

# INSANE IN THE MENS REA: WHY INSANITY DEFENSE REFORM IS LONG OVERDUE

LOUIS KACHULIS\*

## ABSTRACT

While there have been advances in both the criminal justice system and the mental health community in recent years, the intersection of the two has not seen much progress. This is most apparent when considering the insanity defense. This Note explores the history and public perception of the insanity defense, the defense's shortcomings, and attempts to provide a model for insanity defense reform. I spend the first section of the Note exploring the history of the insanity defense and show where the defense sits today. The Note then examines the public perception of the insanity defense, and the news media's influence on that perception, using two recent events as small case studies. The last section of the Note proposes a new model insanity defense, and a plan to implement it.

## TABLE OF CONTENTS

I. INTRODUCTION .....	246
II. INSANITY DEFENSE – HISTORICAL IMPLICATIONS AND	

---

\*Class of 2017, University of Southern California Gould School of Law, B.S. Chemical Engineering, North Carolina State University. This Note is dedicated to those in the criminal justice system suffering from mental health issues. While we work as a society to solve the crisis that is mental health, we cannot forget those who are most vulnerable. I would like to thank Professor Elyn Saks for her guidance and direction with this Note, Chris Schnieders of the Saks Institute for his assistance, and lastly, my parents and Brittany Dunton for their overwhelming support.

CURRENT DEFINITION ..... 247

III. PUBLIC PERCEPTION OF INSANITY DEFENSE – WHAT IS  
THE MEDIA’S INFLUENCE? ..... 252

    A. EDDIE RAY ROUTH..... 255

    B. JAMES HOLMES..... 259

IV. PROPOSAL FOR INSANITY DEFENSE REFORM ..... 263

    A. INTRODUCE AND IMPLEMENT A GRASSROOTS MOVEMENT ..... 263

    B. INTRODUCE AND IMPLEMENT THE “MENTAL ILLNESS  
        CONTRIBUTION DEFENSE” ..... 266

V. CONCLUSION ..... 270

I. INTRODUCTION

Imagine the following scenario: A man is suffering from psychosis, and as a result of his psychotic state, he takes an expensive watch from a department store, not fully understanding his actions. If he is charged with theft, he will very likely not have any defense in court, even though he is clearly not culpable and did not understand that his actions were inappropriate when he committed them. If he is found guilty of theft and subsequently incarcerated, his psychosis will likely not be effectively treated in prison. Once his sentence is served, he will reenter society suffering from the same issues that sent him to prison in the first place, and could very well commit the same crime. This is a dangerous path that abuses both the mentally ill and prison resources and is unfortunately all too common.<sup>1</sup> In scenarios like this, there should be some recourse for defendants whose mental illness contributes to a crime. The closest thing that exists today is the insanity defense, which is extremely ineffective and cannot practically be used in a large number of crimes. The goals of this paper are to show why the current insanity defense is problematic, what factors lead to these problems, why these problems have not been addressed already, and to introduce a solution.

The first portion of this Note explores the insanity defense from a historical perspective. It explains the various iterations of the insanity defense that exist currently or have existed recently, and where those

---

<sup>1</sup> See E. Fuller Torrey et al., *The Treatment of Persons with Mental Illness in Prisons and Jails: A State Survey*, TREATMENT ADVOCACY CENTER 101 (2014), <http://www.treatmentadvocacycenter.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf> (finding that between 15-20 percent of all prison inmates in the United States have a serious mental illness).

iterations succeed and fail. The next section analyzes media trends in reporting on the insanity defense and how the media influences public opinion of both mental illness and the insanity defense. Two recent cases involving the insanity defense are examined in depth as examples. This section's major proposition is that the media's consistent negative portrayals of the insanity defense lead to public misunderstanding and misconception. The final section of this paper introduces a proposal for a reformed insanity doctrine. This proposal provides a solution to the many drawbacks that exist with the current defense and includes strategies to battle the negative public perception of the insanity defense. The goal of this paper is to shed light on various social and legal issues surrounding the insanity defense, and to provide solutions to some of these issues. The propositions presented in this paper represent a dramatic shift from current insanity defense doctrine, but this shift is necessary and will lead to better treatment of the mentally ill and a more complete and progressive criminal policy.

## II. INSANITY DEFENSE – HISTORICAL IMPLICATIONS AND CURRENT DEFINITION

Historically, the insanity defense has been important and necessary, but has long been viewed as controversial.<sup>2</sup> The underlying rationale in the insanity doctrine is that those who are mentally ill and cannot fully comprehend their actions should not, in justice, be held responsible for those actions.<sup>3</sup> This rationale has carried through the various iterations of the defense as it has evolved over time, with other sub-rationales being added as society has evolved.<sup>4</sup> From a policy standpoint, the insanity defense is important for a number of reasons. First, it allows for rehabilitation of the

---

<sup>2</sup> See FAYE BOLAND, *ANGLO-AMERICAN INSANITY DEFENSE REFORM: THE WAR BETWEEN LAW AND MEDICINE* 5-8 (1999).

<sup>3</sup> See James F. Hooper, *The Insanity Defense: History and Problems*, 25 ST. LOUIS U. PUB. L. REV. 409, 409-12 (2006); JOHN PARRY, *CRIMINAL MENTAL HEALTH AND DISABILITY LAW, EVIDENCE AND TESTIMONY* 4 (2009).

<sup>4</sup> See PARRY, *supra* note 3, at 4-5 (one example of a sub-rationale is that the goal of deterring other potential criminals through incarceration is virtually irrelevant with the seriously mentally ill, who "are unlikely to be deterred through punishment.").

mentally ill,<sup>5</sup> who may not be receiving proper treatment in the first place.<sup>6</sup> Further, it removes dangerous individuals from society and, through proper treatment, reduces the danger they pose to the society. Further, if it is assumed that the mentally ill who are committing crimes will keep committing crimes without treatment, the insanity defense may.<sup>7</sup> The insanity defense also protects the mentally ill, who may not fully understand the nature of their crime, from being forced into a prison system where they will not receive proper treatment.<sup>8</sup>

Satisfying these policy considerations is extremely difficult, and history has provided several insanity defense iterations, each of which has had its own set of costs and benefits. The M’Naghten Rules provide the backbone for modern insanity doctrine.<sup>9</sup> These rules originated in 1843 and constitute the first attempt at a modern defense based on a mental illness.<sup>10</sup> Under the M’Naghten Rules, the defendant is not held culpable for his actions if a mental condition prevented the defendant from knowing right from wrong.<sup>11</sup> Difficulties in interpreting the M’Naghten Rules come from textual discrepancies (i.e., how significant “know” is and whether a defendant need just know that the rules exist, or additionally understand the purpose of the rules and why they are important) as well as whether a “mental condition” covers only mental illness or further covers temporary mental issues (i.e., drug side effects). Other versions of the insanity defense include the Irresistible Impulse test, which works in conjunction with the

---

<sup>5</sup> Shannon R. Wheatman & David R. Shaffer, *On Finding for Defendants Who Plead Insanity: The Crucial Impact of Dispositional Instructions and Opportunity to Deliberate*, 25 L. & HUM. BEHAV. 167, 168 (2001) (“[t]ypically, acquitted insane defendants are committed and remain under treatment until they petition the court for a sanity hearing and are able to convince the proper authorities that they are no longer a danger to themselves or society or both.”).

<sup>6</sup> See Hooper, *supra* note 3 at 413 (“[e]ssentially one-third of the population, in a recent study, met criteria for mental disorders, and only one-third of those received treatment. This leaves millions of mentally ill persons clogging the criminal justice system because they operate on a different set of rules from the ordinary population.”).

<sup>7</sup> This is a fair assumption, as those with serious mental illnesses often have “delusions or other psychoses that prevent them from making rational choices or perceiving the law or nature of their actions[.]” PARRY, *supra* note 3, at 4. Note also, though, that some jurisdictions have criminal justice systems that flag certain offenders and repeat offenders with mental illness and divert them from traditional incarceration to alternative programs that involve treatment and rehabilitation. See, e.g., California Mental Health Services Act, 2004 Cal. Legis. Serv. Prop. 63 (WEST).

<sup>8</sup> See Hooper, *supra* note 3, at 413-14 (explaining that treatment for mental illness at prisons is severely lacking).

<sup>9</sup> BOLAND, *supra* note 2, at 1 (“[t]hey are considered to be “the point of reference for the insanity plea’s history”...”).

<sup>10</sup> *Id.*

<sup>11</sup> PARRY, *supra* note 3, at 140-41.

M’Naghten Rules and requires that the actor lacks control over his actions to satisfy the defense.<sup>12</sup> Detractors of the Irresistible Impulse test argue that the standard is too difficult to establish because medical experts cannot easily “determine whether a person chose not to exercise control or was unable to make such choice because of a mental defect.”<sup>13</sup> On the other hand, this standard can cover more ground than the traditional M’Naghten Rules, because actors that understand right from wrong, but cannot control their actions, and thus are not blameworthy, can utilize the defense.<sup>14</sup>

Modern iterations of the insanity defense typically involve a less archaic analysis and tend to focus more on psychiatric conditions. A broader insanity defense comes via the Model Penal Code, which holds that in order for the actor to claim insanity, he must have been unable to appreciate the criminality of his conduct or conform his conduct to the requirements of the law.<sup>15</sup> This standard bypasses the right versus wrong issue. Difficulty can arise over what it means for an actor to “appreciate” the nature of his actions, and how a judge or a jury interprets the meaning of “appreciate.”<sup>16</sup> Over time, courts have become more liberal in their application of the insanity doctrine, with the highest pro-defendant point happening in the 1970s with the adoption by many jurisdictions of the Durham Product Test.<sup>17</sup> This iteration holds that the defendant is not criminally liable if his actions were a result of the mental disease or defect.<sup>18</sup> Similar to the Model Penal Code, there is then no question as to the defendant’s moral or legal compass, or whether the defendant had control of his actions.

In 1981, the United States was shaken by the attempted assassination of President Ronald Reagan. John Hinckley Jr. suffered from mental illness and, over time, developed an unhealthy obsession with film actress Jodie Foster.<sup>19</sup> In an attempt to impress Foster, whom he had never met, Hinckley shot President Reagan as he was leaving a hotel in Washington, D.C.<sup>20</sup>

---

<sup>12</sup> *Id.* at 343–44.

<sup>13</sup> Carol A. Rolf, *From M’Naghten to Yates – Transformation of the Insanity Defense in the United States – Is it Still Viable?*, 2 RIVIER COLL. ONLINE ACAD. J. 1, 6 (2006).

<sup>14</sup> Some note that covering more ground may be problematic, because “everyone suffers from some compulsions.” *Id.*

<sup>15</sup> MODEL PENAL CODE §4.01 (1962).

<sup>16</sup> American Bar Association, *The Insanity Defense ABA and APA Proposals for Change*, 7 MENTAL DISABILITY L. REP. 136, 144–45 (1983).

<sup>17</sup> LINCOLN CAPLAN, *THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINCKLEY, JR.* 21–24 (1984).

<sup>18</sup> *Id.* at 21.

<sup>19</sup> *Id.* at 36–46.

<sup>20</sup> *Id.* at 42.

Hinckley's subsequent trial for murder was held under extreme public scrutiny.<sup>21</sup> Hinckley was eventually able to successfully raise the insanity defense, by showing that his actions were a result of his mental illness.<sup>22</sup> This verdict led to a large public outcry, with most of the country expressing dismay at the perceived light sentence (or lack thereof).<sup>23</sup> As a result, insanity defense reform legislations swept the nation, with most states adopting some form of the federally implemented Insanity Defense Reform Act of 1984.<sup>24</sup> This statute tightened the traditional insanity rule to requiring that a defendant must show that he does not appreciate the nature and quality or wrongfulness of the acts in order to raise the insanity defense.<sup>25</sup>

In the United States, the insanity defense in federal courts is governed by the Insanity Defense Reform Act.<sup>26</sup> After its passage, a number of states have followed suit and adopted its provisions.<sup>27</sup> Most other states use the Model Penal Code guidelines, with a few notable exceptions.<sup>28</sup> New Hampshire uses the Durham Product Test, retaining a more liberal standard.<sup>29</sup> On the flip side, four states have completely abolished the insanity defense.<sup>30</sup> Although some states still allow for verdicts that recognize mental illness, these alternative verdicts fail to fully satisfy the rationale and policy considerations for the insanity defense. As such, they are irrelevant.<sup>31</sup> Examples of these watered-down verdicts include verdicts like "Guilty but Mentally Ill," ("GBMI") or "Guilty, but Insane." Typically, verdicts like these show symbols and signals of mitigating factors, and judges will usually issue a lesser sentence when a defendant receives these verdicts. On the other hand, some jurisdictions have specifically stated that verdicts like GBMI do not entitle a defendant to a different sentence.<sup>32</sup> Many mental health advocates believe that these verdicts are harmful to

---

<sup>21</sup> *Id.* at 116-17.

<sup>22</sup> *Id.* at 97-100.

<sup>23</sup> CAPLAN, *supra* note 17, at 116-17.

<sup>24</sup> CHARLES P. EWING, *INSANITY: MURDER, MADNESS AND THE LAW*, xix-xx (2008).

<sup>25</sup> BOLAND, *supra* note 2, at 73.

<sup>26</sup> *Id.*

<sup>27</sup> EWING, *supra* note 24.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> PARRY, *supra* note 3, at 9 (those states are Kansas, Idaho, Montana, and Utah).

<sup>31</sup> EWING, *supra* note 24.

<sup>32</sup> In fact, some states have even gone so far as to say that a GBMI verdict does not preclude the defendant from receiving the death penalty. *See, e.g.,* *People v. Manning*, 883 N.E.2d 492, 499 (Ill. 2008) ("[i]n fact, a defendant who enters a GBMI plea is still eligible to receive the death penalty").

defendants who receive them, because they are not technically different from guilty verdicts, but they attach unnecessary stigma by declaring that the defendant is insane.<sup>33</sup>

Further, a few jurisdictions do not have any insanity defense, but instead use a diminished capacity standard where a defendant must show that he did not have the mens rea to satisfy the specific intent of the crime.<sup>34</sup> This bypasses all mental illness and insanity discussion, but still allows for a defendant to show that a mental illness prevented him from having the required mens rea.<sup>35</sup> The defendant typically carries the burden of proof when raising the insanity defense, and generally must show psychiatric evidence that he has met the required elements to claim insanity.<sup>36</sup> Further, there is disagreement amongst jurisdictions about just how strict of a standard of proof to place on defendants.<sup>37</sup> However, eleven U.S. states impose the burden of proof on the prosecution, requiring the prosecution to prove the defendant's sanity beyond a reasonable doubt in order to rebut the defendant's insanity defense.<sup>38</sup>

If an insanity defense is successfully raised, the defendant is found "Not Guilty [only] by Reason of Insanity."<sup>39</sup> The defendant then is typically placed in a treatment center where the defendant is treated until the defendant is deemed able to return to the society.<sup>40</sup> Many defendants spend years in treatment; some spend the rest of their lives there.<sup>41</sup>

---

<sup>33</sup> See PARRY, *supra* note 3, at 148 ("[f]or 25 years now, the ABA, the American Psychiatric Association, and the American Psychological Association have viewed the GBMI verdict as a "sham" that encourages juries to ignore the effects of mental impairments on criminal responsibility."); Hooper, *supra* note 3, at 413-14 ("[o]ne alternative that is often proposed is the guilty but mentally ill ("GBMI") option. On the surface, this seems to be a win-win situation, with persons who commit crimes punished but still treated. This is folly[.]"); Linda C. Fentiman, "Guilty But Mentally Ill": The Real Verdict is Guilty, 26 B.C. L. REV. 601, 604-05 (1984).

<sup>34</sup> CYNTHIA LEE & ANGELA P. HARRIS, CRIMINAL LAW: CASES AND MATERIALS 721-22 (3d ed. 2014).

<sup>35</sup> *Id.*

<sup>36</sup> PARRY, *supra* note 3, at 145.

<sup>37</sup> *Id.* (these standards vary from preponderance of the evidence, to clear and convincing evidence, to beyond a reasonable doubt.)

<sup>38</sup> John Ingold, *Why Colorado Law Will Make Prosecutors Prove James Holmes is Sane*, THE DENVER POST (June 7, 2013, 2:00 PM), <http://blogs.denverpost.com/crime/2013/06/07/why-colorado-law-will-make-prosecutors-prove-james-holmes-is-sane/5044/>.

<sup>39</sup> PARRY, *supra* note 3, at 145.

<sup>40</sup> Wheatman & Shaffer, *supra* note 5, at 168.

<sup>41</sup> *Id.*

### III. PUBLIC PERCEPTION OF INSANITY DEFENSE – WHAT IS THE MEDIA’S INFLUENCE?

Overall, the general public has an overwhelmingly negative opinion regarding the insanity defense.<sup>42</sup> 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.<sup>43</sup> Further, the association of the insanity defense with heinous, violent crimes<sup>44</sup> 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.”<sup>45</sup> Some common myths surrounding the insanity defense are that the insanity defense is used frequently, that it is often 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 defendants fake mental illness in order to raise the defense.<sup>46</sup> Not surprisingly, there is very little, if any, truth to any of these beliefs.<sup>47</sup> 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.<sup>48</sup> The defense is raised in less than one percent of all criminal cases, and is thought to be successful in no more than thirty percent of those cases. Ultimately, a successful insanity defense is raised in approximately one in every 20,000 criminal cases.<sup>49</sup> Raising the

---

<sup>42</sup> See *id.* at 167-68; EWING, *supra* note 24, at xxii-xxiii; Michael L. Perlin, *Myths, Realities, and the Political World: The Anthropology of Insanity Defense Attitudes*, 24 BULL. AM. ACAD. PSYCHIATRY & L. 5 (1996); Tarika Daftary-Kapur, et al., *Measuring Knowledge of the Insanity Defense: Scale Construction and Validation*, 29 BEHAV. SCI. & L. 40 (2011); Jennifer L. Skeem, et al., *Venirepersons's Attitudes Toward the Insanity Defense: Developing, Refining, and Validating a Scale*, 28 L. & HUM. BEHAV. 623 (2004).

<sup>43</sup> See Perlin, *supra* note 42, at 11-12.

<sup>44</sup> EWING, *supra* note 24, at xxiii (“[t]he insanity defense is most often associated in the public eye with serious crimes such as violent felonies.”).

<sup>45</sup> COREY J. VITELLO & ERIC W. HICKEY, *THE MYTH OF A PSYCHIATRIC CRIME WAVE* 96-97 (2006) (explaining that this view is particularly common amongst juries dealing with insanity defense cases).

<sup>46</sup> Perlin, *supra* note 42, at 11-12.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 11.

<sup>49</sup> The exact number of insanity defenses varies between sources, but the general consensus is that the success rate is somewhere around one quarter to one half of one percent. See *id.* at 11; Ross Buettner, *Mentally Ill, but Insanity Plea Is Long Shot*, April 3, 2013, N.Y. TIMES, <http://www.nytimes.com/2013/04/04/nyregion/mental-illness-is-no-guarantee-insanity-defense-will-work-for-tarloff.html> (finding that there were seven NGRI verdicts handed out in the 5,910



insanity defense is also risky. Namely, if the defense is raised and is unsuccessful, sentences will typically be larger and harsher than if the defense was not raised.<sup>50</sup>

Multiple studies have concluded that strong juror biases exist during trials when the insanity defense is used.<sup>51</sup> Often, jurors come into a trial with negative perception of the defense.<sup>52</sup> When the defense is used, these implicit feelings come to the surface, making it difficult for a defendant to successfully argue that he is not culpable by reason of his mental state at the time of the crime.<sup>53</sup> It can also be difficult for juries to fully understand how the defense operates, because there are different levels of interpretation. For example, if a statute requires that the defendant not know right from wrong, the defendant's actions can be interpreted either from moral right-wrong standpoint (she did not know what was morally just and what was not) or from a legal right-wrong standpoint (she did not know what was acceptable in the eyes of the law and what was not).<sup>54</sup> Further, misconceptions and false narratives exist throughout all of society—even amongst the highly educated. For example, an informal survey of graduate students showed that sizeable portions believe that the insanity defense is commonly raised.<sup>55</sup> This illustrates that lack of knowledge on the issue is prevalent even amongst the educated, and thus may be widespread.

The negative public perception over the insanity defense stems from a variety of factors. First, mystery exists simply because the defense is rarely raised—it is difficult for the public to be knowledgeable about something that is not commonly seen. There are also general negative stigmas towards mental illness that play into this perception, as well as a distrust of scientific

---

murder cases heard in New York state from 2003-2013); EWING, *supra* note 24, at xxii; Wheatman & Shaffer, *supra* note 5, at 168.

<sup>50</sup> Perlin, *supra* note 42, at 12. (“[d]efendants who asserted an insanity defense at trial, and who were ultimately found guilty of their charges, served significantly longer sentences than defendants tried on similar charges who did not assert the insanity defense.”).

<sup>51</sup> See Wheatman & Shaffer, *supra* note 5 (finding that mock juries who were informed of the “consequences of the NGRI verdict” were more lenient in determining a final verdict). See also Skeem, et al. *supra* note 42.

<sup>52</sup> See Wheatman & Shaffer, *supra* note 5.

<sup>53</sup> See VITELLO & HICKEY, *supra* note 45, at 97-100.

<sup>54</sup> See Robert Lloyd Goldstein & Merrill Rotter, *The Psychiatrist's Guide to Right and Wrong: Judicial Standards of Wrongfulness Since M'Naghten*, 16 BULL. AM. ACAD. PSYCHIATRY & L. 359 (1988).

<sup>55</sup> Hooper, *supra* note 3, at 412 (in his informal poll, Hooper says he hears estimates from his graduate students that up to 25-30 percent of all criminal trials involve the insanity defense; this is obviously a small sample size, but still shines light that misconceptions are not limited to the uneducated, merely the uninformed).

information.<sup>56</sup> But the most interesting and influential factor contributing to the negative view of the insanity defense is how the defense is covered and portrayed by the news media.

The news media rarely reports on the insanity defense. However, when it does report on the insanity defense, messages and narratives are sensationalized, with portrayals of defendants as dangerous and deserving of punishment.<sup>57</sup> While sensationalism is certainly found in all corners of the news cycle, sensationalizing topics that are otherwise rarely covered misleads the public.<sup>58</sup> This is particularly true in coverage of the insanity defense in which negative reports of the defense largely outweighs positive reports.<sup>59</sup> Further, most media reports on the insanity defense focus on heinous and violent crimes, which only account for a portion of all insanity defense cases.<sup>60</sup> Thus, the typical image the public receives from the media is that of a nefarious criminal trying to use the insanity defense to claim that a mental illness caused violent acts so he can escape jail time.<sup>61</sup>

From the most basic standpoint, humans form their opinions and knowledge on the information they receive and interpret.<sup>62</sup> People are persuaded by the news they get.<sup>63</sup> Studies have shown that readers tend to form opinions on quick combinations of words and phrases, whether or not those words and phrases are fully understood, or whether or not the reader has complete knowledge of the issues at hand.<sup>64</sup> Roberts and Doob further found that readers were comfortable developing and relaying opinions

---

<sup>56</sup> The American jury always operates with the inherent risk that jurors will disregard evidence arbitrarily, including accurate scientific evidence. See Perlin, *supra* note 42, at 6; Michael J. Vitacco, et al., *Measuring Attitudes Toward the Insanity Defense in Venirepersons: Refining the IDA-R in the Evaluation of Juror Bias*, 8 INT'L J. OF FORENSIC MENTAL HEALTH 62, 69 (2009).

<sup>57</sup> See VITELLO & HICKEY, *supra* note 45, at 73-78.

<sup>58</sup> *Id.* (Vitello and Hickey examined multiple studies, from the 1980s through the 2000s, that looked to see how mental illness was being reported. In the most extreme case, an analysis of all United Press International articles published in 1983 showed that 80 percent of all mentions of mental illness were associated with violence. This figure dropped considerably in the years following it, but it is an alarming example of the seriousness of the issue.).

<sup>59</sup> *Id.* at 73 ("[p]erhaps most significant is the lack of positive stories...even when articles did not focus on violence and dangerousness, they tended to highlight the dysfunction and disabilities of mental health consumers.").

<sup>60</sup> EWING, *supra* note 24, at xxiii-xxiv.

<sup>61</sup> *Id.*

<sup>62</sup> JEFFERSON L. INGRAM, CRIMINAL EVIDENCE 391 (10th ed. 2009).

<sup>63</sup> See Julian V. Roberts & Anthony N. Doob, *News Media Influences on Public Views of Sentencing*, 14 L. & THE MEDIA 451 (1990); Jennifer K. Robbennolt & Christina A. Studebaker, *News Media Reporting on Civil Litigation and Its Influence on Civil Justice Decision Making*, 1 PSYCHOLOGY IN CIVIL LITIGATION 5 (2003).

<sup>64</sup> See Roberts, *supra* note 63.

about complex criminal law topics after being provided only small amounts of information on those topics that covered only side of the conflict.<sup>65</sup> What is even more compelling in the legal field specifically is that most of the general public generates their understanding of the court system from news media reports, instead of actual experience.<sup>66</sup> This leaves the news media in a powerful position because they have considerable impact over public's understanding of the insanity defense and the links between mental health and crime. Thus, the media has a responsibility to explore these complicated issues with deftness and sensitivity. Unfortunately, these qualities are often not present in media reports on the insanity defense and mental illness, meaning the public develops its opinions on these issues out of associations, brief reporting, and basic cognitive interpretation.

The two recent cases that exemplify this idea are the cases of Eddie Ray Routh (Chris Kyle murder) and James Holmes (Aurora, Colorado movie theater shooting). These cases involved horrific crimes brought on by deranged individuals that caught immense public interest. Both of these defendants unsuccessfully raised insanity defenses, claiming that mental illness made it so that they did not understand the nature or appreciate the severity of their crimes. The high-profile nature of these cases, and the overwhelming scorn towards these individuals gave the public a negative view of the insanity defense. In both cases, a Not Guilty by Reason of Insanity (NGRI) verdict was not successful. These sensationalized portrayals of insanity defense cases foster the public's belief that the insanity defense allows defendants to get off easy or puts dangerous people back on the streets.

#### A. EDDIE RAY ROUTH

Eddie Ray Routh is a Marine Corps veteran who was convicted of murdering Chris Kyle, a former Navy SEAL, best known as a war hero and as one of the most prolific snipers in American military history.<sup>67</sup> Routh served tours of duty in Iraq and Haiti, and after returning to the United States, he struggled with adjusting to civilian life because he suffered from schizophrenia and post-traumatic stress disorder ("PTSD").<sup>68</sup> He spent time

---

<sup>65</sup> *Id.*

<sup>66</sup> Robbenolt, *supra* note 63, at 11.

<sup>67</sup> Kevin McSpadden, *Eddie Ray Routh Found Guilty of Murdering American Sniper Chris Kyle*, TIME (Feb. 24, 2015), <http://time.com/3721574/eddie-ray-routh-chris-kyle-guilty-chad-littlefield/>.

<sup>68</sup> Laura Collins, *EXCLUSIVE: 'He'd Rather Take the Death Penalty Than Sit Behind Those Bars Forever.'* Father of Veteran Who Killed American Sniper Chris Kyle Tells How He is Already

in Department of Veterans Affairs (“VA”) hospitals and mental health facilities trying to recover from effects of his deployments.<sup>69</sup>

Kyle was a decorated Navy SEAL and was well known and widely regarded for his service during the Iraq War.<sup>70</sup> After completing his military service, Kyle became active in military-focused nonprofit activities, in which he helped disabled veterans cope with the difficulties of adjusting to civilian life after a military career.<sup>71</sup> In that capacity, Kyle was paired with Routh, and the two were to spend some time together with Kyle acting as a life coach of sorts.<sup>72</sup> Kyle and his friend Chad Littlefield arranged to spend February 2, 2013 with Routh at a shooting range.<sup>73</sup> Routh had been reportedly suffering from bouts of psychosis in the period leading up to the event. By Kyle’s and Littlefield’s accounts, Routh was acting in an off-putting manner throughout the day.<sup>74</sup> That afternoon, Routh shot and killed both Kyle and Littlefield.<sup>75</sup>

The public interest in this case was immense, which is not surprising considering Kyle’s popularity as a war hero.<sup>76</sup> Further complicating matters, a successful Academy-Award winning film adaptation of Kyle’s life (which mentioned, but did not feature or depict his death) was released shortly before Routh’s trial for murder began.<sup>77</sup> Routh’s attorneys invoked the

---

*Mourning the Loss of his Own Son*, DAILY MAIL (Mar. 13, 2015), <http://www.dailymail.co.uk/news/article-2892777/He-d-death-penalty-sit-bars-forever-Father-veteran-killed-American-Sniper-Chris-Kyle-tells-mourning-loss-son.html>.

<sup>69</sup> *Id.*

<sup>70</sup> Christopher Klein, *The Real-Life Story Behind “American Sniper”*, HISTORY.COM (Jan. 21, 2015), <http://www.history.com/news/the-real-life-story-behind-american-sniper>.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Dan Lamothe, *The Fatal Intersection of Navy SEAL Chris Kyle and the Marine Veteran Who Killed Him*, WASH. POST (Feb. 13, 2015), <https://www.washingtonpost.com/news/checkpoint/wp/2015/02/13/first-days-of-american-sniper-murder-trial-leave-questions-unanswered/>.

<sup>75</sup> *Id.*

<sup>76</sup> See Manny Fernandez & Kathryn Jones, *‘American Sniper’ Trial Sets Town on Edge*, N.Y. TIMES (Feb. 9, 2015), <http://www.nytimes.com/2015/02/10/us/trial-in-killing-of-chris-kyle-american-sniper-model-sets-town-on-edge.html>.

<sup>77</sup> Many news outlets referred to this trial as “The *American Sniper* Trial,” in reference to the film. See, e.g. Dan Lamothe, *‘American Sniper’ Trial: ‘I Shot Them Because They Wouldn’t Talk to Me.’*, WASH. POST (Feb. 13, 2015), <https://www.washingtonpost.com/news/checkpoint/wp/2015/02/13/american-sniper-trial-i-shot-them-because-they-wouldnt-talk-to-me/>; Gregg Jarrett, *At ‘American Sniper’ Trial, Questions of Sanity vs. Insanity*, FOX NEWS (Feb. 17, 2015), <http://www.foxnews.com/opinion/2015/02/17/at-american-sniper-trial-questions-sanity-vs-insanity.html>; Fernandez & Jones, *supra* note 76; Collins, *supra* note 68.

insanity defense and argued that Routh did not know that what he was doing was wrong.<sup>78</sup> During the trial phase, defense attorneys brought a psychiatric expert to the stand, who testified that Routh was suffering from schizophrenia, not PTSD, and that he suffered from “paranoid delusions.”<sup>79</sup> For example, Routh believed that Kyle was going to possess Routh’s soul and that Routh was receiving signals in his head from local radio stations.<sup>80</sup> Routh’s insanity plea fell short, as jurors found Routh guilty of first-degree murder and sentenced him to life in prison without the possibility of parole.<sup>81</sup> A key piece of evidence weighing in favor of the prosecution was a taped police interrogation hours after the event in which Routh said that he understood what he did was wrong; in that same interrogation, Routh explained to police that he shot Kyle because if he “did not take [Kyle’s] soul, [Kyle] was going to take [Routh’s].”<sup>82</sup> The public nature of the trial coupled with Kyle’s reputation as a hero aroused intense public disapproval towards Routh. Regardless of the merits of Routh’s insanity defense, the news media’s reports on the case and on Routh’s use of the insanity defense were overwhelmingly negative.<sup>83</sup> Most reports of public opinion showed that the public sought “justice” in the form of Routh’s incarceration. Indeed, many in the public, especially those in Texas where the events and the trial took place, expressed regret that prosecutors were not seeking the death penalty.<sup>84</sup> This sentiment was so strong that Erath County District Attorney, Alan Nash, published an apologetic explanation in the Stephenville Empire-Tribune for why he did not seek the death penalty.<sup>85</sup> Further, other reports

---

<sup>78</sup> Terrence McCoy, *Trial of ‘American Sniper’ Chris Kyle’s Killer: Why the Insanity Defense Failed*, WASH. POST (Feb. 25, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/02/25/trial-of-american-sniper-chris-kyles-killer-why-the-insanity-defense-failed/>.

<sup>79</sup> Mike Spies, *Inside the Tortured Mind of Eddie Ray Routh, the Man Who Killed American Sniper Chris Kyle*, NEWSWEEK (Nov. 23, 2015, 12:22 PM), <http://www.newsweek.com/2016/01/08/inside-tortured-mind-man-who-killed-american-sniper-chris-kyle-397299.html>.

<sup>80</sup> *Id.* Routh’s interactions with medical staff are particularly alarming, and clearly indicate that he was not fit to stop receiving medical care when he did.

<sup>81</sup> McCoy, *supra* note 78.

<sup>82</sup> Spies, *supra* note 79.

<sup>83</sup> See generally Lamothe, *supra* note 74; Fernandez & Jones, *supra* note 76; Dan Lamothe, *Marcus Luttrell, Navy SEAL Friend of Chris Kyle, Warns Killer Eddie Ray Routh Following Verdict*, WASH. POST (Feb. 25, 2015), <https://www.washingtonpost.com/news/checkpoint/wp/2015/02/25/marcus-luttrell-navy-seal-friend-of-chris-kyle-warns-killer-eddie-ray-routh-following-verdict/>.

<sup>84</sup> Fernandez & Jones, *supra* note 76.

<sup>85</sup> Alan Nash, *In His Own Words: DA Alan Nash Talks About the Decision to not Seek Death for Eddie Routh*, STEPHENVILLE EMPIRE-TRIBUNE (Apr. 24, 2015), <http://www.yourstephenvilletx.com/article/20150424/News/304249912>.

expressed doubt that Routh actually suffered from mental illness.<sup>86</sup> This belief that Routh was faking schizophrenia may have stemmed from the prosecution's claims that Routh's psychosis resulted from the combination of Routh's personality disorder and his use of alcohol and drugs.<sup>87</sup> Perhaps the most negative reporting came from local news outlets in the jurisdiction in which Routh was tried. Texas newspapers that covered Erath County (the jurisdiction in which Routh was arrested and ultimately charged) were particularly negative in their reporting on Routh's attempt at an insanity plea. Included in very few reports were detailed explanations of the intricacies of the insanity defense or what challenges Routh faced by raising it. Any discussion of the insanity defense was typically in passing, with the insinuation that it would be brought up as Routh's last-ditch effort to avoid jail time.<sup>88</sup> Routh's overwhelming negative public persona thus was paired with the insanity defense, which caused the public association with the defense to become increasingly negative. Because reports omitted the reality and practicality of the insanity defense, a reader would associate Routh with the defense, and thus associate guilt with insanity.

Where did this reporting go wrong? Was it necessarily wrong? Did it fuel false narratives surrounding the insanity defense? The first note here is that the reporting does not seem to have had bad intent. There were few declarations that the insanity defense is harmful or that it has no place in the legal system. It does not appear that reporters wanted to pass judgment on the insanity defense, positively or negatively. Instead, the focus was on its application in Routh's case, which evoked a decidedly anti-defendant animus from the beginning, especially from the local perspective. Because of that negative perception of the case, any mention of the insanity defense would be tied to negativity.

Readers associate key phrases, headlines, and other small portions of text with emotions a particular article evokes.<sup>89</sup> By mentioning the insanity defense in short articles and reports that negatively portrayed Routh, the public may have associated the insanity defense with grim topics like heinous crimes, violence, or evil. A fairer analysis would have included more depth on the insanity defense, and would have explained the necessary elements of an NGRI verdict, the procedure after the verdict, and the

---

<sup>86</sup> Mark Davis, *Can Eddie Ray Routh Get a Fair Trial?*, DALLAS MORNING NEWS (Jan. 27, 2015), <http://www.dallasnews.com/opinion/latest-columns/20150127-mark-davis-can-eddie-ray-routh-get-a-fair-trial.ece>.

<sup>87</sup> Spies, *supra* note 79.

<sup>88</sup> See, e.g. McCoy, *supra* note 78.

<sup>89</sup> Roberts, *supra* note 63.

likelihood of success given the historical difficulties defendants have in raising the defense. Fully explaining Routh's history of mental health issues would have also garnered a fairer perception of the insanity defense. Readers would have been less inclined to associate the insanity defense with a defendant who fakes mental illness if that concept had been dispelled through the reporting of the case history. Media outlets could have also taken this opportunity to explore the issue of mental health of the veterans, or to examine mental health more broadly as an epidemic.

There is a fine line to be drawn in how these types of cases are presented to the public. The crime that Routh perpetrated was heinous, extreme, and unjustified. The fact that the victims were trying to help Routh and one victim had a large and highly positive public profile meant that the public negatively perceived Routh from the beginning. No matter how the media presented the case, the public was likely to view Routh in a negative light, meaning the insanity defense likely never had a chance at being construed positively or even neutrally. However, reporters and writers removed any hope of neutrality by failing to examine the insanity defense, and readers were left with a negative portrayal of the insanity defense. The fine line between reporting Routh's full story that include details of his mental issues on one side and supporting Routh, or at least being sympathetic, on the other side. Because of Routh's negative public image from the outset, it is clear why the media wanted to avoid appearing sympathetic to Routh. But, reporters would not have to cross this line to shed some of the public's negative perception towards the insanity defense, and could have simply written more detailed and more complete analyses that widened the picture.

#### B. JAMES HOLMES

Another recent case that drew a large amount of public interest was that of James Holmes, a graduate student with severe mental illness who perpetrated a mass shooting in an Aurora, Colorado movie theater on July 20, 2012.<sup>90</sup> Holmes killed twelve people and injured seventy others.<sup>91</sup> Holmes plead the insanity defense, claiming that his mental state prevented him from knowing right from wrong when he committed his acts.<sup>92</sup> Holmes

---

<sup>90</sup> Jack Healy, *Life Sentence for James Holmes, Aurora Theater Gunman*, N.Y. TIMES (Aug. 7, 2015), <http://www.nytimes.com/2015/08/08/us/jury-decides-fate-of-james-holmes-aurora-theater-gunman.html>.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

buttressed his claims with psychiatric evidence that showed that he suffered from schizoaffective disorder.<sup>93</sup> Holmes was found guilty and sentenced to life in prison without the possibility of parole after two psychiatrists testified that he was “legally sane” and that his mental illness did not prevent him from understanding right from wrong or from forming intent to commit his actions.<sup>94</sup>

In Holmes’s case, a guilty verdict was less plausible than in Routh’s. While Holmes clearly suffered from mental illness, his attack was premeditated and his psychiatric evaluations before trial revealed his mental health issues were more in line with personality disorders, as opposed to psychosis or other conditions that would affect his state of mind.<sup>95</sup> Holmes had kept a diary in the time leading up to the attack in which he documented his step-by-step plan to commit the crime.<sup>96</sup> He purchased firearms, ammunition, and assault equipment in the weeks leading up to the attack, and booby-trapped his apartment with explosives.<sup>97</sup> His conduct conformed not with a psychotic break, but instead portrayed a person with severe underlying personality defects. In terms of the insanity defense, this meant that an NGRI verdict was extremely unlikely from the outset. It should be noted that the burden of proof in an insanity defense in Colorado lies with the prosecution instead of the defense, meaning it could be potentially easier to obtain an NGRI verdict.<sup>98</sup> Holmes’s use of the insanity defense was probably his effort to mitigate guilt, rather than outright avoidance. This was likely a symbolic defense, and may have further been a rare case of a defendant using the insanity defense as a long shot defense, knowing that any plea would likely lead to life in prison without parole.

Similar to the Routh case, Holmes’s also garnered immense public interest, and, as can be easily imagined, the public held an extremely negative opinion of him. Here again, regardless of the merits of Holmes’s insanity defense, the media’s portrayals of him and of the insanity defense were misleading at best and sensational at worst. They failed to accurately portray the complex nature of mental illness and the defense. Headlines like “Will Insanity Defense Save James Holmes?,” “Will Mental Illness Save

---

<sup>93</sup> *Id.* (two psychiatrists testified that Holmes was mentally ill).

<sup>94</sup> *Id.*

<sup>95</sup> Ann O’Neill, Ana Cabrera & Sara Weisfeldt, *A Look Inside the “Broken” Mind of James Holmes*, CABLE NEWS NETWORK (June 10, 2015), <http://www.cnn.com/2015/06/05/us/james-holmes-theater-shooting-trial/>.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*



Holmes' Life?," and "Colorado Shooter's Urge to Kill Could Set Him Free" are grossly misleading and factually inaccurate, but were unfortunately commonplace (whether Holmes had intent or was acting solely in response to a psychotic state is arguably part of the insanity defense argument, and a title claiming Holmes could be set free by virtue of the insanity defense is entirely incorrect.)<sup>99</sup> Similar to Routh's case, reports of the trial did not explain the procedure of the insanity defense, its importance in American jurisprudence, and Holmes's likelihood of securing an NGRI verdict. Outside the sensationalist takes, most commentary about the insanity defense was in passing by merely mentioning the defense from a procedural standpoint.<sup>100</sup> Like the Routh case, this case gave the public another opportunity to associate the insanity defense with harm, horror, and overall negativity. The public was poorly served by the media's incomplete discussion of the insanity defense.

Here, the problems do not come necessarily from poor reporting or failing to provide a complete picture, but instead from bad luck and timing. Holmes's was a high-profile case in which Holmes's insanity defense was probably illegitimate. Not only his attack was clearly planned, but also he seemed able to discern the consequences of taking a life.<sup>101</sup> This case was also poorly timed because this was indeed one of those cases that perpetuate specific public myths. A reasonable person could have concluded from this case that the insanity defense was Holmes's last-ditch, long shot effort at acquittal. A person with pre-conceived notions of the insanity defense could also take that conclusion a step further and believe that the insanity defense is a get out of jail free card, or that the insanity defense lets killers to return to the society. It is not wrong for the media to report extensive details about this case, or even wrong for the media to portray Holmes as a troubled person with serious personality and moral defects; these are details that are important for the public to know, especially in a situation as horrifying as this one. However, the media contributed to public's negative perception by

---

<sup>99</sup> Sadie Gurman, *Will Insanity Defense Save James Holmes?*, HUFFINGTON POST (Apr. 27, 2015), Accessed at:

[https://web.archive.org/web/20151116045431/http://www.huffingtonpost.com/2015/04/27/james-holmes-insanity-defense\\_n\\_7151138.html](https://web.archive.org/web/20151116045431/http://www.huffingtonpost.com/2015/04/27/james-holmes-insanity-defense_n_7151138.html); Amy Dardashtian, *Colorado Shooter's Urge to Kill Could Set Him Free*, HUFFINGTON POST (July 17, 2015), [http://www.huffingtonpost.com/amy-dardashtian/colorado-shooter-schizo-o\\_b\\_7531442.html](http://www.huffingtonpost.com/amy-dardashtian/colorado-shooter-schizo-o_b_7531442.html). (This article is particularly problematic, as it contains numerous claims that directly invoke harmful, myth-perpetuating ideas (i.e., "There should be no get out of jail free card for mass shooters"), contains little to no useful legal content, and further is written by an attorney.)

<sup>100</sup> See Gurman, *supra* note 99.

<sup>101</sup> See O'Neill, *supra* note 95 ("[t]he defendant acknowledged to Reid that shooting people is 'legally wrong.'").

discussing the insanity defense lightly in relation to the case. Holmes was not the type of defendant that the insanity defense aims to serve, a fact that is lost to the public without proper explanation. Instead, the myths surrounding the insanity defense percolated and permeated into the conscience of the general public. Just like with Routh, reporters in Holmes's case would have done better service to the public by providing a more thorough legal analysis.

Both the Routh and the Holmes cases show the extreme nature of media reports on the insanity defense, and drive home a key point: the association of the insanity defense with extreme crimes perpetuates myths and misconceptions that surround the defense. While both cases may not have been ideal situations in which to raise the defense, the fact that they are the only major cases involving the defense in the public eye means the association between extreme crime, insanity, and general negativity is very tight. Aside from the Routh and Holmes cases, only a handful of cases involving the insanity defense in any context were reported on in 2014 and 2015.<sup>102</sup> Further, most of those reports mentioned the defense briefly, only to the extent that a particular defendant raised it or planned on raising it. Since the media has not reported on many other insanity defense cases, the public has drawn its ideas of the insanity defense on only the most extreme examples, whether they are indicative of a larger picture or not.

Despite these two cases, there are positive signs in how the media is handling the insanity defense. The New York Times<sup>103</sup> and the Christian Science Monitor<sup>104</sup>, among other outlets, published insightful and in-depth pieces in the last few years on the insanity defense that dug into the complex nature of the doctrine and shed a realistic light on what challenges defendants face in attempting to raise it. Additionally, while the James Holmes was on trial in Colorado, the Denver Post followed up on a handful of defendants who successfully raised the insanity defense at trial and were subsequently rehabilitated to see how they had coped and adjusted to

---

<sup>102</sup> A brief search of the New York Times online database, for example, provides only thirteen results from 2014, 2015, and 2016 that even mention the insanity defense, aside from the Holmes and Routh cases.

<sup>103</sup> In 2011, the New York Times published an extensive series of opinion pieces, written by prominent legal scholars and psychiatrists that debated the merits, challenges, and issues with the current insanity doctrine from practical and theoretical perspectives. Alan M. Dershowitz, et al., *Who Qualifies for the Insanity Defense?*, N.Y. TIMES (Jan. 20, 2011), <http://www.nytimes.com/roomfordebate/2011/01/20/who-qualifies-for-the-insanity-defense>.

<sup>104</sup> Patrik Jonsson, 'American Sniper' and Aurora Trials: Insanity Defense a Tough Standard to Meet, CHRISTIAN SCIENCE MONITOR (Feb. 20, 2015), <http://www.csmonitor.com/USA/2015/0220/American-Sniper-and-Aurora-trials-insanity-defense-a-tough-standard-to-meet-video>.

reentering society.<sup>105</sup> Journalistic endeavors like these are rare, but the fact that they exist is promising, and helps provide hope that there will one day be no mystery or misconception surrounding the insanity defense.

#### IV. PROPOSAL FOR INSANITY DEFENSE REFORM

The insanity defense in its current state is problematic and unsatisfactory. The strict nature of the defense means that it is raised only in extreme situations and is rarely successfully. Further, false narratives that dominate the defense cause jurors to often be unsympathetic to defendants when the defense is applied. From a practical standpoint, the insanity defense does not do much of anything. It may be helpful in some cases, but overall, the defense cannot be commonly used or even considered. Among other reasons why the insanity defense should be reformed, the rationale for the insanity defense is rarely satisfied. The mentally ill are not served when they are incarcerated instead of given treatment for their condition. Further, it is often difficult to get psychiatric evidence into a trial without using the insanity defense.<sup>106</sup> This evidence should be admitted more often, as it is important for determining if a defendant has the requisite mens rea for a crime, as well as if a defendant should be incarcerated or sent to a treatment center if found guilty.

##### A. INTRODUCE AND IMPLEMENT A GRASSROOTS MOVEMENT

The first part of this proposal is to start a grassroots campaign to raise awareness about myths and realities surrounding mental illness and the insanity doctrine. If the general public is educated on the insanity defense, and if the media can alter how it reports on the insanity defense, acceptance of a revised defense that has a more liberal and flexible standard will be easier to achieve. Myths that currently surround the defense must be dissolved, news media portrayals of mental illness and of the insanity defense must be changed from a theme of danger and harm to a fact-based, non-sensationalist approach, and the public and media attitude towards the insanity defense must become neutral.

One reason a campaign is necessary for insanity defense reform is a

---

<sup>105</sup> Kirk Mitchell, *Killers Who Pleaded Insanity Walk Free from State Hospital in Colorado*, THE DENVER POST (Apr. 5, 2015), [http://www.denverpost.com/news/ci\\_27851639/insanity-defense-many-colorado-killers-walk-free-from](http://www.denverpost.com/news/ci_27851639/insanity-defense-many-colorado-killers-walk-free-from) (while the article is fairly positive, the title is still somewhat problematic and misleading).

<sup>106</sup> Mental Health America, *Position Statement 57: In Support of the Insanity Defense*, (June 8, 2014), <http://www.mentalhealthamerica.net/positions/insanity-defense>.

simple “who.” Who will bring to light mental health issues? Who will fight for the mentally ill? Who will institute change amongst the public? Who are the mentally ill? Why these questions are problems is because those with mental health issues often cannot advocate for themselves.<sup>107</sup> Mental illness affects a large section of the population to some degree, and those with serious or severe mental illness often do not have the capacity to handle day to day life, much less advocate for mental health awareness.<sup>108</sup> Further, those with mental illness are often amongst the most vulnerable, and include the elderly, veterans, and homeless persons.<sup>109</sup> Because of the difficulty for these groups to stir the pot enough to bring necessary change, a campaign driven by those affected by mental health issues as well as those who are not is critical. People from all backgrounds and experiences need to band together to campaign for those who need help the most, and who might not have the ability to fight the battle themselves.

Grassroots campaigns have long been used to bring social change and awareness in the United States. With a changing media landscape and a progressive American population, this campaign should focus on new media and on a younger demographic. A successful campaign should be based on what has worked already, and probably the most relevant and visible current grassroots driven effort is the Black Lives Matter movement, which could serve as an excellent model for a mental health and insanity defense awareness campaign. The Black Lives Matter movement is self-described as a “call to action and a response to the virulent anti-Black racism that permeates our society.”<sup>110</sup> As a response to a 2013 shooting of an unarmed black teenager by a volunteer neighborhood watch personnel, Twitter and other social media venues became engulfed with hashtags proclaiming “#BlackLivesMatter,” as young activists who were tired of racial injustice moved to reach the public and gain mass support.<sup>111</sup> Soon, what started as an electronic exchange of ideas about race and inequality in

---

<sup>107</sup> National Alliance on Mental Illness (NAMI), *NAMI Public Policy Platform* (10th ed., Sept. 2014), [https://www.nami.org/NAMI/media/NAMI-Media/downloads/Public-Policy-Platform\\_9-22-14.pdf](https://www.nami.org/NAMI/media/NAMI-Media/downloads/Public-Policy-Platform_9-22-14.pdf).

<sup>108</sup> National Alliance on Mental Illness (NAMI), *Mental Health Facts in America*, <https://www.nami.org/NAMI/media/NAMI-Media/Infographics/GeneralMHFacts.pdf> (last visited Mar. 2, 2016) (indicating that the total percentage of Americans with some type of mental illness is somewhere around 20 percent).

<sup>109</sup> See NAMI, *supra* note 108.

<sup>110</sup> Black Lives Matter, *About*, <http://blacklivesmatter.com/about/> (last visited Mar. 2, 2016).

<sup>111</sup> Elizabeth Day, *#BlackLivesMatter: The Birth of a New Civil Rights Movement*, THE GUARDIAN (July 19, 2015), <http://www.theguardian.com/world/2015/jul/19/blacklivesmatter-birth-civil-rights-movement>.

America became a full-fledged movement, with organized protest events, demonstrations, and even physical chapters with regular meetings.<sup>112</sup> The Black Lives Matter movement transformed from a small online-only community to a large electronic and physical network whose ideas were injected into the general public, the mainstream media, and politics.<sup>113</sup> The main driver of all of this was social media, which facilitated mobilization of people, organization, and discussion of ideas.<sup>114</sup> A successful mental health awareness campaign should be modeled after Black Lives Matter, with roots in social media and young progressives, whose passion and ingenuity can spark discussion that can lead to a powerful discourse. The questions as to whether Black Lives Matter has staying power as a full-on movement, or whether it will be a historical footnote<sup>115</sup> are not particularly relevant to a mental health awareness campaign. The goal of this grassroots campaign will be education, not reform. The reform will occur through legislation and policy shifts, but the grassroots campaign only needs to focus on educating the public.<sup>116</sup> A general public that understands the issues and knows the history of the problems will take the actions necessary to institute change and innovation.

A grassroots campaign for mental health and insanity defense awareness can start with spreading messages via all non-traditional media, including general Internet sources, blogs and the aforementioned social media. From there, seminars and other events can be held at community centers and schools that would answer questions the public might have, and could potentially highlight individuals that were able to successfully raise the insanity defense, emphasizing how these individuals now lead rehabilitated lives. Attorneys and others from the legal community would also be key in these events, to relay the legal aspects of mental illness and the insanity defense that are misperceived. The final tier of the campaign is to embed it into traditional media, and actively persuade news outlets to report in non-sensationalist ways on insanity cases and realities of mental illness. This can include stories about defendants who raised the defense successfully and have since then rehabilitated and reentered society.

---

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> See Black Lives Matter, *supra* note 110 (a question to which Black Lives Matter responds: "This is Not a Moment, but a Movement.").

<sup>116</sup> This differs from Black Lives Matter, whose primary objectives involve much needed societal change. Black Lives Matter, like all socio-political movements, promotes awareness of racial issues, but the point is always to change the way America operates and dispose of systemic racism.

Compassionate stories like this exist currently, but do not receive a lot of mainstream media attention.<sup>117</sup> From the media, truth and awareness can trickle into the general public and into the political arena, where real change can be made. With truth and compassion, this campaign can grow from a small space into something larger that has a real effect on the general public.

The media overall has a lot of space in which reporting and analysis can improve, but a major part of the improvement stems from a change in mindset. One goal of the grassroots campaign is to totally revamp the media's relationship with mental health and with criminal defendants with mental illness. In addition to covering a wider spectrum on mental illness, as mentioned above, it is extremely important for the media to completely change how issues of mental health are approached from a general standpoint. While any positive reporting helps dispel negative perception and stigma, it can only go so far if news outlets continue to tie the insanity defense with negative stories and cases. The media must be able to provide the public with full pictures of the defense and of defendants who use the defense. One way to achieve this may be by introducing more legal and mental health experts into the media landscape. A cable news channel, for example, could easily invite attorneys or psychiatrists on a panel to discuss mental health issues instead of relying on newscasters to relay information. In the same vein, print journalists can better serve their audiences by consulting with experts that have experience in mental health. The awareness portion of the reform proposal ties in here, as to make changes like this, media personnel will need open minds and hearts. So, in brief, the importance of raising mental health and insanity defense awareness is not just to educate the public, but also to inject into the media knowledge and understanding that can facilitate intelligent and accurate conversation. The media has the power to help change the perception of mental illness and of the insanity defense and, if the media fully understands these issues, has the power to facilitate actual reform.

#### B. INTRODUCE AND IMPLEMENT THE "MENTAL ILLNESS CONTRIBUTION DEFENSE"

The second part of this proposal is to revise the insanity defense from the ground up. In revising the defense, the first step is to rename it. The word "insanity" is outdated and stigmatized.<sup>118</sup> The name I have proposed

---

<sup>117</sup> Mitchell, *supra* note 105.

<sup>118</sup> The term "insanity" is almost never used in medicine, and has no real medical definition.

is “Mental Illness Contribution Defense,” which, as the explanation below will reveal, is a more accurate description of how the defense operates, and avoids using harmful or stereotyped language.

Below are the elements of a Mental Illness Contribution Defense: 1) the actor had a serious mental illness<sup>119</sup> at the time<sup>120</sup> of the crime; and 2) the mental illness contributed to the crime.<sup>121</sup>

If the elements are satisfied, the actor can raise the defense, but the actor does not necessarily secure a “Not Guilty” verdict. Instead, a successful defense triggers separate sentencing guidelines, depending on the magnitude the mental illness contributed to the crime. If the mental illness did not fully contribute to the crime, then the verdict is “Guilty.” All successful defenses include treatment for mental illness followed by incarceration if necessary. The sentencing guidelines are approached using a contribution standard, much like the concept of contributory negligence. If mental illness contributed to the crime in a small way, the actor receives a slightly smaller sentence than what a non-mentally ill defendant would receive, and is incarcerated after treatment is successful.<sup>122</sup> The time of treatment would count as part of the sentence time. For example, if someone is sentenced to five years in prison, and is treated in a mental hospital for two years, he would have to serve three years in prison in order to complete his sentence. If mental illness contributed to the crime in a larger magnitude, the actor receives a shorter sentence, and still receives treatment. The thought here is that many cases where this defense is raised would lead to situations in which the defendant spends his sentence being treated (i.e., a two year sentence, and three years of treatment). Further, if the actor’s mental condition fully contributed to the crime (i.e., he was in a psychotic state and had no awareness of his actions), a verdict of Not Guilty is awarded, but the actor must undergo treatment until it is shown that he has successfully been treated and can safely rejoin the public. This is similar

---

VITELLO & HICKEY, *supra* note 45, at 3-15.

<sup>119</sup> The inclusion of serious mental illnesses only means that the defense is aimed at treatable conditions, and does not offer protection for defendants with personality disorders, among other things.

<sup>120</sup> This can be shown with psychiatric records. If the defendant was not seeing a psychiatrist at the time of the crime, a psychiatric evaluation can be attempted to show that the defendant was mentally ill.

<sup>121</sup> Evidence does not need to be shown that the actor did not know right from wrong, or that the crime was a product of mental illness, but instead that mental illness contributed in some way to the actor’s commission of the crime.

<sup>122</sup> Incarceration here would not necessarily put a mentally ill defendant with the general prison population, which could be harmful in many ways to someone who just underwent treatment for mental illness.

to the current insanity doctrine, but does not apply stigmatized, harmful terminology in its conviction.<sup>123</sup>

By using a contribution-based standard, multiple goals are achieved. First, the primary rationale that has historically driven the insanity defense is satisfied, as a contributory standard keeps those who should not be held culpable for their crimes from being held responsible. Those whose mental illness contributes fully to their crime are still not blamed. Further, the new standard promotes rehabilitation of the mentally ill by providing treatment services for convicted defendants if mental illness was involved in the crime in any capacity. This keeps more people with mental illness away from the prison system, at least until they have been treated. A tangential theory here is that recidivism will decrease, as successfully treated patients will be less likely to commit crimes once the sentence has been served. Lastly, a contribution-based standard creates a defense that can be practically used. By foregoing an all-or-nothing mentality, the defense is far more accessible, and can be used by more defendants that deserve relief.

Further, by embracing a contribution-based standard, criminal policy will take a positive step forward. More than half of the U.S. prison population is made up of prisoners with some mental illness, and this group is immensely undertreated from a medical standpoint.<sup>124</sup> The current state of mental health treatment in prisons simply does not serve the interests of the mentally ill or of the public. By diverting a portion of this population, that is, the population of those with mental illness who would ordinarily be incarcerated, the issue of underserved mentally ill prisoners is alleviated somewhat. The practice of treating mental illness while patients are incarcerated is ineffective and can be avoided if these patients are treated before serving prison sentences. While this is not the primary rationale behind insanity defense reform, it certainly shows the power and necessity of reimagining the insanity defense.

Reforming the insanity defense to a mental health based approach could also lead to reforms in the criminal justice system, which could trickle out to other sectors in society. The criminal justice system may be more able to meet the needs of mentally ill offenders, and may be much more entrenched with the mental health concepts. Judges could understand more clearly how to take mental health into consideration when presiding over a case, attorneys could better understand how to argue in favor of their clients

---

<sup>123</sup> In the rare case that an actor's mental illness contributed to the crime, but the actor had undergone successful treatment after the crime and before their sentence, the shortened sentence still applies, but the defendant would bypass the treatment phase and is simply incarcerated.

<sup>124</sup> Torrey, *supra* note 1.



when those clients have mental health issues, and defendants with mental health issues would be obviously served through innovative sentencing procedures. Prisons would be more prepared to handle inmates with mental health problems if the system as a whole better understood mental health. Because prisons may hold less inmates with ongoing or severe mental illness, inmates may be better served and prisons themselves may be better able to meet their needs. If the legal community moves forward with fresh, new ideas about mental health, the rest of society can follow and also move forward with the same ideas. Because the focus of law will be on rehabilitation of the mentally ill, society will recognize the value of rehabilitation and could embrace changes. All in all, insanity defense reform could lead to a better, more progressive society that is able to identify mental health issues and move forward towards solving those issues.

There are potential issues that could be present when the standard is implemented, but over time those issues may go away. The primary concern is interpretation and execution of the defense. Even if a defendant satisfies the elements required to use the defense, a judge could wrongly apply the magnitude of contribution and force a longer than deserved sentence upon the defendant. This issue would get remedied over time, though, as higher courts would be able to interpret appealed cases to set the common law. As time goes on and more successful defenses are raised, courts will develop guidelines that will prevent rogue judges from misapplying sentences. A different issue is the potential for abuse in treating patients. A poor treatment system could lead to situations where patients do not receive complete treatment, but are sent to the next phase of the sentence – incarceration – too early. This situation defeats the purpose of having a revised defense, as mentally ill defendants are stuck in the same situation as before: incarcerated with no recourse. This is a compelling problem, but the threat of mistreatment is an inherent risk present in any rehabilitation program.

Detractors may point to this new iteration of a mental health-based defense as being too lenient, or not doing enough to punish criminals. However, this argument does not hold up against the defense. This mindset is antiquated and is based both on support for an incarceration-heavy model of punishment that does not promote societal evolution and on current myths that were dispelled earlier. Most of the detraction should easily be proven wrong just by exposing to the masses the realities of the current insanity defense. Likewise, some individuals may serve longer sentences due to their treatment than they would otherwise without this defense. Those who oppose insanity defense reform may be swayed after learning how many commonly held myths are inaccurate. Those who still oppose insanity

defense reform after learning the truth to these misconceptions should be swayed after learning procedurally how the insanity defense functions and the policy reasons behind the defense.

One limitation of this proposal is in its dealing with those with psychopathy, personality disorders, or other types of non-serious mental illness.<sup>125</sup> Most criminals deserve a chance at rehabilitation, but this revised mental illness defense would probably not be easily applied to those with non-serious mental illness who commit crimes. The response here is that the current insanity doctrine is also not aimed at those with non-serious mental illness, who are probably better served using a different mechanism. Society is arguably improved if rehabilitation is attempted for this category of criminals, instead of incarceration that keeps them removed from the general public. Rehabilitation would ideally enable more criminals with non-serious mental illness to reenter society and would also allow mental health researchers to learn more about these illnesses and hopefully advance mental health treatment. In addition to rehabilitation, a separate doctrine could be developed to address this issue, be it a criminal defense, a trial system in a specialized court, or some other scheme. Unfortunately, while it would be ideal for the proposal in this paper to adequately address all facets of mental health that the insanity defense impacts, it is impractical, and a separate proposal would be best.

In sum, although the Mental Health Contribution Defense is a major shift from the current insanity doctrine, it is an absolutely necessary step in obtaining practical and useful protections for the mentally ill.

## V. CONCLUSION

Mental illness affects a significant portion of the U.S. population.<sup>126</sup> An issue as large as mental health would seemingly be well understood and fully explored. Unfortunately, great disservices are done to criminal

---

<sup>125</sup> The National Survey on Drug Use and Health defines a Serious Mental Illness as one that meets the following criteria: a mental, behavioral, or emotional disorder (excluding developmental and substance use disorders); diagnosable currently or within the past year; of sufficient duration to meet diagnostic criteria specified within the 4th edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV); and, resulting in serious functional impairment, which substantially interferes with or limits one or more major life activities. Any other mental illness falls outside of the SMI designation falls under the Any Mental Illness (AMI) designation. Personality disorders fall outside the SMI designation, but are still considered AMIs. See National Institute of Mental Health, Serious Mental Illness (SMI) Among U.S. Adults, <http://www.nimh.nih.gov/health/statistics/prevalence/serious-mental-illness-smi-among-us-adults.shtml>, (last accessed Mar. 5, 2016).

<sup>126</sup> See NAMI, *supra* note 108.

defendants who have mental health issues. Mentally ill criminal offenders are too often incarcerated, too often go untreated, and too often have no recourse to escape these harsh realities. Quite simply, the United States does not properly approach issues of mental health.

In its current state, the insanity defense is incredibly problematic. In addition to not adequately satisfying its primary rationale – to provide reprieve from liability for those who cannot be held blameworthy for their actions – it is impractical and outdated. The mentally ill are not served by the insanity defense, and the public is left confused and unclear about the defense and how it operates. Compacting these problems are the myth-riddled opinions of the general public, who are misinformed and misguided by the news media, as evidenced by the reporting and analysis in relation to the cases of Eddie Ray Routh and James Holmes. The media's effect on public opinion surrounding the insanity defense is harmful, and leads to apathy towards insanity defense reform at best, and intense opposition at worse. While the media may not have intentions of being harmful, the lack of sensitivity and explanation unfortunately creates a net negative effect.

With the introduction of the Mental Illness Contribution Defense and a grassroots campaign to educate the public on the insanity defense, the original rationale behind insanity doctrine can be satisfied practically and effectively. The mentally ill can be served, the criminal justice system can advance and evolve, and the world can become more knowledgeable about how mental health and the law are intertwined. This innovation is much needed and can provide real, measurable results.

This paper is not simply an exercise in legal analysis. It is a call to action; in this paper lies hope that those who can advocate for mental health reform will advocate for it, and that those who can make changes to pursue the advancement of mental health rights will make those changes. Change cannot happen overnight, but steps in the right direction will lead to a progressive and positive future.