethics and, to some extent, deliberative theories of social conflict resolution. In short, they suggest a professional ethics with open recognition of these tensions as a part of the profession along with a sincere social debate aimed at reducing incoherence between competing viewpoints.[23] However, while this suggestion may hold as a sort of conventional wisdom,[24] it does not amount to a theory of how the ethical tensions implied by forensic psychiatric research should be resolved. Providing such a theory is not essentially about helping responsible forensic professionals recognise ethical tensions with an intact peace of mind, or about providing a guide for behaviour in the face of

[23] Candilis, Weinstock & Martinez, *op. cit*. note 1. chapter 5.
[24] Taken to its extreme, however, it seems to be open to similar objections as the 'change of hat' approach.

social disagreement. The problem is about the proper design of a theoretical framework within which the ethical issues themselves can be analysed and worked on in a rational way with the aim of *justifying* positions (rather than making them appear personally or socially acceptable within a certain professional institutional framework). What we have seen is that neither traditional medical research ethics alone, nor the 'change of hat' approach, seem able to provide something like that.

In light of all this, we cautiously propose an idea for the 'place' of forensic psychiatric research ethics where standard medical research ethics provide a framework for medical researchers in forensic psychiatry, while acknowledging a connection with a *general* public good that is of special importance as compared to many other areas within biomedicine. The latter has to be recognised in a proper idea of the balancing of benefits and burdens in the forensic psychiatric field of research. Perhaps, therefore, forensic psychiatric research should be ethically classified in a way similar to certain forms of *public health*-related medical research (e.g. certain research on communicable disease, nutrition, and toxicology that mostly feed into the societal handling of individual liberty, public safety, and national economy). The public health context means that even the general category of people to which the research subjects belong is often unlikely to benefit;[25] the subjects are burdened by risks and placed in a situation where they are heavily dependent on and constrained by the action of society's

[25] This is due to the fact that public health measures are mostly preventive and applied at a population level. That is, they target mostly people who are not yet suffering much of ill health, and the success of the measures is compatible with considerable downsides affecting particular individuals.

representatives. At the same time, just as in forensic psychiatry, the research is a part of a basic and important societal undertaking for the sake of a general public good. It is not implausible that the presence of this latter factor can be a reason for a somewhat more permissive interpretation of the requirement to have the burdens of (vulnerable) research subjects balanced by sufficient health benefits (to them or the group they represent) than in the common biomedical context. This may be especially relevant for research projects in which the burdens are light, such as register-based epidemiological research with anonymized data, while few would argue that considerations of this kind could motivate research involving persons directly, such as treatment trials or neuroscience studies.

It is essential to clarify that, first, persons at risk of being burdened by a forensic psychiatric study are not less worthy of respect than any other category, even if the need of knowledge in society is weighted into the balance. Secondly, forensic psychiatric research results by no means always go against the interests of selectively detained MDOs. As initially pointed out, research may often benefit this population in the form of better understanding and treatment, and such prospects may, of course, balance risks imposed by the methods used in the research. What we have focused on is the *additional* risk of harm to these subjects that stems from the criminal justice system and how one should reason, from an ethical point of view, in the face of such risks. The issue of the actual sources and severity of these risks will be discussed below.

Informed consent in the forensic psychiatric context

Besides a sufficient balance of benefits over burdens, standard research ethics prescribes that research on humans involving risks to the subjects must, as a rule, be preceded by the collection of informed consent.[26] The rule of informed consent is furthermore composed by a number of requirements: information, counselling, understanding, and free decision.[27] However, in the case of research on selectively detained MDOs, several of these requirements may appear difficult to satisfy. This is due partly to the vulnerability of these subjects, partly to their mental health status and partly to their legal status.

The fact that potential subjects are MDOs means that their freedom is restricted in ways that may jeopardize the *freedom of any decision to consent* to participate in a study. This, of course, will depend on the more exact form of detention but also on the design of the offer to participate in a study.[28] For instance, if therapies built on behavioural conditioning techniques are used, consenting to participate may easily be viewed in that light by the subject – i.e., as an instance of 'good behaviour', making various rewards used in the therapy appear more likely, while declining to consent would appear to yield risks of negative consequences. Similarly, the subject may believe or be guided by an unreflected expectation that consenting to participate may entail benefits such as access to desired

[26] See World Medical Association, *op. cit*. note 13.
[27] For a standard account of these ingredients, see, e.g. T.L. Beauchamp & J.F. Childress. 2008. *Principles of Biomedical Ethics, 6th edition.* Oxford: Oxford University Press.
[28] We are thus not suggesting that compulsory detention *as such* renders free decisions about whether or not to participate in a study impossible.

pharmaceuticals, temporary leave opportunities, or discharge, and so on. When the subject is undergoing assessment (in the pre-trial stage or in connection with various decisions about the length and form of the detention), consent to participate may similarly be viewed as increasing the likelihood of a more favourable assessment.

Now, even if there are such problems, it may seem that a proper design of the information and counselling parts of the informed consent procedure can often circumvent them. While indeed being especially vulnerable for the reasons set out above, MDO's are, generally speaking, still *people* that, albeit suffering some impediments of a psychiatric nature and being coercively confined, often are capable of understanding information and process it in decision making, as long as the context and methods applied have the right design. By being careful about how the study is described and how this description is communicated (and by whom),[29] and by using dialogue-type counselling techniques for minimising risks of misunderstanding, it can, we suggest, often be made *reasonably* certain that the potential subjects do not confuse their roles as patients in coercive care with their roles as potential participants in a study. Measures of this sort should therefore be required as standard, although that will probably create practical difficulties and increased expenditure on behalf of research

[29] It is, for instance, not a good idea to have a representative of the institution play a prominent role in this (even if, for example, the doctor responsible for the care is involved in the study) and to take some care to avoid insignia of such a representative role (such as standard clothing on the ward).The study's lack of connection with various benefits within the therapeutic or legal context in which the subject is situated should also be stressed explictly.

projects. However, in some cases problems cannot be avoided albeit the research may be of great value. We are thinking both about cases where powerful drugs are used (but where there is considerable interest in finding more efficient ones) and where the very mental health condition of the potential subject affects cognitive and emotional capacities in such a way that the sort of understanding aimed for in the requirement of informed consent seems ruled out. Thus, the problem is not restricted to design and application of an appropriate informed consent procedure but actualises an underlying ethical issue of what the requirement of *decision competence* should be with regard to informed consent. Besides problems relating to controlling behaviour on the basis of social regulations, selectively detained MDOs may also to various degrees be afflicted by, for example, psychosis, dementia, or mental retardation.

This may be viewed as nothing new, research ethics-wise. Is it not the same problem that regularly appears in general psychiatric research,[30] as well as in medical research on children, the mentally retarded, the severely demented, unconscious patients, etc.? Such an assumption, however, ignores the peculiar context of forensic psychiatric research pointed out above. It is in the nature of this context that forensic psychiatry need not serve the interests of either individual patients or even a generic population of patients that suffer or may come to suffer from this or that mental health

[30] Thus, there are some interesting studies on the difficulties and possibilities of obtaining (bona fide) informed consent from schizophrenic patients. See, e.g. D.V. Jeste et al. A New Brief Instrument for Assessing Decisional Capacity for Clinical Research. *Arch Gen Psychiatry* 2007; 64: 966-974, for an account of the problems involved and further references.

condition. Moreover, forensic psychiatric research concerns a category of people that (in most jurisdictions) have been selectively detained as MDOs for the very reason that they are considered to lack that sort of decision competence that is required to be accountable, i.e. they are not held legally responsible for their criminal actions.

The idea behind the informed consent principle does express something of fundamental importance – the notion of people as deserving a *respect* that sets limits to what scientists may do to them in the name of the public good. Unless explicit provisions are made in standard research ethical regulation, the forensic psychiatric researcher will have to comply with existing professional rules if she is a health care professional. However, as before, we can ask to what extent this points to a flaw in the current regulation – perhaps such provisions *should* be made with regard to the sort of research we have characterised. What, in such a case, should such provisions look like? A suggestion that would be in line with what was said above regarding the 'place' of forensic psychiatric research ethics is that while informed consent should have some ethical leverage, this has to be balanced against the other values at stake in a way that makes the presence or lack of consent less of a decisive and more of a contributory reason for the ethical defensibility of forensic psychiatric studies of selectively detained MDOs. However, to directly translate this general idea into a proposal where general concerns for the public good override consent considerations would be unwise.

First of all, the potential research subject's decision competence certainly makes a difference. In general, the idea implied by standard research ethics is that if a person is decision competent, forcing something upon him against his will is significantly worse, morally speaking, than to have something done to someone who lacks decision competence (although he may express an objection). This becomes clear when we consider beneficial actions. A dominant idea in biomedical ethics is that in the absence of decision competence, the guiding principle should be the best interest of the patient. However, when the patient is indeed competent, the fact that some procedure is in his best interest is no reason for imposing it against his (informed) will. Thus, in the presence of decision competence, there is an additional wrong we can do to a person besides harming her – an *infringement* consisting in disrespect – and, given the assumption of decision competence, this wrong is actually more serious than imposing harm as such.

This brings us back to the question of how the decision competence of selectively detained MDOs should be assessed. Plausibly, some mental health conditions or side-effects of treatments that may be involved clearly reduce such competence in their own right. However, what could be said about the connection between the issue of decision competence in relation to informed consent and the fact that someone has been judged as unaccountable by a criminal court? Besides pointing out that this issue is critical for forensic psychiatric research ethics and that further analysis

therefore is desirable,[31] we wish to stress that persons who are considered legally unaccountable may nevertheless have the competence to veto research, while consent has to be qualified by the use of specific methods to ensure its freedom and possibly also by support from an external part, such as a legal guardian or support person. Moreover, besides recognising the claim to respect, it is also important to uphold a high standard of protection against abuse in the name of the public good – not least due to the vulnerability of selectively detained MDOs.

In order to pursue further the issue of the significance of consent in forensic psychiatric research ethics, let us for the sake of argument assume that many selectively detained MDOs are indeed competent. In these cases, we have said that lack of consent is more of a reason to abstain from a study. How strong is this reason in relation to the other considerations mentioned (risk of harm and chance of benefit to the potential subject and/or the group he represents, as well as the importance of forensic psychiatric research for the public good)? In line with the reasoning applied earlier, we suggest the following: Risks of harm generated by an increased functionality of the criminal justice system achieved through a study (or a family of studies) are less weighty than other risks of harm imposed by a study in relation to a

[31] Besides relating the theoretical frameworks of philosophy of law and legal theory to the ethical theories behind ideas about decision competence in medical ethics and research ethics, such analyses would have to pay close attention to general psychiatric and specific forensic psychiatric information about various conditions and how these develop over time and express themselves in different circumstances.

lack of consent.[32] Thus, when the risks of a study are almost exclusively of this sort (as in the case of register based epidemiology where adequate protection against integrity breaches is implemented), seeking consent need not be an absolute requirement.

However, all studies posing a direct risk for a major breach of integrity, complications, or side-effects, still require a clear consent from those involved, considering all the problematic aspects detailed above. Besides reasons in terms of respect, this conclusion is further supported by pragmatic considerations: Due to the difficulties of conducting psychiatric human subjects research that requires the active participation of the subjects when these subjects are unwilling to cooperate, forensic psychiatric research that failed to observe such a standard would not be likely to produce valuable results.

It is thus possible to summarise our analyses on the basis of the methods that may be involved in studying a person in the forensic psychiatric context. In the case of studies imposing very minor risks, but where the outcome is not very likely to produce significant benefits to the subjects, or to the general population of MDOs to which the subjects belong, it normally requires clear and substantial chances of significantly improving the functionality of the criminal justice system in order to justify research despite of a lack of informed consent. For instance, methods utilising

[32] According to what was said above, if the subjects are not decision competent, the objection to a study ascribed to lack of consent become even weaker in the light of the first type of risks.

already recorded material (from earlier studies, medical and criminal records, etc.) pose very slight risks of imposing harm to the person (besides the possible contribution of the study to the functionality of the criminal justice system).[33] At the same time, the chance of actual benefits to the subjects may be as good as if the risk picture had been different. Such studies, therefore, may be possible to justify in terms of the public good also in the absence of informed consent. Thus, databases collected and maintained for other reasons, e.g. administrative routine, should be accessible for such research, provided that there are benefits to be had from it.[34]

Almost all other research methods, however, impose more substantial risks. Invasive sampling is one example, methods utilising behavioural experimental techniques (where the manipulation of behaviour may affect the subject negatively in a variety of ways) is another. Survey or interview studies, where the subject is exposed to a set of questions to answer also impose risks directly, as the questions themselves and the thoughts and associations they inspire may cause discomfort or even anxiety. In addition, the ensuing data handling and interpretations may harm integrity. The same holds for methods utilising overt surveillance of the subjects or repeated

[33] This, of course, presumes that protective procedures mentioned earlier, such as anonymising or coding all data, are applied.
[34] In contrast, in several countries, e.g. Sweden, the trend is the opposite. While the number of official registers in the health care and legal systems has increased dramatically over the last few decades, it has become more and more difficult to secure ethical approval to use them for research, not least due to consent requirements.

contacts during follow-up. In all these cases, informed consent is required no matter the potential benefits for the criminal justice system.

Let us now turn our attention to a type of harm to research subjects mentioned above but not yet analysed. This is the sort of harm that research subjects, the general population of MDOs (selectively detained or not), and even people suffering mental disorders in general may be exposed to as an effect of how the results of forensic psychiatric studies are presented to society *in general* and perceived by non-professionals. We believe that this sort of harm is in fact a greater and more serious threat to the ethical defensibility of forensic psychiatric research on MDOs than the other possible harms mentioned so far. At the same time, these sorts of risks are produced not directly by the collection of data but by the communication and use of the research results in a wider context. In effect, they actualise a whole new set of questions, to which we now turn.

USE AND COMMUNICATION OF RESULTS

The fact that forensic psychiatric research at its very outset is presumed to serve society and the public good actualises a number of issues about the interaction between the forensic psychiatric scientific community and society. As mentioned above, forensic psychiatric research results may be put to use by state authorities in a number of socially important areas and attract great interest from the media and the general public. All of this may create serious harm to broad groups of people and should be weighted into the general research ethical approach outlined in the former section. We will

here illustrate the sort of ethical issues arising out of this by two examples: forensic psychiatric risk assessment and media consultancy.

Forensic psychiatric risk assessment

Regardless of system, societies discriminating between selectively detained MDOs and other offenders as a rule employ forensic psychiatric expertise for special risk assessment tasks in connection with legal decisions about the duration and form of detainment. Moreover, these assessments are presumed by the legal system to be based on forensic psychiatric research results and are not seldom performed by prominent forensic psychiatric researchers. All this creates a picture of mental health factors having a scientifically proven relevance for assessments of the likelihood of specific types of criminal behaviour among offender populations. However, reviews of the scientific literature cast serious doubts on such a presumption.[35] The role of mental health problems instead seems to depend on the context of study. For example, two of the most used risk assessment schemes treat schizophrenia either as a protective or aggravating factor.[36] While there are indeed conditions scientifically ascertained to affect the probability of violent criminal behaviour, these are not 'mental' in any other sense than that they describe behaviour patterns.[37] Criminal history in combination

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[35] T. Nilsson, C. Munthe, C. Gustavson, A. Forsman, H. Anckarsäter. The Precarious Practice of Forensic Psychiatric Risk Assessment. Accepted for publication in *The International Journal of Law and Psychiatry*. This forthcoming article works through recent overviews and meta-analyses regarding forensic psychiatric risk assessment.

[36] *Ibid.*

[37] G.D. Walters, R.A. Knight, M. Grann, K.P. Dahle. Incremental Validity of the Psychopathy Checklist Facet Scores: Predicting Release Outcome in Six Samples. *J Abnorm Psychol*. 2008;117:396-405.

with gender, age, substance use, are the typical 'clinical' predictors of the predisposition of an individual to commit serious crimes in the future, to which all possible situational, social, cultural or economic factors may be added just as well as mental features. Repeated criminal behaviour is a part of several diagnostic categories in forensic psychiatry (such as pyromania, conduct disorder, or psychopathy) and may therefore make such diagnoses predictors of criminality. However, as such, the factor of previous behaviour is applicable to *any* habitual offender and does not, therefore, pinpoint anything especially psychiatric or mental health related. Similarly, many mental health problems are correlated with substance abuse and socio-economic problems, but such factors are, of course, present also in many cases where there is no psychiatric diagnosis of forensic relevance.

In spite of this, forensic psychiatric researchers continue to provide risk assessments that will, as a rule, be understood as being based on scientific findings on mental problems, not merely on commonalities such as gender, age and previous behaviour. Increased awareness of this phenomenon has made many experts cautiously adding clauses about margins of error and uncertainties afflicting the assessments. It has even been suggested that one should retreat into the more defensive view that one is not really providing any scientific information about the connection between mental health and propensity for criminal behaviour at all, but merely giving a "factual background and interpretative context" for the assessments and decisions of

other people.[38] The problem we want to point to here is that no such amendment can really fix the basic fault of the current practice of forensic psychiatric risk assessment; namely, that forensic psychiatric researchers, due to faulty expectations inherent in many legal systems and entertained by the general public, serve to uphold a public image of selectively detained MDOs as an especially dangerous subclass of offenders.

In some countries (e.g. Sweden), the forensic psychiatric research profession comes with a *formal professional duty* to serve society with assessments of this sort, in other countries being commissioned to make such assessments is a common phenomenon and often important lever for promoting the status of one's research institution. Forensic psychiatric researchers may therefore seem to be caught in a dilemma between answering the call and serving the interest of the profession, on the one hand, or rising up to the basic research ethical requirement not to contribute to a misrepresentation of scientific facts, on the other. It may be proposed that this dilemma can be handled by making it clear that scientifically founded risk assessments based on mental factors other than violent behaviour patterns over longer periods of time cannot in fact be had. Such a shift of paradigm would not be easily accepted, not least because the current practice provides psychiatrists and psychologists with expert roles and saves politicians and judges from unrewarding roles.

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[38] Appelbaum, (2008). *Op. cit.* note 1, p. 195. It should be observed that Appelbaum is here addressing all sorts of forensic psychiatric legal testimony. However, he has also made an explicit analogy between the 'change of hats' he claims to be going on when the forensic psychiatric clinician acts as expert consultant, and when the same person performs research (Appelbaum, 1997. *Op. cit.* note 1).

In our view, all of this makes for a twofold (and, in combination, quite strong) ethical call to researchers in the field to break with the interests of their professions, as long as these are about serving a system built on prejudice. There would be a significant benefit to society if forensic psychiatric research could instead help rid legislation of unjustified discrimination of MDO's regarding the much over-publicised connection between mental health and serious crime.

Media and policy consultancy

This claim regarding risk assessment can be extended to the role of forensic psychiatrists acting as media consultants or providing summaries of the current standpoint of forensic psychiatric research to policymakers. In these contexts, it is even more salient that an ethical analysis has to take into account the general social practice in which the forensic psychiatric researchers embed themselves. This practice is apparently soaked in prejudice against people suffering from mental disorders, especially those disorders that, in case of a criminal offense, may provide grounds for selective detention.

This situation speaks strongly for a forceful duty of the forensic psychiatric researcher: in as much as she participates in media coverage of crime, her activities should be designed to fight the prevailing public prejudice, stressing mainly the strong scientific case against the idea of selectively detained MDOs as especially dangerous due to mental health factors

(unless, of course, there really is compelling evidence to the contrary). The much too common practice of public provision of various alleged (but scientifically unsuported) explanations of crime in terms of mental health problems is not consistent with basic scientific ethical requirements. A collective acceptance of such a duty by the assembled forensic psychiatric research community would constitute a strong statement indeed.

Now, in many cases, such a line of action would probably mean that the media would find less use for the consultancy of the forensic psychiatric researchers, and we recognise that this may be seen as unfortunate. Similarly, policy-makers would possibly become less prone to rely on forensic psychiatric research, since that would force them to stand for unpopular views. However, given the total dominance of the prejudicial backdrop regarding MDOs in most social settings, it is unlikely that any sort of pragmatic accommodation to these factors on the part of forensic psychiatric researchers would provide much of a remedy in this context.

CONCLUDING DISCUSSION

The emerging picture of the ethics of forensic psychiatric research is complicated. While selectively detained MDOs are indeed an especially vulnerable group of potential research subjects in several respects, the connection between the situation of this group and the important societal undertaking of criminal law creates a special situation from an ethical point of view. We have cautiously suggested that the research ethics has to balance between risks and benefits taking this situation into account while

going on to apply standard medical research ethics in research on selectively detained MDOs. This suggestion provides an approach that permits the sort of reasons that are important in standard medical research ethics, while, at the same time, other reasons connecting to the function of criminal law to serve the public good are allowed to play an important part. For instance, in the basic balancing of benefits and burdens, very small risks to research subjects, such as in epidemiological research on anonymized data files, may be considered to be acceptable if the gain is an improved functionality of criminal law achieved through the research, even if that improvement in turn may burden this group of subjects.

The issue of the relation between legal accountability and the sort of decision competence required for informed consent has been pointed out as critical and in need of further study. Nevertheless, it is obvious that selectively detained MDOs are especially vulnerable also from an informed consent perspective, and that this calls for special measures when seeking the consent, applied with an awareness of the lack of freedom inherent in the situation of the potential research subject. Moreover, recognition of the basic value of respecting people underlying the informed consent rule means that informed consent should be sought in forensic psychiatric research as in other research contexts. For this, as well as for pragmatic reasons, patients should have the right to veto all research that poses direct risks to them. In contrast, epidemiological research using data from registers may rather require special efforts to reduce risks for breaches of confidentiality, such as anonymization or secure coding. Special efforts

should also be made to ensure the independence of consent from persons with mental disorders, institutionalised persons, or persons who are both. Some examples have been given of how different research methods may be easier to justify than others in light of this.

The most serious threat to the ethical defensibility of forensic psychiatric research on selectively detained MDOs, we have argued, is not the actual research situation and direct interaction between researchers and subjects. Instead, it resides in that step of the research process when the results are communicated to the wider society. We have argued that much of current practice in connection with forensic psychiatric risk assessment and media and policy consultancy is highly questionable for the simple reason that it serves to uphold and strengthen a prejudicial picture of MDOs, and people with mental health problems in general, that harms these people and supports unjust legal practices. In effect, we have argued that strong statements from scientific and professional organisations in support of a scientifically well-founded revision of forensic psychiatric risk assessment and consultancy practices are urgently called for. We have also suggested that such a call has to imply less of participation in contexts where prejudicial presumptions systematically lead to the misrepresentation or overinterpretation of scientific information. Of course, if solid evidence implicating mental phenomena (such as attention deficits, learning disabilities or specific psychotic symptoms) in the aetiology of crimes would be provided in systematic research in epidemiologically representative groups (where it can be disentangled from behaviour

patterns), the connection must be acknowledged by researchers. Hence, our argument is in favour of knowledge development, but influenced by the current situation of widespread exaggeration of mental health problems as explanatory factors of serious crime.

What has not been pointed out earlier is an interesting connection between the much discussed ‘dual role dilemma’ and results from newer forensic psychiatric research underlying the foregoing point. If forensic psychiatric research on selectively detained MDOs should show that these subjects are really not especially dangerous or prone to further criminal behaviour due to their mental health problems, the public good that may be served by such research would presumably be to inspire some revisions of how criminal law deals with MDOs, which is likely to be to their general benefit. Thus, the conflict in the research context between the role of forensic psychiatry to serve the interests of its patients and the role to serve the functionality of the criminal law system may in fact not be as radical as has been assumed throughout the debate. On the contrary, if only the forensic psychiatric scientific community assumes its apparent responsibility regarding communication and consultancy, the value (and thus arguments in favour) of forensic psychiatric research on selectively detained MDOs consists of *both* benefits to this group (as well as other MDOs and people suffering mental health problems in general) and an improved criminal justice system.

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