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NOTE

THE CRAZIEST REFORM OF THEM ALL: A CRITICAL ANALYSIS OF THE CONSTITUTIONAL IMPLICATIONS OF "ABOLISHING" THE INSANITY DEFENSE

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INTRODUCTION

Ronny Zamora was fifteen years old when he shot and killed an elderly neighbor in Florida in the mid-1970s.[1] At trial, Zamora entered a plea of not guilty by reason of insanity (NGRI) and his attorney, Ellis Rubin, argued that Zamora had become involuntarily and subliminally intoxicated by violent television programming—the so-called "television intoxication" defense.[2] The trial judge excluded a defense expert's testimony on the effects of television violence upon children,[3] and Zamora was subsequently convicted "in record time."[4]

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1 *See* Zamora v. State, 422 So. 2d 325, 326 (Fla. Dist. Ct. App. 1982); *see also* Patricia J. Falk, *Novel Theories of Criminal Defense Based upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N.C. L. REV. 731, 742–48 (1996) (discussing the facts of *Zamora*, as well as the defense of television intoxication generally).

2 According to Professor Falk, as of 1996 there were only two cases other than *Zamora* in which defendants used, or attempted to use, this defense; however, both defendants were unsuccessful. *See* Falk, *supra* note 1, at 745–46 (discussing *State v. Quillen*, No. S87-08-0118, 1989 Del. Super. LEXIS 129 (Mar. 28, 1989), and *State v. Molina*, No. 84-2314 (Fla. Dade County Ct. filed Oct. 1984), both of which involved defendants who unsuccessfully attempted to use the defense).

3 The trial judge held the testimony to be irrelevant. For the portion of the trial transcript relating to the court's decision to disallow this testimony, see JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS 446–52 (3d ed. 1994). This was a hotly contested issue on appeal. *See infra* note 4; *see also* ELLIS RUBIN & DARY MATERA, "GET ME ELLIS RUBIN!": THE LIFE, TIMES, AND CASES OF A MAVERICK LAWYER 51 (1989) (arguing that the trial judge's exclusion of the expert testimony, seventy-eight scientific studies, and published stories regarding the effect of television violence on children was incorrect).

4 Falk, *supra* note 1, at 743. It took the jury less than two hours to return a guilty verdict. *Id.* at 743 n.57 (citing Donna Gehrke, *Trial Over, but Ordeal Continues: TV Intoxication Murder Case Still Haunts Principals*, MIAMI HERALD, Dec. 3, 1989, at 1G). Falk notes that the *Zamora* case also sparked considerable subsequent litigation on appeal:

> In state courts, Rubin appealed on the ground that the trial court erred in excluding the expert testimony on the negative effects of violent television on children, but the Florida Court of Appeals rejected the appeal. Zamora

However, considering past public reactions in cases where the insanity defense was used successfully, such as that of John Hinckley, Jr.,[5] one can only imagine the outrage that would have resulted had the jury been permitted to hear the excluded testimony and had thereafter found Zamora legally insane.

To say that the insanity defense is merely controversial would be a vast understatement.[6] Cases such as those of Ronny Zamora and John Hinckley give rise to public furor at the mere announcement of a defendant's intent to assert the insanity defense, not to mention the exponential growth of this vehemence if the defense is ultimately successful.[7] Yet if one considers the actual impact of the defense on

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> thereafter retained new counsel and appealed, arguing ineffective assistance of counsel; this appeal was also denied. After exhausting the appellate process in Florida, Zamora mounted a habeas corpus challenge in the federal courts, again claiming, inter alia, that he had been denied effective assistance of counsel because Rubin had tried the unlikely defense of television intoxication. The federal courts were not sympathetic to this argument . . . .
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> . . . The final piece of litigation resulting from this case was a civil suit by Zamora and his parents against the three major television networks. The federal district court dismissed the suit . . . .

Id. at 743–44 (footnotes omitted).

5 Hinckley shot and wounded President Ronald Reagan and three other persons, including Press Secretary James Brady, as the President was walking to his limousine after an appearance at a hotel in Washington, D.C. Many people witnessed the shooting, and millions more watched it happen on national television. After a seven-week trial, Hinckley was found NGRI, and was subsequently committed to St. Elizabeth's Hospital by U.S. District Judge Barrington D. Parker. *See* RITA J. SIMON & DAVID E. AARONSON, THE INSANITY DEFENSE: A CRITICAL ASSESSMENT OF LAW AND POLICY IN THE POST-HINCKLEY ERA 1 (1988). As Professors Simon and Aaronson explain, the Hinckley acquittal resulted in "swift emotional demands for changes in the insanity defense laws." *Id.*

6 *Cf.* MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE 3 (1994) ("No aspect of the criminal justice system is more controversial than is the insanity defense. . . . [N]o other aspect of the criminal law inspires position papers from *trade associations* spanning the full range of professions and political entities." (emphasis added)); SIMON & AARONSON, *supra* note 5, at 2 ("Perhaps no other area of the criminal law has been subject to more controversy . . . ."); George L. Blau & Richard A. Pasewark, *Statutory Changes and the Insanity Defense: Seeking the Perfect Insane Person*, 18 LAW & PSYCHOL. REV. 69, 69 (1994) ("[The insanity defense] is one of the most frequently appearing topics in legal literature."); Lisa Callahan et al., *Insanity Defense Reform in the United States—Post-Hinckley*, 11 MENTAL & PHYSICAL DISABILITY L. REP. 54, 54 (1987) (asserting that "[t]he insanity defense is among the most hotly debated and controversial issues in mental health law").

7 The mere possibility that a person could be absolved of responsibility for his actions when his guilt is clear seems to be what both puzzles and angers members of the general public, regardless of whether the defense, in reality, actually works. This seems to "reflect our basic dissatisfaction . . . with the notion of psychiatric excuses allowing a 'guilty' defendant to 'beat the rap' and escape punishment." Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 613 (1989–1990). As Professor Perlin also argues:

> [T]he [perceived] abuse of the insanity defense symbolizes the alleged breakdown of law and order, the thwarting of punishment . . . , the failure of the crime control model, and the ascendancy of a "liberal," exculpatory, excuse-ridden jurisprudence . . . . The successful use of the defense . . . symbolizes, on a psychodynamic level, the thwarting of punishment of the

the criminal justice system, perhaps no other legal topic receives a more disproportionate amount of attention.[8]

Even with all of this attention, though, misperceptions about the insanity defense are, as studies and accounts have shown, nothing short of remarkable,[9] and result in repeated calls from all segments of

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> errant child who commits the perfect Oedipal crime against the perfect father figure, making the subsequent furor inevitable.

Id. at 621–22 (footnotes omitted); *see also* Donald H.J. Hermann, *The Insanity Defense*, 44 OHIO ST. L.J. 987, 987 (1983) ("[T]he view [is] often expressed that too many criminals escape punishment by pleading and, in some instances, feigning insanity. The general view is that the insanity defense . . . is too often a means for defendants to escape their just punishment." (footnote omitted)) (reviewing WILLIAM J. WINSLADE & JUDITH WILSON ROSS, THE INSANITY PLEA (1983)). If one compares the aftermath of the Hinckley case (in which the defense was successful) to that of Zamora, Jeffrey Dahmer, or David Berkowitz (all cases in which insanity was pleaded but was ultimately rejected), one would realize that the public's outrage seems to subside quickly if the result of the trial is a conviction. However, this is certainly not the case if a jury happens to find the defense persuasive, especially in a sensational case such as Hinckley's. *See* HARRY J. STEADMAN ET AL., BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM 1–2 (1993). Steadman states that, because of their convictions,

> neither the Dahmer nor the Berkowitz cases incited an outcry calling for revision of the insanity defense. After their convictions the press, the public, and legislators moved on to other issues. But the John Hinckley case was another matter. . . . [I]t was not so much Hinckley's plea . . . as it was his acquittal by reason of insanity [that caused the outcry for insanity defense reform] . . . .

It therefore seems that in the eyes of the public, when the defense is asserted and the trial results in a conviction, the system works after all; yet if the trial results in a NGRI verdict, the system has failed for allowing a "wrong verdict" to come about. Quite possibly, as Dr. Loren Roth has suggested, "the American public may simply be nothing more than a 'bad loser.'" PERLIN, *supra* note 6, at 16 (quoting Loren H. Roth, *Preserve but Limit the Insanity Defense*, 58 PSYCHIATRIC Q. 91, 91 (1986–87)).

8 *See* Blau & Pasewark, *supra* note 6, at 69. According to Christina Studebaker, "[i]nsanity is a legal defense that is raised relatively infrequently, and rarely pleaded successfully." Christina A. Studebaker, *Evaluating the Insanity Defense: Identifying Empirical and Moral Questions*, 5 U. CHI. L. SCH. ROUNDTABLE 345, 345 (1998) (reviewing BARBARA R. KIRWIN, THE MAD, THE BAD, AND THE INNOCENT: THE CRIMINAL MIND ON TRIAL (1997)). Some studies have placed the frequency with which the defense is used at less than one percent of all criminal trials. *See, e.g.*, SIMON & AARONSON, *supra* note 5, at 7 ("[T]he insanity defense . . . is introduced as a defense in less than 1 percent of all criminal trials."). To demonstrate this infrequency more concretely, Steadman and his coauthors note that "[i]n New York there were only two insanity *pleas* for every 1,000 felony *arrests* in 1978, and in California there were only five insanity *acquittals* for every 1,000 felony *convictions* in 1980." STEADMAN ET AL., *supra* note 7, at 5 (citations omitted).

9 For example, as Steadman and his coauthors observe, "the public and its legislators' perceptions of the insanity defense are badly skewed. . . . [C]ollege students overestimated the number of insanity pleas by a factor of 800 and . . . legislators overestimated the number by a factor of 400." STEADMAN ET AL., *supra* note 7, at 5. Blau and Pasewark paint a similar picture:

> Requested to estimate the percentage of indicted defendants who entered the defense, various groups in Wyoming grossly overestimated its frequency. State hospital aides estimated 57%, community residents estimated 43%, college students estimated 37%, police officers estimated 22%, legislators estimated 20%, mental health center professionals estimated 17%, and state hospital professionals estimated 13%. Similar over-estimations were

society to abolish the defense. Quite possibly, the desire to condemn

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> also provided when respondents estimated the number of persons making the plea who were actually adjudicated NGRI. College students estimated 44%, state hospital aides estimated 43%, legislators estimated 40%, community residents estimated 38%, police estimated 25%, state hospitals [sic] professionals estimated 21%, and mental health center professionals estimated 19%. In fact, of the 22,012 indicted defendants, 102 [0.46%] had presented the defense. Of these 102 defendants, only one [0.0045% of the 22,012] was found NGRI.

Blau & Pasewark, *supra* note 6, at 74 (footnotes omitted). In addition to misperceptions regarding the insanity defense's perceived use and success, other beliefs resulting from illogical or wholly incorrect assumptions lead to even more animosity towards the defense. They include, but are not limited to, beliefs "(1) that the insane, through the insanity defense, escape punishment; (2) that a successful insanity defense is easily engineered; (3) that the insanity defense . . . places an unfair burden on the prosecution," NORMAN J. FINKEL, INSANITY ON TRIAL 124 (1988), and (4) that the use of the defense "will thwart the criminal justice system's crime-control component." Perlin, *supra* note 7, at 710. Focusing on the misperceptions and unsupported rhetoric of legislators and other government officials, Professor Perlin gives the following account of post-Hinckley trial congressional debates regarding proposed legislation designed to limit the insanity defense:

> Former Attorney General Meese argued that eliminating the insanity defense would "rid . . . the streets of some of the most dangerous people that are out there, that are committing a disproportionate number of crimes." Senator Strom Thurmond criticized the insanity defense for "exonerat[ing] a defendant who obviously planned and knew exactly what he was doing." Senator Dan Quayle endorsed constituents' views that asserted [sic] the insanity defense "pampered criminals," and that the defense was "decadent," giving defendants the right to kill "with impunity." Nearly as dramatically, Senator Steve Symms argued that the insanity defense reflected a criminal justice system "no longer representative of the interests of a civilized society."
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> . . . .
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> Senators Larry Pressler and Orrin Hatch called the defense "a rich man's defense." Congressman Myers alleged that it provided a "'safe harbor' for criminals who bamboozle a jury" into thinking they should not be held responsible. Congressman Sensenbrenner portrayed the insanity trial as "protracted testimonial extravaganzas pitting high-priced prosecution experts against equally high-priced defense experts." In perhaps the most bizarre statement, Congressman Lagomarsino—in testimony characterized by Congressman John Conyers as "thoughtful"—asserted that the controlling insanity defense test was that of *Durham v. United States* [214 F.2d 862 (D.C. Cir. 1954), *overruled by* United States v. Browner, 471 F.2d 962 (D.C. Cir. 1972) (en banc)] "that broadened the insanity defense to include everything from alcoholism and drug addiction to heartburn and itching."
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> Former Attorney General William French Smith charged, "There must be an end to the doctrine that allows *so many persons* to commit crimes of violence, to use confusing procedures to their own advantage and then have the door opened for them to return to the society they victimized."

PERLIN, *supra* note 6, at 17–19 (emphasis added) (footnotes omitted). Perhaps what is most remarkable (or disturbing, depending on how one characterizes it) is that these myths retain vitality even given the effect they can have on organizations that know or should know of their falsity or lack of empirical or logical support. As Perlin articulates:

> Perhaps even more bizarre, embarrassing, and ominous [than the statements mentioned above] is the concession made in the House Report that accompanied the Insanity Defense Reform Act [18 U.S.C. § 17 (2000)]. The drafters conceded that the basic beliefs about the insanity defense were "myths," but justified the new legislation because the *myths* "undermined public faith in the criminal justice system." This concession—that Congress

what in reality is almost never utilized (and even less likely to be successful)[10] is a product not of what the insanity defense is, but of what these groups perceive it to be.

Nevertheless, legislators do pay lip service to these calls for reform,[11] and many even lead such campaigns themselves;[12] still, the results are often negligible. Indeed, even after a sensational case, most of the pointed focus on reforming the insanity defense dies down without implementation of any significant changes.[13] However,

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must assuage sentiment it knows to be false—reflects the myths' lasting power.

Id. at 20 (footnotes omitted). Indeed, as Perlin indicates in a footnote to this striking observation, "notwithstanding clinical evaluations or behavioral realities, St. Elizabeth's Hospital's Forensic Division staff 'can be counted upon' to oppose any conditional release recommendation in cases of 'controversial' patients." *Id.* at 20 n.37 (citing *Final Report of the National Institute of Mental Health (NIMH) Ad Hoc Forensic Advisory Panel*, 12 MENTAL & PHYSICAL DISABILITY L. REP. 78, 96 (1988)). Further, Dr. Goldstein asserts that the American Psychiatric Association supported limitations on federal evidentiary rules as to the scope of expert testimony in insanity cases not because the Association thought it was a good idea, but rather because of its concern about negative public attitudes toward "unfavorable" forensic participation in "controversial" cases. *See* Robert Lloyd Goldstein, *The Psychiatrist's Guide to Right and Wrong: Part IV: The Insanity Defense and the Ultimate Issue Rule*, 17 BULL. AM. ACAD. PSYCHIATRY & L. 269, 279–80 (1989).

10 *See supra* notes 8–9.

11 *See supra* note 9.

12 For example, in 1979, Montana state representative Michael H. Keedy both drafted and introduced a bill calling for the abolition of Montana's insanity defense, which became law shortly thereafter. *See infra* note 217 and accompanying text.

13 Considering the public's contempt for the defense, it seems somewhat paradoxical that this is true. That is to say, if the vast majority of the population believes that major insanity defense reform is necessary, in a democratic society one would expect that the legislature would vote accordingly. One explanation for the lack of significant reform might be the concept of paternalism. *See generally* JOHN KLEINIG, PATERNALISM (1983) (discussing the theory of paternalism and examining its application in various contexts of American public policy); JOHN STUART MILL, ON LIBERTY 134–67 (photo. reprint 1973) (1859) (discussing the limits of government authority over individuals); DONALD VAN-DEVEER, PATERNALISTIC INTERVENTION: THE MORAL BOUNDS OF BENEVOLENCE (1986) (discussing when it is justifiable for government to intervene in the lives of competent and incompetent persons); John D. Hodson, *The Principle of Paternalism*, 14 AM. PHIL. Q. 61 (1977) (discussing paternalism and proposing criteria for identifying cases in which paternalism is justified); David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519 (1988) (discussing paternalism and argning that courts should be reluctant to act for paternalist reasons in the absence of legislative direction). Yet this notion seems inconsistent with the ideals of a democratic society. As Professor Shapiro writes, "paternalism has not been held in high regard by democratic theorists and practitioners. The idea . . . was described only recently as an 'almost "un-American" rationale for any type of government activity.'" *Id.* at 519 (footnote omitted) (quoting Peter Huber, *The Old-New Division in Risk Regulation*, 69 VA. L. REV. 1025, 1103 (1983)). Nonetheless, Shapiro notes that "we do not live in a world of absolutes, and [John Stuart] Mill's modern-day heirs recognize, as he did, that [one's] capacity to choose may be impaired by such conditions as youth, mental state, or ignorance." *Id.* Perhaps it is this factor—that most members of the public are ignorant to the realities of the insanity defense as well as its fundamental and necessary place in the Anglo-American system of criminal law—that leads many legislators to decline to significantly reform their insanity defense laws, even if they do take some symbolic action, however trivial. This explanation certainly is consistent with the above definition of

some states have actually followed through on their promises to reform the insanity defense.[14] My focus in this Note is on four such states—Idaho, Montana, Utah, and, most recently, Kansas—that have taken an extreme approach to insanity defense reform by passing legislation restricting the admission of psychiatric evidence to the issue of mens rea, thus abolishing insanity as a separate affirmative defense.[15]

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paternalism, but with an interesting twist, in that the paternalistic result is achieved not through affirmative legislative action, but rather through its failure to act. *But cf. id.* at 531 ("At the level of legislation—action by the people's elected representatives—there is no doubt that paternalist motives have contributed to the *enactment* of many laws." (emphasis added)).

That being said, one might respond by questioning why a handful of state legislatures (namely, the four that have actually "abolished" the insanity defense—discussed *infra* at Part I) have actually made the decision to indulge their constituents' desires to live in an insanity defense–free state. Two possible answers come to mind. The first is that the legislators in these particular states do not see it as their place to act contrary to the wishes of a majority of their constituents. However, this seems unlikely, given that legislators regularly act in just such a manner. Indeed, accomplishing one's political agenda as a legislator often requires compromise, and this might occur through such off-the-record mechanisms as vote-trading (i.e., voting against constituents' wishes on one issue in order to secure a vote in favor of their wishes on another, possibly more politically important issue). Thus, to say that the legislators in these states do not subscribe to paternalistic values is probably incorrect. A second, more plausible reason is that in these four states, legislators simply saw it as too politically unsound to continue to work against the desires of their constituents. In other words, paternalism does have its limits, and where the political pressure is such that a legislator cannot continue to act paternalistically without sacrificing popularity among her constituents, the desire to win votes rather than the desire to do what is in the public's best interests will almost always dictate the legislator's future actions in regard to that issue—at least if the legislator desires reelection. Therefore, either the political pressure to enact more serious insanity defense reform laws was greater in these four states, or the legislators in these states simply had a lower "breaking point" before they abandoned their paternalistic mindset and adopted a more democratic approach to their activity on this issue.

14 *See* STEADMAN ET AL., *supra* note 7, at 34–39. The most common types of reforms were made in the area of release and commitment procedures. *Id.* at 35. The next most common reform concerned the burden of proof (either shifting the burden to the defense or increasing it), while another approach was to change the test of insanity entirely. *Id.* at 36. A fourth approach, popular with the public and legislators, was to adopt the "guilty but mentally ill" (GBMI) verdict. *Id.* at 38. Finally, some states adopted reforms in trial procedures (for example, adopting a bifurcated insanity trial). *See id.*

15 *See* Act of Mar. 14, 1996, ch. 225, § 1, 1996 Idaho Sess. Laws 737, 737 (codified at IDAHO CODE § 18-207 (Michie 1948–1997)); Act of May 13, 1995, ch. 251, § 20, 1995 Kan. Sess. Laws 1187, 1213 (codified at KAN. STAT. ANN. § 22-3220 (1995)); Act of May 17, 1991, ch. 800, § 150, 1991 Mont. Laws 3011, 3074 (codified at MONT. CODE ANN. § 46-14-1-2 (2001)); Act of Feb. 4, 1999, ch. 2, § 1, 1999 Utah Laws 2, 2 (codified at UTAH CODE ANN. § 76-2-305 (1999)). "These states were not the first to contemplate abolition of the insanity defense. Early in the twentieth century, Louisiana, Mississippi, and Washington enacted statutes barring *all* evidence of mental condition; these statutes ultimately failed on constitutional grounds, most notably as violations of due process." Recent Developments, *118 Idaho 632, 798 P.2d 914 (1990)*, 104 HARV. L. REV. 1132, 1132 n.2 (1991); *see* Sinclair v. State, 132 So. 581, 584–87 (Miss. 1931) (Ethridge, J., concurring) (finding a violation of the federal due process, equal protection, and cruel and unusual punishment clauses); State v. Lange, 123 So. 639, 641–42 (La. 1929) (finding a violation of the state due process clause); State v. Strasburg, 110 P. 1020, 1023–24 (Wash. 1910) (finding a violation of the state due process clause). *But see* State v. Searcy, 798 P.2d 914, 932–33 (Idaho 1990) (Mc-

This drastic change, resulting in a statutory scheme commonly referred to as the "mens rea approach," has provoked a flurry of fierce debate over whether such a law is morally correct, and whether it represents sound policy.[16] My purpose, though, is not to explore these particular aspects of the controversy. Rather, it is to join the relatively sparse debate over the constitutionality of the mens rea approach by discussing the numerous constitutional questions it raises.

Part 1 of this Note supplies background information regarding the insanity defense, the mens rea approach, and the differences between the two. In Part I.A, this Note gives a brief introduction to the insanity defense. In Part I.B, this Note explores the origins of the mens rea approach. In so doing, it first illustrates the traditional vehicles through which a defendant could introduce evidence of mental abnormality, and then outlines the history of insanity defense reform in the context of the abolition of the defense[17] and the subsequent adoption of the mens rea approach. In Part I.C, this Note explains how a switch to the mens rea approach affects the determination of a defendant's culpability. Part II establishes what courts have already said about the constitutionality of the mens rea approach by dissecting

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Devitt, J., dissenting) (arguing that *Strasburg* and *Sinclair* may not necessarily stand for the proposition that only statutes completely disallowing evidence of mental condition are unconstitutional, and that the statute struck down in *Strasburg* was actually a "mens rea approach" statute of sorts). The Louisiana, Mississippi, and Washington statutes differ substantially from the Idaho, Montana, Utah, and Kansas statutes, as the latter clearly allow evidence of mental condition, but only in regard to mens rea. *See infra* Part I.

16 For abolitionist arguments, see, for example, RUDOLPH JOSEPH GERBER, THE INSANITY DEFENSE 85–89 (1984); SEYMOUR L. HALLECK, PSYCHIATRY AND THE DILEMMAS OF CRIME: A STUDY OF CAUSES, PUNISHMENT AND TREATMENT 212–28, 341–42 (1967); H.L.A. HART, THE MORALITY OF THE CRIMINAL LAW 24–25 (1964); NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW (1982); THOMAS S. SZASZ, LAW, LIBERTY, AND PSYCHIATRY: AN INQUIRY INTO THE SOCIAL USES OF MENTAL HEALTH PRACTICES 123–46 (1963); WINSLADE & ROSS, *supra* note 7, at I–20, 198–226; BARBARA WOOTTON, CRIME AND THE CRIMINAL LAW: REFLECTIONS OF A MAGISTRATE AND SOCIAL SCIENTIST 65–93 (2d ed. 1981); Alexander D. Brooks, *The Merits of Abolishing the Insanity Defense*, 477 ANNALS AM. ACAD. POL. & SOC. SCI. 125 (1985); Joseph Goldstein, *The Brawner Rule—Why? or No More Nonsense on Non Sense in the Criminal Law, Please!*, 1973 WASH. U. L.Q. 126; Joseph Goldstein & Jay Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853 (1963); Norval Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514, 514–20, 544–47 (1968). For retentionist arguments, see, for example, HERBERT FINGARETTE, THE MEANING OF CRIMINAL INSANITY (1972); ABRAHAM S. GOLDSTEIN, THE INSANITY DEFENSE 222–26 (1967); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 131–35 (1968); James B. Brady, *Abolish the Insanity Defense?—No!*, 8 HOUS. L. REV. 629 (1971); Hyman Gross, *Justice and the Insanity Defense*, 477 ANNALS AM. ACAD. POL. & SOC. SCI. 96 (1985); Sanford H. Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273 (1968); John Monahan, *Abolish the Insanity Defense?—Not Yet*, 26 RUTGERS L. REV. 719 (1973); Perlin, *supra* note 7; Jonas Robitscher & Andrew Ky Haynes, *In Defense of the Insanity Defense*, 31 EMORY L.J. 9 (1982).

17 In this Note, the use of the word "abolish" with regard to the insanity defense, unless otherwise indicated, stands only for abolishing insanity as an "extrinsic" defense, *see infra* notes 18–21 and accompanying text, and not for disallowing relevant evidence of mental disease or defect in order to negative the mens rea of the crime charged. *See infra* Part I.

various major cases dealing with the issue. In Part III, through critical analysis of both the constitutional implications of the abolition of the insanity defense as well as the mens rea approach in general, this Note demonstrates the flaws in many of the arguments advanced by the courts discussed in Part II. Specifically, Part III focuses on three constitutional problems: due process, equal protection, and cruel and unusual punishment. Finally, this Note concludes by asserting that because of the politically charged nature of the insanity defense reform, as well as its effect on a small, unpopular, and politically vulnerable segment of individuals, judges in both state and federal courts must be wary of allowing political influences and reputational concerns to interfere with correct and well-reasoned constitutional analysis in this area.

I
BACKGROUND

A. The Insanity Defense Generally

The insanity defense is typically considered an affirmative defense, in that it is raised by the defendant, who normally carries the burden of persuasion.[18] It also is alternatively considered either a "justification" or "excuse" defense, depending on the commentator.[19] By this, it is meant that the insanity defense serves to exculpate the defendant even when the state has proved beyond a reasonable doubt all elements of the offense charged, including the requisite mens rea.[20] For purposes of clarity and consistency, I will avoid using the terms "justification," "excuse," and "affirmative defense" in this Note and will instead refer to any defense raised by the defendant that can

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18 *See* 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 2.13(c), at 232–33 (2d ed. 1986). This does not necessarily mean the defendant must always carry the burden of proof when raising the defense. In some jurisdictions, the prosecution carries the burden of proof and must sufficiently demonstrate that the defendant was not insane. *See id.* Nonetheless, it is an affirmative defense because the defendant must raise it initially.

19 Criminal law theorists have long debated the differences, if any, between the labels "justification" and "excuse." *See, e.g.*, GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW (1978); Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984); Heidi M. Hurd, *Justification and Excuse, Wrongdoing and Culpability*, 74 NOTRE DAME L. REV. 1551 (1999). However, such a discussion, while fascinating, is beyond the scope of this Note. *See infra* note 21 and accompanying text (avoiding the use of the terms "justification" and "excuse" by adopting the term "extrinsic defense").

20 LaFave and Scott explain that sometimes the circumstances giving rise to a defense of insanity will warrant the conclusion that the defendant did not possess the requisite mens rea. 1 LAFAVE & SCOTT, *supra* note 18, § 4.1(b), at 429–30. This, however, is rarely the case, as Part I.C. explains. Further, the defense of insanity makes such an inquiry unnecessary in the first place. Because insanity is a broader concept than that of mens rea, even those who clearly possess the requisite mens rea may be exculpated under the insanity defense. *See id.*

exculpate despite the state's ability to prove all elements of the offense charged as an "extrinsic defense," a term suggested by Susan Mandiberg.[21]

B. The Origins of the Mens Rea Approach

1. *Introducing Evidence of Mental Abnormality Under Traditional Statutory Schemes*

Prior to 1979, every jurisdiction had an extrinsic defense of insanity—the vehicle a defendant would typically use in order to introduce evidence of his mental abnormality.[22] However, this was not the only manner in which a defendant might seek to introduce such evidence. Theoretically, the defendant could introduce evidence of mental disease or defect in two of the following ways: either as part of an extrinsic insanity defense or as an effort to negative the mens rea of a crime with which the defendant is charged.[23] As Professor Mandiberg explains:

> Evidence of mental abnormality [can] potentially [be used in] either [way], depending on the specific facts and the charge involved. Assume a murder statute . . . in which the crime is defined as intentionally causing the death of another human being. A psychotic who perceived his attacker to be a bear and killed it, only to discover later that he had killed a person, would have a negativing [insanity] defense: If the jury believed [t]his evidence, the prosecution could not prove "intent to kill a human being." A psychotic who believed that God was commanding him to kill that person, however, would not have a negativing [insanity] defense: Even if the jurors believed [t]his evidence, they could still conclude that he had

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21 *See* Susan F. Mandiberg, *Protecting Society and Defendants Too: The Constitutional Dilemma of Mental Abnormality and Intoxication Defenses*, 53 FORDHAM L. REV. 221, 225 (1984). The insanity defense, therefore, would be considered an extrinsic defense, and I will refer to it henceforth as either an "extrinsic defense of insanity" or an "extrinsic insanity defense."

Although the actual test used for determining insanity varies among jurisdictions, for the purposes of this Note I will assume that a defendant would successfully raise an extrinsic insanity defense if he could establish to the satisfaction of the trier of fact that he did not know the nature or quality of his act, or if he did, that he did not know what he was doing was wrong. *See* 1 LAFAVE & SCOTT, *supra* note 18, § 4.1(a), at 427. This particular test is known as the *M'Naghten* rule and is the dominant test among the jurisdictions. *See id.*

22 *See* SIMON & AARONSON, *supra* note 5, at 251–63.

23 I will refer to the latter method as a "negativing defense of insanity" or a "negativing insanity defense." Professor Mandiberg might describe the mens rea approach, then, as a negativing defense, *see* Mandiberg, *supra* note 21; however, I will not. The use of the phrase "mens rea approach" does not connote a particular type of defense; that is what I will refer to by the term "extrinsic insanity defense" and "negativing insanity defense." Rather, it connotes an entire statutory scheme in which a defendant may present only the negativing defense of insanity, not the extrinsic insanity defense.

> the intent to kill a human being. He might, however, have an extrinsic [insanity] defense, depending on the jurisdiction[ ]. . . .[24]

Both defendants in Professor Mandiberg's hypothetical could prevail under an extrinsic insanity defense, but only one could successfully raise a negativing insanity defense. Therefore, the latter defendant in Mandiberg's example, who possessed the requisite mens rea but would not be culpable under an extrinsic insanity defense, would introduce the evidence only by way of the extrinsic defense; conversely, the former defendant in Mandiberg's example, who would succeed under either method of utilizing the evidence, theoretically could choose how to introduce it.[25]

2. *The Road to Reform: Adoption of the Mens Rea Approach*

While the extrinsic insanity defense has always been controversial, the first attempts to do away with it did not actually occur until the early part of the twentieth century, when Louisiana, Mississippi, and Washington each attempted to abolish the defense through statutes allowing no evidence of mental disease or defect to be admissible through any means.[26] Subsequently, the supreme courts of each state struck down these statutes as unconstitutional.[27] As a result, lawmakers made no further efforts to abolish the defense, and until the mid-1970s insanity defense abolitionists were unsuccessful in convincing either Congress or state legislatures to embrace their position. However, according to Professor Wales, writing in a 1976 article,

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24 *Id.* at 226–27 (footnotes omitted).

25 Many jurisdictions, however, require defendants to use the extrinsic insanity defense as the sole vehicle to introduce evidence of mental abnormality, and thus refuse to allow the defendant to use it to negative mens rea. *See id.* at 223 n.13, 227. In a jurisdiction where choice is possible, there are both advantages and disadvantages in choosing to use evidence of mental abnormality as part of a negativing insanity defense as opposed to using it to support an extrinsic insanity defense. For example, a not-guilty verdict arguably carries less of a stigma than an NGRI verdict, a factor that might influence a defendant who could possibly raise a successful negativing insanity defense to attempt to obtain a full acquittal. However, if no NGRI option is available, a jury might be reluctant to fully acquit an obviously dangerous defendant if such an acquittal would result in his complete freedom (i.e., no supervision or control by the state). On that note, because of the relationship between the two types of insanity defenses, *see supra* note 20, an NGRI verdict would be guaranteed where a defendant could use such evidence to successfully raise a negativing insanity defense; therefore, a defendant might not want to take his chances with the jury and risk a possible guilty verdict. Additionally, an NGRI verdict almost always results in subsequent civil commitment, while a not guilty verdict does not. *See* 1 LAFAVE & SCOTT, *supra* note 18, § 4.1(c)(3), at 431. Such consequences might influence a defendant to choose a negativing insanity defense. However, in presenting such clear evidence of his dangerous mental abnormality to the court, the defendant would be demonstrating, quite clearly, his future dangerousness if he were not subject to state supervision and control, and would thus almost guarantee his subsequent civil commitment after being fully acquitted.

26 *See supra* note 15.

27 *See supra* note 15.

> [a]s debate over the function and administration of the insanity defense has heightened in recent years, abolition of the defense has become an increasingly serious alternative. . . .
> Born of frustrations over the administration of the insanity defense, the death of the *Durham* experiment, and the rising influence of the behaviorist position, the abolitionist argument has become respectable for liberal and conservative alike.[28]

This frustration became most apparent with the proposal of the Criminal Justice Reform Act of 1975[29] (popularly known as S. 1) in Congress.[30] Under section 522 of S. 1, a viable defense exists if "the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged. Mental disease or defect does not otherwise constitute a defense."[31] This is the typical language of the mens rea approach, which allows evidence of mental disease or defect only to negate the mens rea of a crime with which the defendant is charged.[32] Ultimately, Congress did not pass S. 1,[33] but in 1979 Montana statutorily adopted the mens rea approach and thus became the first jurisdiction to eliminate insanity as an extrinsic defense since Louisiana, Mississippi, and Washington attempted to do so early in the 1900s.[34] Idaho and Utah soon followed suit, with Kansas becoming the fourth state to do so in 1995.[35] Additionally, the legislatures of Oklahoma, Arkansas, and Massachusetts

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28 Heathcote W. Wales, *An Analysis of the Proposal to "Abolish" the Insanity Defense in S. 1: Squeezing a Lemon*, 124 U. PA. L. REV. 687, 687–88 (1976) (footnotes omitted). The "*Durham* experiment" refers to the case of *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), *overruled by* United States v. Brawner, 471 F.2d 962 (D.C. Cir. 1972) (en banc), which held that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." *Id.* at 874–75. The so-called "product rule" was overruled almost two decades after the *Durham* decision, in large part because "of undue dominance by the [medical] experts giving testimony." *Brawner*, 471 F.2d at 969.

The behaviorist position argues "that free will is an illusion and that behavior is conditioned by numerous forces, so that the sole function of the criminal law should be to modify the personalities of those committing antisocial acts. Accordingly, insanity becomes relevant only at the sentencing-dispositional stage." Wales, *supra*, at 688 n.4 (citing PACKER, *supra* note 16, at 12).

29 S. 1, 94th Cong. § 522 (1975).

30 Wales, *supra* note 28, at 687.

31 *Id.* (quoting the proposed Criminal Justice Reform Act of 1975, S. 1, 94th Cong. (1975)).

32 *See supra* note 23.

33 *See* Jodie English, *The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense*, 40 HASTINGS L.J. 1, 1 (1988) (noting that the enactment of the Insanity Defense Reform Act of 1984, 18 U.S.C. § 17 (2000), followed years of previous unsuccessful attempts to abolish the insanity defense, including the unenacted Criminal Justice Reform Act of 1975).

34 *See* Rita D. Buitendorp, Note, *A Statutory Lesson from "Big Sky Country" on Abolishing the Insanity Defense*, 30 VAL. U. L. REV. 965, 965 & n.4 (1996).

35 *See* Raymond L. Spring, *Farewell to Insanity: A Return to* Mens Rea, J. KAN. B. ASS'N, May 1997, at 38, 39; *supra* note 15 and accompanying text.

considered adopting the mens rea approach in 1995,[36] but they have not passed any such laws as of yet.[37]

C. How the Mens Rea Approach Affects Determinations of Culpability

Whereas many jurisdictions require the defendant to use an extrinsic insanity defense regardless of whether a negativing insanity defense would be successful,[38] the mens rea approach requires just the opposite—it forces defendants to use a negativing insanity defense. The practical ramifications of adopting the mens rea approach are enormous, but the full panoply of these effects can be elusive upon first impression. Some further commentary should illuminate this distinction. As Marc Rosen notes:

> In order for a mentally ill offender to be excused under the *mens rea* approach, she must establish mental incapacity which prevents her from formulating the *mens rea* of the crime. The classic example is the defendant who, because of his mental disease, believed that he was squeezing a lemon when in fact he was strangling his victim. In such a case, the prosecution has the duty of proving intent. However, the prosecution would fail under the *mens rea* approach because evidence of a mental disease or defect would show that the defendant truly believed that he was squeezing a lemon and not strangling a human being. Thus, no intent to kill. . . .
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> . . . However, evidence of mental disease or defect does not necessarily preclude the defendant from possessing the requisite intent. A defendant can be both insane and capable of having the requisite intent; the two concepts are not mutually exclusive.[39]

Rosen proceeds to give examples of five cases in which replacing the affirmative defense of insanity with the mens rea approach would be outcome-determinative:

> In case one, the defendant believed that the devil was in his daughter. After stabbing her over one hundred and fifty times with a pair of scissors, he proceeded to gouge out her eyes. In case two, the defendant extracted all of her three year old daughter's teeth because she believed that the devil was inside of them. In case three, the defendant threw his baby from a first floor window in order to save him from being attacked by some assailants who did not exist. The defendant in case four cut off the tip of his young son's penis

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36 *See* Buitendorp, *supra* note 34, at 968 n.10.

37 *See* ARK. CODE ANN. § 5-2-312 (Michie 1997 & 2001 Supp.); OKLA. STAT. ANN. tit. 22, § 1161 (West Supp. 2000–2001); Commonwealth v. Keita, 699 N.E.2d 1243, 1244 n.1 (Mass. App. Ct. 1998) (following the approach in *Commonwealth v. McHoul*, 226 N.E.2d 556 (Mass. 1967), in permitting defendant to assert an insanity defense).

38 *See supra* note 25.

39 Marc Rosen, *Insanity Denied: Abolition of the Insanity Defense in Kansas*, KAN. J.L. & PUB. POL'Y, Winter 1999, at 253, 261 (footnote omitted).

> while suffering delusions relating to "black magic." Finally, the defendant in case five attempted to kill his parents because he believed that they were going to be tortured, and he wanted to kill them first to insure that they would die in a humane way.[40]

Obviously, each of the aforementioned defendants suffered from some mental abnormality. If proved to the satisfaction of a jury, under the extrinsic insanity defense these defendants would be (and were in fact[41]) successful in obtaining a verdict of NGRI. However, under the mens rea approach, they would all have been found guilty.[42] The defendant in case two, for example, knew she was extracting her daughter's teeth, and she possessed the intent to do just that. The fact that she thought the devil was inside of them is irrelevant under the mens rea approach.

To say only that some insane defendants[43] will be unable to prevail under the mens rea approach greatly understates the impact of this reform. Indeed, Rosen notes that "even the most debilitating mental illness rarely negates the appropriate mental state."[44] According to Professor Mandiberg, this is because "in very few individuals will reality perception be so impaired as to prevent accurate processing of data from the surrounding world. Few defendants will be able to show a disability that is logically relevant to the required subjective mental state."[45]

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40 *Id.* at 261–62.

41 *See id.* at 262.

42 *See id.*

43 I use the term "insane defendants" to mean those defendants who would theoretically have a one-hundred percent chance of being found NGRI in a jurisdiction with an extrinsic insanity test. In other words, when the term "insane person" is mentioned in this Note, I will assume that both the prosecution and defense would have stipulated to the requirements of legal insanity in a jurisdiction with an extrinsic insanity defense.

44 Rosen, *supra* note 39, at 261.

45 Mandiberg, *supra* note 21, at 263 n.192; *see also* United States v. Pohlot, 827 F.2d 889, 900 (3d Cir. 1987) (stating that "[o]nly in the rare case, however, will even a legally insane defendant actually lack the requisite mens rea purely because of mental defect," and quoting H.R. Rep. No. 98-577, at 15 n.23 (1983), which concluded that "[m]ental illness rarely, if ever, renders a person incapable of understanding what he or she is doing" and "does not, for example, alter the perception of shooting a person to that of shooting a tree"); State v. Herrera, 895 P.2d 359, 374 (Utah 1995) ("As to crimes requiring intent, an insane person will virtually always have the mental state required by the law . . . even though the defendant suffers from severe mental derangement, such as an extreme and bizarre psychotic delusion."). A study analyzing the effects of Montana's adoption of the mens rea approach strongly corroborates these assertions. While the success rate of Montana's extrinsic insanity defense was already declining in the years prior to its 1979 reform, there was a much more sudden and drastic diminution following the reform. *See* STEADMAN ET AL., *supra* note 7, at 128. Specifically,

> In the 6 years after the reform, only five people in the seven study counties [out of the 466 who raised the lack-of-mens-rea issue in their defense—an incidence of approximately one percent] were successfully acquitted due to their mental state at the time of the crime. . . . Three of the acqnittals

It is important to note that the preceding examples all refer to crimes in which the prosecution was required to prove subjective intent, such as purpose, knowledge, and, in some cases, recklessness.[46] In such cases, while the insane defendant will rarely prevail under the mens rea approach, it does occasionally happen, and one could certainly conceive of scenarios in which an insane defendant might successfully raise a negativing insanity defense. However, when an objective mental state (such as negligence) or no mental state (i.e., strict liability) applies to the prohibited conduct, the results of a switch to the mens rea approach are far more draconian. In such cases, absolutely no insane defendant could successfully raise a negativing insanity defense under any set of circumstances.[47] Indeed, "[i]f the prosecution can convict merely on proof of objective culpability . . . , mental abnormality . . . will be irrelevant."[48] The reasoning behind such a conclusion is relatively straightforward. As illustrated

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occurred within the first year following the reform and may have been tried under the old law.

Id. at 128–29.

46 In her article, Professor Mandiberg discusses how one might negative the mens rea of recklessness, though she does so in the context of a defendant's intoxication, *see* Mandiberg, *supra* note 21, at 223, which is not relevant for the purposes of this Note. However, looking at Professor Mandiberg's explanation in the context of mental abnormality instead of intoxication does not alter her general framework. She notes that whether one can negative recklessness depends essentially on how the jurisdiction defines the term. *See id.* at 261 n.184. If recklessness is used in its purely objective sense, meaning that the prosecution must prove only carelessness about any aspect of the defendant's behavior, then the defendant will not be successful, because mental abnormality cannot negative an objective mens rea. *Id.* On the other hand, if recklessness is used as the Model Penal Code defines the term, then the defendant has a much greater chance of success.

Section 2.02(2)(c) of the Model Penal Code defines recklessness as follows:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

MODEL PENAL CODE § 2.02(2)(c) (1985). From this definition, establishing recklessness requires proof of both an objective and subjective element. First, there must exist a "substantial and unjustifiable risk that the material element exists or will result from [the defendant's] conduct." *Id.* Whether the risk is "substantial" is the objective element. *See id.* However, the prosecution must also establish that the defendant "consciously disregarded" this risk, which is a subjective element. Therefore, if a defendant's mental abnormality precluded him from consciously disregarding a substantial and unjustifiable risk, he would prevail under the mens rea approach.

47 *Cf.* State v. Herrera, 895 P.2d 359, 374–75 (Utah 1995) (Stewart, J., dissenting) ("As to nonintentional crimes . . . an insane defendant is held strictly liable for doing the act because he cannot, by definition, show that he acted as a reasonable person would have acted—the standard objective test employed in such cases."); Mandiberg, *supra* note 21, at 228 (noting that "mental abnormality . . . can be [a] negativing defense[ ] only to subjective mental state requirements").

48 Mandiberg, *supra* note 21, at 228.

above, the concept of insanity is broader than the concept of mens rea;[49] therefore, all defendants who could prevail under a negativing insanity defense could also prevail under an extrinsic insanity defense, but only a small fraction of those prevailing under an extrinsic insanity defense could also prevail under a negativing insanity defense. In cases where strict liability is at issue, the determination of insanity under an extrinsic defense is a separate inquiry, and would occur after stipulating to the elements of the offense. Thus, a defendant could, in theory, commit a strict liability crime, yet still be exculpated under an extrinsic insanity defense.[50] However, when evidence of mental abnormality may be used only to negative mens rea, a defendant would always be unsuccessful in doing so because a strict liability crime, by definition, contains no mens rea for the defendant to negative. Similarly, in crimes requiring objective culpability, the defendant will never be able to show that he acted as a reasonable person would have, because the reasonable person does not suffer from a mental abnormality.[51] Clearly, then, the switch to the mens rea approach is hardly a matter of semantics—it effectively precludes almost all insane defendants from exculpation on the basis of mental abnormality.[52]

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49 1 LAFAVE & SCOTT, *supra* note 18, § 4.1(b), at 429 (quoting Frederica B. Koller, Note, *The Insanity Defense: The Need for Articulate Goals at the Acquittal, Commitment, and Release Stages*, 112 U. PA. L. REV. 733, 734 (1964)).

50 Some commentators, however, have argued that insanity should not be a defense to strict liability offenses, especially those considered "public welfare offenses," such as traffic violations. *See, e.g.*, Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 78 (1933) (arguing that this approach is justified by the light penalties imposed for such infractions).

51 Professor Mandiberg makes this point all the more apparent:

> Assume the jury believes that the defendant shot a human being with a gun and also that the defendant was delusional and thought he was shooting a bear. If the prosecutor must prove that the defendant was aware his target was human (subjective mental state) the prosecutor will fail, as the delusion will negative the element. But if the prosecutor merely has to prove that a reasonable person would have been aware that the target was human (objective mental state) the prosecutor will succeed. Since the standard is not "the reasonable delusional person," the cause of the defendant's failure to perceive the nature of his target is irrelevant.
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> . . . In other words, the objective approach does not assume that the defendant is a reasonable person; it merely indicates that society will demand that he act like one. If he does not, for whatever reasons, he must bear the consequences.

Mandiberg, *supra* note 21, at 262–63 (footnote omitted).

52 One question I seek to answer in this Note, then, is whether such a result is constitutionally permissible. In other words, the question becomes whether it is a constitutional minimum that an extrinsic insanity defense be available, regardless of whether or not the option of a negativing insanity defense is available. If this is so, then allowing a negativing insanity defense to be the only medium available to the defendant by which to introduce evidence of mental abnormality (i.e., the mens rea approach) would be constitutionally inadequate. *See infra* Part III.A (discussing due process analysis in the insanity defense context).

II
ABOLITION IN THE COURTS: A REVIEW OF THE CASES

As one might guess, it was not long after the adoption of the mens rea approach in the above-mentioned states that convicted defendants challenged these statutes as unconstitutional. This Part explores three main cases dealing with such challenges.[53] The first case, *State v. Searcy*,[54] pertained to Fourteenth Amendment due process, while in the second case, *State v. Cowan*,[55] the defendant raised a different due process issue, as well as a cruel and unusual punishment argument. In the final case, *State v. Herrera*,[56] the court addressed questions of due process, cruel and unusual punishment, and equal protection.

A. Idaho—*State v. Searcy*

In *State v. Searcy*,[57] a 1990 case, the Idaho Supreme Court was called upon to decide the constitutionality of the mens rea approach.

1. *Facts, Procedural Posture, and Majority Opinion*

On July 15, 1987, Barry Searcy shot and killed Teresa Rice while robbing Jack's Grocery Store in Ashton, Idaho.[58] At trial, Searcy presented psychiatric testimony indicating that he had been suffering from a mental disease called "cocainism."[59] The judge, following Idaho Code section 18-207, admitted the testimony but instructed the jury to consider it only in determining whether Searcy possessed the requisite mens rea—that is to say, whether he possessed criminal intent.[60] The jury found Searcy guilty of first-degree murder.[61] On ap-

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53 In many of the following cases, the defendants challenged their respective state statutes as violative of both the federal Constitution and their state constitutions. While these state constitutional claims will be mentioned where appropriate, the focus of this Note, as well as the analysis in Part III, *infra*, will be in regard to federal constitutional implications. Additionally, because of the substantive similarity of the various state statutes, I will not examine them closely.

54 798 P.2d 914 (Idaho 1990).

55 861 P.2d 884 (Mont. 1993).

56 895 P.2d 359 (Utah 1995).

57 798 P.2d 914 (Idaho 1990). As of yet, no federal circuit court has squarely addressed this question. However, in 1994, the Supreme Court denied certiorari in a Montana case dealing with the issue. *See* State v. Cowan, 861 P.2d 884 (Mont. 1993), *cert. denied*, 511 U.S. 1105 (1994). See *infra* Part II.B for a discussion of *Cowan*.

58 *Searcy*, 798 P.2d at 915.

59 Recent Developments, *supra* note 15, at 1133 (citing Brief of Appellant at 17, *Searcy* (No. 17835)).

60 *Id.* Section 18-207 provides, in relevant part, that "Mental condition shall not be a defense to any charge of criminal conduct. . . . Nothing herein is intended to prevent the admission of expert evidence on the issue of any state of mind which is an element of the offense, subject to the rules of evidence." IDAHO CODE § 18-207(a), (c) (Michie 1997).

61 *Searcy*, 798 P.2d at 916.

peal to the Idaho Supreme Court, Searcy argued that section 18-207 denied him due process of law "because it prevented him from pleading insanity as a defense."[62] Chief Justice Bakes, writing for the court, rejected Searcy's argument.[63] One commentator later observed:

> [D]rawing guidance from various Supreme Court opinions, the court declined to establish any constitutional rule compelling the availability of the insanity defense. Specifically, the court understood *Powell v. Texas* to recognize the insanity defense as having no constitutional definition and as therefore subject to different interpretations by the states. In addition, the court explained that *Leland v. Oregon* gave the states broad discretion in determining the burden of proof to impose on defendants raising the insanity defense. Finally, the court found reassurance in then-Justice Rehnquist's dissenting opinion in *Ake v. Oklahoma* that "[i]t is highly doubtful that due process requires a State to make available an insanity defense to a criminal defendant."[64]

The court also gave weight to *State v. Korell*,[65] a Montana Supreme Court case that upheld a similar mens rea approach statute.[66] Here, much like in *Korell*, the court distinguished this type of statutory scheme from the three early abolition attempts that were struck down for excluding all evidence of mental condition.[67] Because evidence of mental condition may still be admissible into evidence under the Idaho and Montana statutory schemes (though not as part of an extrinsic defense), the court held that it satisfied the requirements of due process.[68]

2. *Justice McDevitt's Dissent*

In a lengthy and thoroughly researched dissent, Justice McDevitt concluded that Idaho's statutory scheme violated Fourteenth Amend-

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62 *Id.*

63 *See id.* at 919.

64 Recent Developments, *supra* note 15, at 1133–34 (footnotes omitted); Powell v. Texas, 392 U.S. 514 (1968); Leland v. Oregon, 343 U.S. 790 (1952); Ake v. Oklahoma, 470 U.S. 68 (1985).

65 690 P.2d 992 (Mont. 1984).

66 *See Searcy*, 798 P.2d at 918.

67 Recent Developments, *supra* note 15, at 1134.

68 As will be discussed *infra* at Part III.A, by holding that due process is not violated, the court implicitly determined that the insanity defense is neither "one of the 'fundamental principles of liberty and justice which lie at the base of our civil and political institutions,'" *Searcy*, 798 P.2d at 916 (quoting Herbert v. Louisiana, 272 U.S. 312, 316 (1926)), nor is "so deeply rooted in our legal traditions as to be considered fundamental and thus embedded in due process." *Id.* However accurate (or inaccurate) this proposition might be, the court nevertheless seems to have skirted the issue. At the outset of its analysis, it mentioned the relevant due process standard, but went no further in addressing it, save for the statement that the defense "has had a long and varied history during its development in the common law." *Id.* at 917.

ment due process guarantees.[69] According to one commentator, "Justice McDevitt rejected the majority's conclusion that authority for repeal of the insanity defense could be found between the lines of United States Supreme Court opinions [cited by the majority]."[70] Justice McDevitt criticized the majority for its "unjustifiably broad leaps of reasoning,"[71] arguing that simply because the Supreme Court, through *Leland v. Oregon*[72] and *Powell v. Texas*,[73] has given states flexibility in developing their insanity defense standards and procedures, it does not logically follow that they may abolish the defense entirely.[74] He then determined, through an exhaustive historical analysis, that the insanity defense "has an independent existence [apart from the concept of mens rea] of sufficient duration and significance to entitle it to a place in our American concept of 'ordered liberty.'"[75] In fact, he argued, treating the insanity defense as nonfundamental would be inconsistent with the underlying principles of *Penry v. Lynaugh*[76] as well as those of *Leland*.[77] Thus, according to Justice McDevitt, Four-

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69 *See id.* at 922–35 (dissenting opinion).

70 Brian E. Elkins, *Idaho's Repeal of the Insanity Defense: What Are We Trying to Prove?*, 31 IDAHO L. REV. 151, 156–57 (1994).

71 Recent Developments, *supra* note 15, at 1134.

72 343 U.S. 790 (1952).

73 392 U.S. 514 (1968).

74 Recent Developments, *supra* note 15, at 1134.

75 State v. Searcy, 798 P.2d 914, 927 (Idaho 1990) (McDevitt, J., dissenting). The insanity defense is separate from the concept of mens rea, according to Justice McDevitt, because "[w]hile *mens rea* is concerned with the guilty mind, the defense of insanity questions whether the guilty mind with which the act is done is a product of voluntary and rational choice." *Id.* at 935 (McDevitt, J., dissenting).

76 492 U.S. 302 (1989).

77 *See Searcy*, 798 P.2d at 934–35 (McDevitt, J., dissenting) (citing Penry v. Lynaugh, 492 U.S. 302 (1989); Leland v. Oregon, 343 U.S. 790 (1952)). As Justice McDevitt reasoned:

> In *Penry*, the issue was whether the Eighth Amendment rule against cruel and unusual punishment prohibited the execution of a mentally retarded defendant. . . . [T]he Court ultimately concluded that there was no bar to the execution of Penry. The central rationale was that there were other screening mechanisms in place in the criminal justice system which would measure the mental competence and related culpability of the accused. The Court reasoned that "[b]ecause of the protections afforded by the insanity defense today, such a person is not likely to be convicted or face the prospect of punishment." . . . The rule of *Penry* cannot apply in jurisdictions that lack an insanity defense; otherwise there would exist the danger of imposing capital punishment against the mentally incompetent, in violation of the Eighth Amendment.

Id. at 934 (McDevitt, J., dissenting) (citation omitted). In regard to *Leland*, Justice McDevitt asserted:

> That case, in conjunction with the holdings of *In re Winship* [397 U.S. 358 (1970)] and *Martin v. Ohio* [480 U.S. 228 (1987)], . . . establish[es] that the issues of *mens rea* and insanity are not one and the same.
>
> As noted previously, the United States Supreme Court in *Winship* held that due process requires the prosecution to prove every element of the crime charged beyond a reasonable doubt. However, that holding would

teenth Amendment due process requires the availability of an extrinsic insanity defense, regardless of whether a negativing insanity defense is available.

B. Montana—*State v. Cowan*

State v. Cowan,[78] probably the most cited and well-known opinion standing for the proposition that the abolition of the insanity defense is not unconstitutional,[79] was the next case in which the constitutionality of the mens rea approach reached a state's highest court.

1. *Facts, Procedural Posture, and Majority Opinion*

On April 23 or 24, 1990, Joe Cowan broke into a cabin at the Lolo Work Center near Lolo, Montana which served as the living quarters for Margaret Doherty, a United Sates Forest Service employee.[80] When Doherty came home and discovered that someone had been inside the cabin watching television, eating, and "generally making himself at home," she immediately locked the doors and called the police.[81] While on the phone with the police, "Doherty saw Cowan circling the cabin trying to gain entrance. He called Doherty a 'society bitch' and a 'mechanic robot bitch,' and he yelled 'it's my house' and other unintelligible statements. Cowan also kicked at Doherty's car and pulled at her license plates."[82] Using a hodag (a sharp tree-planting tool), Cowan again broke into the cabin.[83] Doherty pointed

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> not apply to affirmative defenses, as they are not considered to be an element of the crime. . . . In *Leland*, the Court characterized the issue of insanity as a defense in the course of holding that the burden of proof to prove insanity could be placed on the defendant. . . .
>
> Under the rule[ ] enunciated in [*Winship*], if the insanity defense is no more than an issue of whether the defendant entertained the necessary *mens rea* to commit the crime, then the holding of *Leland* must fall, and the prosecution must bear the burden of proving the sanity of every defendant. For *Leland* and *Winship* to exist in harmony under such an interpretation, it would have to be concluded that the state could define all crimes in such a way as to eliminate the requirement of *mens rea* as an element of the crime, characterize a lack of intent as an affirmative defense, and thus shift the burden of proof to the defense to prove that there was no intent to commit the act charged. It is my belief that such a reading of the Supreme Court's holdings in this area is too strained to merit serious consideration.

Id. at 934–35 (McDevitt, J., dissenting).

78 861 P.2d 884 (Mont. 1993), *cert. denied*, 511 U.S. 1005 (1994).

79 The notoriety of the *Cowan* decision likely results from the Supreme Court's subsequent denial of certiorari, which was characterized by many as the Court's tacit approval of *Cowan*. For a discussion of this issue, see *infra* Part II.B.3.

80 861 P.2d at 885; *see* Stephanie C. Stimpson, Note, State v. Cowan*: The Consequences of Montana's Abolition of the Insanity Defense*, 55 MONT. L. REV. 503, 513 (1994).

81 *Cowan*, 861 P.2d at 885.

82 Stimpson, *supra* note 80, at 513 (footnotes omitted) (citing Petitioner's Brief at 4, *Cowan* (No. 93-1264); *Cowan*, 861 P.2d at 890 (Trieweiler, J., dissenting)).

83 Stimpson, *supra* note 80, at 513–14.

a gun at him, and when he came toward her, she shot the gun, but it misfired.[84] Cowan proceeded to attack Doherty with the hodag, striking her numerous times on the head, arms, and shoulders.[85] The sheriff's deputies responding to the call found Cowan outside of the nearby mess hall, where he surrendered without incident.[86] Doherty was found in a semi-conscious state, and she survived, "despite injuries including a punctured lung, broken ribs, a broken scapula, a dislocated shoulder, and a skull fracture."[87]

Prior to trial, Cowan was diagnosed with paranoid schizophrenia.[88] While all three mental health experts that testified at trial—one psychiatrist and two clinical psychologists—concluded that the disease likely precluded Cowan from appreciating the criminality of his conduct at the time of the crime,[89] they also determined that he could satisfy Montana's requisite mental state because notwithstanding his delusions, he could act with purpose and knowledge.[90] He was found competent to stand trial and subsequently was convicted.[91] During the trial, defense counsel filed a memorandum challenging Montana's statutory scheme as violative of the Due Process Clause of the Fourteenth Amendment, as well as the Eighth Amendment prohibition against cruel and unusual punishment, arguing that these protections guaranteed the right to consideration of an acquittal based on the insanity defense.[92] On appeal to the Montana Supreme Court, Cowan raised two issues relevant to this Note: (1) whether due process was violated because Montana's statutory scheme establishes a conclusive presumption of criminal intent in violation of *Sandstrom v. Montana*,[93] and (2) whether "sentencing and confining Cowan to prison

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84 *Id.* at 514.

85 *Id.* at 513–14.

86 *Id.*

87 *Cowan*, 861 P.2d at 885.

88 Stimpson, *supra* note 80, at 514.

89 *Cowan*, 861 P.2d at 891–92 (Trieweiler, J., dissenting). Indeed, this lack of appreciation was even conceded by the state's psychologist, and "[t]here was no testimony from any witness to controvert the expert medical opinion that, because of serious mental disease, defendant was unable to appreciate the criminality of his conduct at the time that he assaulted his victim." *Id.* at 892 (Trieweiler, J., dissenting).

90 *Id.* at 891–92 (Trieweiler, J., dissenting).

91 *Id.* at 885.

92 Stimpson, *supra* note 80, at 515. Presumably, the trial court rejected these arguments.

93 *Cowan*, 861 P.2d at 885 (citing Sandstrom v. Montana, 442 U.S. 510 (1979)). *Sandstrom* held that the Due Process Clause "prohibits the use of a [mandatory] presumption which relieves the prosecution of the burden of proving mental state by requiring an inference of the existence of criminal intent from the fact of criminal conduct." *Id.* at 888. For example, as was the case in *Sandstrom*, a jury instruction providing that "'a person intends the ordinary consequences of his voluntary acts'" would be impermissible. *Id.*

violate[s] the Eighth and Fourteenth Amendments . . . because of his mental condition."[94]

Writing for the majority, Chief Justice Turnage quickly disposed of these arguments. Regarding due process, the court first noted that, because Cowan had received a bench trial, there were no jury instructions.[95] However, Cowan asserted that *Sandstrom* would still apply if the trial judge relied on Montana statutes that created a conclusive presumption of mental state.[96] Specifically, he alleged that, because a "mental disease or defect does not . . . constitute a valid defense to a criminal charge in Montana, a conclusive presumption is established as to mental state in violation of . . . *Sandstrom*."[97] Further, because Montana law provided that knowledge or purpose may be inferred from evidence of organized or integrated conduct,[98] Cowan claimed that "no one who commits a criminal act can ever be acquitted on grounds of insanity because it would be impossible for anyone to cause harm without engaging in a minimal level of organized conduct."[99] Chief Justice Turnage responded by relying on *State v. Korell*[100] and *Leland* to hold that the Due Process Clause does not require the use of any particular insanity test or allocation of burden of proof.[101] Next, he concluded that the plain language of the Montana statutes at issue merely establishes a permissive inference, not a conclusive presumption, because it states that conduct "may" suffice to establish criminal intent, and thus leaves the ultimate determination to the trier of fact.[102] Such permissive inferences, he commented, do not violate the *Sandstrom* rule.[103]

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94 *Id.* at 885. It is likely that Cowan did not raise a "fundamental principle of liberty and justice" argument under his due process challenge because the Montana Supreme Court had already decided that issue in *State v. Korell*, *see supra* note 65 and accompanying text, and was likely not willing to reconsider it.

95 *See Cowan*, 861 P.3d at 888.

96 *Id.* The court did not seem to disagree with this contention.

97 *Id.* This argument is relatively weak, however, as mens rea approach statutes do not, by their nature, establish any presumption of mens rea; rather, they explicitly leave the determination of mens rea to the trier of fact. Chief Justice Turnage probably recoguized the same weakness in this argument, for he did not even address it in the majority opinion.

98 *See* MONT. CODE ANN. § 45-5-112 (2001) ("In a deliberate homicide, knowledge or purpose may be inferred from the fact that the accused committed a homicide and no circumstances of mitigation, excuse, or justification appear.").

99 *Cowan*, 861 P.2d at 888.

100 *See supra* note 65 and accompanying text.

101 *Cowan*, 861 P.2d at 888 (citing Leland v. Oregon, 343 U.S. 790 (1952)). This part of the opinion was probably unnecessary, as it was not part of the due process challenge mounted by Cowan. The court may have included this dictum simply to reaffirm its commitment to the constitutionality of Montana's statutory scheme.

102 *Id.*

103 *Id.*

As for Cowan's cruel and unusual punishment challenge,[104] the court noted that the Montana legislature "has acted to assure that the attendant stigma of a criminal conviction is mitigated by the sentencing judge's personal consideration of the defendant's mental condition and provision for commitment to an appropriate institution for treatment, as an alternative to a sentence of imprisonment."[105] Additionally, it stated that

> Cowan was not sentenced to prison, but was placed in the custody of the Department of Institutions. The [trial] court specifically stated its purpose to provide for treatment of Cowan's mental illness at a different facility if the Director of the Department of Institutions determines [that] treatment at a different facility is needed.[106]

Taken together, the court determined these safeguards protected Cowan from being subjected to cruel and unusual punishment.[107]

2. *Justice Trieweiler's Dissent*

Justice Trieweiler, in a lengthy dissent joined by Justice Hunt, noted that the facts of *Cowan* present "the worst case scenario anticipated by national critics of Montana's insanity laws"[108] and was a clear example of how Montana's statutory scheme "inadequately and unconstitutionally addresses mentally ill defendants."[109] In arriving at this conclusion, Justice Trieweiler criticized the majority's reliance on *Korell* because of its misinterpretation of *Leland*, agreeing instead with the reasoning of the California Supreme Court in *People v. Skinner*,[110] which deduced an interpretation of *Leland* opposite to the majority's in *Cowan* and *Korell*.[111]

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104 Specifically, Cowan argued that punishing the insane constitutes inhumane treatment, and that considering a defendant's insanity only for the purpose of reducing the degree of the crime or determining the punishment for the crime qualifies as cruel and unusual punishment and a violation of due process—presumably because considering the defendant's insanity in a determination of guilt constitutes a fundamental aspect of due process. *See id.* Much of this particular challenge seems grounded in the type of due process reasoning found in *Searcy* and *Korell*. *See supra* Part II.A.1. While this was probably not the best framework in which to argue this type of Eighth Amendment challenge, Cowan may have been trying to dress a wolf in sheep's clothing, disguising a due process argument as one based upon cruel and unusual punishment. If this indeed was his intention, the court certainly was not fooled.

105 *Cowan*, 861 P.2d at 889 (quoting State v. Korell, 690 P.2d 992, 1002 (1952)).

106 *Id.*

107 *See id.*

108 *Id.* at 892 (Trieweiler, J., dissenting).

109 Stimpson, *supra* note 80, at 519 (characterizing Justice Trieweiler's dissenting opinion).

110 704 P.2d 752 (Cal. 1985).

111 Specifically, Justice Trieweiler noted:

> In *Leland v. Oregon*, the [C]ourt . . . affirmed the right of the state to formulate the applicable test of legal insanity. In so doing, however, the [C]ourt measured the law under due process standards, concluding that the irresis-

Trieweiler also determined that Montana's statutory scheme inadequately protects mentally ill defendants, embracing the view of the California Supreme Court in *People v. Coleman*,[112] which professed that "[o]bviously an insane person accused of a crime would be inhumanely dealt with if his insanity were considered merely to reduce the degree of his crime or the punishment therefor."[113] For a statutory scheme to be constitutional, Justice Trieweiler asserted, a court or jury must be able to consider whether a defendant could cognitively understand the criminality of his conduct or be able to conform his conduct to abide by the law.[114] Montana's statutory scheme, he argued, "does exactly what the California Supreme Court suggests would violate due process and cruel and unusual punishment provisions of the Constitution."[115]

Finally, quoting Justice McDevitt's dissent in *Searcy*,[116] Justice Trieweiler explained that the insanity defense is implicit in the American concept of ordered liberty,[117] a proposition that later commentators have observed is "evidenced by historical precedence and its nearly universal acceptance in American jurisdictions."[118]

3. *Subsequent History: Denial of Certiorari by the Supreme Court*

In February 1994, Cowan petitioned the United States Supreme Court for a writ of certiorari.[119] The petition, however, was denied.[120] A denial of certiorari carries no precedent; "[n]onetheless," as one commentator described, "several newspapers characterized this denial of certiorari . . . as a 'green light' for state legislatures to abolish their insanity defenses. Victims' rights advocates considered the denial of certiorari a victory. Legal authorities interpreted the Supreme Court's action as easing the way for abolition of the insanity defense."[121]

> tible impulse extension of [the] traditional [extrinsic] insanity test was not "'implicit in the concept of ordered liberty.'" The court thus seemingly accepted the proposition that the [extrinsic] insanity defense, in some formulation, *is* required by due process.

Cowan, 861 P.2d at 890 (Trieweiler, J., dissenting) (citations omitted) (quoting Leland v. Oregon, 343 U.S. 790, 801 (1952)).

112 126 P.2d 349 (Cal. 1942).

113 *Id.* at 353.

114 *See Cowan*, 861 P.2d at 890 (Trieweiler, J., dissenting).

115 *Id.* (Trieweiler, J., dissenting).

116 *See supra* Part II.A.2.

117 *See Cowan*, 861 P.2d at 893 (Trieweiler, J., dissenting).

118 Stimpson, *supra* note 80, at 519–20 (characterizing Justice Trieweiler's dissenting opinion in *Cowan*, 861 P.2d at 893–94).

119 *See* 62 U.S.L.W. 3629 (U.S. Feb. 1, 1994) (No. 93-1264).

120 *See* Cowan v. Montana, 511 U.S. 1005 (1994).

121 Buitendorp, *supra* note 34, at 969–70 (footnotes omitted). *See, e.g.*, Bob Hohler, *Curb on Plea of Insanity Is Let Stand*, BOSTON GLOBE, Mar. 29, 1994, at 1 ("The court, in bypassing the thorny issue without comment, may have eased the way for other states to

These groups may be counting their chickens before they hatch, though, as a denial of certiorari can occur for a number of reasons. As Justice Frankfurter explained,

> [a] variety of considerations underlie denials . . . , and as to the same petition different reasons may lead different Justices to the same result. This is especially true of petitions for review on writ of certiorari to a State court. Narrowly technical reasons may lead to denials. . . . A decision may satisfy all these technical requirements and yet may commend itself for review to fewer than four members of the Court. Pertinent considerations of judicial policy here come into play. A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening.[122]

Yet, at the same time, it seems that the facts of *Cowan* would have made it the "poster child" case for the granting of a writ, which could lead one to believe that the Supreme Court is satisfied with the Montana Supreme Court's opinion and rationale after all.[123] Alternatively, though, they might just be waiting for a conflicting decision in another state court or in a federal habeas corpus action before they believe the issue is ripe for review. Nevertheless, it is dangerous to draw any conclusions from a denial of certiorari, and therefore only time will tell whether—or, more likely, when—the Court will grapple with this question in the future.

C. Utah—*State v. Herrera*

Utah is the most recent state to encounter a challenge to its mens rea approach statute. In *State v. Herrera*,[124] the Utah Supreme Court was presented with a flurry of constitutional claims, including many previously discussed, but with an additional challenge: Fourteenth Amendment equal protection.

1. *Facts and Procedural Posture*

Herrera presented itself to the court as a consolidation of two cases on interlocutory appeal, *State v. Herrera* and *State v. Sweezey*, both of which contested the constitutionality of Utah's mens rea approach

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follow Montana's lead in outlawing the controversial defense method, according to legal authorities on both sides of the debate."); David G. Savage, *High Court Action Puts Insanity Defense in Peril*, L.A. TIMES, Mar. 29, 1994, at A23 ("The Supreme Court on Monday gave states a green light to abolish the traditional insanity defense by declining to review the assault conviction of a schizophrenic Montana man.").

122 Maryland v. Balt. Radio Show, Inc., 338 U.S. 912, 917–18 (1950).

123 *Cf.* Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1304 (1979) ("Many times [the denial of certiorari] gives us a glimpse, imperfect to be sure, into the Justices' preliminary attitudes on a given issue.").

124 895 P.2d 359 (Utah 1995).

statute.[125] Therefore, the facts involved in each case, as far as this appeal was concerned, were quite limited. In *Herrera*, the defendant was charged with shooting and killing Claudia Martinez, his ex-girlfriend.[126] He told the police that he had been visiting "'some girl'" when "'something snapped, something happened to him and he decided to go to the Martinez house and shoot Claudia.'"[127] Herrera did so, shooting her twice in the head.[128] He then chased Martinez's mother into a bedroom where Martinez's brother was sleeping.[129] He shot at both of them, but missed.[130] The police then arrived at Martinez's house and arrested Herrera while he was still in possession of the gun.[131] He was charged with Martinez's murder and two counts of attempted murder, to which he pled NGRI.[132] Herrera then filed a number of motions "attacking Utah's statutory scheme as unconstitutional."[133] After Salt Lake County District Court Judge John Rokich dismissed these motions, Herrera petitioned for an interlocutory order.[134]

In *Sweezey*, Mikell Sweezey approached another man, Steve Matthews, outside a hotel in downtown Salt Lake City, pulled a gun from his backpack, and shot Matthews in the face from a distance of about eight feet.[135] According to the court, "[t]he bullet entered Matthews's left cheek, but did not kill him. A security officer of the hotel heard Sweezey say, 'They wrecked my home so I shot him.'"[136] Sweezey was charged with the attempted murder of Matthews, to which he pled NGRI. Like Herrera, Sweezey filed a number of motions challenging unsuccessfully Utah's insanity defense statutes, then petitioned for an interlocutory order.[137]

2. *Majority Opinion*[138]

The majority began its equal protection discussion by noting that the federal constitution requires that "similarly situated individuals be

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125 *See id.* at 361.
126 *Id.*
127 *Id.*
128 *Id.*
129 *Id.*
130 *Id.*
131 *Id.*
132 *Id.*
133 *Id.*
134 *Id.*; *see also* Catherine E. Lilly, Recent Development, State v. Herrera*: The Utah Supreme Court Rules in Favor of Utah's Controversial Insanity Defense Statute*, 22 J. CONTEMP. L. 221 (1996) (providing a case discussion of *Herrera*).
135 *Herrera*, 895 P.2d at 361.
136 *Id.*
137 *See id.*
138 The majority opinion discusses due process, equal protection, and cruel and unusual punishment issues. Because this Note has already discussed how the *Searcy* and

treated alike unless there is a reasonable basis for treating them differently."[139] The defendants in *Herrera* argued that Utah's mens rea approach "illegally differentiates between mentally ill defendants solely on the content of their delusions."[140] In other words, given two defendants who both are mentally ill and suffer from the same mental disease or defect, suppose one kills under the delusion that he is killing something that is not human, while the other kills under the delusion that he is being attacked and that his actions are justified as self-defense. The mens rea model precludes conviction of the former, but not the latter. According to the defendants, "each is equally mentally ill, but they are treated differently because some 'clinically indistinguishable delusional system' causes them to have different hallucinations."[141]

The majority did not find this argument compelling, reasoning that the legislature had a rational basis for the differential treatment in that it was "draw[ing] a line between those who do not comprehend that they are taking a human life and those who do."[142] The first type of mentally ill offender, the court explained, does not know that he is hurting or killing another person and thus makes no moral judgment.[143] Conversely, the second offender does know he is hurting or killing another person, and therefore is aware that his actions may be criminal.[144] Citing an American Medical Association (AMA) report,[145] the court decided:

> It can reasonably be concluded that those who understand and appreciate the fact that they are killing another are more "culpable" than those whose delusions carry them even further away from reality. . . . The mens rea model is a legitimate means to the end of

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Cowan courts addressed due process challenges, *see supra* Part II.A–B, and because the *Herrera* due process analysis does not differ greatly in substance, that issue will not be addressed here. The majority did not reach the cruel and unusual punishment challenge because of the appeal's interlocutory status. *See Herrera*, 895 P.2d at 371. Neither defendant had been convicted or sentenced, nor had there been an adjudication of their respective mental states. *Id.* Thus, the issue was deemed unripe for review, *see id.*, and although the dissent disagreed with this determination, I will not discuss it here (though the dissent's cruel and unusual punishment analysis will be referenced *infra* at Part III.C). Instead, I will presently focus only on the equal protection issue.

139 *Herrera*, 895 P.2d at 368. Presumably, the court was referring to rational basis review, which is the test for non-suspect classifications under the Constitution. If the classification is semi-suspect or suspect, a higher standard applies in order for the differential treatment to pass constitutional muster. *See infra* notes 225–27 and accompanying text.

140 *Herrera*, 895 P.2d at 368.

141 *Id.*

142 *Id.* at 368–69.

143 *Id.* at 369.

144 *Id.*

145 *See* Committee Report, *Insanity Defense in Criminal Trials & Limitations of Psychiatric Testimony*, JAMA 2967 (June 1984).

holding responsible those persons who acted with the necessary intent.[146]

3. *Associate Chief Justice Stewart's Dissent*

In a somewhat rhetorical dissent and otiose dissent, Associate Chief Justice Stewart claimed that the identical treatment of two clearly dissimilarly situated groups—sane and insane persons—under Utah's statutory scheme, as well as its discrimination based upon the content of delusions of the latter group, is "patently irrational and invidious. It serves no rational purpose. It has no rational connection to the protection of the public, which historically has been accomplished by civil confinement. . . . [It] is vacuous. It is capricious and arbitrary . . . irrational and invidiously discriminatory."[147] He argued that a person who is so insane as to believe that he is actually squeezing a grapefruit rather than a human being is just as "dangerous to society as one who kills in the delusional belief that he is acting in self-defense."[148] Further, Associate Chief Justice Stewart contended that an insane person who kills under a delusion that, if real, would render the killing self-defense and therefore justified, would be punished "simply for being insane, not for the act. That is not only a denial of equal protection, but also the infliction of cruel and unusual punishment."[149]

Finally, Associate Chief Justice Stewart analogized the rationale behind the insanity defense to the law against punishing children of a very young age who cannot discern between right and wrong:

> A four-year-old who points a loaded gun, pulls the trigger, and kills another is not criminally punished because the law presumes that a child does not understand the nature or wrongfulness of the act due to his mental immaturity or incapacity. However, an insane person who suffers from the same inability to understand either the nature or the wrongfulness of his act is subject to punishment . . .

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146 *Herrera*, 895 P.2d at 369.

147 *Id.* at 384–85 (Stewart, Assoc. C.J., dissenting).

148 *See id.* at 385 (Stewart, Assoc. C.J., dissenting).

149 *Id.* at 385 (Stewart, Assoc. C.J., dissenting). It is not clear from Associate Chief Justice Stewart's opinion how this violates equal protection. Assuming, though, that this particular assertion is true (i.e., that in this instance the punishment would be based only upon a condition, not an act), it seems likely that the law would amount to a violation of the Eighth Amendment. However, the underlying basis for such an assertion (presumably, that the discrimination violates *Robinson v. California*, 370 U.S. 660 (1962)) seems to stem from an incorrect application of the *Robinson* principle, which compels the invalidation of criminal laws that reach beyond concrete prescribed acts. *See Robinson*, 370 U.S. at 667 (holding that a state law "which imprisons a [narcotics addict] as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment").

not for culpable conduct, but for being insane, that is, for engaging in conduct he would not have engaged in but for his insanity.[150]

III
ABOLITION ON TRIAL: A CRITICAL ANALYSIS OF THE CONSTITUTIONAL ISSUES

Needless to say, the justices' differing opinions in the above cases leave much room for discussion of the constitutional issues presented by the abolition of the extrinsic insanity defense. This Part, by reference to the above cases as well as other constitutional doctrines, addresses the issues of due process, equal protection, and cruel and unusual punishment.

A. Due Process

Few phrases in the Constitution are more malleable than "due process of law."[151] There are numerous ways of phrasing the test that is used to determine whether due process has been violated.[152] Essentially, an infringement occurs when state action deprives an individual of a procedure or right among those which are considered "'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"[153] If this formulation of the test is accurate, it seems that the dissenters in *Searcy*, *Cowan*, and *Herrera* are more correct in their respective analyses.

In ascertaining whether the extrinsic defense of insanity meets the "fundamental principle" test, court majorities are usually quick to point out that the defense has not been uniform—rather, it has changed over the years. For example, in *Searcy*, the court explained that while "[t]he insanity defense has had a long and varied history during its development in the common law," nevertheless, "[a]s the

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150 *Herrera*, 895 P.2d at 385 (Stewart, Assoc. C.J., dissenting). Justice Durham also filed a separate dissent, in which Associate Chief Justice Stewart joined. Justice Durham began his opinion by questioning the logic and reasoning of the AMA report the majority relied upon. *Id.* at 389–90 (Durham, J., dissenting) (quoting from Stephen Morse's critique of the AMA analysis in Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 791–92 (1985)); *see supra* note 145. In addition, he pointed out that "the majority's 'second group' of killers makes no more of a 'moral judgment' than the first. The whole point is that because of their mental condition, they are *incapable of recognizing that any moral choice presents itself.*" *Herrera*, 895 P.2d at 390 (Durham, J., dissenting).

151 *See* U.S. CONST. amend. V (stating, in pertinent part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law"). The Due Process Clause was made applicable to the states through the Fourteenth Amendment, which requires that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." *Id.* amend. XIV, § 1.

152 *See* Duncan v. Louisiana, 391 U.S. 145, 148–49 (1968) (noting the various ways the Supreme Court has phrased the test).

153 Powell v. Alabama, 287 U.S. 45, 67 (1932) (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).

understanding of the mental processes changed over the centuries, the implications of a criminal defendant's insanity have changed."[154] However, what the majority opinions fail to recognize is that while the insanity defense has not been uniform in its formulation over the years (in that different jurisdictions have applied different tests, such as the *M'Naghten*,[155] American Law Institute (ALI),[156] and *Durham*[157] tests), every jurisdiction throughout the common law and in the history of this country (with the recent exceptions) has recognized insanity as an *extrinsic* defense and has used some form of an insanity test or standard that recognizes it as such.[158] Indeed, the dissenters in each of the opinions discussed in Part II explain at length the history and treatment of the defense, tracing it back hundreds of years.[159] Certainly, this is weighty evidence that the extrinsic insanity defense should qualify as "fundamental" for the purpose of extending due process protection.

If the issue were to reach the United States Supreme Court, one might argue that for the Court's reasoning to be consistent with that of its prior cases, it must conclude that the insanity defense must be made available as an extrinsic defense. For example, in *Montana v. Egelhoff*,[160] the Court stated that "[o]ur primary guide in determining whether the principle in question is [a] fundamental [principle of justice] is, of course, historical practice."[161] Quoting Hale, Blackstone, and Coke, among others, Justice Scalia determined in *Egelhoff* that the common law tradition did not allow a defendant to present evidence of voluntary intoxication to negate the mens rea of a crime with which he was charged.[162] Yet all of these same commentators, as well as myriad others, fell unequivocally on the side of the dissenters in *Searcy*,

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154 State v. Searcy, 798 P.2d 914, 917 (Idaho 1990).

155 *See supra* note 21.

156 *See* MODEL PENAL CODE § 4.01 (1985) ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." (alteration in original)). For a discussion of the ALI "substantial capacity" test, see 1 LAFAVE & SCOTT, *supra* note 18, § 4.3(d), at 462–64.

157 *See supra* note 28.

158 *See* GERBER, *supra* note 16, at 83 ("From the earliest common law, insanity in some form has been either a partial or complete defense. [It] was firmly established by the time the United States Constitution was adopted, and it has remained a fundamental part of American criminal law since Revolutionary days.").

159 *See Searcy*, 798 P.2d at 927–35 (Idaho 1990) (McDevitt, J., dissenting); State v. Cowan, 861 P.2d 884, 893–94 (Mont. 1993) (Trieweiler, J., dissenting); State v. Herrera, 895 P.2d 359, 374–76 (Utah 1995) (Stewart, Assoc. C.J., dissenting).

160 518 U.S. 37 (1996).

161 *Id.* at 43.

162 *Id.* at 44–45.

Cowan, and *Herrera*, and in the cases these opinions cited.[163] Further, while Scalia noted that a principle should have "the uniform and continuing acceptance one would expect for a rule that enjoys 'fundamental principle' status,"[164] he certainly could not have meant this literally to require that all states adopt the same exact principle and standard for applying it (a contention the majorities in the *Searcy* and *Herrera* opinions seem to believe[165]). If this were the case, it is likely that very few, if any, principles would be considered fundamental.

To illustrate this point, consider that in *Duncan v. Louisiana*,[166] the Court held that because "trial by jury in criminal cases is fundamental to the American scheme of justice," due process requires a jury trial in all criminal cases.[167] Until and after that decision—indeed, since sometime in the fourteenth century—a jury had been composed exclusively of twelve citizens, and most states today continue to require that this number constitute a criminal jury.[168] However, in *Williams v. Florida*,[169] the Court held that a jury may be comprised of as few as six members without running afoul of the Constitution.[170] This is, no doubt, a nonuniform application of the fundamental right to trial by jury. However, it would be absurd to conclude that because of the nonuniformity in its application, one can no longer consider the right to a jury trial fundamental. Yet, this is exactly the reasoning the majorities employed in *Searcy* and *Herrera*. Further, such a uniformity requirement would certainly fly in the face of the well-established right of the states to define and experiment with their criminal law *within the bounds of the Constitution*[171]—a proposition with which more conservative Justices, such as Scalia and Rehnquist, would likely agree.[172]

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163 *See, e.g.*, *Searcy*, 798 P.2d at 929 (McDevitt, J., dissenting) (relying on Hale); Sinclair v. State, 132 So. 581, 583–84 (Miss. 1931) (Ethridge, J., concurring) (relying on Blackstone and Sir Edward Coke).

164 *Egelhoff*, 518 U.S. at 48.

165 *See Searcy*, 798 P.2d at 916–19; *Herrera*, 895 P.2d at 365–66.

166 391 U.S. 145 (1968).

167 *Id.* at 149.

168 *See* Williams v. Florida, 399 U.S. 78, 87–90 (1970) (discussing the history of the common law's arrival at a twelve person jury); *see also* AUSTIN WAKEMAN SCOTT, FUNDAMENTALS OF PROCEDURE IN ACTIONS AT LAW 75–76 (1922) ("At the beginning of thirteenth century twelve was indeed the usual but not the invariable number. But by the middle of the fourteenth century the requirement of twelve had probably become definitely fixed. Indeed this number finally came to be regarded with something like superstitious reverence." (footnote omitted)).

169 399 U.S. 78 (1970).

170 *See id.* at 103.

171 *See* State v. Searcy, 798 P.2d 914, 934 (Idaho 1990) (McDevitt, J., dissenting).

172 In *Egelhoff*, the Court reiterated that:

> 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

Some might criticize this line of reasoning, however, on the ground that requiring the right in question to be historically and traditionally protected *as the sole factor* in determining whether it should be constitutionally protected allows "'personal and private notions' [to] dictat[e] how that tradition is defined. It is then very likely that the jurist will allow his or her personal morality to influence how to define the tradition. . . . [Therefore, this approach] serve[s] as an illusory limitation on the judiciary."[173] Such critics might instead advocate an approach in which tradition serves merely as one factor in the overall calculus.[174] Indeed, in his dissent in *Michael H. v. Gerald D.*,[175] Justice Brennan sharply criticized Justice Scalia's methodology (which was the same as that employed in *Egelhoff*), labeling Scalia's complete dependence on tradition as a "pretense," and arguing that Scalia's methodology did not provide the objective boundaries it purported to set from the fact that "reasonable people can disagree about the content of particular traditions."[176] Thus, Scalia's narrow interpretation may rightly be characterized as making the Due Process Clause "a rigid doctrine unable to adapt to changes in society."[177]

Yet, even if Brennan's "totality of the circumstances" approach is ultimately more suitable, the lengthy and consistent tradition behind the insanity defense should figure prominently into this overall calculus. Further, as Justice McDevitt noted in *Searcy*:

> Another . . . test of whether a particular doctrine is "implicit in the concept of ordered liberty" other than the history of the legal concept, is the unanimity with which the doctrine is adopted among American jurisdictions. With the exception of . . . Montana (1979), Idaho (1982) and Utah (1983), the insanity defense has been universally accepted in all American jurisdictions throughout this nation's history. . . . [A]s the Supreme Court has noted in the context of judging "evolving standards of decency" under the Eighth

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> 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.

Montana v. Egelhoff, 518 U.S. 37, 56 (1996) (internal quotations omitted) (quoting Powell v. Texas, 392 U.S. 514, 535–36 (1968) (plurality opinion)). While the *Powell* Court noted in this passage that the "adjustment" of these doctrines may be appropriate, it is most likely that the wholesale abolition of such critical principles would be unconstitutional as violative of due process. Insanity does not seem to distinguish itself as more or less important than these other fundamental doctrines.

173 Robert J. McManus, Note, Montana v. Egelhoff*: Voluntary Intoxication, Morality, and the Constitution*, 46 AM. U. L. REV. 1245, 1281 (1997) (footnotes omitted).

174 *See id.*

175 491 U.S. 110 (1989).

176 *Id.* at 137 (Brennan, J., dissenting).

177 McManus, *supra* note 173, at 1283.

> Amendment, such legislation is "an objective indicator of contemporary values upon which we can rely."[178]

This nearly unanimous acceptance of insanity as an extrinsic defense, in one form or another, is further evidence that our contemporary values have not changed dramatically from the basic principle that the law cannot impose punishment where it cannot impose moral blameworthiness.[179]

In sum, regardless of which method of constitutional interpretation one utilizes, considering both past tradition and the current state of the law, one can arrive only at the conclusion that due process prohibits the elimination of the extrinsic insanity defense.

B. Equal Protection

As no commentator has yet spoken to the equal protection implications of the mens rea approach, this subpart attempts to comprehensively address the issue. In exploring how contemporary equal protection theory and doctrine play out in the context of the mens rea approach, it should become clear as to why the *Herrera* court's equal protection analysis is both incomplete as well as fundamentally flawed—even if it ultimately arrived at the correct result.

The *Herrera* court was the first court that purported to address the issue of equal protection in regard to the mens rea approach.[180] However, the result of its endeavor was, to say the least, disappointing. In both the majority and dissenting opinions, the justices' respective

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178 State v. Searcy, 798 P.2d 914, 934 (Idaho 1990) (McDevitt, J., dissenting) (quoting Penry v. Lynaugh, 492 U.S. 302, 335 (1989)). In addition to the jurisdictions noted in Justice McDevitt's opinion, Kansas also has restricted the use of insanity as a separate affirmative defense. *See supra* note 15 and accompanying text.

179 As the Court recognized in *Morissette v. United States*, "[h]istorically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong." 342 U.S. 246, 250 n.4 (1952) (internal quotations omitted) (quoting Roscoe Pound, *Introduction* to FRANCIS BOWES SAYRE, A SELECTION OF CASES ON CRIMINAL LAW, at xxix, xxxvi–xxxvii (1927)). Thus, the Court concluded, "[t]he contention that an injury can amount to a crime only when inflicted by intention [i.e., culpable mental state] is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief and freedom of human will *and a consequent ability and duty of a normal individual to choose between good and evil*." *Id.* at 250 (emphasis added).

An exception to this principle is the doctrine of strict liability, which allows for punishment without regard to intent or moral blameworthiness. However, "in this country the United States Supreme Court has been zealous in maintaining the concept of *mens rea* as the general rule." GERBER, *supra* note 16, at 69. It is thus quite possible that employing strict liability to convict defendants for anything but relatively minor offenses would offend due process. *See id.*; *see also* United States v. Brawner, 471 F.2d 969, 985 (D.C. Cir. 1972) ("[W]hile . . . the legislature has dispensed with [mens rea] in some statutory offenses, . . . these instances mark the exception and not the rule, and only in the most limited instances has [mens rea] been omitted by the legislature as a requisite for an offense that was a crime at common law.").

180 *See* State v. Herrera, 895 P.2d 359, 368–69 (Utah 1995).

analyses were far more rhetorical and conclusory than systematic and well-grounded in law. First, by erroneously describing the actual classification that the mens rea approach creates, the majority failed to correctly assess whether the two groups classified were similarly situated.[181] Further, while both the majority and dissenting opinions had the correct standard of review in mind,[182] they each failed to implement this standard in any meaningful way in their respective analyses of the rationality (and therefore constitutionality) of the mens rea approach's disparate treatment of insane persons.

The Equal Protection Clause[183] generally ensures that "persons similarly situated should be treated alike,"[184] unless a sufficient justification exists for not doing so. It is implicated only when (1) state action (2) creates a classification (3) distinguishing between persons similarly situated.[185] Because the legislature's enactment of a law clearly qualifies as state action, this requirement needs no further discussion.[186]

1. *The "Classification" Requirement*

The second threshold element of an equal protection claim is that the law create a classification. However, a coherent definition of or theory behind the term "classification" is, surprisingly, absent from almost all cases and commentaries addressing equal protection. Quite possibly, the notion of what constitutes a classification is overlooked because many assume to be true the proposition that "all laws classify."[187] Even if this is so, it can hardly be said that all laws classify such

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181 *See infra* notes 222–23 and accompanying text.

182 *Compare Herrera*, 895 P.2d at 368–69 (applying rational basis review), *with id.* at 384–85 (Stewart, Assoc. C.J., dissenting) (similarly applying rational basis review).

183 *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person . . . the equal protection of the laws."). The Due Process Clause of the Fifth Amendment requires that the federal government afford persons equal protection under the law. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

184 City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985).

185 These, of course, are not the only showings a plaintiff must make in order to prevail on an equal protection claim. However, they are the threshold elements a plaintiff must demonstrate in order for a claim to lie at all. Additionally, the plaintiff must successfully argue that the law's disparate treatment fails the relevant standard of review—in other words, that it does not have a sufficient justification. *See infra* Part III.B.3.

186 For clarity, throughout the remainder of this Note I will replace the term "state action" with the term "law." For example, instead of stating that "the state action was challenged on equal protection grounds," I will state that "the law was challenged on equal protection grounds." Of course, many types of state action, such as administrative adjudication, do not involve the enactment of laws. However, this Note is concerned solely with state action in the context of lawmaking.

187 *See, e.g.*, Toll v. Moreno, 458 U.S. 1, 39 (1982) (Rehnquist, J., dissenting) (asserting that "[a]ll laws classify"); Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1068 (1979) ("Every time an agency of government formulates a rule—in particular, every time a legislature enacts a law—it classifies."); Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of* Cleburne Living

that they would allow for a serious equal protection claim.[188] Thus, it is important to understand what exactly it is that creates a classification, because framing the classification correctly will facilitate later stages of any equal protection analysis, such as the "similarly situated" inquiry[189] and the determination of the appropriate standard of review.[190]

In their celebrated article *The Equal Protection of the Laws*, Joseph Tussman and Jacobus tenBroek attempted to convey the basic understanding of the idea of a classification as follows:

> To define a class is simply to designate a quality or characteristic or trait or relation, or any combination of these, the possession of which, by an individual, determines his membership in or inclusion within the class. . . .
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> . . . .
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> . . . [M]embership in a class is determined by the possession of the traits which define that class. Individual *X* is a member of class *A* if, and only if, *X* possesses the traits which define class *A*. Whatever the defining characteristics of a class may be, every member of that class will possess those characteristics.[191]

Thus, observe Tussman and tenBroek, "[a] legislature defines a class, or 'classifies,' when it enacts a law applying to 'all aliens ineligible for citizenship,' or 'all persons convicted of three felonies,' or 'all citizens between the ages of 19 and 25' or 'foreign corporations doing business within the state.'"[192] While this analysis is helpful insofar as Tussman and tenBroek define what a "class" is and give examples of what would constitute a classification, they still do not define exactly what virtue creates a classification. Therefore, I will do so here.

Webster's Revised Unabridged Dictionary defines a "classification" as "a distribution into *groups* . . . according to some common relations or

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Center, Inc., 88 Ky. L.J. 591, 600 (1999–2000) ("[A]ll (or at least practically all) legislation classifies. Thus, no laws would be immune from potential constitutional challenge." (footnote omitted)). Professor Perry explains this view most convincingly:

> All laws classify. The law, "no one under sixteen years of age may obtain a driver's license," obviously classifies potential drivers on the basis of age. The law, "no one may sell pornography in Peoria," not only forbids everyone to sell pornography; it also classifies: forbidding the sale of pornography, but not, for example, bread.

Michael J. Perry, *Constitutional "Fairness": Notes on Equal Protection and Due Process*, 63 VA. L. REV. 383, 385 (1977) [hereinafter Perry, *Constitutional Fairness*].

188 By this, I mean to say that even if all laws did classify, it would be proper to analyze only a small percentage of these laws under the rubric of the Equal Protection Clause because of the further requirement that the groups classified under the law be similarly situated. *See infra* Part III.B.2.

189 *See infra* Part III.B.2.

190 *See infra* Part III.B.3.

191 Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344–45 (1949).

192 *Id.* at 344.

affinities."[193] The pluralization of the word "group" in this definition is quite important, in that a law must create at least two groups before it can be said to establish a classification; otherwise, it creates only a "class." Further, these two or more groups must necessarily have been drawn from a single class within which the groups originally shared some common trait that made them members of the class before they were divided into groups. This requirement is not difficult to fulfill, in that a class may be as broad as one desires. Because equal protection protects only people (and not, for example, animals), the broadest class possible would be the class of which every person would be a member—"people."[194] A classification, then, occurs when two distinct groups are drawn from this original class—for example, "people over the age of eighteen" and "people not over the age of eighteen."

For a legitimate classification to exist, the two or more distinct groups need not be mutually exclusive of one another. Although there may be some overlap among the members—i.e., some persons may be members of more than one group—there must be some people who will belong exclusively to one group and not the other.[195] For instance, the two groups, "people over the age of eighteen" and "people over the age of twenty-five," do not represent a proper classification in the equal protection sense. Here, all members of "people over the age of twenty-five" are also members of "people over the age of eighteen." Therefore, a law purporting to treat "people over the age of twenty-five" differently from "people over the age of eighteen" is illogical, because the way it treats "people over the age of eighteen" would also apply to "people over the age of twenty-five." Thus, while appearing to create two groups, it actually creates only one ("people over the age of eighteen"), which does not meet the requirements of a classification.

To fix this problem, one would leave one subgroup as "people over the age of twenty-five" and change "people over the age of eighteen" to "people between the ages of eighteen and twenty-five," or "people not over the age of twenty-five," or even "people who attend

193 WEBSTER'S REVISED UNABRIDGED DICTIONARY (1913 ed.) (emphasis added).

194 I should note that one rule does apply only to this particular class (that is, "people"), which is that because "people" is a class into which every person would fit, it may not be considered in determining whether two or more subgroups are similarly situated. In other words, the fact that two subgroups share the common trait "people" is not enough to make them similarly situated for purposes of equal protection analysis, but it is enough to create a classification. *See infra* Part III.B.2.

195 These are the people who would have standing to make an equal protection claim. If the essence of an equal protection claim is that the challenged law treats two groups differently—burdening one and/or benefiting the other—persons belonging to both groups can choose to be part of the benefited group in the classification, and thus cannot claim to have been injured.

law school" (as there are law students under the age of twenty-five—again, the two subgroups need not be mutually exclusive). Whether these groups are similarly situated is another matter,[196] but at the very least, they represent a proper classification.

At this point, one might respond by contending that if the above theory is correct, then Tussman and tenBroek incorrectly used a law treating "all persons convicted of three felonies" in a certain manner as an example of a classification. According to the above theory, this law does not create a legitimate classification because it does not explicitly create two distinct groups—after all, "persons convicted of three felonies" is only one group within the class "people." However, a law creating the group "people convicted of three felonies" necessarily excludes "people not convicted of three felonies," and, therefore, implicitly creates a classification. This is provided, though, that the implied second subgroup is the logical target for differential treatment from the group that is mentioned. In sum, because a classification requires at least two distinct groups to be drawn from a single class, if two groups are explicitly mentioned, then the inquiry as to whether a legitimate classification exists is at an end, provided that the groups do not completely overlap one another. If only one group is mentioned, this is still sufficient to establish a legitimate classification where the law would implicate another group—typically the first group's logical counterpart.

That being said, there is one further aspect to a classification that Tussman and tenBroek did not address, which is that inherent in the notion that a law establishes a classification is the requirement that the two or more subgroups it creates be classified specifically for the purpose of being subject to differential treatment.[197] If the subgroups are treated the same, it is likely that an equal protection claim will not exist, because equal protection claims, by their nature, allege unequal treatment. For example, if "people under the age of eighteen" and "people over the age of eighteen" were treated the same, it would be unnecessary to create the classification in the first place. Therefore, a more complete definition of the term "classification" would be: "ex-

196 *See infra* Part III.B.2.

197 *Cf.* Perry, *Constitutional Fairness*, *supra* note 187, at 385 (observing that "[a] claim not emphasizing differential treatment but simply asserting that a law fails to serve a legitimate objective is traditionally characterized as a substantive due process claim"). Therefore, even if the mens rea approach did not meet the requirements necessary to state a cognizable equal protection claim, it still could be challenged on substantive due process grounds for lack of rationality. However, because that substantive due process inquiry (not to be confused with the "fundamental principle of liberty or justice" substantive due process inquiry conducted *supra* Part III.A) is almost equivalent to that which will be discussed *infra* Part III.B.4, it would be duplicitous to address it here. The reader should therefore assume that the analysis in that section could be imported into a "rationality" substantive due process claim.

tracting and separating two or more groups from a single class by virtue of one or more characteristics, and subjecting those groups to differential treatment."[198]

Working with this definition, one should consider how a law may create a classification. According to Ronald Rotunda and John Nowak,

> [a] classification . . . can be established [by a law] in one of three ways. First, the law may establish the classification "on its face." This means that the law by its own terms classifies persons for different treatment. . . .
>
> Second, the law may [classify] in its "application." In these cases the law either shows no classification on its face or else indicates a classification which seems to be legitimate, but those persons challenging the legislation claim that the governmental officials who administer the law are applying it with different degrees of severity to different groups of persons who are described by some suspect trait. . . .
>
> Finally [and most importantly for purposes of this Note], the law may contain no classification, or a neutral classification, and be applied evenhandedly. Nevertheless the law may be challenged as in reality constituting a device designed to impose different burdens on [similarly situated] classes of persons. If this claim can be proven the law will be reviewed as if it established such a classification on its face.[199]

An example of a law that clearly creates a classification on its face would be a San Francisco city council ordinance stating that "all non-Asians may operate hand laundries in wooden buildings in the city of San Francisco without a permit, but all Asians must obtain a permit."[200] Other matters aside (that is, not engaging in any further

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198 However, this is not to imply that the law may not permissibly classify. If groups are not similarly situated, the law may classify them for differential treatment without implicating the Equal Protection Clause. However, whether the groups are similarly situated is a separate inquiry, to be undertaken only after the determination that a classification exists has been made. *See infra* notes 219–23 and accompanying text. Further, even if a classification exists and the groups are determined to be similarly situated, the government may still treat the groups differently if it presents a sufficient justification. "The equal protection clause . . . does not reject the government's ability to classify persons or 'draw lines' in the creation and application of laws . . . . If the government classification relates to a proper governmental purpose, then the classification will be upheld." 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.2, at 208 (3d ed. 1999). Whether the justification is sufficient depends on the basis of the classification (race, religion, gender, sexual orientation, etc.) and on the consequent standard of review employed (strict scrutiny, intermediate scrutiny, or rational basis). *See infra* Part III.B.3.

199 3 ROTUNDA & NOWAK, *supra* note 198, § 18.4, at 255–56. I will refer to this final method as a classification "by intent."

200 This and the following examples are based upon *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In that case, the classification was created by application.

equal protection analysis), this law explicitly treats two groups (Asians and non-Asians) differently. The typical mens rea approach statute, however, does not appear to make such a facial classification.[201]

In a classification "as applied," the law itself is facially neutral, and, if applied evenhandedly to all persons, would pose no equal protection problem. However, in reality, it is not applied evenhandedly. For instance, assume that the above hypothetical law is a facially neutral one that states, "all persons who operate hand laundries in wooden buildings must obtain a permit." Assume also that the government agency with the authority to grant permits refuses to grant permits to any Asians, even those who meet the necessary requirements for a permit, while granting permits to non-Asians meeting the exact same requirements (or, alternatively, granting permits to non-Asians who do not meet the permit requirements). Here, the facially neutral law has created a classification not through the city council's enactment, but instead through the agency's biased implementation. Regardless, the mens rea approach does not create a classification in this manner, either, because such statutes seem to be correctly and evenhandedly applied.

Therefore, because the mens rea approach is facially neutral and is applied evenhandedly, the only other way to establish that it creates a classification is by intent. This requires a showing that the government desired to bring about the differential treatment—that any discriminatory effect was not merely incidental to the actual purpose for which the action was taken. In other words, regardless of any disproportionate impact, the government's purpose in enacting the law (or at least one such purpose) must be to create the classification.[202]

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201 *See supra* text accompanying note 31.

202 *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("'Disproportionate impact is not . . . the sole touchstone of an invidious [classification].' Proof of . . . discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." (citation omitted) (quoting Washington v. Davis, 426 U.S. 229, 242 (1976))). A well-known case that illustrates this principle is *McCleskey v. Kemp*, 481 U.S. 279 (1987). In *McCleskey*, the Court faced an equal protection challenge to Georgia's facially neutral death penalty statute. *See id.* at 284 nn.2–3. McCleskey's counsel presented to the Court the Baldus study, a sophisticated statistical analysis of death penalty cases in Georgia that took into account over two hundred variables. *See id.* at 286–87. The study very clearly demonstrated that black defendants convicted of killing white victims were statistically much more likely to receive the death penalty than were other types of convicted homicide defendants, including those who were white. *See id.* Nevertheless, the Court refused to find for McCleskey because he had not sufficiently proved that the state had enacted its death penalty statute for a racially discriminatory purpose. *See id.* at 297–99.

However, it need not be proved that the government's sole motive in passing the law was to discriminate. As the Court acknowledged in *Arlington Heights*:

> [*Washington v. Davis*] does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that

When alleging a classification by intent, the plaintiff's claim is essentially that the neutral appearance of the law is being used as a screen for the legislature's true motive—discrimination that would be considered impermissible had it been attempted openly. It is often difficult to obtain convincing evidence of this sort of allegation,[203] however, and when one considers the frequently heavier burden of proof inherent in the motive test,[204] along with the awkward position

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> a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But . . . discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.'

Arlington Heights, 429 U.S. at 265–66 (footnote omitted); *see also* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) ("[Discriminatory purpose] implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects . . . .").

Originally, the Supreme Court rejected a subjective, motive test in favor of an objective, effects-based inquiry, due to the problems inherent in proving subjective intent. *See* Palmer v. Thompson, 403 U.S. 217, 224–25 (1971); *infra* note 203. However, *Davis* and *Arlington Heights* represented the Court's change of heart on the issue. *Cf.* Robert W. Bennett, *Reflections on the Role of Motivation Under the Equal Protection Clause*, 79 Nw. U. L. REV. 1009, 1009 (1984) ("Since *Washington v. Davis*, the Supreme Court has insisted, at least on a rhetorical level, that illegitimate motivation is a necessary ingredient of any violation of the [E]qual [P]rotection [C]lause." (footnotes omitted)). Commentators have thoroughly debated this area of law; however, such a discussion is beyond the scope of this Note. For purposes of this Note, it will suffice to say that in order to prove a classification by intent, evidence of subjective illegitimate purpose is required, although such purpose may be proved in part or in whole through circumstantial, objective evidence. *See* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 717 (1983) (holding that direct evidence of discriminatory intent is not necessary for a finding of discrimination); *infra* note 203.

203 Indeed, direct evidence can be exceedingly difficult to obtain. Legislative history, which is one of the few sources of such evidence, normally would not be helpful, for it is unlikely that a legislature would place any discriminatory motive "on the record." *Cf.* Stephen E. Gottlieb, *Reformulating the Motive/Effects Debate in Constitutional Adjudication*, 33 WAYNE L. REV. 97, 105 (1986) ("Unless the [legislators] foolishly make their positions clear, the courts are consigned to use an inferential method of proof."); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1335 (1984) ("Individual officials are unlikely to disclose impermissible motives, leaving the courts to engage in historical psychoanalysis to uncover the illegitimate motivation."). Additionally, "[i]n only rare cases would the direct testimony of members of the agency or legislative body be admitted, due both to problems of separation of powers and the announced principle against searching inquiries into legislative motives." 3 ROTUNDA & NOWAK, *supra* note 198, § 18.4, at 264–65; *see also* Louis S. Raveson, *Unmasking the Motives of Government Decisionmakers: A Subpoena for Your Thoughts?*, 63 N.C. L. REV. 879, 927–36 (1985) (noting that even if a court determines a decisionmaker's testimony to be necessary, legislative or administrative privilege may bar the inquiry). Furthermore, even if one were to obtain direct evidence of discriminatory intent by a small portion of those comprising a government body, it might nonetheless be difficult to ascribe that same intent to the body as a whole. *See* Gottlieb, *supra*, at 104.

204 Although a motive test would be easier to satisfy when, for example, disproportionate impact is not clear, it is more often the case that disproportionate impact, and not motive, will be apparent. *See supra* note 202. When this occurs, an effects test obviously

in which it places the judiciary,[205] the difficulty the plaintiff encounters becomes quite apparent. Apart from statistical evidence of impact, the Court has mentioned a number of other possible evidentiary sources that one could utilize to evince intent. While this list is not exhaustive, such evidence includes the historical background of the law, the specific sequence of events leading up to its passage, departures from a normal procedural sequence, substantive departures (if, for example, factors the government normally considers important favor a legislative result contrary to that reached), legislative history, and—in extraordinary circumstances—direct testimony from decisionmakers.[206]

To illustrate, recall the facially neutral version of the hypothetical San Francisco laundry ordinance discussed earlier[207] and further assume that the government agency in charge of implementation applies it evenhandedly. However, in this scenario, the law also places the cost of a permit at $50,000. This, in itself, is still a facially neutral law, but suppose also that: (1) there is evidence in the ordinance's history that the city council, before determining the permit fee, examined statistics showing that only three percent of all Asians in the city earned over $50,000 annually, whereas over seventy-five percent of all non-Asians earned the same amount; (2) the city's normal practice is to place permit fees at a figure no higher than the amount it would incur in expenses to ensure compliance with the regulations, and here, the cost to the city would only be around $10,000 per business; (3) the city council enacted the ordinance immediately before ten Asian-owned hand laundries were set to open (a fact known to the

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would require a lesser burden of proof, as the effects themselves, without further evidence, would often be conclusive. Under the motive test, only in the most extreme cases will courts allow effects alone to constitute conclusive evidence of motive. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960) (holding unconstitutional a legislative act altering the shape of Tuskegee, Alabama, from a square to a twenty-eight-sided figure that had the effect of removing all but four or five of its four hundred black voters, while not removing a single white voter or resident); *Arlington Heights*, 429 U.S. at 266 ("Absent a pattern as stark as that in *Gomillion* . . . , impact alone is not determinative . . . ."). In cases where effects (and not motive) are clear, then, I would argue that because the motive test almost always requires other proof in addition to proof of effects, whereas an effects test could be satisfied through evidence of effects alone, a motive test will frequently pose a heavier burden of proof than an effects test.

205 According to Rotunda and Nowak:

> In these cases the Court is confronted by decision-making entities to whom it feels it owes some deference. . . .
>
> It is not easy to establish the proper role of the Court in this area. . . .
>
> On the other hand, the Court cannot allow all laws to stand unchallenged when they may constitute devices used by another branch of government to subvert the equal protection guarantee. Thus, the Supreme Court is faced with a most difficult problem. . . .

3 ROTUNDA & NOWAK, *supra* note 198, § 18.4, at 264–65.

206 *See Arlington Heights*, 429 U.S. at 267–68.

207 *See supra* text following note 201.

council, according to the legislative history); and (4) the council was aware of another set of statistics showing that out of all hand laundries in wooden buildings in the city, approximately seventy-five percent were Asian-owned. All of the above evidence is, of course, circumstantial, and while any one piece, standing alone, might not be enough to meet the plaintiff's burden of proof, taken together they strongly suggest the intent to create a classification.

With this in mind, the available evidence in the insanity context militates strongly in favor of the conclusion that the intent behind the mens rea approach is to create a classification. First, the disparate impact of such statutes is clear, for two reasons. One, as mentioned above,[208] is that the mens rea approach allows only a small fraction of all insane persons[209] to successfully raise a defense based upon a disorder. Second, given two insane persons, the mens rea approach allows one whose illness would negate mens rea to present evidence of a disorder, while the other—whose diagnosis could very well be identical to that of the first person but whose particular mental state would not negate mens rea—is barred from so doing.[210] Thus, in effect, it takes one class ("insane persons"), classifies it into two groups—"insane persons that do not possess mens rea" and "insane persons that do possess mens rea"—and treats them dissimilarly, by conferring a benefit upon one (in allowing it to present evidence of mental abnormality) and placing a burden upon the other (in disallowing the same type of evidence).[211] However, this impact certainly does not rise to the level of pervasive invidiousness present in *Gomillion v. Lightfoot*,[212] in that one could probably devise some plausible neutral reason as to why the mens rea approach might be adopted, yet one could hardly come up with a straight-faced explanation for the patently racist statute in *Gomillion*.[213] Therefore, the disparate effect of the mens rea approach would probably not pass as conclusive evidence of intent, but instead would serve only as one factor in the overall calculus. Even so, other considerations, such as historical background and legislative history, are helpful in arriving at the conclusion that an intent to classify existed.

In regard to direct evidence of discriminatory motive, the available legislative histories of the specific mens rea approach statutes are,

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208 *See supra* Part I.C.

209 Here, this Note uses "insane person" in the same sense in which it uses the phrase "insane defendant." *See supra* note 43.

210 *See supra* Part I.C.

211 The typical mens rea approach statute therefore meets all of the requirements of a classification. *See supra* note 198 and accompanying text.

212 364 U.S. 339 (1960); *see supra* note 204.

213 *See supra* note 204.

not surprisingly, brief and unhelpful[214]—apparently, legislators learn from experience not to be overly candid while "on the record."[215] However, one need not look directly to these sources to obtain circumstantial evidence of why the statutes were passed. The mens rea approach was only one type of reform in the overall insanity defense reform movement, the goal of which was to decrease not only the number of defendants who could enter a plea of insanity, but also to decrease the number of defendants *who successfully used mental abnormality* to excuse themselves of criminal responsibility. Therefore, one can infer that legislators, by adopting the mens rea approach, were aware that they would be preventing the successful use of mental abnormality to escape criminal responsibility by individuals who possessed the requisite mens rea, but who would nonetheless prevail under an extrinsic insanity defense. The substantial evidence of legislators' negative views of the insanity defense and those who assert it serves only to support such an inference.[216] In regard to Montana's statutory scheme specifically, even more damaging evidence of this bias against the insanity defense exists. As one commentator learned through a telephone interview with Michael H. Keedy, the former Montana state representative who introduced the bill in 1979 to abolish Montana's insanity defense:

> [T]he abolition of the insanity defense proposed by Montana legislators was not motivated by concerns linked to [objective reasons] . . . . Keedy stated that his motivation in drawing up the bill stemmed from the belief that the "insanity defense is a perversion of the basic tenet of the criminal justice system—holding people accountable for their actions." Thus, what prompted Montana's reform was the legislators' and their constituents' negative impression of the insanity defense . . . .[217]

It is highly probable that legislators and citizens of other states share this view as well.

As a whole, these factors strongly suggest that the legislative intent behind the mens rea approach was to create a classification among insane persons. Accordingly, the mens rea approach qualifies

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214 *See* S. 1396, 46th Leg., 2d Reg. Sess. (Idaho 1982) [hereinafter *Idaho Legislature Statement of Purpose*]; *Hearings on H.B. 877 Before the Executive Session of the House Senate Judiciary*, 1979 Leg., 46th Sess. 3, 12 (Mont. 1979) [hereinafter *Montana Executive Session Hearings*]; *Hearings on H.B. 877 Before the Senate Judiciary Comm.*, 1979 Leg., 46th Sess. 4–5 (Mont. 1979). This is not to say that the legislature's purpose in enacting the mens rea approach was rational for purposes of determining whether a rational basis exists—however, there is no direct evidence of a purpose to discriminate against the insane.

215 *See* Gottlieb, *supra* note 203, at 104–05; *supra* note 203.

216 *See supra* note 9.

217 Buitendorp, *supra* note 34, at 967 n.9 (quoting Telephone Interview by Rita D. Buitendorp with Michael H. Keedy, Representative, Montana State Legislature (Feb. 25, 1995)).

as an intent classification, and thus should be treated as though it created a classification on its face.[218]

2. *The "Similarly Situated" Requirement*

Even if a legitimate classification exists, no equal protection claim will lie if the two or more groups that are classified for differential treatment are not similarly situated.[219] Indeed, the theory behind equal protection requires it, as a logical implication of the proposition that similarly situated persons must be treated similarly is that dissimilarly situated persons need not be treated similarly.

Naturally, this begs the question, "what does that ambiguous and crucial phrase 'similarly situated' mean?"[220] In this regard, it may help to establish what the phrase does *not* mean, which is that the two or more groups classified by the law for different treatment must be exactly the same—a proposition that would be inconsistent with the definition of a classification.[221] The question of how similar the two groups must actually be in order to qualify as similarly situated depends on the relationship between the groups with respect to the law.

The majority in *Herrera* implicitly contended that the two groups at which the mens rea approach is aimed are not similarly situated, classifying them as (1) defendants who do not possess the mens rea to commit a crime and (2) defendants who do possess the requisite mens rea.[222] Because any group can be classified as "persons who *x*," two groups that share only this trait (i.e., personhood) cannot, as a rule,

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218 *See supra* note 199 and accompanying text.

219 *See* Lynn S. Branham, *Toothless in Truth? The Ethereal Rational Basis Test and the Prison Litigation Reform Act's Disparate Restrictions on Attorney's Fees*, 89 CAL. L. REV. 999, 1013–14 (2001). Professor Branham states that:

> When undertaking an equal protection analysis, the threshold inquiry is whether the two groups . . . treated differently by a statute are "similarly situated." If they are not, then the statute's discrepant treatment of the two groups does not implicate the requirements of equal protection. For example, if a statute levies an income tax on adults, but not small children, a court need not belabor itself [with a further equal protection analysis]. The statute clearly passes constitutional muster from an equal protection standpoint because small children and adults are not similarly situated for revenue-generation purposes; small children are not employed and receive no income upon which a tax could be levied.

Id. (footnotes omitted). This is one reason the majority's equal protection analysis in *State v. Herrera*, 895 P.2d 359 (Utah 1995), is plainly incorrect. By implicitly determining that the two groups classified by the mens rea approach were dissimilarly situated, *see infra* note 222 and accompanying text, the majority should not even have proceeded to analyze whether a sufficient justification for the classification existed. In other words, by proceeding to the next step in the equal protection analysis, the majority in *Herrera* contradicted itself.

220 Tussman & tenBroek, *supra* note 191, at 345.

221 *See supra* note 198 and accompanying text.

222 *See Herrera*, 895 P.2d at 368–69 ("The legislature has drawn a line between those who do not comprehend that they are taking a human life and those who do.").

be similarly situated—otherwise, every group could be similarly situated to any other group, no matter how different they are in reality. Thus, the majority's conclusion looks sound at first glance, because those who do not possess mens rea are certainly not similarly situated to those who do possess mens rea.

Of course, this is only true as long as "persons" is the sole similar trait between the two groups, which is simply not the case here. By ignoring the legislative purpose behind the law, the *Herrera* court made an incorrect determination of the complete classification at which the law is aimed. The groups share one additional, critical trait: they both consist of persons who are insane. It will always be possible to find *some* difference between two groups receiving disparate treatment in order to determine that they are not similarly situated. However, it is not the role of the courts to find such a difference through their own creativity and manipulation; rather, their role is to determine the legislature's target in enacting the statutory scheme in question in order to determine whether two groups are similarly situated with respect to the law's purpose. In this case, the classification is between (1) *insane persons* with mens rea and (2) *insane persons* without mens rea, as the term "insane persons" describes the exclusive class the statute, by its terms, implicates. Certainly, this type of statute does not apply to an individual who does not suffer from a mental abnormality, regardless of whether he possesses the requisite mens rea. Viewed in this light, the two classes are similarly situated with respect to the law, in that members of both classes suffer from a mental abnormality, and only these individuals were the target of this particular legislative scheme.[223]

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223 The statute at issue in *Rinaldi v. Yeager*, 384 U.S. 305 (1966), helps clarify this concept. In *Rinaldi*, a New Jersey statute required certain indigent prisoners, but not nonprisoners, to reimburse counties for the costs of their transcripts on appeal should the appeal fail. *See id.* at 307. Before it could advance to the merits of the equal protection claim, the Court would have had to determine that the two groups the statute classified—"persons who are indigent prisoners" and "persons who are indigent nonprisoners"—are similarly situated. *See supra* note 219 and accompanying text. Upon first impression, one might conclude that because one group includes only prisoners and the other includes only nonprisoners, the two groups are not similarly situated. However, the law does not involve only a class of prisoners, because the law does not target some prisoners—namely, prisoners who are not litigants. Inherent in the status of being indigent is the fact that one is a litigant; therefore, the classification the law actually creates is "persons who are indigent litigants and prisoners" and "persons who are indigent litigants and nonprisoners." From this conclusion, it follows that because the law targets only the class society would label as "litigants," and because the purpose of the law is to target only the class "indigent litigants" (thus classifying two groups, "persons who are indigent litigants and prisoners" and "persons who are indigent litigants and nonprisoners"), members of both groups are "litigants" and, therefore, the two groups are similarly situated.

Professor Branham's income tax example is another illustration of this concept. *See* Branham, *supra* note 219, at 1013–14. There, the two groups are dissimilarly situated not because one group is a child and one is an adult, but because one group pays income tax

3. *Establishing the Appropriate Standard of Review*

Even after one satisfies the aforementioned threshold requirements—state action, the classification requirement, and the similarly situated requirement—one must not forget that the law may still permissibly classify similarly situated persons if a sufficient justification exists.[224] Whether the justification the state proffers is sufficient depends on the standard of review a court ultimately employs. A court must choose between three "levels" of review: strict scrutiny,[225] intermediate scrutiny,[226] and rational basis (to which courts sometimes refer as "mere rationality").[227] Rational basis is the appropriate

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and the other does not. The classification in Branham's example is thus not between "persons who are adults" and "persons who are children," but between "persons who pay income tax and are adults" and "persons who do not pay income tax and are children." The law in Branham's example targeted those who pay income tax, regardless of whether or not they are adults. Therefore, if the same law had instead exempted children who do pay income tax from paying the tax, the two groups the law would then classify—"persons who pay income tax and are adults" and "persons who pay income tax and are children"—would be similarly situated with respect to the purpose of the law.

224 *See supra* note 198 and accompanying text.

225 Strict scrutiny is the most demanding standard courts use when reviewing classifications based upon certain "suspect" traits, including race, national origin, and alienage. *See* 3 ROTUNDA & NOWAK, *supra* note 198, § 18.3(a). *But see id.* § 18.11 (noting that if an alienage classification relates to allocating power or positions in the political process, courts will subject the law only to a rational basis inquiry). Additionally, if the classification implicates a "fundamental right," courts will use the strict scrutiny standard. *See id.* § 18.3(a), at 217.

When applying strict scrutiny, "the Justices will not defer to the decision of the other branches of government but will instead independently determine the degree of relationship which the classification bears to a constitutionally compelling end." *Id.* at 216–17. To prevail, the government must demonstrate not only a compelling interest for creating the classification, but also that the classification is "narrowly tailored" to promote that interest. *Id.*

226 Originally, only two tiers of review existed: strict scrutiny and rational basis. Intermediate scrutiny, which the Court first formally recognized in *Craig v. Boren*, 429 U.S. 190 (1976), "developed as a separate standard because in some cases neither the extremely deferential standard of rational basis nor the demanding standard of strict scrutiny seemed to be adequate." Robert S. Logan, Note, *The Reverse Equal Protection Analysis: A New Methodology for "Special Needs" Cases*, 68 GEO. WASH. L. REV. 447, 465 (2000). It is a relatively young standard—indeed, "[a]t the close of the 1960's it was still possible to do a detailed analysis of all Supreme Court equal protection decisions in terms of a 'two-tiered' model involving recognition of only [strict scrutiny and rational basis review]." 3 ROTUNDA & NOWAK, *supra* note 198, § 18.3, at 218.

To withstand intermediate scrutiny, a classification must have a "substantial relationship" to an "important governmental interest." *See Craig*, 429 U.S. at 197. *But see* United States v. Virginia, 518 U.S. 515, 531 (1996) (asserting that an "exceedingly persuasive justification" is required). The Court employs this standard for classifications based upon "quasi-suspect" (also called "semi-suspect") traits, such as gender and illegitimacy. *See* 3 ROTUNDA & NOWAK, *supra* note 198, § 18.3, at 219.

227 Courts employ rational basis review for classifications based upon traits that do not demand either strict or intermediate scrutiny. Thus one may characterize it as "the default method for examining assertions of equal protection violations." Logan, *supra* note 226, at 462. To prevail under this standard, the classification must serve only a "legitimate governmental interest" and be "rationally related" to furthering that interest. *Id.* at 463. The rational basis test is extremely deferential; under this standard, "[t]raditionally, courts do

standard under which a court should evaluate the mens rea approach because the approach does not classify the two groups by any suspect trait that mandates heightened scrutiny.[228]

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nothing more than determine 'whether a classification is wholly arbitrary,' thereby placing a nearly insurmountable task upon those challenging the law." René J. LeBlanc-Allman, *Guilty but Mentally Ill: A Poor Prognosis, Annual Survey of South Carolina Law*, 49 S.C. L. REV. 1095, 1110 (1998) (footnote omitted) (quoting JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.3, at 608 (5th ed. 1995)). Indeed, the Court has not required that the legislature explicitly state a purpose for the classification, instead holding that if any *conceivable* rational basis exists for the classification (that is, any set of facts that could conceivably justify the classification), it must be upheld. *See, e.g.*, Heller v. Doe, 509 U.S. 312, 324 (1993) (upholding a classification based upon plausible justifications); *see infra* Part III.B.4. Therefore, it is not surprising that the Court invalidates very few statutory schemes under this standard.

228 Some might disagree with this conclusion, and argue that because the classification created by the mens rea approach disadvantages most insane persons, it qualifies for a heightened form of the rational basis test, commonly referred to as rational basis "with bite." *See, e.g.*, LeBlanc-Allman, *supra* note 227, at 1110–13 (discussing the equal protection implications of "guilty but mentally ill" statutes and determining that because they burden insane persons, these laws require a heightened level of scrutiny); Sarah J. Bredemeier, Comment, *Hollow Verdict: Not Guilty by Reason of Insanity Provokes Animus-Based Discrimination in the Social Security Act*, 31 ST. MARY'S L.J. 697 (2000) (arguing for "rational basis with bite" scrutiny for a law limiting social security benefits for certain insane people); Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 780 (1987) (discussing the application of "rational basis with bite" review during the Supreme Court's 1985 Term).

This heightened rational basis test has its roots in *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985). In *Cleburne*, a Texas city denied the respondent a special use permit for the establishment of a home for mentally retarded persons even though it allowed similar permits for nursing homes, fraternities, and other specialty housing in the same area. *See id.* at 435–37. While the Court declined to consider the mentally retarded as either a suspect or quasi-suspect class, it invalidated the ordinance under what it termed a rational basis test. *See id.* at 446–47, 450. However, the Court appeared to apply a heightened level of scrutiny. *See id.* at 456 (Marshall, J., concurring in part and dissenting in part) ("The [majority] holds the ordinance invalid on rational-basis grounds and disclaims that anything special, in the form of heightened scrutiny, is taking place. Yet Cleburne's ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation."). Some scholars point to *Romer v. Evans*, 517 U.S. 620 (1996), for the proposition that this heightened form of rational basis remains vital in equal protection jurisprudence. *See* Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 483 n.62 (citing scholars who read *Romer* for this proposition). According to these scholars, in *Romer*, the Court performed a more searching inquiry than is typically conducted under the traditional rational basis test when it invalidated an amendment to Colorado's constitution that prohibited governmental protection of gays and lesbians. *See Romer*, 517 U.S. at 633–36; Stein, *supra*, at 483–84.

I would question the rationale of these scholars' argument for two reasons. First, the Court has never explicitly acknowledged such a theory (that a heightened form of rational basis review exists) to be correct. In fact, in *Heller v. Doe*, 509 U.S. 312 (1993), another case involving equal protection of the mentally retarded that was decided after *Cleburne* but before *Romer*, the Court appeared to apply a much less stringent form of rational basis review than it applied in *Cleburne*. *Compare id.* at 324–28, *with Cleburne*, 473 U.S. at 446. Also, in *Romer*, it seems that the Court invalidated the Colorado amendment under the traditional rational basis test, not under any form of heightened rational basis review. *See Romer*, 517 U.S. at 631–36. Many scholars seem to imply that the invocation of the rational basis standard means that the Court will inevitably uphold the law. *See, e.g.*, Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV.

4. *What Does "Rational Basis" Mean, Anyway?: Testing the Mens Rea Approach*

It is highly uncommon, and thus presumably difficult, for a plaintiff to prevail under the rational basis test;[229] however, this is not to say that a court's decision to employ the test automatically means that it will uphold the challenged law.[230] This section first explores the framework of the rational basis test, then applies the test to determine

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L. REV. 56, 79 (1997) (asserting that "judicial scrutiny under rational basis review is typically so deferential as to amount to a virtual rubber stamp"). While this is often true, overcoming the rational basis test is certainly not an impossible task. As mentioned *supra* note 227, for a law to survive rational basis review, it must be rationally related to a *legitimate* governmental purpose. In *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), the Court held that the "bare congressional desire to harm a politically unpopular group" was not a legitimate state purpose, and the *Romer* Court relied on this statement to conclude that this was the only conceivable purpose for the Colorado amendment. *See Romer*, 517 U.S. at 634–36. The Court decided *Romer* the way it did because the state action in that case failed the "legitimate governmental purpose" prong of the *traditional* rational basis test. At the very least, a close reading of *Heller* and *Romer* calls into question the propriety of any "rational basis with bite" theory. Further, even if the Court recognized the "rational basis with bite" test, and classifications involving the mentally retarded as well as gays and lesbians are entitled to some form of heightened scrutiny, it does not follow that the Court would extend this protection to the insane—indeed, I would go so far as to say that the Court would not be willing to extend such protection.

Second, implying that the classification in the mens rea approach deserves heightened scrutiny simply because it involves insane persons misstates the manner in which one should determine the appropriate standard of review. To begin with, the defense of insanity (whether extrinsic or negativing) applies only to insane persons. Therefore, one cannot say that altering the insanity defense discriminates against insane persons as a whole. The law does not burden all insane persons (although it burdens most), and it seems axiomatic that for a law to discriminate against a class as a whole, it must discriminate against all members of the class, not just part of the class (even a large part). One determines the correct standard of review by looking at the trait that triggers differential treatment among the groups the law classifies and ascertaining whether the trait is a suspect trait (e.g., race or gender). Here, while "insanity" is the trait that leads one to the conclusion that the two groups classified by the mens rea approach are similarly situated, this is a different inquiry than that used to determine the appropriate standard of review. In the context of the mens rea approach, both groups are insane; therefore, this trait does not trigger differential treatment. Rather, the possession of mens rea is what triggers the burden on one group in the classification, and this is obviously not a trait that would result in a court employing heightened scrutiny.

229 *See supra* note 227.

230 *See* Branham, *supra* note 219, at 1052 ("The Court has insisted . . . that the rational basis test is not 'toothless' and that it provides meaningful protection from the erratic and disparate treatment that are the hallmarks of invidious discrimination." (quoting Mathews v. Lucas, 427 U.S. 495, 510 (1976))); Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 357 (1999) ("[S]uccessful rational basis claims under the Equal Protection Clause . . . are sufficiently rare to stand out as unusual, but they do exist."); Saphire, *supra* note 187, at 607 (responding to Professor Fallon's characterization of judicial review under the rational basis test as "so deferential as to amount to a virtual rubber stamp" by noting that "a 'virtual' rubber stamp is not necessarily the same as the real thing" (quoting Fallon, *supra* note 228, at 79)). Professor Farrell notes that since 1974, the Court has invalidated statutes under the rational basis test in ten cases, while it has rejected such claims on one hundred other occasions—a success rate of approximately 9%. *See* Farrell, *supra*, at 357.

whether the mens rea approach passes muster under this highly deferential standard of review.

a. *The Basic Requirements of the Rational Basis Test*

The usual formulation of the rational basis test requires that the challenged law have some rational relationship to a legitimate state purpose.[231] There are two distinct requirements implicit in this definition: first, that a "legitimate state purpose" exist for the legislation (the "legitimate purpose" requirement), and second, that the legislation be "rationally related" to achieving that purpose (the "nexus" requirement).

The first requirement of the rational basis test is that the challenged law have a legitimate state purpose. The word "legitimate" is crucial, in that not just any purpose will suffice.[232] One might say, then, that a legitimate state purpose is not among those that one would consider to be improper for a rational, impartial government to possess[233]—hence the Supreme Court's determination that "a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest,"[234] and that a legislative enactment motivated by "animus toward the class [the law] affects . . . lacks a rational relationship to *legitimate* state interests."[235]

The Supreme Court has made it abundantly clear that in determining whether a legitimate purpose exists under the rational basis

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231 *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973) ("A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State's system be sbown to bear some rational relationship to legitimate state purposes.").

232 *See, e.g.*, Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 876 (1985) (stating that "the promotion of domestic industry" is not generally a legitimate state purpose); *Moreno*, 413 U.S. at 534 (finding that a "bare congressional desire to harm a politically unpopular group" is not a *legitimate* governmental interest).

233 *Cf. Cleburne*, 473 U.S. at 452 (Stevens, J., concurring). In his concurring opinion, Justice Stevens discusses the characteristics of rationality in greater detail:

> The term "rational," of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word "rational" . . . includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.

Id. (Stevens, J., concurring) (footnote omitted).

234 *Moreno*, 413 U.S. at 534.

235 Romer v. Evans, 517 U.S. 620, 632 (1996) (emphasis added). Here, a court must be careful not to run afoul of its proper role in employing the rational basis test. There is a major difference between declaring a law to have an illegitimate purpose because it has a fundamentally improper purpose, and declaring it to have an illegitimate purpose because it is ill-advised. The judiciary may do the former under the rational basis test, but not the latter. *See, e.g.*, Schweiker v. Wilson, 450 U.S. 221, 234 (1981) ("[The] rational-basis standard . . . does not allow [the Court] to substitute [its] personal notions of good public policy for those of Congress.").

test, courts must consider not only the purpose(s) articulated by the legislature, but also any other conceivable purpose.[236] Therefore, if a court could find no conceivable legitimate purpose for a law, including those articulated by the legislature, it could correctly say that no rational basis exists; thus, an inquiry into the nexus between the enactment of the law and the purpose it seeks to achieve would be unnecessary.

As simple as this proposition appears, it can pose a number of problems. It is relatively obvious that if all conceivable government purposes for a statute are legitimate, the statute will be deemed to have a rational purpose. The converse is equally apparent; that is to say, if all conceivable purposes for a law are illegitimate, the law will not have a legitimate purpose. For example, although it was a strict scrutiny case, in *Gomillion* the Court found that the only conceivable purpose for the reapportionment of the city from a square into an "uncouth" twenty-eight-sided figure, which excluded all but four black voters while maintaining the same number of white voters,[237] was to discriminate against blacks. Because this purpose (certainly the only conceivable one) was illegitimate, in addition to failing the strict scrutiny test, the state action involved would have also failed the rational basis test.[238]

What would happen, then, if any of the following scenarios were to occur: (1) the legislature articulates only legitimate purposes, but there are conceivable illegitimate purposes for the law; (2) the legislature articulates an illegitimate purpose for the law, but there are other conceivable legitimate purposes for the law; or (3) the legislature ar-

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236 *See* Heller v. Doe, 509 U.S. 312, 320–21 (1993) ("'The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record." (citation omitted) (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973))). Professor Branham has discussed this aspect of the rational basis test:

> It will not suffice if the plaintiff demonstrates that the interest cited by the legislature to justify the differential treatment of similarly situated individuals is not legitimate or that the statute is not sufficiently linked to a legitimate governmental interest. Instead, the plaintiff must show that the statute does not further any "conceivable" legitimate governmental interest that might arguably support this legislation, regardless of whether or not the legislature enacted the statute with this interest in mind.

Branham, *supra* note 219, at 1018.

237 Gomillion v. Lightfoot, 364 U.S. 339, 340–41 (1960).

238 As Chief Judge Posner explained in *Milner v. Apfel*:

> If a law is challenged as a denial of equal protection, and all that the government can come up with in defense of the law is that the people who are hurt by it happen to be irrationally hated or irrationally feared by a majority of voters, it is difficult to argue that the law is rational if "rational" in this setting is to mean anything more than democratic preference. And it must mean something more if the concept of equal protection is to operate, in accordance with its modern interpretations, as a check on majoritarianism.

148 F.3d 812, 817 (7th Cir. 1998).

ticulates both legitimate and illegitimate purposes for the law? The short answer is, "nothing." In the first scenario, the law will assume that a legitimate purpose exists, because one could easily conceive of illegitimate purposes for most laws, regardless of whether the legislature actually contemplated such purposes. In the second and third scenarios, even though the legislature has articulated an illegitimate purpose, the law could still be said to have at least one legitimate purpose, and will thus pass muster under the rational basis test.[239]

The second requirement of the rational basis test is that the law have a rational relationship to any legitimate purpose.[240] Generally, this standard is so lenient that most laws can be said to have such a relationship. However, it is still axiomatic that for a law to have a rational relationship to the purpose for which the legislature enacted it, it must not completely fail to serve that purpose—in other words, the means chosen (i.e., the law) cannot be "wholly unrelated to the objective."[241]

According to Michael Perry, for a law to satisfy the nexus requirement (and therefore have a rational basis), the premise(s) underlying it must at least be plausibly accurate; if it is not, then the law cannot be said to serve the purpose at all.[242] Professor Perry calls this concept "fairness-as-accuracy."[243] To illustrate how it functions, he gives the following hypothetical: "Imagine that a legislature, fearful that red dye No. 2 causes cancer, enacts a law prohibiting the use of the dye in human foodstuffs."[244] Perry explains that "[t]his [law] makes no sense—it lacks legitimacy—unless the factual premise that the dye might be carcinogenic is plausibly accurate. If the premise is not even plausibly accurate," Perry asserts, "then prohibiting use of the dye does absolutely nothing to serve the interest in curtailing cancer. . . . It offends fairness-as-accuracy."[245] As he goes on to argue:

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239 Of course, many would likely disagree with this outcome on a number of grounds, and I, too, am inclined to argue that once the legislature articulates any illegitimate purpose for enacting the law, no amount of conceivable legitimate purposes should suffice to save it. However, this is clearly not the view of the current Supreme Court, and a further discussion of this concept is beyond the scope of this Note. For purposes of this Note, it is enough to say that if a law has at least one conceivable legitimate purpose, it will be upheld, provided it passes the nexus requirement of the rational basis test.

240 It is important to note what this requirement does *not* ask, which is whether there are more desirable, alternative means that could achieve the law's purpose.

241 Reed v. Reed, 404 U.S. 71, 75–76 (1971). However, as one commentator has observed, "the rationality requirement does not require that the classificatory distinction be rationally related to all possible legislative purposes." Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 151 (1972). Thus a rational relationship to only one conceivable purpose will suffice.

242 Perry, *Constitutional Fairness*, *supra* note 187, at 393.

243 *See id.* at 390.

244 *Id.* at 392.

245 *Id.* at 392–93.

> The factual premises of some laws are subject to empirical verification—for example, the premise that red dye No. 2 might be carcinogenic. Other "factual" premises are not verifiable—for example, the premise that the Creator forbids abortion [though this is a premise that would likely fail the legitimate purpose requirement]. Of factual premises that are theoretically verifiable, some are obviously true, or virtually so—for example, the premise that women will be materially better off if guaranteed equal pay. Some others are not obviously true, but neither are they readily subject to empirical testing—for example, the premise that in the community's ethical view, "there is a real difference between doing in self-interest and doing for hire."[246]

If a law is based upon a factual, verifiable premise, but the premise is not plausibly accurate, then one can say that the law lacks any rational relationship to its purpose, and thus fails the nexus requirement. However, tweaking Perry's hypothetical slightly, even if it were statistically more probable than not that red dye No. 2 does *not* cause cancer, there would nonetheless be a plausible basis for the law—that red dye No. 2 *might* cause cancer—which would satisfy the nexus requirement.[247] Further, "[i]f a law is premised on a factual judgment that is not verifiable, a court will not—because it cannot—invalidate it on the ground that the judgment is inaccurate."[248] Thus, if a law is premised on a judgment that is factual in nature but not readily subject to empirical testing, a court must find that the law satisfies the nexus requirement. According to Perry:

> To presume otherwise would demean the legislative process. . . .
>
> . . . Government must respond to a wide variety of complex problems. To do so effectively, it needs a latitude of judgment that inevitably entails some factual inaccuracy. Moreover, legislatures have both primary authority for rulemaking and a factfinding competence generally superior to that of the judiciary. A proper respect . . . demands that a court not strike down a law . . . on the basis of

246 *Id.* at 393 (quoting Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 116 (1949) (Jackson, J., concurring)).

247 *See id.* at 394 n.52.

248 *Id.* at 394. It is one thing for a court to invalidate a law because its purpose rests on a premise that runs against all available empirical data, or is contrary to what might be called "common sense." It is quite another thing, however, for a court to invalidate a law because the court does not agree with the legislature's decision to choose one position over another (even if the position chosen carries some, but less, factual support), or because no empirical data are available. Again, the former is a permissible role of the judiciary—otherwise, courts would be giving legislators carte blanche to "decree reality to the extent politically possible." *Id.* at 397. The latter role, however, is not appropriate under the rational basis test.

judicial disagreement with a factual judgment, unless the judgment lacks even a plausible basis.[249]

b. *Applying the Rational Basis Test to the Mens Rea Approach*

If one were to take a cynical view of a plaintiff's chance of prevailing under the rational basis test, one might consider this entire section unnecessary—in other words, the mere conclusion that the standard to be applied is rational basis would end the inquiry, and the state would immediately triumph. However, as the above analysis indicates, if a court correctly applies the principles underlying the notion of "rational basis," in certain circumstances the test may indeed have some teeth to it. In this subsection, I propose conceivable purposes for the mens rea approach—some of which have already been articulated by legislatures, some of which have not—and examine each under the aforementioned principles in order to determine whether they pass muster under the rational basis test.[250]

i. *Five Conceivable Purposes for the Mens Rea Approach*

It seems that there are five conceivable purposes for the mens rea approach that would not, on their face, be considered illegitimate: (1) to curb abuse of the extrinsic insanity defense; (2) to prevent the insane from being hastily released; (3) to provide for treatment of the insane; (4) to hold individuals personally accountable for their actions; and (5) to eliminate confusion and inconsistency resulting from considering mental illness in the guilt phase of the trial. I will now consider the rationality of each of these possible purposes in turn.

• *To curb abuse of the extrinsic insanity defense*

It is often argued that the insanity defense is heavily abused.[251] One possible purpose for adopting the mens rea approach, then,

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249 *Id.* at 394 (footnotes omitted). In sum, for a law to fail the nexus requirement, there would have to exist (1) a factually verifiable premise for the law, (2) no factual evidence supporting that premise, and (3) factual evidence contradicting the premise. Of course, where the only premise(s) for the law is (are) not factual in nature, the concept of fairness-as-accuracy is inapplicable. In such a case, the primary scrutiny of the premise would occur under the legitimate purpose requirement. However, if the premise were legitimate, one would still determine whether the law logically could be said to serve that purpose at all.

250 I recognize that it can be relatively tempting to depart from the above principles in order to find what is actually a rational basis to be irrational. *See* Note, *supra* note 241, at 138 ("[I]t is always possible . . . to define a statute's purpose such that the statute will not meet the rationality requirement."). However, I attempt to avoid such a bias here, stating the conceivable bases in a light favorable to the state, as well as analyzing them consistent with the principles I have introduced above.

251 *See* Hermann, *supra* note 7, at 987 ("[T]he view [is] often expressed that too many criminals escape punishment by pleading and, in some instances, feigning insanity. The general view is that the insanity defense is too frequently used and is too often a means for defendants to escape their just punishment." (footnote omitted)). President Nixon once

would be to lessen this purported misuse. This purpose would definitely qualify as legitimate, as a state may certainly take measures to curtail abuse of its processes. However, whether adopting the mens rea approach is rationally related to furthering this goal is a more difficult question; nevertheless, it must ultimately be answered in the affirmative.

Perlin makes a strong case as to why this particular purpose is based upon a premise that amounts to little more than a myth:

> All empirical analyses have been consistent: the public at large and the legal profession (especially legislators) "dramatically" and "grossly" overstate both the frequency and the success rate of the insanity plea . . . . The most recent research reveals, for instance, that the insanity defense is used in only about one percent of all felony cases, and is successful just about one-quarter of the time.
>
> What is as startling as any other fact unearthed by empiricists is the realization that, as recently as 1985, directors of forensic services in only ten of the fifty states could even provide researchers with baseline information regarding the frequency of the insanity plea and its success, and that officials in twenty states could provide no information whatsoever about the use of the plea.[252]

One might contend, therefore, that this purpose violates the nexus requirement on fairness-as-accuracy grounds[253]—after all, the available data indicate that because the insanity defense is used so infrequently, it is not really "abused." While probably true, the nature of the rational basis test makes this argument untenable. Even if the de-

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charged that the insanity defense "had been subject to unconscionable abuse by defendants." Michael L. Perlin, *"The Borderline Which Separated You from Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1409 n.229 (1997). His comments, as Judge Gerber speculates, probably stemmed from his reading of press accounts of *United States v. Trapnell*, 495 F.2d 22 (2d Cir. 1974). *See* Rudolph J. Gerber, *The Insanity Defense Revisited*, 1984 ARIZ. ST. L.J. 83, 117–18. Jonas Robitscher and Andrew Ky Haynes discuss the *Trapnell* case and its backdrop in greater detail:

> In [*Trapnell*], the court admitted evidence that Trapnell, while a patient at a hospital, had counseled a fellow patient, Padilla, about how to feign insanity. Padilla subsequently had charges against him dropped and attributed his success to Trapnell's teachings on the art of acting insane.
>
> Trapnell apparently was quite good at feigning insanity. He was arrested at least twenty times for major crimes but served less than two years in jail. He claimed that he could "fool psychiatrists and psychologists in Florida, Texas, Maryland, New York, California, and Canada into believing that he was a genuine 'Dr. Jekyll and Mr. Hyde' normally a sane, honest man, whose mind, every so often was taken over by a sinister alter ego called 'Greg Ross.'"

Robitscher & Haynes, *supra* note 16, at 36 n.99 (citation omitted) (quoting ALEXANDER D. BROOKS, LAW, PSYCHIATRY, AND THE MENTAL HEALTH SYSTEM 318 (1974)).

252 PERLIN, *supra* note 6, at 108 (footnote omitted).

253 See *supra* text accompanying notes 242–43 for a description of the "fairness-as-accuracy" concept.

fense is used infrequently, it is still within the province of the legislature to consider the defense to be "abused." Abuse is a subjective term, and such subjective determinations do not fall within the purview of fairness-as-accuracy.[254] In other words, even if most people would not consider a defense that is used in only about one percent of all criminal cases to be abused, and even if "malingering among insanity defendants is, and traditionally has been, statistically low,"[255] it is not the goal of the courts in conducting rational basis review to second-guess the legislature on what it considers the term "abuse" to mean.

One might also argue that there exist other defenses that are "abused" and that are raised much more frequently than the insanity defense. Even if one were to accept this proposition as true, the rational basis test does not ask whether the law was the most sensible means by which to carry out the purpose at issue, or whether the law fully eradicated the problem it was enacted to solve. Such questions are reserved only for higher levels of scrutiny. A legislature may address problems "one step at a time," and if it chooses to address and remedy the "abuse" of the insanity defense before it addresses the "abuse" of other defenses, that is certainly its prerogative. Again, all the rational basis test asks is whether the law in question would be rationally related to furthering the purpose at issue. Because fewer defendants will be able to raise a defense based upon mental disease or defect after the adoption of the mens rea approach (by virtue of the approach's relevancy restrictions as to when a defendant would be permitted to introduce such evidence[256]), the purported "abuse" will likely be lessened somewhat, and under the rational basis test, this is

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254 *See supra* note 248 and accompanying text.

255 PERLIN, *supra* note 6, at 239. Interestingly, Perlin observes:

> In reality . . . it is much more likely that seriously mentally disabled criminal defendants will feign *sanity* in an effort to not be seen as mentally ill, even where such evidence might serve as powerful mitigating evidence in death penalty cases. Thus, juveniles imprisoned on death row were quick to tell Dr. Dorothy Lewis and her associates, "I'm not crazy," or "I'm not a retard."

Id. at 240–41 (emphasis in original) (footnote omitted) (citing Dorothy Lewis et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584, 588 (1988)); *see also* People v. McCleary, 567 N.E.2d 434, 437 (Ill. App. Ct. 1990) (testimony from doctor finding defendant insane that "defendant did not want to be known as a crazy person and, in fact was 'malingering sanity,'" and that "defendant was upset that mental illness was an issue in this case"). *Compare* Wettstein & Mulvey, *Disposition of Insanity Acquittees in Illinois*, 16 BULL. AM. ACAD. PSYCHIATRY & L. 11, 15 (1988) (one of 137 insanity acquittees seen as malingering), *with* Grossman & Wasyliw, *A Psychiatric Study of Stereotypes: Assessment of Malingering in a Criminal Forensic Group*, 52 J. PERSONALITY ASSESSMENT 549 (1988) (concluding that twenty-two to thirty-nine percent of all insanity defendants demonstrated evidence of *minimizing* their psychopathology).

256 *See supra* notes 46–52 and accompanying text.

all that is required. Therefore, while not the most compelling of purposes, this one does pass muster under the rational basis test.

◦ *To prevent the insane from being hastily released*

It is also contended that NGRI acquittees are released too hastily, spending much less time in custody than those who are convicted and sentenced to prison.[257] Thus, another purpose for adopting the mens rea approach might be to allow for more criminal convictions of a class of insane defendants (those who possessed the requisite mens rea) so that they are not released from custody as quickly. This purpose might appropriately be rephrased as "protecting public safety," which a court certainly would consider legitimate. And while it is unclear from the available data whether it is actually true that NGRI acquittees are released more quickly than those defendants who are convicted and sentenced to prison,[258] this lack of clarity, in itself, prohibits one from asserting a fairness-as-accuracy argument. Adopting the mens rea approach can thus be said to be "rationally related" to furthering this public safety purpose (at least within the meaning of the rational basis test).

• *To provide for treatment of the insane*

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257 *See, e.g., Montana Executive Session Hearings, supra* note 214 ("[Insanity acquittees] could . . . be out on the street again virtually overnight." (remarks of Rep. Keedy)).

258 For example, Perlin notes that

> NGRI acquittees spend almost *double* the amount of time that defendants convicted of similar charges spend in prison settings, and often face a lifetime of post-release judicial oversight. In California . . . defendants found NGRI for . . . violent crimes [other than murder] were confined twice as long as those found guilty of such charges, and those found NGRI of nonviolent crimes were confined for periods over *nine* times as long.

PERLIN, *supra* note 6, at 110–11 (footnote omitted). However, he also concedes that in California, "the length of confinement for individuals acquitted by reason of insanity on murder charges was less than for those convicted." *Id.* at 110. Additionally, Steadman discusses a number of studies, each yielding entirely different results. *See* Henry J. Steadman, *Empirical Research on the Insanity Defense*, 477 ANNALS AM. ACAD. POL. & SOC. SCI. 58, 65 (1985). To illustrate, in one study Steadman cites, in which forty-six New York insanity acquittees were matched with the same number of felons on the basis of sex, county of arrest, and criminal charge, the average length of detention for the insanity acquittees was twenty-six days longer than it was for the matched felons. *Id.* However, in another New York study utilizing fifty insanity acquittees and fifty felons, the insanity acquittees were released, on average, 304 days before the matched felons. *Id.* In another set of data taken from Connecticut, the insanity acquittees "spent substantially less time detained than the felons who were matched with them on sex, race, age, and offense—639 days versus 1142 days. In only 2 of the 10 offense categories did the NGRI detentions exceed in length those of the matched felons." *Id.* Finally, in a District of Columbia study in which no matching was done, insanity acquittees averaged 1950 days of detention, whereas federal prison inmates averaged 1050 days. *Id.* Notably, in that study, the lengths of NGRI hospitalizations exceeded those of inmate incarcerations in all nine offense categories. *Id.*

It is clear from this brief survey that the available data are not in agreement. Accordingly, legislatures are free to choose whichever set of data they find most convincing without violating fairness-as-accuracy.

In the Idaho Legislature's "statement of purpose" accompanying its mens rea approach statute, the legislature stated that one purpose for the law was to "provide treatment for offenders in appropriate circumstances."[259] While this purpose would certainly be considered legitimate—and indeed, quite laudable—the mens rea approach is not rationally related to achieving it, and thus it fails the nexus requirement.

An inevitable result of adopting the mens rea approach is that more defendants will be convicted and sent to prison, including those who would be found NGRI under an extrinsic insanity defense. Therefore, adoption of the mens rea approach would only be rationally related to treatment of the insane if defendants who are sent to prison would be more likely to receive treatment than defendants who would otherwise be sent to a mental health institution. This proposition is simply absurd.

It has become relatively clear that since the mid-1970s, the emphasis on rehabilitation as a central purpose of punishment has fallen into strong disfavor, and has been almost completely replaced by a focus upon retribution.[260] And while most prisons usually have some treatment programs available to offenders, it can hardly be gainsaid that the focus of prisons in today's society is not on treatment. Therefore, to assert that a mentally ill individual is more likely to receive treatment in a state prison than he would if placed in a state mental health institution, which exists for the very purpose of treatment, is not even minutely logical.

• *To hold individuals accountable for their actions*

One purpose often expressed for enacting insanity defense reforms, including the mens rea approach, is to hold individuals accountable for their actions.[261] This purpose might suffer from the

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259 *Idaho Legislature Statement of Purpose, supra* note 214.

260 *See, e.g.*, 1 LAFAVE & SCOTT, *supra* note 18, § 1.5, at 39–40. As LaFave and Scott explain:

> [S]kepticism regarding the rehabilitative model began developing in the mid-1960's, and about ten years later there came "an explosion of criticism . . . calling for restructuring of the theoretical underpinnings of the criminal sanction." This rejection of rehabilitation, usually in favor of a "just deserts" theory, was . . . reflected by "a spate of legislative proposals, enacted or advocated throughout the country, that attack the statutory expressions of the rehabilitative ideal. The objects of this attack are sentencing discretion, the indeterminate sentence, the parole function, the uses of probation in cases of serious criminality, and even allowances of 'good time' credit in the prisons."

Id. (first alteration in original) (footnotes omitted) (quoting Martin R. Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 WIS. L. REV. 781; FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 67 (1981)).

261 *See, e.g., Montana Executive Session Hearings, supra* note 214. During Representative Keedy's speech, he stated that "[m]y purpose [for proposing Montana's mens rea approach statute] is to hold people accountable for their criminal acts." *Id.*

same deficiency as the preceding purpose, in that while it is certainly legitimate (as a core purpose of our criminal law is to hold individuals accountable for their actions), whether the mens rea approach is rationally related to furthering this goal is dependent upon whether the notion of "accountability" is framed as "personal accountability" or "accountability in the eyes of the general public." If the former, I would argue that such a purpose is illogical to the point that it would fail the nexus requirement. Accountability connotes responsibility, and one simply cannot say that individuals who could not appreciate the consequences of their actions or understand that what they were doing was wrong—even if they possessed the requisite intent (and would thus be found guilty under the mens rea approach)—would feel in some sense "responsible" for their acts, or would understand why they were being punished. Indeed, just the opposite would be true, as they would likely disavow any responsibility for their acts *because* of their mental illness.

If one frames the purpose as "holding individuals accountable in the eyes of the public," however, then the mens rea approach would be rationally related to achieving this purpose, so long as "holding individuals accountable" is synonymous with finding individuals guilty and punishing them instead of finding them NGRI and treating them—which, as just discussed, is apparently the case.[262] Therefore, framing the purpose in this manner would satisfy not only the legitimate purpose requirement, but also the nexus requirement.

- *To eliminate confusion and inconsistency resulting from considering mental illness in the guilt phase of the trial*

Another purpose articulated by the Idaho Legislature in enacting its mens rea approach statute was to "eliminate some of the confusion and inconsistency which results from considering mental illness on the question of guilt or innocence."[263] It is definitely legitimate for a

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262 Of course, it might be argued that framing the purpose in this manner makes it illegitimate, because "holding individuals accountable in the eyes of the public" cannot give legislatures carte blanche to abolish any defense in order to accomplish this purpose. What this argument is really attempting to say is that curtailing certain defenses would violate due process, which is certainly true. Indeed, in Part III.A., I concluded that abolishing the extrinsic defense of insanity would likely violate due process. However, the rational basis test is not concerned with such arguments; rather, it first asks if the purpose is legitimate in a general sense, which this particular purpose is, and then asks whether the law is rationally related to furthering that purpose, which is also the case here. Inquiry into whether the law violates another constitutional provision is certainly not foreclosed in such an analysis, but such an inquiry is usually irrelevant for the purposes of determining whether the law satisfies the requirements of equal protection—especially under the rational basis test.

263 *Idaho Legislature Statement of Purpose*, *supra* note 214. This purpose apparently stems from the belief that the guilt phases of most insanity defense trials feature "battles of the experts" that serve to overwhelm the jury, which allegedly results not only in creating uncertainty over the issue of defendant's sanity (the "confusion") but also in requiring case-

state to want to eliminate confusion from its trial processes, thus allowing such processes to run more smoothly and efficiently. However, whether the mens rea approach will ultimately advance this goal is less clear.

The purpose, in and of itself, implies that taking the defendant's mental disease or defect into account in the sentencing, as opposed to the guilt, phase of trial somehow will lead to less "confusion" and "inconsistency." As to "confusion," I can see little difference between a juror's confusion in making a determination of whether the defendant possessed the appropriate mens rea and his confusion in determining whether the defendant was insane—if anything, it seems that making a mens rea determination would be *more* difficult or confusing for a juror than would applying an insanity test. Further, the argument that experts somehow confuse jurors in the small percentage of insanity defense cases in which "battles of the experts" do exist is flawed in two respects. First, recent research demonstrates that jurors are *not* unduly influenced by experts' opinions,[264] and second, a trial with experts probably should be more likely than a trial without experts to help a jury arrive at an appropriate determination of the defendant's sanity. Indeed, if experts were "confusing" to jurors by virtue of their expert status alone, the same argument could be made against experts used in any case and for any purpose. As to the "inconsistency" claim, by allowing only the sentencer to consider the defendant's mental disease or defect, the mens rea approach seems to invite much more inconsistency insofar as it would allow sentence durations to vary immensely depending on the type of disease, its acuteness, and even on peculiarities between sentencing judges. Thus, two defendants suffering from exactly the same illness might receive sentences on opposite ends of the spectrum. It seems much more justifiable to allow variation and inconsistency in the unspecified duration of confinement given to insanity acquittees, if only because such individuals are, at first, remanded to the custody of the state for

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by-case decisionmaking (the "inconsistency"). *See* PERLIN, *supra* note 6, at 112. However, this belief is both exaggerated and illogical. For instance, as to the claim that "battles of the experts" frequently take place, Perlin begs to differ:

> The empirical reality is quite different. In a Hawaii survey, there was examiner congruence on insanity in ninety-two percent of all cases; in Oregon, prosecutors agreed to insanity verdicts in eighty percent of all cases[.] Most importantly, these are not recent developments: over twenty-five years ago, a study . . . found that between two-thirds and three-quarters of all insanity defense acquittals were uncontested.

Id. at 113 (footnote omitted). Furthermore, while insanity trials may lead to jury verdicts that are inconsistent in light of the facts of each case, case-specific determinations of culpability are inherent in our jury system and make inconsistencies among cases inevitable. Indeed, such inconsistencies probably occur much more often in the non-insanity context.

264 *See* PERLIN, *supra* note 6, at 112 n.181.

an identical period of time (i.e., one that is indeterminate), and are released only when certain criteria are met.

Again, however, as with the "preventing abuse" purpose, this purpose, as illogical as it may sound, is not so blatantly illogical that it fails the nexus requirement (as the "provide for treatment" purpose did). There would still be certain cases in which "battles of the experts" would take place, just as there would still be inconsistencies in jury verdicts in insanity defense cases. The terms "confusion" and "inconsistency," like "abuse," are terms of degree, and are thus subjective in nature. While the mens rea approach may not be a wise step for a legislature to take in order to effectuate this particular purpose, the wisdom of a law is irrelevant under the rational basis test, and one probably cannot say that the mens rea approach is not "rationally related" to achieving this purpose—it may be, even if only minutely.

ii. *Conclusion*

While the application of the extremely deferential rational basis test may, on occasion, result in the invalidation of a statute, as the foregoing analysis demonstrates, this is not one of those occasions. Indeed, even if, as one commentator has argued, insanity defense reform statutes seem to "express[ ] animosity toward mentally ill defendants"[265]—a proposition with which many would agree—this is entirely irrelevant if even one conceivable purpose would satisfy the test's legitimate purpose and nexus requirements. And while the conceivable purposes for the mens rea approach discussed in this subsection are certainly not the most compelling, or even entirely logical, and while not all of the purposes mentioned would satisfy the requirements of the rational basis test, at least one such purpose would. Whether the mens rea approach could withstand a higher level of scrutiny is highly doubtful; however, unless and until courts are willing to extend such heightened scrutiny to mental disease–based classifications—a time that seems unlikely to arrive even in the distant future—states apparently will be free to abolish their extrinsic insanity defenses without fear of violating equal protection.

C. Cruel and Unusual Punishment

The Eighth Amendment commands that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[266] In *Ford v. Wainright*,[267] the Court held that what is cruel and unusual embraces at least what was considered to be

265 Leblanc-Allman, *supra* note 227, at 1112.
266 U.S. CONST. amend. VIII.
267 477 U.S. 399 (1986).

cruel and unusual at the time the Bill of Rights was adopted,[268] and in *Penry v. Lynaugh*,[269] the Court stated that "[i]t was well settled at common law that . . . 'lunatics[ ]' were not subject to *punishment* for criminal acts committed under [that] incapacit[y]."[270] Taken together, it seems difficult to reconcile these two decisions with the notion that punishing the insane is *not* a violation of the Eighth Amendment. In the end, however, a cruel and unusual punishment claim is not likely to be successful because the Court seems to open its ears to such claims only when the death penalty is involved. For example, in *Coker v. Georgia*,[271] the Court held that a death sentence for the crime of rape constituted cruel and unusual punishment.[272] However, with the death penalty not at issue, the Court has upheld what some might consider draconian punishments for crimes nowhere near as serious as rape.[273] Similarly, while the Court held in *Ford* that an insane person cannot be executed,[274] it seems likely that if the death penalty is not implicated, the Court would not entertain an Eighth Amendment claim.[275]

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268 *Id.* at 405.

269 492 U.S. 302 (1989).

270 *Id.* at 331 (emphasis added).

271 433 U.S. 584 (1977).

272 *See id.* at 600.

273 *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957 (1991) (upholding mandatory sentence of life in prison without possibility of parole for possession of 672 grams of cocaine); Rummel v. Estelle, 445 U.S. 263 (1980) (upholding life sentence under recidivist statute for defendant who had been successively convicted of fraudulently using credit card to obtain $80 worth of goods or services, passing forged check in the amount of $28.36, and obtaining $120.75 by false pretenses).

It is notable that the Ninth Circuit recently held that, as applied, California's "Three Strikes" law violated the Eighth Amendment where a life sentence was imposed for the theft of nine videotapes worth $153.54. *See* Andrade v. Att'y Gen., 270 F.3d 743 (9th Cir. 2001), *cert. granted sub nom.* Lockyer v. Andrade, 70 U.S.L.W. 3497 (U.S. Apr. 1, 2002) (No. 01-1127). However, *Andrade* departed sharply from the principles espoused in *Harmelin* and *Rummel*, and it was thus not terribly surprising that the Court decided to grant certiorari. As mentioned earlier, *see supra* Part II.B.3, while it can be dangerous to jump to conclusions from a grant or a denial of certiorari, I would venture that the Court's purpose in granting certiorari in this case is to reverse the decision of the Ninth Circuit and reaffirm its commitment to an extremely narrow (if not nonexistent) Eighth Amendment proportionality requirement in the noncapital context.

274 Ford v. Wainwright, 477 U.S. 399, 410 (1986).

275 *Cf. Harmelin*, 501 U.S. at 995–96 (stating that "because of the qualitative difference between death and all other penalties, . . . [w]e have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further"); *id.* at 994 (noting the existence of "several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides"). Of course, this is not to say that the Court would not intervene on Eighth Amendment grounds if a sufficiently unusual punishment short of the death penalty, such as corporal punishment, were to be imposed on an offender. *See* Atkins v. Virginia, 122 S. Ct. 2242, 2265 (2002) (Scalia, J., dissenting) ("The Eighth Amendment is addressed to always-and-everywhere 'cruel' punishments, such as the rack and the thumbscrew.").

This is not to imply, though, that such a claim lacks merit. While the holding of *Ford* may not extend to the issue of punishing the insane outside the context of the death penalty, its logic certainly does. The Court in *Ford* noted that the Eighth Amendment recognizes the "'evolving standards of decency that mark the progress of a maturing society.'"[276] The Court also declared that in "determining whether a particular punishment comports with the fundamental human dignity that the Amendment protects," it must "take[ ] into account objective evidence of contemporary values,"[277] and, as the Court stated in *Penry*, "The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[278] As mentioned above, in examining the national trend, it is fairly clear that contemporary values mandate the existence of an extrinsic insanity defense, as all but four states possess, and have always possessed, this type of statutory scheme.[279]

Assuming the Court is willing to entertain an Eighth Amendment claim, the success of such a challenge will depend on how the Court characterizes this minority of states. If the Court views these states as too deviant regarding contemporary values, then it will likely strike down the mens rea approach as cruel and unusual. However, if the Court sees these states as beginning a trend in the opposite direction (as might be evidenced by the consideration of similar mens rea approach statutes in the legislatures of a handful of other states[280]), then it might be more willing to uphold the abolition of the defense on the ground that contemporary values are changing.[281]

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276 *Ford*, 477 U.S. at 406 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

277 *Id.*

278 Penry v. Lynaugh, 492 U.S. 302, 331 (1989).

279 *See supra* Part I.B.2.

280 *See supra* note 36 and accompanying text.

281 The uncertainty of what the Court's answer might be is only exacerbated by its recent discussion in *Atkins v. Virginia*, 122 S. Ct. 2242 (2002), which held that the Eighth Amendment prohibits the execution of mentally retarded criminals. *Atkins* highlights the inherent malleability in ascertaining the content of "contemporary values," even where objective evidence is readily available. The majority found that because eighteen states (forth-seven percent of states permitting capital punishment) had enacted laws forbidding, in whole or in part, the execution of the mentally retarded, a "national consensus" against the practice could be said to exist; as a result, it was contrary to contemporary values and thus constitutionally impermissible. *Id.* at 2248–49. However dubious this conclusion might be, *see id.* at 2262–63 (Scalia, J., dissenting) (disputing existence of national consensus), it is certainly not the case that adoption of the mens rea approach by only eight percent of the states could be regarded as compelling evidence of a change in contemporary values, as ninety-two percent of the states do not punish the insane. *See id.* at 2262 (Scalia, J., dissenting) (noting that "[o]ur prior cases have generally required a much higher degree of agreement [than forty-seven percent] before finding a punishment cruel and unusual on 'evolving standards' grounds").

Yet the majority does not rest its hat on numbers alone, asserting that "[i]t is not so much the number of these states that is significant, but the consistency of the direction of

CONCLUSION

While it has not yet confronted this country's highest court, the abolition of the extrinsic defense of insanity in favor of the mens rea approach has become a hotly contested issue among legal scholars as well as the few state court judges who have grappled with it. It clearly raises questions of constitutional magnitude in the areas of due process, equal protection, and cruel and unusual punishment, and although my analysis demonstrates that an equal protection challenge would almost undoubtedly fail, and that a cruel and unusual punishment challenge may or may not succeed, even challenges based upon due process—which the mens rea approach plainly violates—have thus far fallen upon deaf ears in state courts.

Justice Holmes's expression that "hard cases make bad law"[282] may not always ring true. However, for at least three such cases—*State v. Searcy*,[283] *State v. Cowan*,[284] and *State v. Herrera*[285]—the resulting law was definitely as Holmes predicted it would be. Aside from the results the courts ultimately reached, what is most troubling about these cases is that the poor reasoning rampant throughout the decisions appears to be the product of little more than highly manipulative, outcome-based decisionmaking. The issue of insanity defense reform is, no doubt, a political hotbed. Moreover, the issue concerns a relatively small, unpopular group of individuals who are unable to participate meaningfully in the political process and therefore are highly vulnerable. While it should be the goal of the courts to interpret the Constitution correctly every time, the political popularity of insanity defense

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change." *Id.* at 2249. As Justice Scalia correctly notes in criticizing this argument, it is the use of this type of factor that inevitably results in the dilution of the objective nature of the constitutional standard:

> The Court attempts to bolster its embarrassingly feeble evidence of "consensus" with the following: "It is not so much the number of these States that is significant, but the *consistency* of the direction of change." But in what *other* direction *could we possibly* see change? Given that 14 years ago *all* the death penalty statutes included the mentally retarded, *any* change (except precipitate undoing of what had just been done) was *bound to be* in the one direction the Court finds significant enough to overcome the lack of real consensus.

Id. at 2263 (Scalia, J., dissenting) (citation omitted) (emphasis in original). Indeed, importing such subjective factors into the overall determination of the existence of a national consensus would permit courts to conclude, for example, that because four states have adopted the mens rea approach and others are considering it, the "trend" is such that a national consensus *does not* exist against the punishment of the insane. Certainly, even the mere possibility of such an absurd conclusion being reached is troubling, for as Justice Scalia observed, "[R]eliance upont 'trends' . . . is a perilous basis for constitutional adjudication." *Id.*

282 N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

283 798 P.2d 914 (Idaho 1990).

284 861 P.2d 884 (Mont. 1993).

285 895 P.2d 359 (Utah 1995).

reform certainly makes result-oriented and politically motivated decisionmaking all the more tempting. Judges in state courts ordinarily are elected and face the prospect of reelection or retention at some point.[286] Therefore, they can be especially prone to such transgressions, particularly with an issue such as the punishment of the insane—after all, no judge's reelection chances increase if the public sees her as "the judge who lets insane people go free." Of course, this is not to say that political pressure ends at the stairs of the federal courts either, as "even federal judges are sensitive to the role that public acceptance plays in legitimizing their authority."[287] However, for the sake of the basic principles upon which our system of criminal justice was founded, one can only hope that when the Supreme Court eventually takes on the issue—and we can rest assured that someday it will—it does not, like the legislatures and courts of four of our states, choose to ignore the foundations of our jurisprudence and follow the political path of least resistance.

286 *See* AN INDEPENDENT JUDICIARY: REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE § V.B (1997), *at* http://www.abanet.org/govaffairs/judiciary/report.html.

287 Mandiberg, *supra* note 21, at 271 (citing Stephen L. Wasby, *Arrogation of Power or Accountability: 'Judicial Imperialism' Revisited*, 65 JUDICATURE 208, 218–19 (1981)).