

## SPECIAL COMMUNICATION

Richard Rosner,<sup>1</sup> M.D.

# Foundations of Ethical Practice in the Forensic Sciences

**ABSTRACT:** This paper presents an introduction to moral philosophy to assist forensic scientists in thinking more clearly about ethics. A four step model for the analysis of problems is provided. A logical model for reasoned arguments is offered. Two common objections to claims of objective foundations for ethics are considered and criticized. Two leading theories of objective foundations for ethics are considered and criticized. It is suggested that further research in ethics is needed to develop intellectual structures and tools adequate to resolve questions about what constitutes evidence in ethics and how to adjudicate between conflicting ethical theories. The task for forensic scientists is to develop interim ethical guidelines for practice despite the current absence of universally accepted objective foundations for ethics.

Ethical conduct by forensic scientists is a matter of public concern, as demonstrated by the attention the media gives to legal cases in which forensic testimony is crucial to the decision that must be made. Ethical conduct is also a matter of personal concern to each forensic scientist, in so far as each seeks not merely to be scientifically proficient, but to have self-respect based upon ethical application of that scientific proficiency. It is all too easy to delegate consideration of ethical matters to others, but each person is responsible for his own conduct. No one can trust that obeying the rules and customs of one's society, or of one's professional organization, will provide a shield from moral accountability. Ever since the Nazis were convicted of war crimes, the excuse that one was "only following orders" has been seen to be no excuse at all. The majority of forensic scientists have not had formal training in ethics and may benefit from an introduction to the field. Ethics has been defined as "a branch of philosophy; it is moral philosophy or philosophical thinking about morality, moral problems, and moral judgments" (1). The purpose of this discussion is to provide baseline levels of information on reasoning about ethics for forensic scientists, so as to permit them to think clearly about ethical issues, consider the foundations of ethical practice in the forensic sciences, and come to reasoned ethical decisions.

A general model (2,3) for the consideration of practical problems consists of four steps: First, what is the exact issue to be decided? It is important to be clear on the issue to be decided because different issues may be confused. What action is right is an ethical issue, but it is often confused with what is legal, what is most prudent, what conforms with community customs, what is the

most cost-effective, what is consistent with one's religion, what constitutes optimal professional service-delivery, or what reflects one's personal biases/preferences.

Second, what are the criteria that are to be used in deciding the issue? It is important to be clear on the criteria used to decide the issue because different sets of criteria are available to determine the same issue. Whether a particular act by a forensic scientist is right may depend on whether you are using the ethical criteria of The American Academy of Forensic Sciences, or The American Association for the Advancement of Science, or The American Medical Association, or those of some other organization. The ethical criteria of The American Academy of Forensic Sciences are set forth in its Bylaws, in Article II: Code of Ethics and Conduct. In its pertinent parts, the Code (4) reads: a. Every member of the American Academy of Forensic Sciences shall refrain from exercising professional or personal conduct adverse to the best interests and purposes of the Academy. b. 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. c. Every member of the AAFS shall refrain from providing any material misrepresentation of data upon which an expert opinion or conclusion is based. d. Every member of the AAFS shall refrain from issuing public statements which appear to represent the position of the Academy without specific authority first obtained from the Board of Directors.

Third, what are the data that are relevant to the criteria? Depending upon the organizational context within which one is operating, different data may be required for the different criteria.

Fourth, what is the reasoning process used to decide the issue? It frequently happens the someone is willing to state an ethical opinion but is unable to provide a reasoned argument to support that opinion. Many people are unfamiliar with formal logic and have difficulty with the process of logical argument. To address that problem, this general structure (5) is offered for logical reasoning in ethics: First, assert a general ethical premise, second, assert a factual data premise, and, third, draw a conclusion.

For example: First, the general ethical premise is that according to the Code of Ethics and Conduct of The American Academy of Forensic Sciences, ethical forensic scientists do not misrepresent their education, second, the factual data premise is that the forensic scientist named John Doe claimed to have a doctoral degree when in fact he only had a masters degree, and, third, the conclusion is

<sup>1</sup>Medical Director, Forensic Psychiatry Clinic, Bellevue Hospital, New York, NY, and Clinical Professor, Department of Psychiatry, School of Medicine, New York University, New York, NY; President, AAFS, 1996-1997.

that John Doe is not an ethical forensic scientist according to the AAFS ethical criteria.

In considering the AAFS Code of Ethics and Conduct, at least two reasonable questions may be raised: First, what is the moral justification, the ethical foundation, for each of the components of the Code? The issue of the justification of the AAFS Code of Ethics and Conduct addresses the authority of the Code. The Code should be more than the arbitrary outcome of a formal administrative process, more than merely the work-product of an AAFS committee that was ratified by the Board of Directors and the AAFS membership, more than organizationally ratified etiquette. The authority of the Code depends on the ethical foundations from which its components are derived. For example, one possible justification of the AAFS Code's requirements to refrain from providing any material misrepresentations of one's credentials and one's data might be that they derive from a commitment to justice, and that justice is intrinsically and absolutely good in itself. Another possible justification for those components of the AAFS Code might be that they derive from a commitment to doing what will produce the most overall human good, and that telling the truth about one's credentials and one's data will result in the greatest good for mankind.

Second, given the ethical premises upon which each of the components of the Code is based, are there additional components that should be included in the Code? For example, imagine for a moment that the moral foundations of the Code were ethical commitments to justice and maximizing overall human well-being. It might logically follow from such underlying ethical commitments that the AAFS Code would require additional components because there were more ways in which AAFS members could and should advance justice and maximize overall human well-being than are currently addressed in the Code. The matter of exactly what additional components may be required depends on clarifying the ethical foundations of the Code.

However, it is one thing to assert that the components of the AAFS Code of Ethics and Conduct might be morally grounded in one or another moral principle, and quite another thing to demonstrate the moral foundations of such principles themselves. Why should a commitment either to justice or a commitment to maximizing overall human well-being be regarded as good? If AAFS members are to consider the ultimate sources of moral justification of the Code of Ethics and Conduct, and whether additional components to the Code are required, they need to have a basic understanding of ethics, of what objective moral justifications may be available, and of the strengths and weaknesses of each of the leading foundations of ethical principles.

There are two popular schools of thought that deny that there is any need to explore objective foundations for ethics. Forensic scientists need to be aware of the weakness of their arguments both to avoid succumbing to the arguments themselves and to be able to constructively rebut the arguments when they are advanced by critics who question the ethics of forensic scientists.

The first of these criticisms is secular (6,7): Relying on ethnological findings from the social science of cultural anthropology, this school of thought holds that every society has different ethical standards, that there are no objective grounds for evaluating a society's ethical assertions, that every specific society's ethical principles are right as applied to that specific society. It argues that in ethics all opinions are of equal value, and that there are no objective foundations of ethical practice in anything, including the forensic sciences. The argument is flawed. The fact that different cultures have different ethical codes does not logically lead to

the conclusion that there are no objective grounds for evaluating ethical claims. One should be able to support one's ethical opinions with reasons and logical arguments. The best opinion is the one supported by the best reasons.

We do not believe that the existence of different assertions about material facts leads to the conclusion that there are no objective grounds for evaluating material assertions. For example, it may be a fact that one person believes the earth is flat, that another person believes the earth is round, and that each person has a Constitutional right to hold these incompatible beliefs about the shape of the earth, but it is *not* necessarily a fact that both beliefs are correct. We are quick to see that material beliefs must be supported by evidence. Similarly, the fact that two ethical assertions are incompatibly different does not necessarily mean that both are equally correct. When two incompatibly different ethical assertions are made, it is possible that one or the other or both are incorrect. We are not as quick to see that ethical assertions must be supported by evidence as we are to see that material assertions must be supported by evidence. For example, it may be a fact that a vegetarian might argue that eating animal flesh is unethical, that an omnivore might argue that eating animal flesh is ethical, and that each person has a Constitutional right to hold these incompatible beliefs about the dietary ethics, but it is *not* necessarily a fact that both beliefs are correct. The type of evidence needed to support an ethical belief may not be the same type of evidence as is needed to support a material belief. However, that does not mean that there is no evidence relevant to the evaluation of ethical beliefs. Examples of evidence cited in ethics are reasons, logical arguments, and ethical intuitions.

The second of these criticisms of the search for objective ethical foundations is religious (8,9). There is wide-spread misunderstanding about the fact that ethics and religion are two separate fields. Some people erroneously believe that there can be no ethics apart from religion, and that any ethics apart from religion is anti-religious. Forensic scientists may have to respond constructively to persons who assert that religion reveals the sole foundation of all ethical practice, including the ethical practice of the forensic sciences. According to one such argument, "morally right" or "good" *means* "commanded by God" and "morally wrong" or "bad" *means* "forbidden by God." Most thoughtful religious persons can be helped to see that this argument is flawed because it leads to a conclusion that they will find unacceptable: that God is arbitrary. If one means that conduct (such as telling the truth) is ethically right because God commands it, then the opposite conduct (such as telling lies) would be ethically right if God had commanded it. If telling the truth was not ethically right before God commanded it, then God had no more grounds for commanding telling the truth than He had for commanding telling lies; this leaves God's commands entirely arbitrary.

Forensic scientists should have basic familiarity with the two leading schools of ethical thought, in order to understand the strengths and weaknesses of each of them and to be informed consumers of their more refined variants. Arguments derived from these two schools of thought are often invoked when questions are raised about the ethics of forensic scientists providing evidence in criminal prosecutions that are likely to result in legal punishment of a defendant.

One school (10,11) argues that whether an action is right or wrong should be determined by its consequences; the right course of action is always the one that produces the best outcome. In this argument, usually the best outcome is understood to mean the outcome that maximizes human happiness. However, others have

argued that there are circumstances when choosing to produce the optimal consequences is not the right thing to do. For example, this school of thought has suggested that punishment of a defendant is ethically justified by the deterrent effect that punishment has on future criminal behaviors. The small unhappiness of the criminal that legal punishment causes is allegedly off-set by the greater happiness of society that will result from the of deterrence of crime. One weakness of this argument is that it permits deterrence by punishment of persons who merely are perceived to be guilty, but who are really innocent.

Sometimes the best outcome is not consistent with justice. Imagine that there are ten equally deserving persons and that you can give \$10 dollars to each of the ten people (a \$100 gift to the group of ten persons) or that you can give \$1 to nine people and \$92 to one person (a \$101 gift to the group of ten persons). Everything else being equal, the consequences of your second gift (\$101) are better than the consequences of your first gift (\$100), so it can be argued that it is ethically right for you to give the second gift of \$101 rather than the first gift of \$100. However, the distribution of the money in the second gift is grossly unjust; if all ten persons are equally deserving, there is no reason why one person should get \$92 and nine persons should get only \$1 each. Making ethical decisions solely on the basis of optimizing benefits can lead to injustices.

Sometimes the best outcome is not consistent with respect for individual rights. Imagine that a perfectly healthy young person happens to wander into the hospital emergency room seeking change for a dollar so as to make a telephone call. Imagine that at the same time two patients need kidney transplants, two patients need lung transplants and one person needs a heart transplant. The surgical team can save five lives by taking the needed organs from the youngster and transplanting them into the waiting patients. The healthy young person refuses to agree to give up his organs. Everything else being equal, preserving five lives is better than preserving one life. Nonetheless, it is inconsistent with respect for individual human rights to use the one unconsenting youngster to save the five patients. Making ethical decisions solely on the basis of optimizing benefits can lead to abuses of individual human rights.

The second school (12,13) argues that we should be guided by ethical principles that are intrinsically right, principles that are right not because they are conducive to some desired end (like maximizing happiness) but because they are absolutely right in themselves. Imagine that perfectly rational beings, desirous of protecting their own autonomy, must decide what ethical rules they should follow. What criteria would they use to determine their ethical rules? It has been argued that they would only countenance ethical rules that applied equally to all of them, that the master criterion for determining if a particular course of conduct is ethical would be to "Act as though the maxim of your action were by your will to become a universal law of nature" (14). If you want to do something, first figure out what maxim would apply to your potential action, and then consider if you would agree to have everyone guide their conduct in all circumstances by that maxim. If you would not agree to everyone being guided by that absolute and universal maxim, then you may not be guided by it either, and the action you are considering is not ethical. For example, this school of thought endorses the maxim that every violation of the criminal law must be punished; it argues that criminal acts inherently deserve punishment (regardless of whether punishment has any beneficial consequences either for the criminal or for society). One weakness of this argument is its inflexibility, it

disregards instances in which punishment is ineffective, too expensive, or unnecessary, and it leaves no room for mercy to temper justice.

It has been suggested that because all of the maxims that pass this scrutiny are absolute, that is they must be followed without exception, there are likely to be occasions when following the maxims have dreadful consequences. Imagine that you believe that telling the truth is a maxim that everyone should follow, that it is absolutely good in itself, how would you deal with the following situations? You are living in occupied Holland, secretly hiding Jews in your attic, the Nazi Gestapo comes to your door and asks if you know the whereabouts of any Jews. You are living in Virginia, secretly hiding run-away slaves en route to freedom in the North, an irate slave-owner comes to your door and asks if you know the whereabouts of his human property. Surely there is something wrong with an argument that says that truth-telling is an absolute ethical imperative, that obliges you to give Jews to the Gestapo and run-away slaves to their former masters.

It has also been suggested that absolute rules can be in conflict, that there occasions when following one absolute rule will be incompatible with following another absolute rule. Imagine that you believe that both keeping promises and preserving human life are maxims that everyone should follow, that they are absolutely good in themselves, how would you deal with the following situation? You borrow a rifle from your friend and promise to return it to him whenever he asks for it; your friend tells you that he wants the rifle back so that he can shoot and kill someone. If you give your friend the gun, you will obey the maxim of keeping your promises, but you will violate the maxim of preserving human life. If you refuse to give your friend the gun, you will violate the maxim of keeping your promises, but you will obey the maxim of preserving human life. You can not obey both maxims simultaneously in this situation. There is no ethical course of action for you to take when absolute maxims conflict.

While there are much more sophisticated versions of the two ethical theories that have been summarized here, and there are still more theories that offer completely different foundations for ethics, the fact remains that presently there is no consensus among ethicists as to which theory (if any) is correct. Rather, each ethical theory has its own partisans who defend ever-more-subtle versions of it and who find fault with the ever-more-subtle versions of all the other theories. Whenever so many theories thrive at the same time, whether in ethics or in any other field, it is because there is a lack of agreement about what should be accepted as probative evidence and/or a lack of evidence sufficient to prove which theories are correct. It is not that there are no foundations for the ethical practice of the forensic sciences. Rather, it is that there are a plethora of such foundations and no way at this time to determine which, if any of them, is correct. The consequence for forensic scientists is that we are obliged to have guidelines for ethical conduct that can not be justified by reference to a unitary, universally accepted underlying theory of ethical conduct.

To say that there is no unitary, universally accepted theory of ethical conduct at the present time, is entirely different from saying that there can never be such a theory. Ethics is not frozen in time. Ethical research is being conducted at the great universities around the world. Progress is continually being made both by discovering errors in prior ethical studies and by exploring new approaches to problems. We are familiar in the sciences with the possibility that some problems are relatively intractable given the material tools and theoretical structures that we currently have at our disposal. Such intractable scientific problems do not cause us to despair

that knowledge is impossible. Rather, we hope that additional tools and theories will permit scientific progress to be made in the future. The same holds in ethics: some ethical problems are relatively intractable given the intellectual tools and theoretical structures that we currently have at our disposal. Such intractable ethical problems need not cause us to despair that ethical knowledge is impossible. Rather, we hope that additional tools and theories will permit ethical progress to be made in the future.

The task for forensic scientists is to develop, implement and enforce ethical guidelines for practice in the absence of consensus about what constitutes evidence in ethical reasoning and in the absence of consensus regarding which ethical theory (if any) should serve as a foundation for those ethical guidelines. The task is difficult, but as Weinstock's rule reminds us: the difficult should never be confused with the impossible. The 49th annual meeting of The American Academy of Forensic Sciences is designed to provide an opportunity to make progress in this task. If the information and the problems presented at the meeting are stimulating and challenging, we will have accomplished our initial goal, which is (15) "to make the agony of decision-making so intense that it can only be resolved by thinking."

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#### Recommended Advanced Readings

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Additional information and reprint requests:  
 Richard Rosner, M.D.  
 Medical Director  
 Forensic Psychiatry Clinic  
 100 Centre St., Rm 124  
 New York, NY 10013