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Forensic Psychiatry and the Law: Litigation, Advocacy, Scholarship and Teaching

Michael L. Perlin
New York Law School

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The Evolution of Forensic Psychiatry

*History, Current Developments,
Future Directions*

EDITED BY

Robert L. Sadoff, M.D.

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This book, which contains contributions from so many and such diverse professions, is dedicated to my mentors and teachers, to my esteemed and cherished colleagues, to my students, both current and past, and to the people we have served over the years, all of whom have taught me so much that has led to the ideas formulated in this volume.

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Forensic Psychiatry and the Law

Litigation, Advocacy, Scholarship, and Teaching

Michael L. Perlin

I met Bob Sadoff on a snowy day in December 1971, and it changed my life.¹ I was a rookie public defender (PD) in Trenton, NJ, and I had been assigned to represent a young man (Raamon Jenkins), institutionalized in what was called the “Vroom Building,” New Jersey’s maximum security hospital for the “criminally insane.” He had been charged with assaulting his treating psychiatrist. Not surprisingly, most of the psychiatrists whom I called, quickly declined the offer, but several said, “Contact Bob Sadoff. I bet he’d love to do the case.” I didn’t know who Bob was at the time, but when I researched him and found that he was president of the American Academy of Psychiatry and Law, I gulped. Why on earth would an expert as prominent as *this* want to come to the Trenton PD office to work on a case with me, who had been practicing law all of 4 months?

Heart in mouth, I called Bob, and introduced myself. He said, without hesitation, “Sure! Just make sure that the guards know that I’m coming so we don’t kill half a day getting me access.” I was floored. A few days later, Bob came to my office, and introduced himself. We chatted for a few minutes (I am sure about sports), and he said, “Let’s get to work!” And we did.

The case turned into one of the ultimate shaggy-dog stories of my career. New Jersey was and is a *M’Naghten* state,²⁻⁵ but, at this point in time (12 years before John Hinckley shot Ronald Reagan), it seemed certainly within the realm of possibility that the state supreme court could be persuaded to abandon it, and adopt, instead, the more liberal Model Penal Code/American Law Institute test—that the defendant “as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law

which he is alleged to have violated” (*United States v. Currens*, 1961),⁶ which a decade earlier had been adopted by the third circuit for federal criminal trials.^{7,8}

After Bob examined my client, he came back and said, “Do you want the good news or the bad news?”⁹ Although I am generally an optimist, my few months as a criminal defense lawyer had already amply demonstrated that the bad news would eventually prevail, so I said, “Start with the bad.” And Bob told me that my client did not meet the *M’Naghten* standard. Deflated, I asked, “So what’s the good news?” To which Bob responded, “He *does* meet the American Law Institute (ALI) standard. Maybe you want to use this as a test case?” I thought about it for 12 seconds, and said, “Sure!” And we were off and running.

The trial came, and Bob got up to testify. And, after a detailed explanation of my client’s actions, his motivations, his mental illness, and more, he explained to the judge (This was a bench trial; I might have been a rookie, but I realized that there was no way a jury could have grasped the nuances of this case) that my client did “lack substantial capacity to conform his conduct to the requirements of the law” (tracking the ALI test). At which point, the prosecutor jumped up and said, “Well, this is interesting, but it’s not the law of New Jersey. And, in fact, Dr. Sadoff *did* prepare a report in this case in which the court might be interested.” The judge looked at me, and said, “A report?” I said, “Yes, your honor. I was getting to that in a moment. I wanted to set the stage though, by putting on this testimony first.” In his report, Bob concluded that my client was *not* insane under *M’Naghten* but would have been insane *if New Jersey were to adopt the ALI test*. It took the judge about 3 minutes to wish me luck on my appeal and find my client guilty.

This was not unexpected at all, and Bob and I agreed that this was the perfect test case to take to the New Jersey Supreme Court—I had clerked for the state appellate division the year before and that position had given me a lot of time to think about how the justices felt about the toughest criminal law and procedure issues—and that we had, all in all, a fairly good shot, in what would probably be a 4-3 decision. My client, unfortunately, thought the wheels of justice moved too slowly, and decided that he would be better off taking matters in his own hands, so, one day, when the laundry truck was leaving the jail, he hopped in somehow and took his leave, thus ending our chances of a test case appeal.¹⁰

This is not the kind of case one forgets, and it was the start of what has perhaps been the most remarkable professional relationship of my life. I worked closely with Bob on many, many cases over the years. He was a witness in many cases that I have litigated,^{11,12} and has been the inspiration for others.¹³

We have taught together and presented on panels together,¹⁴ we have shared the podium innumerable times at meetings of the American Academy of Psychiatry and Law (AAPL), the American Association of Law Schools, the American Psychiatric Association, the International Academy of Law and Mental Health, and other cross-professional organizations. He has served on monitoring committees of cases I have litigated.¹⁵ We have made teaching tapes together,¹⁶ have co-authored articles,^{17,18} and I have written chapters in other books that he has edited.^{19,20} I present regularly in his Practical Applications in Forensic Psychiatry Seminar series at the University of Pennsylvania Medical School.²¹ Bob gave me my “national” start by inviting me to

present at an American Academy of Psychiatry and Law meeting in 1975 (see Perlin, 1975). He has written about me in his books,²² and I have written about him in my articles.^{23,24} I have written introductory forewords to two of his books,^{25,26} and I have participated in two *festschriften* honoring Bob.^{27,28}

I begin this chapter with these personal recollections because, in answering the question that was posed to me—to discuss the impact forensic psychiatry has had on my work and reciprocally the effect I have had on forensic psychiatry—I realized that so much of my answer flows from my relationship with Bob, a relationship that has touched on every aspect of my professional life.

I spent 13 years as a practicing lawyer and have now spent 30 as a law professor. Forensic psychiatry has had an impact on every aspect of my careers, in the context of litigation, advocacy, scholarship, and teaching. I hope that, both directly through my having taught forensic psychiatry fellows for many years, and less directly, through my scholarship—especially my foci on sanism and pretextuality and my incorporation of therapeutic jurisprudence in all aspects of my work, as discussed in the following—and my advocacy—especially my insistence that American mental health professionals learn about and incorporate international human rights principles and standards into their work—that I have had a modest effect on forensic psychiatric practice as well. Again, my work with Bob—my presentations at AAPL, my teaching in the fellowship programs, our co-authorships—form the core of that sphere of influence.

Litigation

I have spent much of the past 40 years seeking to persuade forensic psychiatrists that they could best influence the development of the law by working with plaintiffs’ lawyers in test cases that challenge the way the civil commitment process is carried out, that challenge the conditions of confinement in public psychiatric facilities (including the prescriptive right to treatment and the proscriptive right to refuse treatment), that challenge the way that hospital release plans rarely meet any of the criteria of a true deinstitutionalization program, and by working with criminal defendants’ lawyers in the full range of forensic issues, including competency to stand trial, responsibility determinations, sentencing, and the death penalty.²⁹

At the same time, forensic psychiatry has influenced me by demonstrating to me—on multiple occasions—that there are significant limits as to what lawyers can do for a client if they fail to acknowledge the reality of the limitations, political influences, and funding pressures on forensic systems.

I believe that these influences have been—and continue to be—symbiotic. It is only if forensic psychiatrists continue to work with lawyers, who seek consciously to advance a social law reform agenda, and only if those lawyers continue to work with forensic psychiatrists who continue to ask questions—questions about forensic systems, about clients beyond the narrow legal inquiry that may be the only question before the court (e.g., is the defendant competent to stand trial?)—that the law often simply does not ask, that litigation in this area can become an effective tool for social change.³⁰

Teaching: My Influence on Forensic Psychiatry

I began teaching in 1984. Almost immediately thereafter, students from the New York University (NYU) Forensic Fellowship program began to audit my mental disability law courses, and, from approximately 1986 to 2004, enrollment in and successful completion of one of my courses was a prerequisite for all NYU fellows. For many years, I was an adjunct professor of law and psychiatry at the University of Rochester Medical Center, and taught the forensic fellows affiliated with that program as well. For several years, I have done an annual lecture for the New York City Forensic Fellowship Consortium (attended by fellows in all the forensic programs in New York City and North/Central New Jersey). As noted, I present yearly at the Practical Applications in Forensic Psychiatry Seminar at the University of Pennsylvania Medical School, do grand rounds regularly at hospitals in New York, New Jersey, and elsewhere, and am a regular presenter at conferences and workshops offered by groups such as the American Academy of Psychiatry and Law, the American College of Forensic Psychiatry, and the World Psychiatric Association. Forensic psychiatrists from around the world have enrolled for many years in the masters program in mental disability law studies that I have directed at the New York Law School.

I think it is critical that psychiatrists understand the different perspectives of the legal system and how it is so different from the medical model taught in medical schools (even if the psychiatrist had had a course in “the law” in medical school that included case summaries or expository essays *about* cases). It is only by reading cases and by taking law courses or participating in legal seminars that psychiatrists in training can understand how the legal system works and why the questions posed by counsel and the courts may appear to be so discordant with the methodology in which they are versed.

Teaching: Forensic Psychiatry’s Influence on Me

By working with forensic psychiatrists, teaching them, studying with them, sharing the seminar table with them, I have come to grasp the chasm in the ways that the pedagogy in law is different from the pedagogy in psychiatry, and to more fully understand how the two fields “work” and how we (lawyers *and* law professors) must learn from forensic psychiatry teachers the same ways that we hope they learn from us.

I believe that this training will expand the pedagogic and practical horizons of all involved, and will ultimately lead to a forensic system that is more consonant with legal requirements (especially, *constitutional* requirements), that is more humane, and, in the end, provides better care and treatment for patients.

Scholarship

Since the early 1990s, I have been writing regularly about how sanism and pretextuality have ravaged the legal system and poisoned mental disability law practice.³¹ I define *sanism* as

an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry,³² and define *pretextuality* as the ways in which courts accept, either implicitly or explicitly, testimonial dishonesty and engage similarly in dishonest and frequently meretricious decision making.³³ Since about the same time, I have begun to write about therapeutic jurisprudence, a model for assessing the impact of case law and legislation that recognizes that, as a therapeutic agent, the law can have therapeutic or antitherapeutic consequences.^{34,35} The ultimate aim of therapeutic jurisprudence is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.³⁶⁻³⁹ I have written about these approaches to the law in the *Bulletin of the Academy of Psychiatry and Law*,⁴⁰ the *American Journal of Forensic Psychiatry*,⁴¹ and other publications that I believe are regularly read by forensic psychiatrists.⁴²⁻⁴⁵ My hope is that, by publishing in such journals, I am able to reach out to forensic psychiatrists on their own turf so as to share some of what I think are the important aspects of understanding why and how the legal system treats persons with mental disabilities the way it does.

There is no question in my mind that scholarship is, and can be, a tool for social change.⁴⁶ By seeking to “unpack” how sanism and pretextuality can affect and infect the work of forensic psychiatrists, I seek to contribute to that social change. By reaching out to forensic psychiatrists in my work on therapeutic jurisprudence, I hope to sensitize this cohort to the contours of that discipline and to encourage them to apply those principles in their own writing. Not coincidentally, Bob Sadoff is one of the very few who has yet taken up that challenge.⁴⁷ Other such writings by forensic psychiatrists include Glaser (2003) and Mossman (1996).^{48,49}

Advocacy

Since the early 2000s, I have turned my attention to the intersection between mental disability law and international human rights law.⁵⁰⁻⁵⁶ In recent years, I have presented papers, workshops and panels to groups of forensic psychiatrists in the United States, New Zealand, Austria, the Czech Republic, Australia, Turkey, Argentina, and elsewhere, seeking to emphasize how important it is that they understand this connection, begin to incorporate international human rights insights into their reports and evaluations, and emphasize that state psychiatry is still, in many nations, used as a tool through which to suppress political dissent.⁵⁷ Interestingly, most of the forensic psychiatrists I speak to abroad know about recent developments in this area of the law—specifically, the ratification of the United Nations Convention on the Rights of Persons with Disabilities⁵⁸—but, domestically it is news to virtually everyone in my audiences. I hope to continue to share these insights with progressive forensic psychiatrists, in the hopes that, in the coming years, this will be as well known domestically as it is internationally.

Recently, I have written about the relationship between international human rights law and guardianship,⁵⁹ international human rights law and juvenile punishment,⁶⁰ international human rights law and mental health courts,⁶¹ international human rights law and

the treatment of patients in forensic facilities,⁶² and international human rights law and the sexual autonomy of psychiatric patients.^{63,64} Forensic psychiatrists should have something to say about each of these topics, and I hope that these pieces will lead to invigorated scholarship in that regard.

Conclusion

In this chapter, I have considered the relationship between forensic psychiatry and the law through four filters (litigation, teaching, scholarship, and advocacy) and one very unique lens—my relationship with Bob Sadoff. Bob and I have worked together for more than 40 years, and I continue to learn from him each time we meet, speak, or e-mail. I believe that his career is a template for forensic psychiatrists in each of these areas of social policy. His work continues to be an inspiration to all of us.

Acknowledgment

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- For a full discussion, see *State v Singleton*, 48 A3d 285, 295 (NJ 2012).
- Personal communication with Robert L. Sadoff, MD.
- The denouement? My client went to Texas, got a job working in a community mental health facility, and was found out years later only when he was given some sort of award, and his picture was in the local paper. A Trenton jail guard was, coincidentally, visiting family in that town at the time, saw his picture, and he was quickly extradited to serve his prison sentence. . . . Bob discusses this case in a dialogue with Dr. Kenneth Weiss, in Weiss K, & Robert SL. (2012). From the journal of *Psychiatry & Law Archives*: Bernard L. Diamond, M.D. *J Psychiatry Law*, 40, 128–129.
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