Ethics in the Time of Injustice

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At a time of national protests following the tragic death of George Floyd, and a pandemic that disproportionately affects people of color, it is time to revisit the values that best guide us and our medical specialty. As a profession that works closely with the criminal justice system (and is involved in the direct evaluation and treatment of those hospitalized, arrested, and incarcerated), it is a time for action and reflection about our participation in a system marked by injustice. Arrests of minors, incarceration of adults, and rates of police misconduct have long disproportionately affected communities of color, as have infant and maternal mortality.[1–3] And now COVID-19. It is past time for the forensic professions to be clear on the social benefits and goods that they can contribute to society. We must define once and for all the goals and purposes that stand in opposition to the glaring deficiencies in the systems where we work.

In our collaborations,[4–6] we have emphasized that much of forensic practice involves relationships with vulnerable people and have underscored the unfairness inherent in a system that has long claimed devotion to abstractions of truth and justice. We have viewed forensic practice as primarily moral at its core, engaged in a complex system of moral relationships where attention to that complexity should not be aspirational but foundational to our actions in the diverse settings and situations we find ourselves.

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Historically, our forensic specialty ignored the perspective of what Ezra Griffith called nondominant communities.[7] These are communities poorly served by our systems of justice and health care, where discrimination has led to unacceptable outcomes. With continued exposure of structural inequities, we can no longer ignore how our best intentions fall short of cultural and racial understanding, moral endeavors that should be central to our awareness as we practice.

As contributors to the ethics discussions of our profession, we have promoted a concept of robust professional identity based on cultural competence, the narrative of vulnerable people and values, and the centrality of moral relationships. We believe that this approach to forensic professionalism supports a better understanding of individuals caught in institutions that perpetuate racism and injustice. Unfortunately, forensic psychiatry has clung to an ethics framework that supports loyalties to a flawed, unrepresentative system; we still make untenable claims about objectivity and truth-telling. If politics, law, and medicine have historically excluded entire swaths of society, their ethics pronouncements can hardly be legitimate, never mind objective. We believe there is an ethics imperative to change the understanding of our participation in these systems to ensure a full measure of fairness and redress.

In fact, we in the American Academy of Psychiatry and the Law (AAPL) may have gotten it wrong in our own ethics code.[8] In an attempt to balance individual protections against societal rules, we fell into an old trap. No individual can face the weight of society on one's own. The math is too great in society's favor. Our colleagues in the law already recognize the importance of protecting defendants in the grasp of society's legal institutions: "Better that ten guilty persons escape than one innocent suffer" (Ref. 9, bk. 4, ch. 27). And if that society is created on the backs of those less fortunate, any default must be in favor of

the vulnerable individual. Ethicist George Annas raised this alarm when governments resorted to the torture of detained terror suspects.[10] Society had merely to claim a threat to its structure to overcome individual protections: an approach eerily similar to historically oppressive behavior and to recent protests pitting First Amendment protections against calls for law and order.

Forensic assessment can no longer be some sterile calculation crafted by a technician blind to context and history. As protests against racial injustice spread across the globe, we forensic professionals can bring our own professionalism under scrutiny. Medical experts strengthen their ethics when they recognize the shared social goals of justice and fairness at the intersection of personal, professional, and community behavior at the intersection of justice and history.

Examining overarching goals and purposes means aligning our professional narrative with that of the most vulnerable, the least heard. It means reflecting on and studying how we ourselves contribute to unequal outcomes. It means holding ourselves, the courts, and police accountable when there are clear inequities. We cannot participate in such systems without changing them through our public statements, our work, and our advocacy.

Nor is this merely an aspirational appeal. Change can come through specific actions that bolster empirically successful forensic interventions. Housing, social services, rehabilitation, access to health care, and diversion all make a difference to those who interact with the legal system. We can contribute directly to police de-escalation training, hiring, and fitness-for-duty decisions. We can advocate more forcefully for improved fair housing and employment standards for justice-involved people.

Our colleague Michael Norko famously turned to compassion to remind us of The Golden Rule and our universal connectedness.[11] He reminds us that it is the compassionate professional who recognizes suffering in others. Our work can be placed more easily in the broader context of human endeavor when we recognize the blinders attached to traditional, antiseptic rule-making. Recognizing pain and suffering allows us to better serve others and the systems that contain the human dramas we participate in every day. Compassion, then, permits "an approach to justice that allows us to attend to and engage the humanity of all the subjects of our evaluations" (Ref. 11, p 388).

Humanity is stripped from our evaluees and from us as professionals if there is no respect for one's inherent value. Is it any wonder that our European colleagues and AAPL's own Alec Buchanan invoke human rights and the dignity of persons as the ultimate gauge of whether we are being just?[12]

In a previous article in this journal, Martinez argued that ethics principles, traditional decision-making, and related models for forensic professionals are not enough to guide our organization and its members.[13] The variety and diversity of dedicated professionals working in diverse and varied settings require a unifying moral approach that all practitioners can turn to for guidance. For those guided by principles of objectivity like truth-telling and honesty (without considering how participation may support institutional failures) there has to be a more coherent view.

Ezra Griffith wrote, "[a] call for truth-telling is empty if the legal system achieves no just result. Telling the truth for the sake of telling truth is an adaptation of the credo that pushes art for the sake of art . . . . I for one cannot pat myself on the back when I tell the truth in court and the end is unjust" (Ref. 14, p 430).

In the development of ethical approaches in forensic practice, we are left with professional guidance that does not provide an adequate consensus on the social goods and responsibilities of forensic psychiatry. We argue that today our organization and its members require unifying goals and purposes that confront the ways in which the judicial system, like all systems in our society, is institutionally flawed.

Just as medicine identified its core social goods in the 1990s,[15] it is time to be clear on the goals and purposes that qualify as overarching social goods in our specialty, goods that protect the vulnerable values of justice and fairness. Goals that ignore the cultural and contextual realities of the judicial, correctional, and health care systems should be evolving alongside our calls for professionalism, compassion, and dignity. The claim that we strive for objectivity and adhere to honesty[8] must evolve along with us. When we invariably witness injustice due to institutional racism and bias, we are obliged to shine a light and change those practices, certainly in our role as treaters, but also in our daily activities of report-writing and testifying.

As in the 2018 article by Martinez,[13] we have identified and expanded certain goals and purposes that should guide forensic practice:

> To provide knowledge and understanding of persons diagnosed with mental illness within legal, regulatory, administrative, governmental, public, and clinical settings.
>
> To provide competent and respectful care to persons with mental illness in correctional and other clinical settings.
>
> To contribute to the [nondiscriminatory] truth-seeking and fairness goals of the legal system.
>
> To witness and narrate from forensic psychiatry's unique perspective the suffering [and inequities] that accompan[y] mental illness.
>
> To advocate for the de-stigmatization [and de-criminalization] of persons with mental illness (Ref. 13, p 436).

Further goals should include:

> To advocate for alternatives to the narratives of polarization common in the adversarial system.
>
> To address the suffering of those with mental illness.
>
> To advocate for research and public policy that increase understanding of mental illness, address inequities in the behavioral health system, and move toward the development of forensic and treatment interventions that decrease suffering.

In the context of current protests and the public health crisis, we are moved to re-emphasize those requirements that alleviate suffering, demand witnessing, and advocate policy change. These are all-encompassing goals that even individual practitioners can enact through compassion and respect for dignity.

AAPL is a far different organization 50 years after it was founded. It is different even from its last ethics revision 15 years ago. The need to appreciate the cultural factors in which we work, to understand the intrinsic dynamics of power and disenfranchisement, and to remain aware of how we participate in perpetrating racism and prejudice, require adherence to contemporary social goods. The moral requirements to work in forensic practice are great, and we cannot hide behind the claim of honesty and striving for objectivity while actually contributing to grave institutional failures.

Our participation in a deeply flawed system has profound consequences for individual human beings, just as for entire groups. Questioning and acting on how we participate in the worst aspects of our society should be the path for improving those consequences. Bringing overarching goals and purposes into all aspects of our professional work will not only affect individual lives but change the systems where stories like George Floyd's are told and shaped.

References

1. Hardeman RR, Medina EM, Kozhimannil KB: Dismantling structural racism, supporting Black lives and achieving health equity: our role. N Engl J Med 375:2113–5, 2016
2. Alang A, McAlpine D, McCreedy E, *et al*: Police brutality and Black health: setting the agenda for public health scholars. Am J Public Health 107:662–5, 2017
3. Petersen EE, Davis NL, Goodman D, *et al*: Racial/ethnic disparities in pregnancy-related deaths—United States, 2007–2016. MMWR Morb Mortal Wkly Rep 68:762–5, 2019
4. Candilis P, Martinez R, Dording C: Principles and narrative in forensic psychiatry: toward a robust view of professional role. J Am Acad Psychiatry Law 29:167–74, 2001
5. Martinez R, Candilis P: Toward a unified theory of personal and professional ethics. J Am Acad Psychiatry Law 33:382–5, 2005
6. Candilis P, Weinstock R, Martinez R: Forensic Ethics and the Expert Witness. New York: Springer Publishing, 2007
7. Griffith EEH: Ethics in forensic psychiatry: a cultural response to Stone and Appelbaum. J Am Acad Psychiatry Law 26:171–84, 1998
8. American Academy of Psychiatry and the Law: Ethics Guidelines for the Practice of Forensic Psychiatry, 2005. Available at: https://aapl.org/ethics-guidelines. Accessed August 7, 2020
9. Blackstone W: Commentaries on the Laws of England. Oxford: Clarendon Press, 1769
10. Annas GJ: Military medical ethics: physician first, last, always. N Engl J Med 359:1087–90, 2008
11. Norko MA: Commentary: compassion at the core of forensic ethics. J Am Acad Psychiatry Law 33:386–9, 2005
12. Buchanan A: Respect for dignity and forensic psychiatry. Int'l J L & Psychiatry 41:12–7, 2015
13. Martinez R: Professional identity, the goals and purposes of forensic psychiatry, and Dr. Ezra Griffith. J Am Acad Psychiatry Law 46:428–37, 2018
14. Griffith EEH: Truth in forensic psychiatry: a cultural response to Gutheil and colleagues. J Am Acad Psychiatry Law 31:428–31, 2003
15. The Goals of Medicine. The Forgotten Issues in Health Care Reform. Edited by Hanson MJ, Callahan D. Washington DC: Georgetown University Press, 1999