NOTE

THE LEGAL INSANITY DEFENSE: TRANSFORMING THE LEGAL THEORY INTO A MEDICAL STANDARD

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INTRODUCTION

In February 2010, Bruco Eastwood walked onto the grounds of a Colorado middle school, yelled at the children that they were going to die, and eventually shot two eighth graders.[1] The state charged Eastwood with

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[1] Steven K. Paulson, *Bruco Strong Eagle Eastwood, Deer Creek Middle School Shooting Suspect, May Be Mentally Ill, Lawyers Say*, HUFFPOST DENVER (Sept. 20, 2011, 2:38 PM),

attempted first-degree murder, and he pleaded insanity.[2] Eastwood had a history of mental illness—just eight years before the shooting, Eastwood had been hospitalized because he claimed that he heard voices coming from his television box.[3] He said that he had been hearing voices for years.[4] Beyond his own claims, Eastwood exhibited odd behavior after the shooting. While being questioned, he picked at his skin, claiming that he was removing "transforming forces from his body."[5] Moreover, at trial, the defense presented the jury with a notebook that belonged to Eastwood, containing odd doodles, ramblings stating that mutants were taking over his body, and statements that the voices in his head were becoming worse.[6] Eastwood was eventually found not guilty by reason of insanity.[7]

A little over ten years earlier, in January 1999, Andrew Goldstein pushed a thirty-two-year-old woman in front of a New York subway train, killing her.[8] Goldstein was charged with second-degree murder.[9] Goldstein had a long history of mental illness with well-documented indications that he suffered from schizophrenia and delusions.[10] In 1992, Goldstein had committed himself to a state psychiatric hospital where he remained for eight months before being transferred to a group home.[11] After his release from the state hospital, for years Goldstein was in and out of hospital emergency rooms begging for additional help—repeatedly, he was turned away and put on waitlists for permanent hospitalization.[12] Records show that Goldstein was labeled

https://web.archive.org/web/20150219205047/http://www.huffingtonpost.com/2011/11/10/bruco-eastwood- colorado-s_n_1086407.html [https://perma.cc/M582-TXEY].

[2] *Id*.

[3] Ivan Moreno, *Bruco Strong Eagle Eastwood, Deer Creek Shooter, Tells Authorities He Heard Voices*, HUFFPOST DENVER (Mar. 12, 2010, 6:22 PM), https://web.archive.org/web/20120107005219/http://www.huffingtonpost.com/2010/03/12/bruco-strong-eagle-eastwo_1_n_496935.html [https://perma.cc/U9MX-XJAQ].

[4] *Id.*

[5] *Id.*

[6] Paulson*, supra* note 1.

[7] Steven K. Paulson, *Bruco Eastwood, Colorado School Shooter, Will Not Serve Time in Prison*, HUFFPOST DENVER (Nov. 10, 2011, 12:33 PM), https://web.archive.org/web/20150219205047/http://www.huffingtonpost.com/2011/11/10/bruco-eastwood-colorado-s_n_1086407.html [https://perma.cc/8QEP-SSMT].

[8] Julian E. Barnes, *Insanity Defense Fails for Man Who Threw Woman onto Track*, N.Y. TIMES (Mar. 23, 2000), http://www.nytimes.com/2000/03/23/nyregion/insanity-defense-fails-for-man-who-threw-woman-onto-track.html [https://perma.cc/26NY-K6GG].

[9] *Id.*

[10] *A Case of Insanity*, PBS FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/crime/trial/other.html [https://perma.cc/5D27-7GMW] (last visited June 21, 2016).

[11] *Id*.

[12] *Id*. Goldstein was voluntarily committed to the hospital fourteen times in the two years leading up to the subway incident. Michael Winerip, *Report Faults Care of Man Who Pushed Woman onto Tracks*, N.Y. TIMES, Nov. 5, 1999, at B1.

"severe[ly] schizophrenic," "thought-disordered," "delusional," and "psychotic."[13] The subway push occurred only three weeks after his most recent release from the hospital.[14] Goldstein pleaded legal insanity, but the jury refused the defense and convicted him; he was sentenced to twenty-five years to life in prison.[15] One juror stated that Goldstein must have known what he was doing because the push "was not a psychotic jerk, [or] an involuntary movement."[16]

The legal insanity defense is generally based on the theory that those who suffer from particular mental diseases or defects cannot be held accountable for their actions.[17] Although legal insanity statutes differ among states, the overarching idea is that a mental or cognitive incapacity should preclude a defendant from being held responsible for his actions.[18] But was Eastwood more "insane" than Goldstein? That is, was Eastwood less responsible for his actions than Goldstein? Can their cases be distinguished?[19] Legal insanity cases are extremely difficult to predict, which means that there may be inconsistency and confusion in the application of the defense. Such inconsistency and confusion create the notion that something in our criminal justice system may be going awry. In practice, applying the legal insanity defense is a challenge.[20] First, the statutory text of legal insanity defense is

[13] *A Case of Insanity*, *supra* note 10.

[14] *Id.*

[15] Barnes, *supra* note 8.

[16] *Id.*

[17] *See infra* Part I.

[18] *See infra* Part I.

[19] While it is true that these cases arose in different states, the insanity defense within each state is fairly unpredictable. Even when applying the appropriate legal standard as prescribed by statute in a particular state, it can be difficult to predict whether a defendant will be found legally insane (and therefore acquitted), or whether a defendant will be found guilty of the crime charged (and therefore convicted). For example, in New York, the same state in which Goldstein's case took place, David Trebilcock was found not guilty by reason of legal insanity after he stabbed his girlfriend's six-year-old daughter to death, believing that she was the Antichrist and that God had told him to kill her. Russ Buettner, *Mental Illness Is No Guarantee Insanity Defense Will Work for Psychologist's Killer*, N.Y. TIMES, Apr. 3, 2013, at A23. A difficulty arises, however, because if a legally insane person lacks the psychological capacity to act rationally in one state, one would assume that person lacks the capacity in all states. Walter Sinnott-Armstrong & Ken Levy, *Insanity Defenses*, *in* THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 219, 317 (John Deigh & David Dolinko eds., 2011) (stating that what removes responsibility "is a lack of the *capacity* to be rational").

[20] All states use a variation of one or two of a few different accepted defenses. *See infra* notes 81-82 and accompanying text. Therefore, some challenges and confusion remain regardless of the state's particular definition of the defense. Although this Note often references the "legal insanity defense" in the singular, it is referring to the collection of legal insanity defenses across states, generally.

vague;[21] and second, the defense is only loosely based on mental illness, yet the science surrounding mental illness itself does not study legal questions.[22] The two issues together create a legal insanity defense that may not be justifiable.

This Note argues that to justify the legal insanity defense under extant theories of punishment, we should defer to science—that is, the legal insanity defense should be rooted in medicine. While "[n]o rule of law can be reliable when absolutely dependent on another discipline . . .[,] without input from other areas, the law would be an arid system."[23] Medical knowledge has vastly expanded in recent years, and to create a justifiable defense the law should align with that knowledge. Part I will discuss the history of legal insanity, extant theories of punishment, and why, although the insanity defense is used so rarely, its justifications remain important. Part II will discuss some of the problems pertaining to the current legal insanity defense, the medical field's approach to the insanity defense, and why there is a great deal of confusion and unpredictability surrounding the defense's application. Lastly, Part III will propose a construction of the legal insanity defense that would align with current medical knowledge, and which would lead to greater consistency, predictability, and fairness in the use of the defense. This Note argues for a proposed insanity defense that, most importantly, would be justifiable under current theories of punishment.

I. BACKGROUND

A. *The History of the Legal Insanity Defense*

The theory of the legal insanity defense has evolved over hundreds of years. Indeed, even the Romans deemed it improper to impose criminal liability on the mentally ill.[24] Beginning in the twelfth century, courts in Europe started searching for a definition of insanity to excuse defendants from criminal liability.[25] In 1313, the first insanity defense, known as "the good and evil" test, appeared in English common law.[26] The "good and evil" test embraced

[21] GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 212 (3d ed. 2007).

[22] The scientific community has its own agenda for research aside from scrutinizing the legal insanity defense, such as accurately assessing medical diagnoses and finding ways to cure those suffering from mental illness. *See* David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research*, 45 U. MIAMI L. REV. 979, 981-82 (1991).

[23] RALPH SLOVENKO, PSYCHIATRY AND CRIMINAL CULPABILITY 53 (1995).

[24] *See* GABRIEL HALLEVY, THE MATRIX OF INSANITY IN MODERN CRIMINAL LAW 5 (2015).

[25] *Id.*

[26] *Id.* at 6. Interestingly, the defendant in the 1313 English case was not even seven years old, which was the youngest age at which one could be found criminally liable at the time. *Id.*

the idea that because mentally ill people were unable to differentiate between good and evil (similar to infants), they were unable to commit sins.[27] Moreover, the mentally ill did not need to be punished through the legal system because the insanity they suffered was sufficient punishment.[28]

In 1616, courts narrowed the test by determining that only those who were considered "idiots" were not liable for criminal punishment.[29] An "idiot" was considered a person who was illiterate and unable to count from one to twenty, who did not recognize their parents, or who could not tell what matters were useful as opposed to harmful.[30] Courts replaced the "idiot" test with the "wild beast" test in 1724.[31] The "wild beast" test provided that a defendant should not face criminal liability if he did not understand his actions any more than a wild animal would.[32] The "wild beast" test narrowed the criteria under which one would qualify as insane, and therefore decreased the number of cases in which a court accepted the defense.[33]

The legal insanity defense underwent major changes in 1843 following the trial of Daniel M'Naghten.[34] M'Naghten, delusional at the time, attempted to assassinate the Prime Minister of England, Robert Peele, but accidentally shot Peele's secretary instead.[35] At trial, M'Naghten's lawyer regularly referred to a recently published treatise on criminal insanity to persuade the court to excuse M'Naghten from his actions.[36] Ultimately, M'Naghten was found not guilty by reason of insanity.[37] Both the public and Queen Victoria were very disturbed by the acquittal of a person who committed a seemingly horrendous act of violence.[38] When the Queen asked the House of Lords how it could acquit M'Naghten, the House of Lords answered that:

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[27] *Id.*

[28] *Id.*

[29] *Id.* at 6-7 (describing refinement of the insanity test to individuals labeled as "idiots" and explaining that an "idiot was not considered to have legal personhood, and therefore was not subject to the imposition of criminal liability").

[30] *Id.* at 6.

[31] *Id.* at 7.

[32] Norman J. Finkel & Steven R. Sabat, *Split-Brain Madness: An Insanity Defense Waiting to Happen*, 8 LAW & HUM. BEHAV. 225, 230 (1984) (citing Rex v. Arnold, 16 How St. Tr. 684, 764 (1723)).

[33] HALLEVY, *supra* note 24, at 7. Supposedly, the "wild beast" was actually a mistranslation of the Latin word "brutis," meaning "brutes," from which this idea was first established in the thirteenth century. *Id.*

[34] SLOVENKO, *supra* note 23, at 17-20; *see also* Queen v. M'Naghten [1843] 8 Eng. Rep. 718 (HL).

[35] 41 AM. JUR. 2D *Proof of Facts* § 3 (1985); Zachary D. Torry & Stephen B. Billick, *Overlapping Universe: Understanding Legal Insanity and Psychosis*, 81 PSYCHIATRIC Q. 253, 256-57 (2010).

[36] Finkel & Sabat, *supra* note 32, at 231.

[37] 41 AM. JUR. 2D, *supra* note 35, § 3.

[38] *Id.*

> [T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring 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.[39]

From this case, over 150 years ago, the modern legal insanity defense was born.

The M'Naghten Rule, still used by several states, results in acquittal for defendants who prove that they either do not understand (1) the nature of their actions, or (2) the wrongfulness of the act.[40] The rationale underlying the M'Naghten Rule is that defendants who fall under either of the test's two prongs cannot be held liable because they do not possess the necessary criminal intent, or mental blameworthiness, for their actions.[41] Many jurisdictions and parts of the medical community have criticized the M'Naghten Rule for its focus on outdated psychiatric knowledge: "An insane person may frequently know the nature and quality of his act, may know that it is wrong, and that it is forbidden by law, yet commit it as a result of a mental disease."[42]

In an attempt to broaden the M'Naghten Rule, some jurisdictions have added an irresistible impulse test to their insanity defenses.[43] Under the irresistible impulse test, the defendant may understand right from wrong, but he is unable to resist committing the crime.[44] "An irresistible impulse is generally defined as a behavioral response that is so strong that the person could not resist it by will or reason."[45] The irresistible impulse test, like other

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[39] *M'Naghten*, 8 Eng. Rep. at 722.

[40] Alabama, California, Florida, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Virginia, and Washington all use the M'Naghten Rule. U.S. DEP'T OF JUSTICE, *State Court Organization 2004*, at 199-201 tbl.35 (2004), http://www.bjs.gov/content/pub/pdf/sco04.pdf [https://perma.cc/HX7Y-HNPK].

[41] *E.g.*, 41 AM. JUR. 2D, *supra* note 35, § 3; SLOVENKO, *supra* note 23, at 20 ("The M'Naghten rule . . . asks whether he knew what he was doing was wrong or, perhaps, thought he was right in doing it . . . ."); Torry & Billick, *supra* note 35, at 257 (explaining that the M'Naghten test "forces the jury to get inside of the mind of the accused and to determine whether the accused is able to understand not only if the accused comprehends his action to be against the law but also if the accused was able to govern his behavior according to the law").

[42] 41 AM. JUR. 2D, *supra* note 35, § 4; *see also* United States v. Currens, 290 F.2d 751, 771 (3d Cir. 1960) ("It has been stated time and time again that psychiatry now regards and recognizes man as an integrated personality and that he cannot be compartmentalized and that his cognitive faculties cannot be detached from his emotions.").

[43] Colorado, New Mexico, Texas, and Virginia all use the irresistible impulse test in their defenses. U.S. DEP'T OF JUSTICE, *supra* note 40, at 199-201 tbl. 35.

[44] *See* 41 AM. JUR. 2D, *supra* note 35, §5.

[45] STEVEN R. SMITH & ROBERT G. MEYER, LAW, BEHAVIOR, AND MENTAL HEALTH:

insanity defense tests, has been widely criticized—namely on the ground that the test assumes an impulsive crime must be committed "in a sudden and explosive fit."[46] In reality, many crimes committed because of a mental illness occur after consistent compulsion instead of being the result of an isolated incident.[47]

As understanding and acceptance of mental illness changed, rejection of narrowly defined insanity defenses increased. Much of the criticism revolved around the belief that the strictness of the M'Naghten Rule and irresistible impulse test prevented medical experts from conveying all of the necessary and relevant medical material to the judge and jury.[48] In response to these critiques, in 1954 the D.C. Circuit Court of Appeals held that a defendant should be acquitted "if his unlawful act was the product of mental disease or mental defect."[49] The D.C. Circuit's articulation came to be known as the "Durham Rule" or "Product Test."[50] While many legal scholars embraced the Durham Rule, most courts rejected it. These courts reasoned that the rule gave psychiatrists too much power in determining criminal responsibility, which led to general confusion and a plethora of appeals.[51]

Due to problems caused by the Durham Rule, in 1962, the American Law Institute (the "ALI") created its own version of the insanity defense that fell somewhere between the M'Naghten Test and Durham Rule.[52] The ALI's rule, as articulated in the Model Penal Code (the "MPC"), provides that "[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 law."[53] The MPC provision goes on to reject repeated criminal and antisocial conduct from the terms "mental disease" and "defect"[54] in an attempt to exclude defendants who suffer from sociopathy or psychopathy.[55]

POLICY AND PRACTICE 389 (1987).

[46] *See* 41 AM. JUR. 2D, *supra* note 35, §5.

[47] *See* United States v. Freeman, 357 F.2d 606, 620-21 (2d Cir. 1966) ("Thus, the 'irresistible impulse' test is unduly restrictive because it excludes the far more numerous instances of crimes committed after excessive brooding and melancholy by one who is unable to resist sustained psychic compulsion or to make any real attempt to control his conduct.").

[48] SMITH & MEYER, *supra* note 45, at 387.

[49] Durham v. United States, 214 F.2d 862, 874-75 (D.C. Cir. 1954), *abrogated by* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972).

[50] Sinnott-Armstrong & Levy, *supra* note 19, at 309.

[51] SLOVENKO, *supra* note 23, at 23.

[52] 41 AM. JUR. 2D, *supra* note 35, §7 (discussing the historical origins of the ALI's formulation and its different and newly developed elements).

[53] MODEL PENAL CODE § 4.01(1) (AM. LAW INST. 1985).

[54] *Id.* § 4.01(2).

[55] SLOVENKO, *supra* note 23, at 25. Sociopathy and psychopathy are generally interchangeable terms referring to a person with "[l]ack of empathy, inflated self-appraisal,

The major distinctions between the MPC and previous legal insanity defenses are: (1) the use of the term "appreciation" instead of "knowledge;" (2) the standard that a person is not criminally liable if he lacks a "substantial capacity" to appreciate the wrongfulness of the act instead of a complete loss of capacity; and (3) the incorporation of both cognitive and volitional incapacities.[56] Many jurisdictions embraced the ALI approach; within just two decades, a majority of jurisdictions had adopted the MPC formulation.[57] Even the D.C. Circuit, less than twenty years after it had first formulated the Durham Rule, adopted the MPC approach in its place.[58] At that time, the D.C. Circuit endorsed the MPC and reaffirmed its earlier definition of mental illness as "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls."[59]

Dissatisfaction with the legal insanity defense reemerged in the late 1970s, however, due in part to the fear that dangerous defendants would be acquitted through the defense and released into society.[60] In 1979, Montana completely abolished its legal insanity defense.[61] The growing rejection of the insanity

and superficial charm." Steve Bressert, *Antisocial Personality Disorder Symptoms*, PSYCHCENTRAL, http://psychcentral.com/disorders/antisocial-personality-disorder-symptoms/ [https://perma.cc/8DH3-U5FK] (last visited July 10, 2016); *see also Sociopath*, BLACK'S LAW DICTIONARY (10th ed. 2014). Some distinguish the terms sociopath and psychopath by considering a psychopath to be a more dangerous person than a sociopath, but neither is inherently violent. *See* William Hirstein, *What is a Psychopath? The Neuroscience of Psychopathy Reports Some Intriguing Findings*, PSYCHOLOGY TODAY (Jan. 30, 2013), https://www.psychologytoday.com/blog/mindmelding/201301/what-is-psychopath-0 [https://perma.cc/6AK5-8322]. The Diagnostic and Statistical Manual of Mental Disorders (the "DSM") used by medical professionals to diagnose mental illness does not include a diagnosis of psychopathy or sociopathy, but rather considers people containing psychopathic or sociopathic traits as having "antisocial personality disorder." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 659 (5th ed. 2013) [hereinafter DSM-5] ("The essential feature of antisocial personality disorder is a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood. This pattern has also been referred to as *psychopathy, sociopathy,* or *dyssocial personality disorder*."). Insanity defenses aim to exclude this type of disorder, as psychopaths "consume an astonishingly disproportionate amount of criminal justice resources." Kent A. Kiehl & Morris B. Hoffman, *The Criminal Psychopath: History, Neuroscience, Treatment, and Economics*, 51 JURIMETRICS 355, 355 (2011). Psychopaths are thought to be fifteen to twenty-five times more likely than nonpsychopaths to be imprisoned; however, there is still no treatment for psychopathy. *Id.* at 377.

[56] SLOVENKO, *supra* note 23, at 24; Sinnott-Armstrong & Levy, *supra* note 19, at 311.

[57] SLOVENKO, *supra* note 23, at 24.

[58] *See* United States v. Brawner, 471 F.2d 969, 991 (D.C. Cir. 1972).

[59] *Id*. at 978 (quoting McDonald v. United States, 312 F.2d 847, 851 (D.C. Cir. 1962)).

[60] RICHARD J. BONNIE ET AL., A CASE STUDY IN THE INSANITY DEFENSE: THE TRIAL OF JOHN W. HINCKLEY, JR. 21 (3d ed. 2008).

[61] *Id.* The Supreme Court has not decided whether it is constitutional for a state not to

defense only worsened in the following years. On March 30, 1981, John W. Hinckley, Jr. shot President Ronald Reagan.[62] Hinckley supposedly did so to gain actress Jody Foster's love and respect.[63] The shooting, unsurprisingly, gained widespread attention.[64]

At trial, all of the experts who evaluated Hinckley found that he was psychologically disturbed in some way, but they disagreed over the extent and nature of his disturbance.[65] One of Hinckley's experts determined that, among other mental disorders, Hinckley was schizophrenic under the American Psychiatric Association's Diagnostic and Statistical Manual, Third Edition ("DSM-III"),[66] while another expert determined Hinckley had schizophrenic personality disorder.[67] Both agreed Hinckley was psychotic at the time of his act.[68] In contrast, the prosecution's experts concluded that Hinckley was neither psychotic at the time of the shooting nor schizophrenic; rather, they concluded that Hinckley had dysthymic disorder, narcissistic personality disorder, and schizoid personality disorder.[69] Ultimately, a jury found Hinckley not guilty by reason of insanity.[70] After thirty-five years of confinement in a psychiatric hospital, Hinckley was released on August 5, 2016.[71]

offer a legal insanity defense. *Id*. ("[T]he Court ruled that a test allowing an insanity defense only if the defendant lacked capacity to know or appreciate the wrongfulness of his conduct is constitutionally sufficient, but it has not ruled on whether it is constitutionally required."); THOMAS J. GARDNER & TERRY M. ANDERSON, CRIMINAL LAW 123 (12th ed. 2014).

[62] BONNIE ET AL, *supra* note 60, at 1.

[63] Doug Linder, *The Trial of John W. Hinckley, Jr.*, UNIV. OF MISSOURI-KANSAS CITY (UMKC) SCH. OF LAW (2008), http://law2.umkc.edu/faculty/projects/ftrials/hinckley/hinckleyaccount.html [https://perma.cc/FSN8-6ZN4] (discussing Hinckley's obsession with Foster and accompanying delusional thoughts about gaining the actress's attention).

[64] BONNIE ET AL., *supra* note 60, at 121.

[65] *Id.* at 28.

[66] The fifth edition of the American Psychiatric Association's Diagnostic and Statistical Manual ("DSM-5") is now in use.

[67] BONNIE ET AL., *supra* note 60, at 28-29.

[68] *Id.*

[69] *Id.* Dysthymic disorder is described as being in a sad mood; narcissistic personality disorder is described as being self-absorbed; and schizoid personality disorder is shown through "lack of friends and emotional coldness or aloofness." *Id.*

[70] BONNIE ET AL., *supra* note 60, at 1.

[71] Devlin Barrett, *Reagan Shooter John Hinckley Jr. to Be Released from Mental Hospital*, WALL ST. J., July 28, 2016, at A3 ("Now Mr. Hinckley will be allowed to live with his mother [in Virginia], provided he continues regular medical and social-work checkups, works or volunteers at least three days a week and adheres to limits on his travel and communication."); Jenny Derringer, *John Hinckley Jr. Released from Institution*, THE CRESCENT-NEWS (Aug. 11, 2016), http://www.crescent-news.com/columnists/jenny_derringer/jenny-derringer-john-hinckley-jr-released-from-institution/article_2528089a-2274-5771-b4b8-55b324d41945.html [https://perma.cc/3HBP-8YDV].

The American public was outraged and terrified by Hinckley's acquittal.[72] "The public could not fathom the idea that Hinckley could be not guilty after attempting a seemingly cold-blooded assassination."[73] Politicians quickly attempted to change the laws surrounding legal insanity so that people like Hinckley would not be acquitted.[74] In 1984, President Regan signed into law the Comprehensive Crime Control Act, which changed the law surrounding the legal insanity defense.[75] The Act put the burden of proof on the defendant and, essentially, reverted to the M'Naghten Rule.[76] Additionally, two-thirds of states amended their legal insanity defenses to place the burden of proof on the defendant, eight states adopted the verdict of "guilty but mentally ill,"[77] and Utah abolished the defense altogether.[78]

Today, states use a wide variety of legal insanity defenses. Twenty-five states have adopted the M'Naghten Rule or a modified version of the rule (four of those states use it along with the irresistible impulse test);[79] twenty states have adopted the MPC rule or a modified version;[80] four states have abolished the legal insanity defense altogether (three of those states allow for a finding of guilty but mentally ill[81]—Kansas is the only state that does not); and only one state (New Hampshire) embraces the Durham Rule.[82] Accordingly, the legal insanity defense is defined in different ways among the states.

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[72] *See* BONNIE ET AL., *supra* note 60, at 1.

[73] *Id.*; Stuart Taylor Jr., *The Hinckley Riddle*, N.Y. TIMES, June 24, 1982, at D21.

[74] Taylor, *supra* note 73.

[75] *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1989 (codified as amended in 18 U.S.C. § 4241 and scattered sections).

[76] *Id.* ("It is an affirmative defense to a prosecution under any federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.").

[77] A guilty but mentally ill ("GMBI") verdict "authorizes both a conventional criminal sanction and psychiatric treatment for a mentally ill defendant who sought to be found not guilty by reason of insanity (NGRI)." Note, *The Guilty but Mentally Ill Verdict and Due Process*, 92 YALE L.J. 475, 475 (1983). The GBMI verdict is used when a jury finds that the defendant committed the offense in question, was *mentally ill* at the time of the offense, but was not *legally insane* at the time of the offense. *Id.* at 476.

[78] BONNIE ET AL., *supra* note 60, at 21; Kimberly Collins, Gabe Hinkebein & Staci Schorgl, Comment, *The John Hinckley Trial & Its Effect on the Insanity Defense*, UNIV. OF MISSOURI-KANSAS CITY (UMKC) SCH. OF LAW, http://law2.umkc.edu/faculty/projects/ftrials/hinckley/hinckleyinsanity.htm [https://perma.cc/ECW4-JLKR] (last visited July 10, 2016).

[79] *The Insanity Defense Among the States*, FINDLAW, http://criminal.findlaw.com/criminal-procedure/the-insanity-defense-among-the-states.html [https://perma.cc/GRT5-HGXP] (last visited July 10, 2016).

[80] *Id.*

[81] *Id.*

[82] *Id.*

B. *The Theories of Punishment*

The United States criminal justice system is based on punishment. Instead of rewarding desirable conduct, the system punishes undesirable conduct.[83] Furthermore, the punishment must be justified by at least one extant theory of punishment: rehabilitation, deterrence, or retribution.[84] A punishment that cannot be justified is unconstitutional.[85] As argued below, punishing a person who is mentally ill and who cannot control his actions at the time of his crime cannot be justified by any existing theory of punishment.[86]

First, under the rehabilitation theory of punishment, the criminal justice system serves to treat offenders so they can return to society as behaving and productive citizens.[87] The rehabilitation theory of punishment suggests that by increasing an offender's self-respect, instilling good values and a proper attitude, and providing him with the means to live a productive life, he will, hopefully, return to society as a law-abiding citizen.[88] A mentally ill person, though, requires a greater amount of care and different methods of treatment than does a mentally healthy offender.[89] Prisons lack effective treatment methods for inmates.[90] Accordingly, committing mentally ill offenders to psychiatric institutions, rather than incarcerating such offenders, so that the offenders can get the care they truly need, is the only rational measure.[91]

[83] *See* WAYNE R. LAFAVE, 1 SUBSTANTIVE CRIMINAL LAW §1.5 (2d ed. 2015).

[84] *See* Kennedy v. Louisiana, 554 U.S. 407, 420 (2008).

[85] Coker v. Georgia, 433 U.S. 585, 592 (1977) (asserting that if a punishment cannot be rationalized under an accepted theory of punishment, then it "is nothing more than the purposeless and needless imposition of pain and suffering" and is unconstitutional).

[86] United States v. Freeman, 357 F.2d 606, 615 (2d Cir. 1966) ("[S]ociety has recognized over the years that none of the three asserted purposes of the criminal law—rehabilitation, deterrence and retribution—is satisfied when the truly irresponsible, those who lack substantial capacity to control their actions, are punished.").

[87] 1 WHARTON'S CRIMINAL LAW § 4 (15th ed. 1993).

[88] *Id.*

[89] Stephen M. LeBlanc, Comment, *Cruelty to the Mentally Ill: An Eighth Amendment Challenge to the Abolition of the Insanity Defense*, 56 AM. U. L. REV. 1281, 1319-21 (2007).

[90] TREATMENT ADVOCACY CTR., THE TREATMENT OF PERSONS WITH MENTAL ILLNESS IN PRISONS AND JAILS: A STATE SURVEY 8 (2014), http://www.tacreports.org/storage/documents/treatment-behind-bars/treatment-behind-bars-abridged.pdf [https://perma.cc/S6P6-UBDC] ("Prison and jail officials thus have few options. Although they are neither equipped nor trained to do so, they are required to house hundreds of thousands of seriously mentally ill inmates. In many cases, they are unable to provide them with psychiatric medications. The use of other options, such as solitary confinement or restraining devices, is sometimes necessary and may produce a worsening of symptoms."); *see* Jennifer M. Reingle Gonzalez & Nadine M. Connell, *Mental Health of Prisoners: Identifying Barriers to Mental Health Treatment and Medication Continuity*, 104 AM. J. PUB. HEALTH, 2328, 2330-31 (2014) (describing the lack of pharmacological mental health treatment in prisons).

[91] LeBlanc, *supra* note 89, at 1320; *see* TREATMENT ADVOCACY CTR., *supra* note 90, at 8

Ultimately, convicting mentally ill offenders of crimes and imprisoning them in correctional institutions cannot be justified under the rehabilitative theory of punishment.

Second, under the deterrence theory of punishment, the criminal justice system seeks to make an example out of the offender to minimize future crime.[92] Deterrence assumes that all people are rational beings and perform cost-benefit analyses prior to acting: "Each individual calculates with more or less correctness, according to the degrees of his information, and the power of the motives which actuate him, but all calculate."[93] As applied to criminal conduct, in theory, a person who considers committing a crime will weigh the potential cost of his crime against the potential benefit and then decide whether or not to act.[94] Within deterrence theory, there are two subsets: *general* deterrence punishes an actor in order to intimidate other potential offenders so that they will not commit the same or a similar crime as the punished actor,[95] and *specific* deterrence punishes an actor so that same actor will not commit another crime.[96]

Even assuming the ordinary person is a rational actor, neither type of deterrence can apply to mentally ill offenders. First, punishing mentally ill actors cannot be justified under a theory of general deterrence because mentally healthy people are unable to identify with a mentally ill offender and thus are not likely to learn anything from the punishment of a mentally ill offender.[97] Furthermore, mentally ill offenders cannot be deterred from the punishment of other mentally ill actors because mentally ill people lack the capacity to act rationally.[98] Mental illnesses "potentially impair or skew rational calculations of risk and reward and generate motivations that may skirt the calculus of offending based on a narrower risk-reward model of decision

("The ultimate solution to this problem is to maintain a functioning public mental health treatment system so that mentally ill persons do not end up in prisons and jails.").

[92] SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 115 (6th ed. 1995) (identifying the central premise of deterrence theory to be that "punishment should not be designed to exact retribution on convicted offenders but to deter the commission of future offenses").

[93] JEREMY BENTHAM, *Principles of Penal Law*, *in* J. BENTHAM'S WORKS 365, 402 (J. Bowring ed., 1843).

[94] *Id.*

[95] WHARTON'S CRIMINAL LAW, *supra* note 87, § 3.

[96] KADISH & SCHULHOFER, *supra* note 92, at 115.

[97] LeBlanc, *supra* note 89, at 1318.

[98] Jeffrey Fagan & Alex R. Piquero, *Rational Choice and Developmental Influences on Recidivism Among Adolescent Felony Offenders*, 4 J. EMPIRICAL LEGAL STUD. 715, 721 (2007); *see also* Stephen J. Morse, *Mental Disorder and Criminal Law*, 101 J. CRIM. L. & CRIMINOLOGY 885, 886 (2011) ("I believe . . . that special rules to deal with at least some people with mental disorder are justified because they substantially lack rational capacity . . . ." (footnote omitted)).

making."[99] Because mentally ill offenders do not fully understand their actions, they are incapable of learning from the punishment of other mentally ill offenders to perform a rational cost-benefit analysis.[100] Second, punishment of mentally ill actors cannot be justified under a theory of specific deterrence—a mentally ill offender, due to his mental illness, lacks the rationality to perform a cost-benefit analysis that incorporates his own incarceration.[101] Thus, punishing mentally ill actors cannot deter future crimes committed by either mentally healthy or mentally ill actors.

Third, and finally, the retributive theory of punishment includes two types of retribution. Culpability-based retribution punishes criminals because the criminals knew their actions were wrong and therefore are blameworthy;[102] harm-based retribution punishes criminals based on the harm they caused.[103] Under the theory of culpability-based retribution, society believes that the offender should suffer in a manner proportionate to the crime he committed.[104] An essential element of culpability-based retribution is an interrogation about whether the offender committed the crime subsequent to his making a choice to do so: "[T]he actor's subjective awareness of wrongdoing triggers

[99] Fagan & Piquero, *supra* note 98, at 721.

[100] *See* Morse, *supra* note 98, at 886; *see also* Atkins v. Virginia, 536 U.S. 304, 320 (2002) ("The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.").

[101] As one study shows, "[m]entally ill inmates in state prisons are nearly 90% more likely than non-mentally ill inmates to have been convicted of eleven or more prior offenses; in federal prisons, mentally ill inmates are nearly 350% more likely than non-mentally ill inmates to have been convicted of eleven or more prior offenses." Amanda C. Pustilnik, *Prisons of the Mind: Social Value and Economic Inefficiency in the Criminal Justice Response to Mental Illness*, 96 J. CRIM. L. & CRIMINOLOGY 217, 237 (2005).

[102] *See* WHARTON'S CRIMINAL LAW, *supra* note 87, § 2 (defining culpability-based retribution as punishment imposed because "[t]he offender simply deserved to be punished; he was allowed, by suffering punishment, to expiate the sin he has committed"); Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1424 (2003) ("Culpability-based retributivists believe that the actor's subjective awareness of wrongdoing triggers blameworthiness and makes the actor eligible for punishment.").

[103] Dripps, *supra* note 102, at 1424 ("Harm-based retributivists believe that causing or risking harm crosses the threshold of blameworthiness.").

[104] *See* WHARTON'S CRIMINAL LAW, *supra* note 87, at § 2 ("[R]etribution may have a bearing on the justice of a particular sanction in the sense that the measure of punishment should never exceed that which the gravity of the offense deserves.").

blameworthiness and makes the actor eligible for punishment."[105] Thus, if the offender did not choose to commit the crime, then society should not punish him.[106] Essentially, the offender must be morally blameworthy in order to deserve punishment. A legally insane offender, however, lacks moral culpability for his actions because, "[b]y definition, the insane offender's acts result from a mental disease, not a controllable conscious choice."[107] Thus, the offender does not deserve to be punished under the culpability-based retributive theory of punishment unless he made a conscious choice to commit the crime.

In contrast, under the theory of harm-based retribution, society believes that the offender should be punished in proportion to the harm he caused.[108] In other words, where a mentally ill defendant causes the same amount of harm as a mentally healthy defendant, the defendants are punished equally regardless of their respective mental states. Yet the criminal justice system is the improper place for harm-based retribution because it is the objective of tort law, not criminal law, to make a victim whole again.[109] Tort law focuses on compensating for wrongful losses, while criminal law focuses on punishing the "the wrongful actions themselves."[110] Therefore, society should look to the tort system rather than the criminal justice system to provide for harm-based retribution.

It is critical that society is able to justify its punishments because without legitimate justification, no penological purpose is served.[111] Although the legal insanity defense is rarely raised and is even more rarely successful,[112] it is still imperative to justify it under the theories of punishment. Because mentally ill

[105] Dripps, *supra* note 102, at 1424.

[106] LeBlanc, *supra* note 89, at 1316. Stephen LeBlanc goes on to note that "[t]he fact that the majority of insanity standards require the offender to labor under a mental disease or defect, which prevents the actor from understanding his conduct, illustrates that an insane offender by definition lacks the capacity for free choice. Since free choice is a necessary element of a volitional act it follows that an insane offender does not exercise free will over his actions." *Id.* at 1316 n.210 (citing *Volition*, BLACK'S LAW DICTIONARY (8th ed. 2004)).

[107] LeBlanc, *supra* note 89, at 1317.

[108] *See* Dripps, *supra* note 102, at 1424.

[109] *See* WAYNE R. LAFAVE, CRIMINAL LAW §1.3(b) (5th ed. 2010).

[110] Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1661-62 (1991).

[111] *See* Hall v. Florida, 134 S. Ct. 1986, 1992-93 (2014) (concluding that none of the theories of punishment provided a compelling rationale for executing a mentally disabled person and so execution served no penological interest); SMITH & MEYER, *supra* note 45, at 383 ("[T]he insanity defense requires that we examine some of the assumptions on which [the criminal justice] system is built.").

[112] Carmen Cirincione, Harvey J. Steadman & Margaret A. McGreevy, *Rates of Insanity Acquittals and the Factors Associated with Successful Insanity Pleas*, 23 BULL. AM. ACAD. PSYCHIATRY & L. 399, 408 (1995) (finding that the defense is used in about one percent of felony cases and successful in about twenty-six percent of those cases).

offenders cannot justifiably be imprisoned for their acts through any of the theories of punishment, the legal insanity defense has to be broad enough to encompass people whose mental illnesses render them not able to make conscious choices to act. As this Note will discuss in Part III, one way to reconstruct the legal insanity defense in order to make it justifiable, and therefore more predictable, is to place greater emphasis on science.

II. PROBLEMS WITH THE INSANITY DEFENSE

A. *General Issues Surrounding the Insanity Defense*

The legal insanity defense has received an extraordinary amount of attention over the years and, as a result, has received a lot of criticism.[113] "One reason for the attention to insanity is that this defense is often associated with criminal trials that attract wide public interest but, more fundamentally, the insanity defense also raises basic questions about the meaning of criminal responsibility and free will."[114] Yet much of the resulting criticism has been misplaced, and it has produced a version of the insanity defense that reflects outdated modes of thinking rather than modern medical views,[115] leading to a confused and unpredictable doctrine.

1. Public Views on the Insanity Defense

The public tends to believe both that the defense is successfully raised without merit and that dangerous individuals are then released back into public

[113] For just a few examples of this criticism, see Bageshree V. Ranade, Note, *Conceptual Ambiguities in the Insanity Defense:* State v. Wilson *and the New "Wrongfulness" Standard*, 30 CONN. L. REV. 1377, 1408 (1998) ("Because the insanity defense questions the very foundations of criminality, legislatures and courts alike have been hesitant to delineate precise boundaries for the concept of depravity. However, it is this hesitancy which has produced conceptual ambiguity within the core elements of insanity, and encouraged a system of definition that shuffles and manipulates key concepts."); Brian D. Shannon, Essay, *The Time Is Right to Revise the Texas Insanity Defense*, 39 TEX. TECH. L. REV. 67, 69-70 (2006) ("These tragic cases, involving defendants with severe psychoses, illustrate that the Texas insanity defense bears no relationship to modern understandings of serious mental illness. Contrary to popular myth, the defense is rarely invoked and seldom successful. Notwithstanding the ultimate results in these three cases, the Texas test for insanity is so narrow that it is virtually meaningless." (footnotes omitted)); *Who Qualifies for the Insanity Defense?*, N.Y. TIMES: ROOM FOR DEBATE (Jan. 20, 2011), http://www.nytimes.com/roomfordebate/2011/01/20/who-qualifies-for-the-insanity-defense [https://perma.cc/PE2B-XTYM] (including articles from six authors debating the defense).

[114] SMITH & MEYER, *supra* note 45, at 383.

[115] Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 730 (1989) (describing how cases like *Hinckley*, which push misconceptions of the defense on the public, force the legal system to retreat back to an eighteenth-century theory of thinking, despite the advancements of modern medicine).

once acquitted.[116] There is an unrealistic belief about the frequency with which the insanity defense is used, leading people to assume that guilty mentally healthy people often fake insanity to plead the defense.[117] In reality, the insanity defense is raised in about one percent of felony cases and is only successful in about twenty-six percent of those cases.[118] Historically, the numbers have been even lower; for example, in 1978, two million Americans on trial for misdemeanors and felonies raised the insanity defense yet only 1625, less than ten percent, were found to be legally insane.[119] These numbers do not support the general public's perception of the insanity defense. In one study, college students in Wyoming estimated that about thirty-seven percent of defendants on trial for felonies offered an insanity defense.[120] Furthermore, the students predicted that forty-four percent of those defenses were successful.[121] In reality, only one-half of a percent of defendants indicted for felonies in Wyoming in the same year as the study pleaded insanity, and only *one* of those pleas was successful.[122] Likely, the public's view of the defense is distorted due to the few highly publicized cases in which the insanity defense is raised, regardless of whether the defense is successful or unsuccessful.[123]

The public also unrealistically assumes that acquitting defendants by reason of legal insanity will result in the release of dangerous criminals into society. This view is also a misconception.[124] One study found that the public substantially underestimates (by almost thirty-five percent) the number of offenders who are acquitted by the insanity defense and then hospitalized.[125] The study also found that the public overestimates (by almost ten percent) the number of offenders acquitted after being found not guilty by reason of insanity but then *not* committed to hospitalization.[126] In general, the public believes that those acquitted by reason of insanity will serve little time in confinement, but, in reality, most of the defendants acquitted spend more time hospitalized than they would have spent in prison if convicted.[127] Such lengthy

[116] *See* MATTHEW T. HUSS, FORENSIC PSYCHOLOGY: RESEARCH, PRACTICE, AND APPLICATIONS 165 (2009).

[117] *Id.*

[118] Cirincione, Steadman & McGreevy, *supra* note 112, at 399, 408.

[119] SMITH & MEYER, *supra* note 45, at 391.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *See* Perlin, *supra* note 115, at 730 (discussing the impact of the public's "heightened arousal" that is created by high-profile cases).

[124] HUSS, *supra* note 116, at 167.

[125] *Id.*

[126] *Id.*

[127] *Id.* (citing Joseph H. Rodriguez, Laura M. LeWinn & Michael L. Perlin, *The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders*, 14 RUTGERS L.J. 397, 398 (1983)); Eric Silver, *Punishment or Treatment?: Comparing the Lengths of Confinement of*

confinements may be attributed to the fact that "[i]nsanity acquittees tend to be individuals with severe mental illnesses for whom treatment has largely been ineffective . . . ."[128] These misconceptions about the legal insanity defense upset a large portion of the public and fuel much of the criticism of the defense.

2. Problems with Construction and Application of the Insanity Defense

Of course, some criticism of the insanity defense comes from legitimate problems with the defense's construction and application. Aside from the defense's generally vague wording, what drives many legal insanity defense issues is the fact that society does not know exactly who it wants to punish and who it wants to acquit.[129] Society mostly believes that there is some justification in acquitting people who are not morally culpable for their actions, but it is difficult to create a legal insanity defense that only acquits offenders who society believes are blameless for their actions.[130] One problem with the insanity defense is the difficulty of obtaining consistent medical testimony. Another, possibly related, issue is that jurors tend to determine legal insanity cases based on personally-held moral convictions, rather than the available evidence.

Mental health experts often have divergent opinions when diagnosing defendants.[131] "Even when there is agreement on the theoretical nature of mental illness, professionals may disagree about the nature or existence of the illness in a specific individual."[132] Essentially, classifying a person's mental illness is much easier to do in theory than in practice. The fact that mental health experts must often make their determinations about a defendant's state of mind after the fact, possibly months after the alleged crime, makes it very difficult to find consistent expert opinions.[133] Moreover, psychiatry and psychology generally seek to diagnose, help, and cure; their conclusions are not readily translated into legal conclusions about culpability.[134]

Additionally, the ability of either party to cherry-pick expert witnesses does not make it any easier for the jury to determine who is a reliable source. There is a general fear that expert witnesses will testify dishonestly and only in favor

Successful and Unsuccessful Insanity Defendants, LAW & HUM. BEHAV. 375, 383-84 (1995).

[128] HUSS, *supra* note 116, at 167.

[129] *See* SMITH & MEYER, *supra* note 45, at 395.

[130] *See id.* at 385 ("If the concept of *mens rea* assumes rational choice, persons deprived of such capacity cannot have the *mens rea* to commit a crime. . . . The punishment of certain of the mentally disabled may not serve society . . . .").

[131] *See* BONNIE ET AL., *supra* note 60, at 5-7 (describing different perspectives that mental health professionals might adopt in diagnosing a defendant).

[132] SMITH & MEYER, *supra* note 45, at 392.

[133] *Id.*

[134] BONNIE ET AL., *supra* note 60, at 5.

of their client because either the prosecution or the defense pays them.[135] Studies have shown that lawyers "shop" for expert witnesses and "frequently coach their experts to present their opinions in the most favorable light."[136] The result is that, although most jurors want expert testimony, many nevertheless do not fully trust it.[137] For example, in the Hinckley case,[138] all of Hinckley's expert medical witnesses testified that he was psychotic at the time of the attempted assassination.[139] The prosecution's expert medical witnesses, meanwhile, testified that Hinckley was not psychotic at the time of the attempted assassination.[140]

Jurors often decide legal insanity cases based on general moral feelings towards the validity of the defense as well as their personal impressions of the defendant. Although jurors with negative opinions concerning the insanity defense generally think that they can decide cases impartially, research has shown that their personal biases usually cloud their judgment.[141] Even if a juror doesn't realize it, negative attitudes can affect his or her ability to reach a fair decision that is consistent with the law.[142] Furthermore, jurors often make their decisions based on personal feelings toward the defendant. With a vague statute, conflicting expert testimony, and most likely limited personal medical knowledge, jurors are essentially left to make a determination based on what they feel is right.[143] Studies conducted with mock jurors have shown that while jurors consider a variety of factors when making their decisions, those factors usually do not align with the specific insanity defense factors or with the

[135] Richard A. Posner, *The Law and Economics of the Economic Expert Witness*, 13 J. ECON. PERSP. 91, 93 (1999) ("[E]xpert witnesses paid by the respective parties are bound to be partisans . . . rather than disinterested, and hence presumptively truthful, or at least honest, witnesses.").

[136] Anthony Champagne, Daniel Shuman & Elizabeth Whitaker, *An Empirical Examination of the Use of Expert Witnesses in American Courts*, 31 JURIMETRICS J. 375, 392 (1991).

[137] *Id.* at 388 ("Sixty-five percent of the jurors stated that the testimony of expert witnesses was crucial to the outcome of the case. However, 35% stated that payment of the expert by the lawyers or litigants meant that the expert could not be trusted to be unbiased . . . ."). Additionally, in the same study, seventy percent of judges believed that expert witnesses "cannot be depended upon to be impartial." *Id.* at 390.

[138] *Supra* notes 62-78 and accompanying text.

[139] BONNIE ET AL., *supra* note 60, at 28. Although the defendant's expert witnesses did not agree on Hinckley's exact diagnosis, they did all agree that he demonstrated "symptoms of psychological disturbance" at the time of the offense. *Id.*

[140] *Id.* at 29.

[141] Jennifer Eno Louden & Jennifer L. Skeem, *Constructing Insanity: Jurors' Prototypes, Attitudes, and Legal Decision-Making*, 25 BEHAV. SCI. L. 449, 465 (2007).

[142] *See id.* ("When negative attitudes are identified, simply asking jurors to set them aside will probably insufficiently protect a defendant's right to a fair trial by an impartial jury.").

[143] Norman J. Finkel & Sharon F. Handel, *How Jurors Construe "Insanity*," 13 LAW & HUM. BEHAV. 41, 57 (1989).

instructions provided by the judge.[144] Additionally, neither the burden of proof nor the standard of proof appear to have any significant impact on jurors' decisions regarding the insanity defense.[145] Seemingly, jurors use their own personal schemas when evaluating legal insanity cases instead of the legal construction of the defense.[146]

B. *Medical Aspects of Legal Insanity*

The legal and medical communities are forever linked with respect to the legal insanity defense. Studies have shown that insanity acquittees generally all have severe psychiatric illnesses.[147] Also, the majority of defendants who have successfully raised the legal insanity plea were suffering from an intellectual disability[148] or psychosis.[149] For example, in 2010 Alejandro Morales stabbed a 9-year-old boy in the chest while they were playing video games together.[150] Morales, at the time, "was on parole for an assault conviction and was taking antipsychotic medication."[151] Morales had been diagnosed with paranoid schizophrenia and was acquitted of the stabbing through the legal insanity

[144] James R. P. Ogloff, *A Comparison of Insanity Defense Standards on Juror Decision Making*, 15 LAW & HUM. BEHAV. 509, 526 (1991) (describing factors that jurors generally rely upon and how they differ from the insanity defense elements and likely jury instructions). Ogloff suggests that to better align jurors' rationales with the law, either the insanity defense must be construed in line with jurors' feelings, or jury instructions must be made as clear as possible. *Id.* at 527.

[145] *Id.* at 524.

[146] *Id.*

[147] SLOVENKO, *supra* note 23, at 67 (reporting that eighty-nine percent of insanity acquittees are schizophrenic or mentally retarded while eighty-two percent have been hospitalized at least once).

[148] Although intellectual disability accounts for some legal insanity acquittees, this Note only concerns mental illness.

[149] MELTON ET AL., *supra* note 21, at 211 ("In historical fact, most successful insanity defenses are based on the presence of one of two mental conditions: psychosis or mental retardation."); Howard V. Zonana et. al., *Part I: The NGRI Registry: Initial Analyses of Data Collected on Connecticut Insanity Acquittees*, 18 BULL. AM. ACAD. PSYCHIATRY & L. 115, 122 (1990) (finding that the average of a four-state survey showed that at least more than sixty percent of acquittees were psychotic); *see also Psychosis*, NAT'L ALL. ON MENTAL ILLNESS, https://www.nami.org/Learn-More/Mental-Health-Conditions/Related-Conditions/Psychosis [https://perma.cc/8RHD-V7Z5] (last visited July 10, 2016). Psychosis usually involves hallucinations (seeing, hearing, or feeling things that do not exist) and/or delusions (strong, yet probably irrational, beliefs). *Id.*; *see also infra* notes 232-40 and accompanying text (describing psychosis more in depth).

[150] Shayna Jacobs, *Boy's Killer Dodge Pen on Insanity*, N.Y. DAILY NEWS, July 2, 2015, at 34.

[151] James C. McKinley Jr., *Cleared of Murder, a Man Punches His Lawyer*, N.Y. TIMES, July 2, 2015, at A22.

defense.[152] Yet, there are many defendants suffering from the same illnesses, but who have been unsuccessful in raising the defense; for example, Andrew Goldstein was severely mentally ill, suffering from delusions and schizophrenia, but was convicted of second-degree murder.[153] One juror noted that, although a murder conviction might not be right, Goldstein seemed dangerous.[154] Fear and misunderstanding about the defense and mental illness have contributed to inconsistent applications of the defense and have led "to unjust convictions for some people who truly deserve an excuse."[155]

Nevertheless, while there is significant overlap between those defendants suffering from severe mental illness and those who raise the insanity defense, the medical diagnoses themselves did not exist when the M'Naghten Rule was first adopted.[156] Rather, the medical understanding of mental illness has developed independently of the criminal law system.

1. The Medical Field's Approach to the Insanity Defense

As in the legal field, there is no ultimate consensus in the medical field about what should constitute legal insanity. Mental Health America ("MHA"), a community-based non-profit that works to promote mental health and help those already living with mental illnesses,[157] is a strong proponent of the legal insanity defense.[158] MHA rejects the belief that people suffering from mental illnesses are inherently violent[159] or that the insanity defense should be restricted simply in order to keep the public safe.[160] Rather, MHA does not believe that restricting the legal insanity defense will increase public safety in any way.[161] Specifically, MHA supports the ALI's approach to legal insanity

[152] *Id.*

[153] *See supra* notes 9-16 and accompanying text. Additionally, Goldstein had not taken his antipsychotic medication on the day of the crime because he did not like certain side effects. PAUL H. ROBINSON & MICHAEL T. CAHILL, LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN'T GIVE PEOPLE WHAT THEY DESERVE 35-36 (2006). Yet, without his medicine Goldstein would often suffer from hallucinations, causing him to believe that "aliens were sucking oxygen from the earth and that there was someone inside him controlling his behavior and movements." *Id.* at 35.

[154] ROBINSON & CAHILL, *supra* note 153, at 40.

[155] *Id.* at 35.

[156] *See* SLOVENKO, *supra* note 23, at 67 (distinguishing between medical and legal insanity).

[157] *About Us*, MENTAL HEALTH AM., http://www.mentalhealthamerica.net/about-us [https://perma.cc/F2UQ-NUZN] (last visited July 10, 2016).

[158] MENTAL HEALTH AM., POSITION STATEMENT 57: IN SUPPORT OF THE INSANITY DEFENSE (June 18, 2014), http://www.mentalhealthamerica.net/positions/insanity-defense [https://perma.cc/L5YW-JQ3M] ("It is vital that states provide for the ongoing availability of a complete insanity defense resulting in a verdict of not guilty by reason of insanity.").

[159] *Id*.

[160] *Id.*

[161] *Id.*; *see also* MENTAL HEALTH AM., POSITION STATEMENT 72: VIOLENCE: COMMUNITY

as codified in the MPC.[162] MHA advocates for a broad construction of the defense that includes both cognitive and volitional prongs.[163] Additionally, MHA agrees with the ALI that it is important to deny a defense to repeated criminal activity and behavior stemming from antisocial tendencies.[164]

The American Psychiatric Association (the "APA") also supports a legal insanity defense.[165] The APA has taken two major positions on the insanity defense: (1) the defense is important to the criminal justice system because it is unfair to punish someone who was substantially mentally impaired at the time the crime was committed, and (2) the legal standard for the insanity defense should be broad enough to allow for the evaluation of serious disorders on an individual basis.[166] The rationale behind the APA's second position is that the organization wants jurisdictions to adopt a legal insanity standard that allows for substantial psychiatric testimony to reach the jury.[167] The APA is unconcerned with the precise construction of the defense because "exact wording of the insanity defense has never . . . been shown to be the major determinant of whether a defendant is acquitted by reason of insanity."[168] Thus, many psychiatrists favor a defense that allows them to give expansive testimony as to the nature of the defendant's mental state at the time of the crime.[169] Additionally, the APA acknowledges that many psychiatrists favor the right and wrong test—a cognitive approach—over the volitional test, because it allows a psychiatrist to provide additional relevant information not otherwise allowed in court:

> Many psychiatrists, however, believe that psychiatric information relevant to determining whether a defendant understood the nature of his act, and whether he appreciated the wrongfulness, is more reliable and has a stronger scientific basis than, for example, does psychiatric

MENTAL HEALTH RESPONSE (Sept. 23, 2014), http://www.mentalhealthamerica.net/positions/violence [https://perma.cc/86B9-3GBQ] (arguing that gun ownership restrictions for the mentally ill are unlikely to increase public safety).

[162] MENTAL HEALTH AM., *supra* note 158.

[163] *Id.* (citing MODEL PENAL CODE § 4.01(1) (AM. LAW INST. 1985)).

[164] *Id.* (citing MODEL PENAL CODE § 4.01(2) (AM. LAW INST. 1985)).

[165] AM. PSYCHIATRIC ASS'N, POSITION STATEMENT ON THE INSANITY DEFENSE (2014), https://www.psychiatry.org/file%20library/about-apa/organization-documents-policies/policies/position-2014-insanity-defense.pdf [https://perma.cc/2CRJ-7BEZ].

[166] Insanity Def. Work Grp., *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 661, 686 (1983).

[167] *Id.* at 684.

[168] *Id.* (citing Richard A. Pasewark, *Insanity Plea: A Review of the Research Literature*, 9 J. PSYCHIATRY & L. 357 (1981)); *see also supra* notes 143-46 and accompanying text.

[169] *See* Insanity Def. Work Grp., *supra* note 166, at 686.

> information relevant to whether a defendant was able to control his behavior.[170]

In short, psychiatrists seem to favor defenses that allow them to provide to the jury as much relevant information about the defendant as possible.

Though most medical groups support some variation of the insanity defense, there are exceptions such as the American Medical Association (the "AMA"). The AMA supports abolishment of the insanity plea and its replacement with acquittal for a defendant lacking mens rea.[171] Further, the AMA proposes that mental illness be used as a factor for determining where a defendant serves his or her sentence, provided that the defendant should never spend more time in a mental hospital than the maximum jail term for the underlying offense.[172] The AMA's proposal to abolish the defense has met significant resistance from the legal field and parts of the medical field, with some organizations observing that abolishment of the defense "could be perceived as a punitive strike against the mentally ill . . . ."[173]

2. Changing Knowledge in the Medical Field and the Evolution of the DSM

The M'Naghten Rule—still used today by many states—dates back to 1843.[174] Yet scientific knowledge has changed dramatically in the past 173 years; after all, just fifty years ago essentially all mental disorders were considered types of "madness."[175] Although there is still an abundance of mysteries about mental illnesses, scientists and doctors have solved important puzzles in recent years.[176] Many mental illnesses are now considered brain disorders stemming from physical problems, like chemical imbalances and/or complex environmental factors.[177] As scientists continue to research mental illnesses, the puzzle pieces continue to be put together and society's understanding of mental diseases grows.[178]

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[170] *Id*. at 685.

[171] THINKING ABOUT THE INSANITY DEFENSE: ANSWERS TO FREQUENTLY ASKED QUESTIONS WITH CASE EXAMPLES 12-13 (Ellsworth Lapham Fersch ed., 2005). See *infra* notes 209-18 and accompanying text for a discussion of the mens rea approach.

[172] THINKING ABOUT THE INSANITY DEFENSE, *supra* note 171, at 12-13.

[173] *E.g.*, *Medical Association Urges Insanity Defense Be Ended*, N.Y. TIMES, Dec. 6, 1983, at B8.

[174] *See supra* notes 34-42 and accompanying text (discussing the M'Naghten Rule).

[175] Linda Sirois, *He's Mad! Stigma and the Changing Understanding of Mental Illness*, 30 LANGUAGE ARTS J. MICH. 8, 10 (2014).

[176] *Id.*

[177] *Id.*

[178] *Id.* Many scientists and medical professionals agree that tremendous progress has been made. John Medina, a developmental molecular biologist and affiliate professor of biomedical engineering at the Washington University School of Medicine, has observed that "[p]sychology is a truly original scientific product of the 20th century—the first real attempt

The Diagnostic and Statistical Manual of Mental Disorders ("DSM") is one way to measure the changes and progress in the psychiatric community. The APA releases the DSM periodically, and psychiatrists, psychologists, and other mental health professionals across the United States use it to classify mental disorders.[179] The DSM includes diagnostic classifications, criteria sets, and descriptions for each disorder.[180] The APA released the first DSM in 1952 and the current edition, the fifth edition of the DSM ("DSM-5"), in 2013.[181] Changes in the DSM generally reflect changes in psychiatric knowledge of mental illnesses, and the DSM has changed drastically over the years.[182]

Even between the release of the previous edition of the DSM (DSM-IV) in 1994[183] and the release of DSM-5 in 2013,[184] there have been a large number

to take the interior mental life of people seriously. Before that, we were drilling holes into the heads of mentally ill patients to drive out hallucinogenic spirits, or saying mental health was the interactive balance between a person's bile and their phlegm." Stephen J. Dubner, *How Much Progress Have Psychology and Psychiatry Really Made? A Freakonomics Quorum*, FREAKONOMICS (Apr. 8, 2008), http://freakonomics.com/2008/04/08/how-much-progress-have-psychology-and-psychiatry-really-made-a-freakonomics-quorum [https://perma.cc/3TZP-4GFD]. Peter Kramer, a clinical professor of psychiatry and human behavior at Brown University, has suggested "it might be fair to argue that more progress was made in the past century in the treatment of mental illness than in the entire prior history of medicine." *Id.* And David Baker, a professor of psychology at the University of Akron, has noted that "[a] century ago one could be labeled 'feeble-minded,' committed to an institution, subject to sterilization, and be powerless to do anything about it. In the span of 100 years, psychological science and practice have made significant gains in assessing and treating the human condition." *Id.*

[179] *Diagnostic and Statistical Manual of Mental Disorders (DSM)*, AM. PSYCHIATRIC ASS'N, http://www.psychiatry.org/psychiatrists/practice/dsm [https://perma.cc/N2ET-SEVJ] (last visited Aug. 8, 2016).

[180] *Id.*

[181] *History of the DSM*, AM. PSYCHIATRIC ASS'N, http://www.psychiatry.org/psychiatrists/practice/dsm/history-of-the-dsm [https://perma.cc/NGX7-CNBJ] (last visited Aug. 8, 2016).

[182] CHARLES SCOTT, DSM-5 AND THE LAW 1 (2015) ("DSM-5 sought to incorporate the most current neurobiology, developmental neuroscience, and genetics to influence psychiatric classification in the first comprehensive revisions of psychiatric nomenclature in two decades."). The original DSM contained 106 diagnoses while DSM-5 contains 298 diagnoses. Alina Suris, Ryan Holliday & Carol S. North, Concept Paper, *The Evolution of the Classification of Psychiatric Disorders*, 6 BEHAV. SCI. 1, 7-8 (2016), http://www.mdpi.com/2076-328X/6/1/5/pdf-vor [https://perma.cc/AT75-XBWW]. In addition to the number of diagnoses, the original DSM contained only 130 pages while DSM-5 contains 992 pages. *Id.* at 8.

[183] *History of the DSM*, *supra* note 181.

[184] *Id.* The APA decided to abandon traditional roman numerals in DSM-5: "This change reflects APA's intention to make future revision processes more responsive to breakthroughs in research with incremental updates until a new edition is required. Since the research base of mental disorders is evolving at different rates for different disorders,

of changes that demonstrate how rapidly the field of mental illness is transforming and expanding.[185] DSM-5 reflects a plethora of developments, including those impacting the very definition of mental illness.[186] The definitional change demonstrates how DSM-5 attempts to broaden the scope of mental illness.[187] Along with the general definition of mental illness, many other disorder definitions have, at the very least, been tweaked in DSM-5 to create broader categories and to allow for greater interconnectedness between disorders.[188]

> Indeed, the once plausible goal of identifying homogeneous populations for treatment and research resulted in narrow diagnostic categories that did not capture clinical reality, symptom heterogeneity within disorders, and significant sharing of symptoms across multiple disorders. The historical aspiration of achieving diagnostic homogeneity by progressive subtyping within disorder categories no longer is sensible; like most common human ills, mental disorders are heterogeneous at many levels, ranging from genetic risk factors to symptoms.[189]

Not only is the reformulation supposed to improve diagnoses and increase research, but it should also allow the DSM to be more flexible with new discoveries: "Ongoing revisions of DSM-5 will make it a 'living document,'

diagnostic guidelines will not be tied to a static publication date but rather to scientific advances. These incremental updates will be identified with decimals, i.e. *DSM-5.1*, *DSM-5.2*, etc., until a new edition is required." *Frequently Asked Questions*, AM. PSYCHIATRIC ASS'N., DSM-5 DEVELOPMENT, http://www.dsm5.org/about/pages/faq.aspx [https://perma.cc/K2WG-CA5A] (last visited Aug. 8, 2016).

[185] *But see* Brent Robbins, *Open Letter to the DSM-5*, IPETITIONS, http://www.ipetitions.com/petition/dsm5/ [https://perma.cc/C3FH-LRJE] (last visited Aug. 8, 2016) ("Though we admire various efforts of the DSM-5 Task Force, especially efforts to update the manual according to new empirical research, we have substantial reservations about a number of the proposed changes that are presented [in the DSM-5].").

[186] SCOTT, *supra* note 182, at 25, 27 ("DSM-IV carried the existing definition from DSM-III of a mental disorder as follows: 'a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (e.g., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom.' In contrast, DSM-5 redefined a mental disorder as follows: 'a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress or disability in social, occupational, or other important activities.'").

[187] *See* DSM-5, *supra* note 55, at 12 ("Earlier editions of DSM focused on excluding false-positive results from diagnoses; thus, its categories were overly narrow . . . .").

[188] *See generally* SCOTT, *supra* note 182, at 25-46 (discussing the various changes implemented in DSM-5).

[189] DSM-*5*, *supra* note 55, at 12.

adaptable to future discoveries in neurobiology, genetics, and epidemiology."[190]

As the standard manual used by mental health professionals,[191] the DSM's changes demonstrate the expansion in the medical field's understanding and approach to mental illness. But while the medical understanding of mental illness has grown more sophisticated, the legal understanding of mental illness, embodied by the insanity defense, remains critically underdeveloped. In order to better serve the interests of justice, the legal field should rework the insanity defense to more closely align with the medical field's understanding of mental illness.

III. DEFERENCE TO SCIENCE PROFESSIONALS

This Part describes an approach to a new legal insanity defense. First, this Part discusses why a legal insanity defense is necessary. Next, this Part proposes a new legal insanity defense that would be justifiable under the culpability-based retributive theory of punishment as well as be a more consistent and morally sound statute. Overall, to create a better legal insanity defense, it is essential to understand that it should be based on scientific knowledge and allowed the flexibility to evolve with new scientific discoveries. As one neuroscientist has observed: "Neuroscience is beginning to touch on questions that were once only in the domain of philosophers and psychologists . . . . These are not idle questions. Ultimately, they will shape the future of legal theory and create a more biologically informed jurisprudence."[192] If the legal field collaborates with the medical and scientific fields, it can create a superior defense.

A. *The Necessity of an Insanity Defense*

Before discussing a better approach to the legal insanity defense, it is important to understand why the defense is necessary. Four states—Idaho, Montana, Kansas, and Utah—have abolished the insanity defense completely.[193] Although the Supreme Court has not ruled whether defendants have a constitutional right to an insanity defense,[194] failure to recognize the insanity defense has serious consequences. Rather than solving problems that

[190] *Id.* at 13.

[191] *Id.* at 10-11 (describing efforts to organize and standardize DSM-5 in order to serve the goal of "creating a common language for communications between clinicians about the diagnosis of disorders").

[192] *See* David Eagleman, *The Brain on Trial*, ATLANTIC, July/Aug. 2011, at 123.

[193] *See supra* note 82 and accompanying text. Note that Kansas is the only one of the four states that does not allow a guilty but mentally ill verdict. *Id.*

[194] *See id.* (describing variety of approaches adopted by states and allowed by the Supreme Court).

stem from the insanity defense, abolishment sends severely mentally ill people to prison, which undermines society's theories of punishment.[195]

There are two main approaches that jurisdictions have taken when abolishing the defense: they have either provided for a guilty but mentally ill verdict[196] or allowed for evidence of mental illness to help negate the mens rea necessary for the crime.[197] Neither is an adequate solution to the problems with the insanity defense. First, the guilty but mentally ill verdict is a faulty solution to the problems posed by the legal insanity defense. A defendant found guilty but mentally ill is sentenced as if he were found only guilty. The court then determines whether the defendant needs medical treatment for his mental health; if the defendant needs medical treatment, then he receives the treatment, but once the treatment is complete he returns to prison to serve out the remainder of his term.[198] Not surprisingly, the guilty but mentally ill verdict has received an enormous amount of criticism.[199] One problem many, including the APA, have with the verdict is that it gives jurors an easy escape from the difficult task of determining whether or not a defendant is guilty.[200] Jurors will often reach this verdict because it seems like a good intermediate position; they can accept that the defendant is mentally ill but also punish the defendant for his actions.[201] The defendant should not spend time in a correctional institution, nor should he acquire a criminal record as a result of his actions. Jurors do not have to make the hard choice of deciding whether to acquit or convict the defendant that is necessary in most insanity defense cases.[202] "[I]n those cases where the jurors are afraid that an insane defendant

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[195] *See supra* Section I.B.

[196] See *Guilty but Mentally Ill Verdict and Due Processes*, *supra* note 77, at 475, for a definition of the guilty but mentally ill verdict. Additionally, note that some states have a guilty but mentally ill verdict along with a not guilty by reason of mental insanity verdict. *Id.* Only states that have abolished a not guilty by reason of mental insanity verdict are addressed here.

[197] *See supra* note 82 and accompanying text.

[198] *Insanity Defense FAQs*, FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/crime/trial/faqs.html [https://perma.cc/JK93-BX2K] (last visited Aug. 8, 2016) ("When, and if, the defendant is deemed 'cured' of his mental illness, he is required to serve out the rest of his sentence, unlike an insanity-defense acquittee who would be released from psychiatric commitment once he is deemed to be no longer dangerous.").

[199] *See, e.g.*, Christopher Slobogin, *The Guilty but Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494, 496-97 (1985).

[200] *Insanity Defense FAQs*, *supra* note 198.

[201] *Id.*

[202] *Id.*

may be set free . . . they will view the 'guilty but mentally ill' verdict as an acceptable compromise."[203]

Second, if the defendant is not morally culpable for his act, due in part to his mental illness, then he should not be punished at all.[204] Rather, the defendant should receive the necessary treatment and then be released, which the legal insanity defense enables. The guilty but mentally ill verdict allows the public to feel safer, due to the misconception that those found not guilty by reason of legal insanity are violent and a threat to public safety.[205] "In the eyes of the jurors, the verdict will be 'a vehicle for protecting the public's need for security while simultaneously providing for the defendant's individualized treatment.'"[206] But in reality those acquitted under the insanity defense spend more time in hospitals than they would spend in prison.[207]

Additionally, abolishing the legal insanity defense is not justifiable. In Kansas, where a finding of guilty but mentally ill is not permitted,[208] defendants are forced to attack the prosecution's case.[209] Specifically, the defendant has to prove that he lacked the requisite mens rea for the crime.[210] But the mens rea approach is grossly underinclusive,[211] because it would only acquit defendants in situations that are unlikely to arise.[212] The defense "would exculpate someone who squeezes a person's neck believing that he is squeezing lemons; or . . . someone who believes he is shooting a tree when he is shooting a person. But we all know that these cases do not exist."[213] Practically all people suffering from extreme mental illnesses knew what they

[203] KADISH & SCHULHOFER, *supra* note 92, at 992 (quoting Sharon M. Brown & Nicholas J. Wittner, *Criminal Law (1978 Annual Survey of Michigan Law)*, 25 WAYNE L. REV. 335, 358 (1979)).

[204] *See id.* ("The [guilty but mentally ill] verdict is . . . an abolition of the mens rea requirement.").

[205] *See id.* (acknowledging defense lawyers' views that the guilty but mentally ill verdict is "an acceptable compromise" under which the defendant is not set free like under the insanity defense).

[206] *Id.*

[207] *See supra* Section II.A.1 (discussing public misconception of the insanity defense).

[208] *See supra* note 81 and accompanying text.

[209] Marc Rosen, *Insanity Denied: Abolition of the Insanity Defense in Kansas*, 8 KAN. J.L. & PUB. POL'Y 253, 260 (observing that in Kansas insanity is not an affirmative defense against the prosecution's charges).

[210] *See id.* at 261 (explaining that under current Kansas law, "evidence of a mental disease or defect is admissible only to the extent that it directly relates to *mens rea*").

[211] Norval Morris, Richard Bonnie & Joel J. Finer, *Should the Insanity Defense Be Abolished? An Introduction to the Debate*, 1 J.L. & HEALTH 113, 123 (1986-87).

[212] *Id.* (contending that because mens rea requirements have "no qualitative dimension," applied strictly in practice, they "would cover only, or primarily, cases that never arise").

[213] *Id.*

were doing at the time of their crime and actually intended to commit the crime.[214]

> A person who kills another because of a delusional belief is aware of killing a human being and does so intentionally. If such a person is to be acquitted, it must be because of an excuse, not because the state has no prima facie case.
>
> . . . .
>
> Unless one confuses *mens rea* with general responsibility, some mentally disordered persons can be treated justly only by a criminal justice system that has a defense of insanity. . . . A person who kills because of the delusional belief that it is necessary to do so to save one's own life kills intentionally and will not succeed with the defense of self-defense.[215]

Merely because a person suffers from an extreme mental illness that meets the strict definition of mens rea for a crime does not necessarily mean that he should be held responsible for the crime.[216] As discussed earlier, imprisoning people who acted out of a severe mental illness yet did not have conscious control over their actions[217] cannot be justified under the theories of punishment.[218] Abolishing the insanity defense and using the mens rea approach would fail to acquit such actors who committed crimes out of severe mental illnesses.

B. *A New Defense*

Since the insanity defense was adopted, neuroscience and the medical field have evolved greatly, yet the law remains largely unchanged.[219] When the insanity defense is raised, juries are asked to apply advanced medical knowledge from expert testimony to answer tough moral questions posed by the legal insanity defense; yet modern medical knowledge rarely aligns with

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[214] Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 801-02 (1985).

[215] *Id.* at 802 (footnote omitted).

[216] *See id. But see* Morris, *supra* note 211, at 120 ("Like it or not, the mentally ill must remain, in a personal sense, responsible for their past conduct if they are ever to wrench some satisfaction from their lives.").

[217] *See supra* notes 105-07 and accompanying text.

[218] *See supra* Section I.B.

[219] The legal insanity defense was created in an attempt to get inside a defendant's mind at a time when mental illness was not only misunderstood, but also rarely acknowledged. *See* Barbara Floyd, *Mental Health*, UNIV. OF TOL. LIBR. (June 26, 2015), http://www.utoledo.edu/library/canaday/exhibits/quackery/quack5.html [https://perma.cc/AS6V-CUFH] (describing treatment of the mentally ill in the nineteenth century).

questions posed by the outdated defense.[220] Psychiatric testimony can help explain defendants' mental illnesses and shed light on their state of mind at the time of the crimes, yet the law does not probe into such testimony.[221] "In all fairness, the problem is not the experts' fault. The legal system has created this predicament by asking the wrong questions. The answer is not to abandon the defense, however, but to reform the role of the experts by recognizing and asking the proper questions."[222] The legal and medical fields should be connected to clarify and create consistency in the legal insanity defense. Instead of legal insanity being a legal term of art, it should be rooted in medicine. Medical knowledge has vastly expanded, and the law should embrace that knowledge.

Of course, not every person suffering from a mental illness should be acquitted for his crimes. Because imprisoning the mentally ill can never be justified under the theories of rehabilitation, deterrence, or harm-based retribution,[223] the only available theory of punishment is culpability-based retribution. Under this theory, an actor can only be punished when he is responsible for his actions, and, therefore, morally blameworthy.[224] Thus, to be blameworthy and punishable, the action needs to be the product of a conscious choice rather than of a mental illness.[225] To draft a justifiable insanity defense, it is therefore imperative to determine which mental illnesses can deprive a person of his conscious choice. When is a person so sick that he loses control and cannot make voluntary decisions?[226]

This Section proposes a two-pronged legal insanity defense to determine whether a mentally ill defendant is legally insane.[227] First, the defendant must have been in an active state of psychosis at the time of the crime. Second, that psychosis must be the cause of the crime committed. Accordingly, the

[220] *See* Morse, *supra* note 98, at 922.

[221] *Cf.* Torry & Billick, *supra* note 35, at 254 ("One reason for the controversies surrounding the insanity defense is the different language used in the fields of criminal law and mental health. Each field has varying ways of expressing similar ideas but using different sets of terminology.").

[222] Morse, *supra* note 214, at 821.

[223] *See supra* Section I.B.

[224] *See* Dripps, *supra* note 102, at 1425.

[225] *See* LeBlanc, *supra* note 89, at 1317; *supra* notes 105-07 and accompanying text (discussing, further, why punishing mentally ill defendants who did not act out of 'choice' cannot be justified under the retributive theory of punishment).

[226] "The criminally insane offender is characterized by a complete absence of free will over his actions. By definition, the insane offender's acts result from a mental disease, not a controllable conscious choice. Because the insane offender lacks a free will he is inculpable, and therefore his punishment does not further the penal goal of retribution." *Id.* at 1316 (footnotes omitted). Thus, when a person is severely mentally ill, the mental illness can essentially control the person's actions, depriving him of his voluntary choices. *See id.*

[227] This Note only discusses the defense in terms of the mentally ill and does not consider the defense as it applies to those with intellectual disabilities.

psychosis must have deprived the defendant of his conscious choice, causing him to lose control and commit the crime.

1. The Defendant Must Be in an Active State of Psychosis

To justify the legal insanity defense under the theory of culpability-based retribution, the defense must determine when someone suffering from a mental illness loses control and essentially can no longer make conscious choices.[228] This Note assumes that a person can no longer make conscious choices when he is grossly detached from reality;[229] a severely impaired sense of reality can cause people to act in ways they never would have otherwise.[230] Because one must be grossly detached from reality to avail oneself of the insanity defense, this Note proposes that to be acquitted under the insanity defense, a defendant must have been in an active state of psychosis at the time of the crime.[231]

Individuals suffering from psychosis perceive a severely impaired reality. To be diagnosed as psychotic, an individual must, among some other criteria, have delusions, hallucinations, or disorganized thinking.[232] "*Delusions* are fixed beliefs that are not amenable to change in light of conflicting

[228] *See* LeBlanc, *supra* note 89, at 1317. *But see* Morse, *supra* note 98, at 929 ("I am an opponent of control tests . . . . People who are out of touch with reality may have trouble controlling themselves in the sense that they cannot be guided by reason, but irrationality is the problem.").

[229] *See* Morse, *supra* note 214, at 808-09 (contending that the insanity defense should be an available defense to those "so out of touch with reality that they do not deserve conviction" in proposing a definition for legal insanity). Morse proposes a definition of mental illness similar to the APA's 1982 proposed definition that defines mental illness as a condition that "grossly and demonstrably impair[s] a person's perception or understanding of reality." *Id.* at 808 n.97 (citing AM. PSYCHIATRIC ASS'N, STATEMENT ON THE INSANITY DEFENSE 11-12 (1982)).

[230] For example, a person must be severely detached from reality to kill her children because she truly believes that is the only way to save them. *See also Woman Not Guilty in Retrial in the Deaths of Her 5 Children*, N.Y. TIMES, July 27, 2006, at A20 (describing how jurors found Andrea Yates suffered from psychosis in drowning her five children).

[231] "In Norway, an insanity defense requires a defendant be psychotic – so out of touch he cannot control his own actions – while committing a crime." Debra J. Saunders, *Norway's Strange Definition of Insanity*, Opinion, S.F. GATE (Dec. 1, 2011, 4:00 AM), http://www.sfgate.com/opinion/saunders/article/Norway-s-strange-definition-of-insanity-2339878.php [https://perma.cc/WC8Y-ZPNK]. For an interesting discussion about the insanity defense used in Norway, see Pål Grøndahl, *Legal Insanity – Look to Norway?*, OPENDEMOCRACY (Aug. 23, 2013), https://www.opendemocracy.net/p%C3%A5l-gr%C3%B8ndahl/legal-insanity-look-to-norway [https://perma.cc/8XW4-QRPA]. Norway is one of the few countries that use the "medical principle," which "implies that a person with a diagnosis that involves an active ongoing psychosis should be regarded as insane." *Id.*

[232] DSM-5, *supra* note 55, at 87-88 (explaining that the key features of psychotic disorders are defined by "delusions, hallucinations, disorganized thinking (speech), grossly disorganized or abnormal motor behavior (including catatonia), and negative symptoms").

evidence"[233] and can include a vast array of beliefs. For example, a belief may be that one is under constant surveillance; another may be that an outside force took all of a person's organs and replaced them with someone else's.[234] Hallucinations are involuntary and vivid "perception-like experiences that occur without an external stimulus."[235] Auditory hallucinations, often hearing voices, are the most common type of hallucination in psychotic disorders.[236] "*Disorganized thinking (formal thought disorder)* is typically inferred form the individual's speech"[237] and must be severe enough to impair communication.[238] "The individual may switch from one topic to another . . . . Answers to questions may be obliquely related or completely unrelated . . . ."[239] Thus, a diagnosis of psychosis means an individual has a severe impairment in his sense of reality.[240]

[233] *Id.* at 87.

[234] *Id.* (describing examples of bizarre and nonbizarre delusions).

[235] *Id.*

[236] *Id.* (detailing that auditory hallucinations are most common in psychotic disorders).

[237] *Id.* at 88.

[238] *Id.*

[239] *Id.*

[240] *See* John M. Whelan, Jr., *Psychotic Delusion and the Insanity Defense*, 23 PUB. AFF. Q. 27, 37 (2009) ("[Yates] believed drowning her children was a good idea because her mind was dominated by psychotic delusions at the time she drowned them."). Professor John Whelan proposes a two-part defense based on "psychotic delusions": "No one may be found guilty of an intentional offense (though that person may be found guilty of negligence), if (a) that person was led to perform the act for which he's accused by psychotic delusions and if (b) those psychotic delusions so dominated his mind at the time he acted that either (i) he was mistaken in significant respects about what he was doing or (ii) he didn't know (and wasn't negligent in failing to know) that what he was doing was illegal or (iii) if he did know that what he was doing was illegal, he was unable to take proper account of that fact." *Id.* at 42. While Whelan's proposal is similar to that suggested in this Note in that the definition of legal insanity hinges on psychosis, *id.*, it is distinguishable in three major ways. First, Whelan specifies the actor must have psychotic *delusions* as opposed to be diagnosed as psychotic. *Compare id.*, *with supra* note 232 (explaining that to be diagnosed as psychotic according to the DSM, an individual can have delusions, hallucinations, *or* disorganized thinking—the definition is not limited to delusions). Second, Whelan rejects the DSM approach and invents a legal definition of "psychotic delusions," stating that "legal liability should not be held hostage to (even correct) psychiatric diagnoses," Whelan, at 32, and explaining that the term should not be defined for diagnostic purposes, like the DSM. *Id.* at 44 (contending that "psychotic delusions" should be defined narrowly and "for legal and not diagnostics purposes"). Additionally, Whelan sets out nine factors to determine whether someone is legally "psychotically delusional." *Id.* at 42-43. Third, Whelan's insanity defense requires more than diagnosis and causation. Instead, the psychotic delusions must be of a great enough magnitude to render the actor mistaken about (1) what he was doing, (2) the illegality of the act, or (3) similar to the MPC approach, understanding his acts. *Id.* at 42. Whelan demonstrates that this last part (3) is an explanation of the MPC's cognitive prong that the

Under this construction, there would be no carve-out for antisocial personality disorder (or those many people think of as 'psychopaths').[241] Antisocial personality disorder is not accompanied by psychosis, and therefore those with antisocial personality disorder are generally not detached from reality.[242] While patients with psychosis "may be unable to control their behavior . . . individuals with antisocial personality disorder can control their behavior."[243] Individuals with antisocial personality disorder could not use the insanity defense as an excuse for their crimes.

The psychosis requirement creates a much brighter line than the current defense. Moreover, a diagnosis of psychosis would encompass only those defendants who lack the ability to make conscious choices and therefore lack moral culpability. Although there will inevitably still be disagreement between expert witnesses, their testimony will be grounded in medical science and better help the jury answer the specific question posed by the defense. The jury will no longer need to apply medical expert knowledge to a defense that is not grounded in science. Therefore, this should result in a better understanding by jurors on how to apply the insanity test, and they will be less likely to need to rely on their own moral compasses.

Additionally, basing the first prong of this test on a DSM diagnosis will allow the defense to evolve with the rapidly developing medical field. As our understanding of psychosis and how to diagnosis psychosis changes, the DSM will be updated, and therefore the insanity defense will inherently change as well.

2. The Psychosis Must Be Directly Linked to the Crime Committed

In addition to a medical diagnosis of psychosis, a causal link between the diagnosis and the defense should be retained as a requirement of the insanity defense.[244] If psychosis caused an actor to be grossly disconnected from reality and lose conscious control, then that loss of control should be the cause of the crime. Being in an active state of psychosis unrelated to the crime committed would mean that the particular crime was not caused by a lack of control, and therefore the actor could justifiably be punished.

actor did not appreciate the wrongfulness of his actions: "someone who doesn't 'appreciate the criminality of his conduct' is, in my terms, someone who knows that something is a legal offense but who is unable, because his mind is dominated by psychotic delusions, to take proper account of that fact." *Id.* at 45.

[241] *See* Morse, *supra* note 214, at 809.

[242] DSM-5, *supra* note 55, at 659.

[243] Bruce J. Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 1 PSYCHOL. PUB. POL'Y & L. 534, 568 (1995).

[244] To be found legally insane in Norway, there does not need to be any causal relationship between the diagnosis of psychosis and the crime committed. *See* Grøndahl, *supra* note 231. This approach is "methodically easy" and allows for fewer acquittal errors. *Id.*

A causal link requirement would inevitably create tough questions for the jury, but the link is necessary to avoid acquittals of people who, although mentally ill, are still blameworthy for their crimes. While there would still be gray areas under this requirement, a jury would be better situated than it is under the current legal insanity defense to answer hard questions and make tough decisions. This formulation better allows the jury to answer legal questions using medical knowledge and testimony. Under this proposed test, an expert witness could testify how the defendant felt at the time of the crime and how the psychosis affected his beliefs and actions. Then the jury could use that information to determine whether the psychosis was the cause of the crime committed. Therefore this Note proposes that the legal insanity defense require (1) an active state of psychosis, and (2) that the psychosis be linked to the crime committed.

CONCLUSION

The insanity defense is essential to the penal code. Yet, the defense, as it currently stands, cannot be justified under our theories of punishment. For consistency, the criminal justice system should be able to justify every punishment. This Note demonstrates that while the legal insanity defense is based on unchanging archaic legal rules, modern understanding of mental illness is rapidly growing. This creates a divergence between what is scientifically known about mental illness and how the mentally ill are punished under the criminal justice system. For the legal system to align with current understandings of mental illness, the legal system must rely more on the scientific and medical communities. The law must combine legal and medical knowledge to draft a defense that is modern, flexible, and most importantly, justifiable.

This Note proposes that the defense should be a two-pronged test. First, the defendant must have been in an active state of psychosis at the time of the crime. A diagnosis of psychosis assures that the defendant was grossly detached from reality at the time of the crime and thus lost conscious control over his actions. Second, this active state of psychosis must be the cause of the crime committed, as not to acquit a defendant whose crime did not stem from his lack of control. While the insanity defense will always remain a legal defense, it is inherently based on scientific fields. By aligning the defense with medical knowledge, jurors will be able to better apply expert medical testimony to legal questions with greater consistency than under the current defense. Additionally, this would allow for the defense to evolve with medical knowledge and understanding, so the two can grow together. Ultimately and most importantly, this proposed legal insanity test would create a defense that is justifiable under extant theories of punishment.