2013

Abolition of the Insanity Defense Violates Due Process

Stephen J. Morse
University of Pennsylvania Carey Law School

Richard J. Bonnie
University of Virginia School of Law

Abolition of the Insanity Defense Violates Due Process

Stephen J. Morse, JD, PhD, and Richard J. Bonnie, JD

This article, which is based on and expands on an *amicus* brief the authors submitted to the United States Supreme Court, first provides the moral argument in favor of the insanity defense. It considers and rejects the most important moral counterargument and suggests that jurisdictions have considerable leeway in deciding what test best meets their legal and moral policies. The article then discusses why the two primary alternatives to the insanity defense, the negation of *mens rea* and considering mental disorder at sentencing, are insufficient to achieve the goal of responding justly to severely mentally disordered offenders. The last section considers and rejects standard practical arguments in favor of abolishing the insanity defense.

J Am Acad Psychiatry Law 41:488–95, 2013

In November 2012, the Supreme Court declined to grant *certiorari* in an Idaho case, *Delling v. Idaho*,[1] which urged the Court to consider whether the Due Process Clause and the Eighth Amendment to the Constitution require all jurisdictions to retain some form of the insanity defense. Justice Breyer, joined by Justices Ginsburg and Sotomayor, dissented from the denial of *certiorari*.

Idaho abolished the insanity defense in the early 1980s and instead permits defendants to introduce evidence of mental disorder solely for the purpose of negating the *mens rea* required by the definition of the crime charged. John Joseph Delling had paranoid schizophrenia and believed that his victims were stealing his essence by shrinking his brain and that he had to kill them to save his life. He carefully planned the killings and succeeded. Mr. Delling clearly formed the intent to kill, the *mens rea* required for murder, but the judge also explicitly found that he was unable to appreciate the wrongfulness of his conduct due to his severe mental illness. No insanity defense was available, and he was therefore convicted of murder. Consequently, the validity of his conviction turned squarely on whether an independent insanity defense is constitutionally required.

We submitted an *amicus* brief in *Delling* on behalf of 52 law professors, urging the Supreme Court to grant *certiorari* and to decide the constitutional question in Mr. Delling's favor. In the course of his brief dissent, Justice Breyer referred to the "Law Professors' brief," as well as an *amicus* brief submitted by the American Psychiatric Association and the American Academy of Psychiatry and the Law, in support of granting *certiorari*. In the Law Professors' brief, we argued that the affirmative defense of legal insanity has such a strong historical, moral, and practical pedigree and is so ubiquitous that providing some form of an insanity defense is a matter of fundamental fairness in a just society. It gives doctrinal expression to fundamental moral and legal principles that have been recognized by the common law for centuries and that the Supreme Court has repeatedly acknowledged. Jurisdictions have substantial leeway in deciding what test best meets their legal and moral policies, but some form of affirmative defense is "so rooted in the traditions and conscience of our people as to be ranked as fundamental" as a principle of substantive justice (Ref. 2, p 105), and, accordingly,

Dr. Morse is Ferdinand Wakeman Hubbell Professor of Law and Professor of Psychology and Law in Psychiatry, University of Pennsylvania Law School and Department of Psychiatry, University of Pennsylvania Medical School, Philadelphia, PA. Professor Bonnie is Harrison Foundation Professor of Law and Medicine and Director, Institute of Law, Psychiatry and Public Policy, University of Virginia School of Law, Charlottesville, VA. Address correspondence to: Stephen J. Morse, JD, PhD, 3501 Sansom Street, Philadelphia, PA 19104-6204. E-mail: smorse@law.upenn.edu.

Disclosures of financial or other potential conflicts of interest: None.

required by the Due Process Clause. In this article, we present and elaborate upon these arguments.

The first section provides the moral argument in favor of the insanity defense. Then it considers and rejects the most important moral counterargument. Finally, it suggests that jurisdictions have considerable leeway in deciding what test best meets their legal and moral policies. The second section discusses why the two primary alternatives to the insanity defense, the negation of *mens rea* and considering mental disorder at sentencing, are insufficient to achieve the goal of responding justly to severely mentally disordered offenders. The last section considers and rejects standard practical arguments in favor of abolishing the insanity defense.

Why the Insanity Defense Is Constitutionally Required

This section provides the positive argument in favor of the moral necessity of providing an insanity defense, considers the primary counterargument, and concludes with discussion of what test is required.

The Moral Necessity of the Defense of Legal Insanity

Blame and punishment by the state are fundamentally unfair and thus a violation of the Due Process Clause if an offender was not responsible for his crime. The affirmative defense of legal insanity applies this fundamental principle by excusing those mentally disordered offenders whose disorder deprived them of rational understanding of their conduct at the time of the crime.[3–5] This principle is simple but profound. Indeed, in recognition of it, the insanity defense has been a feature of ancient law and of English law since the 14th century.[6–8] It was universal in the United States until the last decades of the 20th century, and there is still a near consensus among state and federal lawmakers that the defense must be retained.[9]

The concept of responsibility connects with our most fundamental convictions about human nature and dignity and our everyday experience of guilt and innocence and blame and punishment. It also explains our common aversion to the idea that we might simply be like machines responding to neural activities in the brain and our resistance to thinking of all wrongdoing as sickness. Failing to provide an insanity defense confounds the meaning of what it is to be responsible for one's actions. It cheapens the idea of being a responsible person by classifying and holding responsible persons intuitively regarded as fundamentally nonresponsible.

In both law and morals, the capacity for reason is the primary foundation for responsibility and competence. The precise cognitive deficit a person must exhibit can, of course, vary from context to context. In the criminal justice system, an offender who lacks the capacity to understand the wrongfulness of his actions as the result of severe mental disorder does not deserve full blame and punishment and must be excused in a sufficiently extreme case. Moreover, such offenders cannot be appropriately deterred because the rules of law and morality cannot adequately guide them. Failing to excuse some mentally disordered offenders is inconsistent with both retributive and deterrent theories of just punishment.

A similar baseline principle explains the many competence doctrines employed in the criminal justice process. This Court has long recognized that, at every stage, justice demands that some people with severe mental abnormalities must be treated differently from those without substantial mental impairment, because some impaired defendants are incapable of reason and understanding in a specific context. Competence to stand trial,[10] competence to plead guilty and to waive counsel,[11] competence to represent oneself,[12] and competence to be executed[13,14] are all examples in which the Constitution requires such special treatment. It is unfair to the defendant and offensive to the dignity of criminal justice to treat people without understanding as if their understanding was unimpaired. Evidence of mental disorder is routinely introduced in all these contexts to determine whether the defendant must be accorded special treatment.

Legally insane offenders are not excused solely because they had a severe mental disorder at the time of the crime. The mental disorder must also impair their ability to understand or appreciate that what they are doing is wrong or some other functional capacity that a jurisdiction believes is crucial to responsibility. The criminal acts of those found legally insane do not result from bad judgment, insufficient moral sense, bad attitudes, or bad characters, none of which is an excusing condition. Rather, the crimes of legally insane offenders arise from a lack of understanding produced by severe mental abnormality and

thus they do not reflect culpable personal qualities and actions. To convict such people offends the basic sense of justice.

The impact of mental disorder on an offender's responsibility and competence is recognized throughout criminal law. Even the few jurisdictions that have abolished the insanity defense recognize that mental disorder affects criminal responsibility because it permits the introduction of evidence of mental disorder to negate the *mens rea* for the crime charged.[15,16] As the Supreme Court has recognized, state infliction of stigmatization and punishment is a severe infringement (Ref. 17, pp 363–4). The insanity defense is grounded in long-recognized legal and moral principles and on routinely admissible evidence. Even if a defendant formed the charged *mens rea*, it is unfair to preclude a defendant from claiming and proving that he was not at fault as a result of lack of understanding arising from a severely disordered mind. That is precisely the issue *Delling* raised.

Historical practice, the near universal acceptance of the need for an independent affirmative defense of legal insanity, and the fundamental unfairness of blaming and punishing legally insane offenders provide the strongest reasons to conclude that fundamental fairness and the Due Process Clause require an insanity defense. Abolishing this narrowly defined and deeply rooted defense could plausibly be justified only if an alternative legal approach could reach the same just result or if irremediably deep flaws preclude fair and accurate administration of the defense. The next two main sections show that there are no such alternatives and that the defense is no more vulnerable to risks of mistake and abuse than any other disputed issue in the penal law.

Response to the Counterargument

The late Norval Morris presented the most recent, important, nonconsequentialist argument for abolishing the insanity defense in his book, *Madness and the Criminal Law*.[18] Professor Morris suggested numerous consequentialist arguments for rejecting the insanity defense, but, believing in desert as a limiting principle in criminal law, he confronted directly "the question of fairness, the sense that it is unjust and unfair to stigmatize the mentally ill as criminals and to punish them for their crimes" (Ref. 18, p 61). In brief, Morris argued that other causes, such as social disadvantage, are far more criminogenic than mental disorder (including severe disorder); yet, he pointed out, we do not excuse those who are poor or the products of broken homes. Morris concluded, "[a]s a rational matter it is hard to see why one should be more responsible for what is done to one than for what one is" (Ref. 18, p 63). This conclusion is surely correct. It does not follow from the argument presented for it, however, which makes a morally irrelevant comparison between socially disadvantaged persons and persons with severe mental disorders.

Morris confuses causation with excuse, a confusion that has consistently bedeviled clear thinking about criminal responsibility. Causation is not *per se* an excusing condition in criminal law. All behavior is caused, even if we are often ignorant of the causes. If causation were an excuse, no one would be held responsible for any behavior, criminal or not. Moreover, causation is not the equivalent of the subspecies of the genuine excuse that we term compulsion. Compulsion exists when the person faces a regrettable hard choice that leaves him with no reasonable alternative to wrongdoing. We also sometimes say that people are compelled if they yield to an internal desire that they find it extremely difficult to resist. Again, if causation were the equivalent of compulsion, no one would be responsible, because all behavior would be compelled. Causation is not the question; nonculpable lack of reason and compulsion are the genuine excusing conditions.

Consider the case of a person whose extreme irrationality stems from the unknowing ingestion of a powerful hallucinogen. Such a defendant, who is not responsible for the ingestion of the drug, is not held responsible for a consequent crime. How can we distinguish this case from that of a person who commits a crime in response to motivations produced by severe mental disorder, say, a sudden command hallucination buttressed by a consistent delusional belief that the action is necessary? Mentally disordered defendants who are not responsible for their condition should also be excused. In both cases, the defendant is excused not because the behavior was caused—all behavior is caused—but because the defendant was sufficiently irrational and was not responsible for the irrationality.

The reason we do not excuse most disadvantaged criminals (or those whose criminal behavior can be explained by other powerful causes) is not because we lack sympathy for their unfortunate backgrounds or because we fail to recognize that social disadvantage

is a powerful cause of crime, as it surely is. Rather, most disadvantaged defendants are held responsible because they possess minimal reason and are not compelled to offend. A disadvantaged defendant whose stress causes him to be mentally disordered will be excused because he is disordered, not because the abnormal mental state is caused by disadvantage. Similarly, most mentally disordered persons are held responsible for acts influenced by their disorders because they retain sufficient reason to meet the low threshold standards for responsibility. In sum, the criteria for moral autonomy and responsibility are the capacity for reason and lack of compulsion, whereas the criteria for excuses are that the person is nonculpably lacking the capacity for reason or is compelled.

The Test for Legal Insanity

Like the *amicus* brief filed on behalf of the American Psychiatric Association (APA) and the American Academy of Psychiatry and the Law (AAPL), the Law Professors' brief did not endorse any particular test of insanity. This perspective is in keeping with the Supreme Court's long-standing reluctance to intrude too deeply into the sphere of state policymaking regarding the substantive criminal law. As Justice Marshall's plurality opinion in *Powell v. Texas* said:

> We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of *actus reus, mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States [Ref. 19, 535–6].

At the same time, the Law Professors' brief, like the APA/APPL brief, identified the core content of the traditional insanity defense as the incapacity to understand the wrongfulness of one's actions.[20] In one form or another, this deficit best explains the various tests adopted by 46 states and the federal criminal code. How such lack of understanding should be defined doctrinally and whether more controversial control tests[21,22] should be adopted at all are matters within the province of the states and the federal government.

Alternatives to the Insanity Defense Are Not Morally Adequate

This section first addresses the *mens rea* alternative and then considers sentencing.

The Mens Rea Alternative

The negation of *mens rea* and the affirmative defense of legal insanity are different claims that avoid liability by different means and trigger different outcomes. The former denies the *prima facie* case of the crime charged; the latter is an affirmative defense that avoids liability in those cases in which the *prima facie* case is established. The postverdict consequences are also different. The former leads to outright acquittal; the latter results in some form of involuntary civil commitment. The two different claims are not substitutes for one another.

The primary reason that permitting a defendant to introduce evidence of mental disorder to negate *mens rea* cannot replace the affirmative defense of legal insanity to achieve justice is that the *mens rea* alternative is based on a mistaken view of how severe mental disorder affects human behavior. In virtually all cases, mental disorder, even severe disorders marked by psychotic symptoms such as delusions and hallucinations, does not negate the required *mens rea* for the crime charged[23] (Ref. 5, p 933). It is difficult to prove a negative, but cases, especially those involving serious crime, in which the *mens rea* for every offense charged is negated are extremely rare. Rather, mental disorder affects a person's reasons for action. A mentally disordered defendant's irrationally distorted beliefs, perceptions, or desires typically and paradoxically give him the motivation to form the *mens rea* required by the charged offense. They usually do not interfere with the ability to perform the necessary actions to achieve irrationally motivated aims.

Consider the following typical examples beginning with Daniel M'Naughten himself.[24] In *M'Naughten's Case*, 8 Eng. Rep. 718 (1843), M'Naughten delusionally believed that the ruling Tory party was persecuting and intended to kill him (Ref. 25, p 10). As a result, he formed the belief that he needed to assassinate Prime Minister Peel to end the threat. He therefore formed the intention to kill Peel. Thus M'Naughten would have been convicted of murder if a defense of legal insanity had not been available. Indeed, his case has come to stand for one of the rules enunciated by the House of Lords, that a

defendant should be acquitted on grounds of insanity if he "was laboring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong" (Ref. 24, p 722). For a more contemporary example, consider the case of Andrea Yates, the Texas woman who drowned her five children in a bathtub. She delusionally believed that she was corrupting her children and that unless she killed them, they would be tortured in Hell for all eternity.[26] She therefore formed the intention to kill them. Indeed, she planned the homicides carefully. Ms. Yates was nonetheless acquitted by reason of insanity because she did not know that what she was doing was wrong. Even if she narrowly knew the law of Texas and her neighbors' mores, she thought the homicides were fully justified by the eternal good of the children under the circumstances. If only society knew what she knew, they would approve of her conduct as justified. For a final example, suppose an offender with aural hallucinations believes that he is hearing God's voice or delusionally believes that God is communicating with him and that God is commanding him to kill.[27] If the offender kills in response to this command hallucination or delusion, he surely forms the intent to kill to obey the divine decree. Nonetheless, it would be unjust to punish this defendant, because he, too, does not know right from wrong, given his beliefs, for which he is not responsible.

In all three cases, one could also claim that the defendants did not know what they were doing in a fundamental sense, because the most material reason for action, what motivated them to form *mens rea*, was based on a delusion or hallucination that was the irrational product of a disordered mind. Nevertheless, in all three cases, the defendants' instrumental rationality, the ability rationally to achieve their ends, was intact despite their severe disorders. They were able to carry out their disordered plans effectively.

Mr. Delling's case is consistent with this most typical pattern of legal insanity claims in which the defendant clearly had the *mens rea* required by the definition of the crime but lacked capacity to understand or appreciate the wrongfulness of his conduct. He indisputably had a major mental disorder, paranoid schizophrenia, and as a result, delusionally believed that his victims were stealing his powers and would thereby kill him. He therefore believed that he needed to kill the victims to save his own life. His grossly delusional belief was the cause of his formation of the intent to kill. It is also undisputed that he carefully planned his victims' deaths and learned from one failed attempt. Such evidence of his instrumental rationality is consistent with having such delusional beliefs. The trial judge explicitly found that Mr. Delling did not know right from wrong under the circumstances. Nonetheless, he was convicted of murder because legal insanity was unavailable as a defense.

Mr. Delling was not a morally responsible agent. He was completely out of touch with reality concerning his victims and the actions necessary to save his own life. He did not deserve blame and punishment for his murders. He is no more to blame than someone with dementia, for example, who acts on the basis of similarly disordered beliefs. It is true, of course, that Mr. Delling poses a genuine threat to social safety as long as he remains deluded, but commitment after an insanity acquittal is more than sufficient to protect public safety, as 46 states and the federal jurisdiction have recognized by having commitment statutes that require acquittees to prove their suitability for release and that establish tightly controlled programs of community supervision when the acquittees are released.

To further understand the injustice of the *mens rea* alternative, consider a case in which *mens rea* may plausibly be negated. Suppose a defendant charged with murder claims that he delusionally believed that his obviously human victim of a shooting was in reality a rag doll. If that were true, the defendant did not intentionally kill a human being. Indeed, in a *mens rea* alternative jurisdiction, he could not be convicted of purposely, knowingly, or recklessly killing a human being, because his delusional beliefs negated all three mental states. After all, he fully believed that he was shooting at a rag doll, not a human being. The defendant would be convicted of negligent homicide, however, because the standard for negligence is objective reasonableness and the motivating belief was patently unreasonable.

Of course, convicting the severely disordered defendant of a crime on the basis of a negligence standard is fundamentally unjust, as even Mr. Justice Holmes recognized in his rightly famous essays on the common law (Ref. 28, pp 50–1). The defendant's unreasonable mistake was not an ordinary mistake caused by inattention, carelessness, or the

like. Defendants are responsible for the latter, because we believe that they have the capacity to behave more reasonably by being more careful or attentive. In contrast, the hypothetical defendant's delusional mistake was the product of a disordered mind, and thus he had no insight and no ability to recognize the gross distortion of reality. He was a victim of his disorder, not someone who deserves blame and punishment as a careless perpetrator of manslaughter. He does not deserve any blame and punishment, and only the defense of legal insanity could achieve this appropriate result. Paradoxically, such a defendant's potential future dangerousness if he remains deluded would be better addressed by an insanity acquittal and indefinite involuntary commitment than by the comparatively short, determinate sentences for involuntary manslaughter.

Thus, the *mens rea* alternative is not an acceptable replacement or substitute for the insanity defense. Only in the exceedingly rare case in which mental disorder negates all *mens rea* would the equivalent justice of a full acquittal be achieved, albeit for a different reason; but again, this is the rarest of cases. Most legally insane offenders form the *mens rea* required by the definition of the charged offense, and only the defense of legal insanity can respond justly to their blameworthiness. Finally, a defendant who negated all *mens rea* would be entitled to outright release and subject only to traditional involuntary civil commitment, which is far less protective of public safety than postinsanity acquittal commitment.

Sentencing

Consideration of mental disorder for purposes of assessing both mitigation and aggravation is a staple of both capital and noncapital sentencing, but it is no substitute for the affirmative defense of legal insanity. On moral grounds, it is unfair to blame and punish a defendant who deserves no blame and punishment at all, even if the offender's sentence is reduced. Blaming and punishing in such cases is unjust. Sentencing judges might also use mental disorder as an aggravating consideration, as occurred in *Delling*, because it might suggest that the defendant is especially dangerous as a result. Thus, sentences of severely mentally ill offenders might not be reduced or might even be enhanced. Again, injustice would result, and public safety would not be protected as well as an indeterminate postacquittal commitment would achieve. Third, unless a sentencing judge is required by law to consider mental disorder at sentencing, whether the judge does so will be entirely discretionary. Again, this is a potential source of profound injustice if the sentencing judge fails to consider severe mental disorder in an appropriate case. In short, only a required insanity defense would ensure that arguably blameless mentally disordered offenders have an opportunity to establish that the stated blame and punishment are not justified.

Practical Objections to the Insanity Defense are Inconsequential

Several objections to the insanity defense have been raised by proponents of abolition, including those in Idaho, but they are insubstantial and provide not even a rational basis for abolishing a defense with such a profound historical, moral, and legal basis. They certainly cannot survive a more searching analysis. In general, these objections relate to supposed difficulties of administering the insanity defense fairly and accurately. Specific objections include that administering the defense requires an assessment of the defendant's past mental state using controversial psychiatric and psychological evidence, a task that is too difficult; acquitting insane defendants endangers public safety; the defense produces wrong verdicts; and defendants use it to beat the rap.

Assessing Past Mental State Using Psychological and Psychiatric Evidence

It is often difficult to reconstruct past mental states and, as the Supreme Court has acknowledged, psychological and psychiatric evidence can be problematic (Refs. 9, p 740–1; 29, p 413). Nevertheless, if all jurisdictions, including *mens rea* alternative jurisdictions, concede the necessity of proving *mens rea* (for most crimes) before punishment may justly be imposed, then their argument against the insanity defense based on the difficulty of reconstructing past mental states must fail unless assessing past intent, knowledge, and other types of *mens rea* is easier than assessing whether the defendant was acting under the influence of severely abnormal mental states. After all, both *mens rea* and legal insanity refer to past mental states that must be inferred from the defendant's actions, including utterances. The severe disorder that is necessary for practical support of an insanity defense is in most cases easier to prove than ordinary *mens rea*. Despite the problems with mental health evidence, all but four jurisdictions believe that

assessing legal insanity at the time of the crime with mental health evidence is feasible. Indeed, it is routine. Moreover, the abolitionist jurisdictions permit introduction of such evidence to negate *mens rea*. Unless abolitionist jurisdictions are prepared to argue—and none has—that assessing *mens rea* with mental health evidence is uniquely reliable, the argument based on the deficiencies of mental health evidence lacks credibility. Indeed, one could claim that the severe disorder that is practically necessary to support an insanity defense is easier to prove than ordinary *mens rea* because it is, by definition, obvious. Finally, mental health evidence is routinely admitted in a vast array of civil and criminal contexts, including all the criminal competencies and sentencing.

Public Safety

As previously argued, the insanity defense poses no danger to public safety. Successful insanity defenses are so rare that deterrence will not be undermined, because few legally sane defendants will believe that they can avoid conviction by manipulatively and falsely raising the defense. More important, every jurisdiction provides for commitment to a secure mental facility after a defendant has been acquitted by reason of insanity and the Supreme Court has approved the constitutionality of indefinite confinement (with periodic review) of such acquittees as long as they remain mentally disordered and dangerous.[30,31] (Ref. 5, p 932). Further, the Supreme Court has approved procedures for the commitments that are more onerous for acquittees than standard civil commitment.[30] It is of course true that acquittees may be released earlier than if they had been convicted and imprisoned, but there is no evidence that released acquittees pose a special danger to the community.[32–36]

Wrong Verdicts

Another objection is that the insanity defense is especially prone to erroneous verdicts. This objection is unwarranted.

There is no evidence that the factual determinations concerning whether a defendant has a severe mental disorder incapacitating him from understanding the wrongfulness of his conduct are especially prone to error. Expert evidence on these concerns is routinely admitted and is subject to the usual rules of cross-examination.

The ultimate value judgments that the insanity defense requires, such as the question of whether the defendant is incapable of understanding the wrongfulness of his conduct, are no more intractable or unreliable than the many other value judgments that the criminal law asks finders of fact to make, such as whether the defendant grossly deviated from the standard of care to be expected of a reasonable person, or whether an intentional killer was reasonably provoked. In our American system of justice, it is entirely appropriate to leave to the jury considerable discretion to judge, in light of all the facts and circumstances of the particular case, whether the defendant's mental disorder undermined his criminal responsibility. Drawing the line between guilt and innocence is the task of the finder of fact as the legal and moral representative of the community.

Complaints about erroneous insanity acquittals are factually exaggerated because the incidence of such acquittals is low and the complaints are speculative. There is no reason to believe that the insanity defense is particularly prone to error compared with other, equally indeterminate, value-laden criminal law doctrines. The wrong-verdict argument does not provide a legitimate policy reason for abolishing the insanity defense.

Beating the Rap

Few defendants who are actually legally sane in some objective sense beat the rap with the insanity defense. Experts using the proper diagnostic tools can reliably distinguish people who are faking major mental disorder.[37] Further, it is best estimated that the insanity defense is raised in less than one percent of federal and state trials and is rarely successful[38,40] (Ref. 39, pp 361–6). The complaint that this defense allows a large number of guilty criminals to avoid conviction and punishment is simply unfounded. Prosecutors and defense attorneys alike generally recognize that insanity is a defense of last resort that betokens an otherwise weak defense and that rarely succeeds. Insanity acquittals are far too infrequent to communicate the message that the criminal justice system is soft or fails to protect society. It is impossible to measure precisely the symbolic value of these acquittals, but it is also hard to believe that they have much impact on social or individual perceptions. So few insanity pleas succeed that neither aspiring criminals nor society assumes that conviction and punishment will be averted by raising the defense.

If the defendant is genuinely legally insane and succeeds with the defense, he deserves to be acquitted and has not beaten the rap at all. The tough-on-crime justification that underlies this argument is based on a fundamental misconception about the meaning of an insanity acquittal. In successful insanity defenses, the *prima facie* case for guilt has been established, and the verdict thus announces that the defendant's conduct was wrong. Nonetheless, the defendant did not deserve blame and punishment and will be confined by commitment.

Conclusion

Until the latter part of the 20th century, all American jurisdictions had some version of the insanity defense. Even now, only four states deny defendants the use of the defense. The affirmative defense of legal insanity has such a strong historical, moral, and practical pedigree and is so widely accepted that providing it is a matter of fundamental fairness in a just society. Jurisdictions have substantial leeway to decide what test best meets their legal and moral policies, but some form of affirmative defense is a prerequisite of justice, and its constitutional status under the Due Process Clause should be explicitly recognized. It is part of the legal tradition and collective conscience of the nation. Further, no alternative will achieve equal justice by other means.

References

1. Delling v. Idaho, 133 S.Ct. 504 (2012), cert. denied
2. Snyder v. Massachusetts, 291 U.S. 97 (1934)
3. Moore M: Law and Psychiatry: Rethinking the Relationship. Cambtidge: Cambridge University Press, 1984
4. Fingarette H, Hasse A: Mental Disabilities and Criminal Responsibility. Berkeley, CA: University of California Press, 1979
5. Morse SJ: Mental disorder and criminal law. J Crim Law Criminol 101:885–968, 2011
6. Maeder T: Crime and Madness: The Origins and Evolution of the Insanity Defense. New York: Harper & Row, 1985
7. Walker N: Crime and Insanity in England. Edinburgh: Edinburgh University Press, 1968
8. Elkins BE: Idaho's repeal of the insanity defense: what are we trying to prove? Idaho L Rev 31:151–71, 1994
9. Clark v. Arizona, 548 U.S. 735 (2006)
10. Drope v. Missouri, 420 U.S. 162 (1975)
11. Godinez v. Moran, 509 U.S. 389 (1993)
12. Indiana v. Edwards, 554 U.S. 164 (2008)
13. Ford v. Wainwright, 477 U.S. 399 (1986)
14. Panetti v. Quarterman, 551 U.S. 930 (2007)
15. State v. Beam, 710 P.2d 526, 531 (Idaho 1985)
16. State v. Searcy, 798 P.2d 914, 917 (Idaho 1990)
17. In re Winship, 397 U.S. 358 (1970)
18. Morris N: Madness and the Criminal Law. Chicago, IL: University of Chicago Press, 1982
19. Powell v. Texas, 392 U.S. 514 (1968)
20. Bonnie R: The moral basis of the insanity defense. ABAJ 69: 194–7, 1983
21. American Bar Association: ABA Criminal Justice Mental Health Standards. Washington, DC: American Bar Institute, 1989
22. American Psychiatric Association: Insanity Defense: Position Statement. Washington, DC: American Psychiatric Association, 1982
23. Morse SJ: Undiminished confusion in diminished capacity. J Crim Law Criminol 75:1–55, 1984
24. M'Naghten's Case, [1843] 8 Eng. Rep. 718
25. Moran R: Knowing Right From Wrong: The Insanity Defense of Daniel McNaughtan. New York: Free Press, 2000
26. Denno DW: Who is Andrea Yates?—a short story about insanity. Duke J Gender L Poly 10:1–139, 2003
27. People v. Serravo, 823 P.2d 128 (Colo. 1992)
28. Holmes OW Jr: The Common Law. Boston: Little, Brown and Company, 1945
29. Kansas v. Crane, 534 U.S. 407 (2002)
30. Jones v. United States, 463 U.S. 354 (1983)
31. Foucha v. Louisiana, 504 U.S. 71 (1992)
32. Spodak MK, Silver SB, Wright CU: Criminality of discharged insanity acquittees: fifteen year experience in Maryland reviewed. Bull Am Acad Psychiatry Law 12: 373–82, 1984
33. Wiederanders MR, Bromley DL, Choate PA: Forensic conditional release programs and outcomes in three states. Int J Law Psychiatry 20:249–57, 1997
34. Callahan LA, Silver E: Revocation of conditional release: a comparison of individual and program characteristics across four states. Int J Law Psychiatry 21:177–86, 1998
35. Parker GF: Outcomes of assertive community treatment in an NGRI conditional release program. J Am Acad Psychiatry Law 32:291–303, 2004
36. Steadman HJ, Keitner L, Braff J, *et al*: Factors associated with a successful insanity plea. Am J Psychiatry 140:401–5, 1983
37. Perlin ML: The borderline which separated you from me: the insanity defense, the authoritarian spirit, the fear of faking, and the culture of punishment. Iowa L Rev 82:1375–426, 1997
38. National Mental Health Association: Myths and Realities: A Report of the National Commission of the Insanity Defense. Arlington, VA: National Mental Health Association, 1983, pp 14–15
39. Pasewark RA: Insanity pleas: a review of the research literature. J Psychiatry Law 9:357–401, 1981
40. Steadman HJ, McGreevey MA, Morrissey JP, *et al*: Before and After Hinckley: Evaluating Insanity Defense Reform. New York: Guilford Press, 1993