

The Insanity Defense in the Twenty-First Century: How Recent United States Supreme Court Case Law Can Improve the System

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INTRODUCTION

A mentally ill prisoner “responded to the stress [of hearing another prisoner’s murder] by cutting himself, and was subsequently given a disciplinary report and placed in an isolation cell for ‘destruction of state property.’”¹ Examples such as this illustrate that the treatment of mentally ill offenders is a debated issue in criminal law because of the danger posed to society by those inflicted with mental illness² and because of the significant number of mentally ill offenders in our correctional system today.³ In fact, this debate over how the criminal justice system should handle mentally ill offenders has been present since the insanity defense came into existence.⁴ Despite recent legislative action targeted at non violent mentally ill offenders,⁵ the judicial system must be improved in order to deal more effectively with *all* mentally ill offenders, regardless of the degree of crime for which they stand accused.

The underlying problem of this debate centers around the reality that mentally ill offenders, particularly violent offenders, are not given the opportunity to obtain adequate rehabilitative treatment while serving their sentences. Therefore, this Note offers a two-part recommendation for remedying this problem by increasing the

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1. First Amended Complaint at 31, *Fluellen v. Wetherington*, No. 1:02-CV-479-JEC (N.D. Ga. Mar. 15, 2002).

2. See, e.g., MICHAEL L. PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* 68 (1994) (“[E]mpirical studies have shown, clearly and consistently, that a significant percentage of offenders suffer from mental illness . . .”).

3. Mentally Ill Offender Treatment and Crime Reduction Act of 2004, Pub. L. No. 108-414, § 2, 118 Stat. 2327 (2004) (“According to the Bureau of Justice Statistics, over 16 percent of adults incarcerated in United States jails and prisons have a mental illness.”); see also Robert Bernstein & Tammy Seltzer, *Criminalization of People with Mental Illnesses: The Role of Mental Health Courts in System Reform*, 7 *UDC L. REV.* 143, 145 (2003) (“Approximately a quarter million individuals with severe mental illnesses are incarcerated at any given moment . . .”).

4. See Brian E. Elkins, Note, *Idaho’s Repeal of the Insanity Defense: What are We Trying to Prove?*, 31 *IDAHO L. REV.* 151, 161 (1994) (“Insanity was recognized as a defense by ancient Moslem law, Hebraic law and Roman law.”).

5. See § 3, 118 Stat. at 2328 (seeking to “maximize the use of alternatives to prosecution through graduated sanctions in appropriate cases involving nonviolent offenders with mental illness”).

effectiveness of the rehabilitative treatment received by mentally ill offenders. This recommendation includes: 1) adoption of a guilty-except-for-insanity verdict and 2) creation of a mental health sentencing board. This recommendation is based on a combination of the current insanity defense system's components and improvements developed from a recent line of case law that began with *Apprendi v. New Jersey*.⁶ In Part I, a definition of the insanity defense introduces the criminal justice system's basic approach to dealing with mentally ill offenders. Part I also discusses the policy rationale behind the insanity defense, which will provide a basis to later evaluate the effectiveness of the current treatment of these offenders. Part II illustrates the evolution of public views regarding the insanity defense by providing an overview of the history of the insanity defense and the treatment mentally ill offenders receive. Part III of this Note then differentiates between common public misconceptions and justified public concerns regarding the insanity defense. Finally, Part IV addresses the justified public concerns by recommending that a revision should be made to the current system. By creating a more accurate and uniformly applied insanity standard, more mentally ill offenders will be appropriately determined "mentally ill," thereby providing for them the opportunity to receive effective rehabilitative treatment. This recommendation also involves shifting the responsibility of selecting the appropriate punishment of the mentally ill offender from the lay jury to a mental health sentencing board composed of a variety of professionals. Based on the *Apprendi* line of case law, the mental health sentencing board would have the authority to select the appropriate method of punishment falling within the boundaries of the jury-determined sentencing range in order to meet the mental health needs of each offender.

I. THE INSANITY DEFENSE

A. *The Insanity Defense Defined*

All state and federal courts find criminal liability only when the defendant's conduct fulfills every element of the charged offense.⁷ The United States Constitution requires that the prosecution prove each element beyond a reasonable doubt.⁸ Even when the prosecution has met this burden of proof, the insanity defense serves as an affirmative defense for the defendant. By pleading the insanity defense, the defendant acknowledges that he committed the crime, but asserts that he is nonetheless "not guilty" due to his mental illness. More specifically, a plea of not guilty by reason of insanity (NGRI) claims that due to an extenuating circumstance (mental illness), the defendant should not be held *morally blameworthy* for the crime.⁹ The reasoning

6. 530 U.S. 466 (2000).

7. Ira Mickenberg, *A Pleasant Surprise: The Guilty but Mentally Ill Verdict has Both Succeeded in its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense*, 55 U. CIN. L. REV. 943, 951 (1987) (citing *In re Winship*, 397 U.S. 358, 364 (1970)).

8. *In re Winship*, 397 U.S. at 364 ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.")

9. See Mickenberg, *supra* note 7, at 953 (discussing the purposes of using a defense in general).

behind this plea is that the mental illness affects the defendant's ability to comprehend his actions and conform his conduct to the law.¹⁰ This rationale illustrates the notion that there cannot be punishment when blame cannot be imposed.¹¹

By focusing on blameworthiness, the insanity defense addresses the long-standing connection between mens rea/guilty mind and culpability. The United States Supreme Court describes mens rea as "the ancient requirement of a culpable state of mind."¹² Mental illness itself does not preclude criminal responsibility. In order to successfully plead the insanity defense, a defendant must not only show that he is mentally ill, but must also show that there was a nexus connecting the mental illness and the criminal offense at issue.¹³

B. The Policy Rationale Underlying the Insanity Defense

The insanity defense addresses the policy issues inherent in the question of criminal culpability:¹⁴ the connection between responsibility and blameworthiness. The view is that in a criminal justice system based on free will,¹⁵ the acts of mentally ill persons lacking complete free will cannot fairly be judged in the same way as the acts of sane, free-willed persons. Therefore, the insanity defense reflects the "criminal justice system's view that the conduct of individuals who lack some degree of mental capacity should not be judged according to general volitional and cognitive principles."¹⁶ Society's recognition of a moral difference between the acts of a sane person and a mentally ill person¹⁷ results in the insanity defense serving dual roles in the criminal justice system: 1) as a way to distinguish between offenders who are able to conform

10. See Donald H. J. Hermann, *Madness and the Criminal Law by Norval Morris*, 51 GEO. WASH. L. REV. 329, 339 (1983) (book review) (arguing against Professor Morris's reasoning of why mad offenders are excused for their conduct).

11. Vicki L. Plaut, *Punishment Versus Treatment of the Guilty but Mentally Ill*, 74 J. CRIM. L. & CRIMINOLOGY 428, 431 (1983) (quoting *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954) (Bazelon, J.) ("Our collective conscience does not allow punishment where it cannot impose blame.")).

12. Elkins, *supra* note 4, at 163 (citing *Morissette v. United States*, 342 U.S. 246, 250 (1952)).

13. Mickenberg, *supra* note 7, at 954–55.

14. See Ellen Byers, *Mentally Ill Criminal Offenders and the Strict Liability Effect: Is There Hope for a Just Jurisprudence in an Era of Responsibility/Consequences Talk?*, 57 ARK. L. REV. 447, 486 (2004) (stating that the question at the core of criminal liability is the culpability of the defendant).

15. See Peter Arenella, *Reflections on Current Proposals to Abolish or Reform the Insanity Defense*, 8 AM. J.L. & MED. 271, 273 (1982) ("[The] presumption of 'free will' under[ies] all tests for criminal responsibility . . ."); Harry J. Philips, Jr., Comment, *The Insanity Defense: Should Louisiana Change the Rules?*, 44 LA. L. REV. 165, 180 (1983) ("The relationship of free will to culpability for one's actions has become a cornerstone of our entire criminal justice system.").

16. Lynnette S. Cobun, *The Insanity Defense: Effects of Abolition Unsupported by a Moral Consensus*, 9 AM. J.L. & MED. 471, 474–75 (1984).

17. *Id.* at 473; see also Arenella, *supra* note 15, at 274 ("[T]he moral perception underlying the insanity defense [is] that it is unjust to hold a severely disabled person responsible for his criminal conduct . . .").

their conduct to the law as a result of punishment from those offenders who are not able to conform their conduct to the law despite punishment,¹⁸ and 2) as a method of ensuring offenders posing a threat to society are restrained.¹⁹ The insanity defense is used to identify offenders for whom punishment would not serve the three policy rationales of deterrence, retribution, and rehabilitation.

Punishment of the mentally ill does not promote the normal goal of punishment: deterrence. The mentally ill offender is essentially undeterrable since he has little, if any, moral culpability.²⁰ And if the mental illness has caused loss of free will, the offender has lost his ability to freely choose whether or not to recommit the offense, and he is therefore undeterrable through punishment.²¹ Additionally, punishment of the mentally ill precludes the deterrence of others because sane would-be wrongdoers cannot identify with the mentally ill who are punished and are therefore also not deterred from committing a crime.²²

Punishment of the mentally ill also runs counter to the retributive theory of criminal justice, which holds that it is only just to punish those defendants who “freely choose to do wrong.”²³ Since mentally ill offenders lack free will, they do not affirmatively choose to commit a crime in the same way in which a sane offender decides to commit a crime. Therefore, notions of equity and justice caution against using punishment in the typical retributive way against these offenders.

Similar to the other two policy rationales of punishment, rehabilitation is also inapplicable to mentally ill offenders. Mentally ill offenders do not suffer from a moral defect that is subject to rehabilitation, but instead suffer from a mental disease that is in need of medical treatment.²⁴ Therefore, mentally ill offenders should be appropriately placed in a secure medical institution,²⁵ an approach which also addresses the public concern that these offenders pose a threat to society.

C. Historical Development of the Insanity Defense

The insanity defense, existing since ancient times,²⁶ has undergone significant changes. As the requirements for successfully raising the insanity defense increased over time, the number of successful insanity pleas decreased. By the eighteenth

18. RITA J. SIMON & DAVID E. AARONSON, *THE INSANITY DEFENSE: A CRITICAL ASSESSMENT OF LAW AND POLICY IN THE POST-HINCKLEY ERA* 174 (1988).

19. Mickenberg, *supra* note 7, at 977 (“[T]he release of dangerous persons is antithetical to the very nature of the insanity defense . . .”); *see also* CRIMINAL JUSTICE? THE LEGAL SYSTEM VERSUS INDIVIDUAL RESPONSIBILITY 146 (Robert James Bidinotto ed., 2d ed. 1995) [hereinafter CRIMINAL JUSTICE] (postulating that the insanity defense exists “to make all of us feel safer”).

20. Timothy S. Hall, *Legal Fictions and Moral Reasoning: Capital Punishment and the Mentally Retarded Defendant After Penry v. Johnson*, 35 AKRON L. REV. 327, 331 (2002).

21. Renée Melançon, Note, *Arizona’s Insane Response to Insanity*, 40 ARIZ. L. REV. 287, 301 (1998).

22. *Id.*

23. Paul Butler, *Judging a “Very Sick Man”: Should the Insanity Defense Save Russell Weston’s Life?*, LEGAL TIMES, Aug. 3, 1998, at 24.

24. Mickenberg, *supra* note 7, at 959.

25. Arenella, *supra* note 15, at 273.

26. *See supra* note 4 and accompanying text.

century, defendants were required to show a complete lack of cognitive ability in order to successfully raise the defense.²⁷ Jury instructions during this time stated that “no man could be held responsible for an act committed while deprived of his reason.”²⁸ After this time, modern insanity tests began to develop at common law. The first modern insanity test, the *M’Naghten* Test, was developed in 1843 and is still used by some courts today as a cognitive test of insanity. After the *M’Naghten* Test, courts began to develop volitional tests of insanity, including the Irresistible Impulse Test and the *Durham* Test. In 1962, the American Law Institute (ALI) created an insanity test which took into account both cognitive and volitional ability. The current federal test of insanity was created in 1984, largely in response to public outcry over insanity acquittals at that time. Recent modifications of the insanity test have included the mens rea approach and the guilty but mentally ill verdict (GBMI).

In 1843, the first modern insanity test resulted from the famous *M’Naghten* case.²⁹ *M’Naghten*, suffering from schizophrenia, attempted to kill the British Prime Minister but instead killed the Prime Minister’s secretary.³⁰ At trial, *M’Naghten* was acquitted by reason of insanity. On appeal, the House of Lords devised the famous *M’Naghten* Test.³¹ This purely cognitive test excuses a defendant suffering from “a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing” or a defendant who “did not know he was doing what was wrong.”³² A defendant needs to establish only one of these elements for a successful insanity plea. American courts used the *M’Naghten* Test as the test of insanity for the next century.³³

The Liberal Era of American criminal law, occurring during the 1960s and 1970s, saw a dramatic increase in the scope and use of the insanity defense.³⁴ Due to criticisms of the perceived rigidity of the *M’Naghten* Test,³⁵ courts adopted other insanity tests. Many states turned to volitional tests of insanity, which were first articulated in the mid-nineteenth century. One volitional test, known as the Irresistible Impulse Test, excuses a defendant whose mental illness “so subverts his will as to destroy his free agency by rendering him powerless to resist by reason of *the duress of the disease*.”³⁶

27. Christopher Slobogin, *The Integrationist Alternative to the Insanity Defense: Reflections on the Exculpatory Scope of Mental Illness in the Wake of the Andrea Yates Trial*, 30 AM. J. CRIM. L. 315, 317 (2003) (citing Justice Tracy’s definition of an insane person in *Rex v. Arnold*, 16 Ho.St.Tr. 764–65 (1724)).

28. Leslie A. Leatherwood, *Sanity in Alaska: A Constitutional Assessment of the Insanity Defense Statute*, 10 ALASKA L. REV. 65, 76 (1993) (citing the jury instructions of *In re Clark*, 1 City Hall Recorder 176, 177 (N.Y. 1816)).

29. Daniel M’Naghten’s Case, (1843) 8 Eng. Rep. 718 (H.L.).

30. *M’Naghten’s Case*, 8 Eng. Rep. at 719; Slobogin, *supra* note 27, at 317.

31. *M’Naghten’s Case*, 8 Eng. Rep. at 722.

32. *Id.*

33. Melançon, *supra* note 21, at 292.

34. See John Q. La Fond & Mary L. Durham, *Cognitive Dissonance: Have Insanity Defense and Civil Commitment Reforms Made a Difference?*, 39 VILL. L. REV. 71, 74, 77 (1994) (noting that “courts in over half of the states adopted broader tests of insanity”).

35. Slobogin, *supra* note 27, at 318; see also Paul H. Robinson, *The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY 693, 699 (1993) (“As early as 1887, the [*M’Naghten* Test] was criticized as failing to reflect the growing understanding of human behavior.”).

36. *Parsons v. State*, 2 So. 854, 866 (Ala. 1887) (emphasis in original); see also Robinson,

This is a very narrow volitional test, since it requires total impairment of volitional capacity.³⁷

Another broader more recently devised volitional test is the *Durham* Test, articulated in 1954 by Judge David Bazelon in response to modern scientific discoveries regarding insanity.³⁸ The *Durham* Test states that “an accused is not criminally responsible if his unlawful act was the *product* of mental disease or mental defect.”³⁹ Due partly to its possibility for an expansive definition of insanity, the *Durham* Test has since fallen out of favor.⁴⁰

In response to the ambiguities present in the *Durham* Test⁴¹ and the “single-minded emphasis on the concept of right and wrong commonly associated with the *M’Naghten* rule”⁴² in 1962, the ALI and Model Penal Code (MPC) developed a test containing both cognitive and volitional prongs, combining the *M’Naghten* Test and the IIT with recent scientific knowledge.⁴³ The ALI/MPC Test excuses a defendant who “as a result of mental disease or defect . . . lacks substantial capacity either to appreciate the criminality . . . of his conduct or to conform his conduct to the requirements of law.”⁴⁴ By use of the words “substantial capacity,” “appreciate,” and “conform,” the ALI/MPC Test attempted to lessen the rigidity of previous insanity tests.⁴⁵

During the 1980s, the American criminal justice system began a new era: the Neoconservative Era.⁴⁶ During this period, community safety was greatly emphasized, at the expense of the individual rights of the mentally ill.⁴⁷ The popularity among the public of the insanity defense dramatically decreased after the successful insanity plea in 1982 by John W. Hinckley Jr., failed assassin of President Reagan,⁴⁸ and efforts were made to once again revise insanity tests to prevent similar acquittals in the future. One such test was the current federal insanity test, devised in 1984,⁴⁹ which requires a “severe mental illness,” rather than the previously less-stringent requirement of a

supra note 35, at 699.

37. Henry T. Miller, *Recent Changes in Criminal Law: The Federal Insanity Defense*, 46 LA. L. REV. 337, 344 (1985).

38. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954); Melançon, *supra* note 21, at 292.

39. *Durham*, 214 F.2d at 874–75 (emphasis added).

40. SIMON & AARONSON, *supra* note 18, at 28 (attributing this decline to the test’s potentially broad application).

41. CRIMINAL JUSTICE, *supra* note 19, at 145.

42. SIMON & AARONSON, *supra* note 18, at 39.

43. *Id.* at 38.

44. MODEL PENAL CODE § 4.01(1) (1962).

45. See Christine Michalopoulos, Note, *Filling in the Holes of the Insanity Defense: The Andrea Yates Case and the Need for a Volitional Prong*, 10 VA. J. SOC. POL’Y & L. 383, 392, 395 (2003) (noting that the ALI/MPC’s cognitive prong is less stringent than the *M’Naghten* Test and the ALI/MPC’s volitional prong is less stringent than the IIT).

46. La Fond & Durham, *supra* note 34, at 80.

47. *Id.* at 81.

48. See Mickenberg, *supra* note 7, at 946–47 (noting the widespread public outrage following the Hinckley trial: “ninety percent of the population favored doing away with the insanity defense”).

49. SIMON & AARONSON, *supra* note 18, at 47 (“The *Hinckley* verdict was unquestionably the decisive influence on congressional modifications to the insanity defense.”).

“mental disease or defect.”⁵⁰ This test removed the ALI/MPC’s volitional prong in favor of a total impairment cognitive prong,⁵¹ excusing a defendant who is “unable to appreciate the nature and quality or wrongfulness of his acts.”⁵² The 1984 federal test also shifted the burden of proving insanity from the prosecution to the defense.⁵³

The ideology of the Neoconservative Era also prompted efforts to abolish the insanity defense altogether. Between 1979 and 1983, three states (Idaho, Montana, and Utah) abolished the insanity defense and adopted the mens rea approach.⁵⁴ Under this approach, evidence of insanity can only be introduced as a means to rebut the prosecution’s evidence of the mens rea element needed to prove the crime.

Another recent development in many jurisdictions is the adoption of the guilty but mentally ill verdict to supplement, or in a few jurisdictions, to replace, the NGRI verdict. The GBMI verdict is used when the offender’s mental illness “did not impair him severely enough to meet the legal definition of insanity.”⁵⁵ Usually, the GBMI defendant receives the normal prison sentence that would be given to a sane offender, but is also given a medical evaluation and necessary treatment according to the state’s statutory procedures.⁵⁶

A recent review conducted in 2002 by the American Academy of Psychiatry and the Law reported the type of insanity test used by each state.⁵⁷ The results of this study reveal that 25 states use the *M’Naghten* Test,⁵⁸ 17 states use the ALI/MPC Test,⁵⁹ 4 states have abolished the insanity defense,⁶⁰ 3 states utilize the IIT,⁶¹ and 1 state uses the *Durham* Test.⁶²

D. History of the Treatment of Mentally Ill Offenders

As the insanity defense evolved, so did the treatment of mentally ill offenders. In comparing these two evolutions, this section reveals a correlation between the scope of the insanity test used at the time and the level of treatment received. In short, the

50. Slobogin, *supra* note 27, at 318 (quoting 18 U.S.C. § 20 (1984)).

51. Miller, *supra* note 37, at 350–51.

52. 18 U.S.C.S. § 17 (2004); *see also* Michalopoulos, *supra* note 45, at 390.

53. Butler, *supra* note 23.

54. Andrew M. Levine, Note, *Denying the Settled Insanity Defense: Another Necessary Step in Dealing with Drug and Alcohol Abuse*, 78 B.U. L. REV. 75, 79 (1998).

55. Mickenberg, *supra* note 7, at 949–50; *see, e.g.*, MICH. COMP. LAWS ANN. § 768.36 (2000 & West Supp. 2005).

56. Robinson, *supra* note 35, at 701; *see also* RICHARD J. BONNIE, JOHN C. JEFFRIES & PETER W. LOW, A CASE STUDY IN THE INSANITY DEFENSE: THE TRIAL OF JOHN W. HINCKLEY, JR. 132 (2nd ed. 2000) (“The GBMI verdict is designed to facilitate psychiatric treatment of mentally disordered offenders.”).

57. Deborah Giorgi-Guarnieri et al, *AAPL Practice Guideline for Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense*, 30 J. AM. ACAD. PSYCHIATRY & L. S3, 2002.

58. *Id.* at S8.

59. *Id.* at S9.

60. *Id.* at S6.

61. *Id.* at S9.

62. *Id.* at S5.

broader the scope of the insanity defense, the higher the level of treatment mentally ill offenders received.

As the scope of the insanity defense increased during the 1960s and 1970s,⁶³ a simultaneous shift in the underlying focus on the goals of confinement also occurred. This shift emphasized rehabilitation of mentally ill offenders, instead of punishment. Many believed that scientific advances in mental health treatment would allow these people to one day become productive members of society.⁶⁴ Offenders were prescribed anti-psychotic drugs, making them more amendable to treatment efforts.⁶⁵ De-institutionalization of treatment efforts was simultaneously taking place, driven by the belief that treatment was more effective if given in familiar community settings.⁶⁶

However, the emphasis on rehabilitation was abandoned during the narrowing of the insanity defense in the 1980s. Citing lack of evidence showing the effectiveness of rehabilitation, the “just deserts” model of punishment gained significant support among the public and politicians.⁶⁷ The primary goal was no longer rehabilitating mentally ill offenders, but rather guaranteeing appropriate punitive punishment regardless of mental illness.⁶⁸ Some states passed mandatory sentencing laws for serious crimes, while other states reinstated the death penalty in order to ensure that mentally ill offenders were placed and remained in prison.⁶⁹

II. PUBLIC MISCONCEPTIONS REGARDING THE INSANITY DEFENSE

The public receives a substantial amount of information regarding the insanity defense from the media, and the portrayal is not always accurate.⁷⁰ This inaccuracy is largely a result of high profile cases, which the public uses to form generalizations about the insanity defense.⁷¹

The media gave large amounts of attention to recent cases in which the defendant has invoked the insanity defense, such as the Lee Boyd Malvo trial,⁷² the Andrea Yates

63. See *supra* text accompanying note 34.

64. La Fond & Durham, *supra* note 34, at 77.

65. Max Lindeman, *Out of Sight. Out of Mind. The Transinstitutionalization of the Mentally Ill*, FORTUNE NEWS, Fall 2000, at 12.

66. *Id.*

67. La Fond & Durham, *supra* note 34, at 81; see, e.g., SIMON & AARONSON, *supra* note 18, at 184 (noting that President Nixon “believed that the insanity defense allowed criminals to escape punishment”).

68. La Fond & Durham, *supra* note 34, at 82.

69. Lindeman, *supra* note 65 at 13–14.

70. See David B. Wexler, *Redefining the Insanity Problem*, 53 GEO. WASH. L. REV. 528, 544 (1985) (Drs. Henry Steadman and Joseph Cocozza concluded from their research that “selective reporting is at the bottom of public misconceptions of the criminally insane.”).

71. See, e.g., PERLIN, *supra* note 2, at 235 (“[S]o much of our insanity defense jurisprudence is informed by sensational cases . . .”); George L. Blau & Richard A. Pasewark, *Statutory Changes and the Insanity Defense: Seeking the Perfect Insane Person*, 18 LAW & PSYCHOL. REV. 69, 75 (1994) (“[T]he legislature’s concentration is focused on a few dramatic cases involving some heinous criminal act.”).

72. See, e.g., Mike M. Ahlers, *Jury Convicts Malvo of Sniper Murder*, CABLE NEWS NETWORK, Dec. 19, 2003, <http://www.cnn.com/2003/LAW/12/18/sprj.dcsp.malvo.trial/> (illustrating the continual media coverage preceding and during the trial of Lee Boyd Malvo for

trial,⁷³ the Unabomber case,⁷⁴ and the John Hinckley Jr. trial.⁷⁵ These cases renewed the insanity defense debate,⁷⁶ regardless of whether the defendant was actually mentally ill⁷⁷ or whether the insanity plea was ultimately successful.⁷⁸

The widespread public belief that defendants frequently use the insanity defense to avoid punishment⁷⁹ is largely attributable to high profile cases and the attention the media gives them. The public also believes that the availability of the insanity defense will result in the opportunity for those faking mental illness to avoid punishment.⁸⁰ These inaccurate concerns are largely attributable to the public's suspicion of mental illness due to its perceived "invisibility."⁸¹

Based on empirical studies, the insanity defense is not as frequently or successfully used as many believe. According to the Virginia Department of Mental Health, Mental Retardation, and Substance Abuse Services, only one percent of felony defendants nationwide raise the insanity defense.⁸² The rate of these defendants successfully

the 2002 sniper shootings in the Washington D.C. area).

73. See, e.g., Slobogin, *supra* note 27, at 315 (describing the trial of Andrea Yates, charged with drowning her five children in 2001, as a "tragic and controversial case").

74. See, e.g., Michael L. Perlin, "Where the Winds Hit Heavy on the Borderline": *Mental Disability Law, Theory and Practice, "US" and "Them"*, 31 LOY. L.A. L. REV. 775, 777 (1998) (referencing "the debate that raged recently over the Unabomber case, as reflected specifically in the sub-debate over the relationship between mental illness and insanity").

75. See, e.g., Carolyn Alexander, *Oregon's Psychiatric Security Review Board: Trouble in Paradise*, 22 LAW & PSYCHOL. REV. 1, 5 (1998) (describing Hinckley's attempted assassination of President Ronald Reagan as a "sensational crime[]"); see also *supra* note 48 and accompanying text for further background of this trial.

76. See, e.g., *id.* at 6 ("Eighty percent of the reforms in the insanity defense between 1978 and 1990 occurred shortly after Hinckley's acquittal.").

77. See Michalopoulos, *supra* note 45, at 385 (noting that Yates had previously been diagnosed with a major depressive disorder and had been prescribed an anti-psychotic drug used for schizophrenia); see also Ahlers, *supra* note 72 (psychiatric testimony presented at trial characterized Malvo as having dissociative disorder, causing him to be unable to distinguish right from wrong).

78. See Slobogin, *supra* note 27, at 315 (Yates was originally convicted of murder by a jury and sentenced to life in prison); Ahlers, *supra* note 72 (jury rejected Malvo's insanity defense and found Malvo guilty of terrorism and capital murder). *But cf. Court Overturns Yates' Convictions*, CABLE NEWS NETWORK, Jan. 6, 2005, <http://www.cnn.com/2005/LAW/01/06/children.drowned/index.html> (citing false testimony by a prosecution witness, the Texas First Court of Appeals overturned Yates' convictions and ordered a new trial).

79. Marc Rosen, Note, *Insanity Denied: Abolition of the Insanity Defense in Kansas*, 8 KAN. J.L. & PUB. POL'Y 253, 258 (1999) (stating that one expert has found that "the general public has the impression that the defense is used in 20% to 50% of all criminal cases"); see also La Fond & Durham, *supra* note 34, at 92-93 (noting that this belief is held not only by the general public, but also by "attorneys and judges, legislators, [and] mental health workers").

80. La Fond & Durham, *supra* note 34, at 92; see also Michael L. Perlin, "There's No Success Like Failure/and Failure's No Success at All": *Exposing the Pretextuality of Kansas v. Hendricks*, 92 NW. U. L. REV. 1247, 1259 (1998) ("The fear that defendants will 'fake' the insanity defense to escape punishment continues to paralyze the legal system . . .").

81. PERLIN, *supra* note 2, at 247.

82. Siobhan Roth, *Long Odds for Malvo on Insanity*, LEGAL TIMES, Oct. 20, 2003, at 1; see also Blau & Pasewark, *supra* note 71, at 74 ("[I]n a study of forty-nine counties in eight states, it was found that an average of .93% of defendants indicted for felonies employed the

pleading the insanity defense is even lower—less than 0.002%.⁸³ This low success rate is partially due to the fact that there is little incentive to plead the insanity defense unless the defendant is confident of its success. If the insanity plea is unsuccessful, the defendant is unable to bargain for a reduced charge because an insanity plea is viewed as an admission of committing the crime.⁸⁴

Beliefs regarding the abuse of the insanity defense also lack evidential support.⁸⁵ Empirical evidence reveals that only a small number of defendants fake mental illness in order to be acquitted;⁸⁶ in reality, offenders often *deny* mental illness.⁸⁷ Mental health professionals can usually discover this small percentage of defendants who fake mental illness. Mental health doctors are between ninety-two and ninety-five percent successful in determining whether a defendant is faking mental illness,⁸⁸ making abuse of the insanity defense unlikely in reality.

III. JUSTIFIED PUBLIC CONCERNS AND THE REAL PROBLEMS OF THE SYSTEM

Despite the persistence of public misconceptions regarding the frequency and success of insanity pleas, some justified concerns exist. These concerns, coupled with the fact that mentally ill offenders comprise a significant portion of the criminal justice system,⁸⁹ warrant a renewed examination of the insanity defense. The most significant concerns involve the anti-therapeutic nature of the criminal justice system's treatment of the mentally ill, which hinders the achievement of the policy goals of the insanity defense.

defense.”).

83. See Grant H. Morris, *Placed in Purgatory: Conditional Release of Insanity Acquittes*, 39 ARIZ. L. REV. 1061, 1063 (1997) (noting studies have concluded that “for every 1000 felony cases, insanity is pleaded in approximately nine cases and is successful in only two”).

84. La Fond & Durham, *supra* note 34, at 95.

85. Mickenberg, *supra* note 7, at 981 (stating that “the most vociferous opponents of the insanity defense are usually unable to cite actual examples of defendants who escaped justice by pretending to be mentally ill”).

86. Perlin, *supra* note 80, at 1259 (stating that the number of cases in which defendants fake mental illness is “minuscule”); see also Mickenberg, *supra* note 7, at 981 (“[S]tudies indicat[e] that eighty percent of those defendants found NGRI had been previously hospitalized for mental illness . . .”).

87. PERLIN, *supra* note 2, at 66 n.264.

88. Rosen, *supra* note 79, at 259 (citing David Schretlen & Hal Arkowitz, *A Psychological Test Battery to Detect Prison Inmates Who Fake Insanity or Mental Retardation*, 8 BEHAV. SCI. & L. 75 (1990) (detailing two doctors' group study of one hundred men that sought to determine the accuracy of a test battery in detecting individuals faking mental illness)).

89. See Alexander, *supra* note 75, at 4, 30–31 (noting that “mentally ill criminal defendants are a significant sector of the criminal justice system,” since “individuals with psychiatric impairment were disproportionately represented among individuals charged with a crime”) (emphasis added); see also Byers, *supra* note 14, at 520 (“Today’s evidence reveals that the problem posed by mentally ill offenders goes beyond the narrow question of how many raise the defense”); *Louisa Van Wezel Schwartz Symposium on Mental Health Issues in Correctional Institutions: Symposium Introduction*, 7 UDC L. REV. 111, 115 (2003) (citing Bureau of Justice Statistics “showing that 16% of all persons in the criminal justice system have serious mental disorders”).

A. The Current System of Treatment

Mentally ill offenders do not receive the most beneficial rehabilitative treatment available. The current system of treatment is best described as “anti-therapeutic.”⁹⁰ This characterization is supported by the President’s New Freedom Commission on Mental Health’s 2003 Final Report, which states that “[m]any people with serious mental illnesses . . . remain . . . housed in institutions, jails, or juvenile detention centers. These individuals are unable to participate in their own communities.”⁹¹

Studies documenting the harshness of mentally ill offenders’ prison sentences state that because of the perception that mentally ill offenders are more dangerous than sane offenders, mentally ill offenders receiving prison sentences often serve longer sentences than similarly situated sane offenders.⁹² While serving prison sentences, mentally ill offenders usually receive little, if any, rehabilitative treatment, but instead are targets of abuse and cruelty by sane offenders.⁹³ Due to the unavailability of adequate mental health treatment, mentally ill offenders are sent to the penitentiary or state correctional facility to serve their sentence among the general prison population.⁹⁴ At the end of their prison sentence, mentally ill offenders are often still dangerous when they return to society because they have not received psychiatric treatment in prison.⁹⁵ Unlike the danger posed by sane offenders returning to society after serving their sentences, the cause of the danger posed by mentally ill offenders could have been medically treated during their sentences.

B. Failure to Achieve the Policy Goals of the Insanity Defense

Although the public routinely misconceives the insanity defense, some public concerns, particularly those involving the treatment of mentally ill offenders, remain justified⁹⁶ but have often been ignored.⁹⁷ The public’s real concern regarding the

90. Michael L. Perlin, “*For the Misdemeanor Outlaw*”: *The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*”, 52 ALA. L. REV. 193, 237 (2000).

91. THE PRESIDENT’S NEW FREEDOM COMMISSION ON MENTAL HEALTH FINAL REPORT 28 (2003), available at <http://mentalhealthcommission.gov/reports/FinalReport/downloads/FinalReport.pdf>.

92. See Amy Watson, Patricia Hanrahan, Daniel Luchins & Arthur Lurigio, *Mental Health Courts and the Complex Issue of Mentally Ill Offenders*, American Psychiatric Association (2001), available at <http://ps.psychiatryonline.org/cgi/content/full/52/4/477> (citing a survey by the Bureau of Justice Statistics which revealed that “mentally ill state prison inmates were sentenced to prison terms 12 months longer on average than those of other offenders”) (emphasis added).

93. Byers, *supra* note 14, at 518 (“[J]ails . . . function as psychiatric inpatient institutions where . . . [mentally ill inmates] are ‘targets of cruel manipulation and of physical and sexual abuse’ and whose ‘bizarre behavior . . . can get them punished.’”).

94. Alexander, *supra* note 75, at 10.

95. *Id.* (stating that mentally ill offenders are “incarcerated in state institutions without treatment and released into the community on parole or discharge”).

96. Morris, *supra* note 83, at 1111 (“The public demands, and is entitled to receive, protection from those who commit criminal acts but who escape criminal responsibility.”).

97. Wexler, *supra* note 70, at 531 (“[T]he reformers . . . rarely paused to consider the real

insanity defense is not based on the issue of blameworthiness, but rather it is centered around the issue of at what time the mentally ill are released back into society.⁹⁸ Many question whether “treatment for dangerous mental illness is effective” or whether “dangerous mentally ill people can get better.”⁹⁹ The mentally ill, a group for which we cannot insure that the goals of punishment are carried out,¹⁰⁰ are ineffectively being punished since they are not receiving potentially beneficial mental health treatment. While being punished, the proper placement of those offenders posing a threat to society in a psychiatric treatment facility is not guaranteed in all cases.

A main policy rationale of the insanity defense (as well as the criminal justice system in general)¹⁰¹ is the assurance that dangerous mentally ill offenders do not pose a threat to society. The best way to accomplish this policy rationale is the restraint of mentally ill offenders in rehabilitative facilities, in which the offender is released, and subsequently monitored, only upon a satisfactory mental health examination.¹⁰² Early release of the mentally ill from prison on parole or from a treatment facility before adequate treatment is received not only poses a threat to society,¹⁰³ but also “rob[s] [the offender] of needed psychiatric treatment.”¹⁰⁴ Furthermore, early release weakens the public’s confidence in the legal system’s ability to protect society from harmful individuals.¹⁰⁵

Even when mentally ill offenders are placed in psychiatric treatment facilities, treatment is not used to rehabilitate the offender; the treatment facility merely resembles a “de facto prison.”¹⁰⁶ Treatment is used more as a punitive tool than as a rehabilitative tool.¹⁰⁷ Despite the fact that even Congress noted the inappropriateness of retributive punishment, the impairment of the offender’s volitional control is often

roots of public dissatisfaction.”).

98. James E. Ellis, *The Consequences of the Insanity Defense: Proposals to Reform Post-Acquittal Commitment Laws*, 35 CATH. U. L. REV. 961, 962 (1986); see also Phillip E. Johnson, Book Review, 50 U. CHI. L. REV. 1534, 1548 (1983) (reviewing NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW (1983)) (“[T]he public will tolerate insanity acquittals only if it is convinced that ‘dangerous’ defendants are locked away through a commitment procedure.”).

99. Morris, *supra* note 83, at 1062.

100. See *supra* text accompanying note 20.

101. *United States v. Lyons*, 731 F.2d 243, 246 (5th Cir. 1984).

102. See, e.g., Morris, *supra* note 83, at 1111 (“Protection is assured by hospitalizing insanity acquittees until they are no longer dangerous and by monitoring them as they move from hospitalization to community living.”).

103. See, e.g., Leatherwood, *supra* note 28, at 66 (providing an example of a NGRI acquittee: “Charles Meach, a patient on release from the Alaska Psychiatric Institute, murdered four teenagers.”).

104. Perlin, *supra* note 74, at 785.

105. Arenella, *supra* note 15, at 279.

106. See Perlin, *supra* note 80, at 1248–49, 1269 (noting that the United States Supreme Court holding in *Kansas v. Hendricks*, 521 U.S. 346 (1997) “upholding a state law sanctioning long-term institutionalization of ‘sexually violent predators’” shows that a majority of the Court “is comfortable with a statutory scheme that has the potential of transforming psychiatric treatment facilities into de facto prisons and that uses mental health treatment as a form of social control . . .”).

107. See Jonas Robitscher & Andrew Ky Haynes, *In Defense of the Insanity Defense*, 31 EMORY L.J. 9, 35 (1982) (noting that according to Professors Goldstein and Katz, “the insanity defense, while ostensibly designed to reach a therapeutic result, actually was more punitive than traditional punishment methods”).

disregarded for purposes of punishment.¹⁰⁸ Some psychiatrists recognize the highly punitive nature of the treatment being received, calling the commitment of offenders “America’s newest form of slavery.”¹⁰⁹ Many judges then propagate these views by punitively basing their decisions on stereotypical views that the mentally ill are incompetent and do not exercise enough self-restraint,¹¹⁰ thus continuing the deficiencies present in the insanity defense system.

IV. APPROPRIATE SOLUTIONS TO IMPROVE THE INSANITY DEFENSE SYSTEM

The current insanity defense system must be improved in order to appropriately address its deficiencies and the justified public concerns. Two improvements can substantially impact the current system: the adoption of a guilty-except-for-insanity (GEI) verdict and the creation of a mental health sentencing board to determine the treatment of offenders found by a jury to be GEI. When combined, these two solutions will constitutionally ensure that mentally ill offenders are sentenced appropriately and receive the treatment necessary for them to return to society as productive members.

A. Adoption of a GEI Verdict

Presently, there is no uniform insanity test used across the nation. Although the 1984 federal test is used by all federal courts, state courts use different verdicts employing varying insanity tests,¹¹¹ all of which have displayed flaws upon implementation. The resulting increase in uniformity of insanity determinations as more states adopt the insanity standard this Note recommends would have two benefits. First, notions of equity and justice will be enhanced, since similar offenders will be treated in the same manner. Second,, since an insanity determination serves as a prerequisite to receiving an effective treatment as part of the sentence, more offenders in need of this treatment will be given the opportunity.

The superior insanity standard that should be adopted is based on Oregon’s GEI verdict. Determination of insanity under this standard asks whether “as a result of mental disease or defect at the time of engaging in criminal conduct, the person lacks substantial capacity either to appreciate the criminality of the conduct or to conform the conduct to the requirements of the law.”¹¹² Under this insanity test, defendants would be found guilty of commission of the underlying crime except for insanity if they were unable to conform their conduct to the law (volitional impairment) *or* appreciate the criminality of their conduct (cognitive impairment) due to a mental illness or defect present at the time of the offense. By taking into account both the

108. See, e.g., Byers, *supra* note 14, at 516 (noting that Congress “acknowledged the relevance of volitional control to the aims of punishment . . . [but] firmly rejected a test acknowledging the impact of mental illness on volition and therefore on culpability”).

109. Robitscher & Haynes, *supra* note 107, at 40–41 (discussing the views of psychiatrist Thomas Szasz).

110. Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 420 (2000) (noting that “[c]ourts often appear impatient with mentally disabled litigants, ascribing their problems with the legal process to weak character or poor resolve”).

111. See *supra* Part I.C.

112. OR. REV. STAT. § 161.295(1) (2003).

volitional and cognitive abilities of the offender, the GEI verdict avoids the flaws of exclusively cognitive or volitional insanity tests.¹¹³ The GEI verdict appropriately takes into consideration offenders with volitional incapacities that are amenable to treatment in mental health facilities¹¹⁴ as well as offenders with cognitive incapacities. Additionally, the GEI verdict does not unnecessarily narrow the definition of insanity, thereby forcing the criminal justice system to ignore blameworthiness in order to protect society.¹¹⁵ The GEI verdict supports the premises underlying both the criminal justice system and the insanity defense. The basic requirement of criminal responsibility, free will, is not disregarded. The policy goals of the insanity defense are furthered because there is a greater probability that the offender will receive rehabilitative treatment through a finding of GEI than through a finding under another insanity standard resulting in a strictly punitive prison sentence.¹¹⁶

1. Why Other Methods of Determining Insanity Are Flawed

The GEI verdict is a solution to the problems inherent in other methods of determining insanity. Criticisms involving exclusive use of cognitive or volitional determinations of insanity led to the creation of alternative methods of insanity determination. Since these other methods also revealed various flaws, they should similarly be characterized as inappropriate. Except for the GBMI alternative, these insanity tests lead juries to inaccurately find mentally ill offenders insane and thus acquit them. Mentally ill offenders usually return to society upon acquittal, without receiving any treatment. Alternatively, these insanity tests do not accurately identify mentally ill offenders, but instead treat these offenders as sane offenders and sentence them to a regular prison term with no mental health treatment. This scenario also results in mentally ill offenders returning to society after serving their sentences without receiving any treatment.

In addition to the fact that volitional tests¹¹⁷ of insanity often result in an acquittal and no mandatory treatment for mentally ill offenders, other arguments claim that strictly volitional tests do not accurately determine insanity. The volitional test for insanity fails to properly distinguish between mentally ill offenders and blameworthy offenders capable of free will and instead “creates a huge potential for chaos in the culpability-based criminal justice system we have today.”¹¹⁸ This chaos results because volitional tests for insanity disregard the existence of the offender’s free will, which is

113. See, e.g., *Leatherwood*, *supra* note 28, at 85 (concluding that Alaska’s insanity test is inadequate until both the cognitive and volitional abilities of the offender are taken into account).

114. PERLIN, *supra* note 2, at 430.

115. Cf. *Robinson*, *supra* note 35, at 706 (critiquing the abolitionist approach and deletion of the volitional prong: “[t]he criminal justice system is modified as necessary to protect us from the dangerous offenders that the civil system does not, without regard to the offender’s blameworthiness”).

116. See, e.g., *Melançon*, *supra* note 21, at 316 (noting that Arizona’s GEI verdict system “continue[s] to recognize that a person judged legally insane is not responsible for his action and therefore should not be punished”).

117. See *supra* text accompanying notes 36, 39.

118. *Slobogin*, *supra* note 27, at 323.

a prerequisite for criminal responsibility. Offenders asserting volitional insanity pleas based on predisposition or subjective urge are “asserting simply that their criminal behavior is driven by factors outside their control,” *not* that they lacked the free will upon which to commit the act.¹¹⁹ Therefore, mentally ill offenders capable of exercising free will are often incorrectly found to be insane, and thus acquitted.

Criticisms of the exclusive use of cognitive ability to determine insanity have focused primarily on the inadequacies of the *M’Naghten* Test. The *M’Naghten* Test’s analysis of cognitive ability usually reduces the fact-finder’s inquiry into whether the actor was aware of his conduct, but it fails to take into account other relevant factors such as “the existence or classification of the mental defect” and volitional abilities, such as the “actor’s ability to will, control, or appreciate the consequences of his acts.”¹²⁰ Offenders found to have the cognitive ability to understand that their conduct was wrong are found guilty, despite other mental impairments that may exist.¹²¹ Psychiatric research subsequent to the creation of the *M’Naghten* Test revealed that the unconscious mind plays a significant role in a person’s actions,¹²² illustrating that cognitive ability alone does not control one’s actions. Therefore, exclusive use of cognitive ability to determine insanity may also disregard the existence of free will because cognitive tests do not recognize the role of the unconscious mind.

The GBMI verdict¹²³ is flawed largely because in practice it has not accomplished its theoretical goal: assurance of treatment opportunity.¹²⁴ Since courts *may* impose a prison sentence following a GBMI verdict, these offenders often have no greater chance of receiving treatment than other mentally ill offenders serving regular prison sentences.¹²⁵ Additionally, evidence reveals that GBMI offenders are more likely than sane offenders to go to prison and to receive longer sentences for the same offense.¹²⁶ Therefore, GBMI verdict systems further precipitate the justified public concern caused by releasing mentally ill offenders back into society without receiving sufficient mental health treatment.

The abolitionist approach/*mens rea* approach¹²⁷ is also flawed, even though initial constitutional due process objections to this approach appear to be unfounded.¹²⁸

119. *Id.* at 321.

120. Byers, *supra* note 14, at 482.

121. *See, e.g.,* *People v. Phillips*, 83 Cal. App. 4th 170 (Ct. App. 2000) (finding the defendant guilty of second degree robbery of a convenience store because he knew what he was doing was wrong, despite the fact that he was mentally retarded and brain injured from a previous gunshot wound).

122. CRIMINAL JUSTICE, *supra* note 19, at 143 (“The unconscious mind was a powerful, if hidden, influence on behavior.”).

123. *See supra* text accompanying note 55.

124. *See supra* text accompanying note 56.

125. Plaut, *supra* note 11, at 437 (stating that the Illinois GBMI statute provides that “[t]he Department of Corrections shall provide such special psychiatric, psychological, or other counseling and treatment for the defendant *as it determines necessary*”) (emphasis in original).

126. La Fond & Durham, *supra* note 34, at 103. *See generally* BONNIE ET AL., *supra* note 56, at 132 (noting that “the actual impact of the GBMI procedure on the sentencing and correctional process may be slight”).

127. *See supra* text accompanying note 54.

128. *See* Paul E. Antill, Comment, *Unequal Protection? Juvenile Justice and the Insanity Defense*, 22 J. JUV. L. 50, 54 (2001) (“[I]t was ‘highly doubtful that due process requires a State

Despite the substantial decline in the number of acquittals based on the insanity defense following the adoption of this approach,¹²⁹ other stages of the system are affected. Empirical evidence reveals that defining the scope of mental illness too narrowly results in an increase in dismissals based on incompetency to stand trial.¹³⁰ Additionally, since even severe mental illness rarely negates the required mens rea, the mens rea approach serves little practical use for mentally ill offenders.¹³¹ For example, an offender previously diagnosed with a mental disorder who commits a crime in response to a belief that he would “metamorphos[e] into a new level of existence” will be found guilty, since he intended to commit the crime despite his troubled belief.¹³² Since the scope of mental illness is narrowly defined, the criminal justice system is no longer capable of accurately distinguishing between those who are blameworthy and those who do not deserve punishment.¹³³ Furthermore, the unavailability of an insanity defense will increase justified public concerns raised by the release of mentally ill offenders back into society after serving their prison sentences without receiving any psychiatric treatment.¹³⁴

The ALI/MPC Test provides the closest resemblance to a GEI verdict, because it takes both cognitive and volitional abilities into consideration.¹³⁵ Even though it receives a substantial amount of support from the courts, this test is flawed in actual application. Despite inclusion of the words “substantial” and “appreciate” to broaden the definition of insanity, it is difficult for fact finders to actually apply this broadened test as articulated.¹³⁶

2. Constitutionality of a GEI Verdict

The proposed system for issuing GEI verdicts would dispel any Sixth Amendment challenges that may arise. The Sixth Amendment right to a trial by jury applies to the

to make available an insanity defense to a criminal defendant.” (quoting *Ake v. Oklahoma*, 470 U.S. 68, 191 (1985) (Rehnquist, J., dissenting))).

129. See, e.g., Slobogin, *supra* note 27, at 339 (“In the state of Montana before the Mens Rea Alternative was adopted, about 23% of all mental state defenses succeeded. After the adoption of the Mens Rea Alternative, only 2.3% of those who asserted mental state defenses prevailed.”).

130. *Id.* at 340.

131. See Rosen, *supra* note 79, at 261 (“A defendant can be both insane and capable of having the requisite intent; the two concepts are not mutually exclusive.”); see also Catherine E. Lilly, Recent Development, *State v. Herrera: The Utah Supreme Court Rules in Favor of Utah’s Controversial Insanity Defense Statute*, 22 J. CONTEMP. L. 221, 237 (1996) (stating that the mens rea approach creates an impractical system based on the delusions of each defendant).

132. *State v. Bethel*, 66 P.3d 840, 843 (Kan. 2003) (finding that the defendant, previously diagnosed with paranoid schizophrenia, killed his father as God instructed him to do and was guilty of murder).

133. See Leatherwood, *supra* note 28, at 82 (“The issue of criminal blameworthiness merits deeper inquiry [than whether the defendant harbored the requisite mens rea for the offense]” (quoting *State v. Searcy*, 798 P.2d 914, 935 (Idaho 1990) (McDevitt, J., dissenting))); Levine, *supra* note 54, at 95 (claiming that the insanity defense is necessary to allow the criminal justice system to determine when punishment is justified).

134. See Philips, *supra* note 15, at 170.

135. See *supra* text accompanying note 44 (providing an articulation of the ALI/MPC Test).

136. Michalopoulos, *supra* note 45, at 393.

determination of guilt or innocence.¹³⁷ This right guarantees that a criminal defendant's guilt will be determined by a lay jury of his peers.

Under the proposed system, a lay jury would be given complete authority to issue GEI verdicts to mentally ill offenders. Once the jurors hear all the evidence and facts regarding the defendant's insanity plea during the guilt phase of the trial, they would be able to issue a GEI verdict. Issuance of a GEI verdict would signify that the jury acknowledges that the defendant is technically guilty of the commission of the offense, but should not be held to the same degree of criminal responsibility as a similarly situated sane offender. After issuing a GEI verdict, the jury would also determine the offender's sentencing range. This sentence determination by the jury would ensure fairness, since the sentencing range would be based on the facts and evidence presented at trial. Therefore, because a lay jury would be deciding whether to hold the offender GEI at the conclusion of the guilt phase of the trial, the offender's Sixth Amendment rights would be guaranteed.

3. Benefits of Adopting the GEI Verdict

Every state should look at and consider adopting the GEI verdict. As previously stated, all other insanity tests currently in use by one or more states are flawed. The GEI verdict is a superior approach to these flawed insanity standards. Thus, one practical benefit of widespread adoption of the GEI verdict is the assurance of greater uniformity in the ultimate result of insanity determinations, which presently does not exist even among jurisdictions that use the *same* insanity rule.¹³⁸ Offenders in need of medical treatment would be appropriately found to be GEI, rather than being sentenced to prison without receiving any treatment or being acquitted by reason of insanity.

An increasingly popular alternative utilized in many criminal justice systems is mental health courts, which typically hear only cases of *nonviolent* offenders.¹³⁹ Because a jury is not present, these courts face potential violations of the Sixth Amendment right to trial by jury unless the offender accepts transfer to a mental health court, thereby waiving his right to a trial by jury.¹⁴⁰ Additionally, since an offender must waive his right to a trial by jury, not all offenders in need of treatment will necessarily affirmatively choose to be tried in a mental health court. Because a jury

137. U.S. CONST. amend. VI ("the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State"); Kimberly Tibbetts, Case Note, *Qualified to Convict: State v. Griffin and the Constitutionality of Death-Qualified Juries in Connecticut*, 22 QUINNIPIAC L. REV. 359, 386 (2003).

138. See, e.g., Blau & Pasewark, *supra* note 71, at 86 (noting that studies have indicated differing rates of NGRI pleas throughout counties in Wyoming and differing rates of NGRI acquittals in New York).

139. Bernstein & Seltzer, *supra* note 3, at 148, 150 (noting that mental health courts, composed of a judge and attorneys with training in mental illness, typically hear only cases of nonviolent offenders charged with minor offenses); see also *Mentally Ill Offender Treatment and Crime Reduction Act of 2004*, Pub. L. No. 108-414, § 3, 118 Stat. 2327 (promoting mental health court systems).

140. See Bernstein & Seltzer, *supra* note 3, at 150 ("It is crucial from the outset that transfer to the mental health court be voluntary. Otherwise, singling out defendants with mental illnesses . . . would likely violate the 6th Amendment right to a trial by jury.").

determines the offender's guilt in the system proposed by this Note, however, this system would not face the potential constitutional violations of mental health courts. Receipt of proper treatment would not be dependent on the offender's affirmative choice to utilize this sentencing system.

B. Creation of a Mental Health Sentencing Board

In addition to adoption of a GEI verdict, the criminal justice system also needs "back-end" reforms that deal with the treatment and monitoring of mentally ill offenders.¹⁴¹ Since the criminal justice system's current treatment of mentally ill offenders is anti-therapeutic,¹⁴² a system of therapeutic jurisprudence should be adopted to ensure appropriate treatment.¹⁴³

Economically, the long-term savings to society from a system of therapeutic jurisprudence would outweigh the initial costs of increased treatment. This system would help decrease the enormous costs to society that the correctional system currently poses¹⁴⁴ by reducing the recidivism rates of mentally ill offenders. Society's tax dollars would be used more productively for treatment initially, rather than for repeat incarceration of untreated mentally ill offenders.¹⁴⁵ The system would divert funds currently used to ineffectively house mentally ill offenders in the correctional system by ensuring that mentally ill offenders initially receive proper treatment so that they will not continue to remain a financial burden to society.

Therapeutic jurisprudence offers an avenue to transform the way the criminal justice system deals with mentally ill offenders from a system rooted in stereotypical bias

141. See La Fond & Durham, *supra* note 34, at 103–04 (noting that "front-end reforms," such as modifications of the test for insanity, "have not significantly reduced the number of pleas or the number of defendants 'excused' for their crimes"); Philips, *supra* note 15, at 182 (concluding that "[i]nstead of changing the test for legal sanity or modifying the burden of proof, the legislature would be well advised to consider higher standards for release of those found 'not guilty by reason of insanity'").

142. See *supra* text accompanying note 90.

143. See Perlin, *supra* note 110, at 431 (concluding that "therapeutic jurisprudence is an absolutely essential tool for the reconstruction of mental disability law").

144. See, e.g., U.S. Department of Justice Bureau Statistics, *Prisoners in 2004*, <http://www.ojp.usdoj.gov/bjs/abstract/p04.htm> (last visited Nov. 6, 2005) ("The Nation's prison population grew 1.9% in 2004, reaching 1.5 million inmates."); U.S. Department of Justice Statistics, *State Prison Expenditures, 2001*, <http://www.ojp.usdoj.gov/bjs/abstract/spe01.htm> (last visited Nov. 6, 2005) ("[P]rison expenditures increased 150% from \$11.7 billion [in FY 1986] to \$29.5 billion [in FY 2001].").

145. Bernstein & Seltzer, *supra* note 3, at 161. For example, according to the preliminary figures from a 2006 Internal Study by the Oregon Department of Corrections Research and Evaluation Unit, the average daily cost per inmate in Oregon is \$67.53. Depending on the level of mental health treatment needed by the offender, this average cost increases by only \$2.51 daily for an offender needing moderate mental health treatment. Even the cost of treating an offender needing the highest mental health treatment in the general prison population (\$9.14 per day) is significantly less than the cost of reincarcerating an offender (\$67.53 per day) who did not initially receive proper mental health treatment while previously incarcerated. These small additional costs in the short-term outweigh the overall costs that will result in the long-term if the mental illnesses of these prisoners are not properly treated.

against the mentally ill to a system that preserves due process principles, while also focusing on healing.¹⁴⁶ Implementation of a therapeutic jurisprudence system is most effectively accomplished by creating a mental health sentencing board, which would determine the sentencing and treatment of offenders found by a jury to be GEI.

1. The Composition and Role of the Mental Health Sentencing Board

A mental health sentencing board, a variation of Oregon's Psychiatric Security Review Board,¹⁴⁷ would be used to implement this superior system of therapeutic jurisprudence. The mental health sentencing board would determine both the appropriate sentencing scheme and treatment of each offender that is found GEI, as well as monitor the offender's treatment. Under Oregon's system, the trial judge must affirmatively grant custody of an *insanity acquittee* to the review board upon a determination that the individual's mental condition still exists.¹⁴⁸ The review board consists of "a psychiatrist, a licensed clinical psychologist, an attorney, a parole and probation representative, and a lay citizen."¹⁴⁹ Once custody of the offender is granted, the board evaluates the individual and monitors the treatment for a period of time that is not to extend beyond the maximum sentence the offender would have faced upon conviction.¹⁵⁰

The proposed mental health sentencing board would have a composition similar to Oregon's Board, consisting minimally of a psychologist, a psychiatrist, and a law enforcement officer. Unlike Oregon's system, the mental health sentencing board proposed by this Note would be part of the judicial system and automatically receive jurisdiction over *every* offender found GEI by a jury. Once granted custody, the mental health sentencing board would determine the appropriate treatment and sentencing scheme for the offender *within the sentence range* determined by the jury. The mental health sentencing board would be bound only by the outer limits of the jury's sentence and thus would be free to adopt any appropriate sentence within these limits that is based on facts found by the jury. This provides the mental health sentencing board the ability to determine an appropriate sentence based on their mental health knowledge and law enforcement experience.

Similar to the monitoring essential in Oregon's system, the mental health sentencing board would be given continual monitoring authority over each GEI offender. Once eligible for parole (according to the jury's sentence), an offender could be released conditionally or outright, based upon a finding of successful treatment by mental health and law enforcement personnel. Upon conditional release, the mental health sentencing

146. Perlin, *supra* note 110; *see also* Perlin, *supra* note 74, at 784 (referencing the work of Professors Stephen Behnke and Elyn Saks, which considers the ways the law "can promote the mental health and well-being of individuals who struggle with significant psychological and behavioral difficulties") (footnote omitted).

147. *See* OR. REV. STAT. § 161.327 (2004); *see also* CONN. GEN. STAT. § 17a-581 (2004) (modeled after Oregon's statute); Alexander, *supra* note 75, at 2 (Oregon's Board is a state agency within the Department of Administrative Services).

148. Blau & Pasewark, *supra* note 71, at 103.

149. Alexander, *supra* note 75, at 11.

150. Blau & Pasewark, *supra* note 71, at 103-04 (noting that Oregon's Board retains monitoring authority over each offender).

board would have supervisory authority over the monitoring and any required outpatient treatment of the offender. In Oregon, a similar conditional release program has yielded positive results, with low recidivism rates among conditionally released offenders: "only six of 126 conditionally released patients (4.8%) were charged with new crimes In all six cases, the charges were dismissed" ¹⁵¹

2. Validity of a Mental Health Sentencing Board System

The Sixth Amendment right to a trial by jury ensures that every accused person be given the right "to have the jury pass upon every substantive fact going to the question of guilt or innocence."¹⁵² The United States Supreme Court has recently addressed this right, specifically in the context of findings that affect sentencing, beginning with *Apprendi v. United States* in 2000.¹⁵³ When applied to the insanity context, this line of case law establishes the validity of the proposed mental health sentencing board.

The *Apprendi* Court held that "any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt."¹⁵⁴ The Court distinguished between facts affecting punishment that are presented during the guilt phase of the trial to the jury with facts that come to light only *after* the jury verdict.¹⁵⁵ Facts cannot be presented after the jury verdict which would "alter[] the maximum penalty for the crime committed [or] create[] a separate offense calling for a separate penalty,"¹⁵⁶ since these are considered elements of the crime that must be proven beyond a reasonable doubt.

Two years later in *Harris v. United States*,¹⁵⁷ the Court distinguished its holding in *Apprendi* by finding that the statutory provision at issue in *Harris*¹⁵⁸ did not violate the defendant's constitutional rights since it only allowed the judge to increase the defendant's *minimum* sentence.¹⁵⁹ The Court reasoned that the type of judicial fact-finding authorized by the statute at issue in this case, "[j]udicial factfinding in the course of selecting a sentence *within the authorized range*,"¹⁶⁰ "is by definition not 'essential' to the defendant's punishment"¹⁶¹ and therefore does not need to be proven beyond a reasonable doubt to the jury. In the same year, the Court held in *Ring v. Arizona* that determination by a trial judge of aggravating factors for imposition of the

151. Morris, *supra* note 83, at 1070.

152. Robitscher & Haynes, *supra* note 107, at 52 (quoting *State v. Strasberg*, 110 P. 1020, 1022 (1910)).

153. 530 U.S. 466 (2000).

154. *Id.* at 490 (emphasis added).

155. *See id.* at 482–83.

156. *Id.* at 486 (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 87–88 (1986)).

157. 536 U.S. 545 (2002).

158. 18 U.S.C. § 924(c)(1)(A)(2000) ("[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . shall, in addition to the punishment provided for such crime of violence or drug trafficking crime . . . (i) be sentenced to a term of imprisonment of not less than 5 years; (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.").

159. 536 U.S. at 568.

160. *Id.* at 558 (emphasis added).

161. *Id.* at 561.

death penalty for a defendant convicted of first-degree murder was unconstitutional because the aggravating factors *increased* the defendant's sentence.¹⁶²

In holding that the trial court's imposition of an exceptional sentence exceeding the maximum jury sentence was unconstitutional, the Court in *Blakely v. Washington*¹⁶³ provided further definition of *Apprendi's* "statutory maximum." The Court clarified that the statutory maximum is the maximum sentence that can be imposed "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"¹⁶⁴

Most recently, the Court held in *United States v. Booker*¹⁶⁵ that trial judges are prohibited from holding a post-trial sentencing proceeding which results in a sentence *exceeding the maximum amount* allowable based only on the findings presented to the jury.¹⁶⁶ The Court stated that the rationales of *Apprendi* and *Blakely* applied in this case to the Federal Sentencing Guidelines, thus requiring juries, rather than judges, to make findings affecting sentencing maximums.¹⁶⁷

The Court's main focus in this line of case law was on the *effect* of the finding: "[D]oes the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict,"¹⁶⁸ thereby violating the defendant's Sixth Amendment rights?¹⁶⁹ The Court was concerned that sentencing power would be taken away from the jury and sentences would be based on facts that were not presented during the guilt-phase of the trial. This would create a separate punishment phase of the trial in violation of the Sixth Amendment.

Based on the Court's articulated concerns and rationale, the proposed mental health sentencing board would be constitutional. A lay jury guaranteeing the offender's Sixth Amendment rights would hear all the facts and evidence relating to the offender's insanity plea during the trial. After hearing this evidence, the jury would decide whether to issue a GEI verdict and an accompanying mandatory minimum and maximum sentence. The mental health sentencing board would be bound by this authorized sentencing range as well as the facts proven to the jury beyond a reasonable doubt when determining the offender's sentencing scheme and treatment. The mental health sentencing board would not have the authority to deviate from the outer boundaries of the jury's prescribed sentence, so this system would be free from the problems held to be unconstitutional by the Court in the *Apprendi* line of cases.

Although there is no way to empirically test the effectiveness of this proposed system, Oregon's similar system for insanity acquittees has already received high amounts of praise.¹⁷⁰ These remarks have been particularly directed at the system's ability to maintain a balance between addressing justified public concerns regarding

162. 536 U.S. 584 (2002).

163. 542 U.S. 296 (2004).

164. *Id.* at 303 (emphasis in original).

165. 543 U.S. 220 (2005).

166. *Id.* at 226–27.

167. *Id.* at 243–44.

168. *Apprendi*, 530 U.S. at 494.

169. *See also Ring*, 536 U.S. at 602 ("The dispositive question, we said, 'is one not of form, but of effect.'") (quoting *Apprendi*, 530 U.S. at 494).

170. *See, e.g.,* CRIMINAL JUSTICE, *supra* note 19, at 151 ("The [American Psychiatric Association] suggests conditional release, or parole, when there is 'a coherent and well structured plan of supervision, management, and treatment' available . . .").

dangerous mentally ill offenders¹⁷¹ and ensuring mentally ill offenders' constitutional rights.¹⁷²

Unlike mental health courts, which typically hear only cases of *non-violent* offenders,¹⁷³ the proposed mental health sentencing board system would be able to handle *all* mentally ill offenders, regardless of the degree of the crime for which they stand accused. This would ensure that the system of therapeutic jurisprudence is implemented with respect to *all* mentally ill offenders.

Creation of a mental health sentencing board would also ensure that more expert and effective treatment decisions are made. Courts have generally questioned the ability of lay jurors to comprehend and synthesize complicated mental health information, particularly in criminal cases.¹⁷⁴ Even if jurors are able to comprehend the mental health information, jurors often ignore this information and base their decision on other, less relevant factors.¹⁷⁵ There is also the possibility that jurors will be unable to render an unbiased verdict after hearing evidence of mental illness,¹⁷⁶ believing that it is their duty to protect society from this mental illness.¹⁷⁷

CONCLUSION

A long-standing fundamental principle of the American criminal justice system is that one is "innocent until proven guilty." Although not completely violating this principle, the criminal justice system's current treatment of the mentally ill offends this principle. The criminal justice system lacks a uniform insanity standard that correctly identifies offenders who are mentally ill. This improper designation of offenders effectively labels mentally ill offenders as guilty and places these offenders in regular corrective institutions with little or no mental health treatment. The problem is that

171. Alexander, *supra* note 75, at 12 (noting that "the primary goal of the [review board] is protection of the public, and monitoring is its key function") (footnote omitted); *see also* Blau & Pasewark, *supra* note 71, at 104 ("The legislation was written to protect society and more closely monitor those pleading NGRI.").

172. *See* Alexander, *supra* note 75, at 27 ("[P]lacing persons under the jurisdiction of the Board has been favored by those persons involved with the system." (alteration in original) (quoting OR. HOUSE JUDICIARY COMM., PSYCHIATRIC SECTION REVIEW BOARD REPORT ON H.B. 2075 (1983) (report by Felicia M. Gniewosz, Executive Director))).

173. *See supra* text accompanying note 139.

174. *See* Byers, *supra* note 14, at 499-500 (quoting Learned Hand's belief that "[t]he jury is not a competent tribunal") (alteration in original); *see also* Blau & Pasewark, *supra* note 71, at 87 ("[I]t has been evidenced consistently that mock jurors have a low rate of comprehension of the major insanity rules.").

175. *See, e.g.*, RITA JAMES SIMON, *THE JURY & THE DEFENSE OF INSANITY* 154 (1999) (noting that one factor ranking extremely high in influencing a juror's verdict is "the extent to which the defendant resembled or failed to resemble someone whom the juror knew to be mentally ill").

176. *See* JENNIFER LYNNE SKEEM, *UNDERSTANDING JUROR DECISION MAKING AND BIAS IN INSANITY DEFENSE CASES: THE ROLE OF LAY CONCEPTIONS AND CASE-RELEVANT ATTITUDES* 6 (1999) (concluding that "juror's verdicts may depend more upon their attitudes and opinions than on case facts and court instruction").

177. *See* SIMON, *supra* note 175, at 146 ("These jurors felt that it was their responsibility to prevent any further extension of this [mental illness] and they viewed a verdict of guilty as the first act in their program of reform.").

these offenders were never proven guilty of the underlying crime. Although they may have committed the underlying crime, their mental illness precludes them from having the requisite *mens rea*/guilty mind to commit the crime; yet, they face the same punishment as sane offenders proven to have the requisite *mens rea*.

This Note has attempted to assess and respond to current problems within the criminal justice system by offering a solution that has been made possible by recent United States Supreme Court case law. In order to correct the existing deficiencies in the insanity defense system, the criminal justice system needs to readopt a rehabilitative focus on treatment.¹⁷⁸ Adoption of the superior GEI verdict would increase uniformity of insanity determinations while more accurately assessing the offender's sanity, thereby allowing the opportunity for mental health treatment when appropriate. Creation of a mental health sentencing board would ensure that mentally ill offenders receive adequate treatment before being released back into society. Dangerous mentally ill offenders would be appropriately confined to proper treatment facilities while receiving treatment. Mentally ill offenders would be less of a financial burden to society since they would be able to return to society as productive members following treatment. The fundamental notions of the criminal justice system would also be upheld by this recommended system. Mentally ill offenders would no longer be sentenced as if they had the *mens rea* required for committing the crime. Instead, mentally ill offenders would receive a constitutionally valid sentence that is proportional to their degree of culpability, thus accurately reflecting the criminal justice system's notion of criminal culpability.

178. See Bernstein & Seltzer, *supra* note 3, at 162 (noting that the criminal justice sector is "ill-equipped to address the needs of people with mental illnesses").