Dialectical Principlism: An Approach to Finding the Most Ethical Action

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Most forensic psychiatrists occasionally face complex situations in forensic work in which ethics dilemmas cause discomfort. They want to determine the most ethical action, but the best choice is unclear. Fostering justice is primary in forensic roles, but secondary duties such as traditional biomedical ethics and personal values like helping society, combating racism, and being sensitive to cultural issues can impinge on or even outweigh the presumptive primary duty in extreme cases. Similarly, in treatment the psychiatrists' primary duty is to patients, but that can be outweighed by secondary duties such as protecting children and the elderly or maintaining security. The implications of one's actions matter. In forensic work, if the psychiatrist determines that he should not assist the party who wants to hire him, despite evidence clearly supporting its side, the only ethical option becomes not to accept the case at all, because the evidence does not support the better side. Sometimes it can be ethical to accept cases only for one side. In ethics-related dilemmas, I call the method of prioritizing and balancing all types of conflicting principles, duties, and personal and societal values in a dialectic to resolve conflicts among them *dialectical principlism*. This approach is designed to help determine the most ethical action. It is aspirational and is not intended to get the psychiatrist into trouble.

J Am Acad Psychiatry Law 43:10–20, 2015

In forensic contexts, most psychiatrists are uncomfortable from time to time with the roles that they are asked to assume. This discomfort can represent many things. It does not necessarily reflect ethics concerns and does not necessarily mean that they should not accept the case. For example, their discomfort could be based on bias and prejudice. I will focus on what the psychiatrist should do if asked to perform an evaluation in a case where he thinks it might be wrong to do what is asked without considering other factors.

First, the forensic psychiatrist might check the American Academy of Psychiatry and the Law (AAPL) Ethics Guidelines[1] and Questions and Answers,[2] only to find that what he has been asked to do violates no guideline; but it may still seem wrong. Some might argue that if it is possible to give a reasonably objective opinion and the position that the hiring party wants the psychiatrist to take seems valid, then he should just put blinders on, accept the case, and ask no further questions. Some might speculate that the hindrance is inappropriate therapeutic bias, and as a forensic psychiatrist, one must be resolute in avoiding that bias. In some extreme circumstances, though, concern for the person to be evaluated because of his potential to cause severe harm and other factors can have relevance in a forensic context. In my opinion, the question of whether what the psychiatrist is being asked to do is wrong is a legitimate one that requires further exploration.

Ethical Dilemmas in Forensic Psychiatry

When a prospective case causes discomfort, further analysis is needed, because the problem could be ethics based. Ethics-related discomfort must be distinguished from other types of discomfort, such as prejudices and concerns about displeasing a referral source, rejecting an opportunity, or hurting someone; but an ethics dilemma must be addressed.

One example is being asked to take a case for an organization such as the Ku Klux Klan (KKK). The facts may support their position, but associating with

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Disclosures of financial or other potential conflicts of interest: None.

such an organization may cause extreme personal discomfort.

Another example is a request to evaluate an individual involved in a high-profile case. It first seems like a great opportunity that can generate more referrals and help one's forensic career. A review of the material provided, however, reveals little evidence for the view the attorney desires.

Ethics challenges also arise when a forensic psychiatrist is asked to assist the prosecution in the penalty phase of a capital case in which the only sentencing options are death or life without the possibility of parole. The prosecutor is interested only in identifying the aggravating circumstances that would support a death sentence.

The Method of Dialectical Principlism

Analysis of an ethics dilemma first starts with the specific context and then determines which duties are primary and which are secondary for that particular role. Then, a balance must be struck between competing duties and principles, weighing the primary duties against secondary duties of all types. Next, conflicts must be resolved among principles and duties in such a way as to have them impinge as little as possible on each other. Afterward, the weighted principles are applied to the situation in question. Those with less weight and importance in the situation may have little or no impact and in the interest of reducing complexity do not enter into the decisional equation.

I am referring to principles here in the broadest sense of the term. By that I mean, for example, the principle of fostering justice and answering the legal question honestly and as objectively as possible, the principles of biomedical ethics, the principle of meeting societal expectations of the forensic psychiatrist's role, the principles reflected in one's personal values, and the principle of providing for one's family and oneself, among such principles.

Challenging cases present ethics dilemmas causing the greatest initial discomfort, but I believe an equal or greater satisfaction occurs when the dilemmas are resolved. This article presents a framework to help in achieving the most ethical conclusion possible when faced with such difficult circumstances.

I call this method of prioritizing and balancing all significant conflicting principles for the purpose of determining the most ethical course *dialectical principlism*. Dialectical describes a method (originated in ancient Greece) by which apparently contradictory and competing considerations can be synthesized into a coherent whole to guide one's actions. The term emphasizes the need not to be purely situational and subjective, but instead to focus on the more generalizable principles deriving from a narrative. Competing principles must then be prioritized, weighed, and balanced, with the goal of resolving conflicts among them with minimal intrusion of one on the other. Last, the weighted principles are applied to the context in question. I will demonstrate what I mean later.

Dialectical principlism accepts as legitimate the appropriate uneasiness many, if not most, forensic psychiatrists feel in some extreme situations that raise ethics-related concerns and provides a method to help analyze and resolve ethics dilemmas. The method helps identify, prioritize, weigh, and balance conflicting considerations in a dialectical manner in which considerations compete to reach a determination of the most ethical course of action.

This method is intrinsically aspirational. In contrast, the current AAPL Ethics Guidelines are aspirational only in that they are not enforced, *per se*. Most could be enforced, however.[3] Dialectical principlism is not designed to get psychiatrists in trouble. Implementation of these considerations serves to enhance self-satisfaction with one's work and to improve public perception of the profession and AAPL as well.

Primary and Secondary Duties

Though primary duties have special weight in the balancing process (usually outweighing and thereby trumping all secondary duties), there are important exceptions. An unusually strong secondary duty in some contexts can outweigh the presumptively primary one and can thus become determinative.

To illustrate, in medical, including psychiatric, treatment, the presumptive primary duty is to help the patient. There are primary duties related to the biomedical ethics of beneficence, nonmaleficence, and respect for autonomy. The duties are similar for all mental health professionals, but in treatment, there are additional secondary duties such as meeting societal and professional expectations of protecting the public or preserving security for a hospital, correctional facility, or any other employing institution. Some considerations can outweigh the primary duty. For example, in child or elder abuse reporting, the secondary duty to protect those individuals most vulnerable to harm in society can impinge on or out-

weigh the primary duty of nonmaleficence to patients. Many dual-agency conflicts are best avoided, but often that is not possible.

In the forensic realm, the primary duty is to foster justice with evidence within the psychiatrist's expertise, but in some unusual situations, secondary duties can outweigh the primary one and preclude assisting the hiring side, even if the evidence would support that side. In such situations, the forensic psychiatrist should not accept the case. Testifying for the other side is not an option either if the truth does not support that side. Such secondary duties take center stage only in extreme situations. Nonetheless, achieving balance among secondary duties is relevant in most cases.

Intent is central in dialectical principlism. One forensic psychiatrist cannot get inside the mind of another to know his intent, and so anybody satisfied with meeting minimal ethics expectations is free to do so without fear of ethics sanctions.

Ethics Foundations

Paul Appelbaum, in his presidential address to AAPL,[4] stated that the goals of forensic psychiatry differ from those of treatment psychiatry and therefore forensic psychiatry requires its own ethics, different from treatment ethics. He stated that, unlike treatment psychiatry with a primary duty to the patient, in forensic work the primary duty is to foster justice. In that effort, psychiatrists sometimes provide relevant information to the court for one side or the other, or for the court itself, to promote justice. Forensic psychiatrists are commonly asked to give an opinion about a legal question. Opinions must be offered truthfully and honestly, while showing respect for persons. He went on to say that, for opinions to be meaningful, of necessity, they must have the potential to hurt the person being evaluated. If distorted to help the defendant, an opinion would have no value. I agree, but propose that as in the rest of psychiatric practice, secondary duties in forensic work should be regarded as more than merely an afterthought.

Dialectical principlism is consistent with Appelbaum's position, and supplements it. His position suffices for the majority of cases. The differences I propose are applicable solely in those rare cases in which secondary duties outbalance the usual primary duty after a dialectical analysis involving weighing and balancing all significant principles, duties, and values. These exceptional cases are the ones that raise ethics dilemmas and challenges.

Do Ethics Dilemmas Suggest That the AAPL Ethics Guidelines Are Inadequate?

Guidelines of necessity cannot account for every possible situation. There is the potential for the guidelines themselves to conflict with one another or with other principles, duties, and values. Although second-order rules could determine priorities when conflict arises, at some point a situation is reached in which even second-order rules would conflict with one another. That rules cannot resolve all ethics dilemmas is true of any guideline and is not a deficiency in the AAPL Guidelines.

AAPL Ethics Guidelines and Opinions

The AAPL Ethics Guidelines expect forensic psychiatrists to be honest, but add the necessarily aspirational duty to strive for objectivity. It is necessarily aspirational, in that it requires knowledge of intent to know how much a forensic psychiatrist has strived to reach an objective opinion. The remainder of the Guidelines can be enforced should anybody choose to do so.

Parenthetically, although nobody enforces the Guidelines *per se*, the American Psychiatric Association (APA) does enforce many forensic guidelines that fall under the framework of their Annotations Especially Applicable to Psychiatry to the AMA Principles of Medical Ethics[5] and the Opinions of the APA Ethics Committee.[6] My emphasis, again, is on determining the most ethical course of action.

The AAPL Ethics Guidelines and Questions and Answers set important minimum standards, but cannot always assist in making the best possible ethical decision, just as following the law is only the minimum for being an ethical person. Being ethical requires more than merely following the law. Those who want to be as ethical a forensic psychiatrist as possible will want to use the method described in this article. Although forensic psychiatrists may not always agree on what is most ethical, they can determine the best course for themselves by weighing relevant competing considerations. Dialectical principlism provides a method of reaching for that goal.

Ethics, Morality, Right, and Wrong

In philosophy, ethics has generally been synonymous with morals. In some contexts, the terms are used interchangeably. In professional guidelines, the term ethics is commonly used, but there also are personal and societal ethics and morals. Both terms are used to describe right and wrong. I am using ethics in its broadest sense to include what others refer to as morals. It includes professional and personal ethics and values, societal ethics and norms, and any religious values one may have. Sometimes, ethics and morals are distinguished in forensic psychiatry, with ethics limited to professional guidelines and all else relegated to morals in a way that excludes morals from ethics discussions. I see the distinction as potentially counterproductive and prefer to use ethics in the widest sense to include moral as well as professional obligations.

Similarities and Differences With Other Approaches

The method I am proposing has much in common with the reflective equilibrium developed by John Rawls.[7,8] Beauchamp and Childress[9] introduced the four principles of biomedical ethics: respect for autonomy, beneficence, nonmaleficence, and distributive justice. These have primacy in treatment. In forensic work, they are instead secondary. Nonmaleficence means do no harm, not first, do no harm, which is frequently mistakenly believed to be part of the Hippocratic Oath.

Beauchamp and Childress claimed that their principles of medical ethics derive from the common morality that most psychiatrists accept *prima facie* as right, with a compelling force. They then balanced the conflicting considerations using reflective equilibrium in much the same way as I am proposing that dialectical principlism be used.

Similarities and Differences With Robust Professionalism

Robust professionalism, developed by Candilis and Martinez,[10,11] considers similar factors but with differing priorities and emphasis. It also deems traditional medical concerns to be relevant. In addition, it considers what I call secondary duties in the forensic role, but does not favor role primacy and is less concerned with a hierarchical ordering of roles and principles. Nonetheless, both approaches consider all relevant aspects in the forensic context.

In 1997, Appelbaum[3] made a valid criticism of my original concept of forensic ethics, and this same criticism seems applicable to robust professionalism. He said that the considerations that go beyond fostering justice and truth-telling should not affect the forensic psychiatrist's opinion. Appelbaum believed that if a forensic psychiatrist who is on the side opposite an evaluee thinks that he is still equally bound by traditional medical values, he is confusing the roles and thereby misleading the evaluee. Consistent with robust professionalism, I agree that other considerations should influence the aspects of the narrative that is presented. However, I now agree with Appelbaum, that these considerations should not determine the psychiatrist's opinion on the legal issue itself. In my current view, duties conflicting with the primary one in a forensic role are best seen as secondary duties, which, when they overcome the primary duty, should cause the psychiatrist to reject a case, unless no conflict exists. Examples are some civil capacity contexts or being hired when the facts support the hiring attorney's side.

Another difference is that robust professionalism focuses on usual situations and may not give sufficient guidance in balancing the influences in the unusual situations most likely to create disconcerting ethics dilemmas. Dialectical principlism focuses on these unusual situations. In dialectical principlism, all psychiatric role duties are separated into primary and secondary ones and not just the single duties arising from the forensic psychiatrist's role.

Both dialectical principlism and robust professionalism are inclusive and consider the wide range of ethics-related considerations for a forensic psychiatrist. They include the traditional concerns of medical ethics and society's expectations that physicians and mental health professionals will help those whom they evaluate or treat and will protect society. In addition, the clinician must deal with his own personal values, concerns about racial and religious prejudices, his religious beliefs, and responsibilities to support himself and his family. Some consider medical duties solely as an afterthought, such as recommending medical care or emergency services for a problem discovered during a forensic assessment. My focus is on duties that occasionally can go beyond those.

Potential Areas of Misunderstanding

Many times at the outset of a case, the outcome of an assessment is uncertain. After reaching an opinion forensic psychiatrists can sometimes be called or even compelled to testify for the other side or the information that they uncover can be used for that purpose. Intent is crucial in these situations. If the psychiatrist cannot know in advance and is prepared to reach an honest opinion as objectively as possible, that is the best that can be hoped for.

Later decisions may be needed after the assessment that necessitate another ethical determination at that time. Even if the forensic psychiatrist is forced to testify or his findings are used against his will for an unethical purpose, he has acted ethically if his original intent was good. But when it is clear at the outset what the evaluation will reveal and how the attorney will use the results, it may be more ethical to refuse to accept the case.

I am not suggesting that psychiatrists must work only for saints and angels. They could accept few if any cases if this were true. Few corporations who hire psychiatrists are angels. Most do both good and bad in society. Few criminal defendants are saints. Some prosecutors may care more about winning than justice. Such work is ethical even if it causes some discomfort. It involves most of what forensic psychiatrists do.

A forensic psychiatrist should not turn a case down just because the prospect of violating a secondary duty feels distasteful. I am focusing on the unusual situations in which competing ethics cause appropriate discomfort because they pose ethics dilemmas without a simple solution. The challenging question is what is sufficiently extreme to require a change in role priority.

Is It Ever Ethical to Accept Cases for Only One Side and Not the Other?

As individuals and as a profession, must forensic psychiatrists be prepared to accept any cases for either side on an issue or for neither? One of the founders of AAPL, Bernard Diamond, took an extreme contrary view in criminal cases.[12] He would testify only for the defense, but only if all the facts justified that position. Otherwise, he would turn the case down. He would reject cases if they involved distorting the facts in any way, even by withholding evidence when legally permissible. Few if any take this extreme position these days, but it could be a valid model in rare situations.

This position risks being mischaracterized as that of a hired gun, when the opposite is true. Real hired guns are dishonest and make little or no effort to reach an objective opinion. In fact, contrary to the commonly held view, the hired gun can have a superb record of testifying for both sides depending on who pays, with no attempt to reach an objective opinion. However, testifying only for one side necessitates keeping biases sufficiently under control to be able to satisfy the AAPL Ethics Guideline of honesty and striving for objectivity. It is unethical to be a hired gun, either for money or to further a cause.

It should not be any harder to put a belief aside than to put aside the temptation of money if being hired is likely to require reaching an opinion the attorney wants. Some are more likely to be influenced by one than the other. Both temptations need to be controlled and the case refused if objectivity is impossible for any reason. The need for objectivity, however, does not preclude honest advocacy so long as there are no distortions of the evidence.[13] In testimony, it is ethical to advocate honestly for an opinion. Everyone has biases, but the forensic psychiatrist's duty is to strive to reach an objective opinion, nonetheless.[1,14]

There can be other explanations for taking cases only for one side. Sometimes, it is because the other never calls. In other instances, prior employer-attorneys may not want psychiatrists whom they have formerly engaged to take the other side, because they fear that the psychiatrists are privy to their secrets.

A Brief History of Significant Concerns in Forensic Psychiatric Ethics

Alan Stone upset many AAPL members some years ago by calling attention to questions of ethics for which he personally had no answers.[15] I have always seen his position primarily as a challenge to forensic psychiatry. One example he gave was Dr. Leo, a Jewish physician in England in the mid-1800s who would come into court and allegedly give exaggerated testimony on behalf of Jewish defendants during a time of extreme anti-Semitism in England. Is that necessarily wrong? Would it be unethical in Nazi Germany for a physician to lie knowingly in

court to save a defendant from an unjust punishment? Most of us would consider the latter heroic and not unethical. Does it depend on the degree of anti-Semitism or how bad the specific legal system is? Many forensic psychiatrists do not think the legal system's faults warrant its being undermined.

Ezra Griffith in his presidential address[16] argued for the participation of black psychiatrists in the legal system because of their familiarity with racism and relevant cultural concerns. But the parameters of that participation are unclear. Is Dr. Griffith advising distortions to help African American defendants much like Dr. Leo did? Is he suggesting being sensitive to racial aspects of a case only when they may directly affect the legal criteria or introducing a narrative including racial concerns, even if it is only indirectly relevant to the legal criteria? The latter can be a challenge in recent years when courts seem less interested in understanding why a defendant committed a crime but only whether legal criteria are met.

Ciccone and Clements[17,18] proposed using case-based situational ethics and paradigms and deriving principles from a case to apply to it. Norko[19] considers compassion to be a central issue in forensic ethics. Religious considerations are relevant, but only for those who believe in that faith, unless it is focused on secular principles, but conclusions can be similar. My focus is on secular ethics. There are analogous points of ethics in other forensic mental health professions as well, but my focus is on forensic psychiatric ethics.

Competing Duties in Other Psychiatric Roles

Psychiatry in general has changed over the past 40 years since the decisions in *Tarasoff v. Regents of the University of California*. Treating psychiatrists in the past, with rare exception, had duties solely to patients, whereas today there are child- and elder-abuse reporting laws.

Treating psychiatrists increasingly have competing duties and resultant conflicts caused by dual agency. There are duties to the psychiatrist's employer, whether it is a hospital, university, the health care system, the state, or a correctional facility. Although the duties to the patient are supposed to be primary, in reality, secondary duties to the employing institution sometimes outweigh primary duties to the patient. This problem is most marked in correctional facilities.

Research psychiatrists have duties to their research as well as to a research subject, but even if the research duty has primacy, there is an ethics-based duty for the psychiatrist to withdraw a patient from the study who shows evidence of being harmed. This duty exists regardless of whether an institutional review board (IRB) requires it or it is part of an approved research protocol.

Another role analogous to forensic work is that of the managed-care reviewer or administrator who is a physician. It is unrealistic to expect such reviewers to put patient welfare first. Financial considerations realistically come first, but it is essential that such reviewers not forget about patient welfare and still view it as an important secondary consideration that occasionally can determine what action to take.

Even if Duties in Other Psychiatric Practices Have Changed, Why Should Forensic Psychiatrists Complicate Things by Considering the Implications of Their Work?

Many forensic psychiatrists entered medicine, psychiatry, and forensic psychiatry at least in part because they wanted to do some good. Doing good requires trying to determine the most ethical thing to do and not merely trying to avoid trouble. The psychiatrists' practice significantly affects those they evaluate and others. Differences of opinion are legitimate and ethical. The expert witness should not confuse his role with that of the attorney, since attorneys are supposed to present one-sided arguments to help their clients. In contrast, forensic psychiatrists take an oath to tell the truth and not to make cases in which they do not believe. The public generally views physicians in the helping role, either for an individual or society at large. If findings are distorted and the expert appears to be fighting to get somebody executed, he is taking advantage of the public perception that if there were anything good to say, he would have said it. Consequently, one's testimony is ascribed too much credence. That can make the field of forensic psychiatry, AAPL, and individual psychiatrists look bad. The same could happen if testimony is seen as distorted to help get a dangerous defendant released. Honesty helps everyone in the field look good and demonstrates that expert witnesses are not simply hired guns.

Those who are satisfied with the minimum and do not try to determine the most ethical path to follow

will not get into trouble. That is because dialectical principlism is not enforceable, since it requires the impossible task of assessing another psychiatrist's intent; but that does not diminish its importance.

Previous Ethics Surveys of AAPL Members and Their Implications

In a survey of AAPL forensic psychiatrists conducted in 1989,[20] the respondents indicated their concerns about traditional medical problems and ethics, not just in the treatment context but also in the forensic context. The relevant items in order of concern were giving an opinion in a death penalty case without a personal examination, failing to clarify the forensic role to a defendant who misunderstands it, recognizing a duty to both a defendant and society regardless of who pays, seeing an ethics-related problem in specifically recommending a death penalty, and seeing a need to treat the death penalty differently because of its special seriousness. Most, in contrast, saw no breach of ethics in performing a forensic evaluation on their patient in a major case with the patient's consent (despite the AAPL guideline discouraging dual agency) or in evaluating a prisoner's competence to be executed. There was almost an equal division regarding the ethics of treating a prisoner to restore competence to be executed.

A subsequent survey of AAPL members in 1991[21] was even more convincing. The overwhelming majority saw medical and psychiatric ethics as a consideration in the forensic role, prearraignment examinations as unethical, the necessity of a personal evaluation if expressing an opinion in a capital case, and a duty to both the evaluee and society in forensic work. In this survey, there were divided opinions on being a participant in a legally authorized execution (perhaps not recognizing the limited way this actual guideline has been interpreted), and, unlike the previous survey, there were mixed views on performing a forensic evaluation on a former patient. Both surveys had high response rates.

There may have been changes in the intervening years, as many may have been led to believe it is a settled matter that considerations beyond answering the question asked have no place in the forensic context. These surveys, however, indicate support for medical ethics and values in the forensic context. I know of no recent relevant surveys on this subject. More surveys of this kind would be beneficial as an area of future study.

How Does Dialectical Principlism Differ From Situational and Narrative Ethics?

Situational ethics or casuistry in its pure form entails creating paradigm situations to which new situations can be compared.[22] In its more recent form, it also includes developing more generalizable principles out of these paradigms. Narrative ethics entails creating a narrative unique to an individual in a specific context and assessing ethics within that individual's universe and the psychiatrist's values, but it does not necessarily include consideration of principles. Robust professionalism includes consideration of roles and principles, but does not give them special status or help in prioritizing them. Dialectical principlism, like modern situational ethics, starts with a search for the principles pertinent to the context that is of concern. These principles are based on common morality (accepted without question by most), but also include those based on professional and personal values. The principles, as I conceptualize them, include what the legal system wants from forensic psychiatry, the psychiatrist's duties as a physician and mental health professional, his interests in promoting good results, societal expectations, and his personal values, including a desire to help society, combat prejudice and racism, and consider cultural factors, among others. In dialectical principlism, however, forensic psychiatrists must determine from the context and individual narrative which duty or duties are primary. They also must determine the relevant secondary duties and then balance potentially conflicting principles and duties in a dialectical manner and return to the situational narrative to apply them.

A way to clarify the ethics analysis is to base the analysis on the four-step model by Richard Rosner.[23] In the ethics arena, one first determines the ethics concerns; second, he lays out the relevant criteria (multiple in complex situations); third, he considers the specific situational data; and finally, he applies the ethics criteria to the situational data. In that process, in dialectical principlism, differing weights, depending on the context, are given to conflicting criteria and include consideration of the importance of the principle in that context and the potential serious harm that can be done by a forensic psychiatrist's involvement in a case. The psychiatrist should try to infringe on as few alternative applicable principles and criteria as possible. Dialectical principlism comes

into play only in extreme cases. In most cases, the primary duty to foster justice outweighs all secondary considerations, and no further ethics analysis is needed. I will now demonstrate how to perform this analysis using dialectical principlism with two illustrative examples.

Is It Ethical to Accept a Referral from the Prosecution in the Penalty Phase of a Capital Case for the Purpose of Finding Aggravating Circumstances?

Accepting a referral from the prosecution to evaluate and present aggravating circumstances in the penalty phase of a capital case where the only other option is life without the possibility of parole differs conceptually from accepting other possible roles.

I have been unable to find another discussion of this specific death penalty role as distinct from others, such as presenting mitigating circumstances at the penalty phase. Maybe that is because it has been assumed that if presenting mitigating circumstances is acceptable, presenting aggravating circumstances must be as well. I will challenge that assumption as outlined below.

The problem with presenting aggravating circumstances is that they are being solicited for the sole purpose of obtaining a death penalty verdict when the only alternative is life without parole, which almost always is equally protective of the public. It is even economically preferable not to execute an individual, since it costs more money to try, have appeals, and execute a defendant than to have him serve a life sentence. It is not like other death penalty roles. Here, the prosecution is not asking for a balanced list of mitigating and aggravating factors but solely for as many bad factors as can be found.

Although it is ethical to introduce mental illness as mitigation, it can be aggravating to some juries, even if intended to be mitigating. A frequent use of psychiatrists for aggravating circumstances is in asking them to predict dangerousness. I will analyze this request using the four-step model and the method of dialectical principlism.

1. The issue: Is it ethical to perform an evaluation at the penalty phase of a capital case for the prosecution if the request is to present solely aggravating circumstances? The prosecution wants to obtain a death penalty verdict as opposed to utilizing an objective balanced list of mitigating and aggravating circumstances. Of course, the psychiatrist is not the one making the final penalty determination. However, the sole intent of the use of this assessment is to obtain a death sentence.
2. The criteria
   a. The primary duty is the forensic one to promote justice by presenting data within the expert's expertise.
   b. A secondary duty as a physician and mental health professional is to the person evaluated. The biomedical ethics-based duty of nonmaleficence is relevant.
   c. The AMA and APA forbid participation in a legally authorized execution. The AMA considers presenting both mitigating and aggravating circumstantial evidence permissible at the penalty phase.
   d. My view is that presenting aggravating circumstances for the prosecution is not ethical for a physician, since a balanced view of aggravating and mitigating circumstances is not being sought.
   e. As a citizen I support the death penalty, but only if reserved for the most heinous circumstances, unlikely to be true in this or most cases.
   f. Society expects physicians to be helpful whether to the people they evaluate or treat or to protect society. They do not expect doctors to engage in vengeance and can mislead the court and a defendant if that is the true purpose.
3. The facts: The defendant killed three people and there are special circumstances that make him eligible for the death penalty. The negative aspects of his past actions are obvious from the evidence provided by the prosecution, but there is no evidence of psychopathy or a criminal history. He has done many good things in the past.
4. Applying the ethics criteria to the situational facts:
   a. In this case, the prosecution is seeking a sentence of death as opposed to life without parole, so the secondary duty of nonmaleficence outweighs the primary duty and takes precedence.
   b. It necessitates my refusing the case, since it is not ethical in my opinion to perform the role of aiding in seeking the death penalty as a physician or mental health professional.
   c. There is no reason to act contrary to my and societal expectations of physicians.

The defense also in this case is trying to present only mitigating circumstances as opposed to a balanced assessment but with vastly different implications. I would be willing, if asked instead, to consider accepting this case for the defense or as a court appointment, since there are significant mitigating circumstances in addition to any aggravating ones.

If called by the defense, it would be ethical to present mitigating circumstances, since nonmaleficence would not apply. Beneficence supports such an action. There are no secondary duties that outweigh the primary one. The expert would, of course, risk being called a hired gun, though, like many accusations, it would be totally unfair if he were truthful, presenting testimony as objectively as possible without distortion.

I now want to consider two additional hypothetical factors:

1. What if in this case the defense presented outrageously exaggerated mitigating circumstances and the prosecution wanted an expert to counter them? As a citizen I would think it appropriate for the prosecution to present evidence to counter significant distortions, but in my opinion, that evidence still should not be provided by a physician or mental health professional for all of the already mentioned reasons associated with secondary duties. The prosecution should find other ways to present that evidence, even if more difficult. I could see others legitimately disagreeing, and, under this hypothetical, balancing the duties differently to foster legal justice. The prosecution may give more weight than I to the need to counter distorted testimony.

2. What if the defendant were attempting to get other prisoners to arrange a revenge killing outside the prison[24] or as a member of a crime syndicate, as in the case of a Mafia boss? Such a circumstance might change the balance for me, since there is the important duty as a physician to prevent future murders. It might well outweigh the other considerations, since prison security is not perfect, we know future murders were being planned, and the death of the defendant might be the sole way to prevent future killings.

The most ethical forensic psychiatrist should try to determine what is ethical for himself even if there is no consensus. It is important to be aware that an opinion on what is professionally appropriate for physicians in this context is not necessarily related to personal opinions about the death penalty. A weak correlation likely exists, but no more than that. A survey on a related question yielded results consistent with that view.[25] To be completely clear, it is unethical to engage in an anti–death-penalty vendetta and exaggerate data to oppose a death sentence.

Accepting Referrals From a Company That the Psychiatrist Sees as Having Little or No Redeeming Value, Even if It Is in the Right

There is no requirement in the AAPL Guidelines for a company or organization to be perfect for a forensic psychiatrist to agree to testify for it, as long as the facts support the company's position. Otherwise, very few cases would be acceptable. It is different for a particular company or organization that the psychiatrist views as especially bad, with no redeeming value. I will illustrate how I would analyze whether to take a case from what I consider an especially bad company or group:

1. The ethics question: is it right to testify for a tobacco company or to provide valid information on their behalf?
2. The criteria:
   a. The primary ethics duty for the forensic psychiatrist is to promote justice by providing information that is within his expertise and answering legal questions.
   b. As physicians, forensic psychiatrists have a secondary duty not to help companies that do significant harm.
   c. As a person, I am unaware of any good that the tobacco industry has done unless it was compelled to do so and consequently I am not motivated to help it.
3. The data: It appears that the plaintiff, who was a smoker, knew all about the dangers of tobacco but made no effort to stop its use. Most of the problems attributed to tobacco he believes are better accounted for by another cause. My impression is that tobacco companies around the world continue to market their product despite awareness that it can addict and kill people. If I help the tobacco company retain money, it will enable them, even if only in a small way, to continue to market deadly products.
4. Applying the ethics criteria to the data:

a. Although the duty to promote justice is primary, tobacco companies market their products around the world, well aware of the potential to addict and kill people. In my view, the harm they cause is so significant that my secondary duty as a physician—to avoid doing anything that financially helps these companies to continue to promote smoking in third-world countries—outweighs the primary duty to provide information on their behalf.
b. My personal views of tobacco companies are consistent with my view of my professional duty.
c. Since it is inappropriate to lie or distort in court, the only option for me is not to take the case for either side. The forensic facts in isolation favor the tobacco side, so the data do not objectively support the other side. It is inappropriate to distort the facts. While acknowledging that others may weigh these principles and values differently than I, the resultant analysis of the situation by the dialectical principlism method indicates that, for me, it is not ethical to take this case for either side.

Others might analyze this case differently using dialectical principlism and conclude to take the case for the tobacco industry. Some may not see the secondary duty as a physician as sufficiently compelling. Some may consider the amount of money at stake in this single case to be so small as to cause negligible impact on the company's ability to further market and sell its product and not consider the cumulative effect of many such cases. Some may give more weight than I to the need to counter distorted plaintiff testimony.

Usual Forensic Practice and the Unusual Dilemmas in Complex Cases

I would not want anybody new to the field to misunderstand me and think that all forensic practice is fraught with ethics dilemmas. In most situations, the duty and the ethical course of action are clear. My focus is on the complex situations that cause the most discomfort but even more satisfaction when the best or most ethical thing to do is decided. Forensic psychiatry, as Dr. Stone pointed out years ago, is a moral adventure, but so currently is all psychiatric practice. Dr. Stone in his recent paper presented at AAPL but published elsewhere[26] has clarified that, although he has chosen to stay out of court, he does not necessarily recommend that course for everyone, nor is he sure that he is correct to do so. Forensic psychiatry can be a moral adventure in certain extreme circumstances but not most of the time.

In difficult situations, consulting those with special ethics expertise can help. Such consultation could be helpful if any actions are later questioned. It demonstrates an effort to determine the best thing to do and that the chosen course of action is not so unusually esoteric that no other respected expert would do the same.

Rather than avoid considering the rare exceptions, dialectical principlism focuses on them so that the psychiatrist who encounters them is not overwhelmed or confused. Determining the best thing to do can be a very meaningful and exciting challenge requiring decisions on how to balance competing duties. If possible, simplification is helpful, but oversimplification can lead to unawareness and obfuscation of key facets and resultant miscarriages of justice.

Conclusion

Forensic psychiatrists should not shy away from confronting the implications of their actions and the ethics questions posed. Competing duties are present in many human endeavors, and in cases of true ethics dilemmas, duties conflict and legitimate acceptable differences of opinion can exist. Potentially conflicting duties should not be misconstrued to require avoidance of situations. When dilemmas arise in extreme situations, the psychiatrist must ask questions and balance competing considerations, including their own principles and values such as helping society, combating racism, and being sensitive to cultural factors. Analyzing these difficult and relatively rare contexts can be an exciting challenge, not something to avoid or fear. In my opinion, it is neither preferable to have rigid rules and principles without regard for context, nor to have a *laissez faire* attitude, without principles and priorities, necessitating a reliance on subjective reaction to a specific narrative or situation. Instead, the narrative or situation should be used to find principles that can be weighed and balanced and then applied to that narrative or situation.

The method of dialectical principlism can help in conceptualizing and analyzing difficult situations and narratives. Rather than attempt to characterize the forensic subspecialty as unique in psychiatry in its

ethical simplicity, psychiatrists should be aware of the potential exceptions to the duty hierarchy. I am proposing that forensic psychiatry requires a balancing of conflicting duties in a judicial context. Most of the time, the primary duty to answer the legal question will clearly outweigh all other secondary considerations; but, ethical dilemmas occur in certain extreme situations in which the secondary duties may outweigh the primary one. This would trigger a need for further analysis implementing dialectical principlism, and the resolution of the dilemma may involve refusing to accept the case in such circumstances. Many forensic psychiatrists are not hired guns and want to do the best thing or what is right, even if there is sometimes disagreement on what is right. The method in this article enables the laying out and balancing of competing considerations. Facing ethics dilemmas and challenges reminds forensic psychiatrists of one of the motivations for entering this field and why they were and continue to be attracted to forensic psychiatry.

Acknowledgments

The author thanks the following for their contributions to the development of this paper: Paul S. Appelbaum, MD, Renee Binder, MD, Daniel Bonnici, MD, JD, Philip Candilis, MD, J. Richard Ciccone, MD, Jeffrey Janofsky, MD, Emily Keram, MD, Mohan Nair, MD, Debra Pinals, MD, Richard Rosner, MD, Charles Scott, MD, Alan A. Stone, MD, Christopher Thompson, MD, Barry Wall, MD, Diana Weinstock, PhD, and especially William Connor Darby, MD.

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