Memorandum

To: Hub members

From: Bob Fleischner[1]
Coordinator, Crux Work Stream

Re: My response to an article critical of our Ongwen amicus brief

Date: August 9, 2023

Two Harvard University affiliated authors have published an article criticizing widely accepted interpretations of the Convention on the Rights of Persons with Disabilities' impact on the criminal legal system. (I have included a copy of the article with this memorandum.) They strongly disagree with what they characterize as "the argument espoused by significant members of the global disability rights community that bioscientific evidence of psychosocial disability should be inadmissible to negate criminal responsibility."[2] The article takes issue with positions taken by the Office of the United Nations High Commissioner for Human Rights ("HCHR"); the Committee on the Rights of Persons with Disabilities ("CRPD Committee"); and, without much exposition, by Disabled Persons' Organizations ("DPOs").

The authors reserve what is probably their harshest criticism for the arguments in the *amicus brief*[3] which some Hub members drafted and submitted to the International Criminal Court ("ICC").[4] As one of the authors of the brief, I am pleased it is getting some, albeit

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[1] Tina Minkowitz, Jenny Talbot, Tim Hodgson, and Diana Scheinbaum reviewed earlier drafts of this memorandum. Tirza Leibowitz helped to frame the arguments. I appreciate their comments and suggestions, many of which I have adopted, and all of which helped to sharpen my thinking and improve the memorandum. The opinions expressed, however, are mine and may not reflect the opinions of any of the people who worked on the brief, who reviewed this memorandum, or who are Crux work stream members. Any errors are mine.

[2] Benjamin A. Barsky, Michael Ashley Stein, The United Nations Convention on the Rights of Persons with Disabilities, Neuroscience, and Criminal Legal Capacity, 10 Journal of Law and the Biosciences (2023), https://doi.org/10.1093/jlb/lsad010. Hereafter the "Barsky/Stein article."

[3] The Prosecutor v. Dominic Ongwen, ICC-02/04–01/15A, Appeals Chamber, Amicus Curiae Observations Regarding the Relevance to this Case of the Convention on the Rights of Persons with Disabilities | International Criminal Court (Dec. 21, 2021)("*Amicus* Brief," "the brief," or "our brief"). Tina and I were the named *amici* and the primary authors of the brief. Steven Allen, Tim, Šárka Dušková, Tirza and others also contributed significantly to the brief.

[4] The authors make no mention of similar interpretations by, for instance, the Special Rapporteur on the rights of persons with disabilities and an important committee of the Organization of American States. See, the Special Rapporteur's International Principles and Guidelines on Access to Justice for Persons with Disabilities | OHCHR (2020) and Organization of American States, Committee on the Elimination of All Forms of Discrimination against Persons with

negative, attention. I am also pleased to find myself in good company among what Barsky and Stein describe as "significant members" of the global disability rights community who share common interpretations of the CRPD.

We were careful to say in the brief (and have acknowledged in every discussion of these issues inside and outside the Hub) that the issues raised in the *Ongwen* case are difficult ones. We have spent hours discussing them in Hub meetings, webinars, and at the July 2022 Institute. Debate has been encouraged and welcomed. Accordingly, a thoughtful response to the criticisms in the article is warranted.[5] The reflections below are mine alone, but I have been helped by comments and suggestions from others. While this is not a comprehensive reply to authors Benjamin A. Barsky and Michael Ashley Stein, I hope it can contribute to the conversations.

Given the stature and reputations of the article's authors,[6] some of their arguments are, at best, disappointing. Much of their criticism of our brief is ill founded, some is based on a misreading of the brief, some of their positions seem absolutist (just what they accuse us of), some others seem to contradict themselves, and still others appear to be contrary to universally accepted human rights doctrines. Frankly, it seems that Barsky and Stein's problems are as much with the CRPD itself (especially with the concept of legal capacity and the rejection of the medical model of disability) as they are with those who interpret the CRPD according to its own terms. Moreover, although laws and systems of other nations are discussed, the analysis is very U.S.-centric even though the CRPD is an international treaty with global implications. Many of my comments in response necessarily suffer from the same bias. Some other of my comments are based on my experiences which are in U.S state and federal courts.

Here, then, is my reply to some of the criticisms of our brief in the Barsky/Stein article.

1. By reducing the brief's arguments to "absolutism" in decision-making, Barsky and Stein fail to recognize or contest our main point, which is about using an inclusive definition of *mens rea* to arrive at substantive equality with regard to criminal culpability.

Barsky and Stein note that there has been insufficient attention to the implications of Article 12 on the criminal legal system. I agree. Although there have been some thoughtful articles (including, of course, Tina's which is both important and often cited[7]) articulating divergent views, the overall quantity of the scholarship is rather nominal. I also agree that while

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Disabilities (CEDDIS), Practical Guide for the Establishment of Supports for the Exercise of Legal Capacity by Persons with Disabilities, OEA/Ser D/XXVI.39 (2021), pages 22-23 (Concluding that the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities must be re-interpreted in light of Article 12 of the CRPD). https://www.oas.org/en/sare/publications/guia_practica_ceddis_eng.pdf.

[5] Of course, I can respond only for myself. DPOs, the HCHR, and the CRPD Committee can speak for themselves if they care to.

[6] Michael Ashley Stein, in particular. His numerous articles and other publications are impressive in their scope and scholarship. See, https://hls.harvard.edu/bibliography/?page=1&instructor_reverse=Stein%2C%20Michael%20Ashley&hls_bibliography_pub_type=article.

the CRPD Committee and the HCHR each clearly express the view that the insanity defense[8] must be abolished, they fail to describe alternatives. We said as much in our brief. We tried to fill the void.

I thought that we had three goals in writing our brief: first, to summarize some of the existing scholarship and the CRPD Committee's jurisprudence[9]; second, to offer a practical and workable alternative to the insanity defense; and, third, and more generally, to educate the ICC judges about the CRPD and its importance to international criminal law. In pursuit of these goals, the brief attempted to harmonize the Rome Statute's provisions which establish an insanity defense and a duress defense[10] with the relevant provision of the CRPD.

As a matter of overriding principle, we should not yield on our interpretation of Article 12's provision on universal legal capacity. One of the many reasons to respect legal capacity is individual autonomy. Respecting autonomy means allowing for culpability and accountability where it is justifiable – that is, accepting people as moral agents. Barsky and Stein are correct that our interpretation of legal capacity is critical to our proposal, but it is not all we had to say.

Most fundamentally, the brief suggests the ICC adopt an inclusive definition of *mens rea* to arrive at substantive equality with regard to criminal culpability. Barsky and Stein do not really explain why they oppose (if they do) offering persons with disabilities the same defenses available to all other defendants – ones that we argue would allow consideration of the defendant's "state of mind at the time of the alleged offense, taking into account any distress or unusual perceptions [the defendant] experienced at the time."[11] Contrary to what Barsky and Stein seem to believe, we do not oppose differential treatment including, of course, accommodations. What we *do* oppose is discrimination. Differential treatment and considerations of disability are fine in the appropriate context. This is why considering disability in *mens rea* and/or sentencing is appropriate.

Indeed, the proposal in the brief does *not* eliminate a consideration of disability or even expert evidence, although Barsky and Stein claim it does. Although psychological and psychiatric evidence can be problematic, we do we say that:

> evidence of distress or unusual perceptions would be examined wherever it may be raised to negate the mental element (*mens rea*) of a crime or to establish the mental element of a

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[7] Tina Minkowitz, Rethinking Criminal Responsibility from a Critical Disability Perspective: The Abolition of Insanity/Incapacity Acquittals and Unfitness to Plead, and Beyond by Tina Minkowitz, 23 Griffin L. Rev. (2014).

[8] I share Barsky and Stein's discomfort with the term "insanity defense." However, I use it here because it is the term most often used in legal practice and in most scholarship and commentary.

[9] Unlike the brief, the Barsky/Stein article dismisses the significant jurisprudence of the CRPD Committee. The authors ignore the expertise of Committee Members and the submissions to them from experts which, in considerable detail and with often lengthy explanations, define the CRPD's content.

[10] The Rome Statute establishes the ICC. The non-culpability defense is set out in Article 30. Volume 2187, 1-38544 - ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT.

[11] *Amicus Brief* at p. 29, ¶ 8.

partial or complete defence such as duress. Relevant evidence would include direct testimony by the defendant and those who knew him or her well at the time, as well as expert testimony from diverse sources congruent with the social model of disability, including testimony based on experts' interviews with the defendant. Such evidence would assist a Trial Chamber in understanding diverse mental states and processes that may be idiosyncratic or uncommon and how the distress and/or unusual perceptions experienced by a defendant could affect his or her formation of intent or construction of knowledge as relevant to a charged crime. *Medical or psychological expertise would not be dispositive but would be accepted alongside that of less conventional experts such as peer support specialists and communication assistants.*[12]

Finally, we and others are criticized for not thinking through the implications of our "absolutist" position on a variety of other processes that impact persons with disabilities – e.g., capacity to plead,[13] eligibility for disability income benefits,[14] and drug-use defenses. We are criticized for not answering questions we were not asked. Barsky and Stein repeatedly praise neuroscientists while acknowledging that their research is "underdeveloped" in some areas, that their theories have developed "slowly and haphazardly,"[15] and, indeed, are "still developing." Since our brief was one of the first attempts to formulate a CRPD compliant alternative to the insanity defense, I think we and our colleagues merit the same patience and forbearance.

2. The Barsky/Stein article legitimizes neuroscientific determinations of criminal culpability because, they claim, neuroscience will insure persons with disabilities are excluded from inhumane treatment, such as death penalty and solitary confinement.[16]

Barsky and Stein state that "neuroscientific evidence of impaired decision-making, insofar as it presents valid and interpretable diagnostic information, can be a useful tool for influencing judicial decision-making and outcomes in criminal court."[17] They argue, incorrectly, that our formulation will exclude "useful" evidence. If our suggestions were adopted, they ominously predict, more defendants will be "punished harshly, sentenced to death, and placed in solitary confinement."[18] (I have more to say on this dire prediction below.)

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[12] Id. ¶ 50 (emphasis provided).

[13] We did not discuss what evidence could be used in determining capacity to plead. After all, that was not what the ICC asked for *amicus* briefs to address. If we had, we would have pointed out that because they are contrary to the CRPD, capacity to plead paradigms should be rescinded. See, e.g., Special Rapporteur International Principles and Guidelines on Access to Justice for Persons with Disabilities | OHCHR (2020), Principle 1, Guideline 12 (e).

[14] The authors cannot think disability benefits entitlement has anything to do with the insanity defense, which is what we were writing about. It would have been a distraction and a waste of the limited space allowed by the ICC for *amicus* observations, to discuss that subject in the brief.

[15] Barsky/Stein article, at 3.

[16] It is not entirely clear how Barsky and Stein use the term " neuroscience." They seem mostly to be talking about brain scans and imaging, but may also include other aspects of psychiatry, psychology, and neurology.

[17] Barsky/Stein article, p. 1 (Abstract).

[18] Id., p. 2 (Abstract).

It is true that neuroscientific testing is playing an increasing role in the criminal legal system, although scholars disagree how frequently it is used in *individual* cases, which is what Barsky and Stein are most concerned with. Neuroscientific studies have certainly played a part in advances in criminal law. As they note, in the United States group-based studies have supported important Supreme Court decisions eliminating the death penalty and mandatory life without parole for crimes committed by defendants when they were minors.[19] It is also true that some U.S. defense lawyers use neurological evidence both in the culpability and sentencing (mitigation) phases of individual cases, especially in death penalty cases. Although the evidence in the literature is contradictory, I strongly suspect that prosecutors often subsequently use defendants' own neuroscientific evidence *against* defendants acquitted under the insanity defense to support petitions for involuntary institutionalization and forced treatment.[20]

I have two concerns with the Barsky/Stein article's approach to neuroscientific evidence. First, I am dubious of their mostly unquestioning (in fact, nearly absolutist) acceptance of neuroscience as a valid way to determine whether a defendant is competent or culpable, or in support of mitigation in sentencing. Second, while like Barsky and Stein, I oppose harsh punishments, inhumane treatment, and solitary confinement for persons with disabilities, I would abolish them for *all* persons and would not perpetuate discrimination in order to keep persons with disabilities from suffering from these inhumane punishments and interventions.

The insanity defense actually advances institutionalization as an alternative to prison. But institutionalization is contrary to human rights, violates the CRPD, and survivors of psychiatric institutionalization, people with psychosocial disabilities, and their allies have been fighting against it for decades. Moreover, these institutions use the same kinds of inhumane interventions, albeit sometimes with different names, like solitary confinement (called perhaps "seclusion" and "physical and mechanical restraint"), and mental health watch (usually called "suicide watch") that Barksy and Stein decry in prisons. Indeed, at least in the U.S., as the

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[19] Roper v. Simmons, 543 U.S. 551 (2005)(taking into account studies into the development of the adolescent brain; notably, however, the defendant had not been tested using neuroscientific procedures); Miller v. Alabama, 567 U.S. 460 (2012)(mandatory life without parole for crimes committed when the defendant was a juvenile are unconstitutional, even if the crime is murder).

[20] It has been my experience when representing individuals acquitted "by reason of insanity" in involuntary commitment hearings that the evidence they used to support their insanity defense is then used against them to support their institutionalization. My experience of course is anecdotal and is a small sample. Some studies in other countries are consistent with my experience, others are not. Compare Miha Hafner, Judging homicide defendants by their brains: an empirical study on the use of neuroscience in homicide trials in Slovenia 6 J. L. & Biosciences 226 (2019) (finding very little use of neuroscientific evidence to support security measures after successful use of the insanity defense in Slovenia) with Jennifer A. Chandler, The use of neuroscientific evidence in Canadian criminal proceedings - PMC, 11 J. L. & Bioscience 550 (2015) (use of neuroscientific evidence to support insanity defense "tends to increase perceptions of risk and dangerousness. This so-called double-edged sword of the biological explanation of criminal behavior … raises questions about whether and when the pursuit of such evidence is advisable from the defense perspective.) For a study of the use in the U.S., see Henry T. Greely & Nita A. Farahany, Neuroscience and the Criminal Justice System, 2 Ann. Rev. Criminology 451 (2019).

Supreme Court has recognized, there may be more forced medication and involuntary treatment in psychiatric facilities than in prisons.[21]

A. The role of neuroscience. I suspect that few Hub members are experts in the neuroscientific applications that Barsky and Stein promote. The literature is dense. The Barsky/Stein article focuses on articles that purport to demonstrate that brain scans can visually identify "psychotic disorders," "schizophrenia," "depression," and "anxiety disorders,"[22] without any acknowledgement of the controversy surrounding the diagnoses. Except for a fleeting reference to the "often-problematic" DSM diagnostic categories,[23] Barsky and Stein ignore this controversy.

They do, however, acknowledge some controversy about this kind of neuroscience. They say "the most contentious debates surrounding the use of neuroscience in criminal court have gravitated around issues of responsibility (i.e., identifying *mens rea* at the time of an alleged offense) and deception (i.e., lie detecting)."[24] Despite this, they claim their proposed "application" (it is not clear to me just what that is) is "much less controversial."[25] This is confusing. First, they criticize our formulation because in their view it prohibits the use of neuroscientific evidence in determining culpability. Then, they acknowledge that the use of neuroscience in determining culpability is controversial. Then, they say their application, which seems to include using it in determining culpability, is "much less" controversial.

Whatever they actually mean to say, Barsky and Stein probably minimize the controversy. My research, while admittedly limited, found abundant literature that is more

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[21] That is also my observation in Massachusetts and some other states, at least in regard to forced medication. In a case involving the transfer of a prisoner to a mental hospital, the U.S. Supreme Court held that the prisoner was entitled to due process because "the stigmatizing consequences of a transfer [of a prisoner] to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness, constitute the kind of deprivations of liberty that requires procedural protections." Vitek v. Jones, 445 U.S. 480, 494 (1980). In other words, a mental hospital can constitute more restrictive placement and involve a greater loss of liberty than even a prison.

[22] They identify four neuroscientific applications, electroencephalography ("EEG") computed tomography ("CAT") scans, magnetic resonance imaging ("MRI"), and positron emission tomography ("PET") scans. They cite to articles in which EEGs are said to allow visual identification of psychotic disorders and Alzheimer's disease, among other things. They quote articles that claim CAT scans can detect tumors, traumatic injuries and the like and that MRIs facilitate the diagnosis of psychotic and neurodegenerative disorders, strokes, and injuries. PET scans are claimed to be "useful for the clinical management of individuals with psychiatric disorder diagnoses, such as mood (e.g., depression) and anxiety disorders, schizophrenia, and obsessive-compulsive disorder." Barsky/Stein article at p. 9 (footnotes omitted).

[23] Id. at 14.

[24] Id. at 9.

[25] Id. A formulation for determining *mens rea* is at the core of the brief. Although the Barsky/Stein article criticizes the approach, and lauds neuroscience, as noted in the text above, it acknowledges that commentators believe determining *mens rea* may be where neuroscience is the least helpful.

critical than the article's authors might have readers believe. In particular, the evidence that neuroimaging can detect psychosocial disabilities (a critical claim that is at the foundation of their arguments) is actually significantly in dispute.[26]

Moreover, the empirical research (as opposed to theoretical work) on the effects of the use of neuroscience in criminal cases may not be anywhere near as extensive as they imply. One researcher concluded in 2019 (only four years ago) that

> against a backdrop of a large body of theoretical work on the use of neuroscience in criminal law *de lege ferenda* [the law as it should be] one is surprised to find very little empirical research on the use of neuroscience in criminal justice systems *de lege lata* [the law as it is]. In fact, we could only identify a handful of studies attempting to paint a more comprehensive picture about the use of neuroscience in particular criminal justice systems. Moreover, except for one Dutch study, all the research was conducted in common-law criminal justice systems: three studies in the USA, one in England and Wales, and one in Canada. Thus, little is known about how neuroscience shapes the outcomes of criminal trials in civil-law jurisdictions.[27]

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[26] For instance, see Peter Falkai, Andrea Schmitt, and Nancy Andreasen, Forty years of structural brain imaging in mental disorders: is it clinically useful or not?, 20 Dialogues Clin. Neuroscience 179 (2018) ("The search for such markers in so-called affective and non-affective psychoses, namely bipolar disorder, MDD [major depressive disorder], and schizophrenia, is likely to take longer because these disorders lack an established neuropathological basis. It appears that a much greater number of brain imaging studies will be needed in these disorders to identify a common neurobiological basis in each of them.") Further, with the assistance of citations in an article by Joshua W. Buckholtz, Valerie Reyna, & Christopher Slobogin, A Neuro-Legal *Lingua Franca*: Bridging Law and Neuroscience on the Issue of Self-Control, 4 Mental Health L. & Pol'y J. 2, 3 (2016), Vanderbilt University Law School Public Law and Legal Theory, I identified the following articles and a book that either criticize or raise serious questions and cautions about the use of neuroscience in individual criminal cases: David Eagleman, The Brain on Trial, The Atlantic, July/August 2011, 112–115; Editorial, Free to choose? Modern Neuroscience is Eroding the Idea of Free Will, The Economist, Dec. 19, 2006, Thomas Nadelhoffer & Walter Sinnott-Armstrong, Neurolaw and Neuroprediction: Potential Promises and Perils, 7 Phil. Compass 631 (2012) http://onlinelibrary.wiley.com/doi/10.1111/j.1747-9991.2012.00494.x/full; Thomas R. Scott, Neuroscience May Supersede Ethics and Law, 18 Sci. & Engineering Ethics 433 (2012); Sally Satel & Scott O. Lilienfeld, Brainwashed: The Seductive Appeal of Mindless Neuroscience (2013)(arguing that many of the applications of neuroscience gloss over limitations and intricacies, at times obscuring—rather than clarifying—the factors that shape behavior and identities); Stephen J. Morse, Avoiding Irrational NeuroLaw Exuberance: A Plea for Neuromodesty, 62 Mercer L. Rev. 837, 837–38 (2011) ("Neuroscience has many things to say but not nearly as much as people would hope, especially in relation to law. At most, in the near to intermediate term, neuroscience may make modest contributions to legal policy and case adjudication.") https://ursa.mercer.edu/handle/10898/9307?show=full; Owen D. Jones, Joshua W. Buckholtz, Jeffrey D. Schall & Rene Marois, *Brain Imaging for Legal Thinkers: A Guide for the Perplexed*, 2009 Stan. Tech. L. Rev. 5 (2009)("We are concerned that brain imaging can be misused by lawyers (intentionally or unintentionally) and misunderstood by judges and jurors.").

Regardless of the value and reliability of neuroscientific examinations, significant questions about them arise in the context of the CRPD. For instance, as the Hub, the CRPD Committee, the Special Rapporteur, and others have repeatedly acknowledged, the CRPD eschews the medical model of disability.[28] There is no gainsaying that neuroscience for people with psychosocial disabilities is fully integrated into the medical model.[29] While its diagnostic methods are different from those used by traditional psychiatry, the outcome is the same – a medical or psychiatric diagnosis. Barsky and Stein, perhaps to understate it, are uncomfortable with the CRPD's rejection of the biomedical model of disability. Rather, they embrace the "trend" in "bioscience research, including genetics, where psychiatric disabilities and psychopathology more generally are understood in biological terms rather than as social constructs."[30] In that sense, the Barsky/Stein article may be read to further a medical model which has been challenged by survivors of psychiatry and people with psychosocial disabilities and which is repudiated by the CRPD including most recently in the deinstitutionalization guidelines.[31]

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[27] Miha Hafner, Judging homicide defendants by their brains: an empirical study on the use of neuroscience in homicide trials in Slovenia, 6 J. L. & Biosciences 226 (2019)(footnotes omitted).

[28] This is how we explain it in our brief at paragraphs 20 and 21:

> 20. In contrast, the medical model, which the CRPD decisively rejects, perceives a person with a disability through the lens of inherent limitations or impairments ("mental disease or defect" in the wording of the Rome Statute) that require diagnosis and often intervention by medical and social welfare professionals and upon which the person's exclusion from full and equal participation in mainstream culture institutions, legal processes and in the exercise of human rights may be justified.
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> 21. The social model, at its core, maintains that the socially engineered environments and attitudes play a central role in creating "disability". Therefore, the CRPD does not define "disability". However, Article 1 states that "[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

[29] Barsky and Stein do not exactly acknowledge this. Rather, they say that neuroscience "identif[ies] and diagnose[s] brain and behavioral impairments" which, they concede, "are often *clothed in biomedical terminology*." Barsky/Stein article, p. 3 (emphasis supplied). They suggest that the "often-problematic diagnostic categories" in the DSM may be resolved with the "advent of computational and precision psychiatry" which "seeks to enable mental health diagnoses and treatments based on multidimensional information such as the environment in which people live as well as their biological makeup." Id. 15. For a bit more information about "precision psychiatry," see, for instance, Center for Precision Psychiatry at the Massachusetts General Hospital in the U.S., which says its mission is "To integrate research and clinical practice to enable more accurate risk prediction, targeted prevention, precise diagnosis and effective treatments for psychiatric disorders."

[30] Id. 14.

[31] CRPD Committee, Guidelines on Deinstitutionalization, Including in Emergencies (2022) ¶10 ("Individual crisis should not be treated as a medical problem requiring treatment or as a social problem requiring State intervention, forced medication or forced treatment.") https://www.ohchr.org/en/documents/legal-standards-and-guidelines/crpdc5-guidelines-deinstitutionalization-including.

There are serious and complex ethical issues that arise from the use of neuroscientific tests. Consent is one.[32] Isn't it a problem if defendants consent to tests which purport to determine them to be incompetent? Was the consent invalid? Then what?[33] The Barsky/Stein article does not address these broad questions. However, it does more narrowly acknowledge the ethical issues that can arise in "human research exploring the neurocognitive effects of solitary confinement" because of the inability to create or identify a control group.[34] It seems fair to assume ethical concerns arise in neuroscientific human research into other issues, as well. These ethical questions warrant our further exploration and thought, especially in the context of CRPD's legal capacity principles.

One final note on this topic. While I do not want to appear as a luddite, I am inherently skeptical of science that claims to be able, in essence, to read a person's mind.[35] Cruel history should warn us to be cautious of scientific advances that, no matter how modestly, claim to be able to read what is going on in a person's head and, if what is it is inconsistent with dominant social norms, to know how to fix it. Think, for instance, about the now discredited "science" that supported eugenics, psychosurgery, insulin shock therapy, the diagnosis of "hysteria," and the invention of the asylum. Consider also that, even today, courts in Massachusetts in the United States accept discredited "science" to authorize the widely condemned use of painful electric skin shock to control behavior of disabled persons at the Judge Rotenberg Educational Center ("JRC").[36]

Barsky and Stein seek to cushion criticism of neuroscientific evidence by stating that "[h]ow neuroscientific evidence influences criminal punishments is, by and large, a matter of [judicial] discretion."[37] The discretion exercised by some Massachusetts judges to credit "behavioral science" presented by JRC's clinicians and supporters is a cautionary tale that I know from my clients' harsh experiences.

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[32] See, Sjors Ligthart, Thomas Douglas, et al, Forensic Brain-Reading and Mental Privacy in European Human Rights Law: Foundations and Challenges, 14 Neuroethics 191 (2021)(arguing there is a "legal right to mental privacy" in European law).

[33] Of course, this is also a potential problem in any testing for competency. However, limited case law in the U.S. suggests that consent is not required to conduct a clinical interview to determine competency and that if the defendant refuses to cooperate, the examiner may base an opinion on other sources or report that it is not possible to state an opinion. A summary of cases is available at 21 Am. Jur. 2d Criminal Law § 94.

[34] Barsky/Stein article, p. 17.

[35] See CRPD Committee, General Comment 1 at ¶ 15 (Functional approaches to determining capacity fail because they "presume[] to be able to accurately assess the inner-workings of the human mind.") https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement.

[36] For the current status of the decades long litigation involving JRC and for access to the most recent briefs including competing briefs on the scientific research, see https://www.ma-appellatecourts.org/docket/SJC-13298.

[37] Barsky/Stein article, p. 11

I think that healthy skepticism is particularly appropriate when science challenges fundamental ideas about free will.[38]

B. Harsh punishments, solitary confinement, and inhumane treatment. Barsky and Stein also point to the importance of neuroscience in regulating or eliminating the imposition of harsh sentences (including death) and the use of solitary confinement. I have already acknowledged that group-based neuroscientific studies have been a part of the development of laws that I support. I have no quarrel with the elimination of the death penalty and solitary confinement. Nor do I suggest that defense lawyers should not use whatever admissible evidence is available to them to save their clients from death or other harsh sentences.

However, I think that Barsky and Stein overestimate the impact of neuroscience in the progress made in these areas. I understand the human rights response to the death penalty, harsh prison treatment, and solitary confinement is to seek their elimination -- for everyone. (This isn't to suggest that Barsky and Stein are not in favor of abolition.) Since several Hub members have long been involved in prisoners' rights and solitary confinement advocacy, I will limit comments here to those issues. (The Hub is learning more about the death penalty from our colleagues in Taiwan and through our ongoing dialogue with anti-death penalty lawyers in India and the U.S.)

Advocacy against solitary confinement in the U.S. has had two important threads. (Sorry, again, for the U.S. focus, but that is the venue of most of what Barsky and Stein discuss.) The first is broad-based policy advocacy seeking its elimination. This advocacy has relied heavily on the argument that solitary confinement is a human rights violation that amounts to torture. Evidence of the emotional and physical consequences of solitary are among, but hardly the only, the arguments against it. There is, for instance, compelling evidence that solitary does not make prisons safer – indeed, it makes them more dangerous to incarcerated people and to staff. And, solitary is very expensive.[39] Moreover, to the extent evidence of emotional harm was a reason for abolition of solitary, that evidence was based on mostly clinical interviews, not neuroscience testing.[40]

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[38] Theologians, philosophers, social scientists, psychologists, biological scientists, jurists and many of us and our ancestors have contemplated questions about free will for centuries. Criminal punishment is acceptable because we believe in convicted defendants' free will and agency. Neuroscience is seen by some as undermining concepts of free will. An examination of the implications of neuroscience on notions of free will is far beyond the scope of this memorandum. For an interesting article about some of the early neuroscience research that was interpreted to show free will does not exist, see Bahar Gholipour, A Famous Argument Against Free Will Has Been Debunked, The Atlantic, September 10, 2019.

[39] See, Kayla James & Elena Vanko, The Impacts of Solitary Confinement (2021).

[40] See, e.g., Stuart Grassian's seminal (although sometimes criticized) article identifying a "SHU [Secure Housing Unit] syndrome," which was based on his extensive clinical interviews with prisoners at the infamous Pelican Bay prison. Stuart Grassian, Psychiatric Effects of Solitary Confinement, 22 J. of Law & Pol'y 325 (2006), https://www.prisonlegalnews.org/media/publications/grassian_journal_of_law_and_policy_psychiatric_effects_of_solitary_confinement_2006.pdf.

The second thread is litigation. Because of the way that courts interpret the U.S. Constitution's 8th Amendment (which prohibits "cruel and unusual punishments"), most of the successful anti-solitary litigation has focused on a subset of prisoners – those diagnosed with a "serious mental illness" *before* they were placed in solitary. Psychiatrists and psychologists have been among the expert witnesses in these cases.[41] The remedy in such cases is to exclude persons with pre-existing serious psychosocial disabilities from solitary. Such remedies, unfortunately, do little, at least in the short term, to keep others out of solitary. Indeed, they may have the unintended effect of actually legitimizing the use of solitary for everyone else. From that perspective, I have wondered whether the legal theories, supported by admissible psychological and medical evidence, has actually hindered efforts to totally eliminate the use of solitary confinement in the United States. Nevertheless, I have concluded that this kind of litigation, which scholar Margo Schlanger characterizes as using an "incrementalist approach" to the abolition of solitary, has much to recommend it even though it does not entirely eliminate the use of solitary confinement.[42]

Barsky and Stein correctly point to important legislation and administrative actions which have the promise of significantly limiting the use of solitary. In the U.S., much of this legislation, as they note and I just discussed, has restricted the use of segregated housing for persons with "serious" psychosocial disabilities. Nevertheless, in some states in the U.S., corrections administrators have gone beyond what legislatures and courts have required and are on course to eliminate (or nearly eliminate) solitary for all incarcerated persons. Massachusetts, where successful litigation[43] and subsequent legislation exempted persons with psychosocial disabilities from solitary, is an example.[44] Internationally, the U.N.'s Nelson Mandela Rules are a widely accepted model for solitary reform and several nations have moved to eliminate the use of solitary.[45]

Speaking again of Massachusetts, Barsky and Stein describe a Department of Justice ("DOJ") investigation into the use of "mental health watch" ("MHW") in the state's prisons.[46]

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[41] In my experience, our clinical expert witnesses in class actions challenging solitary confinement have offered their opinions about the harms to class members based on extensive interviews with prisoners and exhaustive record reviews, not on brain scans.

[42] Margo Schlanger, Incrementalist vs. Maximalist Reform: Solitary Confinement Case Studies, 115 Nw. U. L. Rev. 273 (2020).

[43] Disability Law Center v. Massachusetts Department of Correction, 960 F.Supp.2d 271 (D. Mass. 2012). All the documents in the case including the Memorandum and Order approving the settlement are available at https://clearinghouse.net/doc/41234/.

44 Esteban Bustillos, Mass. Department Of Correction Announces Intent To Do Away With Restrictive Housing, (June 30, 2021).

[45] Despite some advances, the overall picture is discouraging. For a brief and sobering update on the use of solitary internationally see, Thailand Institute of Justice & Prison Reform International, Global Prison Trends 2023, p. 34.

[46] Barsky/Stein article, p. 17. The article says the DOJ investigation was into "segregation practices in Massachusetts prisons." This is not precisely correct. The investigation did begin as a look at restrictive housing generally, but soon focused much more narrowly on MHW which was the practice of placing incarcerated persons with psychosocial disabilities who were

Their description of the conditions on the health care units that contain the MHW cells is accurate and very disturbing.[47] I have seen these cells (and others just like them elsewhere),[48] have spoken to people isolated in them, and with colleagues have advocated for their elimination. They are an example of the inhumanity of the prison system for adults (and, in many places, children) with psychosocial and emotional disabilities. Barsky and Stein offer up these inexcusable interventions as one of the inevitable terrible consequences that will flow from an adoption of our formulation for the elimination of the insanity defense. I reject that argument. These awful conditions exist where the insanity defense is available (including Massachusetts) and used. We all should look for ways to keep people out of prison (I agree with Barsky and Stein about this goal) and, for those in prison, to ensure more appropriate and effective responses to emotional crises. Perpetuating disability-based discrimination and inhumane treatment in order not to subject more people to the possibility of winding up in prison and in segregation does not seem like a useful strategy to me.

3. Barsky and Stein appear to disregard the reality of the forced institutionalization and involuntary "treatment" that follows the application of the insanity defense and other disability-based defenses.

The brief asserts that the most common consequences of being found "insane" in a criminal case are the use of coercive mechanisms through psychiatric commitment, guardianship, and forced treatment. Barsky and Stein dissent. They suggest that whether that is true will "depend on jurisdictional preferences and the availability of non-coercive schemes like supported decision-making arrangements..."[49] I wish this was true.

Forced institutionalization is a form of harsh imprisonment. While some jurisdictions have instituted diversion systems, have adopted restorative justice programs, and have created community alternatives to forensic psychiatric facilities, the Hub's research has found these efforts, though promising in many cases, are narrowly designed and hardly wide spread. In many Hub members' countries, as soon as a question of mental culpability or incapacity to plead is raised, the defendant is sent to prison or a mental hospital. In Latin America, for instance, individuals found by the court to be exempt from criminal responsibility – "*inimputables*" – are arbitrarily detained because they have a disability, and subjected to forced medical treatment and

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considered at risk of suicide, self-harm, or, sometimes, harm to others in cells by themselves. The cells, which were in a health care unit, were designed so that the prisoners could not have access to things they could use to harm themselves or others and where they could be closely observed. MHW is a form of non-disciplinary solitary confinement.

[47] Massachusetts has agreed to reform its MHW and suicide response systems. See, Justice Department Secures Agreement with Massachusetts Department of Correction Investigation Involving Individuals in Mental Health Crisis. The state's legislature has enacted a bill aimed at ameliorating some of the worst aspects of MHW. See, Mass. Gen. L. c. 123 § 18a½. General Law - Part I, Title XVII, Chapter 123, Section 18.

[48] I have visited most of the MHW units in Massachusetts prisons with plaintiffs' experts as part of discovery in class action litigation and as a member of a committee charged with oversight of the use of restrictive housing (including solitary confinement) in the state's prisons and jails.

[49] Barsky/Stein article p. 13. The article does not provide any examples of such non-coercive schemes.

other measures in prison or elsewhere. Moreover, too many diversion-type programs have coercive eligibility requirements and conditions for participation that include the possibility of prison or institutionalization if the person does not fully comply with mandated treatment orders. Finally, while I support the appropriate use of supported decision-making arrangements, I think Barsky and Stein exaggerate their potential utility in the criminal legal system.[50]

I agree with Barsky and Stein that the goal should be to keep people with disabilities out of the criminal legal system. But I think they are too optimistic about what alternatives may already exist. Mental hospitals and coercive community-based programs are not alternatives. This is an area where considerable thought and advocacy is necessary. Three of the Hub's workstreams have been discussing and writing about these issues and will continue to do so.

Conclusion

There is more that could be said. I hope others will weigh in. The Barsky/Stein article helps by forcing us to confront and defend our principles and, if necessary, modify our ideas. It also reminds us that we need to be in continued dialogue with others who share all or some of our ultimate goals, but see the way to achieve them quite differently than we do.

[50] Supported decision-making potentially can be useful in supporting people to make decisions about the course of the criminal case. It may also be useful in providing support so that a person is considered competent to stand trial. It seems to me to have limited applicability to the substance of the insanity defense, however.