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SAVING THE INSANITY DEFENSE: INSIGHT INTO PERSONALITY DISORDERS AND THE NECESSARY ELEMENTS OF THE TEST

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I. INTRODUCTION

In January 2017, Anthony Montwheeler kidnapped his second ex-wife, attacking her with a knife and fleeing with her in his car.[1] The following police chase ended in a high-speed collision with another car, and Montwheeler was finally arrested.[2] His ex-wife and the driver of the other vehicle were pronounced dead at the scene.[3] However, this was not the beginning of Montwheeler's story.

Just over twenty years earlier, in 1996, Oregon courts found Anthony Montwheeler "guilty except for insanity" for kidnapping his first ex-wife and ordered Montwheeler subject to state jurisdiction for seventy years.[4] During his years in custody, Montwheeler benefitted from Oregon's conditional release program, which also helped him obtain housing.[5] Eventually, Montwheeler convinced the state review board that he did not in fact have mental illness and that he could be released.[6] At the hearing to determine

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[1] Rob Fischer, *Pleas of Insanity: The Mysterious Case of Anthony Montwheeler*, ROLLING STONE (Feb. 21, 2020), https://www.rollingstone.com/culture/culture-features/anthony-montwheeler-oregon-murder-annita-harmon-954479/ [https://perma.cc/GDZ3-T6K5].

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

Montwheeler's sanity, the forensic psychologist reviewing Montwheeler's file determined that Montwheeler had an increased risk of violence if released unsupervised.[7] However, the psychiatrist at the state hospital disagreed based on Montwheeler's clinical records from the previous two decades—Montwheeler was released before the completion of his term, just a month before the events of January 2017.[8] Like other offenders discharged from the state hospital in Oregon, he was not diverted into the penitentiary.[9]

The public has a multitude of fears regarding the insanity defense, which are clearly presented by the Anthony Montwheeler case:[10] the safety of the public, the potential for malingering, and the indiscriminate use of such a defense, among others.[11] Intense media coverage of cases like these has repeatedly encouraged states to narrow or even do away with their insanity defenses.[12] The prevalence of these fears are reflected in the restriction on insanity defense legislation, but these misconceptions are largely unfounded.[13] For example, a common misconception exists that the insanity defense is used in a significant portion of trials—this simply is not true.[14] In fact, the defense is only used in around one percent of criminal cases,[15] and of that number only one in four is successful.[16] This low number can be traced to the stringency of insanity defense statutes.[17] While proving

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[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* ("Concerns that Montwheeler has repeatedly taken advantage of the system, and may have the opportunity to do so again, have only been exacerbated by competing explanations for what went wrong in his case.").

[11] *See id.*; Steve Erickson, *A Watershed Right to the Insanity Defense*, CRIME & CONSEQUENCES BLOG (Sept. 17, 2019), http://www.crimeandconsequences.com/crimblog/2019/09/a-watershed-right-to-the-insan.html [https://perma.cc/NHH6-WCEJ] ("Any discussion about the insanity defense invites skeptics who complain about defendants who malinger or flaws within the formulations of the defense."); *see generally* Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. L. REV. 599, 644 (1989).

[12] *See* Lawrence Fitch & Susan R. Steinberg, *Competency to Stand Trial and Criminal Responsibility*, 36 MD. B.J. 14, 18–19 (2003) ("The rare contested case may generate significant media attention . . . ."); *see generally* Louis Kachulis, *Insane in the Mens Rea: Why Insanity Defense Reform is Long Overdue*, 26 S. CAL. REV. L & SOC. JUST. 245, 250 (2017).

[13] *See generally* Perlin, *supra* note 11.

[14] *See* Shawn Roberson & Connie Smothermon, *Changes to the Insanity Laws: Not Guilty by Reason of Mental Illness and Guilty with Mental Defect*, 87 OKLA. B.J. 2349, 2349 (2016).

[15] *Id.*

[16] Fischer, *supra* note 1.

[17] *See, e.g.*, Ralph Slovenko, *Commentary: Personality Disorders and Criminal Law*, 37 J. AM. ACAD. PSYCHIATRY L. 182, 184–85 (2009) ("[W]hen the NGRI [not guilty by reason of insanity] plea is urged, even defendants who are floridly psychotic are found guilty, not NGRI.").

highly contentious over the years,[18] the insanity defense is necessary as a means of protecting the most vulnerable in our population when they are no longer able to follow public norms.[19]

Those with mental illness still operate with a consistent internal logic and worldview.[20] However, these constructs within the private mind can fail to conform to constructs held by society as a whole.[21] A severely mentally ill individual simply interacts with the world in a different way than someone without mental illness.[22] The misconception that the mentally ill are dangerous may have arisen because those with mental illness have more difficulty conforming their behavior to societal norms.[23]

This Note first examines the background of the insanity defense, including the various tests that have been used in U.S. jurisdictions. Part III of this Note explores the greatest dangers to the insanity defense, including public misconceptions of the defense and the impact of stigma. Part III also investigates the public, legal, and judicial skepticism shown to psychiatrists and mental health experts. Part III concludes by pointing out the lack of a system protecting the mentally ill in the United States. This Note then considers, in Part IV, the potential impact of increased psychological consideration in the field of law by delving into personality disorders, specifically exploring the impact of antisocial personality disorder and why these individuals are excluded from the defense.

Finally, Part V of this Note shows why a profound adjustment to the current insanity defense jurisprudence is necessary. Part V first considers the extreme necessity of the insanity defense, then delves into who should be allowed to use the defense. In determining who should use the defense, Part V explores the insanity defense requirements as they relate to the

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[18] *See* Fischer, *supra* note 1.

[19] Angela B. Vickers, *The Importance of Mental Illness Education*, 52 JUV. & FAM. CT. J. 55, 55 (2001) ("Until our legal community—both lawyers and judges—understands basic truths about the medically based and highly treatable mental illnesses . . . our nation does not offer 'justice for all' for the more than 27 million Americans who have one or more of these common brain problems."); Sarah Rosenfield, *Factors Contributing to the Subjective Quality of Life of the Chronic Mentally Ill*, 33 J. HEALTH & SOC. BEHAV. 299, 299 (1992) ("The seriously mentally ill often receive only minimal services in the community.").

[20] Sam Vaknin, *Personality Disorders as an Insanity Defense*, HEALTHY PLACE (Oct. 1, 2009), https://www.healthyplace.com/personality-disorders/malignant-self-love/personality-disorders-as-an-insanity-defense [https://perma.cc/98QD-J66Y] ("All 'mentally-ill' people operate within a (usually coherent) worldview, with consistent internal logic, and rules of right and wrong (ethics).").

[21] *Id.* ("The problem is that these private constructs rarely conform to the way most people perceive the world.").

[22] Jennifer S. Bard, *Re-Arranging Deck Chairs on the Titanic: Why the Incarceration of Individuals with Serious Mental Illness Violates Public Health, Ethical, and Constitutional Principles and Therefore Cannot Be Made Right by Piecemeal Changes to the Insanity Defense*, 5 HOUS. J. HEALTH L. & POL'Y 1, 24 (2005).

[23] James F. Hooper, *The Insanity Defense: History and Problems*, 25 ST. LOUIS U. PUB. L. REV. 409, 413 (2006).

personality disorders discussed in Part IV. In using this comparison, this Note determines the optimal basic elements of the defense and argues this basis should be required before the individual jurisdictions make their iterations. Part V concludes with the necessity of education regarding the insanity defense and mental illness as a whole, along with the requisite element of community care and access to treatment.

II. BACKGROUND: THE INSANITY DEFENSE

The insanity defense dates back to ancient Greece and Rome.[24] For hundreds of years, there existed an understanding that a lack of capacity to differentiate good from evil, or right from wrong, could relieve responsibility for a crime.[25] This remained true even as science, medicine, and knowledge about mental illness expanded in the passing centuries.[26] The core issue for the insanity defense is the law's ability to differentiate the "mad" from the "bad," and what to do with those individuals.[27] The term "insanity" is a legal concept and does not refer to the state of psychosis of an individual, but rather refers to the responsibility of an individual for their actions.[28] The underlying reasoning is that the law "ought not punish someone who was incapable of forming good reasons through no fault of [their] own."[29]

The insanity defense is an excuse, admitting the wrongfulness of the defendant's action while simultaneously recognizing the actor does not deserve punishment.[30] Though the tests for insanity have changed throughout the centuries, and continue to vary to this day, the common underlying principles remain the same.[31] The defense has historically been based in morality, which is conceptually derived from the community.[32] In the common law, the presence of moral understanding and reason are essential to criminality itself.[33] The community's criminal law is based upon

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[24] T.V. Asokan, *The Insanity Defense: Related Issues*, 58 INDIAN J. PSYCHIATRY 191, 191 (2016).

[25] Kahler v. Kansas, 140 S. Ct. 1021, 1030 (2020).

[26] *Id.* at 1039 (Breyer, J., dissenting).

[27] Fischer, *supra* note 1.

[28] Asokan, *supra* note 24, at 192.

[29] Erickson, *supra* note 11 ("A system of justice that convicts someone who is so out of touch with reality that he cannot reason sensibly is an unjust one. He cannot be guided by the law because he is insufficiently governed by its reasons.").

[30] Asokan, *supra* note 24, at 192 ("Justifications render conduct lawful and so may not be construed as crime. Excuses render the actor's otherwise unlawful conduct as not deserving punishment.").

[31] *Kahler*, 140 S. Ct. at 1045 (Breyer, J., dissenting). Even as states experimented with the test, they retained a common core going all the way back to the "good and evil" test. *Id.*

[32] *Id.* at 1047.

[33] *Id.* at 1040 ("The four preeminent common-law jurists, Bracton, Coke, Hale, and Blackstone, each linked criminality to the presence of reason, free will, and moral understanding."); Erickson, *supra* note 11 ("The capacity for rationality is a necessity for legal

a collective understanding of what is "right" and what is "wrong."[34] A defendant's capacity to understand right from wrong has historically served as a test of responsibility.[35] Thus, the traditional insanity test excuses defendants of their criminal responsibility due to an inability to differentiate rightfulness and wrongfulness.[36] However, the law strictly limits the conditions that can be used to mitigate criminal responsibility under the insanity defense.[37]

A series of different insanity tests have evolved over the centuries. Early tests reflect the roots of the insanity defense—the "good and evil" test, the "wild beast" test, and the "right and wrong" test—which are all based in cultural and social understandings of superstition and demonology, not science.[38] In 1843, the case of Daniel M'Naghten created a new insanity standard.[39] M'Naghten tried to kill Robert Peel, the United Kingdom's Prime Minister, under the psychotic delusion that Peel wanted to kill him.[40] When M'Naghten was found not guilty by reason of insanity, the public outcry led the House of Lords in Parliament to command that the Lords of Justice of the Queen's Bench "fashion a strict definition of criminal insanity."[41] They did so, determining that in order to obtain a verdict of not guilty by reason of insanity, the individual must have been "labouring under such a defect of reason, from a 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."[42] The United States initially adopted the English *M'Naghten* rule, as with most common law.[43]

Four tests evolved across U.S. jurisdictions:

> 1. The *M'Naghten* test has two prongs: the first inquires as to whether the defendant knew what he was doing (cognitive incapacity); the second inquires as to whether the defendant knew

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and moral responsibility, which is why young children and those with profound intellectual disabilities have long been considered not responsible for their conduct.").

[34] *Kahler*, 140 S. Ct. at 1047 ("The tradition [of having a morality component in the insanity test] reflects the fact that a community's moral code informs its criminal law.").

[35] Fitch & Steinberg, *supra* note 12, at 15.

[36] *Kahler*, 140 S. Ct. at 1030.

[37] Ronald Schouten, *The Insanity Defense: An Intersection of Morality, Public Policy, and Science*, PSYCHOLOGY TODAY (Aug. 16, 2012), https://www.psychologytoday.com/us/blog/almost-psychopath/201208/the-insanity-defense [https://perma.cc/T93Z-U3JT].

[38] Perlin, *supra* note 11, at 631–32.

[39] L. LIBR. - AM. L. AND LEGAL INFO., *M'Naghten Rule*, https://law.jrank.org/pages/8620/M-Naghten-Rule.html [https://perma.cc/5HCG-6BCB] [hereinafter *M'Naghten Rule*].

[40] *Id.*

[41] *Id.*

[42] Queen v. M'Naghten, 8 Eng. Rep. 718, 722 (H.L. 1843). Additionally, intoxication has never qualified for the insanity defense. *M'Naghten Rule*, *supra* note 39.

[43] *M'Naghten Rule*, *supra* note 39.

what he was doing was wrong (moral incapacity).[44] Seventeen states use variations of the *M'Naghten* test.[45] Ten states have a defense based only on moral incapacity.[46] The federal court system is governed by the Insanity Defense Reform Act, which uses a stricter variation of the *M'Naghten* test.[47]

2. The volitional incapacity test (also known as the "irresistible-impulse" test) determines whether the defendant is driven to commit the criminal act by an "irresistible impulse" caused by mental defect.[48] The volitional element to an insanity test involves whether a delusional compulsion overmastered the individual's will.[49]

3. The American Law Institute's Model Penal Code creates an insanity test with both a volitional incapacity component and a moral incapacity component.[50] Thirteen states have variants of the Model Penal Code test.[51]

4. The "product" test asks whether the accused crime was the product of mental disease or defect.[52] The product test is the most liberal and expansive of the tests and is followed only by New Hampshire.[53]

Each state has the right to choose which insanity test it follows,[54] but only five states do not have an insanity test questioning the blameworthiness

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[44] Kahler v. Kansas, 140 S. Ct. 1021, 1025 (2020); *Id.* at 1046 (Breyer, J., dissenting). The *M'Naghten* test, though used almost exclusively by American courts for over a century and still in use today, received severe criticism due to its rigidity and inappropriate ignoring of the volitional components of behavior. Perlin, *supra* note 11, at 634.

[45] *Kahler*, 140 S. Ct. at 1046.

[46] Clark v. Arizona, 548 U.S. 735, 751 (2006).

[47] Kachulis, *supra* note 12, at 250; Perlin, *supra* note 11, at 638–39.

[48] *Kahler*, 140 S. Ct. at 1046.

[49] Zoom Call Interview with Dr. Adriana Flores, Forensic Psych., Adjunct Assoc. Professor, Emory Univ. Sch. Med. (Oct 2, 2020) [hereinafter Interview with Dr. Flores].

[50] *Kahler*, 140 S. Ct. at 1046.

[51] *Clark,* 548 U.S. at 800.

[52] *Kahler*, 140 S. Ct. at 1046. The test also looks at the defendant's morality and impulsivity. *Id.*

[53] *Id.*; Zoom Call Interview with Dr. Bob Stinson, Forensic Psych., Att'y, Stinson & Assocs., Inc. (Feb. 4, 2021) [hereinafter Interview with Dr. Stinson].

[54] *Kahler*, 140 S. Ct. at 1026 n.3. Four states have abolished the insanity test altogether. Samuel Adjorlolo, Heng Choon (Oliver) Chan & Matt DeLisi, *Mentally Disordered Offenders and the Law: Research Update on the Insanity Defense, 2004–2019*, 67 INT'L J.L. PSYCHIATRY 1 (2019); Bard, *supra* note 22, at 36 ("Currently, Idaho, Montana, Utah, and Kansas do not offer an insanity defense.").

of the defendant.[55] In the 1970s, outrage following the heavily publicized insanity trial of John Hinckley Jr. led to many states narrowing their insanity statutes.[56] At that time, most states turned from the American Law Institute's test to a more limited version of the *M'Naghten* test.[57] Now, jurisdictions predominantly use the cognitive prong, where if an individual understands essentially what they are doing, they are held responsible for those acts regardless of whether the acts constitute a product of mental illness or a lack of volitional control.[58] The basic philosophy exists that an individual who did not understand what they were doing was wrong should not be held legally responsible, the reason being that there is little use punishing or trying to rehabilitate an individual who did not know the wrongfulness of their actions or who lacked volitional control.[59] Difficulty arises when trying to put these basic philosophical principles down into law and assessment.[60]

Given the allowance for states to create their own insanity jurisprudence, the test for the defense varies between jurisdictions.[61] Jurisdictions also vary on how they limit expert witnesses in insanity trials.[62] Likewise, the programs for conditional release for the mentally ill after a finding of not guilty by reason of insanity (NGRI) vary by jurisdiction.[63] Insanity laws do not always contain definitions of mental disease or defect and also vary considerably between jurisdictions.[64] Despite the jurisdictional differences, the particular label for the mental illness is not necessarily relevant in insanity cases; more important considerations are the functional, cognitive, and moral impairments of the individual.[65]

The insanity defense is representative of the fundamental and basic values held in criminal law, and reflects the community fear, much like the death penalty, of potential failures in the justice system.[66] These fears relating

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[55] *See* Bard, *supra* note 22, at 36; Clark, 548 U.S. at 735 (adding Arizona to the list of states using only a mens rea standard of guilt).

[56] *See* David B. Wexler, *Putting Mental Health into Mental Health Law*, 16 L. HUM. BEHAV. 27, 30–31 (1992).

[57] *Id.*

[58] Interview with Dr. Stinson, *supra* note 53.

[59] *Id.*

[60] *Id.*

[61] Landy F. Sparr, *Personality Disorders and Criminal Law: An International Perspective*, 37 AM. ACAD. PSYCHIATRY L. 168, 169 (2009).

[62] *E.g.*, Jason R. Smith, *Invested with a Strange Authority: A Guide to the Insanity Defense and Related Issues in Tennessee*, 5 LINCOLN MEM'L UNIV. L. REV. 20, 23–24 (2018).

[63] Samuel J. House, Tiffany A. Howell, Jessica Howdeshell, Carrie Jones & Rebecca B. Spohn, *How Effective is Arkansas' Program that Conditionally Releases Criminal Defendants Judged Not Guilty by Reason of Mental Disease or Defect?*, 53 ARK. LAW. 30, 31 (2018).

[64] Sparr, *supra* note 61, at 168.

[65] Richard J. Bonnie, *Should a Personality Disorder Qualify as a Mental Disease in Insanity Adjudication?*, 38 J.L. MED. ETHICS 760, 760–61 (2010).

[66] Perlin, *supra* note 11, at 618–19 ("[T]he insanity defense . . . 'has consistently reflected a "symbolic perspective" of citizens' basic values.").

to the defense represent the fundamental fears intrinsic to society: the breaking down of law and order and an ultimate failing of the justice system.[67] This intrinsic nature of the defense makes changes to insanity jurisprudence complex and controversial.

III. THE CRISIS OF A DISAPPEARING INSANITY DEFENSE

Widespread misconceptions about mental illness and the insanity defense fundamentally impact the insanity doctrine.[68] The insanity test as it currently exists is more restrictive than it was over 145 years ago at the time of the *M'Naghten* verdict.[69] While society knows comprehensively more now about science and human behavior, the insanity defense has shrunk unnaturally.[70] The continued narrowing and abolishment of traditional insanity tests fails to adequately acknowledge the serious impact mental illnesses can have on individuals and society, and perpetuates the criminalization of the mentally ill.[71] The concerns of the public regarding the insanity defense do not negate the fundamental principle that those who lack responsibility for their actions due to impaired rational capacity are not deserving of punishment.[72] The mentally ill are a vulnerable population and should therefore have increased protection.

The lay public holds many incorrect stereotypes about the mentally ill.[73] These misunderstandings involve risk level, treatability, stability of symptoms, and more.[74] Mental illness is difficult to conceptualize for the layperson, creating fundamental misunderstandings. Knowledge gaps make the role of the experts crucial—they provide the relevant knowledge the layperson lacks.[75] Crucially compounding the issue, the fields of law and psychology regard one another with suspicion.[76] The difficulty

[67] *Id.* at 621.

[68] *Id.* at 604 (The myths propagated about mental health are powered by "an omnipresent fear of feigning, by a community sense that mental illness is somehow different from other illnesses, by a public need for mentally disabled criminal defendants to conform to certain typical external manifestations of 'craziness,' and by a persistent belief that it is simply improper to exculpate most criminal defendants because of their mental illness.").

[69] *Id.* at 643.

[70] *Id.* ("A fundamental question that we must ask ourselves as a society is, if we now understand so much more about science, human behavior, and empiricism than we did at the time of, say, the *M'Naghten* verdict, why have we shrunken our insanity defense to the point where it not only approximates, but is even more restrictive than what was scientifically, empirically, and morally out of date 145 years ago?").

[71] Interview with Dr. Stinson, *supra* note 53.

[72] Erickson, *supra* note 11 ("A system of justice that convicts someone who is so out of touch with reality that he cannot reason sensibly is an unjust one. He cannot be guided by the law because he is insufficiently governed by its reasons.").

[73] Interview with Dr. Stinson, *supra* note 53. Stereotypes of mental illness may be due to fear and emotional reasoning. *Id.*

[74] *Id.*

[75] *Id.*

[76] *See id.*

conceptualizing mental illness can affect the standing of mental health experts, who have been viewed skeptically by judges and jurors alike.[77] There is no other system protecting those with severe mental illness from being sent to prison.[78] A more accurate understanding and increased interdisciplinary work between these two fields—law and psychology—would contribute to improving the prospects of those with severe mental illness.

A. Public Misconceptions Mischaracterize the Defense

The layperson lacks an accurate understanding of those with mental illness.[79] All extreme violence seems insane on some level, and this may be why the insanity test is surrounded by so many myths and general misunderstandings.[80] There is a common misconception that the insanity defense functions as an arbitrary get-out-of-jail-free card.[81] In truth, the defense is so narrow that it excludes most of those who are perhaps deserving of its use.[82] The insanity defense is also commonly misconstrued as only being used in conjunction with the most "heinous" and "violent crimes."[83] However, this misconception inaccurately conflates mental illness with violence. When those with severe mental illness are able to remain symptom-free and do not use drugs and alcohol, they are no more dangerous than anybody else.[84] An individual with severe mental illness is not, by definition, a significantly higher risk to their community compared to a neurotypical individual,[85] and the identification between violent crimes and mental illness may be propagated mostly by sensationalized media.[86]

The system for those adjudicated NGRI is generally misunderstood, with a great deal of misconception surrounding the topic of release into the

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[77] *Id.*

[78] A lack of capacity can temporarily stop an individual from going to trial, but these individuals are repetitively examined to see if they have the renewed capacity to go to trial. *See* Interview with Dr. Flores, *supra* note 49. Therefore, the insanity defense is the only excuse a mentally ill defendant can use to escape imprisonment. *See id.*; *infra* Part III.B.

[79] Interview with Dr. Stinson, *supra* note 53.

[80] Fischer, *supra* note 1.

[81] *See id.*; Kachulis *supra* note 12, at 261.

[82] *See, e.g.*, Clark v. Arizona, 548 U.S. 735, 741 (2006). Clark, though indisputably suffering from paranoid schizophrenia at the time of the shooting, did not meet the requirements of the insanity defense. *See id.*

[83] Kachulis, *supra* note 12, at 252 ("[T]he association of the insanity defense with heinous, violent crimes means that the public feels like retribution is especially deserved, and that defendants are gaming the system . . . .") (footnote omitted).

[84] Interview with Dr. Stinson, *supra* note 53. Risk of dangerousness is on a continuum; some individuals will necessarily be more or less dangerous due to individual factors. *Id.* Risk of dangerousness increases with use of drugs and/or alcohol and when symptoms remain uncontrolled. *Id.*

[85] *Id.* Risk management precautions can be taken for those at a higher risk but protecting society from an entire class of individuals due to mental illness makes little sense when compared to the available research. *Id.*

[86] *See* Kachulis, *supra* note 12, at 254.

community.[87] Despite the common myth that insanity acquitees spend less time in custody than defendants convicted of the same offenses,[88] NGRI defendants actually serve "more time than they would have for a criminal conviction."[89] Data shows that NGRI acquitees spend almost double the time in custody and can "often face a lifetime of post-release judicial oversight."[90] For an extremely sick individual who commits homicide, the best outcome with NGRI is that they are in the hospital for the rest of their life.[91] That same individual could plead out for thirty years and be released again.[92] The decision to release those adjudicated NGRI back into the community is a consideration with many factors and huge potential consequences.[93] Consequently, many insanity acquitees spend longer in hospitals while judges determine their risk.[94] Before an individual deemed NGRI can be discharged on conditional release, they are assessed by professionals for their risk of dangerousness.[95] That assessment is then given to the judge who ultimately makes the decision whether or not to release the individual and set the conditions of their release.[96] Importantly, if a risk of dangerousness is found in a mentally ill individual, that individual is not released, and any subsequent release is conditional and monitored.[97]

Another common, but false, misconception is that defendants claiming the insanity defense are malingering, or "faking."[98] The truth is actually the opposite: malingering is statistically low and empirical evidence shows seriously mentally ill defendants will actually feign sanity.[99] Additionally,

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[87] Interview with Dr. Stinson, *supra* note 53.

[88] *See* Perlin, *supra* note 11, at 651.

[89] Bard, *supra* note 22, at 51; *see also* Perlin, *supra* note 11, at 651.

[90] Perlin, *supra* note 11, at 651.

[91] Interview with Dr. Flores, *supra* note 49.

[92] *Id.*

[93] *Id.*

[94] *See* D.J. Jaffe, *Legal System Still Does a Terrible Job of Handling the Mentally Ill*, WALL ST. J. (Mar. 26, 2010), https://mentalillnesspolicy.org/ngri/not-guilty-reason-insanity.html [https://perma.cc/CLW3-8HRD]. Insanity acquitees may face longer sentences simply because judges are not willing to let them out into the community again. *See id.*; Adjorlolo, *supra* note 54, at 7 ("The severity of the index offense significantly predicts the duration of stay at inpatient facility.").

[95] Interview with Dr. Flores, *supra* note 49.

[96] *Id.*

[97] *See* House, *supra* note 63, at 31. *But see* Natalie Jacewicz, *Does a Psychopath Who Kills Get to Use the Insanity Defense?*, NAT'L PUB. RADIO (Aug. 3, 2016), https://www.npr.org/sections/health-shots/2016/08/03/486669552 [https://perma.cc/2Q9K-TFWZ] [hereinafter *Does a Psychopath*] ("[F]acilities sometimes make release decisions based too much on whether patients are currently stable mentally, rather than on long-term risks they pose.").

[98] Perlin, *supra* note 11, at 715–16.

[99] *Id.* ("Contrary to the prevailing stereotype, malingering among insanity defendants is statistically low and is fairly easy to discover. In fact, the empirical evidence shows that it is much more likely that seriously mentally disabled criminal defendants will feign *sanity* in an effort to avoid being seen as mentally ill . . . .") (emphasis added) (footnotes omitted).

public perception that mental health experts tend to disagree among themselves is perpetuated by the significant media attention garnered by the unusual and rare contested case.[100] For the vast majority of cases, experts for both prosecution and defense are in agreement regarding the psychiatric diagnosis of the defendant.[101]

The insanity defense has undergone both substantive and procedural modifications over the ages, but any parallels toward medical science and psychological understanding have been accompanied by regression in the doctrine following unpopular verdicts in highly publicized cases.[102] While scholars, legislators, and judges acknowledge the need for criminal law to take psychological and psychiatric learnings into account, sensationalized trials consistently promote the widespread myths about the insanity defense.[103] The media feeds into public misconceptions regarding the insanity defense and the link between mental illness and criminality as a whole.[104] Highly publicized disputes by experts, such as in the *Hinckley* trial, only aid in spreading the myth and public skepticism regarding psychiatrists' ability to make trustworthy and reasoned judgments in these cases.[105] The public is thus led to the conclusion that the insanity defense should not be used, and this impetus encourages lawmakers to narrow the defense.[106] While both law and science value the testing of hypotheses and empirical results, data relevant to insanity defense jurisprudence is "ultimately irrelevant to legal decision-makers."[107] In a very significant way, showing data to legislatures means nothing because of these persistent publicly held beliefs that ultimately affect the narrowing of the defense.[108]

The public's misunderstanding of the insanity defense can also

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[100] Fitch & Steinberg, *supra* note 12, at 19 (showing how media attention to contested cases can lead "to the public perception that mental health experts generally disagree and that 'insanity' trials regularly entail a battle of the experts.").

[101] *Id.* ("In the vast majority of cases . . . verdicts of not criminally responsible are uncontested.").

[102] Perlin, *supra* note 11, at 624–25 ("For every insanity defense 'refinement' that paralleled greater comprehension of human behavior, there has been a concomitant regression as a result of a highly-publicized case bringing about an unpopular verdict.").

[103] *See id.* at 613 (Sensationalized trials "reflect [society's] basic dissatisfaction with the perceived incompatibility of the due process and crime-control models of criminal law, and with the notion of psychiatric excuses allowing a 'guilty' defendant to 'beat the rap' and escape punishment.") (footnotes omitted).

[104] *See* Kachulis, *supra* note 12, at 254–55 ("[W]hen [the media] does report on the insanity defense, messages and narratives are sensationalized, with portrayals of defendants as dangerous and deserving of punishment . . . . These sensationalized portrayals of insanity defense cases foster the public's belief that the insanity defense allows defendants to get off easy or puts dangerous people back on the streets.") (footnote omitted).

[105] Perlin, *supra* note 11, at 652–53.

[106] *See* Kachulis, *supra* note 12, at 255; Perlin *supra* note 11, at 606–07.

[107] Perlin, *supra* note 11, at 664.

[108] *See id.* at 606–07. Insanity defense jury cases are incredibly difficult to win even with a lot of data. Interview with Dr. Flores, *supra* note 49.

severely impact mentally ill individuals during trial.[109] There is strong juror bias surrounding the insanity defense from both common public misconceptions regarding the defense, and individual sentiments about retribution occurring independently from any action of defense attorneys.[110] It can be extremely difficult to convince a jury of people, or a judge, that an individual did not know what they were doing was wrong simply because the defense criteria are so stringent.[111] The legal definition of insanity varies between jurisdictions and this variability influences whether a defendant raises an insanity defense; studies have shown that juries may be more willing to convict if the jurisdiction holds a stricter definition of insanity.[112] Studies show that jurors misunderstand the impact of a NGRI verdict.[113] In fact, a study from 2005 found that only fifty-five percent of jurors in their sample correctly identified the legal definition of NGRI.[114] In a 2012 study, fifty-four percent of jurors incorrectly believed that a defendant convicted of the crime would be sent to a psychiatric hospital instead of prison.[115] In the same study, more than half of the participants who returned a guilty verdict falsely believed the defendant would be released from custody upon a NGRI verdict instead of being committed to a psychiatric hospital.[116]

Public distrust of the insanity defense, along with controversial insanity trials with extensive media attention, helped create what many jurisdictions refer to as the "guilty but mentally ill" verdict (GBMI).[117] A defendant given this verdict receives the same sentence they would have if found guilty.[118] Critically, the jury can misunderstand the impact of this sentence.[119] An individual deemed GBMI only receives the mental health care "available to any inmate."[120] Therefore, GBMI verdicts do not give any additional

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[109] Adjorlolo, *supra* note 54, at 4 (based on a study conducted by Sloat and Frierson in 2005, with a sample of ninety-six jurors).

[110] *See* Kachulis, *supra* note 12, at 253 ("Multiple studies have concluded that strong juror biases exist during trials when the insanity defense is used."); Perlin, *supra* note 11, at 653–55.

[111] Interview with Dr. Flores, *supra* note 49.

[112] Natalie Jacewicz, *'Guilty but Mentally Ill' Doesn't Protect Against Harsh Sentences*, NAT'L PUB. RADIO, (Aug. 2, 2016), https://www.npr.org/sections/health-shots/2016/08/02/486632201/guilty-but-mentally-ill-doesnt-protect-against-harsh-sentences [https://perma.cc/4S3L-NYCK] [hereinafter *Guilty but Mentally Ill*].

[113] Adjorlolo, *supra* note 54, at 4.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] Jurisdictions use different terms that all equate to "guilty but mentally ill" to describe the potential verdict when a defendant successfully pleads insanity. Roberson & Smothermon, *supra* note 14, at 2350–51; Fischer, *supra* note 1.

[118] Roberson & Smothermon, *supra* note 14, at 2351.

[119] Bard, *supra* note 22, at 38 ("[J]uries may give a GBMI verdict with the 'false belief' that the defendants will 'actually receive treatment.'").

[120] *Id.* at 39–40 ("[I]t does not appear that GBMI defendants receive anything but the inadequate care available to any inmate.").

assistance to the defendant, and in fact may parole efforts.[121] Even though GBMI offers little to no protection for the mentally ill defendants, jurors tend to favor this verdict if available, possibly believing it is a kind of middle ground.[122] Unfortunately, this is not true.[123]

Even when a jury does fully understand the verdict, it can be very hard for courts and juries to trust evidence of mental illness.[124] Studies reflect that the public has a "common sense" feeling that experts on the psychologically imprecise and invisible branch of study are not as trustworthy as experts from fields with more "objective" data.[125] Many people, including jurors, have difficulty conceptualizing a person being so mentally ill that they lack the ability to reason or understand what they are doing.[126] This may be particularly true because it is especially hard for a jury to understand a person's inability to differentiate right from wrong when it seems as though their actions have some logic.[127] Evidence involving mental illness tends to be viewed with more hostility than testimony for even a difficult-to-prove physical disease.[128] While many things are still unknown in the field of medicine—many inferences and judgement calls can be made in any medical case[129]—differences of medical opinion are allowed in the courtroom, and medicine is still accepted by the law.[130] Comparatively, the biases of mental illness stigma and deeply held stereotypes severely impact society's acceptance and perception of mental health experts, evidence, and the mentally ill.[131]

B. There Is No System Protecting the Mentally Ill

While it may be constitutional for states to abolish the insanity defense,

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[121] Interview with Dr. Flores, *supra* note 49.
[122] *Guilty but Mentally Ill*, *supra* note 112.
[123] *Id.*
[124] Faith Hayman, *Mental Illness and the Credibility Crucible,* 74 ADVOC. 197, 201 (2016) (Can.) ("The reaction of most people who encounter mental illness is unease or instinctive rejection, even moral judgment.").
[125] Perlin, *supra* note 11, at 680–81.
[126] *Cf.* Sarah Lustbader, *A Precarious Time for the Insanity Defense,* THE APPEAL (Feb. 25, 2020), https://theappeal.org/a-precarious-time-for-the-insanity-defense/ [https://perma.cc/WR2T-RN29] ("One of the first things law students learn in criminal law class is that a person whose body is used as a projectile by another person to cause harm cannot be criminally prosecuted. This seems intuitive to most students. But somehow, if a person's body is controlled by a mentally ill brain, not another person, it no longer makes sense."); *see* Adjorlolo, *supra* note 54, at 3–4.
[127] Interview with Dr. Flores, *supra* note 49.
[128] Perlin, *supra* note 11, at 723.
[129] Interview with Dr. Stinson, *supra* note 53.
[130] *Id.* Conversely, psychology is considered a "soft science," and because experts are not able to take a picture of the brain and show a jury what is going on, people are skeptical. *E.g.*, *id.*
[131] *Id.*

it is terrible public policy, with definitive consequences.[132] Kansas, for example, does not have an insanity defense and instead requires evidence of mental health to disprove the mens rea component at trial.[133] There is a key difference, however, between an individual's ability to determine right from wrong, and an individual's criminal intent.[134] In other words, mens rea and insanity are very different: mens rea evidence serves only to disprove an element of the prima facie case, while a true insanity defense operates as an excuse regardless of the prima facie elements present.[135] Likewise, a claim of non-responsibility is different from a claim of no intent.[136] An individual can have the full intent to murder another, and therefore have the requisite intent, but be so deeply mentally disorganized that they should not be held criminally responsible for their actions, even with proof of that intent.[137] Ultimately, mens rea is not an accurate measure of rationality.[138] Thus, using mens rea alone as the test for whether an individual can claim insanity is a fundamentally insufficient defense for this vulnerable population.[139]

The ability to abolish the defense is a symptom of the broader mental health crisis in the criminal justice system.[140] There used to be a whole system of psychiatric hospitals set up to care for those with severe mental illness.[141] The 1960s showed a time of dramatic change in the treatment of mental illness when a series of exposés highlighted the inhumane conditions in many psychiatric hospitals, and then-President John F. Kennedy led mass deinstitutionalization of the nation in response to the national outcry.[142] President Kennedy promised deinstitutionalization as the return of freedom, liberty, and humane treatment to the mentally ill, while

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[132] Joseph Langerman, Note, *The Montwheeler Effect: Examining the Personality Disorder Exclusion in Oregon's Insanity Defense*, 22 LEWIS & CLARK L. REV. 1027, 1057 (2018).

[133] *See* Kahler v. Kansas, 140 S. Ct. 1021, 1023 (2020).

[134] Joshua Dressler, *Kahler v. Kansas: Ask the Wrong Question, You Get the Wrong Answer*, 18 OHIO ST. J. CRIM. L. 409, 418 (2020) ("Indeed, to suggest that a defendant who introduces evidence in order to raise a reasonable doubt regarding one of the prima facie elements of the crime is thereby raising a 'defense' is to blur the distinction between asserting an affirmative defense and merely casting doubt on the government's case-in-chief."). *But cf.*, *Kahler*, 140 S. Ct. at 1034 (reasoning that an inability to know right from wrong indicates lack of criminal intent rather than insanity).

[135] *See* Stephen J. Morse & Morris B. Hoffman, *The Uneasy Entente Between Legal Insanity and Mens Rea: Beyond Clark v. Arizona*, 97 J. CRIM. L. & CRIMINOLOGY 1071, 1074–75 (2007).

[136] *Id.*

[137] *See id.* at 1082–91.

[138] *See* Erickson, *supra* note 11 ("To be rational is to have reasons based on accurate perceptions and the ability to form sound judgments.").

[139] *See id.* ("Crazy reasons are not just bad reasons; they are reasons that arise from fundamental defects of the mind.").

[140] Fischer, *supra* note 1.

[141] Lustbader, *supra* note 126.

[142] *Id.* ("Deinstitutionalization decreased the population of people in state psychiatric hospitals from 559,000 in 1955 to 154,000 in 1980. There are now fewer than 43,000."); Fischer, *supra* note 1.

incorporating more effective treatments in the community.[143] However, President Kennedy's hope that mentally ill individuals could be cared for by their community failed to materialize in the subsequent years and decades.[144] Deinstitutionalization failed because community care centers never received funding and supportive housing failed to meet the supply demands.[145] Since then, the cost of such services and psychiatric care has only grown.[146] The mass deinstitutionalization of the nation created new problems with how the nation treats the mentally ill, and the current health care administration and organization in the United States is inadequate to fully deal with and meet the needs of the mentally ill.[147]

Notably, the only individuals in the United States with a right to health care are those in prison.[148] Prisons are the biggest providers of mental health services in this country.[149] The -prevalence of the mentally ill in prisons has to do with how the United States deals with the mentally ill and the fundamental failure to provide adequate mental health resources that would assist those with severe mental illness.[150] Additionally, the prison environment is retributive in nature, and about as far from a therapeutic environment as possible.[151] Contrary to popular belief, mental health treatment in prisons does not even have some minimal standard to meet.[152] The majority of prison inmates have some kind of mental illness, but mental

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[143] Interview with Dr. Stinson, *supra* note 53. The community mental health systems never received funding, and these people "saved" by deinstitutionalization ended up without support. *Id.* Now, we fund the Department of Rehabilitations and Corrections more than any other agency. *Id.*

[144] Lustbader, *supra* note 126 ("Kennedy vowed that the 'cold mercy of custodial isolation,' would be 'supplanted by the open warmth of community concern and capability,' but the second part of that vision never materialized."); Fischer, *supra* note 1 ("Part of the problem is that the nation's mental health care system is stuck in a sort of limbo.").

[145] Patty Mulcahy, *As a White Woman With Untreated Schizophrenia, I Was Never Deemed a Threat. Many Aren't as Fortunate*, WBUR, (Dec. 7, 2020), https://amp.wbur.org/cognoscenti/2020/12/07/mental-illness-schizophrenia-health-care-race-patty-mulcahy [https://perma.cc/DMA2-YM68].

[146] *Id.*

[147] Bard, *supra* note 22, at 2–3.

[148] *Id.* at 14–15 ("In what strikes most people as unfair, under our current system the only people with a right to health care are those imprisoned by the state. As a result, the mentally ill are guaranteed treatment only when they have brought themselves to the attention of the criminal justice system by committing a crime, or the civil justice system by exhibiting striking, public, dangerous behavior.") (footnote omitted).

[149] Interview with Dr. Stinson, *supra* note 53. The promise of deinstitutionalization was just the promise of reinstitutionalization. *See, e.g.*, *id.*

[150] Bard, *supra* note 22, at 3.

[151] Lustbader, *supra* note 126 ("What can putting that person in prison possibly do? It will, of course, increase the chances that corrections officers, trained to get prisoners to submit to authority rather than treat mental illness, will beat my client, throw him into solitary confinement, or worse. But will it engender accountability? Safety? Justice?").

[152] Hooper, *supra* note 23, at 413–14.

health care in prisons is critically underfunded.[153] Putting the severely mentally ill in prison can do little to help that individual or achieve the goals society intends with the use of sentencing.[154] In fact, newer research suggests that punishment actually *increases* violence, while the traditional understanding is that punishment through prison acts as a deterrent to further crime.[155]

Those who struggle with mental illness also face the enormous societal adversary of stigma.[156] This stigma contributes to the severe misunderstanding of the mentally ill, including a prominent misconception that those with mental illness are dangerous or even to blame for their mental condition.[157] This makes assessing mental illness in court much more difficult.[158] The court may also struggle with mental illness because all "rights and remedies are fashioned with the reasonable person in mind," and because our laws expect persons to act in a reasonable way to promote a civilized society.[159] Debilitating mental illness, by its very nature, disrupts the individual's ability to participate in society as a socially reasonable person.[160]

Amplifying the uncertainty and misunderstandings regarding mental

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[153] *Id.* at 412–14.

[154] *See* Lustbader, *supra* note 126 (questioning if putting the mentally ill in prison actually provides accountability, safety, and justice).

[155] James Gilligan, *Why We Should Universalize the Insanity Defense and Replace Punishment with Therapy and Education*, 46 AGGRESSION & VIOLENT BEHAV. 225, 229 (2019) ("[I]t would seem that if we set out to create the conditions that would produce the maximal amount of violence, we could hardly do better than to create the punitive criminal justice system that we have established in the U.S.").

[156] Anna S.P. Wong, *Mental Illness: Let's See It as a Strength Not a Liability*, 77 ADVOC. 523, 527 (2019) (Stigma "is arguably the greatest adversary that people with mental illness are up against."); Vickers, *supra* note 19, at 56 ("Despite medical advances, our society remains ignorant of mental illnesses. This is a result of stigma and prejudice . . . . Many people fear, ridicule, and discriminate against what they do not understand.").

[157] *Id.* (People with mental illness "are handicapped by mainstream endorsement of negative stereotypes and prejudicial attitudes toward mental illness . . . ."); Patrick W. Corrigan, Amy C. Watson, Amy C. Warpinski & Gabriela Gracia , *Implications of Educating the Public on Mental Illness, Violence, and Stigma*, 55 PSYCHIATRIC SERVS. 577, 577 (2004) ("Results of a nationwide probability survey showed that 75 percent of the public view persons with mental illness as dangerous."); Patrick W. Corrigan & Amy C. Watson, *At Issue: Stop the Stigma: Call Mental Illness a Brain Disease*, 30 SCHIZOPHRENIA BULL. 477, 478 (2004) ("Many studies have found that the public views people with mental illness as responsible for their disorders: because of poor character or moral backbone, people with disorders like schizophrenia and major depression choose to have their mental illness and are to blame for the symptoms and the disabilities that result.").

[158] *See* Hayman, *supra* note 124, at 197.

[159] *Id.* at 199.

[160] *Id.* at 200 ("Mental illness comes in many forms and cannot be treated as a uniform entity, but in some way or other, if mental illness is disabling, it will likely startle and disrupt the paradigm of the reasonable person.").

illness is the ambiguity of diagnosis.[161] Determining mental status and appreciation of wrongfulness is difficult and may lead to conflicting diagnoses such as in the case of *Clark v. Arizona*, where psychiatrists from each side came to different conclusions.[162] Despite the uncertainty of psychological diagnosis, forensic psychologists are a necessity in cases of an insanity defense or for those with severe mental illness. The field of forensic psychology is the intersection of psychology with the court system.[163] Forensic psychology experts are different from other psychologists and should be used specifically in these kinds of trials since they are specially trained to consider information relevant to law, like potential secondary gain for an individual claiming mental illness.[164] Forensic psychology experts and psychiatric experts can assess the dangerousness of an individual.[165] Forensic psychologists are also trained on how to testify so they can show their knowledge in a clear and concise way for the trier of fact.[166]

Insight into the fields of psychology and psychiatry could provide invaluable assistance to the legal profession to help jurors and judges alike obtain a more complete understanding of mental illness. Historically, the fields of law and psychology have not worked with each other.[167] Law and psychology are fields with different goals, an express reason why there is so much policy conflict between them.[168] The existing conflict arises from the legal system's fear that any reliance on the aid of psychiatrists will result in too much power over legal decision-making being given to the expert rather than the decision-maker.[169] The law is prone to considering psychology experts as unable to conceptualize the legal concept of criminal responsibility given the distance between the field of criminal law and ideology of treatment.[170] Mental health law would seemingly be the subdiscipline most likely to encourage interdisciplinary work. However,

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[161] Kahler v. Kansas, 140 S. Ct. 1021, 1037 (2020) ("As the American Psychiatric Association once noted, 'insanity is a matter of some uncertainty.'"). The Diagnostic and Statistical Manual of Mental Disorders itself is merely descriptive, and as such can be unreliable as to underlying causes of behavior. BRUCE D. PERRY & MAIA SZALAVITZ, THE BOY WHO WAS RAISED AS A DOG 286 (3d ed. 2017).

[162] Clark v. Arizona, 548 U.S. 735, 745 (2006).

[163] Interview with Dr. Flores, *supra* note 49.

[164] *Id.* For example, forensic psychologists are specially trained to spot malingering. *Id.*

[165] *Id.*

[166] *Id.*

[167] *See Clark*, 548 U.S. at 777–78.

[168] Asokan, *supra* note 24, at 197 ("Law is concerned with blameworthiness and medicine is concerned with treatment. They are not identical with each other because their 'concerns' are different."). It should be noted that psychology contributes to both the social sciences and the field of medicine. *Compare* Christopher Suhler & Patricia Churchland, *Psychology and Medical Decision-Making*, 9 AM. J. BIOETHICS 79 (2009) *with* Robert Nisbet & Liah Greenfeld, *Social Science*, ENCYC. BRITANNICA (Mar. 25, 2021), https://www.britannica.com/topic/social-science [https://perma.cc/K6NX-4NMW].

[169] Perlin, *supra* note 11, at 674.

[170] *See Clark*, 548 U.S. at 777.

mental health law grew out of the antipsychiatry movement and, as such, is just as skeptical of experts as is the rest of the legal field.[171] The legal system remains dismissive of psychology as a whole.[172]

In return, the law has been criticized as cruel and ignorant for not keeping pace with scientific and medical understanding of the times.[173] Psychiatry and psychology, unlike the legal field with its veneration of bright-line rules, exists easily in a state of internal disagreement, given that experts can never definitively agree on the meanings of terms like "mental illness" or "responsibility."[174] Finding middle ground between psychology and the law may be a bit like "putting a square peg in a round hole"; the law is ultimately binary while psychology appreciates divergence.[175] While these fields have traditionally not worked well together, a renewed understanding of psychological concepts may help provide insight into both the underlying philosophy of the insanity defense, and also how to make corrections to the currently existing problems surrounding the defense.

IV. PERSONALITY DISORDERS AND THE INSANITY DEFENSE

For purposes of the insanity defense, personality disorders do not, and should not, qualify as severe mental illness.[176] The reluctance of the United States to mitigate responsibility for those with personality disorders is not unique.[177] The primary distinction between personality disorders and mental illness is that mental illness is a mental process that can lead to a sudden change, while personality is a long-term psychological way of functioning.[178]

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[171] Wexler, *supra* note 56, at 31 ("[M]odern mental health law, as part of the civil liberties revolution, was conceived to correct the abusive exercise of state psychiatric power. Accordingly, mental health law has in large measure been part of the antipsychiatry movement, mistrustful of the mental health disciplines and of their practitioners.").

[172] *See* Perlin, *supra* note 11, at 602–03.

[173] Kent Scheidegger, *The Relation of Insanity to Crime,* CRIME & CONSEQUENCES BLOG (July 16, 2019), http://www.crimeandconsequences.com/crimblog/2019/07/the-relation-of-insanity-to-cr.html [https://perma.cc/EH6Z-DTM2] ("Cruelty, ignorance, prejudice, and the like, are freely ascribed to the law and to those who administer it, on the grounds that it is said not to keep pace with the discoveries of science and to deny facts medically ascertained.").

[174] Perlin, *supra* note 11, at 677.

[175] *See* Michael Pierce, Case Comment, Commonwealth v. Shin*, 86 Mass. App. Ct. 381 (2014),* 97 MASS. L. REV. 15, 18 (2015).

[176] *See* Fischer, *supra* note 1. A personality disorder is not a mental illness. *Id. But see* Langerman, *supra* note 132, at 1049–50, 1059; Perlin, *supra* note 11, at 664 n.290.

[177] Sparr, *supra* note 61, at 173 ("[M]ost other national jurisdictions have been reluctant to allow mitigation of responsibility for individuals with a diagnosis of APD, sociopathy, or psychopathy.").

[178] William Glaser, *Morality and Medicine: The Law Reform Commission's Concept of 'Mental Illness' Provides a Rationale for Continued Indefinite Detention of 'Dangerous' Offenders*, 15 LEGAL SERV. BULL. 114, 115 (1990) ("The key distinction which needs to be

Personality disorders are chronic through time, and pervasive across different contexts.[179] Those with personality disorders are excluded because they, by their disorder's very definition, do not qualify under the insanity test.[180] A person with a personality disorder is able to differentiate right from wrong; no mental deficit is making them lose touch with reality, but they may behave in ways society deems unacceptable anyway.[181] A majority of those incarcerated for violent crimes exhibit a personality disorder.[182] While personality disorders cannot be used in the insanity defense, they can be used to mitigate any potential sentence.[183]

Personality disorders are relatively common among Americans, with at least one serious personality disorder found in an estimated ten to twenty percent of the population.[184] An individual's personality traits only constitute a personality disorder when they "are inflexible and maladaptive and cause significant functional impairment."[185] Personality disorders are marked by significant impairments in interpersonal relationships and are diagnosed according to the criteria in the Diagnostic and Statistical Manual of Mental Disorders (DSM-V for the fifth edition, DSM generally).[186] The DSM, currently in its fifth edition, is the "Bible" for those in mental health.[187] Under the DSM-V, personality disorders are organized into three distinct clusters.[188] Given the wide variety of personality disorders, this Note focuses on the effects of antisocial personality disorder (APD). APD falls under

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kept in mind is between *personality* (including 'disordered' personality), i.e. the way one has psychologically functioned since childhood, and *illness*, i.e. a process which can lead to a dramatic and often sudden change on one's psychological functioning.").

[179] Interview with Dr. Stinson, *supra* note 53. Personality cannot be changed because personality is an untreatable, unchangeable state of existence. Interview with Dr. Flores, *supra* note 49.

[180] *Insanity Defense: Psychopaths and Sociopaths*, LAW LIBR. – AM. L. & LEGAL INFO., https://law.jrank.org/pages/7670/Insanity-Defense-Psychopaths-Sociopaths.html [https://perma.cc/H3Q4-LWEW]; *see* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STAT. MANUAL OF MENTAL DISORDERS 645 (5th ed. 2013) [hereinafter DSM-V].

[181] Interview with Dr. Flores, *supra* note 49.

[182] Michael H. Stone, *Violent Crimes and Their Relationship to Personality Disorders*, 1 PERSONALITY AND MENTAL HEALTH 138, 138 (2007).

[183] Interview with Dr. Flores, *supra* note 49.

[184] Anthony Zorich, *Disorder in Family Court: Addressing Personality Disorders in High-Conflict Family Law Cases*, 70 NWLAWYER 34, 34 (2016). Every human being has a personality, and so disorders related to personality are relatively common among the general population. Sparr, *supra* note 61, at 169.

[185] DSM-V, *supra* note 180, at 647.

[186] Zorich, *supra* note 184, at 34; Elizabeth Wittenberg, *Are Your Clients Making You Crazy?: How to Avoid Drama with Maddening Clients*, 68 BENCH & B. MINN. 20, 21 (2011) ("Personality disorders are defined as enduring patterns of behavior and subjective experience that affect a person's thinking, feeling, relationships, and impulsiveness. Often the affected person sees these patterns as perfectly reasonable and appropriate despite their dramatic, negative impact on her daily life and the lives of those around her.").

[187] Perry & Szalavitz, *supra* note 161, at 287.

[188] Zorich, *supra* note 184, at 34; *see* DSM-V, *supra* note 180, at 649–82.

Cluster B disorders.[189] While the DSM-V is used to diagnose, it serves only as a descriptive source: it can classify and categorize individuals, but only on symptoms, not on underlying physiological causes of those symptoms.[190] Thus, while the DSM is a great tool for categorization, it has limits on its usefulness.[191] The specific way APD is classified in the DSM may not matter for efforts to exclude it from the insanity defense; personality disorders are excluded by the Model Penal Code test through a description of behavior instead of diagnostic category.[192]

While more personality disorders than APD are overrepresented in prison,[193] this Note focuses on the lessons that can be learned from APD in particular.[194] Commonly known as psychopathy or sociopathy, APD is characterized as a kind of "moral insanity."[195] The Mayo Clinic defines APD as "a mental disorder in which a person consistently shows no regard for right and wrong and ignores the rights and feelings of others."[196] A typical prerequisite for a diagnosis of APD is a showing of conduct disorder before the age of fifteen.[197] This may mean that an individual with APD has behaved in a socially unacceptable way for a significant portion of their life.[198] Those with APD suffer from a lack of compassion; while they can imagine the experiences of another, they do not care about that person, only how other

[189] *See* DSM-V, *supra* note 180, at 659–66.

[190] Perry & Szalavitz, *supra* note 161, at 286.

[191] *Id.* at 287; *see also* DSM-V, *supra* note 180, at 25 ("[T]he use of DSM-5 should be informed by an awareness of the risks and limitations of its use in forensic settings.").

[192] Slovenko, *supra* note 17, at 183.

[193] Randy A. Sansone & Lori A. Sansone, *Borderline Personality and Criminality*, 6 PSYCHIATRY (EDGMONT) 16, 17 (2009); *see* Stone, *supra* note 182, at 138 ("While admixtures of traits from several disorders are common among violent offenders, certain ones are likely to be the main disorder: antisocial PD, Psychopathy, Sadistic PD, Paranoid PD and NPD."); Helen M. Farrell, *Dissociative Identity Disorder: No Excuse for Criminal Activity*, 10 CURRENT PSYCHIATRY, at 33–34, 39–40 (2011).

[194] Other personality disorders are not so interrelated with violence and crime as APD and may even be reversible over time. *E.g.*, NAT'L INST. OF MENTAL HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVS., BORDERLINE PERSONALITY DISORDER 4, https://infocenter.nimh.nih.gov/pubstatic/QF%2017-4928/QF%2017-4928.pdf [https://perma.cc/B9VZ-QH2J] [hereinafter NIH PUBLICATION NO. QF 17-4928] ("Borderline personality disorder has historically been viewed as difficult to treat. But with newer, evidence-based treatment, many people with borderline personality disorder experience fewer and less severe symptoms, improved functioning . . . .").

[195] Slovenko, *supra* note 17, at 184 ("In psychiatric circles, the psychopath is one who is morally insane—that is, one without a sense of morals, an unprincipled person, a person whose conscience is full of holes. There is a lack of guilt or remorse, an absence of anxiety, and a failure to learn by experience.").

[196] *Antisocial Personality Disorder*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/antisocial-personality-disorder/symptoms-causes/syc-20353928 [https://perma.cc/CP2J-3DAM] [hereinafter Mayo Clinic].

[197] *Id.*

[198] *See id.*

people will affect them.[199] Individuals with APD traditionally have a disregard for social norms with little, if any, regard for right or wrong.[200] Perhaps because of this, APD is associated with crime.[201] There is no treatment for APD, and the cause remains unknown.[202] More recent developmental psychology theories describe that while APD may have genetic factors, development of the disorder probably has a lot more to do with early stages of life.[203] Dr. Bruce Perry, an American psychiatrist and leading researcher and clinician for the development of children with trauma, describes that early childhood experiences are critical for developing empathy.[204] Dr. Perry describes an individual with APD as "emotionally frozen" and "emotionally blind," a result of childhood neglect leaving them incapable of feeling empathy.[205] In popular media, a person with APD is described as a "psychopath."[206] That term is no longer used in the DSM.[207] An individual with psychopathic traits necessarily has the characteristics of antisocial personality disorder.[208] However, not all individuals with antisocial personality disorders are psychopathic.[209]

Consider the following case. In December 2012, Jerrod Murray killed Generro Sanchez.[210] Murray composed and implemented a detailed plan to execute a fellow college classmate, and he selected Sanchez at random.[211]

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[199] Perry & Szalavitz, *supra* note 161, at 127–28 (describing those with APD as being "emotionally frozen, in an ice that distorts not only their own feelings, but also how they see the feelings of others and then respond to them").

[200] *See* Zorich, *supra* note 184, at 35 (Those with APD may "seek to antagonize, manipulate, or deceive others.").

[201] *Id.* ("APD has shown to be more common among men, and is closely associated with crime."); Anne G. Crocker, Kim Mueser, Robert Drake, Robin Clark, Gregory McHugo & Theimann Ackerson, *Antisocial Personality, Psychopathy, and Violence in Persons with Dual Disorders: A Longitudinal Analysis*, 32 CRIM. JUST. & BEHAV. 452, 455 (2005) ("Psychopathy is an important predictor of future criminal behavior, particularly violent behavior."); *Does a Psychopath*, *supra* note 97 ("Some of the country's more notorious criminals, including Ted Bundy, who raped and killed dozens of women in the 1970s, and Jeffrey Dahmer, who murdered and ate almost 20 boys in Wisconsin between 1978 and 1991, have been hypothesized to have had antisocial personality disorder."). Upon the very first iteration of the DSM, mental hospital superintendents worried that listing sociopathic personality (currently known as APD) as a mental illness would send dangerous criminals to hospitals rather than prisons. Slovenko, *supra* note 17, at 183.

[202] MAYO CLINIC, *supra* note 196.

[203] Perry & Szalavitz, *supra* note 161, at 115–16, 119–24.

[204] *Id.*

[205] *Id.* at 127–28, 134.

[206] *See, e.g.*, Fischer, *supra* note 1 (using "psychopathy" as a descriptor for APD).

[207] *See generally* DSM-V, *supra* note 180.

[208] Interview with Dr. Stinson, *supra* note 53.

[209] *Id.* A different question exists as to whether those with personality disorders are mentally ill. *E.g.*, *id.* (noting that personality disorders are in the DSM, and thus categorized as a mental disorder).

[210] Roberson & Smothermon, *supra* note 14, at 2349.

[211] *Id.*

Murray showed no remorse or emotion during his confession.[212] Despite his calculated plan, the court found Murray not guilty by reason of insanity and sent him to a psychiatric hospital where it was determined a mere thirty-five days later that he could be released.[213] The Murray case spurred changes to Oklahoma's insanity defense laws and modified the assessment that would have let him free from the hospital.[214]

The fact that an individual in Murray's position was able to get a NGRI verdict speaks to the potential problems in the insanity tests for each and every jurisdiction around the country. The case of Jerrod Murray provides a clear picture of why a person with APD should be excluded from the insanity defense.[215] Continued insight into psychology can help identify a more concrete standard. Using APD as a benchmark for who should not be admitted helps to define who *should* be able to use the defense.

V. THE SOLUTION: SAVING THE INSANITY DEFENSE

The mental health system is broken and a profound adjustment to the current system is required.[216] It needs to be easier for individuals to be found NGRI.[217] Criminal responsibility and the insanity doctrine reflect the evolution of criminal law, which necessitates a complicated balancing of social policy, moral culpability, and scientific understanding.[218] The law itself can be a force that promotes therapeutic consequences.[219] Uncertainty and fear are currently undermining the use of the insanity defense, leading to an increased public policy effort to continually narrow the defense.[220] Controversy over the defense obscures the deeper and growing crisis of

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[212] *Id.*; Crime Vault, *Murder Confession: Jerrod Murray | A Well-Mannered Murderer*, YOUTUBE (Apr. 5, 2018), https://www.youtube.com/watch?v=ic7pNnL4ZCo [https://perma.cc/SRZ3-8UCM].

[213] Roberson & Smothermon, *supra* note 14, at 2350.

[214] *Id.* ("In the new law, the word 'presently' was stricken from the definitions, allowing the evaluator to consider past history in making his determination.").

[215] Anthony Montwheeler also demonstrated symptoms of antisocial personality disorder. Fischer, *supra* note 1 (noting "[a]nti-social personality disorders, or psychopathy . . . do not meet the threshold of the insanity defense" and that "[p]ersonality disorders are excluded" because "'that's who the prison system is for.'").

[216] Bard, *supra* note 22, at 9 ("The country's failure to provide adequate mental health treatment should be seen as a massive failure of public health policy that has resulted in people with mental illness being incarcerated in settings that violate fundamental fairness as well as their Eighth Amendment right to receive adequate health care in prison."); Interview with Dr. Flores, *supra* note 49; Interview with Dr. Stinson, *supra* note 53.

[217] Interview with Dr. Flores, *supra* note 49. Increasing the allowance of NGRI results increases the institutional help given to the severely mentally ill when they commit crimes. *See id.*

[218] Kahler v. Kansas, 140 S. Ct. 1021, 1028, 1036 (2020).

[219] *See* Wexler, *supra* note 56, at 32 ("Therapeutic jurisprudence is the study of the role of law as a therapeutic agent. It looks at the law as a social force that, like it or not, may produce therapeutic or antitherapeutic consequences.").

[220] *See* Perlin, *supra* note 11, at 624–25 (noting recurrent constriction of the insanity defense).

mental illness within the criminal justice system.[221] Without a clear definition and target recognizing the background and principles of the defense, these laws will still allow individuals through who should not receive the defense, while excluding many who desperately need hospitalization instead of prison.[222] A properly organized defense can cover the appropriate individuals as is necessary for society without overly extending the defense.[223]

Writing a cogent and workable insanity defense test can be very challenging; it must be simple enough for a jury to understand, and yet must be workable with current science and the passage of time.[224] As Supreme Court Justice Kagan noted in the recent *Kahler v. Kansas* opinion in March 2020, writing an accurate insanity defense law "involves choosing among theories of moral and legal culpability," which are also comprehensively full of controversy.[225] However, having an inaccurate insanity test is better than nothing at all, as it allows those defendants who commit crimes in the midst of their mental illness to obtain needed mental health care, even if the treatment is imposed involuntarily.[226]

First and foremost, the existence of the insanity defense is crucial for those with debilitating mental conditions, and society as a whole. A lack of a NGRI defense is thus an injustice to this population and is continually harmful to broader society.[227] A better understanding of psychology can outline the basic principles that should be required for every insanity test. Finally, education and increased community support are requisites for making any kind of positive change for the mentally ill in the United States.

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[221] Fischer, *supra* note 1 ("According to the most recent estimates, 37 percent of prisoners and 44 percent of jail inmates have been told by a mental health professional at some point in their lives that they suffer from a mental disorder.").

[222] Who should receive the defense is an allocation of resources question; while personality disorders can be classified as another type of mental illness, personality disorders are commonly not responsive to treatment. *Compare* Langerman, *supra* note 132, at 1049–50, 1059 *and* Perlin, *supra* note 11, at 664 n.290 *with* Fischer, *supra* note 1 *and* Interview with Dr. Flores, *supra* note 49. Thus, institutionalization following a NGRI verdict is better spent on those who can receive treatment. *Cf.* Fischer, *supra* note 1 (arguing the prison system is for those with APD).

[223] Scheidegger, *supra* note 173 ("[T]he principle which they have laid down will be found, when properly understood and applied, to cover every case which ought to be covered by it.").

[224] Dale E. Bennett, *The Insanity Defense - A Perplexing Problem of Criminal Justice*, 16 LA. L. REV. 484, 484 (1956).

[225] Kahler v. Kansas, 140 S. Ct. 1021, 1037 (2020).

[226] Dressler, *supra* note 134, at 424 (noting that "by retaining an insanity defense, a [mentally ill individual] can potentially avoid a finding of moral responsibility and obtain needed mental health care.").

[227] *Cf.* Arthur J. Lurigio, Angie Rollins & John Fallon, *The Effects of Serious Mental Illness on Offender Reentry*, 68 FED. PROB. 45, 47–48 (2004) (implying consistent recidivism is counterproductive to the purposes behind sentencing).

A. The Insanity Defense Is a Necessity

The insanity defense is necessary for individuals with severe mental illness. The severely mentally ill represent a vulnerable population. These individuals are more likely to end up in prison, and once in prison are more likely to experience assault and abuse.[228] The NGRI defense makes sure that these individuals get the psychiatric care that they need—the kind of care that is not available in prison and is not adequately available in the community.[229] Having a stronger insanity defense can also help fix the mental health crisis in the criminal justice system: around seventy-seven percent of the 200,000 prior offenders with severe mental illnesses will be rearrested within five years for violent crimes.[230] Without this defense, the individuals with severe mental illness are locked up in prison without the proper care and then let out into the communities once their sentence is over to recommit these crimes.[231] Those with severe mental illness need help, not incarceration. Jail is not a therapeutic environment and can make symptoms worse.[232] The NGRI defense not only gets these individuals the care that they need in a hospitalized setting, but can also help the broader community by reducing recidivism.[233] Almost all kinds of mental illnesses are very treatable to the extent that an individual with severe mental illness who takes their medication and has their symptoms under control represents no greater threat to the community than anyone else.[234] The NGRI system can help these individuals get their symptoms under control and become one support in a broader system for this population. Even when those judged NGRI may be confined to a mental hospital for longer

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[228] *See* E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. CRIM. L. & CRIMINOLOGY 147, 150–51, 160 (2013) ("[J]ust as individuals with major mental disorders are vulnerable to victimization in the outside world, they are more susceptible than non-ill persons to physical and sexual assault in prison."); *Developments in the Law: The Law of Mental Illness*, 121 HARV. L. REV. 1114, 1145 (2008) [hereinafter *Developments*] (noting that "[t]he mentally ill often have a particularly difficult time coping with prison conditions and complying with regulations. In turn, many prison officials treat disordered behavior as disorderly behavior . . . .").

[229] *See, e.g.*, Adjorlolo, *supra* note 54, at 18 (reciting the adjunct treatments available for acquitees).

[230] Fischer, *supra* note 1; *see Developments*, *supra* note 228, at 1169.

[231] Interview with Dr. Flores, *supra* note 49.

[232] *Developments*, *supra* note 228, at 1145 (The disciplinary measures in prison may "exacerbate the illnesses contributing to the inmates' conduct."); Vickers, *supra* note 19, at 58–59 ("Time is of the essence in mental illness recovery—just as it is in cancer or heart disease. Incarcerating a child or adult for aggressive behavior or an act of bad judgment which is based in symptoms of mental illness . . . might lessen the chance for recovery and for a normal life upon completion of the rehabilitation and sentence.").

[233] *Cf.* Lurigio et al., *supra* note 227 (implying recidivism is bad for the community).

[234] Interview with Dr. Stinson, *supra* note 53. Providing mental health treatment has additional potential benefits for the mentally ill in prison who do not meet the NGRI defense threshold: Research suggests that providing psychiatric services to violent prison populations is enough to almost entirely reduce the crime within the prison. Gilligan, *supra* note 155, at 229.

(in some cases) than their alternative time of imprisonment, this may be an effective way to both protect the public and give the individual the care they need.[235]

Ultimately, the defense is needed to help these individuals cope with any additional stigma.[236] They already have to cope with the stigma that comes with being mentally ill;[237] adding the stigma of a criminal conviction can negatively affect their ability to retain any employment, housing, or public assistance that they may have otherwise been able to keep.[238] The insanity defense should also be treated as a real defense. Mentally ill individuals granted NGRI are susceptible to becoming political pawns when judges determine, due to their offense, that they should never get out of the psychiatric hospital.[239] The same would never occur with any other affirmative defense.[240]

Likewise, jurisdictions that do not offer NGRI are not fully protecting the mentally ill. Jurisdictions claiming proof of mens rea is sufficient for a finding of criminal responsibility ignore the defendant's capacity for limited rationality given their mental illness.[241] The ability to reason and understand reality are important to a mental health defense and should not be thus limited by intent.[242] Under the test in Kansas (and similarly for the other states with no NGRI defense), a defendant who intentionally commits an act against another cannot claim the defense even if their mental illness caused them to believe their actions were morally just.[243] The underlying

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[235] *See* Adjorlolo, *supra* note 54, at 7.

[236] *See* Wong, *supra* note 156, at 527; Hayman, *supra* note 124, at 197 ("There is little in the way of an analytical framework for assessing the evidence of plaintiffs advancing claims for psychological loss and thus their testimony in court remains confused and murky, caught in the strictures of the 'reasonable person' and mired in the stigma of mental illness.").

[237] *Stigma, Prejudice, and Discrimination Against People with Mental Illness*, AM. PSYCHIATRIC ASSOC., https://www.psychiatry.org/patients-families/stigma-and-discrimination#:~:text=Stigma%20and%20discrimination%20can%20contribute,diagnosed%20with%20severe%20mental%20illnesses [https://perma.cc/2DUU-DNQB] (determining the harmful effects of stigma may include "[f]ewer opportunities for work, school or social activities or trouble finding housing," among others).

[238] REBECCA VALLAS, MELISSA BOTEACH, RACHEL WEST & JACKIE ODUM, CTR. FOR AM. PROGRESS, REMOVING BARRIERS TO OPPORTUNITY FOR PARENTS WITH CRIMINAL RECORDS AND THEIR CHILDREN: A TWO-GENERATION APPROACH 5–7 (2015), https://cdn.americanprogress.org/wp-content/uploads/2015/12/09060720/CriminalRecords-report2.pdf?_ga=2.115763782.1548785377.1630365988-14502360.1630365988 [https://perma.cc/7RRP-BZZG].

[239] Interview with Dr. Stinson, *supra* note 53.

[240] *Id.*

[241] Erickson, *supra* note 11 ("Just about all human actions are intended but what we care about is why they are done.").

[242] *Id.* ("There is a world of difference between killing someone to gain his wallet and someone who kills under the delusion that the victim is the devil who has come to harm his children.").

[243] Eric Roytman, Commentary, *Kahler v. Kansas: The End of the Insanity Defense?,* 15 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 43, 54 (2020) (noting that "in Kansas, a defendant

values and principles of traditional insanity defense jurisprudence contend the insane defendant should not have been found guilty in the first place.[244] While the end result of incarceration or institutionalization may end up being the same as any other state, an insane defendant in Kansas carries a much heavier burden.[245] The sentencing discretion offered in Kansas does nothing to alleviate the stigma and criminal conviction-related consequences that come with a guilty verdict. The current test in Kansas also ignores the roots of the insanity test. The insanity defense should work as an affirmative defense, not as a counterargument to an element of the government's case.[246]

While definitions of legal concepts may separately remain in the domain of the states, there is a significant need for a more extensive consistency between broadly held morality and criminal law.[247] The optimal insanity test must remain true to the core values and fundamental principles that have existed for centuries.[248] States should be able to individualize their insanity defense, but to maintain the alignment between criminal law and societally accepted morality, there should be basic requirements for each insanity defense.[249] Additionally, the insanity defense should have constitutional backing.[250] The Supreme Court could help define broader consistency standards for such a defense. As it currently stands, the decision regarding the insanity defense is left to the states.[251]

Insight into psychology can help determine what a reasonable defense looks like for the mentally ill, as well as who should be included under the defense and why. Therefore, an important barrier to cross is that between the law and mental health professionals.[252] Jurisprudence surrounding the insanity defense has typically occurred with little regard for scientific

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may be guilty of murder if he knowingly or intentionally kills someone, regardless of whether he believed his killing to be morally justified" and also that "[t]his distinction demonstrates that *mens rea* and moral capacity are fundamentally different concepts.").

[244] Kahler v. Kansas, 140 S. Ct. 1021, 1049 (2020) (Breyer, J., dissenting).

[245] *Id.*; Dressler, *supra* note 134, at 422 ("[T]he very fact that a person is convicted of a crime constitutes punishment in that it falsely stigmatizes the person if he is morally innocent.").

[246] Dressler, *supra* note 134, at 418.

[247] *See Kahler*, 140 S. Ct. at 1047 (Breyer, J., dissenting).

[248] *Id.* at 1045 (noting the insanity test has a core going all the way back to the "good and evil" test).

[249] *Id.* at 1047 ("[T]he general purpose—to ensure a rough congruence between the criminal law and widely accepted moral sentiments—persists. To gravely undermine the insanity defense is to pose a significant obstacle to this basic objective.").

[250] *See* Erickson, *supra* note 11. *But see Kahler*, 140 S. Ct. at 1021; Wexler, *supra* note 56, at 38 (disentangling mental health law from constitutional law may make the field more "international and comparative").

[251] *Kahler*, 140 S. Ct. at 1047 (Breyer, J., dissenting).

[252] Hooper, *supra* note 23, at 414–15 ("Lawyers and judges do not understand psychiatrists and psychologists (or even that they are different) . . . . Mental health professionals do not understand the courts . . . . The only answer seems to be that we need more mental health and legal cross-training.").

understandings.[253] There is a need for more education and cross-training between these specialties.[254] As previously stated, forensic experts are crucial when it comes to insanity cases.[255] While it could be argued insanity is externally apparent to any lay juror, the severity and bizarreness of a crime do not necessarily mean the defendant has a severe mental illness.[256] An expert can show the absence of mental illness in spite of the incomprehensible nature of a crime.[257]

B. The Question of Who Should Get Covered by the Defense Remains

Reality has a lot more gray than the field of law would like to admit.[258] For example, an individual may maintain a perfect grasp on reality, and yet undoubtedly be mentally ill.[259] The biggest difference between mental illness and personality disorders when considering legal policy is that a group of individuals with mental illness can all be effectively treated.[260] With the limited resources of the system, more public safety principles are met by excluding those with personality disorders, which remain untreatable, from receiving a NGRI diagnosis.[261]

The insanity defense is conceptualized as a mechanism whereby certain people are not held responsible under the law due to their lack of understanding of what they were doing.[262] Criminal responsibility is traditionally informed by societally held norms and understandings of right and wrong.[263] Those who must be covered by the insanity defense are those who do not meet the threshold for criminal responsibility. Therefore, there are three different types of people deserving an insanity defense: (1) those who know what they are doing is wrong but cannot stop their actions; (2) those who believe their actions are morally correct; and (3) those who do

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[253] Perlin, *supra* note 11, at 659.

[254] Hooper, *supra* note 23, at 414–15.

[255] Interview with Dr. Flores, *supra* note 49.

[256] *Id.*

[257] *Id.*

[258] Vaknin, *supra* note 20.

[259] *Id.* ("Some criminals are undoubtedly mentally ill but still maintain a perfect grasp on reality ('reality test') . . . . The 'perception and understanding of reality', in other words, can and does co-exist even with the severest forms of mental illness.").

[260] Lustbader, *supra* note 126. The differentiation between mental illness and personality disorders is a concept derived by legal jurisprudence; the mental health field views personality disorders as just another kind of mental disorder. *But see Personality Disorders*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/personality-disorders/symptoms-causes/syc-20354463 [https://perma.cc/6QF8-VMMN] ("A personality disorder is a type of mental disorder . . . .").

[261] Lustbader, *supra* note 126. This concept extends mostly to APD; some personality disorders are more treatable and thus should be considered mental disorders for purposes of the insanity defense. *See* NIH PUBLICATION NO. QF 17-4928, *supra* note 194.

[262] Interview with Dr. Stinson, *supra* note 53.

[263] *See supra* Part II.

not understand what they are doing while committing the act.

First, the volitional impulse test may be hard for the public to understand, but it is crucial to an insanity test. Current psychology indicates that compulsion and volitional components of behavior should be a part of the rationality tests.[264] Public skepticism of the volitional component of the defense results from a crucial lack of understanding relating to the disordered mind—those without serious mental illness cannot conceptualize compulsion.[265]

The reason *why* a person commits an action matters for purposes of criminal responsibility. The question of why not only pertains to the mental state, or mens rea, of a defendant, but also to their deeper psychology involving their cognitions and their volitional control. The reason why an individual acts is inherently wound up in their understanding of the world.[266] For example, taking Justice Breyer's example from his dissent in *Kahler*, a person who kills because a dog "told them to" has still murdered even though their reality is significantly skewed.[267] In other words, this person knows what they are doing, knows it is wrong, and probably is able to stop if they wanted to because the reason they are committing the action—the *why*—is not wrapped up in their volition. For another example, Jerrod Murray chose to kill his classmate because he wanted to see what it felt like.[268] The reason why he killed had both to do with his intent and his mental state.[269] There is every indication that he had total volitional control over his actions.[270] This means that Murray understood what he was doing and could have stopped if he chose to. Conversely, consider the following

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[264] Asokan, *supra* note 24, at 191 ("Going by the current understanding of neurological evidences of compulsion and lack of impulse control, rationality tests without the inclusion of lack of control, seem to be outdated.").

[265] Bennett, *supra* note 224, at 487 (quoting State v. Maish, 185 P.2d 486 (Wash. 1947)) ("The basis of a general judicial fear of the test is expressed in a 1947 Washington decision where the court declared: 'For myself I can not [sic] see how a person who rationally comprehends the nature and quality of an act, and knows that it is wrong and criminal, can act through irresistible innocent impulse. Knowing the nature of the act well enough to make him otherwise liable for it under the law, can we say that he acts from irresistible impulse and not criminal design and guilt?'").

[266] Erickson, *supra* note 11.

[267] Kent Scheidegger, *An Insanity Debate Goes to the Dogs*, CRIME & CONSEQUENCES BLOG (Mar. 23, 2020), https://www.crimeandconsequences.blog/?p=791 [https://perma.cc/4FB8-D7RT] ("If a killing is otherwise murder (not a justifiable homicide), the fact that one is ordered to do it by a human is not a defense, even if the human is the leader of one's country. We established that at Nuremberg. How does a delusional belief that one has been ordered to do it by a dog make a difference? If the fact that the defendant believes were true, the killing would still be murder.").

[268] Roberson & Smothermon, *supra* note 14; Across the Table, *Jerrod Murray Full Length Interrogation*, YOUTUBE (Mar. 1, 2020), https://www.youtube.com/watch?v=cAlwGZQy6vM [https://perma.cc/9CMZ-4FST] [hereinafter *Murray Interrogation*].

[269] *See Murray Interrogation*, *supra* note 268.

[270] *See* Roberson & Smothermon, *supra* note 14; *Murray Interrogation*, *supra* note 268.

hypothetical: Defendant F sends increasingly threatening letters to her state representative under the delusional compulsion she will die if she does not. Although she understands *what* she is doing and that her actions are morally and legally *wrong*, she feels *compelled* to complete the action due to her mental illness. Denying her use of the insanity defense despite her lack of volitional control would be fundamentally unfair and unjust. Therefore, the ideal insanity defense would have a volitional component to the test.

Second, when a person's mental illness temporarily makes them think their crime is morally justified, they should have the remedy of the insanity defense.[271] Under the traditional insanity defense, a member of society who is unable to appreciate right from wrong does not meet the level for criminal responsibility.[272] The morality branch of the test must be carefully written to account for those whose moral compass differs from that of the general society. Some individuals have a temporary anomalous morality where they view what they are doing as okay in the moment, even though when they come to their senses, they fully realize their actions were not moral.[273] The perfect insanity defense would allow these individuals to utilize the defense. Some individuals, like those with APD, have a permanent anomalous morality.[274] For people with APD, they can accurately claim they did not know what they were doing was wrong, and so pass one of the tests under *M'Naghten*.[275] For them and their anomalous morality, it was not wrong. The perfect insanity defense would recognize this problem—the morality test must be based upon an objective understanding of societal morality, as opposed to one individual's subjective moral code.

Consider the following hypothetical: Defendant M, in the middle of severe paranoia, attacks his next-door neighbor under the delusional belief his neighbor is about to initiate a terrorist attack against the U.S. government. This defendant knew the meaning of his act and understood *what* he was doing. However, in his unbalanced reality, he could no longer comprehend the rightfulness or the wrongfulness of his actions. This is a perfect case for the insanity defense. This defendant can receive treatment for his paranoia and can be assessed for his potential future dangerousness before being released into society. Conversely, consider the case of Defendant B, a man who kills his neighbor's dog because the barking annoyed him. Though Defendant B feels no moral repercussions for the killing of what was to him an annoyance, he has still committed an act that

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[271] *See* Lustbader, *supra* note 126 ("[W]hat can accountability even mean when a person has no recollection of ever violating the law, and, after treatment, returns to his calm, law-abiding self?"). *But cf.* Kahler v. Kansas, 140 S. Ct. 1021, 1031 (2020) ("Kansas law directs a conviction even if he believed the murder morally justified.").

[272] *See supra* Part II.

[273] *See* Morse & Hoffman, *supra* note 135, at 1088–89.

[274] *See supra* text accompanying notes 195–202.

[275] *Cf., e.g.*, Roberson & Smothermon, *supra* note 14, at 2349–51 (noting Murray was not considered a danger after only thirty-five days due his claimed clack of understanding).

an objective observer would deem immoral.[276] While Defendant B supposedly lacks understanding of the wrongfulness of his actions, his morality is permanently anomalous from the rest of society. Therefore, he should not be eligible for the insanity test.

Finally, the optimal insanity defense has a cognitive incapacity test. There must be a way of humanely treating individuals who committed the offense solely because of their severe mental illness.[277] It stands to reason, as the Supreme Court has also noted, that a person who is so mentally ill as to not understand *what* he is doing, cannot thus form accurate moral understanding of the situation.[278] Consider the following hypothetical: Defendant A, experiencing a psychotic break, believed demons were trying to enter his home to kill his family, and so defended himself accordingly. In reality, he injured a family member who attempted to calm him down. Defendant A, due to his mental illness, lacks crucial understanding of the reality that surrounds him. He does not understand what he is doing even if he had the express intent to act. As such, he does not have the cognitive capacity to form adequate criminal responsibility. The insanity defense is an absolute requisite in a case like this.[279] Conversely, consider the hypothetical of Defendant H who, in a fit of jealous rage, severely beat his girlfriend for talking to another man. Defendant H may have felt temporarily out of control, but his basic understanding of *what* he was doing, his understanding of reality itself, was not skewed. Therefore, Defendant H may not use the insanity defense despite arguing he did not understand what he was doing.

To summarize, basic elements of an insanity defense should be required for every jurisdiction. These basic elements include the requirement of a volitional (the *why*), moral (the *wrongfulness*), and cognitive (the *what*) branch of the test. The standards for the test would also exclude those with symptoms and behavior of APD. In applying these standards, this broader test would allow more individuals to use the NGRI defense, thus keeping these individuals out of prison and reducing recidivism rates. A standardized model for an insanity test would also help public understanding related to what a NGRI defense entails.

C. A Simple Change Is Not Enough

The insanity defense cannot be saved by a simple fiddling with language. A more comprehensive change is necessary to make sure those with severe mental illness can obtain NGRI verdicts. To mitigate popular

[276] If not immoral for love of animals, then immoral for the protection of personal property.
[277] Interview with Dr. Flores, *supra* note 49.
[278] Clark v. Arizona, 548 U.S. 735, 753–54 (2006). "In practical terms, if a defendant did not know what he was doing when he acted, he could not have known that he was performing the wrongful act charged as a crime." *Id.* at 737.
[279] *See* Lustbader, *supra* note 126 ("[W]hat can accountability even mean when a person has no recollection of ever violating the law, and, after treatment, returns to his calm, law-abiding self?").

misconceptions, stigma, and negative media portrayals of the defense and mental illness in general, education is necessary regarding both mental illness and the insanity defense. The broader change necessary also includes increased community support for the mentally ill, and changes to the availability of treatment.

1. Education Is Needed

There is little knowledge of mental illness among the general population; these are illnesses that cannot be seen and can escape physical detection.[280] The same save-the-public mentality pushing for incarceration of the mentally ill for their "safety" caused the original overuse of institutionalization in the first half of the twentieth century, resulting in the mass deinstitutionalization movement.[281] Therefore, education is perhaps the most important thing that could be offered to help the insanity defense.[282]

Education should be focused on a balancing approach with the primary intent to break down the common misconceptions related to serious mental illness.[283] To achieve an accurate portrayal of mental illness, the goal of the education must be specific and tuned precisely for the intended audience to be most effective.[284] For example, education about how mental illness is a biological disorder, similar to other chronic diseases, can help decrease some stigma-associated repercussions such as the blame and social avoidance traditionally directed at those with mental illness.[285]

Increased education from a young age can help reduce stigma and increase understanding.[286] Part of helping reduce the problem of mental illness is recognizing the symptoms of mental illness in the juvenile population, whether through regular doctor's visits, or through the juvenile court system.[287] Children can be taught about mental illness in order to normalize it, thereby reducing future stigma of the unknown.[288]

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[280] Hooper, *supra* note 23, at 409.

[281] Bard, *supra* note 22, at 67 (Incarceration "serves the direct purpose of removing dangerous individuals from society. The institutionalization of the mentally ill during the early 20th century was similarly intended to keep them separate . . . ." But "[o]veruse of institutionalization led to legal reforms that placed a high value on individual liberty and spawned the de-institutionalization movement.").

[282] Vickers, *supra* note 19, at 60 ("Education—in the schools, in the courts, and everywhere ignorance prevails—is imperative for a change to occur to restore our nation to mental wellness.").

[283] Corrigan & Watson, *supra* note 157, at 477.

[284] George S. Tolomiczenko, Paula N. Goering & Janet F. Durbin, *Educating the Public About Mental Illness and Homelessness: A Cautionary Note*, 46 CAN. J. PSYCHIATRY 253, 256 (2001) (emphasizing "the importance of adjusting the form of a message to maximize impact in the intended direction among a particular audience").

[285] Corrigan & Watson, *supra* note 157, at 477.

[286] Interview with Dr. Stinson, *supra* note 53.

[287] *See* Vickers, *supra* note 19, at 56–57.

[288] *See id.*

A popular strategy for educating the public has been to associate mental illness with a disease of the brain.[289] While this approach may reduce the blame put on those with mental illness, certain stigma like dangerousness can be exacerbated.[290] The need for education should not be fulfilled without due research into the proper way to educate the public; certain types of education regarding mental illness can actually increase stigma and social isolation.[291] While focusing on public awareness may increase resources for mental health services, the added stigma with certain types of education is not worth the risk.[292] For example, education should not focus on the association between mental illness and dangerousness, as this can lead to increased stigma.[293] Stigma is particularly hard to overturn as exposure to "emotionally charged material" can actually push an individual's perceptions regarding the subject in a negative direction.[294] Education about mental illness is thus rather complicated, necessitating a multi-faceted and dimensional approach to reduce stigma through proper methods and with accurate facts.[295] Efforts to destigmatize through education should be backed by studies showing effectiveness of the technique.[296] Reducing stigma involves a careful approach to balance exposure to the subject matter while avoiding preconceived stereotypes.[297] Stigma is best reduced through direct contact with affected persons.[298] Therefore, in the course of attempting education about severe mental illness, the court might try meeting with individuals with severe mental illness to gain more insight into their daily existence. Additionally, education about treatment, and the effectiveness of treatment for serious mental illnesses can reduce harmful misconceptions about dangerousness.[299]

Jury education is particularly important. With the limited knowledge of the insanity defense systems and mental illness in the lay public, jury misconceptions regarding the insanity defense can have lasting and damaging impacts on the mentally ill population.[300] A simple misconception

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[289] Corrigan & Watson, *supra* note 157, at 477.

[290] *Id.*

[291] *Id.* at 577–80 (education focusing on the association between mental illness and dangerousness resulted in an increase of stigma and a social isolating of the mentally ill).

[292] *See id.* at 580.

[293] *Id.* (negative attitudes cannot be avoided even with a disclaimer explaining violence not being characteristic of those with severe mental illness); Tolomiczenko et al., *supra* note 284, at 256 (showing certain materials can actually increase stigma).

[294] Tolomiczenko et al., *supra* note 284, at 256.

[295] Corrigan & Watson, *supra* note 157, at 478.

[296] *See* Tolomiczenko et al., *supra* note 284, at 255–56 (while it may seem like an educational video may help reduce stigma, this is in fact the opposite of what is shown in this study).

[297] *Id.* at 256.

[298] *Id.* at 253 (pointing out that "lower levels of perceived dangerousness were associated with increased contact with persons suffering from mental illness").

[299] Corrigan & Watson, *supra* note 157, at 478.

[300] *See supra* Part III.A.

that NGRI means letting an individual back onto the streets may convince a jury to send that individual to prison, where they will get inadequate treatment.[301] The false idea that a GBMI verdict is a "halfway" point between NGRI and prison must be corrected so that the juries can make a fully informed choice, with a full understanding of the law and the consequences of each decision.[302] The public should be educated about recovery for those with mental illness, specifically that many of those with mental illness can recover and lead healthy lives.[303] This information is crucial because the juries deciding NGRI cases are not only deciding the facts of the case—their decision can severely impact the life of an already suffering individual.

Educating the public about severe mental illness does not only diminish the stigmas associated with having any kind of mental illness, but also serves to diminish unrealistic fears surrounding the mentally ill that are furthered by media portrayals.[304] More understanding of mental illness, including knowledge relating to actual dangerousness of these individuals and the success rates of treatment, can pressure legislatures to lessen the limits on the defense.[305] Additionally, with more judicial knowledge of mental illness, psychology, volitional control, and the like, judges may make more informed decisions of when to let severely mentally ill individuals out of hospitalization.

2. More Community Support Is Needed

Communities should give more attention to the needs of the mentally ill. Efforts to create opportunities for help before an individual ends up in police custody are optimal.[306] The insanity defense provides a unique and much needed opportunity for the states to start providing the requisite treatment for those who are severely mentally ill but end up in the criminal justice system.[307] These severely mentally ill individuals are not getting treatment in their communities because the services they need are extremely hard to access given failures in state funding and insurance.[308] For example,

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[301] *See supra* notes **Error! Bookmark not defined.**–15 and accompanying text.

[302] *See supra* notes **Error! Bookmark not defined.**–24 and accompanying text.

[303] Corrigan & Watson, *supra* note 157, at 477–78; Vickers, *supra* note 19, at 55.

[304] *See* Kachulis, *supra* note 12, at 254.

[305] *See, e.g.*, Fischer, *supra* note 1 (noting that "insanity acquittals are often met with public skepticism," which influences "many jurisdictions" to "curtail the practice").

[306] *See, e.g.*, *New Empath Units Will Offer Expanded Access to Emergency Mental Health Care*, M HEALTH FAIRVIEW (Nov. 25, 2020), https://www.mhealth.org/blog/2020/nov-2020/new-empath-units-will-offer-expanded-access-to-emergency-mental-health-care? [https://perma.cc/AH8K-5JWP] ("Nationally, 1 in 8 emergency room visits involve mental health or substance use conditions.").

[307] Wexler, *supra* note 56, at 32. *See id.* for general information surrounding Therapeutic Jurisprudence.

[308] *See* Interview with Dr. Flores, *supra* note 49; Lurigio et al., *supra* note 227, at 46 (noting that those with mental illness "fall into the lap of the criminal justice system because of the dearth of mental health treatment and other community services").

an aspect of community support severely lacking is the availability of affordable housing for individuals with severe mental illness.[309] There would be less need for a protection like the insanity defense if people with severe mental illness had the ability to get basic mental health care. However, the current health care system vilifies mental illness; insurance companies do not always pay for mental health problems, and reimbursement rates are different for mental health versus physical ailments.[310]

Community support must exist symbiotically with the criminal justice system and the health care system in order to provide the requisite support for those individuals leaving the prison system.[311] Proper access to community support can change how a mentally ill individual is able to function in society.[312] In fact, interruption of services can actually cause a reversal of previously obtained benefits for those with mental illness.[313] Community care must be prevalent to the degree that care for each individual can be catered to their unique situation.[314] The creation of community care clinics specializing in free or lower-cost mental health services would provide the requisite and available assistance to those that need it. Allowing private insurance companies to continue to deny or make mental health treatment unobtainable must be avoided at all costs.

Successful community support for those with chronic and severe mental illness involves including practical community-oriented help such as support for basic needs, along with a range of services.[315] The integral component of community support is structure for those with mental illness.[316] Improving the community support for the mentally ill can improve the life satisfaction for this population.[317] Currently, the insanity defense is treated differently from other defenses since the individual is viewed as still responsible.[318] With continued education, community assistance, and

[309] Lurigio et al., *supra* note 227, at 46 ("Lack of affordable housing compounds the problems of people with [serious mental illness] and interferes with the provision of mental health treatment.").

[310] Interview with Dr. Stinson, *supra* note 53. Health care issues may vary by jurisdiction. *See id.*

[311] Lurigio et al., *supra* note 227, at 47.

[312] Frank Baker, David Jodrey, James Intagliata & Harry Straus, *Community Support Services and Functioning of the Seriously Mentally Ill*, 29 CMTY. MENTAL HEALTH J. 321, 329 (1993) ("[R]eceipt of needed community support services . . . is significantly related to maintenance of functioning . . . .").

[313] *Id.*

[314] *Id.* at 330 ("[I]t was not the absolute amount of such support that was found to be associated with improvement in functioning, but rather the degree to which clients rated their level of available support as adequate to their own particular needs.").

[315] *See* Rosenfield, *supra* note 19, at 301.

[316] *Id.* at 310.

[317] *See id.* at 301.

[318] Interview with Dr. Stinson, *supra* note 53. Dr. Stinson described his experiences where individuals held NGRI are then treated as if they are responsible for the offense, regardless

availability of a standardized insanity defense, the insanity defense itself will hopefully provide the support for this vulnerable population.

VI. CONCLUSION

It is not enough that mental health be taken into account during trial and sentencing: if we are to help those with mental illness, a defense must exist where those suffering from serious mental conditions can get help instead of receiving the additional stigma of a criminal sentence. Rehabilitation is effective at restoring mentally ill individuals to reason and should be used when possible.[319]

The solution proposed in this Note involves a deeper examination into the psychology of personality disorder to determine what must be excluded from the defense and what ultimately must be included. From that point, this Note argues that the comparison of necessary insanity test components with personality disorders outlines the basic principles, which should be prevalent in every insanity test, no matter the jurisdiction. This Note also contends that an influx of education, both publicly and within the legal field, is necessary to reduce stigma and misconceptions regarding mental illness and the insanity defense. Finally, this Note argues that increased community support and availability of treatment will result in a reduced need to use NGRI defenses at all and will benefit the whole community.

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of their successful use of the defense. *Id.* These NGRI acquitees can become political hostages, where judges have decided that on their watch, the individual will never be free. *Id.*

[319] Bard, *supra* note 22, at 70. "Rehabilitation takes on particular significance in the case of the mentally ill, because advances in medications and therapy have proven highly effective in restoring the mentally ill's capacity for reason and thus steering them away from criminal behavior." *Id.* at 72.