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An Ethical Dilemma

THE ELECTION OF DONALD TRUMP IN 2016 RAISED PROFOUND ethical questions for many psychiatrists. Is it ethical to diagnose a public figure without examining him or her? If so, why? If not, why not? Are there compelling reasons for a psychiatrist to comment on a president's mental health if nuclear warfare or the conduct of an unjust war is at stake? Is the media the right place for such comment? Under what circumstances, and in the name of what higher principles, may a psychiatrist violate the ethical code of her own professional organization?

In *Diagnosing from a Distance*, I explore and reflect on these ethical questions using a historical and philosophical lens. This book is a study of the development of professional ideas in a political context – and ultimately an argument about how we might approach the ethics of psychiatric comment on public figures.

HOW DID WE GET HERE?

As a psychiatrist myself, and one with a long-standing interest in history, politics, and ethics, I became interested in the question of what a professional owes to the larger society some time after I graduated from my psychiatry residency at the Harvard Longwood psychiatry training program in Boston. During college, I had learned about psychoanalyst Erik Erikson and his efforts in “psychohistory” from a teacher and mentor, psychiatrist Robert Coles. Later, I read and admired Erikson's influential book *Young Man Luther* (1958). The book is a deeply humane consideration of the relation between a developing

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religious thinker's inner conflicts and his emerging role in a historical movement. Erikson remained a favorite after my residency, as I joined the faculty at Harvard Longwood and began to teach adult development (the unfolding of psychological strengths over the life span) to psychiatry residents there. Along the way, a colleague enthusiastically recommended psychoanalyst John Mack's biography of T. E. Lawrence, *A Prince of Our Disorder* (1976), and it proved to be a remarkable book. But I had not formally studied history beyond college, and I had never really given much thought to the ethics of speaking about *living* figures.

In 2008, I saw a series of articles in the *New York Times*. These explained that the American Psychiatric Association (APA), an organization to which I belonged, was reviewing section 7.3 of *Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry*. Section 7.3, the portion of the psychiatric ethics code that deals with comment on public figures, is better known by its informal name: the Goldwater Rule. In 1973, I learned, the APA had first adopted the Rule and had stuck to the principle ever since. In wording that was puzzling to me, the Rule said that when psychiatrists are asked by members of the media to comment on public figures, they should refrain, because it is unethical to offer a professional opinion unless one has interviewed the person and obtained his or her consent:

On occasion psychiatrists are asked for an opinion about an individual who is in the light of public attention or who has disclosed information about himself/herself through public media. In such circumstances, a psychiatrist may share with the public his or her expertise about psychiatric issues in general. However, it is unethical for a psychiatrist to offer a professional opinion unless he or she has conducted an examination and has been granted proper authorization for such a statement.¹

Was the Goldwater Rule a ban on comment to the media, as its framing in the first sentence seemed to suggest? Or was it intended as a ban on any professional comment without interview and consent, as the ringing principle enunciated in the final sentence seemed to imply? In my uneasy rereading of section 7.3, I concluded that the APA believed it is always unethical to comment on a person without interview and consent – a procedure that my title for this book calls, for convenience, “diagnosis from a distance.” By this

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term I mean not only diagnosis, but a variety of ethically debated activities undertaken by psychiatrists without a personal interview with the subject, authorization from an appropriate institution, and/or the consent of the subject herself, including offering professional comment on a subject's leadership style, on his or her personality, reactions to stress, or what psychoanalytic clinicians call "psychodynamics" – how an individual's thinking, feelings, and behavior change according to emotional circumstances and according to little understood (unconscious) forces within himself. A more formally elaborated version of such comment is psychological profiling or psychobiography. In the text, I generally refer to these various activities simply as psychiatric "comment" or "comment without interview and consent."

The tone of the Goldwater Rule, as I read it, was strikingly different from the tone the APA used in other areas of psychiatry and ethics. In many clinical settings, ethics principles conflict and must be reconciled or resolved through close reasoning about the risks involved in the case. In emergency settings, for example, concern about safety often conflicts with the otherwise central principle of respect for privacy. In my psychiatry residency training, I had learned that a psychiatrist is sometimes compelled to violate a patient's confidentiality in order to keep the patient herself safe or to protect a patient's potential victim: if there is no safe alternative, one calls the police or an ambulance and ensures that the patient is taken to an emergency room for an evaluation, even if this intervention is against the patient's wishes. On a regular basis, my co-residents and I had learned to use our judgment in just such difficult circumstances. Under the doctrine known as *parens patriae*, the patient's safety – and sometimes the public's – required it.

The Goldwater Rule, in contrast, seemed to say that it is *always* unethical to comment on a person's mental health without interview or consent. But did the APA really mean always? There were, it turned out, even further circumstances where diagnosis from a distance happened all the time – not only in the common case of the emergency room, where patients often declined to be interviewed, but in forensic (court) settings, where defendants often saw only hazards in speaking to a psychiatrist, and in the case of the psychological profiling of world leaders by psychiatrists in the Central Intelligence Agency (CIA). In the ordinary course of

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our learning as residents, we were encouraged to seek opinions from knowledgeable colleagues, supervisors, and local experts in the daily course of our work. Was a “curbside” consultation, in which we briefly asked a knowledgeable peer for an opinion on a diagnosis or treatment, ethically supportable?

The Rule turned out to be more complicated than I had realized. I did not know it at the time, but the APA had addressed each of these issues but continued to endorse the seemingly absolute wording of the Rule. Why?

During the presidential campaign of 1964, a provocative publisher named Ralph Ginzburg – who figures prominently in this book – put together and publicized a special issue of his hip, independently funded *Fact* magazine (which he advertised as “not for squares”). The issue consisted of a psychological profile of candidate Barry Goldwater and the results of a survey of the nation’s psychiatrists. Complete with *Mad* magazine-style cartoons lampooning Goldwater, the issue hit the stands a little more than a month before the election. *Fact*’s back cover included numerous sample comments from psychiatrists: “I find myself increasingly thinking of the early 1930s and the rise of another intemperate, impulsive, counterfeit figure of a masculine man, namely, Adolf Hitler.” If elected, said another, Goldwater would lead the country straight into nuclear war and “obliteration.”²

The incident had led the APA to form a new ethics rule on the issue – and no wonder. But did that mean that CIA profilers could not opine on foreign leaders like, say, Saddam Hussein? Was Erik Erikson’s book *Young Man Luther*, and, for that matter, the whole field of psychohistory that I had so admired, unethical to pursue?

I was puzzled but very curious, and I wanted to know more. In 2015, I invited experts on each side of the issue to participate in a panel, held at the APA’s annual meeting in Toronto, on the ethics of the Rule. I was not interested in soliciting their comments on public figures, but I did want to know their reasoning about the Rule: Is section 7.3 an important ethics guideline or a hindrance to sound ethical practice, and why? For presentation at the conference, two colleagues and I conducted a videotaped interview with 1988 presidential candidate Michael Dukakis and sought his opinion on the Rule. He strongly supported it as an important

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protection for the profession as well as for public figures. At the panel, journalist and ethicist Meredith Levine agreed with Dukakis and argued that the Rule protects the quality of the public discourse on politics and psychiatry. Yet Jerrold Post, a psychiatrist and former CIA profiler, had strong doubts about the Rule. He recounted his experience with profiling and with the APA and concluded that the Rule interferes with important contributions that psychiatrists could otherwise make to the conduct of foreign policy and to public safety. Psychiatrist Paul Appelbaum, a former APA president, gave the most balanced assessment of anyone on the panel, concluding that section 7.3 is imperfect but too valuable to do without.³

In the next year or two, I decided to look further into the history and background of the Rule. How had the odd framing and phrasing of the Rule come into being? What exactly is prohibited under it? Given the Rule's seeming ban on all psychiatric comment without interview, did the APA view psychological profiling for the CIA (for example) as ethically appropriate? Or did it mean only to ban individual psychiatrists from making comments in the media? How had the APA decided to put this Rule in place, and how did the organization interpret its own Rule? I published the first results of my inquiries in the *Journal of the American Academy of Psychiatry and the Law* in 2017. By then I had concluded that the Rule is unclear, that its wording makes it appear more general in scope than it actually is, and that it needs to be revised in the interest of clarity and fairness. Adopting this unclear Rule as a central ethics principle, I argued, could itself lead to problems – including misunderstanding by APA members and by the general public.⁴

HISTORY, ETHICS, AND PSYCHIATRIC COMMENT: A CLOSER LOOK

This book represents the next stage of my curiosity. I have tried to deepen my understanding not only of how the Rule developed but also of its antecedents in history: psychoanalysts' efforts during World War II to profile Adolf Hitler (about which there was no controversy), the controversy over Barry Goldwater in 1964, the role of the CIA in profiling over decades, and the current bitter debate about Donald Trump's mental

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health and whether it is ethical or an ethics violation to comment on him in the absence of an interview and consent. I looked more deeply into archives for this project than I had done before, and I interviewed a number of the antagonists in my narrative. The APA and its critics disagreed with each other, but each side spoke with me.

The resulting study, I hope, has several virtues to recommend it. By presenting original material and reassessing clichés about my topic, I hope *Diagnosing from a Distance* will illuminate the various political and media contexts in which psychiatric comment, and the ethics debates over it, have taken place. In other words, I intend *Diagnosing from a Distance* to be an original investigation of the psychiatrist's relationship to society from the 1930s to the present. I also hope the historical material I present will add perspective to our era's debate over the ethics of commenting on public figures. For example, I spend much time reconstructing the history of changes in libel law in the 1960s, where the controversy over Goldwater first played itself out fully. In recent years, Supreme Court justices Antonin Scalia and Clarence Thomas, and President Trump himself, have shown great interest in reversing *Sullivan* and thereby making libel law more restrictive again. Such changes would undo the progressive evolution in libel law that protected reporters and publishers and allowed ordinary citizens wide latitude to criticize government officials.⁵

I hesitate to say, with Santayana, that history repeats itself (in his words, those who cannot remember the past are condemned to repeat it). I much prefer two other sayings – Wilfred Sheed's remark that anyone who has ever discovered Santayana's remark is condemned to repeat it, and the concise saying attributed to Mark Twain: history rhymes. Sheed's witticism reminds me that clichés have a destructive power of their own, while Twain's alleged remark (it is not clear that he ever actually said it) highlights how historical parallels are intriguing yet can never be exact. Sometimes apparent repetitions are in fact very different phenomena.⁶

In Chapter 1, I examine American psychoanalysts' effort to profile Hitler for the Office of Strategic Services (OSS) during World War II. Partly conducted in secret and largely uncontroversial at the time, this effort is in many ways the progenitor of modern psychological profiling. Here American psychoanalysts, including a highly sophisticated refugee from Nazism, tried to understand and undermine the worst form of

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totalitarianism Europe has ever seen. The effort to profile Hitler and to understand him in a cultural and leadership context remains an indispensable reference point for the controversies over psychiatric comment on public figures that would follow in the years ahead.

I next take an in-depth look at the controversy that gave rise to the Goldwater Rule itself. As Chapter 2 shows, Ralph Ginzburg devoted a special issue of his *Fact* magazine to the alleged dangerousness and lack of fitness for office of 1964 Republican presidential candidate Barry Goldwater. Like many liberals of his era, Ginzburg turned to psychoanalytic thinking (in his case, a much-debased version of it) to deal with the fear of fascism and nuclear war that came over him as he watched Goldwater announce on television that “extremism in the defense of liberty is no vice.” The provocative Ginzburg, I argue, has seldom been taken seriously as a free speech advocate or as a liberal opponent of repression. His career as a publisher, little understood today, deserves to be revisited in a fresh light despite the ethics problems his publications raised. Hitler, Jewishness, masculinity, professionalism, and the need to prevent nuclear war were central in the furious ethics debate that ensued.

Barry Goldwater, target of the special issue of *Fact*, was understandably outraged by it. Ahead of his time politically, Goldwater was also ahead of his own conservative movement in grasping that a lawsuit could be used as a political weapon. Goldwater chose to pursue the point, bringing a libel suit against Ralph Ginzburg and *Fact* in 1966. In an era of expanding civil liberties, Goldwater argued that public figures need to be protected from vilification. As Chapter 3 demonstrates, Goldwater’s capable attorney Roger Robb faced off against Ginzburg in the Foley Square courthouse in New York in *Goldwater v. Ginzburg*. Ginzburg contended that *Fact* was motivated by genuine concern for the country’s welfare and was covered by the doctrine of free speech; Goldwater and Robb argued that *Fact* had committed an outrageous violation of journalistic and medical ethics as well as libel law. This was a complicated question at the time, because both Ginzburg and Goldwater were operating within a new space cleared by a revolutionary new doctrine of libel announced in 1964 by the Supreme Court in *New York Times v. Sullivan*. Before *Sullivan*, public figures could bring libel actions fairly easily; while technically the burden of proof was on the plaintiff, the substantial difficulty

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rested with defendants. Under traditional libel law, “defamatory statements were presumed to be false”; the defendant had to prove otherwise. After *Sullivan*, newspapers could publish much more freely, and the burden of proof was now on plaintiffs to prove that libel had been committed. But what were the limits of the new doctrine?⁷

Chapters 2–4 of this book, then, largely relate the story of how journalists and public figures adjusted to the new legal reality of *Sullivan* and argued bitterly over its limits. Inevitably, the media descended on the courtroom and covered all three weeks of the contest in *Goldwater v. Ginzburg*. This media scrutiny – with major newspapers, wire services, radio, and *Time* magazine covering the proceedings in detail – provided the equivalent of a gigantic microphone for each side to use as it saw fit.

As I document in Chapter 4, after the district court was decided, the losing side tried to get the Supreme Court to accept the case for further review. (I prefer not to disclose too early who won the case.) The moment proved to be an occasion for an eloquent statement by Justice Hugo Black, a liberal icon of First Amendment jurisprudence. The depth of Goldwater’s support and the value he gained from media exposure in the case may be traced in his correspondence with his often passionate supporters.

If the 1964 *Fact* debacle had stopped at the Supreme Court and only influenced libel law, it would still be noteworthy. But there was much more. In the second part of this book, I look at the next iteration of the debate: how the country’s largest organization of psychiatrists also was deeply shocked by Ralph Ginzburg’s publication, and how it responded in an era of growing specialization and professionalization. At a time when psychiatry was gaining wide acceptance but still felt insecure about its status, the American Psychiatric Association was preparing its first formal ethics code. The Goldwater Rule – a direct response to the *Fact* episode – was enshrined in the organization’s first formal code of ethics in 1973. There was no shortage of disagreement either then or later, as the Rule gradually hardened into established doctrine.

I next explore psychological profiling in the CIA and the White House, especially during the Nixon administration. The saga is too little known by psychiatrists today, but it represents perhaps the most egregious ethical violation involving psychological profiling ever to occur

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within a government agency. As I document, the Nixon White House aimed to discredit antiwar activist Daniel Ellsberg in the media by commissioning a psychological profile from the CIA. Agency psychiatrists had done sophisticated profiles of foreign leaders for years. But profiling an American citizen was outside the domestic mandate of the CIA's charter. The uncomfortable response of the CIA psychiatrists, who agreed to create the profile but then raised objections and used delay tactics, is sadly instructive rather than inspiring. These professionals were caught between a president and their sense of what was proper.

The CIA's story also shows that profiling has proceeded unimpeded over the decades. Given the existence of the Goldwater Rule, how can this be? As the reader of the Rule will note, profiling for government agencies is not mentioned in the text of section 7.3; it turns out that government profiling is elsewhere specifically *exempted* from the Rule's purview. In the APA's view, profiling for the CIA (i.e., *for* a president) is ethically acceptable, but it is unethical for an individual psychiatrist of conscience to comment *on* an American president. This ethics stance, I argue, is insensitive to the risks of profiling when undertaken for the government and can place government psychiatrists in a precarious ethical position.⁸

It has been during the Trump administration that the controversy over the ethics of psychiatric comment has grown most bitter and most personal. Since Donald Trump's election and inauguration, a large group of psychiatrists has concluded that it is in the national interest to warn the public about what it sees as the president's dangerousness. Bandy Lee's best-selling book *The Dangerous Case of Donald Trump* (2017) illustrates both the strength of this movement and its limits, and the strong backlash against it. The APA listened to the Lee group's argument but then rigidly reasserted its prohibition on media comment. Here I try, as much as it is possible in recounting contemporary events, to understand what is at stake for both sides in the debate. This latest iteration of the ethics debate has played out against the backdrop of a constitutional crisis nearly as dramatic as the Watergate crisis of 1973–4.

In important ways, issues of civil rights, ethnicity, and immigration are central to this book. In the 1930s and 1940s, the effort to defeat Hitler involved many Jewish psychoanalysts and at least one media executive who understood personally what was at stake in the war and who sought

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to use the then-considerable power of psychoanalysis and the media to the greatest possible advantage in that effort. Ralph Ginzburg, Jewish himself, saw Barry Goldwater not only as similar to Hitler in his authoritarianism and mental instability but also as a threat to the welfare of African Americans and the civil rights of all Americans. Like many left-leaning Jewish activists in the 1960s, he imaginatively identified with the civil rights and antiwar movements. Daniel Ellsberg, whose parents were of Jewish descent, was similarly drawn to protest over what he saw as an unethical war in Vietnam. Justice Hugo Black, once a Ku Klux Klan member himself but now the nation's leading advocate for the First Amendment, would voice his views in cases involving the actions of both men – as Ginzburg clashed with Goldwater, and as the *Washington Post* (to whom Ellsberg leaked antiwar information) clashed with Nixon. *Sullivan* itself had grown from a case involving Martin Luther King and the Southern effort to quash coverage of the civil rights movement – what Anthony Lewis calls the “strategy of intimidation by civil libel suits.”⁹ Thus my story is inseparable from the story of civil rights and social justice.

By the time immigration reemerged as an issue during the Trump presidency, the political beliefs of left-leaning European refugees or the rights of African Americans were no longer central issues in the debate, as they had been in the 1950s and 1960s. The rights of marginalized citizens remained an issue, however, as the debate over the treatment of immigrants at America's southern border showed. Once marginalized in the discussion themselves, women were now well represented in the debate over psychiatric comment on public figures and over public policy. Bandy Lee, a Korean-American female psychiatrist, took the lead in challenging the public to confront what she saw as the dangerousness of Donald Trump. Many of the mental health professionals who contributed to Lee's *Dangerous Case* were appalled by Trump's statements and policies concerning women and immigrants, and the APA itself assertively fought Trump's policy on the separation of children from their parents at the border.¹⁰

In my Conclusion, I review themes that emerge from the history I have presented and use this foundation to reconsider the ethics of the Goldwater Rule. The reader need not agree with me in all of my