MENTAL HEALTH and CRIMINAL JUSTICE

AN OVERVIEW

BY ANDREW E. TASLITZ

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This symposium is about mental health and criminal justice. But what exactly is "mental health"?

Mental health is a broad term whose meaning is subject to dispute. Rather than wrestling with an academic discussion of its definition, I prefer to rely here on a commonsense, everyday notion of its meaning and of its opposite: mental illness. All persons suffer periods of extended emotional pain and may have episodes of forgetfulness or confusion, yet they are still mentally healthy. They understand the nature of the acts they perform, and they react with emotions within the range of "normal." But the mentally ill person demonstrates, either temporarily or for more protracted periods, cognitive or emotional deficiencies sufficiently beyond that of "normal." These deficiencies need not be so severe, however, as to be limited to the layperson's idea of "craziness"—meaning persons who suffer from hallucinations or delusions. Moreover, mental health and mental illness are arguably points on a spectrum rather than polar opposites. Because of these sometimes fuzzy boundaries between health and its absence, and because "normalcy" unquestionably involves moral and social judgments, no definitions of mental health or illness can be purely "scientific" ones. Yet judgments about to which side of the line an individual belongs may be unavoidable in any context in which mental health and mental illness must be considered, as is true in the criminal law.

Furthermore, to judges and jurors, who are, after all, only human, there will be some sense of "I know it (men-

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tal illness) when I see it," regardless of any technical definitions that may be used. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV-TR), the mental health profession's diagnostic bible, itself uses a definition of "mental disorder" that is equally broad and ambiguous, having been critiqued as relying on value-laden, "culturally sanctioned" terminology, perhaps a recognition that, even for the experts, precise definition, free from moral assessment, is impossible.

So understood, mental health versus disability become central concepts in criminal law and procedure for this simple reason: both areas frequently turn on assessments of the suspect's mental state at the time of the crime or of evidence-generation (such as by interrogation). Mental health and illness are often relevant to determining mental state, creating an unavoidable bridge between psychology and the law. For example, a person with nearly no short-term memory arguably could not plan sufficiently in advance to engage in the "premeditation" required for first degree murder, as it is defined in many jurisdictions (movie buffs will recognize this example's roots in the cult film, *Memento*). Nor could such individuals "knowingly, voluntarily, and intelligently" waive their *Miranda* rights because they could not remember them. A wide range of disorders may thus become relevant to the law, ranging from psychoses, such as schizophrenia, which involves hallucinations, delusions, or disorganized thinking, to dementias (significant loss of memory or consciousness), mood disorders (think bipolar), dissociative disorders (think *Sybil* or the *Three Faces of Eve*), mental retardation, anxiety disorders, sexual disorders, personality disorders, and substance abuse. (Christopher Slobogin, Minding Justice: Laws That Deprive People with Mental Disability of Life and Liberty 2-3 (2006) (listing illustrative conditions fitting the DSM-IV-TR definition of "mental disorders.").) These conditions can be applicable to an enormous number of legal issues, the substantive ones including insanity, diminished capacity, self-defense, death-worthiness, and entrapment, the procedural ones including the voluntariness and accuracy of confessions, the validity of consent to search, and competency to stand trial. These issues can benefit (or harm) either the defense or the prosecution because mental disorders may inculpate (consider the argument that the suspect's "pedophilia" means it is more probable that he, rather than someone else, committed a charged act of sexual abuse of a child—testimony not necessarily barred by the character evidence rules in all jurisdictions) as well as exculpate.

But mental health and illness matter in a more systemic way as well. The prisons have increasingly become dumping grounds for the mentally ill, the "end of the line for the schizophrenics, bipolars, and borderlines among us without the resources or wherewithal to care for themselves and stay out of trouble." (Mary Beth Pfeiffer, Crazy in America: The Hidden Tragedy of Our Criminalized Mentally Ill X (2007).) Investigative reporter Mary Beth Pfeiffer notes, for example, that an extraordinarily high percentage of all suicides in New York State in a given year occur in its prison system. (*Id.*) Although prison systems vary in their ability and willingness properly to handle an increasingly high percentage of their prison population that is mentally ill, many "justice" systems fall well short of the mark. Pfeiffer describes one "special housing unit" in the Fishkill Correctional Facility, 75 miles north of Manhattan:

> Within the walls of that building—inmates called it "the Box"—a quite remarkable phenomenon was playing out. Here, in twenty-first century America, a prison system had recreated what America thought it had left behind: warehouses for the insane.
>
> Try if you will to conjure up the sights, sounds, and smells of a Victorian-era asylum. Add the brutally cool security of a supermax prison. Put people there for months and years at a time—people whose rights under law are severely curtailed along with their freedom—and you have America's special housing units. They go by different names in different places—disciplinary detention, administrative segregation, the Box, the hole—but in too many states they are remarkably, and sadly, similar.

(*Id.* at 8.)

Apart from the cruelty of this state of affairs, it raises questions about whether housing the mentally ill should be a major function of the criminal justice system in the first place and whether our treatment of them has any connection to that system's goals of retribution, rehabilitation, education, deterrence, and proportional punishment, though it certainly serves one systemic goal: isolation. Mental health issues thus pervade the system, raising practical, in-the-trenches issues for practitioners, along with broader theoretical ones for policy makers, administrators, and academics, and power-distribution issues, such as how much concern we show for the "least of these," for the politicians.

Some partial solutions

This symposium seeks to address a representative sampling of these issues. Christopher Slobogin, in his piece, *The Supreme Court's Recent Criminal Mental Health Cases: Rulings of Questionable Competence*, offers a survey of the three most important recent U.S. Supreme Court substantive criminal law cases: *Sell v. United States* (right of defendants incompetent to stand trial to refuse

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medication), *Clark v. Arizona* (scope of psychiatric defenses), and *Panetti v. Texas* (definition of competency to be executed). Slobogin finds reason to be troubled about the Court's views on each of these issues, views that, he argues, allow over-use of commitment procedures, confuse mens rea defenses with legal insanity, and unmoor the death penalty determination from its soundest roots in informed assessments of culpability.

Judge Matthew J. D'Emic shifts the symposium's focus in *The Promise of Mental Health Courts*. There, Judge D'Emic explains in detail the origins and operation of the Brooklyn Mental Health Court, a court guided by the philosophy of therapeutic jurisprudence, which teaches, among other things, that legal institutions can affect mental health. The Brooklyn court, unlike many other mental health courts, relies on an in-house clinical team to design and implement individualized treatment plans, including daily contact with treatment providers and the close monitoring of each defendant's progress, a team that meets daily and works with the judges in pursuit of treatment over incarceration. Judge D'Emic concedes that more study is needed of mental health courts' effectiveness, but he optimistically cites a study by the Center for Court Innovation finding Brooklyn court graduates satisfied with the level of procedural justice provided them and "the lives of the participants, measured in terms of recidivism, homelessness, substance abuse, hospitalization and psycho-social functioning improved."

Professor Michael Mello finds the U.S. Supreme Court case law on when, if ever, the mentally ill may be executed and what evidentiary procedures must govern those determinations wanting. Rather than taking a primarily doctrinal or theoretical approach to these cases, Mello tells the personal story behind them, particularly those of two of his clients—Alvin Ford and Nollie Lee Martin. In these compelling stories, Mello seeks to convey just how ill his clients were, letting the facts speak his condemnation of the law.

William C. Follette, Deborah Davis, and Richard Leo address mental health issues related to confessions in their piece, *Mental Health Status and Vulnerability to Police Interrogation Tactics*. Follette and company address the mental health factors affecting suspects' *ability* to resist coercive interrogation tactics and their *motive* for doing so, as well as those factors affecting understanding and exercising of *Miranda* rights, the particular risks of coercing them that are created by various interrogation tactics, the circumstances raising dangers of suggestibility (and thus of their falsely confessing), and the specific clinical diagnoses and cognitive processes relevant to representing clients in these cases. The authors develop a model for such cases in such detail as to offer a road map for practitioners on how to investigate, understand, and develop the evidentiary and legal arguments needed to prevail on, or resist, a motion to suppress confessions by the less-than-mentally-healthy on Fifth Amendment or due process grounds.

Cook County prosecutor Gerald Nora, in his piece, *Prosecutor as "Nurse Ratched": Misusing Criminal Justice as Alternative Medicine*, while bemoaning the assumption of massive mental health treatment responsibilities by the criminal justice system, nevertheless urges prosecutors to step up to the plate. If prosecutors are really to further deterrence, they should want the mentally ill to be treated, and if prosecutors are obligated to promote fully-informed fact finding based on reliable evidence, they must foster, rather than oppose, fair mental health assessments of defendants. These two goals, rather than some amorphous notion of "doing justice," are what should guide prosecutors, he urges, goals that cannot be fulfilled by routinely playing the role of the "skeptical advocate" who views mental health issues as but ways for wily defense lawyers to free guilty clients. Nora does not argue for prosecutors' abandoning their role as an adversary but only suggests tempering it by taking a more informed approach to mental health issues. At the same time, he recognizes that prosecutors are put in a difficult position in many cases, so Nora recommends a small number of institutional changes that, he argues, will ease the burden a bit while improving the overall quality and accuracy of how the justice system handles the mentally ill. Concludes Nora, "If we persist in prosecuting mentally ill defendants in willful ignorance of their medical problems, our system will stand as an asylum whose keepers are as deluded as the inmates." ■

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