

# Ethical Issues in Forensic Psychiatry

## Minimizing Harm



Robert L. Sadoff

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# Ethical Issues in Forensic Psychiatry

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## Minimizing Harm

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*“The Highest Form of Wisdom is Kindness”  
The Talmud*

# ***About the Authors***

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Dr. Sadoff is currently Clinical Professor of Forensic Psychiatry and Director of the Forensic Psychiatry Fellowship at the University of Pennsylvania School of Medicine. Dr. Sadoff received his MD in 1959 from the University of Minnesota School of Medicine and completed his residency in psychiatry in 1963 at UCLA Neuropsychiatric Institute, from which he received a master of science degree in psychiatry. He also attended Temple University School of Law and has taught legal medicine courses at Temple University Law School and at the Villanova University School of Law. He is board certified in psychiatry, forensic psychiatry, and legal medicine, and has added qualifications in forensic psychiatry with the American Board of Psychiatry and Neurology.

Dr. Sadoff is the author of over 90 articles in medical and legal journals and more than 30 chapters in books by other authors, and has authored, edited, or co-authored eight books, including *Forensic Psychiatry: A Practical Guide for Lawyers and Psychiatrists*, *Psychiatric Malpractice: Cases and Comments for Clinicians*, with Robert I. Simon, MD, *Mental Health Experts: Roles and Qualifications for Court* and *Crime and Mental Illness* with Frank Dattilio, PhD. He has numerous editorial appointments with peer reviewed journals. He has served as President of the American Academy of Psychiatry and the Law, and President of the American Board of Forensic Psychiatry. In addition, he is a Distinguished Life Fellow of the American Psychiatric Association, a Fellow of the American College of Legal Medicine, and a Fellow of the American Academy of Forensic Sciences, as well as a Fellow of the American College of Psychiatrists and The College of Physicians of Philadelphia, for which he serves on the board of trustees.

Dr. Sadoff is the recipient of a number of national and international awards, including the very prestigious Isaac Ray Award from the American Psychiatric Association, the Philippe Pinel Award given by the International Academy of Law and Mental Health, the Lifetime Achievement Award from the Philadelphia Psychiatric Society, and the Earl Bond Award and the Dean's Special Award from the University of Pennsylvania. In addition, he has been the recipient of the Manfred S. Guttmacher Award from the American Psychiatric Association, and the recipient of the Nathaniel Winkelman Award from the Philadelphia Psychiatric Center. He has also been named repeatedly in the list of *Best Doctors in America* and in *Who's Who in America* and *Who's Who in the World*.

Dr. Sadoff has examined over 10000 individuals charged with crimes during the past 40 years, and has testified for both the prosecution and defense in criminal cases and for the plaintiff and defense in civil cases in approximately 20 states and several federal jurisdictions. He has served as a consultant to the Norristown State Hospital, the Trenton Psychiatric Hospital, the Harrisburg State Hospital and the Forensic Psychiatric Hospital of New Jersey, as well as the Philadelphia prison system. Dr. Sadoff has been licensed to practice medicine in five states, including Pennsylvania, New York, California, Minnesota, and New Jersey (currently inactive). He has also lectured in nearly all of the states in the United States and in 12 countries worldwide.

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Dr. John Baird has worked as a forensic psychiatrist in Scotland for over 30 years. He has in the past been a member of the Parole Board for Scotland, and is currently a member of the Parole Board for England and Wales and the Mental Health Tribunal for Scotland. He is an elected officer of the Executive Committee of the Forensic Faculty of the Royal College of Psychiatrists, having served in the past as



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Dr. Barrios is the author of 6 books, over 50 articles published in medical and legal journals, and has contributed 18 chapters to books by other authors.

He has intervened, as a member of the legal expert panel, in the following studies: EUNOMIA (European Evaluation of Coercion in Psychiatry and Harmonisation of Best Clinical Practice, within the Fifth Framework Programme of Research of the European Commission, completed in 2005), EUPRIS (Mentally ill or disordered persons in European prison systems—Needs, Programmes and Outcome, European Commission, completed in 2007), DEMoB.inc (Development of a European Measure of Best Practice for People with Long Term Mental Illness in Institutional Care, European Commission, completed in 2010).

Dr. Barrios is a member of the Geneva International Academic Network on Mental Health, Human Rights and Legislation of the World Health Organization (WHO), and he has collaborated with the Pan American Health Organization (OPS). He is a co-author of the report: “Fundamental Freedoms, Basic Rights and Care for the Mentally Ill” (Council of Europe, 2009–10).

# ***Preface***

**Isaac Ray**

This book is dedicated to the memory of Isaac Ray, the great nineteenth century American psychiatrist who became the father of American forensic psychiatry following the publication of his seminal book, *A Treatise on the Medical Jurisprudence of Insanity*, published initially in Boston, in 1838 [1]. Dr. Ray was instrumental in advocating for the rights of the mentally ill, for protection of those who were less able to protect themselves, and advocated for reforms that are still needed today.

The forensic psychiatric historian, Dr. Jacques Quen, in a paper entitled, "Isaac Ray: Have We Learned His Lessons?" [2] cites Overholser and Weihofen, who summarized Isaac Ray's philosophy as "doing as little harm to the mentally ill as possible." The authors quote Ray as stating, "In the first place, the law should put no hindrance in the way of the prompt use of those instrumentalities which are regarded as most effectual in promoting the comfort and restoration of the patient. Secondly, it should spare all unnecessary exposure of private troubles, and all unnecessary conflict with popular prejudices. Thirdly, it should protect individuals from wrongful imprisonment" [3].

Although Ray was most concerned about commitment of the mentally ill and the manner in which the mentally ill were treated in judicial decisions in court cases, his concern about doing little or no harm is the basic theme of this book, in which I hope to illustrate means by which we may limit or minimize the inherent harm in the practice of forensic psychiatry.

**Primum Non Nocere**

The concept of *primum non nocere*—first, do no harm—is the basis for ethical medical practice and treatment in psychiatry. However, it cannot, and does not, apply to forensic cases where there is no doctor-patient relationship and the forensic psychiatrist may indeed cause harm to the examinee. Consider, for example, the psychiatrist hired by the prosecution in a capital murder case. His or her assessment of the defendant may lead to a verdict of guilty and subsequent death penalty. Consider also the role of the treating psychiatrist on death row, treating a psychotic prisoner who has deteriorated and requires medication and further therapy in order to improve to the point where he or she may be competent to be executed. Consider also the plaintiff in a civil matter who has been emotionally harmed as well as physically damaged in an accident or incident at work. Consider the forensic psychiatrist working for the defense in that case who may minimize the damage or find no significant mental illness caused by the accident in question.

Forensic psychiatrists work in three major areas in assessment of individuals in civil or criminal cases. First, they are involved in examining the defendant in a criminal case, or the plaintiff in a civil matter. Secondly, they are responsible for writing a report to the court or to an attorney regarding their findings, which would include not only the psychiatric examination, but also the review of extensive records and interviewing collaborative individuals, when necessary. Third, they may be required to testify at deposition and/or at trial. Harm may come to the individual examined at any or all of the three levels of work: examination, report writing, and/or testimony.

## **Personal Concerns**

I have been practicing psychiatry for over 45 years, 25 years of which have been exclusively in forensic work. During the past many years I have seen over 12000 individuals, either in civil or criminal cases, in a variety of different circumstances. I have worked for both defense and prosecution in over 10000 criminal cases, and either for the defendant or the plaintiff in over 2000 civil cases. In addition, I have been asked by judges to evaluate and assess individuals in both criminal and civil matters and have worked in a number of administrative cases involving patients' rights, competency, and other forensic psychiatric issues.

I have been concerned about the manner in which individuals, families, or groups of people have been assessed and the conclusions that have been drawn depending on the needs of the attorney. I have seen testimony that has been slanted, unscientific, and based on inadequate evidence or which is contrary to the facts proven. Perhaps, adversaries of mine in specific cases may have felt the same about my assessments or my testimony. Nevertheless, it is an issue that forensic psychiatrists, attorneys, judges, and other concerned citizens need to address as the practice of forensic psychiatry has grown and proliferated over the past several decades. We now have formal accredited training programs in forensic psychiatry. We have board certification that originated with the American Board of Forensic Psychiatry and which culminated in the acceptance of forensic psychiatry as a subspecialty of psychiatry by the American Board of Psychiatry and Neurology. We have recertification of these boards in forensic psychiatry to insure high quality of professional behavior.

I have been struck with the manner in which colleagues and adversaries have approached their professional responsibilities. I have witnessed destructive and biased



attitudes toward various criminal defendants and plaintiffs in civil cases that are unnecessary and harmful. I have witnessed psychiatrists becoming adversarial in order “to win” cases. I have seen professional psychiatrists testify to speculative rather than evidence-based or scientific matters. And I have also seen our colleagues testify on matters for which they have no expertise and very little experience. One psychiatrist even admitted that he did not know the legal criteria for assessing competency in a particular criminal case. Nevertheless, he speculated on the issue based on his medical diagnosis rather than applying the medical observations to the legal standards.

## **Changes in Psychiatry**

Psychiatry is a changing and evolving specialty of medicine. When I began my career in 1960, the emphasis was on psychodynamics, and Freud was still a very prominent influence in the training programs. During the past five decades, we have seen a major shift from psychoanalytic concepts to cognitive behavioral matters in psychotherapy and to chemical imbalance in our diagnoses, and the use of various medications to treat major mental illnesses. Psychopharmacology has become a major subspecialty of psychiatry. In addition, we have developed various techniques to diagnose brain problems, including MRI, PET scan, and CAT scans. Neuropsychological testing has been shown to be effective in the diagnosis of functional organic conditions that may not be revealed on more grossly sensitive tests that pick up only structural organic damage.

We have brought the newer scientific psychiatry into the courtroom when testifying for individuals revealing significant mental illness or brain damage that affected behavior in criminal or civil cases. As a result of the transitions within psychiatry, the law has made further

demands on our scientific acumen by such cases as Daubert [4] and Kumho [5], demanding scientific-based testimony rather than speculative “junk science.” The judge has become the gatekeeper for various types of testimony that may be harmful to an individual as it reveals prejudice or bias rather than scientific methods.

## **Bias in Forensic Psychiatry**

Several decades ago, one of the early leaders in forensic psychiatry, Bernard Diamond, pointed out, in his historic paper on “The Fallacy of the Impartial Expert” [6], that all of us have our biases that need to be considered in forensic cases.

The major ethical prohibition in medicine has been *primum non nocere*—first, do no harm. Paul Appelbaum [7] and others have shown that forensic psychiatrists have a different ethical standard when conducting assessments, or even in testimony, because the nature of our work cannot guarantee that no harm is done to the individual. Rather, he has developed concepts of respecting the integrity of the evaluatee (the defendant in a criminal case, or the plaintiff in a civil case), and considering beneficence or non-maleficence. Others have debated with Appelbaum on these concepts, most notably Alan Stone [8] pointing out glaring differences. This book will attempt to present the major issues that arise for forensic psychiatrists practicing in this very complex and controversial field where harm may occur.

## **Medicine in General**

It is well known that in medicine generally, physicians attempt to treat or cure illnesses by utilizing treatments that may be harmful to patients. However, physicians are clearly aware that in many cases, in order to help their patients,

they must first cause pain either through surgery, through various medications or chemotherapy, or other procedures. Even in psychiatry, we have learned that various medications given to improve psychotic conditions may cause harmful side effects such as tardive dyskinesia. We have recently found that some antidepressants may also lead to diabetic conditions. Clearly, electroshock treatment which has been helpful for severe depression has caused many patients fear, anxiety, and harm. We have seen the effects of lobotomy on various patients who were not amenable to treatment by other methods, such as psychotherapy, medication, or even electroshock treatment. All of this is performed in order to help our patients who depend upon us for scientific and accurate information and effective therapy.

Benjamin Rush is considered the father of American psychiatry, and his portrait appears on the seal of the American Psychiatric Association. It should be noted that Benjamin Rush, in all his greatness as a physician and the author of one of the earliest textbooks on psychiatry in America, entitled, *Medical Inquiries and Observations Upon the Diseases of the Mind* [9], used leeches for bloodletting as a means of treating his patients. It is well known that some patients did not do well from such harmful treatments. We learn as we go, and sometimes we have learned that the treatment that was once thought to be helpful and successful was not scientifically based and proved to be harmful.

We have mentioned surgery as a means of helping others that may be harmful. The surgery may result in a painful after-effect, but pain is not necessarily harmful, and we must consider harmful as having long-term side effects. The short-term downside from surgery that leads to long-term cure or improvement is certainly worth the discomfort. When I speak of harm, I am talking about long-term harm

that can be either avoided or minimized through careful planning and application of ethical principles outlined by the American Academy of Psychiatry and the Law [10]. However, even following these principles may not eliminate or minimize harm that is inherent in the system.

I am not advocating that the harm can be totally eliminated, because I know that is impossible in the adversarial system in which forensic psychiatrists work. However, there are means by which harm may be minimized if care is taken during the assessment, the report writing, and the testimony phase of the proceedings.

This book will analyze the ethical issues affecting forensic psychiatric practice, especially those promulgated by the American Academy of Psychiatry and the Law. Within those guidelines, we will look at individual bias, vulnerability of the examinee, and potential harm to the mental health professional. The book will discuss each of the procedures of the forensic expert separately with respect to minimizing harm.

The scope of forensic psychiatry will be developed from the standpoint of administrative, civil, and criminal cases. The practical issues involved in conducting forensic psychiatric assessments under various conditions will be presented as will special considerations, such as bias, minimizing harm, developing a therapeutic approach, and elaborating on various vulnerable individuals who are frequently examined in forensic cases. These include juveniles, mentally retarded, autistic, sexual assault victims, the elderly, the organically damaged, the psychotic, and the mentally disabled prisoners. The ethical issues in conducting forensic psychiatric examinations and presenting psychiatric testimony in court will also be examined and discussed. Cases illustrating the difficulties involved will punctuate the presentation. Harm may also come to the non-vulnerable defendant or plaintiff in legal cases. We

need to minimize the harm that comes to these individuals as well whenever possible. Selecting the vulnerable populations does not imply that we are not concerned about the general populations as well. There are those individuals, primarily in civil cases, who are the victims of harassment, discrimination, and prejudice. These are individuals who may not have specific diagnostic entities that place them in the vulnerable categories. However, they may develop psychiatric syndromes or illnesses as a result of the alleged harassment, discrimination or bias. We also see individuals who are victims of accidents with physical and mental injuries, but who do not have a predisposing illness or psychiatric syndrome.

In criminal cases, we may be asked to examine victims of crime who are not in the vulnerable categories. These are people who may have been shot during a robbery or a kidnapping and may require psychiatric assessment as a result of the injuries sustained in the criminal case.

In administrative matters, we may be asked to evaluate professionals who have been accused of negligence in their work or we may need to assess competency of individuals facing administrative matters. In all of these cases, we need to be careful in our assessment, report writing, and testimony in order to minimize harm.

Any ethical issue pertaining to vulnerable populations applies to all individuals seen in forensic mental health matters. The system has inherent difficulties that may bring harm to those involved that we may be able to mitigate whenever possible. There are situations in which harm will occur to those who have transgressed, and that is a justifiable harm or punishment. However, we are more concerned about innocent people who may be victimized even more because of the legal situation in which they are involved. The very act of filing a lawsuit, with all its ramifications and consequences, affects both plaintiffs and

defendants. We must do all we can to minimize harm to all populations, but the vulnerable ones listed above will be stressed since they represent individuals who are most likely to be harmed in the legal system if special care is not taken by the forensic psychiatrist to minimize such harm.

The original manuscript for this book did not include the perspective from Europe and the United Kingdom. Reviewers recommended that we include ethical issues in forensic psychiatry from a more global perspective than just from the United States.

Dr. John Baird, a forensic psychiatrist from Scotland who has had experience in working in the United Kingdom, comments on the differences between the practice of forensic psychiatry in the United Kingdom and the United States. His presentation is from a more systemic view, utilizing different organizations that monitor the practice of forensic psychiatry. In both the United Kingdom and Europe, individual forensic psychiatry appears to be secondary to the institutional application of principles to the mentally disabled within the legal system.

Both Dr. Baird and Dr. Valenti, a forensic psychiatrist and ethicist, present the changes that have occurred in both systems that promote the welfare of the individual involved in the legal system. Dr. Baird focuses on minimizing the harm from the perspective of the forensic psychiatrist and Dr. Valenti on human rights for this same population.

Dr. Valenti presents the very complicated system in the European Union that comprises a number of different countries and cultures and legal systems that have attempted to unify their ethics as regards the mentally ill within the judicial system. Dr. Valenti does not focus particularly on minimizing harm, but does relate the newer ethical principles that affect the mentally ill within the court system in the European Union. He points out that the reforms that have occurred in the last several years have



helped the human rights of such people and thus harm to them is minimized. Ideally, an attempt is sought to unify the variety of systems in order to promote human rights and thus minimize harm.

The theme of this book is to minimize the harm inherent in forensic psychiatric practice. Clearly, the intent is to minimize the harm to plaintiffs or defendants, but also to the expert witness as well. Donna Vanderpool, an attorney and risk manager, provides comprehensive coverage of potential liability to expert witnesses, especially those in medical malpractice cases. She points out the inconsistencies of a number of Appellate Court holdings and illustrates the complexity of the emerging liability cases against expert witnesses.

Her intent is to educate expert witnesses to prevent damage or harm to themselves in the course of their work in conducting forensic examinations, writing reports, and testifying in court. As she points out, the harm that may come to a defendant or plaintiff could result in retaliation against the expert for causing such harm. She demonstrates the areas of duty the expert has to the examinee and the areas of liability that may exist for the expert professional. Finally, she presents important guidelines and recommendations for the expert in order to prevent or minimize harm.

The motivation to write this book was the presentation of the Isaac Ray Award given by the American Psychiatric Association in 2006, which required my preparing lectures on important issues in forensic psychiatry. Thus, I decided that the important message for the Isaac Ray Lectures should be a reiteration of Ray's concerns about minimizing harm to vulnerable mentally ill patients and applying his recommendations to the forensic psychiatric profession.

In summary, the purpose of this book is to illustrate the ethical and practical issues that affect forensic psychiatric

practice. The question is not what we do, but how we do it, and under what standards, ethical guidelines, and personal values that contribute to the total picture. It is hoped that by such presentation and discussion, vast improvements in the manner in which forensic psychiatry is practiced will occur, resulting in less harm to the examinee and greater credibility to the examiner and our role within the judicial system. Despite the fact that we cannot always adhere to the doctrine of *primum non nocere*, we can minimize the harm caused inherently by the adversarial system in which we participate.

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