

Reply to Schafer: Ethics and State Extremism in Defense of Liberty

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For the past 30 years these pages have seen forensic practitioners struggle with the subtleties of forensic ethics, with the balance of clinical and social responsibilities, and with the demands of dual agency. How best does the forensic professional practice in the dual role of clinician and agent of social control? Stated more broadly, how ought one use clinical expertise as an agent of society? We have read of the need to avoid seducing an evaluatee into a therapeutic relationship, of the elusive nature of perfect objectivity, of the primacy of truth-telling, of the importance of an individual's historical narrative, of the necessity of preserving civil and criminal rights, and of the nearby influence of clinical ethics.¹⁻⁶

It is heartening to find a case with national security implications that draws on these discussions and calls on a distinguished officer of the Academy to testify on the ethics of forensic practice. It is likewise disheartening to find a polemic in this issue that ignores the subtleties of thought so carefully explicated over the years.⁷ Which thread in the decades-old discussion should we follow in a case that involves forensic practice in pursuit of a suspected spy?

Students in introductory philosophy are often asked to engage in a thought experiment that tests their conceptualization of social roles. They are asked to consider a society that permits a citizen firing squad to punish criminals. They imagine citizens from various walks of life doing the punitive work of the state. Then they are asked to imagine a physi-

cian's volunteering to join the execution. The physician is within her rights; she is not prohibited from participating. All other things being equal, does this have an effect on the fabric of social roles? Does it affect the community's view of the individual? Of the profession?

The mainstream response is that the physician's participation indeed does violence to social roles and community expectations. The American Medical Association and World Psychiatric Organization, for example, use this reasoning to oppose physicians' participating in executions. The U.S. Supreme Court followed this logic in denying the right to physician-assisted suicide. This is because there are significant social expectations built on the provision of licensure, status, and clientele to a profession founded on trust, beneficence, and care. They are expectations built on a "triple-contract" model, a social contract with reciprocal obligations of practitioners, clients, and community.⁸ Stepping out of role may consequently undermine professional integrity and identity. With deception and subversion in the mix, as when a psychologist uses expertise endorsed for one purpose by the social contract to serve another purpose (e.g., espionage), social roles are similarly challenged.

What happens when a clinical professional steps out of a classic social role? This is not a new question. We have asked it in the military context when clinicians must heal soldiers to return them to battle. We have asked it in the correctional context when clinicians must return inmates to the environment causing or exacerbating their illnesses. We are now asked to consider it in the context of protecting the nation's secrets. Is it ethical for a psychologist in a forensic role to use clinical science and a "target's" secretly re-

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corded clinical information to identify a security threat?

The answer must take into account many of the questions of ethical inquiry taught in our basic ethics courses. First among them: Are there frameworks currently available that offer guidance?

Both Dr. Jeffrey Janofsky and Special Agent (SA) John Schafer draw on the ethics of professional societies for guidance, albeit with differential enthusiasm. The Specialty Guidelines for Forensic Psychologists, it turns out, are quite explicit in their concern for an evaluatee's informed consent and civil and criminal rights.⁵ The language includes admonitions "to obtain the informed consent of the client or party," "to inform clients of the limitations to the confidentiality of their services," "to understand the civil rights of parties," and to avoid providing services "prior to that individual's representation by counsel." Although there are qualifying statements attached, this is a clear endorsement of individual rights in the face of society's right to truth and justice. The profession's guidelines, it appears, are deeply concerned with what happens when psychologists serve society's interest rather than the evaluatee's. There is no indication that the FBI's psychologist showed a matching concern. Indeed, under this rubric, the psychologist appears to have stepped outside clinical and forensic roles.

My colleagues and I have recently advocated taking the social role theory of forensics to another level.⁹ We support broad community claims on the behavior of forensic professionals and draw on the medical profession's narrative to recognize clinical influences on forensic ethics. Our endorsement of the relevance of clinical ethics raises the bar significantly for practitioners who use their expertise in service to the state. Until this higher standard is more widely recognized, however, I will limit the discussion to the role framework that dominates forensic practice.

Schafer also limits his view of the framework that applies in this discussion. Although the professional guidelines express both individual and collective obligations, he values law to the exclusion of other influences. He may be unaware that the Specialty Guidelines "are intended to conform with state and Federal law." They state that forensic experts must have a "fundamental and reasonable level of knowledge and understanding of the legal . . . standards which govern their participation . . . in legal pro-

ceedings." There is a clear sense of duty toward the law. But the guidelines demonstrate a fundamental balance between legal obligations and individual protections that is missing from Schafer's arguments—as it is from the behavior of the FBI psychologist.

Now, are we to believe that these guidelines apply to nonmembers? Schafer is certain that they carry no weight outside the professional society—certainly not within an organization such as the FBI, which answers to federal laws and rules of evidence. This impoverished view of professional ethics belies the reality of social discourse.

Professional societies may indeed have narrow agendas in publishing their ethics. They may be influenced by economic greed, territorial hegemony over other specialties, and similar unflattering motives. Nonetheless, the public statement of a profession's ethics serves a far wider purpose than mere regulation of its membership. Such public statements establish a voice in the community, provide unification of purpose, recruit community support, and concentrate political power. They focus scientific discourse, set the foundation for practice guidelines and standards, and establish credibility. They are a public recognition of reciprocal obligations, a social contract that, although not absolute, frames the moral discussion. To dismiss the relevance of professional ethics as a matter of club rules ignores the entire breadth of meaning behind them.

Do such guidelines, then, apply in matters of national importance? Perhaps professional ethics and role theory can be suspended when the stakes involve state secrets. Perhaps the thresholds of ethical permissibility can be shifted to accommodate society's collective security. Perhaps there is even a utilitarian calculus that allows us to benefit the many by limiting the rights of the few.

One World War II-era philosopher remarked that he could imagine being asked to justify the torture of a child. The child, he observed, might have crucial information that could save a community from the Nazis. But his was not an argument for relaxing societal prohibitions against torture. Rather, he was warning of the costs to society of allowing the ends to justify the means. What would it do to the community's moral standing if it saved itself by subjecting a child to torture? The community, he reasoned, would give up important moral claims to survival. The German philosopher Immanuel Kant built one

of the most influential doctrines in Western thought on just this anti-utilitarian approach.¹⁰ John Rawls, one of this century's most important writers on justice observes, "Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override." (Ref. 11, p 3). Similarly, in the espionage case we are examining, a greatest-good-for-the-greatest-number approach sacrifices the very moral ideals it values when it trades off individual rights for protection of state secrets.

So, if professional ethics hold some sway, and moral rules stand even when the stakes are high, how are we to balance the rights of society and the individual? After all, as Leslie Danoff points out,¹² we use profilers in criminal investigations and forensic professionals throughout the judicial system. What elements of the Squillacote case best clarify our reasoning?

Mainstream ethics, like the professional ethics of forensic psychologists, concerns itself mightily with matters of social justice, adopting a balancing approach between society and individual when the two conflict. The most common approaches acknowledge control and power differences and adjust formal protections to compensate for imbalance. Forensic ethics reflect this paradigm by including warnings on limitations of confidentiality, instructions on the need for counsel, and censorship of an evaluatee's irrelevant personal information. The power differential is acknowledged with individual protections.

Consequently, in cases in which there is less scrutiny, such as espionage investigations, the burden falls more heavily on the state to show care in exercising its power. Because the individual is more vulnerable in this setting, the moral requirement is for greater protection. Certainly, forensic practitioners may turn their expertise to state use if the parameters are defined by open discussion. But if the intervention is shrouded in secrecy, the onus is on the state (and the practitioner) to ensure protection of the individual. This is true for other morally compelling reasons as well.

The need for individual protection increases because the penalties are dire: Criminal sanctions for espionage can be severe indeed. The higher the risks of harm, the greater the protection required. This is not a new idea in the law. Furthermore, the trigger for investigation (e.g., the suspicion threshold of the Foreign Intelligence Surveillance Act [FISA]) is more primitive in its protections of the accused. Add to

this a crime that has yet to be committed, and the burden on the state grows even further. I, like Danoff, was impressed that FBI documents admitted a lack of certainty on the extent—and even existence—of espionage.¹³

Against the backdrop of American jurisprudence, the level of individual protection is an important moral point. Our legal system is one of imperfect procedural justice (Ref. 11, p 85). That is, it recognizes that perfect justice may not be attainable in all circumstances. Therefore, complex trial procedures and rules of evidence (namely, due process) are constructed to approximate a just result. Due process is the currency of the legal system—the moral process. In cases in which there is less due process (as in espionage investigations, FISA) the burden is on those who would restrict it.

The equivalence of legal procedure and moral process underscores the importance of narrative in understanding the ethics of this case. Schafer contends that Theresa Squillacote's family and history do not contribute to the moral discussion. We might be generous and allow Danoff, a producer of documentaries, some leeway in establishing a story line. But as moral observers, we especially want to know how the protagonists arrived at their moral crossroads. Are there elements of coercion, illness, and personal vulnerability that weaken justification for the combined intervention of psychology and state power? Are there historical circumstances that mitigate the seriousness of the betrayal? Does the narrative even indicate a betrayal without the psychologist's intervention? Much information is necessary before deciding the moral nature of the act and whether it justifies the psychologist's use of her talents outside the usual clinical and forensic agreements.

The entire field of narrative ethics concerns itself with the process individuals use to reach their moral conclusions. Here, as in law, narrative is a procedure that constitutes moral process.¹⁴ Forensic practitioners use just this narrative approach when exploring the thoughts, feelings, and behaviors that lead someone to commit a crime. Moreover, forensics has recently incorporated narrative ethics into its theory on ethics.^{4,9} It could not be more relevant to an understanding of this case.

It appears that professional ethics, the social contract, and the common balance between individual

and state's rights begin to militate against the kind of analysis conducted by the FBI's psychologist.

But we are not done yet. There is the ethics of perception to consider as well. The move in both case law and ethics has been toward recognition that even the perception of wrongdoing is damaging.^{15,16} This perceptual fallout particularly undermines the credibility of fiduciary relationships. When trust is the currency of the relationship, even activities at the margins are harmful. Government officials, lawyers, judges, clergy, and clinicians are among those held to this higher ethics standard.

The mere perception of a government psychologist's disavowing forensic protections and using deception against a suicidal individual is damaging. Are private thoughts and feelings, which a psychologist has special powers to exploit, fair game, or will the community view the intrusion as Orwellian? Will the community perceive the need for some kind of warning to government employees? The social contract with psychologists is not likely to tolerate the perception that government clinicians are secretly available to record and manipulate private thoughts. Even if overstated, the scenario's emotional valence undermines both psychology and governance.

Now, is this simply a matter of personal opinion? Schafer contends that beyond law and professional ethics there is only personal opinion. Janofsky's testimony should have been couched in terms of his own personal bias, Schafer says, not as a matter of ethics. Is there truly nothing beyond the law and professional ethics?

I am among those who argue that the law is a model of minimalist, negative obligations.^{17,18} It tells us what citizens must not do to each other and generally stays silent on what is morally praiseworthy. Clinical psychology and ethics are more in keeping with the positive obligations of one person to another. Admittedly, professional ethics may be influenced by unflattering motives and may not be definitive. But there are alternative guides to right action that are invoked by Janofsky's testimony.

What of organizational ethics (the moral responsibilities of entire organizations), communitarianism (the values of communities supporting those organizations), and pure rights theory (the primacy of individual freedoms)? Surely these doctrines are not simply matters of personal opinion. They are complete models that enrich our view of

ethics dilemmas and provide moral guidance. In the interests of space I will not draw on these paradigms to build on Janofsky's testimony. I assert only that ethics concerns from these quarters are not easily discounted.

Our youngest students, too, make the "personal opinion" critique. "You believe," they say, "that being both a clinician and an agent of social control raises the ethical requirements of the situation. Isn't that just your opinion? I have a different view." But if there is one thing that ethics is not, it is personal opinion. These students come to realize that ethics is a method of structured reasoning. It is an appreciation of how different analytic perspectives inform and influence each other. It is a familiarity with ways of deciding when one approach (e.g., the utilitarian or the Kantian) is superior to another. It is a manner of limiting unregulated emotional influences and applying rationality.

Schafer's arguments raise serious concerns about the conduct of the Squillacote case. The doctrines of professional ethics, legal ethics, role morality, and social contract theory all oppose the actions of the FBI psychologist. A suspected betrayal by a government employee is not sufficient to justify the state clinician's stepping out of both clinical and forensic roles. It is particularly indefensible when the clinician's expertise is governed by one set of rules in open society and by another set of rules in secret. This extremism in defense of liberty sacrifices the very freedoms it intends to protect. It cannot be considered ethical.

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