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Lauren M. Pappacena

Fordham University, laurenmpappacena@gmail.com

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The Social Worker's Role in Ensuring Quality Counsel for Defendants with Mental Illness

Lauren Pappacena
Fordham University

The current literature surrounding the intersection of criminal justice and mental health is addressed. First, the history of overrepresentation of individuals with a mental health disorder in the criminal justice system is discussed, followed by a discussion of the current gaps in the literature. These gaps need to be addressed to inform better practices among public defenders and their decision-making role with clients who have a mental health disorder. The lack of research is evident in ambiguous judicial guidance in ensuring that defendants with a mental health disorder are able to exercise autonomy relevant to their case. Social workers are professionally positioned to advocate for this population, in a way that public defenders are not.

Keywords: criminal justice, mental health, public defenders

The overrepresentation of individuals with a mental health disorder (MHD) in the prison population demonstrates the need to address structural inadequacies of the mental health system in the United States (Torrey, 1995). Psychotropic medications and the defunding of state-run mental health facilities redirected mentally ill individuals into the community despite an absence of resources for addressing their clinical needs (Kim, 2016). Unsupported and untreated, many of these individuals found themselves in the custody of the criminal justice system, which was and continues to be under resourced and ill-suited to provide adequate mental health treatment (The Sentencing Project, 2002; Torrey, 2010).

As the prison population increases each year, so does the percentage of imprisoned individuals who experience a mental illness. A 2012 study suggests that out of a sample of 20,000 arrestees, 17% (14.5% of men and 31% of women) had a severe mental illness (Osher, D'Amora, Plotkin, Jarrett, & Eggleston, 2012). This finding is three times higher than the prevalence of mental illness in the general public (Osher et al., 2012). Thereby, the prison system is currently situated as the primary institution providing care to individuals with a MHD (Torrey, 2010). Given this reality, the justice system is continually targeted in discussions of advocacy for this population, and consequently, public defenders assume the bulk of this responsibility.

Given that comprehensive mental health treatment is beyond the scope of the criminal justice system, there is an absence of policies and procedures to assist courts in appropriately processing individuals with MHD (Aufderheide & Brown, 2005). Courts are posi-

tioned as an intermediary platform between mentally ill offenders and the jail or prison system. Individuals with MHD who encounter the justice system are statistically predisposed to longer, harsher sentences and experience higher rates of recidivism than their counterparts without MHD (Baillargeon, Binswanger, Penn, Williams, & Murray, 2009; Canada & Watson, 2013). This can be attributed to the fact that individuals with MHD have greater difficulty understanding and navigating the legal system and coping with the associated stressors of being in a disciplinary setting (Hoge et al., 1996). Judges, who are presented with a lack of viable treatment options as alternatives to incarceration for these individuals, base sentencing decisions on the interest of public safety and providing the individual with treatment and a standard of living that may be unrealistic for them outside of prison (Denckla & Ber- man, 2001).

Negotiating Autonomy and Mental Illness

The concept of autonomy is understood as the ability to advocate for one's interests independent of restriction (Murdach, 2011). Client autonomy is a modern hallmark of the social work profession (National Association of Social Workers, 1999). Buoyed by the values of the Charity Organization Societies of the late 19th century, ideas of client paternalism proved detrimental to promoting the wellbeing of clients (Shulman, 1999). Today, the profession has evolved to allow clients to take on the role of decision makers rather than passive recipients (Shulman, 1999). This idea of client autonomy becomes problematic when working with a popu-

lation that has MHD. Public defenders do not receive specialized training to inform better client–attorney relationships when representing individuals with MHD; however, social workers possess knowledge of available resources and understand the best practices when working with this population (Denckla & Bernman, 2001). This finding underscores the need for empirically-informed practice in working with this population.

Autonomy and satisfaction with outcomes have shown to have a strong positive relationship (Lind, Kafner, & Earley, 1990); however, whether or not this relationship holds true when applied to a population with MHD has yet to be addressed. Adams, Drake, and Wolford (2007) assessed decision making preferences in severely mentally ill adults in a community mental health center and found that individuals desired to be more active decision makers regarding their mental health care than they currently were (Adams et al., 2007). Health center residents demonstrated a strong preference for shared decision making or being able to participate in an active, meaningful, and well-informed way (Adams et al., 2007). These findings support the desire within this population for a degree of authority in the decisions that impact them. Further research is required to assess if these findings are consistent in a criminal justice setting.

Challenges Faced by Defenders

Within the courts, public defenders take on the majority of the responsibility in representing defendants with a MHD (The Southern Center for Human Rights, 2013). Representing an individual with a MHD presents public defenders with a range of obstacles. Defense attorneys need to judge to what extent a client with a MHD is capable of making informed decisions that uphold their best interests, assess the client’s ability to deliver beneficial testimony, and balance the responsibility of servicing the legal and clinical needs of their client (Fisler, 2015). In working with defendants who have a MHD, this becomes a delicate balance between honoring a client’s right to self-determination and honoring a professional obligation to advise clients on the legal process (Slobogin, 2009). The literature supports that individuals with MHD are more receptive to efforts that respect their autonomy given their relatively low status in society and the stigma that accompanies a mental health diagnosis; this is especially true when these individuals interact with law enforcement, lawyers, and judges who occupy a relatively high status in society (Tyler, 1992; Watson & Angell, 2007).

Need for Judicial Regulation

The American Bar Association (ABA; 1980, 2016) refers to two documents to guide an equitable and non-coercive, attorney–client relationship: The Model Code of Professional Responsibility and the Model Rules of Professional Conduct. However, neither document is clear on the nature of attorney–client decision making. Consultation with clients regarding strategy and procedure is left to the lawyer’s personal judgment that the consultation is “feasible and appropriate” (Uphoff & Wood, 1998, p. 68).

The same lack of clarity can be applied to constitutional mandates and various Supreme Court decisions. In *Strickland v. Washington* (1984), the Justices ruled against the creation and implementation of a set of detailed standards for public defense efficacy. Similarly, in *Morris v. Slappy* (1983), the Court ruled that a meaningful attorney–client relationship is not a legal requirement (Boccaccini & Brodsky, 2002). Given this lack of legal accountability, the role of public attorneys and their decision making relationships with mentally ill clients is largely subjective.

The absence of judicial guidance can often lead to unjust and inequitable practice behaviors among indigent defenders. One study found that one-third of attorneys did not consult with their client when an insanity defense was raised, while a client’s level of participation was low when they were consulted (Bonnie, Poythress, Hoge, & Monahan, 1996). This finding paired with the reality that attorneys are not required to be well-versed in mental health demonstrates a need for alternative processing for these individuals.

Established in the late 1990’s, mental health courts were established to divert criminal offenders away from punitive legal outcomes and towards treatment alternatives (Wolff, Fabrikant & Belenko, 2011). Under judicial supervision, defendants are linked with community-based treatment options and attend regular hearings to review their progress in a program (Wolff et al., 2011). While well-intentioned, these courts often fall short in their failure to address the larger issue of underfunded mental health resources in the community (Cunningham, McKenzie, & Taylor, 2006). Secondly, studies that evaluate the success of these courts are largely based on anecdotal evidence through quasi-experimental methods and demonstrate small, negligible associations with positive outcomes (Center for Behavioral Health Services and Criminal Justice Research, 2009; Fisler, 2015). In the absence of appropriate judicial regulation, the population of defendants with MHD is in need of advocacy. Social workers are best positioned to assume this role.

The Role of Social Workers

109.

The prevalence of individuals with MHD in the justice system is a product of systemic and institutional inadequacies, which take tremendous time and energy to correct. It is a professional and moral imperative of social workers to serve as a point of intervention for this population and to offer them the opportunity to have their voices heard in a setting that prioritizes a quick reentry into the community, as opposed to treating the problem at the root of their criminal justice involvement. In general, there are significant gaps in the literature surrounding the experiences of individuals with MHD and the intersection between mental health and the justice system. These findings are critical in order to best advocate for this growing population. The role of public defenders in advocating for clients with MHD is judicially ambiguous and the professional training they receive does not extend beyond the provision of legal services. Social workers possess the necessary expertise in working with this population and should be utilized as such.

Thereby, the United States legal system is at a crossroads. With the steadily increasing prison population, the nation is presented with a problem it can no longer afford to ignore. Given the unique needs of individuals with a mental illness who come into contact with the justice system and the absence of legal interventions to meet these needs, increased utilization of social workers in the courts is a prerequisite to a more equitable and effective criminal justice system.

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Author Information

Lauren M. Pappacena, MSW, received her Master of Social Work from Fordham University, concentrating in research. She spent her advanced year placement at The Vera Institute of Justice, where she worked with the research team in the Substance Use and Mental Health program. Ms. Pappacena hopes to pursue a career in national policy evaluation, particularly in a criminal justice context. Address correspondence about this article to Lauren M. Pappacena at: laurenmpappacena@gmail.com