Forensic Psychiatry: The Need for Self-Regulation

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The shortcomings of forensic psychiatrists in the courtroom fall into two categories: failure to meet expected levels of performance in evaluation and testimony; and unethical behavior or deliberate misfeasance. Legal mechanisms for controlling the quality of testimony have been inadequate to the task. Courts rarely make use of their powers to screen expert witnesses with care; and *post-hoc* remedies, such as malpractice actions or charges of perjury, are almost unheard of. Psychiatry has been equally ineffective to date in responding to these problems, with educational programs usually reaching those least in need of help, and ethical codes either not addressing forensic issues or lacking powers of enforcement. Each class of problem calls for a distinct response. Inadequate performance in forensic work can be monitored and corrected by implementation of a program of peer review of forensic testimony. Preliminary attempts indicate the feasibility and utility of this effort. Unethical behavior, on the other hand, should be addressed by clear standards of forensic ethics, enforced by the relevant professional organizations. Forensic psychiatry bears the responsibility of cleaning its own house.

A well-known forensic psychiatrist changes her diagnosis of a defendant during the course of a murder trial and appears confused and unprepared on the stand.[1] Another psychiatrist is said to be notorious in his home state as an opinion for hire, someone to whom attorneys can turn for an assessment that will always match the needs of their case.[2] A third psychiatrist, almost a decade after he was censured for such behavior by the American Psychiatric Association, continues to testify to an absolute certainty about the future dangerousness of capital defendants whom he has never examined.[3]

These cases represent only a sampling from my files of recent pieces in the popular press on the purported misfeasance of forensic psychiatrists. The implication of these articles and others is that forensic psychiatrists as a group, albeit with some exceptions, are incompetent at best and venal at worst. Forensic psychiatrists, one might conclude from such reports, distort the adjudicatory process they purport to assist and represent one more mechanism by which those with wealth and influence can purchase the results they desire from the justice system.

Such a characterization, of course, is

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grossly unfair. The scope of the demand for forensic psychiatric expertise bespeaks the valuable functions it serves whenever the courts struggle with the impact of mental functioning on behavior. Determinations of competence to stand trial, criminal responsibility, and competence to waive trial-related rights, among others, all would be stymied without the particular knowledge that forensic experts bring to the process. In civil cases, assessments of disability, emotional harms, and decision-making and behavioral competences rely heavily on forensic expertise. Forensic psychiatrists clearly make an enormous contribution to the dispensing of justice in the courts.

How then should one respond to the reports of egregious behavior by forensic psychiatrists that seem to turn up so regularly in the lay press? One could, of course, shrug off these articles as sensationalistic, or chide the authors for failing to understand the role of psychiatrists in the courts. Or one could acknowledge that a few "bad apples" exist in the field, but argue that they represent so small a minority of practitioners that they deserve neither the attention they already have received nor any remedial efforts.

Responses such as these are appealing—since they each capture a facet of the truth—but ultimately unsatisfying. Critics, including distinguished jurists and psychiatrists themselves, have complained for years about the quality of the performance of many forensic psychiatrists. These critiques, which are harder to shake off than the headlines in the popular press, focus on the lack of conceptual clarity in psychiatrists' testimony, their unfamiliarity with the legal process, and the ease with which their personal opinions are made to pass for scientific conclusions.[4-8]

The studies that have attempted to assess the adequacy and appropriateness of forensic performance generally have been limited to discrete areas, such as competence to stand trial or criminal responsibility. They have focused heavily on evaluating the reliability and validity of experts' conclusions about the ultimate legal issues, rather than assessing the quality of forensic reports or testimony. Their results are mixed and confounded by methodologic problems.[9] It is difficult to apply their findings to the questions most often raised about forensic testimony, since the studies are usually conducted in contexts in which the pressures and incentives that may tend to compromise forensic testimony are absent.

The limited empirical data, though, are supplemented by every day experience. When forensic psychiatrists gather to talk "shop" with each other, the stories they most often trade are about the unfounded or otherwise questionable testimony they have heard from their colleagues, and about the purportedly self-serving motives that lie behind it. None of us can deny that we have encountered such testimony, and many of us can produce transcripts to back up our claims. Of course, caution is required in accepting all of these assertions at face value; they seem disproportionately to involve experts who were testi-

fying on the other side of the case from the person telling the story. But I have frequently enough seen transcripts of such testimony to believe that the "war stories" are accurate more often than we would like to think.

Forensic testimony that is either incompetently rendered or deliberately shaped to achieve a given end has obvious, as well as more subtle costs. To the extent that finders-of-fact rely on psychiatrists' testimony to reach their conclusions—which may happen less often than we believe—the inadequacies of the experts' performance directly impedes the rendering of justice. That is reason enough to be concerned with the problem. Beyond that, however, the general public's acquaintance with psychiatry comes to a large degree from the reports it sees of forensic testimony in court. When that testimony is incompetent or transparently dishonest, it should not be surprising if many people reach the conclusion that these characteristics are typical of psychiatrists in their other roles as well. Substantial damage is done to the profession as a whole, and to potential patients who may be dissuaded from seeking needed help by such experiences.

There is a paradox in this situation that ought not to escape our notice. The process that appears to be plagued by inadequate and misleading testimony is the very one on which society relies to ferret out the truth in its most difficult and most important disputes. It may serve us well to consider why the legal system is so vulnerable to poor testimony by experts.

Existing Mechanisms of Regulation: The Law

How do the courts attempt to control the quality of the expert testimony they receive? The initial screening mechanism they employ is the process of "qualifying" the potential witness as an expert in the area that his or her testimony will address. Although this could be a potent device for excluding unknowledgeable witnesses, in practice it is of little value. The courts' own lack of knowledge of the substantive fields at issue often leads them to focus more on credentials than on actual expertise. Since psychiatrists are presumed to be experts in the whole range of human behavior, the completion of residency training is often the key to qualification as a witness in almost any issue concerning mental functioning and human behavior. This may range from the characteristics of battered women, to the motives of serial killers, to the role of work-related stress in the induction of panic disorder.

Some courts, of course, are more meticulous than others about qualifying experts, and the best attorneys will often challenge an expert's credentials. Yet, despite suggestions that courts recognize that forensic psychiatry is really composed of several subdisciplines, each with its own unique body of knowledge,[10] it is still commonly the case that the qualification process is a coarse sieve for sorting knowledgeable experts from poor ones. Indeed, insofar as expert witnesses whose testimony has the least support in a body of scientific knowledge, or is most suspect of being swayed by

venal motives, may "specialize" in evaluations of particular legal problems or psychiatric disorders, they may be the most easily qualified experts of all.

Rules on admissibility of testimony are similarly limited in their ability to serve as a check on poorly grounded or openly deceptive opinions. The much discussed *Frye* rule, the best-known standard for the admissibility of expert testimony, merely requires that the technique on which the expert's deductions are based be generally accepted in the profession.[11] Literally interpreted, this means, for example, that any conclusion that an expert claims is derived from his knowledge of psychodynamic theory—a generally accepted basis for psychiatric formulations and treatment—could not be denied admission in court. Newer competitors of the *Frye* rule are even less demanding, omitting the requirement for general acceptance by the profession, and asking only that the testimony be relevant to the issue in question.[12]

The courts, moreover, are reluctant to enforce professional orthodoxies in setting standards of admissibility. The most notorious example of this came in *Barefoot v. Estelle*,[13] in which the U.S. Supreme Court rejected the contentions of organized psychiatry that predictions of long-term future dangerousness, especially when made without a direct examination of the defendant, were too unreliable to be admitted at capital sentencing hearings. Since the predictions, if they could be made, were clearly relevant to the proceedings, and given the assertions of some psychiatrists concerning their ability to make those predictions, the Court refused to declare such testimony—whose unreliability it acknowledged—constitutionally inadmissible.

The *Barefoot* court turned instead to that pillar of the adversary system, cross-examination, as its preferred tool for ensuring that undue weight is not given to dubious predictions of future dangerousness. Whether cross-examination will be effective in exposing unfounded assertions by expert witnesses, based either on incompetence or venality, depends almost entirely on the sophistication of and resources available to the attorney for the opposing party. The experience in the wake of *Barefoot* has not been encouraging. Attorneys for capital defendants, who are usually unfamiliar with psychiatric terminology and the literature on prediction of dangerousness, and who typically operate in a short time frame, with few resources for accessing experts of their own, have had little success in rebutting the testimony of psychiatrists who label their clients as certain to kill again.[3]

Strategic decisions may also limit the utility of cross-examination in debunking expert testimony. Attorneys may be unwilling to challenge experts directly, fearing the effort may simply underscore the importance of the expert testimony, or allow other facts injurious to their clients to emerge. Some psychiatric experts have gained the reputation of "holding back" damaging information to discourage active cross-examination.[3]

Finally, one might ask about the availability of *post-hoc* remedies, but these

too appear inadequate. Saks'[14] recent review of actions against forensic witnesses revealed that prosecutions for perjury are almost unheard of, except when witnesses have demonstrably misstated their credentials. Malpractice suits are rare, both because of immunity granted to experts examining persons for the courts and the frequent lack of a relationship between the party who is aggrieved by the testimony and the offending expert.[14]

One can only conclude that despite what might, at first glance, appear to be formidable legal barriers to the entry of questionable expert testimony, there are few real checks in the legal system on what forensic psychiatrists say in court. This helps to explain the state of affairs portrayed in the popular media. It also underscores the potential role of psychiatry itself in regulating forensic testimony. If there is to be effective control over expert witnesses, in the absence of meaningful reform by the courts, that control must be exercised by the profession itself. How well has psychiatry utilized the power of self-regulation to date?

Existing Mechanisms of Regulation: The Psychiatric Profession

If the law largely has failed in asserting some control over the quality of expert testimony reaching the courts, psychiatry has done little better. The profession's efforts can be grouped primarily into two areas: education and the promulgation of ethical codes.

Educational efforts have constituted the backbone of psychiatrists' attempts to improve the performance of their colleagues and themselves. The American Academy of Psychiatry and the Law was organized to promote ongoing education of forensic psychiatrists, and has done an excellent job of it, as this meeting bears witness. Forensic psychiatry fellowships have contributed a steady pool of well-trained forensic experts to be tapped by the legal system.[15] The American Board of Forensic Psychiatry, with its two-stage examination and certification process, based on an examination by one's peers, may represent the most ambitious effort to upgrade the performance of forensic psychiatrists.[16]

These programs and institutions cannot help but have had a salutary effect on the quality of forensic testimony. Yet, clearly they have not gone far enough. Only a minority of those psychiatrists who identify themselves as doing forensic work in the surveys of the American Psychiatric Association are members of AAPL, and only a fraction of AAPL members attend the organization's educational programs in any given year. A minority of AAPL members have completed fellowship programs, or are certified by the ABFP. And, experience would suggest, not fellowship training, membership in professional organizations, nor board certification guarantees competent and objective testimony.

Promulgation of ethical standards is the other means by which the profession has sought to assert some control over psychiatrists' performance in court. Although forensic testimony can reach the stage of inadequacy much before one could characterize it as unethical, a cat-

alogue of ethical rules at the least can establish the outer perimeters of acceptable behavior. Efforts in this area, however, have been partial and often stillborn.

The American Psychiatric Association's *Principles of Medical Ethics, with Annotations Especially Applicable to Psychiatry*[17] constitutes the major ethical code by which psychiatric practice is judged. Apart from rules so general as to create no boundaries at all (e.g., "A physician shall be dedicated to providing competent medical service with compassion and respect for human dignity."), the American Medical Association's *Principles* fail to speak directly to the forensic setting. APA's *Annotations* are not much better, since they are generated on an *ad hoc* basis, as an issue rises to the surface in the APA, rather than in a systematic effort to elaborate an ethical code.

Thus, although an explicit annotation reassures us that it is ethical for a psychiatrist to practice acupuncture, the obligations of a psychiatrist on the witness stand are left almost completely unaddressed. Indeed, the only pieces of guidance the *Annotations* provide for forensic psychiatrists are: 1) subjects of an evaluation performed for third parties must be informed in advance of the purpose of the exam and the lack of confidentiality; 2) psychiatrists are encouraged to consult to the courts, but must make clear that they do not speak for the profession as a whole; 3) psychiatrists cannot participate in a legally authorized execution; and 4) except to render treatment, a psychiatrist should not become involved with a defendant before he or she has access to legal counsel. A spottier set of guidelines for forensic practice cannot be imagined.

Recognizing this gap, the American Academy of Psychiatry and the Law has generated its own ethical guidelines.[18] The *Guidelines* are welcome, but they number only four and are sufficiently vague when it comes to potentially controversial matters that they offer little real guidance. The guideline on confidentiality goes little beyond the APA's statement. A second guideline urges that a subject's informed consent be obtained "when possible," without further specification. The last two guidelines endorse "honesty and striving for objectivity" and condemn claiming expertise one does not possess. One ought not to criticize these guidelines overmuch. They were developed by a long and intricate process of negotiation, and clearly constitute an improvement over the APA's *Annotations* standing alone. Nonetheless, it is clear that they provide only the barest outlines of an ethical code for forensic psychiatrists.

More to the point, the AAPL *Guidelines* suffer from a serious flaw. They are not enforceable. AAPL does not undertake ethical adjudications concerning its members, referring complainants instead to the APA. However, the APA's *Annotations*, which govern the organization's ethics proceedings, are all but bereft of principles applicable to forensic psychiatry. Thus, there is no functional mechanism within the profession for dealing with complaints, and those seeking redress are caught in a catch-22 be-

tween the organization that has the principles, but not the proceedings, and the organization that has the proceedings, but not the principles.

One can point to other problems with the ethics process: the time it takes (up to several years, depending on the jurisdiction) for complaints to be heard; the limited range of sanctions available to ethics committees (the maximum penalty is expulsion from the organization); and the absence of incentives to bring ethics complaints. But even were there to be solutions to these problems, the underlying lack of a systematic code of forensic ethics would stall most efforts to address unethical behavior.

Improving the Self-Regulation of Forensic Psychiatry

Problematic behavior by forensic psychiatrists falls into two categories, each of which requires its own set of remedies. The first category is rooted in the failure of psychiatric experts to meet expected levels of performance. Such failings may reflect deficiencies in conducting proper evaluations; drawing accurate conclusions, based on relevant psychiatric knowledge; or presenting conclusions in a manner that speaks to the legal questions before the courts. What is at issue here are matters of individual competence.

The usual means for addressing questions of competence are educational efforts targeted at the deficiencies identified. Here is where our current educational programs fall short. Lectures and seminars, no matter how excellent, cannot pinpoint problematic aspects of the performance of each practitioner and suggest remedies. That task requires review of the actual behavior of forensic psychiatrists. Medical education as a whole is based on this premise, with clinical teaching done at the bedside. Psychiatric education is similarly focused, as residents bring to their supervisors the notes or recordings of their sessions with patients for evaluation and critique.

Medicine in general has recognized the importance of feedback targeted at actual clinical performance, not just during training, but throughout one's professional lifetime. Review of performance by one's peers has become a foundation of medical quality control efforts. Peer review is now ubiquitous in organized medical settings, being mandated by accrediting bodies, including the JCAHO.[19] Peer review is not targeted at physicians who are believed to be incompetent, but extends to all practitioners, with the goal of helping every physician improve his or her clinical abilities.

I submit that the time has come for a similar program in forensic psychiatry. A number of national medical organizations, including the Council of Medical Specialty Societies and the American College of Physicians, have called for peer review of all medical expert testimony, although their concerns focus largely on testimony in malpractice cases.[20] To my knowledge, however, there is no organization that is conducting a systematic program of forensic peer review.

The Council on Psychiatry and Law

of the APA, in collaboration with the Commission on Judicial Action, has been exploring mechanisms for peer review. AAPL has established a similar committee that is just getting its efforts underway. I am hopeful that an account of the APA experience will soon be published elsewhere, but it may be useful to summarize it here. We found peer review of transcripts of testimony and forensic reports to be feasible and useful. Experienced psychiatrists who submitted their own testimony for review believe that they learned a good deal from the process, especially from the discussion among the reviewers themselves concerning alternative, and perhaps preferable, ways of presenting testimony.

The expected lack of agreement on controversial aspects of psychiatrists' functioning in court was not an obstacle to the review process. In part, this was because the lapses that were identified tended not to fall under the shadow of controversy, but lay in such areas as presentation of credentials, adequacy of evaluation, and scientific basis for conclusions. Comforting, as well, was the ability of all concerned to recognize that there may be a variety of acceptable views regarding forensic testimony (e.g., in respect to answering the ultimate question) and to accept as adequate testimony that fell within that spectrum.

I believe that the initial APA experience warrants further exploration to confirm these impressions and to develop models and procedures for peer review. Such exploration might be undertaken by professional societies at the national, regional, or local levels, or by psychiatric departments or facilities. Continuing education credit or other incentives might be developed to encourage participation by forensic psychiatrists. The key, I believe, is that peer review should represent a voluntary effort by forensic psychiatrists. We do not know enough yet about the efficacy and accuracy of the process to warrant calls for mandatory peer review. This should be seen as an educational effort, not a punitive enterprise.

The second category of problematic behavior by forensic psychiatrists transcends mere problems of competence and moves into the realm of unethical behavior and deliberate malfeasance. It is not easy to distinguish between deficiencies in competence and problems in ethics, since the differentiation requires some knowledge of the expert's motives, not merely the expert's behavior. Furthermore, the boundaries can become blurred: forensic psychiatrists who undertake tasks for which they are totally unqualified, or who fail to make any effort to become cognizant of the relevant scientific literature, at some point cross the line into unethical behavior.

In such situations, educational approaches are insufficient. If forensic psychiatry is to regulate itself effectively, some form of punitive sanctions are required. But at present, in the absence of clear standards of forensic ethics, it is almost impossible to apply such sanctions. I believe that we are ready, as a profession, to take the next step in self-regulation: the development of a com-

prehensive set of ethical standards for forensic psychiatrists.

The difficulty in achieving consensus in an effort of this sort should not be underestimated. On the other hand, there are reasons for optimism. A recent survey of forensic psychiatrists revealed substantial degrees of agreement on many ethical issues, including some of the most troublesome.[21] Moreover, forensic psychology recently has gone through a process of generating its own ethical principles, with good results.[22] To avoid the problems inherent in the APA *Annotations*, however, a code for forensic psychiatrists should be based on a fundamental set of principles, rather than merely responding on an *ad hoc* basis to perceived problems in the current forensic scene. Since forensic psychiatry differs in many important respects from clinical psychiatry, not least of which involves the application of ethical principles such as beneficence and truth-telling, I believe that a code of ethics for forensic psychiatry would best be formulated *de novo*, rather than as an off-shoot of the APA *Annotations*, and that the job would best be done by an organization of forensic psychiatrists, rather than by the APA itself.

Conclusion

To the extent that we have been waiting for the legal system to address the problems that arise with forensic evaluation and testimony, we have been waiting in vain. Courts and legislatures have neither done so, nor offered evidence of an intention to do so. The initiative lies in our hands. Fortunately, there are mechanisms available to us to help reduce problems of inadequate (or openly incompetent) expert testimony, and to respond to lapses of ethics by forensic psychiatrists. The two means suggested here, peer review of forensic testimony and the elaboration of a code of ethics for forensic psychiatrists, are by no means exclusive remedies, nor are they likely to be panaceas for all the ethical problems that beset forensic psychiatry. But I believe they represent two of the more promising possibilities for meaningful self-regulation of forensic psychiatry.

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