

Law for Medical Students and Physicians: Mental Health Issues

Wheaton B Wood, MD JD

This is the fourth edition of this course, and will include changes as follows:

- 1) 9 broad topics
- 2) Shorter written notes
- 3) Simpler format
 - a. Initial true-false questions
 - b. Topic presentation
 - c. Final true false questions
- 4) Lecture differs from lecture notes: it presents cases from Ohio that demonstrate the points of law covered in the notes.
- 5) There will be a final exam the basis of which is the cases, and the true-false questions.

Initial True-false Questions

- 1) If someone is hearing voices that tell them to kill innocent girl scouts, they must be committed to a hospital.
- 2) Someone who has a colonoscopy, is given sedatives, and becomes wild because of the sedatives and beats up a policeman, has no defense from conviction for a crime because intoxication is not a defense against conviction for a crime
- 3) 2% or less of psychotic people are violent, but 10% of violent crimes are committed by psychotic people (+/- 10% error).
- 4) A sexual predator rapes 7 women. He is caught. He is convicted of these crimes and spends 12 years in prison in Ohio. Upon serving his term, he says he plans to go back to raping people. If he has no identifiable mental illness, he may be released when his sentence is served.
- 5) You are at the ER. A “frequent flier” shows up hallucinated and odd, and has a firm diagnosis of schizophrenia. Unpleasant and time consuming but not dangerous, you pink slip him to the State Hospital, as they can better handle him than can your busy ER. This is false imprisonment.

I: Mental Health Issues: Introduction

In all societies, persons who are irrational because of mental illness are at least immobilized from harming self or others, or possibly treated. Mental illness – especially severe mental illness such as schizophrenia, bipolar disorder, psychotic depression, and borderline personality disorder – are not culturally determined phenomena. They are illnesses, recognizable in all cultures, and subject to medical treatment.

All cultures, especially modern constitutional democracies, struggle with an inherent tension in the above: people made dangerous to themselves or others by their mental illness must be saved from their own violent impulses, while ill; but since mental illness are precisely that – mental productions – the lines between marginal illness and

marginal health can be blurred, and there must be restraint in incapacitating people because of their mental productions.

II: Mental Health Issues: Dangerousness

About 2 % of people will have a psychotic illness during their lives; about 10% will be depressed (some of them being psychotically depressed); and about 15% of people (overlapping with the above categories) will experience severe personality disorders excluding antisocial (a separate 10%).

14 people per 100,000 will kill themselves in Appalachia this year; significantly more will kill someone else, either intentionally or recklessly.

90% of suicides are depressed, 50% of suicides and homicides are committed by intoxicated persons, 10% of violent crimes are committed by severely mentally ill persons; and borderline personality disorder carries a 10-12% lifetime suicide risk.

Can you tell who will do what to whom, when, based on the above?

In Ohio (and most other US states and Western European countries) one may be detained in a mental hospital against one's will if:

- a) A mental health worker or any physician or peace officer...
- b) ...reasonably believes....
- c) ...that such person is mentally ill, and
- d) ...because of that illness is imminently dangerous:
- e) To self (by suicide or failure to care for self)
- f) Or others (by aggression).

It is that simple, but each element must be addressed. As a physician, you have the power to detain someone whom you believe is dangerous as stated above; your decision will be reviewed, and may be right, or wrong, or indeterminate. [Bronaugh v Harding Hospital (1967) 12 Ohio App. 2d 110].

Your problem is: if you go outside the statute, you are committing false imprisonment, but luckily for you it is construed in this case as medical malpractice [In re Boggs (1990) 50 Ohio St. 3d 247]; but if you fail to detain a person whom you should have detained, and the danger which should have been predicted occurs, you are also subject to malpractice liability [Littleton v. Good Samaritan Hospital (1988) 39 Ohio St. 3d 86 *but cf Estates of Morgan*].

There are two special case of dangerousness in the mentally ill. One is the sex offender, discussed in section V below. One is the mentally ill person announcing a credible plan to harm a specific individual. This is the so-called "Tarassoff situation" which is covered by a specific statute in Ohio. That we will deal with briefly here.

"Tarassoff" was a woman in California murdered by a psychotic man. The man told his therapist he would murder, his reasons were delusional, and he did murder her. The therapist was concerned but thought them self estopped from revealing confidential material. The California Supreme Court disagreed, saying that this situation is an exception to patient-therapist confidentiality: a mentally ill person, with a specific and

credible plan, and an identified victim, is not covered by the confidentiality statute, but in fact may report, and in fact, must either warn the victim, summon law enforcement in a way calculated to prevent the attack; or hospitalize (thus incapacitating the predator).

In Ohio this is stated slightly differently in a statute (...) which says: no person who otherwise should hold medical or mental health information as confidential, shall be penalized if they either warn the victim, incapacitate the predator, or summon law enforcement help, in a situation where a reasonable mental health worker would believe the threat, and had identity of the victim sufficient to find them. [Estates of Morgan v. Fairfield Family Counseling Center (1997) 77 Ohio St. 3d 284].

Would such a person be committable? How about if they were dangerous, like a rapist, but not mentally ill (just mean)?

III: Mental Health Issues: Hospitalization (Probate)

Once you decide that a person is more likely than not mentally ill, and is either fairly likely to do a very dangerous thing, or highly likely to do a not-so-dangerous thing, and that incapacitation (rather than medicine) is required to prevent the harm, then you really must fill out a form and call law enforcement to take this person for detainment in a mental health facility.

If this person also has an identified victim, in most circumstances you should (and will not be penalized if you do) warn the victim, and tell them what happened.

Why should you warn them, if you have already called the police? The mentally ill person may escape, or the police may not respond.

Substance use disorders and plain old antisocial personality disorder (being a criminal) are not considered mental illnesses for purposes of the above. There are numerous shades to that truth, some discussed below. [State v. Fox (1981) 68 Ohio St. 2d 53].

Once the patient is detained by the mental health system, they shall be examined by a licensed physician within 24 hours of such detainment; who shall, within 48 hours, either move to dismiss the patient, to seek commitment of same, or to convince such patient to become a voluntary patient. [In re Miller (1992) 63 Ohio St. 3d 99].

The US Supreme Court has ruled, however, that a sham voluntary admission is actually an involuntary, subject to the due process considerations in discussion in this section. A sham voluntary would be taking an actively hallucinated disorganized man a saying "sign this paper, and I will give you a cigarette."

The patient if sought to be committed, has a right to counsel, [In re Fisher (1974) 39 Ohio St. 2d 71] and can appear in a probate court section, to try to prove why he should not be committed. Evidence rules are purposefully relaxed in such a session; and usually the hospital keeps the patient.

The mentally ill committee then has rights for periodic review of his fitness for discharge.

When the state takes charge of a patient in this way, the patient has a right to adequate health care [In re Burton (1984) 11 Ohio St. 3d 147] ; and also to refuse health care (including psychotropic medicines) unless such refusal places patient or others unreasonably at risk, where medicine would reduce that risk without undue harm to the patient [Steele v. Hamilton Co. Comm. Mental Health Board (2000) 90 Ohio St. 3d 176].

IV: Mental Health Issues: Defenses from Criminal Prosecution

Not Guilty by Reason of Insanity (Can't be convicted). If someone commits a crime, but does so because of a disease of the mind such that either they did not know that what they were doing was wrong or they knew but could not stop themselves, and this condition of mind obtained at the time of committing the crime, they may be not guilty by reason of insanity.

Examples of the above: Did not know the act was wrong: Man has delusions, that he has an important job, and needs a car to get to his job; and that a certain blue car parked on the street is his car; so he takes it, except a) he has no job and b) the car is not his. NGRI. Woman has delusion that unless she kills her grandmother, the evil spirits will take her baby to hell and torment it forever, so feels incapable not to kill grandma, because she is thereby saving baby. NGRI (probably).

Incompetent to Stand trial (restorable, or unrestorable) (Can't be tried): If a mentally ill person is so disorganized, bizarre, deluded, or confused that he cannot help his lawyer defend him, or even understand the charges against him, then he is incompetent to assist in his own defense (which is a constitutional right in criminal cases). In that case, a person cannot be tried until he is competent to assist. If he can be made competent to assist, he is restorable; if not, he is unrestorable. [State v. Muncie (2001) 91 Ohio St. 3d 4409forced medication for restoration];[State v. Tibbetts (2001) 92 Ohio St. 3d 146 {mentally ill not equal to incompetent}].

Incompetent to be executed. Because the death penalty is a penalty it is meant to be unpleasant (but not barbarous). Therefore, if someone is so deluded that he is set to be executed, but thinks he is actually going out for an ice cream cone, then the punishment is no longer rational, and hence is cruel and unusual (barbarous). Several cases like this have recently been litigated: man kills in cold blood, with intent, for robbery or revenge; is tried, and sentenced to death; then goes insane on death row. Cannot be executed: because unable to appreciate his impending death. Obviously, there would be gradations of mental illness, some of which would not prevent execution. Similarly, retarded persons are not subject to the death penalty by definition, as most likely being unable to appreciate the reason for and the impending nature of their death. [State v Lott (2002) 97 Ohio St. 3d 303].

Forced medication to make someone competent to be executed. This gets a little odd, but is actually reasonable if you understand the above. If the insanity of the death row inmate can be reversed by medicine, but prisoner refuses the medicine, can he be forced to take medicine which will make him understand the penalty of death? Short answer, yes, if the medicine is not unreasonably harmful (side effects) (even though another side effect is death by lethal injection) because the state has an important interest in putting certain criminals to death.

V: Mental Health Issues: Sex offenders

This brings us to sex offenders, a most difficult issue. In the California prison system, as many as 10% of prisoners has committed a sexual offence. In a control group of college students, five percent had committed sexual offences. The college students were most likely to commit voyeurism, whereas the prisoners' crimes were more likely to involved force.

When a person commits a sexually motivated crime – and has another mental illness not related to the sexual offense – we may suppose that treatment of the non-sexual illness may reduce the chance of re-offense of the sexual crime. Unfortunately, however, it is not clear that this is so. It is clear that having a mental illness other than the sexual perversion does predispose to re-offending; and of course, sexual offenders are notoriously hard to treat and notoriously tend towards re-offense.

All of the above being so, can a sexual offender who has a mental illness be locked up indefinitely in a mental hospital for a mental illness for which otherwise he could not be so locked up? That is, can a sexual pervert (a paraphiliac) with an anxiety disorder be committed indefinitely, for anxiety, because, having committed a sexual offense, and having anxiety, he is more likely to sexually re-offend? Yes, at this time, that can happen, and will be happening in Ohio. [State v. Williams (2000) 88 Ohio St. 3d 513]. The state hospitals will have more and more of the mentally ill sexual offenders kept for long periods of time in the mental hospitals.

The logic here is that, since a person who has a mental illness is more likely to offend, regardless of the mental illness, therefore he is more likely to be dangerous to others because of the mental illness. Add to that the fact that most paraphilias are mental illnesses and so almost any sexual offense can be construed to derive directly from a mental illness; and you can see why society has argued that sex offenders who are mentally ill can be detained indefinitely. This problematic reasoning stems in part from the lack of effective treatments for sexual offenders; and in part from the horror with which people behold these offenses.

VI: Conclusion:

Mental illnesses are illnesses, not social constructs; but illnesses of mood or mentation. When dangerous actions are elaborated as a result of these illnesses, society may take action to incapacitate the mentally ill person until such time as they are less likely to harm themselves or others. Merely harmful people are put in prison. The exception currently is mentally ill sexual offenders, who can be placed in hospitals for behaviors which may be unrelated to their mental illnesses. There are rules based on constitutional principles, which govern the incapacitation of mentally ill people, and mentally ill criminals.

Final True-false Questions

- 1) A person is an alcoholic; when drunk, he tends to attempt suicide. Since alcohol dependence is a mental illness in the DSM, and since when he drinks he is at risk to commit a grave injury to himself, therefore he may be committed until such time as his alcoholism is cured.
- 2) A woman has schizophrenia, and four times in the past has required prolonged hospitalization for delusions which command her to threaten to kill the president. Each time, the secret service have interviewed her and found her not a threat. Threatening to kill the President is, however, a crime. She begins to decompensate, and will not take the medicines which make her delusions better. You may detain her as a mentally ill person dangerous to herself.
- 3) A man has an insane urge to jaywalk, and is severely injured many times because of it. Nowhere does his exact illness fit into any DSM criteria except "Mental illness not otherwise specified (nonpsychotic)". He can be indefinitely hospitalized until not likely to jaywalk (and be killed or maimed).
- 4) Murder (first degree homicide) is punishable by death in Ohio. A man picks up two hitchhikers, they all three get drunk together in his car, in Perry County, and he kills them with a pistol. When taken into custody, he is so drunk he does not know where he is, or even that he has killed people. In Ohio, to commit murder, you must intend to kill the person whom you have killed. Because voluntary intoxication is never an excuse for crime, he may be tried and sentenced to die.
- 5) You are in the ER. A person with a known history of schizophrenia comes into the ER. This person is known both to be alcohol dependent, but also to be lethally suicidal when psychotic or drunk. You honestly cannot differentiate whether they are psychotic and mildly drunk, or just very drunk and irrational; but they are definitely suicidal. You may detain and send to the mental hospital, and that is not malpractice.

VI: Table of Cases

Bronaugh v Harding Hospital (1967) 12 Ohio App. 2d 110
Estates of Morgan v. Fairfield Family Counseling Center (1997) 77 Ohio St. 3d 284
In re Boggs (1990) 50 Ohio St. 3d 247
In re Burton (1984) 11 Ohio St. 3d 147
In re Fisher (1974) 39 Ohio St. 2d 71
In re Miller (1992) 63 Ohio St. 3d 99
State v. Fox (1981) 68 Ohio St. 2d 53
State v Lott (2002) 97 Ohio St. 3d 303
State v. Muncie (2001) 91 Ohio St. 3d 440
State v. Tibbetts (2001) 92 Ohio St. 3d 146
State v. Williams (2000) 88 Ohio St. 3d 513
Steele v. Hamilton Co. Comm. Mental Health Board (2000) 90 Ohio St. 3d 176