FOREWORD: HEALTH LAW IN THE CRIMINAL JUSTICE SYSTEM

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FOREWORD

Scholars of mental health law today find themselves laboring in something of a twilight zone. In theory, most of the constitutional contours of this terrain have been charted, and little work remains to be done to complete the constitutional globe.¹

Of course, there is always the occasional new territory to be discovered or created, which will require judicial mapmakers. Sexual predator laws are a recent example of this sort. These laws use the state’s mental health authority to fill in the gaps when the criminal justice system can no longer be used to confine dangerous sex offenders.² Sexual predator laws created new domains for mental health law and sparked new constitutional controversy.³ Even there, however, the dust seems to be settling. Except for second-generation issues involving the right to treatment and conditional release,⁴ courts have sorted out the states’ civil commitment authority and individual rights under the Constitution.

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¹ For contrasting broad historical reviews and analyses of how mental health law has evolved in the United States over the past several decades, see PAUL L. APPELBAUM, ALMOST A REVOLUTION: MENTAL HEALTH LAW AND THE LIMITS OF CHANGE (1994); JOHN Q. LAFOND & MARY L. DURHAM, BACK TO THE ASYLUM: THE FUTURE OF MENTAL HEALTH LAW IN THE UNITED STATES (1992).

² See generally PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE AND THERAPY (Bruce J. Winick & John Q. LaFond eds., 2003).


⁴ See generally John Q. LaFond, Outpatient Commitment’s Next Frontier: Sexual Predators, 9 PSYCHOL. PUB. POL’Y & L. 159 (2003).
Although cases like *Sell v. United States*\(^5\) and *Atkins v. Virginia*\(^6\) stir the pot from time to time, mental health law in the criminal justice system is also fairly well settled. The United States Supreme Court has definitively resolved fundamental constitutional issues involving mentally ill offenders in the criminal justice system, the insanity defense, and the disposition of mentally ill offenders.\(^7\) States have broad flexibility in how mentally ill offenders will be processed by the criminal justice system provided they observe these constitutional parameters.\(^8\) In sum, most of the important discoveries have been made in the criminal justice system.

As a consequence of these discoveries in mental health law, scholarship in this domain increasingly focuses on law and public policy and on examining the empirical assumptions underlying the law.\(^9\) Additionally, contemporary mental health scholarship endeavors to explore the consequences, intended and unintended, of law reform.\(^10\) Other scholars are exploring how mental health legal regimes actually work.\(^11\) This refocusing is especially welcome in the criminal justice system because of two indisputable facts. First, the number of persons incarcerated in state and federal penal institutions has increased enormously over the past several decades.\(^12\) Second, the number of offenders with mental disabilities confined in these institutions has also increased enormously.\(^13\) Thus, contempo-

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\(^5\) *Sell v. United States*, 539 U.S. 166, 177–85 (2003) (analyzing when the state may forcibly medicate an incompetent criminal defendant in order to restore his competency to stand trial).


\(^8\) See *LaFond & Durham*, supra note 1, at 58–81.


\(^13\) There are a number of explanations for this increase, including deinstitutionalization of the mentally ill. See *M. Abramson*, *The Criminalization of Mentally Disordered Behavior*, 23 Hosp. & Community Psychiatry 101 (1972). Another explanation for the increase is more
The articles in this symposium demonstrate the extremely wide gap that still exists today between theory and practice in this seemingly settled domain. Perhaps this is not surprising given the inevitable complexity and difficulty of meshing the criminal justice system, which emphasizes punishment and social protection, with a mental health system, which emphasizes treatment. There is something paradoxical in considering someone both “bad” and “mad.” To compound matters, the criminal law cannot function without the participation of forensic mental health experts. Thus, their testimony, based on presumed expertise, is crucial to the smooth and reliable functioning of the criminal justice system. Official participants from these two communities undergo very different professional training, have varied underlying value systems, experience different systems of knowledge, and use different terms for conveying their knowledge and values.

Nonetheless, it is disturbing (or at least it should be) to a society that cherishes a constitutional system of ordered liberty, which requires minimal cognitive and behavioral capacities before someone can be convicted and punished for committing a crime, that the outcome of a criminal trial may well depend on which expert is asked to conduct the competency evaluation. It also should be disquieting that many people who populate criminal justice habitats suffer from serious mental disorders that require treatment and that, far too often, these services are not available.

In Competency to Stand Trial on Trial, Grant H. Morris, Ansar M. Haroum, and David Naimark report on research they conducted reviewing how forensic experts implement the legal requirement that severe criminal sentencing. See Nat'l. Inst. of Just., U.S. Dept. of Just., Three Strikes and You're Out: A Review of State Legislation Series (1997).

14 See generally Stephen J. Morse, Bad or Mad: Sex Offenders and Social Control, in Protecting Society from Sexually Dangerous Offenders: Law, Justice, and Therapy, supra note 2.


16 See Grant H. Morris et al., Competency to Stand Trial on Trial, 4 Hous, J. Health L. & Pol'y 193, 200 (2004).

17 See, e.g., Mears, supra note 12 (collecting authorities).
a criminal defendant must be competent to stand trial. The Supreme Court has held that, under the Constitution, all defendants in a criminal case must be competent to stand trial before they can be convicted and punished. Without this necessary condition of mental capacity, our adversary criminal justice system simply cannot engage in accurate fact-finding, honor individual autonomy, and sustain basic constitutional values of justice. To the public’s probable surprise, a finding of incompetency to stand trial does not necessarily benefit someone accused of crime. Instead, it can have significant adverse consequences for criminal defendants, including continued—in some cases indeterminate—confinement in a secure mental health facility and the involuntary administration of medication. Research also establishes that arrest for a minor crime followed by a predictable incompetency proceeding has often been used to circumvent the restrictive substantive and procedural protections provided by contemporary civil commitment laws.

Not surprisingly in our federal system, federal and state courts have developed differing legal standards to be used in evaluating competency. Morris and his colleagues trace the development of the requirement that a criminal defendant must be competent before he can be tried, and analyze the various legal competency standards currently used in this country. In their view, three primary legal standards of competency have evolved over time. One requires only that the defendant is competent in his thinking; that is, he is able to understand the nature of the proceedings. The second requires, in addition, that the defendant can act to assist his or her counsel in a rational manner. Thus, it has both a “thinking” and an “acting” component that requires rationality. The third is the federal statutory standard that does not use the word “rational.” It requires only that the defendant can “assist properly” in his or her defense.

18 Morris et al., supra note 16.
19 Drope v. Missouri, 420 U.S. 162, 171 (1975). See also Dusky v. United States, 362 U.S. 402 (1960) (interpreting the federal competency standard, which Morris and his co-authors contend is the current constitutionally required standard).
23 See Morris et al., supra note 16, at 200–11.
24 Id. at 204–09.
The authors want to know how forensic experts interpret and apply these various standards to cases. In order to “evaluate the evaluators” (to paraphrase them), they asked forensic psychiatrists and psychologists to apply legal standards of competency to two case study vignettes, which were based on real cases. The article reports on the results of this survey and then analyzes the implications of their findings.

The first vignette indicates that the defendant’s thinking is impaired, but his pre-trial behavior is normal. They assumed that this defendant may not have a rational understanding of the issues, but could conduct an arguably irrational defense in a rational way. The second vignette involves a defendant whose pre-trial behavior is impaired, but her thinking is not. They assumed that, in contrast to the first vignette, this defendant had a rational understanding of the proceedings, but could not conduct her defense in a rational way.

Surprise! In evaluating the defendant’s competency in the first vignette, the experts disagreed. They split almost evenly. About half considered the hypothetical defendant competent to stand trial, while the other half did not. Morris, Haroun, and Naimark are shocked at this level of disagreement among experts. In the second vignette there was greater agreement, but the divergence of expert opinions is still troubling. Interestingly, most evaluators reached their same conclusion on competency or incompetency under all three standards. Perhaps more importantly, the authors concluded that many of the experts probably were incorrect. Since judges usually agree with the examining expert, the authors believe that whether a criminal defendant will be found competent to stand trial depends on the luck of the draw; i.e. who happens to conduct the evaluation. This data, in their view, raises a fundamental question of whether experts really are experts.

The authors then analyze comments about the two vignettes made by individual evaluators. Some comments about the first vignette suggest that the evaluators too often “played lawyer” in reaching their conclusions, and may need to know about how the clients interacted with their attorney and what the legal defense might be to make a conduct a thorough evaluation. Comments about the second vignette suggest, among other things, that evaluators gave undue weight to the diagnosis and its severity in reaching their conclusion. Others took treatment needs into account.

25 Id. at 214.
26 Id. at 215-16.
Simply put, experts infuse their own normative preferences and interpretations of legal standards when determining whether mentally ill defendants are competent to stand trial. 27

Professor Morris and his colleagues make a number of recommendations to address the problems disclosed by their research. One recommendation is to refine the standard of legal competency to focus on the defendant’s thought process and to insist that experts actually use it correctly. They also recommend that judges, lawyers and forensic evaluators should understand and accept their specific roles in this process. They would allow defense counsel, who often can offer probative evidence on this issue, to testify if appropriate. Their recommendations might well improve both the process and outcomes of competency evaluations, thus ensuring that all competent defendants, and only competent defendants, stand trial on criminal charges. 28

Professor Michael Perlin, a distinguished and prolific scholar on mental health law, extends the implications of the Morris article in his article, “Everything’s a Little Upside Down, as a Matter of Fact, the Wheels Have Stopped”: The Fraudulence of the Incompetency Evaluation Process. He demonstrates, with his usual insight and élan, just how erratic, inconsistent, and perhaps even fraudulent the claim and application of expertise is in the criminal justice system. 29

As Perlin cogently demonstrates, this research goes beyond theoretical concern. Many thousands of mentally ill defendants pass through the criminal justice system each year. What happens to them too often depends on which forensic expert is chosen to conduct a competency evaluation. Thus, like cases are not treated alike. 30 Some defendants will be found competent and will stand trial. Others will be found incompetent. This is especially surprising because, as Professor Perlin demonstrates, most observers consider a competency evaluation to be relatively easy and uncomplicated. 31 What is worse for the individual defendant—standing trial or diversion into the criminal mental health system—is an interesting question.

27 Id. at 237.
28 Id. at 226–38 (discussing recommendations for refining the competency determination).
30 Id. at 241.
31 See id. at 244.
However, Professor Perlin makes a more serious charge. In his view, the whole process of competency evaluation reflects a systemic failure of the criminal justice system, which, too often, is not really interested in accurately ascertaining present mental status and capabilities. Rather, other social ends animate the players. This “pretexuality,” as Professor Perlin has so aptly described it, is manifested in several ways. First, the participants involved, including experts and judges, assume the defendant is guilty. Second, the best evidence on this issue, defense counsel’s experience with the client, is almost never considered. Third, too many mental health experts “play lawyer,” second-guessing the defendant and his attorney. Fourth, these experts conflate their evaluative and their treating roles, often skewing their opinions to reach the best treatment outcome for the defendant. Fifth, experts often decide what the law should be and simply use their own standard of competency. Sixth, too frequently experts do not use psychological tests, which can be extremely useful. Finally, experts inject their clinical values into what should be a functional analysis.32

Too often, judges ratify the hidden agenda of experts by simply ratifying their opinions. This collective abdication of judicial responsibility not only allows experts to usurp the court’s fundamental role; it also ensures that mentally ill defendants are not properly screened to determine if they can and should stand trial. Instead, their fate depends on the flip of a coin. Some may proceed to trial and either acquittal or conviction, followed by a specified sentence. Others will be returned to the criminal mental health system for an indeterminate period.33

In sum, Morris and his colleagues demonstrate again, Professor Perlin argues, that the law simply is unable—or unwilling—to operationalize the legal model that competency is an indispensable condition of any judicial determination of criminal responsibility.

As noted earlier, in the Atkins case the Supreme Court concluded that the Eighth Amendment’s prohibition against cruel and unusual punishment precludes the execution of mentally retarded defendants.34 In the majority’s view, individuals with mental retardation are sufficiently impaired in their reasoning, judgment, and

32 Id. at 246–50 (surveying the mechanisms that tend to detail competency evaluations in the criminal justice system).
33 Id. at 251 (discussing judicial failure to independently assess the competency of criminal defendants).
impulse control that they do not act with the same moral culpability as normal adults. Thus, execution of these defendants is excessive punishment.\textsuperscript{35}

The majority did not explain when a criminal defendant should be considered "mentally retarded" for this purpose. Rather, they left this pivotal question for each state to decide.\textsuperscript{36} As Victor R. Scarano and Bryan A. Liang point out in their article, \textit{Mental Retardation and Criminal Justice: Atkins, the Mentally Retarded, and Psychiatric Methods for the Criminal Defense Attorney}, this may be a life-and-death question for the defense.\textsuperscript{37} The pivotal issue after this case is whether a defendant suffers from mental retardation or simply has borderline intelligence.

Scarano and Liang review the \textit{Atkins} decision and provide direction to defense lawyers, who now have a duty to investigate their client's intellectual and behavioral competency in order to define and determine whether he suffers from mental retardation. There are a number of important legal issues packed into defining mental retardation, including when the cognitive and behavioral deficits that indicate mental retardation manifest themselves. Relevant legal definitions pick different ages of onset.\textsuperscript{38} In addition, mental retardation is further refined into different categories depending on the range of disabilities present.\textsuperscript{39} Which particular category an individual should be placed in is not without controversy, especially if the choice is between mild mental retardation (not eligible for capital punishment) and borderline intelligence (eligible for capital punishment). Scarano and Liang provide very helpful guidance for attorneys and judges about the records and tests normally used to evaluate mental retardation.\textsuperscript{40}

The authors also explore the policy ramifications of the \textit{Atkins} decision. They note that \textit{Atkins} now precludes the execution of defendants who are mentally retarded. Pushing the envelope, Scarano and Liang urge defense lawyers to extend the logic of the two \textit{Penry

\textsuperscript{35} Id.

\textsuperscript{36} Id. at 317.


\textsuperscript{38} Id. at 288-90.

\textsuperscript{39} Id. at 291-93.

\textsuperscript{40} Id. at 288-306.
cases that preceded *Atkins* to include the mentally ill. They contend that juries should be allowed to consider serious psychotic disorders in the punishment phase of a capital criminal trial. In non-capital cases, however, defense counsel must be very cautious in introducing evidence of either psychotic disorder or mental retardation, lest that evidence establish that the defendant is dangerous and, therefore, worthy of a harsher punishment. Counsel must also consider whether the insanity defense should be used if the client is mentally retarded. However, they caution that careful consideration of the dispositional consequences of a successful insanity defense is essential, lest a successful insanity defense result in longer confinement than would result from a criminal conviction. They also suggest that *Atkins* portends a future Supreme Court decision holding that the Eighth Amendment precludes execution of defendants who are responsible but mentally ill. Time will tell if their forecast is correct.

Conventional wisdom argues forcefully that the mentally ill are over-represented in the criminal justice system and that more resources must be allocated to treating those mentally ill offenders. In his article *Mental Health Needs and Services in the Criminal Justice System*, Daniel P. Mears reviews the current public policy debate in this area in light of the available research. He seeks answers to three questions. First, what is the demand for mental health services in the criminal justice system? Second, are adequate services currently being provided or is there a gap between the need and services provided? Third, what services and programs should be provided?

Proponents of providing more resources to treat the mentally ill in the criminal justice system usually make two general argu-

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41 Id. at 306.
42 Id. at 307.
43 Id.
44 Id. at 308.
45 Id.
46 Id. at 310.
47 In 2003, the Missouri Supreme Court held that a national consensus has developed precluding execution of offenders under the age of 18 at the time of their crime and that the United States Supreme Court would so hold under the Eighth Amendment. *Simmons v. Roper*, 112 S.W.3d 397 (Mo. 2003), *cert. granted*, 124 S. Ct. 1171 (2004). The Supreme Court granted certiorari. Thus, the Court will soon hear an analogous claim.
48 Mears, *supra* note 12, at 255.
49 Id. at 258.
ments: one moral, the other pragmatic. The moral argument maintains that society ought to provide treatment to the mentally ill even if they have committed a crime, just as society ought to provide other medical services for criminals in the system who suffer from physical illness. This is a normative argument that does not depend on empirical evidence. The pragmatic argument maintains that treating mentally ill offenders will reduce crime and allow them to become productive citizens. This is an empirical argument whose validity does turn on what we know and do not know about the effect of mental health treatment on this group of offenders.

Mears thoroughly analyzes the available research on the connection between mental illness and the commission of crime. As importantly, he explores the deficiencies in this research. Simply put, though the research tends to establish a positive correlation, it sheds very little light on how or why mental illness is related to the commission of crimes. Such information is extremely important in determining how treatment should be provided and whether investment of these resources in other possible causal factors, such as inadequate education, might prevent more crime. The research is stronger in establishing that mental illness is related to outcomes other than crime. Thus, for example, treating mental illness should increase stable employment and improve inmate management. The more difficult question, however, is even if many offenders are mentally ill and society supports treating them, should scarce resources be spent on this effort or on other pressing social needs, such as poverty or physical illness?

Mears then analyzes the best available evidence on how many individuals in the criminal justice system are probably mentally ill. He concludes that a higher proportion of offenders in the criminal justice system are mentally ill compared with the general population. Nonetheless, these conclusions must remain provisional and approximate. If society is to get an accurate measurement of how many mentally ill people come into contact with the criminal justice system, it needs much more sophisticated information collection systems at all levels of this system. Only then will society know with more accuracy the level of need.

Mears also details what we need to know about what services are delivered to the mentally ill in the criminal justice system and

50 Id. at 262.
51 Id. at 263.
52 Id. at 279.
where and when they are delivered. Unfortunately, as Mears makes clear, we currently know very little on a systemic level. One limited study suggests that at least some states do provide significant mental health services in their state prison system. Conversely, the same research suggests that some states do not provide adequate services. Even these studies, however, have not been validated. Another study is more pessimistic, suggesting that mentally ill inmates rarely receive appropriate services. Other studies highlight a number of ways in which states fail to provide adequate and appropriate services to mentally ill inmates. Mears’s most striking conclusion is how little we know about service actually provided to the mentally ill in the criminal justice system.53

His final point follows from what he has so ably demonstrated already. Society cannot intelligently and systematically begin to determine what services for the mentally ill are needed in the criminal justice system until it knows much more about inmate needs and services already in place throughout the state and federal criminal justice systems.54 Without this vital information, any policy initiatives will be flying blind. Mears also recommends some useful steps that can be taken while we await this information.55 In sum, Mears’s article is a tour de force blueprint for future research that must be done if society is to prudently and effectively deploy limited resources in addressing the needs of the mentally ill in the criminal justice system.

Together, these articles prompt thoughtful examination of how the criminal justice system, in theory, should process mentally ill offenders. They should provoke critical reconsideration of how this system actually works and how it can be improved.

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53 Id.
54 Id.
55 Id. at 279–82.