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Why It Is Essential to Teach About Mental Health Issues in Criminal Law (And a Primer on How To Do It)

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Richard E. Redding*

INTRODUCTION

Studies consistently show a high prevalence of mental disorders among criminal defendants. Forensic mental health issues thus arise frequently in the criminal justice system and are commonly encountered by prosecutors, defense attorneys, and judges—much more so than some criminal law doctrines (e.g., necessity, duress, impossibility) routinely taught in criminal law courses. Yet rarely are students taught about mental illness, how to represent mentally ill clients, adjudicative competence, the mental health needs of various offender groups and how these unmet needs may contribute to criminal behavior, or the use of mental health mitigation evidence at sentencing. If taught at all, such topics are only part of a survey course in mental health law.

Forensic mental health issues should be an integral part of the criminal law curriculum, beginning with the first-year criminal law course. This Article presents recommendations for teaching mental health issues in first-year criminal law, presents empirical data indicating that first-year students have mixed, though generally positive, reactions to incorporating such non-traditional content into the course, and provides a syllabus for an upper-level course in criminal law and psychology. Incorporating mental health topics into the traditional criminal law curriculum is part of the ongoing trend in legal education towards expanding pedagogy beyond legal doctrine

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into relevant social science disciplines that can inform legal policy and students' understanding of the criminal justice system, perhaps more so than many of the doctrinal lessons we now teach.

> "The Los Angeles County jail system . . . [is] the largest mental institution in the country."[1]

I. THE PREVALENCE OF MENTAL HEALTH ISSUES IN THE CRIMINAL JUSTICE SYSTEM

The prevalence of mental disorders[2] among persons with criminal justice system involvement is staggering.[3] Each year about 700,000 adults with serious mental illness come into contact with the criminal justice system.[4] Justice Department statistics indicate that sixteen percent of jail and prison inmates have a serious mental illness,[5] but these estimates rise to 35% when they include less serious disorders.[6]

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1. E. Fuller Torrey, *Editorial: Jails and Prisons–America's New Mental Hospitals*, 85 AM. J. PUB. HEALTH 1611, 1611-12 (1995) (quoting M. J. Grinfeld, *Report Focuses on Jailed Mentally Ill*, PSYCHIATRIC TIMES, July 1993); *see also* Gilles Cote & Sheilagh Hodgins, *Co-Occuring Mental Disorders Among Criminal Offenders*, 18 BULL. AM. ACAD. PSYCHIATRY & L. 271 (1990); H. Richard Lamb & Linda E. Weinberger, *Persons With Severe Mental Illness in Jails and Prisons: A Review,* 49 PSYCHIATRIC SERV. 483, 486 (1998) (stating that "a large proportion of the severely mentally ill persons . . . in jails and prisons are similar in almost every way to long-term patients in state hospitals").

2. Because research increasingly shows how even less serious mental disorders (e.g., depression and attentional disorders) can be risk factors for violence and criminality, this Article uses the term "mental disorders" broadly to include all mental illnesses and clinically-defined psychiatric disorders contained in the AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, TR-IV (2000) (DSM-IV), the standard diagnostic reference for mental health professionals.

3. *See generally* MENTAL ILLNESS IN AMERICA'S PRISONS (Henry J. Steadman & Joseph J. Cocozza eds., 1993); E.R. Pinta, *The Prevalence of Serious Mental Disorders Among U.S. Prisoners*, 1930 CORRECTIONAL MENTAL HEALTH REP., Sept./Oct. 1999. The studies reviewed herein do not include "Antisocial personality Disorder" within their definitions and assessments of mental disorder.

4. Henry J. Steadman et al., *A SAMHSA Research Initiative Assessing the Effectiveness of Jail Diversion Programs for Mentally Ill Persons*, 50 PSYCHIATRIC SERV. 1620, 1620 (1999).

5. Because this figure fails to include those who were not formally diagnosed, the true prevalence rate is likely considerably higher. *See* Sheilagh Hodgins, *Assessing Mental Disorder in the Criminal Justice System: The Need for Common Approaches and International Perspectives,* 18 INT'L. J.L. & PSYCHIATRY 15 (1995); Christin E. Keele, *Criminalization of the Mentally Ill: The Challenging Role of the Defense Attorney in the Mental Health Court System*, 71 UMKC L. REV. 193, 194 (2002).

6. *See* Linda A. Teplin, *Psychiatric and Substance Abuse Disorders Among Male Urban Jail Detainees*, 84 AM. J. PUB. HEALTH 292, 292-93 (1994).

About 70% of those admitted to correctional facilities have active symptoms of serious mental illness,[7] making the Los Angeles, Cook County (Chicago and surrounding suburbs), and Rikers Island (New York City) jails the largest mental hospitals in the country.[8] Indeed, a recent study in Michigan found that 31% of its prison population required psychiatric care.[9] The largest study to date, sampling 3,332 inmates in New York prisons, found that 80% had severe disorders requiring treatment and another 16% had mental disorders requiring periodic mental health services.[10]

Historically, jails and prisons have always had many people with mental illness, but the numbers have increased in the last several decades due to massive deinstitutionalization from mental hospitals, cutbacks in social services, and the unavailability of community and inpatient psychiatric treatment. There is also an increasing "criminalization" of the mentally ill.[11] Some mentally-disordered offenders who should be diverted to the mental health system are instead shunted to the criminal justice system in the hope that they will receive even minimal services unavailable in the community mental health system. Mentally ill offenders are far more likely to be arrested, detained, and held without bail than others apprehended for the same offense.[12]

Serious mental illness is not just prevalent among those who have been convicted, however. A recent large-scale study of pre-trial arrestees in Brooklyn, New York found that 18.5% had a serious mental disorder (schizophrenia, bipolar disorder, or major

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7. Keele, *supra* note 5, at 194.

8. Paul F. Stavis, *Why Prisons are Brim-Full of the Mentally Ill: Is Their Incarceration a Solution or a Sign of Failure?*, 11 GEO. MASON U. CIV. RTS. L. J. 157, 159 (2000).

9. *See id.* at 180.

10. Henry J. Steadman et al., *A Survey of Mental Disability Among State Prison Inmates*, 38 HOSP. & COMM. PSYCHIATRY 1086, 1086 (1987).

11. *See* Lamb & Weinberger, *supra* note 1, at 486-89; Stavis, *supra* note 8, at 169-98; Torrey, *supra* note 1, at 1612; E. FULLER TORREY ET AL., CRIMINALIZING THE SERIOUSLY MENTALLY ILL: THE ABUSE OF JAILS AS MENTAL HOSPITALS (1992); *see also* Linda A. Teplin, *Criminalizing Mental Disorder: The Comparative Arrest Rate of the Mentally Ill*, 39 AM. PSYCHOLOGIST 794 (1984).

12. *See* sources cited *supra* note 11; Nahama Broner et al., *Arrested Adults Awaiting Arraignment: Mental Health, Substance Abuse, and Criminal Justice Characteristics and Needs*, 30 FORDHAM URB. L.J. 663, 686 (2003) (finding mentally disordered offenders more likely to be incarcerated for the index offense); Torrey, *supra* note 1, at 1612 (citing studies).

depression) and that 3% had a moderately serious mental disorder (post-traumatic stress disorder, depression, or generalized anxiety disorder), for a total of 22.1% having one of the six disorders addressed in the study. Sixty-nine percent of those having a mental disorder also had a substance abuse or dependence problem, substantially higher than the 45% base-rate for substance abuse in the overall sample.[13]

Clearly, attorneys representing criminal defendants will encounter many clients who suffer from one or more mental disorders. Extrapolating from data on the prevalence of mental disorders among jail and prison inmates, as well as data on the frequency with which defense attorneys have concerns about their client's mental health status, permits the conclusion that many clients will have diagnosable mental disorders. The most common serious mental disorders among criminal defendants include schizophrenia, bipolar disorder (formerly known as manic depression), mania, major depression, personality disorders (particularly antisocial, narcissistic, and borderline disorders), and neuropsychological abnormalities. Common but less-serious disorders include attentional disorders, post-traumatic stress disorder, and anxiety disorders. Substance abuse and dependence is also quite common in this population.

It is not surprising, therefore, that forensic mental health issues (e.g., concerns about representing mentally ill clients, competence to stand trial, and the use of mental health evidence in sentencing) frequently arise in criminal practice.[14] Nor is it surprising that mental health treatment often is a necessary component of effective rehabilitation and recidivism prevention programs, and it constitutes necessary medical treatment for many of those incarcerated.

Despite the centrality of mental health issues in the criminal justice system, law schools seldom teach students about these issues in criminal law courses. This is particularly the case in first-year criminal law, which constitutes the only criminal law course for many law students. Thus, many practitioners know little about mental illness or the forensic and treatment issues that frequently arise with criminal defendants. Yet defense attorneys, prosecutors, judges, and

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13. Broner et al., *supra* note 12, at 681-84.
14. *See* Part II.A, *infra*.

probation officers are routinely confronted with forensic mental health issues throughout the advocacy, adjudicatory, dispositional, and post-dispositional process; and attorney competence in such issues is essential for effective advocacy.

Pedagogically, teaching about mental health issues will foster students' understanding of the criminal justice system, perhaps more so than many of the doctrinal lessons schools now teach. An awareness and appreciation of mental health issues will make attorneys working in the criminal justice system better able to represent their clients and better equipped to serve the ends of justice. It will also raise lawyers' awareness about mental illness among civil clients and members of the bar. For instance, based in part on surveys indicating that lawyers have the highest prevalence rate of depression among professionals,[15] the Florida Bar now includes "mental illness awareness" as part of mandatory continuing legal education.[16]

II. TEACHING ABOUT MENTAL HEALTH ISSUES IN FIRST-YEAR CRIMINAL LAW: CHALLENGES AND OPPORTUNITIES

> But the student should not imagine, that enough is done, if he has so far mastered the general doctrines of the common law, that he may enter with some confidence into practice. There are other studies that demand his attention. He should addict himself to the study of philosophy, of rhetoric, of history, *and of human nature*.[17]

Given their recurring importance in criminal law practice and criminal justice administration, forensic mental health issues deserve attention in the first-year criminal law course. Most courses only touch on these issues with respect to criminal responsibility doctrines and do not address other important forensic mental health issues. For example, only a few criminal law and criminal procedure casebooks

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15. U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL (1999).

16. *See* Angela D. Vickers, *The Importance of Mental Illness Education,* 52(4) JUV. & FAM. CT. J 55 (2001).

17. JOSEPH STORY, MISCELLANEOUS WRITINGS OF JOSEPH STORY 527 (William W. Story ed., 1852) (emphasis added), *quoted in* JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW iii (2d ed. 1999).

address the issue of competence to stand trial. However, several casebooks address forensic mental health in somewhat greater detail, notably those by Bonnie et al. and Dressler.[18]

A three or four credit course in substantive criminal law is part of the first-year curriculum of every American law school, and some schools also require a semester of criminal procedure or teach criminal law and criminal procedure in a year-long course.[19] There is much to be crammed into the first-year course, and professors already do not have enough time to teach all the important topics. Many teach only the so-called "general part" of criminal law and perhaps one substantive crime (typically murder), but they are unable to teach other crimes (such as rape or property crimes) or the inchoate crimes of conspiracy and attempt. Others teach the general part and the inchoate crimes, but do not teach any substantive crimes. Thus, the argument that forensic mental health topics should be incorporated into the first-year course is advanced with an acute recognition that it is one of many important topics competing for time in the first-year curriculum. Other problems include the potential resistance by professors and students against incorporating new and relatively non-traditional topics into the course, the perception that such topics are somehow less "legal" and therefore less deserving of attention in the first-year curriculum, and the professors' potential lack of expertise. Such challenges are common to interdisciplinary law teaching.[20]

Although the level of expertise required to teach basic forensic mental health issues in the first-year course is not great, professors may wish to invite practitioners or other professors (e.g., forensic psychologists or psychiatrists) with such expertise to guest lecture in the course. In addition, professors can acquire the necessary expertise by consulting the resources on forensic mental health issues cited throughout this Article, particularly those listed topically in Appendix A.

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18. RICHARD J. BONNIE ET AL., CRIMINAL LAW (1997); DRESSLER, *supra* note 17 at iii.

19. Law school curriculums were accessed at http://stu.findlaw.com/schools/fullist.html (last visited on Oct. 11, 2003). Roughly 80% of law schools teach substantive criminal law as a three credit hour, one semester course.

20. *See generally* Kim Diana Connolly, *Elucidating the Elephant: Interdisciplinary Law School Classes*, 11 WASH. U. J. L. & POL'Y 11 (2003).

Time constraints will likely be the most serious problem for most professors. Given the frequency with which forensic mental health issues arise in criminal law practice and the importance of attorney competence in these issues for effective client representation, devoting time to forensic mental health issues at the expense of several more traditional criminal law topics seems well justified. Doctrines surrounding claims of duress or necessity, for example, are rarely encountered in criminal law practice (and easily forgotten by students after the final examination!). Nonetheless, these doctrines are routinely taught in first-year courses because they convey important concepts about the philosophy underlying the criminal law. But the same can be said about forensic mental health issues, which variously convey important concepts about the increasing use of science and social science in criminal law, attorney-client relationships, professional ethics, the adjudicatory process, principles of criminal responsibility, and sentencing, all of which arise with far greater frequency in the real world. For instance, emerging research on the neurobiological basis of violence and criminality has implications for sentencing,[21] and with most cases settled through plea bargains or tried with a resulting guilty verdict, sentencing (rather than adjudication) is where most of the action takes place in modern criminal law practice. Yet students typically are taught little about sentencing policy (and scientific findings relative to considerations of rehabilitative versus punitive sentencing regimes) in criminal law courses, particularly the first-year course.

A. Forensic Mental Health Topics in First-Year Criminal Law

The forensic issues that most readily come to mind are the insanity defense and other claims for diminished criminal responsibility (e.g., diminished capacity and mens rea "defenses"). Fortunately, these topics are already taught in many first-year criminal law courses (though often without exploring the clinical realities of such cases). Criminal responsibility is an obvious area in which mental health issues become relevant, and their relevance is growing. Over the last several decades, a "[p]articularly significant

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21. *See infra* notes 36-39 and accompanying text.

[development] has been the increasing relevance of mental disability in determining criminal liability."[22]

Keeping in mind the significant time constraints, the first-year criminal law course ideally would also include the following forensic mental health topics, which can feasibly be taught in approximately two weeks of class sessions. Ideally, many of these topics can and should be integrated into most criminal law courses without modifying the course sequence or adding new units.

1. Types of Mental Disorders

Criminal law courses are not psychology courses. In order to appreciate the forensic mental health issues, students need only a rudimentary understanding of the broad categories of mental disorders and the most common specific disorders. Professors can integrate much of this into class sessions by way of brief lectures on the relevant mental health issues as they arise in the discussion of the substantive legal issues. When lecturing on adjudicative competence, for example, it is important to point out that psychotic disorders and mental retardation are the most common reasons for client incompetence, and the implications for how attorneys may recognize the indicia of incompetence and the competency restoration process. More generally, it is useful to provide a very brief primer on the nature of mental disorders and the characteristics and symptoms of the three major classes of mental disorders encountered in forensic contexts: psychotic disorders, mood disorders, and personality disorders. For professors without any background in mental health, it may prove useful to invite a forensic mental health professional as a guest speaker.[23]

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22. RALPH RISNER ET AL., LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS 519 (1999).

23. A good primer for professors and students alike can be found in Chapter 1 (*Perspectives on Mental Disorder*) in REISNER ET AL., *supra* note 22 For a good overview of key psychiatric diagnoses and state-of-the-art treatments, see Joanmarie Ilaria Davoli, *Still Stuck in the Cuckoo's Nest: Why Do Courts Continue to Rely on Antiquated Mental Illness Research?*, 69 TENN. L. REV. 987, 1026-46 (2002).

2. Representing Mentally Disordered Clients

Extrapolating from data on the prevalence of mental disorders among jail and prison inmates, as well as data on the frequency with which defense attorneys have concerns about their client's mental health status,[24] permits the conclusion that many clients encountered in criminal practice will have one or more diagnosable mental disorders. Attorneys sensitive to the possible mental health problems faced by their clients will be better advocates, even before the adjudicatory stage, in negotiating with prosecutors for reduced charges, alternative sentences, or perhaps even diversion to the mental health system. Such an awareness on the part of the attorney can help to avoid the "criminalization" of the mentally ill.[25]

The adjudicative competence context[26] provides wonderful examples of the challenges of representing mentally disabled clients because mental disorders may affect the attorney's ability to communicate effectively with the client and assess his or her decision-making competence. Professors Litwack and Ross provide rich case studies of the challenges attorneys face in representing questionably or marginally competent clients who, for delusional reasons, want to pursue an irrational defense or refuse to mount a viable insanity defense.[27] The strategic and ethical considerations in such cases are substantial.[28] Professors can adopt these case studies for use in class. It is easy to engage students in a discussion of the famous Theodore Kaczynski ("Unabomber") case, which can be discussed in the context of both adjudicative competence and the insanity defense.[29] Although Kaczynski was clearly competent when

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24. *See supra* notes 3-13, 30 and accompanying text.

25. *See* Lamb & Weinberger, *supra* note 1, at 489.

26. *See* Part II.A.3, *infra*.

27. Thomas R. Litwack, *The Competency of Criminal Defendants to Refuse, for Delusional Reasons, a Viable Insanity Defense Recommended by Counsel*, 21 BEHAV. SCI. & L. 135 (2003); Josephine Ross, *Autonomy Versus a Client's Best Interests: The Defense Lawyer's Dilemma When Mentally Ill Clients Seek to Control Their Defense*, 35 AM. CRIM. L. REV. 1343 (1998). *See also* Adrienne E. Volenik & Lynda E. Frost, *The Ethical Perils of Representing the Juvenile Who May Be Incompetent to Stand Trial,* 14 WASH. U. J.L. & POL'Y_______(2004).

28. *See* sources cited *supra* note 27; Christopher Slobogin & Amy Mashburn, *The Criminal Defense Lawyer's Fiduciary Duty to Clients with Mental Disability*, 68 FORDHAM L. REV. 1581 (2000).

29. United States v. Kaczynski, 239 F.3d 1108 (4th Cir. 2001); *see* Michael Mello, *The*

it came to understanding the nature and purposes of the trial process and was found competent to stand trial by the District Court, a number of clinical evaluators, along with his own attorneys, questioned his competence to decide whether to mount an insanity defense, which Kaczynski refused to allow his attorneys to do. Paranoid schizophrenia may have impaired Kaczynski's judgment on this and other key decisions surrounding his defense.

3. Adjudicative Competence (Competence to Stand Trial)[30]

Surveys show that defense attorneys have significant concerns about their client's adjudicative competence in about 8% to 15% of all felony cases.[31] Thus, the issue of adjudicative competence[32]

Non-Trial of the Century: Representations of the Unabomber, 24 VT. L. REV. 417 (2000); Joel S. Newman, *Doctors, Lawyers and the Unabomber*, 60 MONT. L. REV. 67 (1999); William Finnegan, *Defending the Unabomber*, NEW YORKER, Mar. 16, 1998, at 52-62.

30. Because "competence to stand trial" includes competence to participate in pretrial and sentencing proceedings, "adjudicative competence" is the more appropriate term. *See* Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond* Dusky *and* Drope, 47 U. MIAMI L. REV. 539, 567 (1993).

31. *See* Steven K. Hoge et al., *Attorney-Client Decision-Making in Criminal Cases: Client Competence and Participation as Perceived by Their Attorneys*, 10 BEHAV. SCI. & L. 385, 392 (1992); Norman G. Poythress et al., *Client Abilities to Assist Counsel and Make Decisions in Criminal Cases: Findings from Three Studies*, 18 LAW & HUM. BEHAV. 437, 450 (1994).

32. Although this topic more properly falls under criminal procedure, it is useful to discuss alongside, and in contrast with, the insanity defense. The following chart illustrates the differences between adjudicative competence and the insanity defense (as students *often* confuse the two):

	Adjudicative Competence (Competence to Stand Trial)	Insanity Defense
Legal Status	Not a Defense	A Defense
Legal Inquiry	Capacity to Understand & Participate in Adjudicatory Proceedings	Culpability for the Offense
Required Predicate	Any Reason for Incompetence	Must Have Mental Disease or Defect
Time-Frame of Interest	Current & Prospective	Retrospective (Mental Status at Time of Offense)
Frequency	Can be Raised Multiple Times; Raised Frequently	Raised Once; Raised Infrequently
Who Can Raise Issue	Anyone (Defense, Prosecution, Judge)	Defense
Disposition	Incompetent to Stand Trial	Not Guilty by Reason of Insanity [NGRI]

frequently arises in criminal cases, and is the most common mental health inquiry in the criminal justice system.

The requirement that defendants be competent to stand trial is a basic constitutional due-process requirement necessary for fair and reliable adjudication.[33] Although many attorneys working in the criminal justice system are familiar with the basic legal contours of the adjudicative competence requirement and the procedures for litigating the issue, most lack a deeper understanding of the collateral legal and mental health issues. They also fail to understand the many strategic, ethical, and practical considerations in representing incompetent clients and litigating the issue of client incompetence. Issues to be covered in the first-year course may include how to recognize indicia of client incompetence, the legal standards and procedures for determining competency, the problem of foundational versus decisional competence, and the competency restoration process.[34] Attorney awareness of the importance of adjudicative competence, and how to recognize possible incompetence, will facilitate the detection and early screening of defendants at risk for being incompetent to stand trial.[35]

4. Mental Disorders and Criminal Offending

During the last fifteen years, our scientific understanding of the causes, correlates, and risk factors for particular types of criminal offending has increased dramatically. Significantly, we are discovering the genetic, neurochemical, and neurophysiological bases of violent and criminal behavior. For example, forty years of research has shown that 94% of homicide offenders, 49% to 78% of sex offenders, 61% of habitually aggressive offenders, and 76% of

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33. *See generally* Bonnie, *supra* note 30; Richard E. Redding & Lynda J. Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 VA. J. SOC. POL'Y & L. 353, 353-60 (2001) (discussing adjudicative competence in the adult context).

34. An overview of these issues is provided in Redding & Frost, *supra* note 33 at 353-68.

35. With respect to competency restoration, Jackson v. Indiana, 406 U.S. 715, 737-38 (1972), for example, requires that states attempt restoration only for a "reasonable period of time," after which they must release the defendant or institute civil commitment proceedings. States' failure to legislatively mandate a procedure to provide judicial oversight of the restoration process, combined with ineffective or non-existent attorney advocacy, has led to the detention of many persons for long periods of time, in violation of *Jackson*.

juvenile offenders have a brain dysfunction.[36] Scientists now talk routinely about "the biology of violence," "criminal behavior as a clinical disorder," "the neurobiology of the psychopath," and say that "addiction is a brain disease."[37]

Our new scientific knowledge on the causes and correlates of criminal behavior has direct implications for criminal law and criminal justice policy (e.g., sentencing policy and sentencing decisions, fashioning effective and individualized rehabilitation programs, and assessing a defendant's risk for re-offending) and is directly relevant to criminal law practice. Professors can integrate these issues into a discussion of the purposes of punishment, a topic that typically is already a part of criminal law courses (particularly since mental status issues play a role in defenses other than the insanity defense, including the mens rea defenses and the battered woman's syndrome defense).

For example, neuroimaging studies indicate that many violent offenders have dysfunctional frontal lobes (the part of the brain responsible for impulse control and the ability to delay gratification, planning, and judgment),[38] and thus, evidence of frontal lobe dysfunction is now being introduced in criminal cases vis-a-vis issues of criminal responsibility and mitigation.[39] Consider also just a few of the recent findings from research on sex offenders (some of which can be integrated into the discussion of rape law). A prosecutor handling sex offender cases, for example, benefits from knowing

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36. "Brain dysfunction," however, may include anything from mild deficits to major dysfunction, and the casual link between brain dysfunction and crime is not yet firmly or precisely established. Nathaniel J. Pallone & James J. Hennessy, *Brain Dysfunction and Criminal Violence,* SOCIETY, Sept./Oct. 1998, at 21, 27.

37. *See* DEBRA NIEHOFF, THE BIOLOGY OF VIOLENCE: HOW UNDERSTANDING THE BRAIN, BEHAVIOR, AND ENVIRONMENT CAN BREAK THE VICIOUS CYCLE OF VIOLENCE (1999); ADRIAN RAINE, THE PSYCHOPATHOLOGY OF CRIME: CRIMINAL BEHAVIOR AS A CLINICAL DISORDER (1993); JAN VOLAVKA, NEUROBIOLOGY OF VIOLENCE (2002) (discussing the role of genetics, neurochemistry, neuropsychology, psychophysiology, hormones, and cognitive deficits, and arguing that crime is a clinical disorder); JAN VOLAVKA, NEUROBIOLOGY OF VIOLENCE (1995); James Grisolia, *Neurobiology of the Psychopath, in* VIOLENCE AND PSYCHOPATHY 79 (Adrian Raine & José Sanmartín eds., 2001); Alan I. Leshner, *Addiction is a Brain Disease—And it Matters,* NAT'L INST. JUST. J., Oct. 1998, at 2.

38. *See* Adrian Raine, *Psychopathy, Violence and Brian Imaging*, *in* RAINE, *supra* note 37, at 35.

39. Richard E. Redding, Evidence of Frontal Lobe Dysfunction in Criminal Cases: Emerging Research and Caselaw (unpublished manuscript, on file with author).

about research showing that the overwhelming majority of sex offenders have multiple paraphilias (deviant sexual behaviors), that certain kinds of paraphilias tend to co-occur, that offenders often commit many sex crimes but typically are apprehended for only a few,[40] that physical or chemical castration may be the only treatments that significantly reduce long-term recidivism in many types of adult sex offenders,[41] and that Megan's laws may have counterproductive effects in preventing recidivism.[42] A prosecutor armed with such knowledge has notice to probe for many other (and perhaps particular kinds of) deviant sexual behaviors beyond the instant offense, and can seek to fashion sentencing and parole options consistent with scientific knowledge on recidivism reduction.

5. Sentencing

The relevance of mental disorder, as mitigating evidence (of rehabilitative potential or diminished criminal responsibility) or aggravating evidence (of unamenability to treatment or risk of future dangerousness), can be great at sentencing, particularly in juvenile and capital cases. Professors can give students a brief sampling of the ways in which mental disorders can be risk factors for violence and criminality,[43] the role and validity of clinical and actuarial risk assessments of future dangerousness,[44] and recent research findings

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40. *See* Gene G. Abel et al., *Multiple Paraphilic Diagnoses Among Sex Offenders*, 16 BULL. AM. ACAD. PSYCHIATRY & L. 153 (1988).

41. *See generally* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, & THERAPY (Bruce Winick & John LaFond eds., 2003); Ariel Roseler & Eliezer Witztum, *Pharmacology of Paraphilias in the Next Millenium,* 18 BEHAV. SCI. & L. 43 (2000).

42. *See* Lisa C. Trivits & N. Dickon Reppucci, *Application of Megan's Law to Juveniles,* 57 AM. PSYCHOLOGIST 690 (2002).

43. *See* Jackson v. Indiana, 406 U.S. 715, 737 (1972). It is important to note, however, that although people often assume that many mental illnesses substantially raise the risk for violence, this is not the case. As a class, those with mental illness are only slightly more likely to be violent than the general population. However, a serious mental illness *along with* a substance abuse problem substantially increases the risk of violence. *See Mental Disorder & Violence; The Validity of Clinical Predictions, in* DAVID L. FAIGMAN ET AL., SCIENCE IN THE LAW: SOCIAL AND BEHAVIORAL SCIENCE ISSUES 108-111 (2002). But it is true that mental disorders often are contributing factors to criminal behavior generally, and even chronic criminality is coming to be seen as a clinical disorder partly based in neurobiology and/or genetics. *See supra* notes 36-38 and accompanying text.

44. *See* FAIGMAN ET AL., *supra* note 43, at 108-11.

on effective treatment and intervention programs (discussing whether offenders can be rehabilitated).[45] These topics can be integrated into the discussion of the purposes of punishment, as can the issue of the criminalization of the mentally ill.[46]

In addition, incarcerated offenders with mental disorders have unique treatment needs. Despite constitutional and statutory mandates that prisoners receive necessary medical treatment,[47] the criminal justice system often fails to meet these needs; even though doing so may facilitate rehabilitation, prevent victimization, and improve the behavioral management of these offenders in the correctional facility. Inmates frequently receive inadequate mental health treatment services or no treatment at all, and they may be subject to abuse by prison guards (who generally lack knowledge about mental disorders) or other inmates.[48] Generally overlooked is the real need for post-dispositional legal representation of incarcerated offenders, which I emphasize when discussing representing mentally disordered offenders and sentencing issues.

6. Criminal Justice Reform

If time permits, it is useful to conclude with a brief discussion of recent reform efforts designed to address the problem of mental disorders among the criminal justice population. Consider specialty courts such as mental health courts and drug courts.[49] The philosophy and operation of mental health courts, aimed at reducing justice system involvement and recidivism among those who offend due to

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45. *See, e.g.*, Mark W. Lipsey, *Will the Juvenile Court Stystem Survive? Can Intervention Rehabilitate Serious Delinquents?*, 564 ANNALS AM. ACAD. POL. & SOC. SCI. 142 (1999).

46. *See supra* notes 11-12 and accompanying text.

47. *See generally* FRED COHEN, THE MENTALLY DISORDERED INMATE AND THE LAW (1998).

48. *See* NAT'L INST. OF CORRECTIONS, U.S. DEP'T OF JUSTICE, PROVISION OF MENTAL HEALTH CARE IN PRISONS (2001); Stavis, *supra* note 8, at 179-84; Richard L. Elliott, *Evaluating the Quality of Correctional Mental Health Services: An Approach to Surveying a Correctional Mental Health System*, 15 BEHAV. SCI. & L. 427, 427-38 (1997) (characterizing the mental health services in Georgia's correctional system as a "non-system" of care).

49. *See generally* NICHOLAS N. KITTRIE ET AL., SENTENCING, SANCTIONS, AND CORRECTIONS: FEDERAL AND STATE LAW, POLICY AND PRACTICE 1136-86 (2d ed. 2002); Keele, *supra* note 5, at 197-209.

mental illness, illustrates the ways in which the justice system may be restructured to respond to the mental health needs of offenders.

The relatively recent promulgation of "sexual predator" laws allowing for the civil commitment of sexually violent predators after they have served their full prison term, a practice recently upheld by the United States Supreme Court in *Kansas v. Hendricks*,[50] provides a rich canvas for students to explore issues surrounding how the criminal law defines mental abnormality, punishment and the proper goals of the penal system, and criminal and civil justice system interractions. *Hendricks* is very relevant to criminal law courses, because, as a preventive regime, it poses a challenge to current conceptions of criminal law.

More generally, professors can point out how informed attorneys can promote a reasoned consideration of mental illness by courts when rendering decisions involving forensic mental health law. As Professor Davoli aptly points out, courts are "still stuck in the cuckoos nest," continuing to rely on "antiquated" notions about the nature of mental illness and mentally disordered offenders that are inconsistent with current scientific knowledge.[51]

B. Student Attitudes Towards Including Mental Health Issues in Criminal Law

Knowing how students respond to forensic mental health (FMH) issues and whether students fully appreciate their relevance enhances our effectiveness in teaching about these topics in first-year criminal law. To assess student attitudes, I administered a voluntary, anonymous survey as part of the course evaluation process in my first-year criminal law course. Approximately three weeks of the course were devoted to FMH topics, including criminal responsibility issues, but with an emphasis on adjudicative competence, representing mentally disabled clients, the neurobiological basis of violence and criminality (including the implications for sentencing

50. 521 U.S. 346, 350 (1997) (upholding constitutionality of the Kansas Sexually Violent Predator Act, which permits civil commitment of those likely to commit "predatory acts of sexual violence" due to "mental abnormality").

51. Davoli, *supra* note 22at 988 -89.

and the punishment/rehabilitation debate), and the psychology of battered woman's syndrome.

One hundred and fourteen students (of the 132 students enrolled in the course) completed the survey, which gauged attitudes about the FMH topics taught in the course and general attitudes about mental health evidence. Students were asked to identify their undergraduate major, whether they planned on pursuing a career in criminal law or juvenile justice, and whether they felt that more, less, or the same amount of time should be devoted to FMH issues in future classes. There also were likert-scale questions asking them to rate—from 1 (very negative) to 8 (very positive)—how interesting and relevant they found the FMH topics; how favorably inclined they were towards the use of psychological, psychiatric, or social science evidence in court cases; and how strictly or liberally they felt that judges should construe or interpret the law.

The following summarizes the results, with higher ratings denoting more positive attitudes:

- How interesting were the FMH Topics? Mean = 6.0 (Standard Deviation (SD) = 1.5).
- How relevant were the FMH Topics? Mean = 6.0 (SD = 1.5).
- How favorably do you view the use of FMH evidence? Mean = 5.3 (SD = 1.6).
- Should more time, less time, or the same amount of time be devoted to FMH topics in future classes? More Time = 9.1%; Same Time = 47.3%; Less Time = 43.6%.

Thus, students generally found the FMH topics relevant and interesting, and they felt that three weeks was about the right amount of time to devote to these issues. At the same time, however, 44% felt that too much time was spent on these topics, 14% did not find these topics to be very interesting, and 18% did not find them to be very relevant (rating them below 5 on the likert-scale). The discussion of these topics left students moderately enthused (with an average rating of 5.3) about the use of FMH evidence in court cases, with the class roughly split between those having generally favorable versus unfavorable attitudes.

To ascertain relationships among attitudes and students' backgrounds, I computed correlations[52] between all the survey questions. The statistically significant findings are discussed as follows: Those planning on pursuing a career in criminal law were more interested in the FMH topics ($r=.25$, $p =.01$); students who had majored in psychology as an undergraduate found them to be more interesting ($r=.23$, $p < .05$) and more relevant to criminal law ($r=.20$, $p <.05$) than those who had majored in other subjects, though these relationships were modest; and there was a reasonably strong correlation between how interested students were in these topics and how relevant they found them to be ($r=.49$, $p<.001$).

Not surprisingly, there also was a relationship between the amount of time that students felt should be devoted to FMH topics and how interested they were in these topics ($r=.58$, $p < .001$), how relevant they found them to be ($r=.57$, $p < .001$), and how positively they felt about forensic mental health evidence ($r=.24$, $p < .05$). Those favoring the use of mental health evidence in court cases were more likely to be interested in the FMH topics ($r=.58$, $p<.001$) and to find them relevant ($r=.50$, $p < .001$). Finally, there was a fairly strong relationship between how favorably students viewed mental health evidence and their attitudes towards judicial interpretation ($r=.51$, $p<.001$), and a relationship between students' interest in FMH topics and their attitudes towards judicial interpretation ($r=.37$, $p < .001$). Those favoring a more liberal or expansive approach (rather than a strict constructionist approach) to interpreting the law had greater interest in the FMH topics.

Taken together, these results indicate that students having a prior background in psychology and those planning to pursue a criminal law career had a greater appreciation for the FMH topics, and they

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52. Correlations are denoted as "r" throughout. Only statistically significant correlations are reported ("p" throughout denotes the statistical significance level). Statistical "significance" means that the results reflect findings unlikely to be due to chance. By statistical convention, results are considered significant if the probability value ("p") is less than .05, meaning that the finding would have occurred by chance no more than five times out of one hundred. Correlations (which can range from -1.0 to 1.0, with values nearing zero reflecting an absence of association) reflect the degree of association between variables, but not causal relationships. Generally, correlations lower than .30 are considered modest, correlations between .30 and .50 are moderate, and correlations above .50 or .60 are considered strong.

show a relationship between the perceived relevance of these topics and students' interest level. Moreover, students having more positive attitudes towards FMH evidence and/or those with a more liberal view of judicial interpretation were more likely to have an interest in the FMH topics, a finding consistent with Redding and Reppucci's study on the attitudes of judges and law students towards social science evidence in court cases.[53]

In addition, students were asked to provide comments explaining their ratings on the two questions about interest and relevance. Roughly 75% of the comments were largely positive while 25% were largely negative. To summarize the positive comments, many students said that the FMH topics helped them understand the psychological basis of criminal behavior and the ways in which mental disorders may contribute to criminality; others indicated the topics helped them see the relevance and importance of FMH issues for attorneys working in the criminal justice system and for criminal justice policy. The most common comment was that the FMH topics provided a broader and deeper understanding of the purposes of (and problems with) the criminal justice system, particularly vis-a-vis sentencing policy and the extent to which the criminal justice system should be based on punishment versus rehabilitation. The following comments are representative:

> "It gave me a much broader perspective on our criminal justice system, particularly in terms of what is wrong with it."
>
> "The study of law should not be limited to learning the trade of lawyering. The ability to understand and apply the social policies behind the law aid in serving our clients. I will work in the U.S. Attorney's Office this summer and the materials regarding mental disorder and mental illness will be food for thought."

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53. Richard E. Redding & N. Dickon Reppucci, *Effects of Lawyers' Socio-political Attitudes on Their Judgments of Social Science in Legal Decision Making*, 23 LAW & HUM. BEHAV. 31, 50 (1999) (finding effects of attitudes about judicial interpretation and social science evidence on judgments about the admissibility and relevance of social science evidence in court cases).

> "It forced me to think more deeply about why the criminal did what they did and not just the fact that they committed a crime."
>
> "I think that in order to understand why we punish, and what objective we are trying to achieve, we need to understand why people act in [a criminal] way."
>
> "It is such an important issue in terms of defenses, witnesses, and determining what punishment will or will not be effective. I think it is crucial to proper representation."

The negative comments, however, indicate the concerns professors must address if they are to persuade more students of the value of the FMH topics in first-year criminal law. Learning is enhanced when students appreciate the relevance of course topics. Thus, it is worthwhile to consider how best to respond to student concerns, which were of five varieties:

1. Mental health issues are not law, and we are here to learn the law

For some students, the psychological theory and research inherent in FMH topics was inappropriate content for a first-year criminal law course, even when its relevance to criminal law doctrines or practice was understood. In their view, these topics were insufficiently "legal." Some students also did not care to learn about mental health issues, found it difficult to understand them without a background in psychology, or would rather have spent the time learning traditional criminal law doctrine:

> "Although I found it interesting, I felt that learning more about criminal law would be more interesting."[54]
>
> "Having not taken a basic course in either criminal law or psychology, swallowing them together was difficult."

54. Perhaps I am overly parochial, but I find such comments surprising. One might imagine that students would enjoy inherently interesting topics like human psychology and mental health. Although interdisciplinary topics and approaches are fun for many students, *see* Connolly, *supra* note 20at 39, apparently they are not enjoyed by all.

2. Other topics are more important

Some students were unpersuaded about the importance of the FMH topics relative to more traditional topics taught in first-year criminal law:

> "It is relevant, but there are more fundamental things to learn first in an introductory course."

> "I feel it would be more relevant to a higher-level criminology course – we are supposed to learn the basics."

3. Mental health issues will not be on the bar exam

Law students are pragmatic creatures. Even when convinced of the relevance of FMH issues in criminal law, some students did not think it relevant to a criminal law course because of their perception that such topics would not be on the bar examination:

> "It was interesting, but the fact that it will not be on the bar exam decreases its value."

This concern is not atypical for law school courses with an interdisciplinary flavor. "[P]articularly in a tight job market, hostile student reaction, particularly among first-year students, becomes a severe problem. 'Teach us the kind of law we need to get good grades and pass the Bar rather than irrelevant social slush.'"[55]

4. Mental health issues can be learned, as needed, in law practice

Some students felt that FMH issues were important, but that they could learn about these issues on an ad-hoc basis as they confronted them in law practice. In their view, FMH issues could be learned later, but the basic criminal law doctrines were what they needed to master (and be taught) in law school.

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55. Robert L. Bard & Lewis Kurlantzick, *Law and Society Perspectives in the Basic Law School Curriculum: Critique of an Interdisciplinary Experiment in Freshman Contracts*, 29 J. LEG. EDUC. 66, 68 (1977) (internal quotations omitted).

5. Criminals should be punished—their mental health problems are irrelevant

For students having a strongly punitive approach to issues of criminal responsibility and sentencing, FMH issues were irrelevant—criminals are bad people who should be punished:[56]

> "I just don't think it is all that relevant. I guess I just believe in punishing violent criminals. I have tremendous compassion for people who don't commit murder and other violent felonies."

> "I'm not satisfied that it amounts to anything other than apologetic sentencing."

How may professors preempt and asauge these concerns when teaching FMH topics in first-year criminal law? Of the five concerns, the chief ones appeared to be that other topics were more important, or that the issue of mental disorders among criminal defendants was largely irrelevant because the criminal law should be offense-based and punishment-oriented. The latter attitude is likely to be resistant to change because it reflects an underlying conservative ideological stance towards crime and punishment, though even punishment-oriented prosecutors must confront forensic mental health claims raised by defendants.

I emphasize how often FMH issues arise in criminal practice and how they directly link to practical issues. For instance, after explaining how frequently criminal defense attorneys have concerns about their client's adjudicative competence, we discuss practical issues for attorneys, including: how to recognize and investigate possible client incompetence; the steps attorneys may take to ameliorate client incompetence; how mental disorders common in criminal defendants can impact competence in different ways (with different legal implications); and the tactical and strategic issues to consider when raising and litigating the issue of client competence. I also explain that since most criminal lawyers do not have near the

56. Whether or not some students have this reaction may depend in part on the perspective communicated by the professor concerning the purposes of punishment.

level of expertise that they should on FMH issues, it will likely prove difficult for students to learn about such issues on an ad-hoc basis in practice. Who will have the expertise to teach the FMH issues to them?

As for the related concern that basic concepts are the most important things to learn in first-year criminal law, FMH issues *are* the basics when it comes to working effectively in the criminal justice system. A number of ineffective assistance of counsel claims are raised based on the attorney's failure to pursue mental status issues.[57]

However, some students will remain unconvinced that FMH issues are relevant, even when their link to doctrinal, policy, and practice issues is made explicit. For these students (who, fortunately, appear to be a relatively small minority), first-year legal education should teach legal doctrines and not the extralegal information that informs how and why those doctrines are applied. The objection that such material "will not be on the bar exam" represents the most extreme of these sentiments—reflecting a consumer, jobs-oriented student perspective. Such students are in law school less to learn than to obtain a diploma, pass the bar, and land a job. Yet as law professors appreciate, interdisciplinary perspectives arm students with knowledge and skills eminently useful in practice, providing them with the extralegal knowledge critical for appreciating and solving legal problems, along with an appreciation for the limits of law and legal training. Law is "a profession of process"—a system for ordering, regulating, and mediating human affairs.[58] But law itself is an empty vessel, relying on other disciplines to fill it with the social facts upon which law operates. Thus, law must look to other disciplines for the knowledge and data upon which legal doctrine is shaped.[59] But it can be difficult to sell the relevance of

57. *E.g.*, Starr v. Lockhart, 23 F.3d 1280 (8th Cir. 1994); Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991). *See generally* Michael Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 LAW & HUM. BEHAV. 39 (1992).

58. Richard E. Redding, *Reconstructing Science Through Law*, 23 S. ILL. U. L.J. 585, 585 (1999) (quoting Carl N. Edwards, *In Search of Legal Scholarship: Strategies for the Integration of Science into the Practice of Law*, 8 S. CAL. INTERDISC. L.J. 1, 28 (1998)).

59. *Id.* (As an example, "[l]aw sets doctrines of criminal liability–doctrines based largely on inferring a defendant's state of mind, but law is no criminal psychologist").

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interdisciplinarity to students, particularly given the limited and often excessively career-driven perspective of first-year law students.

III. TEACHING ABOUT MENTAL HEALTH ISSUES IN THE UPPER-LEVEL CURRICULUM

Most law schools do not incorporate many FMH issues in their advanced criminal law courses. Instead, these topics are taught in mental health law courses variously labeled "mental health law," "law and psychiatry," or "mental disabilities law." Competency to stand trial, criminal responsibility issues, and expert mental health testimony appear to be the criminal law topics most often covered in these courses. Only about 10% of law schools substantially include FMH topics in their upper-level criminal law courses (including courses in criminology, which often include FMH issues),[60] and only a handful of schools offer courses specifically on forensic mental health issues in criminal law.[61] About 25% of schools offer neither mental health law nor criminal law courses that substantially address FMH issues.

Confining FMH topics to mental health law courses limits pedagogy in three ways. First, mental health law is a very broad domain. Most mental health law courses and casebooks focus on the *civil* aspects of mental health law[62] (e.g., civil commitment, civil competencies, right to refuse treatment, and the Americans with Disabilities Act); therefore, there is not enough time to delve deeply into criminal law issues, other than perhaps the insanity defense and sometimes adjudicative competence. Second, teaching both civil and criminal mental health law topics in one course often does justice to

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60. I derived these data by reviewing the course offerings of a random sample of fifty accredited law schools. The course offerings of U.S. law schools are available at http://stu.findlaw.com/schools/fullist.html.

61. For example, New York Law School offers "Criminal Law and Procedure: The Mentally Disabled Client" and "Criminal Law and Procedure: Criminals and Our Urge to Punish Them;" the State University of New York at Buffalo offers "Mental Illness and the Criminal Justice System" and "Criminal Reponsibility;" Villanova University offers "Criminal Law and Psychology;" and the University of Virginia offers "Psychiatry and Criminal Law."

62. The leading casebook on mental health law is 1,218 pages in length, longer than most casebooks. *See* REISNER ET AL., *supra* note 21 Only 200 pages are devoted to substantive criminal law and another 100 to evidentiary issues relevant to criminal law.

neither. Moreover, greater focus and integration can be achieved through a course devoted solely to the criminal aspects of mental health law. Third, students who focus their studies in criminal law often do not take courses in mental health law and do not realize the relevance of these courses to criminal law.

A. A Course in Criminal Law and Psychology (Psychiatry)

Recognizing the problems inherent in teaching only a slice of the relevant FMH issues in mental health law courses, the importance of FMH issues for everyday criminal law practice and criminal justice policy, and the level of student interest in criminal law, every law school should have an upper-level criminal law course focusing on FMH topics. Appendix A provides an annotated syllabus and suggested readings for a fourteen-week, three credit-hour course entitled "Criminal Law and Psychology," which I offer, based on my experience in teaching such a course for the past five years.[63] This advanced seminar focuses on the criminal justice system's treatment of mentally disordered offenders. Course topics include: representing mentally disabled clients; adjudicative competence; criminal responsibility; mentally disordered offenders in the criminal justice system; civil and criminal justice system interactions; capital cases; sex offenders; juvenile offenders; and mental health expert testimony.

Central to the course is a case-based approach involving the observation and discussion of written or videotaped forensic clinical evaluations of criminal defendants. The cases are selected to illustrate key legal issues and problems on selected topics in the criminal aspects of mental health law. Teams of students are assigned cases obtained from local forensic psychologists and psychiatrists, or from the book *Forensic Mental Health Assessment*, which provides case material from forensic reports in a variety of criminal and civil

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63. I owe a debt of gratitude to Professor Richard Bonnie at the University of Virginia for his tutelage in the pedagogy of this course, which was first developed, in part, at the Institute of Law, Psychiatry and Public Policy at the University of Virginia School of Law. *See* Richard J. Bonnie & Christopher C. Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation,* 66 VA. L. REV. 427, 429-30 (1980). The course has been variously taught by a number of professors, including Richard Bonnie, Larry Fitch, Lynda Frost, Elizabeth Scott, Christopher Slobogin, and myself.

areas.[64] Students receive copies of the forensic evaluation report, sanitized to remove identifying information, and/or watch a videotaped excerpt of the clinical evaluation.[65] Each team meets with the clinician who performed the evaluation (or a clinician who can guide them through the forensic report), and later present the case to the class through the preparation of a short written case memorandum and oral presentation. The clinician who performed the evaluation is invited to attend the class when the case is discussed. Professors may wish to co-teach the course with a forensic psychologist or psychiatrist.

The course also includes a visit to the forensic unit of a state psychiatric hospital. Hospital staff give students a tour of the facility and an overview of the patient population and the clinical and legal issues they encounter. I arrange in advance with hospital staff for students to talk with one or two of the patients. The staff recruits as volunteers only those patients who can verbalize their experiences, who are competent to provide fully-informed consent, and for whom giving consent would not be counter-therapeutic or ill-advised based on a pending legal case. It is made clear to the patients that they may decline to answer any questions and are free to end the session at any time. The patients typically talk about their illness, whether and how they view it as contributing to their criminal justice system involvement, and their hospital experience. The patients appear to enjoy the opportunity to tell their stories to someone outside the hospital walls. This also is the highlight of the visit for students, providing a consciousness-raising experience about persons with mental illness and a glimpse at the reality of mental hospitals. Students come away with an appreciation that the mentally ill are much more "normal" than common stereotypes suggest and with a better understanding of how mental illness may contribute to criminal behavior.

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64. KIRK HEILBRUN ET AL., FORENSIC MENTAL HEALTH ASSESSMENT: A CASEBOOK (2002) (including forensic reports on waiver of *Miranda* rights, adjudicative competence, competence to be executed, sentencing, juvenile commitment, juvenile adjudicative competence, juvenile transfer, insanity, and diminished capacity).

65. Some forensic clinics, particularly those at universities, may be willing to videotape evaluations with the client's consent for use in instructional settings.

IV. CONCLUSION

Beginning with the first-year criminal law course, forensic mental health topics, such as: adjudicative competence; representing mentally disabled clients; assessing the mental health needs of various offender groups, and how these unmet needs may contribute to criminal behavior; and using mental health evidence in sentencing, can feasibly be incorporated throughout the criminal law curriculum. Doing so presents challenges along with opportunities. The challenges include finding time to teach such topics in an already tight course schedule, student resistance to non-traditional topics, and professors' possible lack of expertise. However, the opportunities, which include educating students about important issues they will face in criminal law practice while also providing them with an interdisciplinary perspective on the criminal justice system, are far greater.

The inclusion of forensic mental health topics in criminal law courses represents another step in the increasing interdisciplinarity of legal education that is necessary to equip students with the knowledge needed for modern criminal law practice. An awareness and appreciation of mental health issues will make attorneys working in the criminal justice system better able to represent their clients and better equipped to serve the ends of justice. Pedagogically, it will foster students' understanding of the criminal justice system, perhaps more so than many of the traditional doctrinal lessons we now teach.

APPENDIX A

ANNOTATED SYLLABUS FOR A SEMINAR COURSE IN CRIMINAL LAW AND PSYCHOLOGY

Session 1-Course Introduction: Introduction to Psychopathology
Assignment: *Perspectives on Mental Disorder*, *in* RALPH REISNER, ET AL., LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS (1999); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xv-xxv, xxvii, 8-9 (4th ed. 1994); NANCY C. ANDREASEN, THE BROKEN BRAIN 34-63 (1984).

The first class is devoted to an overview of the nature of mental illness, the classification of mental disorders, and the mental health professions. It is helpful to invite a psychologist or psychiatrist as a guest speaker on these issues. It is important to point out to students that there is not a one-to-one relationship between particular mental disorders and legal concepts. Rather, functional impairments and behaviors in particular situations are what matter. For example, not every defendant with schizophrenia will be incompetent.

Session 2-Introduction to Psychopathology (cont'd) and Introduction to Forensic Mental Health Assessment
Assignment: *The Nature and Method of Forensic Assessment*, *in* PSYCHOLOGICAL EVALUATIONS FOR THE COURTS 41 (Gary B. Melton et al. eds., 1997).
Video (one hour): *Looking at Abnormal Behavior*, Video 1 *in* THE WORLD OF ABNORMAL PSYCHOLOGY SERIES (Annenberg/CPB Collection 1992).[66]

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66. Available from the Annenberg/CPB Collection. *See* Anneberg/CPB, Homepage, *at* http://www.learner.org. Students are also required to view two other hour-long videos (also available from Annenberg) on Mood Disorders and the Schizophrenia-Spectrum Disorders—two major classes of mental disorders frequently encountered in forensic criminal contexts. The videos are outdated (mainly vis-a-vis current knowledge on the biological basis of serious mental illness), but nonetheless provide good introductory overviews.

The second class continues to introduce students to mental disorders and the mental health professions. Students are also introduced to the nature of forensic mental health assessment (e.g., how it differs from therapy and typical clinician-client relationships, ethical considerations, the nature of forensic reports, the ability of clinicians to determine malingering, and the question of whether clinicians should provide conclusions about the ultimate legal issue). The one-hour video, though a bit dated, provides a good introduction to the ways in which mental health professionals assess mental health problems and the various theories and modalities of treatment intervention.

Session 3-Adjudicative Competence
Assignment: Richard E. Redding & Lynda E. Frost, *Adjudicative Competence In the Modern Juvenile Court*, 9 VA. J. SOC. POL'Y & L. 353, 353-68 (2002); Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond* Dusky *and* Drope, 47 U. MIAMI L. REV. 548 (1993); Godinez v. Moran, 509 U.S. 389 (1993).

Session three introduces students to the most frequently encountered forensic mental health issue: adjudicative competence. It is important to make clear to students that adjudicative competence is distinct from other criminal competencies (e.g., competency to confess, to plead guilty, or to be executed). After an introduction to the substantive legal and procedural issues, including a discussion of the important practical distinction between foundational and decisional competence, students are shown videotape excerpts of the clinical evaluation of a mentally disordered but competent client and an evaluation of an incompetent client. The two contrasting cases illustrate the boundaries of competence and how mental disorder can differentially affect competence.

When watching the videotapes, students are asked to consider whether they observe any symptoms of mental disorder or indicia of incompetence, how such symptoms might adversely affect client competence, the ways in which the client may be foundationally competent but not decisionally competent, and what steps the attorney might take to facilitate the client's competence in assisting

with their defense. The session concludes with the *Godinez* case, which explicates the law on whether foundational and decisional competence may be disaggregated, and thus sets up the discussion of the cases for the next class.

Session 4-Adjudicative Competence and the Attorney-Client Relationship
Assignment: Thomas R. Litwack, *The Competency of Criminal Defendants to Refuse, for Delusional Reasons, a Viable Insanity Defense Recommended by Counsel*, 21 BEHAV. SCI. & L. 135 (2003); Josephine Ross, *Autonomy Versus a Client's Best Interests: The Defense Lawyer's Dilemma When Mentally Ill Clients Seek to Control Their Defense,* 35 AM. CRIM. L. REV. 1343 (1998); Joel S. Newman, *Doctors, Lawyers and the Unabomber,* 60 MONT. L. REV. 67 (1999).

The case studies provided by Professors Litwack and Ross, and the Unabomber case, vividly illustrate the many legal and ethical dilemmas attorneys face when representing a client who, although found competent to stand trial, is incompetent to make key strategic decisions normally left to the client (e.g., whether to plead guilty or to plead insanity).

Session 5-Criminal Responsibility and the Insanity Defense
Assignment: *The Insanity Defense*, *in* MURRAY LEVINE & LEAH WALLACH, PSYCHOLOGICAL PROBLEMS, SOCIAL ISSUES, AND LAW 41 (2002); *The Schizophrenic Mind*, NEWSWEEK, Mar. 11, 2003, at 44.

Though designed as an advanced undergraduate textbook, the chapter in the Levine & Wallach text provides an excellent integrative overview of the law and history of the insanity defense, common myths about the insanity defense, the role of expert mental health testimony, and reform proposals. Since schizophrenia is probably the most common mental disorder encountered in insanity cases, this class provides an opportunity to describe in greater detail

the nature and symptoms of schizophrenia. This session concludes with two videotape excerpts of forensic mental status evaluations, one illustrating a defendant found legally insane and another showing a case involving an unsuccessful insanity plea (these case discussions usually carry over into class session 6).

Session 6-The Insanity Defense (cont'd), Capital Sentencing
Assignment: *Use of Psychiatric Experts in Capital Cases*, *in* RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 527-54 (2d ed. 2001); Richard J. Bonnie & C. R. Showalter, *Psychiatrists and Capital Sentencing: Risks & Responsibilities in a Unique Legal Setting,* 12 BULL. AM. ACAD. PSYCHIATRY & L. 159 (1984).

Capital cases offer a rich context in which to explore the use of mental health evidence and expert testimony in sentencing because such evidence is so ubiquitous in these cases and because capital defendants have an especially high prevalence of mental (particularly neuropsychological) disorders. It is useful to invite defense attorneys and mental health experts who have worked together on capital cases as guest speakers. These cases also provide a good opportunity to discuss risk assessment, since a consideration for the capital sentencing jury in some states is the likelihood of future dangerousness.

Session 7-Risk Assessment in Conditional Release [NGRI] Planning and Criminal Sentencing, Mental Disorder and Violence
Assignment: *Disposition of Mentally Disordered Offenders, in* RICHARD J. BONNIE ET AL., CRIMINAL LAW 514-38 (1997); *In Sentencing*, Chapter 9, § 9.09 (*Violence Prediction & Risk Assessment*), *in* PSYCHOLOGICAL EVALUATIONS FOR THE COURTS 277-93 (Gary B. Melton et al., eds. 1997); *Clinical and Actuarial Predictions of Violence*, Chapter 2, § 2-2.2.1 et seq. (*Mental Disorder & Violence; The Validity of Clinical Predictions*)*, in* DAVID L. FAIGMAN ET AL., SCIENCE IN THE LAW: SOCIAL AND BEHAVIORAL SCIENCE ISSUES 108-11 (2002); RICHARD J. BONNIE ET AL., A CASE

STUDY IN THE INSANITY DEFENSE: THE TRIAL OF JOHN W. HINCKLEY, JR. 139-56 (2d ed. 2000).

Informal (by legal actors) or formal (by mental health professionals) risk assessment occurs throughout the criminal justice process and informs legal decisions concerning diversion, sentencing, parole and release. This session introduces students to: the use of risk assessment in the criminal justice process, key Supreme Court cases on the use of clinical risk assessment, the accuracy and reliability of risk assessment, and its use in legal decision making. The session concludes with a discussion of recent research findings on the relationship between mental disorders and violence, and the implications for risk assessment and legal policy generally. If time permits, the *Hinckley* case provides a good vehicle for exploring the legal and clinical issues in conditional release decision making (as discussed in the Bonnie et al. assignment).

Session 8-Sex Offenders
Assignment: AM. PSYCHIATRIC ASS'N, DANGEROUS SEX OFFENDERS, A TASK FORCE REPORT OF THE AM. PSYCHIATRIC ASS'N (1999); Kansas v. Hendricks, 521 U.S. 346 (1997); G. Abel et al., *Multiple Paraphilic Diagnoses Among Sex Offenders*, 16 BULL. AM. ACAD. PSYCHIATRY & L. 153 (1988); *Sexual Aggressors*, Chapter 3, § A (*Legal Issues*), § 3-2.4 to 2.6, *in* DAVID L. FAIGMAN ET AL., SCIENCE IN THE LAW: SOCIAL AND BEHAVIORAL SCIENCE ISSUES 114-37, 164-66 (2002).

With sex offenders, the intersection between legal and mental health issues is fascinating and especially problematic, illustrating how the legal system struggles to define the boundaries of mental disorder and the constitutional dilemmas in using the state's police power to confine those deemed dangerous due to mental abnormality. Sex offenders also provide excellent examples for studying the psychology of patterned, repetitive criminal behavior. The session includes a discussion of current law and controversies surrounding sexual predator commitment and community registration and notification laws. A brief overview is also provided on current

scientific knowledge about the treatment (do any treatments work?) and recidivism rates of sex offenders, which has significant implications for sentencing policy.

Session 9-Visit to Forensic Unit of a State Psychiatric Hospital
Assignment: MARTHA MANNING, UNDERCURRENTS: A LIFE BENEATH THE SURFACE 109-23 (1996).

The reading assignment provides an illuminating portrait of daily life in a psychiatric hospital, as recounted by a former psychiatric patient.

Session 10-Discuss Hospital Visit, Student Case Presentations

The student teams begin presenting their cases in this class session. Each case presentation and discussion is about thirty to forty minutes in length.

Session 11-Criminality and Mental Illness, Criminal and Civil Justice Systems Interactions
Assignment: H. Richard Lamb & Linda E. Weinberger, *Persons with Severe Mental Illness in Jails and Prisons: A Review,* 49 PSYCHIATRIC SERV. 483 (1998); Paul F. Stavis, *Why Prisons Are Brim Full of the Mentally Ill: Is Their Incarceration a Solution or a Sign of Failure?,* II CIV. RTS. J. 157 (2000); N.J. Pallone & J.J. Hennessy, *Brain Dysfunction and Criminal Violence*, SOCIETY, Sept./Oct. 1998, at 21; Alan I. Leshner, *Substance Abuse is a Disease: And It Matters*. NAT'L. INST. JUST. J., Oct. 1998, at 2; Joel Feinberg, *Sickness and Wickedness: New Conceptions and New Paradoxes*, 26 AM. ACAD. OF PSYCHIATRY L. 475 (1998).
Video (45 minutes): *Geraldo Rivera: Back to Bedlam* (NBC TELEVISION BROADCAST, MAR. 12, 1999).

This session is designed to give students an appreciation for emerging research on the neurobiological basis of criminality (and substance abuse), the criminalization of the mentally ill, mentally disordered offenders in the criminal justice system, and the problem

of the revolving door or transinstitutionalization between the civil mental health and criminal justice systems. The Geraldo Rivera documentary, which vividly portrays how the mental health and criminal justice systems fail the mentally ill, is outstanding.

Session 12-Juvenile Offenders and Amenability to Treatment
Assignment: Julian W. Mack, *The Juvenile Court,* 23 HARV. L. REV. 104 (1909); *Juvenile Court and the Legal Processing of Children and Adolescents*, *in* MURRAY LEVINE & LEAH WALLACH, PSYCHOLOGICAL PROBLEMS, SOCIAL ISSUES, AND THE LAW 238 (2002); Office of Juvenile Justice and Delinquency Prevention, *Serious and Violent Juvenile Offenders,* JUV. JUST. BULL. (1998); Richard E. Redding, *Rehabilitating the Souls of Violent Boys,* 47 CONTEMP. PSYCHOL. 386 (2002); *Rehabilitation Evaluations, in* Thomas GRISSO, FORENSIC EVALUATION OF JUVENILES (1998); DOUGLAS E. ABRAMS & SARAH RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE 1053-63 (2000).
Exercise: Judging Amenability to Treatment.

Because the juvenile justice system offers the best example of a system designed to integrate mental health and rehabilitation into criminal justice policy and practice, it offers a wonderful and more particularized context in which to explore, from a policy perspective, many of the topics already discussed in the course: How should mental disorders be considered in determinations of criminal responsibility and sentencing; what is the proper balance between punishment and rehabilitation; can we determine who is treatable; and how might rehabilitation enhance community protection? The session includes an overview lecture and discussion on the purposes of a separate court system for juveniles, the basic operation of the juvenile court (from court intake to disposition), dispositional alternatives available in juvenile court, the nature of juvenile delinquency (e.g., types of offenses and offenders and common characteristics of chronic and serious offenders), and recent research on key risk factors for delinquency and effective treatments.

Session 13-Juvenile Offenders and Amenability to Treatment (cont'd), Student Case Presentations

The discussion of juvenile offenders concludes with an introduction to the problem of serious and violent juvenile offenders and an overview of the types of state "transfer" or "waiver" laws allowing the adjudication and sentencing of these offenders as adults. Determining a juvenile's amenability to treatment in the juvenile justice system is discussed in this context, with an emphasis on how such determinations are made (by prosecutors, judges, and court personnel), and whether they can be made reliably. To illustrate how varied these judgments may be, I show short video excerpts of real or mock interviews with juvenile offenders; I ask students to judge each child's amenability to treatment on a scale of 1 to 10 and to provide reasons for their judgments. Students' amenability ratings and rationales vary considerably, which mirrors what often occurs with judges and prosecutors in real-life cases.

Session 14-Student Case Presentations
Course Wrap-Up