

## FOREWORD

Steven K. Erickson, J.D., Ph.D., LL.M.\*

Mental health care is a growth industry of sorts. While people have undoubtedly suffered from a variety of mental infirmities since the dawn of civilization, only fairly recently has professional mental health care become embedded in our shared culture in a way that is on par with the care of the physical body. People today openly discuss whether their crestfallen reflections are indicative of some sort of neurochemistry imbalance or whether their immoderate use of the Internet is caused by an addiction to its pages, tweets, and blogs. Whether we realize it or not, we all speak within the framework of mental health: depression, anxiety, mood, and personality are common to the discourse of explaining people.

But mental health is not like physics. While philosophers may spend innumerable hours pondering the question of the tree falling in the forest, the acoustics of matter, vectors, and gravity producing the "thud," these phenomena exist irrespective of whoever is there to hear them. To state the obvious, the behavioral sciences are about people. And people not only evolve, but also inhabit a social context that moderates all explanatory meaning of human affairs. This sociological medium evolves as well, but its process is not linear. Tastes change, descriptions of mental or behavioral processes once deemed wise appear less enlightened, and novel paradigms are often not so new upon closer inspection. In many ways, people are not that much different than they were in the distant past, nor are our explanations of why they behave as they do. What is different, however, is the sheer size of our institutions of mental health.

---

\* Forensic Psychologist, York, PA.

In this issue of the Houston Journal of Health Law and Policy, six authors tackle the difficult question of what should our future mental health care policy look like in the coming years. Reflecting the vast reaches of mental health care in our modern society, the articles range from criminal law to implementing the new health care law to considered criticism of whether mental health professionals have infiltrated our cultural constructions of normalcy for the worse. This symposium issue is particularly timely because our nation faces a turning point as new technologies, serious fiscal constraints, and changing demographics will impinge on our collective view of mental illness and the delivery of mental health care services.

Jonathan Fish begins the issue with a serious indictment of professional psychiatry in his article, *Overcrowding on the Ship of Fools: Health Care Reform and Psychiatry's Never-Ending Assault on Normality*. In Fish's view, the recent enactments of various mental health parity laws are unwise because psychiatry still has yet to tell us convincingly what distinguishes true mental illness from mere individual difference. As has been recounted elsewhere,<sup>1</sup> many of the textbook diagnoses employed by psychiatry seem odd and without much rational justification. The coming Fifth Edition of the *Diagnostic and Statistical Manual of Mental Disorders* has already generated numerous criticisms—even though its anticipated publication date is many years down the road.<sup>2</sup> As Fish sees it, when nearly half the general population meets the criteria for mental illness, the abnormality denoted by the diagnosis seems amiss.

But what to do about this strange state of affairs? According to Fish, the answer lies in a candid assessment of the nature of mental illness. Many reasonably minded people would agree with that prescription, but the devil is always in the details. Take, for instance, the recent proposal to add hebephilia as a formal mental illness.<sup>3</sup> To crit-

---

<sup>1</sup> See Steven K. Erickson, *The Myth of Mental Disorder: Transsubstantive Behavior and Taxometric Psychiatry*, 41 AKRON L. REV. 67 (2008).

<sup>2</sup> See Benedict Carey, *Psychiatrists Revise the Book of Human Troubles*, N.Y. TIMES (Dec. 17, 2008), <http://www.nytimes.com/2008/12/18/health/18psych.html?partner=rss&emc=rss>; John Gever, *DSM-V Publication Pushed Back to 2013*, MEDPAGE TODAY (Dec. 11, 2009) <http://www.medpagetoday.com/Psychiatry/GeneralPsychiatry/17482>.

<sup>3</sup> Ray Blanchard, et al., *Pedophilia, Hebephilia, and the DSM-V*, 38 ARCHIVES OF SEXUAL BEHAV. 335 (2008).

ics, there simply is no empirical evidence to suggest that there is anything mentally abnormal with folks who have sexual proclivities with pubescent adolescents.<sup>4</sup> For supporters, people who harbor strong sexual desires for minors despite strong social taboos are obviously displaying some sort of mental abnormality. Both sides claim a lack of candor and seriousness by the other, but candor is often judged according to the lens through which one views it. Nevertheless, we ought to pause and seriously consider what it means to live in a nation where half of the population is considered mentally unsound.

Next, in his article, *Using Cognitive Neuroscience to Provide a Procedure for the Involuntary Commitment of Violent Criminals as a Part of or Following the Duration of Their Sentence*, Professor Lamparello suggests that cognitive neuroscience might finally provide the criminal justice system with a reliable method of crime control. Unlike previous proposals under the fashionable neurolaw framework, Lamparello suggests that the value of the technology neuroscience brings to the table lies not in overturning the entrenched legal doctrine of mens rea or responsibility, but rather in its utilization to make predictions of future dangerousness. Those offenders who possess neurological abnormalities should be civilly committed after serving their prison sentences, according to Lamparello, just as many sexually violent predators are civilly committed today in light of the Supreme Court's decisions in *Kansas v. Hendricks*<sup>5</sup> and *Kansas v. Crane*.<sup>6</sup>

The proposal is ambitious and represents one of neurolaw's foremost goals: predicting future behavior. In all human affairs, but particularly in matters deemed criminal, we often want to know why people act the way that they do. Cognitive neuroscience offers an attractive model of human conduct by virtue of its reducible methodology and impressive technology. According to the dominant strands of neurolaw, people often do bad things because their brains are hardwired for mischief or damaged in some crucial way. We can fool ourselves into believing that these folks had a choice, but science tells us that choice is largely illusory. The real challenge for this type of

---

<sup>4</sup> See Karen Franklin, *Hebephilia: Quintessence of Diagnostic Pretextuality*, 28 BEHAV. SCI. & L., 751 (2010).

<sup>5</sup> 521 U.S. 346 (1997).

<sup>6</sup> 534 U.S. 407 (2002).

neurolaw, however, is whether it can truly become incorporated into a legal system that blames and punishes people based on the assumption that most people can choose to act according to contemplation irrespective of their urges or desires to do otherwise.

In *Risky Business Versus Overt Acts: What Relevance Do "Actuarial," Probabilistic Risk Assessments Have for Judicial Decisions on Involuntary Psychiatric Hospitalization?*, Dr. Mossman, Ms. Schwartz, and Ms. Lucas delve into the popular area of actuarial risk assessment as it relates to traditional civil commitment. The authors' claim is straightforward: the movement toward actuarial assessment in civil commitment proceedings lies in tension with the customary demand of an overt act of harm being necessary for commitment. The exposition of the claim nicely lays out a logical puzzle that often is never mentioned in civil commitment discussions. By requiring overt acts for commitment, most civil commitment statutes base determinations of dangerousness on distinct past occurrences. Actuarial methods provide their strength by providing a projected probability of future violence on which to make the dangerousness determination. As a consequence, the push for incorporating actuarial assessment instruments is disharmonious with the established doctrine enshrined within most civil commitment statutes.

But, as the Supreme Court has repeatedly said, civil commitment is just that—civil.<sup>7</sup> And, in the civil context, policy determinations based on risk projections are made all the time. From various FDA regulations to FAA safety mandates, determinations of risk within the civil context do not require any overt act before the powers of the government may be invoked. Of course, neither do those regulations speak in terms of deprivation of liberty. And here, Mossman and colleagues draw a strong connection between the act requirement of the criminal law and what is generally required for traditional civil commitment. Because the scope of criminal law is so large in contemporary American jurisprudence, perhaps the line that should be drawn in legal discourse should be between deprivation of liberty

---

<sup>7</sup> See *Hendricks*, 521 U.S. at 361–63 (finding the statutory scheme civil because “[a]s a threshold matter, commitment under the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence.”); *Jones v. United States*, 463 U.S. 354, 369 & nn.18–19 (1983) (noting that civil commitment of a defendant acquitted under an insanity defense does not implicate the punishment rationales of penal sanctions).

and everything else instead of between criminal and civil.

Lastly, Professor Tovino provides the final installment of her work on mental health parity laws in her article, *Reforming State Mental Health Parity Law*. Tovino takes the strong position that existing distinctions between somatic and mental health should be abolished in terms of insurance coverage. The argument has gained support in many contexts over the years, as many notable scholars and scientists have declared that mental illnesses are brain diseases and therefore, by definition, they are somatic diseases like everything else.<sup>8</sup> Tovino prescribes an abolition of insurance policies that make a distinction between severe mental illnesses and other psychological infirmities that effectively limits current treatment for a fair number of Americans.

It is fitting that Professor Tovino's article should appear side by side with Professor Fish's article. Since the definition of mental illness is so vague, one question that naturally arises under Tovino's proposal is whether there would be any incentive for mental health care providers not to further enlarge the definition of behavior considered abnormal and warranting professional care. Should precious health care dollars be spent treating Internet Addiction Disorder?<sup>9</sup> It is a sobering question as healthcare promises to remain one of the foremost national expenditures for the foreseeable future. Arguably, though, the answer to that question should be answered in the affirmative. Whether using the Internet too much is an addiction or merely a vice, mental health care can help with both. Perhaps it should not be this way. But we have crafted a cultural narrative that emphasizes psychological (and increasingly neurological) explanations as the modern account of humanity. Until our collective social consciousness chooses otherwise, the therapeutic agent most comprehensible for behavioral change is the mental health professional.

In all four articles that comprise this Symposium, the authors struggle with the indelible aspects of the mental health law. Few oth-

---

<sup>8</sup> See, e.g., Alan I. Leshner, *Addiction Is a Brain Disease, and It Matters*, 278 *SCI.* 45 (1997); Nora D. Volkow & Joanna S. Fowler, *Addiction, a Disease of Compulsion and Drive: Involvement of the Orbitofrontal Cortex*, 10 *CEREBRAL CORTEX* 318 (2000); Lewis L. Judd, *Depression as a Brain Disease*, 3 *DEPRESSION* 121 (1995).

<sup>9</sup> See Jerald J. Block, *Issues for DSM-V: Internet Addiction*, 165 *AM. J. PSYCHIATRY* 306 (2008).

er areas of the law are imbued with such fundamental questions that drive to the heart of what it means to be an agent under the influence of the law. Who is dangerous because of who they are? Which citizen is mentally abnormal and subject to special deprivations of liberty? What behaviors should entitle someone to compensated professional care? For the average citizen, questions of law often condense into two concerns: what benefit can the government bestow on me and what freedoms may it curtail? Because the human condition resists many of the fine distinctions that the law desires, these questions will remain alive for as long as the law prospers.