

Prearraignment Forensic Evaluations: Toward a New Policy

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Prearraignment forensic evaluations are forensic psychiatric evaluations performed on a suspect soon after his or her arrest. In the guise of ethics, the committee members who originated this code have imposed apparently personal and political views on all members of respective professional organizations in order to circumvent rulings of the judiciary, including the U.S. Supreme Court. The prohibition against prearraignment evaluations represents a misapplication of physician-as-healer-based medical ethics—in which the core principle is the physician's beneficence to the patient—to the forensic arena, where no physician-patient relationship exists and healing is not the purpose. The ethical code prohibiting prearraignment evaluations reflects misguided paternalism and political bias, as well as being in direct conflict with current law. Whether or not prearraignment evaluations should be permitted is primarily a Fifth and Sixth Constitutional Amendment issue more than a traditional medical-ethical one. Ethics and the law, when both are examined carefully, suggest prearraignment evaluations are proper when performed responsibly.

With regard to any person charged with criminal acts, ethical considerations preclude forensic evaluation prior to access to, or availability of, legal counsel. The only exception is an examination for the purpose of rendering emergency medical care and treatment.¹

A physician shall respect the rights of patients, of colleagues, and of other health professionals, and shall safeguard patient confidence within the constraints of the law . . . Ethical considerations in medical practice preclude the psychi-

atric evaluation of any person charged with criminal acts prior to access to, or availability of, legal counsel. The only exception is the rendering of care to the person for the sole purpose of medical treatment.²

Prearraignment forensic evaluations are commonly referred to as "prearraignment examinations," "prearraignment psychiatric examinations," or "prear-

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This article takes a strong stance in support of a position that many, if not most, forensic psychiatrists may find unacceptable. Nevertheless, it is a carefully written document that deserves discussion in a public forum. The Editor has deliberately refrained from editing the contents of this paper, since this could involve trying to impose his beliefs and those of the reviewers upon the authors. Hopefully, readers who have strong negative or positive opinions about this article will state their views in the *Letters to the Editor* section of the *Bulletin*.

raignment evaluations.” Prearraignment evaluations are forensic psychiatric evaluations performed on a suspect soon after his or her arrest. Prearraignment evaluations are generally requested by the district attorney or law enforcement for suspects in whom it is anticipated that “state-of-mind” defenses will be raised. Typically, the suspect has not conferred with an attorney, since the evaluation is performed usually within hours of the arrest. Prearraignment evaluations may enhance information regarding the suspect’s emotional state at the time of the crime as compared with postarraignment evaluations because: (1) the suspect is being evaluated in close temporal proximity to the crime; (2) licit and illicit drug effects may still be present; (3) in a psychotic or severely depressed suspect, the mental state of the person at the time of the crime has not been affected by treatment; (4) the suspect may be more candid and less guarded about his or her state of mind and behavior, since he or she is not focused on his or her defense; (5) the suspect may not have developed emotional defenses (e.g., denial, repression) that might obscure the suspect’s state of mind at the time of the crime; and (6) the suspect has not had the opportunity to be “coached” by the defense attorney to malingering symptoms on which to base a psychiatric defense.

The preamble of the American Medical Association’s (AMA’s) Principles of Medical Ethics states: “The medical profession has long subscribed to a body of ethical statements developed primarily for the benefit of the patient.”³ The results

of a recent survey suggest that the majority of practicing forensic psychiatrists view prearraignment evaluations as unethical and want to retain the current prohibition against prearraignment evaluations.⁴ Nevertheless, attempts to comport the ethics of forensic psychiatry with that of traditional medical ethics have resulted in contradictory and logically inconsistent policies. The prohibition against prearraignment evaluations represents a misapplication of physician-as-healer-based medical ethics—in which the core principle is the physician’s beneficence to the patient—to the forensic arena, where no physician-patient relationship exists and healing is not the purpose. What is not widely appreciated is that forensic psychiatry, by definition, inherently requires a different ethical framework than that governing the conventional physician-patient relationship, since the forensic psychiatrist is serving valid ends distinct from beneficence to the “patient.” Furthermore, the ethical codes prohibiting prearraignment evaluations are not in keeping with the law, which has evolved considerably since this rule was first drafted by the American Psychiatric Association (APA) in 1981. In this context, whether or not prearraignment evaluations should be permitted is primarily a Fifth and Sixth Constitutional Amendment issue more than a traditional medical ethics one.

Ethics

Ethics are principles of right and wrong governing the conduct of a group. Foot⁵ views ethical questions and moral questions as synonymous. Moral principles

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are “the ‘equations’ we claim to use when forced to measure incommensurable values against one another.”⁶ Labeling psychiatric prearraignment evaluations as unethical conceals a sectarian view of what is ethical. This pedagogy, arguably, usurps individual moral values to that of the professional association’s hierarchy via the threat of discipline and sanctions over an issue in which there are a wide range of ethically acceptable alternatives. This imposition of ethical dogma is antithetic to the spirit of our profession and the autonomy of its members. Hundert⁷ observed that, “When we apply the model of ethical problem solving to the ethical dilemmas we face daily as physicians, the most striking quality that stands out is just how personal the process is.”

Furthermore, the ethical precept, as written, of the AMA, APA, and American Academy of Psychiatry and the Law (AAPL) “[w]ith regard to any person charged with criminal acts . . .” is ambiguous since there is often a significant interval between the time of the arrest and the time the person is formally charged with a crime. A defendant is not considered “charged with criminal acts” in the legal sense until formal charges have been filed, usually in the form of a criminal complaint, and after the suspect has been arraigned in court on those charges. Only upon being charged does a defendant’s Sixth Amendment right to counsel attach. Furthermore, the phrase “access to or availability of counsel” is not synonymous with having conferred with an attorney. All defendants have been guaranteed “access to or availability of counsel” as a constitutional right as enumerated in

the Sixth Amendment and affirmed by the U.S. Supreme Court in *Gideon v. Wainwright*.⁸

Despite the ambiguity of the ethical codes of the AMA, APA, and AAPL, as written, based on a 1981 *amicus curiae* brief submitted by the APA, and on a review of the literature, it appears that many psychiatrists interpret the code to mean a prohibition against psychiatric evaluations for legal purposes performed soon after the suspect is arrested but prior to the suspect having conferred with counsel.⁹ These ethical guidelines are singular in that they are the only ones in which *timing* of the forensic evaluation (i.e., attachment of counsel—a purely legal and constitutional issue) defines the psychiatrist’s behavior as either ethical or unethical.

History of the Ethical Precept

An ethical dilemma is spawned by conflicting values, and its resolution requires a “balancing of values.”¹⁰ Yet the values and rationale behind this policy, and the ethical principles being invoked by the ethics committee that promulgated this rule, are less than self-evident. It appears that no complete records of the deliberations of either the ethics committees of the APA or AAPL exist to provide insight into the basis for the prohibition. Furthermore, no explanations are provided for the ethical tenet that forms the basis of this policy, or why prearraignment evaluations are viewed as both a lack of “respect” for, and a violation of, the “rights” of individuals, as implied in Section 4 of the AMA ethical guidelines. Although a recently published prominent forensic

psychiatry textbook¹¹ reiterates this prohibition against psychiatrists performing prearrestment evaluations in the ethical guidelines chapter, again there is no discussion of the rationale behind this policy.

The history of this code was delineated in an article written 20 years ago by Goldzband.¹² After two local defense attorneys complained to the San Diego Psychiatric Society regarding two San Diego psychiatrists performing this once common practice of prearrestment psychiatric evaluations, the society formed a task force in 1974, headed by a local forensic psychiatrist, to consider the ethics of prearrestment evaluations. The task force concluded that the issue was informed consent, and drafted a position paper and a model consent form to be signed by the suspect at the beginning of the interview. Copies of the position paper were sent to the APA Committee on Psychiatry and the Law, "as a needed step in a neglected direction." Excerpts from the minutes from the APA committee meeting are as follows:

... any examination and evaluation for prosecutory purposes of a suspect before arraignment and before counsel has been obtained raises issues as to the constitutional rights and privileges against self-incrimination and the ethical and professional roles of the psychiatrists. The problem must be looked at from both of these perspectives and is especially acute because of the character of the relationship between the accused and the examining psychiatrist. From the standpoint of the privilege against self-incrimination as a practical matter the suspect may be in more urgent need of counsel before participating in the psychiatric examination and evaluation. From the standpoint of the ethics and his professional role, the psychiatrist, by participation in such an exam-

ination and evaluation, engages in a potential conflict of interest which clearly should be avoided ...¹³

In September 1975, the APA Area VI Council rejected as too restrictive a resolution deeming prearrestment evaluations to be unethical. Goldzband describes the politics behind the genesis of the ethical code prohibiting prearrestment evaluations. According to Goldzband, when the "activist-oriented members" of the APA Committee on Psychiatry and the Law were "incensed that no civil liberties lawyers had emerged in San Diego to fight this battle [against prearrestment evaluations by defense attorneys]" and that "there was little chance of fighting this battle on legal grounds ... [t]he district branch began the process whereby a resolution could be presented for action to the APA Committee on Ethics in hopes that the situation could best be handled by presenting it as an ethical problem to be acted upon nationally."¹⁴

In 1981 the APA, based on the recommendations of its own ethics committee, adopted the present aforementioned language as its code. It is revealing that Miller¹⁵ was unsuccessful in his attempts to obtain the minutes from this meeting "because of the time the research [by the APA] would have taken," and he wrote that the Chair of the Committee at the time did not recall the discussions. It is surprising that there is little record of the rationale for this rule, especially given the controversy it has generated and the lack of consensus by forensic psychiatrists over its interpretation and adoption.

Because of the ambiguity of the APA's

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ethical code, the San Diego Psychiatric Society, in conjunction with a well-respected attorney who specializes in mental health law, developed its own protocol governing prearraignment evaluations. In a March 1981 memorandum to the Council of the San Diego Psychiatric Society, attorney Root wrote:

While the thrust behind the principal [*sic*] [of the ethical code] may be to prevent prearraignment psychiatric evaluations until the defendant has actually consulted with an attorney, the literal meaning of the annotation is not that clear. Until the annotation more distinctly prohibits such interviews in the absence of counsel, the San Diego Psychiatric Society should interpret the 'prior to access to or availability of legal counsel' as the acceptance of retained or appointed counsel or a waiver of such right to counsel after a proper warning of the effects of such a waiver.¹⁶

A protocol was adopted by the San Diego Psychiatric Society requiring the suspect both to have previously waived his or her *Miranda* (Fifth Amendment) rights and to have confessed, to avoid placing the psychiatrist in a position of using his status as a physician to obtain a confession that might otherwise not have been elicited.¹⁶

The APA in an *amicus curiae* brief submitted in October 1981 defined "access to counsel" to mean "that the defendant has not only had access to counsel, but that counsel knows of the examination—including its time and place and the identity of the examining psychiatrist—and has agreed that the examination may proceed." However, the ethical codes of the APA, AMA, and AAPL have never been revised to incorporate this narrow and legally unprecedented interpretation of the phrase "access to counsel" in the

amicus brief despite having had 15 years to do so. The most recent edition of the APA booklet on the ethics committee's opinions is silent on this issue.¹⁷

The American Bar Association (ABA), in 1986 following the APA's position stated in the *amicus curiae* brief, adopted in its *Criminal Justice Mental Health Standards*¹⁸ the more politically "liberal" policy prohibiting all prearraignment evaluations. The ABA, citing the Goldzband article and the APA's ethical guidelines, concluded that *Miranda* warnings alone are insufficient to protect defendants from the dangers of revealing damaging information without understanding what they are doing.¹⁸ Interestingly, the ABA's *Criminal Justice Mental Health Standards* acknowledges that the issue is not one of an informed consent "doctor-patient" relationship: "When professionals function as either evaluators or consultants, they establish no therapeutic or rehabilitative relationship with defendants and thus owe them no loyalty."¹⁹

On January 3, 1996, Dr. Ornish wrote the Chair of the APA Ethics Committee requesting clarification of the meaning and application of section 4, number 13, of the APA's ethical code. On March 28, 1996, he received this nonresponsive answer from the Ethics Committee:

At its February meeting, the APA Ethics Committee considered your request concerning Section 4, Annotation 13 of The Principles of Medical Ethics With Annotations Especially Applicable To Psychiatry . . . It is the view of the Ethics Committee that Section 4, Annotation 13 will continue to be interpreted to apply on [*sic*] prearraignment evaluations and that no revision of the annotation is necessary at this time.²⁰

A recent question and answer column by the AAPL ethics committee²¹ in the *AAPL Newsletter* deemed prearrestment evaluations unethical because: "The psychiatrist cannot obtain adequate informed consent under these circumstances . . ." However, a caveat at the beginning of the column advised that the opinion of the AAPL Committee on Ethics was not voted on and endorsed by the entire AAPL membership unlike the "Ethical Guidelines for the Practice of Forensic Psychiatry": "We offer no assurances that the APA, which enforces ethical behavior, will agree with our analysis."²¹

California Rulings

In 1992, the California Supreme Court held in *People v. McPeters* that the trial court committed no error in admitting evidence in the penalty phase of a murder case by permitting a prosecution psychiatrist to testify that the defendant had refused to cooperate in a court-ordered mental examination. The California Supreme Court ruled that: "By tendering his mental condition as an issue in the penalty phase, defendant waived his Fifth and Sixth Amendment rights to the extent necessary to permit a proper examination of that condition . . . Any other result would give an unfair tactical advantage to defendants, who could, with impunity, present mental defenses at the penalty phase, secure in the assurance they could not be rebutted by expert testimony based on actual psychiatric examinations. Obviously this would permit and, indeed, encourage spurious mental illness defenses."²²

The California Supreme Court held in

the following two cases that a psychiatric evaluation of an arrestee conducted prior to arraignment does *not* impinge upon the defendant's Fifth Amendment rights where the defendant has freely waived those rights after being given the proper *Miranda* warnings: in *People v. Bonillas*, in 1989, the California Supreme Court rejected a proposed rule wherein the Sixth Amendment right to appointed counsel would attach when a defendant is faced with the decision of whether to submit to a prearrestment psychiatric evaluation.²³ The California Supreme Court permitted the use of a correctional psychiatrist's testimony in a capital sentencing hearing in which the correctional psychiatrist had examined the defendant Bonillas one week after the crime, but prior to counsel. The Court also rejected Bonillas' claim that his own decision to submit to a psychiatric evaluation performed by a correctional psychiatrist was so complex that the advice of counsel was necessary to give truly informed consent:

[D]efendant urges this court to establish a new rule of law that the right to appointed counsel attaches at the prearrestment stage because the question whether to submit, prearrestment, to a psychiatric evaluation is so complex and subtle that no defendant can be expected to knowingly consent without advice of counsel. Defendant acknowledges the novelty of his request to establish a new right to counsel prearrestment. . .

Defendant's claim must fail in any event . . . [D]efendant was repeatedly *Mirandized* and thus informed of his right to counsel and freely waived his rights before the psychiatric interview was conducted. Although defendant urges the decision whether to submit to such an interview is too complex for a defendant to make without advice of counsel, the issue is precisely the same as in an investigative interrogation:

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that defendant's statements may be used against him. A *Miranda* advisement is sufficient.²³

Also in *Bonillas*, the California Supreme Court rejected a broadening of the U.S. Supreme Court landmark case *Estelle v. Smith*²⁴ to extend to prearrest evaluations. The court ruled that, in contrast to *Estelle*, *Bonillas* was not yet represented by counsel and had numerous times waived the right to the appointment of counsel, and again was advised of and waived his constitutional rights, including the right to counsel, immediately before submitting to the prearrest evaluation.

The California Supreme Court also held in *People v. Anderson* in 1990 that a confession made by a murder suspect during a forensic psychiatrist's prearrest evaluation was not made in violation of the defendant's Fifth Amendment rights, since the defendant voluntarily waived his rights.²⁵ And in *People v. Danis*, the California Court of Appeal affirmed that an order appointing a psychiatrist to examine a defendant in a criminal action does not in itself violate the defendant's Fifth Amendment rights, since he may remain silent and refuse to cooperate.²⁶

U.S. Supreme Court Rulings

Notwithstanding the respective positions of the AMA, the APA, and the AAPL, the issue of self-incrimination in an individual incompetent to waive Fifth Amendment *Miranda* rights prior to the appointment of counsel, as well as issues of "free will" and confession, were subsequently addressed in the landmark case *Colorado v. Connelly* in 1986.²⁷ Francis

Connelly approached a Denver policeman on August 18, 1983, and spontaneously confessed that he had murdered someone and wanted to talk about it. Connelly was immediately advised of his *Miranda* rights and proceeded to confess to a murder. A homicide detective was called, who again advised Connelly of his rights, and Connelly answered that he had come all the way from Boston to Denver to confess to the murder of a young woman. Throughout this episode, the detective perceived no indication whatsoever that Connelly was suffering from any form of mental illness.

Connelly was held overnight—the following morning he manifested gross symptoms of a psychosis, complaining of command hallucinations telling him to come to Denver and confess to the murder. A psychiatrist employed by the state hospital diagnosed Connelly with chronic schizophrenia. The Colorado trial court suppressed Connelly's confession made to the Denver policeman, because his statements were "involuntary" and not a product of his "free will." The Colorado Supreme Court affirmed and opined that the proper test was whether the statements were "the product of a rational intellect and a free will." In this seminal case, the U.S. Supreme Court reversed the lower court's ruling:

We hold that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment. We also conclude that the taking of respondent's statements, and their admission into evidence, constitute no violation of that Clause.²⁸

The majority viewed Connelly's competency to waive his *Miranda* rights as irrelevant:

We think that the Supreme Court of Colorado erred in importing into this area of constitutional law notions of 'free will' that have no place there . . . The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion . . . Indeed, the Fifth Amendment privilege is not concerned with moral and psychological pressures to confess emanating from sources other than official coercion.²⁹

The issues in *Connelly v. Colorado* overlap with those of prearrestment evaluations (i.e., voluntary confession, self-incrimination, and competency to waive *Miranda* rights in the mentally ill prior to consultation with an attorney). While the U.S. Supreme Court did not specifically address the issue of prearrestment evaluations in *Connelly v. Colorado*, it is instructive as to the rationale behind protecting a defendant's right against self-incrimination. *Connelly* is relevant to the issue of the ethics of prearrestment evaluations, since preventing self-incrimination in the mentally ill, who may not understand the role of a forensic psychiatrist, appears to be the fundamental rationale behind the current ethical rule prohibiting prearrestment evaluation. In *Connelly*, the majority opinion of the U.S. Supreme Court is that preventing state-sponsored coercion, not self-incrimination in the incompetent, is the precept behind the Fifth Amendment.

Ethical Issues

Subsequent authors of articles in a relatively small body of literature on this topic have attempted retrospectively to

enumerate the concerns underlying prearrestment evaluations. The most common arguments are as follows, each immediately followed by an analysis.

1. Prearrestment evaluations violate defendants' constitutional rights and privileges against self-incrimination.³⁰ Defendants for whom prosecutors request forensic evaluations are likely to have mental disorders that prevent them from understanding *Miranda* rights.³¹

The APA's *amicus curiae* brief acknowledges that a defense attorney's approval for a prearrestment examination is probably not "constitutionally compelled." The necessity for the aforementioned "procedural safeguards" is recommended "as a matter of professional ethics and sound medical practice, both to assure that the rights of the defendants are adequately safeguarded and to define more clearly the function and responsibility of the examining psychiatrist." The argument that "sound medical practice" precludes prearrestment evaluations is specious, since an axiom of the same brief is that: "The defendant in such examinations is not the psychiatrist's patient, subject to the various protections that the doctor-patient relationship normally implies."

The U.S. Supreme Court, not psychiatrists, are empowered by our Constitution to interpret and rule on constitutional issues. Legal rights are created by legislators and interpreted by the courts, not ethics committees. As discussed above, the U.S. Supreme Court in the landmark case *Colorado v. Connelly* addressed this issue of waiver of *Miranda* rights for a

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psychotic individual. As mentioned, Chief Justice Rehnquist writes for the majority: "Indeed, the Fifth Amendment privilege is not concerned with 'moral and psychological pressures to confess emanating from sources other than official coercion'."²⁹

Psychiatrists should be vigilant in preventing human rights abuses by psychiatrists and political misuse of psychiatry by governments, such as those seen in the former Soviet Union. Yet it seems audacious for psychiatrists, who generally have little training in jurisprudence, to designate themselves as the interpreter of the American constitutional rights of suspects, presupposing that these committee-appointed psychiatrists have a greater wisdom than the Supreme Court Justices on legal and constitutional issues. The "Catch-22" is that prearraignment evaluations have the potential to be most exculpatory for those severely psychotic individuals who are least able to understand their rights.

2. Regardless of the rulings made by the U.S. Supreme Court, psychiatrists should have a "higher" ethical standard than the law.

The point has been raised that the Superior Court of the State of California had ruled that there was no legal reason that prearraignment evaluations could not be performed, so long as the rights of a suspect were clearly explained to him by the examiner. However, on January 6, 1975, Dr. Stanley Portnow, the Chairman of the APA Committee on Psychiatry and the Law, wrote to Dr. Goldzband: "The recent *Wyatt v. Stickney*³² case concerning the right to treatment relates to the point

in question. Psychiatrists can no longer sit back and permit things to happen which we know are morally incorrect and expect to be excused by a Nuremberg-type defense, i.e., 'I was following orders . . .'"³³

The comparison between physicians who perform prearraignment evaluations and those charged in the Nuremberg trials trivializes the enormity of the Nazi crimes by physicians who participated in the forced experimentation and torture of prisoners. Such hyperbole is inflammatory and precludes a sober discussion of the issues. Ironically, Portnow condemns the "following orders" defense, while apparently demanding blind obedience to the APA dicta.

The values of the legal profession are best described as different rather than "higher" than medicine by nature of the goals of the respective professions (e.g., determining culpability versus providing medical care). While the point is well taken that behavior that is legal is not necessarily ethical, the "higher standard" argument confuses medical ethics issues with issues of law, of which Fifth and Sixth Amendment concerns are of the latter. In light of recent rulings and current and past law, the positions of the AMA, AAPL, APA, and ABA might better be reevaluated and reformulated by these organizations.

3. Prearraignment evaluations have a "potential for abuse" and violate the moral principle of "First, do no harm" (*Primum non nocere*) from the Hippocratic oath.

Primum non nocere is not actually from the Hippocratic oath, although the ancient Greek principle dates back to

Hippocrates. The oath does implore physicians to apply “. . . measure for the benefit of the sick . . .” and to protect the sick from “harm and injustice.”⁴³ Although *primum non nocere* may seem unambiguous, there are numerous ethical issues being sharply debated today among physicians, such as the removal of feeding tubes, performing abortions, rationing of medical care, and physician-assisted suicide, that are at loggerheads with the Hippocratic oath. One criticism of the Hippocratic oath is that it is anachronistic, and a literal and simplistic interpretation of this tenet would stifle ethical debate and moral evolution. For example, does “do no harm” mean to keep terminally patients alive at all costs, or to relieve their suffering through euthanasia or by ceasing aggressive medical care?

There is no mention of “do no harm” in the APA’s ethical guidelines, since apparently removing feeding tubes or disconnecting respirators could be construed as “doing harm” in a literal sense. Nevertheless, Rappeport³⁴ concluded that prearrestment evaluations are unethical because of the “potential for abuse.” The only potential abuses Rappeport cites are: (1) the “prosecutor using the psychiatrist’s humanitarian role” in order to obtain evidence against the defendant; and (2) whether or not the defendant was informed of his or her “right not to speak to the doctor.” Rappeport, unwittingly, in this same chapter makes a better case for the potential *benefits* of prearrestment evaluations for both the defendant and society than for the potential for harm from prearrestment evaluations.

Why is this [practice of prearrestment evaluations] such a problem? A person is arrested, read his rights, and is interrogated. In walks the friendly doctor and sits down to talk to the person in order to discover his mental state now and at the time of the crime. The individual having been interrogated (an experience which probably would make most people anxious) may wish to share his innermost feelings with the psychiatrists; it may be to his benefit to reveal what is going on in his mind now and what was going on in his mind at the time of the crime. Such information may be most useful in a defence [*sic*] of not guilty by reason of insanity . . . By delay, the defendant could be coached to fabricate a psychosis. On the other hand, he might recover completely from an acute psychosis and have genuine amnesia for the episode, thus seriously impairing his ability to convince the court of his insanity at the time of the crime. Had he been examined earlier, the psychiatrist could have reported on his condition at the time of arrest. While prearrestment examination before the defendant has obtained a lawyer, may benefit the defendant, and also the public by assisting prosecution, its potential for abuse is so great that it cannot be condoned.

What these other “great” abuse potentials are, however, were never enumerated by Rappeport. Curiously, in the same chapter, Rappeport argues that the dictum “First do no harm” does not apply, “[i]f the latter [the defendant] is not considered mentally ill, and if the psychiatrist is consultant to a lawyer or to the court, and not a physician helping a patient . . .” conditions which have the same abuse potentials. It seems logically inconsistent to contend that postarrestment psychiatric evaluations that have the potential for “abuse and harm” are ethical, but prearrestment evaluations (with the same potentials for abuse) are not. Furthermore, this reasoning leads to another “Catch-22” in that only defendants “not consid-

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ered mentally ill" would be eligible for forensic psychiatric evaluations.

The interpretation of "do no harm" is equally ambiguous when applied to forensic psychiatry. Diamond³⁵ views forensic psychiatrists as having a "fiduciary responsibility" to the patient that should not be violated for the legal system. However, the flaw in this argument is the assumption that the relationship with the forensic psychiatrist is a doctor-patient one, which it is not. Kermani³⁶ makes the point that if "do no harm" is the prohibition against psychiatrists participating in death penalty cases, then ethical consistency would require enjoinder from physicians participating in *any* legal process that enables punishment, capital or not. Kermani concludes that a decision to participate in legal proceedings in conflict with current ethical guidelines "... should be based on well-considered personal principles and moral values, rather than blind obedience to professional code of ethics or institutional job descriptions."³⁷

Appelbaum and Gutheil apparently begged the question another way and concluded:

Can clinicians (especially psychiatrists, whose ethics derive from a long tradition of medical adherence to the principle of *primum non nocere*—first do no harm) legitimately testify in ways that may cause harm to the people they have assessed? Some clinicians answer this question in the negative and shun all forensic work as a result. But this seems too extreme a conclusion. In their *clinical roles*, [emphasis added] clinicians in fact must seek the best interests of the people they evaluate and treat. Their functioning in the forensic setting, however, is guided by a different set of principles, emphasizing the pursuit of truth, within the

limits of fairness. In this non-clinical task, it may still be obligatory to avoid needless harm to subjects, but harm resulting from the disclosure of information in proper legal settings is not ethically problematic.³⁸

This ethical controversy is due, in part, to the blurring of boundaries by psychiatrists in confusing their role as healer in treating a patient as compared with the role as a forensic evaluator in advancing truth. Appelbaum³⁹ sharply delimits these two roles and writes, "Psychiatrists operate outside the medical framework when they enter the forensic realm, and the ethical principles by which their behavior is justified are simply not the same." Appelbaum makes the point that we do not expect physicians to act solely out of beneficence toward others outside of the physician-patient treatment relationship and that there is no reason for such expectations in the evaluator-evaluee relationship.⁴⁰ Even the APA's *amicus curiae* brief recognized "the fact that psychiatrists performing such [sanity or competency] examinations are acting outside their traditional therapeutic role."

Psychiatrists who believe prearraignment evaluations are unethical have further failed to make the distinction between harm to the defendant versus harm to the defendant's case. A defendant may reveal incriminating information to a psychiatrist previously nondisclosed to anyone else. This distinction may be a semantic one, since punishment, often in the form of incarceration, is a common outcome, if the jury relies on the forensic psychiatrist's testimony to convict. Nevertheless, in the absence of coercion, non-coerced, self-incriminating statements

made to a psychiatrist during a prearrest evaluation fall within the purview of the Fifth Amendment as previously discussed.

Indisputably, since *coercive* interviews by a psychiatrist have the potential to harm not only the accused's case but also the individual as well, and are a variant of torture, such evaluations are unethical. Since case law explicitly prohibits *coercive* interrogation methods by police, no conflict exists between ethical and legal principles on this issue. For example, in *Blackburn v. Alabama*,⁴¹ the court specifically condemned police activity that "wrings a confession out of an accused against his will." In this case, the police kept Blackburn, who had a history of mental illness known to the police, in a tiny room intermittently filled with police officers for eight to nine hours of sustained interrogation. In *Townsend v. Sain*,⁴² the Supreme Court held that the confession obtained by police officers who had given Townsend "truth serum" was involuntary. Relying on these two cases, the U.S. Supreme Court held in *Colorado v. Connelly* that "... while mental condition is surely relevant to an individual's susceptibility to police coercion, mere examination of the confessor's state of mind can never conclude the due process inquiry."²⁹ Again, coercion is the test for the violation of Fifth Amendment rights, not the defendant's competency to waive this right.

4. Psychiatrists are especially good at eliciting information; many mentally ill defendants believe that forensic psychiatrists are evaluating them to help

them, not to elicit evidence for criminal prosecutions.⁴³

There is neither published scientific data nor anecdotal evidence indicating that psychiatrists are more skilled at eliciting information as compared with law enforcement personnel. A thorough forensic psychiatric evaluation requires a very detailed history, with the potential to *either* harm or help the evaluatee's case. The potential for obtaining evidence harmful to the defendant's case is present in both prearrest and postarrest evaluations, although the gathering of evidence is neither the purpose nor the premise of a forensic psychiatric evaluation. This argument confuses the boundaries between the role of a forensic psychiatrist as compared with that of a defense lawyer. While it can be argued that access to counsel provides a safeguard against self-incrimination, the goal of a forensic evaluation is a search for truth, in contrast to the role of defense counsel who is expected to be a zealous advocate for his or her client in the hopes of minimizing culpability and the likelihood of conviction.

Since defense counsel is rarely present during any psychiatric evaluation, if it were inherently unethical for a psychiatrist to gather self-incriminatory evidence, then ethical consistency would require that the psychiatrist immediately terminate any postarrest forensic evaluation at the first hint of disclosure by the defendant of damaging information to his or her case. Obviously, this would make any meaningful examination impossible to conduct, as well as potentially harm viable insanity defenses. While it is

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true that there is a potential for a suspect to misconstrue the relationship as one of beneficence, despite admonishments by the forensic psychiatrist, the state has a compelling interest in understanding the state of mind of the defendant at the time of the crime, both because of the prosecutor's ethical obligation not to "overcharge" for crimes as well as to serve the interests of justice.⁴⁴

5. Forensic psychiatrists are serving as "double agents."⁴⁵

Szasz⁴⁶ described the "double role" of the "institutional psychiatrist" as the conflict of interest between simultaneously being a therapist to the patient and protecting society from the patient. Stone considers both pre- and postarrestment forensic psychiatric evaluations unethical, not only because of the Hippocratic oath, but more so because of the "double agent problem."⁴⁵

Stone writes that despite admonishments the interview may be harmful to the accused's case, the rapport that develops during the interview becomes a "therapeutic encounter."⁴⁵ In this context, testimony serving the justice system, but adverse to the case of the accused, becomes a betrayal of the "doctor-patient" relationship. In the parable described by Stone of the black sergeant court-martialed for theft, it is not surprising that his experience of the ensuing relationship seemed more like a doctor-patient one, since Stone spent "more than ten hours" interviewing the suspect. One wonders if a briefer, more focused interview to determine whether the accused suffered from a psychiatric disorder, rather than the lengthy, psychodynamically oriented

one performed by Stone, might have kept the boundaries more delineated. Stone is correct that psychiatrists should generally avoid intermingling the roles of forensic evaluator and treater, and this can be easily accomplished through appropriate referrals.

Although Stone eschews all forensic work, repudiating moral relativism,^{47a} his analysis makes no mention of the resulting miscarriages of justice and harm to individuals if all psychiatrists were to emulate him.⁴⁷ What of the "harm" done to individuals when psychiatric expert testimony is absent from the judicial system (e.g., a mother convicted and sentenced to life imprisonment for killing her baby while in a post partum psychosis)?

In contrast to Stone, regarding psychiatrists in the courtroom, Judge Bazelon takes a different view in support of forensic psychiatry: "Total retreat [by forensic psychiatrists], to my mind, is neither a desirable nor a viable option. Psychiatry today, more than ever before, offers critical insights for our understanding of the mind and human behavior . . . Unquestionably, inclusion of the psychiatric perspective often enhances the sophistication with which such public and private decisions may be reached."⁴⁸ Halleck proposes that "a more temperate approach is that each double-agent role should be evaluated on its own merits" in terms of benefits and possible harms, and he suggests guidelines to maximize benefits and minimize harm.⁴⁹

6. Prearrestment evaluations are a potential conflict of interest.⁵⁰

While it is true that there is a potential conflict of interest by a prosecution-re-

tained forensic psychiatrist (i.e., to slant one's opinion maximizing the chances of conviction), forensic psychiatry is replete with conflicts of interest, since it is the exception in both civil and criminal matters that a neutral party (i.e., the court) pays for the forensic evaluation. The same conflict of interest exists for the defense-retained psychiatric expert, since future referrals may not be forthcoming if the defense expert does not provide testimony helpful to the defendant's case. Furthermore, conflicts of interest are omnipresent at *all* stages of both criminal and civil forensic evaluations, since there is the potential for expert bias at any stage of the proceedings in favor of the party retaining him or her.

Performing forensic psychiatric evaluations as a profession despite conflicts of interest does not, *per se*, render prearrestment evaluations unethical; if so, ethical consistency would require that a psychiatrist should be enjoined from participating in *any* aspect of criminal (or civil) proceedings in which he or she is a paid consultant.

7. Because district attorneys are responsible for requesting the great majority of prearrestment evaluations, they can be expected to choose evaluators biased in favor of the prosecution.⁵¹

Implied in this "bias in favor of the prosecution" argument is that the defendants' need to confer with counsel is to safeguard against biased or "hired gun" forensic consultants. The bias argument is based on the unsubstantiated notion that experts who are "prosecution oriented" are more likely to be requested by the

district attorney. By this rationale, a prearrestment evaluation performed by a psychiatrist selected by a "neutral" party would be ethical. Therefore, it is not the prearrestment evaluation that is inherently unethical, but bias, distortion of opinion, and the possibility of unscrupulousness by the forensic psychiatrist. However, this potential source of bias (and conflict of interest) are invariably highlighted under cross-examination for the jury, who as the trier of fact must weigh the credibility of the experts and may choose to give little or no weight to experts whose opinions are consistently one-sided. Yet, the ethical prohibition against prearrestment evaluations presupposes little faith in our judicial system to discern the truth. These issues of veracity and candor by an expert witness are addressed in other AAPL ethical guidelines that require adhering to "principles of honesty and striving for objectivity."

8. Prearrestment evaluations violate informed consent.

The informed consent argument confuses issues of law with medical ethics, since the doctrine of informed consent was originally a legal one defined by the courts, and only subsequently incorporated into physicians' canons. The premise of informed consent rests on identifying the potential risks of treatment (or lack of treatment) as ruled in *Truman v. Thomas*, a case in which a physician was found liable for having failed to inform his patient that foregoing a Papanicolaou test could lead to fatal cervical cancer.⁵² In *Natanson v. Kline*, the questions raised were: "What is the extent of a physician's duty to confide

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in his patient where the physician suggests or recommends a particular method of treatment? What duty is there upon him to explain the nature and probable consequences of that treatment to the patient? To what extent should he disclose the existence and nature of the risks inherent in treatment?"⁵³ In *Canterbury v. Spence*, the U.S. Court of Appeals ruled that: "A reasonable revelation . . . is as much a matter of the physician's duty. It is a duty to warn of the dangers lurking in the proposed treatment . . . surely a facet of due care. It is, too, a duty to impart information which the patient has every right to expect."⁵⁴

Since no treatment is being rendered by the forensic psychiatrist performing a prearraignment evaluation, this is a misapplication of informed consent doctrine. Nevertheless, the forensic psychiatrist performing a prearraignment evaluation is in a position to recommend a referral for treatment to a penal psychiatrist as well as suicide precautions when indicated.

The informed consent argument against prearraignment evaluations also confuses comprehension of *Miranda* rights by a defendant, an issue addressed in *Colorado v. Connelly*, with patient competency to understand the risks and benefits of medical treatment. Furthermore, the AAPL ethical guidelines state that the need for informed consent would be satisfied with a court order: "If the evaluatee is not competent to give consent, substituted consent is obtained in accordance with the laws of the jurisdiction."¹

9. Prearraignment evaluations violate privilege and confidentiality.

Privilege, also known as "testimonial privilege," is the patient's right to bar a psychiatrist from testifying based on information that the psychiatrist learned from contact with him. Confidentiality refers to the psychiatrist's obligation to keep material revealed in a professional relationship from being disclosed to a third party. Privilege applies only in legal settings and its scope is strictly limited by law. There are numerous exceptions to privilege and confidentiality, including: criminal cases in many jurisdictions; the patient-litigant exception in cases in which the patient-plaintiff has initiated litigation to which his or her mental status is an issue; dangerousness to others; and court-ordered examinations for purposes of determining competency to stand trial or to assess criminal responsibility. Nevertheless, with the exception of grossly psychotic or intoxicated individuals, the majority of evaluatees in prearraignment evaluations understand that the interview is not confidential. While the relationship between a forensic psychiatrist and an evaluatee does not fall within the traditional ambit of doctor-patient, the forensic psychiatrist should endeavor to protect the evaluatee's confidences from unnecessary disclosure. Where the requirements of the law are explicit, one may have to publicly divulge those confidences in a particular forum such as a court of law. The APA's *amicus curiae* brief concurred on this point: "In particular, of course, the privilege of confidentiality that would ordinarily attach to communications between psychiatrist and patient is wholly inapplicable to sanity or competency examina-

tions, at least when conducted at the direction of the prosecution or the court."¹⁹

In those defendants who are not competent to understand issues of confidentiality, a court order can be obtained post-arraignment if the person is in jail, although the courts have no jurisdiction over suspects detained at police stations. A motion *in limine* can also be made by the defense to prevent disclosure by the prosecution of the results of the evaluation; however, if a defendant chooses to put his or her mental state at issue in a criminal case, then the defendant's Fifth and Sixth Amendment rights are considered waived to the extent necessary to examine his or her mental condition.²²

Case Vignette

Mrs. Jones (not her real name), a woman in her twenties, was arrested following the death of her six-month-old baby. A neighbor received a telephone call from Mrs. Jones' husband in Mexico asking to speak with his wife, since she did not own a telephone. The neighbor permitted Mrs. Jones to use her telephone, and overheard her tell her husband that her baby had been "purple" for two days, but not to worry because the baby will wake up like Jesus two thousand years ago. The neighbor investigated and discovered Mrs. Jones holding her dead baby, claiming the baby was still alive. The police were called and, when they arrived, they too found Mrs. Jones holding her dead baby, agitated and calling the officers "the devil." The officers discovered a water-soaked bed, a shower/bathtub overflowing and flooding the house, towels damming the outside of the bathroom door, and a crib bumper used to tie the door closed. Two weeks earlier, Mrs. Jones had been hospitalized at the county psychiatric hospital and treated with antipsychotics, after she had placed her baby and her seven-year-old child in the middle of the street in hopes that cars would run over them.

A prearraignment psychiatric evaluation was

requested by the district attorney and performed. In the holding cell, unbeknownst to the suspect, Mrs. Jones was observed by the forensic psychiatrist to be agitated, yelling incoherently, and rocking and rolling her head autistically. On mental status exam, Mrs. Jones was uncooperative, grossly psychotic, and repeatedly yelling "nothing, nothing" while shaking her head violently in response to all questions and frequently spitting on the ground. She was read her *Miranda* rights, but clearly did not comprehend them. She denied hearing any voices, although yelled that the detective present during the evaluation was "evil." Further collateral history obtained from the police indicated that Mrs. Jones was suffering from auditory and visual hallucinations while in transit to the police station.

Per the recommendations of the forensic psychiatrist, arrangements were made for Mrs. Jones to be transferred for immediate psychiatric care and be placed on suicide precautions. The deputy district attorney was advised by the forensic psychiatrist that Mrs. Jones met the legal test for insanity in the State of California (M'Naghten). An exact cause of the infant's death was later indeterminate, and no charges were filed.

Toward a New Policy

In conclusion, the ethical code as written is vague, logically inconsistent, inhibits personal moral reflection, encroaches on physicians' autonomy, and assumes that forensic psychiatrists performing prearraignment evaluations are biased, unprofessional, and performing the prearraignment evaluations solely to the detriment of the defendant. Additionally, the ethical code may be considered demeaning to the integrity of the forensic psychiatric profession, since the premise of the dictum is that many forensic psychiatrists will act unethically and partially without a prohibition against prearraignment evaluations. The code, furthermore, fails to distinguish between ethical con-

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siderations applicable to a psychiatrist as nonmaleficent healer in relationship to a patient, in contrast to the forensic psychiatrist, whose purpose is to discern truth, render an opinion, and advance justice—none of which is inherently in the best interest of the suspect.

In the guise of ethics, the committee members who originated this code have imposed apparently personal and political views on all members of respective professional organizations in order to circumvent rulings of the judiciary, including the U.S. Supreme Court. Through the threat of discipline, sanctions, and ultimately expulsion from professional organizations, this ambiguously written ethical rule coerces psychiatrists to expropriate their own individual moral authority to that of partisan regional and national ethics committees over a code in which there are a wide range of ethically acceptable interpretations. The ethical code prohibiting prearraignment evaluations reflects misguided paternalism and political bias, as well as being in direct conflict with current law.

With the advent of increasingly creative mental health defenses designed to abdicate responsibility (e.g., “the battered persons’ syndrome” and “the Twinkie defense”), the state has a compelling interest in understanding the state of mind of the defendant at the time of the crime. Although attempts have been made *post hoc* to justify the rule against prearraignment evaluations by a number of disparate and changing arguments at variance with recent and past court rulings, the result of the current ethical code is an encroachment on the autonomy and val-

ues of AMA, APA, and AAPL members as well as an intrusion upon the dominion of the law. A new, coherent, ethical framework specific to forensic psychiatry is needed. Ethics and the law, when both are examined carefully, suggest that prearraignment evaluations are proper when performed responsibly.

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