

**Special Article:  
Ethics in Forensic  
Psychiatry—An  
Annotated Bibliography  
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1. Pollack S: *Forensic Psychiatry in Criminal Law*. Los Angeles: University of Southern California, 1974.

Pollack S: Principles of forensic psychiatry for psychiatric-legal opinion-making. pp 129–68. Reprinted from *Wecht CH Legal Medicine Annual*. New York: Appleton-Century-Crofts, 1971.

In this seminal article, Seymour Pollack discusses his approach to forensic psychiatry. He defines forensic psychiatry as the application of psychiatry to evaluations for legal purposes with consultation concerned primarily with the ends of the legal system, justice, rather than the therapeutic objectives of the medical system. The other subdivision of psychiatry and law is community psychiatry, in which all psychiatric involvements are directed toward the goals of psychiatry (i.e., helping the patient and influenced by the value system of community mental health). Pollack presents his principle of legal dominance and the primacy of legal objectives and definitions, and the primacy of social policy emanating from the community in determining threshold levels for legally significant behavior and as guidelines for psychiatric-legal opinions. He defines reasonable medical certainty as opinions about

the medical condition with a professionally acceptable level of conviction in accordance with the current level of medical sophistication. It is a higher standard than required for treatment purposes. He claims this standard is necessary for psychiatric legal opinion-making. He distinguishes this standard from the principle of reasonable probability, the level of confidence required in making judgments relating clinical psychiatric material to the legal question. Reasonable probability requires a substantial degree of confidence, but is not the same as the legal concept of burden of proof. He advocates impartiality and overcoming “therapeutic bias” when evaluations for legal purposes are performed.

2. Diamond BL: The fallacy of the impartial expert, in *The Psychiatrist in the Courtroom: Selected Papers of Bernard L. Diamond, M.D.* Edited by Quen J. Hillsdale, NJ: Analytic Press, 1994, pp. 221–32. Reprinted from *Arch Crim Psychodynamics* 3:221–6, 1959.

Bernard Diamond expresses his view that impartiality and objectivity are impossible to achieve in forensic psychiatry and should not be claimed. All experts have biases. However, even in the unlikely possibility that an expert actually has no initial bias, the adversary process will make the expert identify with “his” side and strive to win or at least to justify his opinion and professional competence.

3. Appelbaum PS: The parable of the forensic psychiatrist. *Int J Law Psychiatry* 13:249–59, 1990.

Paul Appelbaum presents his thesis that beneficence and nonmaleficence have primacy in the doctor-patient relationship but do not attain primacy for the forensic psychiatrist. He claims the APA Annotations neglect forensic psychiatry and that is why AAPL developed its Ethical Guidelines. He criticizes the 1984 APA Task Force report on the Role of Psychiatry in the Sentencing Process for not biting the bullet when it tried to balance beneficence and non-maleficence with justice, by failing to recognize the harm a forensic evaluation and testimony can cause. Potential for harm is what gives the opinion its value. He proposes that psychiatrists operate outside the medical framework when they enter the forensic realm and need a different ethical comprehensive theory. Other *valid* ends such as truthfulness and respect for persons would in his opinion be a more valid beginning for the “forensicist.”

4. Rosner R, Weinstock R (eds): *Ethical Practice in Psychiatry and the Law*. New York: Plenum, 1990.

- a. Stone AA: The ethics of forensic psychiatry: a view from the ivory tower. pp 3–17. Reprinted from Stone AA: *Law, Psychiatry, and Morality*. Washington, DC: APA Press, 1984.

Alan Stone presents a major intellectual challenge to forensic

psychiatry to justify its ethics. He discusses the boundary problem of what knowledge we have that the courts should listen to, the problem of twisting justice and fairness to help a patient, the problem of deceiving a patient to achieve justice and fairness, and the danger of prostituting the profession as psychiatrists alternately are seduced and assaulted by the adversary system. He discusses the intellectual philosophical problems of the fact-value distinction and the tendency to present values as scientific facts; the free will vs determinism problem, and the use of psychodynamic testimony as an excuse; and the deconstruction of the self and how to deal with dissociation and the unconscious. Also pertinent are the mind-brain problem as well as the relevance of any interaction for responsibility, and the chasm between science and morality. Stone then criticizes Watson’s good clinical practice standard, Roth’s scientific standard, and Appelbaum’s standard of truth. He criticizes the lack of ethical principles in forensic psychiatry by which to judge its practice. Stone suggests the adversarial standard as providing a possible solution but only if courtroom candor included a statement to the jury of the reality that experts are hired to make the best case possible for their side. Stone states that it is an illusion that a forensic psychiatrist can solve the

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- ethical problems by either adjusting to the adversary system or remaining true to one's calling as a physician.
- b. Rosner R: Forensic psychiatry: a subspecialty. pp 19–30.
- Richard Rosner reviews the problems forensic psychiatry initially faced in being recognized as a subspecialty. He discusses unresolved philosophical issues in ethics and claims it is no surprise that forensic psychiatry is often caught on the horns of ethical dilemmas, since philosophy has not resolved conflicts such as between deontological and consequentialist approaches. He advocates clarification of disagreements in forensic psychiatry as well as the issues which cause the disagreements, but points out that disagreements occur in all branches of medicine. He proposes expanding the scientific and clinical bases of our work as well as striving for increased support for board certification and training.
- c. Weinstock R, Leong GB, Silva JA: The role of traditional medical ethics in forensic psychiatry. pp 31–51.
- Robert Weinstock and coauthors review the history of Hippocratic medical ethics. They discuss the artificiality of distinctions between ethics and morals, since both terms are often used interchangeably. The real question is which issues achieve sufficient support such that organizations wish to have an ethical position about them. Individual practitioners can have ethical opinions about what they think is acceptable ethically, either personally or professionally, but these are not necessarily accepted by the entire professional community. Ethical surveys of forensic psychiatrists show most wish to consider psychiatric and medical ethics as relevant to forensic psychiatric practice. Rather than failing to bite the bullet, Weinstock proposes that traditional Hippocratic medical ethics remain a factor in forensic psychiatric functioning. Usually, they would be outweighed by truth and justice when conflicts arise. However, in extreme situations, traditional medical ethics, even though secondary, can outweigh other factors.
- d. Hundert EM: Competing medical and legal ethical values: balancing problems of the forensic psychiatrist. pp 53–72.
- Edward Hundert describes ethical dilemmas as caused by competing ethical values with no perfect solution. He describes the need to balance ethical values by weighing the arguments on one side against those on the other. The effort is especially challenging when there is the need to balance ethical values of law with those of medicine. He applies his approach to the ethi-

cal dilemmas of the forensic psychiatrists. Basic values will often collide, such as when the deontological end of justice leads to a decrease in the teleological end of welfare.

- e. Diamond BL: The psychiatric expert witness: honest advocate or “hired gun”? pp 75–84.

Bernard Diamond presents his view that honest advocacy is an appropriate role for the forensic psychiatrist. He distinguishes this role from the “hired gun,” insofar as the “hired gun” is dishonest. The “hired gun” knowingly gives false testimony, usually for monetary gain, but sometimes to further a personal crusade or belief. Diamond believes the expert should care about the outcome of a case and should participate only in cases consonant with the expert’s values. At the very least, the expert should be an advocate for the scientific status of psychiatry and against the misuse of psychiatric evidence. Diamond opposes the sole use of court appointed experts. He recommends that professional organizations set clearer standards for the boundaries of legitimate psychiatric expertise, and if need be, violators should be disciplined.

- f. Weinstein HC: The impartial expert: myth or reality? pp 117–28.

Henry Weinstein favors the retention of “impartiality” as an ideal, despite Bernard Diamond’s

rejection of both impartiality and objectivity as realistic or as ideals. Weinstein focuses primarily on impartiality and the need by self-analysis for psychiatrists to be alert to biases and prejudices, and to strive for impartiality. He supports “objectivity” as having “scientific” inferences. AAPL’s Ethical Guidelines recently replaced “impartiality” with “honesty” and retained “objectivity” as an ideal.

- g. Miller RD: Ethical issues involved in the dual role of treater and evaluator. pp 129–50.

Robert Miller discusses the AAPL Ethical Guidelines that state treating psychiatrists should generally avoid agreeing to be an expert witness or perform an evaluation of a patient for legal purposes except in minor matters. There is concern about problems of double agency. Miller states that such a separation may not always be possible in the public sector when both roles are required. Even in the private sector, child custody conflicts or alleged psychic trauma may require therapist testimony. Problems may be greater in the civil area since rights are usually clearer in the criminal context. Although double agency can be problematical, sometimes, combination of both roles can be advantageous when the state’s and patient’s interests coincide such as in civil commitment or for reasons of continuity

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of care. Nevertheless, it is often ideal to separate the roles of treator and evaluator as much as possible.

- h. Foot P: Ethics and the death penalty: participation by forensic psychiatrists in capital trials. pp 207–17.

Phillipa Foot criticizes Appelbaum's separation of the "forensicist" role, since it would justify any role, even that of a forensicist executioner. Doctors facilitating death penalties differ from military doctors, who do not aim at the death of soldiers they treat. Foot believes it is appropriate for the psychiatric profession to address the death penalty problem, since psychiatrists, unlike ordinary citizens, belong to a profession regularly asked to utilize its skills as part of the process. She also opposes the withdrawal of psychiatrists who oppose the death penalty, since the field would be left to those who support it. She supports honest participation of those opposed, even if occasionally it results in a recommendation that in essence supports a death penalty. Foot states that can happen from any attempt to do "good." Even if psychiatric professional opposition to the death penalty were "ineffective," since others would do it, she suggests that it could have an effect on public conscience and that it is ethical to do the "right" thing

even if it has no utilitarian consequence.

- 5. Bernard L: Diamond Memorial Issue of the AAPL Bulletin. Vol 20, No. 2, 1992.

- a. Diamond BL: The forensic psychiatrist consultant versus activist in legal doctrine. pp 119–32.

Bernard Diamond presents his concerns about the portrayal of forensic psychiatry in the media and even in *Science*, in which only two articles, both critical, were published. He believes the proper role for a forensic psychiatrist is to fulfill a fiducial function for the law. The forensic psychiatrist should agree with the law's ends in a case and not do whatever asked much as treating psychiatrists do not do everything a patient asks. Of course, the legal system has the right of informed consent, but we should not offer our expertise blindly or merely sell our expertise and become a technician or "hired gun." It also is possible to influence the law to be more humanitarian and consistent with medical values through testimony, the appellate process, or *ad limine* hearings about the reliability of evidence.

- b. Katz J: "The fallacy of the impartial expert" revisited. pp 141–52.

Jay Katz supports Bernard Diamond's view of the fallacy of the impartial expert. He recommends the elimination of the need to strive for objectivity in AAPL's

Ethical Guidelines, since in his opinion objectivity is an impossible task. He would replace it with a need for “disciplined subjectivity.” Unlike Diamond, Katz also would recommend that psychiatrists not testify about the ultimate legal issue. Additionally, he recommends the need to acknowledge ignorance, doubt, and uncertainty about an opinion. Katz considers the *Ake v. Oklahoma* Supreme Court decision as support for Diamond’s view on the expert witness as advocate.

- c. Appelbaum PS: Forensic psychiatry: the need for self-regulation. pp 153–62.

Legal mechanisms for controlling the quality of testimony have been inadequate. Little use is made of the power of courts to screen experts and *post hoc* remedies such as malpractice actions or perjury charges are rare. Paul Appelbaum believes the APA does not address ethical issues in forensic psychiatry, and AAPL’s Ethical Guidelines additionally do not have enforcement mechanisms. Peer review of psychiatric testimony can serve a monitoring and remedial role. However, forensic psychiatry needs to clean its own house with clear enforceable standards of forensic ethics. Appelbaum believes forensic psychiatry needs a set of ethical principles formulated *de novo* and based on “truth” constrained by fairness,

rather than as an offshoot of APA annotations or on an *ad hoc* basis in response to current problems.

- d. Miller RD: Professional versus personal ethics: method for system reform. pp 163–77.

Robert Miller argues that the lack of consensus on controversial ethical issues is likely to impede implementation and enforcement of meaningful ethical codes. Neither psychiatry nor psychology has provided courts with effective guidelines about the limits of expertise which might assist them in limiting inappropriate pronouncements. He advocates attempting to educate the courts and legislatures through writings, testimony, and interdisciplinary teaching, since these methods are more likely to be effective for the foreseeable future.

- e. Weinstock R, Leong GB, Silva JA: The death penalty and Bernard Diamond’s approach to forensic psychiatry. pp 197–210.

Bernard Diamond’s approach is discussed. It includes testifying only for the defense in criminal cases, as well as total honesty and total disclosure. Although few forensic psychiatrists agree with this policy for all criminal cases, the paper suggests that this policy be considered in death penalty cases. It could be used by those opposed to the death penalty for personal ethical reasons or because of their view of what should be ethical

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professionally. Also, it is possible to adhere to this policy in a specific case in which the psychiatrist considers the death penalty excessive and therefore immoral. It is argued that bias in capital cases is not a persuasive reason to withdraw from involvement if the psychiatrist gives an honest opinion.

6. Rappeport J: Ethics and forensic psychiatry, in *Psychiatric Ethics* (ed 2). Edited by Block S, Chodoff P. New York: Oxford University Press, 1991, pp 391–443.

Jonas Rappeport reviews the origin of the word “forensic” from the Latin *forum*. He then discusses a number of ethical problems that arise in forensic psychiatric practice. These areas are opinions without examination, confidentiality, the death penalty, malpractice, personal injury, forensic hospital practice, and the forensic psychiatrist in the prison.

7. Gutheil TG, Bursztajn H, Brodsky A, Alexander V: *Decision Making in Psychiatry and the Law*. Baltimore: Williams and Wilkins, 1991.

The authors break down decisions into their component parts and examine ethics in the context of making actual practical decisions. Analysis distinguishes medical, moral, legal, and policy factors and distinguishes the ethical and nonethical. Through decision analysis ethical assumptions and biases can be identified, values articulated, and ethical decisions evaluated. It requires successful identification of the reasons and consid-

erations motivating the decisions. Sometimes the morally right action is contrary to the legally mandated one. Ethical actions also can deter malpractice suits. The book uses decision analysis to evaluate a number of dilemmas in psychiatry and the law.

8. Weinstock R, Leong GB, Silva JA: Opinions by AAPL forensic psychiatrists on controversial ethical guidelines: a survey. *Bull Am Acad Psychiatry Law* 19:237–48, 1991.

This paper reviews previous surveys of forensic psychiatrists that have shown the “hired gun” to be the ethical problem of most concern and a divided opinion about the ethics of contributing in any way to a death penalty verdict. In this survey of AAPL members, strong support was found for guidelines in which medical and psychiatric ethics remain a consideration when performing a forensic evaluation; the forensic psychiatrist should not distort data; sex is unethical with an evaluatee so long as the case is in litigation; the forensic psychiatrist should strive to clarify the legal issues before expressing an opinion on them; and support for the ethical prohibition against performing prearrestment examinations. Other supported ethical guidelines were: to forbid opinions in death penalty cases without a personal examination; the responsibility of a forensic psychiatrist to both the evaluatee and society no matter who does the hiring. The results are interpreted as most consistent with the belief that

forensic psychiatrists are aware of double agency responsibilities to both an evaluatee and society, with traditional Hippocratic values still remaining as one consideration. They are not consistent with forensic psychiatry having an ethics unrelated to psychiatry and medicine.

9. American Psychiatric Association: Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry. Washington, DC: APA Press, 1993.

APA Annotations to the AMA Principles of Medical Ethics. Many of the Annotations are relevant to psychiatry and the law and forensic psychiatry. These guidelines are enforced by the local district branches of the APA.

10. American Psychiatric Association: Opinions of the Ethics Committee on the Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry. Washington, DC: APA Press, 1993.

Opinions by the APA Ethics Committee developed in response to specific questions. Many of the Opinions are relevant to psychiatry and the law and forensic psychiatry.

11. American Medical Association: Code of Medical Ethics Annotated Current Opinions of the Council on Ethical and Judicial Affairs. Chicago: AMA, 1994.

Opinions by the AMA Council with references. Some are relevant to forensic psychiatry.

12. Halleck SL: The ethical dilemmas of forensic psychiatry: a utilitarian approach. Bull Am Acad Psychiatry Law 12:279–88, 1984.

Seymour Halleck suggests that ethical problems can be solved by reducing harm and increasing benefits. Double agent roles are problematical but can provide advantages. Harm can come to a patient but apparent duplicity can lead to distrust of all psychiatry. Institutional psychiatric practice can be least problematical if (1) the psychiatrist is clear about what kind of evaluation is requested; (2) the information desired is of a variety that psychiatric clinical skills can provide (not task-oriented capacities, as for example, driving); (3) the report is not a *de facto* mandate for an administrative decision; and (4) patients are provided with thorough information as to the process and potential outcome of the interview. The criteria are applied to civil commitment of dangerous patients. Halleck suggests that changes be negotiated between psychiatrists and the reporting agency or, if necessary, that legislative change be attempted. To the extent possible, forensic psychiatrists in social and forensic roles should try to create the least harm and do the most good.

13. Bloche MG: Psychiatry, capital punishment and the purpose of medicine. Int J Law Psychiatry 16:301–57, 1993.

M. Gregg Bloche discusses the problems of psychiatric participation



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in the death penalty. Bloche discusses the problem of extra-clinical harm that can come from clinical involvement. Bloche criticizes Appelbaum's standard of truth, because society and the legal system look to forensic psychiatrists because of their physicianhood and not merely because of technical excellence. An explanation to an evaluatee of the purpose of a forensic evaluation does not negate culturally determined expectations of medical fidelity. He suggests that harm to individuals can undermine confidence in the profession's therapeutic potential. Bloche suggests practitioners can satisfy public expectations of objectivity so long as the harms do not rise to a level undermining the credibility of medicine as a helping profession. He argues that the moral awkwardness of forensic psychiatry becomes untenable when the death penalty looms closely. He believes competence to be executed evaluations strain conflicts beyond the breaking point and should be ethically unacceptable.

14. Pellegrino ED: Societal duty and moral complicity: the physician's dilemma of divided loyalty. *Int J Law Psychiatry* 16:371–91, 1993.

Physician-ethicist Edmund Pellegrino believes moral distance from harm is established by the fact that the physician is acting in the interest of his or her patient. He believes the failure of the medical profession to oppose the use of medical knowledge for maleficent purposes is to indict

the whole profession and assign it complicity in harm along with the physician involved. In his opinion, organizations should take positions on ethical issues, since physicians acting in concert are much less vulnerable than individuals acting alone. To accept a role as a morally neutral technicians is to violate the whole idea of medical ethics and is analogous to the position of physicians in oppressive political regimes. Pellegrino believes that there are state functions in which physicians never should participate, since they are in direct controversion of the purpose of medicine and public expectation of beneficence, such as involuntary treatment of an insane inmate to restore sanity in order to be executed. There is no perceptible moral distance between this role and the act of killing, in his opinion. Pellegrino advocates a moral authority of medicine arising from the nature of medical activity (helping, healing, caring) that provides for medical norms transcending social, political, or cultural whims. He accepts some double agency roles to permit society the benefits of medical knowledge. He sees no problem with certification of competence to stand trial or insanity evaluations, even if the outcome is unfavorable, since the outcome cannot be known before the evaluation. He states that the moral integrity of our profession and the individual physician is determined by how we calculate moral distance and how we determine what should be done,

never done, or done with caution and under prescribed conditions.

15. Stone AA: Revisiting the parable: truth without consequences. *Int J Law Psychiatry* 17:79–97, 1994.

Alan Stone approves of Appelbaum's recommendation to separate forensic evaluation and treatment roles. However, he believes Appelbaum's forensic ethics based on "truth" does not address the problem of the skilled psychiatric interviewer engendering inappropriate trust in a person being evaluated, regardless of any warning given. He approves of peer review of psychiatric testimony, but believes that it does not solve the problem of the unethical forensic psychiatrist who does not wish remedial education.

16. American Academy of Psychiatry and the Law: Ethical Guidelines (revised). Bloomfield, CT: AAPL, 1991.

AAPL provides advisory ethical guidelines that can be used by the APA, since the guidelines are supplemental and not contradictory to those

of the APA. The APA has the enforcement mechanism. There are sections on confidentiality, consent, honesty, and striving for objectivity, qualifications, and procedures for handling complaints of unethical conduct.

17. Appelbaum PS, Gutheil TG: *Clinical Handbook of Psychiatry and the Law* (ed 2). Baltimore: Williams and Wilkins, 1991.

This text reviews basic concepts in psychiatry and the law, as well as forensic psychiatry, with an emphasis on the ethical problems that arise in these contexts.

18. Rosner R (ed): *Principles and Practice of Forensic Psychiatry*. New York: Chapman and Hall, 1994.

This text is designed for the practitioner of forensic psychiatry, forensic psychiatry fellows, and those studying for the new examination for added qualifications in forensic psychiatry. There is substantial coverage of ethical topics in forensic psychiatry.