

Truth in Forensic Psychiatry: A Cultural Response to Gutheil and Colleagues

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It is clear in the preceding paper that Gutheil and his colleagues¹ have framed an intriguing discussion about truth-telling by witnesses in court. The discourse at once arrests our attention and asks of us that we reflect seriously on the questions raised by the authors. This is but one of a distinguished series of papers that have appeared recently in this journal, authored by representatives from the Program in Psychiatry and the Law at the Massachusetts Mental Health Center and Harvard Medical School.

Gutheil and his team have understandably focused their interest on expert witnesses in court. However, it is always worth the effort to remind ourselves that deliberating about the whole truth is a complicated exercise for all who participate in the justice system, not only the witnesses. All too often, we ignore the notion that law enforcement officers, attorneys, and even judges have their own struggles over truth-telling. A recent newspaper report² about the infamous Central Park (New York City) jogger case is a relevant example. In that case, after repeated analysis of all the evidence, police and prosecutors differed significantly in their views of what happened during the attack.

Gutheil *et al.* focused on a basic notion that deserves repeated emphasis: forensic psychiatrists do much of their work in the courtroom; they do not control the rituals that are fundamental to that culture. Consequently, we may want to tell the whole truth. However, the court's rituals and unique customs may frustrate our most concentrated inten-

tions. Despite that reality, Gutheil and his group would have us hold unflinchingly to the task of telling the whole truth, regardless of the oppositional elements that divert us from this concentrated effort. In addition, these authors buttressed their position by reminding us of Appelbaum's claim³ that truth-telling is a characteristic of all ethical forensic psychiatrists.

Two problems infiltrate the approach taken by Gutheil and his collaborators. There may, at times, be good reasons to circumscribe the whole-truth-telling of forensic psychiatrists. When those good reasons exist, the judicial system should not give in to the expert's desire to tell the whole truth, even if the expert is experiencing ethics tensions. Secondly, the authors blithely ignored the problems framed for us some years ago by their own Harvard colleague, Professor Alan Stone, who stung us all with his profound narrative, the parable of the black sergeant.⁴ I shall return to the black sergeant later.

In the authors' first case example,¹ about the expert witness's dilemma, they did not provide us details of the abuse allegedly perpetrated by the father on his mentally retarded, adult son. But the authors also did not give us evidence to buttress the idea that the allegations of abuse should be aired in the courtroom. These abuse allegations were not the central basis of the court case. What the authors called excluded truth may in fact be no more than ideas, which if mentioned in court, would inexorably give rise to distorted reasoning. The result would be a patently evident miscarriage of justice. Not every fact, because it is true, should be mentioned in the course of a hearing.

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The authors' second example¹ also deserves more scrutiny than they gave it. The judge apparently excluded testimony from a psychiatrist that represented details of the story presented by a social worker to the psychiatrist. In other words, the social worker was recounting to the psychiatrist information the social worker had gleaned from third-party bystanders. It is one thing to argue in judicial parlance that the psychiatrist should be permitted, under an exception to hearsay rules, to testify about what the social worker had told the psychiatrist. However, it is quite another thing for Gutheil and his colleagues to argue that the psychiatrist was telling the truth. This doctor was asserting to be fact and truth a part of the story of which only the social worker was legitimately cognizant. There may be good reasons for psychiatrists to accept as truthful what colleague social workers say. We do it all the time. That is not quite the same as arguing in court that we know the social worker's statements to be true.

Consequently, Gutheil *et al.* deserve only a modicum of sympathy when they argue, with self-serving wistfulness, that these examples demonstrated how the psychiatrist was permitted to "testify about a partial truth." In the first example, the excluded material could have brought dishonor on the judicial process. In the second example, the psychiatrist may have believed that his colleague-social worker was truthful. However, he could not have known it.

In the authors' third example,¹ the psychiatrist apparently obtained information for use at a commitment hearing. However, the court would permit testimony only about information obtained after the patient was given a nonconfidentiality warning. The psychiatrist in this example was prevented from discussion of information obtained infelicitously. The fruit was tainted. This leads us to the philosophical tangent of exploring whether tainted truth is, in a judicial sense, really truth. At any rate, if the psychiatrist was left in this example to testify only about half-truth, it was certainly his fault.

Examples 4 and 5 in the article¹ spoke eloquently about the problem of distorting truth in the courtroom. The authors emphasized plainly enough what I consider to be a major problem in the adversarial system. It is that the attorneys are there in court to weave a story of their own creation. Once the expert gives testimony that diverges from the attorneys' version of the story, then the expert can expect to undergo pressure that will serve to bring the expert's

testimony into line with the version being touted by the questioning attorney. Expert witnesses should therefore be rarely surprised by these attorney efforts to distort the experts' truth. Indeed, I suspect that what bothers experts the most when faced with these efforts to distort their truth is that their desire to be effective witnesses is being meddled with. Gutheil *et al.* suggested that the tension for a psychiatrist results from simultaneously attempting to be effective and ethical. Stone (Ref. 4, p 72) noted that the tension was between being partisan and being ethical.

I return now to Stone's parable of the black sergeant.⁴ In that story, Stone recounted his experience of entering the courtroom and diligently telling the truth about a black soldier's theft of a deodorant stick from the post exchange. The Army authorities also found other stolen articles, like blankets and uniforms, at the soldier's home. Stone uncovered a story about the black sergeant that demonstrated how the sergeant had become progressively bitter over what racism had done to his life. The sergeant eventually felt justified in taking the property. After doing his duty as a forensic psychiatrist, Stone was flabbergasted to witness the result. The unfortunate sergeant was sentenced to five years at hard labor, a punishment so harsh that it surpassed anything Stone could have imagined would meet the crime. So when Gutheil and his colleagues suggested that the expert witness should tell the truth and then rely "on the inherent safeguards of the legal system to achieve a just result," I cannot support their optimistic approach. We may not like the conclusion that Professor Stone reached when he chastised us and told us all to take our truth-telling stories outside the courtroom. And I for one do not agree with him on that point. Nevertheless, we should not ignore what Stone wanted us to grapple with: our truth-telling sometimes serves no beneficent purpose because the judicial system will not have it so. I assume that is what Stone meant when he stated, "The Army was determined to court-martial the sergeant" (Ref. 4, p 254).

Sometimes, we may be vibrant participants in a process that intends, from the beginning, to pursue an unjust result. When that is the case, I believe the real ethics dilemma is not in telling the whole truth, but in pretending that the expert's hands remain clean even though the expert has just participated in a process that is unjust and destructive. That is why

for me, truth-telling may at times be an exercise in obfuscation.

Experts from dominant ethnic groups in the United States have the luxury of pursuing truth-telling while being inattentive to the ultimate results of their participation in court. But I urge my colleagues from nondominant ethnic groups to remain sharply aware of what the leaders of the court process intend. This awareness may be useful when one works either for the prosecution or the defense. The point is to make a serious effort to understand whether the lawyer really wishes to learn the truth and intends to employ it in the interest of justice. When, for example, a prosecutor who wishes to engage my services makes clear that he intends to proceed with his case unchanged regardless of my findings, I think long and hard about participating in the case. I do not simply accept the possibility, as advocated by Gutheil and colleagues, that the legal process may fail the end of achieving a just result. When the prosecutor tells me squarely that he intends not to pursue justice, but to punish the black defendant at any cost, then I think about whether I wish to help that particular prosecutor succeed in his avowed objective.

Gutheil and his collaborators have written an insightful and thoughtful article about the quandaries that attend our work as forensic psychiatrists. They are right to force us into reflection about the work we do, as some of us are so contented that we worry no longer about improving the quality of our contribution to the marketplace of psychiatry and the law.

However, at the same time that they invited inquiry and contemplation, Gutheil and colleagues seemed less assertive in suggesting that experts could usefully think about ways to have an impact on the rituals that control our efforts at truth-telling. The adversarial system may indeed not be the best way to frame the truth for a jury. So in important cases, experts might consider using a consensus panel to report the accumulated psychiatric data. Obviously, this methodology would be fiscally costly. But we need first to determine whether there are ways of doing our work that might immunize us against the pressures of the adversarial system.

Lawyers and judges are concerned about their own participation in court rituals.⁵ Even juries want to be thoughtful and meaningful about the role they play.⁶ So, we experts have to find ways to have an impact on deliberative justice. There is now substan-

tial scholarly literature on the problem of leaving the judicial system alone and unsullied by any element of culture.⁷ Psychiatry experts play a pointless game when they pretend that they can just deliver their truth in court and then show the court their backs. This is what Crenshaw calls “dominant mode ‘perspectivelessness,’”⁸ a pretense by dominant group members to be objective and neutral while they embody an analytical stance that buttresses the specific cultural and political characteristics of the dominant group.

Appelbaum’s call for truth-telling is empty if the legal system achieves no just result. Telling truth for the sake of telling truth is an adaptation of the credo that pushes art for the sake of art. I remind my colleagues once again that we need to free ourselves from “reflexive obedience to familiar signals.”⁹ I for one cannot pat myself on the back when I tell the truth in court and the end is unjust. I will not twist my testimony to help the defendant. But I am not pleased when I have participated in a ritual that pretends to serve justice and mocks justice and fairness all the way. What I want from the scholarly group at the Massachusetts Mental Health Center is help in forging a way to couch our truth-telling in a broader, culture-based fabric of ethics.¹⁰ This is also a recapitulation of my argument that in this day and age, forensic psychiatrists, too, have a duty to be culturally connected.¹¹ Advocacy of principles in a context that may be blatantly and arrogantly punitive to nondominant group members is problematic. Let us tell the truth. But let us also be concerned about telling the truth in processes that may be unfair.

One final point deserves mention. Our discourse on ethics in forensic psychiatry fails to consider the dynamic nature of our development as experts in the field. So when colleagues advocate the prized objective of truth-telling, they should also consider that maturation as experts may well teach us that other objectives deserve equally serious consideration. These objectives may derive from our individual responses to sociocultural pressures and circumstances. The nondominant forensic specialist caught up in the personal effort of solidifying his ethnic identity attitudes may come late to the recognition that truth-telling in the court context is no more important than making sure his work efforts do not facilitate gratuitously or contribute unfairly to the humiliation of other members of the expert’s nondominant group.

References

1. Gutheil TG, Hauser M, White MS, *et al.*: "The whole truth" versus "the admissible truth": an ethics dilemma for expert witnesses. *J Am Acad Psychiatry Law* 31:422-7, 2003
2. Dwyer J: One trail, two conclusions: police and prosecutors may never agree on who began jogger attack. *The New York Times*. February 2, 2003, pp 35, 39
3. Appelbaum PS: A theory of ethics for forensic psychiatry. *J Am Acad Psychiatry Law* 25:233-47, 1997
4. Stone AA: *Law, Psychiatry, and Morality: Essays and Analysis*. Washington, DC: American Psychiatric Press, 1984, pp 251-63
5. See, for example, Terry D: Los Angeles confronts a bitter racial legacy in a Black Panther case. *The New York Times*. July 20, 1997, p 14
6. Butler P: Racially based jury nullification: black power in the criminal justice system. *Yale Law J* 105:677-725, 1995
7. See, for example, Volpp L: Talking "culture": race, nation, and the politics of multiculturalism. *Columbia Law Rev* 96:1573-617, 1996
8. Crenshaw KW: Foreword: toward a race-conscious pedagogy in legal education. *Natl Black Law J* 5:1-14, 1988
9. Kennedy R: *Race, Crime, and the Law*. New York: Pantheon Books, 1997, p X
10. Griffith EEH: Ethics in forensic psychiatry: a cultural response to Stone and Appelbaum. *J Am Acad Psychiatry Law* 26:171-84, 1998
11. Griffith E: Forensic psychiatrists and cultural connectedness. *J Forensic Psychiatry* 7:477-9, 1996