THE BLAME GAME: PUBLIC ANTIPATHY TO MENTAL HEALTH EVIDENCE IN CRIMINAL TRIALS

*Andrea D. Lyon**

Although in recent years it has become a bit easier to discuss mental health challenges in public, mental illness is still somehow viewed by many in the public as a moral failing. It is that underlying judgement, that unwillingness to look at the many sources that leads to profound misunderstandings by the public, particularly in the context of a criminal trial. In this article I examine these issues in that context in order to better identify, and come to a better understanding of where our shared biases get in the way of a reasoned view of such evidence. The article examines some broad policy questions regarding what we, as a society, do with our mentally ill, and then looks at public perceptions and their impact on criminal justice decision making.

Keywords: *mental health evidence, criminal law, trial*

The Wilsons[1] were an older couple. They didn't have much in the way of education; Maude had gone to the third grade, Albert had finished the sixth. They had migrated to Illinois from a small town in Mississippi when they were both in their teens. They had one son, Gerald, who was nearly 50 when I met him. He had served in Korea, and had survived a gunshot to the head. Gerald had a metal plate in his head, and he had increasingly bizarre and disturbing ideas. He had been diagnosed as schizophrenic, with

* Andrea D. Lyon is Dean and Professor of Law at the Valparaiso University School of Law. She wishes to thank Valparaiso University's President Heckler and Provost Beirman for their support of this work.

1. This is from a real case, where I represented the Wilsons' son, who was charged with murder. I have changed the names of all involved.

New Criminal Law Review, Vol. 21, Number 2, pps 247–266. ISSN 1933-4192, electronic ISSN 1933-4206. DOI: https://doi.org/10.1525/nclr.2018.21.2.247.

brain damage, many times. He had been hospitalized dozens of times by the Veterans Administration. It had become a routine; he would begin hallucinating, get out of control, and then be admitted to the hospital. The hospital staff would medicate him until he was quiescent, and release him. Gerald had a little apartment on the southwest side of Chicago, just on the edge of what is referred to as "K town" (the part of town where all of the north-south streets have names that start with "k", like Kedzie), which was and remains a pretty tough place. Maude and Albert would see him, but couldn't handle him living with them anymore; hence the studio apartment. Gerald was receiving social security support (SSI) due to his mental illness, and would get his check (yes, this was before ubiquitous direct deposit) on the first of the month. Often his parents would walk with him to cash it at the currency exchange four blocks from his house, but not always.

About six weeks before the events leading to my representation of him, the Wilsons had appeared in mental health court, and asked that their son be evaluated for involuntary commitment. They were frightened for him, and of him. His hallucinations were getting worse, medication didn't seem to help, and the VA wouldn't keep him. In particular, he was convinced that some people were actually alligators and that he needed to kill those alligators.

Let me take a minute to tell you what a herculean effort it had been for the Wilsons to get to mental health court. First, they had to find out that there was such a court, and then where it was (at the time it was in a south suburb, and not accessible by public transport). Then they had to get a clerk to help them file a petition, get on the docket, and get heard. They did all this, and the judge agreed that Gerald should be evaluated, signed an order and issued a mental health warrant for Gerald's arrest, which would then allow for the three-day mental health confinement while he was analyzed. The police were informed of the warrant, where Gerald lived, where he cashed his check, and where his parents lived. But they simply didn't arrest him. They did nothing. Six weeks later, while walking to the currency exchange, Gerald saw Phillip Jackson, thought he was an alligator, and stabbed him multiple times in broad daylight in front of many witnesses.

Ultimately Gerald was found not guilty by reason of insanity, but it wasn't easy. This should have been an agreed-upon disposition in my view; instead, it was a fight. The level of prosecutorial distrust of mental health

evidence, the insanity defense, and the certainty of the prosecutors that he was faking it somehow was astonishing to see. The indifference of the police to their role in this, and their hostility to my client (and his parents) was unsurprising but deeply disappointing. The level of hostility I experienced as I interviewed and prepared various Veteran's Administration health professionals as witnesses was disturbing. (With one notable exception, a young resident who had argued unsuccessfully to keep Gerald in a more secure environment. She told me that she got dressed down for speaking up.) Ironically, the only people who seemed at all sympathetic were the parents of the deceased; I watched them bond with the Wilsons over their mutual tragedy.

I open this article with Gerald's story because it is emblematic of so many issues when mental health—whether as a defense, mitigation, or to counter *mens rea*—intersects with criminal proceedings.

While time has passed since I represented Gerald, and it is somewhat easier to discuss mental health challenges in public now, mental illness is still somehow viewed as a moral failing. It is that underlying judgement, that unwillingness to look at the many sources leading to the tragedy of Gerald's case, that I wish to address in this article—not to call them out simply for the sake of disparaging them, but rather to name and identify these issues so that, hopefully, our criminal justice system and those who work within and around it, can come to a better understanding.

I. WHAT SHOULD WE DO WITH OUR MENTALLY ILL?

I raise this question seriously, even though in some ways this seems an obvious question to which there is an equally obvious answer: we should competently treat the mentally ill, hospitalize them if needed, and generally be accepting, the way we are more easily with physical handicaps. But that is not what we do at all.[2]

In many ways our knowledge of the brain and its relationship to physical health, genetics, and environment is not well understood.[3] The oft-referred

2. *See, e.g.*, Caitlin Kelvoric, *Our Unhealthy View of Mental Health (and Mental Illness)*, HUFFPOST (May 3, 2013, 2:52 PM ET), https://www.huffingtonpost.com/caitlin-klevorick/our-unhealthy-view-of-men_b_2797892.html.

3. Kirsten Weir, *The Roots of Mental Illness*, 43(6) APA SCIENCE WATCH 30 (2012), *available at* http://www.apa.org/monitor/2012/06/roots.aspx.

to debate about nature vs. nurture isn't really a debate; we are the sum of all of our parts—a sum that sometimes adds up and sometimes seems not to.

We know what to do with someone who is so far "out of it" that they cannot function at all; we institutionalize them. If they have insurance.[4] But more perplexing for most of us is figuring out how to interact with, feel about, and relate to people with less debilitation, like those with serious depression or personality disorders. For example, suppose you have a family member who suffers from severe depression. That family member can also be very self-centered and annoying. When and how can you hold her to account?[5] Where is the line? In other words, is it acceptable to get mad at her for being insensitive, rude, or otherwise self-absorbed when maybe she can't really help it? These questions plague those with mental illness and their loved ones, and are questions worth thinking about in this way when advocating for the mentally ill.

It is this jagged boundary that we don't know how to navigate, and it plays out even more starkly in the context of a criminal trial. When an accused presents a full or partial mental health defense, the natural human reaction is to hold that person "accountable" (however one might define that), and to view the presentation of any mental health evidence that doesn't inexorably lead to the conclusion that she didn't know right from wrong as an excuse, or worse, a con.

Harkening back to Gerald's case, his family loved him but were bewildered and frightened of him, and it appeared to me that the Veteran's Administration had no idea how to help him long term, and so defaulted to medicinal suppression of symptoms and subsequent release. The staff at the VA did not know how to communicate with him, and frankly, I was struggling myself.

I learned to time my visits with him to coincide with when the antipsychotic medicines would be at their peak (typically late morning or mid-

4. For many, there is no place to go, and they end up in our biggest mental health care provider: jail. Matt Ford, *America's largest mental hospital is a jail*, The Atlantic (June 8, 2015), https://www.theatlantic.com/politics/archive/2015/06/americas-largest-mental-hospital-is-a-jail/395012/.

5. There is advice to be had on this subject. For example, the American Psychological Association: http://www.apa.org/helpcenter/serious-mental-illness.aspx (last visited Feb. 15, 2018); or E. Fuller Torrey, Surviving Schizophrenia: A Family Manual (6th ed. 2013); and Demitri Papolos & Janice Papolos, Overcoming Depression (3d ed. 1997).

afternoon), so that it was possible to talk. I never had the sense that he entirely understood me and did contest his fitness for trial, but the judge found him "fit with medication."[6]

Truthfully, I could not always tell whether Gerald understood me. He would sort of come and go, and I had to hope that enough was getting through that the decisions we were making were ones he was comfortable with. To some degree, though, there was no avoiding an *in loco parentis*[7] relationship with him.

II. THE PUBLIC PERCEPTIONS

There are many entirely or partly false beliefs held by some of the public[8] which over-represent the relationship between mental illness and criminal activity. These beliefs make representing someone with mental health issues particularly challenging; the very fact that your client is in the criminal justice system reinforces the widely and erroneously held belief that people with mental health problems are inherently dangerous. It's a kind of feedback loop.

> Overall, the general public has an overwhelmingly negative opinion regarding the insanity defense. The average U.S. citizen believes the insanity defense is a commonly used device that allows criminals who deserve to be punished to escape any sort of retribution. Further, the association of the insanity defense with heinous, violent crimes means that the public feels like retribution is especially deserved, and that defendants are gaming the system in order to grab a get-out-of-jail-free card. Some common myths are that the insanity defense is used frequently, that it is frequently successful, that defendants who successfully raise the defense are "quickly released from custody," that there is no risk in raising the defense, and that many

6. The standard for fitness to stand trial is not very high; the accused must know the nature of the charges against her, and be able to cooperate with counsel. For an interesting approach to "making" the accused fit, see the Illinois Department of Human Services, *Fitness Restoration Manual* (n.d.), *available at* http://www.dhs.state.il.us/OneNetLibrary/27896/documents/By_Division/MentalHealth/ProviderManual/FitnessRestorationManual2015rev.pdf.

7. "In place of the parent."

8. See Eric Ravenscraft, *The Misconceptions about Mental Illness We Need to Unlearn*, LIFEHACKER (June 16, 2015, 11:00 AM), https://lifehacker.com/the-misconceptions-about-mental-illness-we-need-to-unle-1711647132.

> defendants fake mental illness in order to raise the defense, among others. Not surprisingly, there is very little, if any, truth to any of these ideas. The reality is that the insanity defense is a device that is rarely used and even more rarely successful, and most defendants who are able to successfully raise it end up spending an immensely large amount of time under state-supervised hospitalization, treatment, and institutionalization. The defense is raised in less than 1 percent of all criminal cases, and is thought to be successful in no more than 30 percent of those cases. When all is said and done, a successful insanity defense is raised in approximately one in every twenty thousand criminal cases. There are also large risks involved in attempting to raise the insanity defense. Namely, if the defense is raised and is unsuccessful, sentences will typically be longer and harsher than if the defense was not raised.[9]

In fact, these misperceptions are increased by the media's penchant for the salacious story. The more television a person watches, the more likely he or she is to hold these misperceptions.

> The relationship between media and public perception is a well-researched area and has generally shown to be significant. Researchers in Scotland conducted a content analysis and found that two-thirds of the sample believed mentally ill individuals to be violent, with two-thirds of those individuals attributing such beliefs to the media. The fictional media content portrayed mental illness through prevalent themes of "split personality" and "intensely manipulative character." More recently, researchers who conducted a content analysis of primetime television found that these shows portrayed the mentally ill as violent offenders "nine times higher than the rate in the real world." Significantly, fourteen-percent of the portrayals in the study were of personality disorders. A survey conducted in the same study also showed that the more television participants watched, the more likely that the participants were to believe that living in an area with mental health services "endangers local residents." Thus, there seems to be a general consensus that media's portrayal of the mentally ill has stigmatized them in the minds of the general population, either implicitly or explicitly.[10]

In many ways these attitudes are a way of feeling safe from mental illness oneself; if a person is responsible for their acts, then he or she can be held to

9. Louis Kachulis, *Insane in the Mens Rea: Why Insanity Defense Reform is Long Overdue*, 26 S. CAL. INTERDISC. L.J. 357, 362–63 (2017) (footnotes omitted).

10. Bang Thi, *The Psychological Double-Edged Sword: How Media Stigma Influences Aggravating and Mitigating Circumstances in Capital Sentencing*, 25 S. CAL. REV. L. & SOC. JUST. 173, 192–92 (2016) (footnotes omitted).

account. If mental illness is the result of a moral failing, well then, one can feel safe from its depredations.[11] The beliefs that the public holds are at odds with the facts—hardly a new phenomenon, but one which is starkly apparent in the United States today.[12]

> When people with serious mental illness make headlines for violence, it is often for irrational and unpredictable acts of mass violence that spark public fear. This is why the belief that mental illness causes unpredictable violence is pervasive. However, these acts of extreme violence account for a very small percentage of the criminal activity carried out by people with serious mental illness. It is important to note that most people with mental illness are not violent. In fact, large-scale studies have found that people with mental illness are actually *less* likely to be violent than similar individuals without mental illness.[13]

Most people are not even consciously aware they have these attitudes, and so part of the advocate's job is to help the jurors (and judge) recognize their default attitudes.

Addressing these issues is more easily said than done; ordinary rules of relevancy[14] prevent the defense lawyer from presenting context and telling jurors what the consequences of their actions might be.[15] Thus, evidence

---

11. "These individualized and shared conceptions of the mentally ill merge together in a theory known as framing. Frames are used to 'economize our information-processing burden by highlighting certain informational elements, and hidings others.' The media uses frames to present information in a way that is understandable and conveys the intended message. Robert Entman has proposed that frames work to 'define problems,' 'diagnose causes,' make 'moral judgments,' and 'suggest remedies.' It has been suggested that framing is composed of various elements, which include the use of metaphors, depictions, catch-phrases, exemplars, and visual images. The audience members reason through a frame by utilizing a consequential, causal, and moral analysis." Bang, *id*. at 193 (footnotes omitted).

12. Ruth Marcus, *Welcome to the post-trust presidency*, WASH. POST, Dec. 12, 2016, *available at* https://www.washingtonpost.com/opinions/welcome-to-the-post-truth-presidency/2016/12/02/baaf630a-b8cd-11e6-b994-f45a208f7a73_story.html?utm_term=.604970f57f43.

13. Jillian Peterson & Kevin Heinz, *Understanding Offenders with Serous Mental Illness in the Criminal Justice System*, 42 MITCHELL HAMLINE L. REV. 537, 541 (2016) (citations omitted).

14. Federal Rule of Evidence 401: Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. *Federal Rules of Evidence* (2014), *available at* http://www.uscourts.gov/sites/default/files/Rules%20of%20Evidence.

15. In *Shannon v. United States*, 512 U.S. 573 (1994), the Supreme Court held that a defendant does not have the right to instruct the jury about what would happen in terms

that might provide some comfort to a juror—for example, the fact that a person found not guilty by reason of insanity will likely spend *more* time in a secure mental health facility than if he or she had pled guilty for a sentence of imprisonment[16] (which implicates some significant ethical questions)—cannot be presented at trial.

> Studies have consistently shown that the public is deeply suspicious of the insanity defense. A 2001 study, to cite just one example, found that 79 percent of participants believed the defense is often abused and poses a threat to public safety. . . . Researchers have found that attitudes toward the insanity defense are "powerful predictors" of verdicts in insanity cases, at times mattering more to the outcome of a case than even a manipulation of the facts.[17]

Another challenge is the mistaken belief of many jurors that a defendant who is found not guilty by reason of insanity will be treated the same as if he or she were simply acquitted. Depicted in television programs and movies as a get-out-of-jail-free card, there is a persistent notion that lack of criminal responsibility under the law is the equivalent of not having committed the act at all.[18]

> Psychopathic stigma presents problems within the criminal justice system. As the disorder is characterized as a moral illness, issues of sanity and capacity are inapplicable during a trial. Psychopaths can differentiate between right and wrong, but their ability to act in accordance with such limits is questionable. This dispute becomes salient during the sentencing phase of criminal trials, in which mental health evidence is "double-edged" in nature. That is, while the evidence may diminish blameworthiness, this

---

of commitment after a finding of not guilty by reason of insanity except in unusual circumstances, such as when the prosecutor argues that the defendant will "walk free."

16. *See* Mac McClelland, *When 'not Guilty' Is a Life Sentence*, N.Y. TIMES MAGAZINE, Sept. 27, 2017, *available at* https://www.nytimes.com/2017/09/27/magazine/when-not-guilty-is-a-life-sentence.html.

17. Scott Brooks, *Guilty by Reason of Insanity: What a Maligned Defense Demands a Constitutional Right of Inquiry on* Voir Dire, 20 GEO. MASON L. REV. 1183, 1183–84 (2013) (citations omitted). *See also*, *The Double-Edged Sword of the Insanity Defense*, THE CRIME REPORT, Oct. 27, 2017, *available at* https://thecrimereport.org/2017/10/27/the-double-edged-sword-of-insanity-defenses/.

18. *See* Julian V. Roberts & Anthony N. Doob, *News Media Influences on Public Views of Sentencing*, 14 LAW & MEDIA 451, 453 (1990); Jennifer K. Robbennolt & Christina A. Studebaker, *News Media Reporting on Civil Litigation and Its Influence on Civil Justice Decision Making*, 1 LAW & HUM. BEHAV. 5, 11 (2003).

> comes at a risk of exposing future dangerousness. Media perceptions may prompt potential jurors to have a biased or distorted view on what psychopathy is and its applicability as either an aggravating or mitigating factor. Such misperceptions of violence and "evil" may prompt such jurors to support greater punishment. In one study, when the prosecutor labeled a defendant as a psychopath, jurors perceived that individual to be more dangerous, even when mitigating evidence was presented to the contrary. The literature suggests that the public's negative perception of psychopaths works against mitigation and may, in fact, lead to additional penalties. At best, public perception may be ambivalent, prompted in part by the recent increase of antihero programs.[19]

This is the crux of the matter: mental illness is viewed by many as a moral failing, as something that one can just fix if one wanted to. Logically, we know this isn't true. Who would choose to be depressed? Or schizophrenic? But it just feels like this is something that the will alone can control, and that presenting mental illness evidence in the criminal context is just a dodge to get out of responsibility. And often juries see it that way.

So, many hold the belief that the presentation of mental health evidence as a defense (or as mitigation at sentencing) is some kind of a trick. What complicates the problem is that, to some extent, this is not entirely without merit; someone with bipolar disorder can in fact control, in whole or in part, his or her symptoms with medication. Schizophrenia's symptoms can be at least ameliorated with psychotropic medications. And yet, those with such diagnoses often don't take their medications, or don't take them correctly. Isn't that a willful act? And if that is a willful act, should we not hold the defendant responsible? This may seem like a simple question, but it is not.

III. CHALLENGES IN COURT: THE INSANITY DEFENSE

It is in the context of a fact finder deciding whether to credit evidence that might negate criminal intent, or lower it, where the rubber (the facts) meet the road (the jury instructions). Juries are generally instructed that they can infer intent from action.[20] It is a natural instinct to do so, and asking a jury

19. Bang, *supra* note 10, at 177–78 (citations omitted).

20. *See, e.g.*, Illinois Pattern Jury Instructions—Criminal: Mental State, Accountability, and Responsibility §§ 501(a), 501(b) (Oct. 28, 2016), *available at* http://www.illinoiscourts.gov/CircuitCourt/CriminalJuryInstructions/default.asp.

to disregard what seems normal and intuitive to them is a big ask. As Deborah Denno explains:

> The neuroscience evidence bolsters a range of claims concerning why a defendant would not be capable of the level of mens rea required for a particular offense. In broad categories, defense strategies raise arguments that the defendant had evidence of "mental retardation" (that is, intellectual disability), intoxication (either at the time of the crime, over time, or both), diminished capacity, an inability to premeditate or deliberate and to form intent, brain abnormality, an inability to appreciate wrongfulness or the criminality of conduct, life stressors, and poor impulse control. These categories are not mutually exclusive but rather can occur simultaneously in the same case.[21]

It is also not difficult to appeal to a fact finder's "common sense" in asking them to reject psychiatric or psychological evidence. For example, if after a crime, the defendant—concededly schizophrenic—stops at a red light, doesn't that mean he or she was not insane? This may seem unduly simplistic, but it is emotionally appealing, and I have seen prosecutors argue this way, often successfully. Television and movies add to this misperception:

> Characters labeled as psychopaths have been portrayed on TV and movie screens in the form of serial killers and sadistic, ruthless villains—both fictional and ripped from mass media headlines. Given salacious mass media portrayals, various authors have raised concerns that the potentially prejudicial impact of the "psychopath" concept may outweigh the probative value in some legal arenas, particularly in "high impact" cases such as capital murder trials. In support of this concern, mock jury research suggests that exposure to the psychopath label in reference to a defendant predicts juror support for death verdicts. Other naturalistic studies of actual criminal cases suggest that prosecutors focus heavily on defendant psychopathic-like traits (e.g., cold-blooded, cunning, "sociopathic") when arguing that capital defendants should be executed and that capital jurors tend to attribute psychopathic features (e.g., remorselessness, grandiosity) to defendants they sentence to death.[22]

21. Deborah Denno, *How Prosecutors and Defense Attorneys Differ in Their Use of Neuroscience Evidence*, 85 FORDHAM L. REV. 453, 462–63 (2016) (citations omitted).

22. Shannon Toney-Smith & John F. Edens, *"So What is a Psychopath?" Venirepersons Perceptions, Beliefs and Attitudes about Psychopathic Personality*, 38 LAW & HUM. BEHAV. 490 (2014) (citations omitted).

There is a tendency to view someone who is intelligent, or who is able to plan their actions, as not mentally ill, which is a false assumption, but again, viscerally appealing.[23]

Another issue is the conflating personality disorders and mental illness. A personality disorder is pretty much what it sounds like. According to the American Psychiatric Association:

> Personality is the way of thinking, feeling and behaving that makes a person different from other people. An individual's personality is influenced by experiences, environment (surroundings, life situations) and inherited characteristics. A personality disorder is a way of thinking, feeling and behaving that deviates from the expectations of the culture, causes distress or problems functioning, and lasts over time.
>
> There are 10 specific types of personality disorders (such as borderline personality disorder). Common to all personality disorders is a long-term pattern of behavior and inner experience that differs significantly from what is expected. The pattern of experience and behavior begins by late adolescence or early adulthood, and causes distress or problems in functioning. Without treatment, the behavior and experience is inflexible and usually long-lasting.[24]

It doesn't help that mental illness and personality disorders often travel together,[25] which makes it difficult to present or to challenge such evidence.

> The debate over whether personality disorders should or should not be considered in nullification of criminal responsibility needs to be seen in a broader context. For example, arguments are made that the impairments associated with personality disorders are insufficiently severe to nullify criminal responsibility, that relying on these diagnoses is tautological since the diagnoses are simply defined by behaviors without reference to etiology

23. "Mental health experts can also explain to jurors the effects of mental diseases and disorders on cognitive functioning or the extent to which psychiatric disabilities are masked by *high* intellectual functioning. Some psychiatric conditions frequently co-exist with high IQs, and it is important for jurors to appreciate the distinct disabilities which may lie beneath the surface of the client whose intelligence seems apparent." Russ Stetler, *Capital cases: Mental disabilities and mitigation*, 23 CHAMPION 49 (Apr. 1999).

24. *What are personality disorders?* AMERICAN PSYCHIATRIC ASSOCIATION (Feb. 2016), *available at* https://www.psychiatry.org/patients-families/personality-disorders/what-are-personality-disorders.

25. RETHINK MENTAL ILLNESS. Personality Disorders (Oct. 2016), https://www.rethink.org/diagnosis-treatment/conditions/personality-disorders.

> or other factors, or that application of the tests of legal insanity when personality disorders are involved is simply too difficult to warrant their use in finding legal insanity.[26]

What this means is that opponents of mental health evidence are able, often successfully, to challenge its importance by reference to and deprecation of personality disorder, which can be thought of "just the way he is."

Although mental health evidence isn't only presented in the context of an insanity defense, I am going to address the issues facing the defense advocate in that endeavor here, as I think the lessons apply equally to mental health evidence presentation in other contexts. Over the past several decades, the "marketability" of an insanity defense has markedly declined.

Yet the option to present this defense is still there for those accused who meet its requirements. An attorney considering a defense of insanity for her client should be prepared to meet a high burden. The general insanity defense provides that a person should be excused from his otherwise criminal conduct if, as the result of a mental disorder or defect, the accused did not: (1) perceive the physical nature or consequences of his conduct; or (2) does not know his conduct is wrong or criminal; or (3) is not sufficiently able to control his conduct so as to be held accountable for it.[27] Individually, these tests are referred to as the M'Naughten, Model Penal Code, and Irresistible Impulse tests, respectively. One, two, or all three of these may be available, depending on the jurisdiction. However, just because the defense is available does not mean that it will be effectively implemented.

To use the defense successfully, counsel must understand why jurors are reluctant to believe it.

The first element is that the accused has a mental defect or disorder. Regardless of which of the tests is used in a particular jurisdiction, most require that the mental disorder or defect conform to three minimal requirements.[28] First, the offender must suffer from a medically recognized mental disorder at the time of the offense. It is not enough that the condition afflict the accused over 90 percent of his typical day, if the offense was not committed while he was affected by the ailment.

---

26. Robert Kinscheff, *Proposition: A Personality Disorder May Nullify Responsibility for a Criminal Act*, 38 J.L. MED. & ETHICS 745 (2010).

27. 2 PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* § 173(a) (1984).

28. *Id.*

Next, the symptoms of the disorder must show themselves at times other than when the offense occurred. Thus, if the accused's only symptom of insanity is that he thrust the knife into the victim's body, he will not be considered insane.

Finally, the condition must be severe enough to make the accused "abnormal" in the eyes of the community. Note that behavior consistent with this idea does not necessarily involve the traditional notions of madness, such a "barking at the moon." These factors establish that some mental defect caused the accused's behavior.

The second element in the analysis focuses on how that disorder affected his mind at the time of the offense. As mentioned, this part of the analytical framework can follow one of three tests to determine if the accused was insane when committing the act.[29] The M'Naghten test is the oldest of the three, having been established in England in 1843.[30] The test came about following a highly publicized assassination attempt against the British prime minister, which resulted in the death of his secretary. At trial, the Court accepted the accused's claim that he should not be held responsible because he was delusionary. As a result, the accused was acquitted. Outraged by this result, the Parliament passed a law regulating the defense.[31] The M'Naghten Rule, as it became known in England and America, required

> [T]hat to establish a defense on the grounds of insanity, it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong.[32]

---

29. A fourth scheme, the so-called Durham test, was established by the D.C. Circuit in 1954 and used for a number of years in various courts. *Durham v. U.S.*, 214 F.2d 862 (D.C. Cir. 1954). However, that same circuit expressly overruled it in *U.S. v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972). The Durham test merely required the defendant to prove that his actions were the result of a mental defect or disorder. There was no need to show that the illness affected his *mens rea*, or knowledge that the actions were wrong, prohibited, or otherwise illegal. *MacDonald v. U.S.,* 312 F.2d 847, 851 (D.C. Cir. 1962). Since the test is no longer used, it will not be addressed further in this article.

30. M'Naghten's Case, 8 Eng. Rep. 718 (1843).

31. Nancy Beran & Beverly Toomey, Mentally Ill Offenders and the Criminal Justice System: Issues in Forensic Services 9 (1979).

32. M'Naghten's Case, House of Lords, 8 Eng. Rep. at 722.

The test became widely used in the United States, where it was primarily interpreted to require an inquiry into whether the accused could know right from wrong at the time of the act.[33] Today, the test is a two-fold inquiry. First, was the person suffering from a defect in reasoning resulting from a defect of the mind, leading to an inability to know the nature and quality of the act? Second, did the person know at the time of the act that what he was doing was wrong?[34] Most people think of this last part when they consider whether a person was insane when committing a crime.

The American Law Institute's (ALI) Model Penal Code (MPC) test defines the insanity defense in a decidedly modern manner, with its focus on an updated concept of what constitutes insanity. According to the MPC,

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect he lacks the substantial capacity to appreciate the criminality of his conduct to the requirements of the law.

(2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.[35]

One difference between this test and M'Naghten is that the MPC test does not deal with perceptions. Under M'Naghten, a person may be insane if she misperceived the physical nature of her actions. The ALI eliminated this option, believing that if a person cannot understand what she is doing physically, she must not be able to appreciate its moral or criminal nature either.[36] The focus instead is on this "substantial capacity to appreciate the criminality" of an action. Since the ALI failed to define this phrase any further, there is some room for maneuverability. Thus a person may still use the defense if she knows her actions are illegal, or even wrong, even if she does not appreciate *how* wrong they are.[37]

It is also important to note that certain types of offenders are specifically prevented from using the defense by the second paragraph of the definition. This excludes those sociopaths whose only abnormal behavior is

33. Beran & Toomey, *supra* note 31, at 9.

34. Powell v. State of Texas, 3129 U.S. 514, 536 (1968).

35. Model Penal Code § 4.06.

36. Robinson, *supra* note 27, at § 173(d)(4). *See also* Foucha v. Louisiana, 112 S.Ct. 1780 (1992).

37. Robinson, *supra* note 27, at § 173(d)(4).

exhibited through criminal acts. Some jurisdictions have rejected this approach, however, preferring instead to continue with a case-by-case analysis.[38]

Finally, the Irresistible Impulse test acknowledges that the person knew what he or she did was wrong, but because of the metal defect could not avoid committing the act.[39] Some authors have criticized the name "Irresistible Impulse" as a misnomer and preferring instead to call it the "Control" test.[40] The exact requirements of the defense vary from court to court, but most require some element of suddenness, an impairment of resistance, and in a few jurisdictions, an overwhelming urge. The suddenness element has been characterized as requiring that the urge to act come to the offender quickly.[41] For example, a husband walking in on his wife in bed with another man may trigger an abrupt, urgent need to act. This leads to the second factor, the impaired ability to resist. This generally requires that the mental disorder affect the actor's ability to withstand urges that a healthy individual could resist with a modicum of effort.[42] Finally, some jurisdictions require an overwhelming urge to act resulting from the mental disorder. The difficulty with this is that few mental disorders actually cause such an urge.[43] Before leaving this defense, it should be noted that its essence has been internalized by the MPC test.[44] The MPC's "substantial capacity to appreciate the criminality" easily encompasses the concept of an ability (or lack thereof) to resist urges.[45]

Regardless of which test is accepted by a particular court, all will require testimony from experts to establish that the condition exists. The problem with this is that it requires a psychiatrist or psychologist to fit their professional definitions of insanity into the legal analytical framework. Unfortunately, the jury is often lost somewhere between the clinical dissection of the accused's mind and the emotionally jarring nature of the crime. This leaves them critically vulnerable to the more memorable testimony about

38. *Id.* at § 173(b)(2) n.17.

39. Leland v. State of Oregon, 343 U.S. 790, 800 (1952).

40. Harlow M. Huckabee, Lawyers, Psychiatrists, and Criminal Law: Cooperation or Chaos? 10 (1980).

41. Snider v. Smith, 187 F.Supp. 299, 302 (E.D. Penn. 1960).

42. Parsons v. State, 81 Ala. 577, 596 (1866), first proposed the test.

43. Robinson, *supra* note 27, at § 173(e)(2).

44. Beran & Toomey, *supra* note 31, at 10.

45. *Id.*

the crime itself and the victim. The jury is bound to be affected more by this emotional subtext of the crime than by those experts with better credentials.

The "emotional subtext" of a trial involving an insanity defense has two bases. The first concerns a balancing of harms in the case. The jury considers the victim and asks *sub silentio*: Who is this person? How badly is he hurt? Then the jury turns to the accused and asks: Who is this person? How much does she hurt? It is difficult to imagine a trier of fact accepting the insanity defense where the accused seems happily mad. The second emotional subtext concerns the nature of the crime itself. To be successful, the act has to *sound* crazy. For example, a woman who shoots her mother in plain view of the neighbors might not be considered insane. However, if she did so while explaining to the world that she had to shoot her to get the witch out of her, then people might be more apt to believe the defense. The woman in this second situation sounds crazy: the crime had no discernable sane motive, and she was clearly suffering.

IV. MENTAL HEALTH EVIDENCE IN THE DEATH PENALTY CONTEXT

Mental health evidence is nearly always a part in a death penalty trial. Profiled in Professor Denno's article discussed at the beginning of Part III (above) is a study that looked at how mental health evidence was considered in the death penalty context. To understand the import of the study, it is important to note that at a death penalty sentencing hearing, rules of evidence are relaxed, and generally anything that is considered both relevant and reliable is admissible.

The Eighth Amendment of the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." As death penalty opponents sought to challenge the validity of capital punishment, they premised their argument on the "cruel and unusual punishments" clause.[46] The Supreme Court provided a framework for legal challenges to the death penalty in 1958, in *Trop v. Dulles*, when it stated that the Eighth Amendment contemplated an

46. Much of my description of how the death penalty works comes from my book, *The Death Penalty: What's Keeping it Alive* (2015).

"evolving standard of decency that marked the progress of a maturing society."[47] Because it is an "evolving standard," the mere fact that the drafters of the Constitution did not find the death penalty cruel and unusual when they wrote the amendment does not preclude the Supreme Court from finding it cruel and unusual in contemporary society.

Initial attacks on the death penalty dealt with how death sentences were issued. In *United States v. Jackson*, the Supreme Court decided that criminal statutes permitting the death penalty may not give the death-sentencing power solely to the jury. The Court reasoned that giving juries the sole power to impose a death sentence improperly coerced defendants to plead guilty and forego a jury trial for fear of execution.[48] Another case, *Witherspoon v. Illinois*, clarified the jury selection process for trials implicating the death penalty. In *Witherspoon* the Court held that jurors with "religious or conscientious" scruples against the death penalty may nevertheless sit on a capital jury, so long as the juror adequately assures the court that he or she can make an impartial decision regarding punishment.[49]

It was not until 1972's *Furman v. Georgia* that the Court addressed the substantive question of whether death penalty statutes comported with the Eighth Amendment's protections against cruel and unusual punishment. In *Furman*, a series of defendants that had been sentenced to death appealed their sentences on the grounds that the jury's broad discretion in deciding whether they lived or died resulted in the arbitrary imposition of the death sentence. All of the *Furman* defendants were convicted and sentenced by the same jury during the same deliberations, and each defendant was African American. The Court observed that under the existing model of broad jury discretion, "the death penalty [was] exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."[50] The Court also noted that the unpredictable application of the death penalty was "an open invitation to discrimination."[51]

47. Trop v. Dulles, 356 U.S. 86 (1958).
48. Unites States v. Jackson, 390 U.S. 570 (1968).
49. Witherspoon v. Illinois, 390 U.S. 510 (1968).
50. Furman v. Georgia, 408 U.S. at 313 (J. White, concurring).
51. *Id.* at 365 (J. Marshall, concurring).

Despite strong outright disapproval of the death penalty expressed by some of the justices,[52] the Court's decision in *Furman* was only 5–4 in favor of the *Furman* defendants and striking down then-existing death penalty statutes nationwide, and its ultimate impact was relatively narrow. Rather than categorically eliminating the death penalty as unconstitutional under the Eighth Amendment, the Court held only that the existing one-jury, one-deliberation system for issuing the death penalty violated the Eighth Amendment. Although *Furman* brought the death penalty to a temporary halt by voiding nearly every death penalty statute as it currently existed, state and federal legislatures convened to rewrite their statutes to comport with the *Furman* decision's constitutional mandates.

In 1976, the Court began assessing the newly revised death penalty statutes that appeared after *Furman*. North Carolina addressed the excessive jury discretion concerns by eliminating sentencing discretion altogether and mandating the death penalty for all defendants convicted of capital crimes. However, the Supreme Court held this practice unconstitutional in 1976's *Woodson v. North Carolina*.[53] Other states adopted a more nuanced approach.

In *Gregg v. Georgia*,[54] the Court reviewed a death penalty scheme—introduced in Georgia, Texas, and Florida—that created a two-part system for finding guilt and sentencing death (referred to as "bifurcated proceedings" by the courts). A death penalty case is really two trials. First, it's a trial on the merits (Did your client commit the crime? If he or she did, was it first degree murder?). In some jurisdictions, the question of eligibility for the death penalty is answered at the trial on the merits. This means that, for the prosecution to even ask for the death penalty, it must prove a first degree murder as well as an aggravating factor that takes the case into the (allegedly) small group of cases where the death penalty can be sought. Common aggravating factors that make a first degree murder case into a capital case is the first degree murder of a police officer acting in the line of duty, or a first degree murder of a woman during a rape.

52. For a fascinating look at the personalities and politics behind this decision and the ones following 1976, take a look at Evan J. Mandery's *A Wild Justice: The Death and Resurrection of Capital Punishment in America* (2013).

53. Woodson v. North Carolina, 428 U.S. 280 (1976).

54. Gregg v. Georgia, 428 U.S. (1976).

Assuming the prosecution is able to establish both guilt beyond a reasonable doubt and eligibility as a capital case, the jury then decides whether death is the appropriate choice of punishment. At that part of the trial, the prosecution may present aggravating evidence, some of which is statutory and some of which is not. Some examples might include prior criminal record, other violent acts that were not charged or that did not result in a conviction, and victim impact evidence. Mitigation—reasons to punish with imprisonment rather than death—is any evidence that might tend to explain the client's actions—such as family history, mental health issues, or physical health matters—or the impact the client's execution would have on his or her loved ones. The rules of evidence are relaxed at a penalty phase; in most states, this means that anything that is "relevant and reliable" is admissible.[55]

Here is how it works: After a trial and a guilty verdict, the jury hears evidence in the sentencing phase, referred to as a bifurcated proceeding.[56] There are many differing death penalty statutes in the remaining death penalty states (and in federal courts), but all of them require individualized consideration for every convicted capital murderer in deciding which punishment is appropriate, death or imprisonment. The evidence considered by the jury falls into two categories: aggravating (reasons to punish with death) and mitigating (reasons to punish with imprisonment).

Nearly anything can be considered mitigating. It would be an unusual case indeed where some sort of psychological evidence relating to mitigation was not presented. But here is the rub: it is very easy for a juror to conflate mitigation with defense or excuse, even though that is not what it is at all.

The facts surrounding the crime itself are, of course, outside of the control of counsel or experts. However, both need to remember how important those facts are to the audience. The expert testifying to the accused's insanity may be technically correct, but may fail to convince the jury if the crime doesn't fit preconceived notions of madness.

CONCLUSION

As a nation, we are struggling with our identity, particularly when it comes to issues of economic fairness, racial justice, and its inevitable companion,

55. *Id.* at 164–66.
56. *Id.* at 153.

criminal justice. We fluctuate between a punitive view of the world, and an attempt to understand and address what underlies our baser actions. Defaulting to "mentally ill" allows us some distance from those actions and is a typical response to, for example, mass shootings. Perhaps it is not how different we are from those who commit these acts, but how similar that frightens us so.

Learning to listen to and then tell these stories is a start.