

## Response from a Straw Man

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One problem with ivory towers (often sited on Olympian heights) is that the view from them is often grossly distorted and inaccurate. The fog and miasma below often makes viewing the landscape difficult to impossible.<sup>1</sup> I personally have great difficulty in recognizing the terrain from which Alan A. Stone, MD draws his generalizations about expert testimony.

First, although Stone does make one small doff of his cap toward child custody disposition,<sup>2</sup> he discusses the topic of forensic psychiatry mostly in terms of criminal law and mostly as though the adversarial legal system settles its differences primarily through trials. Quite to the contrary, most civil cases are settled by negotiation. By the time experts from each side complete their evaluations, there is little reason to carry out a trial, at least as far as psychiatric issues are concerned.

Negotiations between counsel explore and evaluate the several options. These are worked through to a reasonable and mutually held viewpoint about the case, and then a settlement is drafted. Although I have worked on fifteen to twenty cases during the past year, I have testified in only two. Most of the rest were resolved without trials, although a couple of them were tried without using expert testimony at all. The reason for the latter situation, in my judgment, was that there was no utility in using expert psychiatric opinion and so counsel did not do so. Contrary to apocrypha, counsel did not go out to find a new and different opinion that better fitted their side of the case. That is something I have seen infrequently, and I believe that when lawyers receive a thoroughgoing evaluation of their case that goes against them, they generally proceed to cut their losses and settle. In all the cases I am working on at present (if my hunches are correct) I will only testify in two or three. Nor will I even be deposed in most since the full and written reports on the cases will provide an adequate basis for settlement negotiations. This is not to say that all the cases will end up as I thought they should. It merely means that counsel were willing to use a thorough and balanced opinion as the basis for resolving the case; just what the adversarial method contemplates.

I understand what Kant's caveat means, but his point goes to the weight of evidence rather than to its admissibility.<sup>3</sup> The law has sought for five hundred years or more to distinguish different mind-states as they relate to causes of behavior. Whether we can do it perfectly is somewhat beside the point. We believe that such variations exist, we respond to them clinically, and in fact psychiatric science is struggling to make such discriminations with as much precision as possible.

Like many of the ritual words of legal procedure, when the expert is asked to give an opinion with "reasonable scientific certainty" in the trial context, it really

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means to the best of his/her ability, assuming he/she qualifies as an expert in the field. I see nothing inappropriate about doing just that, since my clinical activities day-in and day-out (and I assume those carried out in the ivory tower as well) turn on precisely that degree of certainty/uncertainty. Since the justice system is the social institution that tries to resolve problems where facts are not certain, it would be most unwise if they did not use any substantial group of individuals whose work centers on attempts to deal with just such slippery points. When Freud-Hartmann purist types formulate the dynamics of a person's behavior for the purposes of helping that person find his/her way to some new form of reality testing, it apparently does not trouble them that they could not scientifically prove and validate the theoretical tenets with which they carry out their procedures.

It does not seem illogical that the same sort of formulation might be thought useful in struggling with some legal problem. Since the expert has been invited in to do just that, his/her behavior does not seem inappropriate nor does he or she have the task of locating "the ethical boundary for an imposter."<sup>4</sup> In due course (as in the example Stone raises from the Walker book<sup>5</sup>) a given expert may be superseded by a more "scientific" group. Indeed, the very adversarial process is tuned to explore that sort of issue. When courts come to the judgment that a certain kind of testimony "is more prejudicial than it is probative," they will eliminate it or curtail its use. We, the practitioners, do not have an ethical problem there. Our ethical requirement is that we carry out our professional task (a psychiatric evaluation in this case) with all the effectiveness we know. If the legal system does not want such information, we shall not be called; if our work is poorly done or useless we should be destroyed on the witness stand.

I am puzzled by statements implying that psychiatrists are taking over the legal system and making decisions that properly belong to the law. Szasz frequently has said this, and it seems that Stone implies the same thing. I can only wonder what legal system they are talking about, for I have seen no inclination for fact finders to fall over themselves to believe what I offer in my expert testimony. It is clear that with the help of opposing counsel, jurors and judges are quite willing and capable of listening to my opinion with great skepticism and even acting against it in situations when they have been offered precious little alternative explanation. They *do* find the facts. Like the old chestnut about baseball: a pitch becomes a ball or a strike only after the umpire calls it.

### The Expert Witness

Before going further, let me describe briefly what I do as an expert witness.<sup>6</sup> First I gather all information known about the person from every available source. Following my interview with the person, when and if that is possible (sometimes it is not, for instance, as in a will contest when the testator is deceased), I use psychiatric theories and principles to understand what the person did or didn't do as it related to the legal issue in contest. I attempt to determine *the person's* values and how those values influence his or her behavior, what kind of behavioral controls he/she had, what volitional forces are present in the person's mind, and what kind of psychological choices lay before him/her in relation to the

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legally relevant activities. These are the same questions that fact finders will face in the case and that must be resolved by the person in the law suit.

My profession (psychiatrist/psychoanalyst) has gone as far as any other profession to be highly aware of personal biases and how they influence thinking. I do not pretend there may not be residual qualities of my psyche that complicate and modify my judgments. I am highly aware of the need to think about this matter and consciously try to do so at all times. When my testimony is admitted in a case, the degree to which the fact finders believe I have been effective in doing this will influence the weight and credibility they give to my evidence.

When I agree to participate in a law suit, I inform counsel I do not know *a priori*, whether my views will be useful to his/her case or not. All I can do is thoroughly study the situation or the client (or the opponent's client) and give my best opinion about the psychological state of affairs. Frequently my opinion virtually destroys the case of the person who retained me. The nature of procedural rules as well as the practical principle of cutting losses usually causes counsel to move expeditiously toward settlement rather than to prolong the expense of litigation, which so far as they are concerned will fail.

As noted above, I have not encountered a lawyer who would seek another expert opinion that better suited their cause. They generally perceive my evaluation as a piece of competent work, and therefore other competent experts would tend to have the same findings. This being so, they should work out some kind of settlement or plea bargain. These same attorneys frequently return for my assistance in other cases. They do not see this outcome as a defeat or as a basis not to seek my services. Neither the legal profession nor the psychotherapeutic profession can sit and wait for the day when we will have highly validated theories about personality and behavior. We must use the best we have now, and even as we acknowledge its shortcomings, there is certainly no need to apologize.

Dr. Stone characterizes my standard as relating to "good clinical practice."<sup>7</sup> Quite obviously this expression has, among other things, temporal relativism to it. It obviously expresses "state-of-the-art judgments," which though they may be slippery, are the best available concepts at the time. I see no reason to be apologetic for such a standard, nor does it trouble me in the least that a Dr. Leo, of two centuries ago, might say things we would not use today. The fact that he can provide the butt for much humor is not surprising; any unsettled facts or situations have that tendency. (In addition, I gather he was not a very effective witness then, nor would he be today.)

I am not troubled by the fact that psychiatrists participate in a process which is "there to get defendants off." Lawyers are there for the same reason, and we do not seem to think that troublesome (at least those of us who understand the constitutional right to counsel). Psychiatrists are not responsible for the defense of insanity. That defense reflects ideas that have been evolving for more than five centuries and that reflect the multiple and complex attitudes people have about punishment in general. We should not decide our participation on the presence or absence of these mixed attitudes in the population at large but rather simply ask, "Do we have anything useful to bring into the resolution of such difficult ques-

tions?" If in fact we have anything useful to offer in the therapeutic arena, those same offerings, brought into legal procedures may have usefulness there also. If the legal system wishes to use our ideas and insights, why should we not participate? As I have stated elsewhere, the law needs all the help it can get to bring deeper understanding of human behavior into all of its processes. For these reasons, I do not feel that I am prostituting my profession when I participate in a law suit.<sup>8</sup>

Regarding Dr. Stone's concern for the egocentricity of my views, I believe ethical behavior in the last analysis is and must be primarily the result of much "egocentric" soul-searching. The day-by-day problems of ethical behavior in professional work are rarely found in codes of ethics, and they have to be generated by the vigorous soul-searching of the person who carries them out. I do not believe external rules and regulations from "society" can do much to augment this process. Rather, the professional group itself must direct considerable support, pressure, and praise toward those who carry out the difficult tasks of ethical professionalism. The crucial question always is: Has the given professional actively worried about his/her own behavior? Then that person can be "closer to honesty; the forensic psychiatrist must honestly believe what he says and should not allow his views to be distorted. He should be an honest, good clinical practitioner." I fully agree with Appelbaum's view on this.<sup>9</sup>

The last issue Dr. Stone explores is the question of partisanship in the testimony. When I testify in a case, I do in fact lay out "the whole truth" in my testimony. I believe that removing bits and pieces of testimony that run against the individual about whom you are testifying, disturbs the fundamental credibility of the presentation, and I will not do it. Jurors are not fools, and they know that all details of a case are not likely to be favorable to one side or the other. The most persuasive presentation a litigant can make is to present all data fully with the presumption that its algebraic sum will be advantageous to the presenter. As stated earlier, not infrequently I end up not testifying because my findings ran contrary to the interests of the side that retained me. Counsel then proceeded to settle the case as advantageously as they could under the circumstances. That does not strike me as inappropriate, undesirable, or unethical.

It seems to me that when Dr. Stone peered down from his ivory tower and saw us as straw men, he was mistaken. What he really observed were poor peasants plodding away in their rice paddies in a pelting rain storm *but* well covered by our straw raincoats.

#### References

1. Stone AA: The ethical boundaries of forensic psychiatry: A view from the ivory tower. *Bull Am Acad Psychiatry Law* 12:209-19, 1984
2. *Ibid*, 211
3. *Ibid*, 210
4. *Ibid*
5. *Ibid*, 212
6. For more extensive description see Watson A: On the preparation and use of psychiatric expert testimony: Some suggestions in an ongoing controversy. *Bull Am Acad Psychiatry Law* 6:226-46, 1978
7. Stone: Ethical boundaries, 211
8. *Ibid*, 209
9. Appelbaum PS: Psychiatric ethics in the courtroom. *Bull Am Acad Psychiatry Law* 12:225-31, 1984 □