Ethics in forensic psychiatry: Re-imagining the wasteland after 25 years

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Professor Stone revisits the landscape of forensic ethics first addressed two decades ago both in a presentation to American Academy of Psychiatry and Law and in his book, Law, Psychiatry and Morality. *While at present there exists no uniform ethical guideline, forensic psychiatrists now have many options for moral guidance in the courtroom, and this situation is the beginning of ethical development for the profession.*

In the spring of 2007 Dr. Glenn Miller, a member of the American Academy of Psychiatry and Law (AAPL), contacted me to ask if I would be willing to present at their annual meeting in the fall a 25th anniversary reprise of my paper, "The Ethics of Forensic Psychiatry: A View from the Ivory Tower." That critical essay provoked in subsequent months a number of publications by leading members of

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AAPL attacking or rejecting my views but I had never presented my reactions to those responses. Dr. Miller's request seemed like an excellent opportunity to repair that omission. The idea of the reprise was taken up by AAPL and grew into a symposium at the annual AAPL meeting with scheduled commentaries by Paul Appelbaum, Ezra Griffith, and Stephen Morse as well as Dr. Miller. Ezra Griffith, the Editor of *Journal of the American Academy of Psychiatry and the Law*, informed me that the entire symposium including my original article, the planned reprise, and the commentaries would be published in their Journal. Given the apparent importance of the invitation I set to work reviewing the intervening literature and soon recognized that I would need help in the task I had undertaken. My original article had discussed the epistemological limitations of forensic psychiatry as an interlocking problem with its ethics, given the academic writing in these areas over the past 25 years it seemed too much to survey by myself. I therefore enlisted my former student, co-author, and friend Duncan MacCourt to collaborate in this effort. He is the person most knowledgeable about my criticisms of forensic psychiatry and the underlying structure of my arguments. We agreed that what was wanted for the AAPL symposium was a presentation of my current views and that he would assist in the review of the relevant literature and in the writing of the reprise and would be listed as a co-author of the presentation and the publication. A great deal of time and effort went into the article we prepared that would reflect the evolution of my views in a style and content that made it a brother to the original critical essay. That Duncan MacCourt fulfilled his part of the bargain is clear, that the presentation reflects my views is equally clear and we felt we had fulfilled our obligation to AAPL and to each other.

After the symposium had taken place, Dr. Griffith, for purposes of publication in the Journal, objected to the first person narrative style of the article. He invoked a rule that he claimed had no exceptions holding that a co-authored article

could not be published in that first person narrative style in JAAPL no matter what the understanding or agreement of the co-authors might be.

For obvious personal and ethical reasons I was unwilling to observe that inviolable rule by demoting my co-author to a footnote. Nor was I prepared to sacrifice the first person voice of the presentation that is essential not only to the style but to the substance and structure of my arguments. I do not believe that third person principles manipulated by contemporary ethicists give meaningful answers to the context bound ethical choices of physicians or to the moral adventure of one's life. Ethics in my view is praxis; the objective principles distilled from tradition, philosophy and social science are important but only as part of the context that informs our choices. Translating my subjective existential views into the objective third person style of journalese (as the JAAPL attempted in a draft) seemed a corruption of what we meant to say in the *reprise*. We suggested an explanatory footnote that the journal or we might provide. This was unacceptable. We reached an impasse; JAAPL decided unilaterally and without consulting us to publish the entire symposium including my 25-year-old article, the commentaries on the new reprise and other related pieces omitting only the presentation that had been the centerpiece of the project. The editor informed his readers, "I had hoped to publish as a regular article Stone's recent speech at the 2007 AAPL annual meeting. That was not possible." I am therefore particularly grateful to Professor Witt and the Journal of Psychiatry and Law who did find it possible to publish the article I co-authored with Duncan MacCourt along with this introductory explanation. Perhaps I may be allowed to point out that the strange and vexing result reached by Dr. Griffith's rigidly applied rule, providing his readers published commentaries on an unpublished article, is an excellent example of what happens when we ignore the relevant contexts that should inform our ethical choices.

A re-imagining

I thought it would be appropriate today to revisit the ideas I presented to AAPL 25 years ago (Stone, 1984), respond to your reactions to those remarks, and address new issues that now seem important. Recently Chandilis, Weinstock, and Martinez (2007) have summarized some of the matters I plan to discuss, and therefore along the way I shall use their book *Forensic Ethics and the Expert Witness* as a convenient organizing reference. I use the acronym *FEEW*!

FEEW discusses my views and those of Drs. Paul Appelbaum and Ezra Griffith. It provides a brief history of the contemporary ethical landscape and a catalogue of different ethical approaches to forensic testimony and to medical ethics in general. Whether one agrees with FEEW in its magisterial evaluation of a sprawling and undisciplined literature, it has encouraged me to clarify, unpack, and perhaps reimagine my own position.

One of the conclusions of my original article was that forensic psychiatrists were forced to abandon traditional medical ethics when they offered their services to the law (Stone, 1984, p. 71-73). For the purposes of that article I defined medical ethics for my own purposes as the traditional medical injunction *primum non nocere*, first of all do no harm, and the praxis of medical care that my generation was taught in Medical School, *do whatever you can to help your patient*. This conception was derived neither from the American Medical Association's (AMA) principles of ethics nor from any of the contemporary writings on medical ethics. As a personal conception, it was derived on the medical side from the time honored tradition of *do no harm* and from the psychoanalytic emphasis on the importance of the doctor-patient relationship; on the legal side, both from the notion of an implied contract with the patient drawn from the common law's articulation of informed consent (see, e.g., *Canterbury v. Spence*, 1972), and from Kenneth Arrow, the Nobel prize economist who concluded in a famous

paper that, given the nature of the market for medical services and the incorrigible lack of information, the doctor owed a fiduciary obligation to the patient (Arrow, 1963). I have more to say about the praxis below.

First, it seemed clear to me that forensic psychiatrists could not adhere to the traditional elements of medical ethics. This judgment was based on years of teaching and thinking about law and psychiatry, my personal experience as recorded in the *Parable of the Black Sergeant* which had been the centerpiece of my Presidential address to the APA in 1980 (Stone, 1980) and years of discussions with Drs. Seymour Pollack, Bernard Diamond, Jay Katz, and Andrew Watson at the Group for the Advancement of Psychiatry. They were among the founding fathers of AAPL and all of them struggled with questions about the relationship between their roles as physicians and their participation as expert witnesses in the work of the courts. Each of them recognized different aspects of the problem and each had a different approach. A typical Andy Watson solution to the do no harm problem was to pick cases in which he believed he could help someone who was being misunderstood and unfairly treated. However, Seymour Pollack championed the duty of forensic psychiatrists to serve prosecutors as well as defendants and argued that as a developing subspecialty forensic psychiatry could no longer pick cases and march under the do no harm, fidelity to the patient banner of medical ethics. Pollack, a founder of AAPL, had ten years earlier written that forensic psychiatry (to quote FEEW) "is concerned primarily with the ends of the legal system, justice, rather than the therapeutic objectives of the medical system" (Chandilis et al., 2007, p. 10).

These founding fathers also conceded that among their generation of forensic psychiatrists there were notorious outlaws and scavengers who seemed to exploit the ambiguity of ethical, professional and scientific boundaries. Based on their experience and my own I concluded that forensic psychiatrists could neither claim to be operating under the

traditional banner of medical ethics nor under any other agreed upon banner (Stone, 1984). Each forensic psychiatrist was playing by his own rules, ethically, professionally and scientifically. There were no generally accepted standards for forensic psychiatrists. I also suggested that most forensic psychiatrists failed even to recognize the epistemological gap between psychiatry and law. The Yale Law School Professor and psychoanalyst Dr. Jay Katz (1992) explicitly recognized this problem, and his solution was to refuse to answer the ultimate legal question. I was more radical than Professor Katz because I thought psychoanalysis, which was then the prevailing science in psychiatry, both was deterministic and had little *truth* to offer to the law (Stone, 1984, p. 59-64).

These conclusions about ethics, science, and philosophy were greeted at AAPL with a great deal of dissatisfaction and some resentment. Paul Appelbaum (1997) later wrote about the article as "condemning forensic psychiatry to wander in an ethical wasteland, permanently bereft of moral legitimacy." Ezra Griffith (1998) would write that my article "was disheartening because (my) concluding recommendation was that forensic psychiatrists ought to stay out of the courtroom." Dr. Emanuel Tanay made the first comment from the floor after my talk to AAPL and compared me to the Reverend Jim Jones telling his congregation in Guyana to drink the Kool-Aid.

However, in the same article in which he claimed I was condemning you to the wasteland, Paul Appelbaum explicitly recognized the essential validity of part of what I had said—I shall now call that part the Pollack—Stone argument—and raised a separate ethical banner for forensic psychiatry.

The standard position

If the older generation were the founding fathers of A.A.P.L., I imagine Paul Appelbaum with this article becoming the James Madison, the man who made coherent sense of their

ideas and established forensic psychiatry's current approach to ethics, to science and to professionalism. It seems to me that Professor Appelbaum provided a rationale for the line taken by Seymour Pollack. Appelbaum's functional agenda, as I saw it, was to permit forensic psychiatrists to participate with professional dignity as expert witnesses on both sides of the adversarial process of the American system of justice. He emphasized honesty, respect for persons, and the importance of justice. He also recognized what I shall call the standard position: that when forensic psychiatrists participated in the work of the courts to serve justice, they were bound by an ethics that was different than doctors functioning in their traditional role (Appelbaum, 1997, p. 243-246). FEEW reviews this history and discusses both what they consider the limitations of my views and those of the standard position (Chandilis et al., 2007, p. 21-25). As Appelbaum says in his preface to the book, FEEW provides a *guide for thought* (Chandilis et al., 2007, p. ix), but in my reading it offers no coherent resolution of the problems it raises. I therefore present my own current thoughts about the standard position.

Fundamental to the standard position is serving justice: How, I ask, does the forensic psychiatrist go about that service? In discussing my APPL article, Appelbaum expressed puzzlement at what I have since come to think of as my homespun and inadequately articulated conception of medical ethics. In response, he substituted the formulations of contemporary writers on ethics in which the principles of beneficence and non-maleficence had been explicitly defined and replaced the traditional and ambiguous maxims. Let me underline this substitution which seems to me very important at several levels: I certainly had no intention of referring to the two principles of beneficence and maleficence as they had been articulated by contemporary ethicists or to any hierarchy of ethical principles. In fact, I was then and I remain today skeptical about the burgeoning ethics industry, particularly as it is applied to the medical profession.

Ethics as praxis

It seems to me, as I look back, that what was most important in my own homespun formulation was left out when it was reduced to two abstract principles. I had meant to suggest a dialectical tension inherent in medical care of any kind, a tension between the thesis to do no harm and the antithesis to do everything you can to help the patient. But I could provide no bottom line synthesis, and I still cannot! I recognized that historically psychiatrists in their efforts to do all they could for their patients had not infrequently done harm. In reflecting on that harm, I could justify my own failings and excuse those of others only because we were trying to help suffering patients. But in my view forensic psychiatrists could not justify their failings on those or similar grounds because they weren't trying necessarily to help their subjects. In addition, I also believed then and still believe now that there are no simple answers and no single ideal *truth of the matter* in ethics, morality, and psychiatry.

Appelbaum complained about my article that I had condemned forensic psychiatrists to wander in an ethical wasteland forever (2007, p. 234). His phrase brings to mind T. S. Eliot, who at the beginning of the 20th Century described the *Wasteland* as the place where we all have to wander (Eliot, 1991). But that is exactly my view of contemporary psychiatry. We live and practice inside the dialectic without the resolution provided by synthesis and without certitudes but with the hope that our praxis leads away from the ethical wasteland. Let me say that none of my ideas about ethics are original. There is a reading of existential philosophy that says much the same thing (Sartre, 1992).

In addition, what was also crucial to me in my homespun formulation was my idealized identity as a doctor in both an Ericksonian and existential sense. In other words, one of the projects in my life was to determine what I would do as a doctor to give my life moral meaning. What had initially

attracted me to the medical profession was both a commitment to the highest level of knowledge and clinical skill and to personal acts of altruism. What I learned at Yale Medical School was to strive for the highest standard of care and to provide that to all of my patients. This I learned from professors who exemplified those ideals, but unfortunately none of these exemplars were psychiatrists. This was not a theory of ethics; rather, it was a praxis that shaped my identity and my existential project. This praxis I then believed was the core of medicine as a caring profession.

Pitfalls in serving justice

Now in examining the profession of forensic psychiatry, I therefore ask, "What is the forensic psychiatrist's ethical praxis for serving justice?" Serving justice is much more complicated than serving a suffering patient. Furthermore, you are often in the spotlight of public attention where your failings, when they occur, tarnish the reputation of your nonforensic colleagues. The wasteland of the forensic psychiatrist is more perilous, and if I am correct you have no clear praxis. In contrast, American lawyers have a very clear praxis for serving justice, and it is of crucial significance to forensic psychiatry when you consider your own aspiration to serve justice: The lawyer's praxis is zealous advocacy in the adversarial system of American justice. Do everything you can to win your case within the boundaries of zealous advocacy. Lawyers are constantly pushing those boundaries and using experts in that effort, including forensic experts. Lawyers like my friend, Professor Alan Dershowitz of Harvard Law School, make it clear that the praxis of zealous advocacy is distinct from the lawyers own personal or even professional search for justice or truth; indeed a zealous advocate may or must serve corporations and clients he despises, and advocate for legal resolutions which he suspects, or knows, are not reflective of the truth of the particular case (see. e.g., Bennett, 2001). For the zealous

advocate it is the adversarial system that produces the ultimate justice. So the lawyer is often faced with a conflict between his own sense of justice and moral aspirations and the goals of his client. Now, this is not an isolated or rare phenomenon: many of my former students find this moral dilemma the most repugnant aspect of their profession. Thousands of lawyers leave the profession each year, many of them burdened by such concerns. Their struggles are outlined in the legal literature ranging from sociological analysis (see, e.g., Granfield, 1992) to personal case histories (see, e.g., Kahlenberg, 1992). And I would point out that this moral dilemma is typically confronted in the legal profession where the potential remuneration and market power are greatest (Granfield, 1992, p. 143-167). Lawyers who want to be financially successful let the system of justice be responsible for justice and they do their pro bono on the side.

Some of you of course are now in a position to tell a lawyer what to do and how to proceed, but most forensic psychiatrists who take the standard position serve both sides of this adversarial process and therefore serve justice only as the lawyers allow. Specifically the forensic psychiatrist serves the development and presentation of the advocate's position, designed often without regard to concepts of ultimate truth or justice but to win this particular case. You are a cog in the lawyer's machinery, and from the ethical standpoint of the lawyer, this is as it should be.

In what other sense can the forensic psychiatrist serve justice? As I read through FEEW looking for an approach to the ethical praxis of forensic psychiatry other than the standard position, I found a diversity of approaches being suggested with no clear guidance as to how to choose among them. From a distance my own impression is that the standard position leads the scrupulous practitioner to a posture of *objectivity* that stays within the boundaries of normal science and accepts the role of being a cog in the lawyer's machinery.

Legal ethics and the forensic psychiatrist

I read FEEW as a demonstration of the profession's dissatisfaction with this situation. As FEEW notes, I doubt that many of you achieve this objectivity, and I have commented on the fact that forensic psychiatrists regularly succumb to adversarial pressures (Stone, 1984). In the atmosphere of zealous advocacy which I believe has been absorbed by forensic psychiatrists—or perhaps it is more accurate to say, has absorbed forensic psychiatry—the partisan truth of the adversary often eclipses the objective truth of the dispassionate expert. You make the best argument you can for your side, and that is what the lawyer wants and for what he reimburses.

In Kafka's parable of the law the peasant waits at the door to the law all his life to gain access (Kafka, 1946). As he is dying the doorkeeper closes the door and tells him this is only one of many doors. The forensic psychiatrist waits not at the door of the law but at the door of the lawyer's office. To serve justice he has to get through that door, and that position is where the ethical problems of forensic psychiatry are first confronted. Unfortunately, FEEW and AAPL's ethical guidelines provide little guidance on this basic matter.

I would emphasize two further considerations here. The first is pragmatic and has to do with the lack of demand for objective testimony. Many years ago, a prominent attorney told me confidentially, "I do not have to pay a psychiatrist $500 an hour to give me his objective version of the truth" (Personal communication with anonymous source). The second consideration is from social psychology. The important lesson we derive from the research of Milgram (2004), Asch (1951), and Haney, Banks, & Zimbardo (1973) is that context matters and has an impact on one's objective, ethical, and moral judgments. Given this research, what I find most predictable and most troubling is the certitude with which so many forensic psychiatrists advance their expert

opinions about dubious matters. The attribution error is repeatedly enacted.

I do not claim that forensic psychiatrists can not devise strategies to deal with these pressures. Indeed I have read transcripts which in my judgment demonstrate that some forensic psychiatrists succeed in objectivity. But I see no reason to modify the concerns I raised in my original article about the pressures of the adversarial system on the ethics of forensic psychiatry. Indeed my personal observation is that, as forensic psychiatrists have become increasingly sophisticated about law—and drink in the intoxicating wisdom of the law—they increasingly take on the identity and habits of lawyers, one of them being the ethics of zealous advocacy. The preamble to the AAPL ethics guidelines (2005) agree with these concerns, stating that "the practice of forensic psychiatry entails inherent potentials for complications, conflicts, misunderstandings and abuses."

As a practical matter I would point out that when forensic psychiatrists resist the seduction of the lawyers who pay them it is typically because they have market power or professional leverage. FEEW describes one expert as an ideal practitioner, who explicitly states that he preserves his independence because he is a tenured professor with a salary who is always ready to withdraw from a case if pushed beyond his objective opinion (Chandilis et al., 2007, p. 89). Surely there is a moral here that cuts both ways, for if only the insulated tenured professor can provide objective testimony, then the position of forensic psychiatry as an independent profession is dubious. In contrast, when FEEW argues against the standard position by contending that forensic psychiatrists can retain their traditional medical values, the authors emphasize two examples to prove their point. But both are forensic psychiatrists who were in fact appointed by the court and were operating outside the private, adversarial system. They were not being paid to serve lawyers (Chandilis et al., 2007, p. 100-105).

Medical ethics outside the United States

I advance a second criticism of the standard position drawn from the global perspective and dealing with new developments. Physicians in other nations and in the World Medical Association (WMA) have adopted the United Nation's (UN) Conventions on Human Rights as the fundamental basis of medical ethics (WMA, 2006). The idea of a separate professional ethics derived from a historical tradition and the doctor patient relationship that I endorse has been sharply criticized by the WMA and replaced by a new tradition of ethics derived from the broad international consensus on human rights. This new medical ethics generates and adds its own notion of justice to the banner of medical ethics and finds American justice wanting. For example, capital punishment is a violation of basic human rights under the UN conventions. Therefore as a matter of medical ethics doctors in their role as doctors are obliged to be against capital punishment (WMA Resolution on Physician, 2000).

This new global construction of a medical ethics, with justice in its own banner, is relevant to AMA–AAPL discussions about participation in capital punishment and where to draw the line. The specific positions AAPL takes on capital punishment may seem increasingly provincial if not unethical to psychiatrists elsewhere in the world (Halpern, Halper, & Freedman, 2004). If I am correct about the functional purpose of AAPL's ethics, they foster your maximum participation in the American system of justice. For my purpose the global perspective highlights the extent to which the identity and professional mission of American forensic psychiatry is increasingly defined by the substance and process of American law rather than by any independent professional identity and values. While I believe the latter should predominate, I must concede that the view of ethics I espoused and presented to you 25 years ago is also being repudiated on all sides both here and abroad. And, as I read FEEW, so is the standard position.

The medical market and medical ethics

There is a famous exchange between lawyers that I am sure most of you know but it is apropos at this point. One lawyer asks the other "How's your wife?" and gets the response "Compared to what?" Compared to the rest of psychiatry and the rest of medicine, the ethical terrain of forensic psychiatry, despite its special problems, now seems less a hazardous wasteland than it did 25 years ago.

Twenty-five years ago when I spoke about the ethics of medicine as opposed to the ethics of forensic psychiatry, I had failed to take into account what Eli Ginzburg had described as the monetarization of health care (Ginzberg & Ostrow, 1997). When I finally did focus on health policy and the vicissitudes of managed care in my teaching and writing I concluded that the monetarization of health care had allowed health plans to control the practice of medicine and to undermine both the ethical praxis of the medical profession and to interfere with the fiduciary obligation to the patient (Stone, 1998). Oligopsony purchasing power had in a few years destroyed the market power of physicians and was reducing the independent medical profession to the status of supervised employees. I then thought this was a bad thing for medical ethics, and in my opinion it has gotten worse as doctors have now rejected the primacy of the implied contract with the patient and the sense of professional accountability that goes with it. The cunning of this monetarized healthcare bureaucracy is that no one any longer feels directly responsible for the patient. The primary care physician who is supposed to hold it all together is overworked, underpaid and unable to aspire to the traditional praxis of caring for patients. We are therefore fast becoming a profession with lots of talk about ethics and no personal sense of professional responsibility. Caring for your patient in the era of monetarized medicine is an act of civil disobedience.

FEEW, in rejecting the approach I espouse, quotes with approval Wynia and colleagues' redefinition of professionalism "as an activity that involves both the distribution of a commodity and the fair allocation of social goods" (Chandilis, et al., 2007, p. 98). But how during an encounter with a patient does an individual doctor go about the fair allocations of a social good? And I might add, exactly what is the *commodity*? Can we really think of ourselves, trained to heal, as providing a commodity? Or, more bluntly as a commodity ourselves? I for one would never have been willing to devote my life to being a commodity and reject any conception of myself or my practice as a commodity.

So, where is the caring praxis in the 21st century? It seems to me this is much more than an abstract debate about ethical systems. This duty to allocate and this moneterization of medical care have destroyed the praxis of ethical professional care and with it, the autonomy and the morale of the medical profession. Compared to the current situation of the medical profession, I can understand how many young psychiatrists would look to forensic psychiatry as the specialty in which they might pursue a meaningful ethical project. Others may see in forensic psychiatry an escape from managed care's restrictions on income and autonomy.

The epistemological problems

I turn now briefly to the epistemological questions. These relate to the problem of truth and honesty. Do psychiatrists have any truth to offer? And are truth and ethics related? Twenty-five years ago I asked whether clinical psychiatry had anything practical or true to offer as answers to legal questions. For historical perspective I cited the answers to this question of Immanuel Kant and Sigmund Freud. Kant did not think that the alienists of his day either knew enough about the brain or about moral philosophy to provide guidance to the law. Freud thought he had discovered the

scientific truth in psychoanalysis, but he was convinced that its truths based on psychological determinisms could not be applied to arbitrary unscientific legal concepts like criminal responsibility. In fact, Freud was offered a great deal of money to testify as an expert witness in the notorious Leopold and Loeb murder trial but refused (Kramer, 2006). Kant and Freud taken together I characterized as the purist position, which holds that psychiatrists have no true answers to offer in the courtroom (Stone, 1984, p. 59-60).

Much has happened in psychiatry since then but our science base is still in its infancy and not mature enough to declare the purist position untenable. This is a matter on which Professor Appelbaum and I have major disagreements. One of the fundamental differences between us has to do with our differing conceptions of psychiatry and forensic psychiatry as having a scientific base. It seems to me that Professor Appelbaum believes that forensic psychiatry is building block by block a scientific foundation for forensic psychiatric practice. He believes psychiatrists who stand on those blocks have a scientific and objective foundation for practice and much to contribute to legal determinations. I, on the other hand, believe that most of those blocks will quickly crumble and time will demonstrate their methodological and scientific limitations. The history of psychiatry, I suggest, tells us to be humble about our scientific claims. They often prove to be mirages. It is I think because of our differing views about *normal science* in psychiatry that Professor Appelbaum and I disagree so strongly about the wasteland and what forensic psychiatrists have to offer.

Twenty-five years ago I also described five unsolved and interrelated philosophical problems: the fact value distinction, the free will-determinism divide, the deconstruction of the self and of agency, the mind brain problem (Kant's noumenal and phenomenal domains), and the chasm between the Kuhnian paradigm of normal science and moral discourse (Stone, 1984, p. 60-64).

Today I would construct a somewhat different list. Biological reductionism would be at the top, particularly since psychiatry and the field of forensic testimony has been invaded by neuroscientists who think they are in the midst of discovering—or even have grasped—the new scientific truth about the human condition. And there is a new generation of law professors who believe them and a proliferation of neuroscience and law courses and projects in our country's law schools.

I would maintain today that however one constructs the list there has been no resolution of these crucial underlying conceptual and intellectual problems, and that they limit the scientific validity of clinical psychiatry and the truth telling capacity of the forensic psychiatrist.

Let me remind you that the preeminent forensic psychiatrists of my generation were all psychoanalysts or psychoanalytically oriented: Guttmacher, Diamond, Katz, Watson, Pollack, Halleck, Robitsher, et al. They ignored or thought they had solved the philosophical problems. Does anyone today believe that what these psychoanalysts testified to on the stand can now be called truth telling? Think of the impact of Bernard Diamond's testimony on the legal doctrine of diminished capacity (1994) or of Joseph Goldstein, Anna Freud, and colleagues writings on family law (1973).

I now think that all of these endeavors, derived from a belief in the validity of psychoanalysis, were misguided, although all originally had been presented in good faith as the truth and as valid science to guide lawmakers. This is not to say that their proponents were dissembling in any way. The generations of American forensic psychiatrists before you were, I assume, being honest. When they appeared before judges and juries, they testified to the best of their ability and honestly, thinking they told the truth. However, they just did not have any truth to tell. It was all a mirage. In my heart of hearts I believe the same is true of this generation of forensic

psychiatrists and neuroscientists. What I am suggesting is that even when you faithfully pursue the standard approach and the praxis of objectivity and honesty your testimony rests on an inadequate scientific foundation.

The legal approach to the "is it science?" question is reached under the law of evidence, typically the *Daubert* (1993) and *Kumho* (1999) line from the United States Supreme Court. In other cases the law is interested in the expert's professional opinion. However my purpose is not to focus on what the law allows but on what experts are willing to provide to the law's decision makers, i.e., to judges and juries. I shall focus now on neuroscience testimony, the leading edge of expert testimony today just as psychoanalysis was 50 years ago.

Twenty-five years ago to illustrate the mind brain problem and truth I discussed the Torsney case (Stone, 1984). Back then honest neurologists testified that Torsney, a white policeman, who killed a black teenager, was experiencing a temporal lobe seizure when he killed a young man. The policeman was found Not Guilty by Reason of Insanity (NGRI) based on scientific testimony that no self respecting neurologist believes today. Can we look back on this as truth or justice?

Fast forward to the 90's and the case of Spyder Cystkopf, now revealed as Herbert Weinstein, a case evaluated and much discussed by Stephen Morse (2004) wearing two hats, one as a Professor of Criminal Law and the other as a hypothetical expert forensic psychologist. Let me emphasize that Professor Morse did not participate in this case! I nonetheless rely on his account of it. As you may know, Mr. Weinstein strangled his wife and then threw her body out the window of their 12th floor apartment on East 72nd Street in Manhattan (NY) to make it look like suicide. Weinstein, a wealthy man, was worked up by two preeminent neuroscientists employed by his defense team—Antonio Damasio then at the University of Iowa and Fred Plum at Cornell University, both of whom I respect greatly—who

scanned his brain and found an arachnoid cyst under the left frontal area. Pet scans also showed abnormal patterns in the left frontal area. Professor Morse reports that the defense employed its expert testimony to argue that the abnormality in Weinstein's brain "made him do it", that is, he was not responsible because he could not control his rage (Morse, 2004). The case was eventually settled by a plea bargain, leaving everything about it contested but also the strong impression, despite Professor Morse's opinion that the defense arguments, based on their experts' functional imaging and neuroscientific opinions, were potent enough to force the prosecution to agree to a lesser punishment.

The lawyer journalist Jeffrey Rosen, writing about the case recently in the New York Times Sunday Magazine, described it dramatically as the "moment that neuroscience began to transform the legal system" (2007). From now on the efforts of sophisticated defense attorneys, and their highly paid experts, would be to convince the jury that the brain and not the mind was at fault and so the legal concept of responsibility would be transformed or abolished. In other words, the defense of "My brain made me do it" would force the law to change its paradigm from one of individual responsibility to biological determinism.

It is important to understand that the neuroscientifically oriented law professors of the 21st century, like the psychoanalytically influenced law professors of the 50's, insist that they have the scientific truth and that the law must be changed to reflect that truth. It is no coincidence that the zealots of both schools, based on determinism, emphasize their new scientific understanding of the volitional prong. Stephen Morse, in contrast, thinks rationality is the key to criminal responsibility. He therefore interprets the Weinstein case in a convincing counter-narrative of agency with comprehensible reasons and intentions indicating that Weinstein was rational and thus responsible for his actions (Morse, 2004).

The scientific technology is far better in Weinstein than it was in Torsney. We know more about the amygdala in the 90's than we did in the 60's. And we think we know much more about the frontal lobes and their projections to deeper structures. But I maintain we still do not know nearly enough to offer a biological account of Weinstein's behavior or to reject Professor Morse's narrative of agency. In my opinion the best neuroscience offered by the most respected experts is still over-reaching and still misleading the law when it tries to give answers about responsibility. The state of the art, as the neuroscientist Michael Gazzinaga and colleague (2005) eloquently argues, is simply not advanced enough to provide any explanation for behavior, only very basic correlations. But correlation is not causation, I would remind you.

Although I value Professor Morse's scholarly account of why the neuroscience in Weinstein was inadequate, I would have serious reservations if he had testified in this case as a forensic psychologist. He has a theory about what constitutes insanity based on his theoretical understanding of agency and responsibility in law, and he accepts many of the arguments of Michael Moore, the legal theorist, in formulating his own position. Moore (1984) attempted to resolve the competing legal and psychiatric understandings of agency and responsibility by finding a resolution in philosophy. I review Moore's articles every year with the students in my law and psychiatry class. Whether he succeeded or not in his philosophical resolution is an open question, certainly neither all philosophers nor all legal scholars have been persuaded. I think Professor Morse, like Moore, has a powerful theoretical critique of biological reductionism and a powerful account of the legal conception of agency and responsibility based on Aristotle's practical syllogism. But if Professor Morse were to put his hat on as a psychologist and testify as a forensic psychologist none of his erudition would allow him to identify with psychological or scientific precision those human beings who are in fact insane. Stephen Morse and Michael Moore can tell the court everything it wants to know

about the law except where to draw the line of criminal responsibility. Professor Morse, I warrant, understands these philosophical problems better than I do, but neither he nor Professor Moore has been able to apply their theory to actual cases in a convincing demonstration. To be clear, the Moore-Morse theory of rationality is presented an attempt to interpret the legal doctrines of criminal responsibility. I take no position on the validity of the argument. Professor Morse has also argued that as an expert witness, his testimony—unlike that of the determinist *normal science* expert—is relevant to legal determinations because it is based on *folk psychology*. As I understand him, folk psychology is based on the theory of agency in Aristotle's practical syllogism (Morse, 2007). In my view such testimony may be relevant to law but it is not a valid account of the human mind. I hope therefore in presenting you the truth limitations of psychoanalysts, neuroscientists, and legal theorists you might be able to imagine your own limitations.

However, many forensic psychiatrists are not focused in their testimony on questions of ultimate or even scientific truth. I therefore return to the professional standard that forensic psychiatrists provide to the courts in their everyday life. Twenty-five years ago my friend Loren Roth argued that the profession of forensic psychiatry should hold to the "scientific standard as exemplified in DSM-III" (Stone, 1984, p. 66). This professional standard has prevailed and the Diagnostic and Statistical Manual of Mental Disorders (DSM) has become the bible of American psychiatry and one of the gospels according to forensic psychiatry.

As the president of the APA who signed off on the DSM-III, I note that the project of the DSM always was to produce, through a phenomenological approach, a more reliable diagnostic nomenclature. In some respects I believe that we have made progress toward that goal. However, as I have watched the DSM evolve from the 3rd edition to the 4th, and as I hear what my colleagues are thinking for the 5th, I worry

that the entire phenomenological project has become an obsessive search for committee consensus rather than a scientific search for truth.

I do not envy you going into court chained to this flawed Bible of consensus. I think many of you must share my conviction that when you swear on the Bible of DSM you are providing something less than scientific truth. I believe it is the posture of professional objectivity that requires you to uphold the consensus of committees of experts who increasingly dominate psychiatry and whose own objectivity about treatment, standards of care, and diagnosis is increasingly in doubt.

Finally, let me address one more issue. There is one thing about my talk 25 years ago that FEEW got wrong as did my friend Ezra Griffith. FEEW writes that my "original stance was (that) physicians should avoid the courtroom" (Chandilis, et al., 2007, p. 22). And, as mentioned earlier, Professor Griffith similarly says I originally urged physicians to shun the courtroom (Griffith, 1998). This misperception was obvious to Dr. Glenn Miller (2007), who recently commented to me that he believed that I had been making an observation only about my own willingness to testify in court, and to the late Dr. Vit Universal Patel. Dr. Patel approached me after the AAPL session 25 years ago and said "they didn't really understand you," and then he quoted exactly what I had said and written, "the philosophers say life is a moral adventure and to choose a career in forensic psychiatry is to choose to increase the risks of that moral adventure" (Stone, 1984, p. 73). Dr. Patel was quite correct and the line he quoted has been central to my own intellectual and moral convictions over the intervening years. I criticized forensic psychiatrists for failing to recognize the ethical pitfalls of their profession, for failing to confront the epistemological limitations of their knowledge, and for denying the deformations created in their professional identity by the adversarial system. I have the existentialist's disbelief in objectivity and thus a Sartrean

suspicion of the *objective* professional posture of forensic psychiatrists. Still I did not urge you then to stay out of the courtroom nor would I today suggest that you shun the courtroom. I believe that life is a moral adventure and that my own choice of not going into court as an expert witness, far from endowing me with any moral superiority, in fact might count as a moral failure. It was Ezra Griffith who made me realize that my choice could be characterized in that way. I see Ezra as a man pursuing his own personal moral adventure—his existential project—and using the platform of forensic psychiatry for that purpose.

Several years ago Ezra Griffith (2005) was using his role as a discussant of an article I gave to chastise me even more than I thought I or that article deserved. In the midst of this chastisement he said something about Dr. Leo that I puzzled over for some time. But I finally got it. I had given as an example of forensic testimony in my AAPL article a Jewish Dr. Leo in London claiming in 1801 for the third time in the Old Bailey that a fellow Jew should be excused from shoplifting because of insanity—the mania of stealing spoons. I had offered Dr. Leo as an example of the well meaning but unethical psychiatrist of his day sacrificing professional truth to achieve a merciful result (Stone, 1984, p. 64-65). Professor Griffith however saw Dr. Leo as a heroic figure who understood that his fellow Jews were victims of injustice and that I had failed to recognize the broader moral perspective from which Dr. Leo should be judged. He thought I should have followed in Dr. Leo's footsteps. Professor Griffith (1998) drew similar conclusions about my parable of the Black Sergeant. FEEW addresses Professor Griffith's approach respectfully as part of the contemporary ethical landscape (Chandilis et al., 2007, p. 115). Professor Griffith has raised his own banner of professional ethics that has his own version of justice on it.

It is my current intuition that many forensic psychiatrists are drawn to the field because they have moral ambition, because

they care about social justice, and because like Professor Griffith they believe law offers a better platform for the realization of those ideals. So in this respect forensic psychiatrists are like the thousands of Harvard Law students I have taught over the last 40 years. But I would point out that Ezra Griffith is also like Bernard Diamond and Anna Freud who carried their banner of psychoanalysis into the legal arena—that was their truth and their justice. I see Ezra Griffith as a throwback to that old Andy Watson school, picking cases in which he thinks in light of his better understanding of social and cultural factors the law is being unfair or unfairly applied to a particular client. He wants to bring Franz Fanon's vision (1968,1982) to the American system of justice, a vision that advocates against and fights to overthrow the oppressive classes. I think therefore we can comfortably say that Professor Griffith does not serve as a functionary cog in the American system of adversarial justice.

When I spoke to you 25 years ago I had the impression that forensic psychiatry had no ethical banner to carry into the courtroom. However as I prepared this article, consulted your relevant writings, and read FEEW I came to the conclusion that ethical considerations are now in the forefront of your concerns and you have many banners from which to choose. My interpretation of this ethicizing is that you yourselves feel uneasy sitting at the gates of lawyers and are looking for a better way to serve justice but have not yet settled on any one approach or banner to follow. In any event, even though I remain unwilling to share them, I am now convinced that many of you do understand the risks entailed in the moral adventure of a career in forensic psychiatry. That kind of understanding is the beginning of all ethics.

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