

Guest Editorial

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Ethical Practice in the Forensic Sciences and Justification of Ethical Codes*

"Ethical Practice in the Forensic Sciences" is both the theme for the AAFS convention in New York City in February 1997 and the focus of considerable media concern about our profession. It is common for discussions about professional ethics to be more notable for heat than for light. Everyone tends to be certain of his/her own ethical probity, and to feel certain that he/she needs minimal or no further formal training in ethics. Nevertheless, conceptual clarity and sound reasoning are often lacking in ethical discourse. This will provide a brief introduction to thinking more clearly about the subject.

What is called for is a systematic approach to ethical issues. In the model proposed here, there are four steps:

1. What exactly is the issue? What specific behavior has the member engaged in that is the focus of ethical concern?
2. What specific criteria in the Academy's Code of Ethics and Conduct are applicable to the behavior at issue?
3. What is the relevant data? What evidence is there regarding whether or not the member did or did not behave in a manner inconsistent with the code's specific criteria.
4. What is the reasoning process that has been used to determine whether or not the member has breached the AAFS Code of Ethics and Conduct?

Use of this model facilitates discussion of ethical matters. Some disagreements about the ethical status of a member's specific behavior can be resolved simply by thinking more precisely.

The first problem with discussions of ethics is a failure to specify exactly what issue is the focus of concern. One may hear vague statements such as "I'm not sure he/she is ethical." The issue should be more sharply focussed, e.g., "When he said that he was a 'member' of AAFS, rather than a 'Provisional Member' of AAFS, was he violating the AAFS ethical rule against misrepresenting one's credentials?" or "When she said that she 'personally interviewed' the defendant, but neglected to state that she conducted the interview by telephone, was she violating the AAFS



ethical rule against misrepresenting one's data?" It helps to specify the exact issue under consideration, e.g., Arthur thinks that Jack has not attended any AAFS educational meetings and therefore is unethical, but Barbara thinks that Jack has published scientific papers in refereed journals and therefore is ethical: they are focusing on different issues, talking at cross-purposes, as well as both misunderstanding the AAFS Code of Ethics and Conduct.

The second problem is a failure to specify exactly what ethical criteria are being used to evaluate the specific behavior at issue. One may hear statements such as "I would never do what he/she did on that case; he/she is a hired gun." Within AAFS, the Code of Ethics and Conduct is set forth in Article II, Section 1 of our Bylaws. These are the criteria to be used in determining whether or not a member's specific behavior constituted a breach of ethics:

- Every member of the AAFS shall refrain from exercising professional or personal conduct adverse to the best interests and purposes of the Academy.
- Every member of the AAFS shall refrain from providing any material misrepresentation of education, training, experience, or area of expertise. Misrepresentation of one or more criteria for membership in the AAFS shall constitute a violation of this section of the code.
- Every member of the AAFS shall refrain from providing any material misrepresentation of data upon which an expert opinion or conclusion is based.

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*This paper is a revised version of two articles that appeared in *The American Academy of Forensic Science's Academy News*, Vol. 26, Issues 2 and 3, 1996.

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• Every member of the AAFS shall refrain from issuing public statements that appear to represent the position of the Academy without specific authority first obtained from the AAFS Board of Directors.

It helps to define the specific criteria being used to assess the conduct, e.g., Charles thinks that Joan has misrepresented her experience and therefore is unethical, but Diana thinks that Joan has not misrepresented her education and therefore is ethical: they are focussing on different criteria in the AAFS code.

The third problem is a failure to refer to data truly relevant to the ethical criteria set forth in the code in assessing whether or not a member's specific behavior was unethical. One may hear such statements as "He/she never comes to the annual conventions" or "He/she is not well-liked by colleagues." Such matters are not clearly pertinent to the ethical criteria of the code. Whether or not a person is sociable is not relevant to whether or not he/she had engaged in unethical conduct. It helps to define the relevant data, the evidence pertinent to the code's ethical criteria, e.g., Edward proves that Joseph is of obnoxious character, pedantic, and pompous and claims he therefore is unethical, but Francine proves that Joseph has neither misrepresented his training nor his data and claims he therefore is ethical: Edward's data (even if true) is irrelevant, whereas Francine's data is pertinent and probative.

The fourth problem is a failure to reason logically from the relevant data, clearly linking the behavior observed to the criteria of the ethical code, to resolve the issue regarding whether or not a member's specific behavior violated the Academy's ethical standards. It helps to evaluate the quality of the reasoning process underlying the opinion. George argues that Jessica is irritatingly opinionated, has no friends in the Academy, and should be expelled as unethical, but Harriet argues that Jessica has never been proven to have falsified her credentials or to have misrepresented her forensic findings, and should remain a member in good standing: George's conclusion does not follow from the premises, whereas Harriet's argument is sound.

This model for the structuring of the organization and analysis of ethical assessments is offered as one means of facilitating discussion of cases in which ethical misconduct is alleged. Each AAFS member will have ample opportunity to determine the model's use and its limitations in the course applying it to the systematic consideration of ethical issues.

It is straightforward to turn to the AAFS ethical code for criteria to assess the ethical status of a member's conduct. It is a more complicated matter to consider how the AAFS Code of Ethics and Conduct itself is justified. Is it merely an arbitrary set of guidelines or is it a rational product that rests on a firm foundation? When we join a professional organization, we are expected to obey the ethical code of that organization. We are entitled to ask what the reasoning process is that justifies the organization's code of ethics. Consider a homey analogy: When we were children, our parents set forth many principles to guide our conduct, e.g., if a ball rolls into the street, do not run after it. When we grew up, we often were able to understand and accept the reasoning process that justified those principles, e.g., if you run after the ball, you might be hurt or killed by an automobile speeding along the street. However, sometimes we were unable to accept the reasoning process behind our parents' guidelines, and we decided that their rules were arbitrary or no longer applicable to current circumstances. As adults, we are not required to accept blindly the rules that our parents imposed upon us as children. We are free as adults, and

some would claim that it is incumbent upon us as adults, to reevaluate what we were taught as children and to decide for ourselves what rules (including ethical rules) we regard as binding upon us.

In a similar manner, we are free to consider the AAFS Code of Ethics and Conduct. We can determine if the reasoning process that justifies the ethical code is understandable and sound. We can decide to accept that reasoning process and the ethical code itself. We want to be certain that its rules are not arbitrary or no longer applicable to current circumstances. As responsible moral agents, we are free, and some would claim that it is incumbent upon us, to reevaluate the AAFS Code of Ethics and Conduct and to decide for ourselves if we regard it as binding upon us.

Two of the major approaches to justifying rules are related to Legal Positivism (1) and to Natural Law (2). The first attends to the formal procedures by means of which rules are developed and promulgated. The second attends to the rational and benevolent foundations of the rules.

The Legal Positivist tradition holds that a valid legal rule (a law) is the product of a valid law-making procedure; analogously, a valid ethical rule is the product of a valid ethics-making procedure. According to Legal Positivism, if the USA operates in accordance with its Constitution, then the laws that Congress promulgates and the President signs are valid. If AAFS operates in accordance with its Bylaws, then the ethical rules approved by the majority of the organization's elected officers and ratified by a majority of its members assembled at an annual business meeting are valid. This Legal Positivist approach does not address the content of the code, but only the formal procedures that produced it. *Any* content that is produced in accordance to the authorized formal procedures is valid.

Most citizens of the USA would like to believe that their laws are not simply procedurally valid, they would like to believe that their laws are just. Similarly, most members of AAFS would like to believe that their ethical rules are not simply procedurally valid, they would like to believe that their ethical rules are just.

The Natural Law tradition holds that a valid law must be a product of human reason designed to foster the well-being of the persons in the community governed by the law; analogously, a valid ethical rule must be a product of human reason designed to foster the well-being of the persons in the organization governed by the rule. According to Natural Law, if the USA operates in accordance with its Constitution, then the laws passed by Congress and signed by the President are *not* valid if they are irrationally arbitrary or inconsistent with the well-being of the citizens of the USA. If AAFS operates in accordance with its Bylaws, then the ethical rules approved by the majority of the organization's elected officers and ratified by a majority of its members assembled at an annual business meeting are *not* valid if they are irrationally arbitrary or inconsistent with the well-being of the members of AAFS. This approach insists that an ethical rule must be based on reason and that it must be beneficial to the members of the organization to be valid. If the content of the organization's ethical code is not rational and not conducive to the best interests of the members, then it is not valid.

Based upon what criteria does one determine whether or not a given ethical rule is "right" and not merely arbitrary? Two of the major approaches to defining what is "right" are Act Consequentialism (3) and Deontology (4). The first approach, Act Consequentialism, specifies some principle (e.g., human happiness) for rating overall states of affairs from best to worst and requires each person in all cases to act in such a way to produce the highest-ranked state of affairs that he or she is in a position to produce (5).

Different Act Consequentialist theories use different values (e.g., happiness, health, and justice) for rating overall states of affairs, but all agree that the right thing for a person to do is to act to produce the best overall outcome. The second approach, Deontology, maintains that it is sometimes wrong to do what will produce the best available outcome overall, that there is no impersonal principle for rating overall states of affairs such that it is always permissible to produce the best state of affairs according to that principle (6).

Most people know of Act Consequentialism through one of its prime examples, the principle of benevolence, the principle that we should do what is beneficial to others., e.g., act always to produce the greatest good for the greatest number of persons. Deontology is frequently known through one of its prime examples, the principle of human autonomy, the principle that we should respect other persons, e.g., act always to treat persons as ends in themselves rather than as means to other ends. Often, but certainly not always, the same specific acts can be justified both by Act Consequentialism (benevolence) and by Deontology (respect for persons). In such cases, people often feel comfortable that they are doing what is "right." In other cases, true ethical dilemmas occur when the dictates of Act Consequentialism and the dictates of Deontology are mutually incompatible.

An extreme example may serve to illustrate the conflict between these two approaches (7). One possible Act Consequentialist principle might be that it is better to maximize the number of persons who are healthy. Based upon that principle, consider the following bizarre situation. A physician has a patient in need of a heart transplant, a second patient in need of a liver transplant, and a third and a fourth patient each in need of a kidney transplant. An otherwise healthy eighteen-year-old young man with a painful sprained ankle walks into the Emergency Room. The physician proposes to take the heart, liver and both kidneys from the youngster and transplant them into his four needy patients. The eighteen-year-old declines the offer, but the physician claims that it is the young man's Act Consequentialist ethical duty to cooperate because the health of four persons will be improved and the only health of one person (the youngster) will be worsened, so overall health will be maximized. Fortunately for himself, the young man is a Deontologist and says that the situation is an example of how it is sometimes wrong to do what will produce the best available outcome overall.

Is it possible to develop an impersonal principle for ranking overall states of affairs from best to worst such that each person should in all cases act so as to produce the highest-ranked state of affairs that he or she can produce? If so, what is that principle? If not, what are the Deontological constraints on human behavior and what is their rational basis? Are there viable alternatives to Consequentialism and Deontology as foundations for ethical rules? Specifically, how is the Code of Ethics and Conduct of AAFS justified? Is it merely a Legal Positivist product of formal organizational procedures or is it a product of rational deliberation that benefits AAFS members? These and other ethical issues will be

considered at the AAFS convention on "Ethical Practice in the Forensic Sciences" in New York City in February 1997.

References

- (1) Golding M. *Philosophy of law*, Englewood Cliffs, New Jersey: Prentice-Hall, 1975;24-9.
- (2) Golding M. *Philosophy of law*, Englewood Cliffs, New Jersey: Prentice-Hall, 1975;30-37.
- (3) Frankena W. *Ethics*, 2nd ed., Englewood Cliffs, New Jersey: Prentice-Hall, 1973;34-37.
- (4) Frankena W. *Ethics*, 2nd ed., Englewood Cliffs, New Jersey: Prentice Hall, 1973;16-7 and 23-33.
- (5) Scheffler S. *The rejection of consequentialism*, Oxford: Clarendon Press, 1982;1.
- (6) Scheffler S. *The rejection of consequentialism*, Oxford: Clarendon Press, 1982;2.
- (7) Fischer J, Ravizza M. *Ethics: problems and principles*, Orlando, Florida: Harcourt Brace Jovanovich, 1992;2-12.

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Bibliography

Introductory Works

- Frankena W. *Ethics*, Second Edition, Englewood Cliffs, New Jersey: Prentice-Hall, 1973.
Golding M. *Philosophy of Law*, Englewood Cliffs, New Jersey: Prentice-Hall, 1975.
Rachels J. *The Elements of Moral Philosophy*, Second Edition, New York: McGraw-Hill, 1993.

Intermediate and Classic Works

- Aristotle. *Nicomachean Ethics*, translated by Martin Ostwald, Indianapolis: Bobbs-Merrill, 1962.
Fischer J, Ravizza M. *Ethics: Problems and Principles*, Orlando, Florida: Harcourt Brace Jovanovich, 1992.
Johnson C. *Philosophy of Law*, New York:McMillan, 1993.
Kant I. *Foundations of the Metaphysics of Morals*, translated by Lewis Beck, Indianapolis: Bobbs-Merrill, 1959.
Mackie J. *Ethics*, Harmondsworth, England: Penguin Books, 1977.
Mill J. *On Liberty*, Indianapolis: Bobbs-Merrill, 1957.
Plato. *Euthyphro*, translated by Hugh Tredennick, in Plato, *The Last Days of Socrates*, Harmondsworth, England: Penguin Books revised edition 1959.
Singer P. *Practical Ethics*, New York: Cambridge University Press, 1979.

Relatively Advanced and Contemporary Works

- Hart H. *The Concept of Law*, Oxford: Clarendon Press, 1961.
Nagel T. *Mortal Questions*, Cambridge: Cambridge University Press, 1979.
Nagel T. *The View from Nowhere*, Oxford: Oxford University Press, 1986.
Rawls J. *A Theory of Justice*, Cambridge, Massachusetts: Harvard University Press, 1971.
Scheffler S. *The Rejection of Consequentialism: A Philosophical Investigation of the Considerations Underlying Rival Moral Conceptions*, Oxford: Clarendon Press, 1982.
Unger P. *Living High & Letting Die: Our Illusion of Innocence*, New York: Oxford University Press, 1996.
Williams B. *Ethics and the Limits of Philosophy*, Cambridge, Massachusetts: Harvard University Press, 1985.