

Brief Report: Judicial Attitudes Regarding the Sentencing of Offenders with High Functioning Autism

Colleen M. Berryessa^{1,2}

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Abstract This brief report presents preliminary data on the attitudes of judges on the sentencing of offenders with High Functioning Autism (HFA). Semi-structured telephone interviews were conducted with twenty-one California Superior Court Judges. Interviews were qualitatively coded and constant comparative analysis was utilized. Findings revealed that judges consider HFA as both a mitigating and aggravating factor in sentencing, and knowledge of an offender's disorder could potentially help judges understand why a criminal action might have been committed. Judges voiced concerns about the criminal justice system being able to effectively help or offer sentencing options for offenders with HFA. Finally, judges reported that they are focused on using their judicial powers and influence to provide treatment and other resources during sentencing.

Keywords Judiciary · High Functioning Autism (HFA) · Sentencing · Punishment · Prison

Introduction

In recent years, the diagnosis of Autistic Spectrum Disorders (ASDs) has increased dramatically; globally, in 2012, the median of prevalence estimates of ASDs was 62 per 10,000 individuals (Elsabbagh et al. 2012). The frequency of criminal cases involving criminal offenders diagnosed with ASDs,

especially High-Functioning Autism (HFA) (for more information on HFA, please see Carpenter et al. (2009)), has also reportedly increased within several jurisdictions (Freckelton 2011, 2013). Further, there have been a notable number of cases in recent years in which information on HFA, as well as information on the disorder's potential relevance or connection to the criminal actions for which an offender is on trial, has been used in court during responsibility determination and sentencing (Freckelton and List 2009; Freckelton 2011). The presentation of this information is important in court, as many individuals with HFA who exhibit criminal behavior are often thought to do so in association with the disorders' symptoms (Attwood 2006; Barry-Walsh and Mullen 2004; Browning and Caulfield 2011; Haskins and Silva 2006; Howlin 2004; Kristiansson and Sorman 2008; Murrie et al. 2002). For example, the obsessional interests of an individual with HFA might lead one to exhibit criminal behavior in order to pursue those interests, with an individual potentially failing to recognize the consequences of his actions and that his actions may be criminal due to his obsessions (Howlin 2004).

As the number of cases involving diagnosed offenders reportedly rises, it is integral to understand the issues that may arise or become pertinent for judges when sentencing an offender with HFA. It appears that no literature exists specifically on how judges view offenders with HFA in regards to sentencing. Thus, this paper presents preliminary data from interviews with U.S. trial judges for the California Superior Court on perceptions of sentencing offenders with HFA.

Methods

The data reported in this analysis were collected and analyzed as a part of a larger body of research according to already documented methods (Berryessa 2014a, b;

✉ Colleen M. Berryessa
berrco@sas.upenn.edu

¹ Stanford Center for Biomedical Ethics, Stanford University, Stanford, CA, USA

² Department of Criminology, University of Pennsylvania, 483 McNeil Building 3718 Locust Walk, Philadelphia, PA 19104, USA

Berryessa, in press); the methods of this analysis are briefly described below. This research was approved by the Stanford Institutional Review Board (IRB).

Participants

The research sample consisted of twenty-one U.S. trial judges for the California Superior Court who have jurisdiction over all criminal and civil cases in the state of California. More information on California Superior Courts can be found on the court website (see California Courts 2015).

Judges agreed to participate in this research by denoting that they would be willing to be interviewed and by providing their email address or phone number when returning a brief mail survey on HFA and criminal offending, as well as genetics and the criminal justice system; this survey was sent to a random sample of five hundred judges of the California Superior Court as a component of a larger project not reported here (see Berryessa 2014a). Judges' mailing addresses were publically available. Sixty-one judges returned the survey and twenty-two of them volunteered their participation in this interview research. Twenty-one of them were ultimately interviewed; one judge could not be reached.

Interviews

A semi-structured twenty question interview protocol was developed by the author after a thorough literature review on forensic aspects of and legal issues involving HFA, as well as genetic mental disorders and the legal system. The protocol, which has been generally described previously (Berryessa 2014b), included questions in three categories: (1) genetic mental disorders (related to criminal offending and court proceedings, as well as views on genetic mental disorders more generally outside of forensic contexts); (2) ASDs and HFA (related to criminal offending and court proceedings specifically, as well as views on ASDs and HFA more generally outside of forensic contexts); and (3) judges' personal experiences with HFA and their perceptions of its portrayal in the media, (related to criminal offending and court proceedings specifically, as well as personal experiences with HFA and perceptions of its portrayal in the media outside of forensic contexts). Questions relevant to this analysis were found in the second category of the protocol; the full interview protocol is available upon request. Interviews were conducted via telephone, audio recorded, and then transcribed. All participants gave verbal informed consent and interviews were on average about 25 minutes each. Interviews reached conceptual saturation.

Analysis

In order to analyze the data reported in this analysis, a constant comparative analytic method (Maykut and Morehouse 1994; Strauss and Corbin 1990) was utilized (see Berryessa 2014a, b; Berryessa, in press). First, open coding of ten interviews was used to identify preliminary themes. Second, data were iteratively coded using these preliminary themes, leading to the development of a qualitative coding scheme that included the most frequent of these themes. Third, themes were organized into categories that spoke to the aims and topics being probed by this research. The codebook for this data, as well as an overview of categories/themes, are available upon request. A single coder fully coded all twenty-one interviews; six interviews were randomly chosen to be co-coded by a second independent coder in order to substantiate the coding scheme, which determined high inter-rater agreement ($k = 0.89$).

Results

Twenty-one California Superior Court judges expressed their views on the sentencing of offenders with HFA, seven of which reported having previous case experience with offenders with HFA (Berryessa 2014b). Demographic characteristics of participants have been previously reported (Berryessa 2014a, b; Berryessa, in press) and also are available upon request. Results reported here encompass two categories that emerged during analysis: (1) HFA as a factor in sentencing and (2) sentencing options for offenders with HFA. I have illustrated various themes within each category with characteristic quotations.

HFA as a Factor in Sentencing

Fifteen judges stated an individual's diagnosis with HFA would be an important factor in sentencing, describing it as an important factor because knowing that an offender has HFA can help judges, juries, or other criminal justice professionals understand if the condition potentially led to the committed criminal action. Further, twelve of these judges described HFA as either a mitigating or aggravating factor.

Mitigation

Overall, nine judges talked about HFA as a potential mitigating factor in sentencing; the large majority of judges that believed HFA would be a potential mitigating factor questioned if an offender's actions would be completely willful or if his criminal intent would be potentially

influenced by the symptoms of the condition (see Berryessa 2014b). One judge, regarding HFA, stated, “I think it mitigates sentencing and I think it helps put it in perspective to all of the parties in terms of how we can best help this individual” (Interview 7).

Aggravation

Three judges described HFA as a potential aggravating factor, as an individual’s inability to control his behavior may be an inherent danger and threat to himself, others, and public safety. One judge, commenting on HFA, said, “I think it would be a detriment to [offenders] in future cases. Judges are going to be concerned because they’re more likely to re-offend” (Interview 5). In general, these judges believed that diagnosis with HFA may lead some to believe that the impulse control problems associated with the disorder will lead to dangerous behavior or offending in the future, which can negatively influence sentencing.

Sentencing Options for Offenders with HFA

Prison

The large majority of judges stated that they would likely not want to incarcerate this type of offender because it would likely be a very damaging environment for someone with HFA. One judge, commenting on offenders with HFA, stated that “a lot of the traditional tools that we would use for other kinds of offenders won’t necessary work, you know, incarceration for example, aren’t necessarily going to work” (Interview 7).

Limited Sentencing Options

Judges expressed the desire for sentencing alternatives, aside from prison, for offenders with HFA, but were fully cognizant that the criminal justice system may not currently have the tools to provide the types of alternatives needed. One judge said the sentencing process “would be trying to find the most appropriate manner of addressing the disorder within the confines of the criminal system... Can I find some form of treatment that might be more effective than say incarceration and a jail? Or a prison? I don’t generally find that jails and prison cells are that effective in dealing with offenders with mental health issues... When they’re placed in a jail or a prison cell, they’re basically being warehoused because we don’t have a better way of dealing with it... My concern is that we don’t have an effective way to deal... it’s not a criminal problem in the sense of the treatment, it’s only a criminal problem in how do we deal with the crime that was...committed” (Interview 8).

Using Judicial Powers to Attain Most Effective Sentencing Option

Judges stressed the use of their roles, powers, and influence, as members of the judiciary, in order to obtain assistance, therapy, or treatment for these offenders, rather than focusing on traditional sentences and objectives of punishment. Many judges highlighted the importance of making sure that these individuals avoid the criminal justice system in the future. One judge stated, “My goal as a judge is to try to ensure that I put as many variables in place that will assist [an offender with HFA] in not becoming another statistic in the criminal justice system and actually make probation something that will provide that individual with the benefit and that might include...a therapy modality...It wouldn’t change it but it might help the person to be better able to deal with their inherited tendency to react in a certain way in particular situations...I have to...figure out, you know, what’s going to work, what’s the best way to position the offender so that they’re successful” (Interview 7).

Discussion

Overall, the majority of judges reported that HFA would be an important factor in sentencing; additionally, findings showed that judges may view HFA as either a mitigating or aggravating factor. Although more judges viewed HFA as mitigating, the fact that some judges viewed the disorder as an aggravating factor is interesting and has important implications. As there have been a notable number of cases in recent years in which information on HFA has been used in court during sentencing (Freckelton and List 2009; Freckelton 2011), these findings suggest that there could be potential downsides to presenting information about HFA in court during sentencing depending on how the judge perceives the disorder, such as judges viewing the disorder as evidence that an individual is inherently dangerous or that impulse control problems associated with the disorder will likely lead to future offending.

Findings also suggest that many judges are sympathetic and aware of the difficulties associated with HFA when thinking about sentencing. The large majority reported that judges would likely not want to send an individual with HFA to prison and would rather utilize other sentencing alternatives. As many individuals with HFA who exhibit criminal behavior are often thought to do so in association with the symptoms of HFA (Attwood 2006; Barry-Walsh and Mullen 2004; Browning and Caulfield 2011; Haskins and Silva 2006; Howlin 2004; Kristiansson and Sorman 2008; Murrie et al. 2002), these findings may suggest that judges would rather find ways to treat the disorder and its

symptoms that may have led to offending, rather than just solely punishing the individual for the committed action. Judges appeared cognizant that the criminal justice system is limited in providing sentencing alternatives or aid to those with HFA and other mental health issues, but they did highlight their interest in using their judicial powers and influence to secure assistance and positive outcomes for offenders with HFA. This likely suggests that many judges would attempt to use whatever powers, influence and resources that they do have to try to best secure positive outcomes for offenders with HFA, even if some judges may not believe that the criminal justice system itself has the formal tools to do so.

Although there are a few limitations to this research (see Berryessa 2014a, b; Berryessa, in press), the author hopes these preliminary results can provide a brief but solid foundation for future research on the sentencing of offenders with HFA. For example, future investigators may want to further explore these issues focusing on the perceptions of judges who handle specific types of cases, such as sexual offenses, or judges in different jurisdictions, such as the United Kingdom, to see if they are similar to the perceptions of judges interviewed for this analysis. Additionally, future research may want to examine whether judges perceive individuals with HFA differently or more sympathetically compared to other offenders where mental capacity, such as acquired brain injury or dementia, might also be an issue.

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Author contribution C.B. designed the study, collected and analyzed the data, and drafted the manuscript.

Compliance with Ethical Standards

Conflict of Interest Colleen M. Berryessa declares that she has no conflict of interest.

Ethics Approval All procedures performed in studies involving human participants were in accordance with the ethical standards of the institutional and/or national research committee and with the 1964 Helsinki declaration and its later amendments or comparable ethical standards. This article does not contain any studies with animals performed by any of the authors.

Informed Consent Informed consent was obtained from all individual participants included in the study.

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