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Ethical Concerns Expressed by Forensic Psychiatrists

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ABSTRACT: A survey was made of American Academy of Forensic Sciences (AAFS) forensic psychiatrists to evaluate whether there is concern among them about potential ethical problems in criminal justice work. Of the respondents, 93.8% had encountered such problems. The main concerns indicated were about those psychiatrists who become a "hired gun," become an advocate, do not give an honest opinion, or have problems with confidentiality. The need for ethical guidelines and further debate about ethical issues is presented.

KEYWORDS: psychiatry, ethics, bias, confidentiality, forensic psychiatrists, criminal justice work, privacy, doctor-patient privilege, advocacy, death penalty, right to treatment, right to refuse treatment, dangerousness, indeterminate sentence, rehabilitation

Ethical problems in forensic psychiatry have become of increasing concern to our profession. Attacks in the news media sometimes portray the forensic psychiatrist as a person who would sell his opinion to the highest bidder or is naively duped by criminals. At times they go so far as to imply that the forensic psychiatrist may be responsible for the problem of crime in our society. As a result of these implications the public tends to question the credibility of the services we provide.

Within the psychiatric profession, Stone [1,2] has raised some very important albeit controversial questions about ethical issues. He has stated that, according to philosophers, life is a moral adventure, and "that to choose a career in forensic psychiatry is to choose to increase the risks of that moral adventure." Although he raised a number of valid points, his personal decision not to participate in court proceedings was probably partly responsible for alienating many forensic psychiatrists. His papers have nonetheless stimulated ongoing discussion in the area of ethics and present a challenge to those of us who practice in the field.

Forensic psychiatrists have been criticized for being unconcerned about ethical issues and for believing that no problem or conflict exists if one testifies in accordance with the wishes of whomever pays one's fees. Pollack's [3] definition of forensic psychiatry as involving only legal ends, has been interpreted by some to mean that ethics in forensic psychiatry is solely the concern of the court or the legal profession, and that the psychiatrist, when he participates, is morally unconcerned and needs only to do whatever the legal system wishes.

Because of the controversies regarding ethical issues and whether forensic psychiatrists themselves are concerned about these issues, I conducted a survey in my capacity as Chair-

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man of the Committee on Ethics of the Psychiatry Section of the American Academy of Forensic Sciences (AAFS). The purpose of my survey of the membership of the Psychiatry Section was to find out whether most forensic psychiatrists did or did not feel that they encountered ethical problems in their work and what they considered to be the main ethical problems facing forensic psychiatrists today. Because Monahan [4] in 1976 conducted a survey of 349 psychologists who worked primarily in areas involving criminal justice issues and were members of the American Psychological Association, I decided to compare the results of that survey with those of a survey of forensic psychiatrists who are members of AAFS. The results of the American Psychological Association questionnaire were used by them to formulate recommendations on the ethical course that psychology as a profession should set and follow in the criminal justice area.

Forensic psychiatrists have witnessed recent discussion by the American Academy of Psychiatry and the Law Committee on Ethics of preliminary ethical guidelines [5]. We do have some minimal ethical guidelines in the American Psychiatric Association's "The Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry" that are applicable to forensic psychiatry [6], and there are also some ethical principles enunciated by the American Academy of Forensic Sciences organization as a whole [7]. However, with some notable exceptions, forensic psychiatry as a profession has given relatively little consideration on a formal basis of ethical problems; in contrast to other professions, no guidelines have yet been adopted for forensic psychiatry. Since I suspected that most forensic psychiatrists had, like myself, encountered complex ethical problems, and that they had probably thought seriously about these problems, I conducted a survey of the membership to find out whether they had in fact encountered ethical problems and to determine what problems were considered most significant by the members of the profession, at least as represented in the membership of the Psychiatry Section of the American Academy of Forensic Sciences.

Method

A total of 81 questionnaires were sent to the entire membership of the Psychiatry Section of the American Academy of Forensic Sciences as listed in the membership directory. The questionnaires were a modification of the one used by Monahan [4] and the American Psychological Association. Each question had five points of response, with the central point usually being neutral and Points one and five representing the extremes of "yes" or "no."

Each psychiatrist also was asked to list the three major ethical issues that he or she believed confronted psychiatrists engaged in criminal justice work. There followed questions which included whether a "right to rehabilitation" and a "right to refuse rehabilitation" should exist in prison; whether psychiatric treatment is effective in rehabilitating offenders; whether the indeterminate sentence should be maintained, modified, drastically modified, or abolished; and whether psychiatrists are accurate in their predictions about the dangerousness of an offender. Other issues included whether conflicting loyalties, such as loyalty to a patient or to an institution or individual who pays one's salary, was a problem; whether respondents saw a potential conflict for forensic psychiatrists being caused by differences in the ethics of the medical and legal professions; whether they saw a potential ethical conflict when a psychiatrist testifies in such a way as to contribute to a death penalty verdict; whether they saw a potential ethical conflict in performing forensic science evaluations before the defendant has legal counsel; and whether they saw potential breaches of confidentiality as significant ethical problems. Finally the respondents were asked to place a check if they had not personally encountered an ethical problem in criminal justice work.

Results

There was a good response rate to the questionnaire, with 63.0% responding. Only 6.2% of the respondents said that they had never encountered an ethical problem in their criminal

justice work, which means that 93.8% had encountered ethical problems in their criminal justice work.

The issues that were of greatest concern to the respondents are listed in Table 1 together with the number of people who listed each issue or a very similar one. As can be seen, the highest concern was about those psychiatrists who become a "hired gun," and also about those who become an advocate or who do not give an honest evaluation. Third was the issue of confidentiality and the conflict of obligations between patient and society. Then followed testifying in court without adequate knowledge. Next in order was concern about the issue of medical ethics as distinct from legal ethics. Additional concerns are listed in the table.

I then evaluated the questionnaire items having the most agreement. In this computation, a definite "yes" received a score of 2, and a qualified "yes" a score of 1. A definite "no" received a score of -2, and a qualified "no" a score of -1. As Table 2 shows, potential breach of confidentiality received the greatest agreement, with a score of 1.02. Other questionnaire items with their agreement scores can be seen in Table 2. Table 3 lists those issues about which there was little agreement.

Table 4 compares the responses on each item with those of the psychologists. Since the psychologists responded in 1976 and the psychiatrists in 1984, dates are listed because of the possibility that the years might have affected some responses. As the table shows, there was a great deal of agreement except that a higher percentage of the psychiatrists had encountered an ethical problem in their work and even more psychiatrists responded than psychologists.

TABLE 1—*Ethical concerns expressed by psychiatrists.*

Concern	Number
1. Becoming "Hired guns"	23
2. Becoming an advocate, not giving an honest evaluation	20
3. Confidentiality, patient versus society obligations	19
4. Testifying in court without adequate knowledge	10
5. Medical ethics separate from legal ethics	8
6. Problems with predictions	6
7. Capital execution being anti-Hippocratic oath	4
8. Treatment of prisoners	4
9. How to deal with unethical attorneys, judges, experts	3
10. Examiner versus treating physician role conflict	3

TABLE 2—*Questionnaire items with greatest agreement.*

Issue	Score
1. Breach of confidentiality	1.02
2. Right to refuse treatment	0.98
3. Pretrial evaluation prior to attorney	0.93
4. Conflicting loyalties	0.53
5. Differing ethics of medical and legal professions	0.47

TABLE 3—*Questionnaire items with little agreement.*

Right to rehabilitation
Effect of therapy
Prediction of dangerousness
Psychiatrist contributing to death penalty verdict

TABLE 4—*Comparison of responses with psychologists (in percent).*

Issue	Psychiatrists (1984)	Psychologists (1976)
Response percentage	63.0	58.2
Encountered ethical problem in their work	93.8	81.8
Right to rehabilitation (affirmative)	53.0	81.5
Right to refuse treatment	83.3	85.3
Dangerousness prediction:		
Very accurate or inaccurate	15.5	7.8
Middle of the road		
Fairly accurate	44.9	43.8
Fairly inaccurate	28.8	30.4
Don't know	8.8	18.0
Indeterminate sentence:		
Maintain as is	17.6	8.7
No opinion	7.8	7.6
Maintain but modify	33.3	37.8
Drastically modify	13.7	19.9
Abolish	27.4	26.0

Surprisingly, however, fewer psychiatrists felt that a right to rehabilitation should exist in prison. On issues of prediction of dangerousness, and the indeterminate sentence, there was striking agreement. For the psychiatrists who gave an extreme response to the prediction of dangerousness, all but one thought the predictions very inaccurate.

Regarding the issue of confidentiality, 77.5% of the psychiatrists believed potential breaches of confidentiality to be significant issues, with as much as 55.1% listing it as very significant. Conflicting loyalties to a patient, to an institution, or to a person who pays one's salary was considered an issue by 67.3%. There was no comparable item on the psychologists' questionnaire, but 75% of the psychologists listed confidentiality dilemmas as one of the three problems they encountered most frequently, and they wrote it in on their questionnaire, so I included it also. It proved to be one of our highest rated items. Most psychiatrists on our questionnaire responded that confidentiality is a significant or very significant item, and 19 out of 81 listed it as one of the three write-in issues encountered most frequently. It was the item of most concern on our questionnaire and the third highest write-in item. On the issue of pretrial evaluations before legal counsel has been consulted by the defendant, 75.0% of psychiatrists saw it as a significant problem and 61.7% saw differing ethics in the medical and legal professions as an issue.

Discussion

Contrary to some popularized misconceptions of the forensic psychiatrist as being blind to ethical issues, it is significant that 93.8% of our membership had encountered ethical problems in their criminal justice work. If, as Stone suggests, forensic psychiatrists increase the risks of life's moral adventure, our survey shows that most of our membership are not facing the adventure with eyes closed but are aware of encountering some ethical problems in their work. The fact that 63.0% took time out from their busy schedules to fill out the questionnaire indicates that many are concerned about these issues. Many even volunteered to be on our committee on ethics. So great was the response that we could not accommodate all who volunteered.

Regarding the issues of most concern for forensic psychiatrists, the issue of being a "hired gun" and the related issues of becoming an advocate and not giving an honest evaluation appeared to generate the most concern even though these issues were not included either in

our questionnaire or in that of the psychologists. These two issues were written in as significant most often by psychiatrists in our survey. Another issue with high concern was confidentiality, which was third in frequency among problems written in and also was the questionnaire item with the most agreement. It did not appear on the psychologists' questionnaire but was their highest write-in item. Conflicting obligations between patient and society or conflict between loyalty to one's patient and loyalty to the institution or person who pays one's salary were also seen as significant.

The issue of the right of prisoners to refuse treatment received high agreement. The issue of a pretrial evaluation before the defendant has obtained legal counsel was also seen as a significant ethical issue but did not show up frequently on the list of three main concerns. The need to avoid such pretrial evaluations might be a useful guideline. Testifying without adequate knowledge was also seen as important. In accordance with this finding, a guideline might be developed to require the forensic psychiatrist to become knowledgeable about any legal issue regarding which an opinion is expressed. Such a guideline would be an alternative to proposals that psychiatrists express no opinions about ultimate legal issues. A guideline could also require that unconventional opinions be clearly labeled as such by the testifying forensic psychiatrist.

Significantly, the psychiatrists saw differing medical and legal ethics as a salient issue, which suggests the need for forensic psychiatrists to develop ethical guidelines and definitions. Leaving these issues to the legal system, the American Bar Association, or outside politicians with their own perspectives is not advisable. It does not resolve a problem to define an issue out of existence [3]. The new definition of forensic psychiatry adopted by the American Board of Forensic Psychiatry,² is an improvement insofar as it states that the ethical principles and guidelines are those adopted by the psychiatric profession.

Weinstein [5] has proposed guidelines that expand on those originally developed by Rapaport and do address some of the problems noted by the psychiatrists in our study. Significantly, however, the preliminary version of the guidelines of the American Academy of Psychiatry and the Law does not confront the issues of greatest concern to the psychiatrists in this study, the issues of a psychiatrist being a "hired gun" or becoming an advocate and of not giving an honest evaluation. Consequently, this study suggests that these issues should be included in our professional guidelines. Related issues are expressed in the ethical guidelines of the American Academy of Forensic Sciences [7]. They include such guiding principles as that the forensic scientist should "avoid any misleading or inaccurate claims" and that he or she should "act in an impartial manner and do nothing which would imply partisanship or any interest in a case except the proof of the facts and their correct interpretation." The problem of impartiality was raised years ago by Diamond [8].

Also notable was the general agreement between psychiatrists and psychologists on almost all of the issues that appeared in both questionnaires. The only exception was the right of prisoners to receive treatment. This was seen as a right by most psychologists in 1976 but not by forensic psychiatrists in 1984. It is difficult to know whether forensic psychiatrists do, in fact, believe less in a right to treatment than psychologists or whether this is a reflection of contemporary trends, and whether recent Supreme Court decisions have influenced opinion in that regard.

The results of this study indicate that forensic psychiatrists are concerned about ethical issues and that these issues must be explored further. These problems are faced daily by forensic psychiatrists and cannot easily be resolved. In a time when the legal system is becoming more punitive, the ends of justice and the ends of psychiatry do not always coincide. The problems were probably less evident in an earlier era when the criminal justice system was oriented more toward treatment and rehabilitation and toward less punishment. Both the criminal justice system and some psychiatrists have recently become more pessimistic

²A. Halpern, *Actions of the American Board of Psychiatry*, May 1985.

about treatment, and we may be returning to an era in which nosology and diagnosis are all that is important except in crisis situations or those in which medication would cure the problem.

There may be additional ethical obligations as a forensic psychiatrist over and above the obligations as a citizen. Even if we do totally accept the ends of the criminal justice system, punitive though they may be, it is still essential for us to have our own ethical guidelines. Otherwise, control of the ethics of the forensic psychiatric profession would be given over to others. Significantly, the Code of Ethics of the American Academy of Forensic Sciences can provide some basis for guidelines, particularly since it addresses some of the issues of most concern at least to those forensic psychiatrists in AAFS.

Conclusion

It is important that we realize the complexity of the issues and examine them carefully. There are no easy solutions, especially to matters about which there is little agreement even among ourselves. However, by carefully examining the problems, we can begin to generate our own guidelines. This study does indicate that most forensic psychiatrists have been doing this individually and that we do give serious thought to the problems we encounter. I believe we should do more of this as a group, sharing our thoughts and experiences so that we can develop guidelines acceptable to a majority.

Forensic psychiatry plays an important role in society. Because of the public nature of our profession, ethical problems have been magnified and exaggerated so that they have achieved an unjustified notoriety. Considering and clarifying ethical issues can make us less vulnerable to attack or to control from outside our profession. In those instances in which the practices of the psychiatric and legal professions may differ, complex ethical questions arise especially when the goals and values of the legal and psychiatric professions may be in opposition. The forensic psychiatrist may have a duty to at least make an effort to maintain the ethics of his profession. Such issues may be most crucial when life is at stake such as in death penalty cases. Our membership was divided on the ethics of testifying in such a way as to contribute to a death penalty verdict. Perhaps, more limited guidelines such as not specifically recommending a death penalty verdict or not testifying in death penalty cases without examining the defendant might be adopted. The commitment of the profession to the preservation of life could make this an ethical question and not merely a personal moral question.

The best way to handle the problem is to develop some basic ethical guidelines, especially regarding those issues shown by this study to be of most concern to the forensic psychiatrists surveyed. We need to continue discussion on an ongoing basis of those issues and problems that are truly controversial. Although we need guidelines and definitions, we should not define problems out of existence or foreclose debate on issues that are shown to be of concern to many forensic psychiatrists. On the controversial issues, the majority should not use ethical guidelines to force its will on a minority, which would in and of itself be unethical. There may be some matters about which honest differences of opinion can exist. Debate should be ongoing to keep our guidelines consistent with the times and our needs. An active ongoing effort can fortify us against inevitable attacks and keep control within our discipline. Hopefully, such endeavors will succeed in strengthening our profession.

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References

- [1] Stone, A., "The Ethical Boundaries of Forensic Psychiatry: A View from the Ivory Tower," *The Bulletin of the American Academy of Psychiatry and the Law*, Vol. 12, No. 3, 1984, pp. 209-219.
- [2] Stone, A., *Law, Psychiatry and Morality*, American Psychiatric Press, Washington, DC, 1984.
- [3] Pollack, S., "Forensic Psychiatry in Criminal Law," University of Southern California, Los Angeles, 1974, pp. 137-144.
- [4] Monahan, J., *Who Is the Client?*, American Psychological Association, Washington, DC, 1980.
- [5] Weinstein, H., "How Should Forensic Psychiatry Police Itself? Guidelines and Grievances: The AAPL Committee on Ethics," *The Bulletin of the American Academy of Psychiatry and the Law*, Vol. 12, No. 3, 1984, pp. 289-302.
- [6] "Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry," American Psychiatric Association, Washington, DC, 1981.
- [7] "Code of Ethics, Bylaws," in *Membership Directory*, American Academy of Forensic Sciences, Colorado Springs, CO, 1985, pp. 118-119.
- [8] Diamond, B., "The Fallacy of the Impartial Expert," *Archives of Criminal Psychodynamics*, Vol. 3, 1959, pp. 221-229.

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