COMMENT

THE KEY TO ANY SUCCESSFUL RELATIONSHIP IS COMMUNICATION: LAWYERS AND DOCTORS, TAKE NOTE*

ABSTRACT

This Comment criticizes the disconnect between the criminal justice system and public healthcare in the United States. The effects of tough-on-crime rhetoric and deinstitutionalization have led to a broken criminal justice system in which some of our most vulnerable citizens are left neglected and abused. Left with little to nonexistent public healthcare resources, those with mental illnesses who encounter law enforcement are destined to end up incarcerated, overpopulating prisons and jails. Once the mentally ill are incarcerated, they essentially have no chance of receiving the medical care and attention they so desperately need to function and survive. Their futures are grim. If they happen to make it out, they are generally left homeless or reincarcerated, triggering the inevitable revolving door.

Since the 1960s, two key issues have contributed to the increase in the percentage of mentally ill inmates. First, the idea of "tough on crime" was popularized, leading politicians, legislators, and public leaders to advocate for a criminal justice system that was, and is today, primarily focused on punishment. Second, a large percentage of the mentally ill population that had previously been placed in public mental health facilities was forced to find new accommodations due to widespread deinstitutionalization.

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The disconnect between the criminal justice system and public healthcare is due to numerous problems. One of those problems is the inconsistent, confusing, and antiquated affirmative defense in American criminal law—the insanity defense. If a mentally ill inmate is charged with a serious crime, that inmate will likely go through the criminal litigation process. That inmate may raise the insanity defense, as this defense is often viewed as one's only option for the chance of getting transferred from prison or jail to a mental health facility. However, the likelihood of that inmate succeeding in proving the defense is slim. The legal elements of the insanity defense that a defendant must prove are not uniform, varying depending on jurisdiction. In addition, some forms of the insanity defense rely on outdated scientific and psychological information. And finally, it would be difficult for that inmate to even raise the insanity defense in the first place, seeing as too many mentally ill inmates are indigent and cannot afford the exorbitant costs associated with a prosperous defense team.

It is time to mend the broken systems that have repeatedly failed some of our most vulnerable populations. This Comment first analyzes the factors that have led to the disconnect between the criminal justice system and public healthcare in the United States. It then discusses various case studies that highlight the problem and concludes by offering possible solutions.

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Black sweet blood mouthfuls,
Shadows.
Something else
Hauls me through air—
Thighs, hair;
Flakes from my heels.
White
Godiva, I unpeel—
Dead hands, dead stringencies.
And now I
Foam to wheat, a glitter of seas.
The child's cry
Melts in the wall.
And I
Am the arrow,
The dew that flies
Suicidal, at one with the drive
Into the red
Eye, the cauldron of morning.[1]

1. Sylvia Plath, *Ariel*, POETRY FOUND., https://www.poetryfoundation.org/poems/49001/ariel [https://perma.cc/S75J-J6H6] (last visited Feb. 29, 2020).

I. INTRODUCTION

The criminal justice system in the United States is systematically failing an exorbitant amount of mentally ill inmates.[2] A recent study by the Bureau of Justice Statistics revealed that 14% of state and federal prisoners and 26% of jail inmates suffer from serious psychological distress.[3] In comparison, 5% of the United States general population suffers from serious psychological distress.[4] Today, the mentally ill are overrepresented in prisons and jails in the United States.[5] Often, prisoners and inmates with mental illnesses end up incarcerated because they have nowhere else to go and are left with no other option.[6]

There is a disconnect between the policies of the United States criminal justice system and modern psychology.[7] Law enforcement and legal professionals, such as judges and prosecutors—rather than psychologists and psychiatrists—are determining the futures of mentally ill inmates.[8] It is unjust to have people who are unqualified in modern psychology and psychiatry making decisions about what to do with the mentally ill.[9] In addition, certain groups in our society are at an enormous disadvantage for being more at risk of incarceration—namely, minority groups, the poor and homeless, and those who have already faced legal trouble.[10]

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2. *See* Christine Montross, *Hard Time or Hospital Treatment? Mental Illness and the Criminal Justice System*, 375 NEW ENG. J. MED. 1407, 1407–08 (2016).

3. Press Release, Bureau of Justice Statistics, BJS Finds Inmates Have Higher Rates of Serious Psychological Distress than the U.S. General Population (June 22, 2017), https://www.bjs.gov/content/pub/press/imhprpji1112pr.cfm [https://perma.cc/G6N3-97BB].

4. *Id.*

5. Seth J. Prins, *Prevalence of Mental Illnesses in U.S. State Prisons: A Systematic Review*, 65 PSYCHIATRIC SERV. 862, 862 (2014).

6. Christine Herman, *County Jails Struggle to Treat Mentally Ill Inmates*, NPR (Sept. 19, 2018, 5:00 AM), https://www.npr.org/sections/health-shots/2018/09/19/647270042/county-jails-struggle-to-treat-mentally-ill-inmates [https://perma.cc/NL3J-MS8R]. *See generally* Christina Canales, Note, *Prisons: The New Mental Health System*, 44 CONN. L. REV. 1725, 1731–35 (2012) (explaining that since deinstitutionalization, there has been a severe increase of mentally ill defendants in prisons and jails).

7. Montross, *supra* note 2, at 1407 ("When a mentally ill person comes into contact with the criminal justice system, the decision about whether that person belongs in jail or in the hospital is rarely a clinical one.").

8. *Id.*

9. For one commentator's argument regarding the justness of this situation, see *id.*

10. *Id.* at 1407 ("The poor, members of minority groups, and people with a history of law-enforcement involvement . . . are more likely to be arrested and less likely than their more privileged counterparts to be adequately treated for their psychiatric illnesses.").

In general, when one experiences a mental health crisis, one is more likely to come in contact with police rather than a medical professional.[11] Police officers are now burdened with the task of dealing with the mentally ill, and subsequently, are forced to make decisions that will severely impact their futures.[12] Police officers are not adequately trained in psychology and psychiatry to take care of the mentally ill, yet it is their job to arrest people; thus, it seems logical that their response would be to arrest people with mental illnesses, regardless of whether they are engaging in criminal conduct or not.[13] For those arrested upon engaging in criminal conduct, the criminal justice system creates a vicious cycle.[14] Once incarcerated, mentally ill inmates do not receive the mental health treatment they severely need, and they stay incarcerated longer than those without mental illness.[15] If and when the mentally ill are released from prison, they have usually lost access to healthcare and other vital resources, and are often left homeless.[16]

This Comment criticizes the criminal justice system in the United States for not being aligned with modern psychology. Part II of this Comment will discuss the intersection between mental health and the United States criminal justice system in a broad manner. This Comment will further discuss the history of mental illness in the United States. Part III will introduce the legal definition of insanity and the various insanity defenses, including a summary and analysis of the Andrea Yates case.

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11. *Jailing People with Mental Illness*, NAT'L ALLIANCE ON MENTAL ILLNESS, https://www.nami.org/Learn-More/Public-Policy/Jailing-People-with-Mental-Illness [https://perma.cc/3X6E-QFG9] (last visited Feb. 29, 2020).

12. Nathaniel Morris, *Police Encounter Many People with Mental-Health Crises. Could Psychiatrists Help?*, WASH. POST (July 23, 2018, 7:30 AM), https://www.washingtonpost.com/national/health-science/police-encounter-many-people-with-mental-health-crises-could-psychiatrists-help/2018/07/20/20561c26-7484-11e8-b4b7-308400242c2e_story.html?utm_term=.ece9af2cf367 [https://perma.cc/JC3T-VDM9] (explaining that police officers are at the forefront of the mental health crisis, assuming the role of first responders during psychiatric emergencies); *see also* Canales, *supra* note 6, at 1735–36 (describing the lack of training that police officers receive).

13. *See* Morris, *supra* note 12.

14. *See Jailing People with Mental Illness*, *supra* note 11.

15. *Id.*

16. *Id.* The revolving door: because the recently released inmates are left homeless and without adequate treatment, they are more prone to engage in criminal activity, more likely to be re-arrested, and thus, more likely to end up back in prison and jail. *See* Andrea M. Odegaard, Note, *Therapeutic Jurisprudence: The Impact of Mental Health Courts on the Criminal Justice System*, 83 N.D. L. REV. 225, 234 (2007).

In Part IV of this Comment, there will be case studies of *McWilliams v. Dunn*[17] and the William Charles Morva[18] case. Part IV will also explore the role that experts play concerning indigent defendants in the criminal justice system. Next, in Part V, there will be a discussion of suggested solutions to remedy the failing criminal justice system. Finally, Part VI concludes this Comment by suggesting that the United States criminal justice system change the way it functions and deals with its mentally ill population.

II. INTERSECTION BETWEEN MENTAL HEALTH AND THE UNITED STATES CRIMINAL JUSTICE SYSTEM

A. The Approach to Criminal Justice in the United States

The idea of punishment is the driving force behind the criminal justice system in the United States.[19] "The United States spent about $80 billion on its system of jails and prisons in 2010—about $260 for every resident of the nation. By contrast, its budget for food stamps was $227 a person."[20] In general, a society constructs a system of punishment in order to reduce the amount of criminal activity.[21] The United States incarcerates more people than any other country in the world.[22] In order to understand why the rate of incarceration is so high in the United States, it is helpful to look at a brief history of how punishment became the overarching goal of the criminal justice system.

The 1960s and 1970s saw an increase in crime.[23] This increase in crime affected the political landscape in the United States, as politicians did not want to appear to be "soft" on crime.[24] Politicians began responding to the public's demand for stricter

17. McWilliams v. Dunn, 137 S. Ct. 1790 (2017).

18. *See* Gary Harki, *The Next to Die, Watching Death Row*, MARSHALL PROJECT (July 6, 2017, 8:37 PM), https://www.themarshallproject.org/next-to-die/va/6tuf7hbu [https://perma.cc/G6KC-3MT5].

19. *See* Eduardo Porter, *In the U.S., Punishment Comes Before the Crimes*, N.Y. TIMES (Apr. 29, 2014), https://www.nytimes.com/2014/04/30/business/economy/in-the-us-punishment-comes-before-the-crimes.html [https://perma.cc/88A5-Z3DW].

20. *Id.*

21. Matthew K. Suess, Note, *Punishment in the State of Nature: John Locke and Criminal Punishment in the United States of America*, 7 WASH. U. JURIS. REV. 367, 381 (2015). Historically, the United States has been determined to reduce crime. *Id.* at 381–82.

22. *Id.*

23. *See* Porter, *supra* note 19.

24. *Id.*; *see also* Arit John, *A Timeline of the Rise and Fall of 'Tough on Crime' Drug Sentencing*, ATLANTIC (Apr. 22, 2014), https://www.theatlantic.com/politics/archive/2014/04/a-timeline-of-the-rise-and-fall-of-tough-on-crime-drug-sentencing/360983/ [https://perma.cc/A9TJ-BV4E].

crime regulation.[25] President Richard Nixon was infamous for his "tough on crime" views.[26] Since Nixon's presidency, the prison population has increased.[27] "The criminal justice system became the only effective institution that could bring order and manage urban communities."[28]

The tough-on-crime theory that infiltrated domestic politics during Nixon's presidency continued on throughout Ronald Reagan's presidency.[29] President Reagan used the War on Drugs to instill fear in the American public—leading the public to believe that drug abuse was the most severe problem plaguing the country, and that crime and drug abuse were inherently intertwined.[30] Thus, the tough-on-crime rhetoric was driven by fear. In order to alleviate that fear in the American public, conservative politicians from the 1960s to the 1980s lobbied for a criminal justice system that would punish to the greatest extent possible.[31] Tough-on-crime rhetoric is not extinct.[32] It has existed throughout each succeeding presidency,[33] and it is alive and well in American politics today, with President Donald Trump as a champion of tough-on-crime policies.[34]

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25. Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 3, 12 (2013) ("Th[e] exploitation of genuine public concerns on the electoral stage and the enactment of 'tough on crime' policies such as mandatory minimum sentences drove the incarceration explosion to heights it would not otherwise have reached.").

26. Emily Badger, *Is This the End of 'Tough on Crime'?*, WASH. POST (Sept. 9, 2014, 3:32 PM), https://www.washingtonpost.com/news/wonk/wp/2014/09/09/is-this-the-end-of-tough-on-crime/?utm_term=.433e3666a6fd [https://perma.cc/ZMD4-PZ8B]. President Nixon advocated for the idea that the crime problem would only be solved by increasing conviction rates. *Id.*

27. *See* Newell, *supra* note 25, at 6.

28. Porter, *supra* note 19 (quoting Harvard Professor Devah Pager to illustrate the idea that the criminal justice system became a system of last resort for the people in our society who did not have the adequate resources to get any sort of help—i.e., mental health treatment, monetary aid, drug and alcohol abuse treatment, etc.).

29. Newell, *supra* note 25, at 19.

30. *Id.*

31. *See id.* at 16–17.

32. *See* German Lopez, *Jeff Sessions Turned Trump's "Tough on Crime" Dreams into Reality*, VOX (Nov. 7, 2018, 4:50 PM), https://www.vox.com/policy-and-politics/2018/11/7/18073074/jeff-sessions-resigns-war-on-drugs-crime [https://perma.cc/L6GH-TKWJ].

33. Newell, *supra* note 25, at 19. President Bill Clinton was tough on crime, stating "no one can say I'm soft on crime," after viewing an execution in Arkansas. *Id.* Even President Barack Obama relied on tough-on-crime rhetoric during his Presidential campaign. *Id.* It is a nonpartisan issue and has become an indispensable tool in United States politics. *Id.*

34. Philip Bump, *Tough on Crime? Strong on the Border? Trump Will Offer His Full and Total Endorsement.*, WASH. POST (July 31, 2018, 11:59 AM), https://www.washingtonpost.com/news/politics/wp/2018/07/31/tough-on-crime-strong-on-the-border-trump-will-offer-

B. History of Mental Illness in the United States

In the 1950s, with the introduction of antipsychotic medication like Thorazine, governments at the federal, state, and local levels began to follow a policy of deinstitutionalization.[35] Deinstitutionalization favors "moving severely mentally ill people out of large state institutions and then closing part or all of those institutions."[36] Deinstitutionalization continued into the 1960s with the passage of federal social welfare programs.[37] In 1963, President John F. Kennedy signed the Community Mental Health Act into law, providing federal funding to create mental health facilities with community-based treatment.[38] These community-based treatment facilities replaced state mental hospitals.[39]

The passage of Medicaid in 1965 reinforced the deinstitutionalization movement.[40] After the passage of Medicaid, a large number of state mental hospital patients were moved to general hospitals and nursing homes; Medicaid does not provide coverage to people in mental health institutions.[41] State-funded mental hospitals were shut down throughout the United States in the 1970s.[42] The closing of state-funded mental hospitals continued into the 1980s.[43] The large-scale shut down of state-funded mental hospitals in the 1980s was largely due to President Reagan's Omnibus Budget Reconciliation Act, which terminated

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his-full-and-total-endorsement/ [https://perma.cc/AN46-ZFNX]. *But cf.* Jamiles Lartey, *Trump's Prison Reform: Republicans on Side but Some Progressives Hold out*, GUARDIAN (June 5, 2018, 6:00 AM), https://www.theguardian.com/us-news/2018/jun/05/trump-prison-reform-first-step-act-tension [https://perma.cc/6JG4-Y7XU] (explaining that even though President Trump ran a tough-on-crime presidential campaign, he still supports various provisions of prison reform legislation).

35. *Deinstitutionalization: A Psychiatric "Titanic,"* PBS, https://www.pbs.org/wgbh/pages/frontline/shows/asylums/special/excerpt.html [https://perma.cc/PWH7-T9EV] (last visited Mar. 6, 2019).

36. *Id.*

37. *See* Deanna Pan, *Timeline: Deinstitutionalization and Its Consequences*, MOTHER JONES (Apr. 29, 2013), https://www.motherjones.com/politics/2013/04/timeline-mental-health-america/ [https://perma.cc/5ASC-SHJS].

38. *Community Mental Health Act*, NAT'L COUNCIL BEHAV. HEALTH, https://www.thenationalcouncil.org/about/national-mental-health-association/overview/community-mental-health-act/ [https://perma.cc/JCA7-E437] (last visited Mar. 7, 2019).

39. E. Fuller Torrey, Opinion, *Fifty Years of Failing America's Mentally Ill*, WALL ST. J. (Feb. 4, 2013, 7:04 PM), https://www.wsj.com/articles/SB10001424127887323539804578260023200841756.

40. *See* Kimberly Amadeo, *Deinstitutionalization, Its Causes, Effects, Pros and Cons*, BALANCE, https://www.thebalance.com/deinstitutionalization-3306067 [https://perma.cc/W8W4-ARG5] (last updated Feb. 17, 2020).

41. Pan, *supra* note 37.

42. *See* Montross, *supra* note 2, at 1407.

43. *Id.*; *see also* Amadeo, *supra* note 40.

the federal government's role in providing mental health facilities and services[44] by shifting funding to the states through block grants.[45]

In 1990, the Food and Drug Administration approved the drug Clozapine to treat the various symptoms of schizophrenia,[46] strengthening the bias against hospitalizing the mentally ill.[47] Public and private mental health facilities continued to dwindle, and in 2004, there were about 100,000 psychiatric beds in the then-remaining mental health facilities.[48] In 2009, states cut $4.35 billion in mental health spending—largely due to the Great Recession.[49] Today, the effect of deinstitutionalization is that there are not enough mental health facilities to treat the mentally ill.[50]

III. LEGAL DEFINITION OF "INSANITY" AND THE INSANITY DEFENSE

A. The History of Legal Insanity in the United States

The insanity defense is a pillar of criminal law.[51] It was not until the thirteenth century that insanity arose as a component in certain criminal trials, but by the sixteenth century, English courts were using various analyses to determine insanity by comparing good and evil.[52] In the 1700s, the idea of sanity versus insanity in the law took a new form.[53]

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44. *See* Pan, *supra* note 37.

45. Amadeo, *supra* note 40. "In short, the expansion of federal social welfare programs contributed to deinstitutionalization by creating financial incentives for states to change the locus of care of the mentally ill away from state institutions." Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L. 53, 67 (2011).

46. Amadeo, *supra* note 40.

47. *Id.*

48. Pan, *supra* note 37. "That means there [were] more [than] three times as many seriously mentally ill people in jails and prisons than in hospitals." *Id.*

49. *Id. See generally* RON HONBERG ET AL., NAT'L ALL. ON MENTAL ILLNESS, STATE MENTAL HEALTH CUTS: A NATIONAL CRISIS 1, 3–7 (2011), https://www.nami.org/getattachment/About-NAMI/Publications/Reports/NAMIStateBudgetCrisis2011.pdf [https://perma.cc/2D3D-UCL4].

50. *See* Amadeo, *supra* note 40; *see also* Liz Szabo, *Cost of Not Caring: Nowhere to Go*, USA TODAY (May 12, 2014, 4:14 PM), https://www.usatoday.com/story/news/nation/2014/05/12/mental-health-system-crisis/7746535/ [https://perma.cc/SC84-M9JS] (describing the plight for those suffering with mental illnesses who come into contact with the criminal justice system).

51. R. Michael Shoptaw, Comment, M'Naghten *is a Fundamental Right: Why Abolishing the Traditional Insanity Defense Violates Due Process*, 84 MISS. L.J. 1101, 1106 (2015).

52. *Id.* at 1106–07.

53. *See* Susanna L. Blumenthal, *The Supreme Court Says States Can't Execute the*

> In the wake of the American Revolution, jurists built a republic of laws upon the Enlightenment science of the mind, presuming all men were endowed with reason and moral sense. Thus, they recast legal personhood in terms of sanity rather than status: Possessing a rational mind, not a noble lineage, was the key to citizenship. In so doing, these jurists posited a certain relationship between mental competency and legal responsibility: A person's ability to exercise a "rational liberty" established his liability for the consequences of his acts.[54]

Doctors and clinicians began advocating for a change in the way the mentally insane should be viewed under the law.[55] They argued that insanity was the result of physical diseases—better treated in mental health institutions than in prisons and jails.[56]

Judges were ill-equipped to handle these new advances in the clinical jurisprudence of insanity.[57] "In case after case, members of the bench were tasked with the maddening enterprise of distinguishing true madness from mere eccentricity or perversity."[58] Judges were being forced to make ambiguous decisions concerning mental health that could not be supported by a singular rule of law.[59] Thus, it is not surprising that in order to mitigate the discord in decisions involving the mentally ill, judges created a law of insanity independent from psychology and medicine.[60]

Insane. Virginia Is About to Do It Anyway., WASH. POST (July 6, 2017, 3:12 PM), https://www.washingtonpost.com/news/made-by-history/wp/2017/07/06/the-supreme-court-says-states-cant-execute-the-insane-virginia-is-about-to-do-it-anyway/?noredirect=on&utm_term=.3ad871309dc6 [https://perma.cc/86C6-UGZ5]; *see also* Abigail Coy, *Mental Health in Colonial America*, HOSPITALIST (May 2006), https://www.the-hospitalist.org/hospitalist/article/123117/mental-health-colonial-america [https://perma.cc/H7KG-5UV9] (explaining that officials in the 1700s advocated for the advancement of the mental health hospital).

54. Blumenthal, *supra* note 53.

55. *Id.*

56. *Id.* These doctors and clinicians published their conclusions in treatises and they actively sought to revise the common law of insanity—they argued that the common law definition of insanity was too narrow and that it should be changed to encompass partial forms of insanity. *Id.*

57. *Id.*

58. *Id.*; *see also* Tijs Kooijmans & Gerben Meynen, *Who Establishes the Presence of a Mental Disorder in Defendants? Medicolegal Considerations on a European Court of Human Rights Case*, FRONTIERS PSYCHIATRY, Oct. 16, 2017, at 1, 3, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5650690/pdf/fpsyt-08-00199.pdf [https://perma.cc/99WM-CEAU] (discussing difficulties judges face in interpreting criminal law statutes requiring that the defendant "suffer from 'a mental defect or mental disease'").

59. *See* Blumenthal, *supra* note 53.

60. *Id.* "But as a practical matter, this has left defendants with severe mental illnesses vulnerable to the same punishments as those with full competency, leaving an entire class of people who are not fully competent potentially subject to the full punitive

The traditional insanity defense was created in England in 1843 and was formalized as the *M'Naghten* test.[61] The *M'Naghten* test requires that an individual must clearly prove that "at the time of the committing of the act," she was "labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act" she was committing, or, if she was aware, she "did not know" that the act was wrong.[62]

Initially, the test was not widely accepted and it faced serious criticism because of its focus on one's ability to distinguish right from wrong.[63] As a result, some states adopted the Irresistible Impulse test as an outgrowth of the *M'Naghten* test.[64] Under the Irresistible Impulse test, a defendant may not be held criminally liable for his actions—even if he was able to tell right from wrong—if the defendant was unable to stop himself from committing the actions he knew to be wrong due to some mental disease or defect.[65] In the United States, the federal government and seventeen states have adopted the original *M'Naghten* test, and thirteen states have adopted some version of the *M'Naghten* test.[66] Along with the *M'Naghten* test, two other standards for an insanity defense are used in the United States.[67]

The American Law Institute (ALI) Model Penal Code test broadens the *M'Naghten* test by introducing the concept of substantial impairment rather than complete impairment.[68] The

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force of the law." *Id.*

61. *See* Shoptaw, *supra* note 51, at 1109; Jessie Manchester, Comment, *Beyond Accommodation: Reconstructing the Insanity Defense to Provide an Adequate Remedy for Postpartum Psychotic Women*, 93 J. CRIM. L. & CRIMINOLOGY 713, 725 (2003).

62. Shoptaw, *supra* note 51, at 1108. "Simply put, if a defendant's mental illness prevents him from knowing what he is doing, or if it prevents him from knowing that what he is doing is wrong, he cannot be held criminally liable for his actions." *Id.*

63. *See* Danny Cevallos, *Don't Rely on Insanity Defense*, CNN (July 17, 2015, 11:04 AM), https://www.cnn.com/2015/02/11/opinion/cevallos-insanity-defense/index.html [https://perma.cc/98Y2-ELYJ].

64. *See id.*; Jessie A. Seiden, *The Criminal Brain: Frontal Lobe Dysfunction Evidence in Capital Proceedings*, 16 CAP. DEF. J. 395, 415 (2004); Judd F. Sneirson, Comment, *Black Rage and the Criminal Law: A Principled Approach to a Polarized Debate*, 143 U. PA. L. REV. 2251, 2267 (1995). Now the *M'Naghten* test is viewed as a combination between the *M'Naghten* test itself and the Irresistible Impulse test—i.e., the *M'Naghten* test "was supplemented with the [I]rresistible [I]mpulse test." Judith A. Northrup, Comment, *Guilty but Mentally Ill: Broadening the Scope of Criminal Responsibility*, 44 OHIO ST. L.J. 797, 804–06 (1983).

65. *See* Cevallos, *supra* note 63; *see also* Seiden, *supra* note 64, at 415 (discussing application of the Irresistible Impulse test in Virginia courts).

66. Shoptaw, *supra* note 51, at 1109.

67. *Id.* at 1109–11. The two other insanity defense tests used in the United States are the American Law Institute (ALI) Model Penal Code test and the *Durham* Product test. *Id.*

68. *Id.* at 1110.

ALI test has both a cognitive prong and a volitional prong.[69] It states that individuals are not criminally liable for any wrongdoing they caused "if they lacked 'substantial capacity either to appreciate the criminality of [their] conduct or to conform [their] conduct to the requirements of law.'"[70] In the United States, fourteen states have adopted the ALI test.[71] The third insanity defense test is the *Durham* Product test, which is only recognized in New Hampshire.[72] "Under the [*Durham*] [P]roduct test, individuals cannot be liable for their criminal actions if these actions were the product of a mental disease or defect."[73]

B. Problems with the Insanity Defenses

There is no uniformity amongst the insanity defenses in the United States[74] because states are free to choose which insanity defense they wish to employ.[75] "Not only are the states free to develop disparate law in the field of legal insanity, but under the Constitution, they are encouraged to do so."[76] This disparity ultimately leads to different legal outcomes depending on which jurisdiction an individual is tried in.[77] To further complicate the

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69. *Id.*

70. *Id.* (quoting MODEL PENAL CODE § 4.01 (AM. LAW INST. 1985)). A commentator explains:

> The first prong—the appreciation of criminality—is a substantial revision of the *M'Naghten* test, collapsing its redundant prongs, substituting the more lenient "appreciate" for the stricter "know," and allowing jurisdictions the option to resolve the moral-legal question by inserting either "criminality" or "wrongfulness." The second prong—the conforming of conduct— . . . avoids the ambiguous word "impulse." The Model Penal Code also modifies both of its prongs with "lacks substantial capacity" and thus departs from both earlier tests in requiring less than total incapacitation. As a result, the Model Penal Code test is broader—and some would say more realistic—than the earlier tests.

Sneirson, *supra* note 64, at 2268–69 (footnotes omitted).

71. Shoptaw, *supra* note 51, at 1111.

72. *Id.*

73. *Id.*; *see also* Eric Collins, Note, *Insane: James Holmes,* Clark v. Arizona*, and America's Insanity Defense*, 31 J.L. & HEALTH 33, 38–39 (2018) (discussing the history and application of the *Durham* Product test).

74. *See* Cevallos, *supra* note 63.

75. *See id.* "While it may seem strange to have patchwork law among the states on an apparent issue of science, according to the U.S. Supreme Court, that's exactly how it was intended to be." *Id.*

76. *Id.*

77. *Id.* "As Justice Louis Brandeis said in New State Ice Co. v. Liebmann, 'It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.'" *Id.*

matter, some states have completely abolished the insanity defense.[78]

The *M'Naghten* test is problematic because it relies on outdated scientific knowledge, and it sets the standard too high.[79] A mentally ill person may commit a crime, understand the nature of his actions, and know that what he did was wrong.[80] However, that does not mean that the mentally ill person is necessarily criminally capable—he could have committed the crime as a result of his mental illness.[81]

Although the ALI Model Penal Code test is more favorable to a mentally ill defendant,[82] the test was largely abandoned after John Hinckley's failed attempt to assassinate President Reagan.[83] In 1982, Hinckley was found not guilty by reason of insanity (NGRI), allowing him to escape a prison sentence and be admitted to a government psychiatric hospital.[84] Hinckley's NGRI verdict led various states to modify or abolish the ALI test.[85] Furthermore, the *Durham* Product test is also flawed because it gives experts too much discretion to define mental illness in whatever terms they wish to use.[86]

There are many other problems associated with the insanity defense.[87] First, the general public mistakenly believes that the

78. *Id.* States that do not have an insanity defense include Montana, Utah, Kansas, Idaho, and Nevada. *Id.*

79. *See* Beatrice R. Maidman, Note, *The Legal Insanity Defense: Transforming the Legal Theory into a Medical Standard*, 96 B.U. L. REV. 1831, 1836 (2016).

80. *See id.*

81. *See id.*; Cevallos, *supra* note 63.

82. The ALI test is more favorable to a mentally ill defendant because a mentally ill defendant is not required to prove his inability to determine right from wrong. *See* John Dent, Comment, *Postpartum Psychosis and the Insanity Defense*, 1989 U. CHI. LEGAL F. 355, 357.

83. *Id.* at 357–58.

84. Natalie Jacewicz, *After Hinckley, States Tightened Use of the Insanity Plea*, NPR (July 28, 2016, 10:20 AM), https://www.npr.org/sections/health-shots/2016/07/28/486607183/after-hinckley-states-tightened-use-of-the-insanity-plea [https://perma.cc/MK6P-TNNM].

85. Dent, *supra* note 82, at 357–58.

86. *See* Elyn R. Saks, *Competency to Refuse Psychotropic Medication: Three Alternatives to the Law's Cognitive Standard*, 47 U. MIAMI L. REV. 689, 746 (1993).

87. The following list is only meant to illustrate a short list of problems associated with the insanity defenses. It is not exhaustive as other fallacies with the insanity defense have been noted. *See, e.g.*, D.J. Jaffe, Opinion, *The Trouble with the Insanity Defense*, WALL ST. J. (Mar. 26, 2010, 12:01 AM), https://www.wsj.com/articles/SB10001424052748704896104575139801575696436 (noting that the insanity defense is problematic because it is rarely successful, it requires people to be committed upon regaining their sanity, it has turned prison into mental institutions, and it allows the mentally ill the right to abstain from violence-preventing medication).

insanity defense is used often.[88] Second, the insanity defense is dependent upon the expert opinions of mental health professionals.[89] Often, mental health professionals have contrasting beliefs about a specific diagnosis.[90] Third, expert witnesses may not always be entirely reliable.[91] Because each party gets to choose its own experts, there may be a tendency to select an expert who is biased toward one side or the other.[92] "Studies have shown that lawyers 'shop' for expert witnesses and 'frequently coach their experts to present their opinions in the most favorable light.'"[93] Fourth, jurors commonly base their decisions in legal insanity cases on their own impressions of the defendant and their own attitudes toward the defense in general.[94]

C. Definition of Insanity in Texas

The insanity defense in Texas is defined in Section 8.01 of the Texas Penal Code. Section 8.01 provides:

> (a) It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong.
>
> (b) The term "mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.[95]

The Texas insanity defense is almost identical to the *M'Naghten* test.[96] Under Texas law, just as under the *M'Naghten*

88. *See* Maidman, *supra* note 79, at 1846. "In reality, the insanity defense is raised in about one percent of felony cases and is only successful in about twenty-six percent of those cases." *Id.*

89. *See id.* at 1847.

90. *Id.* Furthermore, several other factors influence diagnoses and treatment plans, including culture because "[c]ulture and social environment can shape, even predict, common mental disorders, such as depression and anxiety." Linda Rodriguez McRobbie, *How Culture Shapes Your Mind—And Your Mental Illness*, BOS. GLOBE (Nov. 28, 2018, 11:00 AM), https://www.bostonglobe.com/ideas/2018/11/28/how-culture-shapes-your-mind-and-your-mental-illness/sMlhWP5LGSOvQAFd83I3qN/story.html [https://perma.cc/D9YG-7MCY].

91. *See* Maidman, *supra* note 79, at 1847–48; Christopher Tarver Robertson, *Blind Expertise*, 85 N.Y.U. L. REV. 174, 184–89 (2010) (describing the types of biases associated with experts—e.g., selection biases, affiliation biases, and compensation biases).

92. Maidman, *supra* note 79, at 1847–48.

93. *Id.* at 1848.

94. *Id.*

95. Tex. Penal Code Ann. § 8.01.

96. Michael J. Brown, *State Supreme Court Limits Use of "Insanity Defense,"* TEX. CRIM. LAW. BLOG (Jan. 25, 2017), https://www.texascriminallawyerblog.com/state-supreme-court-limits-use-insanity-defense/ [https://perma.cc/3FNQ-S362].

test, the focus is on whether the mentally ill defendant knew that his conduct was wrong and knew the difference between right and wrong.[97] In addition, Section 8.01 interprets the word "wrong" to mean legally wrong.[98] Thus, the test for determining whether the defendant knew that his conduct was wrong is to decide whether the defendant knew that he partook in illegal conduct.[99]

In the Texas legal system, everyone is considered sane until proven otherwise.[100] The defendant has the burden to prove that he did not know the difference between right and wrong when he committed the illegal act.[101] A court can find that a defendant is not legally insane even if the defendant successfully proves that he was mentally ill when he engaged in the illegal conduct.[102]

For example, one can imagine a scenario in which a defendant, who has a mental illness, becomes addicted to illegal substances and begins to abuse illegal substances regularly.[103] The constant abuse incapacitates the defendant, and he can no longer function in a normal and healthy way. Although the defendant's addiction exacerbates his mental illness or even produces a new mental illness, the defendant cannot claim legal insanity unless he can prove that he did not know that his actions were illegal.[104]

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97. *Id.*

98. Brian D. Shannon, Essay, *The Time is Right to Revise the Texas Insanity Defense: An Essay*, 39 TEX. TECH L. REV. 67, 83 (2006); *see also* Brown, *supra* note 96.

99. Shannon, *supra* note 98, at 83. "Texas has one of the nation's highest bars for a successful insanity defense." Paul Burka, *It's Crazy*, TEX. MONTHLY (July 2002), https://www.texasmonthly.com/articles/its-crazy/ [https://perma.cc/EFA3-YYTB] (illustrating the fact that the Texas insanity defense sets up an extremely high standard for mentally ill defendants to meet, making it highly unlikely that the affirmative defense succeeds). However, even though it is difficult to succeed on an insanity defense in Texas, it is not impossible. *See, e.g.*, *Insanity Defense Accepted in Texas Campus Stabbing Attack*, U.S. NEWS (Dec. 11, 2018, 12:25 PM), https://www.usnews.com/news/best-states/texas/articles/2018-12-11/insanity-defense-accepted-in-texas-campus-stabbing-attack [https://perma.cc/TNS5-2HHM] (explaining that an Austin judge found defendant Kendrex White not guilty by reason of insanity because White did not know the difference between right and wrong at the time he attacked and killed victim Harrison Brown).

100. Katherine A. Drew, *Diminished Capacity as a Result of Intoxication and Addiction: The Capacity to Mitigate Punishment and the Need for Recognition in Texas Death Penalty Litigation*, 5 TEX. WESLEYAN L. REV. 1, 13 (1998).

101. *Id.*

102. *See id.* at 14. "[O]ne of the quirks of Texas law is that a mental disease or defect that may constitute a form of psychosis *known and recognized by medical science* may not be sufficient to establish a section 8.01 defense." *Id.*

103. *Id.* at 14–15. *See generally The Connection Between Mental Illness and Substance Abuse*, DUAL DIAGNOSIS, https://www.dualdiagnosis.org/mental-health-and-addiction/the-connection/ [https://perma.cc/8Z9P-4HMN] (last visited Feb. 17, 2020) (providing statistics on the correlation between substance abuse and mental illness).

104. Drew, *supra* note 100, at 15; *see also* Shannon, *supra* note 98, at 83.

D. If Andrea Yates Did Not Pass the Standard for Not Guilty by Reason of Insanity, Who Does?

On June 20, 2001, Andrea Yates murdered her five children by drowning them in the bathtub at their family home, constituting one of the most infamous murder stories in Texas history.[105] After murdering her children while her husband was at work, Yates called the police, exclaiming, "I just killed my kids."[106] Police arrived, and Yates led them to a bedroom in the back of her house, where police found four of Yates's children lying still on the bed.[107] Yates had left her eldest child, who was seven-years-old at the time, lying face-down in the bathtub full of water.[108] Yates remained calm as she explained to the police that she was a bad mother and that her "children were disabled and not developing normally. And so, she decided to send them to God."[109]

It is almost impossible to doubt that Andrea Yates was severely mentally ill. She had psychosis and postpartum depression.[110] She attempted suicide two times—the first time only four months after she gave birth to her fourth child.[111] She was hospitalized four times.[112] Yates routinely took antidepressants and a drug called Haldol.[113] For Andrea Yates, it was a continuous downward spiral into a dark and dangerous place. Yates became incapable of caring for her children by herself due to her mental illness, and so Yates's mother-in-law started coming to Yates's home every day to help watch the children.[114] Yet, even though Yates's mental condition did not improve, Yates's psychiatrist decided to take Yates off her medication, just before the murders.[115]

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105. Skip Hollandsworth, *Her Dark Places*, TEX. MONTHLY (Aug. 2001), https://www.texasmonthly.com/articles/her-dark-places/ [https://perma.cc/T2BL-2RWH].

106. Andrew Cohen, *10 Years Later, the Tragedy of Andrea Yates*, ATLANTIC (Mar. 11, 2012), https://www.theatlantic.com/national/archive/2012/03/10-years-later-the-tragedy-of-andrea-yates/254290/ [https://perma.cc/Y9J7-GBE8].

107. Hollandsworth, *supra* note 105.

108. Cohen, *supra* note 106; *see also* Burka, *supra* note 99.

109. Hollandsworth, *supra* note 105. "Following her arrest, Yates had told authorities that she drowned her children to save them. 'My children were not righteous,' Yates said. 'I let them stumble. They were doomed to perish in the fires of hell.'" Cohen, *supra* note 106.

110. Burka, *supra* note 99.

111. Hollandsworth, *supra* note 105.

112. Burka, *supra* note 99.

113. Hollandsworth, *supra* note 105. "[Haldol is] used to treat delusions, schizophrenia, and mania." *Id.*

114. *Id.*

115. Cohen, *supra* note 106. After each incident, something should have been done. But in the end, it was too late. "[Yates] came to believe that she was possessed by Satan

Today, Andrea Yates resides at Kerrville State Hospital, where she is treated for her mental illness daily, and where she will remain for the rest of her life.[116] However, it was due to a trial mishap that Yates was eventually found NGRI and ended up in a state mental hospital.[117] In 2002, Yates's first trial ended in a capital murder conviction, and Yates was sentenced to life in prison.[118] "[I]n 2005, a Texas appeals court overturned her conviction and prison sentence because a prosecution witness had falsely testified about an episode of a television show."[119] Thus, Yates had a new trial in 2006 in which the jury found her NGRI.[120]

Andrea Yates should never have been sent to prison in the first place.[121] However, her case illustrates the precise issues with the *M'Naghten* test and the insanity defense in Texas. The central question in the Andrea Yates case is whether she knew that drowning her children was wrong. Although not *explicitly* defined in the Texas Penal Code, Texas courts have interpreted "wrong" to mean a legal wrong.[122]

The disconnect between Yates's first trial and her second trial is confusing and frustrating—how did the first jury find that Yates knew that her actions were wrong while the second jury found that Yates actually did not know that her actions were wrong? Jurors from the first trial noted that because Yates could describe the murders exactly as they had occurred, she must have known what

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and the only way to save her children from the evil one for all eternity was to kill them so that they could get to heaven before it was too late." Burka, *supra* note 99.

116. Christine Dobbyn, *Where Is Andrea Yates Now? A Peek Inside Her Life in a State Mental Hospital*, ABC 13 EYEWITNESS NEWS (June 20, 2018), https://abc13.com/where-is-andrea-yates-now-peek-inside-her-secluded-life/1980992/ [https://perma.cc/7TPN-DNSQ]. Yates's insanity defense was rejected by a jury in Houston, Texas, on March 12, 2002, after only three and a half hours of deliberation. Yates was convicted of capital murder and sentenced to life in prison. Cohen, *supra* note 106.

117. *See* Cohen, *supra* note 106.

118. *Andrea Yates Fast Facts*, CNN (June 14, 2019, 6:04 PM), https://www.cnn.com/2013/03/25/us/andrea-yates-fast-facts/index.html [https://perma.cc/RJ6H-Q2XW].

119. Cohen, *supra* note 106; *see also* Yates v. State, 171 S.W.3d 215, 216 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd).

120. Cohen, *supra* note 106.

121. There is a fine line between feeling sympathy for Andrea Yates and acknowledging that she committed an unforgivable, horrific act—the worst fathomable. However, the justice system failed Yates when she was sentenced to life in prison. Yates is the textbook example of not guilty by reason of insanity. How could she have known that what she was doing at the time she murdered her children was wrong when she truly believed that she was saving them and sending them to Heaven? It all came down to the rigid insanity defense law in Texas. Even though Yates believed that drowning her children was right, she most likely knew that it was also illegal. *See generally* Burka, *supra* note 99.

122. Shannon, *supra* note 98, at 83.

she was doing.[123] In addition, they reasoned that Yates would not have called the police if she did not believe that what she had done was wrong.[124] On the other hand, jurors from the second trial stated that Yates knew her actions were illegal at the time she murdered her children. However, the jurors clarified that in Yates' delusional mental state, Yates truly believed that drowning her children was right.[125]

The problem with the *M'Naghten* test (and thus the Texas insanity defense) is that it can be near impossible to judge whether someone knew right from wrong in a certain moment. The *M'Naghten* test is unclear on whether a fact-finder should analyze the "right from wrong test" from an objective standard versus a subjective standard.[126] "M'Naghten is known as a purely cognitive test because it only focuses on the defendant's knowledge and not on her will or volition."[127] The test ignores the volitional aspect of one's lack of control over one's actions.[128] Furthermore, not only did the *M'Naghten* test not apply to Yates, but no current insanity test applied to Yates.[129] It is time to draft a new insanity test—one that is certain to encompass people like Andrea Yates.

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123. *Id.* at 82.

124. *Id. Contra* Christine Michalopoulos, *Filling in the Holes of the Insanity Defense: The Andrea Yates Case and the Need for a New Prong*, 10 VA. J. SOC. POL'Y & L. 383, 400 (2003) ("Dr. Philip Resnick . . . argues that many women who kill their children do so out of love, to relieve the child's real or imagined suffering. . . . [The perpetrators] usually seek help immediately, making no effort to conceal their crimes, and often appear dazed and confess in a mechanical manner.").

125. Shannon, *supra* note 98, at 82.

> [E]ven though [Yates] knew that society viewed the killing as morally repugnant and that she would be punished by society if she were to kill her children, she did not make the connection that the act of killing her children was also wrong because the delusional world she lived in told her that it was right.

Michalopoulos, *supra* note 124, at 399–400.

126. *See* Michalopoulos, *supra* note 124, at 390–91. An objective standard would ask whether Yates knew that her actions were illegal. A subjective standard would ask whether Yates believed in her mind that her children would be possessed by the Devil and thus, whether Yates believed that, to be a good mother, she needed to save them by sending them to God.

127. *Id.* at 389.

128. *See id.* at 401. For example, the test ignored the fact that Yates drowned her children "because of a feeling of necessity—her desire to save her children from eternal torture overwhelmed her to such a degree that she could not prevent herself from killing them." *Id.*

129. *Id.* "Yates would clearly have failed the [I]rresistible [I]mpulse test for insanity." *Id.* at 394. "If Yates had thought about killing her children for two years, and had even once filled her bathtub in order to drown them but then resisted going through with it, it would be impossible to argue that her will was truly overcome when she ultimately carried out her plan." *Id.* at 395. "The standard that comes closest to allowing Yates to qualify is the ALI/MPC test . . . . However, the fairly vague language and the reluctance of courts to provide any assistance on that proper interpretation of the language results in the

IV. ACCESS TO MENTAL HEALTH EXPERTS IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM

A. McWilliams v. Dunn *Case Study*

James McWilliams, an indigent[130] defendant, was convicted of the 1986 rape and murder of Patricia Reynolds in Tuscaloosa, Alabama.[131] The trial court appointed counsel for McWilliams, and McWilliams's counsel requested that McWilliams undergo a psychiatric examination.[132] The trial court granted McWilliams's request, and three psychiatrists concluded that McWilliams was competent and had not been suffering from mental illness at the time he raped and murdered Reynolds.[133] The jury in McWilliams's trial heard testimony from McWilliams's mother, who explained that McWilliams had suffered a traumatic brain injury as a child, and that this brain injury later caused behavioral problems and a psychotic disorder.[134] The jury found McWilliams guilty.[135]

Defense counsel requested additional psychiatric testing and mental health records in anticipation of the sentencing phase of the trial.[136] Dr. Goff, a neuropsychologist, examined McWilliams and found that McWilliams had "organic brain dysfunction" resulting from the head injuries McWilliams suffered as a child.[137] However, defense counsel received Dr. Goff's examination only a few days before the start of the sentencing hearing, leaving counsel with a minimal amount of time to review and analyze the

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ALI/MPC test being difficult to apply." *Id.* at 401.

130. An indigent defendant is "one without sufficient income to afford a lawyer for defense in a criminal case. If the court finds a person is an indigent, the court must appoint a public defender or other attorney to represent him/her." *Indigent*, LAW.COM LEGAL DICTIONARY, https://dictionary.law.com/Default.aspx?selected=944 [https://perma.cc/5NBT-ECWS] (last visited Feb. 17, 2020).

131. Nina Totenberg & Lauren Russell, *Supreme Court to Decide if Prosecution, Defense Can Share Experts in Capital Case*, NPR (Apr. 24, 2017, 4:32 AM), https://www.npr.org/2017/04/24/525113783/supreme-court-to-decide-if-prosecution-defense-can-share-experts-in-capital-case [https://perma.cc/DDZ7-JXZW].

132. Stephen A. Saltzburg, *The Duty to Investigate and the Availability of Expert Witnesses*, 86 FORDHAM L. REV. 1709, 1718 (2018).

133. Carol Garfiel Freeman, *Supreme Court Cases of Interest*, CRIM. JUST., Fall 2017, at 51, 57.

134. Totenberg & Russell, *supra* note 131; Freeman, *supra* note 133, at 57.

135. Totenberg & Russell, *supra* note 131.

136. McWilliams v. Dunn, 137 S. Ct. 1790, 1796–97 (2017); *see also* Freeman, *supra* note 133, at 57.

137. Totenberg & Russell, *supra* note 131. The report also stated that McWilliams's brain damage affected his behavior. McWilliams's mental health records showed that McWilliams was taking psychotropic medication. *Id.*; Freeman, *supra* note 133, at 57.

report.[138] Defense counsel repeatedly requested a continuance,[139] but the court denied every request.[140] The judge sentenced McWilliams to death.[141]

McWilliams appealed and argued that according to *Ake v. Oklahoma*,[142] he was entitled to meaningful expert assistance, which he had been denied.[143] In a 5-4 decision, the Supreme Court of the United States ruled very narrowly in favor of McWilliams, concluding that McWilliams had, in fact, been denied meaningful expert assistance.[144] Justice Breyer, writing for the majority, "found that an independent expert dumping a report on a defense counsel's desk prior to a sentencing hearing without any assistance in understanding it was not enough."[145] However, the majority did not answer the broader constitutional question of whether an indigent defendant who has a mental illness is entitled to an expert who is chosen by the defense, rather than simply a neutral expert.[146]

B. "There Can Be No Equal Justice Where the Kind of Trial a Man Gets Depends on the Amount of Money He Has"[147]

An underlying issue in *McWilliams v. Dunn* is the disparity between the resources available to indigent defendants versus wealthy defendants and prosecutors.[148] Experts are vital in criminal cases, especially those cases involving mentally ill

138. *McWilliams*, 137 S. Ct. at 1796; *see also* Freeman, *supra* note 133, at 57.

139. *McWilliams*, 137 S. Ct. at 1796; *see also* Freeman, *supra* note 133, at 57. "[McWilliams's] defense counsel pleaded with the sentencing judge for time and an expert to help him understand all the new material, which as a layman he could not understand or explain." Dahlia Lithwick, *Dodging Insanity: The Supreme Court Doesn't Know How the Justice System Should Deal with Mental Illness*, SLATE (June 19, 2017, 5:13 PM), https://slate.com/news-and-politics/2017/06/the-supreme-court-has-no-idea-what-to-do-about-mentally-ill-defendants.html [https://perma.cc/8PZM-YVA9].

140. *McWilliams*, 137 S. Ct. at 1796; *see also* Freeman, *supra* note 133, at 57.

141. Totenberg & Russell, *supra* note 131.

142. *See* Ake v. Oklahoma, 470 U.S. 68 (1985); Lithwick, *supra* note 139 ("In *Ake*, the Supreme Court established that when an indigent defendant's sanity becomes a major issue at trial, 'the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.'").

143. Lithwick, *supra* note 139.

144. *McWilliams*, 137 S. Ct. at 1800–01; *see also* Lithwick, *supra* note 139.

145. Lithwick, *supra* note 139; *see also McWilliams*, 137 S. Ct. at 1800–01.

146. *McWilliams*, 137 S. Ct. at 1800.

147. David Medine, *The Constitutional Right to Expert Assistance for Indigents in Civil Cases*, 41 HASTINGS L.J. 281, 298 (1990) (capitalization altered) (quoting Justice Black's majority opinion in Griffin v. Illinois, 351 U.S. 12, 19 (1956)).

148. *See id.* at 298–99; Lithwick, *supra* note 139.

defendants.[149] Experts aid defendants in establishing claims and defenses and in presenting defendants' cases in their entirety.[150] In addition, experts are needed to rebut an adversary expert's testimony.[151]

Experts come with a cost, however. Indigent defendants are disproportionally disadvantaged by the high fees associated with hiring experts.[152] In an underfunded criminal justice system, defense counsel cannot "conduct legal research, vigorously pursue constitutional issues, interview witnesses, conduct factual investigation, hire experts, file briefs, or perform the other activities that are required if counsel is to provide a competent defense."[153] On the other hand, wealthy defendants and prosecutors can build strong cases through experts of their choosing.[154]

The Court in *McWilliams v. Dunn* left open the question of whether indigent defendants are entitled to a partisan expert of their choosing versus simply a neutral expert.[155] Partisan experts serve important functions to indigent defendants, and having a partisan expert is almost always more desirable than having a neutral expert.[156] Unlike a neutral expert, a partisan expert assists in preparation of the case—this includes collecting, assembling, producing, and explaining information, as well as cross-examining the opposing party's witnesses.[157] Furthermore, neutral experts are required to provide both sides with their findings.[158] Thus, if a neutral expert were to create an adverse report about an indigent defendant, that neutral expert would have to provide both sides with the report, and the prosecution could use that information against the indigent defendant.[159] The scales of the justice system are unfairly tipped toward those defendants who can afford counsel and experts.

149. Totenberg & Russell, *supra* note 131.

150. *See* Medine, *supra* note 147, at 286.

151. *Id.*

152. *See id.* at 302–03. "Often an indigent cannot rely on a contingency-fee lawyer to take her case, especially if the representation requires significant expenditures for expert witnesses." *Id.* at 288.

153. Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 762.

154. Medine, *supra* note 147, at 298–303, 313; Lithwick, *supra* note 139.

155. *See* Lithwick, *supra* note 139.

156. Medine, *supra* note 147, at 347.

157. *Id.*

158. *Id.*

159. *Id.* at 347–48.

C. William Charles Morva Case Study

In 2006, while in custody for attempted robbery charges, William Charles Morva escaped and killed a hospital security guard and deputy sheriff.[160] In June 2008, he was sentenced to death by a Virginia court.[161] Morva appealed with a petition for clemency from Governor Terry McAuliffe, a Democrat and an opponent of the death penalty.[162] The clemency petition explained that the jury at Morva's trial did not have the opportunity to hear expert testimony describing the effects of Morva's crippling mental illness.[163]

The problem for Morva was that he never got to argue the affirmative defense of insanity because he was denied access to a partisan expert.[164] After being charged with capital murder and various other crimes, Morva asked to have Dr. Mark Cunningham appointed as a defense expert.[165] Dr. Cunningham would have evaluated the likelihood of Morva committing violence in prison if Morva would have been sentenced to life in prison.[166] The trial court denied Morva's request, and Morva was sentenced to death.[167] Morva's case went up to the Supreme Court, and the Supreme Court affirmed.[168]

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160. Morva v. Commonwealth, 683 S.E.2d 553, 557 (Va. 2009); *see also* Blumenthal, *supra* note 53; Associated Press, *Virginia Executes William Morva Using Controversial Three-Drug Mixture*, GUARDIAN (July 7, 2017, 12:42 AM), https://www.theguardian.com/us-news/2017/jul/07/virginia-executes-william-morva-using-controversial-three-drug-mixture [https://perma.cc/FXJ5-9ADV].

161. Morva, 683 S.E.2d at 559; Blumenthal, *supra* note 53.

162. Rob Warden & Daniel Lennard, *Death in America Under Color of Law: Our Long, Inglorious Experience with Capital Punishment*, 13 NW. J.L. & SOC. POL'Y 194, 295 (2018) (noting that Morva's appeal for clemency "had drawn support from more than two dozen members of the Virginia General Assembly, Amnesty International, the ACLU of Virginia, various mental health organizations, and the daughter of the slain deputy sheriff").

163. Blumenthal, *supra* note 53. Morva believed that he had a gastrointestinal disease which required him to consume only "raw meat, berries, and pinecones," and that he was the sworn leader of indigenous tribes. Morva also believed that former President George W. Bush and local law enforcement had conspired against him in some sort of scheme. Warden & Lennard, *supra* note 162, at 295.

164. Am. Bar Ass'n, *Case Law Developments*, 34 MENTAL & PHYSICAL DISABILITY L. REP. 19, 65 (2010).

165. *Id.*

166. *Id.*

167. *Id.* The trial court had previously appointed two psychologists as experts for the defense. *Id.*

168. Morva v. Commonwealth, 683 S.E.2d 553, 568 (Va. 2009); *see also* Am. Bar Ass'n, *supra* note 164, at 65. The Supreme Court found that the trial court had not acted in error and had not abused its discretion in denying Morva's request to appoint Dr. Cunningham. Am. Bar Ass'n, *supra* note 164, at 65.

However, a dissent argued that Dr. Cunningham's suggested testimony was relevant.[169] The testimony would have shown that, because of Morva's background and characteristics, Morva would most likely not have been a further danger to anyone if he had been an inmate in a maximum security prison.[170] Thus, there was a reasonable probability that if the jury had heard Dr. Cunningham's testimony, it might not have chosen the death penalty.[171] Dr. Cunningham's testimony would have aided the jury in determining whether a sentence of life imprisonment without the possibility of parole would have been a fairer sentence for Morva.[172]

Morva should have had the opportunity to prove that he was not competent to be executed and to assert an affirmative insanity defense through a partisan expert, knowledgeable as to Morva's mental illness.[173] Morva was severely mentally ill; he could not differentiate between reality and delusion.[174] In addition, he was diagnosed with delusional disorder, a disorder that is similar to schizophrenia.[175] Just like it did with Andrea Yates, the justice system failed William Charles Morva. Although there was no question as to the severity of Morva's mental illness, Morva was executed on July 6, 2017.[176]

V. SOLUTIONS

A. The United States Needs Better Public Mental Health

Since the deinstitutionalization movement in the 1960s, there has been a continuous mental health crisis in the United States.[177]

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169. Am. Bar Ass'n, *supra* note 164, at 66.

170. *Id.* Even though the trial court had previously appointed mental health experts to evaluate Morva's mental state, those mental health experts had failed to take into account the entirety of Morva's family history and medical history. Blumenthal, *supra* note 53.

171. Am. Bar Ass'n, *supra* note 164, at 66.

172. *Id.*

173. Blumenthal, *supra* note 53 ("[Sentencing someone to death who is mentally ill is simply] 'killing one who has no capacity to come to grips with his own conscience or deity,' as Justice Thurgood Marshall wrote in his 1986 opinion in *Ford v. Wainwright*.").

174. *See William Morva Execution in Virginia Divides Victim's Mom, Daughter*, CBS NEWS (July 6, 2017, 9:12 AM), https://www.cbsnews.com/news/william-morva-execution-virginia-divides-victim-mom-daughter/ [https://perma.cc/B8Q3-3UP7].

175. *Id.*

176. Tracy Connor & Phil Helsel, *Virginia Executes William Morva for 2006 Killings*, NBC NEWS (July 6, 2017, 2:14 PM), https://www.nbcnews.com/news/us-news/virginia-gov-terry-mcauliffe-won-t-stop-william-morva-execution-n780236 [https://perma.cc/BSK6-ERZX].

177. Fred Osher, *We Need Better Funding for Mental Health Services*, N.Y. TIMES:

Because of the nationwide decrease in public mental health facilities, a large majority of the mentally ill population that would have been placed in mental health facilities has largely been re-routed to prisons, jails, and nursing homes.[178] Funding issues have prevented many people who need organized inpatient care from obtaining the necessary assistance.[179] The mentally ill population is left with the option of private mental health hospitals, which are often extremely costly, and which often do not accept health insurance.[180]

The United States needs to spend more on public mental health. Change must occur at the federal level as well as the state and city level. The 2008 recession saw a $4 billion cut in spending for public mental health.[181] Although it has been more than ten years since the recession, little has been done at the federal level to mitigate the mental health crisis.[182] States also play an important role in providing funding and services for public mental health.[183] States have wide discretion in determining how to deal

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ROOM FOR DEBATE (May 9, 2016, 11:54 AM), https://www.nytimes.com/roomfordebate/2016/05/09/getting-the-mentally-ill-out-of-jail-and-off-the-streets/we-need-better-funding-for-mental-health-services [https://perma.cc/737R-6ZGE]. A large portion of Americans do not have health insurance. Federal and state resources that should be going toward fostering public mental health are going elsewhere. There are not enough public mental health facilities and providers to adequately care for the mentally ill population. The list goes on. *Id.*; *see also* Samantha Raphelson, *How the Loss of U.S. Psychiatric Hospitals Led to a Mental Health Crisis*, NPR (Nov. 30, 2017, 1:15 PM), https://www.npr.org/2017/11/30/567477160/how-the-loss-of-u-s-psychiatric-hospitals-led-to-a-mental-health-crisis [https://perma.cc/BGH9-HYXY] ("A study published in the journal *Psychiatric Services* estimates 3.4 percent of Americans—more than 8 million people—suffer from serious psychological problems.").

178. Osher, *supra* note 177. In addition, a large portion of Americans do not have health insurance. *Id.*

179. Raphelson, *supra* note 177.

180. *Id.* (finding that these private facilities can "cost upwards of $30,000 per month").

181. Osher, *supra* note 177. We must do better. Is it truly necessary to spend billions of dollars on military activities, or could the United States allocate some of that money toward funding public mental health? *See* Amadeo, *supra* note 40. What about the $182 billion the United States spends on mass incarceration every year? Couldn't the United States allocate some of that money toward creating rehabilitation facilities? Maybe that way we could slow the revolving door. *See Mass Incarceration Costs $182 Billion Every Year, Without Adding Much to Public Safety*, EQUAL JUST. INITIATIVE (Feb. 6, 2017), https://eji.org/news/mass-incarceration-costs-182-billion-annually [https://perma.cc/H4E7-85AU].

182. *See* Jason Plautz, *Why Denver Voted to Fund Mental-Health Treatment*, CITY LAB (Nov. 21, 2018), https://www.citylab.com/equity/2018/11/treatment-centers-addiction-mental-health-caring-4-denver/576202/ [https://perma.cc/8FJQ-5MVP].

183. *See The Federal and State Role in Mental Health*, MENTAL HEALTH AM., http://www.mentalhealthamerica.net/issues/federal-and-state-role-mental-health [https://perma.cc/43MS-WSUK] (last visited Jan. 8, 2019).

with public health, making it so that public health services look radically different from state to state.[184]

However, the most significant changes could be implemented citywide and countywide, as exemplified in places such as Denver, Colorado, New York City, and King County, Washington.[185] The city of Denver implemented "Caring 4 Denver," an initiative to support mental health and addiction rehabilitation.[186] Under Caring 4 Denver, the city passed a 0.25% sales tax, which will be used to fund mental health services, programs, and facilities.[187] Initiatives like Caring 4 Denver have the potential to drastically improve the mental health crisis and the overcrowding of prisons. Although citywide and countywide programs are of a smaller scale, they can more effectively address a community's needs. Cities across the United States must use Denver as an example and implement initiatives and tax policies that will support public mental health.

B. The United States Must Shift Its Focus from Punishment to Rehabilitation

The primary goals of the United States criminal justice system are deterrence and punishment.[188] In theory, the ideas of deterrence and punishment make sense—when we punish people for the crimes they commit, we are sending the message to all other potential offenders that they too will be punished for their crimes.[189] However, deterrence cannot be accomplished unless three circumstances are met.[190] The offender must know that his conduct was illegal; the offender must have the ability to weigh

184. *Id.* States can go further than the federal government's requirements by providing additional mental health services. *Id.*

185. Plautz, *supra* note 182.

186. *Id.*

187. *Id.* The financing mechanisms, explained:

> Instead of a hodgepodge drawn from different city budgets, the new tax will net an estimated $45 million a year dedicated solely to mental health and addiction. . . . The city revenue will go to a section 501(c)3 nonprofit with a board including representatives from law enforcement, hospitals, city agencies, and residents in recovery for addiction or mental health. They will direct how the money is spent, dividing it among four buckets: mental illness, addiction, criminal justice, and social factors like housing and unemployment.

Id.

188. Ava Shahani, *The Time Does Not Fit the Crime: Eliminating Mandatory Minimums for Nonviolent Drug Offenders in Favor of Judicial Discretion*, 23 SW. J. INT'L L. 445, 457 (2017).

189. Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089, 1093 (2011).

190. *See id.*

the pros and cons of committing the crime; and finally, the offender must conclude that the consequence of punishment outweighs the profit from committing the crime.[191] The problem is that the people who are most likely to be criminal offenders are also the people who are most likely to have faulty judgment and the inability to appreciate the future ramifications of their actions.[192] In addition, there is evidence tending to show that punishment is not effective in deterring those offenders that have previously been incarcerated.[193]

This Comment does not attempt to argue that prisons should be abolished because prisons do serve a purpose.[194] However, the United States must make several changes to the criminal justice system and the current prison system to change from a punitive system to a more rehabilitative system. First, there needs to be a decrease in the amount of money and resources spent on prisons. Prisons should house only the most violent and dangerous criminals. Second, the United States needs to divert funding toward creating, staffing, and managing rehabilitation facilities.[195] We should not be incarcerating people who commit petty drug offenses or those petty offenders suffering from addiction and severe mental illness. Furthermore, we should not be incarcerating those severely mentally ill offenders who cannot understand the illegality of their crimes or those who committed crimes in delusional, psychotic states.[196]

The rehabilitative model has been demonstrated in states and cities across the United States. James Gilligan, a clinical professor

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191. *See id.*

192. *Id.* "They are more likely to be under the influence of alcohol, drugs, anger, fear, group arousal, group identity shift, over-impulsiveness, mental illness, or a variety of other factors making them dysfunctional in their calculations." *Id.*

193. James Gilligan, *Punishment Fails. Rehabilitation Works.*, N.Y. TIMES: ROOM FOR DEBATE (Dec. 19, 2012, 11:43 AM), https://www.nytimes.com/roomfordebate/2012/12/18/prison-could-be-productive/punishment-fails-rehabilitation-works [https://perma.cc/33V3-CQUE] (describing that within three years of being incarcerated, two-thirds of criminal offenders reoffend).

194. Without going into a discussion about the death penalty, I truly believe that there are people who must be locked up for life for the terrors they committed (e.g., serial killers like Gary Ridgway, Dennis Rader, etc.). *Famous Serial Killers Who Are Still Alive*, RANKER, https://www.ranker.com/list/famous-serial-killers-who-are-still-alive/ranker-crime [https://perma.cc/5KTL-CCBU] (last updated Jan. 24, 2020). *Contra* Gilligan, *supra* note 193 (suggesting that we should get rid of all prisons in America and instead have "locked, safe and secure home-like residential communities—what we might call an anti-prison").

195. An alternative idea would be to transform a large number of American prisons into rehabilitation facilities—that way, we would not have to build new facilities from the ground up.

196. For example, mentally ill offenders like Andrea Yates, who truly believed in her delusional state that she was saving her children.

of psychology, and his colleague Bandy Lee, a psychiatrist, created a re-educational program with offenders in jails in San Francisco.[197] Another example of the rehabilitative model is the North Dakota prison system.[198] After visiting Halden, a maximum-security facility in Norway, North Dakota's Prisons Chief, Leann Bertsch, made progressive changes to the North Dakota prison system.[199]

Bertsch got rid of the standard, outdated solitary confinement model and replaced it with a new model.[200] In addition, Bertsch leased a piece of land on the outskirts of Bismarck, North Dakota, which is now called "the Farm."[201] On the Farm, inmates have the opportunity to earn certain privileges, such as visits home for the day, shopping trips, staying in a private room on the Farm, and the authorization to wear regular clothing.[202] The Farm also has a work-release plan, allowing inmates to leave the Farm to go to work.[203] Rehabilitative programs like the ones in San Francisco and North Dakota have proven to be effective.[204] Texas must follow suit.[205]

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197. Gilligan, *supra* note 193. There was an 83% reduction in violent reoffending for offenders who participated in the re-education program for at least four months. In addition, the re-education program saved taxpayer dollars (about $30,000 per year per person) because of the decrease in recidivism. *Id.*

198. *See* Dashka Slater, *North Dakota's Norway Experiment: Can Humane Prisons Work in America? A Red State Aims to Find out.*, MOTHER JONES, https://www.motherjones.com/crime-justice/2017/07/north-dakota-norway-prisons-experiment/ [https://perma.cc/U2AA-JA6L] (last visited Apr. 24, 2020).

199. *Id.* The North Dakota Department of Corrections and Rehabilitation is comprised of four prisons and a corrective juvenile center. *Id.*

200. *Id.* Under the new solitary confinement system, an inmate can only be placed in solitary confinement for endangering another person; an inmate will only spend a short amount of time in solitary confinement, and the focus is on treatment. In addition, upon leaving solitary confinement, the inmate will be placed in a behavioral therapy unit to help with reintegration. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*; Becky Jacobs, *Work Release a Positive Option for Most First-Time Offenders, Judges Say*, BISMARCK TRIB. (Feb. 29, 2016), https://bismarcktribune.com/news/state-and-regional/work-release-a-positive-option-for-most-first-time-offenders/article_dbe05cce-8f6a-5dd7-a25f-cf80ca9196e1.html [https://perma.cc/Z7Y4-2YD3].

204. Gilligan, *supra* note 193; Slater, *supra* note 198 (stating that there has been a decrease in threats and violence since the new program was implemented).

205. It is important to note that prison/criminal justice reform should not be partisan. Liberals and conservatives alike will greatly benefit from moving towards a system that values rehabilitation over punishment. As Leann Bertsch stated, "The most I can do with the Legislature . . . is get them to understand that incarcerating more people is not a good investment. If we had the same incarceration rate as Norway, we would have the resources to do a really good job . . . . I'm not a liberal . . . . I'm just practical." Slater, *supra* note 198.

C. The Supreme Court Must Go Further Than the McWilliams v. Dunn *Holding*

Although the Supreme Court came to the right conclusion in *McWilliams v. Dunn*,[206] it should have gone one step further. The Supreme Court should have also held that an indigent defendant who has a mental illness is entitled to have his defense counsel choose an expert witness to examine the defendant and testify on the defendant's behalf,[207] rather than having a neutral expert assigned. The judicial system in the United States is based on an adversarial model.[208] In an adversarial justice system, both parties utilize evidence to further their self-interested arguments.[209] Furthermore, an adversarial system can be effective only when both parties have equal resources to present their cases through expert testimony, cross-examination, and strong legal arguments.[210]

The majority of defendants in the criminal justice system are indigent,[211] and often indigent defendants receive court-appointed attorneys.[212] The problem for the indigent defendant with a court-appointed attorney arises in the case of the defendant attempting to argue an insanity defense during the guilt and innocence phase of trial.[213] The adversarial nature of trial is undermined when a neutral expert, or a prosecution's expert, analyzes and evaluates the indigent defendant.[214] A partisan expert will be more

206. *See* discussion *supra* Section IV.A.

207. Specifically, the expert should have been permitted to testify about the defendant's sanity during the guilt/innocence phase of the trial, where the defendant faces a life sentence or the death penalty. *See* Fredrick E. Vars, *An Indigent Criminal Defendant Is Entitled to "an Expert of His Own,"* 74 WASH. & LEE L. REV. ONLINE 1, 4 (2017), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1077&context=wlulr-online [https://perma.cc/U5LY-SNCS].

208. Alexandra Marinucci, *Achieving* Ake*: Defendants Deserve the Constitutional Right to Independent Mental Health Professionals*, 79 U. PITT. L. REV. 729, 743 (2018).

209. *Id.*

210. *Id.* at 743–44.

211. *Id.* at 746.

212. *The Right to a Public Defender*, JUSTIA, https://www.justia.com/criminal/procedure/miranda-rights/right-to-public-defender/ [https://perma.cc/8YET-798U] (last updated Apr. 2018). This means that most of the time, in contrast with nonindigent or wealthy defendants, indigent defendants do not get to choose their attorneys and are thus at a disadvantage. However, court-appointed attorneys are vital to the functioning of the United States criminal justice system and the representation of indigent defendants. *Id.*; *see also* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1042 (2006) (explaining that a criminal defendant's right to counsel is indispensable and essential to ensure due process).

213. *See* Vars, *supra* note 207, at 4–7; *see also* Marinucci, *supra* note 208, at 747.

214. Marinucci, *supra* note 208, at 746. It would be almost impossible for a neutral expert to testify and provide evidence in favor of an indigent defendant while actively aiding

successful than a neutral expert at providing mitigating evidence, psychiatric testimony, and future-dangerousness analysis regarding the indigent defendant.[215] However, partisan experts come at a cost. Thus, the criminal justice system needs more resources to support a plan that introduces more partisan experts representing indigent defendants.

Today, indigent defendants' use of partisan experts is of critical importance, especially when there is a possibility that the defendant receives capital punishment.[216] Parties in criminal cases are increasingly using experts "who may determine whether a defendant loses his or her liberty or life, . . . thus putting in sharper focus the consequences to a defendant of unequal access to [partisan experts]."[217] Indigent defendants need partisan experts on their side to have a fighting chance in front of a judge or a jury.[218] Evidence shows that judges and juries regularly accept an expert's testimony as true.[219] If an indigent defendant cannot obtain his own partisan expert to rebut the prosecution's expert or to present favorable testimony on his behalf, will the defendant ever have a fair chance of prevailing?[220]

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the prosecution at the same time. "To allow the prosecution to enlist [a] psychiatrist's efforts to help secure the defendant's conviction would deprive an indigent defendant of the protections that our adversarial process affords all other defendants." *Id.* at 745. In a statement on this topic, Jessica Brand, defense attorney and legal director of "Fair Punishment Project" at Harvard University, said: "When people are appointed as experts, they're coming in with all kinds of biases. And people who are appointed by the trial court, who do they want to please? The trial judge. Defense counsel has very different interests. That is hugely problematic." James Hamblin, *Is Psychiatry Partisan?*, ATLANTIC (May 5, 2017), https://www.theatlantic.com/health/archive/2017/05/objectivity-in-minds/525036/ [https://perma.cc/L747-88AT].

215. *See* Vars, *supra* note 207, at 4, 6. When an indigent defendant and his legal counsel can choose an expert, they can more easily work together toward presenting an effective defense. In addition, the partisan expert will be devoted to understanding and explaining to a finder of fact the defendant's mental illness and psychological history. Marinucci, *supra* note 208, at 747. But some, including John Petrila, a forensic-psychology scholar in Dallas, Texas, think that a battle of experts could get out of hand and lead to faulty results. *See* Hamblin, *supra* note 214 ("I'm not under any illusion that [guaranteeing access to mental-health experts] solves quality issues or creates efficiency").

216. Vars, *supra* note 207, at 6.

217. Marinucci, *supra* note 208, at 746.

218. *See id.* at 744.

219. *Id.* at 746.

220. *See id.* at 746–47. "On the other hand, a 'battle' between independent or partisan mental health professionals, one for the prosecution and the other for the defense, permits the jury or judge to evaluate opposing scientific opinions and reach a more considered conclusion, pursuant to the adversarial system." *Id.* at 747.

D. Necessary Changes to the Insanity Defenses

There are several possible solutions to improving the insanity defenses. First, legal scholars could draft a completely new defense. Second, they could revise the existing insanity defenses to be more aligned with the medical field and modern psychiatry and psychology. The medical field continues to progress in the understanding of mental illnesses, while the legal field remains static and underdeveloped.[221] Regardless of the solution adopted, the legal field must select an insanity defense that is more closely aligned with the medical field's modern and sophisticated approach.[222]

If legal scholars choose to draft a new insanity defense test, it should include both volitional and cognitive prongs. A volitional prong allows courts to assess mentally ill defendants like Andrea Yates—she probably knew that her actions were illegal and wrong, but she was incapable of controlling her actions because of her severe mental disease.[223] A cognitive prong forces one to ask whether the criminal defendant knew what he was doing when he committed the criminal act.[224] "A defendant [should] not [be] culpable for an act that, because of a psychological infirmity, he or she did not know he or she was committing."[225]

In addition, the new insanity defense should include a causation prong, requiring the defendant's mental illness to have caused his erroneous beliefs that his actions were appropriate.[226] The new causation prong would be necessary to stop those defendants who are not necessarily mentally ill but hold radical, extremist philosophies from succeeding with insanity defenses.[227] The causation prong would also embrace the idea that to be culpable of a crime, one must have consciously decided to commit the crime. If one's mental illness caused one to commit the crime, one cannot be legally culpable.[228]

The causation prong would require a two-part test to determine that a defendant's mental illness caused him to commit

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221. Maidman, *supra* note 79, at 1855.

222. *See id.*

223. *Insanity Defense*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/insanity_defense [https://perma.cc/835B-5875] (last visited Jan. 8, 2019); *see also* Michalopoulos, *supra* note 124, at 399–400.

224. *Insanity Defense*, *supra* note 223.

225. *Id.*

226. Michalopoulos, *supra* note 124, at 394–95, 402–03.

227. *Id.*

228. Maidman, *supra* note 79, at 1859.

the crime.[229] The two-part test would be most effective if applied by a qualified psychiatrist or psychologist. Part one requires the defendant to "[be] in an active state of psychosis at the time of the crime."[230] Part two requires the psychosis to cause the crime committed.[231] If a defendant satisfies the two-part test, then it can be determined that his mental illness caused him to commit the crime.[232]

There are also several changes that legal scholars and judges can make if they choose instead to revise the existing insanity defenses.[233] First, legal scholars could modernize *M'Naghten*-like tests by replacing the words "mental disease or defect" with "mental illness."[234] Second, they could replace the word "know" with "appreciate" in tests that still use the word "know."[235] Third, judges could clarify to the jury, through jury instructions, that a defendant's insanity defense should not be rejected solely because the defendant had the slightest understanding that his actions were illegal.[236] Finally, legal scholars could change "Not Guilty by Reason of Insanity" to Oregon's model of "Guilty Except for Insanity," which focuses on long-term psychiatric treatment rather than punishment via incarceration.[237]

VI. CONCLUSION

The majority of the policies in practice within the criminal justice system today are not aligned with modern psychology. Because of the disconnect, mentally ill defendants are unfairly prejudiced.[238] Mentally ill inmates are flooding prisons and jails but should instead be in rehabilitation and mental health facilities.[239] Since the closing of state-funded mental hospitals started in the 1950s and 1960s, numerous people suffering from

229. *See id.*

230. *Id.*

231. *Id.*

232. I want to note here that this new insanity defense would not override the need to look at each case individually and to investigate the context surrounding the facts of each case. Judges should have wide discretion in determining outcomes on a case-by-case basis.

233. *See generally* Shannon, *supra* note 98, at 85–90.

234. *Id.* at 86. The words "mental disease or defect" have a negative connotation and can be stigmatizing. *Id.*

235. *Id.* at 87 ("The term 'appreciate' better reflects that the concept of cognition includes various layers of mental recognition beyond simple 'knowledge.'").

236. *Id.* at 88.

237. *Id.* at 89–90.

238. *See* Montross, *supra* note 2; *see also* Prins, *supra* note 5, at 869–70.

239. *See* Prins, *supra* note 5, at 862.

mental illnesses have been moved from psychiatric facilities to prisons, jails, and nursing homes.[240]

For many mentally ill defendants, the only hope for being released from prison comes from claiming an insanity defense.[241] However, the three general insanity defenses used in the United States—the *M'Naghten* test, the American Law Institute Model Penal Code test, and the *Durham* Product test—are flawed.[242] Mentally ill defendants are rarely successful in arguing insanity defenses,[243] and Texas, in particular, has a strict insanity defense.[244] The Andrea Yates case illustrates just how difficult it is to use the insanity defense in Texas.[245]

Mentally ill defendants face too many obstacles in the criminal justice system, and circumstances are not better for those mentally ill defendants who are also indigent.[246] The Supreme Court, in *McWilliams v. Dunn*, failed to answer an important question affecting indigent defendants and their ability to hire partisan experts to aid in their defenses.[247] Thus, indigent defendants are left questioning whether they can expect equal treatment under the law.[248]

There are many solutions to ameliorating the discrepancy between modern psychiatry and the criminal justice system's treatment of mentally ill defendants.[249] First, the United States must increase funding for public mental health.[250] Second, the purpose of the criminal justice system must change from punishing people for the sake of an-eye-for-an-eye ideals to rehabilitating people.[251] Third, the Supreme Court must go further than its holding in *McWilliam v. Dunn* and conclude that an indigent defendant who has a mental illness is entitled to have his defense counsel choose a partisan expert.[252] Finally, jurisdictions in the United States can either modernize their insanity defenses to be more aligned with modern psychiatry or create new insanity defenses altogether.[253] Regardless, the United States criminal

240. *See supra* Section II.B.
241. *See supra* Section III.A.
242. *See supra* Section III.B.
243. Maidman, *supra* note 79, at 1846.
244. *See supra* Section III.C.
245. *See supra* Section III.D.
246. *See supra* Part IV.
247. Lithwick, *supra* note 139.
248. *See id.*
249. *See supra* Part V.
250. *See supra* Section V.A.
251. *See supra* Section V.B.
252. *See supra* Section V.C.
253. *See supra* Section V.D.

justice system is largely overdue in changing the way it functions and deals with its mentally ill population.

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