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MENTAL DISORDER AND CRIMINAL LAW

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I. INTRODUCTION

Mental disorder among criminal defendants affects every stage of the criminal justice process, from investigational issues to competence to be executed.[1] As in all other areas of mental health law, at least some people with mental disorders, especially severe disorders, are treated specially by the criminal law. The underlying thesis of this Article is that people with mental disorder should, as far as is practicable and consistent with justice, be treated just like everyone else. In some areas, the law is relatively sensible and just. In others, too often the opposite is true and the laws sweep too broadly. I believe, however, that special rules to deal with at least some people with mental disorder[2] are justified because they substantially lack rational capacity, a condition that justifies disparate treatment. Treating people with mental disorder specially is a two-edged sword. Failing to do so when it is appropriate is unjust, but the opposite is demeaning, stigmatizing, and paternalistic. The central normative question is when special treatment is justified, a question the next Part addresses.

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[1] When I wish to refer to all the doctrines generically, I will summarily term them "criminal competence and responsibility."

[2] I use the term "people with mental disorder" advisedly. Although it is more cumbersome than the term "the mentally disordered," it is the preferred, more respectful way of referring to such people because it avoids treating them as equivalent to their disorder. For a more specific example, it is preferable to refer to a "person with schizophrenia" rather than a "schizophrenic." I recognize that it is common to refer to people with physical disease in the essentializing form, such as a "diabetic" rather than a "person with diabetes." Nevertheless, because as the next Part describes, mental disorder is diagnosed behaviorally rather than mechanistically, the essentializing locution carries the risk of undermining respect for the sufferer's personhood and of stigmatizing the person unduly. Despite these considerations, I will also refer to the behavior that justifies the label of mental disorder as "crazy behavior." This locution betokens no disrespect towards sufferers. For legal purposes, it is simply the most descriptive and neutral and least question-begging term that can be used. *See* Stephen J. Morse, *Crazy Behavior, Morals and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 547–54 (1978).

This Article will focus mainly on United States Supreme Court cases to review the current state of the law, with special attention to the many criminal mental health law contexts in which preventive detention is an issue. It makes no pretense to covering every issue, to providing a complete analysis of these cases, or to comprehensive coverage of all the arguments concerning the issues raised. The Court's cases are simply a vehicle for organizing the overview. To celebrate the one-hundredth anniversary of the *Journal of Criminal Law and Criminology*, I will survey the landscape from the vantage of four decades of working in this field as a scholar, legislative drafter, advocate, and practitioner in both law and mental health. The goal is to explore what I consider the most just approach in each area. In some cases, my preferences are foreclosed by constitutional constraints; in others, the preferred approach could be achieved by statute or by state supreme court decisions.

Part II provides an analysis of the concept of mental disorder, both in the fields of mental health, primarily psychiatry and psychology, and in law. I consider why the law treats some people with severe mental disorder specially and I address confusions and distractions about this issue. Then I turn to the legal survey, beginning in Part III with pretrial issues, including competence to waive constitutional rights during pretrial investigation, the right to a court-appointed mental health expert, competence to stand trial, commitment to restore trial competence, the right of the state to involuntarily medicate an incompetent defendant to restore competence, and competence to plead guilty. Part IV considers trial-related procedural issues, including the right to represent oneself, and culpability issues, including negation of *mens rea* (so-called diminished capacity), partial responsibility mitigations, such as the Model Penal Code's "extreme mental or emotional disturbance" doctrine, the defense of legal insanity, the "guilty but mentally ill" verdict, and the potential for adopting a generic mitigating doctrine of partial responsibility.

Part V next addresses post-trial issues, including competence to be sentenced, the role of mental disorder in setting sentences, including the imposition of capital punishment, involuntary medication of prisoners, transfer of prisoners to mental hospitals, competence to be executed, and the right of the state to involuntarily medicate an incompetent prisoner to restore competence to be executed. Part VI considers two forms of involuntary civil commitment that are used primarily for preventive detention, commitment of so-called mentally abnormal sexually violent predators and commitment after a defendant is found not guilty by reason of insanity. The last substantive section, Part VII, briefly considers the challenge to criminal law from the new neuroscience, a challenge that threatens the very foundation of criminal responsibility for all defendants

and not just for those who suffer from severe mental disorder. A brief conclusion follows.

II. WHAT IS MENTAL DISORDER AND WHY DOES IT AUTHORIZE SPECIAL LEGAL TREATMENT?

This Part begins with the mental health profession's definition of mental disorder. It then turns to the legal definition and explains why it authorizes special legal treatment. The differing definitions reflect the different goals of the criminal law and mental health systems. The former is primarily concerned with justice and social safety; the latter is primarily concerned with the prevention and treatment of mental disorders. The Part concludes by explaining prevalent confusions and distractions about why people with mental disorder are treated differently.

A. MENTAL HEALTH DEFINITIONS

Let us begin with the American Psychiatric Association's generic definition of mental disorder:

> [E]ach of the mental disorders is conceptualized as a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with significantly increased risk of suffering death, pain, disability, or an important loss of freedom. In addition, this syndrome or pattern must not be merely an expectable and culturally sanctioned response to a particular event . . . . Whatever its original cause, it must be considered a manifestation of a behavioral, psychological or biological dysfunction in the individual. Neither deviant behavior (e.g., political, religious, or sexual) nor conflicts that are primarily between the individual and society are mental disorders unless the deviance or conflict is a symptom of a dysfunction in the individual, as described above.[3]

With respect, this definition is so broad, vague, and subjective that it is of little help in determining who should be treated specially by the law and why. To its credit, the American Psychiatric Association's authors recognize these problems. They attempt to remedy it with various caveats,

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[3] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 4TH EDITION-TEXT REVISION xxxi (2000) [hereinafter, DSM-IV-TR or simply DSM]. DSM-V is currently in development and will probably be published in 2013. The generic definition is not likely to be substantially changed, however. For the most current working definition proposed by the DSM-V working group charged with developing the generic definition, see *Proposed Revision*, AM. PSYCHIATRIC ASS'N (May 18, 2010), http://www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=465 (providing essentially the same criteria listed separately as "features"). The major difference is that the proposed revision also provides a set of "other considerations," but no guidance is given about how they are to be used.

but the difficulty remains. Consequently, to obtain clearer understanding of the nature of the phenomenon under consideration, it is useful to turn to an examination of the specific diagnostic categories encompassed in the manual. Before doing so, however, we should note two cautions that the Diagnostic and Statistical Manual of Mental Disorders (DSM) raises. First, there is enormous heterogeneity within each disorder category.[4] That is, people who technically meet the criteria for the diagnosis may have quite different presentations. This is not surprising because it is also true of physical diseases. All sufferers from the same type of cancer, for example, do not present precisely alike. Second, these diagnostic criteria were developed for clinical and research purposes; they were not developed to answer legal questions and indeed do not do so.[5]

If one examines the "elements" of mental disorders, the criteria that must be established to make a diagnosis, mental disorder is diagnosed entirely on the basis of behavioral indicia, broadly defined to include perceptions, thoughts, desires, feelings, moods, and actions.[6] Despite the astonishing recent advances in the brain sciences and the drumbeat of claims that mental disorder is a brain disease, we still have very little understanding of the causation of mental disorder and few measures of it that do not require substantial amounts of subjective judgment by either the subject providing a self-report or the external diagnostician. There are no physical tests, including brain scans, that can accurately diagnose mental disorders.[7] The undoubted success of some biological interventions to ameliorate the behavioral signs and symptoms of mental disorder does not undermine this conclusion. The ability to successfully treat a disorder at some level of intervention, such as the biological, the psychological, or the sociological, does not mean that the problem was caused at that level. For example, alleviating with ethanol (alcohol) the sad feelings occasioned by an adverse life event does not mean that the sad feelings were primarily

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[4] *Id.* at xxxi.

[5] *Id.* at xxxii–xxxiii, xxxvii.

[6] Even delirium, dementia, and similar disorders, which were previously classified as "organic disorders," are diagnosed behaviorally. An organic abnormality must only be assumed and need not be identified. *Id.* at 135.

[7] Allen Frances, *Whither DSM-V?*, 195 BRIT. J. PSYCHIATRY 391, 391 (2009). Many studies do find differences between patients with mental disorders and controls, but the differences are too small to be used diagnostically. *But see generally* John P. A. Ioannidis, *Excess Significance Bias in the Literature on Brain Volume Abnormalities*, ARCHIVES GEN. PSYCHIATRY (Apr. 4, 2011), http://archpsyc.ama-assn.org/cgi/reprint/archgenpsychiatry.2011.28v1.pdf (claiming, based on a meta-analysis of studies of brain volume abnormalities in patients with mental disorders, that many more studies than should be expected found statistically significant results and that this can be best explained by bias in the reporting of the data).

produced by "ethanol deficiency disorder." To believe otherwise is to be guilty of the "treatment aetiology fallacy."[8] The most compelling assumption about the causation of complex human behavior, including severe mental disorders, is that it will require a multifield, multilevel approach to explanation that avoids biological reductionism or any other form of univariate explanation.[9]

If mental disorder is best understood today as a behavioral disorder—a behavioral abnormality—the question is what kind of behavior qualifies for consideration as a disorder or illness. After all, many kinds of statistically abnormal behaviors or behavioral capacities, such as enormously high intelligence or the ability to play the piano at the concert level, would not qualify as disorders. Further, various types of behaviors that can potentially make people unhappy, such as having terrible manners or an unpleasant personality, are not per se disorders. Finally, for another example, many varieties of severe unhappiness, such as mourning the death of a loved one or the loss of a job, are not abnormal nor the sign of a disorder. The difficulty of specifying the criteria for behavioral abnormality that qualify it as a disorder is further complicated by understanding that actions that are the signs and symptoms of behavioral disorders are not pure mechanisms.[10] They are part of the entire psychological experience and life history of a whole human being, who inevitably is a maker and interpreter of meaning, and who is embedded in a social context and in interpersonal relationships that strongly affect his behavioral experience. This will be true even in those cases of the most severe and intractable abnormalities of cognition and mood in which a purely mechanistic explanation seems most compelling.[11] Finally, defining mental disorder is further complicated by

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[8] MICHAEL W. EYSENCK, PSYCHOLOGY: AN INTERNATIONAL PERSPECTIVE 856 (2004).

[9] *See generally* CARL F. CRAVER, EXPLAINING THE BRAIN: MECHANISMS AND THE MOSAIC UNITY OF NEUROSCIENCE (2007) (arguing for a multifield, multilevel explanatory scheme within neuroscience and more generally).

[10] Mechanisms are actions and mental states that cannot be in part explained or rationalized by the agent's reasons for action. For example, addiction to a substance is centrally defined by the signs of persistent seeking and using the substance. *See* Stephen J. Morse, *Addiction, Genetics, and Criminal Responsibility*, 69 LAW & CONTEMP. PROBS. 165, 176 (2006). Even if seeking and using are signs of a disease that has genetic, anatomical, and physiological causes, they are nonetheless actions. Indeed, all intentional action has genetic, anatomical, and physiological causes, whether or not the action is the sign of a disease. The addict has an exceptionally powerful desire—a craving—to consume the addictive substance, believes that consuming it will satisfy that craving by avoiding pain, causing pleasure, or some combination of the two, and therefore forms and acts on the intention to seek and to use the substance. Such explanatory practical syllogisms are the mark of all intentional actions.

[11] *See generally* RICHARD J. MCNALLY, WHAT IS MENTAL ILLNESS? (2011) (providing a nuanced, scholarly analysis of the nature of mental disorder, including the role of culture in

the social values that attach to behavior that do not attach to pure mechanisms. No one properly judges a mechanism in interpersonal terms, but behavior is judged socially as justified or not, and as appropriate or not.

I suggest again, as I have for over three decades, that mental disorder is best understood for legal purposes as crazy behavior, that is, behavior that makes no sense and that is associated with dysfunction or suffering.[12] In less colloquial language, it is irrational behavior that is refractory to evidence and argument. Behavior that is crazier or more irrational indicates more severe disorder; less crazy or less irrational behavior indicates milder disorder. No one denies that crazy behavior exists. I recognize that the definition may be both over- and under-inclusive. For example, it facially fails to distinguish some normal but deep religious beliefs, or some cases that plausibly involve disorder but in which suffering or dysfunction is absent.[13] Nonetheless, the definition of mental disorder as crazy behavior comes closer to an adequate description of the phenomenon in question than any other and it runs the least risk of triggering reductionist assumptions about the causation of the behavior or demeaning assumptions about the non-responsibility of those who exhibit such behavior. Such assumptions tend to deny agency, respect, and dignity to people as persons. Moreover, as philosophers of medicine understand and as DSM recognizes, there is no consensual generic definition of or criteria for disease or disorder.[14] Abnormality is an essentially normative notion.

I am not denying the usefulness of thinking of mental disorders, especially the most severe disorders, as medical diseases. Although the medical model continues to have critics, especially when it is most expansionistic and imperialistic,[15] there is clearly something "wrong" with

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explaining the causes, the signs and symptoms, and the experience of mental disorder by sufferers). Professor McNally rightly rejects a thoroughly social constructionist view of most mental disorders. He believes that some conditions, such as mania, melancholia, panic disorder and others, are natural kinds, for which culture penetrates only the presentation of the disorder, such as the content of delusions. *See id.* at 128–158, especially 129–34, 156–58. Although I agree in principle about the universality and resistance to cultural influence of some disorders, the way a disorder presents, including its content, affects the experience and behavior of the sufferer. I doubt that Professor McNally would disagree, but there may be a difference in emphasis concerning the degree of influence.

[12] *See* Morse, *supra* note 2, at 553.

[13] For example, people with Asperger's Disorder, a developmental disorder marked by impairment in social interaction and restricted behavioral range, especially if it is mild, may find or create environments in which the disorder does not cause significant distress or dysfunction. DSM, *supra* note 3, at 80–84. As DSM notes, many people with this disorder find gainful employment and self-sufficiency as adults. *Id.* at 82.

[14] *Id.* at xxx.

[15] *E.g.*, ALLAN V. HORWITZ & JEROME C. WAKEFIELD, THE LOSS OF SADNESS: HOW PSYCHIATRY TRANSFORMED NORMAL SORROW INTO DEPRESSIVE DISORDER (2007); HERB

people with severe disorders that properly lends itself to thinking that they are "sick," rather than odd, bad, or other potential characterizations of crazy behavior. Nonetheless, for legal purposes, crazy behavior continues to be the best generic descriptor of the phenomenon.

B. CRIMINAL LAW AND MENTAL DISORDER

The ability of the state to respond to dangerous people can best be explained by what I call "desert-disease jurisprudence."[16] The state can justifiably convict and punish a citizen in the criminal justice system if the agent has committed a crime, was responsible at the time of the crime, and therefore deserves punishment. Moreover, the state can do this only if the defendant is competent at each stage of the process. The state can civilly commit a dangerous but non-responsible agent if the citizen is sufficiently predictively dangerous, or if the criminal justice process cannot proceed until the defendant is restored to the necessary competence. This distinction maximally protects liberty and autonomy by leaving people free to pursue their projects and to bear the consequences unless they responsibly offend or unless lack of responsibility for their potential, dangerous conduct has already deprived them of the autonomy and liberty we otherwise seek to protect. It also allegedly protects the dignity of the individual and the integrity and justice of the criminal process by not treating incompetent people as competent. Criminal mental health laws, which do treat some people specially, are thus exemplars of disease jurisprudence. Although desert-disease jurisprudence is a good positive account of the relationship between our criminal justice and mental health systems, the law has adopted many doctrines to fill the "gap" between desert and disease that dangerous but responsible agents create.[17]

To determine what the legal criteria for mental disorder should be, the underlying issue is why we treat some people with severe mental disorder as not responsible and autonomous, at least in the context in question. I suggest that lack of the capacity for rationality is the primary reason the law treats some crazy people specially. Only if the person has sufficient capacity for rationality does the law leave him or her free to pursue his or her own projects unencumbered by state intervention, to bear the consequences of his or her actions, and to be treated in the process as all

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KUTCHINS & STUART A. KIRK, MAKING US CRAZY: DSM: THE PSYCHIATRIC BIBLE AND THE CREATION OF MENTAL DISORDERS (1997).

[16] Stephen J. Morse, *Neither Desert nor Disease*, 5 LEGAL THEORY 265 (1999). The formulation that follows in the text expands on my earlier formulation to encompass competence as well as responsibility issues.

[17] Subpart VI.A, *infra*, discusses a major exemplar of such "gap-filling," the allegedly civil, involuntary commitment of mentally abnormal sexually violent predators.

other responsible, autonomous agents are treated. This accords the person the greatest degree of dignity and respect.

Lack of capacity for control is also sometimes an independent criterion of non-responsibility. Some criminal mental health law tests adopt such a standard, either alone[18] or in addition to a rational capacity test.[19] Lack of control is not well understood conceptually or scientifically in any of the relevant disciplines such as philosophy, psychology, and psychiatry, however, and we lack operationalized tests to accurately identify this type of lack of capacity.[20] I have long been a critic of such standards for just these reasons. The American Bar Association and the American Psychiatric Association also urged the rejection of control tests for legal insanity on these grounds.[21] I suggest that for all cases in which a control test may seem required, the reason can be better characterized as a rationality defect because control difficulties flow from lack of access to the good reasons not to act in the wrong way.[22] Moreover, ordinary people and experts alike have a better understanding of and can more accurately identify rationality defects.[23] Whether control incapacities exist independently and whether

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[18] Kansas v. Crane, 534 U.S. 407, 413 (2002) (holding that proof that a defendant has a "serious difficulty in controlling [his] behavior" is a constitutionally required independent criterion for the involuntary civil commitment of a mentally abnormal sexually violent predator); *see also* KAN. STAT. ANN. § 59-29a01 (1994).

[19] MODEL PENAL CODE § 4.01(1) (Proposed Official Draft 1962) ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.").

[20] Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1060–62 (2002).

[21] AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS COMMITTEE, ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-6.1 cmt. (1984); Am. Psychiatric Ass'n, *American Psychiatric Association Statement on the Insanity Defense*, *reprinted in* 140 AM. J. PSYCHIATRY 681 (1983).

[22] One of the first criminal law theoreticians to argue for the necessity of an independent control test was Sir James Fitzjames Stephen, the great English criminal law historian, theorist, judge, and public intellectual. *See* 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 170 (1883). Fitzjames's rationale was that self-control difficulties flow from the inability of the agent to keep long term consequences in mind and to guide one's conduct by them. Note, however, that this is a classic rationality problem.

[23] H.L.A. Hart recognized this over a half-century ago. H.L.A. Hart, *Legal Responsibility and Excuses*, *in* DETERMINISM AND FREEDOM IN THE AGE OF MODERN SCIENCE 95, 99 (Sidney Hook ed., 1958), *reprinted in*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 28 (1st ed. 1968) [hereinafter HART, PUNISHMENT AND RESPONSIBILITY].

they can be validly measured are open questions, however, which better conceptualization and science might help to resolve in the future.[24]

How much capacity for rationality is required can be context-specific and can be otherwise variable, depending on the values of the society in question. For example, the capacity for rationality required to consent to minimal medical treatment might be quite less than the capacity required to consent to a complex experimental intervention. Similarly, the criteria for legal insanity can be restrictive or expansive depending on how tough or tender a jurisdiction might be. If the person lacks substantial rational capacity in the context in question, however, then special legal rules might apply because we cannot credit the person's reasons and actions or ask him to bear full responsibility for them.

The criminal law can, but need not, turn to scientific or clinical definitions of mental abnormality as legal criteria when promulgating mental health laws. The Supreme Court has reiterated on numerous occasions that there is substantial dispute within the mental health professions about diagnoses, that psychiatry is not an exact science, and that the law is not bound by extra-legal professional criteria.[25] The law often uses technical terms, such as "mental disorder," or semi-technical qualifiers, such as "severe,"[26] but non-technical terms, such as "mental abnormality," have also been approved.[27] Legal criteria are adopted to answer legal questions. As long as they plausibly do so, they will be approved even if they are not psychiatric or psychological criteria.

The definition of mental disorder as crazy behavior fits well with the legal purpose of distinguishing some people with mental disorder. It compels the law to recognize that the legal issue is behavioral—is the person capable of meeting the law's rationality standard in the context in question?—and it makes clear that actions speak louder than clinical tests. When there is a disjunction between the person's behavior in the world and the performance or outcome on any type of test, we must virtually always believe the behavior.[28] That is the gold standard. If the behavior is not clear, then tests may help resolve ambiguity, but, alas, the tests tend to be most unhelpful when the behavior is least clear.[29] And again, thinking of

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[24] I shall only write about rationality problems in what follows, but for those who believe that a control criterion is justified, the same set of considerations apply.

[25] *E.g.*, Clark v. Arizona, 548 U.S. 735,774–75 (2006); Kansas v. Hendricks, 521 U.S. 346, 360 n.3 (1997); Addington v. Texas, 441 U.S. 418, 429 (1979).

[26] 18 U.S.C. § 17 (2006).

[27] *Hendricks*, 521 U.S. at 360.

[28] Cases of suspected malingering are an exception.

[29] I term this the "clear cut" problem. *See* Stephen J. Morse, *Lost in Translation?: An Essay on Neuroscience and Law*, *in* LAW AND NEUROSCIENCE 529, 540 (Michael Freeman

mental abnormality as a behavioral difficulty, untethered from the medical model, avoids question-begging about mechanism and non-responsibility and potentially demeaning an autonomous agent.

Mental disorder per se is not a sufficient criterion for special legal treatment. All mental health laws require further legally relevant behavior, which is in fact the law's primary concern. For example, a criminal defendant will not be incompetent to stand trial solely because he or she suffers from a mental disorder. The defendant must additionally not understand the charges against him or not be able to assist counsel. A defendant raising the insanity defense must also not know the nature and quality of his act or the difference between right and wrong. Defendants who cannot satisfy these further criteria are not competent or responsible because they are not rational. Indeed, the various criminal competencies, such as competence to stand trial, to plead guilty, to proceed pro se, to be sentenced, and to be executed, are all essentially functional rationality standards. As the standards for the legally relevant behaviors entail, they all test whether the agent has sufficient rational understanding and skills to satisfy the demands of due process in the context in question.[30]

One could jettison the mental disorder criterion in mental health laws, the presence of a mental abnormality, and simply address the other legally relevant behavior entirely functionally, but the presence of a mental

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ed., 2011). Scientists do not go on "fishing expeditions" for data. Virtually all studies of potential interest to the law involve some behavior that has already been identified as of interest and the point of the study is to identify that behavior's causes or correlates. There is usually some bit of behavior, such as addiction, schizophrenia, or impulsivity that they would like to understand better. To do this properly presupposes that they have identified and validated the behavior under investigation. On occasion, the science might suggest that the behavior is not well-characterized or is biologically or causally indistinguishable from other, seemingly different behavior. In general, however, the existence of legally relevant behavior will already be apparent. For example, some people are grossly out of touch with reality. If, as a result, they do not understand right from wrong, we excuse them because they lack such knowledge. We might learn a great deal about the causes or correlates of such abnormalities, but we already knew without any scientific data that these abnormalities existed and we had a firm view of their normative significance. In such cases, the scientific data might be quite sensitive to the already clearly identified behaviors precisely because the behavior is so clear. Less clear behavior is simply not studied or the overlap between less clear behavior and the behavioral controls is greater. Thus, the markers of clear cases will provide little guidance to resolve behaviorally ambiguous cases of legally relevant behavior. For example, suppose in an insanity defense case the question is whether the defendant suffers from a major mental disorder such as schizophrenia. In extreme cases, the behavior will be clear and no scientific data will be necessary, except perhaps for convergent validity. In the future, we may be able to use various tests to resolve ambiguous cases more successfully, but for now we cannot.

[30] *See generally* Morse, *supra* note 2, at 530–42 (explaining the function and structure of all mental health laws). These laws are discussed in detail in the various subparts *infra*.

disorder allegedly provides an objective marker that the person genuinely lacks the required rational capacity.[31] The mental disorder criterion for mental health laws achieves this goal only imperfectly at best, but its presence in these laws confirms that the fundamental legal goal is to respond properly to rational incapacity. Finally, it is crucial to understand that the relation of mental disorder to the further legal criteria is not the relation of mechanical causation. The issue is whether an offender's practical reasoning was irrational in the context in issue.

C. DISTRACTIONS AND CONFUSIONS ABOUT WHY MENTAL DISORDER AUTHORIZES SPECIAL TREATMENT

Let us consider four underlying and related issues that are often thought to be relevant to criminal responsibility and competence but that are irrelevant confusions and distractions: free will, causation as an excuse, causation as compulsion, and prediction as an excuse. Much bad thinking and practice about mental disorder and criminal law results from falling prey to these problems.[32]

Contrary to what many people believe and what judges and others sometimes say, free will is not a legal criterion that is part of any doctrine and it is not even foundational for criminal competence or responsibility.[33] Criminal law doctrines are fully consistent with the truth of determinism or universal causation that allegedly undermines the foundations of responsibility.[34] Even if determinism is true, some people do understand

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[31] See United States v. Moore, 486 F.2d 1139, 1180 (D.C. Cir. 1973) (Leventhal, J., concurring) (quoting MODEL PENAL CODE at 6 (Tent. Draft No. 10 1960)).

[32] I discuss these issues in virtually everything I write about criminal responsibility and competence. *See, e.g.*, Stephen J. Morse, *The Non-Problem of Free Will in Forensic Psychiatry and Psychology*, 25 BEHAV. SCI. & L. 203, 209 (2007). My critics accuse me of repeating myself. I plead guilty and will continue to recidivate until people stop making these errors.

[33] *Id.* at 209. By free will, I am referring to metaphysical libertarianism, the view that people can act uncaused by anything other than themselves. This is sometimes referred to as "contra-causal freedom," "agent origination," or like terms. This meaning is the strongest sense of free will and is a god-like power. See *infra* note 35 and accompanying text. When a criminal statute includes a term such as acting "freely" or against the "will," which might be thought to refer to the strong sense of free will, it refers to an ordinary excusing condition such as compulsion. *See, e.g.*, CAL. PENAL CODE,§ 261.2 (2010) (defining rape as sexual intercourse "against a person's will") & § 261.6 (defining adequate consent to sexual contact as "acting freely and voluntarily").

[34] *See generally* JOHN EARMAN, A PRIMER ON DETERMINISM (1986). Determinism means, roughly, that all events are caused by the laws of nature operating on prior states of the world. There are, however, many ways of conceptualizing determinism. It is possible to conceptualize a fully causal universe as probabilistic rather than deterministic, which is why the locution "universal causation" is used.

the charges against them or that they are about to be executed and some people do not. Some offenders act and some do not. Some people form prohibited mental states and some do not. Some people are legally insane or act under duress when they commit crimes, but most defendants are not legally insane or acting under duress. Moreover, these distinctions matter to moral and legal theories of fairness about competence and responsibility and to consequential concerns that we have reason to endorse. Thus, law addresses problems genuinely related to competence and responsibility, including consciousness, the formation of mental states such as intention, knowledge and comprehension, the capacity for rationality, and compulsion, but it never addresses the presence or absence of free will, the alleged ability to act uncaused by anything other than one's own self.

When most people use the term free will or its lack in the context of criminal law, they are typically using this term loosely as a synonym for the conclusion that the defendant was or was not criminally competent or responsible. They typically have reached this conclusion for reasons that do not involve free will, such as that the defendant was legally insane or acted under compulsion. But such usage of free will only perpetuates misunderstanding and confusion because it conflates claims about genuine excusing conditions with the radical, general critique of responsibility that determinism allegedly presents.[35] Recall that free will is not a criterion in any criminal law doctrine.[36] Thus, once the legal criteria at issue have been met, the defendant will be excused or found incompetent without any reference whatsoever to free will as an independent ground for the decision. Criminal justice system participants and scholars would do well to avoid using the term, "free will."

There is a genuine metaphysical problem about free will, which is whether human beings have the capacity to act uncaused by anything other than themselves and whether this capacity is a necessary foundation for

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[35] *See, e.g.*, *Moore*, 486 F. 2d at 1139. Moore appealed from a conviction for possession of heroin by claiming that he was entitled under common law criminal responsibility principles to a compulsion excuse because he was an addict and was therefore acting under compulsion when he possessed heroin. Moore essentially claimed that his behavioral controls were impaired. *Id.* at 1144. This is a standard type of excusing claim, as the plurality opinion recognized, but it then went on to equate loss of control with lack of free will. *Id.* at 1145–46. The plurality appeared to recognize that it was using lack of free will as a synonym for a traditional excusing condition, but using the free will locution lends itself to anxieties about the more radical critique. If the opinion did not use the term, free will, no change in the substantive analysis would have followed and much clarity would have been gained by limiting the analysis to whether recognizing a defense for impaired behavioral controls was a wise legal outcome.

[36] *See supra* notes 33-34 and accompanying text.

holding anyone legally or morally accountable.[37] Philosophers and others have debated these issues in various forms for millennia and there is no resolution in sight. Indeed, the problem may not be resolvable. This is a real philosophical issue, but it is not a problem for the law. Solving the free will problem might have profound implications for criminal law doctrines and practices, such as blame and punishment, but, at present, having or lacking libertarian freedom is not a criterion of any criminal law doctrine.

Neuroscience and genetics are simply the most recent mechanistic, causal sciences that appear deterministically to explain behavior. They thus join social structural variables, behaviorism, and other scientific explanations that have also been deterministic explanations for behavior. In principle, however, these sciences add nothing new, even if they are better, more persuasive science than some of their predecessors. As long as free will in the strong sense is not foundational for just blame and punishment and is not a criterion at the doctrinal level—which it is not—the truth of determinism or universal causation poses no fundamental threat to criminal law doctrines or practices. Science may help shed light on folk psychological excusing conditions, such as automatism or insanity, for example, but the truth of determinism and the lack of free will are not excusing conditions in criminal law. The law will be fundamentally challenged only if science can conclusively demonstrate that the law's folk psychology, which fundamentally depends on mental states, is wrong, and that we are not the type of creatures for whom mental states are causally effective.[38] This is a different question from whether the truth of determinism undermines current legal conceptions of competence and responsibility.

A related confusion is that behavior is excused if it is caused, but causation per se is not a legal or moral mitigating or excusing condition. I have termed this confusion "the fundamental psycholegal error."[39] At most, causal explanations can only provide evidence concerning whether a genuine excusing condition, such as lack of rational capacity, was present. For example, suppose a life history marked by poverty and abuse played a predisposing causal role in a defendant's criminal behavior. Or suppose that an alleged new mental syndrome played a causal role in explaining criminal conduct. The claim is often made that such causes, which are not

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[37] *See generally* ROBERT KANE, FREE WILL: A CONTEMPORARY INTRODUCTION (2006) (providing a complete, balanced account of the debate).

[38] Part VII *infra* addresses this challenge directly. *See generally* Katrina L. Sifferd, *In Defense of the Use of Commonsense Psychology in the Criminal Law*, 25 LAW & PHIL. 571 (2006) (providing an extensive defense of the use of folk psychology that underpins criminal law and claiming that criminal law does not need a substitute).

[39] Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1592–94 (1994).

within the actor's capacity to control rationally, should be an excusing or mitigating position per se,[40] but this claim is false.

All behavior is the product of the necessary and sufficient causal conditions without which the behavior would not have occurred. We sometimes do not know the whole causal account, but this does not mean that the behavior is uncaused. If causation were an excusing condition per se, then no one would be responsible for any behavior. The fundamental psycholegal error is thus an external, radical challenge to all conceptions of responsibility. Some people welcome such a conclusion and believe that responsibility is impossible, but this is not the legal and moral world we inhabit.[41] The law holds most adults responsible for most of their conduct and genuine excusing conditions are limited. Thus, unless the person's history or mental condition, for example, provides evidence of an existing excusing or mitigating condition, such as lack of rational capacity, there is no reason for excuse or mitigation.[42]

Even a genuinely abnormal cause is not an excusing condition. For example, imagine a "career" armed robber who suffers from clinical hypomania.[43] Suppose our robber never robs except when he is in a hypomanic state because only then does he feel sufficiently confident and energetic to rob. If he is charged with an armed robbery committed while he is hypomanic, his clinical condition played a causal role in explaining his criminal conduct, but no excusing condition necessarily obtains. The legal outcome would depend on whether he lacked sufficient rational capacity to be held responsible. If, for example, he had a delusional belief about what

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[40] *See, e.g.*, Anders Kaye, *Powerful Particulars: The Real Reason the Behavioral Sciences Threaten Criminal Responsibility*, 37 FL. ST. U. L. REV. 539 (2010); Anders Kaye, *Resurrecting the Causal Theory of the Excuses*, 83 NEB. L. REV. 1116 (2005).

[41] *E.g.*, Joshua Greene & Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, *in* LAW & THE BRAIN 207, 217–18 (Semir Zeki & Oliver Goodenough eds., 2006).

[42] Characterizing an excusing claim by the cause of that claim perpetuates the fundamental psycholegal error. For example, in United States v. Moore, discussed *supra* note 35, the concurrence variously characterized Moore's claim as an "addiction" or "drug dependence" defense. United States v. Moore, 486 F.2d 1139, 1160, 1179 (D.C. Cir. 1973) (Leventhal, J., concurring). Judge Leventhal did recognize that impaired behavioral control was the heart of Moore's claim, *id.* at 1178, but such characterizations of defenses based on causes tends to beg the question of responsibility. The question is not whether Moore's unlawful possession of heroin was caused (in part) by his addiction. Of course it was. The questions are whether there ought to be a defense of impaired self-control in this type of case and, if so, did Moore meet its criteria? Simply being an addict does not answer the latter question. Lack of control must be proven independently.

[43] DSM, *supra* note 3, at 365–68. Diagnostic features include elevated mood, inflated self-esteem, decrease in need for sleep, and an increase in goal-directed functioning.

he was doing, then the genuine excuse of legal insanity might be appropriate.

Compulsion is a genuine mitigating or excusing condition, but causation, including brain causation, is not the equivalent of compulsion. Compulsion may be either literal or metaphorical and normative. If compulsion is literal, say, a person's arm moves because the person had a neuromuscular spasm or because a much stronger person pushed the arm, the person has not acted at all. Metaphorical compulsion is more difficult to understand. It involves situations in which the person does act, but there is reason to believe that he did not act as he otherwise would wish because the agent was placed in a "compelling" situation through no fault of his own. It includes cases in which someone acts in response to an externally-produced do-it-or-else threat (such as the excuse of duress) or acts in response to strong internal urges or desires (such as the control test for legal insanity). In all metaphorical compulsion cases, the person acts, however, and deciding when to mitigate or excuse in such cases is a normative legal question.

It is crucial to recognize that most human action is not plausibly the result of either type of compulsion, but all human behavior is caused by its necessary and sufficient causes, including brain causation. Even abnormal causes are not compelling. Suppose, for example, that a person with pedophilic urges feels those urges weakly and has a weak desire for sex generally. If the person molested a child, there would be no ground for a compulsion excuse. If causation were per se the equivalent of compulsion, all behavior would be compelled and no one would be responsible. Once again, this is not a plausible account of the law's responsibility conditions. Causal information from science might help us resolve questions concerning whether legal compulsion existed, or it might be a guide to prophylactic or rehabilitative measures when dealing with plausible legal compulsion. But causation is not per se compulsion.

Causal or correlational knowledge can enhance the accuracy of behavioral predictions, which are a feature of every form of preventive detention, but predictability is also not per se an excusing or mitigating condition, even if the predictability of the behavior is perfect. To understand this, just consider how many things each of us does that are perfectly predictable for which there is no plausible excusing or mitigating condition. Even if the explanatory variables that enhance prediction are abnormal, excuse or mitigation is warranted only if a genuine excusing or mitigating condition is present. For example, recent research demonstrates that a history of childhood abuse interacting with a specific genetically-produced enzyme abnormality that affects neurotransmitter levels increases the risk that a person will behave antisocially as an adolescent or young

adult.[44] The study showed that an adult male with this particular genetic abnormality is 9.8 times more likely to be convicted of a violent crime if he also has a history of childhood abuse.[45] Does that mean per se that an offender with this gene-x-environment interaction is not responsible, or less responsible? No. The offender may not be fully responsible or responsible at all, but not because there is a causal explanation that enhances predictability. What is the intermediary excusing or mitigating principle? Are these people, for instance, more impulsive? Are they lacking rationality? What is the actual excusing or mitigating condition?

Again, causation is not compulsion, and predictability is not an excuse. If an offender is caused to do something or the action or behavior is predictable does not mean the offender is compelled to do the crime charged or is otherwise not competent or responsible. Legal policymakers and decisionmakers and advocates should always focus on genuine responsibility and competence criteria and should avoid the distractions and confusions just discussed.

III. PRETRIAL ISSUES

This Part of the Article addresses the main pretrial contexts in which mental disorder may be relevant: competence to waive rights during the investigational stage, forensic evaluations and the right to an expert, competence to stand trial, including the right of the state to involuntarily commit and medicate an incompetent defendant, and competence to plead guilty, which includes the waiver of trial related rights. I suggest that in appropriate cases, mental disorder should invalidate a confession in the absence of wrongful conduct by the police, that the right to an independent mental health expert should be expanded, that the bar for competence should generally be low, that the state has a significant interest in forcibly medicating a defendant incompetent to stand trial, that incompetence to stand trial commitments should not be used as substitutes for punishment or as a form of preventive detention, and that competence to stand trial procedures should be reformed.

A. INVESTIGATION

The defendant's primary constitutional rights during the investigational stage are the right to be free from unreasonable searches and seizures and the right to remain silent. Like virtually all constitutional rights, these rights may be waived, even by suspects in custody. For a

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[44] Avshalom Caspi et al., *Role of Genotype in the Cycle of Violence in Maltreated Children*, 297 SCIENCE 851 (2002).

[45] *Id.* at 853.

waiver to be valid, it generally must be knowing, intelligent, and voluntary.[46] At the investigative stage, the Supreme Court has ruled that the waiver must be voluntary, which is considered according to a totality of the circumstances test.[47] In some instances, the waiver must also be explicitly knowing or intelligent.[48] If a defendant's rational capacities are substantially impaired and he has a grossly irrational reason for waiving his rights, or if he does not understand what he is doing by giving them up, then the waiver is not knowing and intelligent. Some would claim that mental disorder can "compel" a person to waive their rights, even if they do know what they are doing. For example, suppose a defendant confesses because he has auditory hallucinations and "the voices" tell him he must do so. Why the defendant is "compelled" to obey the voices is an open question, but a simpler explanation for why the waiver is invalid is that the defendant does not know what he is doing in the fundamental sense. He would not confess but for irrational stimuli—the voices—that are unrelated to any rational reason why he should confess.

The Supreme Court has discussed waiver in many cases involving investigation issues, but virtually never in cases involving mental disorder. *Colorado v. Connelly* is an exception.[49] Completely unbidden, Connelly confessed a murder to a Denver police officer who had behaved unexceptionably.[50] The officer immediately warned Connelly of his *Miranda* rights and neither he nor any other officer behaved coercively or deceptively towards Connelly, who nonetheless repeated his confession.[51] Connelly was apparently psychotic at the time and was responding to psychotic considerations when he confessed.[52] The Supreme Court of Colorado held that Connelly's "waiver" of his right to remain silent was invalid and the United States Supreme Court reversed.[53] The Court reasoned that the police officers had acted completely correctly and the

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[46] *See* JOHN PARRY, CRIMINAL MENTAL HEALTH AND DISABILITY LAW, EVIDENCE AND TESTIMONY 89 (2009).

[47] WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE 249–55, 315–51 (4th ed. 2004) (discussing the test in the context of search and seizure and self-incrimination).

[48] *E.g.*, Godinez v. Moran, 509 U.S. 389, 400 (1993) (waiver of the right to a trial must be knowing and voluntary). Justice Kennedy's concurrence in *Godinez* characterized the standard as "knowing, intelligent, and voluntary." *Id.* at 403.

[49] Colorado v. Connelly, 479 U.S. 157 (1986).

[50] *Id.* at 160.

[51] *Id.*

[52] *Id.* at 161.

[53] *Id.* at 159. Of course, Connelly did not explicitly waive his right to remain silent, but his uncoerced confession had precisely this effect.

waiver was not the result of state action.[54] Thus, admitting the confession was not a constitutional error.[55]

I concede that the officers behaved well, but the case is nonetheless wrongly decided legally and certainly as a matter of policy. Citizens have an absolute right to remain silent and to be free of an unwanted search in the absence of probable cause or its variants unless they waive those rights. To blame and punish a citizen who has waived his rights not on the basis of conscience or some other potentially rational motive, but rather on psychotically grounded reasons is unfair. If a mentally disordered defendant can avoid a "freely made" contract because it is later determined that he was incompetent to contract, for example, or if we cannot experiment on a subject who "freely" gave consent if it is determined that the consent was incompetent, then it is wrong to use the fruits of an incompetent waiver of the rights to remain silent and to be free of a search against a criminal defendant. If it violates the dignity of the trial process to try an incompetent criminal defendant who could nonetheless receive a fair trial on the merits, it seems equally violative of the dignity of the criminal process to convict a defendant based on admittedly credible evidence that was discovered only because the defendant was grossly out of touch with reality.

If people are not competent, they should not be treated as if they are unless there is the strongest consequential ground to do so. In cases like Connelly's, it may be impossible to bring the suspect to justice unless immediate and less direct fruits of the incompetent waiver are used. This is a genuine cost, but there are at least five reasons why imposing it will not be a major problem. First, the standards for competence to waive one's rights are generally quite low and few people will fail to meet them.[56] Although this may seem harsh, setting the competence bar low has the

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[54] *Id.* at 167.

[55] *Id.*

[56] I know of no study that examined this precise question, but standards for competence in the criminal justice system are generally low. *See, e.g.*, NORMAN G. POYTHRESS, RICHARD J. BONNIE, JOHN MONAHAN, RANDY OTTO & STEVEN K. HOGE, ADJUDICATIVE COMPETENCE: THE MACARTHUR STUDIES 50 (2002) (claiming that only 10–30% of defendants referred for competence evaluation are found incompetent, a number characterized as infrequent); HENRY J. STEADMAN, BEATING A RAP? DEFENDANTS INCOMPETENT TO STAND TRIAL 7 (1979) (finding that in one full year only 539 defendants were found incompetent to stand trial in New York State). Poythress et al.'s and Steadman's data are entirely consistent with the general belief based on experience that the standards are low. We do not know how many confessions or consents to search are the result of severe mental disorder in the absence of police misconduct, but indirect evidence that the standard is low is provided by the general finding that appellate courts seldom overturn a finding of voluntariness absent police misconduct. James S. Wulach, *Psychological Evaluation of the Consent to Search*, 18 J. PSYCHIATRY & L. 319, 327 (1990).

effect of providing enhanced autonomy and respect to citizens. Second, there are no good data on how often a defendant incompetently waives his or her rights whether or not he or she is in custody, but my guess based on my experience is that it happens infrequently. Third, law enforcement may be able to obtain enough data independently to secure a conviction. That is, the evidence gained by the incompetent waiver may be additive rather than crucial.[57] Fourth, although the defendant may not be brought to justice, the case will at least be cleared (assuming that the defendant is guilty). The waste of scarce resources will thereby be avoided as law enforcement can stop trying to solve the crime.

Last, if the defendant poses a continuing danger to the community, standard involuntary civil commitment can be used to deal with such dangerous agents. Traditional involuntary civil commitment is a form of preventive detention applied to non-responsible but dangerous people who allegedly need to be restrained. Using traditional involuntary civil commitment to restrain disordered agents who committed serious crimes is a serious problem, however, because the agent may still be very dangerous and contemporary commitment terms tend to be relatively brief and will not restrain the person as successfully as imprisonment or commitment following an insanity acquittal.[58] Such cases will surely be few, but they are a danger.

Perhaps the best solution would be a new form of potentially lengthy, secure involuntary commitment for those defendants who cannot be successfully tried as a criminal without the evidence obtained by the invalid waiver. This would be a clear instance of preventive detention. In such cases, however, we should insist that the State prove that the defendant did commit the crime to differentiate the subject from the subject of traditional involuntary commitment. Criminal responsibility and punishment are not in issue, however, so there would be no problem using the illegally obtained evidence for civil commitment. In addition, the State should prove that the defendant is mentally disordered and dangerous, and the defendant should have full due process protections and the right to periodic review.[59] For

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[57] For example, independent evidence the police discovered prior to the confession may be sufficient to link the defendant to the crime.

[58] Most traditional involuntary civil commitment has abandoned indefinite terms of commitment and terms infrequently exceed six months. SAMUEL JAN BRAKEL, JOHN PARRY & BARBARA A. WEINER, THE MENTALLY DISABLED AND THE LAW 72 (3d ed. 1985); *see, e.g.*, CAL. WELF. & INST. CODE §§ 5250 & 5300 (West 2010) (providing that people who are dangerous to others as a result of mental disorder may be committed for fourteen days, but can be detained for an additional 180 days if necessary). This is hardly lengthy confinement for a person who may have committed a serious crime and may still be quite dangerous.

[59] Some dangerous people might still be uncommittable. Imagine a defendant who invalidly waives his rights as a result of mental disorder and the State needs the evidence to

example, the types of protections applied to sexual predator commitments,[60] including the right to full adversary counsel and proof beyond a reasonable doubt, should be provided because so much loss of liberty is at stake. Automatic review should be frequent, the review should be thorough and include a hearing, and some provision for permitting the person committed to challenge the commitment between automatic reviews should be available.[61]

I do not generally favor lengthy forms of involuntary commitment because they tend to be abused by keeping people hospitalized longer than is necessary, but I prefer this concededly imperfect compromise to an unfair criminal conviction. At the least, the case is cleared and the agent can be released if he is no longer mentally disordered and dangerous. Society would be protected, treatment would be available if the subject is treatable, and due process protections would limit the risks to the subject's liberty.

B. FORENSIC EVALUATION AND THE RIGHT TO A MENTAL HEALTH EXPERT

Pretrial forensic evaluations are routine both to determine various competencies and to evaluate legal insanity and the negation of *mens rea*. This subpart addresses the issues forensic evaluations create.

In the case of competence evaluations, the defendant seldom has his own expert. State-appointed forensic professionals are virtually always the only experts who examine the defendant.[62] In *Estelle v. Smith*,[63] the Supreme Court held that an expert who had examined the defendant to evaluate competence to stand trial was barred by the Fifth and Sixth

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obtain a conviction. Between the waiver and the commitment, however, the defendant regains his mental health and is no longer committable. I assume that, as a technical matter, such a person would have to be released. I also assume that it would virtually never happen.

[60] See *infra* subpart VI.A, for a discussion of sexual predator commitments.

[61] Some jurisdictions already have special forms of lengthy commitment for certain classes of especially dangerous people who have been charged with a crime but have not been convicted, and who are non-responsible and dangerous to others. *See* CAL. WELF. & INST. CODE §§ 5008(h)(1)(B) & 5350 (West 2010) (providing for "conservatorships" for people who are permanently incompetent to stand trial; conservatorships are for a year and may be renewed annually; the placement may be in a secure facility if necessary). The people committed in such cases are genuinely not responsible, and thus properly qualify for disease jurisprudence, unlike the case of most subjects of sexual predator commitments, which I discuss in subpart VI.A, *infra*.

[62] *See* STEADMAN, *supra* note 56, at 39. Steadman also found that hearings generally were routinized and brief. *Id*. at 45–48. I know of no more recent data that contradicts these observations and they are entirely consistent with my experience. There are exceptions if the defendant retains his own expert or is entitled to name one. *See, e.g.*, CAL. PEN. CODE § 1369 (a) (2010) (a defendant not challenging his own competence may name an evaluator).

[63] Estelle v. Smith, 451 U.S. 454 (1981).

Amendments from testifying for the prosecution at a capital punishment hearing about the defendant's dangerousness based on the competence evaluation.[64] Such testimony would not be barred only if the defendant competently waived his right to remain silent after consulting with counsel and after being adequately warned about the possible consequences.[65] If the defendant did not waive his right to remain silent, then the court-ordered evaluation could still proceed but the results could only be used to determine competence.[66] The Court recognized that whether the Fifth Amendment's protections apply depends on the possible consequences of the defendant's statements, rather than on the type of proceeding at issue.[67] The sentencing phase of a capital punishment case was clearly of sufficient gravity. *Estelle* was correctly decided and little more needs to be said about this issue. Evidence obtained to determine competence should not be used for guilt or penalty determinations without the defendant's consent. As the Court noted, the prosecution will have to prove its case or support its sentencing recommendation with independent evidence.[68] This is as it should be.

Suppose defense counsel suspects that a defense to guilt based on mental disorder is a plausible claim or simply wishes to evaluate whether it is. Anyone with experience in criminal mental health practice understands that mental health experts, typically psychiatrists and psychologists, play a crucial role. Although either the defense or prosecution can succeed with or defeat a claim involving mental disorder without using expert witnesses, as a practical matter it is extremely difficult and perhaps impossible for the defense.[69] This is not a problem for wealthier defendants who can retain an expert, but it is a major problem for indigent defendants. Unless an indigent defendant has access to an expert paid for by the state, the

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[64] *Id.* at 463.

[65] *Id.* at 468–69.

[66] *Id.* at 468.

[67] *Id.* at 462.

[68] *Id.* at 468–69.

[69] ABRAHAM S. GOLDSTEIN, THE INSANITY DEFENSE 124 (1967) ("Though the cases say again and again that expert testimony is not 'essential' to raise the insanity defense, it is clear that a persuasive case is unlikely to be made on lay testimony alone.").

Although a guilty verdict will typically be upheld even if the defense presents unanimous expert testimony that the defendant was legally insane and the prosecution rebuts this testimony only with lay witnesses and cross-examination, such cases are rare at the trial level. *See* WAYNE R. LAFAVE, CRIMINAL LAW 453 (5th ed. 2010) (noting that it is difficult to succeed without expert witnesses, but that appellate courts uphold verdicts based on lay testimony "not infrequently").

defendant will seldom have a fair chance of succeeding with his or her claims.[70]

In *Ake v. Oklahoma*,[71] the Supreme Court finally recognized the unfairness of not providing the defendant with a mental health expert. It noted that fundamental fairness entitles indigent defendants to an adequate opportunity to present their claims.[72] The Court further held that a mental health expert is necessary for this purpose when the defendant has a significant claim of legal insanity or needs expert assistance at capital sentencing hearings to rebut expert predictions of dangerousness.[73] The Court left the implementation of the right to the states.[74] Although I believe the decision is correct, it left open important questions about the extent of the right and how it should be implemented.

The Court's opinion did not address whether experts also needed to be provided to assist the defendant with other claims concerning the relation of mental disorder to culpability and sentencing. A majority of states permit defendants to use evidence of mental disorder to negate *mens rea*, although usually with limitations.[75] Mental disorder can also be a mitigating factor at both capital and non-capital sentencing, and expert predictions of dangerousness at non-capital sentencing may need to be rebutted. In all these contexts, the defendant is in peril without expert assistance. It is difficult to understand how these other types of questions involving mental disorder can be distinguished from legal insanity and rebutting expert predictions at capital sentencing. It is true that legal insanity is a complete defense and that death is "different." Nonetheless, *mens rea* is a crucial culpability issue, and in many cases a *mens rea* negation claim may be more important to a defendant than raising legal insanity because the defendant can thereby defeat the prima facie case for higher levels of offense and avoid potentially lengthy post-insanity acquittal commitments. Moreover, sentencing is vitally important to the defendant and raising mitigation at capital sentencing is especially important, as the Supreme Court recognized beginning with *Lockett v. Ohio*.[76] I assume that most courts would order payment for a defense expert for both culpability and sentencing claims. Failure to do so is substantially unfair because a defendant with a potentially meritorious claim of innocence or mitigation will not be able to raise it effectively.

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[70] *Id.*
[71] Ake v. Oklahoma, 470 U.S. 68 (1985).
[72] *Id.* at 77.
[73] *Id.* at 83–84.
[74] *Id.* at 83.
[75] Clark v. Arizona, 548 U.S. 735, 800 (2006) (Kennedy, J., dissenting).
[76] Lockett v. Ohio, 438 U.S. 586, 605 (1978).

The more difficult problem is how the right has been implemented in many jurisdictions. *Ake* has not been interpreted to guarantee the defendant a mental health professional that the defense chooses.[77] If a defendant has resources, he can "shop around" to try to obtain a mental health professional who will support his claims, but indigent defendants do not have that ability.[78] If the professional consulted will not render a favorable opinion, the defendant's mental health-based argument will almost certainly fail. In some jurisdictions with a sizeable number of forensic professionals, some experts may have a reputation for being favorable to the defense and the problem may be somewhat alleviated. There is no guarantee, however, that even a favorably inclined forensic professional will reach the expected conclusion, and the possibility of using a predisposed expert may not arise in jurisdictions with fewer forensic specialists. What is worse, in some jurisdictions the defendant may be assigned a mental health professional who is an employee of the state and the prosecution may immediately have access to the report.[79] A state employee inevitably has a conflict of interest. The indigent defendant should be entitled to an independent professional, as some jurisdictions hold.[80] Further, the report should not be disclosed to the prosecution unless the defendant decides to go forward with a mental health-based argument at trial. An independent expert's report should be confidential work product unless the claim is raised. The fruits of an evaluation of a potential claim should not be of benefit to the prosecution.

If the defendant chooses to raise legal insanity or *mens rea* negation after evaluating these possibilities, notice must be given to the state and the state is then entitled to have its own expert examine the defendant.[81] The Supreme Court explicitly approved this practice in dictum in *Estelle* and lower federal and state courts have held that it is constitutional.[82] After all, for the same reasons that a defendant needs a mental health expert effectively to pursue a mental disorder based defense, the prosecution needs to obtain its own evaluation to rebut the defense claims. Various remedies have been proposed to cope with the situation in which the defendant

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[77] *E.g.*, United States v. Osoba, 213 F. 3d 913 (6th Cir. 2000).

[78] *Ake*, 470 U.S. at 83.

[79] Granviel v. Texas, 495 U.S. 963, 963–64 (1990) (Marshall, J., dissenting from denial of certiorari).

[80] PARRY, *supra* note 46, at 131–32.

[81] I address below the question of whether the same opportunity must be provided to the prosecution if the defendant chooses to introduce mental health testimony at sentencing.

[82] Estelle v. Smith, 451 U.S. 454, 473 (1981); Pope v. United States, 372 F.2d 710 (8th Cir. 1967).

refuses to cooperate with the prosecution's expert.[83] One such remedy is preventing the defendant from calling his own expert to testify at trial, but, as a practical matter, in my experience—and there are no good studies of this issue—it appears that defendants who raise such defenses seldom fail to cooperate.

Should the defense attorney be present when the defendant is examined by the prosecution's expert? Courts have rejected such arguments on the ground that the attorney's presence will undermine the expert's attempt to obtain information and could be otherwise disruptive.[84] For example, the attorney might try improperly to caution or to coach the client during the evaluation. There is some truth to these worries, but I think that they are exaggerated and that there is good reason to have the attorney present. The examiner inevitably will be wittingly or unwittingly selective in his report and testimony about which aspects of the examination are focused on. Moreover, inferences from, and conclusions about, particular parts of the examination are subject to subjective interpretation. As the Supreme Court has repeatedly said, psychiatry is not an exact science.[85] Consequently, it would be very helpful to both sides to be able to view the examination of the defendant by the opposing expert. Both attorneys can then have a better sense of whether an evaluation actually supports or is consistent with the testifying expert's inferences and conclusions based on the evaluation. The potential for disruption remains, however, so I suggest that all forensic examinations for the purpose of evaluating guilt should be videotaped. This would not be disruptive and would allow the type of assessment that would be helpful. Indeed, in some cases, the tapes might be shown to the jury guided by the expert testimony about them.

In cases involving allegedly civil preventive detention, such as sexual predator commitments, the subject of the potential commitment is not constitutionally entitled to the service of an independent professional and seldom has one unless the subject has independent means. Moreover, the subject does not have the right to remain silent.[86] Great weight will be placed on the testimony of the state-appointed evaluator and the subject's only means of defeating an adverse opinion will be through effective cross-examination. There are no data on this question, but I suspect that judges and juries seldom find that the subject does not meet the commitment

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[83] Christopher Slobogin, Estelle v. Smith: *The Constitutional Contours of the Forensic Evaluation*, 31 EMORY L.J. 71, 103 (1981).

[84] United States v. Byers, 740 F.2d 1104 (D.C. Cir. 1984) (rejecting the claim that the State does not need an independent evaluation).

[85] *See* cases cited in note 25, *supra*.

[86] *E.g.*, Allen v. Illinois, 478 U.S. 364, 374 (1986).

criteria, even if cross-examination is effective. For example, the subjects have typically committed seriously dangerous acts and it is difficult to establish the negative that the subject will *not* commit another dangerous act if released. Most preventive detention commitments associated with criminal justice are potentially indefinite. A subject faced with such a drastic loss of liberty should have a right to the services of an independent mental health professional to defeat the allegation that he should be detained preventively.

C. COMPETENCE TO STAND TRIAL

Competence to stand trial raises two sets of issues. The first is the rationale for preventing the trial of an incompetent defendant. The second is what the state may properly do to restore the incompetent defendant's competence. These issues are related and will be discussed together.

Ever since *Pate v. Robinson*[87] and *Drope v. Missouri*,[88] it has been established that incompetence is an absolute bar to criminal trial. The standards for this form of adjudicative competence vary by jurisdiction,[89] but they essentially involve the defendant's ability to understand the charges and the proceedings and to assist his counsel.[90] The rationales for barring trial are that the incompetent defendant is less likely to get a fair, accurate trial if he or she cannot understand and assist, and that it violates the dignity of our criminal process to try to convict a defendant who does not really understand what is happening or is unable to help himself avoid

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[87] Pate v. Robinson, 383 U.S. 375 (1966).

[88] Drope v. Missouri, 420 U.S. 162, 173 (1975). Some refer to *Dusky v. United States* as the crucial precedent, but *Dusky* was simply an interpretation of the federal statute and not a constitutional case. 362 U.S. 402 (1960).

[89] *See, e.g.*, 18 U.S.C. § 4241(c) (2006) ("unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense"); CAL. PENAL CODE § 1369(a) (West 2010) ("defendant's ability or inability to understand the nature of the criminal proceedings or assist counsel in the conduct of a defense in a rational manner as a result of mental disorder"); N.Y. CRIM. PROC. LAW, § 730.10.1 (West 2010) ("[A] defendant who has a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense").

[90] *See* Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 BEHAV. SCI. & L. 291 (1992). Professor Bonnie has drawn an influential distinction between the capacity to proceed and decisional capacity in the criminal justice system. *Id*. at 298. The defendant incompetent to stand trial requires competence to continue the criminal process; the defendant pleading guilty must be competent to make a current decision about whether to waive his right to trial and attendant rights. *Id*. The distinction has been criticized because implicit in a finding of competence to proceed is that the defendant will have to make decisions as the process continues. *See* Godinez v. Moran, 509 U.S. 389, 397–400 (1993) (finding no significant difference between the two standards). It is nonetheless a useful distinction, as it focuses more precisely on what is at stake.

conviction. In addition, an incompetent defendant is incapable of exercising the autonomy and self-determination expected of criminal defendants who must make crucial decisions.[91] In virtually all cases, the incompetent defendant will suffer from severe mental disorder or developmental disability (retardation).[92]

Defense counsel, prosecution, and the judge have a duty to raise the issue of trial incompetence at any time during a criminal proceeding if any of these people suspects that a defendant is incompetent.[93] The judge then will order an evaluation of the defendant, and a hearing will be held if there is a substantial issue. The hearings are seldom fully adversarial, and in most cases, the judge will simply rubberstamp the evaluator's conclusion that the defendant is incompetent.[94] I suggest that lawyers appointed solely to evaluate trial competence would be better evaluators of a defendant's trial competence than mental health professionals because lawyers comprehend much better what understanding and assistance are necessary. Perhaps the mental health expert will have a better understanding of why the defendant is allegedly incompetent, and the clinician is certainly better positioned to recommend treatment. Nonetheless, the cause is usually apparent, and why the defendant is incompetent is relevant only to the potential treatment to restore competence. The evaluating professional is virtually never involved in the treatment process, so the treatment evaluation will have to be made independently in any case. For now and for the foreseeable future, however, the evaluations will be done by mental health professionals.

A defendant found incompetent to stand trial will typically be committed to a forensic hospital or forensic unit of a hospital for treatment to restore competence. In the leading precedent, *Jackson v. Indiana*, the Supreme Court held that due process requires that the nature and duration of the commitment should bear a reasonable relation to its purpose, which is to restore trial competence.[95] The Court did not provide much guidance about the length of these commitments, and they vary substantially among

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[91] POYTHRESS ET AL., *supra* note 56, at 45–46.

[92] *Id*. at 51, 93–95 (finding that defendants with schizophrenia were the most impaired, but also finding some overlap among the diagnostic groups).

[93] Drope v. Missouri, 420 U.S. 162 (1975). In practice, defense counsel will have the best access to the defendant and will be primarily responsible for raising the issue.

[94] POYTHRESS ET AL., *supra* note 56, at 42 (noting that commentators, but not forensic clinicians and judges, disapprove of this practice); STEADMAN, *supra* note 56, at 54 (noting that the court agreed with the mental health recommendation in 92% of cases, a result consistent with other studies).

[95] Jackson v. Indiana, 406 U.S. 715, 738 (1972). In some jurisdictions, trial competence treatment can be performed in the local jail. *See* CAL. PENAL CODE § 1369.1(a) (West 2010).

jurisdictions. Thus, although there is only probable cause to believe the defendant has committed the crime, he can be incarcerated without trial in a secure facility for many years—in some cases as long as the sentence for the crime charged—despite the lack of a conviction.[96] Although the time hospitalized is counted towards any criminal sentence ultimately imposed, the hospitalized incompetent defendant is in legal limbo, and incompetence can be used as a tactic by both the prosecution and the defense.[97] To the extent that incompetence commitment is used by the prosecution to preventively detain an accused for whom the case may be weak, this is an abuse of the incompetence procedures. The Supreme Court in *Jackson* also held that a defendant who is irreversibly incompetent to stand trial must be released from the criminal justice system, but state officials clearly have substantial discretion to decide that the incompetence is not irreversible and thus to continue what may be improper preventive detention.[98]

Finally, the Court suggested, but did not require, that pretrial motions, such as to suppress evidence, could be adjudicated, even if the defendant were incompetent to stand trial.[99] In some cases, this might have the effect of ending the prosecution because suppressed evidence is crucial to the prosecution's case, but there are no data about how often such pretrial proceedings are used. In sum, much potential exists for abuse of incompetence to stand trial doctrines and practices. It is time to rethink them. Virtually everything I shall say in what follows has been suggested previously,[100] but the system does not change and abuses are not curtailed.

If the criminal process can be halted by the suppression of evidence or other pretrial proceedings, it should be. An incompetent defendant is presumed innocent and should have available any pretrial action that can halt the prosecution. The defendant may go free because the constable has blundered, but that is the cost of doing business in a system dedicated to protecting the rights of defendants. If the defendant is still mentally disordered and non-responsibly dangerous as a result, the state can resort to traditional involuntary civil commitment to protect the public. Once again,

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[96] PARRY, *supra* note 46, at 116 (2009).

[97] POYTHRESS ET AL., *supra* note 56, at 49–50.

[98] *Jackson*, 406 U.S. at 738. If the examining or treating mental health professionals unanimously conclude that an incompetent defendant cannot be restored, then the state will have to use some other means, such as civil commitment, to restrain a permanently incompetent defendant who is believed to still be dangerous.

[99] *Id.* at 741.

[100] *E.g.*, ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Standard 7-4.13 (1989); Robert Burt & Norval Morris, *A Proposal for the Abolition of the Incompetency Plea*, 40 U. CHI. L. REV. 66 (1972). I apologize in advance to the many other excellent scholars who have written about this.

this is an imperfect remedy, but no system of preventive detention can guarantee society's perfect safety and still be consistent with due process concerns. Perhaps the special form of involuntary commitment I suggested earlier would be justifiable.[101] The defendant may not ever be brought properly to justice, but such a commitment is preferable to outright release, which is what would happen if the defendant were competent.

Assume that there is no bar to proceeding with the prosecution other than the defendant's incompetence. Two possibilities arise. The first is that the defendant cannot receive a fair trial on the merits as a result of his incompetence. If so, the risk of error is too great and the proceeding should be stopped. The second is that the defendant can receive a fair trial on the merits despite incompetence. Present law treats these cases as indistinguishable, and on dignity and autonomy grounds they are indistinguishable. If the defendant is incompetent, the process must halt, full stop, and the state may attempt to restore the defendant's competence. After exploring the treatment consequences of the present legal regime in which trial incompetence necessitates a halt, I shall turn to the possibility of trying the incompetent defendant if a fair trial is possible. This is not possible today, but it should be. Or so I shall argue.

As noted, developmental disability and severe mental disorder are the primary abnormalities related to incompetence.[102] Developmental disability itself cannot be treated, but it is possible through educational techniques to teach a defendant some of the communication or other cognitive skills, such as an understanding of the criminal process, necessary to restore trial competence. If such interventions are provided soon and with reasonable intensity, the treating personnel can discover in a matter of months and perhaps only weeks if the defendant is capable of learning the necessary skills. There is utterly no need for long-term hospitalization and its use is simply a means to reach another, constitutionally impermissible goal in this context, such as preventive detention.

Severe mental disorder, including psychotic states, is more treatable, especially with psychotropic medication. Psychotropic medication is not a panacea, however. A substantial number of patients do not respond, even to the most effective agents. All the drugs have side effects that can be extremely serious and unpleasant, and the drugs do not provide life skills that the person did not formerly possess. Thus, even if the person responds

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[101] *See* text at note 59, *supra*. If there were no possibility whatsoever that the prosecution could ever succeed, then perhaps equal protection might require the State to treat incompetent and competent defendants similarly. In that case, only traditional involuntary civil commitment would be available.

[102] *See* note 90, *supra*.

well to psychotropic medication and regains reasonable cognitive control, some educational interventions may also be necessary to prepare the defendant for a criminal trial. Despite the difficulties, medication will be the first treatment of choice for most defendants who are incompetent because they are out of touch with reality.[103] In virtually all cases, a determination can be made within six to nine months that the defendant is or is not treatable. There is no need for longer commitment to restore trial competence.[104] A conclusion of irreversibility can be reached and further commitment for restoration is once again preventive detention. Thus, all jurisdictions that permit lengthy restoration commitments are in virtually all cases engaged in permitting preventive detention rather than in genuine restoration commitment.[105]

In *Sell v. United States*,[106] the Supreme Court addressed whether and under what conditions the state could forcibly medicate an incompetent defendant for the purpose of restoring the defendant's competence to stand trial. The Court agreed, as it had previously,[107] that citizens have a strong

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[103] Prescription of psychotropic medication is usually empirically-based because there are few established links between a specific diagnostic assessment and a specific drug. The therapist typically starts with one from among a class of drugs that has the highest benefit–cost profile. After a trial of a few months, if the patient does not respond, a different drug is tried, and so on. If the patient who is incompetent as a result of psychosis associated with schizophrenia has not responded to any drug over the course of six months, then the therapist can order clozapine. Clozapine is effective with a high percentage of non-responders but has extremely dangerous, potentially fatal side effects that require careful monitoring. If the patient still fails to respond, then it is reasonably safe to conclude that none of the available drug therapies is likely to restore the person's contact with reality. *See* Beng-Choon Ho et al., *Schizophrenia and Other Psychotic Disorders*, *in* TEXTBOOK OF CLINICAL PSYCHIATRY 379, 414 (Robert E. Hales & Stuart C. Yudofsky eds., 4th ed. 2003). *See generally* Lauren B. Marangell et al., *Psychopharmacology and Electroconvuslve Therapy*, *in id.* at 1047.

[104] Suppose the defendant competently refuses to take psychotropic medication, thus preventing the government from restoring his or her trial competence. It is perfectly possible that a defendant with mental disorder might be incompetent to stand trial but competent to refuse medication. Crazy thinking can be relatively domain-specific, diminishing competence in some areas of functioning and not in others. It is also possible that the defendant will be incompetent to refuse. The law is not entirely clear about the government's right to override an incompetent refusal of a committed person, but I shall argue that the government should have the right to treat defendants incompetent to stand trial whether or not they are competent to refuse treatment.

[105] Most defendants are restored to competence within six months. POYTHRESS ET AL., *supra* note 56, at 51. Nonetheless, the potential for lengthy commitment remains and can be abused.

[106] Sell v. United States, 539 U.S. 166 (2003).

[107] In *Washington v. Harper*, the Supreme Court decided under what conditions a prisoner could be forcibly medicated with psychotropic drugs. 494 U.S. 210 (1990). The Court noted that everyone has a substantial liberty interest in being free from unwanted medical interventions. *Id.* at 221–22. The Court held, however, that prisoners could be

liberty interest in being free of unwanted medical interventions.[108] The Court nonetheless held that an incompetent defendant could be involuntarily medicated if four conditions were met: the treatment was medically appropriate, the governmental interest was strong because the charges were serious, the treatment would not cause trial prejudice, and less restrictive means of restoring competence were not effective.[109] The Court did express a preference for treating the defendant under an independent and less fraught rationale, however, such as the defendant's dangerousness.[110] Not all incompetent defendants will satisfy such an independent rationale for involuntary treatment and trial courts will have to apply the *Sell* criteria.

Three of *Sell*'s conditions are appropriate, but I would go further and argue that the government's interest in trying an accused is sufficiently strong in the case of any felony to justify forcible medication of an incompetent defendant for the purpose of restoring competence. A criminal prosecution is an extremely serious matter. Neither the case nor the prosecution and defense should remain in limbo while an incompetent defendant languishes in a hospital untreated. The incompetence standards and consequences are not meant to be used strategically by either side. What is the point of keeping an incompetent defendant in a hospital to restore competence if restoration is made impossible by treatment refusal? The intrusion of forcible medication is not trivial, to be sure, but neither is it so extensive that it should block the progress of the case. It is not a form of thought control or any other type of unjustifiable intervention. Forcible medication simply tries to restore the person's cognitive control and ability to test reality. Moreover, hospitalization is expensive and should be terminated as soon as possible. Finally, no good alternative presents itself.

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forcibly medicated for their own safety or the safety of others if medication was medically appropriate and the prisoner posed a danger to himself or others. *Id*. at 227. I will discuss *Harper* in greater detail in subpart V.B, *infra*.

[108] *Sell*, 539 U.S. at 178.

[109] *Id.* at 180–81. Whether the medication will have an adverse effect on the fairness of trial because it alters the defendant's behavior negatively, such as impairing communication abilities, is an important issue. *See id.* at 185–86. Anti-psychotic medication at proper dosage levels typically does not sedate the defendant or otherwise impair a person's abilities. Rather, if effective, it restores cognitive functioning and should enhance the defendant's performance. On the other hand, it may make the defendant appear "normal" to the judge or jury, which might undermine a claim that the defendant was legally insane, or it might alter the defendant's demeanor in a prejudicial way. Such possibilities especially concerned Justice Kennedy. Riggins v. Nevada, 504 U.S. 127, 142–45 (1992) (Kennedy, J., concurring). These potential difficulties could be alleviated by expert testimony and judicial instructions. In an extreme case, however, the *Sell* criteria will not be met.

[110] *Sell*, 539 U.S. at 181–82. The Court expressed a preference for justifying medication according to the *Harper* criteria. *Id*.

If the defendant can prevent restoration, rendering him permanently incompetent, then the government must dismiss the charges, presumably with prejudice, and seek involuntary civil commitment. As we have seen before, however, this is an imperfect remedy. Once again, perhaps, a special form of commitment is needed, but without necessary treatment, such commitments are simply warehousing. If the person could be forcibly treated in involuntary civil commitment or in some form of special commitment under a different rationale, then perhaps trial competence would be restored. Once the defendant comes to trial, however, he would have the option of foregoing treatment again and might lapse into incompetence.

Unless the Supreme Court reverses decades of incompetence jurisprudence, it is not possible to try incompetent defendants even in those cases in which they could receive a fair trial. This would solve many of the problems raised by *Sell* or by cases of seeming permanent incompetence, allowing final resolution of the criminal justice process. One may fairly ask how we could be sure that the trial would be fair, but I suggest that this could be resolved at pretrial hearings. Everything depends on how complicated the issues are and whether difficult strategic choices will be necessary in which the defendant would be likely to disagree with the attorney's advice. We could also adopt various prophylactic rules, such as requiring the prosecution to disclose evidence that may not pass the *Brady* threshold of actual innocence evidence, but which arguably favors the defense.[111] In any case, the issue will not arise frequently because most state and federal cases are resolved by plea bargains. Nonetheless, the incompetence process would be rationalized in those cases in which going to trial seems optimal and a fair trial was possible despite incompetence. I recognize that this is a controversial suggestion and the procedural requirements to guarantee fairness would be complex, but, in principle, this is a reform that could work.

D. COMPETENCE TO PLEAD GUILTY

In *Godinez v. Moran*,[112] the Supreme Court was asked to impose a standard of competence to plead guilty and to waive the right to counsel, a so-called reasoned choice test, that was different from the standard for incompetence to stand trial. The argument for doing so was that pleading is more complicated than going to trial and therefore a different and presumably higher standard was required to satisfy due process. The Court refused to adopt a different test, holding that the competence to stand trial

[111] Brady v. Maryland, 373 U.S. 83 (1963).
[112] 509 U.S. 389 (1993).

standard was sufficient to protect the defendant's rights as long as the waiver of the right to trial and other constitutional protections was actually knowing and voluntary.[113] After all, a defendant might be competent but might not actually understand what he is doing as a result of confusion, marginal competence, or the like. In my view, the Court missed the theoretical and policy mark although the holding is not self-evidently wrong.

Recall that all competence standards are essentially functional rationality tests. The question is what rational understanding and skills are required. Although competence standards generally should be low, what is required can vary according to the context. Consequently, "one size fits all" standards in many contexts make little sense. For example, some trials are complicated and some guilty pleas are not, and vice versa. It is a fantasy to believe that any particular standard, such as competence to stand trial, adequately operationalizes the test. Even if the standard specifies what must be understood, it does not specify how much understanding and of what type is required. Is the ability to accurately recite information previously provided sufficient or must the agent be capable of a process of rational weighing and assessment?

Although different "skills" may in theory be necessary to accomplish different tasks successfully, such as assisting counsel and deciding whether to plead guilty, it is not clear that the allegedly higher standard that the Court rejected, "reasoned choice," would make much difference in practice. Rational understanding and reasoned choice are both vague formulations that provide little guidance. The test should be a functional and context-dependent rationality standard, focusing on what skills are demanded in a particular context, whichever words are used to express the standard. Waiver of distinct constitutional rights implicates distinct rational understandings of each right waived. Thus, a defendant who appears to have general rational understanding may appear on close examination to lack that understanding for a particular trial right. If the trial court makes a careful inquiry concerning whether a particular waiver is knowing and voluntary, the more general and specific inquiries should merge, as the *Godinez* dissent recognized.[114] Once again, however, what is necessary is not a distinct formulation for competence to plead guilty or to waive the right to counsel, but a context-dependent evaluation by the trial court of the defendant's rational capacities necessary in each context. Finally, if a different or higher standard had been imposed, it is not clear that trial courts

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[113] *Id*. at 400. In his concurrence in *Godinez*, Justice Kennedy characterized the requirement as "knowing, intelligent, and voluntary." *Id.* at 403 (Kennedy, J., concurring).

[114] *See id.* at 409 (Blackmun, J., dissenting).

would have behaved differently, and appellate courts would rarely second-guess a trial court's substantive determination that a defendant was or was not competent.

Requiring deeper or more detailed rational understanding risks parentalism,[115] but requiring less risks an unjust outcome. I have a preference for limiting parentalism as much as possible and perhaps the Court's recognition that the defendant must actually waive his rights knowingly partially remedies the vagueness of the general test. On the other hand, defining knowing or intelligent is as vulnerable to manipulation as defining competence itself. In short, evaluating any competence case is a normatively fraught and difficult enterprise. I have no easy answer, but simply a policy preference for keeping the bar relatively low to let most defendants over it. This will maximize liberty, but the danger is that it will also unduly risk the defendant's ultimate liberty by potentiating the possibility of an irrational outcome.

If the defendant is not competent to plead because he has failed the competence to stand trial standard or a state-imposed higher standard, it seems clear that a *Jackson*-type commitment is warranted, subject to the same limitations I suggested above. And, once again, I believe that the government should have the right to forcibly medicate incompetent defendants who are incompetent because they have lost touch with reality.

IV. TRIAL ISSUES

This Part of the Article surveys the many issues at trial that involve mental disorder, including the right to proceed pro se, the right to introduce evidence of mental disorder to negate the *mens rea* required by the definition of the crime, and various issues raised by the affirmative defense of legal insanity. Whether psychopathy should qualify as a sufficient mental disorder to be the basis of an excuse is given special attention. I suggest that the ability to represent oneself should be cause-neutral and should be treated functionally, that evidence of mental abnormality that plausibly negates *mens rea* should be freely admissible, that a cognitive standard for legal insanity is optimum, and that the alternatives to legal insanity are undesirable. Finally, I offer a proposal for a new, generic verdict of "partial responsibility."

A. THE RIGHT TO PROCEED PRO SE

Should a criminal defendant who meets the *Godinez* standard for waiving the right to counsel, which is essentially the competence to stand

[115] Parentalism is a gender-neutral synonym for paternalism.

trial standard, be permitted to proceed pro se if he suffers from serious mental disorder? The constitutional right to proceed pro se announced by the Supreme Court in *Faretta v. California*[116] does not depend on the defendant's ability to function as an able defense counsel. As long as the defendant understands the consequences of representing himself, he is entitled to do so. Consequently, one would have thought that as long as a defendant with severe mental disorder understood what he was doing, he would be entitled to represent himself.

Nevertheless, in *Indiana v. Edwards*,[117] the Supreme Court held otherwise, unpersuasively distinguishing *Godinez* on the grounds that the issue of self-representation was not raised in the previous case and that *Godinez* involved permitting a defendant to represent himself whereas the instant case involved a state trying to prevent the defendant from doing so. Writing for the majority, Justice Breyer cautioned against trying to apply a unitary competence standard to address two very different questions: whether a represented defendant is capable of going to trial and "whether a defendant who goes to trial must be permitted to represent himself."[118] Instead, Justice Breyer tried to apply a more nuanced understanding of competency that properly considered context. He recognized that a defendant with disorder might be able to assist counsel but might nonetheless be too disabled to perform basic trial tasks at even a minimal level. He therefore worried that an apparently unfair trial could result. Discretion was left in the hands of trial judges to decide if a defendant is competent to represent himself.

This is a difficult issue for those like myself who are advocates for the rights of people with mental disorder and who wish to treat them no differently from other people. Let us assume that if the defendant represents himself, the trial will not be a complete sham, especially if back-up counsel or some other prophylactic is used to try to mitigate the dangers of self-representation. On the one hand, if the defendant understands the perils of self-representation, including how his own mental difficulties will interfere with his performance, why should he not enjoy the usual, constitutionally-protected liberty to represent himself that *Faretta* established? On the other hand, if mental disorder, which affects the defendant's rational capacities, interferes substantially with his abilities fully to understand the peril of self-representation or minimally adequately to represent himself, the risk of an unfair trial is high. It is not clear which approach best balances the rights of the accused with systemic concerns.

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[116] 422 U.S. 806 (1975).
[117] 554 U.S. 164 (2008).
[118] *Id.* at 165.

I believe the solution lies with a more egalitarian approach to *Faretta*. People might simply be too incompetent to represent themselves for a variety of reasons other than mental disorder,[119] even if they are competent to recognize how badly they will do and wish to represent themselves anyhow. *Edwards* makes clear that this type of restriction can constitutionally be placed on the *Faretta* right, at least in cases involving a defendant with mental disorder, but there seems little reason not to apply an "unreasonable trial incompetence" standard to deny the right to represent oneself to any defendant who wishes to assert it. This will mostly apply to defendants with disorder, but at least it is a cause-neutral standard that does not discriminate against defendants with mental disorder.

B. NEGATING *MENS REA*

In some cases, mental disorder may explain why a requisite *mens rea* was not formed, whether or not it actually prevented the defendant from forming it. A defendant who is making such a claim, which is often mischaracterized as the "defense" of "diminished capacity," is not raising a claim of mitigation of responsibility or of excuse; it is simply a denial of the prosecution's prima facie case, which includes the *mens rea* required by the crime charged. I have termed this the "*mens rea* variant" of so-called diminished capacity.[120] For example, in *Clark v. Arizona*,[121] defendant Clark shot and killed a police officer who had pulled the defendant over in his police cruiser and was in full uniform. The defendant was charged with the aggravated murder offense of intentionally killing a human being knowing the victim was a police officer. The defendant claimed he lacked the *mens rea* because he did not intend to kill a human being and did not know the victim was a police officer. This claim would have been incredible, of course, except that the defendant was suffering from paranoid schizophrenia and had delusions that space aliens were threatening him. He claimed that he actually believed that the victim was a space alien impersonating a police officer. If he were believed—and there was evidence consistent with the truth of this belief—he did not intend to kill a human being and did not know the victim was a police officer. In this case,

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[119] *See* Jodi L. Viljoen et al., *An Examination of the Relationship Between Competency to Stand Trial, Competency to Waive Interrogation Rights, and Psychopathology*, 26 LAW & HUM. BEHAV. 481 (2002) (demonstrating that some defendants are incompetent to plead or to stand trial for reasons other than mental disorder).

[120] Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1 (1984).

[121] 548 U.S. 735 (2006). All the facts in the following description are taken from the Court's opinion.

the mental disorder produced an irrational belief that is inconsistent with the formation of *mens rea*.

It is also possible that mental disorder explains a failure to form a *mens rea* that is not a result of an irrational belief. Imagine that a severely disordered person is confused and disorganized on the streets of a large city in a deserted neighborhood. It is freezing cold and the person realizes that he cannot find his way home and fears freezing. He therefore breaks into a building simply to keep warm. The police catch him and charge him with burglary on the theory that he intended to commit the felony of larceny in the building. In this case, the defendant was surely capable of forming the intent to commit larceny and there was no rationality problem about what he was doing, but he simply did not form the intent to steal. His disorganization resulting from mental disorder simply helps explain why he broke in just to keep warm.

In most cases, mental disorder does not interfere with the formation of *mens rea*. The primary effect of mental disorder on the mental states required by the definitions of crimes is to give the defendant crazy reasons for actually forming the requisite *mens rea*. Consider Daniel M'Naghten, who delusionally believed that the governing Tory Party of England meant to kill him.[122] As a result he intentionally killed a person he believed was the Tory Prime Minister, Peel, but who was in fact Peel's secretary, Drummond. M'Naghten intended to kill a human being, but he acted based on a deluded reason. In some cases, however, mental disorder may be the only credible explanation for why a defendant did not form the *mens rea* required by the definition of the offense. If a plausible claim of *mens rea* negation can be made, can the state nonetheless exclude the evidence?

In *Clark*, the Supreme Court addressed precisely this issue and held that the state could constitutionally exclude all non-observational expert evidence of mental disorder that would be introduced to negate *mens rea*.[123] The Court approved Arizona's "channeling" of all such evidence into the issue of legal insanity because so-called mental disorder and capacity evidence bearing on *mens rea* would simply confuse the finder of fact.[124] Judge Morris Hoffman and I have severely criticized the Court's reasoning

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[122] RICHARD MORAN, KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL MCNAUGHTAN 10 (2000) (quoting McNaughtan's first statement to the magistrate after his arrest). Professor Moran provides a full account of the case, including its social, political, and legal context, and the correct spelling of the defendant's last name, which was actually "McNaughtan." *See id.* at xi.

[123] Clark v. Arizona, 548 U.S. 735, 772 (2006).

[124] *Id*. at 774–78.

in *Clark* in these very precincts,[125] but I will not repeat those arguments here. Rather, I will simply go to the heart of why the Court's decision is unfair.

Criminal blame and punishment are the most awesome, painful exercises of state action towards a citizen. In our adversarial system of criminal justice, the defendant is presumed innocent and the prosecution has the burden of proving the defendant's guilt, including the requisite *mens rea*. Criminal liability should not be imposed unless the defendant deserves such treatment. Desert is at least a necessary condition of just punishment, and the fair ascription of criminal culpability thus requires the presence of *mens rea*, which is the indicator of the degree of the defendant's fault. One would think that in such a system of justice, fundamental fairness would require that a criminal defendant should be given every reasonable opportunity to defend against the state's charge with credible and probative evidence.

There are a number of reasons that a jurisdiction might want to reject or limit *mens rea* variant claims, many of which were discussed in the *Clark* opinion. Psychiatric and psychological evidence can admittedly be scientifically and clinically questionable and sometimes of faint legal relevance. I have been a long-term critic of much forensic mental health testimony and remain so.[126] Moreover, even good forensic testimony can be confusing to lay witnesses. Despite these problems—and the Supreme Court has repeatedly acknowledged them, including in *Clark*—mental health testimony is routinely and generously admitted in a wide variety of civil and criminal contexts because it is considered relevant and probative. Indeed, the Court has accepted the admission of expert testimony about the

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[125] 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 (2007). The decision was disappointing but not unsurprising after *Montana v. Egelhoff*, 518 U.S. 37 (1966), in which the Court upheld Montana's complete exclusion of admittedly relevant and probative voluntary intoxication evidence to negate *mens rea* on the grounds that the state had valid policy reasons for doing so and that a criminal defendant does not have an absolute right to have relevant and probative evidence admitted. Voluntary intoxication is of course distinguishable from mental disorder because the latter is not the defendant's fault, but the Court's deference to the state rule and justification for it was generalizable.

[126] Morse, *supra* note 2, at 600–25; Stephen J. Morse, *Failed Explanations and Criminal Responsibility: Experts and the Unconscious* 68 VA. L. REV. 973 (1982) (providing a detailed critique of psychodynamic psychology and forensic testimony that is based on this theory of behavior); Stephen J. Morse, *The Ethics of Forensic Practice: Reclaiming the Wasteland*, 36 J. AM. ACAD. PSYCHIATRY L. 206 (2008) (claiming that forensic practice is not an ethical wasteland, but recommending major changes to practice). Although there are still major problems with forensic mental health testimony, I believe the situation is much improved since I first addressed this, largely as a result of the creation of specialty boards in both forensic psychology and psychiatry and the general professionalization of the field.

prediction of future dangerousness in capital sentencing proceedings in the face of virtually unanimous professional opinion that such predictions were too inaccurate to be the basis of a death sentence.[127] The Court held that such weaknesses were matters of weight rather than admissibility and could be exposed through cross-examination and by opposing witnesses.[128] If such prosecution testimony is admissible to put a defendant to death, how can it be fair to prevent the defendant from negating the prima facie case by using credible, relevant, probative testimony that is admissible in every other legal context?

The "channeling" of mental abnormality evidence into legal insanity claims is no remedy for the inconsistency because the *mens rea* variant is a claim entirely distinct from legal insanity, even if the evidence used is similar for both claims. In the former case, the defendant claims, "I didn't do it"; in the latter, the claim is, "I did it, but I'm not responsible." How can it be fair to permit the prosecution to use abnormality evidence to put a defendant to death but to prevent the defendant from using credible and probative evidence that he or she did not commit the crime charged in the first place?

A related rationale for denying or limiting *mens rea* negation is that it "undermines" the insanity defense. It is not clear precisely what this rationale means. Some courts reject the *mens rea* claim because they appear to assume that this claim is a lesser form of legal insanity and thus a mitigating (but not fully excusing) affirmative defense that should be adopted by legislatures rather than by courts,[129] but this is a confusion. Roughly speaking, the insanity defense is based on the premise that the legally insane defendant substantially lacks rational capacity or the capacity to control his or her criminal behavior. The *mens rea* claim does not specifically address either capacity, however. It simply addresses whether the defendant possessed the mental state required by the definition of the crime.

A better argument is that a defendant who successfully raises the *mens rea* variant may negate all *mens rea* and thus would simply be acquitted and freed. In contrast, an insanity acquittee will be involuntarily civilly committed. Moreover, the *mens rea* claim will be easier to establish than the legal insanity claim. Success in the former case requires casting only a reasonable doubt on the prosecutor's case whereas the burden of proof for

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[127] Barefoot v. Estelle, 463 U.S. 880 (1983).

[128] *Id.* at 896–903.

[129] State v. Wilcox, 436 N.E.2d 523, 526–33 (Ohio 1982) (partially conflating the *mens rea* and partial responsibility variants of diminished capacity and suggesting that the legislature and not the court should adopt this "defense") (quoting Bethea v. United States, 365 A.2d 64, 92 (D.C. 1976)).

affirmative defenses like legal insanity may be placed on the defendant, which significantly reduces the defendant's chance of succeeding.[130] Thus, permitting the *mens rea* claim may compromise public safety more than the insanity defense—a point to be addressed immediately below—but this is distinguishable from claiming that the insanity defense is thereby undermined. As we have seen, criminal liability should not be imposed unless the defendant deserves such treatment and a defendant does not deserve blame and punishment for a particular crime unless he possessed the *mens rea* required by the definition of that crime. The defendant can avoid unjust blame and punishment either by negating *mens rea* or by establishing an affirmative defense. *Mens rea* and legal insanity are independent doctrines. Both implicate public safety, but, more fundamentally, they are aimed at doing justice. Permitting the defendant to negate *mens rea* achieves justice independently rather than undermining the justice the insanity defense achieves.

Perhaps the strongest reason for limiting or rejecting the *mens rea* variant is the fear for public safety, a concern that might be the underlying foundation for the claim that the *mens rea* variant undermines the insanity defense. It is true that *mens rea* variant claims present cases in which fair ascriptions of culpability and public safety might conflict. The defendant who lacks the *mens rea* required by the definition of the crime is simply less culpable. But a defendant with a sufficiently severe mental abnormality to negate *mens rea* may also be a serious danger to the public because such severe abnormalities also suggest that the defendant's general capacity for rationality is diminished in situations in which criminal conduct occurs. A defendant who succeeds with a negation of *mens rea* claim will be convicted of a lesser offense that carries lesser penalties or perhaps will be completely acquitted. Consequently, the defendant will be incapacitated by imprisonment for a shorter period than if he or she had been convicted for the offense charged or acquitted by reason of insanity and then civilly committed.

The fear for public safety is genuine but overwrought. As noted, the effect of mental disorder, including severe mental disorder, is seldom to negate the "subjective" *mens rea*s, such as purpose, knowledge, and recklessness, that are part of the definitions of crimes. Mental disorder may

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[130] HENRY J. STEADMAN ET AL., BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM 84–85, 144–46 (1993). This study found that shifting the burden of persuasion caused a decline in the number of insanity pleas raised and that the presence of a major mental disorder was a necessity for success. It also found, however, that among the very few defendants in New York who did raise the defense, the success rate increased. This seemingly paradoxical effect was almost certainly caused because the defense was probably raised in only the clearest cases after proving insanity became more difficult.

give people irrational reasons to form the *mens rea*, but it almost never interferes with formation of that mental state. There are instances in which subjective *mens rea* is entirely negated, but they are few, indeed. Moreover, no defendant can use evidence of mental disorder to negate negligence because failing to recognize a risk the defendant should have recognized because the accused is abnormal is per se unreasonable. There are attempts to "individuate" the reasonable person standard by endowing the reasonable person with the characteristics of the accused, such as being mentally abnormal, but this abandons objectivity altogether.[131] After all, what does it mean to talk of the "reasonable abnormal" person?

In short, even if a jurisdiction permitted a defendant to negate *mens rea* without any restriction whatsoever, public safety would scarcely be compromised and greater individual justice would be gained. I propose that this is precisely the rule that should be adopted and it is the Model Penal Code rule.[132] There will be occasions in which defendants raise implausible claims about *mens rea* negation based on mental disorder, but these can be limited by pretrial motions to exclude the evidence and similar remedies.

C. LEGAL INSANITY

Legal insanity is an affirmative, complete defense to crime. Forty-six states and the federal criminal code have the defense.[133] Most have some variant of the "cognitive" *M'Naghten* standard, which asks whether as a result of mental disorder the defendant did not know the nature and quality of his act or did not know right from wrong.[134] A minority also have an alternative "control" test, which asks whether as a result of mental disorder the defendant could not control his criminal behavior.[135] In *Clark*, the Supreme Court upheld the constitutionality of Arizona's test, which was simply the right/wrong alternative in *M'Naghten*, although it is the narrowest conceivable test.[136] The Supreme Court has never held that the

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[131] Stephen J. Morse, *The "New Syndrome Excuse Syndrome,"* 14 CRIM. JUST. ETHICS 3 (1995). For example, H.L.A. Hart has suggested general individuation of reasonable person standards for negligence, but recognized that the individuation would be a matter of mitigation or excuse and not of "subjective justification." HART, PUNISHMENT AND RESPONSIBILITY, *supra* note 23, at 153–54. The most common doctrinal examples of the attempt to individuate the reasonable person standard are in cases of self-defense and in cases concerning the reduction from murder to manslaughter if the defendant was legally adequately provoked and killed in the heat of passion.

[132] MODEL PENAL CODE § 4.02 (Proposed Official Draft 1962).

[133] Clark v. Arizona, 548 U.S. 735,749–53 (2006) (providing a description of the various rules and the number of jurisdictions that adopt each).

[134] M'Naghten's Case, (1843), 8 Eng. Rep. 718 (H.L.).

[135] *Clark*, 548 U.S. at 749–53.

[136] *Id.* at 742.

insanity defense is required by substantive due process. Further, the state supreme courts of four of the five states that abolished the defense in the wake of the insanity acquittal of John W. Hinckley Jr. for the attempted assassination in 1981 of President Reagan and others[137] have upheld the constitutionality of abolition.[138] A compelling constitutional argument could be made for the necessity of the insanity defense, but, as I shall argue presently, abolition is a bad policy even if it is constitutional. First, however, let us address a number of issues that need to be clarified.

Legal insanity is a legal and moral issue, not a medical, psychiatric, or psychological issue. The criteria for finding someone not criminally responsible—for deciding who is a fit subject for blame and punishment—are thoroughly normative. Thus, the claim that a test is "unscientific" is a category mistake. One may believe that certain types of mental states should excuse a criminal who possessed them at the time of the crime and may therefore criticize on moral grounds a test that does not include them, but that is a normative and not a scientific critique. A narrow test may be morally offensive, but it will not be scientifically erroneous.

Mental disorder alone, no matter how severe, is not an excusing condition even if it played a causal role in explaining the defendant's behavior. As we have seen, causation per se is not an excusing condition.[139] The moral basis for the insanity defense is that in some cases mental disorder affects the defendant's capacity to act rationally or to control his behavior. These are the genuinely excusing conditions that the other criteria for legal insanity address. The issue is the defendant's impaired practical reasoning. Excuse is warranted only in those cases in which the impairment is sufficient, which is a moral and legal question. As a practical matter, the defendant will have to be out of touch with reality to succeed with the insanity defense,[140] but many defendants who are concededly delusional at the time of the crime may be convicted because their practical reasoning about the crime was nonetheless not sufficiently impaired. For example, Eric Clark was incontrovertibly suffering from paranoid

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[137] For a full account of the case, including substantial excerpts from the trial testimony, see RICHARD C. BONNIE ET AL., A CASE STUDY IN THE INSANITY DEFENSE—THE TRIAL OF JOHN W. HINCKLEY, JR. (2d ed. 2008).

[138] State v. Bethel, 66 P.3d 840 (Kan. 2003); Utah v. Mace, 921 P.2d 1372 (Utah 1996); State v. Cowan, 861 P.2d 884 (Mont. 1993); State v. Winn, 828 P.2d 879 (Idaho 1992). Nevada also abolished the defense, but the Nevada Supreme Court held that abolition was unconstitutional. Finger v. Nevada, 27 P.3d 66 (Nev. 2001).

[139] *See supra* notes 39–43 and accompanying text.

[140] STEADMAN ET AL., *supra* note 130, at 85.

schizophrenia, but the court convicted him because it concluded that Clark did know that what he was doing was wrong.[141]

Much scholarly ink has been spilled and many pixels illuminated about specific issues within *M'Naghten* and its variants, such as whether knowledge of right versus wrong means moral or legal wrong and whether an allegedly broader substitute for knowledge, such as appreciation or understanding, is preferable. I believe that such debates are beside the point. To begin, the test used does not seem to make much difference in the outcome,[142] a result I think is best explained by the jury's rough and ready conclusion that the defendant was or was not sufficiently irrational to deserve to be punished.

To the extent that an outcome might turn on moral versus legal wrong, the former should be preferred because it is more action-guiding and provides a better fit with the underlying rationale for the defense. Note that all crimes for which an insanity defense is typically raised are acts that are also objectively and clearly immoral and illegal. The reason a legally insane offender typically commits the crime is primarily because she believes that she has a sufficient moral or legal justification for what she is doing. Consider Andrea Yates, who delusionally believed that she needed to kill her children while they were still sufficiently pure or they would become corrupted and would be tormented in hell for eternity.[143] Yates knew it was legally wrong to kill her children and she might also have recognized that her neighbors might think it morally wrong to do so. Nonetheless, from her deluded, subjective point of view, she surely thought she was doing the right thing. If the facts and circumstances were as she believed them to be, the balance of evils was positive in this case. Ms. Yates's knowledge of moral and legal wrong is beside the point, however. Although Ms. Yates was instrumentally rational, she deserved to be excused because her actions were deeply irrationally motivated through no fault of her own.

Many critics of cognitive tests believe that the word "know" is too narrow and that other, apparently broader terms should be used that encompass a somehow deeper understanding of what one is doing or that it is wrong.[144] Every lawyer knows, however, that almost any term used can

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[141] *Clark*, 548 U.S. at 745–46.

[142] SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 884 (8th ed. 2007).

[143] Deborah W. Denno, *Who is Andrea Yates? A Short Story About Insanity*, 10 DUKE J. GENDER L. & POL'Y 1 (2003) (providing a complete account of the case).

[144] *E.g.*, MODEL PENAL CODE AND COMMENTARIES § 4.01, at 166, 169–70 (1985); Douglas Mossman, United States v. Lyons: *Toward a New Conception of Legal Insanity*, 16 BULL. AM. ACAD. PSYCHIATRY & L. 49, 54–57 (1988).

be interpreted more or less broadly to reach the morally preferred result. Consider knowledge itself. Did Ms. Yates know what she was doing? The answer depends on whether one takes a narrow or broad view of such knowledge. Ms. Yates knew that she was killing her children, so she knew what she was doing in the narrow sense. On the other hand, her material motive for action—to save the children from eternal torment—was deluded, so she did not know what she was doing in a broader sense. She thought she was saving the children, but she was not. The same could be said of her knowledge of moral and legal wrong. Either result could be obtained by narrow or broad readings of "understand," "appreciate," or other contenders. Fine-grained parsing of small definitional differences will not be helpful to finders of fact. A legislature can certainly signal by using a term different from knowledge that it wishes to adopt a broader reading of its cognitive test, but juries will still make a rough and ready judgment and the word used has no influence on which expert and lay testimony will be admissible. In practice, the complete clinical picture will be brought to bear whichever word is used.

If a defendant was sufficiently irrational, no separate control test will be necessary to excuse him. Suppose, however, that the defendant was rational according to any ordinary definition, but claims that he could not control himself. Such claims are often associated with sexual disorders, substance disorders, and impulse control disorders generally. These are the cases in which an independent control test is thought to be necessary. In the wake of John Hinckley's acquittal by reason of insanity for attempting to assassinate President Reagan and others, many legislatures abolished a control test for legal insanity. The American Bar Association and the American Psychiatric Association also took positions rejecting the validity of control tests.[145] Although it may seem unfair to blame and punish an otherwise rational agent who cannot control himself, there was good reason to jettison control tests. The primary ground was the inability of either experts or jurors to differentiate the defendant who could not control himself from one who simply did not. The presence of mental disorder is of no help in this regard because criminal conduct is human action, even if it is the sign or symptom of a disease. Concluding that human action is not controllable because it is a sign or a symptom is simply question-begging.[146] An independent demonstration that the conduct could not be controlled is required.

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[145] ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, *supra* note 21; Am. Psychiatric Ass'n, *supra* note 21.

[146] HERBERT FINGARETTE & ANN FINGARETTE HASSE, MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY 148–53 (1979).

I am an opponent of control tests because I have not encountered a convincing conceptual account of an independent lack of control and an operational definition of such an incapacity that would permit expert or lay testimony to resolve whether a defendant had such a problem.[147] I readily concede that lack of control may be an independent type of incapacity that should mitigate or excuse responsibility, but until a good conceptual and operational account of lack of control is provided, I prefer to limit the insanity defense to cognitive tests.

Moreover, I believe that virtually all cases in which a control test seems attractive or necessary can be better explained as a cognitive problem. People who are out of touch with reality may have trouble controlling themselves in the sense that they cannot be guided by reason, but irrationality is the problem. For example, people with sexual or substance disorders may not appear irrational, but they do report intense craving and often engage in repetitive actions that can be ruinously costly to them. It seems natural to infer that they somehow cannot control themselves. I suggest that the lack of control arises from the intensity of desire that seems to drown out all the competing considerations that most of us use to control untoward desires. In other words, at times of peak arousal, people with these problems simply cannot be guided by the good reason not to yield to their desires.[148] Even if one accepts a control theory of mitigation or excuse, in most cases the agent can still be held responsible. During those times when arousal is dormant or low, they do have intact rational capacity and recognize that they will yield in the future. It is therefore their duty to take whatever steps are necessary, such as entering treatment, to insure that they do not offend. If they do not take such steps, they are responsible for not avoiding the condition of their own excuse. In other words, even if sexual and substance disorders were to qualify as a sufficient mental abnormality for establishing legal insanity and even if people with these disorders were not rational at the time of the crime, a successful insanity defense might nonetheless be inappropriate in most cases.

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[147] Morse, *supra* note 20; Stephen J. Morse, *Against Control Tests*, *in* CRIMINAL LAW CONVERSATIONS 449 (Paul H. Robinson et al. eds., 2009). The latter was a "target" chapter that challenged proponents of control tests to provide the psychological process or mechanism that produced lack of control capacity and that could be the focus of testimony about it. Five critics responded to the chapter, but not one even remotely suggested a mechanism or process.

[148] *See* Stephen J. Morse, *Addiction, Science and Criminal Responsibility*, *in* THE IMPACT OF BEHAVIORAL SCIENCES ON CRIMINAL LAW 241 (Nita Farahany ed., 2009) (providing a fuller account).

An interesting and important issue that implicates the mental disorder criterion and both the cognitive and control tests is whether psychopathy should qualify as a mental disorder for purposes of legal insanity and whether at least some psychopaths seem to meet either a cognitive or a control test. Psychopathy is a well-validated mental disorder characterized by both conduct and psychological abnormalities.[149] For our purposes, the most important criteria are lack of conscience, lack of empathy, and lack of concern for the rights and interests of other people. The issue is important because psychopathy is highly predisposing to criminal behavior, including heightened recidivism,[150] and is common among prisoners.[151] Psychopaths simply do not get the point of morality or the underlying moral basis of criminal law prohibitions. Criminal punishments are simply prices to them. It may sound as if such people are simply callous and have an unfeeling character, but the dominant understanding today is that they are disordered for reasons not yet well understood.

The Model Penal Code's insanity provisions excluded from the defense a mental disorder "manifested only by repeated criminal or otherwise anti-social conduct."[152] Most courts have interpreted this provision to exclude psychopathy, but the words of the section do not entail this conclusion.[153] Repetitive anti-social and criminal behavior is one factor

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[149] The "gold standard" for measuring psychopathy is ROBERT D. HARE, THE HARE PSYCHOPATHY CHECKLIST-REVISED (2d ed. 2003). An earlier, influential clinical description is HERVEY CLECKLEY, THE MASK OF SANITY (5th ed. 1988). Although psychopathy is a well-validated diagnostic entity, it is not included in DSM-IV. Psychopathic characteristics can be of greater or lesser severity. My discussion will assume that a potentially excusable defendant is severely psychopathic.

[150] Kevin S. Douglas et al., *Risk for Criminal Recidivism: The Role of Psychopathy*, in HANDBOOK OF PSYCHOPATHY 533, 534 (Christopher J. Patrick ed., 2006) (urging caution on methodological grounds).

[151] *See* Thomas A. Widiger, *Psychopathy and DSM-IV Psychopathology*, *in* HANDBOOK OF PSYCHOPATHY 156, 157–59 (Christopher J. Patrick ed., 2006) (noting that there is strong overlap between psychopathy and Antisocial Personality Disorder (APD), but the relation is asymmetric; APD is more prevalent among prisoners and virtually all prisoners who score high on psychopathy meet the criteria for APD, but not the reverse).

Psychopathy must be distinguished from APD, which is included in the DSM. DSM, *supra* note 3, at 701–06. APD is diagnosed on the basis primarily of repetitive antisocial conduct. There are only two psychological criterion among the diagnostic criteria, lack of remorse and impulsivity, but neither needs to be present to make the diagnosis. Psychopathy, by contrast, always includes psychological criteria. As a result, psychopathy might plausibly be a candidate for a mental disorder that would support an insanity defense, but APD would clearly not qualify. *Id.*

[152] MODEL PENAL CODE § 4.01(2) (Proposed Official Draft 1962).

[153] Indeed, the Model Penal Code makes clear that its provision did not exclude a mental condition "so long as the condition is manifested by indicia other than repeated antisocial behavior." MODEL PENAL CODE AND COMMENTARIES § 4.01(2), at 164 (1985).

that can increase psychopathy scores, but the diagnosis is not based on this factor alone. Thus, the language of the various tests for legal insanity permits a reasonable case for inclusion. In brief, the argument for excusing psychopaths, or at least some of them, is that they lack the strongest reasons for complying with the law, such as understanding that what they are doing is wrong and empathic understanding of their victim's plight.[154] Most people can use empathy, conscience, understanding of the reason underlying a criminal law's prohibition, and prudential reasons to guide their behavior. In contrast, as a result of their psychological deficits, psychopaths can be guided only by prudential, egoistic reasons not to be caught and punished. In other words, they cannot grasp or be guided by the good reasons not to offend, which could be expressed either as a cognitive or control defect. And according to the same argument, people with lesser but still substantial psychopathy should qualify for mitigation. In response, most advocates for continuing exclusion of psychopathy as a basis for the insanity defense argue that they are in touch with reality and know the rules and it is sufficient for criminal responsibility that psychopaths can reason prudentially about their own self-interest.[155]

Suppose one accepts on normative grounds, as so many do, that the capacity for prudential reasoning is sufficient for criminal responsibility. There remains one final argument for excusing at least extreme psychopaths based on their lack of even prudential reasoning ability. According to one plausible but controversial, broad characterization of psychopathy, most ably advanced by Paul Litton,[156] psychopaths are not rational at all because they lack any evaluative standards to assess and guide their conduct. They do not even possess evaluative standards related to the pursuit of excitement and pleasure. Litton concludes that "it is not surprising that agents with a very weak capacity of internalizing standards act on unevaluated whims and impulses."[157] Much of their conduct appears unintelligible because we cannot imagine what good reason would motivate it. In brief, psychopaths have a generally diminished capacity for rational self-governance that is not

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[154] *See* Stephen J. Morse, *Psychopathy and Criminal Responsibility*, 1 NEUROETHICS 205 (2008) (providing a fuller account).

[155] Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719, 746–47 (1992). For an intermediate position, see Walter Glannon, *Moral Responsibility and the Psychopath*, 1 NEUROETHICS 158 (2008) (arguing that psychopaths are capable of instrumental reasoning and are capable of being guided by moral considerations to some degree, but their cognitive and affective impairments warrant mitigation).

[156] Paul J. Litton, *Responsibility Status of the Psychopath: On Moral Reasoning and Rational Self-Governance*, 39 RUTGERS L.J. 349 (2008). The argument in the text follows Litton.

[157] *Id.* at 382.

limited to the sphere of morality. They cannot even reason prudentially. Future research may convince legislatures or courts to accept such an understanding of some psychopaths and to extend the insanity defense to them, but this is not the current law, even for such extreme cases.

Finally, in the United States, there is a major practical objection to applying the insanity defense to psychopathic defendants. In all jurisdictions, a defendant acquitted by reason of insanity may be involuntarily committed to a secure hospital facility, a practice that the Supreme Court has held is constitutional and that will be discussed in a later part of the Article.[158] The term of commitment varies, but the Supreme Court has upheld an indefinite term[159] as long as the acquitted inmate remains both mentally ill and dangerous.[160] It thus appears that this would be a secure form of incapacitation for dangerous psychopaths if psychopathy were accepted as a potentially excusing mental disorder. Despite the initial attractiveness of this solution to the danger psychopathy presents, it is unlikely to be successful. The insanity defense cannot be imposed on a competent defendant who does not wish to raise it,[161] and virtually no psychopath would raise the insanity defense because at present there is no effective treatment for adult psychopathy. Any psychopath acquitted by reason of insanity for any crime would potentially face a lifelong commitment to an essentially prison-like facility. In short, even if American law came to the conclusion that psychopaths should be excused, few psychopaths would be willing to accept such "lenient" treatment and we would still have to rely on a pure criminal justice response. Thus, the only potential solution to the desert-disease gap psychopathy produces would be some special form of involuntary civil commitment similar to sexual predator commitments.[162]

Finally, let us consider proposals to abolish the insanity defense and potential alternatives to it. Abolition of the insanity defense is simply unfair and there is no adequate substitute for it. Some people are so lacking in rational capacity through no fault of their own that it would be as unjust to blame and punish them as it would be to blame and punish young children or people with dementia. The consequential grounds for abolition

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[158] Jones v. United States, 463 U.S. 354 (1983); *see* Part VI.B *infra*.

[159] *Id.*

[160] Foucha v. Louisiana, 504 U.S. 71, 76 (1992).

[161] *E.g.*, United States v. Marble, 940 F.2d 1543 (D.C. Cir. 1991).

[162] Sexual predator commitments are discussed in subpart VI.A. The same conceptual and constitutional concerns would apply if a legislature attempted to create a special form of commitment for some psychopaths.

are unpersuasive,[163] so the only potentially convincing ground must be that it is not unfair to abolish the defense. The late Norval Morris tried to make such an argument on behalf of the American Medical Association, which took a position in favor of abolition in the wake of Hinckley. Professor Morris argued that since poverty is a stronger cause of crime than mental disorder and we think it is fair to blame and punish poor criminals, it follows that it is fair to blame and punish criminals with severe mental disorders. With respect, however, Professor Morris confused causation with excuse, an error discussed in subpart II.C above. Poor criminals are not excused because they do not have rational or control incapacities. Some offenders with mental disorder do have such incapacities, which is why they are excused.

There is no suitable alternative to legal insanity. The most common alternative is to permit evidence of mental disorder to be admitted to negate *mens rea*, but this will fail to do justice and it can lead to morally and legally bizarre results. Mental disorder, even severe disorder, seldom negates *mens rea*; rather it gives the offender a crazy reason to form *mens rea*. Thus, even those defendants most out of touch with reality will have no defensive opportunity unless there is a potential insanity defense despite the massive rationality defects they suffer. Think once again of Ms. Yates, whose homicides met all the requirements for premeditated, intentional homicide. In some cases, a defendant charged with premeditated homicide might use evidence of hallucinations or delusions to cast doubt on whether his intention to kill was premeditated, but then he would still be convicted of a lesser form of intentional homicide. If a defendant has an auditory hallucination of God's voice telling him to kill, conviction of second-degree murder would be unjust because the defendant is not rational. Reconsider the facts in *Clark*.[164] If the defendant actually believed he was killing a space alien who was impersonating a police officer, then he is not guilty of purposeful, knowing, or reckless homicide. He would be convicted of involuntary manslaughter on a negligence theory, however, because his deluded mistake was unreasonable. But this defendant is not negligent in the ordinary sense. He cannot correct the error by being more careful. He

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[163] Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 795–801 (1985) (rejecting various consequential and practical arguments for abolition). It is possible that abolishing the defense will increase social safety because it will deter both some severely mentally ill defendants who would succeed with the defense of legal insanity and some normal defendants who might think that they can fake the defense. *See* HART, PUNISHMENT AND RESPONSIBILITY, *supra* note 23, at 48–49 (conceding that abolition of all excuses might increase social safety, but arguing that the cost to individual rights would be too high). Such deterrent benefit is entirely speculative, however, and in the case of abolishing the insanity defense, the likelihood of achieving these benefits is tiny.

[164] 538 U.S. 735, 743–44 (2006).

is irrational and does not deserve to be punished at all. Conviction of involuntary manslaughter is morally and legally obtuse in such a case of gross lack of rational capacity.[165]

Another alternative deserves brief mention: the verdict of "guilty but mentally ill" (GBMI). This verdict has been adopted in a substantial minority of states in addition to legal insanity, so it is an alternative rather than a replacement. A GBMI verdict does not indicate reduced culpability, it does not require lesser punishment, and it does not provide for hospitalization and treatment that would not otherwise be available to the convict. Essentially, the finder of fact is being asked to make a diagnosis in addition to a guilt determination. It is not different from "guilty but herpes." In short, GBMI is a fraudulent verdict because it does not address any issue relevant to just criminal blame and punishment and it has the potential to deflect juries from proper insanity acquittals because they do not understand the insanity defense or fear that it will cause the release of a dangerous offender.[166] When GBMI is available, jurors may falsely believe that they are "taking account" of the defendant's impairment and thus may improperly return the GBMI verdict when an acquittal of insanity was appropriate. Paradoxically, defendants who raise the verdict may receive even harsher sentences, so there is evidence that its use is declining.[167]

Finally, should the jury be informed that the outcome of an acquittal will be a form of involuntary civil commitment with a potentially indefinite term? In *Shannon v. United States*,[168] the Court held that federal trial courts need not instruct the jury about commitment unless the prosecution affirmatively misleads the jury about the consequences. Justice Thomas's

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[165] In addition to the *mens rea* alternative if the insanity defense is abolished, Professor Christopher Slobogin's "integrationist" proposal for abolition should be briefly mentioned because it is the only serious contemporary scholarly proposal and interesting in its own right. CHRISTOPHER SLOBOGIN, MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY 51–60 (2006). This proposal would allow the defendant to use evidence of mental disorder to indicate that he would have been justified or excused if the facts had been as he believed them to be. The proposal depends, however, on adopting a subjectivized view of justification that is unacceptable if the distinction between justification and excuse is to be preserved. It would also fail to acquit many disordered defendants who have substantial rationality defects. Professor Slobogin rejects rationality impairments as the basis for legal insanity, but he then inconsistently uses lesser rationality to argue that juveniles are less responsible than adults. The integrationist proposal has been subject to a great deal of criticism. *See* CRIMINAL LAW CONVERSATIONS, *supra* note 144, at 173–92; Morse & Hoffman, *supra* note 123, at 1123–31. No legislature has seriously entertained adopting the proposal.

[166] STEADMAN ET AL., *supra* note 130, at 102–20 (describing the verdict as a compromise).

[167] *Id.*

[168] 512 U.S. 573 (1994).

majority opinion focused primarily on the traditional assumption that juries should decide whether the defendant is culpable and should not be concerned with the consequences of their verdict.[169] Although this assumption may make sense for the vast majority of cases in which the defendant will be imprisoned or freed depending on the verdict—a fact jurors know—the insanity defense is the only form of exculpation that does not result in the defendant being immediately freed. I recognize that jurors may not fully understand what sentence will follow a conviction, but the insanity defense is *sui generis* because the acquitted defendant is not freed. It would be understandable if a juror voted to convict a legally insane defendant because the juror feared that a disordered and dangerous person might be freed. Similarly, jurors may be far more inclined to reach the just result if they learn that the insanity acquittee will be preventively detained by post-acquittal commitment.[170] Thus, I conclude that the defendant should be entitled to a "consequences" instruction upon request. I would not make it mandatory because, as Justice Thomas recognized, there may be situations when the defendant would think it is not in his interest to have the jury learn of the consequences.

D. GUILTY BUT PARTIALLY RESPONSIBLE

In 2003, I proposed that the criminal law should include a generic, doctrinal mitigating excuse of partial responsibility that would apply to all crimes, and that would be determined by the trier of fact.[171] This partial excuse would apply in cases in which a defendant's behavior satisfied the elements of the crime charged, but the defendant's rationality was non-culpably and substantially compromised and thus the defendant was not fully responsible for the crime charged.[172] Current Anglo-American criminal law contains no such generic partial excuse. Some doctrines, such as provocation/passion and extreme mental or emotional disturbance for which there is reasonable explanation or excuse, appear to operate in effect

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[169] *Id.* at 579–80, 586–887. In fact, Justice Thomas's entire majority opinion relies on the validity of this assumption.

[170] This form of commitment is discussed in subpart VI.B, *infra*.

[171] Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289 (2003). I will use the terms "partial responsibility" and "diminished responsibility" interchangeably, but the former should be preferred because there is no extant legal doctrine by that name with which the proposed doctrine could be confused. Diminished responsibility is probably more accurately descriptive, but there does exist a doctrine with which the proposal might be confused. *See* Coroners and Justice Act, 2009, c. 25, § 52 (Eng.) (discussing criteria for "diminished responsibility"). This section came into force on October 4, 2010 as a result of Statutory Instrument No. 2010/816.

[172] The defendant could also plead in the alternative any other mitigating or full affirmative defense, such as legal insanity.

as partial excuses. They typically apply only in limited contexts, however, such as to reduce a homicide that would otherwise be murder to manslaughter.[173]

Criminal law already recognizes the moral importance of "partial responsibility" for determining just punishment. Despite the lack of a generic mitigating excuse and strict limitations on the few doctrines that serve this purpose, the relevance of diminished rationality and diminished responsibility to sentencing is widely and generally accepted. For example, *Atkins v. Virginia*,[174] which categorically prohibited capital punishment of people with retardation on Eighth Amendment grounds, was based precisely on this recognition. The Court wrote,

> Mentally retarded persons frequently know the difference between right and wrong . . . . Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others . . . . Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability . . . . With respect to retribution—the interest in seeing that the offender gets his "just deserts"—the severity of the appropriate punishment necessarily depends on the culpability of the offender.[175]

The Federal Sentencing Guidelines also explicitly adopt this principle by providing for a reduced sentence if a "significantly reduced mental capacity . . . contributed substantially to the commission of the offense."[176] Although this provision applies only to non-violent offenders, the limitation is based on considerations of public safety, rather than on the belief that violent offenders never suffer from reduced mental capacity or that such incapacity does not affect the culpability of violent offenders. Even the current legislative trend in many jurisdictions towards determinate sentencing does not undermine the general acceptance of this view because the trend is motivated primarily by concerns with disparate sentencing, rather than by the belief that impaired rationality is unrelated to diminished responsibility.

I have long argued that the capacity for rationality is the fundamental criterion for responsibility. Young children and some severely disordered defendants are excused not because they are young or ill, but because youth

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[173] MODEL PENAL CODE § 210.3(1)(b) (Proposed Official Draft 1962). The English doctrine of "diminished responsibility," which is quite expansive, is likewise limited to reducing murder to manslaughter. *See* Coroners and Justice Act, 2009, c. 25, § 52 (Eng.). *See generally* GEORGE MOUSOURAKIS, CRIMINAL RESPONSIBILITY AND PARTIAL EXCUSES (1998); PARTIAL EXCUSES TO MURDER (Stanley Meng Heong Yeo ed., 1991).

[174] 536 U.S. 304 (2002).

[175] *Id.* at 318–19. Note that these are largely rationality considerations

[176] U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (2004).

and disorder, respectively, are inconsistent with or impair the capacity for full rationality.[177] Sentencing reduction based on mental abnormality is premised upon the same basis. Provocation/passion and extreme mental or emotional disturbance as partially excusing mitigating doctrines are best explained by the theory that these conditions non-culpably reduce the capacity for rationality. Finally, the claims for excuses based on newly discovered, alleged syndromes are best justified as irrationality claims. How much rational capacity must be impaired under what conditions to warrant excuse or mitigation is, of course, a moral, political, and legal question.

Present law is unfair because it does not sufficiently permit mitigating claims. Criminal defendants display an enormously wide range of rational and control capacities. Further, there is a substantial range of coercive threats that do not amount to the full excuse of duress in cases in which the defendant is legally responsible. In some cases, there may be quite substantial impairments or very hard choices, but such defendants simply have no doctrinal purchase to argue for mitigation. If criminal punishment should be proportionate to desert, blanket exclusion of doctrinal mitigating claims and treatment of mitigation solely as a matter of sentencing discretion are not fair.

To understand the unjustifiable limitations of current doctrine, consider the impaired rationality doctrines that reduce a murder to manslaughter: heat of passion upon legally adequate provocation, and extreme mental or emotional disturbance for which there is reasonable explanation of excuse.[178] Why should these doctrines be limited to homicide? For example, suppose a defendant acting in the heat of passion intentionally burns the provoker's property on the spur of the moment, rather than killing the provoker. Or suppose that an agent suffering from a non-culpable state of substantially diminished rationality commits arson. Some arsonists and some criminals generally might act with non-culpable, substantially impaired rationality that does not meet the standards for a full

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[177] The Supreme Court confirms this in the case of juveniles. *See* Roper v. Simmons, 543 U.S. 551 (2005) (declaring unconstitutional application of capital punishment to juveniles who committed capital murder at the age of sixteen or seventeen). The Court listed those characteristics of adolescents, such as impulsivity, ill-considered action, and susceptibility to peer pressure, as diminishing juveniles' culpability and cited *Atkins* for the proposition that lesser culpability should lead to lesser punishment, at least in the capital punishment context. *Id.* at 569–71. The factors used in both *Atkins* and *Roper* to justify diminished responsibility are best understood, I believe, as rationality considerations. In the case of juveniles, lesser rationality results from developmental immaturity rather than from an abnormality.

[178] Once again, the English "diminished responsibility" doctrine operates similarly and is similarly limited. *See supra* note 171.

legal excuse. Compromised rationality and its effect on culpability are not limited to homicide. Moreover, such a generic mitigating doctrine would be a more just and practical response than either legal insanity or subjectivizing justification for claims of reduced responsibility based on allegedly newly discovered psychological syndromes. Fairness and proportionality require that doctrinal mitigation should be available in all cases in which culpability is substantially reduced.

I therefore propose the adoption of a new verdict, "guilty but partially responsible" (GPR), that would apply to all crimes and that would be adjudicated at trial (or would be a new variable in plea bargaining). This would be a true mitigating affirmative defense. I am not wedded to any particular set of criteria for this doctrine. Any formula, such as the Model Penal Code's "extreme mental or emotional disturbance,"[179] that captures the essence would be acceptable. I would require that the impairment would have to be substantial, as does the MPC. The consequence of this verdict would be a legislatively mandated reduction in punishment for the crime. I am not committed to any particular reduction scheme, but considerations of public safety would have to play a large role in determining how much reduction would be possible for various crimes. This proposal has been called a "punishment discount," and so it is. But substantially impaired or coerced defendants deserve to pay a lesser price. There are various practical problems that adopting this verdict might create, but I argued in the original paper and still believe that these can be solved. It is certainly worth trying the experiment in the interest of justice.

V. POST-TRIAL ISSUES

This Part of the Article surveys a host of post-trial issues, including competence to be sentenced, the right of the government to involuntarily medicate prisoners with psychotropic medications or to transfer them to a hospital, sentencing, and competence to be executed, including forcible medication for the purpose of restoring competence to be executed. I suggest, *inter alia*, that convicted offenders who are incompetent to be sentenced may be forcibly medicated to restore competence, that the potential for mitigation of sentence based on diminished responsibility should be enhanced and the potential for aggravation based on dangerousness should be limited, and that prisoners who are incompetent to be executed may be forcibly medicated to restore competence under strictly limited conditions.

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[179] MODEL PENAL CODE § 210.3(1)(b) (Proposed Official Draft1962).

A. COMPETENCE TO BE SENTENCED

This issue does not arise with great frequency because any offender about to be sentenced was competent to plead guilty or to stand trial, but an offender's mental condition may have deteriorated between plea or trial and sentencing or there may be a specific problem about sentencing that is not inconsistent with plea or trial competence. Criteria vary, but the essential question is whether the defendant is capable of understanding what is happening to him and why, and is able to speak for himself and to assist counsel.[180] The Supreme Court has not decided this issue nor established constitutional criteria, but I believe it is fair to say that the necessity of sentencing competence is assumed for some of the same reasons that support the bar on trying an incompetent defendant. It is inconsistent with both the offender's dignity and autonomy and the dignity of the law to impose a punishment on an offender who does not understand what is happening. Perhaps more important, an incompetent offender cannot adequately participate in the sentencing process, which may make it more difficult for the defense to argue for mitigation, thus reducing the fairness of the sentencing process.

The difficult question is whether the state may involuntarily medicate an offender incompetent to be sentenced for the purpose of restoring sentencing competence. Unlike the defendant incompetent to stand trial who is presumed innocent, the defendant incompetent to be sentenced has been convicted and is lawfully in custody (or is perhaps out on bail, but still under criminal justice restraint). The offender has a clear interest in being free of unwanted mind-altering medication, but the government's interest in sentencing a convicted defendant is also strong. If the offender is a danger to himself or others in custody—whether in a jail or a hospital—*Washington v. Harper* permits his involuntary medication,[181] and he may thereby also be restored to competence to be sentenced.

Suppose, however, that there is no *Harper* justification? I would permit the state to medicate the offender as long as it was medically appropriate and less restrictive alternatives, such as psychosocial therapies, were unavailing. Retaining a psychotic, unsentenced convict in a hospital, which is more expensive than a prison, is an unjustified use of resources. If the defendant is on bail and is not dangerous, treatment could be

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[180] Lower courts have essentially employed the test for competence to be executed adopted by the Supreme Court in *Ford v. Wainwright*, 477 U.S. 399 (1986), which requires that the prisoner is able to understand what sentence is being imposed and why. Some lower courts and commentators have also imposed or suggested further requirements. PARRY, *supra* note 46, at 103–04.

[181] Washington v. Harper, 494. U.S. 210, 225–27 (1990).

accomplished in the community on an outpatient basis. There is systemic value in reaching final resolution of questions a case presents.

If the offender simply cannot be restored or there is otherwise reason to avoid involuntary medication, the court could impose a conditional sentence and retain the person in a hospital or perhaps in prison if the latter can manage the person. I assume that, as a practical matter, the sentence would be the maximum for the crime of conviction. If there had been a plea bargain and sentence was not imposed at the time the plea was made, then the sentence would be for the agreed term. If at any point the convict is restored to competence, either by agreeing to take medicine or by spontaneous recovery, the court can then impose a final sentence. If the defendant is never restored to sentencing competence, then he would be released at the end of the conditional sentence. I assume that in some cases ordinary civil commitment would not be available after the defendant was released because he did not present a danger to himself or others. If he did, then he probably would have been medicated according to *Harper*. If the jurisdiction has a *parens patriae* commitment standard, such as the need for care and treatment or the inability to care for basic needs, then civil commitment might apply.[182]

B. FORCIBLE MEDICATION AND TRANSFER TO HOSPITAL

In *Harper*, the Supreme Court held that prisoners have a liberty interest in avoiding unwanted psychotropic medication, but the state's interest in the safety of the prisoner and others would justify forcible psychotropic medication if it were medically appropriate and the prisoner would otherwise be a danger to himself or others as a result of mental disorder.[183] I believe that the case is properly decided. Prisons are a particularly difficult environment and interests of institutional and personal safety are paramount. There are a few difficulties, however. Psychotropic medications can be used as instruments of pure social control, which is not justified. This could occur if the prisoner were dangerous and mentally disordered, but there was no relation between the two. *Harper* criteria should explicitly include a connection between the mental disorder and the potential for danger. The second problem is the nature of *Harper* hearings.

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[182] *See* JOHN PARRY, CIVIL MENTAL DISABILITY LAW, EVIDENCE AND TESTIMONY: A COMPREHENSIVE REFERENCE FOR LAWYERS, JUDGES, AND MENTAL DISABILITY PROFESSIONALS 478–79 (2010) (describing *parens patriae* criteria); *see also* CAL. WELF. & INST. CODE, § 5150 (authorizing commitment for people who are "gravely disabled" as a result of mental disorder) and § 5008(h)(1)(A) (defining grave disability as a "condition in which a person, as a result of a mental disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter").

[183] *Harper*, 494 U.S. at 225–29.

The Supreme Court approved Washington's process, which permitted all the personnel involved, including the prisoner's adviser, to be employed by the institution.[184] This creates an inevitable conflict of interest. It is understandable that these hearings need not be fully adversarial with the full panoply of criminal justice procedural protections because this would be unduly burdensome for the state. The prisoner is facing the loss of an important liberty right, however, and some independent check on the institution should be provided. There are many ways this might be reasonably accomplished without undermining the efficiency of the process, such as providing counsel from a public defender's office or a panel of community attorneys, or an independent advisor or mental health professional from another institution.

If a prisoner's mental disorder renders him unmanageable in the prison, *Vitek v. Jones*[185] held that the prisoner can be transferred to a hospital after a hearing at which the prisoner has a right to be heard and the right to an advisor (although not a lawyer). The Court recognized that the prisoner has an interest in avoiding the stigmatization associated with mental hospitalization and the possibility of forcible treatment. This is a sensible decision that reasonably balances individual and governmental interests as long as the hearings provide the defendant with a genuine chance to contest transferal. It would be better if the prisoner were represented by adversarial counsel rather than by an appointed adviser who will typically be a prison employee and therefore subject to conflict of interest. Providing counsel would not be unduly burdensome in this context and it would provide greater fairness. Although *Vitek* does not compel the government to provide adversary counsel, it should do so in the interest of justice.

C. SENTENCING

The issue in all types of sentencing, capital and non-capital, is the role mental disorder should play for both mitigation and aggravation. Sentencing schemes vary substantially across the United States, but I shall assume for the purpose of argument that the judge has the authority to use mental disorder as a sentencing factor. I should say at the outset that if the offender has a colorable mitigation claim based on mental disorder or if the prosecution will introduce mental disorder evidence to support enhancement, I would provide an independent mental health professional to aid the offender with sentencing. As people with criminal justice experience know, for many offenders the length of time that they will spend

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[184] *Id.* at 233–36; *see also id.* at 250–55 (Stevens, J., dissenting).

[185] 445 U.S. 480 (1980).

in prison is more important than whether they are convicted. All sentencing, not just capital sentencing, is vital to the offender and the process will not be fair unless he has the assistance of a mental health professional in appropriate cases.

Let us begin with mitigation. If the guilty but partially responsible mitigation I proposed above were adopted, then the defendant would have two chances to have his mental abnormality short of legal insanity considered. If the jury accepted the GPR claim, then there would be no need for the judge to consider mental abnormality evidence at sentencing because a reduction would be automatic. For now, however, using mental disorder to mitigate will be almost entirely a matter of judicial discretion at sentencing.

In *Graham v. Florida*,[186] the Supreme Court held that the Eighth and Fourteenth Amendments prohibited imposing sentences of life without the possibility of parole (LWOP) on juveniles who committed non-homicide crimes because juveniles were less responsible than adults and did not deserve such severe sentences even for heinous non-homicide crimes. The Court's conclusion about diminished responsibility followed its reasoning in *Atkins*,[187] which excluded people with retardation from receiving death sentences for capital crimes, and in *Roper*,[188] which exempted sixteen- and seventeen-year-old capital murderers from capital punishment. The ground for diminished responsibility was essentially that these defendants suffered from diminished rationality.[189] *Graham* was the first occasion that the Court used a diminished desert rationale based on diminished rationality to insist on what is in effect mitigation for a term of years sentence.[190]

The reasoning of *Graham* or the arguments I have made about guilty but partially responsible generalize perfectly to using evidence of mental

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[186] 130 S. Ct. 2011 (2010).

[187] Atkins v. Virginia, 536 U.S. 304 (2002).

[188] Roper v. Simmons, 543 U.S. 551 (2005).

[189] In *Graham*, the Court explicitly relied on the *Roper* factors discussed *supra* at note 177, and also reemphasized that juveniles were not yet fully mature and might change as normal maturation occurred. Nonetheless, lack of rational capacity was the primary ground. *Graham*, 130 S. Ct. at 2026–227.

[190] In *Graham***,** the majority relied on *Roper*'s conclusion that adolescents are relevantly different, but cited amicus briefs for the proposition that the adolescent brain was not yet fully mature. *Id.* at 2026. This has produced irrational exuberance among those who want courts to take more account of neuroscience evidence. The Court referred generally to neuroscience to support its conclusion that nothing in the science of adolescent development in the intervening five years changed the *Roper* conclusion, but no one had argued to the contrary. Arguments in support of juvenile LWOP in non-homicide cases were based entirely on other normative and empirical arguments, and thus, I submit, the neuroscience was dictum.

disorder at the time of the crime for sentencing mitigation generally. Defendants do not deserve mitigation solely because they were disordered, but they do deserve it if the disorder impaired the rationality of their practical reasoning about the criminal offense. Such rationality impairments can range along a long continuum, however, and thus fine-grained differences in responsibility are possible in principle. At present, however, we lack the conceptual and moral capacity to respond in a fine-grained manner and the result will be inevitable, unwitting abuses of discretion and unjustified disparities in sentencing. Principled, finely-calibrated sentencing is impossible. In such circumstances, greater justice will be done if we recognize the inevitable limitations on fine-grained individualization and try to achieve proportionate equality within limited bounds.

In a few cases, mental disorder evidence might also tend to show that the defendant is less dangerous because it renders the defendant disorganized, ineffective, or the like. If this were the case, there would be grounds for mitigating a sentence on consequential grounds as well. Again, diminished dangerousness would be a continuum, but we lack the empirical resources to make such distinctions and predictions accurately.

My proposal, therefore, is that there should be a legislatively-mandated mitigation if the judge finds that substantial diminished rationality existed at the time of the crime. The amount of reduction could be a uniform percentage or might vary by crime to adjust for social safety concerns, but the sentencing judge would have no power to individualize beyond the mandated reduction. Such one-size-fits-all approaches risk unfair lumping and "cliff effects,"[191] but the overall effects will be positive. Most desert and danger criteria cannot be reliably measured, but instead require rougher retributive judgments and often speculative empirical assessments. Further, given the limits on human judgment and the greater reliability of judgments with fewer categories, everyone can understand the need for bright-line rules that risk some disparity at the margins. Less injustice will be produced by this approach than the inequality flowing from the unreliability of judgments involving more numerous categories.

Evidence of mental disorder can also be used for enhancement within the authorized sentence range if it is a risk factor for future antisocial conduct. For example, substance abuse and psychopathy are both serious

[191] I borrow this term from the economic literature on enforcement, which notes that equal punishments for crimes of different seriousness produces crimes of greater seriousness. *See* George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 527 (1970).

risk factors for future crime.[192] Mental abnormality is thus a knife that cuts both ways in sentencing. Although the relevance to both mitigation and aggravation is true in theory, the empirical basis for the alternatives of mitigation and aggravation is asymmetrical. Despite the problems with mental abnormality evidence, establishing that the defendant had a substantial mental abnormality at the time of the crime and therefore deserves mitigation is reasonably possible. It is a very fact-based issue that turns on the defendant's mental states. Evaluation of such states is a bread and butter issue in criminal (and civil) cases. Predictions are of course based on facts, but even if the facts are established, the accuracy of such predictions is weak, even if mechanical techniques or semi-structured interviews are used. The level of acceptable accuracy is of course a normative question that cannot be "read off" from Eighth Amendment jurisprudence. Despite the Supreme Court's willingness to accept admittedly inaccurate predictions in *Barefoot*,[193] one would hope than an extremely high level of accuracy would be required before increasing a sentence or putting a capital offender to death on the basis of a dangerousness prediction.

After *Barefoot*, there is no constitutional bar to introducing weak prediction evidence, but sentencing enhancements should be rationalized to achieve justice. To the extent one is doing evidence-based sentencing and is using reliable and valid diagnostic techniques and adequate databases, using mental disorder as a risk factor seems reasonable. At present, mechanical (actuarial) methods and semi-structured interview techniques are state of the art and should be required.[194] The difficulty is that too many claims for enhancement based on predictions do not use the best techniques and data despite large improvements in the technology of prediction.

Our ability to make valid, fine-grained predictions about future danger are quite limited at present, so I would limit enhancement to one grade of enhancement if the defendant meets a legislatively mandated threshold of heightened risk beyond the "average" case at the core of the penalty range. I would also require that the sentencing judge should insist that the prosecution should demonstrate that the risk evaluation and prediction methods it uses are state of the art. Although the Constitution may require

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[192] For a discussion of substance abuse, see JOHN MONAHAN ET AL., RETHINKING RISK ASSESSMENT: THE MACARTHUR STUDY OF MENTAL DISORDER AND VIOLENCE 94 tbl.5.1, 141 (2001). For psychopathy, see *id.* at 65–72; Douglas et al., *supra* note 150, at 534; Widiger, *supra* note 151, at 157–59.

[193] Barefoot v. Estelle, 463 U.S. 880 (1983). *See also* notes 127–128, *supra*.

[194] Jennifer L. Skeem & John Monahan, *Current Directions in Violence Risk Assessment*, 20 CURRENT DIRECTIONS PSYCHOL. SCI. 38, 39 (2011), *available at* http://ssrn.com/abstract=1793193.

considerably less, the defendant's freedom is at stake and justice demands that we use the best evidence before depriving it further.

Capital sentencing, the most extreme form of crime and danger prevention, like sentencing generally, raises the issue of the role of mental disorder as both a mitigating and aggravating factor. The considerations are similar, but so much more is at stake. Death is different.

Beginning in 1978 with *Lockett v. Ohio*,[195] the Supreme Court has made clear that the defendant can introduce any potentially mitigating evidence at capital sentencing proceedings, whether or not it supports a statutorily authorized mitigating factor. It is universally accepted that mental disorder is a mitigating factor, and many jurisdictions specifically list mental abnormality as a mitigating factor, using language similar to the Model Penal Code's "extreme mental or emotional disturbance" criterion or a similar partial responsibility standard.[196] Although only a minority of states makes "dangerousness" per se a statutorily aggravating factor, dangerousness is incorporated implicitly or explicitly in other listed factors, and, as just discussed, purely clinical mental health testimony is used to predict future dangerousness, despite the empirical weaknesses of clinical predictions.

There are no constitutional means to exclude abnormality evidence for the purposes of mitigation. The states should nonetheless be free to exclude aggravating predictions because they are too inaccurate to be the basis for imposing the death penalty, but, as a practical, political matter, I suspect that no jurisdiction would do this. I therefore propose two less "extreme" prophylactic measures. First, the state should require use of the most empirically validated prediction methods rather than clinical evaluations or responses to hypothetical questions. As noted previously, mechanical (actuarial) methods and semi-structured interview techniques are state of the art and should be required.[197] Second, the defendant must have access to an independent mental health professional to help him prepare mitigation evidence and to defend against aggravation evidence of future dangerousness. Of course, if the defendant does not raise mental abnormality, then, consistent with *Estelle v. Smith*,[198] a defendant cannot be compelled to undergo a psychiatric examination whose results will be used at capital sentencing, unless the defendant consents to such use. In that case, the state would have to rely on the answers to hypothetical questions, which my proposal would bar.

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[195] 438 U.S. 586 (1978).

[196] MODEL PENAL CODE § 210.3(1)(b) (Proposed Official Draft 1962).

[197] Skeem & Monahan, *supra* note 194, at 39.

[198] 451 U.S. 454 (1981).

D. COMPETENCE TO BE EXECUTED AND FORCIBLE RESTORATION OF COMPETENCE

At common law, a prisoner sentenced to death could not be executed if he was incompetent because he did not understand what penalty was being imposed or why. The Supreme Court finally held[199] and reaffirmed[200] that the common law practice has constitutional status under the Eighth Amendment. In *Ford*, the first Supreme Court case to so hold, the Court noted that the reasons for this uniform common law rule are less certain and uniform than the rule itself.[201] The Court then considered a number of historical rationales that might support the doctrine, but, in short, the rationale is that executing incompetent offenders is simply cruel and that society must protect the defendant and protect the dignity of society.

In *Panetti*, the Court appeared to adopt a primarily retributive rationale, suggesting that the incompetent offender could not recognize the gravity of his crime and that executing him would not allow the community to affirm its judgment that the prisoner's culpability was so serious that he deserved death.[202] The Court therefore rejected a narrow reading of the substantive requirements for competence to be executed. Panetti was concededly delusional and the Court held that a reading of the test that would permit execution of an offender who simply understood or was aware, rather than *rationally* understood, the fact of execution and why he was being executed, was inconsistent with the rationale and language of *Ford*.[203] The Court wrote:

> Gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose. It is therefore error to derive from *Ford*, and the substantive standard for incompetency its opinions broadly identify, a strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted.[204]

It is clear that, unlike in *Godinez*, in which the Court rejected an allegedly higher "reasoned choice" test for competence to plead guilty and to waive counsel,[205] in this context a higher standard is required. Death is indeed different.

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[199] Ford v. Wainwright, 477 U.S. 399, 409–10 (1986).
[200] Panetti v. Quarterman, 551 U.S. 930, 958 (2007).
[201] *Ford*, 477 U.S. at 407.
[202] *Id.* at 958–59.
[203] *Id.* at 958.
[204] *Id.* at 960.
[205] 509 U.S. 389, 398 (1993).

For purposes of discussion, we must assume that the defendant was competent to be tried, was properly convicted, was competent to be sentenced, and was properly sentenced to death. There is much reason to question these assumptions, despite the many procedural protections Justice Powell noted in his *Ford* concurrence.[206] It is possible that the offender was not suffering from substantial disorder at the earlier stages of the criminal process, and only became severely disordered in prison. Nonetheless, the most common age of onset for psychotic ideation of the type that might undermine competence, which is usually a symptom of schizophrenia, is in late adolescence and young adulthood, although late-onset cases do occur.[207] Therefore, many people later found incompetent to be executed were probably suffering from substantial mental problems at the time of the crime and during trial and sentencing—problems that were not sufficiently addressed or properly considered. Consequently, many such offenders should not have been sentenced to death in the first place because, at the least, mental abnormality should have mitigated punishment at sentencing. Again, however, let us assume that the process was sufficiently fair.[208]

It is not clear whose interests are being protected by the bar on executing incompetent offenders. Executing incompetent prisoners might seem to support individual or state interests we endorse. For example, a prisoner who does not fully apprehend what is happening might be less fearful. The community might be indifferent to the mental state of the prisoner at the time of the execution and satisfied both that the defendant deserved death for his conduct at the time of the crime and that the state must fulfill its obligation to impose that sentence. Professor Richard Bonnie, influenced by Justice Powell, suggests that the only sound rationale for this bar is respect for the dignity of the condemned prisoner, who has a right to be treated as a subject worthy of respect and not simply as an object to vindicate the state's promise.[209] If the offender does not realize what is happening to him, he will not be able to exercise the few choices left to him that preserve his autonomy, agency and dignity.[210] I have been persuaded by Professor Bonnie's argument, but it does leave open precisely how much

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[206] *Ford*, 477 U.S. at 420 (Powell, J., concurring).

[207] DSM notes that the typical onset of schizophrenia occurs between the late teens and mid-thirties, but that late onset is also possible. DSM, *supra* note 3, at 307.

[208] I confess that I am deeply ambivalent about the issues in this subpart. I oppose capital punishment and one part of me wants to make any argument possible to abolish it. Another part, however, recognizes that it has constitutional status and I therefore try to make arguments in light of that status.

[209] Richard J. Bonnie, Panetti v. Quarterman: *Mental Illness, the Death Penalty, and Human Dignity*, 5 OHIO ST. J. CRIM. L. 257, 277 (2007).

[210] *See id.*

rational understanding is necessary to vindicate the condemned's dignity. Because death is different, I would insist that a high standard should be imposed. A just society should insure that it substantially increases the risk of error in favor of the prisoner.

In *Ford* and *Panetti*, the Court did not hold that the decision about competence to be executed must be made by a judge. Instead, and again following Justice Powell's *Ford* concurrence,[211] it is apparently sufficient if there is some type of impartial hearing officer or board that can receive arguments and evidence from the prisoner.[212] *Panetti* made clear, however, that the offender is entitled to use his own experts to rebut the State's evidence.[213]

For a decision of such importance, only a judicial hearing is sufficient to protect the prisoner's rights. Any other type of decisionmaker, especially if it is an individual, will appear less formally rigorous or independent and will in fact probably be less rigorous and independent. Moreover, the prisoner should be entitled to the services of a genuinely independent mental health practitioner if the prisoner is too poor to hire his own. As a practical matter, anti-capital punishment advocates will surely insure that such services are provided, but it ought to be the prisoner's right.

Suppose the concededly incompetent capital prisoner could potentially be restored to competence by taking medically appropriate psychotropic medication, but refuses to do so. The Supreme Court has not decided this issue, but it has reached both a state supreme court, *State v. Perry*, which decided that the prisoner could not be medicated unless the death penalty was commuted,[214] and a federal circuit court, *Singleton v. Norris*, which held that the state's interest was sufficiently strong to permit forcible medication.[215] This is a fearsomely difficult issue. In contrast to *Harper*,[216] in this case the prisoner must undergo not only the liberty deprivation of forcible medication, which is not insignificant in itself, but also the ultimate deprivation of death as a result. On the other hand, the meaning of a capital sentence is that society has decided that the prisoner no longer has a right to live. It is forfeit.

Singleton held that forcible medication would be permissible if the state had a sufficiently strong interest, if the medication was the least

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[211] 477 U.S. 399, 425–27(1986) (Powell, J., concurring).

[212] Panetti v. Quarterman, 551 U.S. 930, 949–50 (2007).

[213] *Id*. at 950, 958 (requiring that the prisoner must be able to offer his own psychiatric testimony as a counterweight to the State's evidence).

[214] 610 So. 2d 746, 770 (La. 1992).

[215] 319 F.3d 1018, 1026 (8th Cir. 2003).

[216] 494 U.S. 210 (1990).

intrusive way of restoring competence, and if it was medically appropriate.[217] Let us assume that the state's interest in imposing capital punishment is strong, as it surely is, and that medication is necessary to restore competence, as it will be in most cases. The issue is how to think about whether the medication is medically appropriate. Therapy of the disorder may ameliorate it, but if so, it will enable execution. As a result, it is claimed that it is not in the prisoner's medical interest to be medicated so that he may be killed.[218]

With respect, the petitioner's undoubted interest in continuing his life is a moral and legal issue independent of his medical interests. His medical interest is in alleviating serious illness. His personal interest in remaining alive is the same legal interest any citizen has in life, except that in this case it is forfeit. An analogy may help make this clearer. Suppose the condemned prisoner suffers from an illness that can cause loss of contact with reality or other dementia-like states and suffering. Suppose, too, that medication to control the disorder can cease to be fully effective unless the dosage is increased. If the prisoner's illness became uncontrolled as execution neared and he lost touch with reality and was suffering, it would be medically inappropriate *not* to treat the defendant. Or suppose the prisoner suffered a stroke and was in coma in the emergency room. Should the doctors fail to treat? I suggest that all physicians would believe it is their duty to treat the prisoner. These cases can be distinguished, of course, but is there a distinction that makes a principled difference or is the desire to avoid capital punishment at all costs driving the argument?

In *Washington v. Glucksberg*,[219] the Court rejected the argument that people have a due process right to physician-assisted suicide. In the course of reaching that decision, the Court noted the state's interest in upholding the ethics of the medical profession as one ground for affirming the state's constitutional right to ban this practice.[220] Although there was a split in the medical profession over the ethics of this practice, the dominant view of the medical profession was that it was not ethical. There did not have to be consensus to uphold the state's right to ban the practice. I do not know of any empirical study of this question, but almost certainly the overwhelming majority of American physicians would probably oppose forcible psychotropic medication to restore trial competence unless the death penalty was commuted. Surely, however, there are a few physicians who do not oppose it and who would administer the medication either because

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[217] 319 F.3d at 1027.
[218] *See id.* at 1025–27.
[219] 521 U.S. 702 (1997).
[220] *Id.* at 731.

they do not think it is wrong or because they think it is their distasteful duty, but a duty nonetheless if they work for the state.[221] In a sense, this case is the reverse of *Glucksberg*. There, the patient wanted treatment that most doctors oppose.[222] Here, the prisoner does not want treatment that most doctors think it is wrong to impose unless capital punishment is commuted. Nonetheless, the Court might uphold banning forcible medication on the ground that permitting it undermines medical ethics. And, much as states can authorize physician-assisted suicide, states will certainly have the right to ban the practice of forcible medication to restore execution competence, even if the Supreme Court ultimately decides that the Constitution does not absolutely prohibit it.

If the Supreme Court does permit this practice, a particularly difficult question is whether, when an execution date is set, competence flowing from medication justified by *Harper*[223] should be sufficient to let execution proceed. This would permit the state to avoid the harder issue presented by using forcible medication solely to restore competence to be executed. The prisoner may continue to be a threat to his own safety or the safety of others. Nonetheless, the prisoner on death row can probably be managed without medication because the circumstances are very different from those of prisoners in the general population. I propose that as the execution date approaches, the medication should be reduced or withdrawn to determine if the prisoner is rendered incompetent to be executed. If so, then the state must confront directly whether it is willing to medicate this prisoner solely for the purpose of executing him. I want the state to be forced to decide this rather than to be permitted to comfort itself with an independent rationale that is much less problematic. It is not enough to demonstrate that the *Harper* medication is genuinely independently motivated and justified and that competence restoration is simply a side benefit. It might be argued that because the prisoner's life is already forfeit, society owes no such obligation to set up potential roadblocks that compel the state to clear-sighted recognition of the immensity of its proposed action. Perhaps so, but a civilized society should demand this.

In conclusion, resolving in general and in individual cases the immensely difficult issues presented by incompetence to be executed is another one of the many costs and controversies capital punishment produces that abolition would avoid.

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[221] A state could surely permit an employee without a medical degree but with the proper training to administer the drugs.

[222] 521 U.S. at 710.

[223] Washington v. Harper, 494 U.S. 210 (1990).

VI. PREVENTIVE DETENTION THROUGH CIVIL COMMITMENT

This Part considers two forms of post-trial civil commitment that are triggered by the criminal justice system and by mental abnormality: involuntary commitment of so-called mentally abnormal sexually violent predators and involuntary commitment of defendants who were acquitted by reason of insanity. I conclude that sexual predator commitments are an abuse because they are based on a flawed definition of mental abnormality and flawed lack of control criterion and because they are a disguised form of punishment. Post-insanity acquittal commitment is sensible, but it is often misused.

A. SEXUAL PREDATOR COMMITMENT

A substantial minority of states have adopted a special form of involuntary civil commitment if three criteria are met: a charge or conviction of a sexual offense, the presence of a mental abnormality or a personality disorder, and predicted future dangerousness. Although civil, these forms of commitment are usually accorded heightened procedural due process by legislation, such as the necessity of proving the criteria beyond a reasonable doubt. They may be imposed at the end of a full prison term for the sexual crime of conviction, and the term of confinement is indefinite but includes periodic review.

In *Kansas v. Hendricks*,[224] the Supreme Court upheld this type of commitment against a claim that it violated substantive due process. The Court noted that the requirement of a mental abnormality satisfied a classic due process justification for civil commitment because it indicated that the subject could not control his offending sexual behavior.[225] Thus, for this and other reasons, the Court held that the commitment was genuinely civil and not criminal punishment.[226]

Just five years later, in *Kansas v. Crane*, the Court again addressed the criteria for these commitments to decide whether the justifying rationale of lack of control had to be proven independently.[227] The Court held that it did, noting that the presence of a mental abnormality did not have to render the defendant completely unable to control his conduct.[228] Justice Breyer wrote for the majority:

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[224] 521 U.S. 346 (1997).

[225] *Id.* at 360.

[226] *Id.* at 365–66. The statutes provide that these commitments may be triggered simply by a charge of a sexual offense or incompetence to stand trial for such an offense, but in practice they are imposed post-conviction and sentence.

[227] 534 U.S. 407 (2002).

[228] *Id.* at 411–12.

> [W]e did not give to the phrase "lack of control" a particularly narrow or technical meaning. And we recognized that in cases where lack of control is at issue, "inability to control behavior" will not be demonstrable with mathematical precision. It is enough to say that there must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.[229]

The Court also refused to draw a distinction control capacity flowing from failures of understanding rather than simply "volitional" failures. Justice Breyer wrote, "Nor, when considering civil commitment, have we ordinarily distinguished for constitutional purposes among volitional, emotional, and cognitive impairments."[230] It is implicit in the Court's holding that satisfying the *Hendricks* criteria, including the mental abnormality criteria, did not mean that the defendant lacked the necessary control capacity because otherwise it would not have been necessary to impose an independent control criterion.[231]

Sexual predators fall into the gap between criminal and civil confinement that desert-disease jurisprudence creates. Sexual offenders are routinely held fully responsible and blameworthy for their behavior because they almost always retain substantial capacity for rationality, they remain entirely in touch with reality, and they know the applicable moral and legal rules. Consequently, even if their sexual violence is in part caused by a mental abnormality, they do not meet the usual standards for an insanity defense.[232] For the same reason, they do not meet the usual and implicit non-responsibility standards for civil commitment and could not be restrained civilly after they finish a prison term.[233] In other words, their

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[229] *Id.* at 413.

[230] *Id.* at 415.

[231] In dissent, Justice Scalia claimed that *Hendricks* necessarily meant that lack of control was implicit in the mental abnormality standard because Hendricks's commitment was upheld. *Id.* at 422–23 (Scalia, J., dissenting).

[232] Consider the remarks of Justice Owen Dixon of Australia in *King v. Porter*:

> [A] great number of people who come into a Criminal Court are abnormal. They would not be there if they were the normal type of average everyday people. Many of them are very peculiar in their dispositions and peculiarly tempered. That is markedly the case in sexual offenes [sic]. Nevertheless, they are mentally quite able to appreciate what they are doing and quite able to appreciate the threatened punishment of the law and the wrongness of their acts, and they are held in check by the prospect of punishment.

(1933) 55 CLR 182, 187 (Austl.).

[233] The implicit non-responsibility standard is the lack of rational (or control) capacity. *See supra* subpart II.B (discussing the general rationale for treating people with mental

rationality and control capacities do not indicate that they are sufficiently non-responsible to justify the preventive detention involuntary civil commitment imposes. Moreover, in most cases in which civil commitment is justified, a majority of states no longer maintain routine indefinite involuntary civil commitment but instead tend to limit the permissible length of commitment.[234] Without these special forms of commitment, most "sexual predators" could not be preventively detained unless they committed a new crime.

I have frequently and severely criticized the statutes authorizing allegedly civil commitment for sexual predators and both *Hendricks* and *Crane*.[235] My argument is that the gap-filling is impermissible because the mental abnormality criterion the Court approved is not a definition of abnormality and the control criterion is vague and not operationalizable. Together these two criteria do not entail that the agent is non-responsible. The differential responsibility requirement for criminal conviction and civil sexual predator commitment is unjustified, and adequate prediction does not exist. Let us consider these problems in order.

The Kansas definition of a sexually violent predator, which is similar to those that other states have adopted, is "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence."[236] It is analytic from this definition and the *Hendricks* and *Crane* decisions that personality disorder or mental abnormality and serious control difficulty are the criteria that together satisfy the non-responsibility condition.[237] Unless personality disorder or mental abnormality produce or are the equivalent of non-responsibility because they somehow deprive the agent of the ability to control himself, the non-responsibility justification of involuntary commitment is not satisfied. Just because behavior is caused, even by an alleged abnormality, does not mean per se that it cannot be controlled or that the person is otherwise not responsible. This must be independently demonstrated.[238]

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disorder specially). Moreover, professionals do not prefer to treat dangerous people who are not obviously suffering from a major disorder.

[234] *See* note 58, *supra*.

[235] *E.g.*, Morse, *supra* note 20; Stephen J. Morse, *Fear of Danger, Flight from Culpability*, 4 PSYCHOL., PUB. POL'Y, & L. 250 (1998).

[236] KAN. STAT. ANN.§ 59-29a02(a) (West 2010).

[237] Kansas v. Hendricks, 521 U.S. 346, 358 (1997); Kansas v. Crane, 534 U.S. 407, 409–11 (2002).

[238] *See supra* subpart II.C and notes 145–46.

"Personality disorder" is a recognized category of psychiatric diagnoses, but people with personality disorders rarely suffer on that basis alone from the types of psychotic cognition or extremely severe mood problems that are the standard touchstones for a finding of non-responsibility.[239] Most are perfectly in touch with reality, their instrumental rationality is intact, and they have adequate knowledge of the applicable moral and legal rules that apply to their conduct.[240] Although their abnormalities might make it harder for them to behave well, they seldom manifest the grave problems that might satisfy an insanity defense or even warrant a commonsense excuse on the ground that the person cannot "help" himself. Even if the term "personality disorder" were interpreted broadly to include paraphilias, disorders of impulse control, or other recognized disorders that might apply to sexual predators, the term would still be over-inclusive as a predicate for non-responsibility in the case of most sexually violent people.

The "mental abnormality" criterion the Court approved[241] is defined as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others."[242] All nine Justices approved this definition as an adequate basis for these commitments.[243] The meaning of "emotional" and "volitional" is unclear.[244] But holding that and any consideration of cognitive abilities aside, what else would predispose any agent to *any* conduct—sexual or

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[239] DSM-IV-TR, *supra* note 3, at 685–86.

[240] Examination of the criteria for personality disorders in DSM-IV confirms that sufferers experience no substantial rationality deficits akin to those with psychotic disorders.

In many cases, the conduct that is the basis for the diagnosis does not per se cause the person distress. For example, an agent whose conduct warrants the diagnosis of Antisocial Personality Disorder may be distressed by the reactions of the police, creditors, and others, but the conduct itself might not be distressing. Similarly, many sexually violent predators are not distressed by their desires, but they are distressed by the condemnation and punishment that society and the law impose. Moreover, the degree of distress or impairment such disorders cause is very much a function of the particular social, moral, and legal regime in which the person lives, which once again suggests the highly value-relative nature of the judgment of disorder in these cases.

[241] *Hendricks*, 521 U.S. at 360.

[242] KAN. STAT. ANN. § 59-29a02(b) (2010).

[243] *Hendricks*, 521 U.S. at 360 (majority opinion), 373 (Kennedy, J., concurring), 373–74 (Breyer, J., dissenting).

[244] The meaning of volition is controversial in philosophy and psychology. *See* MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 113–65 (2d ed. 2010) (providing the most extensive discussion of volition in the legal literature, criticizing the view that volitions are desires, and arguing that a volition is an intention to execute a basic action).

otherwise, normal or abnormal—if not biological and environmental variables that affect the agent's emotional and volitional ability? In other words, the definition is simply a partial, generic description of the causation of all behavior, and it is not a limiting definition of abnormality. All behavior is (partially) caused by emotional and volitional abilities that have themselves been caused by congenital and acquired characteristics. The conditions that makes sexual predation mentally abnormal—congenital or acquired causes of a predisposition—apply to all behavior and are thus, vacuous. The mental abnormality criterion certainly cannot explain why the inevitable presence of congenital and acquired causes of a predisposition means that the agent cannot control and is not responsible for action that expresses the predisposition. Indeed, according to this criterion, no one would ever be responsible for any conduct.

The Kansas criterion is entirely dependent on the requirement of a specific predisposition to commit sexually violent offenses to limit the definition to sexual predators, but it is not a definition of mental abnormality, even in the case of sexually violent people.[245] If any agent who has a predisposition to commit sexual offenses is mentally abnormal, as the definition implies, then the definition of mental abnormality is circular, and abnormality does not independently provide even part of the necessary explanation of how the abnormality produces an uncontrollable predisposition to sexual offending. The definition presupposes what it is trying to explain. Moreover, such a circular definition collapses the important distinction between "badness" and "madness," which is precisely the distinction the definition is meant to achieve to justify civil rather than criminal commitment.

In sum, the criteria in the Kansas statute that help establish non-responsibility, personality disorder, and mental abnormality, are over-inclusive, and the definition of mental abnormality is both obscure and virtually incoherent. The causal link standard in general and the Kansas criteria in particular are not non-responsibility standards. They cannot conceivably limit involuntary civil commitment only to those potential predators who cannot control themselves and are, thus, not responsible for their potential sexual violence. Using such criteria, virtually every predator would be both convictable and committable.

In *Crane* Justice Breyer attempted to remedy this difficulty by imposing an independent control incapacity criterion, but this does not rescue the validity of these commitments.[246] Personality disorder and mental abnormality do not imply that the agent is non-responsible or has

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[245] KAN. STAT. ANN. § 59–29a02.

[246] Kansas v. Crane, 534 U.S. 407, 412–13 (2002).

serious difficulty controlling himself. Now, one could permit serious difficulty controlling oneself to be a purely independent non-responsibility criterion untethered from any requirement that the defendant be disordered in some psychological or psychiatric sense. There is much to be said for functional non-responsibility standards. For example, suppose a defendant does not know right from wrong or the nature and quality of his act at the time of the crime, through no fault of his own for some reason other than mental disorder, say, extreme stress or fatigue. Perhaps the defendant deserves an excuse. Such claims are rejected, however, because mental disorder allegedly provides an objective indicator that makes the functional claim credible.

Even if one accepted independent, functional non-responsibility criteria, however, serious control difficulty still fares poorly as a non-responsibility standard because it is so poorly understood and cannot be operationalized adequately. This standard is an invitation for conclusory, morally-grounded expert opinions offered as if they were based on sound scientific or clinical standards and measurements, but they are not. Justice Breyer's suggestion that considering the nature of the diagnosis or the severity of the disorder will not help if the abnormality has no meaning and if there is no necessary relation between these factors and lack of control.[247] Once again, lack of control must be proved independently.

The criminal justice system is the appropriate mechanism for control of responsible predators. Agents who are not responsible for their predatory sexual violence may properly be confined involuntarily, but such a massive deprivation of liberty should be inflicted only on those predators who are genuinely not responsible. Even if a state seems to impose a genuinely independent, serious lack of control problem criterion, as *Crane* requires, the definition of such a problem is so inevitably amorphous that this criterion will impose no practical limit on abnormal sexual predator commitments.[248] Mental health professionals will have no difficulty

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[247] *Id.* at 413.

[248] In his dissent in *Crane*, Justice Scalia scolded the majority for the vagueness of the control standard it adopted. He conceded that the mental abnormality or personality disorder criterion and the resulting propensity for violence criterion were both coherent and, with the assistance of expert testimony, within the capacity of a normal jury to determine. But he chided the majority's control standard as being so vague that it will give trial judges "not a clue" about how to charge juries. *Id.* at 423 (Scalia, J., dissenting). He speculated that the majority offered no further elaboration because "elaboration . . . which passes the laugh test is impossible." *Id.* Justice Scalia wondered whether the test was a quantitative measure of loss-of-control capacity or of how frequently the inability to control arises. In the alternative, he questioned whether the standard was "adverbial," a descriptive characterization of the inability to control one's penchant for sexual violence. *Id.* at 424. The adverbs he used as examples were "appreciably," "moderately," "substantially," and

adjusting their expert testimony to support the conclusion that virtually any sexually violent offender meets the serious lack of control standard. Moreover, there is nothing in the language of *Hendricks* and *Crane* that would permit an appellate judge to overturn a jury verdict of serious loss of control, except, perhaps, in extreme, obvious cases.[249] Loss of control as an independent non-responsibility condition simply will not suffice on conceptual, scientific, and practical grounds.

Note that the standards for non-responsibility differ in the criminal and civil justice systems because the sexual predator is responsible for his sexual crimes but sufficiently non-responsible to warrant involuntary commitment based on the same behavior. It is paradoxical, to say the least, to claim that a sexually violent predator is sufficiently responsible to deserve the stigma and punishment of criminal incarceration, but that the predator is not sufficiently responsible to be permitted the usual freedom from involuntary civil commitment that even very predictably dangerous but responsible agents retain because we wish to maximize the liberty and dignity of all citizens. But Leroy Hendricks and Michael Crane had no realistic chance of succeeding with an insanity defense. Even if the standards for responsibility in the two systems need not be symmetrical, it is difficult to imagine what adequate conception of justice would justify blaming and punishing an agent too irresponsible to be left at large. An agent responsible enough to warrant criminal punishment is sufficiently responsible to avoid preventive detention. If a state seriously believes that any mental disability sufficiently compromises responsibility to warrant civil preventive detention, then such disability should be part of the criteria for the insanity defense. When a defendant is charged with an offense, it is an occasion when the citizen has the most to lose and therefore deserves the most consideration.

Finally, we have previously considered the difficulties with predictive accuracy concerning future behavior. There are mechanical techniques for evaluating the risk of future sexual predation, but none has better than modest success[250] and clinical predictions, which will be used all too often,

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"almost totally." *Id.* According to Justice Scalia, none of these could provide any guidance. He was correct.

[249] Such cases would probably be marked by an alleged predator's history that is entirely inconsistent with a colloquial control problem and by patently deficient expert testimony. I assume, however, that such cases would be rare, especially if there were a history of sexual predation.

[250] *See* Dana Anderson & R. Karl Hanson, *Static-99: An Actuarial Tool to Assess Risk of Sexual and Violent Recidivism Among Sexual Offenders*, *in* HANDBOOK OF VIOLENCE RISK ASSESSMENT 251, 255–260, 262 (Randy K. Otto & Kevin S. Douglas eds., 2010) (reviewing the most widely used sexual recidivism instrument and finding an average "medium to large" effect size by conventional standards, but noting that absolute recidivism rates are

are notoriously unreliable.[251] A sexual predator commitment is potentially for life. The context in which the prediction will be made is a maximum security institution in which the subject has been incarcerated: first prison and then a secure hospital. The context of validation is the community. It will be difficult to predict community behavior accurately based on behavior in maximum security. Moreover, gatekeepers, including the state mental health professionals who evaluate the alleged predator, will have a natural incentive to be conservative. The subjects are sexual criminals and thus not sympathetic people. It will seem better, and safer, from the evaluator's career standpoint, to err on the side of caution than to err by releasing someone who may commit a heinous crime. Although *Ake* does not require the provision of a mental health professional in the civil context,[252] the state should provide the potential subject of a sexual predator commitment with an independent expert to help him defeat the State's case.

Constitutional limitations on the state's power to confine citizens based on our concern for liberty inevitably mean that the protection of social safety cannot be seamless and that security will be compromised. Some dangerous but responsible agents must remain free until they commit a crime or until they become non-responsible for their potential danger. As a result, our justifiable, appropriate fear of the harms such people may cause creates strong incentives to devise means to confine them preventively. Pure preventive detention on grounds of dangerousness alone is an anathema in a free society, however, and we should not loosen the standards of non-responsibility to sweep into civil confinement responsible agents who should more appropriately be incapacitated by criminal sentences. As Justice Anthony Kennedy warned in his concurrence in *Hendricks*, and as all the Justices in *Crane* apparently agreed, civil commitment should not be used to impose punishment or to avoid the effects of deficiencies in the criminal justice system, such as improvident plea bargains, which might cause the legally required but objectionably early release of dangerous criminals.[253] I believe, however, that this is precisely the motivation for sexual predator commitments. They are a way

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unknown and that there is large variability in the effect size among the studies, and recommending caution in cases in which accurate probability estimates are needed).

[251] *See* Skeem & Monahan, *supra* note 194.

[252] Ake v. Oklahoma, 470 U.S. 68 (1985) (applying the right to the assistance of a mental health professional in the criminal justice process).

[253] Kansas v. Crane, 534 U.S. 407, 411 (2002); Kansas v. Hendricks, 521 U.S. 346, 373 (1997) (Kennedy, J., concurring). Indeed, Crane himself was sentenced to a relatively brief term of imprisonment as a result of a plea bargain under circumstances that might otherwise have justified a prison term of thirty-five years to life. *In re* Crane, 7 P.3d 285, 287 (Kan. 2000).

of filling the desert-disease gap using punishment by other means and they should be abolished.

States could, of course, achieve essentially indefinite confinement through the criminal justice system by imposing life sentences on sexual offenders. Almost certainly, there would be no constitutional objection under current proportionality jurisprudence,[254] and many would accept that such sentences would be deserved. Thus, perhaps we should not worry about the potentially extensive reach of various control criteria for the civil commitment of sexual predators because sexually violent offenders will remain incarcerated for very long periods in any case. But this would be an unacceptably skeptical, consequential approach to the danger sexual predation presents.[255] The law sets moral standards and should be clear about which agents are responsible. Moreover, if sexual dangerousness were treated virtually exclusively within the criminal justice system, legislators would be forced to confront and to defend the sentences they are willing to impose on sexual offenders, rather than sweeping this morally fraught question under the psychiatric rug. Finally, prosecutors would be forced to straightforwardly evaluate the strength of their cases and would not be able to rely on allegedly civil commitment to remedy the effects of weak cases or improvident plea bargains.

I do not know why our society is apparently more comfortable with the combination of limited sentences and sexual predator commitments than with lengthier prison terms to protect society from sexual offenders. A positive reason might be that we do not want to impose unnecessarily lengthy terms on sex offenders who might not be at great recidivism risk and we use the predator commitments as a safety valve for those who are at great risk. I suspect, however, that the real difficulty is that we cannot realistically impose draconian sentences on all sexual offenders for various reasons, including the weaknesses of prosecution evidence, the need for plea bargains and fiscal constraints generally. Again, the safety valve seems necessary, but it is a hidden but clear substitute for insufficient punishment.

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[254] *See* Ewing v. California, 538 U.S. 11, 20 (2003) (holding that the Eighth Amendment contains only a narrow proportionality principle applied to term-of-years sentences).

[255] This objection also bears a stunning resemblance to past claims that the insanity defense should be abolished because defendants acquitted by reason of insanity are incarcerated in any case. *See* Joseph Goldstein & Jay Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853, 864–70 (1963). These claims were misguided for the same reasons that it is important to distinguish responsible from non-responsible sexual predators.

B. COMMITMENT AFTER ACQUITTAL BY REASON OF LEGAL INSANITY

In all jurisdictions, a defendant acquitted by reason of insanity may be automatically civilly committed, either for an evaluation that will be followed by formal civil commitment, or by formal commitment itself without a prior evaluation.[256] Although not punishment for crime—the defendant has been acquitted after all—these civil commitments have been justified because the defendant is allegedly still dangerous and not responsible for the dangerousness. The terms of such possible commitments vary across jurisdictions, but in some jurisdictions the term may be indefinite with periodic review. In *Jones v. United States*,[257] the Supreme Court upheld both an automatic commitment for evaluation and the potentially indefinite commitment of a defendant acquitted by reason of insanity for shoplifting a leather jacket. The Court argued that, based on an insanity acquittal, it is rational to presume that the subject was still mentally disordered and dangerous.[258] The Court was unwilling to equate "dangerousness" with violence. It claimed that the legislative purpose to confine was the same for violent and nonviolent offenses and that the former often led to the latter.[259] Moreover, for this type of commitment, the Court was willing to accept a lesser burden of persuasion than the constitutionally-imposed standard civil commitment standard of clear and convincing evidence.[260] Post-insanity commitments are different, the Court claimed, because the defendant himself raised the issue of mental disorder, and so the risk of error is decreased.[261] Finally, the Court approved potentially indefinite confinement on the ground that such confinement did bear a rational relation to the purpose of the commitment, which is to confine dangerous, non-responsible agents. The defendant was acquitted so the length of the confinement need not be limited by the deserved punishment. The subject is properly confined as long the defendant remains disordered *and* dangerous and need not be released until either condition is no longer met. This might happen at any time, or never.[262] In *Foucha v. Louisiana*,[263] the Court affirmed that a post-insanity commitment

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[256] *See* Parry, *supra* note 46, at 168–70.
[257] 463 U.S. 354 (1983).
[258] *Id.* at 365.
[259] *See id.* at 365 n.14.
[260] *Id.* at 367–68; *see also* Addington v. Texas, 441 U.S. 418, 431–33 (1979).
[261] *Jones*, 463 U.S. at 367.
[262] *Id.* at 368–69.
[263] 504 U.S. 71 (1992).

must end if the subject is no longer mentally ill, even if he is still dangerous.[264]

I think that the Court was correct to decouple the potential length of the civil commitment from the sentence for the crime charged. The defendant has been acquitted and the usual justifications for a sentence length do not apply. Roughly, the legislature sets sentences that are proportionate to culpability and that reflect an ordinary, rational offender's dangerousness. The insanity acquittee is neither culpable nor dangerous in the ordinary manner, however. If the basis for the commitment is non-responsible dangerousness, the commitment can justifiably continue until these conditions are no longer met. Although this is true as a theoretical matter, it seems useless to have lengthy commitments for non-violent offenders. They do not present much danger and the risk that they will be erroneously held longer than necessary is substantial. I would have limited terms of confinement for non-violent acquittees. These could be longer than ordinary involuntary civil commitment terms because the acquittee

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[264] *Id.* at 81. Justice O'Connor partially concurred. She noted that an insanity acquittee had been found to have committed the prima facie case beyond a reasonable doubt. She then wrote cryptically, as follows:

> It might therefore be permissible for Louisiana to confine an insanity acquittee who has regained sanity [sic] if, unlike the situation in this case, the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness . . . . [A]cquittees could not be confined as mental patients absent some medical justification for doing so; in such a case the necessary connection between the nature and purposes of confinement would be absent.

Id. at 87–88 (O'Connor, J., concurring). Justice O'Connor also noted that the seriousness of the crime should also affect whether the state's interest in continued confinement would be strong enough. *See id.* at 88.

If the subject is no longer mentally disordered and therefore no longer non-responsible, it is hard to imagine what possible "medical justification" there could be for continuing civil commitment to protect the public. It is not clear from the O'Connor concurrence if she would require some finding of mental abnormality, as did the statute upheld in *Kansas v. Hendricks*, to make the commitment analogous to traditional civil commitment. 521 U.S. 346, 355 (1997). If not, however, then five Justices of the Supreme Court, the four *Foucha* dissenters and Justice O'Connor, would have been willing to countenance pure preventive detention, at least of a person who had committed a crime without being responsible and who continued to be dangerous.

For an attempt to apply Justice O'Connor's suggestion, see *State v. Randall*, 532 N.W.2d 94, 109 (Wis. 1995) (permitting continued confinement if there were a medical justification and the subject was still dangerous, but limiting the term to the maximum sentence for the crime charged). Needless to say, I believe that this practice is simply criminal punishment by other means. The "medical justification" criterion is a transparent and fraudulent attempt to bring this type of commitment within the disease justification for preemptive confinement. The limitation on the term of the commitment to the maximum term for the crime charged is simply a salve to the legislative conscience and a signal that the continued commitment is punitive.

was prima facie guilty of a criminal offense, which is seldom the case in involuntary civil commitment and never required.[265] Nonetheless, the terms of post-insanity commitment for non-violent offenders should be short. If the subject has a clean disciplinary record in the hospital, he should be released at the end of the short term or the state can seek ordinary involuntary civil commitment. Another possibility is conditional or probationary release.[266] If the acquittee has an unproblematic probationary period in the community, the commitment should end.

The Court in *Jones* never noted that the mental disorder and dangerousness had to be linked to insure that the subject was not responsible for his dangerousness.[267] After all, non-responsibility for the legally relevant behavior, in this case dangerousness, is necessary to justify involuntary commitment. It is possible for a person to be independently crazy and bad, with no link between them that suggests that the defendant's dangerousness is irrational. For example, a defendant may be wildly jealous because he delusionally believes that his partner has been unfaithful and might have an excuse if he attacked the partner, but there will be no excuse if he robs a bank.[268] There probably will be such a link in most cases of insanity acquittal, but it cannot be taken for granted empirically.

More important, there is reason to doubt the Court's presumption of continuing mental disorder and dangerousness. By definition, the defendant must have been sufficiently rational to be competent to stand trial. If that state of rational capacity continues, then it is not clear that he continues to be mentally ill for the purpose of involuntary commitment. Moreover, to

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[265] *See* PARRY, *supra* note 182, at 476–77 (discussing the criteria for commitments for dangerousness, which do not include a finding of prima facie guilt for a criminal offense or the equivalent thereof). Parry notes that the trend in standard involuntary civil commitments for dangerousness is away from requiring overt, recent acts and threats and towards more purely predictive criteria. In practice, however, commitment is common for threatening behavior, including verbal threats. Less serious assaults and thefts may also lead to civil commitment, although they are often processed through the criminal justice system. In my experience, seriously violent conduct is virtually always processed through the criminal justice system. Moreover, traditional civil commitment requires only the lower, clear and convincing burden of persuasion. Addington v. Texas, 441 U.S. 418, 431–33 (1979).

[266] *See* CAL. PENAL CODE § 1026.2(e)–(f) (West 2010).

[267] Jones v. United States, 463 U.S. 354, 363–65 (1983) (discussing the need for a showing of both mental disorder and dangerousness to justify these commitments and apparently assuming that the fact of an insanity acquittal supplies a link between the two criteria, but not explicitly requiring the causal link at the time of commitment).

[268] I recognize that a narrow interpretation of the standards for legal insanity would not excuse the person because he would neither be justified nor excused if the facts were as he believed them to be. On a broader reading, however, the defendant is not a rational agent and might have a plausible claim for legal insanity. *See supra* note 144 and accompanying text.

the extent that the mental disorder played a causal role in the practical reasoning that accompanied the offense, it is perfectly possible that the defendant is no longer dangerous either. This will be especially possible if the prosecution bears the burden of persuasion on legal insanity and the defendant only needs to cast a reasonable doubt about his sanity. Even if the defendant bears the burden of persuasion, as is commonly the case at present, the considerations just adduced apply.

My suggestion, therefore, is that all post-acquittal commitments should be for evaluation only and should not be for full commitment. There is little need to deprive the defendant of more liberty to protect the public. Preventive commitment should occur only if the evaluation indicates that the criteria for commitment are met at present. The evaluations need not last more than a few weeks. That is more than sufficient for the state's mental health professionals to reach a conclusion. I once again think that a subject facing potentially indefinite commitment and those facing substantial limited terms should be entitled to the services of an independent mental health professional to help defend against the commitment. Without such help, they have essentially no chance if the state's professional recommends commitment. These forms of commitment are more onerous than ordinary involuntary commitment and fairness requires that insanity acquittees should have a chance to avoid long-term incarceration in secure forensic facilities. For the same reason, the State should have to prove the commitment criteria by the higher, clear and convincing standard that *Addington* imposed for ordinary involuntary commitment to avoid imposing too much risk of error on the individual.[269]

VII. THE RADICAL CLAIM THAT WE ARE NOT AGENTS

In the criminal justice system, mental disorder is typically used as a criterion to pick out those agents who should be treated specially because they are not responsible or competent in some criminal law context. This Part of the Article briefly addresses the radical claim and hope (of some) that neuroscience will cause a paradigm shift in criminal responsibility by demonstrating that we are "merely victims of neuronal circumstances"[270] or some similar claim that denies human agency altogether. This claim is not specifically about the relation of mental disorder to criminal law, but it would nevertheless destroy all mental disorder criteria because it essentially holds that there is no moral difference between practical reasoning affected by mental disorder and ordinary, reasonably rational practical reasoning.

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[269] *Addington*, 441 U.S. at 425–33.

[270] Greene & Cohen, *supra* note 41, at 218.

Further, it would arguably lead to a pure prediction/prevention system of social control unmoored from considerations of responsibility and desert.

At present, the law's "official" position—that conscious, intentional, rational, and uncompelled agents may properly be held responsible—is justified unless and until neuroscience or any other discipline demonstrates convincingly that humans are not the type of creatures that we think we are. The law's implicit theory of action presupposes that its subject is an agent who acts based on his or her mental states, such as desires, beliefs, and intentions.[271] Agents are praised and blamed, rewarded and punished. Because it is an agent who acts, it makes sense to ask that person to give an account of his or her behavior and to be held accountable. Asking a creature or a mechanistic force that does not act to answer to charges does not make sense. If humans are not intentional creatures who act for reasons and whose mental states play a causal role in their behavior, then the foundational facts for responsibility ascriptions are mistaken. If it is true that we are all automata, then no one is an agent and no one can be responsible. If the concept of mental causation that underlies folk psychology and current conceptions of responsibility is false, our responsibility practices, and many others, would appear unjustifiable. Why not move, then, to a system of pure preventive detention for dangerous agents and perhaps to mandated early detection and intervention for those who will become dangerous later?

This claim is not a strawman. Here is a lengthy quote from a widely-noticed article by neuroscientists Joshua Greene and Jonathan Cohen that expresses the mechanistic conception.

> [A]s more and more scientific facts come in, providing increasingly vivid illustrations of what the human mind is really like, more and more people will develop moral intuitions that are at odds with our current social practices . . . . Neuroscience has a special role to play in this process for the following reason. As long as the mind remains a black box, there will always be a donkey on which to pin dualist and libertarian intuitions . . . . What neuroscience does, and will continue to do at an accelerated pace, is elucidate the 'when', 'where' and 'how' of the mechanical processes that cause behaviour. It is one thing to deny that human decision-making is purely mechanical when your opponent offers only a general, philosophical argument. It is quite another to hold your ground when your opponent can make detailed predictions about how these mechanical processes work, complete with images of the brain structures involved and equations that describe their function . . . . At some further point . . . [p]eople may grow up completely used to the idea that every decision is a thoroughly mechanical process, the outcome of which is completely determined by the results of prior mechanical processes. What will such people think as they sit

[271] Morse, *supra* note 29, at 529–33. *See generally* ROBERT AUDI, ACTION, INTENTION AND REASON 109–78 (1993) (providing an account of practical reason); Sifferd, *supra* note 38.

> in their jury boxes? . . . Will jurors of the future wonder whether the defendant . . . *could have done otherwise*? Whether he really *deserves* to be punished . . . ? We submit that these questions, which seem so important today, will lose their grip in an age when the mechanical nature of human decision-making is fully appreciated. The law will continue to punish misdeeds, as it must for practical reasons, but the idea of distinguishing the truly, deeply guilty from those who are merely victims of neuronal circumstances will, we submit, seem pointless.[272]

Greene and Cohen are not alone among thoughtful people in making such claims. The seriousness of science's potential challenge to the traditional foundations of law and morality is best summed up in the title of an eminent psychologist's recent book, *The Illusion of Conscious Will*.[273]

If our mental states play no role in our behavior and are simply epiphenomenal, then traditional notions of responsibility based on mental states and on actions guided by mental states would be imperiled. But is the rich explanatory apparatus of intentionality simply a post hoc rationalization that the brains of hapless homo sapiens construct to explain what their brains have already done? Will the criminal justice system as we know it wither away as an outmoded relic of a prescientific and cruel age? If so, not only criminal law is in peril. What will be the fate of contracts, for example, when a biological machine that was formerly called a person claims that it should not be bound because it did not make a contract? The contract is also simply the outcome of various "neuronal circumstances." The philosophical view called "compatibilism"—the view that responsibility is compatible with the truth of determinism—will not save us from this challenge because compatibilism presupposes that we are agents, a view the radical challenge denies.[274]

Given how little we know about the brain–mind–action connections,[275] to claim based on neuroscience that we should radically change our picture

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[272] Greene & Cohen, *supra* note 41, at 217–18 (internal citation omitted).

[273] DANIEL M. WEGNER, THE ILLUSION OF CONSCIOUS WILL (2002); *see also* Daniel M. Wegner, *Précis of the Illusion of Conscious Will*, 27 BEHAV. & BRAIN SCI. 649 (2004). The *précis* is followed by open peer commentaries and a response from Professor Wegner. *Id.* at 679. In more recent work, Professor Wegner appears to have softened the radical interpretation of his claim, which is that we, as agents, are not really "controllers" whose mental processes cause action. Daniel M. Wegner, *Who Is the Controller of Controlled Processes?*, *in* THE NEW UNCONSCIOUS 19, 32 (Ran R. Hassin et al. eds., 2005) ("This theory is mute on whether thought does cause action."). On the other hand, Professor Wegner seems ambivalent and unwilling to give up the radical interpretation. *See id.*at 27 (arguing that the "experience of conscious will is normally a construction" and referring to mental causation as "apparent"). This apparent ambivalence is present in the work of others.

[274] *See* Morse, *supra* note 32, at 214–16 (discussing the meaning of compatibilism and its relation to criminal law).

[275] For example, we have no idea how the brain enables the mind. PAUL R. MCHUGH & PHILLIP R. SLAVNEY, THE PERSPECTIVES OF PSYCHIATRY 11–12 (2d ed. 1998).

of ourselves and our legal doctrines and practices is a form of neuroarrogance. Although I predict that we will see far more numerous attempts to use neuroscience in the future as evidence in criminal cases and to affect criminal justice policy, I have elsewhere argued that for conceptual and scientific reasons, there is no reason at present to believe that we are not agents.[276] It is possible that we are not agents, but the current science does not remotely demonstrate that this is true. The burden of persuasion is firmly on the proponents of the radical view.

What is more, the radical view entails no positive agenda. Suppose we were convinced by the mechanistic view that we are not intentional, rational agents after all. (Of course, the notion of being "convinced" would be an illusion, too. Being convinced means that we are persuaded by evidence or argument, but a mechanism is not persuaded by anything. It is simply neurophysically transformed.) What should we do now? We "know" (another mental state, but never mind) that it is an illusion to think that our deliberations and intentions have any causal efficacy in the world. We also know, however, that we experience sensations such as pleasure and pain and that we care about what happens to us and to the world. We cannot just sit quietly and wait for our brains to activate further, for determinism to happen. We must and will deliberate and act.

If we still thought that the radical view was correct and that standard notions of genuine moral responsibility and desert were therefore impossible, we might nevertheless continue to believe that the law would not necessarily have to give up the concept of incentives. Indeed, Greene and Cohen concede that we would have to keep punishing people for practical purposes.[277] Such an account would be consistent with "black box" accounts of economic incentives that simply depend on the relation between inputs and outputs without considering the mind as a mediator between the two. For those who believe that a thoroughly naturalized account of human behavior entails complete consequentialism, such a conclusion might not be unwelcome.[278]

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[276] *See* Stephen J. Morse, *Determinism and the Death of Folk Psychology: Two Challenges to Responsibility from Neuroscience*, 9 MINN. J.L. SCI. & TECH. 1, 19-34 (2008).

[277] Greene & Cohen, *supra* note 41, at 218.

[278] A clear implication of the disappearing person argument is that it would not be fair to punish dangerous people because no one deserves punishment (or anything else). We might need to deprive dangerous people of their liberty to ensure social safety, but then we would be morally bound to compensate for the unfairness of restraining liberty by making the conditions of confinement (or other restraints) sufficiently positive. In other words, a regime of "funishment" would be morally required. Saul Smilansky, *Hard Determinism and Punishment: A Practical* Reductio, 30 LAW & PHIL. 353, 355 (2011). I leave the perverse incentives this would create to the reader's imagination, but defenders of the disappearing person view would be required to institute funishment and somehow to avoid the perverse

On the other hand, this view seems to entail the same internal contradiction just explored. What is the nature of the "agent" that is discovering the laws governing how incentives shape behavior? Could understanding and providing incentives via social norms and legal rules simply be epiphenomenal interpretations of what the brain has already done? How do "we" "decide" which behaviors to reward or punish? What role does "reason"—a property of thoughts and agents, not a property of brains—play in this "decision"?

If the truth of pure mechanism is a premise in deciding what to do, this premise yields no particular moral, legal, or political conclusions. It will provide no guide as to how one should live or how one should respond to the truth of reductive mechanism.[279] Normativity depends on reason and thus the radical view is normatively inert. Neurons and neural networks do not have reasons. Only people do. If reasons do not matter, then we have no genuine, non-illusory reason to adopt any morals or politics, any legal rule, or to do anything at all. Thus, this view does not entail consequentialism or a pure preventive scheme of social control.

Given what we know and have reason to do, the allegedly disappearing person remains fully visible and necessarily continues to act for good reasons, including the reasons currently to reject the radical view. We are not Pinocchios and our brains are not Geppettos pulling the strings. Mental disorder will continue to be a factor in all criminal justice decision making.

VIII. CONCLUSION

Mental disorder is a criterion for special treatment of offenders at every stage in the criminal process, from investigation to punishment. The role it ought to play is context-dependent, however, and one must always ask what values and interests are being upheld by a special criminal mental health rule. I have argued that society should try to maximize the liberty and dignity of people with mental disorders by treating them as much as is justifiably possible like people without disorders. In particular, the use of preventive detention based on mental disorder should be strictly limited to extreme cases and the alleged non-responsibility of people with disorders should not be used to justify pure preventive detention in the large number of cases in which people with disorders are responsible. We should not impermissibly fill the desert-disease gap with unjustified ascriptions of non-

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incentives. Smilansky's argument is directed at hard determinists, but it is *a fortiori* directed at those who make the disappearing person claim, as long as the latter can make any moral claims at all. See *infra* note 279 and accompanying text.

[279] I was first prompted to this line of thought by a suggestion Mitch Berman made in the context of a discussion of determinism and normativity. Mitchell Berman, *Punishment and Justification*, 118 ETHICS 258, 271 n.34 (2008).

responsibility. I have also recommended a number of practical and procedural reforms that would make the system as fair as possible.