

Stone's Views of 25 Years Ago Have Now Shifted Incrementally

Ezra E. H. Griffith, MD

Twenty-five years ago, a major article by Professor Alan Stone on ethics in forensic psychiatry was published. It caused reverberations on a national scale. After the seismic shocks that he had provoked settled down, several thoughtful forensic psychiatrists set out to take serious stock of his critique and to articulate ways in which corrective actions could be taken. Indeed, slightly more than a decade later, I critiqued Stone's ideas in my Presidential Address to the Annual Meeting of the American Academy of Psychiatry and the Law. It is a unique privilege now to evaluate what Stone currently says about ethics in forensic psychiatry. While his present positions are slightly different from his arguments of 25 years ago, Stone still holds dearly to his ivory tower, which remains almost impermeable to the voices of those working in the trenches.

J Am Acad Psychiatry Law 36:201–5, 2008

It is a privilege to have the task once again of responding to Professor Alan Stone as he returns to the subject of ethics in forensic psychiatry.¹ By any measure, it is evident that Stone has been an iconic figure in our discipline throughout the past several decades, and his original disquisition about forensic psychiatry ethics, published 25 years ago in this *Journal*,² has had tremendous intellectual influence on forensic psychiatrists. Consequently, we are indebted to him for his insightful contributions to our discipline. Some of Stone's work has also been at the center of my own reflections for at least the past decade. I refer to his work on ethics, on the one hand, and to his seminal reflection about oligopsony purchasing power, on the other. As a result, he has played an important role in my own professional life, and I acknowledge it gratefully.

I have emphasized this introductory aspect of my comments in an attempt to explain my sustained interest in certain dimensions of Stone's work. I also wish to clarify something about the tone I may have unwittingly taken in my critiques of his scholarship in the past. He referred to my overly harsh chastisement of him as I commented on one of his articles

some years ago.¹ With a modicum of insightful reappraisal, I recognize that whatever harshness I showed was most likely attached to the frustration I have felt in reviewing and contemplating certain aspects of his writing. I shall reconsider here some of those aspects that differentiate our positions, particularly in light of the 25-year retrospective reconsideration he now offers.¹

Stone and Courtroom Activity

Stone¹ now states unequivocally that I reached an erroneous conclusion about what he said or meant in his original work published in the *Bulletin of the American Academy of Psychiatry and the Law* 25 years ago. This had to do with my view that Stone wished for forensic psychiatrists to stay out of the courtroom. I concede the technical point that he did not say at that time that forensic psychiatrists should stay out of the court. But after reading once again his original argument,² I am hard pressed to conclude that Stone offered any encouragement to forensic psychiatrists to stay involved in their court work. Indeed, Stone explicitly said at the time, "I am not a forensic psychiatrist. What has kept me out of the courtroom is my concern about the ethical boundaries of forensic psychiatry" (Ref. 2, p 109). Stone went on to accuse forensic psychiatrists of having little truth to offer in court, of going too far and twisting the rules of justice and fairness to help their patients, of deceiving their patients to serve justice

Dr. Griffith is Professor of Psychiatry and of African-American Studies, Yale University School of Medicine, New Haven, CT. An earlier version of this paper was presented at the 38th Annual Meeting of the American Academy of Psychiatry and the Law, Miami Beach, FL, October 19, 2007. Address correspondence to: Ezra E. H. Griffith, MD, Department of Psychiatry, Yale University School of Medicine, 300 George Street, Suite 901, New Haven, CT 06511. E-mail: ezra.griffith@yale.edu

and fairness, and of being in danger of prostituting the profession under the assault of the adversarial system. When I add to this Stone's cavalier treatment of his own exemplar—the Jewish Dr. Leo—whom he presented as an unethical charlatan, I cannot now believe that Stone could have meant for forensic psychiatrists to stay in the courtroom. As a result, I stay with the language I have used elsewhere: “The conclusion that flows from Stone's argumentation is that psychiatrists should stay out of the courtroom” (Ref. 3, p 378).

This point has now been refashioned by Stone,¹ who clarified that his original view was that forensic psychiatrists should not shun the courtroom. As he now states it, Stone was apparently merely recounting an abstract view of life as a moral adventure and was only criticizing forensic psychiatrists for failing to recognize the ethics pitfalls of their profession. But even a cursory review of the responses to Stone's original commentary suggests that his audience took his critique literally. They thought seriously about the concrete implications of Stone's comments for the work of forensic psychiatrists. Indeed, recognizing what Stone's views meant for the vitality and honor of this newly developing subspecialty, several respondents set about to construct a rationale for the continued participation of forensic psychiatrists in the legal system—a participation that was to be carried out by practitioners who could hold their heads high. It was not to be a participation by forensic specialists carrying a hangdog look of dejection, wandering aimlessly in some wasteland without a moral compass.

I have returned to this question of whether forensic psychiatrists should be in the courtroom, of whether they can be seen to have some role to play in that setting, because of my conviction that their non-participation could have a profound effect on the kind of justice meted out to nondominant groups in the United States. This disparity between dominant and nondominant groups with respect to their access to justice is well known and needs no further discussion here. But that concern remains a significant catalyst of my insistence that this debate about ethics in forensic psychiatry is of the utmost importance. Its significance goes far beyond philosophical meanderings about the work of forensic psychiatrists. I am not alone in being troubled by this privilege that Stone wished to arrogate to himself—to criticize from the ivory tower the ethics of forensic psychiatrists with-

out concern for the practical implications of his conclusions. That is why Modlin,⁴ for example, in his reply to Stone reminded us of the ideas of pragmatic morality and situational ethics and accused Stone of blithely ignoring the social context in which the forensic psychiatrist must act—contributing to the resolution of a legal and not a medical problem.

Stone and Dr. Leo

Stone¹ returned once again to consider the story of Dr. Leo, who turned up in his original article of 25 years ago,² as an example of an unethical practitioner of the early 19th century in England who was sacrificing professional truth to achieve a merciful result—to wit, the freedom of a fellow Jew who had stolen some spoons. Dr. Leo was for Stone a good example of a physician prostituting his profession to accomplish the objective of obtaining justice in a legal system known to be anti-Semitic. Stone¹ stated that he now finally understands my argument that Dr. Leo could be seen as a heroic figure who understood that his fellow Jews were victims of injustice and that Dr. Leo should also be judged from a broader moral perspective. Where clearly I have been misunderstood is in the claim that I wanted Stone to follow in Dr. Leo's footsteps. I never intended that such a simplistic conclusion be drawn. I was instead railing against what I saw as Stone's rather offhanded dismissal of Dr. Leo, and I was doing so because I viewed Dr. Leo as a symbol of the nondominant forensic psychiatrist caught in the daily struggles that are similar to those Dr. Leo was confronting.

In other words, poor Dr. Leo was contending with the fact that Jews had a justice problem in London's courts. And despite what is claimed even now, I am not persuaded that Stone grasps the gravity of this reality for Dr. Leo and the significance of considering comparable situations facing the modern-day forensic psychiatrist. My dissatisfaction about this point gets even bigger, as my frustration increases over my inability to interest him in this aspect of my argument. It is an acknowledged reality that a profound unfairness permeates the American criminal justice system and lands disproportionately on the heads of certain nondominant groups. The patent inequality and unfairness (also well reflected in other spheres of social and economic discourse) have led me to the habit of filtering ethics through a narrative sieve and prism.^{3,5} When the response to ethics dilemmas in our discipline does not contemplate this disparity

between dominant and nondominant groups, I always remain less than satisfied. The fashioning of solutions to our moral problems, while failing to contemplate the uniqueness of dominant and nondominant group members in American society, is an unfortunate practice. This insistence on not muddying the social context in which our problems are cast are at the heart of Ciccone and Clements' argument that ethics choices are influenced by context,⁶ as well as being part of Modlin's fundamental point that striking differences between European and American forensic practice could be attributed to differences in social conditions, cultural values, and political structure.⁴

It is an interesting and a curious matter that both American clinical medicine and criminal justice cannot ignore this peculiar dilemma in which they find themselves, which is that the practical outcomes for dominant and nondominant group members are starkly different. This accounts for the steadily burgeoning concern about disparities between dominant and nondominant group members. It is in this context, of course, that I remain also dissatisfied with Appelbaum's position,⁷ which Stone now considers Madison-like in its provision of coherent ideas for the establishment of a current approach to forensic psychiatry ethics—an approach that emphasizes honesty, respect for persons, and the importance of justice. My rejoinder⁵ has been that emphasizing justice while ignoring the plight of nondominant group members cannot possibly warm the heart of nondominant group practitioners of forensic psychiatry. In a sense, once again Dr. Leo's dilemma is ignored.

The line of argument pursued by Stone¹ is unsettling in one other way. He posits that he had a project in life to determine what he would do as a doctor to give his life moral meaning. It was seen as a praxis that shaped his identity and his existential project. However, it was not to be considered a theory of ethics. I fail to see how this is any different from my view that I have taken to melding autobiographical reflection with my thoughts about ethics debates and about the instrumentality of narrative ethics.³ Put another way, my own life project, the one that gives my life moral meaning, is to insist that ethics paradigms proposed to guide practitioners of my professional discipline take seriously into consideration the mundane struggles of nondominant group members like Dr. Leo.

Stone's insistence on remaining in the ivory tower and waxing philosophically eloquent about his position is to me problematic, as he persists in being unconcerned about the social and political arguments with which I remain preoccupied. He put me in a class with Franz Fanon in wanting to overthrow the oppressive classes. I cannot tell whether this classification of my thinking is dismissive. But I know he seeks to define the practice of forensic psychiatry without contemplating the broad lessons to be learned from Dr. Leo, and I will have no truck with this. I remind him that even faculty in the ivory tower can be legitimately *engagé* and thoughtful about the problems presented by the society around them. Producing art and philosophy simply for the sake of esthetics is a self-defined luxury. And this is what, for example, Derek Walcott,⁸ Jamaica Kincaid,⁹ V. S. Naipaul,¹⁰ and Chester Pierce¹¹ reject. These distinguished individuals, in the midst of their esthetic and philosophical activities, still find it important to turn their voices to posing questions about the plight of the disadvantaged and underprivileged, especially those who are additionally burdened by nondominant group membership. Dr. Leo is therefore for me an ineffaceable symbol of a problem that just won't go away. It is how to structure our forensic work in a justice system that is so cavalier about justice for black people and other nondominant group members.

My concern is further heightened as I contemplate again Stone's narrative about his participation in the trial of the black sergeant.¹² There, Stone did apparently go into the courtroom to testify about a black military man's repeated theft of articles that belonged to the government. After giving his testimony, Stone seemed upset that the sergeant was found guilty and relatively severely punished for his misdeeds. I doubt that either Dr. Leo or I would have been surprised at this outcome. As a result, I remain puzzled by Stone's bafflement at the result of the trial of a black man, especially in yesteryear's military court.

Just as Stone now suggests that I misapprehended his arguments of 25 years ago, I hasten to point out that he engaged in tortuous reasoning or reading to reach the conclusion that I wanted him to follow in Dr. Leo's footsteps.¹ That has never been my point. Indeed, I was also cautious in emphasizing that I was "not advocating commission of a wrong to correct an antecedent wrong" (Ref. 3, p 380). In other words, nowhere did I wish to be taken as advocating for or supporting Dr. Leo's role in distorting professional

truth to achieve a merciful result. But I did argue emphatically for reflecting more seriously on Dr. Leo's dilemma. I wanted Stone—and Appelbaum—to think about what it meant for Dr. Leo to represent authentically his nondominant Jewish group in the anti-Semitic context of the time. And I went on to point out that Dr. Leo's respect for the principles of truth-telling and respect for persons would not have eliminated effectively his struggles as a practitioner from a nondominant group. Call it heroic, if you wish. Dr. Leo exemplified legitimate concern for a fellow Jew. It is in overlooking this act of empathy and compassion that Stone's argument becomes seriously compromised. And it is compassion that I have argued for adding to the position espoused by Appelbaum.³ This element of compassion leavens the principles of Appelbaum and turns them into a praxis of sorts.

Monetarization of Health Care

Stone¹ took a short divergent pathway to make the point that other forces besides problematic ethics reasoning have left forensic psychiatrists wandering in the wasteland without an ethics compass. An example of these forces is the monetarization of American medicine and the arrival of oligopsony purchasing power. Stone's point is that health plans now control the practice of medicine and undermine the ethical praxis of the medical profession and its concomitant fiduciary obligation to the patient. The way in which he talked about this phenomenon in American medicine suggests that money and medicine have become linked only recently. I do not believe this to be so, and once again, in a narrative sense, it has not been my experience since arriving in the United States in the 1950s.

It remains a clear recollection of mine that even my black family physician had money and was known in the neighborhood by the distinctive British sedan that he drove. I also recall with embarrassment the school rules that required a current note from a dentist demonstrating that I had been examined recently and that my dental health was under the supervision of a registered practitioner. Only an empathic school adviser understood the inherently problematic nature of the requirement. The teacher knew that it was folly to institute the requirement without first asking how boys like me, from families like mine that lacked financial resources, would obtain the required dentist's note. This was, of course,

monetarized medicine, although some observers do not like to consider it such. But patients lacking money to purchase medical services always believe that medicine is monetarized, even if physicians and moneyed others do not think so.

Therefore, when Stone lamented the relatively recent monetarization of health care and its impact on ethics, he was really talking about the severe dilution of the market power of physicians. And to follow his argument, it seems that physicians felt a responsibility to their patients when doctors dominated the marketplace. However, once they lost their influence and power in the marketplace, the responsibility to their patients got lost. Oligopsony purchasing power diluted with ferocity the power of physicians to set their fees unilaterally. But it didn't mean that it had to dissipate totally their capacity to practice ethically. There are many Western countries that have let physicians run the ethics base of their profession while negotiating with them their control over the setting of fees and other activities related to the financial well-being of physicians.

The final idea worth mentioning is that managed care methodology didn't arrive by itself. It came along with a surge of interest in consumerism, where the voices of those who seek our services grew louder and reached a decibel level not encountered before. Indeed, my European colleagues are praying that only a whiff of this movement reaches them. But the movement here in the United States leaves us with the contention that it was a fundamental mistake not to attend to the difficulties delineated by Dr. Leo. Doctors and professors aren't the only constituency in the marketplace. Not anymore. And no suggestions of ethics-based praxis are worth much if they won't confront the notion raised by Dr. Leo—that a group of Jewish consumers was persistently being treated unfairly.

Stone and the Future of Forensic Psychiatry

When all is said and done, I believe that Stone's original thoughts about ethics in forensic psychiatry,² while provocative and even unnerving to his audience 25 years ago, have had a profound influence on forensic psychiatrists. The field has advanced on many fronts in the past two and a half decades. This is an important development that I believe Stone¹ has not fully appreciated. I also think that he has not given the just compliments due to Candilis and colleagues¹³ for their efforts to describe some of the

transformative changes made in forensic ethics over the past 25 years. Nevertheless, Stone's early reflections have had a clear catalytic effect on ethics developments in the field.

Forensic psychiatry is now a defined area of specialized practice, and there is fellowship training to be had by those desirous of entering the field. There are well-organized training programs and a coherent body of knowledge being taught by these entities. Indeed, the informed specialists in this discipline would, in my view, be thoroughly familiar with many concepts mentioned by Stone¹ as still being problematic today. For example, I am confident that forensic psychiatry fellows would understand that they are expected to deliver objective testimony and not simply respond like automatons to the demands or wishes of attorneys. It is now a mundane concept, fully understood by the average fellow, that the expert witness must not overreach and deliver an opinion that far outstrips evidence available to buttress the claims made in his or her opinion. Similarly, Stone's¹ concern about the pressures of the adversarial system is recognized and discussed on a weekly basis in the average training program. And it is understood everywhere that the lawyer's commitment to his client is not to be confused with the forensic psychiatrist's commitment to strive for objectivity.

Stone¹ seems to suggest that we experts are mere pawns in an adversarial process that constrains us to follow blindly what the lawyers dictate. I reject that allegation, at least in part. The legal system certainly controls the rituals used in the courtroom. But we are not mendicants in that system. Our methodologies must be controlled by us. And there is considerable evidence now available that suggests we forensic psychiatrists are setting about to do just that. The burgeoning literature on risk management is testimony to that.¹⁴ So are the efforts of the American Academy of Psychiatry and the Law to issue guidelines that evaluate the standards we use as reference points in our work.¹⁵

Several of us have also taken to exploring the core competencies in forensic psychiatry. The example *par excellence* of these initiatives is the recent focus on

the writing of the forensic psychiatry report.^{16,17} It is in work such as this that the forensic psychiatrist will evolve a more secure professional identity, one effectively grounded on values and technique and less assailable by the whims and fancy of other disciplines.

References

1. Stone AA: Ethics in forensic psychiatry: re-imagining the wasteland after 25 years. Presented at the 38th Annual Meeting of the American Academy of Psychiatry and the Law, October 19, 2007
2. Stone AA: The ethical boundaries of forensic psychiatry: a view from the ivory tower. *Bull Am Acad Psychiatry Law* 12:209–18, 1984
3. Griffith EEH: Personal narrative and an African-American perspective on medical ethics. *J Am Acad Psychiatry Law* 33:371–81, 2005
4. Modlin HC: The ivory tower v. the marketplace. *Bull Am Acad Psychiatry Law* 12:233–6, 1984
5. Griffith EEH: Ethics in forensic psychiatry: a cultural response to Stone and Appelbaum. *J Am Acad Psychiatry Law* 26:171–84, 1998
6. Ciccone R, Clements CD: The ethical practice of forensic psychiatry: a view from the trenches. *Bull Am Acad Psychiatry Law* 12:263–77, 1984
7. Appelbaum PS: A theory of ethics for forensic psychiatry. *J Am Acad Psychiatry Law* 25:233–47, 1997
8. See, for example, Walcott D: *The Prodigal*. New York: Farrar, Strauss and Giroux, 2004
9. See, for example, Kincaid J: *My Brother*. New York: Farrar, Strauss and Giroux, 1997
10. See, for example, Naipaul VS: *Miguel Street*. New York: Vintage Books, 2002
11. See, for example, Griffith EEH: *Race and Excellence: My Dialogue with Chester Pierce*. Iowa City: University of Iowa Press, 1998
12. Stone AA: Presidential address: conceptual ambiguity and morality in modern psychiatry. *Am J Psychiatry* 137:887–91, 1980
13. Candilis PJ, Weinstock R, Martinez R: *Forensic Ethics and the Expert Witness*. New York: Springer, 2007
14. See, for example, Sreenivasan S, Garrick T, Norris R, *et al*: Predicting the likelihood of future sexual recidivism: pilot study findings from a California sex offender risk project and cross-validation of the Static-99. *J Am Acad Psychiatry Law* 35:454–68, 2007
15. See, for example, Mossman D, Noffsinger SG, Ash P, *et al*: AAPL practice guideline for the forensic psychiatric evaluation of competence to stand trial. *J Am Acad Psychiatry Law* 35(suppl):S3–S72, 2007
16. Simon RI: Authorship in forensic psychiatry: a perspective. *J Am Acad Psychiatry Law* 35:18–26, 2007
17. Griffith EEH, Baranoski MV: Commentary: the place of performative writing in forensic psychiatry. *J Am Acad Psychiatry Law* 35:27–31, 2007