Mental Health and the Law: Two Perspectives

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At the present time, our civil and criminal courts, as well as our communities, struggle with the challenges brought on by those who suffer from mental impairments. But we have working here today a collaboration of various professionals which will go a long way in creating models for addressing complex problems in an adversarial system where issues of mental health are often emotionally charged, presenting a mixed bag of fear and sympathy. It is commendable that entities like The MacArthur Research Network on Mental Health and the Law are creating an environment for developing better criteria and understanding among the people and the systems that have the greatest impact upon major decisions affecting the mentally ill. Such a collaboration provides the opportunity for a variety of experts, including psychiatric professionals, legal practitioners, mental health clinicians, and policymakers, to work together to improve diagnostic tools, assessment, and treatment. Even more remarkable is the MacArthur Network’s inclusion of a significantly broader group of participants in its research bank, reaching out to former mental patients, their families and communities. Such an expansive research model provides a much greater opportunity for those who are not usually invited to the table to discuss critical standards, and the social, legal, and scientific methods for addressing the concerns associated with the mentally ill.

As mental health and legal experts, we share a number of common goals. We share the common goal of increasing the quality of mental health services and decreasing the risk of violence caused by the mentally ill to themselves and others. We share the common goal of increasing the public’s confidence and perceptions about the ability of mental health and legal systems to meet the challenges posed by this

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segment of our population with effective yet compassionate responses. We also share the common goal of producing credible medical and legal standards and criteria for violence risk assessment and for determining the appropriate use of coercion in providing treatment for the mentally ill. The methods which are being explored by the MacArthur Research Network can go a long way in building trust around the mental health and legal institutions that are struggling to cope with these issues.

I have chosen to address the issues surrounding mental health and the law from two perspectives. One such perspective is my viewpoint as a trial court judge. The other perspective is my viewpoint as a citizen and family member who was challenged with deciding what to do when my sister was suddenly stricken with mental illness.

First, I will share some observations and insights learned from my viewpoint as a judge who presides over criminal cases and as one who decides many issues, including competency, involuntary treatment, legal responsibilities, and dangerousness as they relate to those with mental disorders. From a legal and historical perspective, the trial of John Hinckley changed many of the considerations in the mental health area. As you may recall, on March 31, 1981, Hinckley stood outside the Lincoln Hilton Hotel in Washington D.C. and fired six bullets at President Ronald Reagan as the President was leaving the hotel. President Reagan was seriously wounded. The President’s Press Secretary, James Brady, was also struck by bullets and suffered brain damage. At trial there was wide agreement that Hinckley was peculiar and unbalanced. It was believed that Hinckley’s motive for shooting President Reagan was to impress the movie star, Jodie Foster, whom he had never met. During the trial in federal court, Hinckley offered the insanity defense. A battle of expert psychiatric witnesses was at the center of the eight week trial. The Hinckley jury deliberated for three and one-half days. The jury returned a verdict of not guilty by reason of insanity, and a storm of protest ensued.

Immediately following the Hinckley verdict, news polls reported that 75% of the public disagreed with the verdict and 70% wanted to totally eliminate the insanity plea as a legal defense. Disapproval of the Hinckley verdict was still obvious a week later as evidenced by a state poll showing that over 80% of the persons sampled considered the insanity defense just another technical “loophole.” Even the President

and Congress called for changes. In 1984, Congress reconstituted the standards for legal insanity, returning to an earlier standard for the insanity defense in federal cases.²

The public's underlying rage and fear about the insanity plea in cases involving ambitious and wanton crimes, like those of Hinckley, is understandable. However, most of the cases that we see in the state court involving persons with mental disorders or illnesses are not controversial because many of those that we see in the criminal justice system do not attract the attention of the popular press. Moreover, only a few cases offer the defense of insanity; even fewer succeed at establishing the standard necessary for such a defense.

Most of my contacts as a trial judge with the mentally ill deal with ordering competency evaluations and deciding whether defendants have the requisite level of understanding to appreciate and assist with their own defense. If not, the judge has the discretion to order temporary commitments for the purpose of providing treatment so that the requisite level of understanding can be obtained within the statutory guidelines and time frames. Coercion is used by the court in the form of orders for involuntary commitment, for competency evaluations, and for treatment to assist the defendant in regaining or maintaining competency.

Another facet of my involvement with the mentally ill defendant relates to sentencing and giving due consideration to the issue of mental illness as a sentencing factor. Finally, in those few cases where a person is found not guilty by reason of mental disease or defect, the court orders commitment to a state hospital. The defendant is reviewed periodically and the court must then consider whether to conditionally release the person. The court may do so if it is established that the treatment needs can be met in the community and that the defendant is not dangerous to himself or herself or the community.

Last Monday, as I was considering this Conference, I just randomly took a count of the persons who had come before me on one day. I found that out of the fifty people who appeared before me, approximately ten of them, or one-fifth, had obvious mental health issues which had significantly contributed to the crimes with which they had been charged. These same mental health issues had a severe impact on the outcomes of their cases and their ability to respond positively to any interventions the court might impose.

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The first case called last Monday was a 37-year old man with an 11th grade education charged with battery to his father. In 1985, he had been diagnosed as schizophrenic and is now on a treatment regimen with the local hospital. During the case in my court, his father reported, “I am afraid.” He said, “I am gravely afraid of trouble if the defendant does not take his medicine.” The father, therefore, requested that the court require, as a condition of bail release, that the defendant have absolutely no contact with him. The father had been the defendant’s caretaker since the onset of the mental illness in 1985, and had been receiving Social Security Supplemental Income on the defendant’s behalf. Now, this defendant was not new to the criminal justice system. He was convicted of attempted murder for conduct which involved the stabbing of his grandmother in 1985. He faced an aggravated battery charge against another family member, for which he was found not guilty by reason of mental disease or defect in 1986 and was subsequently committed to a state hospital. In 1997, he was convicted of possession of drugs. When he appeared before me at a sentencing hearing, the defendant was calm and almost childlike. He was anxious; at one point in the proceeding, while the prosecutor was reporting, I interrupted the proceeding to determine why the defendant kept waving his hand. I tried to assure him that he would get a chance to speak. He hastily said that he disagreed with one thing that the “Lady DA” had said to the court. Realizing that it might calm him down, I invited him to speak. All that he wanted to say was that he did not stab his grandmother—he cut her. At the end of the day and into the next morning, nearly all of the parties involved in that case including Your Honor, the Coordinating Probation Agent, the District Attorney’s Office and the Defense Counsel, were still trying to determine what to do with this man who was homeless, suffering from a major mental disorder, and who had proven that he could be dangerous if he does not participate in and receive the appropriate mental health treatment.

This is the typical type of challenge which ripples through the criminal justice system and eventually spills over into the civil commitment resources when we run out of time in the criminal system. The mentally ill have substantial and complex circumstances surrounding their disorders. These include potential dangerousness created by inadequate treatment, alcohol and drug abuse, homelessness, violence against family or friends, illiteracy and poverty. This comes as no surprise to me now that I am here in the state court system. When I was a legal practitioner in the federal court system, I really did not have a good picture of what the state court system involved on a daily basis. However, my
friend and colleague, who is present here today, Milwaukee County Dis-

tric Attorney E. Michael McCann, tried to tell me better. At my judi-

cial investiture I was extremely happy; while being adorned with my new

robe, I should have paid closer attention to his words. I pulled out the

transcript of my investiture so that I could recall exactly what he told me
to expect as a criminal court judge in the state court system. He said:

It's quite different in the Milwaukee County Courthouse and

particularly the Safety Building where the criminal courts are lo-
cated. Into these buildings and the criminal courts, pour the im-
poverished to a good extent of our community. Many are semi-
literate, some totally illiterate, most unsophisticated and most of
them poor. They come in large numbers. You try to close the
door, the cases will flow over the transom. They come not by
tens, not by dozens, but by hundreds and the cases that come be-
fore each judge in the misdemeanor and felony courts number in
the thousands. A press of human beings and in many ways, the
tragic human flotsam and human problems, victims, defendants
and witnesses alike, a hard pressed and troubled society. Each
case, in its own way a terrible tragedy, and each of those persons
come in asking for justice. 3

Typically, probation agents report to the court that the mentally ill
view mental illness as a horrible disease. Many probation and parole
agents, who provide supervision and support to mentally ill defendants,
view them as a lifetime caseload. There are large numbers of mentally
ill persons that end up in the criminal justice system when they might be
better served through the civil process. In the criminal justice system,

disorders and illnesses range from depression, manic-depression, bi-
polar disorders, schizophrenia, paranoia types and others. Many of
these are compounded by drug and alcohol abuse, lack of treatment and
learning, as well as criminal behavior stemming from environmental fac-
tors and social contacts. In some areas, the lack of adequate community
resources has resulted in a flow of the mentally ill into the criminal
courts in greater numbers. Families are burned out, the agents tell us,
and want the system to handle the problem. A loss of family involve-
ment in many cases results in the loss of a very important aspect of sur-
veillance and support for the mentally ill.

The mentally ill are very difficult offenders. The primary goal is to

3. Milwaukee County District Attorney, E. Michael McCann, Remarks at the Investi-
ture of Judge Maxine A. White (Sept. 12, 1992) (transcript on file with author).
address the mental illness, but detention is necessary in some situations to meet the risk of violence and the specific treatment needs of these defendants. Courts have broad discretion and great responsibility in ordering evaluations, determining competency, and implementing involuntary treatment. These are judicial rather than medical determinations, and it is often difficult to get medical experts, scientific experts, and the psychiatrists on the stand—and the public as well—to understand that these are judicial determinations and that the buck stops here. The judge has the ultimate responsibility of rendering the decisions on these issues.

The law in this area has evolved through a number of lawsuits, changing a system that in the past routinely confined mentally ill patients involuntarily. As a result, courts have added many due process protections to the civil commitment procedures, including the right to counsel, the right to cross-examination, the right to appeal in some jurisdictions and the opportunity for patients to express their views and present evidence against commitment. Furthermore, evolving case law in this area has also established a right to treatment for persons committed against their will. Some states, like Wisconsin, also require proof of dangerousness in addition to mental illness in order to commit a person involuntarily. Patients who can function in the community, despite a mental disorder, are allowed to retain their freedom.

I would like now to share briefly another perspective with you. The personal and legal problems associated with mental illness have been with us for centuries. Our current struggles to balance the safety of the community against the needs and rights of the individual are in some ways an echo of the challenges faced by families and civilizations long past. The similarities, and even the differences, are at times striking, remarkable, and in many ways disconcerting.

I don't know how many of you read Shakespeare. He wrote the tragedy *King Lear*, an adaptation of a tale about an ancient king, a vain, proud king, who is driven to madness when he realizes that he has given up his kingdom to flattery and deceit. *King Lear* descends into insanity, but eventually he recovers. In the process, his one loving daughter spends all of her resources, and ultimately loses her life, trying to save him from insanity. His friends' lives are also disrupted in their efforts to save him from the effects of his insanity.

I have been confronted personally with the same overwhelming challenge as a citizen in the early 1970s. I shared an apartment with my

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4. See, e.g., WIS. STAT. § 51.20 (1997-98); WIS. STAT. § 980.06 (1997-98).
younger sister. She had been an exceptional high school student. She graduated a year early from high school, completed college with honors and had a budding career with the Department of Labor. All of that came crashing down, and we had to first figure out what was wrong. We had to then figure out whether or not the cause was mental illness and once having crossed that bridge, we struggled to find some way to deal with it. I found myself assisting my sister, a very beautiful, caring, talented, gifted, young woman. She was a bright college student who graduated with honors from college. But she was not able to win her battle against a major mental disorder called schizophrenia.

We were a strong family unit. We had won many a battle in the segregated south but this struggle with a mental illness left us feeling totally and completely devastated. We watched my sister change before our very eyes from a loving sister and friend to a total stranger. The debilitating changes she suffered from this disease and our collective helplessness against it made me fully appreciate those lines from Shakespeare's play: "Who alone suffers, suffers most it'h the mind." In other words, he who suffers the most, suffers in the mind, and oftentimes suffers alone.

Rehabilitation, caviling, excuses, psychiatric treatment, judicial determinations, and a defendant's lack of mental capacity are all viewed with suspicion and considered by many to be dangerous and a waste of time. Mental illness is believed by many to be a trick used by the criminally inclined to get people off the hook and onto the public disability rolls. But as King Lear expressed, and my sister still expresses: "O let me not be mad, not mad, sweet heaven! Keep me in temper, I would not be mad!" "O, that way madness lies, let me shun that." In other words, he said and she says, please make it anything but mental illness. Let it be anything but that. With the mentally ill, truth and consequences are rather involved processes, and depend on credible criteria and qualified experts to assist the courts in making decisions about capacity, culpability, and commitment dispositions and to assist the court in weeding out those who are malingering.

When King Lear's daughter learned of his insanity, she sent her soldiers out to bring him to her. She cried out: "What can man's wisdom

6. Id. at act 1, sc. 5, lines 39-40.
7. Id. at act 3, sc. 4, line 23.
[do] in the restoring [of] his bereaved sense?"\(^8\) For "he that helps him," she promised to give them all of her worth, and she was at that time a queen with considerable riches to offer.\(^9\) As with Lear's daughter, mental illness today drains the resources of the families involved. My parents were married for fifty-seven years before they died in 1995. They devoted the last twenty years of that time protecting, providing and preserving the integrity of the life of my sister.

Mental illness drains the resources of the families, of the criminal and civil justice system and forces us to make tough decisions, balancing an individual's right to choose and be free against the need to protect the public, or in some cases, to protect the mentally ill from themselves.

I would like to end this with a few recommendations.

1. You should, at the MacArthur Network and the network of friends and professionals associated with this area, continue to use multiple resources in making risk assessments.

2. Your work for the court should take into account the legal requirements that will form the parameters of the judge's decision. The question is: "How can you help the decision maker do his or her job better?"

3. Where there are specific reasons for reaching a conclusion, experts should provide concrete examples of conduct or interview responses that demonstrate or support that conclusion. Articulate not only what you conclude but why. A report that is long on conclusions but short on rationale and description does nothing to resolve the primary issues before the court.

4. In presenting the new criteria and violence risk assessment tools to the court, you need to be prepared to show or explain the correlation between the new criteria for evaluating and reporting and the standards imposed by law.

5. Because of the high prevalence of substance abuse found in the mentally ill, you should become involved in the debate over those issues.

6. Finally, it is up to the experts to develop and communicate criteria based on facts, not half-facts, not non-facts and not prejudice, so that the assessments can be used to determine a better course of action before violence occurs.

In your search for new tools and new partnerships and better understanding, bear in mind the following paraphrase of words from King

\(^8\) *Id.* at act 4, sc. 4, lines 8-9.
\(^9\) *Id.* at act 4, sc. 4, line 10.
Lear's good daughter, Cordelia: Be aiding and remedial in the good man's and good woman's distress. Seek, seek for them lest their un gov erned rage dissolve their lives, that once were the means to lead it. In other words, continue to work to help those suffering from mental illness, and to help our society remain responsible and compassionate. I thank you.