

Chapter 10

Mental Health Courts: Competence, Responsibility, and Proportionality

Robert F. Schopp

Introduction

As generally discussed, mental health courts (MHCs) function as a component in the criminal justice system designed to reduce recidivism by promoting effective treatment for offenders who commit offenses due to the effects of their mental illness. A primary purpose of MHCs, as with criminal justice system generally, is to reduce crime. Specifically, MHCs are designed to reduce recidivism by offenders whose crimes are “more a product of mental illness than of criminality.”¹ MHCs can vary in their specific applications and procedures. As described in the prior chapters, they frequently require guilty pleas from mentally ill offenders, place those offenders on probation, and require as a condition of probation that those offenders participate in treatment intended to ameliorate the disorders that increase their propensity to commit crimes. If the offenders do not participate in the treatment required as a condition of probation, incarceration for brief periods is applied to enforce treatment participation. The criminal records can be expunged for those offenders who complete their conditions of probation.²

MHCs are designed to promote the well-being of the mentally ill offenders by providing treatment that improves their clinical conditions in a manner that decreases risk of recidivism and punishment. Decreasing the risk of recidivism also promotes the well-being of society. What could be objectionable or questionable about a problem solving court that promotes the well-being of mentally ill offenders and of society generally? Consider the following concerns. First, do MHCs actually decrease recidivism more effectively than available alternatives? This is essentially an empirical inquiry requiring ongoing collection of relevant evidence regarding recidivism rates

¹ Susan Stefan & Bruce J. Winick, *A Dialogue on Mental Health Courts*, 11 Psychol., Pub., Pol., & L 507 (2005).

² See generally, Petrilla and Redlich, this volume.

R. F. Schopp (✉)

College of Law, University of Nebraska, Lincoln, Nebraska, USA

e-mail: rschopp1@unl.edu

of offenders who have been addressed through MHCs as compared with relevantly similar offenders who have been addressed through the available alternatives.

Second, what are the alternatives and what considerations other than comparative rates of recidivism are relevant to identifying the most appropriate legal institution to apply in attempting to reduce recidivism among offenders with mental illness? Consider, for example, civil commitment. State statutes ordinarily authorize civil commitment of individuals who fulfill the criteria of mental illness and dangerousness to others.³ If an offender presents a risk of harm to others due to mental illness, what justifies the state in applying the police power through civil commitment or through an MHC within the criminal justice system? Alternately, consider a criminal trial with a defense of not guilty by reason of insanity followed by post-acquittal commitment.⁴ What type and degree of psychological impairment justifies the state in accepting a guilty plea and requiring treatment as a condition of probation, rather than finding the offender not guilty by reason of insanity and applying treatment through post-acquittal commitment?

MHCs are often described as applying a framework grounded in Therapeutic Jurisprudence. That framework pursues the development of legal rules, procedures, and roles that promote the well-being of those involved in a manner that recognizes and protects other important values embodied in law.⁵ In order to advance this project, MHCs must decrease recidivism without causing disproportionate harm to the well-being of some participants or seriously undermining other important values embodied in the relevant law. Thus, justifying MHCs requires that we identify the full range of relevant values and examine the ways in which MHCs may advance or undermine them under various conditions.

The analysis proceeds in the following manner. Section “Relevant Values Embodied in Law” identifies some important values embodied in the criminal law and examines some potential concerns regarding the compatibility of MHCs with these values. Section “MHCs and Legal Mental Illness” examines the appropriate conception and scope of psychological impairment that is compatible with the functions of the MHCs as components in the more comprehensive criminal justice system. Section “Conclusion” concludes the analysis.

Relevant Values Embodied in Law

Prevention

It is not controversial that prevention of crime through a variety of processes including deterrence, incapacitation, reform, rehabilitation, and the expressive function of

³ Michael L. Perlin, *Mental Disability Law* § 2A (2nd ed. 1998).

⁴ *Id.* at §§ 9B-1, 2.

⁵ David B. Wexler, (1996) Justice, Mental Health, and Therapeutic Jurisprudence, in *Law in a Therapeutic Key* 713 (David B. Wexler & Bruce J. Winick, eds. 1996).

criminal punishment constitutes an important purpose of the criminal law. What approach would best advance the goal of prevention by minimizing recidivism among offenders with mental illness? Arguably, early English common law provided an effective approach. It applied capital punishment for a broad range of offenses against persons and property shortly after conviction of the offenders.⁶ Such a practice would virtually eliminate recidivism by those offenders through incapacitation, and it would promote the general deterrence function with an emphatic demonstration to the general public that legitimate or deceptive claims of mental illness would not enable offenders to avoid punishment.

Set aside the question regarding the general justification of capital punishment. Even if one assumes that capital punishment is justified in principle, it would be grossly disproportionate to the offenses and offenders addressed in MHCs. Supreme Court decisions have precluded capital punishment of juvenile and mentally retarded offenders, partially on the basis that these offenders are significantly less culpable or blameworthy than ordinary offenders who commit similar offenses.⁷ The Court has applied a similar rationale in precluding a sentence of life in prison without the possibility of parole for juvenile offenders who are convicted of crimes that do not include homicide.⁸ According to a narrow contemporary interpretation, “culpability elements” are the mental states required by the definitions of specific offenses. These may include, for example, purpose or knowledge regarding the causation of death in a statute defining the offense of murder.⁹ In a more general sense, a person is culpable to the degree that he is blameworthy or deserving of disapproval or censure.¹⁰ The Supreme Court opinions referring to punishment in proportion to culpability or blameworthiness apply the term “culpability” in this more general sense because they preclude capital punishment for categories of offenders who have fulfilled the required offense elements for capital offenses. Thus, these opinions identify these categories of offenders as insufficiently culpable in the more general sense of blameworthiness sufficient to deserve capital punishment despite their having fulfilled the offense elements, including the culpability elements in the more specific sense.

Although the cases cited have specifically addressed capital punishment or life sentences without the possibility of parole, the widely accepted principle of proportionality in the application of criminal punishment prescribes punishment severity in proportion to the culpability or blameworthiness of the offender for the offense. MHCs are generally designed to address offenders whose crimes are “more a product of mental illness than of criminality.”¹¹ The application of probation with conditions that promote treatment would be consistent with the premise that offenders addressed

⁶ Nina Rivkind & Steven F. Shatz, *The Death Penalty* 20 (3rd ed. 2009).

⁷ *Roper vs. Simmons*, 125 S.Ct. 1183, 1194–96 (2005); *Atkins vs. Virginia* 536 U.S. 304, 319 (2002).

⁸ *Graham vs. Florida*, 2010 WL 1946731 (U.S.).

⁹ American Law Institute, *Model Penal Code* §§ 2.02, 210.1, 210.2 (Proposed Official Draft, 1962).

¹⁰ *Black’s Law Dictionary* 193 (9th ed., 2009); *I Newer Shorter Oxford English Dictionary* 568 (Lesley Brown, ed., 1993).

¹¹ Stefan & Winick, *supra*, note 1, at 507.

by MHCs resemble the juvenile or mentally retarded offenders addressed by these Supreme Court cases in that they should be punished less severely than ordinary offenders who commit similar offenses because they are less culpable than ordinary offenders.

Supreme Court decisions have also precluded capital punishment as excessive for crimes that are serious wrongs but do not take the lives of the victims.¹² Although MHCs are apparently becoming more inclusive of felonies, as well as misdemeanors, the crimes addressed by MHCs are ordinarily misdemeanors or relatively less severe felonies, rather than the extremely severe murders that ordinarily qualify the offender for capital punishment.¹³ The mental illness manifested by the offenders addressed in MHCs is understood to render them less culpable and more amenable to prevention through treatment than ordinary offenders who commit similar crimes. Thus, the principle of proportionality would prescribe punishment that is less severe than that applied to unimpaired offenders who commit similar offenses.

In short, frequent executions immediately following conviction may minimize recidivism by these offenders and perhaps by others, but it would violate other important values that are central to the justification of criminal punishment. Careful consideration of the most defensible role of MHCs requires explicit identification of the other important values implicated by the functions and practices of these courts. This chapter does not purport to provide a comprehensive review of the values relevant to the functions of MHCs and of the criminal justice system more generally. The next three sections identify three relevant values and provide preliminary analyses of some relevant concerns raised by MHCs regarding these values.

Retributive Justice

As ordinarily understood, justice requires that each individual is treated as that person is due according to the applicable principles. Retributive justice requires that each offender receive the punishment that is consistent with the applicable principles of justified punishment.¹⁴ The Supreme Court's cases do not provide a single consistent theory of justified punishment under the Eighth Amendment, but several of those opinions identify retribution as an important purpose or limit of punishment.¹⁵ A retributive justification of punishment prescribes punishment in proportion to the desert of the offender.¹⁶ Supreme Court opinions apply the retributive purpose of punishment as addressing punishment in proportion to the severity of the offense and the culpability or blameworthiness of the offender. The Eighth Amendment

¹² Kennedy vs. Louisiana, 128 S.Ct. 2641 (2008); Coker vs. Georgia, 433 U.S. 584 (1977).

¹³ Petrilla, *supra* note 2; Redlich, *supra* note 2.

¹⁴ The Cambridge Dictionary of Philosophy 759 (Robert Audi ed., 2nd ed. 1999).

¹⁵ Roper vs. Simmons, 125 S.Ct. 1183, 1194–96 (2005); Atkins vs. Virginia 536 U.S. 304, 319 (2002); Gregg vs. Georgia, 428 U.S. 153, 183–84 (1976).

¹⁶ The Cambridge Dictionary of Philosophy, *supra* note 14, at 759.

proscribes excessive punishment, rather than prescribing specific punishments. Thus, these opinions discuss retributive limits on the severity of punishment.¹⁷

MHCs ordinarily address offenders who have committed misdemeanors or felonies of relatively low severity as compared with the severe offenses and sentences addressed by these Supreme Court opinions.¹⁸ The range of impairment addressed by these courts varies in that some specifically address offenders with “serious mental illness” or an Axis I diagnosis, but others do not specify criteria of mental illness.¹⁹ Consider an offender who commits a felony that does not involve violence against persons. Anderson manifests a chronic schizophrenic disorder that varies in severity across time.²⁰ He voluntarily participates in treatment when his impairment is relatively less severe, but when the severity exacerbates, his capacities to accurately perceive reality, to reason coherently, and to make reasoned judgments deteriorate. He then obeys the orders of the hallucinatory voice of God to stop taking the medication because Satan’s agents are using the medication to prevent him from doing God’s work. His cognitive deterioration exacerbates and in response to hallucinatory orders from God, he breaks into the neighbor’s house in order to destroy the evil device that the neighbor is using to beam Satan’s mind waves into his brain. He destroys the neighbor’s furnace.

Arguably, Anderson’s crime is primarily a function of his mental illness, rather than of his criminality in the sense that his inclination to engage in criminal conduct is a response to psychological impairment that distorts his ability to recognize and adaptively respond to reality. He has not engaged in any criminal conduct during the periods when his schizophrenic disorder has been in remission. During those periods, his neighbors describe him as “odd” or “idiosyncratic,” but he does not engage in criminal or otherwise dangerous behavior. Monitored treatment is likely to promote his well-being and the well-being of society by reducing the severity of his impairment and the risk of further offenses associated with his disorder. Consider, however, some questions regarding the justification for applying the reported MHC process to Anderson. What would justify an MHC in requiring a guilty plea for Anderson in a jurisdiction that has an insanity defense that authorizes a verdict of not guilty by reason of insanity for those who manifest a disorder that rendered them unable to know that their conduct was wrongful? The insanity defense reflects the principle that those who meet this standard are not responsible for their offenses, but requiring a guilty plea apparently reflects the premise that Anderson is responsible for his offense and thus merits the condemnation inherent in criminal conviction and punishment.

¹⁷ *Roper vs. Simmons*, 125 S.Ct. 1183, 1194–96 (2005); *Atkins vs. Virginia* 536 U.S. 304, 319 (2002); *Gregg vs. Georgia*, 428 U.S. 153, 183–84 (1976).

¹⁸ Petrilla, *supra* note 2; Redlich, *supra* note 2.

¹⁹ Petrilla, *supra* note 2; Redlich, *supra* note 2. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 27–28 (4th ed. Text Revision, 2000) (Axis I disorders include a broad range of clinical disorders other than personality disorders and mental retardation.).

²⁰ American Psychiatric Association, *id.* at 298–313.

Insofar as the court uses the threat of jail or actual applications of short periods of incarceration to promote compliance with the treatment required as a condition of probation, it apparently applies the judgment that Anderson merits condemnation for his culpable criminal conduct and for his failure to comply with the conditions of probation, although his disorder renders him not culpable for his offense. In short, the MHC appears to violate the principle of retributive justice by expressing condemnation of Anderson, who does not merit that condemnation, by requiring a guilty plea from an offender who is not guilty because of his impairment, and by applying punishment through incarceration for noncompliance to an offender who does not deserve that punishment because his failure to comply is a result of his serious impairment.

Consider currently available alternative forms of state intervention. Civil commitment of mentally ill individuals most often requires findings that the individual is mentally ill and dangerous to himself or to others. Specific provisions vary across states, with most explicitly applying commitment under the police power to those who endanger other persons, while some may include those who endanger the property of others.²¹ Anderson does not present a clear danger to himself or to other persons, although one may reasonably argue that by breaking and entering the dwelling of others, he places himself in danger of serious harm by the occupants of that dwelling who may exercise defensive force in the belief that they are threatened by someone who is forcefully entering their home.

Alternately, one may argue that by breaking into a home and destroying the furnace in response to his hallucinatory directives, he demonstrates that his psychosis presents a risk to others. Destroying the furnace may have endangered the residents of the house by causing a fire or by releasing toxic fumes. Furthermore, by acting in compliance with the unpredictable content of his delusions and hallucinations in a manner that violates law and the protected interests of others, he provides evidence that suggests that he presents a risk of violence against other persons if his hallucinations and delusions promote such conduct. Thus, Anderson may, or may not, be considered appropriate for civil commitment, depending upon the specific statutory criteria, the accepted interpretations of those criteria, and the specific description of his impairment and behavior at the time of the commitment hearing.

Insofar as civil commitment is applicable to Anderson under the relevant state law, he may be subject to involuntary inpatient or outpatient monitoring and treatment. Alternately, particularly in states with commitment criteria that require overt conduct demonstrating imminent danger to other persons, Anderson could be subject to criminal charges, acquittal as not guilty by reason of insanity, and post-acquittal commitment. Arguably, either civil commitment or post-acquittal commitment would be more consistent with the principle of retributive justice than a guilty plea and suspended sentence in MHC. Neither form of commitment requires a guilty plea or authorizes the use of jail as a means of enforcing participation in clinically appropriate treatment for an individual who manifests mental disorder of a type and degree

²¹ Perlin, *supra* note 3, at § 2A–4.8.

that renders him inappropriate for the condemnation inherent in criminal conviction and punishment.

Compare Anderson to Baker, who suffers from chronic, serious but not psychotic depression involving severe sadness, fatigue, pessimism, and anhedonia.²² He spent extended periods lying dormant in bed—“I’m hopeless, I’m worthless.” He has lost his apartment because he has been unable to work with minimum adequacy during the worst periods of depression. He spends extended periods lying in homeless shelters, under highway overpasses, and in alleys. When he is hungry and unable to secure food from assistance agencies, he sometimes steals food from stores. One night when he has not eaten for several days, he breaks into a neighbor’s basement to steal food. He is arrested and agrees in the local MHC to plead guilty and participate in a required treatment plan designed to ameliorate his depressive disorder.

His crime is a felony but he did not harm or endanger any person.²³ He would not qualify for civil commitment in jurisdictions that require imminent danger to other persons because he did not engage in any conduct that directly created risk to other persons. As discussed previously regarding Anderson, some courts may interpret this conduct as indicative of danger to self, to others, or to property, but in some jurisdictions, he does not present a clear case for commitment.²⁴ He would not qualify for the insanity defense because he knew his conduct was contrary to law and to socially accepted morality. He believed his conduct was wrong, and by engaging in that conduct, he deepened his depression by reinforcing his belief that he is worthless. Although his depression includes severe pessimism, it does not distort his ability to comprehend the criminal charges against him or to communicate with his attorney. Thus, he is competent to plead guilty and waive his right to trial.²⁵

Although Baker’s depressive disorder does not render him not guilty by reason of insanity, it substantially mitigates his culpability. He refrained from criminal conduct until he became desperate for food, and his clear sense of guilt and shame supports the interpretation that he engaged in criminal conduct only when it seemed to him that there was no alternative. Thus, a suspended sentence with participation in treatment as a condition of probation would be proportionate to his culpability for this offense by ordinary standards of retributive proportionality. Treatment as a condition of probation is reasonably related to the offense and to the preventive purpose of the criminal law in that it would be reasonably expected to ameliorate his impairment in a manner that would improve his adaptive capacity and his ability to obtain employment. Thus, it is reasonably designed to reduce the risk that he would commit similar offenses in the future. An MHC would provide an institutional structure that could facilitate and enforce treatment as a condition of probation that would be reasonably expected to promote Baker’s treatment interests and society’s

²² American Psychiatric Association, *supra* note 19, at 349–52, 371–82. (Anhedonia refers to the inability to experience pleasure in activities that are normally pleasurable.)

²³ Model Penal Code § 221.1 (Proposed Official Draft 1962).

²⁴ See *supra*, text accompanying note 21.

²⁵ *Godinez vs. Moran*, 509 U.S. 389 (1993); *Dusky vs. United States*, 362 U.S. 402 (1960).

preventive interests through established coordination between the court and mental health treatment providers.

It remains unclear, however, whether this process justifies expunging Baker's record of the crime and conviction. Baker was criminally responsible for his offense and competent to participate in the criminal justice process. Determining whether successful participation in the treatment process as a condition of probation justifies expunging the record requires clarification of the boundaries of expungement. According to one definition, expungement of a person's record involves, "removal of a conviction . . . from a person's criminal record."²⁶ This definition appears to indicate that the court's record of the conviction is destroyed or deleted in a manner that renders it no longer accessible to the courts, law enforcement, or the public. One state statute indexed as an expungement provision, in contrast, provides a more limited approach. That provision authorizes the court to set aside a conviction for an offense when the sentence involved only probation or probation and a fine, and the offender has fulfilled the conditions of probation.²⁷ By setting aside the conviction, the court removes "civil disabilities and disqualifications imposed as a result of the conviction."²⁸ The record of the offense remains available, however, for a variety of purposes, such as sentencing the same offender for a subsequent offense, impeaching the offender as a witness, or evaluating the offender's application for a license or certificate.²⁹

Insofar as expungement is understood as deleting the record of the conviction or as rendering that record unavailable in the manner of ordinary criminal records, it raises serious questions regarding the ability of the courts and law enforcement to consistently enforce the criminal law, the integrity of the criminal justice process, and the ability of the citizenry to monitor and discipline that process. Insofar as it refers only to relieving Baker of some disabilities ordinarily associated with prior convictions, however, there may be persuasive arguments that such a process is consistent with the application of the principles of retributive justice to an offender whose impairment substantially reduces his culpability as compared with ordinary offenders who commit similar offenses. Expungement in this sense would not distort the record of the criminal justice process. Rather, it would provide one process for reducing the severity of the criminal punishment. Insofar as the offender's impairment rendered him less culpable than ordinary offenders who committed similar offenses, this reduction in severity in response to treatment participation would render his punishment proportionate to his limited culpability. It would also promote the societal interest in promoting participation in treatment expected to ameliorate his disorder and reduce the risk of recidivism by promoting rehabilitation and reintegration.

In short, civil commitment and post-insanity acquittal commitment constitute established institutions designed to serve the preventive purpose by providing treatment designed to ameliorate Anderson's impairment and reduce the risk of recidivism in a

²⁶ Black's Law Dictionary 662 (9th ed. 2009).

²⁷ Neb. Rev. Stat. § 29-2264 (Reissue of 2008).

²⁸ *Id.* at § 29-2264(4)(b).

²⁹ *Id.* at § 29-2264(5).

manner that conforms to the principles of retributive justice that are fundamental to the criminal justice process. Accepting a guilty plea from Anderson and subjecting him to jail for the purpose of enforcing treatment requirements of probation raises serious concerns regarding those principles and thus regarding the integrity of the criminal justice process.

A guilty plea with required treatment as a condition of probation for Baker, in contrast, could conform to those principles of retributive justice and reduce the risk of recidivism by advancing Baker's treatment interests. The factors that render Baker appropriate for MHC include the nature and severity of the offense, the type and severity of his impairment, and the relationship between his impairment and his offense. His offense is a serious but nonviolent felony that renders probation at least arguably within a defensible range of sentencing. His depressive disorder does not involve psychotic impairment that would render him appropriate for an insanity defense. Neither does it render him incompetent to plead guilty. Thus, his disorder does not undermine the legitimacy of his guilty plea. It is sufficiently severe, however, to significantly reduce his culpability for his crime. Thus, it provides a basis to justify a relatively less severe sentence of probation for the offense and it provides reason to think that the treatment conditions of probation will promote his treatment interests as well as the public interest in reducing the risk of recidivism.

Comparative Justice

The principle of comparative justice requires that the criminal justice process treat like cases alike and relevantly different cases differently in proportion to the relevant differences.³⁰ Insofar as the courts addressing criminal cases consistently apply defensible principles of retributive justice, they conform to the requirement of comparative justice. Consistent application of applicable principles of retributive justice would result in similar sentences for offenders who commit offenses of similar severity with similar degrees of culpability. Consistent application of those principles would generate differences in severity of punishment, however, when offenders differed in the severity of their offenses or in the circumstances relevant to their degree of culpability. Such differences would reflect differences in the degree of punishment that was proportionate to these offenders and offenses, rather than arbitrary or discriminatory departures from the principled application of punishment. Several concurring opinions in *Furman vs. Georgia* represent the importance of comparative justice in Eighth Amendment doctrine by emphasizing the significance of arbitrary or discriminatory variations in capital sentencing as a justification for their reversal of three capital sentences brought through sentencing procedures that allowed the sentencers unguided discretion in applying or withholding capital punishment.³¹

³⁰ Joel Feinberg, *Rights, Justice, and the Bounds of Liberty* 265–87 (1980).

³¹ *Furman vs. Georgia*, 408 U.S. 238, 242–57 (Douglas, J., concurring), 274–77 (Brennan, J., concurring), 308–10 (Stewart, J., concurring), 364–66 (Marshall, J., concurring).

Upon initial review, MHCs raise two interrelated concerns regarding the pursuit of comparative justice. First, insofar as these courts accept guilty pleas and apply jail as a means of enforcing conditions of probation, do they violate principles of comparative justice by subjecting some offenders who commit offenses due to their mental illness to sanctions and condemnation more severe than those applied to similarly impaired people who engage in similarly harmful or dangerous conduct but are subject to civil commitment or to post-insanity acquittal commitment? Second, insofar as these offenders are competent to plead guilty and criminally responsible for their offenses, do MHCs violate the requirements of comparative justice by subjecting these individuals to less severe punishment than that applied to other offenders who commit similar offenses in circumstances that render them comparably less culpable for reasons other than mental illness?

MHCs can provide reasonable responses to these questions insofar as they apply standards that reflect relevant differences among offenders resulting from the type and severity of impairment they manifest. Insofar as MHCs accept guilty pleas and apply suspended sentences with requirements of participation in treatment enforced by periods of incarceration to offenders who manifest impairment that does not preclude competence to proceed or criminal responsibility but that reduces their culpability as compared with unimpaired offenders who commit similar offenses, these MHCs can respond to these questions in a manner that conforms to the principles of comparative justice. Some of the practices attributed to MHCs raise questions regarding the ability of MHCs to function in a manner that conforms to this response and thus to the requirement of comparative justice. Consider, for example, the following questions.

What type and degree of impairment justifies treating some offenders as competent to proceed and criminally responsible but subjecting them to less severe punishment than that applied to other offenders who commit similar offenses? If an offender is sufficiently impaired to render that offender not responsible for the criminal conduct, what justifies accepting the guilty plea, rather than applying civil commitment or post-insanity acquittal commitment? Alternately, if that offender is not sufficiently impaired to render him not responsible, what justifies punishing him less severely than other offenders who commit similar offenses or expunging his record but not the records of other offenders who commit similar offenses?

Consider Cook who consistently scored between 75 and 80 on intelligence tests when he was in school. He consistently performed poorly in school and dropped out of high school when he became old enough to find a job doing unskilled work. When the economy encountered a downturn, he lost his job and was unable to find any other work. He has been unable to pay rent, and he has been spending nights in homeless shelters or under highway overpasses. When he was unable to find any food for several days, he broke into a house to steal some food. He was arrested and charged with burglary. In contrast to Baker, Cook suffers no diagnosable psychological disorder, but his limited intelligence, skills, and resources render it very difficult for him to respond adaptively to the situational stress, hunger, and fear. This severe stress and his limited capacities do not prevent him from fulfilling the culpability elements required by the offense definition, but they mitigate his blameworthiness as compared with ordinary offenders who commit similar offenses.

Thus, he resembles Baker in that he is criminally responsible for his offense but deserving of less severe punishment than ordinary offenders who commit similar offenses in a system of retributive justice that prescribes punishment in proportion to the severity of the offense and the blameworthiness of the offender. Is there any defensible justification for punishing Cook more severely than Baker by placing Baker but not Cook on probation?

Assume that Baker and Cook are similar in the degree to which they are reasonably considered less culpable than ordinary offenders who commit similar offenses, although both are criminally responsible. Comparative justice would require that they receive similar sentences and that they receive less severe sentences than ordinary offenders who commit similar offenses in the absence of comparable mitigating circumstances. If MHCs provided treatment, rather than punishment, for all and only offenders with mental disorders, regardless of the type and degree of impairment, then those MHCs would violate the principle of comparative justice because they would allow mentally ill offenders to avoid punishment, with its inherent expression of condemnation, regardless of the degree to which their impairment justified differential punishment as compared with ordinary offenders and as compared with offenders, such as Cook, who were less culpable than ordinary offenders for reasons other than mental disorder.

MHCs would facilitate comparative justice, however, insofar as they met two conditions. First, these courts would apply alternative dispositions to mentally impaired offenders in a manner that reflected the degree to which those offenders' impairment rendered them less culpable than ordinary offenders. That is, they would not apply a general approach to all offenders with psychological impairment. Rather, they would carefully assess the manner and degree to which each individual's impairment rendered that offender less blameworthy than ordinary offenders and they would suspend criminal sentences on the condition of participation in treatment for those whose impairment reduced their culpability to a degree comparable with that of other offenders who qualify for suspended sentences with appropriate conditions of probation. Thus, they would promote treatment designed to reduce recidivism while addressing these offenders in a manner consistent with the suspended sentences and required conditions of probation applied to other similarly blameworthy offenders by other problem-solving courts or by the court of general jurisdiction. Offenders such as Cook, for example, may receive a similar suspended sentence with conditions of probation that required basic training in vocational and adaptive skills.

One potential strength of an identified MHC is that a regular pattern of interaction between the court and the available clinical resources would promote the abilities of the court and of the clinicians to communicate effectively with one another and thus to accurately identify offenders appropriate for clinical interventions and to provide appropriate treatment plans designed to ameliorate their disorders and to reduce the risk of disorder-related recidivism. Clinicians can apply relevant expertise in the form of descriptive and explanatory assessment that informs the court regarding the type and degree of the offender's impairment and the manner in which that impairment contributed to the criminal conduct. Such expertise may enable the MHC to more accurately understand the similarities and differences among Anderson, Baker, Cook,

and the more general population of offenders. The court can apply this understanding in assessing the relative degrees of culpability among these offenders and for each of these individuals as compared with ordinary offenders. Similarly, such clinical expertise can provide relevant information regarding available treatment alternatives that can inform the court in developing conditions of probation that are consistent with each offender's degree of culpability as well as with the societal interest in reducing the risk of recidivism.

The second condition that would facilitate comparative justice would involve an integrated criminal justice system that would include other problem-solving courts designed to provide suspended sentences and conditions of probation for offenders like Cook who resemble mentally impaired offenders insofar as they commit their offenses in circumstances that justify less severe sentences than ordinary offenders but for reasons that are primarily attributable to factors other than psychological impairment. Insofar as MHCs function as the only alternative to the primary criminal courts, they arguably raise concerns regarding comparative justice because they provide an alternative that is available only to those who are less culpable than most offenders because of mental illness. Insofar as MHCs function within a more comprehensive institutional structure that can provide appropriate alternative dispositions for those offenders who manifest lesser culpability for a variety of reasons, they promote comparative justice by providing different dispositions that reflect relevant differences in culpability.

A comprehensive institutional structure may include primary criminal courts and a number of problem-solving courts directed toward specific populations or concerns. These may include, for example, MHCs and drug courts. Such a complex structure may well constitute a two-edged sword for the purpose of pursuing comparative justice. As discussed, courts prepared to address offenders with mental illness or with other conditions or circumstances that mitigate their culpability and render them appropriate for various preventive interventions as conditions of probation could promote comparative justice insofar as they provide dispositions that reflect relevant differences and similarities. To the degree that the more comprehensive criminal justice system becomes fragmented into a variety of different courts designed to address a variety of offenders and circumstance, however, it seems likely that it will be very difficult to coordinate the courts in a manner that will enable them to consistently apply a principled approach to the application of criminal sanctions. This concern arises again in the next section addressing the integrity of the process.

One additional concern regarding comparative justice involves the distribution of treatment resources. Insofar as MHCs interact with the available treatment providers in such a way as to effectively give some impaired offenders priority for access to treatment over similarly impaired offenders who appear in other courts or over other comparably impaired individuals who do not commit crimes, that priority creates concerns regarding preferential treatment for those who commit crimes and are channeled into MHCs. This concern reflects a more general problem regarding access to treatment for impaired individuals, but in the context of MHCs, it also undermines comparative retributive justice insofar as the involvement of these courts provides a benefit of enhanced access to treatment for some impaired offenders who

commit offenses as compared with those who experience similar treatment needs but are channeled to other courts or those who refrain from crime.

Integrity of the Process

Criminal punishment constitutes a severe government intrusion into ordinarily protected liberties. Thus, it is limited by a variety of substantive and procedural rules designed to discipline the exercise of this form of coercion upon individuals. Rigorous enforcement of these rules, and of the principles that underlie the rules, protects individual defendants and the citizens generally from abusive application of coercive force in the form of criminal punishment.

Consider, for example, Anderson who committed his crime in response to hallucinatory orders from God during a period of psychotic decompensation. If he remains psychotically impaired when appearing in the MHC, his competence to plead guilty and to waive the right to a trial on the question of guilt and insanity is highly questionable. The requirement of competence to proceed, including the capacities to comprehend the process and to communicate with his attorney, is central to protecting his right to a fair trial and to maintaining a disciplined criminal justice process.³² Thus, if MHCs allowed some defendants, such as Anderson, to plead guilty when they were in a psychotic state that impaired their ability to comprehend and reason regarding the decision to plead guilty, they would distort the integrity of the process in a manner that undermines the protections from unjustified convictions and punishment for Anderson and for the citizenry more generally.

If Anderson has received treatment and regained competence to proceed before pleading guilty, he may competently decide that he would prefer a guilty plea in an MHC to pursuing an insanity defense in a criminal trial. He may prefer this because doing so will facilitate ongoing treatment without subjecting him to post-acquittal commitment and because the MHC may expunge his record upon completion of the required treatment. Although this decision may well promote Anderson's treatment interests and his comprehensive interests, it raises important concerns regarding the integrity of the process that protects the citizenry more generally. Applying a guilty verdict to a defendant who clearly appears to qualify for a not guilty by reason of insanity verdict undermines the integrity of the process. Insofar as the MHC applies incarceration as a means of enforcing the required participation in treatment, it violates the obligation of society to apply coercive force in the form of criminal punishment only to those who merit that punishment according to the standards of the applicable law because of their culpable criminal conduct.

Criminal punishment expresses societal condemnation of the criminal conduct as wrong and of the offender as a culpable wrongdoer by the standards of the conventional public morality embodied in law.³³ A verdict of guilty and the application of

³² Perlin, *supra* note 3, at § 8A-2.1.

³³ Robert F. Schopp, *Justification Defenses and Just Convictions* 22–26 (1998).

a criminal sentence to an offender, such as Anderson, who lacked the capacities of criminal responsibility at the time of the crime violates the applicable principles of retributive justice and undermines the integrity of the process. It does so by applying the condemnation applicable to culpable wrongdoers to an individual who does not qualify as culpable. It may seem plausible to respond that limiting the punishment to probation with conditions requiring treatment compliance ameliorates this concern because the minimal application of punishment renders negligible the harshness of the punishment and of the condemnation expressed. This response encounters the following dilemma.

Either the sentence is within the range that is proportionate to the offense or it is not. If it is within that range, then it expresses condemnation of the offender as a culpable wrongdoer who deserves punishment that is in the ordinary range of proportionality to this offense, and thus, it reaffirms the condemnation of the offender expressed by the conviction. If an offender, such as Anderson, lacks the capacities required for criminal responsibility, this condemnation of an offender who does not merit such condemnation violates the principles of retributive justice and undermines the integrity of the process. Alternately, if it is sufficiently mild to be clearly disproportionate to the severity of the offense, it expresses the proposition that this offender is not sufficiently culpable to be subject to the punishment prescribed as proportionate to this offense. Then, the conviction and sentence jointly express the incoherent proposition that this offender is, and is not, culpable for this offense. Allowing courts to engage in such incoherent decision-making undermines the discipline of law on the courts. Insofar as this incoherence is visible to the public, it undermines the public trust in the courts. Insofar as it is not visible to the public, in contrast, it undermines the discipline of transparency on the judicial process.

The potential to expunge the record at a later point may appeal to Anderson, but it exacerbates the risk to the citizenry generally insofar as it encourages the courts to consider it legitimate to apply punishment for instrumental purposes to those who do not merit condemnation. Similarly, it undermines the integrity of the process insofar as it allows the courts to conceal the apparently inconsistent interpretation and application of law. Insofar as expungement is limited to relieving the offender of specific disabilities associated with the conviction, it does not distort the record. Insofar as expungement allows revision of the record or limitation of access to the record that would ordinarily be accessible, however, it dilutes the discipline of the criminal process.³⁴ Expungement also has the potential to undermine the integrity of the process if it encourages judges to interpret and apply substantive and procedural standards loosely because they think of the process as promoting, rather than harming, the interests of the individual defendant. Insofar as it has this effect, it may encourage judges to undermine the institutional structure by considering it appropriate to depart from the applicable standards and practices when doing so appears to serve the interests of those immediately affected.

A similar concern arises regarding the use of jail to enforce conformity to the conditions of probation. Insofar as an offender competently pleads guilty to a crime

³⁴ See *supra*, notes 26–29 and accompanying text.

for which he is responsible and probation is an appropriate disposition, the use of jail to enforce the conditions of probation falls within the legitimate range of coercive force applied by the courts. If the defendant lacked competence to waive the right to trial and plead guilty, however, incarceration for failing to conform to conditions of a plea agreement to which he was unable to competently consent raises concerns regarding the legitimacy of the incarceration and of the plea agreement on which it is based. Similarly, if the defendant's impairment was sufficient to undermine his responsibility for the initial crime, then incarceration to enforce conditions of probation as a sentence for that crime raises serious questions regarding the intrusion into ordinarily protected liberty ostensibly justified as punishment for a crime for which he is not responsible.

Baker, in contrast to Anderson, manifests a type and severity of impairment that does not render him incompetent to plead guilty and waive the right to a trial. Insofar as his offense falls within the range of offenses for which a suspended sentence with conditions of probation is consistent with the applicable principles of retributive and comparative justice, the court can accept his guilty plea and suspend his sentence on condition that he fulfills the required conditions of probation. Furthermore, the enforcement of the conditions of probation with brief periods of incarceration would be consistent with the requirements of competence, retributive justice, and comparative justice insofar as similar practices are applied to other offenders with suspended sentences and Baker has not deteriorated into a more severe state of impairment that would undermine his responsibility for his failure to conform. Finally, if expungement consists only of the removal of some disabilities ordinarily associated with conviction, it can be consistent with the principles of retributive and comparative justice, as well as with the integrity of the process.

Insofar as expungement involves deletion of the record of conviction or removal of the record from the ordinary range of accessibility, however, the expungement of Baker's record can raise serious concerns regarding the effectiveness and the integrity of the process. Regarding effectiveness, to the degree that expungement deletes the conviction from the record or reduces access to the record, it undermines the opportunity to accurately review the offender's history with the criminal justice system. Alternately, to the degree that expungement leaves the record intact but limits access to that record, it reduces the transparency of the criminal process and the effectiveness of the record as a means to monitor and discipline the application of coercive force through the criminal justice system. Although a particular offender, such as Baker, may prefer to have his record expunged, allowing expungement has the potential to dilute the ability of the citizenry to monitor the courts in their application of the principles of retributive and comparative justice. It may also be expected to encourage courts to apply the coercive force of the criminal law in a less disciplined manner because it may seem that unjustified convictions can be corrected in retrospect. Insofar as expunging the record reduces the degree to which the courts or others have access to accurate accounts of the process, it may undermine the ability of the courts or other actors to monitor the consistent application of these principles by preventing full awareness of prior applications to relevantly similar or relevantly different offenders. Thus, it has the potential to undermine the principles

of retributive and comparative justice.³⁵ These concerns regarding the potential of expungement to dilute the integrity of the process remain speculative. Thus, the most defensible response to these concerns may involve awareness and careful monitoring in developing the procedures applied by MHCs.

Assume that Cook's limited intelligence, education, occupational skills, and social skills reduce his culpability level to a degree similar to that to which Baker's depression reduces his culpability. Thus, Baker and Cook remain criminally responsible for similar crimes, but both are less culpable than unimpaired offenders who commit similar crimes. If this assumption is accurate, comparative justice should require similar punishment expressing similar degrees of condemnation. Insofar as MHCs are limited to individuals whose crimes are understood as reflecting decreased culpability due to mental illness, they undermine comparative justice by providing an alternative institutional structure that will reduce Baker's punishment in a manner that reflects his reduced culpability but will not reduce Cook's punishment in a manner that reflects his comparably reduced culpability. Such a disparity due to the presence of an MHC in a system with no corresponding problem-solving court for offenders like Cook undermines the integrity of the process because it is not merely a function of unavoidable variations of judgment by different individual judges. Rather, it reflects a disparity in the institutional structure that undermines the comparative justice function of the institution.

MHCs would be consistent with the integrity of the process regarding this concern, however, if the more comprehensive criminal justice system included MHCs designed to address the specific concerns regarding retributive and comparative justice that arise with impaired offenders like Baker as well as alternative structures and processes that accurately applied the general principles of criminal justice to other offenders. These may include, for example, problem-solving courts prepared to address offenders such as Cook and criminal courts prepared to competently address concerns regarding criminal competence and responsibility raised by offenders such as Anderson. In short, specialty courts could reasonably be expected to promote the well-being of those affected and the more general set of relevant values insofar as they developed specialized expertise and functioned effectively as components in an integrated institutional structure designed to implement these values.

MHCs and Legal Mental Illness

Offenders such as Anderson, Baker, and Cook reveal an underlying question that is central to the legitimacy of MHCs. What type and degree of impairment justifies practices of the MHCs that appear to deviate from more general practices that the criminal justice system applies to the broad range of ordinary offenders? As indicated

³⁵ See *supra*, [Sections titled] "Retributive Justice" and "Comparative Justice" regarding retributive and comparative justice.

in section “Relevant Values Embodied in Law,” the point here is not that MHCs necessarily deviate from defensible standards of criminal punishment. Rather, MHCs function as components in a more comprehensive criminal justice system. MHCs can facilitate societal interests in reducing recidivism without violating other important societal values insofar as they pursue the preventive function in a manner consistent with the complex set of purposes and principles that govern that system. Thus, they present a particular context in which it is important to address two questions that permeate mental health law. First, what type and degree of impairment should qualify as “mental illness” for this specific legal purpose? Second, how does that type and degree of impairment justify differential treatment of individuals with that impairment for this particular legal purpose? That is, what integrated set of purposes and principles justify us in treating individuals who manifest that impairment differently than non-mentally ill people who commit similar offenses?³⁶

At first glance, it may seem reasonable to suggest that specialized MHCs within the criminal justice system would be appropriate for addressing criminal behavior by individuals who manifest severe impairment that renders them incompetent to proceed in the ordinary process of criminal adjudication and inappropriate for criminal punishment with its inherent expression of condemnation. The prior discussion of Anderson and Baker suggests, however, that this interpretation would be misguided as applied to MHCs as they are frequently designed and applied. Insofar as MHCs require that defendants plead guilty and apply periods of incarceration as methods of enforcing the requirements of probation, the integrity of the process requires that the individuals are competent to plead guilty and sufficiently responsible for their conduct to justify guilty verdicts and the application of incarceration for failure to conform to the required conditions of probation.

These requirements and the discussion of Anderson and Baker may suggest that MHCs should be limited to individuals, such as Baker, who do not fall within specified diagnostic categories. Those who qualify for psychotic diagnoses manifest distortions of their ability to recognize and reason about reality, as well as distortions in their ability to reason about their relationship to reality.³⁷ Thus, these individuals will often lack the capacities required to qualify as competent to proceed or to plead guilty. Anderson provides an example of one whose psychotic disorder precludes competence to plead guilty and prevents him from meeting minimal requirements of responsibility for his initial crime and for his failure to fulfill conditions of probation. Thus, his impairment undermines the justification for subjecting him to incarceration as punishment for the crime or for the failure to fulfill the conditions of probation.

Consider Davis who suffers from a chronic schizophrenic disorder that includes serious but encapsulated distortion of his ability to recognize and reason about reality. This distortion includes persecutory delusions and hallucinations that he experiences as threats to kill him by agents of a secret criminal conspiracy.³⁸ Due to his disorder, he hides for days at a time to avoid being killed by the conspirators. This pattern of

³⁶ Robert F. Schopp, *Competence, Condemnation, and Commitment* 41–49 (2001).

³⁷ American Psychiatric Association, *supra* note 19, at 297–98.

³⁸ *Id.* at 297–302.

hiding for unpredictable periods of time prevents him from holding a job. He has had several jobs, but he has been fired from each when he failed to attend work without notice during his periods of hiding. Thus, he sometimes lacks food for several days. At one point, following several days of hiding without food, he broke into a house in order to steal food. He was fully aware that this was a violation of law and accepted morality. He agreed at the time of the offense that it was wrong to steal from this family because he did not believe that they were part of the conspiracy. He selected their house partially because he believed that they were not part of the conspiracy and, thus, that they were not watching him. He broke into this family's house because after several days without eating, he was desperate to secure food, and he had no income or alternative source of food. Although he suffers from a psychotic disorder, he resembles Baker in that he does not qualify for acquittal under common standards for insanity because he understood that his conduct was wrong. He is competent to plead guilty and waive his right to a jury trial because he can understand the process and communicate with his attorney.

Davis is guilty by common legal standards. Some readers may conclude that Davis illustrates the inadequacy of common legal standards for the insanity defense. Others may agree that Davis should be held responsible because he was aware that he was committing a crime against innocent persons. Most would probably agree, however, that his disorder renders him substantially less culpable than most criminals who commit similar crimes of burglary. A sentence of probation with required participation in treatment for his disorder would reasonably be expected to reduce the risk that he would commit further crimes, promote his treatment interests, and be proportionate to his reduced degree of culpability. Thus, the guilty verdict, suspended sentence, and required treatment would plausibly be consistent with the principles of retributive and comparative justice. By conforming to these principles and the standard of competence to plead, the court would maintain the integrity of the criminal justice process.

If Davis failed to conform to the treatment process because he disliked the relatively minor side-effects of the treatment or because he found it embarrassing to be required to participate in that treatment, brief periods of incarceration to motivate compliance would be consistent with his conditions of probation and with his impairment which is serious but does not render him incompetent to plead guilty or preclude responsibility for this conduct. In contrast, if he ceased participating in the treatment because his delusions and hallucinations exacerbated and caused him to believe that the judge and treatment providers had joined the conspiracy to kill him by requiring that he ingest poison disguised as medication, then incarceration for his failure to conform to the conditions of probation would undermine the integrity of the process by applying criminal punishment that did not conform to the principles of retributive justice because Davis' impairment would be sufficient to render him not responsible for his failure to fulfill the conditions of probation.

The examples of Anderson, Baker, and Davis arguably illustrate a more general point about the significance of psychological impairment for various legal purposes. The significance of an individual's impairment for a particular legal purpose cannot be determined merely by diagnostic category. Rather, one must describe the functional

impairment manifested by this individual and the manner in which that impairment affects this person's ability to perform the psychological processes that are relevant to the specific legal status at issue. The court must determine whether that functional impairment and the resulting distortion of the relevant psychological operations are sufficient to render that person ineligible for the legal status at issue.³⁹ Participation in MHCs as discussed in this chapter requires competence to plead guilty as well as responsibility for the crimes that justify the guilty finding and for the failure to conform to the conditions of probation that justify the application of incarceration.

In appropriate cases, clinicians can evaluate the offenders' impairment and provide relevant testimony that describes this impairment and explains the manner in which that impairment influences the criminal conduct and the capacities relevant to judicial determinations of competence, responsibility, and sentence severity. That testimony can also include advice regarding available treatment that can reasonably be expected to ameliorate the impairment and, thus, to promote the offender's treatment interests as well as societal interests in reducing recidivism. Insofar as a particular offender is at least minimally competent and responsible, he can plead guilty and be placed on probation with conditions that fall within the range that is consistent with his degree of culpability and that promote participation in treatment expected to improve his well-being and to promote the societal interest in preventing recidivism.

Conclusion

MHCs draw attention to several important components of the criminal law as well as to concerns that are central to mental health law more generally. Various components of criminal and civil law treat some individuals differently than they treat people generally because those individuals are identified as manifesting mental illness. In order to justify differential treatment of these individuals, respect the standing of these individuals, and maintain the integrity of these specific legal institutions, as well as the integrity of the process of self-government through law, we must clearly identify the type and degree of impairment that constitutes mental illness for each specific legal purpose because it justifies differential treatment for those who manifest that impairment. In addition, we must explain the justification for treating individuals with that impairment differently than we treat most individuals in relevantly similar circumstances.

The harsh sanctions and expression of condemnation inherent in criminal punishment require careful attention to the requirements of competence, responsibility, and proportionality. Thus, identifying the type and degree of psychological impairment that justifies treating some offenders differently than we treat most ordinary offenders who commit similar offenses requires that we examine carefully the significance of various types and degrees of impairment for the appropriate attributions of competence, responsibility, and proportionality. This requirement takes on particular significance in context of criminal punishment because criminal punishment

³⁹ Schopp, *supra* note 36, at 44–49.

involves the intentional infliction of harsh sanctions and potentially severe intrusions into protected liberties. The analysis in this chapter advances an initial interpretation of some of the important considerations that must be addressed if MHCs are to pursue societal interests in reducing recidivism in a manner that conforms to the more general principles of criminal competence, responsibility, and proportionality that discipline the infliction of coercive force on individuals by the state in the form of criminal punishment.

One important aspect of this analysis addresses the integration of the legitimate functions of MHCs with related institutions, including general criminal courts and those that apply civil commitment or alternative forms of mental health intervention. Maintaining discipline on the functions of each of these institutions requires integration of the legitimate functions of each with the legitimate functions of the other institutions and with the principles that justify these various functions. In ideal circumstances, a defensible set of coercive state institutions would cohere with the complex set of purposes and justifications that provide the foundation in principle for this integrated institutional structure. In such an ideal world, a single criminal court would have the ability to understand and give justified mitigating effect to all relevant mitigating circumstances. A court with comprehensive understanding of the full range of relevant sentencing factors would be able to weigh them against each other and recognize the net aggravating and mitigating effects of all relevant considerations. In addition, that comprehensive understanding of the full range of sentencing considerations, in conjunction with full understanding of all the available rehabilitative alternatives, would enable the court to attain retributive justice and comparative justice while maximizing the rehabilitative function that would minimize recidivism.

In our world, however, it is not realistic to expect that any human institutions will fully conform in practice to the relevant purposes and justifications in principle. Thus, specific variations of these institutions must be assessed and pursued, or rejected, in context of the realistically available alternatives. In this world, a series of factors impair the ability of criminal courts to attain the ideal. These factors include, for example, a very heavy caseload that prevents courts from expending extended periods of inquiry regarding the most effective disposition for each offender; a lack of clarity regarding the most justifiable integration of various sentencing considerations such as retribution, rehabilitation, deterrence, and comparative justice; and the ongoing difficulties that arise when legal actors and clinicians attempt to communicate and interact with each other. Thus, in our world, a variety of problem-solving courts that focus their attention on specific categories of offenders, such as drug courts and MHCs, may reasonably be expected to advance the preventive functions of the criminal law in a manner that approximates the requirements of retributive and comparative justice more effectively than the realistically available alternatives. Ongoing critical review and revision constitutes one aspect of a responsible attempt to conform as closely as possible to the justifications in principle.

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Appendix: Relevant Offenders

Anderson:

1. Destroys neighbors furnace.
2. Chronic schizophrenic disorder; hallucinatory orders from God.
3. Lacks competence to proceed, criminal responsibility.

Baker:

1. Breaks into neighbor's basement to steal food.
2. Chronic major but not psychotic depressive disorder.
3. Competent to proceed, criminally responsible.

Cook:

1. Breaks into house to steal food.
2. No clinical diagnosis, limited intelligence and employment skills.
3. Competent to proceed, criminally responsible.

Davis:

1. Breaks into house to steal food.
2. Chronic schizophrenic disorder, hallucinatory threats to kill him.
3. Competent to proceed, knew the burglary was wrong.