Ethics and Forensic Psychiatry: Translating Principles Into Practice

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Twenty-five years ago, Alan Stone expressed his skepticism that forensic psychiatry could be practiced ethically. His remarks have proven a useful goad to the field, focusing attention on the importance of an ethics framework for forensic practice. But Stone remains dubious that any system of ethics—including the "Standard Position" on which he focuses his critique—could be of much value in practice. In contrast, I suggest that Stone's pessimism is not well founded. Immanent in forensic practice itself is a reasonable set of ethics principles, based on truth-telling and respect for persons. Psychiatrists can offer reliable and valid testimony, while resisting seduction into an advocacy role. Indeed, with new structured approaches to assessment, the potential utility of forensic testimony is probably greater than ever. Though problematic behavior still exists, forensic psychiatry offers the factual background and interpretive context to allow legal decision-makers to make better choices than they otherwise would.

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Odd how firmly fixed some impressions are in the mind. However many hotel ballrooms I have been in since October 1982, however many speakers I have watched rise and move to the podium, one of my firmest recollections is of the moment when Alan Stone rose to speak at the Annual Meeting of the American Academy of Psychiatry and the Law (AAPL) on "The Ethical Boundaries of Forensic Psychiatry," promising "a view from the ivory tower."[1] There was a certain electricity in the air as the forensic psychiatrists in the audience pushed aside their luncheon plates and settled back to listen to the acknowledged intellectual leader of the field of psychiatry and law talk about the ethics of the work they did every day.

No one was quite sure what to expect. Stone was not a usual attendee at AAPL meetings, indeed not a member of the organization. It was well known that he himself shunned courtroom appearances and that he was generally dubious about his colleagues who made their livings working with attorneys and the courts. Had he accepted the invitation to speak and chosen the topic as an occasion for an intellectual reconciliation, or would this be his opportunity to make clear his differences with the field? And if the latter, how much blood would be spilled along the way?

The moment was particularly poignant for me. Barely two years out of residency, I owed my involvement in psychiatry and law to the influence of Stone, having met him at the very beginning of my medical career. When I was told, as a new medical student at Harvard Medical School, that I had to choose a behavioral science elective to complement a clinical experience, I selected his course on Law and Psychiatry. I was intrigued by the thought that perhaps I would not have to surrender entirely an interest in law, nurtured through years as a high school and collegiate debater, just because I was becoming a physician. By the end of that first class on Friday afternoon of my first week of medical school, I was so excited by Stone's presentation that I turned to the student next to me and declared that this was what I wanted to do for the rest of my career. From that moment, as adviser and role model, Stone was helpful to me in

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many critical ways as I launched my career. But unlike him, I had not shunned direct involvement with the legal system. So what would my first mentor have to say about the work I had chosen to do?

Neither I nor the rest of the audience had long to wait for the answer. From his opening metaphor—Stone likened himself to someone who had arrived on a battlefield after the fighting had ended to shoot the wounded—it was clear that no holds would be barred. Stone questioned whether psychiatrists had anything truthful to offer the courts, whether they would not inevitably deceive either the legal system or the evaluee, and whether it was possible for them to resist the seductions of the adversarial system. Perhaps most disturbing of all, he claimed that there were no neutral principles of ethics by which forensic psychiatrists might guide their practices—and that none would be found. I later characterized this rather gloomy position as condemning forensic psychiatry "to wander in an ethical wasteland, permanently bereft of moral legitimacy" (Ref. 2, p 234).

Stone's talk was a turning point for the field, forcing it to confront directly its significant ethics challenges and the need for a coherent ethics framework to guide its work. The initial responses were embodied in an issue of the *Bulletin of the American Academy of Psychiatry and the Law* in 1984, entirely devoted to Stone's paper and a set of responses to it,[3] including my own.[4] Some time later, I decided to dedicate part of a sabbatical year to formulating a more complete theory of ethics for forensic psychiatry and made it the focus of my AAPL presidential address in 1996,[2] as did Dr. Ezra Griffith the following year.[5] However it was intended, Stone's descent from the ivory tower to shoot the wounded ended up inspiring the survivors to take to the field again with new weapons and an enhanced *esprit de corps*.

Defining the "Standard Position"

Twenty-five years later, Stone returned to the AAPL Annual Meeting to reflect on the evolution of his views on forensic ethics. In his talk, for which I was one of the respondents, he referred to the theory of ethics for forensic psychiatry that I had proposed a decade earlier as the "Standard Position." To the extent that the term suggests that my effort was not to redefine the ethics of forensic psychiatry, but to draw out and systematize the ethics principles that I thought already immanent in forensic practice, I consider that an accurate characterization. In observing my colleagues and their reactions to forensic psychiatrists whose behavior seemed to them unethical, it was my sense that they had an implicit theory of the ethics of their work that guided their daily efforts. The task I set for myself, then, was to identify and crystallize those principles that were based in the functions that forensic psychiatry performed within the justice system.

Here, I cannot recapitulate in detail the theory that I developed, and given the published version,[2] there is no need to do so. But as background to my response to Stone's 2007 reflections on his 1982 talk, let me remind the reader of the outlines of my argument. I suggested that any body of professional ethics cannot contradict or subtract from the ordinary ethics obligations shared by all human beings, but must constitute an addition to that corpus of duties. Moreover, the principles specific to a given profession's ethics code should be derived from an analysis of the functional roles that the profession performs for society. For forensic psychiatrists, whose functions assist in the administration of justice, an applicable ethics code should facilitate and protect that role.

There were, I suggested, two broad principles that govern the ethics of forensic work: truth-telling and respect for persons. In regard to truth-telling, I was referring to a two-fold obligation, beginning with the duty of subjective truth-telling or honesty. That is, forensic psychiatrists should testify to what they believe to be true, regardless of whether such testimony favors or disadvantages the parties employing them. But were that all that truth-telling meant, entirely misguided or ignorant psychiatrists would be free to wreak havoc in legal proceedings, without contravening any ethics principle. Thus, truth-telling must encompass an additional obligation of being objectively truthful. Testimony, whether written or oral—at trial, deposition, or in another venue—should accurately reflect the scientific data on the subject at hand and the consensus of the field. When the testifying expert goes beyond the data or controverts generally accepted professional understandings, that deviation should be made clear.

Were truth all that we sought in our work, such practices as deceiving evaluees to gain the desired information (e.g., concealing the side of the case for which one is working) might be justified as advancing the search for accurate data. That, however, is not the case. Forensic psychiatrists' search for truth is limited by the principle of respect for persons—that

is, respect for the humanity of the evaluee. Hence, we do not engage in deception, exploitation, or needless invasion of the privacy of the people whom we examine or about whom we testify.

In short, then, this is what Stone calls the Standard Position and what I believe reflects the principles underlying the actual practices of most forensic psychiatrists. When forensic psychiatrists deviate from these principles, although of course there are cases in which the boundary between ethical and unethical behavior is not easy to discern, their colleagues have an intuitive sense that they have done something improper, even if they cannot always explicate their judgment with a clearly framed moral argument. To be sure, not everyone has embraced this approach, and as Stone noted, recent years have seen a variety of alternative formulations.[6] Although this is not the place to compare them, I believe none of the alternatives is as theoretically coherent or practically applicable as this approach. In any event, it is on this approach that Stone focused the bulk of his 2007 critique.

Stone's Critique of the Standard Position

No Truth to Tell

At its core, Stone's critique appears to have changed little since 1982. He remains skeptical that forensic psychiatrists can define a defensible, ethical position, perhaps less because principles to guide their work cannot be identified than because those principles, at least those embodied in the Standard Position, cannot be translated into a meaningful praxis. In other words, whatever the principles to which forensic psychiatrists might formally subscribe, the realities of forensic practice make it impossible for them to live up to their ethical obligations. As I understand his presentation, Stone offers two arguments in support of this contention.

At the most basic level, echoing his argument in his earlier address to AAPL, Stone suggests that one cannot adhere to a principle of truth-telling when one has no truth to tell. He believes this to be true of the current generation of forensic psychiatrists and neuroscientists. Whether relying on the flawed Diagnostic and Statistical Manual of Mental Disorders (DSM) series, with the prospect of an equally problematic DSM-V just over the horizon, or offering testimony based on the latest neuroscience findings regarding the purported causation of criminal behavior, forensic psychiatrists' "testimony rests on an inadequate scientific foundation."[7]

A fair response to this contention must begin by acknowledging the current tendency of some forensic experts grossly to overstate what contemporary neuroscience can tell us about the causal links between various aspects of brain function and crime, especially crimes of violence. Whether basing their contentions on genetics, anatomic imaging, functional MRI, positron emission tomography, or other techniques, these witnesses make leaps worthy of the late Evel Knievel from the test findings themselves to conclusions regarding a defendant's responsibility for criminal acts. Like an earlier generation of expert witnesses who based their conclusions on psychoanalytic theories that we now recognize as unproven and perhaps unprovable—Stone makes the point well—some modern-day experts wander into territory well beyond that defined by science.

Part of the problem here relates to the proclivity of forensic psychiatrists and other experts to offer "ultimate issue" testimony—that is, to attempt to answer legal/moral questions like whether a defendant is criminally responsible, as opposed merely to presenting descriptive information about a defendant's mental state. With no special expertise in addressing legal or moral questions, psychiatrists who make such judgments are treading on morally perilous terrain. Indeed, I have long believed that psychiatrists should avoid ultimate issue testimony, focusing their attention on descriptions of mental and functional states that they are much better qualified to address. This is not always a simple matter, since some courts will insist on such testimony as a criterion of admissibility, and many attorneys seek experts who will address the ultimate issue. But the thrust of Stone's critique is apt here, and the point he makes about involvement in an insanity defense case can be generalized to apply to every forensic expert: "none of [the expert's] erudition would allow him to identify with psychological or scientific precision those human beings who are in fact insane."[7]

To say, however, that forensic psychiatrists have nothing to offer the courts, as Stone suggests, seems vastly to overstate his case. Indeed, there appears to be a fair number of issues on which psychiatrists can provide probative and valid information that should assist the trier of fact in reaching a just judgment. Consider the following incomplete list of testimony that I suggest falls into this category: impairment of

decisional and functional capacity in guardianship cases; extent of functional impairment in workers' compensation and emotional harm cases; standard of care in malpractice cases; mental state and functional ability in hearings on competence to stand trial; and even the presence of psychiatric disorder and its impact on mental state in insanity-defense cases. I suspect that, with a little reflection, any experienced forensic psychiatrist could add a dozen items to this list. Testimony about any of these issues, of course, can be problematic in a particular case. But there are questions about which it is possible to offer good psychiatric testimony, rooted in the medical and scientific literatures and directly relevant to the legal determinations that must be made. Although I could be wrong, my guess is that—were his rights or liberty at stake—even Stone would prefer to have a decision-maker whose judgment was informed by the testimony of experts in the field rather than one who was forced to rely on his or her haphazard knowledge and entrenched prejudices.

Granted that controversy continues about the validity of the diagnostic categories in DMS-IV, and there will undoubtedly be changes in the next edition of the manual that will be equally controversial, in truth it is rare for a legal matter to turn on the precise diagnosis being applied. Rather, if the presence of some mental disorder is an issue at all, it is usually a threshold consideration, with the legal question typically turning on the degree of impairment caused by the disorder and its impact on some functional capacity (e.g., ability to work, stand trial, parent a child, control one's behavior, manage one's financial affairs). With regard to the latter, the quarter-century since Stone first challenged the ethics of forensic psychiatry has seen explosive growth in the development of structured assessment tools that increase the reliability, validity, and probative value of the determinations of forensic mental health experts.[8] These tools address areas including competence to stand trial, waiver of rights, criminal responsibility, parenting, guardianship, and competence to consent to treatment, with new instruments appearing almost continually. No longer does the forensic expert have to rely exclusively on unaided clinical judgment, with all the possibility of oversights and subjective bias that this approach entails.

As an example, I offer the work that has been done over the past several decades on competence to consent to medical treatment and research, work in which my colleagues and I have been heavily involved. Unaided clinical judgment on this question tends to be fairly unreliable.[9] Blame rests, in large part, on physicians' unfamiliarity with the legal criteria for capacity, difficulty operationalizing the criteria in performing their assessments, and tendency to confuse clinical states (e.g., psychosis) with legal status (i.e., incompetence).[10,11] The first steps toward remedying this situation began with clarification of the legal criteria to be applied to these determinations.[12,13] This led us to the development of structured assessment instruments that have been demonstrated to have high reliability and validity.[14–16] Although work continues to improve and simplify the assessment process, today a variety of tools—ours and others'—are available to clinicians to help improve their performance of these evaluations.[16]

So, in response to Stone's continued assertion that psychiatrists have no truth to offer the courts, I suggest that we in fact have more useful knowledge to offer than ever before. That is not to say that forensic psychiatrists do not sometimes overstep their bounds and say what they cannot know. Such unfortunate testimony was given 25 years ago and it continues to be given today. To acknowledge that, however, is far different from asserting that they know nothing of use to the legal system at all.

The Seductions of Advocacy

Stone's second objection to the normative ethics of forensic psychiatry is that experts are too often seduced into becoming advocates, rather than retaining their role as neutral experts who are in court to present their data and impressions honestly, regardless of the impact on any of the parties to the case. Pressure to serve the interests of lawyers and their clients in this way comes from both financial pressures on the forensic expert (witnesses who shape their testimony to the needs of the attorneys who hire them are more likely to be employed by those same lawyers in the future) and from the instinctual process of identifying with the goals of the people with whom one is working. With this concern, I agree wholeheartedly, as I have made clear in the past.[17]

But to say that the role of the forensic psychiatrist may be difficult to negotiate is far from saying that no forensic experts succeed at the task (indeed, Stone concedes his awareness of some who do). In fact, it appears merely a different way of restating his conclusion that forensic psychiatry is a morally challenging enterprise, which seems to me undeniable. More-

over, to criticize forensic psychiatrists for becoming advocates suggests that Stone recognizes some ethical norm that they have violated in doing so, which appears to undercut his earlier contention that such norms cannot be discerned.

Since the temptations that Stone describes are inherent in an adversarial system such as ours, unless one were to do away with the participation of psychiatric experts entirely, the question becomes how these tensions in the system can best be managed. Training in the ethics of forensic psychiatry, which fellowship programs are required to provide, is part of the answer; but it may be too easy to push such training to the back of one's mind when one enters the world of practice. Hence, ongoing attention to the very concerns to which Stone directs our view is important in continuing education programs, professional meetings such as AAPL's Annual Meeting, grand rounds, and case conferences. However useful repeated reminders of these problems are, of course, an ample body of literature documents the inadequacies of continuing education in inducing change in clinical practices, and so it is clear that we cannot let matters rest there.

A third piece of the solution, then, is to encourage more widespread adoption of an educational model of peer review of forensic testimony,[18] such as was developed by the Council on Psychiatry and Law of the American Psychiatric Association (APA). AAPL offers such a service through its Peer Review Committee, including a public session at each Annual Meeting reviewing the testimony of a psychiatrist who volunteers for the process. In my view, at a minimum, the profession ought to be working harder to embed such a model in the periodic process for recertification in forensic psychiatry under the American Board of Psychiatry and Neurology. District branches of the APA, state and county medical societies, and academic departments of psychiatry could offer such reviews. Although there are good reasons for peer review to remain educational in its orientation, the increasing willingness of professional organizations and the courts to consider egregious expert testimony as the basis for ethics findings points to the ultimate recourse for the most flagrant perpetrators.[19]

The Ethics of Forensic Psychiatry: 25 Years Later

Has Stone's position on the ethics of forensic psychiatry changed over the past 25 years? To some extent, the answer seems to be that it has. He appears to have backed away from the blanket assertion that there are no ethics principles by which the practice of forensic psychiatry can be governed, although he remains skeptical that any of the current approaches, including the Standard Position, address in practice the ethical challenges of forensic work. And, though Stone now says that he never meant to suggest that psychiatrists should abandon the courtroom, his view remains that psychiatry has nothing that it can offer the courts that is both truthful and of use to the legal process, which leaves one wondering what legitimate role he believes psychiatrists have in court, as Griffith pointedly asked in his response to Stone. Whatever concessions Stone is now inclined to make do not appear to change his bottom line: the ethics foundations of our field are so inadequate that forensic psychiatrists are necessarily engaged in a morally dubious enterprise.

In contrast, I see the situation very differently. Although the ethics challenges cannot and should not be denied, a reasonable set of ethics principles to guide forensic practice exists and, in fact, has been implicit in the work of forensic psychiatrists for many years. Moreover, assuming we circumscribe our role so as to comport with this ethics framework, we can legitimately offer useful information to the courts. Our insights will not, in themselves, resolve legal or moral dilemmas; but they should provide the factual background and interpretive context to allow legal decision-makers to make better choices than they would, left unaided. A modest role, perhaps, but not one to be scorned.

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. Appelbaum PS: A theory of ethics for forensic psychiatry. J Am Acad Psychiatry Law 25:233–47, 1997
3. All articles. Bull Am Acad Psychiatry Law 1984;12:203–302
4. Appelbaum PS: Psychiatric ethics in the courtroom. Bull Am Acad Psychiatry Law 12:225–31, 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. Candilis PJ, Weinstock R, Martinez R: Forensic Ethics and the Expert Witness. New York: Springer, 2007
7. 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
8. Grisso T: Evaluating Competencies: Forensic Assessments and Instruments (ed 2). New York: Kluwer Academic/Plenum Publishers, 2003

9. Marson DC, McInturff B, Hawkins L, *et al*: Consistency of physician judgments of capacity to consent in mild Alzheimer's disease. J Am Geriatr Soc 45:453–7, 1997
10. McKinnon K, Cournos F, Stanley B: *Rivers* in practice: clinicians' assessments of patients' decision-making capacity. Hosp Community Psychiatry 40:1159–62, 1989
11. Markson LJ, Kern DC, Annas GJ, *et al*: Physician assessment of patient competence. J Am Geriatr Soc 42:1074–80, 1994
12. Roth LH, Lidz CW, Meisel A: Tests of competency to consent to treatment. Am J Psychiatry 134:279–84, 1977
13. Appelbaum PS, Roth LH: Competency to consent to research: a psychiatric overview. Arch Gen Psychiatry 39:951–8, 1982
14. Grisso T, Appelbaum PS: MacArthur Competence Assessment Tool for Treatment (MacCAT-T). Sarasota, FL: Professional Resource Press, 1998
15. Appelbaum PS, Grisso T: The MacArthur Competence Assessment Tool for Clinical Research (MacCAT-CR). Sarasota, FL: Professional Resource Press, 2001
16. Dunn LB, Nowrangi MA, Palmer BW, *et al*: Assessing decisional capacity for clinical research or treatment: a review of instruments. Am J Psychiatry 163:1323–34, 2006
17. Appelbaum PS: In the wake of Ake: the ethics of expert testimony in an advocate's world. Bull Am Acad Psychiatry Law 15:15–25, 1987
18. Council on Psychiatry and Law, American Psychiatric Association: Peer review of psychiatric expert testimony. Bull Am Acad Psychiatry Law 1992;20:343–52
19. Appelbaum PS: Policing expert testimony: the role of professional organizations. Psychiatr Serv 2002;53:389–90, 399