

Commentary: Is Ethical Forensic Psychiatry an Oxymoron?

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The role of psychiatry in the legal arena is grossly misunderstood and even controversial. Some respected psychiatrists and members of the public have argued that the current state of the science of psychiatry is such that it has little to offer the legal system, and consequently, psychiatrists should be banned from the courts. Alan Stone's critique of forensic psychiatry 25 years ago is probably the most pointed. In this article, a summary of four different responses to Alan Stone's critique will be presented and analyzed.

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The verdict of not guilty by reason of insanity in the 1982 trial of John Hinckley, Jr, for his attempted assassination of President Ronald Reagan stunned and outraged many Americans. An ABC News poll taken the day after the verdict showed that 83 percent of those polled thought that justice was not done in *United States v. Hinckley*.¹ Many more people, however, blamed a legal system that they claimed made it too easy for juries to return not guilty verdicts in insanity cases, despite the fact that such pleas were made in only 2 percent of felony cases and failed more than 75 percent of the time. A shocked and angry population looking for a receptacle for their rage poured their anger on psychiatrists, whom they viewed as the evil hand used to subvert justice. All psychiatrists were tainted. Perhaps seeking to exonerate himself, much like Peter after he denied Jesus at the time of Jesus' persecution, Dr. Alan Stone came down from the ivory tower with guns blazing, in a seemingly self-righteous attack. His stated goal was to indict forensic psychiatry, the subspecialty of general psychiatry that had brought so much shame on all psychiatrists through involvement in the legal system.² This was the background against which Alan Stone made his critique of forensic psychiatry.

Stone insisted that psychiatrists had no place in the courtroom, and therefore the subspecialty of forensic psychiatry should be proscribed—a problem-

atic stance to take, as psychiatrists, like other expert witnesses, may not have the luxury of making that choice. The courts still possess the power to force psychiatrists into the courtroom through court orders and subpoenas. The question therefore, is not so much about whether they should avoid the courtroom, but how they should conduct themselves in it. For Stone, however, nothing short of proscribing forensic psychiatry would do.

To assist him in arriving at his conclusions, Stone presented a narrow view of forensic psychiatry, focusing mostly on child custody and insanity evaluations. Such a narrow focus caught the attention of Howard Zonana and Barbara Weiner (a practicing attorney) both of whom elaborated on the scope of forensic psychiatry. Weiner described forensic psychiatry as any involvement of psychiatrists in legal, social policy, and treatment issues where law and mental health meet,³ and Zonana added social security disability, malpractice, civil commitment, and fitness to work as areas in which forensic psychiatric opinion may be sought.⁴ In addition, forensic psychiatrists may be called on to assist in developing psychological profiles of suspects for law enforcement agencies.

Stone's description of forensic psychiatry had at its core, the questionable role of psychiatrists in the courtroom. He suggested that the lure of the courtroom is in part due to the desire of forensic psychiatrists to be in the spotlight of the media, an opinion not based on any objective data but presented with confidence, nonetheless, to buttress his argument. Surprisingly, he completely ignored civil cases where,

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as noted by Andrew Watson, court trials and testimonies are hardly needed.⁵ Depositions are also more rarely used. Most of these cases are settled by negotiation, and many psychiatrists involved in them (as well as in many criminal cases) never receive media attention. Therefore, Stone's suggestion that forensic psychiatrists are seduced ("dazzled") by the media is problematic.

While acknowledging the potential of forensic psychiatrists to be seduced by the adversarial system of the courts, Robert Sadoff expressed more concern about potential intimidation of forensic psychiatrists by attorneys who are vigorously representing the best interest of their clients.⁶ Such attorneys may make demands on forensic psychiatrists that are either inappropriate or potentially unethical from a medico-psychiatric standpoint. They may insist that psychiatrists alter, omit, or delete information that may ultimately transform reports in favor of the attorney or patient/client. Although Sadoff's views seemed to support Stone's concern that forensic psychiatrists may be cajoled by attorneys to "twist" the rules of justice and fairness to help their clients, he did not see this as a reason to boycott the courts, but rather, as an indication that ethics guidelines should be developed.

Stone's strong opposition to the presence of forensic psychiatrists in the courtroom seemed to stem not only from his belief that psychiatry, not being a pure science, had little to offer the courts, but also from his erroneous impression that psychiatrists in the legal arenas decide the fate of the involved parties. As a practicing attorney, Weiner rightfully objected to the latter conclusion. She noted that the outcome of a case depends not on the psychiatrists, but on how the attorney presents the facts he or she has to work with, and on the judge, who has the right to reject the findings of the experts or decrease the weight given them.³ She observed that even when forensic psychiatrists have been asked to respond to the ultimate issues, their responses do not mandate inevitable acceptance by the fact finder. The information provided by psychiatrists enhances the ability of the fact finder to reach a better, or at least, more informed decision than otherwise might be the case.

Weiner opined that it is not the psychiatrist's job to alter the facts to win the case. She repudiated actions of psychiatrists whose personal views distort the objectivity of their evaluations and stated that they were not competent forensic psychiatrists. She also

took aim at forensic psychiatrists who see themselves as "defense psychiatrists" or "prosecution psychiatrists," because they are not using their skills in an honest way, and consequently, have disgraced the subspecialty of forensic psychiatry.³ She observed that these are the same individuals who "prostitute the profession," according to Stone, and encouraged the view that forensic psychiatrists are hired guns. Weiner admitted that these psychiatrists taint the profession, but cautioned against judging the entire profession because of the actions of a few.

In elaborating on the flaws of the science of psychiatry ("closer to social science than physical science"), Stone took issue with statements that suggest certainty of opinion or claims that psychiatrists know things beyond a reasonable doubt. He challenged forensic psychiatrists to give opinions that reach the standard of bench scientists or to keep their lips sealed, as they do not have anything true to say to the courts. Andrew Watson reacted to these comments by comparing forensic psychiatry to clinical psychiatric practice. He reminded Stone that the same could be said of clinical psychiatric practice, where there is no scientific proof for diagnosis and treatments such as psychodynamic psychotherapy⁵; yet, no one is calling for the proscription of psychiatry as a medical specialty. The forensic psychiatrist was asked to give opinions with reasonable scientific certainty, which means, to the best of his or her ability as an expert in the field. Weiner observed that indeed, very few things in life are certain; therefore, no intelligent lawyer, judge, or jury member requests or expects true answers. To demand absolute truth is both impractical and unattainable, as the limits of current psychiatric knowledge do not allow for certainty of opinion. The ethical obligation of the forensic psychiatrists, therefore, is for them to carry out their professional tasks with all possible effectiveness.

The question of truth-telling in court inspired Paul Appelbaum to advocate for the development of a truth-oriented standard of ethics.⁷ In his proposal, the primary task of psychiatrists in the courtroom is to present the truth, to the extent that that goal can be approached from both a subjective and an objective point of view. Approximating the truth through a subjective viewpoint involves the gathering of the maximum amount of relevant data and carefully reflecting on them to reach a conclusion. If a conclusion cannot be reached with the available data, then it should be openly admitted. A psychiatrist may also

approximate the truth objectively by acknowledging the limitations of his or her testimony and enlightening the courts about differences of opinion among psychiatrists, stating whether his or her views are held by the majority or minority of psychiatrists. Appelbaum concluded that in all areas of potential ethics conflict confronting the forensic psychiatrist, the truth-oriented standard would suffice.

With regard to insanity defense cases and testimony, Zonana reflected on Stone's criticism and agreed with him that in cases in which experts disagree widely on diagnosis and conclusions, it is appropriate to raise concerns of ethical practices.⁴ Although these situations are in the minority, they often occur in cases with high media exposure, as in *Hinckley*, and cause harm to the profession. Weiner observed, however, that differing opinions among experts are not unique to psychiatry; other technical specialties such as engineering and orthopedic surgery lend themselves to disagreement.³ Zonana conceded that disagreement among competent experts may be due to limitations in our current state of knowledge, but in his view, the main problem is inadequate preparation and training of psychiatrists to function in courts.⁴ Inadequate examination of defendants, unfamiliarity with records, and conclusions based on speculative inferences from inadequate data lead to incompetent testimony, and reflect poor training. Weiner suggested that forensic psychiatrists should, therefore, be engaged in research, education, and treatment to improve their knowledge and professional skills.

If Stone's description of the role of forensic psychiatrists in the courtroom was inadequate, his frequent characterization of individuals examined by forensic psychiatrists as patients was both problematic and provocative. It was intended to advance his view that a doctor-patient relationship exists. Weiner viewed this as the primary flaw in Stone's comments.³ While forensic psychiatrists should always be concerned for the welfare of individuals who have mental illness and should discuss treatment recommendations with the hiring attorney, as necessary, their primary role is to provide consultation to a third party rather than treatment. There is no ethical duty to provide clinical care, and no physician-patient relationship exists. This fact should be clearly explained to the individual being examined, in addition to the purpose of the evaluation, and how what is said may be used in legal settings. The primary role

of the forensic psychiatric evaluator is to attempt to reach an honest conclusion about a psychological issue that has legal consequences. Sadoff proposed that psychiatrists working in the legal arena should frequently ask themselves whom they represent: attorneys, defendant/plaintiff, the judge, psychiatry, society, or himself/herself.

A more controversial response to Stone's imploration that forensic psychiatrists represent only the best interest of patients was Weiner's statement that the skills and knowledge of psychiatrists should be used to serve the ends of justice, not just the needs of a particular individual.³ Such a view, dramatically different from teachings in medical school and residency, could be shocking to some non-forensic psychiatrists. Most forensic psychiatrists would agree, however, that without information from well-trained and competent forensic psychiatrists in certain cases, there is an increased likelihood of miscarriage of justice. The concern of course is that psychiatrists, as do all doctors, take an oath to do no harm. Stone wondered if patients may not be deceived, consciously or unconsciously, and ultimately, harmed, in the quest to serve justice when psychiatrists participate in the legal arena. On the other hand, the distress of cognitive dissonance that may occur in forensic psychiatrists may cause some to alter or "twist" justice in favor of their patients (to do no harm). These observations led Stone to conclude that forensic psychiatry is a specialty that lacks clear ethics guideposts.

In response, Sadoff reminded forensic psychiatrists to be cognizant of the limits of their individual expertise and that of their profession.⁶ They can do only as much as the science of psychiatry permits, and they should be willing to refer cases to colleagues with more expertise/knowledge in special cases. If there are personal biases or any information that might impair his or her effectiveness to the retaining attorney, the ethical forensic psychiatrists should express them to the retaining attorney especially if there is a likelihood that the biases will influence the psychiatrist's opinion. Professional fees should be discussed clearly and should never be attached to or contingent on the outcome of the case. Clients and patients should be informed of the purpose of the examination and which attorney has hired the forensic psychiatrist. Further, they (clients) should be frequently reminded of the limits of confidentiality. Regardless of personal or other biases, the forensic

psychiatrist testifying in court should be an unbiased expert.

In conclusion, despite the attacks heaped on forensic psychiatrists, most attorneys, courts, and legislators recognize the pressing need to use psychiatrists' clinical skills to try to resolve legal disputes. Eradicating forensic psychiatry would adversely affect the goals of achieving fairness and justice in our society. Expert opinion or testimony that leads to the hospitalization and treatment of individuals with serious mental illness in lieu of their incarceration in prison serves not just the individual but also the society at large. Therefore, what is needed is not eradication of the profession but the development of guidelines that would improve the effectiveness and credibility of the profession. Such guidelines should be pragmatic and tailored to the current state of knowledge of the science of psychiatry, not to the

emotional responses of those who would criticize the program.

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