

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

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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 is very unlikely to have a 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 re-enter society suffering from the same infirmities that sent him to prison in the first place, and could very well commit the same crime again. This is a dangerous cycle that abuses the mentally ill and depletes prison resources, and unfortunately, it is all too common.¹ In scenarios like this, there simply should be some recourse for defendants whose mental illness contributes in some way 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 what might be done to ameliorate the problem.

I spend the first portion of this paper exploring the insanity defense from a historical perspective. I explain the various iterations of the insanity defense that exist currently, or have existed recently, and where those iterations have succeeded and failed. The next section of this paper is an analysis of 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

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¹ See TREATMENT ADVOC. CTR., THE TREATMENT OF PERSONS WITH MENTAL ILLNESS IN PRISONS AND JAILS: A STATE SURVEY 101 (2014), <http://www.treatmentadvocacycenter.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf> (finding that 15–20 percent of all prison inmates in the United States have a serious mental illness).

depth as examples. My major proposition in this section 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 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 it has long been viewed as controversial.² The underlying rationale in all 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.³ 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 evolved.⁴ From a policy standpoint, the insanity defense is important for a number of reasons. First, it allows for rehabilitation of the mentally ill,⁵ who may not be getting proper treatment in the first place.⁶ Further, it removes those from society who are dangerous, and allows them to be treated so that they are no longer dangerous. This also ties into criminal policy by preventing crime from perpetuating, if it is assumed that the mentally ill who are committing crimes will keep committing crimes without treatment.⁷ The

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

³ 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).

⁴ 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.").

⁵ See Shannon R. Wheatman & David R. Shaffer, *On Finding for Defendants Who Plead Insanity: The Crucial Impact of Dispositional Instructions and Opportunity to Deliberate*, 25 LAW & HUM. BEHAV. 167, 168 (2001) ("Typically, 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.").

⁶ See Hooper, *supra* note 3, at 413 ("Essentially 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.").

⁷ 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

insanity defense also prevents the mentally ill, who may not fully understand the nature of the crime, from being forced into a prison system where they will not receive proper treatment.⁸

Satisfying these policy considerations is extremely difficult, and history has provided a number of insanity defense iterations, each of which has had its own set of pros and cons. The M’Naghten Rules provide the backbone for modern insanity doctrine.⁹ These rules originated in 1843 and constitute an early attempt at a modern defense based on a mental illness.¹⁰ Under the M’Naghten Rules, the defendant is not held culpable for his or her actions if a mental condition prevented him from knowing right from wrong or that his or her actions were improper.¹¹ 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 M’Naghten Rules and further requires that the actor not have control over his or her actions in order to satisfy the defense.¹² Detractors of the Irresistible Impulse test argue that the standard is too difficult to argue 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.”¹³ On the other hand, this standard can cover more ground than the traditional M’Naghten rules because actors that do understand right from wrong but cannot control their actions, and thus are not blameworthy, can utilize the defense.¹⁴

Modern iterations of the insanity defense typically involve a less archaic analysis and tend to focus more on psychiatric conditions. A more broad insanity defense comes via the Model Penal Code, which holds that in order for the actor to claim insanity, he or she must have been unable to appreciate the criminality of his or her conduct or conform that conduct to the requirements of the law.¹⁵ This standard bypasses the right v. wrong issue. Difficulty can arise here over what it means for an actor to “appreciate” the nature of his or her actions and how a judge or jury should interpret that

traditional incarceration to alternative programs that involve treatment and rehabilitation. *See, e.g.*, California Mental Health Services Act (amended 2012).

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

9 BOLAND, *supra* note 2, at 1 (“They are considered to be ‘the point of reference for the insanity plea’s history’ . . .”).

10 *Id.*

11 *See* PARRY, *supra* note 3, at 140–41.

12 *Id.* at 343–44.

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

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

15 MODEL PENAL CODE §4.01 (1962).

word.¹⁶ Over time, courts became more liberal in their application of the insanity doctrine, with the highest pro-defendant point happening in the 1970s with the adoption of the Durham Product Test in many jurisdictions.¹⁷ This iteration holds that the defendant is not criminally liable if his or her actions were a result of a mental disease or defect.¹⁸ Like the Model Penal Code, the Durham Product Test involves no question of the defendant's moral or legal compass or whether the defendant had control of his or her actions.

In 1981, the United States was shaken up 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 Jodi Foster.¹⁹ In an attempt to impress Foster, whom he had never met in person, Hinckley shot President Reagan as he was leaving a hotel in Washington, D.C.²⁰ Hinckley's subsequent trial for murder was held under extreme public scrutiny, with American citizens intently following every move.²¹ Hinckley was eventually able to successfully raise the insanity defense by showing that his actions were a result of his mental illness.²² This verdict led to a large public outcry, with most of the country expressing dismay at the perceived light sentence.²³ As a result, insanity defense reform legislation swept the nation, with most states adopting some form of the federally implemented Insanity Defense Reform Act of 1984.²⁴ This statute tightened the traditional insanity rule and required that a defendant must fail to appreciate the nature and quality or wrongfulness of his or her acts in order to raise the insanity defense.²⁵

In the United States, the insanity defense in federal court follows the Insanity Defense Reform Act.²⁶ A number of states have followed suit and also adopted the Insanity Defense Reform Act for state crimes.²⁷ Most of the rest use the Model Penal Code guidelines, with a few notable exceptions.²⁸ New Hampshire uses the Durham Product Test, holding on to a more liberal standard.²⁹ On the flip side, four states have completely abolished the insanity defense.³⁰ Some still allow for verdicts that recognize mental illness; however, these alternative verdicts leave much to be desired in terms of

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

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

18 *Id.* at 21.

19 *Id.* at 36–38, 42–43.

20 *Id.* at 42.

21 *Id.* at 116–17.

22 *Id.* at 97–100.

23 *Id.* at 116–17.

24 CHARLES P. EWING, *INSANITY: MURDER, MADNESS AND THE LAW*, xix–xx (2008).

25 *See* BOLAND, *supra* note 2, at 73.

26 *Id.*

27 EWING, *supra* note 24, at xx.

28 *Id.*

29 *Id.*

30 PARRY, *supra* note 3, at 9. Those states are Kansas, Idaho, Montana, and Utah.

satisfying the rationale and policy considerations for the insanity defense, so ultimately, they are irrelevant.³¹ Examples of these watered down verdicts include “Guilty but Mentally Ill,” (“GBMI”) or “Guilty, but Insane.” Typically, a verdict like this is a symbol and signal of mitigating factors, and judges will usually dole out a lesser sentence when a defendant receives these verdicts. On the other hand, some jurisdictions have specifically stated that a GBMI or similar verdict does not entitle a defendant to a different sentence.³² Many mental health advocates believe that these verdicts are harmful to defendants who receive them because they are not technically different from guilty verdicts, but they attach an unnecessary stigma by declaring that the defendant is insane.³³

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

If an insanity defense is successfully raised, the defendant is found “Guilty but Insane.”³⁹ The defendant then is typically placed in a treatment center where she is treated for her condition until she is deemed able to return

31 See EWING, *supra* note 24, at xx.

32 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.”).

33 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 (“One 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, 632–34 (1984).

34 CYNTHIA LEE & ANGELA P. HARRIS, *CRIMINAL LAW: CASES AND MATERIALS* 721-22 (3rd ed. 2014).

35 *Id.*

36 PARRY, *supra* note 3, at 145.

37 *Id.* These standards vary from preponderance of the evidence, to clear and convincing evidence, to beyond a reasonable doubt.

38 John Ingold, *Why Colorado Law Will Make Prosecutors Prove James Holmes is Sane*, DENVER POST: RAP SHEET (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/>.

39 PARRY, *supra* note 3, at 145.

to public life.⁴⁰ Many defendants spend years in treatment, and some spend the rest of their lives being treated.⁴¹

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.⁴² 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.⁴³ Further, the association of the insanity defense with heinous, violent crimes⁴⁴ 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.⁴⁵ 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 defendants fake mental illness in order to raise the defense, among others.⁴⁶ Not surprisingly, there is very little, if any, truth to any of these ideas.⁴⁷ 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.⁴⁸ 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.⁴⁹ When all is said and done, a successful insanity defense is raised in approximately one in every twenty thousand criminal cases.⁵⁰ There are also large risks

40 Wheatman & Shaffer, *supra* note 5, at 168.

41 *See id.*

42 *See id.* at 167–68. *See also* 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, 8 (1996); Tarika Daftary-Kapur et al., *Measuring Knowledge of the Insanity Defense: Scale Construction and Validation*, 29 BEHAV. SCI. L. 40, 40 (2011); Jennifer L. Skeem et al., *Venirepersons's Attitudes Toward the Insanity Defense: Developing, Refining, and Validating a Scale*, 28 LAW & HUM. BEHAV. 623, 623 (2004).

43 Perlin, *supra* note 42, at 19.

44 EWING, *supra* note 24, at xxiii (“The insanity defense is most often associated in the public eye with serious crimes such as violent felonies.”).

45 *See* 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).

46 Perlin, *supra* note 42, at 11–12.

47 *Id.*

48 *Id.* at 11.

49 *Id.*

50 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*, N.Y. TIMES (April 3, 2013), <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 5910 murder cases heard in New York state from 2003–2013); EWING, *supra* note 21, at xxii; Wheatman & Shaffer, *supra* note 5, at 168.

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.⁵¹

Multiple studies have concluded that strong juror biases exist during trials when the insanity defense is used.⁵² Often, jurors come into a trial with negative misperceptions surrounding the defense.⁵³ When the defense is used, these implicit feelings come to the surface, making it difficult for a defendant to successfully argue that he or she is not culpable by reason of his or her mental state at the time of the crime.⁵⁴ It can also be difficult for jurors 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 a 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).⁵⁵ Further, misconceptions and false narratives exist throughout all of society—even amongst the most educated. For example, an informal survey of graduate students showed that sizeable portions believe that the insanity defense is commonly raised.⁵⁶ Lack of knowledge on the issue is thus extremely widespread, and is not limited to any particular subset of the population.

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 information.⁵⁷ But what may be the most interesting and influential factor contributing to the general negative view of the insanity defense is how the defense is covered and portrayed by the news media.

51 Perlin, *supra* note 42, at 12. (“Defendants 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.”).

52 See Wheatman & Shaffer, *supra* note 5, 169 (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, at 624–25.

53 See Wheatman & Shaffer, *supra* note 5, at 167.

54 See VITELLO & HICKEY, *supra* note 45, at 97–100.

55 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, 359–60 (1988).

56 Hooper, *supra* note 3, at 412 (in his informal poll, Hooper says he hears estimates from his graduate students that 25–30 percent of all criminal trials involve the insanity defense; Hooper's sample size is small, but his poll still demonstrates that misconceptions are not limited to the uneducated, merely the uninformed).

57 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. FORENSIC MENTAL HEALTH 62, 69 (2009).

The news media rarely reports on the insanity defense. When it does, however, messages and narratives are sensationalized, with portrayals of defendants as dangerous and deserving of punishment.⁵⁸ While sensationalism is certainly found in all corners of the news cycle, using it for topics that are rarely ever covered another way is misleading to the public.⁵⁹ There simply is not enough positive reporting to balance out the negative.⁶⁰ Further, most media reports on the insanity defense surround heinous, violent crimes, which only account for a small portion of all insanity defense cases.⁶¹ Thus, the typical image the public receives from the media is that of a nefarious criminal trying to use the insanity defense to plead that a mental illness caused violent acts so he or she can escape jail time.

From the most basic standpoint, humans base their opinions and knowledge on the information they receive and interpret.⁶² Quite simply, people are persuaded by the news they get.⁶³ 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.⁶⁴ Roberts and Doob further found that readers were extremely comfortable developing and relaying opinions about complex criminal law topics even after being provided small amounts of information on those topics that only covered one argument.⁶⁵ What is even more compelling in the legal field specifically is that most of the general public generates its understanding of the court system from news media reports instead of actual experience.⁶⁶ This leaves the news media in an extremely powerful position, as it has total control over what the public understands about the insanity defense and about the issue of mental health and crime. The media thus 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.

58 See VITELLO & HICKEY, *supra* note 45, at 73–78.

59 *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.

60 *Id.* at 73 (“[P]erhaps most significant, is the lack of positive stories. . . . [E]ven when articles did not focus on violence and dangerousness, they tended to highlight the dysfunction and disabilities of mental health consumers.”).

61 EWING, *supra* note 24, at xxiii–xxiv.

62 JEFFERSON L. INGRAM, *CRIMINAL EVIDENCE* 391 (10th ed. 2009).

63 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).

64 See Roberts & Doob, *supra* note 63, at 453.

65 See generally Roberts & Doob, *supra* note 63.

66 Robbennolt & Studebaker, *supra* note 63, at 11.

The two recent cases that exemplify this idea are the cases of Eddie Ray Routh (Chris Kyle murder) and James Holmes (Aurora, CO movie theatre 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 prevented them from understanding the nature or appreciating 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. Both of these were cases where the public sought retribution, and the idea of allowing a Not Guilty by Reason of Insanity (NGRI) verdict would not satisfy the public's desires. This leads to the public's idea that the insanity defense lets defendants off easy or puts dangerous people back on the streets.

A. EDDIE RAY ROUTH

Eddie Ray Routh is a Marine Corps veteran who was found guilty of murdering Chris Kyle, a former Navy SEAL who was considered a war hero and was one of the most prolific snipers in American military history.⁶⁷ Routh served a tour of duty in Iraq and was dispatched to Haiti, and after returning to the U.S., he struggled with adjusting to civilian life, an issue complicated by post-traumatic stress disorder.⁶⁸ He spent time in and out of VA hospitals and mental health facilities trying to recover from effects of his deployments.⁶⁹ Kyle was a decorated Navy Seal, and was well known and widely regarded for his service during the Iraq War.⁷⁰ After completing his military service, Kyle became active in military-focused nonprofit activities, in which he would work with veterans with disabilities to help them cope with the difficulties of civilian life after a military career.⁷¹ As part of his work, Kyle was paired with Routh, and the two were to spend some time together, with Kyle acting as a life coach of sorts.⁷² Kyle and his friend Chad Littlefield arranged to spend February 2, 2013 with Routh at a shooting range.⁷³ Routh had been reportedly suffering from bouts of psychosis in the time leading up to the event, and by Kyle's and Littlefield's accounts was

67 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/>.

68 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 Mourning the Loss of His Own Son*, DAILY MAIL (Jan. 1, 2015, 8:42 AM), <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> (last updated Mar. 13, 2015, 2:04 PM).

69 *Id.*

70 See Christopher Klein, *The Real-Life Story Behind American Sniper*, HIST.: IN THE HEADLINES (Jan. 21, 2015), <http://www.history.com/news/the-real-life-story-behind-american-sniper>.

71 *Id.*

72 *Id.*

73 *Id.*

acting in an off-putting manner throughout the day.⁷⁴ That afternoon, Routh shot and killed both Kyle and Littlefield.⁷⁵

The public interest in this case was immense, which could be expected considering Kyle's popularity as a war hero.⁷⁶ Further complicating matters, a hugely 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.⁷⁷ Routh's attorneys attempted to invoke the insanity defense and argued that Routh did not know what he was doing was wrong.⁷⁸ During the trial phase, defense attorneys brought a psychiatric expert to the stand, who testified that what Routh was suffering from was not PTSD, but instead was schizophrenia, and that he had been experiencing "paranoid delusions."⁷⁹ Some of these "delusions" included Routh believing Kyle was going to possess Routh's soul and Routh believing he was receiving signals in his head from local radio stations.⁸⁰ This attempt at an insanity plea fell short, as jurors found Routh guilty of first-degree murder, and he was sentenced to life in prison without the possibility of parole.⁸¹ 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]."⁸² The public nature of the trial coupled with Kyle's reputation as a hero trapped Routh in a situation of intense public disapproval. Regardless of what the merits of Routh's potential for an insanity defense were, the news media reports on the case and his use of the insanity defense were overwhelmingly negative.⁸³

⁷⁴ 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/>.

⁷⁵ *Id.*

⁷⁶ 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>.

⁷⁷ Many news outlets referred to this trial as "The *American Sniper* Trial," in reference to the book and 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/>; Greg 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 65; Collins, *supra* note 67.

⁷⁸ 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/>.

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

⁸⁰ *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.

⁸¹ McCoy, *supra* note 78.

⁸² Spies, *supra* note 79.

⁸³ 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*,

Most reports that included public opinion showed that overall the public sought “justice,” in the form of retribution, and wanted Routh incarcerated. 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 for Routh.⁸⁴ 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.⁸⁵ Further, other reports expressed doubt that Routh actually suffered from mental illness.⁸⁶ This belief that Routh was faking schizophrenia may have stemmed from the prosecution’s claims that Routh’s psychosis was a result of alcohol and drugs in combination with a personality disorder.⁸⁷ 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 mention of the insanity defense was typically made in passing, with the insinuation that it would be brought up as a sort of last-ditch effort in order for Routh to avoid jail time.⁸⁸ Routh’s overwhelmingly negative public persona is thus paired with the insanity defense, and the public association with the defense becomes more and more negative. By leaving details about the reality and practicality of the insanity defense out of any reporting, a reader associates Routh with the defense, and thus associates 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 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 seem like reporters were interested in taking a negative stance on the insanity defense, nor interested even in taking any stance on the defense. Instead, the focus was on its application in this case, a case that was decidedly, publicly anti-defendant from the beginning, especially from a local perspective. With that negative mentality from the onset, any mention of the insanity defense would be tied to negativity. Readers associate key phrases, headlines, and other small portions of text

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/>.

84 Fernandez & Jones, *supra* note 76.

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

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

87 Spies, *supra* note 79.

88 See, e.g., McCoy, *supra* note 78.

with emotions a particular article evokes.⁸⁹ By mentioning the insanity defense in short articles and reports that had negative portrayals of Routh, the press may have prompted the public to associate the insanity defense with heinous crimes, violence, evil, and other grim topics. Fairer analysis would have included more deeper treatment of the insanity defense, and would have explained to readers exactly what was necessary to secure an NGRI verdict, what happened procedurally after the verdict, and what the likelihood of success was, given the historical difficulties defendants have had raising the defense. Fully explaining Routh's past and his history with mental health issues would also have produced a more fair portrayal of the insanity defense. Readers would be less inclined to associate the insanity defense with a defendant that fakes mental illness if that concept had been dispelled through the reporting of the case history. Media outlets could also have taken this opportunity to explore the issue of mental illness among America's veterans, or to examine mental illness in America more broadly.

There is a fine line to be drawn in how these cases are presented to the public. In this case, the media did not necessarily go too far, but at the very least, it was not duly sensitive to mental health issues. The crime that Routh perpetrated was heinous and extreme. That the victims were trying to help Routh, and that one victim had a significant and highly positive public profile, meant that Routh was likely guilty in the eyes of the public from the beginning. No matter how the media presented the case, the public was always likely to view Routh in a negative light, meaning the insanity defense never had a chance at being construed positively, or even neutrally, in this case. But reporters and writers removed all hope of neutrality by failing to examine the insanity defense, and readers were, indeed, left with a mostly negative portrayal of the insanity defense. The fine line is between reporting a full story with detail on the defendant and his history on one side and supporting the defendant, or at least being sympathetic to the defendant, on the other side. With the extreme public resentment for Routh from the outset, it is clear the media would want to avoid appearing sympathetic to Routh. But reporters would not have to cross this line to shed some of the negative weight holding the insanity defense down, and instead could simply have 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, CO movie theater on July 20, 2012, that ended with 12 victims dead and another 70 injured.⁹⁰ Holmes pled the insanity defense, claiming that his mental state prevented him from knowing

⁸⁹ See Roberts & Doob, *supra* note 63, at 453.

⁹⁰ CNN, *Colorado Theater Shooting Fast Facts*, CNN, <http://www.cnn.com/2013/07/19/us/colorado-theater-shooting-fast-facts/> (last updated July 4, 2016, 1:49 PM).

right from wrong when he committed his acts.⁹¹ Holmes buttressed his claims with psychiatric evidence that he suffered from schizoaffective disorder.⁹² Holmes was found guilty and sentenced to life in prison without the possibility of parole after two psychiatrists testified that he was mentally ill but “legally sane” and that his mental illness did not prevent him from understanding right from wrong or from forming intent to commit his actions.⁹³

In Holmes’s case, a guilty verdict was more of a foregone conclusion 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 than with psychosis or other conditions that would affect his state of mind.⁹⁴ 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.⁹⁵ He purchased firearms, ammunition, and assault equipment in the weeks leading up to the attack, and booby-trapped his apartment with explosives.⁹⁶ This was the activity of someone not with a psychotic break, but instead with severe underlying personality defects. This means that an NGRI verdict was extremely unlikely from the outset, although 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 easier to obtain an NGRI verdict there than it would be in another jurisdiction.⁹⁷ The defense’s use of the insanity defense here was probably largely an attempt at some mitigation of Holmes’s sentence: it was likely a symbolic defense, and a rare case of a defendant using the insanity defense as a means of acquiring a plea deal for life in prison without parole rather than death.

Like the Eddie Ray Routh case, Holmes’s case was of immense public interest, and, as can be easily imagined, the public held an extremely negative opinion of him. Whether Holmes had a legitimate case for the insanity defense or not, the media’s portrayal of him and of the insanity defense was misleading at best, sensational at worst, and it did not accurately portray the complex nature of mental illness or the defense. Headlines like, “Will Insanity Defense Save James Holmes?,” “Will Mental Illness Save Holmes’ Life?,” and “Colorado Shooter’s Urge to Kill Could Set Him Free” are grossly misleading and factually inaccurate (whether Holmes had intent or was acting solely in response to a psychotic state is part of the insanity defense argument, and a title claiming Holmes could be set free by virtue of

91 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>.

92 *Id.*

93 *Id.*; Ann O’Neill et al., *A Look Inside the “Broken” Mind of James Holmes*, CNN (June 10, 2015, 4:04 PM), <http://www.cnn.com/2015/06/05/us/james-holmes-theater-shooting-trial/>.

94 O’Neill et al., *supra* note 91.

95 *Id.*

96 *Id.*

97 *Id.*

the insanity defense is entirely incorrect), yet they were commonplace.⁹⁸ Here again, very little reporting was done during the trial that explained how the insanity defense worked from a procedural standpoint, why it is important in American jurisprudence, or why Holmes was unlikely to secure an NGRI verdict. Outside the sensationalist takes, most commentary about the insanity defense was in passing, merely mentioning that it would be raised. 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 not served by the media's 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 poor luck and timing. This was a high-profile case in which Holmes probably never had a legitimate argument for a successful insanity defense. His attack was clearly planned out, and he not only understood right from wrong, but he also seemed to fully understand the societal consequences of taking a life.⁹⁹ This was indeed one of those cases that perpetuates public myths about the insanity defense. A reasonable person could see the details of this case in a vacuum and come to the conclusion that the insanity defense is a last-ditch, long-shot effort at acquittal. A member of the general public, who looks at this case with pre-conceived notions of the insanity defense, could easily 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 roam the streets. It was not wrong for the media to report extensive details about this case, or even 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. But flippant media treatment of the insanity defense in this case has skewed the public's opinion of the defense. Holmes is not the type of defendant that the insanity defense aims to serve, and without proper explanation about the defense and how it relates to this case, the public may not see that. Instead, the myths surrounding the insanity defense will percolate and permeate into the conscience of the general public. As in the Routh case, reporters would have better served the public by providing a more thorough legal analysis when reporting this case.

Both the Routh case and the Holmes case show the extreme influence of media reports on perceptions of the insanity defense, and they drive home a key point: the association of the insanity defense with extreme crimes

98 Sadie Gurman, *Will Insanity Defense Save James Holmes?*, ASSOCIATED PRESS (April 27, 2015), http://www.huffingtonpost.com/2015/04/27/james-holmes-insanity-defense_n_7151138.html; Ann O'Neill & Ana Cabrera, *Will Mental Illness Save Holmes' Life?*, CNN (Aug. 3, 2015), <http://www.cnn.com/2015/07/16/us/holmes-aurora-theater-shooting-jury-choice/>; 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. 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; yet is written by an attorney.

99 See O'Neill, *supra* note 93 ("The defendant acknowledged to Reid that shooting people is 'legally wrong.'").

perpetuates myths and misconceptions that surround the defense. While neither case was an ideal situation in which to raise the defense, the fact that they are the most prominent recent cases involving the defense in the public eye means the association between extreme crime and insanity is very prominent and very negative. Aside from the Routh and Holmes cases, only a handful of cases involving the insanity defense in any context were reported between 2014 and 2015.¹⁰⁰ Further, most of those reports mentioned the defense only to note that the defendant raised it or planned on raising it. Because the media does not report on many other insanity defense cases, the public draws its ideas of the insanity defense from only the most extreme examples.

There are, however, some positive signs in how the media handles the insanity defense. The *New York Times*¹⁰¹ and the *Christian Science Monitor*,¹⁰² among other outlets, have recently published insightful and in-depth pieces regarding the insanity defense. These pieces examined 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 case was ongoing, the *Denver Post* investigated 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 reentering society.¹⁰³ 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 can only be raised in extreme situations and rarely successfully. Further, false narratives that dominate the defense means jurors are often unsympathetic to defendants when it 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 is not a tool that can be commonly used or even considered. The purposes of the insanity defense are rarely fulfilled. The mentally ill are not served when

100 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.

101 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. Editorial, *Who Qualifies for the Insanity Defense?*, N.Y. TIMES: ROOM FOR DEBATE (Jan. 20, 2011), <http://www.nytimes.com/roomfordebate/2011/01/20/who-qualifies-for-the-insanity-defense>.

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

103 Kirk Mitchell, *Killers Who Pleaded Insanity Walk Free from State Hospital in Colorado*, DENVER POST (April 5, 2015), 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.

they are incarcerated instead of being treated for their conditions. Further, it is often difficult to get psychiatric evidence into a trial without using the insanity defense.¹⁰⁴ This evidence should be admitted more often, as it is important for determining if a defendant has the requisite mens rea for a crime, and if a defendant should be incarcerated or sent to a treatment center if found guilty.

A. INTRODUCE AND IMPLEMENT A GRASSROOTS MOVEMENT

I propose first 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 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 attitudes towards the insanity defense must become neutral.

One reason a campaign is necessary for insanity defense reform is to answer the simple question: “Who?” Who will bring to light mental health issues? Who will fight for the mentally ill? Who will institute change among the public? Who are the mentally ill? These are critical questions others must answer because those with mental illness often cannot advocate for themselves.¹⁰⁵ Mental illness affects a large portion of the population, and those with serious or severe mental illness often do not have the capacity to handle daily life, much less advocate for mental health awareness.¹⁰⁶ Further, those with mental illness are often amongst the most vulnerable, and include the elderly, veterans, and homeless persons.¹⁰⁷ Because of the difficulty these groups face in fomenting the necessary change, a campaign driven by those affected by mental illness—in conjunction with advocates who are not—is critical. People from all backgrounds and experiences must 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. Probably the most relevant and visible current

¹⁰⁴ Mental Health America, *Position Statement 57: In Support of the Insanity Defense* (June 8, 2014), <http://www.mentalhealthamerica.net/positions/insanity-defense>.

¹⁰⁵ See NAT'L ALLIANCE ON MENTAL ILLNESS, NAMI PUBLIC POLICY PLATFORM 7–8 (10th ed., Sept. 2014), available at: https://www.nami.org/NAMI/media/NAMI-Media/downloads/Public-Policy-Platform_9-22-14.pdf.

¹⁰⁶ NAT'L ALLIANCE ON MENTAL ILLNESS, 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 around 20%).

¹⁰⁷ See NAT'L ALLIANCE ON MENTAL ILLNESS, *supra* note 105, at 7–13.

grassroots effort is the Black Lives Matter movement—a movement that is self-described as a “call to action and a response to the virulent anti-Black racism that permeates our society.”¹⁰⁸ After the 2013 shooting of an unarmed black teenager by a volunteer neighborhood watchman, *Twitter* and other social media venues were inundated with hashtags proclaiming “#BlackLivesMatter,” shared by young activists tired of racial injustice seeking to reach the public and gain mass support.¹⁰⁹ Soon, what started as an electronic exchange of ideas about race and inequality in America became a full-fledged movement, with organized protest events, demonstrations, and even physical chapters with regular meetings.¹¹⁰ 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.¹¹¹ The main driver of all of this was social media, which facilitated mobilization of people, organization, and discussion of ideas.¹¹² 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. Whether Black Lives Matter has staying power as a full-on movement, or whether it will be a historical footnote,¹¹³ is 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.¹¹⁴ 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 both Internet sources/blogs and social media. From there, seminars and other events can be held at community centers and schools that would answer the public’s questions, and could highlight individuals that were able to successfully raise the insanity defense and now lead rehabilitated lives. Attorneys and others from the legal community would also be key: they could correct legal misperceptions surrounding mental illness and the insanity defense. In the final stage, the campaign would become embedded it into traditional media, and would actively persuade news outlets to report in non-sensationalist ways on insanity cases and the realities of mental

108 *About*, BLACK LIVES MATTER, <http://blacklivesmatter.com/about/> (last visited Oct. 25, 2016).

109 Elizabeth Day, *#BlackLivesMatter: The Birth of a New Civil Rights Movement*, *GUARDIAN* (July 19, 2015, 5:00 PM), <http://www.theguardian.com/world/2015/jul/19/blacklivesmatter-birth-civil-rights-movement>.

110 *Id.*

111 *Id.*

112 *Id.*

113 See BLACK LIVES MATTER, *supra* note 108 (an uncertainty to which Black Lives Matter responds, “This is Not a Moment, but a Movement.”).

114 This differs from Black Lives Matter, whose primary objectives include societal change. Black Lives Matter, like all socio-political movements, promotes awareness, but its purpose is to end systemic racism in America.

illness. This can include stories about defendants who raised the defense successfully and have since then rehabilitated and reentered society. Compassionate stories like this already exist, but do not receive a lot of mainstream media attention.¹¹⁵ 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 passion, this campaign can grow into something that has a real effect on the general public.

The media has a lot of space in which reporting and analysis can improve, but a major part of the improvement must come 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, it is important for the media to completely change how issues of mental health are approached from a general standpoint. While any positive reporting helps to allay negative perception and stigma, it can only go so far if news outlets continue to tie the insanity defense to negative stories and cases. The media must provide full pictures of the defense and of defendants who intend to use and do use the defense to the public. One thought here is to introduce 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 because to make changes like this, media personnel will need open minds and hearts. Ultimately, 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, can enable beneficial 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.¹¹⁶ The name I propose 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 the new Mental Illness Contribution Defense:

- The actor had a serious mental illness at the time of the crime.

¹¹⁵ Mitchell, *supra* note 103.

¹¹⁶ The term "insanity" is almost never used in medicine, and has no real medical definition. VITELLO & HICKEY, *supra* note 45, at 3-15.

- 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 ill.
- 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.
- The mental illness contributed to the crime.
 - 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.

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 of the mental illness's contribution to the crime. 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.¹¹⁷ The time of treatment would count as part of the sentence time (i.e., if someone is sentenced to five years in prison, and is treated in a mental hospital for two years, he or she would have to serve three years in prison in order to complete his or her sentence). If mental illness contributed to the crime in a larger magnitude, the actor receives a shorter sentence, and still receives treatment. In many cases, the defendant ends up spending his or her sentence being treated (i.e., a two-year sentence, and three years of treatment, so the defendant is not incarcerated at all). Further, if the actor's mental condition fully contributed to the crime (i.e., he or she was in a psychotic state and had no awareness of his or her actions), a verdict of Not Guilty is awarded, but the actor must undergo treatment until it is shown that he or she has successfully been treated and can safely rejoin the public. This is similar to the current insanity doctrine, but does not apply stigmatized, harmful terminology in its conviction.¹¹⁸

Using a contribution-based standard would achieve multiple goals. First, the primary rationale that has 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 illnesses contribute fully to their crimes are still not blamed. Further, the new standard

¹¹⁷ Incarceration here would not necessarily put a mentally ill defendant into the general prison population, which could be harmful to someone who just underwent treatment for mental illness.

¹¹⁸ 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 the sentence, the shortened sentence still applies, but the defendant bypasses the treatment phase and is simply incarcerated.

promotes rehabilitation of the mentally ill by providing treatment services for convicted defendants if mental illness was involved in the crime. This keeps people with mental illness out from the prison system, at least until they have been treated. A tangential theory here is that recidivism will decrease because 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.¹¹⁹ The current state of mental health treatment in prisons does not serve the interests of the mentally ill. By diverting a portion of the population 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 at best 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 would be better able to meet the needs of mentally ill offenders, and would be much more familiar with mental health concepts. Judges would understand more clearly how to take mental health into consideration when presiding over a case, attorneys would better understand how to argue in favor of their clients when those clients have mental health issues, and defendants with mental health issues would be better served through innovative sentencing procedures. Because prisons would no longer be holding inmates with ongoing mental health issues, those inmates would be better served, and the prisons themselves would be able to operate more smoothly. If the legal community moves forward with fresh, new ideas about mental health, the rest of society can follow. 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 solve those issues.

Potential issues could arise when the standard is implemented, but those issues would likely be temporary. The primary concern is interpretation and execution of the defense. Even if a defendant satisfied 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. However, this issue would be remedied over time, though, as higher courts

119 See TREATMENT ADVOC. CTR., *supra* note 1, at 101–103.

would be able to interpret appealed cases to set the common law. As time went on, and more successful defenses were raised, courts would develop guidelines that to prevent rogue judges from misapplying sentences. Another issue is the potential for abuse in treating patients. A poor treatment system could lead patients to not receive complete treatment, and they could be sent to the next phase of the sentence—incarceration—too early. This situation defeats the purpose of having a revised defense because mentally ill defendants would be stuck in the same situation as before: incarcerated with no recourse. This is a discouraging problem, but one that is unlikely to occur. Treatment centers have no incentive not to give complete treatment to their patients, and 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. But this argument does not hold up against the defense because it is based on thinking that 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 have already been dispelled. Most detractors should easily be proven wrong just by exposing the realities of the current insanity defense. Those who oppose insanity defense reform should be swayed simply after learning how many commonly held myths are inaccurate. Opponents of insanity defense reform should be swayed after learning how the insanity defense functions and the policy reasons motivating the defense.

One limitation of this proposal is its ability to treat defendants with psychopathy, personality disorders, or other types of non-serious mental illness.¹²⁰ 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 current insanity doctrine is also not aimed at those with non-serious mental illness, who are better served using a different mechanism anyway. Rehabilitation is better for this category of criminals than incarceration. Rehabilitation enables criminals with non-serious mental illnesses to reenter society and allows mental health professionals to learn more about these illnesses and advance mental health treatments. In the future, separate doctrines could be developed to address criminal defense, specialized courts, or other possibilities that could improve the justice system for the mentally ill. Such exploration, however, is beyond the scope of this note.

120 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 NAT'L INST. 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 Oct. 25, 2016).

The mental health contribution defense is a significant shift from the current insanity doctrine, but it is a necessary, positive step to developing a practical and useful protection for the mentally ill.

V. CONCLUSION

Mental illness affects a significant portion of the U.S. population.¹²¹ One might assume that an issue as important as mental health would be well understood and fully explored. Unfortunately, the current system continues to do great disservices to criminal 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 deeply flawed. It fails to adequately satisfy its primary rationale—to provide reprieve from liability for those who cannot be held blameworthy for their actions—and 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. Myth-riddled opinions further confuse the general public, who are misinformed and misguided by the news media, demonstrated by public opinion regarding the Eddie Ray Routh and James Holmes cases. 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 intend harm, the lack of sensitivity and explanation 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 public can become more knowledgeable about how mental health and the law are intertwined. This innovation is needed greatly, 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, and that those who can make changes to pursue the advancement of mental health rights will make changes. Change cannot happen overnight, but steps in the right direction will lead to a progressive and positive future.

121 See NAT'L ALLIANCE ON MENTAL ILLNESS, *supra* note 105.