Commentary: Mapping a Changing Landscape in the Ethics of Forensic Psychiatry

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In 1984, Alan Stone, writing in the *Bulletin of the American Academy of Psychiatry and the Law*, stated that "forensic psychiatrists are without any clear guidelines as to what is proper and ethical," adding that because of the nature of psychiatry and the realities of the law, no such guidelines can be drawn. Put starkly, his conclusion was that the practice of forensic psychiatry is fundamentally unethical. In the same issue, several contemporary commentators criticized his position, arguing that he misunderstood the social context of forensic psychiatry and that, in any case, he was wrong to say that ethics standards did not exist. In this article, these questions are reviewed again, starting from the principle articulated by the philosopher, A. J. Ayer, that that there is no such thing as an ethical fact.

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Reading Dr. Alan Stone's 1984 critique of American forensic psychiatry[1] and the commentaries that follow, I found much that seems familiar 25 years later. The complaints about mercenary forensic psychiatrists doing the bidding of their legal masters, of "experts" overstepping their expertise, and of honest practitioners becoming seduced by the adrenaline and self-importance of the courtroom are as real now as they were then. So, too, are the defensive retorts of many of the commentators that the failings described by Stone relate to others and not to us. Indeed, the same issues that struck a chord in the 20th century and continue to resonate into this one were already apparent in the century that came before. Forensic psychiatry would seem to be, as asserted by Stone, inherently and irredeemably ethically vacuous. Or is it? Has Stone in fact confused the ethical malfeasance of individual forensic psychiatrists with the ethics framework of forensic psychiatry itself?

Stone's thesis is that "forensic psychiatrists are without any clear guidelines as to what is proper and ethical" (Ref. 1, p 210). His claim appears to be that rather than being an oversight, the nature of psychiatry and the realities of the law mean that it is simply not possible for such guidelines to be drawn. Because of this, he believes that forensic psychiatrists lack a moral map and by definition, at least to the extent that they interact with the legal system, continually stray on the wrong side of certain ethics boundaries.

But where do these boundaries lie? Although Stone refers to ethical boundary problems, and indeed includes the phrase "ethical boundaries" in his title, nowhere does he state the overriding ethics principles that define the terrain on which forensic psychiatrists are said to wander blindly.

Ethics Principles

Ethics is the philosophy, some would say the science, of morals. It relates to the determination of what is "right" and "wrong," "good" and "evil." Ethics principles are those on which we base our conceptions of what we should and should not do. Those who act ethically, or in a moral manner, seek to act in accordance with a set of ethics principles.

Ethics principles, however, derive from an underlying framework, founded on a set of basic assumptions. The nature of these assumptions, and the way in which an ethics framework should follow from them, are matters that have been argued about since before Socrates. Some philosophers, like Plato, proposed that there are cardinal virtues and absolute rules on which ethical behavior should be based. A

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similar line is taken in the Bible and by most modern professional codes of practice. Others, like J. S. Mill,[2] take a more pragmatic, relativist approach in which circumstances are taken into account, with what is right based, for example, on the shifting sands of what brings happiness to the greatest number of people (in itself, perhaps, a single cardinal virtue). Still others, like the English philosopher A. J. Ayer,[3] argue that there is no such thing as an ethical fact, nor is there any such thing as an objective value, and that morality is in effect nothing more than the subjective attitudes and beliefs held by individuals, shaped by their experiences—ethics statements are neither true nor false. One can probably find a philosopher who has argued for every point on the objective-subjective spectrum, but as observed by Ayer, ". . . it is silly, as well as presumptuous, for any one type of philosopher to pose as the champion of virtue. And it is also one reason why many people find moral philosophy an unsatisfying subject. For they mistakenly look to the moral philosopher for guidance" (Ref. 3, p 246).

Regardless, once a moral system is chosen, notions of right and wrong then flow from it in a more or less logical manner. But because they have different underlying first principles and starting points, any two systems, internally consistent in themselves, can lead to conflicting conclusions about what is right and wrong. Translation between them is meaningless, although this is often obscured, as the same words are used, masking the fact that they originate from different languages. Eating meat, for example, may be wrong in an ethics system that begins from the premise that all killing is immoral, but may be right in one with the superiority of humans over animals as its starting point. Both conclusions, following as they do from fundamental assumptions of different ethics systems, are "correct." There is no third, metalanguage with which to make an independent judgment.

What, then, is the underlying ethics system used by Stone to judge forensic psychiatry? He does not say. Instead, he identifies ethics questions for forensic psychiatry which he addresses from his undisclosed system of ethics to demonstrate that the answers offered by forensic psychiatry fall on the wrong side of the ethics boundaries he himself draws. His position seems to be, to quote the perhaps apocryphal challenge of the 19th-century political boss William Marcy Tweed, "As long as I count the votes, what are you going to do about it?"[4]

This subterfuge is recognized by Herbert Modlin,[5] who in his commentary focuses on the importance of understanding the ethics framework in which the forensic psychiatrist functions. He argues for the concept of situational ethics, a pragmatic approach to ethics decision-making which he attributes to several modern philosophers. In essence, this contrasts the absolute position taken by Stone whereby certain types of acts, as determined by divine revelation or metaphysical reasoning, are deemed to be inherently wrong, with a more modern view that what matters is the consequences of one's actions. Determination of right and wrong is made on a case-by-case basis, taking into account the context of the relevant action. What is right will vary over time and place, influenced by cultural values and even political structures; beliefs, values, behaviors, and ethics precepts are fluid. Modlin argues that this morality applies even to the role of the doctor, and that the Hippocratic ethic is, in effect, out of date.

According to Modlin, forensic psychiatry in particular functions within a social context that is influenced by time and place. And for him, the social context of the courtroom is different from that of the physician's office. While some might see this as a radical idea, he points out that military surgeons, occupational physicians, public health officers, and medical managers have functioned in this way for years. He argues that, in these various roles, doctors act as consultants and that their clients are the organizations that contract for their services rather than the patient in front of them. Thus, in the medicolegal setting, where the defendant is seeking to resolve a legal rather than a medical problem, the defendant is not a patient, nor indeed is the defendant the client; the client is the court. And, although Modlin does not state it, the ethics of the courtroom are different from those of the physician's office. In his short piece, he does not discuss how one is to determine what the situational ethics of the medicolegal context are, or whether it is every man for himself. He would have no difficulty, however, in conforming to ethics guidelines within a regulatory system.

Stone's Moral Objections to Forensic Psychiatry

Like any good philosophical treatise, Stone's article is full of propositions, subclauses to the propositions, and derivative strands to the subclauses, making it at times difficult to focus on the basic

arguments. But his essential moral objection to forensic psychiatry, which is also his first boundary issue, is based on what he refers to as "The Basic Question," which he articulates as whether "psychiatrists have true answers to the legal and moral questions posed by the law" (Ref. 1, p 210). He answers in the negative, relying on Immanuel Kant for support, quoting Kant's view that, "physicians are generally still not advanced enough to see deeply into the mechanisms inside a human being to determine the cause of an unnatural transgression of the moral law" (Ref. 1, p 210).

Of course, Kant wrote at a time when psychiatry was still finding its feet, and its clinical foundation is much more secure now than it was in his day. But regardless of whether psychiatrists are better able to peer into the mechanisms that underlie human behavior, Stone is mistaken if he believes that the role of the psychiatrist in court is to determine the cause of an unnatural transgression of the moral law. He refers to psychiatrists' blurring, ignoring, or confusing the distinction between facts and values, but this is exactly what he does. It is unlikely that an engineer would worry unduly about whether he has true answers to the questions he is asked in court. He or she provides facts, gives an opinion based on those facts, and then leaves it to a judge or jury to make a decision about negligence, error, or whatever. Why should psychiatry be any different? Psychiatrists can inform the court whether an individual has a mental disorder, and if so, the nature of that disorder and can provide an opinion on how that disorder might influence thinking and behavior. They may get their facts wrong, but so, too, may the engineer. Nevertheless, it is up to the judge or jury, not the psychiatrist, to determine the moral implications of the findings in terms of responsibility or culpability, based on the facts of the specific case. While some forensic psychiatrists, like Stone, may blur the distinction between fact and value, forensic psychiatry does not.

Not only does Stone appear to believe wrongly that psychiatrists are asked to resolve moral questions in court rather than to provide information with which these questions can be answered by others, he also seems to think that psychiatrists must solve the determinism-free will debate, understand the deconstruction of the self, sort out the mind-brain problem, and bridge the chasm between morality and science before they testify about whether a killer has schizophrenia or about the level of risk posed by a sex offender. It is true that these issues have a bearing on responsibility, blame, punishment, and attribution, but these are problems for judge and jury and are considered in the context of their own, usually unarticulated, theories of mind and moral framework. To insist otherwise would be as absurd as it would be to require engineers to resolve the inconsistencies of quantum physics or pathologists to unravel the meaning of life, before they give evidence on the load-bearing properties of a bridge or the cause of death in a homicide case.

Where does ethics come into play? Stone argues that because psychiatrists do not have true answers to legal questions, they are impostors in court, which he implies is a moral wrong. He bases this on his belief that much in our current diagnostic systems may turn out to be wrong and that a psychiatric historian 200 years hence is likely to view the Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R)[6] as bizarre (mind you, some of us already think that about the DSM-IV-TR[7]). But this is a diversion that disguises the fundamental problem with Stone's critique—his failure to come clean about the moral basis of his ethics position. For him, true answers are true in an absolute sense, and he assumes that we all agree that a prerequisite for moral conduct is to speak only absolute truth, at least when under oath. But such a stance is problematic in an ethics system that does not recognize absolute truth, or one that does not place such a high value on it. In Paul Appelbaum's ethics,[8] for example, something like "is true as far as we can tell" is morally acceptable. Absolute truth may be the trump card for Stone in his personal ethics framework, but it will have less importance in other ethics systems.

In their commentary, Ciccone and Clements[9] (the former a psychiatrist, the latter a moral philosopher) put forward just such a system, one that, like that of Modlin,[5] is pragmatic. They refer to their system as "applied clinical ethics" (Ref. 9, p 263), contrasting it with the purist approach taken by Stone of deductively developed absolute principles. Their starting point is specific clinical situations or cases, from which they identify the problems they generate and then develop ethical hypotheses to deal with them that are not dependent on universal rules. They say that by first describing and then solving ethics problems with "hypothetical ethical constructs," they fall between "ethics by committee" and "idiosyncratic individual choice" (Ref. 9, p 264).

Ciccone and Clements give several examples of how this might work. They use these to make explicit the dual loyalties psychiatrists face in the forensic context. For example, when asked to predict dangerousness, the psychiatrist must recognize that there are two things going on: one having a psychiatric focus that involves an assessment of mental state and is intended to result in treatment that will benefit the patient, the other with a legal focus that is about social control and the protection of society. While they note that different safeguards are required for each, they accept that there is "no ideal solution to this problem of dual loyalty, a problem of ethics at two levels" (Ref. 9, p 274). They believe, however, that a balance can be found between social and individual good, with the psychiatrist determining "on an *ad hoc* basis which allegiance will prevail" (Ref. 9, p. 274), with the psychiatrist stating clearly "where loyalty is being placed" once the decision has been made. Whether or not one buys this approach as a workable solution to the issues raised by Stone, it at least exposes once again the egocentrism of Stone's position.

Ethics Boundary Problems

Stone states that forensic psychiatrists, even those who strive to behave in a moral manner, invariably act unethically. He seeks to demonstrate this through the identification of five boundary problems, placing them in the context of what he refers to as clinical, scientific, truth, and adversarial standards, all of which he believes forensic psychiatry violates. The first of these problems, whether psychiatrists have access to absolute truth, has already been discussed above, where it is argued that this is a problem only if one is bound by Stone's own tightly constrained ethics system. What then of the other problems?

Stone's second boundary problem relates to "the risk that one will go too far and twist the rules of justice and fairness to help the patient" (Ref. 1, p 209). To demonstrate this, he cites the practice of a psychiatrist who gave testimony at the Old Bailey in 1801, where the suggestion is that he acted more as an advocate for the defendant than as an objective expert, although there surely would not have been any difficulty in finding more recent examples. Regardless, given that intentionally seeking to mislead the court is likely to be unethical in most people's moral lexicon, it is hard to see why this should be regarded as a particular boundary problem. The boundary is clear, and psychiatrists should have the expertise to see it, although whether they choose to cross it is another matter. The situation is no different from that of the doctor who provides information about a patient for an insurance company, or as noted by Modlin[5] and referred to above, from that of the military surgeon, occupational physician, or public health officer performing his or her ordinary duties. In all these situations, there may be a temptation to act in a manner sympathetic to the patient, contrary to the objectivity being sought. Of course, objectivity may cause harm to a patient, which in some ethics frameworks would be immoral, leading to Stone's next boundary problem.

Stone's third boundary problem is, in effect, the converse of his second. In this case, to serve justice, rather than subjugating the judicial process to the benefit of the patient, the psychiatrist acts as a double agent to seduce information from patients that may not be in their best interests to disclose. Posing as a friend, the psychiatrist deceives the patient and abuses his or her confidentiality and trust. For Stone, this is in blatant conflict with the physician's duty to ease suffering and do no harm. He is not impressed by the fact that the individual will have given informed consent to the assessment as, in a touchingly paternalistic (or perhaps naïve) way, he does not believe patients have the strength to withstand the psychiatrist's skills of eliciting information. But as Modlin[5] pointed out, the person being assessed in a judicial context is not a patient, and it is not the patient who is the client, but the court, tribunal, or instructing lawyer. The problem to be resolved is not a medical matter, it is a legal one, and the psychiatrist is just one of several individuals who provide information with which to resolve it.

Of course, one might ask whether psychiatrists should serve the legal system in this way. Again, the answer to this depends on one's underlying ethics framework. A paternalistic principle that the psychiatrist has a duty to patients, and only to patients, will result in a negative response similar to Stone's. But an ethics framework in which the psychiatrist also has an obligation to society to use psychiatric expertise for broader purposes may elicit a different conclusion, particularly if the psychiatrist is clear in differentiating therapeutic from forensic roles.

This is largely the argument put forward by Seymour Halleck.[10] Like Modlin[5] and Ciccone and Clements,[9] Halleck also notes the double-agent role

forensic psychiatrists must play, with obligations toward both patient and state, which in the end can result in outcomes contrary to the patient's interests, but which are reached using skills designed to help people. (He could, but doesn't, note that this is similar to the position of the cardiologist who uses his skills to obtain information which, when provided to an insurance company, could mean that the patient is not offered the life insurance he seeks.) Halleck's solution is to compromise, to evaluate each of the two roles on its own merits based on the potential harms and benefits inherent to each, with the ultimate goal of maximizing benefit and minimizing harm. However, he stresses that, in the end, the forensic psychiatrist gives advice rather than makes decisions. For example, in providing advice about risk, it is not the psychiatrist who determines where the threshold for dangerousness lies: "Society must decide how many it will restrain unnecessarily to protect us from the one person who might hurt us. This is purely a moral and political issue that must be left to the conscience of the community" (Ref. 10, p 284).

Halleck goes on to describe a situation, civil commitment, in which the distinction between giver of advice and decision-maker becomes blurred. He argues that in such cases psychiatrists shouldn't withdraw, but should seek to have the rules redrawn so that decision-making about commitment is given more explicitly to the judicial system, thereby to define conditions in which they are likely to cause the least harm and do the most good.

Stone's fourth boundary concern is that in taking instructions and money from one side or another, psychiatrists risk giving opinions to suit the needs of whoever pays the piper, thereby prostituting the profession. As with his second boundary issue, however, it is difficult to see why this is a problem. Whether or not some psychiatrists behave in this manner is not the point; few would argue that it is morally right to do so. The boundary itself is quite clear.

Stone's last boundary problem is the absence of clear guidelines as to what is proper and ethical in forensic psychiatry. His claim is that it is simply not possible for such guidelines to be drawn. In his commentary, however, Henry Weinstein[11] describes the development of just such guidelines, demonstrating that the challenge is not in creating an ethics code, but in obtaining a consensus for it. Weinstein wrote as the then Chairman of the AAPL Committee on Ethics. He noted that forensic psychiatrists were well aware of the concerns raised by Stone and had been ruminating about them for years. He indicated that Stone was wrong in claiming that ethics guidelines specific for forensic psychiatry did not exist, pointing out that at that time his Committee had produced provisional guidelines that were still being discussed by the membership of AAPL. He distinguished these guidelines from standards of practice that could be used in litigation against forensic psychiatrists, and hence avoided the use of terms such as principles or standards.

The bulk of Weinstein's commentary describes how the guidelines were developed, and the discussions that took place in their construction. But although a superficial review suggests that there was intense debate about the merits of each, in fact most of the argument was really around the margins. For example, Weinstein referred to the second guideline, which related to forensic opinions, as "quite controversial." This guideline stated that "Opinions should be based upon all available data . . . . Novel ideas and unusual or personal theories should never be used in explaining behavior" (Ref. 9, p 293). This premise gave rise to discussion about whose responsibility it is to ensure that all of the data are collected, and the objection that it should be acceptable to put forward novel ideas and personal theories, provided that they are identified as such. Hardly the making of a heavyweight ethics prize fight. By and large, this characterized the debate on the guidelines generally, with many of those involved simply urging qualification of terms like "never" and "always."

What the committee did not appear to do was to agree on a philosophical starting point regarding the ethics principles on which their guidelines were based. Although the members seem to have acted as if they were all starting from the same place, Weinstein commented toward the end of his article that "what is common sense to one forensic psychiatrist may appear to be nonsense to another" (Ref. 11, p 299). Unfortunately, he did not expand on this, nor indicate how this issue was resolved in the development of the guidelines.

Nevertheless, Weinstein's commentary demonstrates that adherence to ethics guidelines is in the end a governance rather than an ethics matter. Ethics guidelines can be imposed on a profession in the absence of consensus, with those who don't agree with the guidelines having to abide by them none-

theless. Stone, for instance, is greatly concerned about the actions of Dr. Grigson, who testifies in capital cases, because by doing so Grigson contributes to the killing of an individual. Apparently this did not break the ethics codes of the AMA or anyone else in 1984. So be it. A code can be drawn up under which such behavior would be unethical. But Stone gives the game away when he states, "when doctors give [the advancement of science] greater weight than helping their patients or doing no harm, they lose their ethical boundaries" (Ref. 1, p 217). While it is true that they may lose their ethics boundaries in the ethics landscape that Stone inhabits, they would not do so on another ethics map. Why should the moral guidance provided by Stone be preferred?

Clinicalists, Legalists, and Ethicists

In an interesting study in which clinicians were observed while discussing vignettes of cases that involved decisions about compulsory detention in a hospital, Peay[12] identified three types of approach, demonstrating well how individuals operate within difficult ethics frameworks. She described clinicalists whose decision-making was guided by what was best for the patient, legalists who were more influenced by their interpretation of the law and its requirements, and ethicists, a heterogeneous group more concerned with other notions of right and wrong, such as the respect for autonomy. Based on the same material, different decisions were reached. So long as these decisions were consistent with the ethics frameworks within which they sat, none was morally wrong, although they might appear wrong to someone operating within a different framework.

These differences are something that Stone did not recognize. Appelbaum, however, did, commenting, "Even if no uniform standard is agreed on, the existence of a number of competing standards, with advocates of each having to justify their behavior to adherents of the others, can do nothing but clarify the moral reasoning on which courtroom behavior is based" (Ref. 8, p 230).

Conclusions

Stone's commentary was influenced by the noise and dust engendered by *United States v. Hinckley*,[13] which left forensic psychiatrists feeling wounded and misunderstood. The dust from this has settled, and the landscape is easier to see. It appears that Stone, who set out from his ivory tower to shoot the wounded, has wandered onto the wrong battlefield. He may have dispatched a few sitting ducks and the odd stray soldier, but he in fact failed to confront any of the ethical combatants he claims to have sought. In essence, he focused his sights on poor practice and, by doing so, chose easy targets that have much to do with the way in which forensic psychiatry is sometimes practiced, but little to do with the ethics of the discipline.

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