

# Resource Allocation and Forensic Ethics

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Developing a comprehensive theory of forensic ethics has proved a challenge for the profession since Alan Stone questioned the presence of psychiatrists in the courtroom in 1982. Two schools of thought have developed: a “principlist” approach associated with Appelbaum and an approach focused on narrative and context associated with Griffith. Both approaches, and their intellectual progeny, focus primarily upon the relationship between forensic evaluator, forensic subject, and the legal system. Yet the scarcity of forensic psychiatrists renders them a resource whose allocation, often self-driven, has significant implications for ethics. Rather than focus primarily upon questions related to subject-evaluator relations and evaluator work product, a comprehensive ethic for forensic psychiatry must also prioritize the ethics concerns of resource allocation.

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The “tensions and ambiguities” inherent in the practice of forensic psychiatry date back to the emergence of the field as a distinctive profession in nineteenth century America.<sup>1</sup> Noriko invokes a comparison to the famous baseball trio “Tinkers to Evers to Chance” in describing the effort to develop a modern forensic ethic with the refrain: “Stone to Appelbaum to Griffith” (Ref. 2, p 386). Although both Bernard Diamond<sup>3</sup> and Seymour Pollack<sup>4</sup> had grappled with the tensions in forensic ethics starting in the 1960s, the perspectives of these three seminal authorities have played an outsized role in shaping the field’s subsequent development. First, Alan Stone challenged the American Academy of Psychiatry and the Law (AAPL) in a speech in 1982, stating that assigning ethics parameters to a psychiatrist engaged in the legal process was “like asking what the ethical boundary is for an imposter” (Ref. 5, p 168). For Stone, at least in this early take on forensic ethics, mental health professionals were fundamentally ill-equipped to address “the legal and moral questions posed by

the law” (Ref. 5, p 168) and so perched on quicksand when offering expert testimony before the courts.<sup>5</sup> In response, Stone’s former student, Paul Appelbaum, developed a theory of forensic ethics that relied upon the supposedly objective principles of “truth-telling and respect for persons” (Ref. 6, p 242). Shortly thereafter, Ezra Griffith advanced a “cultural formulation” approach to forensic ethics that emphasized the distinctive experiences of nondominant groups and questioned Appelbaum’s implicit assumption that “the justice system was thoroughly just and fair, or that at least it promoted fairness for the greatest number of people” (Ref. 7, p 179). Griffith’s approach highlighted the “performative aspect of forensic practice” (Ref. 8, p 435) and stressed the importance of a “more nuanced complex narrative” (Ref. 8, p 433) that reflected the personal experience of both subject and evaluator.<sup>8</sup> It is essential to note that Griffith “did not disagree so much” (Ref. 7, p 180) with Appelbaum’s “reference points of truth telling and respect for persons,” (Ref. 7, p 180) but rather a “general application” of “principles” that assumed “all of the actors in the judicial drama would arrive at the same point” (Ref. 7, p 180).<sup>5</sup> More recently, Martinez and Candilis have advanced a “unified theory” of “robust professionalism” that strives to reconcile principlism with subjective narrative and social context.<sup>9</sup> At the same time, other leading scholars have built upon Griffith’s foundations,

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emphasizing specific aspects of the evaluator-subject dyad including dignity (Buchanan),<sup>10</sup> compassion (Norko),<sup>11</sup> vulnerability (Roberts),<sup>12</sup> and intersectionality (Sidhu).<sup>13</sup> As important as all of these contributions are to developing an ethics of forensics, they generally do not grapple with the role of resource scarcity.

A series of potentially transformative events, including the killing of George Floyd and the subsequent reinvigoration of movements for racial and economic justice, have led some to call for an ethical reckoning and repositioning in forensic psychiatry. Martinez and Candilis published an editorial in *The Journal* arguing for “action and reflection about [the profession’s] participation in a system marked by injustice” (Ref. 14, p 428) and urging practitioners “to understand the intrinsic dynamics of power and disenfranchisement” (Ref. 14, p 430) and “to remain aware of how [they] participate in perpetrating racism and prejudice” (Ref. 14, p 430).<sup>14</sup> On the correctional side, Zhou and Ford raised serious concerns about mental health courts and the profession’s involvement with the prison-industrial complex.<sup>15</sup> Most notably, Chaimowitz and Simpson issued a clarion call for forensic psychiatrists to become “agents for positive change” (Ref. 16, p 160) and to raise their voices to “demand improved care for the marginalized” (Ref. 16, p 160), “call out discrimination,” and insist upon “true rehabilitation for those in forensic and criminal institutions” (Ref. 16, p 160).<sup>16</sup> Nonetheless, a tension continues to exist between these calls for advocacy and social justice and ethics models that, either explicitly or implicitly, treat forensic psychiatrists and forensic evaluations as nonscarce resources.

Until recently, forensic ethics had focused primarily (albeit not exclusively) upon the nature of the practitioner’s duties vis-à-vis the individual subject of an evaluation and the legal system. Less consideration had been given to the practitioner’s obligations to society at large, to the furtherance of equity, and even to third-parties not before the courts. More recently, forensic ethicists have started to acknowledge the importance of considering the broader and systemic consequences of practitioner conduct. For instance, Martinez has argued that forensic ethics should be conceptualized as a “social good,” and its practice ought to further societal welfare.<sup>8</sup> Among the nonexhaustive goals identified by Martinez are providing “knowledge and understanding of persons

with mental illness,” offering “competent and respectful care to persons with mental illness,” furthering “truth-seeking and fairness,” bearing witness from “forensic psychiatry’s unique perspective the suffering that accompanies mental illness,” and advocating “for the de-stigmatization of persons with mental illness” (Ref. 8, p 436). These are all clearly desirable aims. Yet to achieve them requires not only that forensic practitioners focus upon these goals but that they actively redeploy themselves to do so. Choosing how to allocate one’s time and energy among cases in ordinary practice is among the most important decisions that a practitioner makes vis-à-vis forensic ethics. Unfortunately, such decisions are among those whose ethical implications are often least considered. They are what might be thought of as invisible choices. Forensic psychiatrists likely pay minimal if any attention to the cases they never seek out or the clients they never encounter. At the same time, these choices in the aggregate shape who receives forensics services and the quality of those services. If forensic ethics are to prove robust, and if the field is to live up to its ideals, then the profession must reconceptualize the forensic psychiatrist as a scarce resource whose deployment is not ethically neutral, but rather must be assessed with regards to the consequences of specific allocation choices.

## Resource Allocation

Resource allocation in medical ethics has traditionally focused upon scarce biological resources, such as solid organs, scarce medications (e.g., antibiotics during World War II), and scarce clinical hardware, including dialysis machines, ventilators, and extracorporeal membrane oxygenation (ECMO).<sup>17,18</sup> The staffing shortages generated by the COVID-19 pandemic have served as a cautionary reminder that medical personnel are also a limited resource.<sup>19</sup> Demand for physicians is expected to continue to outstrip supply in the United States, especially the demand for psychiatrists, particularly in response to shortages in emergency psychiatry, child and adolescent psychiatry, and those who serve indigent and rural communities.<sup>20,21</sup> Although forensic practice is not often conceptualized in the same manner, the number of forensic psychiatrists likely continues to hover between 2,000 and 4,000, with AAPL reporting more than 2,000 members worldwide in 2022.<sup>22</sup> As resources, forensic psychiatrists are not rapidly replenishable, since training generally requires nine

years post university for board certification, nor is their population readily expandable, as the medical profession in the United States operates as a guild whose numbers are tightly regulated by both internal bodies and state authority. Needless to say, all forensic psychiatrists are not created equal, so the persuasiveness of their expert testimony may depend upon their credentials, experience, and subjective factors such as eloquence and gravitas.

A comprehensive discussion of the Constitutional and statutory rights to expert witness testimony stands beyond the scope of this article. What must be emphasized is that the limited legal rights both criminal defendants and civil litigants of constrained economic means do possess stand in contrast to the systemic advantages that favor the state and affluent parties. As Paul Gianelli noted, "Obtaining the services of experts is not difficult for the prosecution" (Ref. 23, p 1), endowed as it is with access to substantial resources. In contrast, while indigent defendants have rights to expert testimony under principles of equal protection and due process, fees are often limited by statute and indigent criminal defendants rarely, except in high profile cases, have access to the choice of skilled practitioners that might be available to more affluent defendants or litigants.<sup>23</sup> In civil practice, while courts often have the right to appoint independent experts for purposes of equity, they rarely do so.<sup>24</sup> For example, a survey of American federal judges found that "81 percent had never appointed an expert under Federal Rule of Evidence 706" (Ref. 24, p 168), while "only 8 percent had appointed a court expert more than one time" (Ref. 24, p 168). The impact of a lack of forensic experts can prove devastating. For example, having a forensic expert at an asylum hearing raises a potential asylee's success rate from 37.5 percent to 89 percent, yet the majority of asylum seekers lack such testimony.<sup>25</sup>

### **The Parable of Vincent Gigante**

Forensic ethics is often considered in terms of historical stories and parables, such as Stone's account of "Jewish Dr. Leo" and his parable of the "black sergeant".<sup>26</sup> Yet it is the case of Vincent Gigante (1928-2005), an "archival" of mobster John Gotti and the reputed boss of New York's Genovese crime family, sheds far more light on forensics ethics.<sup>27</sup> Known as the "Oddfather," Mr. Gigante started feigning mental illness in the 1960s to avoid criminal prosecution. These efforts included "shuffling around his

Greenwich Village neighborhood in pajamas, bathrobe and slippers, mumbling to himself and appearing to be a disturbed but harmless person" (Ref. 28, p A29). As "the decisive voice on the Mafia's commission" (or colloquially, *capo di tutti capi*), Mr. Gigante oversaw a vast criminal network that shook down churches and conspired to murder other mobsters.<sup>28</sup> His illicit income was estimated to be around \$100,000,000 annually during the early 1990s.<sup>28</sup> Prior to his eventual trial and conviction, he received a competency hearing as required by the U.S. Supreme Court in *Dusky v. United States*.<sup>29</sup> During the course of this process in 1997, multiple prominent forensic psychiatrists offered testimony on his behalf, including four former presidents of AAPL (Thomas Gutheil, Abraham Halpern, Stanley Portnow, and William Reid). Additional testimony was provided by Monte Buchsbaum, Donald Klein, and Mr. Gigante's own psychiatrist, Eugene J. D'Adamo. After Mr. Gigante pled guilty in 2003 and confessed to his ruse, many both inside and outside forensics questioned how he was able to deceive so many skilled practitioners.<sup>30</sup> From the standpoint of ethics, that is fundamentally the wrong question. Rather, our profession should be asked why seven psychiatrists, including four former AAPL presidents, served as experts on his behalf while so many indigent defendants in New York City did not have access to nearly such vigorous evaluation. That is not to say that Mr. Gigante, as a criminal defendant, was not entitled to an expert, but rather that his use of a large number of highly regarded experts raises concerns regarding resource allocation and equity. On extremely rare occasions, of course, well-resourced yet notorious subjects may struggle to find expert witnesses. For the most part, defendants and litigants with social capital find experts with ease. In that sense, the parable of Vincent Gigante is the untold story of contemporary forensic ethics.

### **The Abundance Fallacy**

If forensic psychiatrists were limitless in number, of comparable efficacy as experts, and available to all at low cost, the case of Mr. Gigante would raise few if any ethics concerns. That blind spot is where principlists like Appelbaum make their error: namely, in beginning their ethics assessment of forensic practice at the point where the practitioner starts to engage with the individual subject or the court. Instead, the primary ethics considerations arise long before any

evaluation occurs. They are reflected in the opportunity costs involved in accepting or rejecting cases; as much as the evaluations never conducted and the narratives never shared as in those that make it into forensic reports and depositions. It is worth emphasizing that forensic psychiatrists are artificially scarce resources, their numbers controlled by state regulation “like taxi medallions and sometimes liquor licenses.”<sup>31</sup> In such a system, whether to conduct an evaluation is as important an ethics consideration, and maybe more so, than how to offer testimony. Certainly, the written report and oral testimony are two key distinctive products of forensic practice.<sup>32</sup> Yet in a system of scarcity, the time and service of experts is itself the field’s defining currency.

### Application

Recognizing overtly and calling out the role of scarcity in forensic ethics carries significant implications for the structure of the field. Acknowledging the importance of resource allocation in forensic ethics also raises a range of significant additional challenges that defy easy resolution. These include: different practitioners will have different conceptions of the public good and opinions as to which cases should take priority over others; a wholesale reallocation of resources might result in those who are currently overserved receiving less than their equitable share of services, which is also not desirable; often cases that are currently over-resourced are among those that some practitioners find most intellectually engaging; and practitioners may have personal goals and obligations that transcend their professional roles, such as earning a living and supporting a family, that may not be fully compatible with an absolute model of prioritizing underserved clients. Like other commentaries in forensic ethics, this article is intended to be aspirational. AAPL’s “Ethics Guidelines for the Practice of Forensic Psychiatry,” the American Psychiatric Association’s “Code of Ethics,” and state licensing regulations impose a floor for conduct by forensic practitioners.<sup>33,34</sup> That does not mean that the ethical forensic psychiatrist should not strive to exceed these minimum expectations.

Much of this proposed redeployment of resources should occur as a result of choices by individual practitioners who more consciously consider how to allocate their time. Providers must consider why they are devoting their limited energies to particular evaluations, at the expense of others, in the context of how

few practitioners allocate their own services and the broader forensics needs of their communities.

The field’s institutions, such as AAPL and fellowship programs, can make structural changes to emphasize this focus. For instance, fellowship programs should consider how prospective applicants are likely to exert their future energies in allocating the limited resource of a position in a top-tier graduate medical program. Some fellowships already afford opportunities for fellows to engage in *pro bono* work; this is highly commendable. Yet if resource allocation is prioritized, all fellowship programs should expect this of their fellows. *Pro bono* service might also be required of all early career forensic psychiatrists, or even all forensic psychiatrists, just as some state bars now require such free services of attorneys. A track record of serious commitment to the underserved should be a highly valued attribute, if not a criterion, for admission to fellowship programs. In selecting landmark cases, AAPL might consider how emphasizing certain subfields, while deemphasizing others, may influence the longtime practice choices of graduates. In choosing speakers for its annual conference, AAPL should seek to emphasize the importance of resource allocation by giving platforms to those who allocate their own time toward furthering such values as social justice, equity, and societal welfare.

### Conclusions

The essayist Annie Dillard observes in *The Writing Life* that “How we spend our days is of course how we spend our lives. What we do with this hour and that one is what we are doing” (Ref. 35, p 32). This oft-quoted insight conveys existential wisdom, but it also holds a moral dimension: how we spend our time conveys our priorities and our values. In forensic psychiatry, practitioners self-allocate their own time, and in doing so, make moral statements. In light of political and structural considerations, it is improbable that such an autonomous model of time allocation by forensic psychiatrists will change any time soon. That does not mean, however, that professional bodies cannot offer ethics guidance on how the time of forensic psychiatrists should be allocated. In fact, forensic authorities and ethicists may be morally obliged to do so. Imagine if every indigent litigant from a nondominant background had access to four past presidents of AAPL as experts. That may not be logistically possible at present, but why they do not (and why Mr. Gigante did) is one of the fundamental

ethics dilemmas in contemporary forensic psychiatry. Until that challenge is sufficiently addressed, forensic ethics will not come of age.

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