



Cultural considerations in forensic psychiatry: The issue of forced medication



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ABSTRACT

There has been an ongoing debate regarding the forced use of antipsychotic medications and both the psychiatric and legal professions have reacted strongly to the growing debate. Within the penological context, cases such as *Washington v. Harper*, *Riggins v. Nevada*, and *Sell v. United States* established the framework for determining when antipsychotic medication may be forcibly administered. Medication decisions under the *Sell* and *Riggins* cases are to be approved at judicial hearings; whereas, administrative hearings are sufficient for *Harper* cases. Forensic psychiatrists are also given responsibility in making the legal decision of whether or not to forcibly treat a patient with psychotropic medication against his will. In making this critical decision, a significant factor that is often minimized is the cultural background of the patient. The purpose of this paper is to present cultural factors to be considered in forced medication. Focusing on the culture defense argument, a review of how the legal system has dealt with cultural implications of a case will be presented. This paper will then discuss cultural issues embedded in the assessment, diagnosis, and treatment of psychiatric patients by forensic psychiatrists who are called upon to make the decision of whether or not to force medicate a patient against his will. Lastly, recommendations and a framework for providing a culturally sensitive assessment during the decision to forcibly medicate a patient with psychotropic medication will be offered.

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1. Introduction

There has been an ongoing debate regarding the forced use of antipsychotic medications, and both the psychiatric and legal professions have reacted strongly to the growing debate. An expression of this debate was clearly reflected in 1980 when the *American Journal of Psychiatry* published a special section entitled, “Life, Liberty, and the Pursuit of Madness: The Right to Refuse Treatment” (Epson, Rodol, &

Bloom, 2012). Within the penological context, cases such as *Washington v. Harper*, *Riggins v. Nevada*, and *Sell v. United States* established the framework for determining when antipsychotic medication (psychotropic drugs, psychoactive drugs, neuroleptics) may be forcibly administered. Medication decisions under the *Sell* and *Riggins* cases are to be approved at judicial hearings; whereas, administrative hearings are sufficient for *Harper* cases. Forensic psychiatrists are also given responsibility in making the legal decision of whether or not to forcibly treat a patient with psychotropic medication against his will.

Forensic psychiatrists consider several factors in their decision of whether or not to medicate a patient against his will. These factors

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include formulating an accurate diagnosis, assessing whether the patients are a danger to themselves or others and recommending the psychotropic medication that should be administered. However, a significant factor that is often minimized, and at times ignored, in the assessment of forced medication is the cultural background of the patient. The purpose of this paper is to present cultural factors to be considered in forced medication. Focusing on the culture defense argument, a review of how the legal system has dealt with cultural implications of a case will be presented. This paper will then discuss cultural issues embedded in the assessment, diagnosis, and treatment of psychiatric patients by forensic psychiatrists who are called upon to make the decision of whether or not to force medicate a patient against his will. In this section, examples utilizing African American patients will be presented, for the literature cites a plethora of disparities in mental health care surrounding issues of misdiagnosis, underutilization, overrepresentation, and improper treatment of this particular ethnic group. Lastly, recommendations and a framework for providing a culturally sensitive assessment during the decision to forcibly medicate a patient with psychotropic medication will be offered.

2. A call for cultural competency in forced medication

The United States continues to become increasingly multiethnic. Mossman et al. (2007) maintain that an increasingly multicultural America is generating new demands, challenges, and stresses for many areas of human endeavor, including psychiatric assessment and the law. The need for forensic psychiatrists to provide culturally relevant and effective forensic services is an essential expectation and professional task; especially in the making of legal decisions regarding treating a patient against his will.

There have been many appraisals of the Nation's health care and mental health delivery system revealing racial and ethnic disparities. In 2000, the Institute of Medicine (IOM) issued a landmark report entitled *Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care*, which revealed that ethnic minorities in the United States are less likely to receive medical care and experience lower quality of health care services (Smedley, Stith, & Nelson, 2002). Similarly, in 2001, the *Surgeon General's report on Race, Culture and Ethnicity and Mental Health* evocatively documented racial and ethnic disparities in mental health care surrounding issues of misdiagnosis, underutilization, overrepresentation, and improper treatment (U.S. Department of Health and Human Services, 2001). Explanations are multifaceted; however, there is evidence to believe that these racial and ethnic disparities are related to the lack of cultural competence among clinicians.

2.1. The cultural defense

Terminology has been introduced into the legal system to describe cultural issues embedded in the legal process. These terms are referred to as cultural evidence, cultural information, and cultural consideration (Tseng, Matthews, & Elwyn, 2004). There is an ongoing debate regarding the place of culture in the legal system. Kirmayer, Rousseau, and Lashley (2007) report that those supporting the use of culture as a defense argue that it is intrinsically unfair to judge someone exclusively by the rules and values of a society that he or she does not know; while others argue that culture as a defense is dangerous in that it will undermine the fairness of the justice system by allowing inconsistent or arbitrary standards to be applied (p. 98). However, the wide discussion of cultural defenses over the last two decades has produced very little actual change in the criminal laws (Chiu, 2006).

Renteln (2009) asserts that more and more courts are confronted with issues of cross-cultural jurisprudence, so that their capacity for interpreting the facts in the context of existing legal frameworks is challenged (p. 80). Since the 1980s, American criminal courts have seen an increase in the incidence of the culture defense strategy. The culture defense strategy claims that “when ascertaining guilt or setting

penalties, courts should consider relevant features of a defendant's background” (Donovan & Garth, 2008). While some judges rule that this argument is irrelevant to a case, others find that the culture defense is very much relevant to the case.

Reedy (2002) asserts that the culture defense strategy takes therapeutic self as its primary reference point. Therapeutic ethic refers to the approach in which the self is the center of moral authority and is the ultimate judge of values and behavior. From this perspective, the defendant's actions are found reasonable, or at least excusable, when understood and judged from her/his point of view, rather than from some universalistic standard insensitive to cultural nuance (Reddy). Cases such as *People v. Kargar (1996)*, *People v. Kimura (1985)*, *People v. Moua (1985)*, and *People v. Chen (1989)*, depicting the range of outcomes from acquittal to punishment mitigation, clearly portray the beneficial outcomes that occur from the use of the culture defense.

While the cultural defense can be beneficial, there is an argument for limitations on the cultural defense (Renteln, 2005). Concerns include, “To whom should the culture defense be available?” and “To what crimes should a defendant be allowed to apply the culture defense?” To minimize potential misuse of the defense, Renteln (2005) proposed a cultural defense test that courts could use to help avoid abuse. Courts applying it would have to consider three basic queries: (1) Is the litigant a member of the ethnic group?; (2) Does the group have such a tradition?; and (3) Was the litigant influenced by the tradition when he or she acted? (p. 50). Building upon Renteln's (2004) three-point culture defense test, Donovan and Garth (2008) proposed the following revised culture defense test:

1. Is the litigant an enculturated member of the referenced group?
2. Does the group recognize the acknowledged tradition claimed by the litigant?
3. Is that tradition expected to contribute to the fostering of positive social bonds within the culture group?
4. Was the litigant influenced by that tradition when he or she acted?
5. Were the circumstances of the litigant such that he or she could be reasonably presumed to be unaware of the contrary normative standards of the dominant society? (p. 138).

Chiu (2006) calls for cultural pluralism in the criminal law by encouraging difficult moral questions posed by the defendants' acts. He proposes a justification approach to cultural defense cases. While Chiu realizes that this approach does not guarantee or require that a prosecutor, judge or jury necessarily agree with the assessments of culturally motivated defendants, he maintains that this approach allows them to explain their behaviors in the context of their cultures' beliefs and values so that such decision makers have the opportunity to absolve them.

2.2. Forensic psychiatry

Forensic psychiatry functions at the interface of two diverse disciplines: law and psychiatry. The foremost purpose of forensic psychiatry is centered on the application of psychiatry to evaluations for legal purposes (Tseng et al., 2004, p. 25). Forensic opinions are grounded in clinical assessment. In making the decision to medicate a patient against his will, the forensic psychiatrist conducts an interview with the patient (mental status examination), considers the psychological testing that was conducted, and finally formulates a diagnosis and recommends treatment (Vandiver & Duncan, 2010).

The forensic psychiatrist can recommend forced medication if a patient is considered to be a harm to self or others (dangerous), gravely disabled (as a result of a mental disorder is unable to provide for his basic personal needs for food, clothing, or shelter), or suffers from mental illness (diagnosis of mental illness). An invalid diagnosis or clinical formulation by the forensic psychiatrist may jeopardize the validity of the forensic conclusion (Hicks, 2004, p. 22). The literature raises the

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