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RE-ARRANGING DECK CHAIRS ON THE TITANIC:

WHY THE INCARCERATION OF INDIVIDUALS WITH SERIOUS MENTAL ILLNESS VIOLATES PUBLIC HEALTH, ETHICAL, AND CONSTITUTIONAL PRINCIPLES AND THEREFORE CANNOT BE MADE RIGHT BY PIECEMEAL CHANGES TO THE INSANITY DEFENSE

Jennifer S. Bard*

Anyone who has spent any time in the criminal justice system—as a defense lawyer, as a district attorney, or as a judge—knows that our treatment of criminal defendants with mental disabilities has been, forever, a scandal. Such defendants receive substandard counsel, are treated poorly in prison, receive disparately longer sentences, and are regularly coerced into confessing to crimes

* Associate Professor of Law, Texas Tech University School of Law, Lubbock Texas; J.D., Yale Law School, 1987; M.P.H., University of Connecticut, 1997; A.B., Wellesley College, 1983. This work grew out of an invitation to give the second Nordenberg Lecture at the University of Pittsburgh Law School in October 2002, where I had the honor of Chancellor Nordenberg's presence at the lecture. I very much appreciate the questions and comments following the lecture, which informed this article. Thank you also to Professor Elyn Saks, Orrin B. Evans Professor of Law, Psychiatry and Behavioral Sciences, University of Southern California Law School, who read a late draft and made many helpful comments; Donna Vickers of the University of Texas Medical Branch; and to my primary research assistant at Texas Tech Law School, Kristi Ward '05, for her invaluable contributions to the project. In addition, Emily Newell '04, Shaun Hunley '05, Yolanda Sewell '05, and Rachel Khirallah '05 all provided substantial research help at critical times. I am especially grateful to my students at the Institute for the Medical Humanities at the University of Texas Medical Branch in Galveston, Texas: Alison Rutledge, John Caskey, Amy McGuire, Bernadette McKinney, and Jason Morrow, with whom I discussed these issues; and to William J. Winslade, Ph.D., J.D., who provided me with much insight about the insanity defense. I also thank Dr. Howard Zonana, Professor of Medicine and Law at Yale Medical and Law Schools. My role models in this work are my mother, Dr. Barbara T. Bard, and Dr. Dorothy Otnow Lewis—for their groundbreaking research on death row inmates that has already done so much to bring to the legal system an understanding of the serious mental illness and neurological damage of those we imprison. Finally, I thank my brother Eli Bard for his constant help and encouragement. All the errors and mistakes in this piece are mine, despite the best efforts of those who have tried to assist me.

(many of which they did not commit) . . . We further know that the one question on which we obsessively focus—the scope and role of the insanity defense—is virtually irrelevant to this entire conversation.¹

“On any given day, at least 284,000 schizophrenic and manic depressive individuals are incarcerated, and 547,800 are on probation . . . [W]e have unfortunately come to accept incarceration and homelessness as part of life for the most vulnerable population among us.”²

“[S]he knew exactly what she was doing, and she knew it was wrong,” said a juror, explaining why she rejected Andrea Yates’ insanity defense.³

INTRODUCTION

The decision by a Texas jury to find Andrea Pia Yates—the woman who drowned her five children because she believed she was saving them from God’s judgment—guilty of murder, rather than not guilty by reason of insanity, has unleashed a torrent of calls to revise the insanity defense to avoid further such perceived injustices. In this Article, I will argue that the problem of adjudicating mentally ill criminals is too large a societal issue to be resolved by merely refining the insanity defense to include provisions for women suffering from post-partum depression who kill their children. Instead, I propose that the mass closing of institutions for the mentally ill over the past thirty years—without creating adequate outpatient mental health treatment—has resulted in a new problem only tangentially related to the high-profile cases which have until now driven the study of the insanity defense. This population of individuals who have difficulty conforming their behavior to societal norms would previously have been committed to mental hospitals. Now, they end up incarcerated as criminals. Without addressing, or at least considering, the lack of available mental health care, laws

¹ Michael L. Perlin, “*Life Is in Mirrors, Death Disappears*”: *Giving Life to Atkins*, 33 N.M. L. REV. 315, 315 (2003) [hereinafter Perlin, *Mirrors*].

² *The Impact of the Mentally Ill on the Criminal Justice System: Hearing Before the House Judiciary Subcomm. on Crime*, 106th Cong. (2000) (testimony of Congressman Ted Strickland).

³ ASSOC. PRESS, 4 *Yates Jurors: Confession, Photos Key to Verdict*, WASH. POST, Mar. 18, 2002, at A18, available at LEXIS, News Library, Wpost File [hereinafter AP, *Yates Jurors*]. As of the publication of this article, the Texas First Court of Appeals in Houston has overturned Andrea Yates’ conviction based on false testimony from a psychiatric expert for the prosecution. *Yates v. State*, Nos. 01-02-00462-CR, 01-02-00463-CR, 2005 Tex. App. LEXIS 81 (Tex. App. Jan. 6, 2005). The fact of the verdict is relevant to this article, whether or not the conviction is eventually sustained on appeal.

concerning the criminal responsibility of the mentally ill cannot be considered fair.

It is stating the obvious to say that the nation's health care system is inadequate to meet the needs of people with mental illness. This threatens the health of both people with mental illness and people who may become victims of crime committed by the mentally ill. It is, therefore, accurate to describe the current situation as a public health crisis. Doing so, however, raises the question of what public health is. The World Health Organization ("WHO") defines "health" as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."⁴ Building on the WHO definition, the Institute of Medicine defines public health as "what we, as a society, do collectively to assure the conditions for people to be healthy."⁵ I contend that assigning full criminal responsibility to people with diagnosable serious mental illness substantially impairs the public's health.

By not providing adequate mental health resources, we create conditions in which people with mental illness find themselves in situations where, due to their illness, they have the opportunity to commit criminal acts that are causally related to the impairment of their thought processes. Further, I contend that when people with mental illness are convicted of crimes and placed in ordinary prisons, the conditions under which they are confined constitute deliberate indifference to their basic health care needs. I will further explain how the crowding, regimentation, and lack of mental health services in prisons all contribute to making prison an unsuitable place for the mentally ill. Third, I propose that by not addressing the issue of how to adjudicate mentally ill people who commit crimes, society itself is sick, because it is acting against normative standards of fairness in assessing responsibility and caring for the ill. Fourth, I argue that confinement in regular prisons is inappropriate—i.e., harmful—to people with mental illness and may well violate their Eighth Amendment right to be free of "cruel and unusual punishment."⁶ Moreover, confinement without treatment is against society's interest, because a large number of prisoners are eventually released and returned to society.⁷ Finally, I contend that the pres-

⁴ Constitution of the World Health Organization pmbl., opened for signature July 22, 1946, 62 Stat. 2679, 14 U.N.T.S. 185.

⁵ INST. OF MED., THE FUTURE OF PUBLIC HEALTH 19 (1988).

⁶ U.S. CONST. amend. VIII.

⁷ National Institute of Corrections, Data on Prison Populations (2004), at http://www.nicic.org/downloads/other/ocjtp_db_prisons.aspx (last visited Mar. 2, 2005) (on file with

ence of so many people with mental illness in prison calls into question the ethical and moral basis for society's assigning criminal responsibility to people with mental illness.

In reviewing the reasons for the insanity defense, Professor Stephen Morse writes that "the moral basis of the insanity defense is that there is no just punishment without desert and no desert without responsibility."⁸ He goes on to define responsibility as being "based on minimal cognitive and volitional competence."⁹ "Thus," he concludes, "an actor who lacks such competence is not responsible, does not deserve punishment, and cannot justly be punished."¹⁰ Recent changes in society, which have resulted in a lack of health care for people whose thought processes are impaired, only highlight what has always been true: There is a large, unexplored area between individuals who are fully responsible for their actions and those who bear no responsibility at all. The traditional view of the insanity defense, as Morse expresses, was that once having satisfied the normative principle, it would be "unfair" to hold "some crazy"¹¹ persons responsible for their criminal behavior."¹² However, as Professor Morse recognizes, although the standards for identifying

author) (According to Justice Department statistics, "630,000 inmates in state and federal prisons are being released each year. . . . That is approximately 1,700 offenders released every day, many of whom have no savings, are not entitled to unemployment benefits, have few employment opportunities, and are dealing with a struggling economy.") (citing BUREAU OF JUST. STATS, FEDERAL CRIMINAL CASE PROCESSING, 2000 WITH TRENDS 1982-2000 (2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fccp00.pdf>; Jeremy Travis et al., *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry*, URBAN INST., June 2001, available at http://www.urban.org/UploadedPDF/from_prison_to_home.pdf; THE SENTENCING PROJECT, U.S. PRISON POPULATIONS—TRENDS AND IMPLICATIONS (2003); Joan Petersilia, *When Prisoners Return to the Community: Political, Economic, and Social Consequences*, 9 SENTENCING & CORR.: ISSUES FOR THE 21ST CENTURY 2000, at 1 (Nov. 2000), available at <http://www.ncjrs.org/pdffiles1/nij/184253.pdf>).

⁸ Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 779, 783 (1985). Written soon after the Hinckley verdict, this article by Professor Morse offers a comprehensive and thoughtful view on the legal status of the insanity defense and its moral underpinnings.

⁹ *Id.*

¹⁰ *Id.*

¹¹ The use of the word "crazy" is Professor Morse's. See *id.* at 780, n.4.

I use the word 'crazy' advisedly and with no lack of respect for either disordered persons or the professionals who try to help them. It refers to behavior that is weird, loony, or nuts; less colloquially, it is behavior that seems inexplicably irrational. I chose the word 'crazy' because I believe that it is the best generic term to describe the type of behavior that leads to a diagnosis or label of mental disorder. At the same time, it avoids begging questions about whether the crazy person was capable of behaving less crazily.

Id.

¹² *Id.* at 781.

which “crazy” people should be excused have changed over time, “the moral perception has remained constant: At least some crazy persons should be excused [of criminal responsibility].”¹³ This Article seeks to show how there is also a moral principle that requires not just the excusing of “some crazy” people, but rather measured and compassionate consideration of the varying levels of responsibility of all people with serious mental illness. It is easy to set such a high standard for excusing behavior that almost no one ever meets it. However, society is not absolved of moral responsibility by excusing people who are the most severely impaired by mental illness, while treating all other mentally ill people exactly like ordinary criminals. I suggest that the moral obligation to consider the whole range of mental illness in assessing criminal responsibility co-exists with the moral obligation to provide access to appropriate treatment and care for all people with mental illness.

While efforts to refine currently existing insanity defenses have a place, I argue that the insanity defense was, and continues to be, concerned only with a very small portion of the mentally ill: those who essentially lack all awareness of external reality. Most individuals affected by some degree of mental illness are excluded from insanity defense consideration because the inquiry is limited to the narrow issue of whether a person can be excused from all responsibility due to mental illness.¹⁴ While I think that it is the right of each state to determine how it will assess criminal responsibility, I also believe this determination must be made based on a full and open societal review of its beliefs about mental illness and responsibility. I believe that the efforts made to remedy or improve the insanity defense, without considering how mental illness might diminish responsibility, even if it does not remove it, reflects an underlying belief that unless mental illness results in a complete lack of awareness, it should not affect determinations of criminal responsibility. Without open discussion about the effect of mental illness on the brain and on our current beliefs about personal responsibility, it will not be possible to take any meaningful measures to avoid unjust treatment of people with mental illness who commit crimes.

Even the verdict of “guilty but mentally ill,” which, as I will discuss *infra* in Part VI.B, is often offered as a solution to an absolu-

¹³ *Id.*

¹⁴ See Daniel J. Nusbaum, *The Craziest Reform of Them All: A Critical Analysis of the Constitutional Implications of “Abolishing” The Insanity Defense*, 87 CORNELL L. REV. 1509, 1521–24 (2002) (noting that an individual can be insane but still possess the required intent to be found guilty of a crime).

tist insanity defense because it recognizes the presence of mental illness, but does not result in any difference in the terms of confinement or the availability of mental health services. Prisons were not designed to house large numbers of the mentally ill, and recent research shows that the cramped, regimented, and punitive atmospheres of prisons exacerbate mental illness and result in inhumane suffering.¹⁵ As I will detail in this Article, this misdirection of the mentally ill to prison violates standards of fairness and decency in the context of the proportional punishment of those who break society's laws. It also violates all prisoners' Eighth Amendment right to not be subject to "cruel and unusual punishment."¹⁶ This is why I propose that we approach the problem of adjudicating mentally ill people who violate society's criminal laws as a public health problem rather than a criminal justice problem. This would reduce the danger to society from mentally ill criminals by developing a population-based strategy to address mental health needs both before and after a crime has been committed. In order to do that, we must, as a society, reach a consensus on two things: How we want to assign criminal responsibility, and what role mental illness should play in that assignment. In looking for a public health solution to the problem of crimes committed by the mentally ill, I fully recognize that a person not deterred by society's laws from harming others is too dangerous to move freely in society. Those people should be confined securely under humane terms until they are no longer a danger. I also believe that mental illness alone does not absolve any person of moral or legal responsibility for harm they have done to others. Rather, the lack of a system for treating and, if necessary, confining people with mental illness results in an inappropriate reliance on the prison system to protect society from individuals whose behavior is not restrained by either inner inhibitions or fear of external punishment.¹⁷ By confining people with mental

¹⁵ See Mark J. Heyrman, *Mental Illness in Prisons and Jails*, 7 U. CHI. L. SCH. ROUNDTABLE 113, 116 (2000) (describing the stressful environment of prisons and how it may trigger mental illness).

¹⁶ U.S. CONST. amend. VIII.

¹⁷ It is important to realize that incarcerating people with mental illness is a temporary method of removing them from society. Because most people sentenced to prison are eventually released, the failure to provide adequate mental health care in prison is likely to result in the release of a person with at least the same, if not worse, illness. See, e.g., T. Howard Stone, *Therapeutic Implications of Incarceration for Persons with Severe Mental Disorders: Searching for Rational Health Policy*, 24 AM. J. CRIM. L. 283, 292-93 (1997) (describing the practice of jailing people with mental illness without charging them or charging them with misdemeanors in order to get them off the street, await a hospital bed, or to obtain

illness in prisons, we diminish our moral commitment to the principles of fairness upon which our legal system is based.

Andrea Yates' conviction is an example of what is wrong with our current methods of determining the criminal responsibility of a person with mental illness.¹⁸ Deficits in available care for people with severe mental illness contributed to her being able to kill her children, and her awareness of what she was doing led to her being held criminally responsible despite uncontested evidence of severe mental illness. The interest sparked by the Andrea Yates case among both the general public and legal academics may be due to the fact that because she is a white, educated, middle-class woman, she triggers a sense of self-identification among people who usually feel they have nothing in common with most serial killers/mass murderers. Whatever the reason, since the verdict, at least twenty law review articles¹⁹ have been published contending that her conviction

mental health treatment). Worse, they are released into a society that lacks access to outpatient mental health care. *Id.*

¹⁸ Bill Hewitt et al., *Life or Death: Does Andrea Yates, on Trial for Murder in Houston, Deserve Mercy for Drowning Her Five Kids? Or Is She, as Prosecutors Argue, Fully Responsible for the Crimes They Say She Had Contemplated for Months?*, PEOPLE, Mar. 4, 2002, at 82, available at 2002 WLNR 7238607.

¹⁹ There are many articles discussing Yates, postpartum depression, and the insanity defense. This long string of citations to law review articles about Andrea Yates is included in its entirety to provide a visual image of their numbers. As discussed *supra*, I believe that the disproportionate interest in her conviction stems from her being a person with whom legal academics can identify. See, e.g., Susan Ayres, "[N]ot a Story to Pass On": *Constructing Mothers Who Kill*, 15 HASTINGS WOMEN'S L.J. 39 (2004) (arguing that our construction of motherhood must be re-examined, and that the presumptions and foundations constructing motherhood must be challenged and subverted); Sheri L. Bienstock, *Mothers Who Kill Their Children and Postpartum Psychosis*, 32 SW. U. L. REV. 451, 497-99 (2003) (noting that the two options posed to the Yates jurors—capital murder or a verdict of not guilty by reason of insanity—are insufficient for a defendant with severe postpartum psychosis, and calling for another option to address her guilt and her illness); Nicole B. Casarez, *Examining the Evidence: Post-Verdict Interviews and the Jury System*, 25 HASTINGS COMM. & ENT. L.J. 499 (2003) (observing that while jurors believed Andrea Yates was mentally ill at the time she murdered her children, jurors believed Yates could distinguish between right and wrong, which resulted in the jurors' rejection of the insanity defense); Joe W. Dixon & Kim E. Dixon, *Gender-Specific Clinical Syndromes and Their Admissibility Under the Federal Rules of Evidence*, 27 AM. J. TRIAL ADVOC. 25 (2003) (examining the use of syndrome evidence in context of requirement for scientific evidence); Marie Galanti, *The Andrea Yates Trial: What Is Wrong with This Picture?*, 9 CARDOZO WOMEN'S L.J. 345 (2003) (examining how the Yates case deconstructed a mother's traditional role); Theresa Glennon, *Walking with Them: Advocating for Parents with Mental Illness in the Child Welfare System*, 12 TEMP. POL. & CIV. RTS. L. REV. 273 (2003) (evaluating opportunities and challenges presented by the application of the ADA on behalf of parents with mental illness); Phyllis Goldfarb, *Creating a New Tango: Re-Imagining Gender*, 9 CARDOZO WOMEN'S L.J. 443 (2003) (examining and challenging the hierarchy as traditionally understood); Dora W. Klein, *Involuntary Treatment of the Mentally Ill: Autonomy is Asking the Wrong Question*, 27 VT. L. REV. 649 (2003) (suggesting that when

is evidence of the ineffectiveness of the insanity defense as now applied in the United States. I do not think it matters for the purposes of evaluating the insanity defense that the widespread impression that her verdict was unjust may stem from the public's ability to sympathize with her.²⁰ Moreover, I do not agree that adjusting the

deciding to allow involuntary treatment the proper equation is whether no treatment is preferable to involuntary treatment); Jane Byeff Korn, *Crazy (Mental Illness Under the ADA)*, 36 U. MICH. J.L. REFORM 585 (2003) (arguing that the current state of the law affords little protection to persons with mental illness, despite the existence of the ADA); Sharon Lamb, *The Psychology of Condemnation: Underlying Emotions and Their Symbolic Expression in Condemning and Shaming*, 68 BROOK. L. REV. 929 (2003) (suggesting that Russell "Rusty" Yates should have been held legally responsible for failing to recognize his wife's depression); Jessie Manchester, *Beyond Accommodation: Reconstructing the Insanity Defense to Provide an Adequate Remedy for Postpartum Psychotic Women*, 93 J. CRIM. L. & CRIMINOLOGY 713, 751 (2003) (proposing a Postpartum Depression Research and Care Act to create a plan for screening and managing postpartum depression in an effort to force American society to recognize the condition); Christine Michalopoulos, *Filling in the Holes of the Insanity Defense: The Andrea Yates Case and the Need for a New Prong*, 10 VA. J. SOC. POL'Y & L. 383, 407-08 (2003) ("The vast majority of women who suffer postpartum disorders, and many people suffering from schizophrenia or delusional disorders, do not reach the level of mental impairment of Andrea Yates. . . . [Thus,] establishing a new insanity prong based upon the Yates case is unlikely to result in the acquittal of other women suffering from postpartum disorders"); Shelby A.D. Moore, *Understanding the Connection Between Domestic Violence, Crime, and Poverty: How Welfare Reform May Keep Battered Women from Leaving Abusive Relationships*, 12 TEX. J. WOMEN & L. 451 (2003) (addressing the interconnectedness between battered women's criminality, the present welfare system, and the subversive legacies left by the criminal justice system's treatment of women as defendants); Michelle Oberman, *"Lady Madonna, Children at Your Feet": Tragedies at the Intersection of Motherhood, Mental Illness and the Law*, 10 WM. & MARY J. WOMEN & L. 33, 33 (2003) (exposing the inadequacy of existing legal frameworks in understanding postpartum mental illness because the existing legal frameworks fail to capture the essence of the condition); Michael L. Perlin, *"She Breaks Just Like a Little Girl": Neonaticide, the Insanity Defense, and the Irrelevance of "Ordinary Common Sense,"* 10 WM. & MARY J. WOMEN & L. 1 (2003) (stating that in insanity defense cases jurors err because they believe factually guilty people will escape punishment); Deborah W. Post, *Which Wave Are You? Comments on the Collected Essays from the Seminar "To Do Feminist Legal Theory,"* 9 CARDOZO WOMEN'S L.J. 471 (2003) (commenting that biological explanations are an easy way out for a community to sidestep responsibility for dead children and infanticidal mothers); Renata Salecl, *The Real Crime: Psychoanalysis and Infanticide*, 24 CARDOZO L. REV. 2467 (2003) (acknowledging the relationship between psychoanalysis and infanticide); Christopher Slobogin, *Rethinking Legally Relevant Mental Disorder*, 29 OHIO N.U. L. REV. 497 (2003) [hereinafter Slobogin, *Rethinking*] (arguing that laws which deprive people of liberty should only be focused on mental illness to the extent they affect culpability, deterrability, or competency and concluding that, in determining whether a person lacks culpability, is undeterrable, or is incompetent, the law should focus on the content of the person's thoughts); Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143 (2003) (exploring the normative implications of applying adult conceptions of *mens rea* to criminal conduct); Leti Volpp, *On Culture, Difference, and Domestic Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 393 (2003) (asserting that cultural differences should play a role in determining the defendant's state of mind).

²⁰ The media portrayed her husband Rusty as a very religious, domineering man who insisted that Yates continue to have babies even though she experienced severe postpartum

insanity defense to include post-partum depression will solve what is really a failure of society to provide adequate mental health care.²¹

The problem of violent crimes committed by people with mental illness cannot be addressed by small adjustments to the current insanity defense laws. The introduction into open society of large numbers of people with mental illness—who in the past probably would have been institutionalized—has resulted in our nation’s prisons and jails becoming the primary provider of mental health care. The country’s failure to provide adequate mental health treatment should be seen as a massive failure of public health policy that has resulted in people with mental illness being incarcerated in settings that violate fundamental fairness as well as their Eighth Amendment right to receive adequate health care in prison.²² Moreover, I also believe that the dissatisfaction with Yates’ conviction exposes a serious lack of societal consensus regarding how mental illness affects behavior, and more importantly, how we should assign criminal responsibility to people that we know experience some impairment in brain function.

Until we come to a societal consensus, both on the nature of mental illness and the purpose of criminal punishment, our efforts at making adjustments to the current insanity defense will be no more successful than re-arranging deck chairs on a sinking ship.²³ I propose, therefore, that the problem of fairly adjudicating crimes committed by people with mental illness can best be addressed by seeing it as a large-scale public health problem that can be solved, not by reworking current versions of the insanity defense but by taking responsible action to make mental health treatment available to everyone with a serious need for it. This approach cannot work without a willingness by the states and the courts to act decisively

depression, and the family was living in the cramped quarters of, first, a camper, and then a bus. See Hewitt, *supra* note 18; SUZANNE O’MALLEY, ARE YOU THERE ALONE? THE UNSPEAKABLE CRIME OF ANDREA YATES 28–30 (2004).

²¹ As the wife of a federal employee, Yates had what is arguably the best health insurance available, but in reality, statements by her family indicate that she was prematurely discharged from inpatient psychiatric facilities because she had reached the insurance company’s limit for treatment. Gary Boulard, *Forgotten Patients: The Mentally Ill*, STATE LEGISLATORS MAG., Apr. 2000, available at <http://www.ncsl.org/programs/pubs/400mntl.htm> (last visited Mar. 2, 2005); see also O’MALLEY, *supra* note 20, at 170.

²² See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (establishing prisoners’ right to health care based on the Eighth Amendment).

²³ I am not alone in coming to this conclusion. See Perlin, *Mirrors*, *supra* note 1, at 315 (writing about the Supreme Court’s decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that executing the mentally retarded violates the Eighth Amendment).

in invoking and enforcing their civil power to commit individuals with mental illness who are a danger to society.

In making these statements I do not mean to imply that people with mental illness are more likely than others to commit violent crimes. Indeed, although there are conflicting opinions as to whether there is a statistically significant association between mental illness and violence,²⁴ the disproportionately large number of incarcerated mentally ill people seems to indicate that efforts to distinguish between the mentally ill who do commit criminal acts from the general population of people who commit crimes are not working.²⁵

By citing to recent data showing the substantial number of seriously mentally ill people incarcerated for determinate sentences, I will consider how historical and contemporary approaches to the insanity defense are inadequate to address the disproportionate presence of people with mental illness in America's jails and prisons. I will also review the literature of the public's perception of the insanity defense and show how the public's concerns about the accuracy of diagnosis and the prospects for treatment have resulted in an increased narrowing of the category of the mentally ill who are found not responsible for their conduct. I conclude by arguing that unless government funds and mandates public health care measures such as universal access to health care, and unless government furthers legislative efforts to craft a better insanity defense, then we in the United States could rightly be charged with crimes against humanity.

I. MENTAL ILLNESS AND CRIME AS A PUBLIC HEALTH ISSUE

If we can see the problem of mental illness and crime as a public health issue rather than a moral or jurisprudential issue, we can make great progress in developing an effective policy. Advocating for the "Rightful Place for Public Health in American Law," Professors Wendy E. Parmet and Anthony Robbins assert that:

[A] population's health is a critical part of law's social context. . . . What remains absent from a law student's training are the perspectives and insights of public health. Public health is a field that fo-

²⁴ Edward P. Mulvey & Jess Fardella, *Are the Mentally Ill Really Violent?*, 33 PSYCHOL. TODAY 39 (Nov.-Dec. 2000).

²⁵ *Id.* (arguing that there is a weak association between the mentally ill and violence; thus, it is unclear what causes this association).

cuses upon the health of populations, and it confronts many issues important to law students and lawyers.²⁶

Presumably, one of society's goals in designating some behavior as criminal is to reduce crime. We are told that criminal laws prevent people from committing antisocial acts.²⁷ However, external laws do not always significantly impact internal motives to commit acts that society considers crimes.²⁸ My article questions the value of law as a deterrent; it is possible, however, to agree that confinement takes people who break laws out of public circulation. Whether or not confinement deters anyone else, it is effective in keeping this particular individual from harming society.

Even if we see value in confining the mentally ill, we are left with the inescapable fact that unless everyone with mental illness is confined as a preventive measure, confinement does nothing to stop the mentally ill from committing crimes. Although a temporary solution might be to ratchet up punishments to totalitarian levels, it is probably safe to assert that there has never been a recorded society without crime or deviance, and that it will always be the case that for some people, personal reasons for committing a crime cannot be overcome by external factors such as the prospect of punishment.²⁹ Prisoner research tells us that many of the individuals who commit crimes, despite the obvious threat of punishment, are mentally ill.³⁰

²⁶ Wendy E. Parmet & Anthony Robbins, *A Rightful Place for Public Health in American Law*, 30 J.L. MED. & ETHICS 302 (2002). See generally LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW AND ETHICS: A READER* (2002), and LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* (2000) (discussing and analyzing how public health embraces many issues important to lawyers, such as immunizations, partner notification, screening, personal privacy, etc.).

²⁷ Deborah Prothrow-Stith, *Strengthening the Collaboration Between Public Health and Criminal Justice to Prevent Violence*, 32 J.L. MED. & ETHICS 82, 85 (2004) (stating that "prevention efforts that are part of the criminal justice system are found in the passage of laws and the deterrence resulting from their enforcement").

²⁸ *Id.* (arguing that "[d]eterrence, the mainstay prevention strategy has limited prevention capacity (particularly in the context of violence among acquaintances and family)"); see also Tracey L. Meares et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1186 (2004) (concluding that "[d]espite the oft-repeated public rhetoric connecting the increase in the American imprisonment rate to deterrence, modern deterrence research has failed to find consistent evidence of the deterrent effects of punishment").

²⁹ Cf., e.g., Benedict Carey, *Payback Time: Why Revenge Tastes So Sweet*, N.Y. TIMES, July 27, 2004, at F1, available at 2004 WLNR 4791333 (reviewing research indicating that there is a strong psychological drive for vengeance). One can extrapolate from this article that the psychological urge for revenge could overpower the fear of punishment.

³⁰ Stone, *supra* note 17, at 287-92 (presenting research indicating the prevalence of mental disorders among those individuals who commit crimes). See, e.g., Brian McCarthy, *Mentally Ill and Mentally Retarded Offenders in Corrections: A Report of a National Survey*, in NAT'L INST. OF CORRS., U.S. DEP'T OF JUST., SOURCE BOOK ON THE MENTALLY DISORDERED PRISONER

While mentally ill people are by no means more likely to commit crime, it is the case that criminals are more likely than the general population to be mentally ill.³¹

Faced with the fact that many crimes are committed by persons who are mentally ill,³² we must now clarify what we consider to be mental illness. Scientific research over the last hundred years has proved definitively that the locus of self-control and intentionality is in the brain.³³ To the extent that mental illness can be described as brain disease, we can trace self-control aberrations to the brain.³⁴

14, 15 (1985); E. FULLER TORREY ET AL., CRIMINALIZING THE SERIOUSLY MENTALLY ILL: THE ABUSE OF JAILS AS MENTAL HOSPITALS 13 (1992); Karen M. Abram & Linda A. Teplin, *Co-Occurring Disorders Among Mentally Ill Jail Detainees*, 46 AM. PSYCHOL. 1036, 1038 (1991); Joel A. Dvoskin & Henry J. Steadman, *Chronically Mentally Ill Inmates: The Wrong Concept for the Right Services*, 12 INT'L J.L. & PSYCHIATRY 203, 207 (1989); Linda A. Teplin, *The Prevalence of Severe Mental Disorders Among Male Urban Jail Detainees: A Comparison with the Epidemiologic Catchment Area Program*, 80 AM. J. PUB. HEALTH 663, 665-66 (1990).

³¹ See Stone, *supra* note 17, at 287 (stating that “the prevalence of severe mental disorders is generally higher than the prevalence of severe mental disorders in the general, non-inmate population”).

³² *Id.* at 287-92.

³³ See KENNETH M. HEILMAN, MATTER OF MIND: A NEUROLOGIST’S VIEW OF BRAIN-BEHAVIOR RELATIONSHIPS 202 (2002) (writing that “[a]ccording to Wally Nauta, the frontal lobe networks fuse biological drives and impulses with the knowledge of how to satisfy them. This fusion leads to the development of goal-oriented behavior, or conation. The frontal lobes project to the motor systems, enabling motivational states to initiate overt behavior.”). See also HOWARD S. KIRSHNER, BEHAVIORAL NEUROLOGY: PRACTICAL SCIENCE OF MIND AND BRAIN 184 (2d ed. 2002), explaining that

[One scientist] . . . divided the behavioral effects of frontal lobe injury into five categories: sequencing; drive; executive control; “future memory” or planning for the future; self awareness . . . Executive control involves planning behavior toward perceived goals, selecting the next response, anticipating future responses, and monitoring those behaviors already carried out. Working memory, attention, sequencing, and anticipation of the future are all aspects of this category of function. What we choose to attend to, out of the vast complexity of incoming stimuli from the external world and from our own bodies, and in what order, and with what response, summarizes the executive functions of the frontal lobes. To a large extent, executive control is the central function associated with the frontal lobes, and it integrates all of the other functions. Executive functions are almost always disturbed in the presence of frontal lobe lesions, even when more basic cognitive functions are intact.

Id. See also *id.* at 9 (presenting “Crick’s ‘astonishing hypothesis’ that all of human behavior, thinking, personality, aesthetics, and even ethics comes from the operations of the human brain”).

³⁴ KIRSHNER, *supra* note 33, at 3. “In the words of the Nobel Laureate Francis Crick (1994), the codiscoverer with James Watson of the structure of DNA, the brain and its electrical and chemical processes make up the mind: ‘You, your joys and your sorrows, your sense of personal identity and free will, are in fact no more than the behavior of a vast assembly of nerve cells and their associated molecules.’” *Id.* at 9. See also PATRICIA SMITH CHURCHLAND,

Given the primacy of the brain, it is reasonable that brain changes will result in behavioral changes. We have no trouble seeing the direct behavioral results of drinking alcohol or taking drugs. Indeed, one commonly observed effect of alcohol and drugs is that they render an individual less susceptible to either the desire to avoid harming others or the desire to avoid punishment. This lack of susceptibility to deterrence means fear of future punishment will not always reduce crime.³⁵ Therefore, unless we are willing to confine all those immune to deterrence or to turn society into an armed camp, we cannot reduce crime without reducing mental illness.

And to reduce mental illness, adequate treatment must be widely available. As a recent article in the *American Journal of Public Health* concluded, “[i]nadequate treatment of serious mental illness is an enormous public health problem.”³⁶ The Campaign for the Mind of America seeks increases in available mental health resources, and the National Alliance for the Mentally Ill (“NAMI”) reported that “one-third of community leaders nationwide identified the mental health treatment system and services as one of the most overburdened community resources,” resulting in “inadequate treatment and services for people with mental disorders.”³⁷ How can this inadequacy be remedied? First, we must recognize mental illness’ parity with so-called physical illness.³⁸ The current structur-

BRAIN-WISE: STUDIES IN NEUROPHILOSOPHY 1 (2002) (explaining that “the self-control one thinks one has is anchored by neural pathways and neurochemicals. The mind that we are assured can dominate over matter is in fact certain brain patterns interacting with and interpreted by other brain patterns”); ROBERT L. TAYLOR, DISTINGUISHING PSYCHOLOGICAL FROM ORGANIC DISORDERS: SCREENING FOR PSYCHOLOGICAL MASQUERADE 16 (2d ed. 2000) (explaining that “[i]mpulse control is yet another important frontal lobe activity. It is as though this part of the brain constrained primitive urges, ensuring their translation into more acceptable social expressions. When impulse control is compromised, personal habits deteriorate and inappropriate sexual and aggressive behaviors emerge without regard for social impropriety”).

³⁵ See, e.g., MINORITY REPORT (Twentieth Century Fox and Dreamworks Pictures 2002) (portraying a futuristic society’s method of predicting and stopping criminal behavior before it occurs, which, as in real life, unfortunately proves less than completely reliable).

³⁶ Philip S. Wang et. al., *Adequacy of Treatment for Serious Mental Illness in the United States*, 92 AM. J. PUB. HEALTH 92, 92 (2002) (reporting in their study that “only forty percent of survey respondents with serious mental illness had received treatment in the previous year” and of those, only “38.9% received care that could be considered at least minimally adequate”).

³⁷ Press Release, Campaign for the Mind of America, Community Leaders Identify Mental Health System as One of Most Overburdened Community Resources Finds Campaign for Mind of America (Nov. 10, 2003), <http://releases.usnewswire.com/GetRelease.asp?id=111-11102003> (last visited Mar. 2, 2005).

³⁸ See Boulard, *supra* note 21 (referring to the Federal Mental Health Parity Act and describing efforts at the state and federal level to achieve parity).

ing of the United States' health care system, which provides less care for mental illness, makes intractable an effective, just, or humane resolution to the problem of mentally ill offenders. Overlying the inequity between physical and mental illness treatment is the reality that the United States provides no universal access to health care. The frayed patchwork of private and public insurance plans leaves many Americans with no health care whatsoever.³⁹ Current legislative efforts to equalize mental and physical health benefits cannot succeed when there is no universal and underlying right or entitlement to any kind of health care.

In what strikes most people as unfair, under our current system the only people with a right to health care are those imprisoned by the state.⁴⁰ As a result, the mentally ill are guaranteed treatment only when they have brought themselves to the attention of the

³⁹ ROBERT J. MILLS & SHAILESH BHANDARI, U.S. CENSUS BUREAU, HEALTH INSURANCE COVERAGE IN THE UNITED STATES, 2002, at 1, 3 (2003), available at <http://www.census.gov/prod/2003pubs/p60-223.pdf> (last visited Mar. 2, 2005).

[T]he share of the population without health insurance rose in 2002, the second consecutive annual increase. An estimated 15.2 percent of the population or 43.6 million people were without health insurance coverage during the entire year in 2002, up from 14.6 percent in 2001, an increase of 2.4 million people.

Although [M]edicaid insured 14.0 million people in poverty, 10.5 million other people in poverty had no health insurance in 2002; the latter group represented 30.4 percent of the poverty population, unchanged from 2001.

Among the entire population 18 to 64 years old, workers were more likely to have health insurance (82.0 percent) than nonworkers (74.3 percent). Among those in poverty, workers were less likely to be covered (52.6 percent) than nonworkers (61.9 percent).

Young adults (18 to 24 years old) were less likely than other age groups to have health insurance coverage[—]70.4 percent in 2002, compared with 82.3 percent of those 25 to 64 and, reflecting widespread medicare coverage, 99.2 percent of those 65 and over.

Id. Rather than a single piece of cloth blanketing the population, Americans are covered by many different health care plans, including private insurance, Medicaid, Medicare, veteran's benefits, and private charity. As demonstrated by the U.S. Census Bureau statistics above, the patchwork is frayed in that it leaves many people out in the cold.

⁴⁰ *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976). This case establishes prisoners' right to health care based on the Eighth Amendment requirements for conditions of incarceration by holding that:

[t]hese elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical "torture or a lingering death" . . . In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose.

criminal justice system by committing a crime, or the civil justice system by exhibiting striking, public, dangerous behavior.⁴¹ At that point, society is forced to deal with these individuals because they then present a threat to public safety. Such a threat is wholly different from the misery suffered by the untreated mentally ill. As to the question of responsibility at the crime's commission, should it matter whether the individual suffers from a treatable brain disease or, in contrast, an equally dangerous untreatable brain disorder?⁴²

Id. See, e.g., *Heisler v. Kralik*, 981 F. Supp. 830, 837 (S.D.N.Y. 1997) (recognizing that the Supreme Court established that prison officials' indifference to a prisoner's need for medical care could violate the Eighth Amendment). See also William H. Danne, Jr., Annotation, *Prison Conditions as Amounting to Cruel and Unusual Punishment*, 51 A.L.R.3d 111, § 15 (2004) (discussing cases where "the Eighth Amendment was declared applicable to the states through the due process clause of the Fourteenth Amendment . . . [and] the courts . . . have increasingly recognized that there is a definite nexus between the right of a prisoner to essential medical care and his right to be spared from cruel and unusual punishment"); Carl T. Drechsler, Annotation, *Relief Under Federal Civil Rights Acts to State Prisoners Complaining of Denial of Medical Care*, 28 A.L.R. FED. 279 § 5 (2004). Drechsler describes relief under the Federal Civil Rights Act to prisoners denied medical care in prison:

Deprivations relating to inmate health, nourishment, and hygiene have commonly been asserted to constitute cruel and unusual punishment with the most frequently litigated area being that of medical care. In this area, numerous courts have come to recognize, at least by implication, that cruel and unusual punishment can reside in the denial of essential medical care to a prisoner. Particularly in actions brought under the Civil Rights Act, 42 U.S.C.A. § 1983.

Id.

⁴¹ See U.S. CONST. amend. VIII; see also *Estelle*, 429 U.S. at 104 (concluding that deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain" prohibited by the Eighth Amendment).

⁴² It is beyond the scope of this article to do justice to the literature of mental illness treatment. Suffice it to say that some mental illnesses are amenable to management through pharmacology, just as diabetes can be managed with insulin, requiring little of the patient except taking the medicine, while others require enormous management effort from the patient by combining therapy and medication. See, e.g., Erica Goode, *Chronic Depression Study Backs the Pairing of Therapy and Drugs*, N.Y. TIMES, May 18, 2000, at A23, available at 2000 WLNR 3206980 (describing a study demonstrating that combining therapy and medication is effective in treating depression, a form of mental illness). Finally, there are serious brain diseases and mental illnesses, such as Alzheimer's disease and delusional disorder, of which it may be said that medical science has not yet found a cure. Cf., e.g., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 154, 323 (4th ed. text rev.) (describing Alzheimer's disease and delusional disorder, respectively); HAROLD I. KAPLAN & BENJAMIN J. SADOCK, 1 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY/IV 1048 (6th ed. 1995) (observing that some patients are "refractory to attempts to reduce their delusional thinking").

II. THE CLOSING OF LARGE STATE MENTAL HOSPITALS IN THE LAST 30 YEARS HAS DIVERTED A SUBSTANTIAL NUMBER OF PEOPLE WITH MENTAL ILLNESS INTO THE PRISON SYSTEM

The research cited in this Article will show that the widespread closing of state mental institutions over the past thirty years has resulted in many people with mental illness being diverted into the criminal justice system.⁴³ In a process labeled “transinstitutionalization,” the mentally ill who twenty years ago would have spent their entire lives in a hospital are now shuffled from short-term stays in mental hospitals to incarceration in jails and prisons.⁴⁴ A *New York Times* headline in 1999 declared America’s “prisons brim with mentally ill.”⁴⁵ The Cook County and Los Angeles County jails are the largest providers of mental health in the country.⁴⁶ Although it is difficult to get an accurate count of the number of defendants with a diagnosable serious mental illness who are sent to prison, research indicates that 16% of defendants tried and convicted for crimes and housed in state and local jails and prisons have serious mental illness; other studies conclude that the number of defendants with mental illness in both the state and federal prison systems could be as high as 283,000.⁴⁷ A report issued by the Department of Justice in 1999 concluded that 16% of inmates in state and federal jails and

⁴³ Paul F. Stavis, *Why Prisons Are Brim-Full of the Mentally Ill: Is Their Incarceration a Solution or a Sign of Failure?*, 11 GEO. MASON U. CIV. RTS. L.J. 157, 157–58, 202 (2000) (reviewing statistics showing the direct relationship between the closing of large mental institutions during the last forty years and the corresponding flooding of the prison system with the mentally ill, and concluding that the solution is to revisit the practice of involuntary commitment in order to prevent people with mental illness from “rotting with their so-called ‘rights’ on”); see Ralph Slovenko, *The Transinstitutionalization of the Mentally Ill*, 29 OHIO N.U. L. REV. 641, 649 (2003) (offering a historical perspective on the treatment of the mentally ill in the United States, and an accounting of how the civil rights movement of the 1970s caused the massive release of the mentally ill from involuntary commitment, which has now led to prisons and jails becoming the largest provider of mental health services).

⁴⁴ Stavis, *supra* note 43, at 157, 157–58, 202. See also Slovenko, *supra* note 43, at 649 (giving a historical perspective on the treatment of the mentally ill in the United States and an accounting of how the civil rights movement of the 1970s caused the massive release of the mentally ill from involuntary commitment, thereby making prisons and jails the largest provider of mental health services).

⁴⁵ Stavis, *supra* note 43, at 157.

⁴⁶ HUMAN RIGHTS WATCH, *ILL EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS* 16 (2003); Stavis, *supra* note 43, at 159.

⁴⁷ Stavis, *supra* note 43, at 159 (stating that the number of prisoners diagnosed with mental illness is more startling considering that it includes none of the individuals found not guilty by reason of insanity, since they are not in the criminal justice system, but rather in the mental health system).

prisons, and approximately 283,800 individuals have a serious mental illness.⁴⁸ In 1998, NAMI held a conference entitled the “Criminalization of the Mentally Ill,” at which it stated that “there are approximately 70,000 persons with severe mental illnesses in public psychiatric hospitals, and 30% of them are forensic patients [hospitalized after committing a crime].”⁴⁹ There are three times as many people with severe mental illness in prison⁵⁰ as there are in mental health hospitals.⁵¹ NAMI asserts that these numbers show that mental illness is becoming criminalized in the United States, and that prisons in the United States have already become de facto psychiatric institutions.⁵² Another conclusion that mental health experts and legal scholars draw from these statistics is that many of these inmates suffered from mental illness before being incarcerated; thus, at the time they committed their crimes, they were mentally ill.⁵³

⁴⁸ PAULA M. DITTON, U.S. DEP’T OF JUST., MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS 1 (July 1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/mhpt.pdf> (last visited Jan. 7, 2005).

⁴⁹ NAT’L ALLIANCE FOR THE MENTALLY ILL, CRIMINALIZATION OF MENTAL ILLNESS 1 (2001), available at http://www.nami.org/Content/ContentGroups/Policy/WhereWeStand/The_Criminalization_of_People_with_Mental_Illness__WHERE_WE_STAND.htm (last visited Mar. 2, 2005) [hereinafter NAMI, CRIMINALIZATION].

⁵⁰ HUMAN RIGHTS WATCH, *supra* note 46, at 1. Although estimates of the number of people with serious mental illness incarcerated in the United States vary, studies indicate that more people with mental illness are “treated in the nation’s three largest jails, Rikers Island (New York City), the Cook County Jail (Chicago) and the Los Angeles County Jail” than in the public hospitals of any of these three cities. See TORREY ET AL., *supra* note 30, at 48–49; Stavits, *supra* note 43, at 159 n.1 (citing E. F. Torrey, *Jails and Prisons—America’s New Mental Hospitals*, 85 J. PUB. HEALTH 1611, 1611–12 (1995)) (inferring from examples given that it is reasonable to assume that those prisoners with identified serious mental illness were suffering from that illness at the time they committed the act described as criminal).

⁵¹ HUMAN RIGHTS WATCH, *supra* note 46, at 1.

⁵² NAMI, CRIMINALIZATION, *supra* note 49. Cf. Kenneth P. Lindsey & Gordon L. Paul, *Involuntary Commitments to Public Mental Institutions: Issues Involving the Overrepresentation of Blacks and Assessment of Relevant Functioning*, 106 PSYCHOL. BULL. 171, 171–72 (1989) (contributing to the debate concerning involuntary commitments and focusing on the overrepresentation of blacks in public mental health institutions); Hava B. Villaverde, *Racism in the Insanity Defense*, 50 U. MIAMI L. REV. 209, 212–18 (1995) (containing research that shows that black defendants are significantly less likely to be successful in an insanity defense than are white defendants despite the fact that they are disproportionately institutionalized in both psychiatric hospitals and prisons).

⁵³ Research increasingly shows that the sensory deprivation of the modern supermax prison often worsens mental illness. See NANCY FRIEDMAN & STUART GRASSIAN, EFFECTS OF SENSORY DEPRIVATION IN PSYCHIATRIC SECLUSION AND SOLITARY CONFINEMENT 61 (1986); Terry A. Kupers, *How Are the Problems of Mental Illness Being Handled in the Prison System?*, 17 HARV. MENTAL HEALTH LETTER 8, 10 (2000). Cf. Heyrman, *supra* note 15, at 116 (describing the stressful environment of prison and how it may trigger mental illness); Bryan B. Walton, Student Article, *The Eighth Amendment and Psychological Implications of Solitary Confinement*.

Statistics indicate that not only is the number of incarcerated people with mental illness high, but also that the mentally ill make up a disproportionate share of the incarcerated population.⁵⁴ A review of available data shows that although only “5 percent of the U.S. population suffers from mental illness . . . somewhere between 8 and 19 percent of prisoners have significant psychiatric or functional disabilities and another 15 to 20 percent will require some form of psychiatric intervention during their incarceration.”⁵⁵ According to the American Psychiatric Association, “as many as one in five prisoners were seriously mentally ill, with up to 5 percent actively psychotic at any given moment.”⁵⁶ In 2002, Jamie Fellner of Human Rights Watch (“HRW”) conducted research on incarcerated persons in the United States criminal justice system.⁵⁷ HRW issued a report concluding that “persons with mental illness are disproportionately represented in correctional institutions.”⁵⁸ After reviewing

ment, 21 LAW. & PSYCHOL. REV. 271, 273–77 (1997) (questioning whether solitary confinement is permissible under the Eighth Amendment).

⁵⁴HUMAN RIGHTS WATCH, *supra* note 46, at 17, 114. See also Heyrman, *supra* note 15. Heyrman points out that the increased rate of incarceration for drug crimes has led to the imprisonment of a disproportionate number of the mentally ill, writing that “persons with mental illness often use alcohol and illegal drugs as self-medication to relieve the symptoms of their illness” and that “when mental illness co-occurs with substance abuse, then persons with mental illness . . . have a higher rate of criminal behavior than the general population.” *Id.*

⁵⁵HUMAN RIGHTS WATCH, *supra* note 46, at 17.

⁵⁶*Id.* (citing *Introduction to AMERICAN PSYCHIATRIC ASSOCIATION, PSYCHIATRIC SERVICES IN JAILS AND PRISONS*, at xix. (2d ed. 2000)).

⁵⁷See HUMAN RIGHTS WATCH, *supra* note 46 (HRW usually monitors human rights violations in places like Iraq, China, and Uganda).

⁵⁸*Id.* This report illustrates the problems concerning offenders with mental illness in U.S. prisons. Furthermore, the report recommends that “the U.S. Congress promptly enact legislation proposed by Senator Mike DeWine (R-Ohio) and Congressman Ted Strickland (D-Ohio).” *Id.*

If enacted, the bill could catalyze significant reforms across the country in the way the criminal justice system responds to people with mental illness. The bill authorizes grants to help communities establish diversion programs (pre-bookings, jail diversion, mental health courts) for mentally ill offenders, treatment programs for mentally ill offenders who are incarcerated, and transitional and discharge programs for mentally ill offenders who have completed their sentences. The grants program would be administered by the Department of Justice in consultation with the Department of Health and Human Services and could be used to help pay for mental health treatment services in addition to program planning and administration, education and training, and temporary housing.

Id. at 9.

the care received by mentally ill, HRW described the inadequate care in prisons as a human rights violation.⁵⁹

The presence of a substantial number of inmates with serious mental illness is no secret to anyone interested in running or overseeing prisons.⁶⁰ In a position statement, the National Commission on Correctional Health Care declared that “[t]oday, many of those with mental illnesses, who would have been cared for in institutional settings in the past, are sent to correctional facilities around the country In many instances, the ‘crime’ committed is a direct result of a mental or psychiatric disorder.”⁶¹ Not only are there a disproportionate number of the mentally ill in prisons and jails, but the facilities for treatment are widely viewed as inadequate.⁶² In fact, meeting prisoners’ mental health needs is considered one of the most serious and expensive problems in providing correctional health care.⁶³

⁵⁹ See *id.* at 94. HRW reports that despite the development of standards by the National Commission on Correctional Health Care (“NCCHC”), only 231 of the nation’s approximately 1,400 prisons have received NCCHC accreditation. *Id.* Accreditation requires adherence to NCCHC guidelines and submission to monitoring by the organization. *Id.* at 94. HRW reports that because “prison mental health services are focused primarily on managing mental health crises and managing symptoms,” they either “have not taken advantage of the opportunity they have to make significant long-term differences in the lives of their mentally ill prisoners” or “do not even provide adequate basic mental health treatment.” *Id.* “[P]oor mental health treatment for mentally ill prisoners is a national reality. The government is responsible for protecting basic human rights, particularly those of the most vulnerable, and making wise use of limited criminal justice resources. Public officials must make the necessary improvements.” *Id.* at 9.

⁶⁰ The volume of material generated over the past five years reviewing the mental health needs of the imprisoned is vast. See generally COMM. TO STUDY THE NEEDS OF PERSONS WITH MENTAL ILLNESS WHO ARE INCARCERATED, FINAL REPORT, 120TH LEGISLATURE (Me. 2001), <http://www.state.me.us/legis/opla/incarrept.PDF> (last visited Mar. 2, 2005); Richard Lamb & Linda Weinberger, *Persons With Severe Mental Illness in Jails and Prisons: A Review*, 49 PSYCHIATRIC SERVICES 483, 483–92 (1998); U.S. DEP’T OF JUST., NAT’L INST. OF CORR. INFO. CTR., PROVISION OF MENTAL HEALTH CARE IN PRISONS (2001).

⁶¹ Nat’l Comm’n on Corr. Health Care, *Mental Health Services in Correctional Settings*, at <http://www.ncchc.org/resources/statements/mentalhealth.html> (last visited Mar. 2, 2005).

⁶² See HUMAN RIGHTS WATCH, *supra* note 46, at 94–125.

⁶³ See generally DITTON, *supra* note 48 (showing that a statistically significant number of prison inmates suffer from mental illness, presenting difficult and costly problems for the corrections system).

III. ONCE INCARCERATED, PRISONERS HAVE AN EIGHTH AMENDMENT RIGHT TO ADEQUATE MENTAL HEALTH TREATMENT

Before reviewing the ethical and jurisprudential questions raised by holding the mentally ill responsible for their criminal behavior, it is important to understand that the Supreme Court in *Estelle v. Gamble* held that the Eighth Amendment prohibition of “cruel and unusual punishment”⁶⁴ requires that neither the states nor the federal government can be deliberately indifferent to prisoners’ health care needs.⁶⁵ Specifically, the Court in *Estelle* reasoned that by taking away an individual’s liberty, the state assumed the responsibility to meet its prisoner’s needs, including medical care.⁶⁶ While the Supreme Court has not held explicitly that the right to medical care includes the right to mental health care, the current presumption, supported by the Fourth Circuit’s opinion in *Bowring v. Godwin*,⁶⁷ supports the belief that psychological or psychiatric treatment is included under the definition of medical care. Therefore, no matter what legal process results in their being imprisoned, all prisoners have a limited right to mental health treatment; this is not a special privilege that needs to be extended by statute.⁶⁸

Whatever our final decision on responsibility, we have a duty to treat all mentally ill persons with humanity and respect. Although the existence of a constitutional right to basic health care in prison allows organizations like HRW to make claims against the prison system for inadequate mental illness care,⁶⁹ the argument can be made that mental health care is more readily available in prison than in the free world.

Mental health’s great event of the last century was the closing of most psychiatric hospitals, and the release of thousands of pa-

⁶⁴ “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

⁶⁵ *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

⁶⁶ *Id.* at 103–05.

⁶⁷ *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977) (noting there is “no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart”). See James R.P. Ogloff et al., *Mental Health Services in Jails and Prisons: Legal, Clinical and Policy Issues*, 18 LAW & PSYCHOL. REV. 109, 119–20 (citing *Bowring*, 551 F.2d at 47).

⁶⁸ See *infra* Part VI.B for a discussion of the guilty but mentally ill verdict. I argue that the verdict adds nothing to the rights that prisoners with mental health already enjoy, regardless of the verdict’s classification.

⁶⁹ See HUMAN RIGHTS WATCH, *supra* note 46.

tients.⁷⁰ Although seen at the time as a civil rights victory, upon reflection, those severely mentally ill patients were not cured by de-institutionalization.⁷¹ Instead, they began living in public parks and bus stations and came to be known by a new name, the “visible homeless.”⁷² Instead of getting care from the network of community mental health clinics, which were supposed to be created to support the newly de-institutionalized, most patients found themselves set adrift into the world with no means to obtain the medical care and prescription medications necessary to function.⁷³ As a result, in some large states, the prison system is in fact the largest provider of mental health care in the state.⁷⁴ A graph prepared by NAMI shows an almost perfect inverse relationship between the number of people committed to mental institutions in the early 1960s and the number of people suffering from a mental illness now in prison.⁷⁵ As is the case with all prison health issues, inmates suffering from mental illness in prison usually will suffer from mental illness outside of prison.⁷⁶ It is irrational to stop treatment—as we do—at the gates of the prison if our goal is to reduce crime.

⁷⁰ See Stavis, *supra* note 43, at 158; ONE FLEW OVER THE CUCKOO’S NEST (United Artists 1975). Without defending the de-institutionalization portrayed so vividly in *Cuckoo’s Nest*, there was no reason to think closing mental hospitals would make serious mental illness go away any more than closing cancer wards could make cancer go away. *Id.* Mental illness, like cancer, can and should be treated in the least restrictive environments. However, “least restrictive” is not synonymous with “providing no treatment at all.” See *id.* In the author’s opinion, it is especially tragic that at the same time science has developed drugs to restore lucidity to many of the hopelessly insane, public policy has decreed it unimportant to make these drugs available to all who need them.

⁷¹ LeRoy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 28 AM. J. CRIM. L. 255, 258 n.10 (2001).

⁷² *Id.* at 269.

[D]uring the 1980s, the number of homeless citizens needing food, shelter, and clothing grew rapidly, with a large percentage of them suffering from mental disorders. The American Psychiatric Association’s Task Force on the Homeless Mentally Ill reported that the increase in homeless mentally disordered populations was caused by societal failures in implementing deinstitutionalization community-based substitutes. Current estimates are that approximately 40 [to] 50% of the homeless are seriously mentally ill, with half suffering from treatable schizophrenia.

Id. See generally CHRISTOPHER JENCKS, THE HOMELESS (1994) (explaining the “visible homeless” phenomenon).

⁷³ Kondo, *supra* note 71, at 269–70.

⁷⁴ *Id.* at 256–59.

⁷⁵ Ron Honberg, Presentation at the Maine Conference on Jail Diversion, Sept. 28, 2004 (on file with author).

⁷⁶ HUMAN RIGHTS WATCH, *supra* note 46, at 94.

IV. SOCIETY'S PERCEPTION OF HOW MENTAL ILLNESS AFFECTS BEHAVIOR IS THE CRITICAL FACTOR IN ASSIGNING CRIMINAL RESPONSIBILITY TO PEOPLE WITH MENTAL ILLNESS

A. What Are Society's Underlying Beliefs About Mental Illness?

In order to address the role mental illness plays in criminal behavior and to address society's understanding of that role, it is necessary to have a unified theory of mental illness and an understanding of what effect this theory has on criminal responsibility. Therefore, we need to identify society's underlying beliefs about responsibility, punishment, and mental illness. If mental health is viewed, from a medical perspective, as existing along a continuum of severity, then the law's current method of dividing the accused into categories of "sane" and "insane" makes no more sense than dividing the general population into two distinct categories, such as the completely physically healthy and the completely physically sick. The law already recognizes degrees of responsibility. Young children, for example, are found to lack the mature thought processes necessary to take responsibility for their actions.⁷⁷ The Supreme Court recently found that it is unconstitutional to execute the mentally retarded because of their impaired ability to reason, judge, and control their impulses.⁷⁸ This finding further demonstrates the law's acceptance that criminal responsibility is affected by the status of an individual's brain.⁷⁹ The difficulty, however, is that in the case of the mentally ill, there is widespread lack of understanding and mistrust of how much brain or thought impairment is sufficient to excuse serious criminal behavior.⁸⁰

⁷⁷ See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL PROCEDURE § 4.11(a) (student ed. 1986) (explaining the common-law defense of infancy).

⁷⁸ *Atkins v. Virginia*, 536 U.S. 304, 306, 320–21 (2002); see also *Atkins v. Virginia*, 581 S.E.2d 514, 515 (Va. 2003). Much of the writing about the legal definition of mental illness can be found in articles reviewing the constitutional limitations on executing the insane or the mentally retarded. See, e.g., Timothy S. Hall, *Legal Fictions and Moral Reasoning: Capital Punishment and the Mentally Retarded Defendant After Penry v. Johnson*, 35 AKRON L. REV. 327, 337–51 (2002).

⁷⁹ See *Atkins*, 536 U.S. at 306, 320–21 (discussing, *inter alia*, how "cognitive and behavioral impairments" render mentally retarded defendants less culpable).

⁸⁰ *Id.* at 317–18; see also Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 727–29 (1990) [hereinafter Perlin, *Unpacking*] (observing that courts, including the United States Supreme Court, have been reluctant to view mental illness as fully exculpatory).

In his novel *Reversible Errors*, Scott Turow accurately describes the current state of legal insanity with his portrayal of a lawyer's initial assessment of a client on death row for murder:

Looking at Rommy's eyes zag about like frenzied bugs near a light, Arthur held little doubt why his prior lawyers had focused on a psychiatric defense. As people commonly used the word "crazy," Rommy Gandolph without question was. Yet not crazy enough. Sociopathic. Borderline personality disorder, maybe even flat-out schizoid. But not thoroughly lost in the wilderness, not so entirely without a compass that he did not know wrong from right, which was what the law required for a defense.⁸¹

Much of what is wrong with the public's and legal community's perception of mental illness is encapsulated in this paragraph. Psychiatrists and psychologists categorize mental illness by using terms that others fail to understand, a failure that becomes clear from reading Turow's work. Mental health professionals use the term "mental illness" to describe a wide range of observable behaviors that interfere with an individual's daily activities.⁸² Part of the problem with developing a fair method of adjudicating the mentally ill who have committed criminal acts is society's lack of confidence in the medical diagnosis of mental illness.⁸³ To the public, the mental health profession seems to describe any deviation from the norm as "mental illness."⁸⁴ Thus, mental health professionals give the public, and most lawyers, the impression that they do not differentiate how specific diagnoses can affect the behavior of a particular individual.⁸⁵

The brief review of literature on mental illness in this section of this article shows that researchers and doctors view the diagnosis of mental illness as a separate issue from the effect that the illness has on an individual's life. Thus, the mere diagnosis of a mental illness is not a basis for determining criminal responsibility. Moreover, it is not yet possible to predict with any degree of certainty the danger-

⁸¹ SCOTT TUROW, *REVERSIBLE ERRORS* 13 (1st ed. 2002).

⁸² See Judith A. Northrup, Comment, *Guilty But Mentally Ill: Broadening the Scope of Criminal Responsibility*, 44 OHIO ST. L.J. 797, 815, 815 n.221 (1983) (writing that "mental illness is defined as a 'substantial disorder of thought processes or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with ordinary demands of life,'" citing Joseph D. Amarilio, Comment, *Insanity—Guilty But Mentally Ill—Diminished Capacity: An Aggregate Approach to Madness*, 12 J. MARSHALL J. PRAC. & PROC. 351, 375 (1979)).

⁸³ MICHAEL L. PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* 148–51 (1994) [hereinafter PERLIN, *JURISPRUDENCE*].

⁸⁴ *Id.*

⁸⁵ See *id.* at 148–51, 196–97.

ousness of an individual with a specific mental illness based on the behavior of a general population with the same diagnosis.⁸⁶ This lack of understanding about the individual's condition and symptoms is recognized by the law, which insists that the mere diagnosis of a mental illness is not sufficient to disprove responsibility.⁸⁷ Thus, whether Scott Turow's character Rommy Gandolph is "sociopathic" or "flat-out schizoid" is not sufficient to determine his level of responsibility under the law.⁸⁸

The process of labeling a person as mentally ill and of diagnosing the nature of his impairment is essentially an observation of how the illness affects the individual. A psychologist compares an individual's thought process to that of someone with competent social interactions.⁸⁹ Therefore, a diagnosis of mental illness means that the diagnosed individual interacts differently with the world than an individual who is not diagnosed as mentally ill.⁹⁰ Any impairment of what are viewed as normal thought processes or impulse control will, by definition, affect behavior.⁹¹ It should be no surprise that if the public—including lawyers and judges—does not view mental illness as a continuum of impairment, like physical illness, then it will be dissatisfied by psychiatry's inability to make definitive statements about who is, and who is not, responsible for their own behavior.⁹² The public's lack of comprehension of mental

⁸⁶ Grant H. Morris, *Defining Dangerousness: Risking a Dangerous Definition*, 10 J. CONTEMP. LEGAL ISSUES 61, 91-92 (1999). Morris explains that:

Using group data to predict individual dangerousness presents other problems. Merely because a group can be identified collectively as dangerous does not mean that a specific individual within the group is dangerous. Actuarial tables tell us attributes of the group, but they obscure or trivialize the person's individuality. If all the people in the United States are at a one percent risk of violence, a test that is 100 percent accurate will identify all the people in the United States as within the group. All of us will be "correctly identified." However, such a finding does not mean that each individual within the group presents a one percent risk of violence. Some may be nearer to zero percent, others may be at ten, or fifty, or ninety-nine percent.

Id.

⁸⁷ TUROW, *supra* note 81, at 13.

⁸⁸ Even though Rommy was mentally ill, this was not severe enough to raise the insanity defense, because he was "not thoroughly lost in the wilderness . . . which was what the law required for a defense." *Id.*

⁸⁹ See Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, 1 PSYCH. PUB. POL. & L. 6, 9-10 (Mar. 1995).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² PERLIN, JURISPRUDENCE, *supra* note 83, at 252-62.

illness as a continuum is readily apparent as compared to the universal appreciation for gradations in physical illness.

Medical diagnosis reflects the existence of a harmful abnormality in the body's functioning, but it does not describe how that abnormality affects an individual's life. Although the doctor knows the aggregate history of people with similar signs and symptoms, nothing is known about the future clinical course of any particular individual. More importantly, every lawyer, judge, juror, or family member knows that to diagnose the presence of a disease is not sufficient to determine whether it can be cured or even managed. Finally, there is no correlation between the presence or absence of illness and the availability of an effective treatment. Just because someone cannot be treated does not mean that they are not ill. Whatever standard the law uses to decide whether a person is "crazy enough" to avoid responsibility cannot begin to encompass the entire reality of mental illness. Although it is important to have a method of dealing with the completely deluded, or those who do "not know wrong from right," such a method does little to address the issue that many people suffering from mental illness do not exhibit a total loss of contact with reality.

B. What Do We Believe About How Mental Illness Affects Human Behavior?

In order to understand how society views mental illness as a factor in determining criminal responsibility, it is necessary to consider the topic of deviance. Crime is traditionally described by sociologists as a form of abnormal behavior, with individual criminals being labeled deviants.⁹³ Mental illness is similarly defined as a form of deviance because it represents a divergence from the majority of society. University of Pennsylvania sociologist Paul Root Wolpe argues against defining the mentally ill as deviant and thus inclined to break the law.⁹⁴ Labeling the mentally ill deviant, he contends, means that we reject the possibility of individual differences.⁹⁵ Deviant behavior is not necessarily caused by disease.⁹⁶ Wolpe asserts that deviance is defined differently at different times, but at all times denotes a person set apart from society.⁹⁷ For exam-

⁹³ PAUL ROOT WOLPE, EXPLAINING SOCIAL DEVIANCE (The Teaching Company 1994).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

ple, in Nazi Germany, groups such as Jews, dwarves and gypsies were labeled “deviant” and thus prone to crime, but such a label appears worse than absurd to us today.⁹⁸ Similarly, the argument that an expanded insanity defense attempts to make mental illness an excuse for criminal liability is actually moving down a slippery slope towards defining crime as the product of mental illness. This fear is strengthened by the degree to which a crime seems incomprehensible—like Yates drowning her five children in the bathtub or Jeffrey Dahmer eating his victims. The argument implies that we can all imagine ourselves committing a crime for financial gain if we were in dire need or committing murder as a result of deeply personal passion. However, when the crimes appear senseless and reflective of moral depravity, we label the crimes a result of mental illness.

One cuts this Gordian knot with the liberating realization that it is not necessary to make this distinction in order to have a rational system of consequences for breaking important societal norms. Although many people who commit crimes do suffer from mental illness that makes them too dangerous to live freely, this does not mean that they deserve punishment. Both impaired judgment and reduced aggressive impulse control could be potential symptoms of severe mental illness.⁹⁹ We face the problem that language philoso-

⁹⁸ See Winick, *supra* note 89, at 10.

[L]abeling individuals as deviant[—]such as by characterizing them as mentally ill[—]may thus produce a lasting stigma that strongly colors the way others regard and interact with them and the way they conceive of themselves. Stigma has been defined as an attribute that is deeply discrediting. Stigmatizing people often causes others to view them as being unable to participate in life normally. The stigmatizing label thus discredits individuals, often pushing them to the periphery of any social situation in which they are involved. Stigmatization frequently results in excluding individuals from social activities and opportunities. It is as though society, in an effort to prove the correctness of its label, proceeds to narrow the life chances of the stigmatized person to the preconceived notions connected with the stigma.

Id.

⁹⁹ However, laying the problem at substance abuse’s door is no solution because substance abuse often begins as a method of self-medicating mental illness. See Heyrman, *supra* nn.15, 54. Moreover, we are told by science that those who fall into addiction to the extent they will steal or kill to obtain their substance of choice are themselves in the grip of a brain abnormality, very likely transmitted genetically, which makes them particularly vulnerable to addiction. See NAT’L INST. ON DRUG ABUSE, THE ECONOMIC COSTS OF ALCOHOL AND DRUG ABUSE IN THE UNITED STATES § 6.2.3 (citing the need to support a drug habit as one of the underlying causes of drug-related crime), available at <http://www.drugabuse.gov/EconomicCosts/Chapter6.html#6.2> (last visited Mar. 2, 2005); John O’Neill, *A Gene for Getting Hooked*, N.Y. TIMES, Nov. 30, 2004, at F9 (asserting that “researchers have come to believe that genetic factors make some people more susceptible to addiction . . .”).

phers such as Ludwig Wittgenstein¹⁰⁰ or J.L. Austin¹⁰¹ describe as “labeling.”¹⁰² What we call things affects how we interpret them.¹⁰³ For example, I believe society is comfortable applying the word “illness” to conditions ranging from food poisoning to influenza to lung cancer. Calling someone “ill” says nothing about the extent of the illness or the degree of impairment. Just because someone wakes up with a sore throat and a stuffy nose does not mean they are too sick to go to work. By the same token, calling someone mentally ill should say nothing about the degree or effect of mental illness and does not answer any legal or ethical questions about his level of responsibility for criminal acts.

There are many definitions of illness that are all related to the concept that something is abnormal. For example, one might say that a woman with high blood pressure is ill even though she feels normal. Even if it is possible through some form of brain imaging to determine who has normal brain function and who does not, such a test would not provide any information about how that person’s behavior is affected.¹⁰⁴ Moreover, the current insanity defense is not based on a diagnosis, but rather on evidence of how that diagnosis affects a particular individual’s thought patterns.¹⁰⁵ For advocates of the mentally ill, one of the strongest objections to diagnosis-based sentencing is the implication that the mentally ill as a whole are a group of potential criminals. These advocates cite compelling evidence that the mentally ill are no more likely to commit violent

¹⁰⁰ LUDWIG WITTGENSTEIN, *THE BLUE AND BROWN BOOKS 27–28* (Harper & Row 1965) (1958) (arguing that words do not have inherent meaning but rather agreed upon meanings).

¹⁰¹ J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962) (describing the power of words to shape perception).

¹⁰² For a discussion of labeling, see generally Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, 1 PSYCH. PUB. POL’Y & L. 6 (Mar. 1995).

¹⁰³ *Id.* at 10.

¹⁰⁴ See Joanmarie Illaria Davoli, *Psychiatric Evidence on Trial*, 56 SMU L. REV. 2191, 2212–13 (2003) (distinguishing between “traditional legal standards for mental illness [that] envision a person suffering from a problem that robs him of free will” and psychiatrists’ view that “[b]ecause every single one of our actions and thoughts are controlled by our brains [the presence of a mental illness] does not mean the absence of free will”).

¹⁰⁵ See Mark J. Heyrman, *Five Things Every Lawyer Should Know About Mental Health Law*, 18 CBA REC. 31 (“Proof of mental illness, without more, will rarely have legal consequences.”). In *Durham v. United States*, Judge David Bazelon advanced the proposition that a legal finding of insanity could be based on the presence of a diagnosable mental illness. See PERLIN, *JURISPRUDENCE*, *supra* note 83, at 85–87. The test was widely criticized as useless for answering questions of individual responsibility, and it is no longer a criterion in any state. *Id.*

crimes than the general population.¹⁰⁶ Mental illness is not a synonym for lack of moral character or humanity.

V. WHAT DOES THE HISTORY OF THE INSANITY DEFENSE SHOW ABOUT ANGLO-AMERICAN ATTITUDES TOWARD MENTAL ILLNESS?¹⁰⁷

It would be reductionistic, but in many respects true, to say that the history of insanity defense jurisprudence tells us that society holds people responsible for their crimes unless they are so impaired that they lack the ability to know that what they are doing is a crime.¹⁰⁸ Nevertheless, it is helpful to review past and current legislative measures addressing crimes committed by the mentally ill through this heuristic. The construct of the current system is that there is a tipping point that switches the scales from “responsible” to “not responsible.”¹⁰⁹ While not denying that there should be such a point, the more important question is whether identifying that point is sufficient to establish a just method for the state to interfere with a person’s fundamental right to liberty. As discussed *infra*, the current system already recognizes varying levels of responsibility and con-

¹⁰⁶ See Korn, *supra* note 19, at 612:

While some studies have shown that people with mental illness are no more violent than the general population, other studies indicate that although there is a correlation between violence and mental illness, it is limited. Suffice it to say, not all people who are mentally ill will commit acts of violence. Moreover, recent studies indicate that about 90% of those diagnosed as mentally ill are not violent. . . . Clearly, mental illness status makes at best a trivial contribution to the overall level of violence in society.

Id. See also Stephen J. Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 CAL. L. REV. 54, 62 (1982):

At one point it was believed that mentally disordered persons were especially prone to violence, but later empirical studies tended to support the opposite conclusion, which in turn became the accepted wisdom for many years. . . . In sum, mental patients are not especially dangerous, and, if they are slightly more dangerous than nonpatients, it is not a consequence of their mental disorders. Finally, the mentally disordered account for much less violence in absolute terms than normal persons.

Id. See Bernard L. Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439, 448 (1974) (citing studies that “tend to show a lesser involvement in criminal behavior by the mentally ill than is true for the general population”).

¹⁰⁷ See Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1208–23 (2000) [hereinafter Slobogin, *Insanity*] (providing an excellent review of the history of the insanity defense).

¹⁰⁸ Nusbaum, *supra* note 14, at 1521–24.

¹⁰⁹ For an analysis of the tipping point theory, see MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2000) (Gladwell develops a theory that it is possible to identify a specific moment when a string of events results in social change).

sequences. A child who steals a candy bar is treated differently from an adult who does the same thing. Even when the result of an act is death, the state has wide discretion in how to characterize that act.¹¹⁰ For example, we know that if a person is struck by lightning while driving a car and then hits a pedestrian, he does not bear the same level of responsibility as the driver who hits a pedestrian after drinking a case of beer.¹¹¹ But where does that leave the mentally ill? How is mental illness understood as an influence on behavior?

Dissatisfaction with the insanity defense is firmly rooted in history.¹¹² From Daniel McNaughton¹¹³ to John Hinckley, highly publicized attacks on public figures by the mentally ill have caused society to reflect on its methods for assessing criminal responsibility.¹¹⁴ Despite efforts to develop a workable insanity defense, the law changed to reflect the old McNaughton standard that excuses from criminal punishment only those individuals whose mental illness caused a complete lack of awareness.¹¹⁵ Current proposals to improve the insanity defense can be characterized as variations of historical efforts to reconcile the morality of assigning criminal responsibility to a person who does not seem to know what he is do-

¹¹⁰ See generally LAFAYE & SCOTT, *supra* note 77, at 603–83 (discussing crimes ending in death that may or may not be classified as murder, therefore calling for varying types of punishment).

¹¹¹ See *Polston v. State*, 685 P.2d 1, 9 (Wyo. 1984) (“Voluntary intoxication resulting in unconsciousness is not as complete a defense as unconsciousness resulting from other causes might be”); *Rylander v. Texas*, 75 S.W.3d 119 (Tex. Ct. App. 2002) (declaring trial counsel ineffective for failing to present medical evidence to support defendant’s claim that when he ran his truck into a police officer he was suffering from a diabetes-induced blackout).

¹¹² Slobogin, *Insanity*, *supra* note 107, at 1220–22.

¹¹³ Daniel McNaughton asserted that he should not be held guilty of attempting to kill Prime Minister Robert Peel on January 24, 1843, because he was insane at the time. JOHN BIGGS, *THE GUILTY MIND: PSYCHIATRY AND THE LAW OF HOMICIDE* 95, 101 (1967). McNaughton believed Peel was persecuting him for political reasons and that Peel was traveling in what was actually McNaughton’s own carriage. *Id.* at 97–98. I use what has become the modern convention of spelling his name “McNaughton” rather than the traditional use of the oddly punctuated “M’Naghten.” There is no way to know which is correct. See Cynthia G. Hawkins-Leon, *The Literature as Law: The History of the Insanity Plea and a Fictional Application Within the Law & Literature Canon*, 72 *TEMP. L. REV.* 381, 390, n.43 (1999). Hawkins-Leon uses the “M’Naghten” spelling and quotes Justice Frankfurter in *OF LAW AND LIFE & OTHER THINGS THAT MATTER: PAPERS AND ADDRESSES OF FELIX FRANKFURTER 1956–1963*, at 3 (Philip B. Kurland ed., 1964) (“[T]o what extent is a lunatic’s spelling even of his own name to be deemed as authority?”). *Id.* On the other hand, one might argue that if there is anything to which a lunatic should be entitled, it is the spelling of his own name.

¹¹⁴ Michael L. Perlin, “*The Borderline Which Separated You from Me*”: *The Insanity Defense, the Authoritarian Spirit, the Fear of Faking and the Culture of Punishment*, 82 *IOWA L. REV.* 1375, 1375, 1380–83 (1996–97) [hereinafter Perlin, *Borderline*].

¹¹⁵ *Id.* at 1382.

ing and cannot be deterred by fear of punishment. Thus, most popular insanity defense reforms require complete detachment from reality.¹¹⁶ The exception is the American Law Institute's model law, which allows for the possibility that an individual knows what she is doing is wrong, but is unable, due to mental illness, to stop herself.¹¹⁷

One of the best accounts of the history of the insanity defense was written by Third Circuit Court of Appeals Judge John Biggs in 1955.¹¹⁸ In *The Guilty Mind*, Judge Biggs traces the origin of the insanity defense in English law to the reign of Henry III, when pardons for "persons committing homicides while of unsound mind were not unusual."¹¹⁹ Later, "complete madness [became] a defence to a criminal charge."¹²⁰ Judge Biggs notes that in 1581, a leading treatise of British law instructed that "a mad man or a naturall foole, or a lunatike at the time of his lunacie" who had no knowledge of good or evil did not have criminal intent, and therefore could not be found responsible for his actions.¹²¹

Judge Biggs shows that the trend for viewing insanity as an all-or-nothing state¹²² is rooted firmly in the history of Anglo-American

¹¹⁶ Carmen Cirincione, *Revisiting the Insanity Defense: Contested of Consensus?*, 24 BULL. AM. ACAD. PSYCHIATRY & LAW 165, 166 (1996). The three most discussed proposals are abolishing the insanity defense and replacing it with a *mens rea* standard; creating a verdict of "guilty but mentally ill" which recognizes mental illness, but still assesses full criminal responsibility; and setting up mental health courts to divert the less dangerous offenders from the prison system. *Id.*

¹¹⁷ MODEL PENAL CODE & COMMENTARIES § 4.01 (1962).

¹¹⁸ RITA JAMES SIMON, THE JURY AND THE DEFENSE OF INSANITY 16 (Transaction Publishers 1999) (1967). "*The Guilty Mind* is based on a lecture Judge Biggs gave as a recipient of the Isaac Ray Award, given each year by the American Psychiatric Association to an individual who 'has made a laudable contribution to the improvement of the relationship of law and psychiatry.'" *Id.* at 16.

¹¹⁹ BIGGS, *supra* note 113, at 83.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Although a state is free to consider mental impairment as a factor in the ability to form intent to commit a crime—even when the defendant is not raising an insanity defense—the United States Supreme Court has long held that this is not a constitutional requirement. *See Fisher v. United States*, 328 U.S. 463 (1946) (holding that a District of Columbia court did not have to instruct the jury to consider whether the defendant's mental illness resulted in a diminished capacity for premeditation); Kimberley Reed Thompson, *The Untimely Death of Michigan's Diminished Capacity Defense*, 82 MICH. B.J. 17, 17–19, (discussing the Michigan Supreme Court's decision in *People v. Carpenter*, 627 N.W.2d 276 (2001) that the existence of an insanity defense law "precludes the use of 'any evidence' of lack of mental capacity short of legal insanity to reduce criminal responsibility by negating specific intent").

law.¹²³ Pointing to several historic cases, he notes that the law's view of behavior that could be excused by insanity has always been based on an assumption of incapacitating mental illness.¹²⁴ An understanding that insanity could negate criminal responsibility was based on the same principle that excused autonomic muscle twitches.¹²⁵ There was no attempt to evaluate thought processes, but rather to recognize rare instances in which the body was overtaken by complete disability.¹²⁶

Later, Mr. Justice Tracy's instructions to the jury in the trial of Edward Arnold in 1723 emphasized that "in order to avail himself of the defense of insanity 'a man must be totally deprived of his understanding and memory, so as not to know what he is doing, no more than an infant, a brute, or a wild beast.'"¹²⁷ Then in 1840, Edward Oxford shot at Queen Victoria.¹²⁸ The jury's instruction in the trial asked several times if the defendant could not distinguish between right and wrong as a result of his diseased mind.¹²⁹ Judge Biggs wrote that "by 1840 the English common law was rapidly developing a procrustean theory of criminal responsibility for the mentally ill and only the meet occasion was required to bring forth full-blown a complete and disastrous rule of law."¹³⁰ That opportunity, he reports, came with the trial of Daniel McNaughton.¹³¹

The story of Daniel McNaughton's trial for assassination is often retold. In a series of events seemingly ripped from a Dickens novel, Daniel McNaughton attempted to kill Prime Minister Robert Peel on January 24, 1843.¹³² McNaughton believed Peel was persecuting him for political reasons and that Peel was traveling in what was actually McNaughton's own carriage.¹³³ McNaughton missed Peel but killed Peel's private secretary, Edward Drummond.¹³⁴

¹²³ BIGGS, *supra* note 113, at 81–117.

¹²⁴ *Id.* at 121–46.

¹²⁵ See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW §§ 9.02(C), 25.03 (3d ed. 2001) (discussing the nature of voluntariness and free will).

¹²⁶ *Id.*

¹²⁷ BIGGS, *supra* note 113, at 88.

¹²⁸ *Id.* at 94.

¹²⁹ *Id.* at 94–95.

¹³⁰ *Id.* at 95.

¹³¹ *Id.*

¹³² BIGGS, *supra* note 113, at 95.

¹³³ *Id.* at 97–98.

¹³⁴ *Id.* at 95. This marks an interesting precursor to John Hinckley's shooting and almost killing President Reagan's press secretary James Brady 140 years later.

McNaughton was arrested and tried for murder.¹³⁵ As history tells us, nine medical witnesses testified that McNaughton was mentally ill.¹³⁶ Applying the then-prevailing test of insanity, McNaughton was acquitted by reason of insanity and sentenced to an insane asylum where he died twenty-two years later.¹³⁷

What happened next had very little to do with McNaughton personally and much to do with the general reaction to the verdict. The British public was outraged at the acquittal.¹³⁸ Queen Victoria, previously the target of an assassination attempt herself as mentioned *supra*, summoned all of the judges in England's highest court ("the Law Lords") to protest the verdict and to express her dissatisfaction with the contemporary state of the insanity defense.¹³⁹ What came out of the meeting was a principle that is now known as the "McNaughton Rule," which would have made, according to some readings of the case, McNaughton's acquittal less likely.¹⁴⁰ McNaughton's rule is usually expressed as stating:

¹³⁵ *Id.* at 96.

¹³⁶ *Id.* at 101.

¹³⁷ One of the flood of articles comparing McNaughton's case to what would become the twentieth century's most celebrated insanity acquittal—the trial of John Hinckley—is this one: Irwin N. Perr, *The Insanity Defense: A Tale of Two Cities*, 140 *AM. J. PSYCHIATRY* 873–74 (1983).

¹³⁸ RICHARD MORAN, *KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL McNAUGHTAN* 19–20 (1981). Thomas Campbell expressed this general sentiment about the insanity defense:

Ye people of England: exult and be glad for ye're now at the will of the merciless mad. [The insane are] a privilege'd class, whom no statute controls and their murderous charter exists in their souls. Do they wish to spill blood—they have only to play a few pranks—get asylum'd a month and a day. Then heigh to escape from the mad-doctor's keys, and to pistol or stab whomsoever they please.

Id.

¹³⁹ BIGGS, *supra* note 113, at 103.

¹⁴⁰ MORAN, *supra* note 138, at 109. Professor Elyn Saks argues that to say that McNaughton would not have been acquitted is to read the case too narrowly. Telephone Interview with Elyn Saks, Orrin B. Evans Professor of Law, Psychiatry and the Behavioral Sciences, University of Southern California Law School (July 29, 2004). She points out that while we do not know the exact nature of his illness, he certainly suffered from the global delusion that he intended to kill him. *Id.* This is certainly possible. I would suggest that a jury applying the McNaughton standard to McNaughton himself would be in the same bind as juries are today when they try to apply legal principles to the behavior of people with severe mental illness. For example, even if McNaughton thought Prime Minister Peel intended to kill him, would he be justified in killing Peel first? There is certainly no claim that McNaughton acted in direct response to a provocation from Prime Minister Peel. Rather, the evidence is that he ambushed Peel who had no idea of his presence in the park. BIGGS, *supra* note 113, at 94–95. Similarly, Yates was found guilty because her delusion, as presented by the defense, did not seem to the jury to be an adequate justification for her

[E]very man is to be presumed to be sane [T]o establish a defense on the ground of insanity, it must be clearly proved, that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.¹⁴¹

Queen Victoria's Law Lords thus instructed future juries that their task in evaluating an insanity plea was to determine if they had heard sufficient evidence to conclude that either: (1) "the prisoner . . . had that competent use of his understanding as that he knew that he was doing . . . a wicked and wrong thing," in which case he was guilty; or (2) the prisoner "was not sensible at the time he committed the act" in which case he was not guilty.¹⁴² Therefore, as the Law Lords summarized the test, "if on balancing the evidence in your minds you think the prisoner capable of distinguishing between right and wrong, then he was a responsible agent and liable to all the penalties the law imposes. If not . . . then you will . . . acquit the prisoner."¹⁴³ The McNaughton rule for insanity was adopted in the United States with the exception of only a few states.¹⁴⁴ However, as early as 1887, the Supreme Court of Alabama, for one, expressed its dissatisfaction with the rule, claiming it did not adequately consider the situation of the person who was less than fully insane, but still impaired by mental illness.¹⁴⁵ This concern can be traced throughout the American jurisprudence of the insanity defense,¹⁴⁶ and was solidified by Judge David Bazelon's landmark rejection of the knowledge-based test in the 1954 case of

actions. Casarez, *supra* note 19 (asserting that while jurors believed Yates was mentally ill at the time she murdered her children, jurors believed Yates could distinguish between right and wrong, resulting in the jurors' rejection of the insanity defense). She did not claim that God commanded her to drown the children or that she was unaware that society would view her actions as illegal. Doug J. Swanson, *Why Did Andrea Yates Kill? Author Helps Provide Pieces of the Puzzle Behind Killer's Acts*, DALLAS MORNING NEWS, Mar. 7, 2004, at 9G; O'MALLEY, *supra* note 20, at 153-54. Thus, she was held responsible for knowing what she was doing and knowing it was illegal. Dawn Fratangelo, *The Jury Speaks: Jury Members Discuss Andrea Yates' Trial*, Dateline NBC (NBC television broadcast, Mar. 17, 2002). The force of her delusions was not, in the jury's view, sufficient to overcome her free will. *Id.* My major criticism of the insanity defense as currently constructed is that it relies too much on analyzing the content of a delusion rather than recognizing the substantial mental impairment that having a delusional set of beliefs evidences.

¹⁴¹ MORAN, *supra* note 138, at 173 (quoting Chief Justice Tindal's majority opinion).

¹⁴² BIGGS, *supra* note 113, at 101.

¹⁴³ *Id.* at 102.

¹⁴⁴ *Id.* at 116.

¹⁴⁵ Hawkins-Leon, *supra* note 113, at 394, 393-95 (1999) (discussing *Parsons v. State*, 2 So. 854 (Ala. 1887)).

¹⁴⁶ PERLIN, JURISPRUDENCE, *supra* note 83, at 83-84.

Durham v. United States.¹⁴⁷ Judge Bazelon wrote that a rigid requirement that a defendant lacked knowledge of his actions being right or wrong resulted in basing insanity on the presence or absence of a particular symptom.¹⁴⁸

While it is fair to say that the insanity defense was never popular, its watershed moment was after John Hinckley's attempt to assassinate then-President Ronald Reagan on March 30, 1981.¹⁴⁹ In 200 years, the story of how John Hinckley shot President Reagan in an attempt to impress actress Jodie Foster will still be as familiar to lawyers as the details of the McNaughton case are to us.¹⁵⁰ Just as McNaughton's acquittal outraged the British public, John Hinckley's acquittal outraged the American public.¹⁵¹ The public outrage resulted in suggestions that the insanity defense be eliminated.¹⁵² What may be lost in the mists of time, however, is the fact that although the jury in the District of Columbia certainly found Hinckley not guilty by reason of insanity¹⁵³ ("NGRI") and that this verdict was not accepted by the public, in fact Hinckley's "history" of mental illness was startlingly slight compared either to Daniel McNaughton's or to the usual successful insanity defense.¹⁵⁴ Regardless of what was proved to the jury at trial about Hinckley's state of mind at the time of the crime, there was disagreement about Hinckley's degree of mental illness.¹⁵⁵ He did not claim he acted based on a deific decree,¹⁵⁶ nor did he claim not to have known what he was doing. The law in the District of Columbia at that time re-

¹⁴⁷ *Id.* at 84–86; see also *Durham v. United States*, 214 F.2d 862, 874–75 (D.C. Cir. 1954) (holding that a defendant can be found insane if his actions were a product of mental illness), *overruled by United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

¹⁴⁸ *Durham*, 214 F.2d at 874.

¹⁴⁹ Joanna Pitman, *Ronald Reagan Is Shot in the Chest*, *TIMES* (London), Jan. 3, 2004, at 6, available at 2004 WLNR 4736900.

¹⁵⁰ *Id.*

¹⁵¹ See Sandy Banisky, *John Hinckley's Modest Request: Fairness*, *BALT. SUN*, Oct. 25, 1996, at 2A, available at 1996 WLNR 937117.

¹⁵² See *id.*

¹⁵³ Carol D. Leonnig, *Judge Grants Hinckley Unsupervised Outings: Stays at Parents' Home Not Allowed*, *WASH. POST*, Dec. 18, 2003, at A1, available at LEXIS, News Library, Wpost File.

¹⁵⁴ See Hawkins-Leon, *supra* note 113, at 400 (saying that the nature of Hinckley's "disturbance" is uncertain).

¹⁵⁵ *United States v. Hinckley*, 525 F. Supp. 1342 (D.D.C. 1981), *reh'g denied*, 529 F. Supp. 520 (D.D.C.) (per curiam), *aff'd*, 672 F.2d 115 (D.C. Cir. 1982) (for the pretrial rulings), *Crim. No. 81-306* (D.D.C. 1981) (for the trial record).

¹⁵⁶ A "deific decree" is an assertion by a defendant that he was instructed by God to act as he did. Margaret E. Clark, *The Immutable Command Meets the Unknowable Mind: Deific Decree Claims and the Insanity Defense After People v. Serravo*, 70 *DENV. U. L. REV.* 161, n.3 (1992).

quired the prosecution to prove Hinckley sane beyond a reasonable doubt.¹⁵⁷ Indeed, Hinckley's lawyers offered testimony that he was "psychotic" at the time of the crime.¹⁵⁸ Therefore, not only did Hinckley do a much despised thing when he attempted to assassinate a well-liked president, murdered a police officer and wounded the President's press secretary, James Brady,¹⁵⁹ he did not meet the de facto standard of insanity in Washington D.C.¹⁶⁰ Hinckley was not—as Scott Turow would write—"crazy enough."¹⁶¹

VI. RECENT DEVELOPMENTS IN THE INSANITY DEFENSE

In the wake of dissatisfaction with Hinckley's acquittal, the federal government and a majority of states set about to review their procedures for treatment and retention of individuals who were acquitted by reason of insanity so as to make it more difficult for insanity defenses to succeed.¹⁶² Twenty-five states changed their insanity defense from July 1982 through September 1985.¹⁶³ By 1990, twenty-five states and the District of Columbia had adopted a version of the McNaughton test; twenty states implemented the ALI

¹⁵⁷ See *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972) (containing an explanation of the District of Columbia insanity defense law at the time Hinckley was acquitted). In *Brawner*, the court adopted the following portions of the (then existing) American Law Institute's primary provision from the MODEL PENAL CODE § 4.01(1) (1972): "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law." The court decided to adopt the ALI rule as "the doctrine excluding responsibility for mental disease or defect, for application prospectively to trials begun after [the date of the decision]."

¹⁵⁸ *Banisky*, *supra* note 151 (stating that Hinckley was found not guilty by reason of insanity).

¹⁵⁹ Pitman, *supra* note 149. It is interesting to consider that James Brady was then, as he is now, a highly charming man and much liked by the Washington press corps. See, e.g., Remarks of President Clinton at Ceremony to Honor Recipients of the Presidential Medal of Freedom, FED. NEWS. SVC., Sept. 9, 1996 ("James Brady came to national prominence as a respected and popular press secretary for President Ronald Reagan."). Perhaps while the relevant parties are alive, a historian of journalism will explore whether the reporters' personal anger at Brady's being shot in the head translated into making the coverage of Hinckley even more negative than it might have been.

¹⁶⁰ *United States v. Hinckley*, 525 F. Supp. 1342, 1346 (D.D.C. 1981).

¹⁶¹ TUROW, *supra* note 81, at 13.

¹⁶² See Hawkins-Leon, *supra* note 113, at 402–03 (1999); see the Insanity Defense Reform Act of 1984, 18 U.S.C.A. § 17(b) (West 1994) (giving the defendant the burden of proving the insanity defense as opposed to the government being responsible for finding the defendant sane). See also Jay M. Zitter, *Construction and Application of 18 U.S.C.A. § 17, Providing for Insanity Defense in Federal Criminal Prosecution*, 118 A.L.R. FED. 265 § 2(a) (1994).

¹⁶³ Lisa Callahan et al., *Insanity Defense Reform in the United States—Post Hinckley*, 11 MENTAL & PHYSICAL DISABILITY L. REP. 54–55 (1987).

test; and twelve states allowed “the guilty but mentally ill” verdict.¹⁶⁴ Many states dropped the ALI concept of a defendant’s ability “to conform his conduct to the requirements of law” and simply re-adopted the old M’Naughton knowledge-based standard of responsibility.¹⁶⁵ Other changes included shifting the prosecutor’s burden of proving sanity to the defendant, adopting knowledge-based standards of proof, and preventing experts from testifying on the ultimate issue of sanity or insanity.¹⁶⁶ In response to the public’s belief that the insanity defense is broken, there have been, and continue to be, numerous efforts to “fix” it. A brief review of the efforts currently under way in the United States to reform the insanity defense shows that none of these proposals address the significant issue of how to treat the vast majority of individuals with mental illness who commit crimes.

A. Abolishing the Insanity Defense

One of the most extreme approaches—abolishing the insanity defense—has been endorsed by many groups, including the American Medical Association.¹⁶⁷ Currently, Idaho, Montana, Utah, and Kansas do not offer an insanity defense.¹⁶⁸ In a fascinating Note in *Cornell Law Review*, Daniel Nusbaum carefully explains that in doing away with the insanity defense, these states are in fact doing no more than adopting a pure *mens rea* standard of guilt.¹⁶⁹ Thus, if a defendant has any awareness of the act he is committing, he cannot prove insanity.¹⁷⁰ In effect, this is not any different from what many states call an insanity defense based on the M’Naughton rule’s requirement of a complete lack of knowledge, thus a complete lack of criminal intent. The Supreme Court gave tacit support to abolishing the insanity defense in *State v. Cowan* by refusing to grant certiorari

¹⁶⁴ See Hawkins-Leon, *supra* note 113, at 402, 445, n.56 (citing HENRY J. STEADMAN ET AL., BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM 37, tbl. 3.1 (1993)).

¹⁶⁵ *Id.* at 397, 402.

¹⁶⁶ *Id.* at 402–03.

¹⁶⁷ See WILLIAM J. WINSLADE & JUDITH WILSON ROSS, THE INSANITY PLEA 219–20 (1983) (arguing that the insanity defense should be abolished in order to eliminate the idea of a “sane” or “insane” defendant, and that a “sliding scale” system should be substituted in place of the insanity defense where “the less sane would receive more treatment, while the more sane someone is, the more punishment he would receive”). *Id.* at 220.

¹⁶⁸ Nusbaum, *supra* note 14, at 1515 n.15 (noting that these four states take an extreme approach to insanity defense reform).

¹⁶⁹ *Id.* at 1519–20 (discussing how the *mens rea* approach forces defendants to use a negating insanity defense).

¹⁷⁰ *Id.* at 1521.

to review Montana's decision that the Constitution did not require an insanity defense so long as the standard for guilt is still possession of criminal intent.¹⁷¹ The Montana Supreme Court's standard for non-responsibility is total lack of awareness.¹⁷² Under this standard, for example, had Andrea Yates thought she was drowning rats in her bathtub, she would lack *mens rea*, a concept explored *infra* in Section IX of this Article. However, if she were aware that she was drowning her children, as she says she was,¹⁷³ and if her visual perceptions were functioning, then she would have exhibited the intent to commit the drowning. Under these standards, physical perception is placed above any thought process, no matter how defective that thought process.¹⁷⁴ Similarly, if someone like the man Oliver Sacks describes who mistook his wife for a hat actually perceived her as a charging grizzly bear, he would lack *mens rea* for beating her to death with the nearest heavy object.¹⁷⁵

B. Guilty But Mentally Ill

Another approach to fixing the insanity defense is reflected in the proliferation of the "guilty but mentally ill" (GBMI) verdict, which was first adopted by Michigan in 1975 and later in twenty other states.¹⁷⁶ The GBMI verdict permits the jury to impose full responsibility for a crime with the acknowledgement that the defendant is also mentally ill.¹⁷⁷ In finding a defendant GBMI, the jury recognizes that the plaintiff suffers from a medically diagnosable mental illness; however, the effects of the illness are not sufficient to excuse responsibility.¹⁷⁸ The GBMI verdict means that an individual

¹⁷¹ See *State v. Cowan*, 861 P.2d 884, 888–89 (Mont. 1993), *cert denied*, 511 U.S. 1005 (1994).

¹⁷² *Id.* at 889 (noting that the Montana legislature finds individuals responsible when they act with a proven criminal state of mind, regardless of their motivation or mental condition).

¹⁷³ See Timothy Roche, *The Yates Odyssey*, TIME MAG., Jan. 28, 2002, at 42, available at LEXIS, News Library, Time File.

¹⁷⁴ See Nusbaum, *supra* note 14, at 1522–23.

¹⁷⁵ OLIVER SACKS, *THE MAN WHO MISTOOK HIS WIFE FOR A HAT* 10 (1986).

¹⁷⁶ E.g. Bradford H. Charles, *Pennsylvania's Definitions of Insanity and Mental Illness: A Distinction With a Difference*, 12 TEMP. POL. & CIV. RTS. L. REV. 265, 268 (2003). Renée Melançon, Note, *Arizona's Insane Response to Insanity*, 40 ARIZ. L. REV. 287, 294–317 (1998) (detailing the development of Arizona's "guilty except insane" defense statute); see also Anne S. Emanuel, *Guilty But Mentally Ill Verdicts and the Death Penalty: An Eighth Amendment Analysis*, 68 N.C. L. REV. 37, 39 (1989).

¹⁷⁷ See Debra T. Landis, *Guilty But Mentally Ill Statutes: Validity and Construction*, 71 A.L.R. 4th 702 § 2(a) (1989) ("To date no case has been found in which an appellate court has held a guilty but mentally ill statute to be unconstitutional"). As of 2004, there still had been no such holding. See also Northrup, *supra* note 82.

¹⁷⁸ See *id.* (noting GBMI as an in-between classification).

had the specific intent or *mens rea* to commit a crime, but was mentally ill.¹⁷⁹ The effect of a GBMI verdict is that the defendant is found guilty and sentenced to a prison, but is supposedly provided with mental health treatment there.¹⁸⁰ However, juries may give a GBMI verdict with the “false belief” that the defendants will “actually receive treatment.”¹⁸¹ In fact, there is no added right to mental health care based on the GBMI verdict.

Thus, in my opinion, the GBMI verdict is a euphemism for a regular criminal sentence: It is neither an indication that the inmate is in need of particular care, nor a promise that he or she will get psychological treatment while in prison. In fact, “[w]hile the defendant found NGRI will likely be committed to a treatment facility and therefore may become eligible for release, the GBMI defendant, if convicted, may serve the statutory maximum prison sentence.”¹⁸² Because the right to mental health in prison flows from the Eighth Amendment—not from any action by a sentencing judge or jury—many commentators conclude that the GBMI verdict is not a form of the insanity defense.¹⁸³ Because the GBMI verdict still results in a determinate prison sentence, one might analogize GBMI to a verdict of guilty but diabetic, or guilty but hypertensive.

The GBMI verdict can therefore be criticized as a gimmick to encourage jurors to deliver a guilty verdict, even though it is obvi-

¹⁷⁹ Mark A. Woodmansee, Student Article, *The Guilty But Mentally Ill Verdict: Political Expediency at the Expense of Moral Principle*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341, 366 (1996).

¹⁸⁰ See *id.* (asserting that “[b]y . . . selecting the GBMI option, jurors may in fact be acting under a false belief that a GBMI offender will actually receive treatment for the mental illness that they have noted.”); see also Emanuel, *supra* note 176, at 41, 41 n.25 (citing Gare A. Smith & James A. Hall, *Evaluating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study*, 16 U. MICH. J.L. REF. 77, 79 (1982) (“[Inmates] also are guaranteed (at least theoretically) necessary mental health treatment during incarceration.”)).

¹⁸¹ See Emanuel, *supra* note 176. See also Woodmansee, *supra* note 179, at 383 (explaining that the GBMI does not improve the care of mentally ill individuals who are convicted of crimes. “Furthermore, the GBMI verdict does not guarantee that mentally ill GBMI offenders will receive mental health treatment. . . . the stark reality of the GBMI verdict is that GBMI prisoners rarely receive psychiatric or psychological treatment. As a result, GBMI prisoners are often punished in a manner identical to those prisoners who were found ‘guilty.’”).

¹⁸² Woodmansee, *supra* note 179, at 352.

¹⁸³ U.S. CONST. amend. VIII; see also Emanuel, *supra* note 176, at 59–67; John H. Blume & Sheri Lynn Johnson, *Killing the Non-Willing: Atkins, the Volitionally Incapacitated, and the Death Penalty*, 55 S.C. L. REV. 93, 100 (2003); Van W. Ellis, *Guilty But Mentally Ill and the Death Penalty: Punishment Full of Sound and Fury, Signifying Nothing*, 43 DUKE L.J. 87, 110 (1993).

ous that the defendant suffers from mental illness.¹⁸⁴ In many states, the GBMI verdict is proposed as an alternative to not guilty by reason of insanity that will assure that the defendant will remain incarcerated.¹⁸⁵ Borum and Fulero note that groups such as the American Bar Association's Criminal Justice Mental Health Standards, the American Psychiatric Association's Statement on the Insanity Defense, the National Mental Health Association's Commission on the Insanity Defense, the American Psychological Association, and NAMI "have all opposed or recommended against the adoption of GBMI."¹⁸⁶ Research on the Michigan experience shows that defendants found GBMI receive the same inadequate mental health care as the other inmates.¹⁸⁷ While it is difficult to disagree with the premise that people in prison with mental illnesses should receive appropriate care, the GBMI verdict is not an alternative to the insanity defense, but rather an addition to the guilty verdict.

Advocates of the GBMI verdict argue that "guilty but mentally ill" is intended to acknowledge the need for mental health treatment when the defendant is not legally insane, and to reduce the number of insanity convictions by giving juries a way to acknowledge the defendant's mental illness without acquitting him.¹⁸⁸ It warrants further research to discover what this public process of acknowledging mental illness adds to the insanity defense. Some reformers support GBMI on the grounds that it is the only way to convince juries that an individual who has in fact committed a crime should not be set free, but should be treated instead.¹⁸⁹ Unfortunately, as noted above, it does not appear that GBMI defendants receive anything

¹⁸⁴ As a side note: given their post-trial interviews, it is highly likely that Andrea Yates' jurors would have found her guilty but mentally ill had this been an option in Texas. See Casarez, *supra* note 19, at 500 (noting that while jurors believed Andrea Yates was mentally ill at the time she murdered her children, jurors believed Yates could distinguish between right and wrong, resulting in the jurors' rejection of the insanity defense).

¹⁸⁵ See Landis, *supra* note 177, at § 2(a).

¹⁸⁶ Randy Borum & Solomon M. Fulero, *Empirical Research on the Insanity Defense and Attempted Reforms: Evidence Toward Informed Policy*, 23 LAW & HUM. BEHAV. 117, 124 (1999).

¹⁸⁷ Andrew J. Black, Comment, *People v. Lloyd: Michigan's Guilty But Mentally Ill Verdict Created with Intention to Help Is Not Really a Benefit at All*, 79 U. DET. MERCY L. REV. 75, 89 (2001).

¹⁸⁸ See Amos Robey, *Guilty But Mentally Ill*, 6 J. AM. ACAD. OF PSYCHIATRY & L. 379 (1978) (asserting that the value of a GBMI verdict is that the defendant can get treatment but the public is assured the defendant will be monitored, for example through probation with required psychiatric treatment, unlike in the case of an acquittal).

¹⁸⁹ See Black, *supra* note 187, at 83-84.

but the inadequate care available to any inmate.¹⁹⁰ Therefore, I would agree that if the GBMI verdict actually resulted in a person with mental illness receiving appropriate care in an appropriate setting, then it would be an acceptable alternative for a jury that believes that a defendant bears criminal responsibility yet still was strongly influenced by a thought impairment not within his voluntary control.

Writing about his experience with the GBMI verdict in Pennsylvania, the Honorable Bradford H. Charles observes that, although jurors are at first confused as to how to determine whether the defendant's mental illness is sufficient to excuse responsibility, "the 'proverbial light bulb comes on' when the judge explains the import of their verdict."¹⁹¹ The only way to be sure that the defendant will be incarcerated for a long period of time is to find him GBMI rather than NGRI.¹⁹² In addition, even if it were desirable to reduce the number of NGRI verdicts, there is no evidence that GBMI does in fact reduce the number of insanity acquittals in the long run.¹⁹³ Indeed, it makes sense that it would not. As noted earlier, if we accept that insanity pleas are a very small proportion of pleas entered and that very few of these insanity pleas result in acquittal, then it makes sense that the acquittals that do occur are based on a finding that the defendant is not only mentally ill, but that his mental illness is so severe that it prevents him from being held responsible for his actions. Fact-finders, whether juries or judges, are apparently not so distracted by a diagnosis of mental illness that they cannot make a decision as to criminal responsibility.

C. Mental Health Courts

Although not intended to deal with violent crime, mental health courts may be the closest states have come to recognizing that defendants with mental illness should be treated differently at

¹⁹⁰ *Id.* at 89. See Woodmansee, *supra* nn.179, 182 (explaining that the GBMI verdict does not improve the care of mentally ill individuals who are convicted of crimes).

¹⁹¹ Bradford H. Charles, *Pennsylvania's Definitions of Insanity and Mental Illness: A Distinction with a Difference?*, 12 TEMP. POL. & CIV. RTS. L. REV. 265, 271 (2003). "Suddenly, jurors understand that they are being asked to decide whether the defendant should go free or face incarceration once his mental health treatment ends." *Id.* at 271-72. Judge Charles is a Pennsylvania state trial court judge for the 52nd Judicial District of Lebanon County. *Id.* at 265 n.a1.

¹⁹² See *id.*

¹⁹³ See Woodmansee, *supra* note 179, at 362-63.

the time of trial. Mental health courts are intended to divert non-violent offenders into separate courts for people with mental illness. The mental health advocacy community sees mental health courts as a move to decriminalize mental illness by “[c]reating authority in state criminal codes for judges to divert non-violent offenders with severe mental illnesses away from incarceration into appropriate treatment” and by “[e]stablishing specialty ‘mental health courts’ to hear all cases involving individuals with severe mental illnesses charged with misdemeanors or non-violent felonies.”¹⁹⁴ This enables the courts to fulfill their “purpose of diverting as many of these cases as possible . . . into appropriate mental health treatment and services.”¹⁹⁵ According to a recent article by LeRoy L. Kondo, “[i]n contrast to most generalist state trial courts, which rely upon the time-honored adversarial system for ensuring justice, the MHCT [Mental Health Court] judge facilitates largely non-adversarial court proceedings with an approach balanced between treatment and punishment.”¹⁹⁶ In 2000, Congress enacted, and President Clinton signed into law, a bill authorizing grants to communities to set up these courts.¹⁹⁷ It remains to be seen whether these courts will substantially reduce the number of mentally ill in prison.

¹⁹⁴ NAMI, CRIMINALIZATION, *supra* note 49.

¹⁹⁵ *Id.*

¹⁹⁶ Kondo, *supra* note 71, at 291.

¹⁹⁷ Pub. L. No. 106-515, 106 Stat. 1865 (2000). These courts initially had \$4 million in funding through the Bureau of Justice Assistance. NAMI, Department of Justice Announces Availability of Funds for Mental Health Courts (Aug. 2, 2002), at <http://www.namisc.org/News/2002/Summer/MentalHealthCourtGrants.htm> (last visited Mar. 2, 2005). Both houses of Congress passed bills to reauthorize federal funding of mental health courts through 2009, a bill that the president signed. American Psychological Association, *New Law Bolsters Treatment of Mentally Ill Offenders*, 46 MONITOR ON PSYCHOLOGY 18 (Jan. 2005), <http://www.apa.org/monitor/jan05/offenders.html> (last visited Mar. 2, 2005); NAMI, Mental Health Courts Reauthorization, http://www.nami.org/Content/ContentGroups/Policy/Mental_Health_Courts_Reauthorization.htm (last visited Mar. 2, 2005). But in fiscal year 2004, no funds were appropriated for the courts at all, while in fiscal year 2003, funding was \$2.98 million. Mental Health Courts, Bureau of Justice Assistance, at <http://www.ojp.usdoj.gov/BJA/grant/mentalhealth.html> (last visited Jan. 11, 2005). For more background material about mental health courts, see NAMI, Survey of Mental Health Courts (Sept. 2003), at http://www.nami.org/Content/ContentGroups/Policy/Issues_Spotlights/Mental_Health_courts_Survey.htm (last visited Mar. 2, 2005).

Additionally, the Mentally Ill Offender Treatment and Crime Reduction Act of 2003 passed both chambers of the House and Senate and was cleared for the President on October 11, 2004. The Act, *inter alia*, “authorizes the Attorney General to award grants to eligible State and local governments . . . to plan and implement programs that: . . . promote public safety by ensuring access to mental health and other treatment services for mentally ill adults or juveniles . . .” and “[d]irects that grants be used to create or expand: (1) mental health courts or other court-based programs for such persons . . .”. S. 1194, 108th Congress (2004). However, it is too early to tell what the effect will be on the mentally ill; under the

The drawback of mental health courts as a global solution to crime committed by the mentally ill is that they are reserved for nonviolent offenses. Although it is important to remember that violent crimes make up only a small percentage of insanity pleas and that many people with mental illness are in prison for non-violent offenses,¹⁹⁸ a system that does not address the needs of violent offenders can only be a partial solution. While the mental health courts, as currently constituted, can only be part of a plan to adjudicate the mentally ill, the idea of mental health courts is a positive step towards recognizing that a person can be impaired by mental illness without being totally disabled by it. Just as GBMI was in some part intended to provide treatment to defendants claiming mental illness,¹⁹⁹ the mental health courts would serve the societal goal of treating the sick even when the sick have committed crimes.

VII. WHY THE INSANITY DEFENSE IS UNSATISFACTORY

As Michael Perlin shows in his article *The Borderline Which Separated You from Me*, there is widespread dissatisfaction with the insanity defense.²⁰⁰ Society views current efforts to determine the culpability of the mentally ill as hopelessly flawed.²⁰¹ Whether it is described as “a loophole,” “a legalistic slight of hand,” or a “travesty,” a large segment of the public does not believe most defendants who disavow responsibility for their actions because of mental illness.²⁰² Fascinating social science research demonstrates that the public does not believe mental illness is an acceptable excuse for illegal behavior, and that the public does not believe in medicine’s ability to know who actually is mentally ill.²⁰³

It is impossible to avoid the moral tone that overlays the insanity defense as it is now used. Following Yates’ conviction for drowning her five children, there has been a flurry of articles seek-

most expansive reading of the act, it does not address the underlying lack of primary mental health care.

¹⁹⁸ See John Q. LaFond & Mary L. Durham, *Cognitive Dissonance: Have Insanity Defense and Civil Commitment Reforms Made a Difference?*, 39 VILL. L. REV. 71, 93–94 (1994).

¹⁹⁹ Landis, *supra* note 177, § 2(a); Annotation, *Guilty But Mentally Ill Statutes: Validity and Construction*, 71 A.L.R. 4TH 702 § 2(a) (1989).

²⁰⁰ See Perlin, *Borderline*, *supra* note 114, at 1375–77.

²⁰¹ See *id.* at 1403, n.178 (noting the media’s portrayal of the insanity plea as a “travesty” and “loophole” which allows individuals to avoid moral responsibility).

²⁰² *Id.* at 1403, nn.167, 170–71.

²⁰³ *Id.* at 1403, 1412.

ing protection for mothers with post-partum depression.²⁰⁴ We see the failure of Andrea Yates to get the insanity defense as a failure of the system.²⁰⁵ Yet, experts have implied that if anyone “deserved” such protection, she did.²⁰⁶ In contrast, Lorena Bobbit was found insane and therefore not responsible for cutting off her husband’s penis, even though she had not before, and has not since, shown any signs of being hindered by mental illness.²⁰⁷ Just as there are “good” people who “deserve” the insanity defense, there are equally glaring examples of “bad” people like Jeffrey Dahmer, who was found to be not insane despite his practice of killing and then eating strangers.²⁰⁸ What also cannot be ignored is the issue of class. Andrea Yates was a white, college-educated nurse who was married to an aerospace professional.²⁰⁹ Critics of the verdict cite to her recovery of reason during her imprisonment and the remorse she now feels.²¹⁰ Yet is her situation any different from others with equally serious mental illnesses who were not only convicted but executed? Do we know better than the Texas jury that her mental illness, as presented in court, was severe enough to absolve her responsibility as defined by Texas criminal law?²¹¹

²⁰⁴ See, e.g., Manchester, *supra* note 19, at 714; Oberman, *supra* note 19, at 2–5.

²⁰⁵ See Pam Easton, *Parnham: Insanity Statute Needs to Change*, ASSOC. PRESS, Mar. 28, 2002.

The lawyer for convicted child killer Andrea Yate[s] wants to change the Texas insanity statute to assist other mentally ill defendants and give his client something to live for.

. . .

Parnham hopes his client’s conviction will allow for Texas’ insanity statute to be reworked so mentally ill defendants have a chance of avoiding conviction for something they were compelled to do because of an illness.

. . .

“We’ve got a poster child in this case for a change in our insanity law,” Parnham said.

Id.

²⁰⁶ See Katie Couric, *George Parnham, Andrea Yates’ Attorney, and Dr. Phillip Resnick, Defense Witness for the Andrea Yates and Deanna Laney Trials, Discuss and Compare Verdicts in Both Cases*, NBC NEWS (Apr. 5, 2004) (noting the disparity between Yates’ sentence and a similar defendant who was acquitted).

²⁰⁷ Joan Biskupic, *Insanity Defense: Not a Right*, WASH. POST, Mar. 29, 1994, at A3 (commenting that Bobbitt successfully used the insanity defense and was acquitted).

²⁰⁸ See Anastasia Toufexis, *Do Mad Acts a Madman Make?*, TIME MAG., Feb. 3, 1992, at 17.

²⁰⁹ Galanti, *supra* note 19, at 349; O’MALLEY, *supra* note 20, at 28.

²¹⁰ Couric, *supra* note 206.

²¹¹ See AP, *Yates Jurors*, *supra* note 3, at A18 (explaining that jurors believed Yates was mentally ill, but able to tell right from wrong when she killed).

A. Is There a Role for the Insanity Defense?

By reflecting on the insanity defense's inadequacy to address the problem of the mentally ill who commit crimes, I do not claim there should not be an insanity defense. I believe each state and the federal government is able and entitled to make its own decisions about how it will attribute criminal responsibility. Just as a state may decide that an involuntary muscle spasm does not constitute intent,²¹² it may decide that a thought disorder can be serious enough to negate intent.²¹³ Whether that disorder is described as mental illness or as a severe manifestation of mental illness, it is still up to the polity to determine how to evaluate responsibility.²¹⁴ As a matter of constitutional authority, a state may draft an insanity defense that only excuses from responsibility individuals whose mental illness has left them with no ability to control their actions, or no awareness of the consequences of their actions.²¹⁵ Whether the state calls this a M'Naghten test or describes it as an abrogation of the insanity defense, the result is the same. A state that recognizes only total lack of awareness as an excuse essentially abolishes the insanity defense and replaces it with a pure *mens rea* standard. Thus, the degree of any mental illness short of complete awareness is irrelevant.

We need societal consensus on the purpose of punishment in order to ascribe responsibility for criminal acts to individual actors.²¹⁶ The first step in reaching such a consensus is to identify what

²¹² See *Herd v. State*, 724 A.2d 693, 700 (Md. 1999):

A simple black-or-white classification of the *mens rea* as one involving a specific intent or one involving only a general intent is but a part of the necessary examination. An involuntary act—a muscular spasm or a fall, for example—would not render one guilty even of a crime *malum prohibitum* let alone a crime *malum in se*. Even a crime *malum prohibitum* requires a voluntary act. *Mens rea* literally means “a guilty mind.” With respect to crimes *mala in se*, to wit, to crimes involving a *mens rea*, even general intent may mean more than merely voluntarily doing the act that constitutes the *actus reus*.

Id. See generally U.S. CONST. amend. X (stating that powers not delegated to the federal government by the Constitution are reserved to the states).

²¹³ See UTAH CODE ANN. § 76-2-305(1)(a) (2003) (stating that “[i]t is a defense to a prosecution under any statute or ordinance that the defendant, as a result of mental illness, lacked the mental state required as an element of the offense charged”); see generally U.S. CONST. amend. X.

²¹⁴ See generally U.S. CONST. amend. X.

²¹⁵ See Hawkins-Leon, *supra* note 113, at 402 (referring to reform measures taken by states to make the insanity defense less attractive by shifting the burden of proof to the defendant); see generally U.S. CONST. amend. X.

²¹⁶ The Anglo-American legal system has always operated on the premise that laws are created by man to enforce social norms. See CLAYTON A. HARTJEN, CRIME AND CRIMINALIZA-

social mores are likely to be violated and thus needed to be reinforced.²¹⁷ Implicit in drafting laws is the expectation that it is for society's benefit that the population complies with the laws. This raises the next important question of how to achieve compliance. Until recently questioned by psychological research, Anglo-American societies agreed that the best way to prevent offenses against social mores and laws was to hold individuals who committed these offenses responsible for their actions.²¹⁸ If, however, it is not true that most people obey the law because they accept the underlying social mores, then acceptance of social mores is not a good predictor of lawful behavior. This is to account for individuals, like the mentally ill, who have less than full capacity to either recognize or conform their behavior to social norms.²¹⁹ Robinson and Darley conclude that "the infrequency of being able to achieve a meaningful deterrent effect through doctrinal manipulation reveals that the deterrent-analysis tradition of modern criminal law scholars, judges, and lawmakers is seriously out of touch with the reality of its limitations."²²⁰

TION, 33–35 (1974) (quoting legal scholar Roscoe Pound's model of law as resolving the conflicting interests of different members of society by establishing a code of conduct).

²¹⁷ See *id.* at 33 (quoting sociologist Edwin H. Sutherland as having said that "when the mores of a society are adequate, laws are unnecessary; and when the mores are inadequate, laws are useless," by which he meant that unless laws are consistent with the mores of society, they will not be obeyed by anyone. EDWIN H. SUTHERLAND & DONALD R. CRESSEY, *PRINCIPLES OF CRIMINOLOGY* 11 (7th ed. 1966).

²¹⁸ An article in *Georgetown Law Journal* co-written by a law professor and a psychologist challenges the assumption that punishment increases compliance with the law. The two argue that the factors which cause individuals to violate social norms are more powerful than the deterrent effect of what a contemporary society would consider reasonable punishment. Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 *GEO. L.J.* 949, 950–51 (2003). Robinson and Darley first track the repeated justification for punishment as deterring crime, and then refer to scientific research that "suggests that both social influence and internalized norms are powerful forces governing individual conduct, even more powerful than the threat of official conviction and punishment by the criminal justice system." *Id.* at 981 nn.159–62.

²¹⁹ Robinson and Darley note that "the insane offender provides a unique opportunity for the law to make clear just how serious it is about punishing a violation" in that such a punishment would be saying to the public that "if the law sanctions even an insane offender, it might be understood as saying, 'make no mistake that it will sanction if you commit this offense.'" *Id.* at 973 n.136.

²²⁰ *Id.* at 1001.

B. How Do We Decide What Is Criminal?

Is the conduct we designate as criminal based on a normative judgment of what behavior people should or should not be able to control? Is it necessary to assume we are all equally resistant to the urge to kill a cheating spouse in order to make it a crime to do so? Does it matter that some people have less difficulty conforming their conduct to these laws than others? Should this make a difference in our reasons for having these laws? Should the requirement to obey the law be based on an individual assessment of how difficult that will be? At the most basic level, we do recognize that humans kill each other, and we have decided that this killing is in most circumstances incompatible with an ordered society.²²¹ We also realize that there is a difference between humans who kill randomly and those who kill based on provocation. The fact that Clara Harris, the dentist in Houston who ran over her unfaithful husband, was convicted of murder did not mean the jury did not understand the urge to kill an unfaithful spouse.²²² It did indicate a decision by society to require a uniform level of impulse control regardless of an individual's specific temptation to act, so long as there is an intact thought system. It does not matter how much you want to kill your husband—what matters is whether you know that you are, in fact, killing a human. Believing that the man you are running over is a robot duplicate of your husband, sent by your enemies to kill you (not a belief of Clara Harris²²³) demonstrates a lack of knowledge that you are killing a human, and has been termed by scholars as a “negative” insanity defense.²²⁴

C. What Is the Role of Irresistible Impulse?

There is a big difference between not knowing you are killing a man and being unable to stop yourself because of forces beyond your control. This concept is recognized in insanity defense law as a “positive” insanity defense, and is encapsulated in the concept of an

²²¹ Cf. Anthony N. Bishop, *The Death Penalty in the United States: An International Human Rights Perspective*, 43 S. TEX. L. REV. 1115, 1231 (2002) (concluding, *inter alia*, that “civil society . . . must progress beyond killing in order to prove that killing is wrong.”).

²²² See Nick Madigan, *Woman Who Killed Spouse With Car Is Guilty of Murder*, N.Y. TIMES, Feb. 13, 2003, at A20 (providing an overview of the Clara Harris case).

²²³ Cf. *id.* (examining, *inter alia*, Clara Harris' motives and state of mind).

²²⁴ Cf. Marlene Atardo, *Defense of Mistake of Fact in Rape Prosecution*, 102 A.L.R. 5th 477, at 10 (2003) (noting that mistake of fact can be considered a negative defense).

irresistible impulse.²²⁵ Some states' insanity laws permit exemption from criminal responsibility if the criminal act is provoked by an irresistible impulse.²²⁶ Such language does not answer the question of what constitutes an irresistible impulse, or what the role of irresistible impulse is in the insanity defense, and whether such an ability to resist varies from person to person. By studying decisions which identify instances of irresistible impulse, we can see that the ability to resist is evaluated on how that impulse might be impaired by mental illness.²²⁷ In other words, the acts of the defendant are compared with those of a hypothetical "normal" person who is not affected by mental illness. In making these determinations, courts are thrown back onto the question of who is qualified to assess whether a specific provocation was irresistible to a specific person based on the extent of that person's enjoyment of "normal" mental health. The obvious dissatisfaction with the process of designating certain professionals as "experts" is expressed in the constant complaint that the insanity defense has become a battle of the experts.²²⁸ This complaint is evidenced by the contention that there is no satisfactory basis for any expert to know, with any degree of reasonable certainty, what is or is not within an individual's capacity to resist, and to what extent that capacity is impaired by mental illness.

To consider the concept of "capacity to resist" is to open the door to one of mankind's unresolved issues. Discussing the origins of religion in human society, Sigmund Freud wrote that "the formation of a religion, too, seems to be based on the suppression, the renunciation, of certain instinctual impulses."²²⁹ Does man have any control over his actions, or are they all predetermined? Is ability to control behavior a reflection of a person's inherent worth? From where does the ability of a "good" person to control his behavior

²²⁵ See DRESSLER, *supra* note 125, § 25.04(B)(2)(a).

²²⁶ *Id.* (citing *Parsons v. State*, 2 So. 854, 866 (Ala. 1887)).

²²⁷ *Parsons*, 2 So. at 863–64.

²²⁸ Christopher Slobogin states that "the psychiatric testimony elicited by the insanity defense has been characterized as time-consuming, confusing, and 'farfetched.' To the public, this is perhaps the most galling aspect of the defense; many who find fault with the outcome in *Hinckley* are particularly critical of the prolonged battle of the experts waged during the trial." Christopher Slobogin, *The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494, 515–16 (1985). See also Katherine A. Drew, *Diminished Capacity as a Result of Intoxication and Addiction: The Capacity to Mitigate Punishment and the Need for Recognition in Texas Death Penalty Litigation*, 5 TEX. WESLEYAN L. REV. 1, 14 (1998).

²²⁹ Davida A. Williams, *Punishing the Faithful: Freud, Religion, and the Law*, 24 CARDOZO L. REV. 2181, 2218 n.83 (quoting SIGMUND FREUD, *OBSESSIVE ACTIONS & RELIGIOUS PRACTICES* 125 (James Strachey ed., 1924)).

come? We cannot hope to resolve these questions through the legal system on any but the most functional levels. Unless we choose to live in total anarchy or in strict totalitarianism—where one individual has complete authority to make all decisions—we must reach some sort of agreement about how to characterize and respond to behavior recognized as a threat to the safety and well-being of our society. Just because any decision we make will not be completely responsive to the needs of each individual does not make the process unfair.

If we can accept the fact that people have varying abilities to conform their behavior to what society determines to be the necessary rules of conduct, then we can see the necessity of interfering with the liberty rights of those who violate these rules without the need to see these violators as less than human. We cannot set someone loose in society if he tends to lose his temper so easily that he is a threat to the public, and this does not mean we cannot see him as sick. This hardly requires a retooling of current practices: For example, would we have trouble permitting chemotherapy for a bank robber with leukemia while imprisoned? Probably not. Society also understands that a person's ability to conform their behavior to the law may be so compromised by disease or injury that he must be confined. We do not consider this confinement to be punishment for disease; although, given the history and current status of the conditions under which the mentally ill are confined, it is sometimes difficult to perceive any difference between confinement and punishment.

VIII. HOW DOES SOCIETY ASSESS CRIMINAL RESPONSIBILITY?

A review of historical and present day approaches to assessing the criminality of the mentally ill reveals that all such efforts are based on society's answers to the fundamental underlying question of how to assess responsibility. No contemporary discussion of free will is complete without reference to the work of Professor Stephen J. Morse.²³⁰ Although it would be impossible to do justice to the

²³⁰ See, e.g., Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1601–1606 (1994). Here, Professor Morse reviews the scholarship on free will, and concludes that it is not useful to base criminal responsibility on whether or not an individual could control his actions; he holds out that, short of external force or involuntary muscular contraction, most people *are* in physical control of their actions. The issue, he explains, is under which circumstances a person's mental status absolves him of responsibility for acts which he committed of his own volition. *Id.*

depth of Professor Morse's thinking and scholarship on the topic of free will and responsibility, his work explores what it means for humans to be held responsible for choices they make.²³¹ Two more scholars—Professor Elyn Saks and Dr. Stephen H. Benke—address in their book *Jekyll on Trial: Multiple Personality Disorder and Criminal Law* the role of responsibility by considering the paradigm of the person who has more than one distinct personality.²³² Is it just, they ask, to hold several distinct personalities responsible for criminal acts committed by only one of them?²³³ This resurgence of negative attention inspired social scientists to research public opinion about the insanity defense.²³⁴ Research found that jurors who were more likely to accept the death penalty were less likely to believe an insanity defense because “[a] physical disorder may be seen as external to the person, creating a sort of necessity or duress, but a purely mental disorder may be seen as simply another manifestation of a weak or corrupted character.”²³⁵ Professor Robert Burt elegantly identifies the terror invoked by the criminally insane.²³⁶ He writes that people view the “criminal-insane” as “a violent madman who cannot rationally be dissuaded from his conduct by application of sanctions, and whose consequent unpredictability is a constant, erratically terrifying threat to our sense of communal order.”²³⁷

²³¹ *Id.* at 1587 (“If it is true that an agent really could not help or control herself and was not responsible for the loss of control, blame and punishment are not justified on any theory of morality . . .”).

²³² See generally ELYN R. SAKS WITH STEPHEN H. BEHNKE, *JEKYLL ON TRIAL: MULTIPLE PERSONALITY DISORDER AND THE LAW* (1997); see also D.O. Lewis & Jennifer S. Bard, *Multiple Personality and Forensic Issues*, *PSYCHIATRIC CLINICS OF N. AM.*, Sept. 1991, at 741–56 (arguing that when a single human body with only one brain contains several personalities who can act without each other's knowledge, then it is reasonable to consider that all personalities within that body are suffering from severe mental impairment and are not responsible for their actions).

²³³ SAKS, *supra* note 232, at 5.

²³⁴ See generally Cirincione, *supra* note 116, at 165–76. Contemporary study of the insanity defense is aided by considerable empirical scholarship. *Id.* The foundational study was done by Arafat and McCahery, who found in a survey of 450 prospective jurors that the individuals' educational and socioeconomic background influenced their attitude toward psychiatry thus affected their decisions to find defendants NGRI. *Id.* Dr. Cirincione notes that this may be an explanation of why so many bench trials result in acquittals: because highly educated individuals, such as judges, have a more positive attitude towards psychiatry. *Id.*

²³⁵ Perlin, *Borderline*, *supra* note 114, at 1398.

²³⁶ See Robert A. Burt, *Of Mad Dogs and Scientists: The Perils of the “Criminal-Insane,”* 123 U. PA. L. REV. 258, 262–63 (1974).

²³⁷ *Id.* at 263.

Such findings are used by contemporary scholars to refute what Michael Perlin calls the “myths” about the insanity defense.²³⁸ One prevalent myth is that the insanity defense is primarily used in murder cases.²³⁹ While the public pays the most attention to the insanity defense in murder cases, many, if not most, crimes committed by the mentally ill are not murders.²⁴⁰ In fact, murder cases make up less than one-third of the situations where insanity is used as a defense.²⁴¹ An eight-state survey showed that only 14.8% of defendants raising the insanity defense were charged with murder.²⁴² This misperception about the insanity defense is as common among attorneys as it is in the general public. A survey of clinicians “found that 80% believed that the insanity defense [was most frequently used for murder cases.]”²⁴³

Another widely held myth is that the insanity defense is used frequently as a last resort for those who have no other defense.²⁴⁴ Actually, statistics show that it is invoked rarely and with caution.²⁴⁵ No lawyer, whether defense counsel or prosecutor, wants to put forward a meritless argument. Opponents of the insanity defense sometimes claim that acquittals based on insanity are the result of a jury confused by expert testimony.²⁴⁶ Actually, over half of insanity acquittals are awarded by judges at bench trials.²⁴⁷ A study of 7,299 uses of the insanity defense in seven states showed that only 14.4% of the cases were tried by a jury.²⁴⁸ Instead, 42.7% were tried by

²³⁸ See Perlin, *Unpacking*, *supra* note 80, at 648–53 (citing the development of seven myths in the wake of the Hinckley verdict); see generally Lisa A. Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 BULL. AM. ACAD. PSYCHIATRY & L. No. 4 331–38 (1991) (studying the characteristics of individuals who plead insanity).

²³⁹ Perlin, *Unpacking*, *supra* note 80, at 649.

²⁴⁰ See LaFond & Durham, *supra* note 198, at 93–94 n.106 (stating that offenders found NGRI have been charged with relatively minor offenses such as assault, drug use, shoplifting, or property offenses).

²⁴¹ Perlin, *Unpacking*, *supra* note 80, at 649.

²⁴² Callahan et al., *supra* note 238, at 337.

²⁴³ Harry J. Steadman, et al., *Factors Associated With a Successful Insanity Plea*, 140 AM. J. PSYCHIATRY 401, 401–03 (1983).

²⁴⁴ James F. Hooper & Alix M. McLearn, *Does the Insanity Defense Have a Legitimate Role?*, 19 PSYCHIATRIC TIMES 4 (2002), available at <http://www.psychiatrictimes.com/p020452.html> (last visited Mar. 2, 2005).

²⁴⁵ *Id.* (the authors conclude that “the insanity defense is used in less than 1% of criminal proceedings and is successful in approximately one-quarter of those cases.”)

²⁴⁶ See Cirincione, *supra* note 116.

²⁴⁷ *Id.* at 175.

²⁴⁸ *Id.* at 167.

judges and 42.9% resulted in plea bargains.²⁴⁹ Furthermore, three-quarters of the cases tried to juries resulted in a conviction and 76.8% of all insanity acquittals followed trial by a judge alone.²⁵⁰ Professor Cirincione theorizes that the large number of bench trials reflect prosecutors' decision to proceed with adjudication even when they do not intend to contest the defendant's insanity defense.²⁵¹ Moreover, although it is the cases where there is disagreement with an insanity verdict which get publicity, an Oregon study of individuals acquitted under the insanity defense found prosecutors agreed to the insanity verdict in more than four out of every five cases.²⁵² The public is equally misinformed about the insanity defense.²⁵³ Research shows that not only is the insanity defense rarely invoked, it is even more rarely successful.²⁵⁴ Other studies have shown that looking at all kinds of cases, the insanity defense is raised in less than 1% of all felony cases and is successful only 15% to 25% of the time.²⁵⁵

The fear of the insanity defense most exploited by the prosecution is that an acquittal will lead directly to a dangerous person being released into society to commit further crimes.²⁵⁶ A recent review of the literature concluded, consistent with past studies, that NGRI defendants often served longer sentences or more time than they would have for a criminal conviction.²⁵⁷ This follows because individuals found NGRI are committed to mental institutions until they are "well," even if this extends their confinement far beyond the longest possible criminal sentence for their acts.²⁵⁸ Nevertheless, research supports that those actually found NGRI face long, indeterminate periods of incarceration without benefit of parole.²⁵⁹ Studies show that the public perception of a revolving door between the hospital and the free world is not true when it comes to defendants

²⁴⁹ *Id.*

²⁵⁰ Cirincione, *supra* note 116, at 168.

²⁵¹ *Id.* at 175.

²⁵² Jeffrey L. Rogers et al., *Insanity Defenses: Contested or Conceded?* 141 AM. J. PSYCHIATRY 885, 887 (1984).

²⁵³ See LaFond & Durham, *supra* note 198, at 92–93.

²⁵⁴ Harry J. Steadman, et al., *Factors Associated with a Successful Insanity Plea*, 140 AM. J. OF PSYCHIATRY 401, 401–03 (1983).

²⁵⁵ Borum & Fulero, *supra* note 186, at 120.

²⁵⁶ See LaFond & Durham, *supra* note 198, at 95–96 (arguing that these changes have not made a difference in outcomes for individual defendants).

²⁵⁷ Borum & Fulero, *supra* note 186, at 120.

²⁵⁸ See LaFond & Durham, *supra* note 198, at 95.

²⁵⁹ Borum & Fulero, *supra* note 186, at 120.

acquitted by reason of insanity.²⁶⁰ Dr. Howard Zonana of Yale Medical School, the president of the American Academy of Psychiatry and the Law, commented on new laws in Connecticut that extended civil commitment for those found NGRI, saying, “[You’ve] got to be crazy to take insanity defense.”²⁶¹

Many states have elaborate procedures for transferring custody of defendants from the criminal system to the mental health system when they are acquitted by reason of insanity.²⁶² The Supreme Court facilitated quick transfers by holding that a state need not prove a person found NGRI dangerous by clear and convincing evidence as would normally be the case in depriving an innocent person of his liberty.²⁶³ The Court has also held that a defendant found NGRI cannot be incarcerated beyond the time they have regained sanity.²⁶⁴ One of the reforms most commonly proposed by those who seek to widen the use of the insanity defense is to inform jurors what will happen to the defendant if he is found not guilty.²⁶⁵

²⁶⁰ See Joseph H. Rodriguez et al., *The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders*, 14 RUTGERS L.J. 397, 402–04 (1983) (noting that NGRI defendants are released only with judicial oversight and not until they no longer pose a danger to themselves or others).

²⁶¹ John P. Martin, *The Insanity Defense: A Closer Look*, WASH. POST, Feb. 27, 1998, available at <http://www.washingtonpost.com/wp-srv/local/longterm/aron/qa227.htm> (last visited Mar. 2, 2005).

²⁶² See David S. Wisz, *States’ Right to Confine “Not Guilty By Reason of Insanity” Acquittees After Foucha v. Louisiana*, 82 KY. L.J. 315, 335–45 (1993) (describing differing procedures amongst states for transferring custody); see also LaFond & Durham, *supra* note 198, at 87 (noting that states can “criminally commit mentally ill offenders to secure psychiatric facilities indefinitely . . . because the insanity verdict proved that they were mentally ill and dangerous—even if their crime had been a minor property offense”).

²⁶³ *Jones v. United States*, 463 U.S. 354, 369–70 (1983). The Court authorized indefinite confinement of insanity acquittees even if this confinement exceeded the time of any possible sentence because “[t]here simply is no necessary correlation between severity of the offense and length of time necessary for recovery.” *Id.* at 369.

²⁶⁴ *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992). See Bruce J. Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 1 PSYCHOLOGY, PUB. POL’Y & L. 534, 536–37 (1995) (analyzing *Foucha* from a mental health perspective, Winnick argues that *Foucha* has implications for both civil and criminal commitment, because simply having a diagnosable mental illness associated with violence is an insufficient reason to commit either a criminal who is no longer insane or any individual who is not a present danger to himself or others).

²⁶⁵ That is, given the lack of mental health resources in the community, there is every likelihood that stability achieved under treatment while civilly committed will not be maintained in the free world.

IX. WHAT JUSTIFIES LOWERING THE STANDARD OF RESPONSIBILITY?²⁶⁶

If the answer to assigning responsibility is not in diagnosis, we are left with the fundamental question of what justifies lowering the standards for an individual's responsibility for his actions. The basis of the criminal justice system in the United States rests on holding people liable for their intentional actions, a concept referred to as *mens rea*.²⁶⁷ Usually translated as "guilty mind,"²⁶⁸ *mens rea* reflects the concern that unlike early concepts of criminal law that were based solely on acts, modern Anglo-American law is concerned with intent.²⁶⁹ For example, present-day Americans see it as self-evident that the woman who kills her husband by backing over him in the car because she did not know he had fallen asleep while changing a tire bears a different level of responsibility from Clara Harris, who followed her husband to a hotel where he was meeting another woman and proceeded to run over him three times in the parking lot despite the horrified cries of onlookers, including her stepdaughter.²⁷⁰ While we hold a woman backing over her sleeping husband to some standard of reasonable care in order to foster the public good of looking behind the car before backing out, we would

²⁶⁶ See George Ainslie & John Monterosso, *Will as Intertemporal Bargaining: Implications for Rationality*, 151 U. P.A. L. REV. 825, 859–60 (2003) (exploring the concept of excusing some people for behavior they claim to be unable to control, and expressing the concern that "classifying behaviors as involuntary based on the presence of a physiological antecedent could eventually bring to full fruition the old maxim that 'to understand all is to forgive all,' and thereby undermine criminal deterrence generally"). See also Leonard V. Kaplan, *Shame: Bergman on Responsibility and Blame*, 68 BROOK. L. REV. 1159, 1165–66 (2003). Through an analysis of the movie *SHAME* (Lopert Pictures Corp. 1968), Professor Kaplan explores how society's views of responsibility affect the system of laws, positing that the concepts of criminal and civil liability are based on a deeper, perhaps hidden, belief on what citizens owe to society and to each other. *Id.*

²⁶⁷ There is a broad, fascinating literature on the concept of what the word "intent" means in the context of criminal law as it relates to mental culpability. For further discussion of the issue see Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 272–73 (2002) (reviewing legal and psychological understanding of what characterizes a voluntary act as opposed to one over which a person has no control); see generally Eunice A. Eichelberger, *Annotation, Automatism or Unconsciousness as Defense to Criminal Charge*, 27 A.L.R. 4th 1067 (1984) (analyzing cases in which automatism was used as a defense).

²⁶⁸ BLACK'S LAW DICTIONARY 999 (7th ed. 1999).

²⁶⁹ See DRESSLER, *supra* note 125, § 10.01 (noting "the existence of *mens rea* as a prerequisite to criminal responsibility"). See also Nusbaum, *supra* note 14, at 1521–25 (discussing intent).

²⁷⁰ E.g., *Saturday Today* (NBC television broadcast, Feb. 8, 2003), available at LEXIS, News Library, Nbcnew File.

not charge her with capital murder and sentence her to life in prison.²⁷¹

The case of Clara Harris is a good example of the fundamental problem we need to resolve before we can hope to develop a justifiable insanity defense: When determining criminal culpability, what does society believe about mental illness that is not caused by organic neurological abnormalities? Neuroscientists report a wide array of external experiences that may leave their traces on the brain, and society seems to understand this.²⁷² We believe that a prisoner of war who went through torture and deprivation may never be the same person he was prior to the torture.²⁷³ Even understanding that these changes cannot be reduced to universal laws of cause and effect, but rather differ according to the psychological characteristics of each individual, does not negate their existence.

Anyone who lived through the events of September 11, 2001, has changed their views about the world and safety. Does this constitute a medical diagnosis of paranoia? Can we see our changed reactions to a fidgety passenger on an airline as analogous to how a person who was tortured might see a situation as threatening, even if it was one others could dismiss? Are we mentally ill? Is a formerly abused child mentally ill? Is either of us less responsible for our actions? Do we have less control over what we do than others who have not had our experiences? To enter into this line of thought is to see its complexity.

The point of this thought experiment is to bring to light the reality that what society chooses to designate as behavior for which an individual is or is not responsible is an artificial artifact signaling how we choose to order our society. It is not the law of nature, but

²⁷¹ TEX. PENAL CODE ANN. § 19.03 (Vernon 2004). Capital murder is the highest degree of murder in Texas and makes the defendant eligible for the death sentence. *Id.* § 12.31. See Laura Elder, *Jury Gets Harris Case*, GALVESTON COUNTY DAILY NEWS, Feb. 13, 2003. Clara Harris was represented by George Parnham—the same attorney who had represented Andrea Yates a year earlier—who advocated for an insanity defense because Harris was so distraught by her husband's infidelity and devaluation of her as a person that she lacked the normal ability of a wronged spouse to seek justice through the divorce courts. *Id.* See also Allan Turner, *Harris Legal Defense Strategy Wins Praise: But Multipronged Approach Not Enough for Acquittal*, HOUS. CHRON., Feb. 14, 2003, at A33 (observing that the jury rejected this defense and also did not consider the evidence of insanity strong enough to support a lesser conviction of manslaughter).

²⁷² See generally Harvey M. Weinstein et al., *Torture and War Trauma Survivors in Primary Care Practice*, 165 W. J. MED. 112–17 (Sept. 1996), <http://www.survivorsintl.org/info/primary-care.html> (last visited Mar. 2, 2004) (discussing torture and noting that both “physical and psychological torture may result in long-term” pathological conditions).

²⁷³ See *id.*

the law of man that assesses the level of responsibility of a person who drives up on a sidewalk and kills a child.²⁷⁴ We may determine whether that person was suffering from a heart attack the day after getting a clean bill of cardiac health, suffered from impaired vision due to longstanding macular degeneration, or was distracted by a dog crossing the road, but to make that determination does not lead inevitably to an assessment of responsibility. It is still a matter of societal intent whether to view the act purely by its results—a child is dead—or to establish a hierarchy of responsibility.²⁷⁵ Should a person who knows that his vision is impaired not be held completely responsible for damage done while driving a car? Was it not his choice to drive? Moreover, it is society's decision to determine the consequences after it has assessed responsibility. Should the driver be jailed? Fined? Have his license taken away? Is the child any less dead because the distraction was unexpected, as with a dog running across the road? Would the roads be safe if there were no consequences for anything but intentional injuries? The point to these questions is not that there is one set of answers better than another, but that they represent societal choices just as the designation of responsibility for crimes committed by the mentally ill are societal choices.

X. WHAT ARE THE GOALS OF IMPOSING CRIMINAL PENALTIES ON PEOPLE WITH MENTAL ILLNESS?

A. What Do We Believe Is the Origin of Mental Illness, and What Is Its Effect on Human Behavior?

It is my belief that without a societal consensus on the following—what constitutes mental illness; what evidences such illness; what effect such illness has on behavior; and whether, once having suffered from its effects, one can be free of it—it is not possible to develop an effective law to adjudicate the mentally ill who commit criminal acts. If contemporary American society shares the belief of post-McNaughton Victorian England that only those who do not know what they are doing can be exempted from criminal responsi-

²⁷⁴ See generally Bernadette McSherry, *Epilepsy, Automatism, and Culpable Driving*, 21 MED. & L. 133, 134 (2002) (describing an incident involving an individual who experienced an epileptic seizure while driving and was charged with manslaughter for the resulting fatal car accident).

²⁷⁵ *Id.* at 143–44 (stating that “[C]ases imply that a person’s actions in an epileptic seizure are involuntary because they lack intention and a person should not be found criminally responsible for any accident that may occur as a result of involuntary conduct”).

bility, then we need to acknowledge that individuals will be responsible for their actions unless they demonstrate this lack of awareness.²⁷⁶ Such a belief is not the same as an appreciation of mental illness as a continuum, because it only recognizes mental illness that takes the form of blocking awareness. It is for this reason that measures like the “guilty but mentally ill” verdict are inherently unsatisfactory to those who see mental illness as having a wide-ranging impact on human behavior.²⁷⁷ If society does not believe that anything but complete incapacity excuses criminal behavior, then mental illness which does not cause complete unawareness of external reality is not relevant to a determination of guilt. In this sense, the obligation to recognize mental illness and provide treatment in prison is no more than the obligation to recognize hypertension and provide treatment in prison. The basis is the Eighth Amendment of the Constitution, not the Sixth.²⁷⁸

If one of the most effective arguments against the insanity defense is the fear that a dangerous person will be released, then this fear must be based on a distrust of medicine’s ability to treat and recognize mental illness or society’s ability to confine the dangerous.²⁷⁹ The practices of prosecutors and juries in other areas of criminal law suggest that this fear is not a trivial factor even in the era of “supermax” prisons.²⁸⁰ For example, one of the most effective arguments in favor of the death penalty is that it eliminates the possibility that the criminal will ever reenter society.²⁸¹ Because the alternative to the death penalty is a life sentence, a jury’s vote for the death penalty indicates a distrust of the parole system and the citizens who will evaluate the possibility of the defendant’s release in the future.

As outlined above, without an agreed-upon understanding of how mental illness affects behavior, there can be no successful ef-

²⁷⁶ See DRESSLER, *supra* note 125, at § 25.04(c)(1)(a)–(b).

²⁷⁷ See generally *id.* § 25.04.

²⁷⁸ U.S. CONST. amend. VI; U.S. CONST. amend. VIII; see also *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (establishing that deliberate indifference to prisoners’ health care needs violated the 8th Amendment).

²⁷⁹ See generally Thomas L. Hafemeister & John Pettila, *Treating the Mentally Disordered Offender: Society’s Uncertain, Conflicted, and Changing Views*, 21 FLA. ST. U. L. REV. 729 (1994).

²⁸⁰ E.g., J.C. Oleson, Comment, *The Punitive Coma*, 90 CAL. L. REV. 829, 860 (2002) (asserting that “the modern prison, whether a warehouse prison (full of caged men left idle) or a supermax prison (consisting of men confined in tiny, isolated cells) is an ineffective social band-aid on an unstaunchable social problem.”).

²⁸¹ See DRESSLER, *supra* note 125, at § 6.05(B).

forts to draft a just policy.²⁸² Using a medical model to describe mental illness shows that it makes no more sense to offer treatment rather than punishment to the most severely affected by mental illness than it would for an insurance company to only pay for the chemotherapy of patients whose cancer had spread out of control. By imposing criminal, determinate sentences on people whose tendency toward criminal behavior is no more voluntary (and no less treatable) than a diabetic's tendency to go into hypoglycemic shock, while offering few extremely ill individuals the opportunity to rejoin society after treatment, we abandon the basic tenets of fairness that underlie the Anglo-American principle of holding people responsible for their actions according to their capacity to understand and obey society's rules.

In order to see how mental illness is both the same as, yet, in an important way, different from physical illness, it is helpful to remember that it is entirely ordinary for prisoners with chronic illnesses to remain ill throughout their sentences, receive necessary care in prison, and be released with the same illness.²⁸³ The difference here is how the presence of the illness at the time of the criminal act affected that individual's ability to navigate society's rules. Further, it is not necessary to determine the effect unless there is a shared belief that the act would not have been done but for the illness. Therefore, the individual should have the opportunity to be treated and released rather than be incarcerated. Although the presence of large numbers of the mentally ill in prison relieves the problem, the relevant issue is not so much care of the mentally ill in prison as it is the disposition of individuals who committed crimes while mentally ill.

²⁸² Perlin, *Unpacking*, *supra* note 80, at 622–24 (citing Stanley Ingber, *A Dialectic: The Fulfillment and Decrease of Passion in Criminal Law*, 28 RUTGERS L. REV. 861, 911 (1975)). Perlin writes that “[s]ince the first emergence of the concept of individual responsibility, the tension between a purportedly free-will based legal system and a purportedly deterministically-driven scientific or psychodynamic system has been the critical obstacle to the development of a coherent insanity defense doctrine.” *Id.* at 623–24. See *supra* nn.34, 104, 125, 230 and *infra* n.319 for a review of writings on the symbolic relationship between the insanity defense and the question of free will.

²⁸³ Cf. William B. Aldenberg, Note, *Bursting at the Seams: An Analysis of Compassionate-Release Statutes and the Current Problem of HIV and AIDS in U.S. Prisons and Jails*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 541 (1998) (analyzing compassionate release statutes relating to HIV-positive inmates).

B. A More Detailed Review of the Andrea Yates Case

In considering what society expects from the insanity defense, it is useful to consider again, this time in detail, the highly publicized Andrea Yates case.²⁸⁴ Yates, a 35-year-old nurse, woke up one morning, saw her husband off to work, and proceeded to systematically drown each of her five children in the bathtub.²⁸⁵ The children's ages ranged in age from six months to seven years.²⁸⁶ She then laid each child on her bed and telephoned the police.²⁸⁷ When the police arrived, they initially found her to be completely calm.²⁸⁸ She explained exactly what she had done and how she had done it.²⁸⁹ She told the officers on the scene that she expected to be taken to prison.²⁹⁰ Her expectations were correct: She was taken to jail and charged with capital murder, which made her eligible for the death penalty, and she was subsequently convicted and sentenced to life in prison.²⁹¹

Almost immediately after the first news of the murders reached the public, her family alleged that she had been deeply depressed and mentally ill since the birth of her youngest child.²⁹² Based on these early reports, Andrea Yates' name has become tightly linked to post-partum depression and has triggered a torrent of commentary and scholarship about this condition.²⁹³ By the time

²⁸⁴ See Andrea Yates, at <http://www.cnn.com/SPECIALS/2001/yates/> (last visited Mar. 2, 2005). See generally O'MALLEY, *supra* note 20; sources cited *supra* note 19.

²⁸⁵ S.K. Bardwell et al., *Mom Details Drowning of Five Kids: Eldest Fled, Was Dragged Back to Tub*, HOUS. CHRON., June 22, 2001, at A1, available at LEXIS, News Library, Hchron File; O'MALLEY, *supra* note 20, at 13–21.

²⁸⁶ Carol Christian, *Jury Gives Yates Life Term with No Parole for 40 Years*, HOUS. CHRON., Mar. 16, 2002 at A1, available at LEXIS, News Library, Hchron File [hereinafter Christian, *Life Term*]; O'MALLEY, *supra* note 20, at 4.

²⁸⁷ Bardwell, *supra* note 285; Mike Glenn et al., *Mom of Five: "I Killed My Kids": Children May Have Died in Tub*, HOUS. CHRON., June 21, 2001, at A1, available at LEXIS, News Library, Hchron File; O'MALLEY, *supra* note 20, at 1–4.

²⁸⁸ See Carol Christian, *Yates Gave Few Hints in 911 Call: Mom Didn't Say Kids Were Killed*, HOUS. CHRON., Dec. 8, 2001, at A37, available at LEXIS, News Library, Hchron File; O'MALLEY, *supra* note 20, at 4–5.

²⁸⁹ See Bardwell, *supra* note 285, at A1; O'MALLEY, *supra* note 20, at 13–21.

²⁹⁰ O'MALLEY, *supra* note 20, at 19–21.

²⁹¹ E.g., Christian, *Life Term*, *supra* note 286; O'MALLEY, *supra* note 20, at 212.

²⁹² Bardwell, *supra* note 285; O'MALLEY, *supra* note 20, at 59–60.

²⁹³ See Manchester, *supra* note 19, at 719 nn.45 & 49, 720 nn.52 & 56–57 (reviewing the literature and case law on mothers who murder their babies soon after childbirth; arguing that the existence of postpartum psychotic depression warrants a broadening of the insanity defense; and reporting that although 25% to 85% of women have "postpartum blues" after giving birth, approximately "0.2% of childbearing women will have psychotic episodes"

of trial, the jury was presented with substantial evidence of a long history of Yates' serious mental illness, including many hospitalizations.²⁹⁴ Although no one denied that post-partum depression was a factor in her condition, or that this condition can lead to mothers killing their children, her defense was based on a global claim of long-term mental illness. At no time did or could the prosecution deny Yates' medical history.²⁹⁵ However, they did argue that despite the existence of severe psychotic depression at the time she committed the crime, Yates knew what she was doing and knew it was wrong.²⁹⁶ Under Texas law, an individual can be found not guilty by reason of insanity only if he or she lacked the knowledge that their action was wrong.²⁹⁷ Yates' painstakingly detailed account to the police and later to the psychiatrists performing an evaluation of her awareness that she was drowning her children made it impossible to convince a jury that she did not know that her conduct was wrong.²⁹⁸ Moreover, Yates did not say that any force compelled her to kill the children other than her own belief that they were des-

(citing Velma Dobson & Bruce Sales, *The Science of Infanticide and Mental Illness*, 6 PSYCHOL. POL'Y & L. 1098, 1109 (2000)). See generally sources cited *supra* note 19.

²⁹⁴ O'MALLEY, *supra* note 20, at 137–212.

²⁹⁵ Christian, *Life Term*, *supra* note 286. The author noted that “prosecutor Joe Owmbly acknowledged at a post-trial news conference . . . that he backed off a bit in his quest for the death penalty. ‘We were as aggressive as the facts allowed,’ he said. ‘I didn’t think the facts warranted asking the jury for the death penalty.’” *Id.* See also Jim Yardley, *Mother Who Drowned Five Children in Tub Avoids a Death Sentence*, N.Y. TIMES, March 16, 2002, at A1, available at 2002 WLNR 4061821. Yardley wrote:

The punishment phase of the trial was notable for the passivity of Harris County prosecutors, usually considered among the most aggressive in the nation. Months ago, District Attorney Chuck Rosenthal had brushed aside criticism to pursue the death penalty against Mrs. Yates. Yet during closing statements today, one prosecutor, Joe Owmbly, never asked jurors for a death sentence and almost seemed to be steering them to vote for life.

Id. O'MALLEY, *supra* note 20, at 137–212.

²⁹⁶ ASSOC. PRESS, *Four Yates Jurors: Confession, Photos Key to Verdict*, WASH. POST, Mar. 18, 2002, at A18.

The jurors said they started by considering what they found to be the most compelling evidence: the videotaped confession to police and photographs of the children, alive and dead. “She was able to describe what she did . . . I felt like she knew exactly what she was doing, and she knew it was wrong, or she would not have called the police,” said Roy, a math teacher. “A lot of people want you to have sympathy for her and feel sorry for her,” said Roy. . . . “And that’s okay, but you cannot forget those children.”

Id. O'MALLEY, *supra* note 20, at 173–201.

²⁹⁷ TEX. PENAL CODE ANN. § 8.01(a) (Vernon 2003).

²⁹⁸ See Dawn Fratangelo, *The Jury Speaks: Jury Members Discuss Andrea Yates’ Trial*, Dateline NBC (NBC television broadcast, Mar. 17, 2002), available at LEXIS, News Library, Nbcnew File.

ted to go to hell because of her failures in raising them.²⁹⁹ She believed that by killing them immediately, she saved them from that fate.³⁰⁰ It was no surprise to anyone familiar with Texas law that Yates was found guilty.³⁰¹

The facts of the Yates case highlight why I argue that the insanity defense addresses only a narrow segment of the mentally ill population.³⁰² By all modern medical standards, Yates was mentally ill.³⁰³ Her illness—severe depression with psychotic features—is among the most amenable to pharmacological treatment.³⁰⁴ The consensus of lay and legal commentators alike is that she should have been found not guilty by reason of insanity.³⁰⁵ Yet because Yates' disease did not manifest itself in the form of a cinematic state of delusion, and because she did not claim a deific decree, her behavior was not excused.³⁰⁶ Because the legal standard in Texas³⁰⁷ is knowledge that one's act was wrong, there was no opportunity for the jury to consider whether mental illness could have impaired her thought process. The sympathy that Andrea Yates' conviction generated has reopened public debate on the role of mental illness in

²⁹⁹ See Swanson, *supra* note 140; O'MALLEY, *supra* note 20, at 153–54.

³⁰⁰ See O'MALLEY, *supra* note 20, at 152–53.

³⁰¹ *Id.*

³⁰² See *Talk of the Nation*, Interview with Jennifer Bard (National Public Radio broadcast, Mar. 13, 2002) (discussing legal insanity and its relevance in the Yates case).

³⁰³ See Charles Krauthammer, *Yates Guilty? No, She Lacked "Free Will,"* HOUS. CHRON., Mar. 15, 2002, at 38, available at LEXIS, News Library, Hchron File.

³⁰⁴ *Id.*; see O'MALLEY, *supra* note 20.

³⁰⁵ See *supra* note 19 and accompanying text.

³⁰⁶ See generally Margaret E. Clark, *The Immutable Command Meets the Unknowable Mind: Deific Decree Claims and the Insanity Defense after People v. Serravo*, 70 DENV. U. L. REV. 161 (discussing case outcomes of defendants who claim a deific decree, unlike Andrea Yates); Edith C. Webster, *Hearing God*, ROCKFORD REGISTER STAR, Apr. 10, 2004 at 3B, available at 2004 WLNR 16406613; Editorial, *A Tale of Two Crimes That End Differently: Andrea Yates and Deanna Laney Both Killed Their Children. Their Verdicts Show the Need for a Change in State Law*, SAN ANTONIO EXPRESS-NEWS, Apr. 9, 2004, at 6B, available at LEXIS News Library, Santex File; Rick Casey, *Devils on the Head of a Pin*, HOUS. CHRON. Apr. 7, 2004 at A17, available at LEXIS News Library, Hchron File; Mike Von Fremd, *Deanna Laney Mother Who Stoned Children Found Not Guilty*, (ABC News Transcripts, Apr. 5, 2004), available at LEXIS, News Library, Abcnew File; Elizabeth Vargas, *Texas Woman Kills Children, Found Innocent Due to Insanity* (ABC News Transcripts, Apr. 4, 2004), available at LEXIS, News Library, Abcnew File. Compare the case of Yates with that of Deanna Laney, who was acquitted under NGRI for stoning her two sons to death on instructions from God. Phil Magers, *Analysis: Texas Reviews Insanity Defense*, UNITED PRESS INT'L (May 7, 2004).

³⁰⁷ See TEX. PENAL CODE ANN. § 8.01(a) (Vernon 2004).

criminal responsibility and has provided an opportunity to review the state of the law.³⁰⁸

C. What is Society's Goal in Punishing the Mentally Ill?

The most accessible evidence as to what the United States believes about the role of mental illness in mitigating criminal responsibility is the contemporary use of the insanity defense. The number of incarcerated individuals diagnosed with severe mental illness demonstrates that evidence of mental illness alone is not sufficient to avoid criminal punishment.³⁰⁹ Theoretically, confinement of a person found not guilty by reason of insanity, or committed under civil law, is not supposed to be punitive, even if the confinement lasts a lifetime. In fact, both confinement and commitment result in a total deprivation of liberty.³¹⁰ Moreover, those defendants with a diagnosed mental illness who are convicted, and therefore not found not guilty by reason of insanity, are given punitive sentences. To make this distinction raises the question of what society intends by imposing a prison sentence. Is it just the deprivation of liberty? Should there be further discomfort and painful punishment built in? In a sweeping analysis of the insanity defense following the *Hinckley* verdict, Professor Perlin writes that it is impossible to understand why society assigns criminal responsibility to the mentally ill unless one first understands the role of punishment.³¹¹ He sees trials as “punishment ceremonies” that “stimulate socialization through a process which involves the internalization of normative social behavior rules.”³¹² In the same way, the standards a state utilizes to excuse criminal behavior are based on who society believes is justly punished.³¹³ Traditionally, the field of criminology identifies four

³⁰⁸ See *supra* note 19 and accompanying text.

³⁰⁹ See Stavis, *supra* note 43, at 159–60.

³¹⁰ See Jennifer L. Morris, *Criminal Defendants Deemed Incapable to Proceed to Trial: An Evaluation of North Carolina's Statutory Scheme*, 26 CAMPBELL L. REV. 41, 46 (2004).

³¹¹ Perlin, *Borderline*, *supra* note 114, at 1383. Perlin's article offers a rich appreciation of legal, political, anthropological, sociological and philosophical perspectives on the role punishment plays in society.

³¹² *Id.* at 1385.

³¹³ *Id.* English law before the 1500s did not attempt to determine the capacity to form intent. Matthew T. Fricker & Kelly Gilchrist, Comment, *United States v. Nofziger and the Revision of 18 U.S.C. § 207: The Need for a New Approach to the Mens Rea Requirements of Federal Criminal Law*, 65 NOTRE DAME L. REV. 803, 813 (1990). Thus, a three-year-old child who suffocated a younger sibling or a bull who trampled a passer-by could both face charges of murder and be punished according to the law of murder. BIGGS, *supra* note 113, at 84. It is a relatively modern idea that although it is appropriate to confine the dangerous, it is

purposes of punishment: retribution, deterrence, rehabilitation, and confinement.³¹⁴

1. *Is Punishment Intended to be a Deterrent?*³¹⁵

The most common contemporary justification for imprisoning people is the deterrent effect on the criminal himself or upon others who would be tempted to commit similar crimes.³¹⁶ According to the deterrence theory, if a person is imprisoned for a period of time, he will think twice before committing a crime in the future.³¹⁷ The prison sentence reifies the possibly hazy reality of punishment.³¹⁸ Since one of the primary reasons for fearing the mentally ill is that their actions are not influenced by society's sanctions, it would be reasonable to conclude that no amount of actual punishment will deter the next impulse to do harm.³¹⁹ The public appears not to

wrong to punish those who do not know or intend the consequences of their actions. 21 AM. JUR. 2D CRIMINAL LAW § 35 (2003).

³¹⁴ See HARTJEN, *supra* note 216, at 127–30 for an overview of the history of punishment. Note particularly his discussion of how “banishment” of the criminal from society, whether through confinement or actual transport out of the country, has played an important role in the Anglo-American legal system.

³¹⁵ See generally Robinson & Darley, *supra* note 218. Robinson and Darley argue that the value of deterrence in decreasing crime is based on “the assumption that deterrence is relevant to every aspect of criminal law doctrine.” *Id.* at 956. They also write that “deterrence is said by some commentators to be the criminal law’s ‘primary purpose’ or its ‘core purpose.’” *Id.* They conclude that “criminal code commentaries, court opinions, legislative histories, and sentencing hearing transcripts are full of the language of deterrence in justifying every manner of criminal law rule and practice.” *Id.* at 957.

³¹⁶ *Id.* at 954–56.

³¹⁷ *Id.* See also Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1423 (2003) (observing that deterrence is based on the theory that both the individual offender and other members of the community will balance the consequences of committing a crime against receiving a punishment and thus will be discouraged from committing the crime).

³¹⁸ See Robinson & Darley, *supra* note 218, at 992–94 (stating that it is the actor’s perception of the likelihood of his crime resulting in actual confinement which most influences his decision whether or not the benefits of the crime outweigh the burdens of imprisonment).

³¹⁹ See *id.* at 959–63 (discussing deterrence as a justification for punishing criminals even though there can be no expectation that the mentally ill criminal would have acted differently in light of those deterrence factors). The authors discuss the case of *Regina v. Dudley & Stephens*, in which men cast adrift on a lifeboat avoided starvation only by killing and eating a weakened cabin boy. *Id.* Acknowledging that the defendants would not have been able to act differently, the judge still sentenced the men to death, declaring that “[A] man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime.” *Id.* See also Matthew Jones, Note, *Overcoming the Myth of Free Will in Criminal Law: The Impact of the Genetic Revolution*, 52 DUKE L.J. 1031, 1048 n.96, 1053 (2003). Jones argues that “recent advancements in the field of genetics [put] the free will

share the mental health community's belief in scientific data supporting the effectiveness of medical treatment for some forms of mental illness.³²⁰ Medication combined with therapy, mental health professionals argue, can restore a criminal's ability to perceive himself at risk of unpleasant punishment.³²¹ Moreover, press reports of individuals who go on violent crime rampages after choosing to stop taking their medications weaken the argument that it is safe to let an individual free simply because his symptoms have ceased during confinement.³²² The public's fear of either medicine's fallibil-

foundation upon which the criminal justice system is based in serious jeopardy," and posits that genetics offers the type of biology-based evidence that judges seek in determining whether an individual is responsible for his conduct. Jones also states that "[m]ost legal scholars, judges and policy makers . . . intuitively give greater credibility to the hard sciences (such as biology and chemistry) rather than the social sciences." *Id.* at 1048. Such "hard evidence" of impaired decisionmaking through genetic abnormality, thus, is preferred over social science in finding a "justifiable excuse" for criminal behavior. *Id.*

³²⁰ See Perlin, *Unpacking*, *supra* note 80, at 676–77, 713 (citing Diane Baldwin Bartley, Note, *State v. Field: Wisconsin Focuses on Public Protection by Reviving Automatic Commitment Following a Successful Insanity Defense*, WIS. L. REV. 781, 784 (1986) and observing that, "[h]istorically, it was believed that insanity was too easily feigned, that psychiatrists were easily deceived by such stimulation, and that the use of the defense has thus been 'an easy way to escape punishment.'").

³²¹ Arguments that a criminal can be changed into a law abiding citizens through appropriate interventions are described as "rehabilitation." HARTJEN, *supra* note 216, at 130–31. Hartjen states that:

In the simplest sense, rehabilitation consists of some course of action directed to transforming individuals into less undesirable, more complete and adequate, better-functioning social beings. As far as criminal correction is concerned, the minimal aim is to make lawbreakers into law-abiders. . . . The goal of rehabilitation is to resocialize offenders by building into them the motivation to obey the law. . . . [I]f rehabilitation seeks to deflect individuals from engaging in further illegal activity, it really makes little difference whether this is accomplished by means of psychotherapy, incarceration, or physical brutality. . . . [I]n the end, the attitude societal members harbor toward the criminal [is that] the criminal cannot be allowed to remain the kind of person he has been defined as being.

Id.

³²² Cf. Perlin, *Unpacking*, *supra* note 80, at 609, 648, 724–25, 727. In this article, Professor Perlin further develops his argument that one of the core problems of developing a rational method of applying the law to mentally ill offenders can be traced to the wide-spread negative beliefs that the general public have about the mentally ill. These beliefs include that most people with mental illness are faking their disease for personal gain, and of those who really are ill, the crime they have committed is evidence that their illness is incurable and that they are a danger to the public. Perlin argues that the lay public's belief that they can, without out the aid of medical testimony, tell who is mentally ill and who is not stands in the way of providing appropriate standards to defendants who do not appear to the public as ill. *Id.* Perlin writes that, "The lay public cannot simply use its intuitive 'common sense' about whether an individual 'looks crazy' (based on a combination of media images, religious iconographs and unconscious rationalizations) . . . to effectively determine who is or is not criminally responsible. . . . In short, for the insanity defense to be successful, the defendant must appear to be 'mad to the man on the street.'" *Id.* By

ity or a criminal's cunning is at the heart of why it is so hard to reform law and practice.³²³ The public, including the judiciary and the bar, simply do not believe that it is possible to reduce a criminal's propensity for violence to the same level as the rest of free society over a long period of time.³²⁴ More importantly, even if they believe effective treatments exist, they do not trust the medical profession to accurately identify good candidates or, after treating them, to know whether or not the treatment has worked.³²⁵ Mental health professionals and advocates for the mentally ill face the inherently impossible task of proving that an individual who has committed a dangerous crime will not commit another one.³²⁶ A person found NGRI and then treated for mental illness is not rendered incapable of crime.³²⁷ Even though a person found NGRI of the most bizarre and horrible crime may respond so well to modern drug treatment that he meets all relevant tests of mental stability within months of hospitalization, there is no socially acceptable way to guarantee that his violent urges will remain under control.³²⁸

The Supreme Court's abhorrence of preventive detention,³²⁹ which makes it extremely difficult to deprive a person of liberty because of the potential to commit crime, does not seem to translate into a reluctance to confine people with mental illness once they have committed a crime.³³⁰ To analogize again to bodily illness, there is a substantial gap between how the public views mental dis-

negating the role of medical diagnosis in identifying the mentally ill, the public excludes people who meet all current medical standards for serious or severe mental illness. *Id.*

³²³ *See id.* at 713–14.

³²⁴ *Id.* at 684.

³²⁵ *See id.* at 677 (stating that “the law is convinced that psychiatrists are not better in finding ‘it’ [mental illness] than are members of the lay public”).

³²⁶ *See* Perlin, *Unpacking*, *supra* note 80, at 729 n.618.

³²⁷ *See, e.g.,* Burt, *supra* note 236, at 261. Professor Burt observed that treatments like psychosurgery that purported to remove the capacity for crime would not necessarily be a good thing. *Id.*

³²⁸ Jennifer L. Morris, *supra* note 310, at 46.

³²⁹ *See* *Zadvydas v. Davis*, 533 U.S. 678, 690–91 (2001) (stating that preventative detention is only upheld when the individuals are extraordinarily dangerous and those detentions are subject to strong procedural protections).

³³⁰ *Id.* at 782. *See also* *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997) (stating that “[i]t cannot be said that the involuntary civil confinement of a limited subclass is contrary to our understanding of ordered liberty”); *Hilton v. Braunskill*, 481 U.S. 770, 782 (1987) (stating that New Jersey law does not allow a state court to consider a defendant’s future dangerousness in detention pretrial commitment).

ease and physical disease.³³¹ If one accepts a biological basis for behavior, there is no more reason to think that a person with mental illness who has committed a serious crime is any less amenable to medical treatment than a person who has a seizure while driving. Both individuals have symptoms that make them a danger to society.³³² The person with the seizure may have epilepsy, a brain tumor, or a bad reaction to a medication, but the symptoms might be tractable to medical management. It would seem unjust to take away the driving privileges of the driver whose seizure was caused by epilepsy that can be controlled by medication. Indeed, people do drive while taking anti-seizure medication.³³³ Yet there is no parallel hesitation to incarcerate a person who commits a crime while suffering from a form of schizophrenia treatable with highly effective anti-psychotics.³³⁴ In fact both people—the schizophrenic who has committed a crime and the person who has had a seizure—may be able to manage their potentially dangerous symptoms.³³⁵

Professor Abraham S. Goldstein, a noted scholar on the purposes of criminal law, writes that the reason for requiring an action component to a crime is because the law “seeks to assure that the evil intent of the man branded a criminal has been expressed in a manner signifying harm to society; that there is no longer any substantial likelihood that he will be deterred by the threat of sanction”³³⁶ If punishment is not justified until it is too late for deterrence, then how can it be justified if the individual is beyond deterrence either because of a lack of understanding, such as mental

³³¹ See Michelle Parikh, *Burning the Candle at Both Ends, and There Is Nothing Left for Proof: The Americans with Disabilities Act's Disservice to Persons with Mental Illness*, 89 CORNELL L. REV. 721, 743 (2004).

³³² Cf. Bernadette McSherry, *Epilepsy and Confidentiality: Ethical Considerations*, 23 MED. & L. 133, 134 n.5 (2004) (observing that in some states, people whose mental or physical infirmities make them a danger to the public must register if they are to drive). States have different laws regarding the standards epileptics must meet in order to drive. Typically, these include permission from a doctor and a six month seizure-free period. The web site of the Epilepsy Association has links to the laws in all the states and also allows for comparison between one state's laws and another's. Epilepsy Foundation, State Driving Laws, at <http://www.epilepsyfoundation.org/answerplace/Social/driving/statedrivinglaws.cfm> (last visited Mar. 2, 2005).

³³³ See, e.g., Fredrick Kunkle, *Epileptic Man Pleads Guilty in Car Crash That Killed 4*, WASH. POST., Feb. 24, 2004, at B2 (recounting how the defendant in this case had not been taking his anticonvulsant medications and had a seizure while driving).

³³⁴ See *In re Civil Commitment of McNamara*, No. C6-02-1596, 2003 WL 948353, at *1 (Minn. Ct. App. Mar. 11, 2003).

³³⁵ See generally McSherry, *supra* note 274.

³³⁶ Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 405–06 (1958–1959).

retardation, or a will to commit an act that is stronger than any available punishment?

Andrea Yates, for example, was aware that murder was illegal, yet her reasons for drowning her children were so compelling to her that she did so anyway.³³⁷ According to her, she cared more about her children's eternal damnation than about society's laws.³³⁸ For this reason, the law did not affect her actions. If punishment is intended to deter crime by convincing a person to control her behavior, but mental illness interferes with a person's ability to control behavior, then punishment cannot deter a person who is mentally ill from bad behavior.³³⁹ The Yates jurors rejected this view of deterrence, perhaps because of the argument that Yates waited for her husband to leave the house and would have been deterred from drowning the children if he or a police officer had been present.³⁴⁰ Yet such an argument is not dispositive, because it only shows that an individual is as susceptible to external barriers as a driver would be to a blocked street. Professor Robinson and Dr. Darley point out that although "increasing punishment would [increase] clearance rates . . . such increases would require one or all of the following: a significant increase in the amount we spend on law enforcement and criminal justice; an increase in the intrusiveness we suffer from law enforcement, and a reduction in the procedural safeguards we provide in criminal adjudications."³⁴¹ Thus, using their analysis, a police officer on every block would lower crime since it would make discovery more likely, but society would have to pay for this increased security, both financially and through loss of liberty.³⁴² In my opinion, if deterrence is the only reason for criminal punishment, then it cannot be justified when an individual is unaware of, or does not care about, future consequences.

³³⁷ See Jennifer Bard, *Unjust Rules for Insanity*, N.Y. TIMES, Mar. 13, 2002, at A25, available at 2002 WLNR 4093279.

³³⁸ Christian, *Life Term*, *supra* note 286; O'MALLEY, *supra* note 20, at 157, 169, 192-93, 197, 199.

³³⁹ Because the clear presence of severe mental illness did not result in an acquittal, the Yates case gives us a framework to consider what society seeks to gain by holding individuals criminally responsible for their actions. One often stated view of the reason for imposing harsh sanctions on those who violate laws is to protect society by deterring people from committing crimes. See Dripps, *supra* note 317, at 1423. Much of the moral criticism of holding the mentally ill criminally responsible stems from disagreement about whether the law should recognize that some people cannot be deterred. Leslie A. Johnson, Note, *Settled Insanity Is Not a Defense: Has the Colorado Supreme Court Gone Crazy? Bieber v. People*, 43 U. KAN. L. REV. 259, 262 n.31 (1994).

³⁴⁰ See O'MALLEY, *supra* note 20, at 20.

³⁴¹ Robinson & Darley, *supra* note 218, at 993, n.210.

³⁴² *Id.* at 993.

2. *Is Incarceration Intended to Be a Form of Quarantine?*

Another often cited reason for incarceration is that it serves the direct purpose of removing dangerous individuals from society.³⁴³ The institutionalization of the mentally ill during the early 20th century was similarly intended to keep them separate from the rest of society, not to punish them for their illness.³⁴⁴ Overuse of institutionalization led to legal reforms that placed a high value on individual liberty and spawned a de-institutionalization movement.³⁴⁵

³⁴³ See HARTJEN, *supra* note 216, at 128 (discussing the history of criminal punishment as a form of banishment from the community and a method of “incapacitating the offender in the hope of gaining some protection for society by keeping the criminal at bay”).

³⁴⁴ See Slovenko, *supra* note 43, at 644 (noting that individuals suffering from addiction and psychosis were diverted into hospitals rather than the criminal justice system because their behavior was regarded as an illness not a crime).

³⁴⁵ History has not yet reached a final conclusion regarding the large-scale transfer of the mentally ill out of residential institutions in the 1960s and 1970s, but the current view of this process is that it was motivated by cost-cutting, not necessarily for improving care for the mentally ill, and that it caused much hardship for the mentally ill. See Stavis, *supra* note 43, at 169–72. Stavis writes a clear, comprehensive recounting of how the mentally ill came to lose the sanctuary of the mental institution and were, in a “war of liberation” released into society, only to be reabsorbed by a new institution, the criminal justice system. *Id.* Stavis cites to the criticism of this process, then termed “deinstitutionalization” by Judge David L. Bazelon, a noted advocate for the mentally ill. *Id.* at n.59. (quoting David L. Bazelon, *Institutionalization, Deinstitutionalization and the Adversary Process*, 75 COLUM. L. REV. 897, 907–08 (1975). Writing about the process he observed in 1975, Judge Bazelon warned that:

Deinstitutionalization poses many of the same dangers as the closed institutions—and perhaps some new ones besides. The “‘promise of freedom’” may be just a[s] chimerical as the “promise of treatment.”

How real is the promise of individual autonomy for a confused person set adrift in a hostile world? . . . Are back alleys any better than back wards?

Just as all patients cannot be helped by “environmental” or “milieu” therapy, not all patients will be helped by autonomy in the community.

Id. See also Olinda Moyd, *Mental Health and Incarceration: What a Bad Combination*, 7 UDC/DCSL L. REV. 201, 204–05 (Spring 2002) (stating that there is a link between the closing of state mental hospital and the opening of “hundreds of new prisons” to accommodate the released mentally ill; and concluding that, based on data from the Bureau of Justice Statistics, “jails and prisons have become the institutions most likely to house the mentally ill”); Patricia A. Streeter, *Incarceration of the Mentally Ill: Treatment or Warehousing?*, 77 MICH. B.J. 166, 166, n.2 (1998) (noting that the “the rapid increase in prison populations in the past 10 years, and the shift from institutionalization to community-based treatment of mental illness” has had the direct result of shifting 500 former institutionalized psychiatric patients into Michigan prisons between 1993 and 1997) (citing DET. NEWS, Dec. 4, 1997). See Stone, *supra* note 17, at 291–99 for a comprehensive analysis of the contributing factors for severe mental disorders in inmates in prisons and jails and of proposals to provide appropriate treatment for these inmates. Stone attributes the disproportionate presence of inmates with severe mental illness to the lack of community mental health treatment, which results in

Indeed, it is now quite difficult to confine a person without clear and convincing evidence that she endangers herself or others.³⁴⁶ Therefore, although there is reason to fear the abuses of confinement, the purpose is preserving safety, not imposing punishment. Removing criminals from society has always been one of the justifications for imprisonment, but such removal does not stand alone without other elements of punishment.³⁴⁷

3. *What is the Role of Retribution?*

Another purpose of criminal sanctions is to exact retribution against law breakers.³⁴⁸ We tell ourselves that collectivist justice represents an advance in civilization, because it transfers the task of retribution to the state, thus preventing individuals from seeking vengeance against those who wronged them.³⁴⁹ In the modern Anglo-American legal system, the state's right to seek retribution relies on a finding that the individual is responsible for his acts.³⁵⁰ Thus, it is only acceptable to punish those whom the law finds capable of

many persons "with severe mental disorders [being] incarcerated in prisons or jails simply because there is no alternative [access to treatment]." *Id.* at 291.

³⁴⁶ The current standard for civil commitment is the probability that an individual is a danger to himself or others due to a mental illness. See *Addington v. Texas*, 441 U.S. 418, 426 (1979) (noting that "the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill"). See also Slobogin, *Rethinking*, *supra* note 19, at 507-11 (discussing the constitutional difficulties of civilly committing people who are by the nature of their personalities dangerous to others); Allison J. Meyers, *Mentally Ill and Mentally Retarded Defendants May Get a Chance at Justice: Recommendations to the Task Force Created by Tex. S.B. 553, 77th Leg. R.S. (2001)*, 43 S. TEX. L. REV. 1233 n.137 (citing ABA Criminal Justice Mental Health Standards § 7-6.8 (1989)) (stating that a defendant who is found "mentally ill or mentally retarded and that . . . poses a substantial threat of bodily harm to others" will be "confined to a secure facility").

³⁴⁷ See GERRY JOHNSTONE, *RESTORATIVE JUSTICE: IDEAS, VALUES, DEBATES* 90-91 (2002) (discussing why imprisonment, with its resulting concentration of law breakers and its permanent stigma, increases rather than decreases crime).

³⁴⁸ Michele Cotton, *Back With a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1315 (2000).

³⁴⁹ HARTJEN, *supra* note 216, at 127.

Until the twelfth century, crime was considered a highly individual matter to be resolved by either blood feud or the payment of compensation to the injured party . . . It was only when the state in the person of the king began to assume control over criminal justice that the system of corrections that has evolved to the present time began to emerge. Once crime was defined as an offense against the state, the state, rather than the individual harmed, became the avenger.

Id.

³⁵⁰ See Dripps, *supra* note 317, at 1422.

forming intent.³⁵¹ Unless the mentally ill are seen as aware of and responsible for their actions, no accepted modern theory of punishment justifies punishment as a form of retribution. As discussed *supra*, the insanity defense developed in 16th century England, along with the decision to punish crimes for which there is *mens rea*.³⁵² The purpose of the insanity defense has always been to prevent punishing someone who does not know his act was wrong and does not understand why he is being punished.³⁵³ The dilemma is how to identify the irresponsible party. In designating someone not guilty by reason of insanity, society says that person does not bear responsibility for his or her actions, and seeking retribution would not be just.³⁵⁴

4. *What is the Role of Rehabilitation?*

Finally, one cannot discuss theories of imprisonment without raising the subject of rehabilitation. Although currently not viewed with high regard, at various times in American history, rehabilitation was the primary goal of the prison system.³⁵⁵ Beginning in the 19th century, many Americans believed it was in society's best in-

³⁵¹ See Biggs, *supra* note 113, at 82–84 (discussing the concept of a “guilty mind” and how lack of it will not support culpability); 21 AM. JUR. 2d CRIM. L. § 35 (2003) (discussing the capacity of children to commit crimes).

³⁵² Matthew T. Fricker & Kelly Gilchrist, Case Comment, *United States v. Nofziger and the Revision of 18 U.S.C. § 207: The Need for a New Approach to the Mens Rea Requirements of Federal Criminal Law*, 65 NOTRE DAME L. REV. 803, 812–18, 813 n.51 (1990).

³⁵³ Northrup, *supra* note 82, at 803.

³⁵⁴ *Id.* at 799 n.27.

³⁵⁵ See Cotton, *supra* note 348, at 1319, 1360–61.

Certainly the criminal law was at its most utilitarian at about the mid-twentieth century, and utilitarian concerns even now stand regularly side-by-side with retributive ones. But it is also true that in their most meaningful test to date, the utilitarian purposes were found by many courts and legislatures to be so inadequate to justify punishment that retribution had to be restored, emphatically and by whatever means necessary, to the forefront of the scheme. Articulated purposes, whether or not they always perfectly reflect substantive law or prevailing tendencies, do reflect what people think they are doing or at least what they want to say about what they are doing. And those purposes suggest that key participants in the criminal justice system—state courts, state legislatures, and even the U.S. Supreme Court—have never been sufficiently enamored of utilitarian purposes to ensure their acceptance and implementation.

Id. See Mark Spatz, Comment, *Shame's Revival: An Unconstitutional Regression*, 4 U. PA. J. CONST. L. 827, 832–834 (2002) (tracing the evolution of rehabilitation in the American penal system).

terests to rehabilitate law breakers.³⁵⁶ Rehabilitation still exists in the form of education, job training, substance-abuse counseling, and faith-based programs.³⁵⁷ Indeed, rehabilitation must exist, because the reality is that most people in prison will eventually rejoin society. Rehabilitation takes on particular significance in the case of the mentally ill, because advances in medications and therapy have proven highly effective in restoring the mentally ill's capacity for reason and thus steering them away from criminal behavior. Whether these advances are the result of anti-psychotic medications silencing command hallucinations or the result of medications combined with psychotherapy, enhancing an individual's ability to resist less specific crime-committing urges, such interventions change criminals into law-abiding citizens.

XI. WHAT NEEDS TO BE DONE?

First, there needs to be appropriate mental health care accessible to all people whether they are imprisoned, involuntarily committed, or living freely in the community.³⁵⁸ Second, there must be a fair, humane mechanism for restraining the liberty of the mentally

³⁵⁶ See Spatz, *supra* note 355, at 832–34; Brian J. Telpner, *Constructing Safe Communities: Megan's Laws and the Purposes of Punishment*, 85 GEO. L. J. 2039, 2046–47 (1997) (explaining that:

[P]rogressive reforms in the last decades of the nineteenth century and the first decades of the twentieth century tried to distinguish those criminals who could be rehabilitated from those who could not. After 1850, many states passed “good time” laws, which reduced prisoners’ sentences for good behavior. Judges were granted the power to sentence criminals for indefinite periods of time until they were deemed fit to reenter society, “just as a person suffering from physical disease or infection is sent to a hospital or asylum, to remain for such period as may be necessary for his restoration to health.” By the end of the nineteenth century, more than half the states had some form of parole law, yet another way to distinguish the worthy from the unworthy prisoners and to allow the worthy ones to reenter law-abiding society.

Id.

³⁵⁷ Michael Welch, *Rehabilitation: Holding Its Ground in Corrections*, 59 FED. PROBATION 3, 5 (1995). See Webb Hubbell, *The Mark of Cain*, 16 FALL A.B.A. CRIM. JUST. 33, 2 (2001) (explaining that though rehabilitation is still viewed negatively by some, “[t]he Justice Department has made a tentative start, backing pilot ‘reentry partnership’ programs in eight states . . . which bring together corrections institutions, local police, businesses, faith-based and community organizations to help ex-offenders reenter society.”). See generally Daniel Brook, *When God Goes to Prison*, 2003 LEG. AFF. 22 (June) (providing a detailed example of a faith-based program in a prison in Texas offered for its rehabilitative purposes).

³⁵⁸ Perhaps the saddest part of the Andrea Yates story is that the medical system so often failed her, despite her access to high-quality insurance. See *supra* note 21. Lack of a legal right to adequate mental health treatment left her shuffled from doctor to hospital without time to meet her needs. In her suburban home, she was no better able to access effective

ill who endanger themselves or others. This mechanism requires a strong civil commitment system that does not repeat the past. Third, prisoners diagnosed with mental illness should receive appropriate mental health care in prison and assistance in making the transition to appropriate community-based care when they are released.

Fourth, we must develop a public health model encouraging compliance with treatment in the free world. We must recognize that although an individual has the same right to refuse mental health treatment as to refuse any other type of medical treatment, there is no right to live freely in society as a danger to himself or others. Under this rationale, a refusal to accept treatment could, with appropriate procedural protections, result in either directly observed therapy or confinement under less restrictive conditions.

Fifth, society must realize that even if we were to provide universal health care, we will still be left with the question of which mentally ill individuals should be held criminally responsible for their actions to the extent that they must serve a fixed prison term, or even be executed. Further, this question will remain, despite the fact that the individual is no longer a danger based on the current standards of medical care: because he is cured of his mental illness or is cooperating with a course of treatment that brings it under control.³⁵⁹

XII. CONCLUSION

This Article expresses my belief that the sharp increase in the number of people with mental illness in America's prisons is directly attributable to the lack of outpatient mental health services. Further, the lack of available health care in prison and the conditions in which people with mental illness are housed makes their incarceration in the criminal justice system morally and legally un-

mental health than the poorest indigent living under a bridge. This, not her exclusion by the narrow boundaries of the insanity defense, is the tragedy.

³⁵⁹ Dr. Alison Rutledge maintains that this situation is one of the most difficult aspects of the law for mental health professionals to accept. Referring to a popular science fiction television program, *Star Trek: Voyager*, she recounts a scenario of a ship bringing a condemned prisoner to his victim's family so they may witness the execution. During the journey, medical staff discover they can remove the part of his brain which led to his criminal behavior. After this procedure he is literally no longer the same man. Confronted with this information, the victim's family reflects and then decides his current mental status is as irrelevant to them as is his future potential for danger. He is, in fact, the being who murdered their son and they insist that he be executed. Alison H. Rutledge, *Insanity and the Insanity Defense: What is Guilt? Who Decides?* 21-22 (Spring 2002) (unpublished class paper, on file with author).

acceptable. In order to end this injustice, we must allocate adequate funding to create adequate access to mental health care for all. Without universal access to mental health care, individuals with mental illness will continue to find it difficult to conform with societal norms and will increasingly find themselves arrested and imprisoned as a consequence. Even if we do not face this as a public health crisis, the Eighth Amendment requires us to face this public health crisis within prisons that is resulting in deliberate indifference to prisoners' serious health care needs.

The current flood of criminal convictions of the mentally ill has overcome the ability of the insanity defense, as it currently exists, to help fact-finders make just or morally defensible decisions as to who should be held criminally responsible for their actions and who should not. Without societal agreement about both how mental illness affects criminal responsibility and mental illness treatment's effectiveness, dissatisfaction with the insanity defense will increase. For this reason, we should look to the expertise of public health policy makers to develop a system of outpatient mental health care that can reduce the number of crimes committed by people with mental illness which will allow legal policy makers to make a comprehensive review of society's goals in imposing guilt and punishment on those who violate the law. Neither of these things can be done until society reaches a consensus about who is "mad" and who is "bad."

A review of the history of the insanity defense shows that it was created to deal with a small number of cases when a defendant's mental illness rendered him essentially unaware of his surroundings and his actions. It is as wrong to use 16th century England's standards for determining criminal responsibility as it would be to burn as witches people who behaved oddly. Although the mere diagnosis of mental illness cannot and should not provide immunity from responsibility, there can be no just system without an understanding of how mental illness affects responsibility.

There will always be individuals who are a danger to society based on their impaired thought processes or judgment, but transferring the untreated mentally ill to the prison system rather than engaging in a careful process of civil commitment and universal access to treatment is not the solution, nor is tinkering with current formulations of the existing insanity defense. Neither harsher legislation nor stronger efforts will change the fact that some mentally ill people commit crimes. We need not believe that everyone who disregards the norms of society when committing a crime is mentally ill in order to treat with compassion the mentally ill who do commit

crimes. Nor is it necessary to achieve society's goals to remove and punish people who break the law by confining them in prisons where they do not receive mental health care, or live in an environment that worsens their condition. If a society is judged by its treatment of the weakest and sickest among them, then given our failure to provide adequate mental health care we in the United States deserve harsh judgment indeed.

