

2018

Criminal Law and Mental Illness

Marisa Tisbo

Follow this and additional works at: <https://lawcommons.luc.edu/pilr>



Part of the [Civil Rights and Discrimination Commons](#), [Criminal Procedure Commons](#), [Environmental Law Commons](#), and the [Human Rights Law Commons](#)

Recommended Citation

Marisa Tisbo, *Criminal Law and Mental Illness*, 24 Pub. Interest L. Rptr. 61 (2018).
Available at: <https://lawcommons.luc.edu/pilr/vol24/iss1/8>

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Public Interest Law Reporter by an authorized editor of LAW eCommons. For more information, please contact law-library@luc.edu.

Criminal Law and Mental Illness

Marisa Tisbo

The relationship between the mentally ill and our criminal justice system has been an ongoing one, as mental health can often affect or influence criminal behavior. But, as conflicted as that relationship might be, the two are forever intertwined. To truly comprehend this intersection between mental health and criminality, we must better understand mental illness as a whole. Mental illness in the law is understood through how disorders are defined and codified. This is laid out in the Model Penal Code (MPC), the Diagnostic and Statistical Manual of Mental Disorders (DSM-V), and various defenses.

When mental health is brought into the criminal justice conversation, it often regards competency issues, specifically the insanity defense. There are various problems surrounding those that suffer from a mental illness and the defense of insanity in the criminal justice system. These include stigma and media influence against mental illness, as well the constant “revolving door” cycle between prisons and the streets for these persons. As a result, prisons are also largely becoming one of the biggest mental health providers in most states. However, mental health reform is an ongoing process and a very crucial part of the public interest world today. Solutions to these problems are what will set the tone for the next generation in better handling those that suffer from mental illness in the criminal justice system.

HOW THE CRIMINAL JUSTICE SYSTEM DEFINES MENTAL ILLNESS

In order to better understand how mental illness is tied into our criminal justice system, we must grasp what exactly “mental illness” means, both clinically and in the law. Merriam-Webster Dictionary defines mental illness as “any of a broad range of medical conditions that are marked primarily by sufficient disorganization of personality, mind, or emotions to impair normal psychological functioning and cause marked distress or disability and that are typically associated with a disruption in normal thinking, feeling, mood, behavior, interpersonal interactions, or daily functioning.”¹

¹ *Mental Illness*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2018).

Mental illness and disorders are defined clinically in the American Psychiatric Association's DSM-V.² The DSM-V outlines, defines, and classifies all of today's known mental disorders in order to better assist in treatment and diagnosis.³ The most current edition is the fifth edition of the manual, and it has grown and changed over the years with our understanding of mental health and disorders. Described broadly, the DSM defines a mental disorder as:

“A clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with significantly increased risk of suffering death, pain, disability, or an important loss of freedom. . . it must not be merely an expectable and culturally sanctioned response to a particular event. Whatever its original cause, it must be considered a manifestation of a behavioral, psychological or biological dysfunction in the individual. Neither deviant behavior (e.g., political, religious, or sexual) nor conflicts that are primarily between the individual and society are mental disorders unless the deviance or conflict is a symptom of a dysfunction in the individual, as described above.”⁴

Criminal law has also codified mental illness through statutory codes, general common law, and the American Law Institute's (ALI) MPC. For example, Illinois defines mental illness as “a mental, or emotional disorder that substantially impairs a person's thought, perception of reality, emotional process, judgment, behavior, or ability to cope with the ordinary demands of life.”⁵ However, this does not include “a developmental disability, dementia or Alzheimer's disease absent psychosis, a substance use disorder, or an abnormality manifested only by repeated criminal or otherwise antisocial conduct.”⁶ Although the MPC does not define mental disease or defect, it explains insanity and the basic standard for excusing a defendant of responsibility based on mental illness.⁷ These will both be discussed in the next section.

² *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)*, AMERICAN PSYCHIATRIC ASSOCIATION, 5th ed. 2013) at 48.

³ *Id.*

⁴ *Id.*

⁵ Mental Health and Developmental Disabilities Code, 405 ILCS § 5/1-129 (2003).

⁶ *Id.*

⁷ *Mental Disease or Defect Excluding Responsibility*, Model Penal Code § 4.01, AMERICAN LAW INSTITUTE (1962).

MENTAL ILLNESS AT WORK: EXCUSING RESPONSIBILITY
THROUGH COMPETENCY TO STAND TRIAL
AND LEGAL INSANITY

A criminal trial cannot proceed if the defendant in question is incompetent to stand trial.⁸ This is because a defendant has a right to be present physically *and* mentally in order to receive a fair trial.⁹ Although a defendant can be found incompetent for a variety of reasons, one of the most common is that they are disabled by a mental disease or defect.¹⁰

Questions of mental capacity and competency can be raised at any time during a criminal proceeding.¹¹ When determining competency, the judge considers the defendant's capacity to understand court proceedings and participate with his or her counsel during those proceedings.¹² In other words, they must decide whether the defendant will be able understand the proceedings around them and or be able to assist in their own defense.¹³

If the question of mental capacity is brought up during the trial, a judge will consider the defendant's mental state at the time of the criminal act; this is where pleas of not guilty by reason of insanity or guilty but mentally ill come in (both of which will be discussed later in this section).¹⁴ The defendant bears the burden of proof regarding mental capacity.¹⁵ When the judge determines the defendant incompetent to stand trial, proceedings cease and the defendant is committed to a mental health facility.

When discussing the defense of insanity, it is important to note that insanity is not a diagnosable medical condition.¹⁶ The disorders in the DSM-V do not identify a disorder called "insanity" because insanity is a legal term; by law, it is defined as "moral conception of insanity and responsibility."¹⁷

Insanity is defined in United States law under 18 U.S.C. § 17, which states that "it is an affirmative defense under any federal statute that, at the

⁸ Patricia E. Erickson, *Crime, Punishment, and Mental Illness: Law and The Behavioral Sciences in Conflict*, RUTGERS UNIVERSITY PRESS (2008) at 57.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Joshua Dressler and Stephen P. Garvey, *Criminal Law Cases and Materials*, WEST ACADEMIC PUBLISHING, 7th ed. (2015) at 642.

¹² *Id.*

¹³ *Id.*

¹⁴ Dressler and Garvey, *supra* note 11 at 644.

¹⁵ *Id.*

¹⁶ Erickson, *supra* note 8 at 30.

¹⁷ *Id.*

time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.”¹⁸ Insanity is both an affirmative and complete defense to a crime, which means that the burden of proof to plead insanity lies with the defendant, who must prove this beyond a reasonable doubt “with clear and convincing evidence.”¹⁹

Courts have generally relied on four tests for determining insanity and relieving a defendant of liability. These are the M’Naughten Rules, the Irresistible Impulse or Control Test, the Product Test, and the ALI’s Model Penal Code test. To establish a defense of insanity under the M’Naughten Rules, it must be proved that the defendant was “laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know, he did not know what he was doing was wrong.”²⁰ This moral and cognitive incapacity must be proved to have existed at the time the defendant actually committed the criminal act.²¹ M’Naughten is applied in most state jurisdictions. In the Irresistible Impulse Test, courts generally look into both the cognitive and volitional parts of a defendant’s behavior.²² This is done by asking if the defendant acted with an “irresistible and uncontrollable impulse,” adding the element of volition to the cognitive component set forth in the M’Naughten Test.²³ The Product Test simply states that a defendant is not criminally responsible “if his unlawful act was the product of mental disease or defect.”²⁴ This test asks the jury to consider all relevant information and not to limit its inquiry to that relating to symptoms or a manifestation of mental illness.²⁵ Lastly, the MPC discusses insanity in § 4.01, which states that a defendant is not responsible for criminal conduct “if, as a result of a mental disease or defect, he lacked the substantial capacity either to appreciate the criminality (wrongfulness) of his conduct, or to conform his conduct to requirements of the law.”²⁶ A defendant falls under the MPC’s umbrella of insanity if he or she was unable to appreciate the criminal-

¹⁸ Insanity Defense, 18 U.S.C. §1 7 (1986).

¹⁹ *Id.*

²⁰ Dressler and Garvey, *supra* note 11 at 663.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 649.

²⁵ *Id.*

²⁶ *Mental Disease or Defect Excluding Responsibility, supra* note 7.

ity of his or her actions and could not adapt that conduct to the requirements of the law.²⁷

There are several ways to raise an insanity defense. Two of these are “not guilty by reason of insanity” and “guilty but mentally ill.”²⁸ Not guilty by reason of insanity (NGRI) is a plea instead of, or along with, a general plea of not guilty.²⁹ It is rarely raised, but if pled successfully, will usually result in the defendant being committed to a mental health or psychiatric facility for a set time.³⁰ To successfully raise a plea of NGRI, a defendant must prove that he or she was unable to understand the difference between right and wrong due to a mental disease or defect.³¹ In other words, they are asserting that they were too impaired by their mental illness to be held criminally responsible.³²

Guilty but mentally ill (GBMI), is somewhat of an alternative to legal insanity. A plea or verdict of GBMI does not provide for any special commitment or treatment that would not otherwise be available to any other defendant, indicates no reduced culpability, and the sentence is often the same as it would be if the defendant was found guilty of the offense.³³ To obtain a GBMI verdict, the prosecutor must prove all the elements of a crime beyond a reasonable doubt, that no defenses were proven, including insanity, and that the defendant suffers from a mental disorder.³⁴ The finder of fact is basically being asked to make “a diagnosis along with a guilt determination.”³⁵ After a GBMI verdict is returned, the defendant is evaluated upon sentencing to determine whether or not the court should seek psychiatric treatment; if it is decided so, care may be provided for in prison while they are incarcerated.³⁶

PROBLEMS: PUBLIC PERCEPTION, STIGMA, AND MEDIA INFLUENCE

Although there are many struggles surrounding the criminal justice system when it comes to mental illness, the stigma and stereotypes are some of the

²⁷ Louis Kachulis, *Insane in the Mens Rea: Why Insanity Defense Reform is Long Overdue*, 26 USC INTERDISCIPLINARY LAW JOURNAL 357, 360 (2017).

²⁸ Dressler and Garvey, *supra* note 11 at 644.

²⁹ *Id.*

³⁰ Kachulis, *supra* note 27 at 362.

³¹ Dressler and Garvey, *supra* note 11 at 644.

³² *Id.*

³³ Stephen J. Morse, *Mental Disorder and Criminal Law*, 101, NORTHWESTERN UNIVERSITY JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, 885, 934 (2011).

³⁴ Dressler and Garvey, *supra* note 11 at 645.

³⁵ Morse, *supra* note 33, at 939.

³⁶ Dressler and Garvey, *supra* note 11 at 645.

worst. The media perpetuates these stereotypes with its poor portrayals of mentally ill defendants and the defense of insanity. There have been many high-profile trials involving defendants suffering from mental illness in the recent years that have especially highlighted this. These include the trials of Eddie Ray Routh, who murdered “America Sniper” Chris Kyle and Chad Littlefield; Andrea Yates, who drowned her five children in a bathtub; and James Holmes, who was responsible Aurora movie theater shooting.³⁷ The media’s portrayal of cases like these, all of which raised the insanity defense, have contributed to the broader problem of the public’s perception of mentally ill offenders and the insanity defense.

In general, the American public has a tremendously negative opinion of the defense of insanity and the mentally ill offender who raises it. Because many people tend to associate the defense with violent crimes, “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.”³⁸ It is seen as something that is used all the time, with a high success rate, and even that defendants will fake mental illness in order to raise it.³⁹ However, the insanity defense is raised in less than one percent of all criminal cases, and it has a less than thirty percent success rate within that small margin.⁴⁰ It is also not a “get-out-of-jail-free card.” In the event that insanity is successfully pleaded, that defendant will most likely spend the rest of their lives in state-mandated institutionalization; they are not set free.⁴¹

Where did these stigmas and generalizations come from? Following John Hinckley Jr.’s attempt to assassinate President Ronald Reagan in 1981 and his subsequent murder trial in which he successfully raised the insanity defense, the American people were outraged at what they thought to be an inadequate punishment.⁴² This led to an overwhelming outcry for insanity defense reform.⁴³ The Insanity Defense Reform Act of 1984 was the result of this country-wide dismay over the Hinckley verdict.⁴⁴ The Insanity Defense Reform Act is a stricter version of traditional insanity, “requiring that a defendant must fail

³⁷ Kachulis, *supra* note 27, at 362.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 363.

⁴² Interview with Peter Baroni, Criminal Defense Attorney, Leinenweber Baroni & Daffada LLC (October 4, 2018).

⁴³ *Id.*

⁴⁴ Dressler and Garvey, *supra* note 11 at 642.

to appreciate the nature and quality or wrongfulness of his or her acts in order to raise an insanity defense.”⁴⁵ It narrowed the inquiry by removing the volitional prong from the previously used Model Penal Code test, as well as shifted the burden from the prosecutor “to prove sanity beyond a reasonable doubt to instead require the defense to prove insanity by clear and convincing evidence.”⁴⁶ Several states have adopted laws similar to this federal law.⁴⁷

Clearly, a lot of this bias stems from negative perceptions of mental illness, as it is not easily understood. However, most of this comes from how a mentally ill defendant and the defense of insanity is covered by news media. Because there is so little understanding of the topics of the issue of mental health and crime and the insanity defense, this puts news outlets in a very powerful position, as it basically has complete control over what the public understands.⁴⁸ This gives the media a responsibility to get it right, and often they do not. The news covering these topics is sensationalized, and there are rarely any positive portrayals of it. When you couple that with the common association of mentally ill defendants and raising insanity with only violent crimes, “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.”⁴⁹

There are several cases in the recent years that have shown this negative public perception and stigma fueled by sensationalized news media at work, but one of the most prolific was that of James Holmes. On July 20, 2012, James Holmes opened fire at a movie theater in Aurora, Colorado.⁵⁰ He killed twelve people and injured seventy more with an AR-15 rifle, a 12-gauge shotgun, and one .40-caliber handgun.⁵¹ A later search of his apartment revealed more than thirty homemade grenades and ten gallons of gasoline.⁵² James Holmes was charged with 12 counts of Murder in the First Degree-After Deliberation, 12 counts of Murder in the First Degree- Extreme Indifference, 70 counts of Attempt to Commit Murder in the First Degree- After Deliberation,

⁴⁵ *Id.*

⁴⁶ Phillip J. Resnick, *The Andrea Yates Case: Insanity on Trial*, 55 *Clev. St. L. Rev.* 147, 154 (2007).

⁴⁷ Dressler and Garvey, *supra* note 11 at 642.

⁴⁸ Kachulis, *supra* note 27 at 363.

⁴⁹ *Id.* at 364.

⁵⁰ *Colorado Theater Shooting Fast Facts*, CNN, July 16, 2018, <https://www.cnn.com/2013/07/19/us/colorado-theater-shooting-fast-facts/index.html>.

⁵¹ *Id.*

⁵² *Id.*

70 Counts of Attempt to Commit Murder in the First Degree- Extreme Indifference, and 1 count of Possession or Control of an Explosive or Incendiary Device.⁵³

He pled not guilty by reason of insanity to all these charges, claiming that his mental state hindered his understanding of right from wrong on that night.⁵⁴ His attorneys wrote that Holmes “was in the throes of a psychotic episode when he committed the acts that resulted in the tragic loss of life and injuries sustained by moviegoers on July 20, 2012.”⁵⁵ He was later found guilty on all 165 counts and sentenced to life in prison without the possibility of parole after two psychiatrists both testified that “his mental illness did not prevent him from understanding right from wrong, or from forming intent to commit his actions,” making him mentally ill but legally sane.⁵⁶

The media had a field day with this case, because the trial was delayed multiple times over disputes as to evaluations of the defendant’s insanity. As Louis Kachulis writes in his article, *Insane in the Mens Rea: Why Insanity Defense Reform is Long Overdue*, the media portrayals of both Holmes and the insanity defense he raised were misleading, exaggerated, and oftentimes bordering on factually inaccurate.⁵⁷ The country was flooded with articles branded with sensational titles like “‘Will Insanity Defense Save James Holmes?’, ‘Will Mental Illness Save Holmes’ Life?’, and ‘Colorado Shooter’s Urge to Kill Could Set Him Free.’”⁵⁸ According to Kachulis, 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 the insanity defense is entirely incorrect.”⁵⁹

The case against James Holmes is just one of many cases that gave Americans another example of mental illness associated with a violent crime. Kachulis explains this point perfectly:

“Flippant media treatment of the insanity defense in this case has skewed the public’s opinion of the defense. Holmes was not the type of defendant that

⁵³ *People of the State of Colorado v. James Eagan Holmes*, No. 12CR1522 (D. Colo.) (suppressed filing).

⁵⁴ Mark Berman, *After Emotional Trial, Jury Convicts James Holmes of Murder for Aurora Movie Theater Shooting*, THE WASHINGTON POST, July 16, 2015, https://www.washingtonpost.com/news/post-nation/wp/2015/07/16/aurora-movie-theater-shooting-trial-finds-james-holmes-guilty-of-murder/?utm_term=.1ebb0744331a.

⁵⁵ *Id.*

⁵⁶ Kachulis, *supra* note 27 at 369.

⁵⁷ *Id.* at 370.

⁵⁸ *Id.*

⁵⁹ *Id.*

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.”⁶⁰

The media is extremely powerful and influential when it comes to public perception, particularly when it comes to the topic of criminality and mental illness. In situations like these, myth truly perpetuates stigma. Because the James Holmes case was a prominent and public one that happened to involve severe mental illness, it created a negative association between violent crime and mental illness.

PROBLEMS: PRISONS AS THE NEW MENTAL HEALTH FACILITIES

America currently has the highest rate of incarceration in the world, so the intersection between inmates suffering from a mental illness and prisons is a unique one in our criminal justice system today. Not only is the psychiatric care provided in prisons and jails throughout the United States inadequate, the amount of state-run psychiatric hospitals and mental health facilities, as well as their space and resources, have dwindled since the mid-twentieth century. In Illinois, spaces in psychiatric hospitals have decreased from 35,000 to less than 15,000 since the 1960s.⁶¹ The consequences of these shut downs are that mentally ill patients are often turned out on the street, without medication or a trained support system to stabilize them. Many end up committing crimes that land them in jail over and over, turning into what is known as a “revolving door” between the streets and prison; a constant cycle of jail, release, reoffending, and re-admittance to the system.⁶²

When it comes to mental illness, incarceration just adds fuel to the fire.⁶³ Criminal institutions like prisons and jails lack the proper funding, education, and expertise needed to deal with their inmates who suffer from mental illness.⁶⁴ Without the proper care, countless mentally ill inmates end up back in the criminal justice system, which would most likely not happen had they been actually treated and given their prescribed medication in a proper facility.⁶⁵

⁶⁰ Kachulis, *supra* note 27 at 370.

⁶¹ Tom Dart, *How We Shaft the Mentally Ill*, THE CHICAGO TRIBUNE, July 29, 2014, <http://www.chicagotribune.com/news/opinion/commentary/ct-cook-county-tom-dart-jail-mentally-ill-0729-20140729-story.html>.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

Jails have really become the largest mental health providers in many states.⁶⁶ According to a 2015 study done by the National Sheriff's Association and the Treatment Advocacy Center, there were ten times as many mentally ill people in the United States' 5,000 jails and prisons than there were in state mental institutions, and three years later that number has only grown.⁶⁷ Tom Dart, who is the Sheriff of Cook County, has estimated that at least one-third of Cook County's inmates are mentally ill.⁶⁸

SOLUTIONS: MENTAL HEALTH REFORM IN THE CRIMINAL JUSTICE SYSTEM

How do we combat these problems that often arise between the criminal justice system and those suffering from mental illness? I interviewed criminal defense attorney Peter Baroni for his take on how mental health and the criminal justice often coincide through the insanity defense in Illinois, as well as where he thinks reform is most needed.

Baroni calls mental illness “dynamic.”⁶⁹ Through dealing with mental illness as both a prosecutor and a defense lawyer, he believes that mental health problems affect “a huge component of people in the criminal justice system.”⁷⁰ According to Baroni, a real change in the limitation of the use of insanity as a defense came after the shooting of President Ronald Reagan by John Hinckley Jr.⁷¹ “Within a year of that verdict, virtually every state in the country went back to a ‘crazed animal’ insanity defense, instead of a clinical approach to mental health and insanity, because of the fear that that event put in people’s heads that you could shoot the president and get a pass. . . I think it was a huge overreaction,” he says.⁷²

As for how the defense is perceived today, Baroni thinks “crazed animal” perception persists.⁷³ “[Insanity’s] almost not available, because of all the ways that it’s been colored. Incredibly hard to raise, incredibly hard to prove up, and even if you do, you are considered Guilty but Mentally Ill, and you’re gone

⁶⁶ Timothy Williams, *A Psychologist as a Warden? Jail and Mental Illness Intersect in Chicago*, THE NEW YORK TIMES, July 30, 2015, <https://www.nytimes.com/2015/07/31/us/a-psychologist-as-warden-jail-and-mental-illness-intersect-in-chicago.html>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Baroni Interview, *supra* note 42.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

anyways. . . [insanity's] not a complete defense anymore, it's almost mitigatory because of the disposition that is Guilty but Mentally Ill."⁷⁴ The insanity defense in Illinois, Baroni explains, is usually raised through "Guilty but Mentally Ill."⁷⁵

In terms of reform, Baroni immediately points to the expansion of mental health courts as one possible solution.⁷⁶ "It's a way to get people treatment, and deal with the case in a more appropriate fashion," he says.⁷⁷ Currently, in order for a defendant to be tried in a mental health court, the prosecution has to agree to the defendant going into the program, so they have veto power over his or her participation.⁷⁸ This is often a problem, Baroni says.⁷⁹ "If [the prosecutors] don't like you, if you've got a criminal history. . . you may need mental health services, but that court setting may not be available to you."⁸⁰ This is where reforms would really benefit those defendants suffering from a mental illness. "I think that expanding mental health court to allow anyone that charged with any crime. . . that would be a much better approach," Baroni explains.⁸¹ "A robust, neutral, mental health court system that acknowledges that the abundance of cases where mental health was a driving factor in the commission of the crime, would be a far better way to deal with the sort of problems that are not necessarily the intention of the defendant, but a byproduct of the mental illness."⁸²

CONCLUSION

In summary, mental illness and its relationship with the law is a very pressing problem in the United States today. Unfortunately, the intersection between mental health and the criminal justice system is plagued with stigma and myths. In order to better understand how these things are involved, we must have a better understanding of mental health as a whole. Reform is needed to really make changes in how those that suffer from mental health problems are treated within the criminal justice system. Things like the expansion of mental health courts, raising proper awareness on what the insanity defense really does

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

and what it protects, and general education on mental health will help these individuals navigate their way through the justice system fairly and with proper care. Reform is needed in order to ensure that those in need are not lost within the system.