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# Ohio Northern University Law Review

## Symposium Articles

### Rethinking Legally Relevant Mental Disorder

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#### INTRODUCTION

The law insists on maintaining mental disorder as a predicate for a wide array of legal provisions, in both the criminal justice system and the civil law. Among adults, only a person with a “mental disease or defect” can escape conviction for an intentional, unjustified crime on grounds of cognitive or volitional impairment.<sup>1</sup> Only people with “mental illness” or “mental disorder” may be subjected to indeterminate preventive commitment based on dangerousness.<sup>2</sup> Under the laws of many states, only people with a mental disorder are prevented from making decisions about treatment, criminal charges, wills, contracts, and a host of other important aspects of life.<sup>3</sup>

What is it about “mental illness” that merits such special legal treatment? Why are mentally ill people singled out by the law in so many different contexts? These questions can be answered only by first figuring out what the law is trying to accomplish in those areas in which it makes mental illness relevant. In undertaking this effort, this article focuses on those settings in which mental illness is a predicate for either avoiding or imposing a

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1. Children under the age of seven have an infancy defense. See WAYNE R. LAFAVE, CRIMINAL LAW 424, 467, 474 (3d ed. 2000). The duress defense is available to non-mentally ill adults but is based on external threats rather than “internal” volitional impairment. *Id.* at 467.

2. *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992) (White, J., plurality opinion) (noting that a system which permitted commitment of dangerous persons who are not mentally ill would be a departure from “our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond a reasonable doubt to have violated a criminal law”).

3. On the relevance of disorder to criminal competency, see *infra* note 92. On civil matters, see GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 340-41 (2d ed. 1997) (“Many state [guardianship] statutes . . . require findings of a threshold status (e.g., mental illness, idiocy, and senility) . . .”).

deprivation of liberty. It is in these situations, where the stakes are the highest, that precisely determining what the law means and should mean when it uses the term "mental illness" and like terminology is most important.

The article starts, in Part I, with a description of how the behavioral sciences have defined mental disorder. The definitions are varied and expansive, leaving the law plenty of working room. Part II then looks at how the law treats the concept of mental illness. In general, the law's definitions of this phenomenon have been equally vague, and they are often nonresponsive to its own normative objectives.

Part III, the heart of the article, takes on the oft-neglected task of identifying the goals of laws that deprive people of liberty. Based on my previous work, it argues that laws which deprive people of liberty should only be focused on mental illness to the extent it affects culpability, deterrability, or competency. It further concludes that, in determining whether a person lacks culpability, is undeterrable, or is incompetent, the law should focus on the *content* of the person's thoughts. Aberrant thought content can be distinguished from a number of other characteristics of mental illness, most prominently an aberrant thought *process*. Analysis of one's thought process might include an examination of thought content but would also require examining the consistency and coherence of the person's beliefs and desires and perhaps a number of other variables as well. This article argues that in deciding whom to deprive of liberty for the purposes of punishment, prevention, or protection the content of the person's thought process is the most relevant consideration, not how he or she arrives at that content or other mental phenomena.

Finally, Part IV explores the advantages and disadvantages of a content-based approach to legally relevant mental disorder. The advantages include: a strong reaffirmation of most people's responsibility, deterrability, and competence; a concomitant destigmatization of mental disorder; and more precise legal standards. At the same time, a content-based definition of legally relevant mental disorder might represent an uncomfortable departure from lay understandings about mental disorder, make some legal determinations more subject to manipulation by litigants, and lead to an emphasis on autonomy values that perhaps should be downplayed with our increasing knowledge about the causes of human behavior.

There are two overarching theses to this article. The first is that the choice as to how mental illness should be defined for legal purposes should be based on pragmatic as well as normative concerns since normative analysis leaves so many questions unanswered. A related thesis is that mental disorder is such a vacuous phrase that the law should consider dispensing with it as an independent criterion for intervention and instead simply identify as precisely as possible the types of mental dysfunction it wants to treat specially.

## I. CLINICAL PERSPECTIVES ON MENTAL ILLNESS

Everyone knows that mental illness and its semantic brethren, mental disability and mental disorder, are not easily defined. The only thing we can say for sure about the concept is that it has continually expanded in scope. Stretched by new discoveries about the causes of human behavior, our society's willingness or desire to label quirky behavior sick,<sup>4</sup> and—if one believes the cynics—the desire on the part of mental health professionals to be compensated by insurance companies for all their patients' problems,<sup>5</sup> the term "mental illness" applies to a far wider array of phenomena than it did a century ago.

Consider the approach taken in the American Psychiatric Association's Diagnostic and Statistical Manual, the bible of psychiatric nosology known simply as DSM (now in its fourth edition, and thus called DSM-IV).<sup>6</sup> DSM-IV states that a "mental disorder" is

a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom.<sup>7</sup>

Furthermore, DSM-IV states the syndrome or pattern cannot be "an expectable and culturally sanctioned response to a particular event" (such as death of a loved one).<sup>8</sup> Although this language does impose some limits, many have noted that terms such as "distress," "disability," "loss of freedom," and "expectable and culturally sanctioned" are hugely value-laden and still permit a wide amount of leeway in defining specific disorders.<sup>9</sup> The drafters of

4. See STUART A. KIRK & HERB KUTCHINS, *THE SELLING OF DSM: THE RHETORIC OF SCIENCE IN PSYCHIATRY* 28 (1992) ("[N]one of the revisions [of the DSM have been] stimulated by clinical practitioners demanding a new classification system."); see generally ALAN M. DERSHOWITZ, *THE ABUSE EXCUSE: COP-OUTS, SOB STORIES AND OTHER EVASIONS OF RESPONSIBILITY* (1994).

5. Daniel Goleman, *Who's Mentally Ill*, 11 *PSYCHOL. TODAY* 34, 34 (1978) (quoting George Albee, past president of the American Psychological Association, as saying that the expansion of diagnostic categories in the DSM is an attempt by the American Psychiatric Association to "turn[] every human problem into a disease, in anticipation of the shower of health-plan gold that is over the horizon").

6. AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (4th ed. 1994) [hereinafter DSM-IV]. The 1994 edition was revised in 2000 (and christened DSM-IV-TR) but in all relevant respects is the same as the 1994 version.

7. *Id.* at xxi.

8. *Id.*

9. See KENNETH MARK COLBY & JAMES E. SPAR, *THE FUNDAMENTAL CRISIS IN PSYCHIATRY: UNRELIABILITY OF DIAGNOSIS* 20 (1983) (calling the DSM a politically motivated compromise between

DSM-IV admit as much, stating “that no definition adequately specifies precise boundaries for the concept of ‘mental disorder.’”<sup>10</sup>

Undeterred by this admission, DSM-IV includes in its listing of “mental disorders” an enormous number of syndromes and psychological patterns (over three hundred in the fourth edition). In the approximate hierarchy likely to occur to a layperson asked to define “craziness,” the major DSM categories might be organized as follows:

- Psychoses (e.g., schizophrenia, manifested by hallucinations and delusions);<sup>11</sup>
- Dementias (involving a significant loss of consciousness and memory);<sup>12</sup>
- Mood disorders (e.g., the bipolar disorders, manifested by swings between severe depression and mania);<sup>13</sup>
- Dissociative disorders (including dissociative identity disorder, formerly known as multiple personality disorder);<sup>14</sup>
- Mental retardation;<sup>15</sup>
- Anxiety disorders (including post-traumatic stress disorder);<sup>16</sup>
- Personality disorders (a large category that is meant to encompass “an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual’s culture”<sup>17</sup> and that includes paranoid personality disorder; schizoid personality disorder (detachment from social relationships and a restricted range of emotional expression); schizotypal personality disorder (odd beliefs or magical thinking; unusual perceptual experiences including bodily illusions; excessive social anxiety); antisocial personality disorder (disregard for and violation of the rights of others); borderline personality disorder (impulsivity; inappropriate, intense anger or difficulty controlling anger); histrionic personality disorder (excessive emotionality and attention seeking); narcissistic personality disorder (grandiosity, need for admiration, and lack of empathy); avoidant personality disorder (feelings of inadequacy and hyper-

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differing interpretations of the data, outright dogma, and propaganda); *see generally* KIRK & KUTCHINS, *supra* note 4.

10. DSM-IV, *supra* note 6, at xxi.

11. *Id.* at 302.

12. *Id.* at 133.

13. *Id.* at 317.

14. *Id.* at 477.

15. DSM IV, *supra* note 6, at 39.

16. *Id.* at 393.

17. *Id.* at 629.

sensitivity to negative evaluation); dependent personality disorder (submissive and clinging behavior related to an excessive need to be taken care of); and obsessive-compulsive personality disorder (preoccupation with orderliness, perfectionism, and control));<sup>18</sup>

- Sexual disorders (including pedophilia)<sup>19</sup> and impulse disorders (including pyromania and kleptomania);<sup>20</sup>
- Eating and sleeping disorders<sup>21</sup> and disorders that feature exaggerated symptoms (somatoform and factitious disorders);<sup>22</sup>
- Substance abuse disorders that do not result in dementia, including not just alcohol and drug-related disorders but caffeine and nicotine-related disorders.<sup>23</sup>

One can certainly dispute the ordering of this list. But its expansive scope, which overlaps with behaviors most of us experience at least to some degree,<sup>24</sup> cannot be denied.

Uncomfortable with that fact, some have tried to cabin the clinical concept of mental illness in various ways. In doing so, they have focused on either the *effects*, the *process*, or the *cause* of the phenomenon to be labeled. One example of the effects approach is a proposal that would narrow the DSM's emphasis on distress and disability to conditions that impose a serious "biological disadvantage"—more specifically, death or reduced fertility.<sup>25</sup> This threshold is said to encompass only the first three categories listed above, plus severe drug dependence and sexual disorders such as homosexuality.<sup>26</sup> A prominent illustration of the process approach is the equation of mental illness with "irrational" thought content.<sup>27</sup> Advocates of this approach contend that

18. *Id.*

19. *Id.* at 493.

20. DSM-IV, *supra* note 6, at 609.

21. *Id.* at 539, 551.

22. *Id.* at 445.

23. *See id.*

24. *Cf.* HERB KUTCHINS & STUART KIRK, MAKING US CRAZY 243 (1997) (summarizing NIMH study applying the DSM diagnostic criteria that found "that 32% of American adults have one or more psychiatric disorders in their life[time and] that 20% have a disorder at any given time"); *see also* R.C. Kessler et al., *Lifetime and 12-Month Prevalence of DSM-III-R Psychiatric Disorders in the United States*, 51 ARCHIVES GEN. PSYCHIATRY 8 (1994) (50% report at least one lifetime disorder and 30% reported at least one disorder within the past year).

25. R.E. Kendell, *The Concept of Disease and Its Implications for Psychiatry*, 127 BRIT. J. PSYCHIATRY 305 (1975).

26. *Id.* at 307.

27. MICHAEL MOORE, LAW & PSYCHIATRY: RETHINKING THE RELATIONSHIP 244-45 (1984); *see also* Christopher Boorse, *What a Theory of Mental Health Should Be*, 6 J. THEORY OF SOC. BEHAV. 61, 63, 72 (1976) (focusing on dysfunctional mental processes).

irrationality is most likely to be a feature of the first few symptom complexes listed, although it could occasionally occur in connection with some of the other symptom patterns as well.<sup>28</sup> Finally, as an example of the etiological move, some mental health professionals believe that the term “mental illness” should be reserved for those problems that are biological in origin (leaving the term “mental disorder” to cover the rest).<sup>29</sup> The theory here is that organically caused disabilities, among which the psychoses are thought to be good examples, are more deserving of the (more serious?) illness rubric.<sup>30</sup>

There are obvious problems with all of these definitions. Using an increased chance of death and reduced fertility as markers of illness seems both under and overinclusive: eating disorders and routine substance abuse (neither of which are considered illnesses under this approach) often hasten death and diminish sexual drive,<sup>31</sup> while the psychoses don't necessarily shorten life or decrease procreative powers;<sup>32</sup> the fact that homosexuality can be classified as a mental illness under this definition speaks for itself. Irrationality probably comes closest to capturing the lay sense of “craziness,” but it can be almost as difficult to operationalize as mental disorder itself, a claim explored more fully below.<sup>33</sup> And biology may well play a major role in causing *all* mental problems. As the drafters of DSM-IV state, “A compelling literature documents that there is much ‘physical’ in ‘mental’ disorders and much ‘mental’ in ‘physical’ disorders.”<sup>34</sup> Eric Kandel summarizes the literature in this way: “[B]ehavioral disorders that characterize psychiatric illness are disturbances of the brain function, even in those cases where the causes of the disturbances are clearly environmental in origin.”<sup>35</sup>

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28. MOORE, *supra* note 27, at 244-45. Moore calls psychiatry's expansion of the mental illness concept “conceptual imperialism” aimed more at defining conditions psychiatrists might treat than at grappling with the problem of what constitutes an improperly functioning mind. *Id.* at 198-210.

29. See RALPH REISNER ET AL., *LAW & THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS* 412 (3d ed. 1999) (“[A] mental disorder is any of the diagnostic categories listed in DSM III . . . . When one switches to the term mental disease or mental illness, one is suggesting that this is a sickness, that it has some kind of biological basis.”) (quoting the testimony of Dr. Park Elliot Dietz in the trial of John Hinckley); see also MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 44 (1999) (“The term ‘disease’ generally is reserved for conditions with known pathology (detectable physical change). The term ‘disorder,’ on the other hand, is reserved for clusters of symptoms and signs associated with distress and disability (i.e., impairment of functioning), yet whose pathology and etiology are unknown.”).

30. REISNER ET AL., *supra* note 29, at 412.

31. DSM-IV, *supra* note 6, at 519, 541.

32. Many people with manic-depression, for instance, lead long and productive, if very intense, disrupted and disrupting lives, even when left untreated. See generally D. JABLOW HERSHMAN & JULIAN LIEB, *MANIC DEPRESSION AND CREATIVITY* (1998) (describing Newton, Dickens, and Picasso, as well as Chopin, Van Gogh, and Marilyn Monroe, as people with manic-depression).

33. See *infra* note 157 and accompanying text.

34. DSM-IV, *supra* note 6, at xxi.

35. Eric R. Kandel, *A New Intellectual Framework for Psychiatry*, 155 AM. J. PSYCHIATRY 457, 460 (1998).

At the same time, as these last statements suggest, the image of mental disorder as simply the product of defective organs is wrong, a fact which further complicates matters. Kandel again:

Social or developmental factors also contribute very importantly . . . to behavior, including social behavior, so behavior and social factors can exert actions on the brain by feeding back upon it to modify the expression of genes and thus the function of nerve cells. Learning, including learning that results in dysfunctional behavior, produces alterations in gene expression. Thus all of nurture is ultimately expressed as nature.<sup>36</sup>

The so-called medical (or biological) model of mental illness appears to be ascendant at the present time, but developmental, learning-behavioral, and social factors also significantly influence behavior and mental processes, "disordered" or not.<sup>37</sup> Mental disorder may be, as the DSM-IV definition cited above asserts, "in the individual," but it is virtually always a product of interaction with the rest of the world.

In part for this reason, Thomas Szasz has famously argued that mental illness is a "myth."<sup>38</sup> To Szasz, either a person has a brain disease, in which case the appropriate intervention is neurological, or he or she has a "problem in living," which is not an illness but a social condition.<sup>39</sup> For most of what we call mental disorder, Szasz asserts, "[T]he norm from which deviation is measured is a *psychosocial and ethical* standard," not a physical one.<sup>40</sup> Although there is much to be said against Szasz's ultimate position that mental illness does not "exist,"<sup>41</sup> his insight about the strong influence social norms exert on the definition of mental illness is worthy of emphasis. Indeed, in a sense Szasz does not go far enough in his critique. *Regardless* of our ability to correlate certain brain structures and bodily chemicals with certain symptoms, the definition of mental illness, like the definition of illness generally, is as much cultural as it is scientific. As Ralph Slovenko has said,

36. *Id.*

37. For a description of the medical, psychoanalytic, behavioral, and social models of mental disorder, see Paul Lazare, *Hidden Conceptual Models in Clinical Psychiatry*, 288 *NEW ENG. J. MED.* 345 (1973).

38. THOMAS S. SZASZ, *IDEOLOGY AND INSANITY* 12 (1970) ("[T]he concept of mental illness . . . has outlived whatever cognitive usefulness it might have had and . . . now functions as a myth.").

39. *Id.* at 21 ("[T]he phenomena now called mental illnesses [should] . . . be removed from the category of illnesses, and [should] be regarded as the expressions of man's struggle with *the problem of how he should live.*").

40. *Id.* at 16.

41. See Michael Moore, *Some Myths About Mental Illness*, 18 *INQUIRY* 233 (1975).



"[M]ental disorders are exaggerations of normal psychodynamics,"<sup>42</sup> with society in general and mental health professionals in particular determining what is "exaggerated" and what is "normal."

As confusing as all this may be, it seems like a perfect setup for the law in its attempts to define mental disorder. After all, the job of legislatures and courts is to make normative judgments. Since science is not able to tell us who is "crazy" and who is not, the law should step up to the plate. More often than not, however, it has stayed in the dugout.

## II. LEGAL APPROACHES TO MENTAL ILLNESS

No less an authority than the U.S. Supreme Court has counseled that judges and legislators, not psychiatrists or other mental health professionals, should define the scope of legally relevant mental disorder.<sup>43</sup> The DSM also cautions that its nosology does not necessarily map onto legal constructs.<sup>44</sup> Those sentiments are wise. Unfortunately, however, in detailing the scope of mental disorder for legal purposes, legislatures and courts have often fallen down on the job or inappropriately delegated it to others, at least in those settings involving potential deprivations of liberty.

### A. *The Insanity Defense*

One would think that the law would be most interested in accomplishing the task of demarcating legally relevant and irrelevant mental illness in connection with the insanity defense, the most conspicuous, if not the most commonly used, arena for determinations of mental illness. But despite centuries of law, the usual test for insanity still speaks simply in terms of "mental disease or defect," without further elaboration.<sup>45</sup> The result is enormous vagueness about the predicate for the insanity defense.

Of course, in order for an insanity claim to succeed, the mental disease or defect must cause significant cognitive or volitional impairment at the time of the offense. In the words of the popular American Law Institute test, it

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42. RALPH SLOVENKO, *PSYCHIATRY AND CRIMINAL CULPABILITY* 54 (1995).

43. *Kansas v. Hendricks*, 521 U.S. 346, 359 (1997) ("The legal definitions of 'insanity' and 'competency' . . . vary substantially from their psychiatric counterparts . . . . Legal definitions . . . which must 'take into account such issues as individual responsibility . . . and competency,' need not mirror those advanced by the medical profession.").

44. DSM-IV, *supra* note 6, at xxiii ("In most situations, the clinical diagnosis of a DSM-IV mental disorder is not sufficient to establish the existence for legal purposes of a "mental disorder," "mental disability," "mental disease," or "mental defect.").

45. DONALD H.J. HERMANN, *THE INSANITY DEFENSE: PHILOSOPHICAL, HISTORICAL AND LEGAL PERSPECTIVES* 129 (1983) ("[I]t is a common feature of [insanity] tests that they lack significant definition or provision of nonnormative criteria for the concept "mental disease.").

must result in a lack of “substantial capacity either to appreciate the wrongfulness of [the] conduct or to conform [the] conduct to the requirements of the law.”<sup>46</sup> A well-known criminal law treatise asserts that this language is the gravamen of insanity, and that the mental disease or defect predicate is not meant to serve any significant limiting role.<sup>47</sup> But the consequences of that view would be dramatic, at least in theory. Many conditions not normally associated with “insanity” correlate with substantial cognitive or volitional impairment. Psychopaths, dependent personalities, and people with mild mental retardation might not appreciate the wrongfulness of their actions.<sup>48</sup> Pedophiles, people with explosive personalities, and people who commit crime to feed addictions may have trouble conforming their behavior to the requirements of the law.<sup>49</sup> Since, if the DSM is our guide, any one of these people could be said to have a mental disease or defect,<sup>50</sup> the term needs more content than simply equating it with a substantial lack of appreciation or control if these types of people should be held responsible for their criminal acts.<sup>51</sup>

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46. MODEL PENAL CODE § 4.01(1) (1962).

47. LAFAVE, *supra* note 1, at 331 (“[I]t would seem that any mental abnormality, be it psychosis, neurosis, organic brain disorder, or congenital intellectual deficiency . . . will suffice if it has caused the consequences described in the second part of the test.”).

48. See ROBERT D. HARE, WITHOUT CONSCIENCE: THE DISTURBING WORLD OF THE PSYCHOPATHS AMONG US 34, 44 (1993) (reporting that psychopaths “seem unable to ‘get into the skin’ or to ‘walk in the shoes’ of others,” lack remorse or guilt, lack empathy, and have shallow emotions); DSM-IV, *supra* note 6, at 665 (Dependent personalities “feel so unable to function alone that they will agree with things that they feel are wrong rather than risk losing the help of those to whom they look for guidance.”); C. Benjamin Crisman & Rockne J. Chickinell, *The Mentally Retarded Offender in Omaha-Douglas County*, 8 CREIGHTON L. REV. 622, 646 (1975) (Although mentally retarded persons “may be able to distinguish right from wrong in the abstract,” they have difficulty “applying such abstract concepts to specific factual settings.”).

49. DSM-IV, *supra* note 6, at 522 (describing “essential features of a Paraphilia” as “recurrent, intense sexually arousing fantasies, sexual urges, or behaviors”); *id.* at 609-10 (describing “intermittent explosive disorder” as evidenced by “discrete episodes of failure to resist aggressive impulses . . . grossly out of proportion to any precipitating psychosocial stressor[s]”); *id.* at 178 (describing the pattern of “compulsive [substance use]”); *id.* at 618 (describing a symptom of “pathological gambling” as commission of “illegal acts such as forgery, fraud, theft, or embezzlement to finance gambling”).

50. See *supra* notes 48-49.

51. The same problem afflicted the *Durham* regime that existed in the District of Columbia Circuit Court of Appeals from 1954 to 1972. In *Durham v. United States*, 214 F.2d 862, 875 (D.C. Cir. 1954), the court established the “product” test for insanity, which stated that an accused was insane if his or her “unlawful act was the product of mental disease or defect.” In *MacDonald v. United States*, 312 F.2d 847, 851 (D.C. Cir. 1962), in an attempt to limit the scope of this test, the court defined mental disease or defect to mean “any abnormal condition of the mind which substantially affects mental or emotional process and substantially impairs behavior controls.” Many have noted that this definition merely replicates the ALLI lack of appreciation and lack of control formulation, with its attendant vagueness. See, e.g., LAFAVE, *supra* note 1, at 348.

In recognition of this problem, some formulations of the insanity defense have narrowed the universe of mental disorders that can form the basis for an insanity defense. The American Law Institute insanity formulation includes a paragraph meant to exclude psychopathy as a basis for excuse,<sup>52</sup> a clause that many states have adopted.<sup>53</sup> Several states have gone further, prohibiting insanity claims based on any type of personality disorder.<sup>54</sup> Apparently along the same lines, the federal insanity statute requires a “severe” mental disease or defect.<sup>55</sup> Case law in some jurisdictions has expressly prohibited insanity based on conditions that are solely the result of “passion” or of substance abuse.<sup>56</sup> Finally, a few states have adopted definitions tied to their civil commitment statutes. For instance, Michigan defines mental illness or defect for insanity purposes as “[a] substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.”<sup>57</sup>

While these latter formulations do limit the scope of the insanity defense, they are either under or overinclusive. Excluding psychopathy, substance abuse disorders, or some other narrow category of disability still leaves large numbers of individuals eligible for an insanity defense who probably should not be. On the other hand, the blunderbuss approach—exemplified by the exclusion of all personality disorders (a category which includes paranoid, schizotypal, and borderline disorders)—prevents people with very bizarre thought content and process from arguing for an excuse.<sup>58</sup> The federal test’s use of the word “severe” may raise the same problem, but since the word is not defined further, it is hard to know.<sup>59</sup>

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52. MODEL PENAL CODE § 4.01(2) (1962).

53. LAFAVE, *supra* note 1, at 351 (stating that “most” ALI states include this paragraph).

54. *See, e.g.*, ME. REV. STAT. ANN. tit. 17, § 39 (West 2002); *see also* CONN. GEN. STAT. ANN. § 53a-13 (West 2001) (prohibiting insanity based on pathological gambling).

55. 18 U.S.C. § 17 (2000). The legislative history states the word was used to exclude “nonpsychotic behavior disorders or neuroses such as an ‘inadequate personality,’ ‘immature personality,’ or a pattern of ‘antisocial tendencies.’” S. Rep. No. 98-225, at 229 (1983).

56. *United States v. Lyons*, 731 F.2d 243, 247 (5th Cir. 1984) (stating that drug addiction is not a mental disease unless it causes “actual drug-induced or drug-aggravated psychosis, or physical damage to the brain or nervous system”); *Thompson v. Commonwealth*, 70 S.E.2d 284, 292 (Va. 1952) (“Frenzy arising solely from the passion of anger and jealousy, regardless of how furious, is not insanity.”).

57. MICH. COMP. LAWS ANN. § 330.1400(g) (West 1999) (mental health code).

58. *See, e.g.*, DSM-IV, *supra* note 6, at 634 (stating that people with paranoid personality disorder “often feel that they have been deeply and irreversibly injured by another person or persons even when there is no objective evidence for this”); *id.* at 645 (describing symptoms of “schizotypal personality disorder” to include “odd beliefs or magical thinking,” and “unusual perceptual experiences, including bodily illusions”); *id.* at 651 (noting that “[d]uring periods of extreme stress,” people with borderline personality disorder can experience “transient paranoid ideation or dissociative symptoms”).

59. *See supra* note 55.

Michigan's formulation is the most interesting. It combines both the effects (impairment in coping ability) and process (impairment in judgment) approaches to mental disorder.<sup>60</sup> It does not depend simply on undifferentiated diagnosis but on specific dysfunctions. But it is still far too imprecise because it could encompass virtually any mental condition, a fact which Michigan courts have recognized.<sup>61</sup> Indeed, the Michigan definition of mental illness for insanity purposes is identical to that used in that state's guilty but mentally ill statute,<sup>62</sup> a law that is routinely applied to garden-variety criminals and results in a verdict that has *no* mitigating impact in terms of ultimate disposition.<sup>63</sup>

### B. Civil Commitment

The same types of observations can be made about the definition of mental disorder in the civil commitment context. As recently as twenty years ago, many state civil commitment statutes did not bother to define the term at all or defined it tautologically, in terms of a condition in which "mental health is substantially impaired."<sup>64</sup> Today most states use language similar to Michigan's<sup>65</sup> (which, it will be recalled, contemplates "a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life").<sup>66</sup> That language (which I shall continue to call, for brevity's sake, the "Michigan" formulation) is clearly an improvement over the older formulations, but it still is fatally lacking in precision in this context as well.

The reasoning necessary to reach that conclusion requires breaking commitment into its two components, police power commitment and *parens patriae* commitment. Police power commitment permits involuntary hospita-

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60. MICH. COMP. LAWS ANN. § 330.1400(g) (West 1999).

61. *People v. Doan*, 366 N.W.2d 593, 597-98 (Mich. Ct. App. 1984) (interpreting the language of Michigan insanity statute to permit a defense based on non-psychotic disorder and stating that "mental impairment due to any cause, physical or purely psychological, may form the basis for a finding of mental illness").

62. MICH. COMP. LAWS ANN. § 768.36 (West 2000) (describing guilty but mentally ill verdict as an alternative to insanity); *see also* MICH. STATE BAR STANDING COMM. ON STANDARD JURY INSTRUCTIONS, MICHIGAN CRIMINAL JURY INSTRUCTIONS § 7.12 (2d ed. 2003 Supp.) (definition of guilty but mentally ill).

63. *See* MICH. COMP. LAWS ANN. § 768.36(3) (West Supp. 2003) (stating that a person found guilty but mentally ill shall be sentenced to "any sentence that could be imposed by law upon a defendant who is convicted of the same offense"); *People v. McLeod*, 288 N.W.2d 909 (Mich. 1980) (no right to treatment for those found guilty but mentally ill).

64. *See* MELTON ET AL., *supra* note 3, at 307.

65. *Id.*

66. MICH. COMP. LAWS ANN. § 330.1400(g) (West 1999).

lization of those who are mentally disordered and dangerous to others.<sup>67</sup> Many commentators have suggested that civil commitment of those considered potentially harmful to others ought to be reserved for those who are so disordered that they would be found insane were they prosecuted for a crime.<sup>68</sup> Even those who do not subscribe to this notion, which includes the Supreme Court justices who were in the majority in *Kansas v. Hendricks*,<sup>69</sup> require that people subject to police power commitment suffer from a “mental abnormality” that makes them “dangerous beyond their control.”<sup>70</sup>

The Michigan language on its face could encompass either the insanity or dangerous-beyond-control standard, but it does a poor job on both scores. The fact that it *can* encompass either standard exposes its main defect, since these two concepts are only tangentially related. Consider first whether the language captures those who would be excused on insanity grounds if they committed crime. In Michigan, as already pointed out, this language also describes those who are guilty “but mentally ill,” which suggests that it is applied to many who would not be excused were they to commit a crime. Putting aside that fact, which could be due to legislative oversight, the language making eligible for commitment those who have “substantial impairments of judgment and behavior” also easily applies to people with antisocial personality,<sup>71</sup> individuals rarely found insane when they commit crime and therefore, presumably, people who generally should not be committable under the excuse rationale.

Indeed, such individuals are not even “dangerous beyond their control” in the sense that phrase is used in *Hendricks*. The Supreme Court has indicated that this language should distinguish between non-insane individuals who are detainable preventively and non-insane individuals who are simply

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67. See *Addington v. Texas*, 441 U.S. 418, 426 (1979) (“The state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.”).

68. See, e.g., ROBERT SCHOPP, *COMPETENCY, CONDEMNATION, AND COMMITMENT* 149-50, 165-66 (2001) (arguing that police power commitment is permissible only for those who lack “retributive competence,” and comparing the latter concept to insanity); Stephen Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1026-27 (2002) (arguing that sexual predator commitment should be limited to those who are “non-responsible”); *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1233 (1974) [hereinafter *Civil Commitment*] (The “criminally insane” is a group that “contains individuals whose mental condition excludes them from the operation of the traditional punishment-deterrence system” and justifies treating them differently, through “preventive detention.”).

69. 521 U.S. 346 (1997).

70. *Id.* at 358.

71. See DSM-IV, *supra* note 6, at 646. People with antisocial personality disorder tend to make decisions “on the spur of the moment, without forethought, and without consideration for the consequences to self or others,” display “a pattern of impulsivity” and “a reckless disregard to the safety of themselves or others,” and also tend to be “consistently and extremely irresponsible.” *Id.*

ordinary felons.<sup>72</sup> Yet the ordinary felon is often diagnosed with antisocial personality disorder<sup>73</sup> (which, as just pointed out, is subsumed under the Michigan definition). A solution to this problem might be to retain the Michigan language but exempt antisocial personality or perhaps all personality disorders from its coverage, as some civil commitment statutes do. But, as already noted, some people with personality disorders do suffer from conditions that might excuse or make them dangerous beyond their control.

Perhaps all of this sounds too finicky, but these definitional issues have real consequences. A huge percentage of the population could be considered “dangerous to others,” including most of those who are released from prison.<sup>74</sup> The definition of mental disorder may determine whom among them is subject to further commitment. Since the resurgence of sexual predator statutes in the 1990s, there have been literally hundreds of judicial decisions grappling with the definition of mental abnormality in connection with commitment of sex offenders who have completed their prison terms.<sup>75</sup> Some courts have required a specific finding that the person subject to commitment be severely volitionally impaired,<sup>76</sup> while others have been satisfied with a finding that “mental abnormality” and “dangerousness” are linked, or do not require any

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72. *Kansas v. Crane*, 534 U.S. 407, 413 (2002) (stating that the “inability to control” formulation is meant to “distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case”); *Hendricks*, 521 U.S. at 358 (holding that the sexual predator commitment statute is constitutional because it “narrows the class of persons eligible for confinement to those who are unable to control their dangerousness”).

73. The Supreme Court itself recognized this fact in *Crane*, 534 U.S. at 412, where it stated that the dangerous-beyond-control “distinction is necessary lest ‘civil commitment’ become a ‘mechanism for retribution or general deterrence’—functions properly those of criminal law, not civil commitment,” and then cited Reid Moran, *The Epidemiology of Antisocial Personality Disorder*, 34 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 231, 234 (1999) for the proposition that 40%-60% of the male prison population is diagnosable with antisocial personality disorder.

74. See Janine DeFao, *Jerry Brown’s About-Face on Criminal Sentencing*, SAN FRAN. CHRON., Feb. 18, 2003, at A1 (“[S]eventy-one percent of California’s inmates land back in prison within eighteen months.”).

75. A Westlaw search of cases which include the terms “definition” and “mental” produced over eight hundred decisions, over two-thirds of which deal with the definition of mental abnormality in sex offender commitment cases.

76. *Converse v. Dep’t of Children and Families*, 823 So. 2d at 295, 297 (Fla. Ct. App. 2002) (stating a jury must find that the offender’s dangerousness was caused by or linked with a mental abnormality that made it “difficult, if not impossible” to control behavior); *In re Civil Commitment of Ramey*, 648 N.W.2d 260, 266-67 (Minn. Ct. App. 2002) (stating some judicial-lack-of-control determination must be made whether it be “difficult, if not impossible,” “serious difficulty,” or inability to “adequately control”); *Thomas v. State*, 74 S.W.3d 789, 790 (Mo. 2002) (stating that “‘mental abnormality’ means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree” that causes the individual serious difficulty in controlling his behavior).

special showing at all.<sup>77</sup> Riding on the outcome of this debate is the liberty of thousands of sexual offenders. In the future, we are sure to see the proliferation of “predator” commitment statutes outside of the sex offender area,<sup>78</sup> making the issue addressed here even more important.

The Michigan language is equally inapposite as a way of implementing the *parens patriae* component of civil commitment, which focuses on danger to self and on inability to provide for basic needs (the latter sometimes called “grave disability”).<sup>79</sup> Here, too, the precise scope of legally relevant mental disorder is an important limiting criterion, for all sorts of behavior—ranging from smoking and overeating to attempts at suicide—can be classified as self-harming. As they have with respect to police power commitment, commentators and the Court have diverged on the meaning of mental disorder in this setting. Commentators have tended to view the primary focus of the inquiry to be the competency of the individual to make the relevant decisions,<sup>80</sup> whereas the Supreme Court has spoken of the *parens patriae* power in terms of the state’s interest “in providing care to its citizens who are unable . . . to care for themselves.”<sup>81</sup>

Once again, the ubiquitous Michigan formulation does not adequately capture the legal agenda. With one possible exception, its multi-part definition of mental disorder (focusing on impairments in judgment, behavior, ability to recognize reality, and ability to cope) fails to operationalize either incompetency or inability to care.<sup>82</sup> Anyone who has a DSM-IV diagnosis and who engages in seriously self-harming behavior could be said to have a “substantial disorder that significantly impairs judgment [or] behavior” since no one in their “right mind” would intentionally harm themselves.<sup>83</sup> Yet such

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77. *People v. Wollschlager*, 122 Cal. Rptr. 2d 171, 174 (Ct. App. 2002) (California sexual predator law “clearly presumes a serious difficulty in controlling behavior: if a person cannot control his dangerous behavior to the extent that he is predisposed to commit criminal sexual acts and thus becomes a menace to others, he has sufficient volitional impairment to be found an SVP.”); *In re Luckabaugh*, 568 S.E.2d 338, 348 (S.C. 2002) (no special finding required); *In re Laxton*, 647 N.W.2d 784, 793-95 (Wisc. 2002) (serious difficulty in control is implicit in nexus between the mental disorder and substantial probability of future sexual violence; failure to instruct on serious difficulty not error).

78. *Cf.* CAL. PENAL CODE §§ 2960-2981 (West 1999) (permitting commitment of people who have a severe mental disorder that is not in remission and cannot be kept in remission without treatment and who represent a substantial danger of physical harm to others).

79. *See generally* MELTON ET AL., *supra* note 3, at 309-10.

80. *See* SCHOPP, *supra* note 68, at 82 (“Absent criteria of commitment that entail incompetence for person, no putative justification for *parens patriae* civil commitment coheres with the broader set of principles underlying the legal institutions of a liberal society.”); *Civil Commitment*, *supra* note 68, at 1212-17 (arguing that incapacity is a required threshold for *parens patriae* commitment).

81. *Addington v. Texas*, 441 U.S. 418, 426 (1979).

82. *See* MICH. COMP. LAWS ANN. § 330.1400(g) (West 1999).

83. *See id.*

people might well be competent to make the decisions they are making (think of heavy smokers diagnosed with “nicotine use disorder”<sup>84</sup> or the recluse with “social phobia”<sup>85</sup>). Likewise, many of these people are probably capable of caring for themselves (including many “mentally ill” people who choose to be homeless<sup>86</sup>). The same can even be said of people with significant impairments in their “capacity to recognize reality,” as many psychotic people are able to give competent reasons for refusing treatment, and, as just noted, can survive on their own.<sup>87</sup> It is more difficult to say that people who are significantly impaired in their mental “ability to cope with the ordinary demands of life”<sup>88</sup> are competent or able to care for themselves, but if that is the definition of mental disorder, it collapses into the grave disability commitment criterion found in virtually every commitment statute<sup>89</sup> and has no independent significance.

### C. Competency in Criminal Proceedings

The final type of liberty deprivation in which mental disorder plays a significant role is in connection with determinations of incompetency to stand trial and related issues. To be competent to deal with the criminal system, a criminal defendant must be able, in the words of the Supreme Court’s decision in *Dusky v. United States*,<sup>90</sup> “to consult with his lawyer with a reasonable degree of rational understanding” and “a rational as well as factual understanding of the proceedings against him.”<sup>91</sup> *Dusky* itself does not mention mental disorder in connection with this test, but most state statutes assume that

84. DSM-IV, *supra* note 6, at 243.

85. *Id.* at 416-17 (characterized by persistent fear of one or more social situations).

86. *Cf.* Robert Farr, *A Mental Health Program for the Mentally Ill in the Los Angeles Skid Row Area*, in *TREATING THE HOMELESS: URBAN PSYCHIATRY’S CHALLENGE* 65, 71 (Billy E. Jones ed., 1986) (describing research finding that the vast majority of homeless people in Los Angeles “would rather live in filth and be subjected to beatings and violence than to be institutionalized even in our finest mental hospitals”).

87. Thomas Grisso & Paul S. Appelbaum, *The MacArthur Treatment Competence Study. III: Abilities of Patients to Consent to Psychiatric and Medical Treatments*, 19 *LAW & HUM. BEHAV.* 149, 171 (1995) (finding that, on any one of three competency measures used, only 25% of schizophrenic patients were “impaired,” and that even when all competency measures were combined, only 52% of schizophrenic patients were “impaired,” compared to 12% of patients suffering from angina).

88. MICH. COMP. LAWS ANN. § 330.1400(g) (West 1999).

89. *See, e.g.*, CAL. WELF. & INST. CODE § 5008(h)(1) (West 1998) (defining gravely disabled as “[a] condition in which a person, as a result of a mental disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter”). Interestingly, Michigan has pretty much the same commitment criterion. *See* MICH. COMP. LAWS ANN. § 330.1401 (West 1999).

90. 362 U.S. 402 (1960).

91. *Id.* at 402.



mental illness is the usual cause of incompetency.<sup>92</sup> Given *Dusky*'s language, the apparent purpose of requiring proof of mental disorder in this context is to ensure that any inability to understand the criminal process or make decisions about it is the result of irrationality rather than ignorance or intransigence.

If mental disorder is defined at all in competency statutes, it is described in language similar to that found in the jurisdiction's commitment statute. In this setting, the "Michigan language" is somewhat better at implementing the law's objectives, at least with respect to "adjudicative competency," which looks at the individual's ability to understand and communicate about the process.<sup>93</sup> A person who cannot understand the charges or talk to his attorney because of substantial impairments in "judgment" or the "ability to recognize reality" is in all likelihood "irrational" in the sense used by *Dusky*. But the language is *not* very helpful in determining who is lacking in "decisional competency," that is, competency in the context of making an important decision in the criminal process.<sup>94</sup> Assume the defendant wants to plead guilty or waive an insanity defense and that the decision is against the attorney's advice. How do we figure out when such decisions are "irrational"? The Michigan language is useless in this situation. It does not tell us whom among those who are significantly impaired in judgment, behavior, or ability to recognize reality should have their control over these decisions taken away, unless we say that all of these people, because of their resistance to their attorney's advice, are irrational.<sup>95</sup> The tautological nature of that solution suggests the problem with the definition, which once again proves too imprecise.

Current laws dealing with mental disability and deprivations of liberty do not do a good job defining legally relevant mental disorder. They do a bad job because they are insufficiently attentive to the specific role mental disorder plays in specific contexts. Any attempt to revise the definition of legally relevant mental disorder needs to begin with a better conceptualized view of these roles.

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92. See, e.g., FLA. STAT. ANN. § 916.12(2) (West 2001) (In determining competency, "[t]he experts shall first determine whether the person is mentally ill.").

93. See Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539, 550-51 (1993) (describing "competency-to-assist," or adjudicative competency, as the capacity to understand the criminal process and communicate relevant facts to the relevant players in the legal system).

94. *Id.* at 554-60 (describing "decisional competency" as the capacity to make a particular decision).

95. Even Professor Bonnie, who places great emphasis on whether the defendant disagrees with his attorney for purposes of determining competency, see *id.* at 579, would not consider the fact of disagreement *alone* grounds for incompetency. *Id.* at 579-80.

### III. MENTAL DISORDER AND DEPRIVATIONS OF LIBERTY—A SUMMARY OF SEVERAL PROPOSALS

The legal objectives sought to be achieved by the insanity defense, police power commitment, and incompetency determinations are obviously and importantly different. These three settings represent what I have called the punishment, prevention, and protection models of government intervention.<sup>96</sup> The insanity inquiry takes place at a criminal proceeding where the primary goal of the law is to determine whether punishment is merited. Police power commitment is a “civil” process aimed not at punishment but at specific deterrence, incapacitation, and (perhaps) rehabilitation. Competency determinations, whether they take place in connection with civil commitment or the criminal process, are meant to ensure autonomous decision making. The first inquiry is retrospective, the second prospective, and the third focus primarily on present mental status.

Beyond these basic propositions, much is hotly disputed. Reactions to the insanity defense have ranged from proposals to replace it with a narrow “mens rea alternative”<sup>97</sup> to judicial formulations that excuse any crime that is the “product” of mental disease or defect.<sup>98</sup> Some have advocated abolition of civil commitment on the ground that people with mental illness are not especially lacking in control,<sup>99</sup> while others think it should be expanded to any dangerous person with a mental abnormality,<sup>100</sup> and still others believe it should be extended to any mentally ill person who needs mental health treatment, dangerous or not.<sup>101</sup> Some believe incompetency should be defined in terms of whether the person can register a choice,<sup>102</sup> while others come close to adopting the position that any person who disagrees with a doctor or lawyer is incompetent.<sup>103</sup>

96. Christopher Slobogin & Mark Fondacaro, *Rethinking Deprivations of Liberty: Possible Contributions from Therapeutic and Ecological Jurisprudence*, 18 BEHAV. SCI. & L. 499, 500-01 (2000).

97. See MONT. CODE ANN. § 46-14-201(2) (2001) (limiting acquittal on mental disorder grounds to proof that “due to a mental disease or defect the defendant did not have a particular state of mind that is an essential element of the offense charged”).

98. See *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

99. Stephen J. Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 CAL. L. REV. 54, 60 (1982) (arguing that involuntary commitment ought to be abolished because “the assertion that the crazy behavior of mentally disordered persons is compelled, in contrast to the freely chosen behavior of normal persons, is a belief that rests on commonsense intuitions and not on scientific evidence”).

100. Cf. CAL. PENAL CODE §§ 2960-2981 (West 1999).

101. Cf. Darold A. Treffert, *The Obviously Ill Patient in Need of Treatment: A Fourth Standard for Civil Commitment*, 36 HOSP. & COMM. PSYCHIATRY 259 (1985).

102. THOMAS SZASZ, *INSANITY: THE IDEA AND ITS CONSEQUENCES* 249-50 (1987).

103. Cf. Grant H. Morris, *Judging Judgment: Assessing the Competence of Mental Patients to Refuse Treatment*, 32 SAN DIEGO L. REV. 343, 432 (1995) (finding in a study of competency determinations that

Despite the highly contested nature of these disputes, one should not forgive the law for failing to define mental disorder precisely. The law's continued vague assertions that people with mental disorder can be treated differently, without identifying more clearly in what sense they are different for legal purposes, has resulted in normatively unsatisfying judgments, unnecessary deprivations of liberty, and unfair stigmatization. The task of figuring out legally relevant differences between those we call "disordered" and those we do not is a hard one, but worth the effort.

In previous work, I have offered my take on these issues. Here, I will only outline my arguments. The primary purpose will be to compare and contrast the types of dysfunction that I think are relevant in the insanity, commitment, and criminal competency contexts with other approaches.

### A. *Insanity: Integrationism*

In general terms, the purpose behind the mental disorder predicate in insanity cases is clear. Mental disorder is thought to diminish culpability, determination of which is the primary focus of criminal punishment. As the above discussion suggests, however, the law has not very accurately specified the type of mental disorder that is relevant to the culpability inquiry.

Partly for that reason, I have argued that the insanity defense should be abolished and that mental illness should only be relevant to culpability determinations to the extent it leads to a lack of mens rea or to beliefs that sound in justification or duress.<sup>104</sup> More specifically, I have suggested that there be four, and only four, excusing conditions: (1) the absence of intent with respect to an element of the crime (i.e., the lack of mens rea defined subjectively, in terms of what the defendant actually knew or was aware of); (2) a mistaken belief about circumstances that, had they occurred as the person believed, would amount to legal justification; (3) a mistaken belief that conditions exist that amount to legally recognized duress; and (4) ignorance of the concept of crime (as in the case of infants).<sup>105</sup> Any of these conditions might result from "mental illness," but they might also exist in the absence of any type of mental disorder.

I call this approach "integrationist" because it accords people who suffer from mental illness the same defenses available to people who are not mentally ill under modern criminal law statutes, no more and no less. Because

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"[m]ost psychiatrists equated incompetence with either their finding of mental disorder or the patient's unwillingness to acknowledge mental disorder" and that psychiatrists "often viewed any patient objections [to proposed treatment] as irrational").

104. Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199 (2000) [hereinafter *An End to Insanity*].

105. *Id.* at 1202-07.

these modern statutes provide an excuse for offenders who do not intend or understand the consequences of their actions and for those who honestly believe justificatory or coercive situations exist;<sup>106</sup> they provide a wide array of grounds for exculpation of offenders who are mentally ill. For instance, the person whose psychosis leads him to believe that someone else's apartment is his own or who thinks that he is killing a nonhuman lacks the mens rea for burglary and homicide, respectively. Paranoid individuals who commit violent crime because they delusionally believe they are being threatened with deadly force would also often have a defense. Similarly, the person suffering from command hallucinations who is told by God to commit a crime could be excused, depending upon the perceived consequences of disobedience. To use a recent example, if Andrea Yates believed that she needed to kill her children to make sure they went to heaven instead of hell, she too would have a defense under the integrationist approach.<sup>107</sup>

On the other hand, individuals who might be insane under current insanity tests because of a "lack of appreciation" or "lack of control" but who intended to commit their crime and lacked motivations that sounded in justification or duress would not be excused under this approach. For example, John Hinckley would not have a defense, assuming, as asserted by his attorneys at trial, that his motivation for trying to kill President Reagan was solely to impress the actress, Jodie Foster.<sup>108</sup> Jeffrey Dahmer (the man who ate his dead victims), Ted Kaczynski (the "Unabomber"), and David Berkowitz (the "Son of Sam" serial rapist and killer) would not be excused either, despite the "irrationality" of their crimes and any "compulsions" that

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106. See, e.g., MODEL PENAL CODE § 2.02 (defining mens rea in terms of actor's *purpose, knowledge, awareness of risk, or negligence*, the latter of which requires analysis of "*circumstances known*" to actor); § 2.09(1) (defining duress in terms of whether a person was coerced by unlawful force which "a person of reasonable firmness in his situation would have been unable to resist" and noting in commentary that the latter provision is meant to "give effect to the defense when an actor *mistakenly believes* that a threat to use unlawful force has been made"); § 3.04(2)(c) (permitting use of deadly force whenever "*the actor believes* such force is necessary to protect himself against death," serious bodily harm, kidnaping or sexual intercourse compelled by force or threat); § 4.02(1) ("Evidence that the defendant suffered from a mental disease or defect is admissible *whenever* it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense."); § 210.3(1)(b) (defining manslaughter as homicide "committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse, . . . reasonableness [to] . . . be determined *from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be*") (emphasis added).

107. See Carol Christian, *New Witness Challenges Yates' Sanity*, HOUS. CHRON., Mar. 6, 2002, available at <http://www.chron.com/cs/CDA/story.hts/topstory2/278348>.

108. REISNER ET AL., *supra* note 29, at 539 (noting that, according to defense experts, "on the day of the assassination Hinckley was preoccupied with two things: 'the termination of his own existence' and accomplishing a 'union with Jodie Foster through death, after life'").

may have driven them to commit them.<sup>109</sup> Psychopathic offenders who might be said to be substantially unable to appreciate the wrongfulness of their conduct or impulsive (but intentional) offenders who assert that they were unable to control their actions would clearly not have defenses under an integrationist approach.<sup>110</sup>

The central justification for integrationism is that the special defense of insanity is no longer normatively required now that modern criminal codes have subjectified mens rea and the traditional affirmative defenses. Those defenses are necessary and sufficient grounds for recognizing the exculpatory effect of mental illness. In contrast, mentally ill people who commit crime with the requisite mens rea and in the absence of justificatory or coercive rationales are not provably different in terms of their perceptions or control over their behavior than many “normal” individuals who commit crime, such as those who offend because they do not like the victim, “lose it” momentarily, or act under the influence of other, more dominant offenders.<sup>111</sup> The intuition that mentally ill people are qualitatively different in terms of their ability to avoid crime is undermined by the fact that mentally ill people offend at no greater rate than the general population;<sup>112</sup> even most of those with serious symptoms do not commit crime.<sup>113</sup>

I have defended the integrationist approach at length elsewhere.<sup>114</sup> There are two aspects of it that I want to emphasize here. First, this version of excuse does not require proof of a particular “mental disease or defect” or, for that matter, any mental disease or defect; the important variable is the motivation for the crime, not the diagnosis. Second, following from the first point, the focus of culpability analysis under the integrationist approach is the precise content of the offender’s thought, not whether, to use the Michigan

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109. Christopher Slobogin, *The Integrationist Alternative to the Insanity Defense: Reflections on the Exculpatory Scope of Mental Illness in the Wake of the Andrea Yates Case*, 30 AM. J. CRIM. L. \_\_\_\_ (forthcoming 2003) [hereinafter *Integrationist Alternative*].

110. See *id.*

111. See *An End to Insanity*, *supra* note 104, at 1230-37.

112. See, e.g., Henry Steadman et al., *Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, 55 ARCHIVES GEN. PSYCHIATRY 393, 393 (1998) (finding no significant difference between violence rates for discharged patients and non-mentally ill members of the community, once analysis controlled for presence of substance abuse).

113. See Paul Appelbaum et al., *Risk Assessment Study*, 157 AM. J. PSYCHIATRY 566 (2000) (reporting data indicating that delusions do not increase the overall risk of violence in persons with mental illness). A large literature also suggests that people with delusions who *do* commit crime are most often those who perceive that someone intends to do them harm, see Dale E. McNiel, Jane P. Eisner & Renee L. Binder, *The Relationship Between Aggressive Attributional Style and Violence by Psychiatric Patients*, 71 J. CONSULTING & CLINICAL PSYCHOL. 404 (2003), precisely the type of person most likely to be excused under the integrationist approach.

114. See *An End to Insanity*, *supra* note 104; *Integrationist Approach*, *supra* note 109.

language, there is a “substantial impairment” in judgment, emotions, ability to recognize reality or control of behavior. The latter considerations are relevant only to the extent they cast light on the extent to which the offender possessed the mens rea or was motivated by beliefs that sound in justification or duress.

### *B. Police Power Commitment: Undeterrability*

Above it was noted that there is significant dispute over the proper role of mental disorder in justifying police power commitment. Many commentators have argued that if preventive detention is permissible at all it is justifiable only for those who are so lacking in autonomy that they would be considered insane if they committed an offense.<sup>115</sup> In contrast, the Supreme Court in *Hendricks* held that even non-insane individuals may be subject to long-term police power commitment if they have a mental abnormality that renders them “dangerous beyond their control.”<sup>116</sup> Since the Court clearly contemplated that convicted sex offenders would be committable under this standard, it rejected the proposition that mental dysfunction akin to that required for insanity is a prerequisite to commitment.<sup>117</sup>

My position falls somewhere between these two stances.<sup>118</sup> I believe that police power commitment is permissible only for those who are undeterred by the prospect of serious punishment. Most criminal actors would not commit crime if they knew they would be caught and subject to serious punishment. But two categories of individuals commit crime even when apprehension is likely, and thus are undeterrable in the sense used here: (1) those who engage in criminal conduct unaware that it is criminal or convinced that it is not; and (2) those who engage in criminal conduct despite awareness of a very high likelihood they will suffer a serious loss of liberty or death as a result.<sup>119</sup> The people in these two categories either cannot or will not abide by the law, and thus are undeserving of the respect that criminal punishment, which is premised on the assumption that people have the capacity to be law-abiding and will act accordingly, grants most individuals.

The first group would be comprised primarily of individuals who suffer from serious mental disability, one that leads them characteristically either to be unaware they are engaged in antisocial conduct or to believe their crimes or contemplated crimes are justified or excused. Included in this group might

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115. See *supra* note 68.

116. *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997).

117. See *id.*

118. See Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U.L. REV. 1 (2003) [hereinafter *Jurisprudence of Dangerousness*].

119. *Id.* at 40-48.

be anyone who is excusable under the integrationist approach, but it might also include those who believe they are justified in acting even though those beliefs would *not* sound in justification or duress (which may have been the case with John Hinckley, for instance<sup>120</sup>). The people in this category are not deterrable by the prohibitions of the criminal law because they (erroneously) think their contemplated actions are not wrongful. Thus, they can be committed as dangerous, even though some of them (like Hinckley?) could also be punished if they were to commit crime.

The second group of undeterrable individuals would be comprised of individuals who know their conduct is criminally prohibited but are characteristically willing to commit it despite being virtually certain of serious punishment or similar consequence. Captured by the “policeman-at-the-elbow” rubric,<sup>121</sup> it would only apply to a small group of especially blatant sex offenders and other individuals who are willing to choose crime over freedom.<sup>122</sup> Within the latter group might be included terrorists who are willing to commit crime despite certain death.<sup>123</sup> All of these individuals are unaffected by the prospect of punishment, and thus are undeterrable in the sense used here.

The undeterrability predicate for police power commitment, like the insanity predicate preferred by commentators and the Court’s inability-to-control concept, is deeply controversial. I defend it and critique the other approaches at greater length elsewhere.<sup>124</sup> Again, the important point for present purposes is the nature of the inquiry posed by the undeterrability notion. The goal is not to find a particular diagnosis or a more global “significant impairment” in cognition or volition, but rather to discern whether the individual is likely to believe that his or her criminal actions are not criminal or is likely to choose to commit them even knowing of a high risk

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120. See *supra* note 108.

121. See *United States v. Kunak*, 17 C.M.A. 346, 357-58 (1954) (describing this test).

122. See, e.g., *In re Kunshier*, No. C7-95-1490, 1995 Minn. Ct. App. LEXIS 1422, at \*\*2-3 (Minn. Ct. App. Nov. 21, 1995) (finding offender raped victim while being actively pursued by the police); Alan Held, *The Civil Commitment of Sexual Predators—Experience Under Minnesota’s Law*, in *THE SEXUAL PREDATOR: LAW, POLICY, EVALUATION AND TREATMENT* 2-1, 2-19 (Anita Schlank & Fred Cohen eds., 1999).

123. Cf. Zacarias Moussaoui, sometimes described as the “twentieth hijacker” and currently on trial for conspiracy to commit terroristic acts in connection with the events of September 11, 2001, who has declared himself “a slave of Allah,” prays for the destruction of the United States, and wants to “fight against the evil force of the federal government.” John Gibeaut, *Prosecuting Moussaoui*, A.B.A. J., July 2002, at 38. He has stated in court documents that he would be “delighted” to blow up the World Trade Center if it were rebuilt. Philip Shenon, *The Nation at War: The Terror Suspect Man Charged in Sept. 11 Attacks Demands that Al Qaeda Leaders Testify*, N.Y. TIMES, Mar. 22, 2003, at B12 (also noting Moussaoui’s “continued allegiance to Al Qaeda and his commitment to the use of violence”).

124. Slobogin, *supra* note 118, at 34-48.

that one's life or liberty will be sacrificed. As with the integrationist approach to culpability assessments, the content of the person's motivations is the focus of the undeterrability evaluation.

*C. Competency Determinations: Basic Rationality and Basic Self-Regard*

Virtually everyone agrees that to be competent to make decisions about treatment or about matters that arise in a criminal trial, the individual must understand the basic risks and benefits of the decision and its alternatives. The more difficult determination concerns when a particular decision is "rational," to use *Dusky's* language. In *Godinez v. Moran*,<sup>125</sup> the Supreme Court came close to holding that an understanding of the risks and benefits is *all* that is necessary for a rational decision.<sup>126</sup> At the other end of the spectrum is the position that only a "reasonable" decision, defined as one the reasonable doctor or lawyer would make, is rational. In between are at least two other standards. The "basic rationality" standard requires a finding of competency unless the reasons for a decision are based on a clearly false assessment of the risk and benefits. The "appreciation" standard takes a more global approach, examining whether the decision is significantly affected by pathological processes.<sup>127</sup>

Not surprisingly, given its focus on the reasons for acting, I favor the basic rationality approach, but with a twist. More specifically, I have argued that competency to make decisions ought to be defined in terms of "basic rationality and basic self-regard."<sup>128</sup> Basic rationality requires non-delusional reasons for the decision (in addition to an understanding of the relevant information). Basic self-regard requires a willingness to exercise autonomy, which can usually be demonstrated by a willingness to consider alternative scenarios.

Under the basic rationality and self-regard standard, Colin Ferguson's decision to fire his attorneys because they would not insist on his innocence was incompetent because he fervently believed he did not commit the crime

125. 509 U.S. 389 (1993).

126. *Id.* at 401 n.12 ("The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the *ability* to understand the proceedings" (citing *Drope v. Missouri*, 420 U.S. 162, 171 (1975))). The Court went on to hold that a decision must also be "knowing," which it defined as a determination "whether the defendant actually *does* understand the significance and consequences of a particular decision." *Id.* (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975)). The "knowing" requirement might call for something more than an understanding of the proceedings, but it is worth noting that the Court ultimately held that Moran, who was severely depressed at the time he waived counsel and pleaded guilty, made a "knowing" decision. *Id.* at 410-11 (Blackmun, J., dissenting).

127. The basic rationality and appreciation tests are taken from Bonnie, *supra* note 93, at 571-76.

128. Christopher Slobogin & Amy Mashburn, *The Criminal Defense Lawyer's Fiduciary Duty to Clients with Mental Disability*, 68 FORDHAM L. REV. 1581, 1597-98 (2000).



despite overwhelming evidence that he gunned down six individuals on the Long Island Railway.<sup>129</sup> Richard Moran, the petitioner in *Godinez v. Moran*, would also be incompetent because he “wasn’t very concerned about anything” when he pleaded guilty to four capital murder charges and sat through his capital sentencing hearing without presenting evidence.<sup>130</sup> Ferguson lacked basic rationality, while Moran lacked basic self-regard. Because of their incompetency, they can be prevented from acting on their decisions.

The same standard would apply to *parens patriae* civil commitment. For instance, also incompetent under the basic rationality standard is the person who refuses treatment because he believes he is Jesus Christ and is immune from disease, both patently false beliefs. As a result of this incompetence, the faux Jesus could be involuntarily hospitalized and treated under the *parens patriae* commitment authority.

On the other hand, a person who rejects treatment because of its acknowledged side effects is not incompetent under the basic rationality standard even if, contrary to the opinions of all the “experts,” he also asserts he is not mentally ill. The latter assertion, standing alone, is not provably false; only if the person denies obvious specific symptoms might basic rationality be lacking. The same might be said about Ted Kaczynski’s refusal to allow mental illness defenses to be raised in his capital murder case, if the reasons for his refusal were, as he suggested in his Manifesto and elsewhere, that he would rather die than be labeled “mentally ill.”<sup>131</sup> That calculus may seem strange to us, but in the competency context it is Kaczynski’s values that are important, not ours. The mental illness label is too inaccurate to allow us to fix it absolutely on someone like Kaczynski. A standard based on the existence of pathological process (the appreciation test) pays too little warrant to the person’s desires and suggests that a person with serious illness can never make a competent decision about anything. A standard based on “lack of insight” (the test often used by clinicians) can easily become a proxy for a straightforward reasonableness inquiry. The person’s specific reasons for a given decision must be *demonstrably* false to render them incompetent under the basic rationality and self-regard standard.<sup>132</sup>

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129. *Id.* at 1608-09 (describing *Ferguson* case).

130. *Id.* at 1607-08 (describing *Moran*’s case).

131. See Stephen J. Dubner, *I Don’t Want to Live Long. I Would Rather Get the Death Penalty Than Spend the Rest of My Life in Prison*, TIME, Oct. 18, 1999, at 44, 46 (“[H]e will not tolerate being called, as he put it, ‘a nut,’ or ‘a lunatic’ or ‘a sicko.’ He says he pleaded guilty last year only to stop his lawyers from arguing he was a paranoid schizophrenic . . .”); Theodore Kaczynski, *Unabomber’s Manifesto*, WASH. POST, Sept. 19, 1995, <http://www.soci.niu.edu/~critcrim/uni/uni.txt>>para.168 (“To many of us, freedom and dignity are more important than a long life or avoidance of physical pain.”).

132. This position has also been strongly argued in ELYN SAKS, *REFUSING CARE: FORCED TREATMENT AND THE RIGHTS OF THE MENTALLY ILL* (2002). Professor Saks contends that only people who

Further defense of the basic rationality and basic self-regard approach is undertaken elsewhere.<sup>133</sup> Once again, the important point for now is that the test rests on an assessment of thought content. Incompetency exists only if a person acts for delusional reasons or is unwilling to give any reasons or consider alternatives. Pathology is relevant only to the extent it is associated with these types of aberrant thought content.

#### IV. A COMPARISON OF FOUR MODELS FOR DEFINING LEGALLY RELEVANT MENTAL DISORDER

The previous section made clear that the inquiries that I think ought to take place in implementing the punishment, prevention, and protection models of government-sponsored liberty deprivation—the integrationist, undeterrability, and basic rationality and self-regard inquiries—all depend on an assessment of thought content. It should also be clear by now that the account these proposals give of when a person should be held responsible for crime, subject to preventive detention, or considered incompetent is a relatively “thin” one. Using the language of the Michigan formulation, the focus is primarily on the individual’s capacity to recognize reality. Given little weight in these proposals are a number of other factors that might be considered relevant to these determinations, including the quality of the person’s thought process and the person’s character and emotional makeup.

For instance, a number of commentators have argued that criminal responsibility (and therefore preventive detention under schemes that require that intervention be reserved for the insane) should focus on the *consistency and coherence of one’s thoughts*, rather than simply the reasons one might give for the conduct.<sup>134</sup> Similarly, those who have tried to conceptualize competency have thought it important to measure a range of cognitive skills,

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lack understanding of or have “patently false beliefs” about the proposed action should be found incompetent. *Id.* at 185. She also argues that, under this standard, “denial of mental illness does not disqualify one from competency,” because the person “may simply not be willing to admit something that is so stigmatizing,” because denial is “a common, understandable, and quite adaptive defense,” and because “mental illness diagnoses are simply less certain than many physical illness diagnoses.” *Id.* at 190-91 (footnotes omitted). However, under the standard as I would apply it, denial of specific symptoms that clearly exist (e.g., hallucinations, delusions) would lead to a finding of incompetency. *Cf.* Xavier F. Amador & Andrew A. Shiva, *Insight into Schizophrenia: Anosognosia, Competency, and Civil Liberties*, 11 GEO. MASON U. CIV. RTS. L.J. 25, 27 (2000) (noting this distinction).

133. Slobogin & Mashburn, *supra* note 128, at 1598-1610.

134. MOORE, *supra* note 27, at 100-08 (arguing that one must look at the “intelligibility” of desires and beliefs, their consistency with one another, and the extent to which they logically cohere with and are implied by one another); SCHOPP, *supra* note 68, at 165-66 (describing “the need for standards of criminal responsibility framed in terms of impaired process, rather than belief content” and concluding that “the major psychological disorders that provide the most plausible bases for exculpation under the insanity defense are characterized by distortion of psychological process,” not just “inaccurate belief content”).

including the person's ability to seek information and to imagine the consequences of one's decisions.<sup>135</sup> Using the Michigan formulation for mental disorder, these approaches are concerned about whether there is a "significant impairment in judgment," although they operationalize that concept somewhat more precisely.

Others' accounts of criminal responsibility and competency, as well as the Supreme Court's account of undeterrability,<sup>136</sup> additionally contemplate some attempt to measure the *strength of one's urges*, either toward criminality or toward harming oneself.<sup>137</sup> A person is mentally disordered if his or her actions, whether they involve commission of crime, resisting treatment, or waiving an attorney, are "compelled" or strongly influenced by psychological or characterological forces, which in turn may be the product of biology or the environment.<sup>138</sup> In the Michigan formulation's terms, these approaches attempt to determine whether there is a significant impairment in behavior.

Still other legal authorities have appeared to look solely at the *externally discernible dysfunction* that results from the disorder. Thus, some have advocated giving exculpatory effect to *any* identifiable disorder that causes crime.<sup>139</sup> In the *parens patriae* setting, some courts have defined mental disorder simply in terms of whether it causes inability to provide for one's basic needs.<sup>140</sup> The analogue to the latter approach in the Michigan formulation is

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135. See, e.g., Thomas Grisso et al., *The MacArthur Treatment Competence Study. II: Measures of Abilities Related to Competence to Consent to Treatment*, 19 LAW & HUM. BEHAV. 127, 134-36 (1995) (discussing a competency instrument that seeks to measure reasoning capacity by examining ability to seek information, generate and weigh consequences, and engage in consequential, comparative, complex, transitive, and probabilistic thinking).

136. See *supra* note 72.

137. See REISNER ET AL., *supra* note 29, at 523-24 (noting that development of the irresistible impulse test for insanity grew out of concern that purely cognitive tests did not recognize the compelling influence of mental disorder).

138. See, e.g., Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 U.C.L.A. L. REV. 1511, 1524 (1992) (arguing that "the most persuasive conception of a moral agent's necessary attributes cannot be derived solely from an account of the conditions of knowledge, reason, and control that must be satisfied before we can fairly attribute culpable conduct to the actor" and advancing "a normative, *character-based* conception of moral agency").

139. KARL MENNINGER, *THE CRIME OF PUNISHMENT* 253-68 (1968). The original *Durham* rule, see *supra* note 51, is the best formal legal example of this approach. It was first proposed by Isaac Ray. See HENRY WEIHOFEN, *THE URGE TO PUNISH: NEW APPROACHES TO THE PROBLEM OF MENTAL IRRESPONSIBILITY FOR CRIME* 5 (1956). As noted earlier, the *Durham* court later tried to limit the definition of mental disease or defect for purposes of the insanity defense. See *supra* note 51.

140. See, e.g., *In re Boyer*, 636 P.2d 1085, 1088-89 (Utah 1981) (construing the formulation "[in]capacity to make or communicate responsible decisions" in guardian statute to mean an impairment that renders the person "unable to care for his personal safety or unable to attend to and provide for such necessities as food, shelter, clothing, and medical care, without which physical injury or illness may occur").

its reference to significant impairment in the ability “to cope with the ordinary demands of life.”

For simplicity sake, I am going to refer to these competing approaches as the *process*, *predisposition*, and *external* models of disorder and to my approach as the *content* model of disorder. This section looks at these models more closely. It does so first from a philosophical perspective. It then discusses practical concerns, specifically issues relating to ease of application and the impact of these various approaches on the lives of people with mental illness.

#### A. *The Legal Relevance of the Four Models*

At the risk of some confusion, note first that the process, predisposition, and external models of legally relevant disorder match the three approaches to clinically-defined disorder described at the beginning of this article (which I called the process, etiological, and effects categorizations).<sup>141</sup> The content model has no direct clinical analogue. More importantly for present purposes, each of the four legal models have difficulties capturing the legally relevant considerations connected with mental disorder, a point which is best made by looking at the predisposition model first, followed by the external, process, and content models.

The primary philosophical problem with the predisposition model of disorder is that it does not fit well with a legal system premised on free will and autonomous decision making. All behavior is caused, if not by biology or character, then by environment. While some behavior may seem “over-caused,” in fact predispositions and compulsions cannot be sensibly distinguished from mere “causes” (outside of those situations where a person is literally not in control of his or her body<sup>142</sup>). Consider the following questions. Is a person with severe schizophrenia who commits rape more “compelled” than a person with pedophilia or a person who rapes out of stress and anger? Is a person who reports strong urges to act or to make a particular decision more volitionally impaired than a person who is unaware of his or her urges?<sup>143</sup> Is a person who commits a criminal act that is “out-of-character” (ego-dystonic) acting less autonomously because it is so out of the ordinary,

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141. See *supra* text accompanying notes 25-30.

142. See generally Deborah Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 344-51 (2002) (discussing limited scenarios in which offender's actions are truly “involuntary” because of unconsciousness).

143. Cf. *Pollard v. United States*, 282 F.2d 450 (6th Cir. 1960) (reversing conviction of police officer whose experts asserted he was insane because he was driven to commit a series of robberies by his unconscious desire to be punished for not protecting his wife and child, who were brutally murdered when he was not at home).

or is that person acting volitionally, again because it is so out of the ordinary? Is the ego-syntonic act relatively uncontrollable because it is “programmed,” or does it merely reflect an individual’s characteristic “willed” choices?<sup>144</sup> These questions are probably unanswerable. Yet given its tendency to ascribe behavior to one’s biology, character, or environment, the predispositional model of mental disorder pushes in the direction of characterizing every act and every decision as “compelled,” thus rendering the concepts of culpability, deterrability, and competency meaningless.

The external model of mental disorder undermines the premises of the legal system in a similar way. It attempts to avoid the difficulties of plumbing one’s internal psychological processes by looking solely at its manifestations in the outside world—whether a crime is committed or whether a person has become gravely disabled. Yet because of this focus on conduct, distinctions about culpability, deterrability, and competency assessments are glossed over. Unless we want to say that all crime (even premeditated burglary) and all grave disability (even that associated with homeless people who like to be homeless<sup>145</sup>) is the result of disorder, we need some method of distinguishing between causes that are “disordered” and those that are not. That analysis presumably requires resorting to some assessment of the mental states that accompany crime and grave disability.

Of course, the legal system could jettison the free will premise and the preference for autonomy. It could accept the assertion that intentionality is a myth, an *ex post* explanation of actions that are caused by forces beyond our control.<sup>146</sup> It could adopt the position that because all behavior is caused by biology, character, and environment; no one is culpable and no decisions are truly one’s own.<sup>147</sup> But these are not the law’s assumptions today, and they

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144. Consider these comments from Professor Arenella, who argues for a character-based assessment of culpability but recognizes possible problems with this approach:

[S]houldn’t we view moral agency on a continuum rather than as a bipolar “all or nothing” determination? And, if we do, should not serious deficiencies in the actor’s ability to exercise these moral capacities support a full excuse? If so, then evil could . . . turn out to be its own exemption.

Arenella, *supra* note 138, at 1613.

145. See *supra* note 86. Cf. Carl I. Cohen & Kenneth S. Thompson, *Homeless Mentally Ill or Mentally Ill Homeless*, 149 AM. J. PSYCHIATRY 816 (1992) (arguing that the distinction between “the general homeless” and the mentally ill homeless is “illusory”).

146. Cf. Denise C. Park, *Acts of Will?*, 54 AM. PSYCHOL. 461, 461 (1999). This article introduces a series of pieces—all on the topic “Behavior—It’s Involuntary”—by noting that all the pieces conclude:

[T]here are mental activations of which we are unaware and environmental cues to which we are not consciously attending that have a profound effect on our behavior and that help explain the complex puzzle of human motivation and actions that are seemingly inexplicable, even to the individual performing the actions.

147. Cf. Mark P. Fondacaro, *Toward an Ecological Jurisprudence Rooted in Concepts of Justice and Empirical Research*, 69 UMKC L. REV. 179, 186 (2000) (noting that the presumption of “traditional

will not be the law's assumptions any time in the foreseeable future, regardless of what science tells us about the causes of behavior.<sup>148</sup> In the meantime, the law should assume that one's choices are the proximate causes of behavior and define mental disorder accordingly.

Both the process and content models of mental disorder seek to accomplish that task. As already noted, the process model looks at a person's mental states in relatively global terms. As described by Michael Moore, one of its progenitors, the process model examines the intelligibility of the desires and beliefs motivating the action, as well as the consistency and coherence of those desires and beliefs.<sup>149</sup> The content model, in contrast, focuses on the intelligibility of desires and beliefs, while relegating the consistency and coherence inquiries to secondary status. Another way of understanding the contrast is through consideration of the MacArthur Network's conceptualization of competency to make treatment decisions. In its experimental work on competency, the Network developed three assessment instruments, one that measures understanding of the situation, another that measures the accuracy of the premises underlying the reasons for making a decision, and a third that gauges the ability to make rational inferences (i.e., the ability to seek information; generate, consider, and compare the consequences of particular decisions; and engage in transitive and probabilistic thinking).<sup>150</sup> The process model of disorder would consider all of these measures relevant, whereas the content model would rely solely on the first two.

If the type of mental disorder that the process model suggests the law should privilege had to be described in a single sentence, it would perhaps best be captured not by the Michigan language, the amorphous nature of which has been discussed, but the American Psychiatric Association's definition of mental disease or defect in the insanity context: "[T]hose severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality. . . ."<sup>151</sup> The content model, instead, looks at the precise way in which the person's perception or understanding of reality was impaired. More specific examples of the contrast have already been suggested. John Hinckley would probably be excused under the process

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legal doctrine [that] people are autonomous, independent, rational actors . . . is highly inconsistent with the weight of behavioral science research, which clearly demonstrates that human behavior is best understood when it is judged in context, and that behavior is a function of both personal and situational influences") (footnotes omitted).

148. Cf. HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 75 (1968) ("The idea of free will in relation to conduct is not, in the legal system, a statement of fact, but rather a value preference having very little to do with the metaphysics of determinism and free will.").

149. See *supra* note 134.

150. See Grisso et al., *supra* note 135.

151. MELTON ET AL., *supra* note 3, at 196.

model but not under the content model. Ted Kaczynski would probably be incompetent under the process model but not the content model. Those few people who are undeterrable because they would choose crime over freedom are committable under the content model but not the process model, while a large number of people who are "substantially impaired in judgment or behavior" could be committed under the latter model but not the former.

My hunch is that the process model more closely conforms with the lay notion of mental illness. Yet it also assumes that a person with severe pathology cannot act culpably, is undeterrable under all circumstances, and is significantly compromised in terms of autonomy. For reasons suggested above, I am not convinced. Again, a severely impaired person who intentionally kills, motivated by desires and beliefs that do not sound in justification or duress, is often as culpable as many other non-mentally ill people and may be just as deterrable.<sup>152</sup> A severely impaired person who nonetheless is able to refuse treatment or insist on waiving an insanity defense for nondelusional reasons is just as competent as many other non-mentally ill people.<sup>153</sup> The intuition that irrational thought process captures the gravamen of legally relevant mental illness is just that—an intuition, based on unproven beliefs about people with mental illness on the one hand and on misinformed assumptions about normality on the other.

Ultimately, choosing between the two models is a normative decision, not a scientific one. Exculpation or commitment under the process standard fails

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152. If instead we were to say that impaired people are excused because they could not control their thoughts (and so are less blameworthy) or just didn't think about the right reasons for acting (and so are undeterrable), consider these comments from H.L.A. Hart:

[A] theory that mental operations like . . . thinking about . . . [one's] situation are somehow "either there nor not there," and so utterly outside our control, can lead to the theory that we are *never* responsible . . . [f]or just as [someone] might say "My mind was a blank" or "I just forgot" or "I just didn't think, I could not help not thinking" so the cold-blooded murderer might say "I just decided to kill; I couldn't help deciding."

H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 151 (1968).

153. Consider these comments from Elyn R. Saks & Stephen H. Behnke:

It is unclear that pure or pristine reasoning plays an essential role in *all* effective decision making. Intuitive and idiosyncratic processes may actually improve decision making in certain instances (consider cases in which people dream of solutions to difficult mathematical problems, or police officers who solve a case on a "hunch"). Perhaps more important, even generally effective decision makers who indisputably have the ability to form accurate beliefs misuse statistics, misunderstand probabilities, and accord undue weight to vivid examples. They may also be profoundly affected by irrational and unconscious factors. Unless we are willing to declare most people incompetent, declaring only the mentally ill who lack reasoning skills incompetent risks unjustifiably discriminating against individuals on the basis of mental illness.

Elyn R. Saks & Stephen H. Behnke, *Competency to Decide on Treatment and Research: MacArthur and Beyond*, 10 J. CONTEMP. LEGAL ISSUES 103, 115 (1999).

to give credence to the fact that even severely impaired people can engage in isolated actions—whether they are crimes, decisions about treatment, or waivers of criminal rights—based on nondelusional reasons.<sup>154</sup> Such choices should count for more than they do under the process model. Under the content model, the person's precise motivation for acting is the important variable, not the extent to which he or she suffers from significant pathology.

It should also be noted that, compared to the process model, the content model will result in fewer findings of legally relevant mental disorder. Bruce Winick has argued that if we are serious about our preference for autonomy, we ought to prefer narrow legal definitions of mental disorder, not just on deontological grounds but because the mental disorder label undermines self-esteem and the willingness to change.<sup>155</sup> While some civil libertarians may be bothered that fewer people would be found insane under the content model than under the process model, they may be comforted by the fact that fewer will be committed and found incompetent. It is also worth remembering that the consequences of an acquittal on insanity grounds are often no better than those that follow conviction.<sup>156</sup>

### *B. Reliability Under the Process and Control Models*

For reasons discussed above, the predisposition and external models of mental disorder do not map onto the foundational premises of the legal system. The rest of the discussion will thus focus on the process and content models. Addressed here is a second consideration in choosing between the two: What is the relative feasibility of determining when a particular person is irrational (under the process model) and when a person acts for reasons that suggest a lack of culpability, deterrability, or competency (under the content model)?

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154. It is a well-known feature of mental disorders that a person who has delusions about some things can be perfectly rational about others. See, e.g., DSM-IV, *supra* note 6, at 287 (stating delusions in people with paranoid schizophrenia "may be multiple, but are usually organized around a coherent theme"); *id.* at 297 ("[A] common characteristic of individuals with Delusional Disorder is the apparent normality of their behavior and appearance when their delusional ideas are not being discussed or acted on."). Similarly, severely impaired people can still give good reasons for making certain decisions. See Morris, *supra* note 103, at 405-07 (documenting that patients whom psychiatrists thought were seriously disordered often refused medication because of side effects, and noting that such a reason "may be a rational basis to support a medication refusal").

155. Bruce J. Winick, *Reforming Competency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 CRIM. L. & CRIMINOLOGY 571, 581-82 (1995).

156. See MELTON ET AL., *supra* note 3, at 188-89 (reporting studies indicating that most people acquitted by reason of insanity spend as long or longer in the hospital than felons convicted of the same offense).



On the face of it, determining a person's reasons for acting should be easier than assessing the various, additional types of cognitive functioning that are relevant to the process model. The mental phenomena to be evaluated under the process model are much more complex than those that need to be assessed under the content model. Consistent with this logic, the MacArthur Network found that, in administering the three measures described earlier, inter-rater reliability was lower for the instrument meant to gauge reasoning process than for the other two instruments.<sup>157</sup>

That is not to say that making accurate determinations under the content model will be simple, however. First, the reasons people give for acting may be inaccurate in both a shallow and a deep sense. They are inaccurate in the shallow sense when the person lies about his or her motivations, which is not uncommon in the forensic context.<sup>158</sup> They are inaccurate in the deep sense when even honest accounts do not appear to explain one's actions or decisions. A Freudian can have a field day determining one's true motivations.<sup>159</sup>

Even if we can be reasonably sure we can trust a person's account of his or her motivations, we may often find there is more than one reason given. That is not a serious problem when the reasons all suggest nonculpability or incompetency or, conversely, when they all suggest culpability or competency. But more than occasionally that is not what happens. At one point, Andrea Yates said she killed her children because otherwise they would go to hell. At another point, she said she killed them because she did not want them to grow up to be bad teenagers.<sup>160</sup> Ms. Northern refused an operation on her gangrenous foot, despite the high possibility she might die in the absence of surgery, because she was aware that the surgery itself was life-threatening (although less so than foregoing the surgery) *and* because she thought the black color of her foot was due to soot.<sup>161</sup> These types of cases could be an argument for the process model, which places more emphasis on inconsistent, incoherent reasoning. On the other hand, these cases should probably result in a finding of mental disorder under the content model as well. If one of the reasons that

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157. Grisso et al., *supra* note 135, at 139, 144 (indicating lower inter-rater reliability for the TRAT (Thinking Rationally About Treatment) instrument than for the UTD (Understanding Treatment Disclosures), and concluding that, while "most subtests" in these two instruments and the POD (Perception of Disorder) instrument "can be scored reliably by nonprofessionals," certain TRAT subtests "may require special care and consideration"); *see also* THOMAS GRISSO & PAUL APPELBAUM, MANUAL FOR THINKING RATIONALLY ABOUT TREATMENT 19 (1993) (reporting relatively low kappa correlations when TRAT was not scored by "master scorer") (on file with author).

158. MELTON ET AL., *supra* note 3, at 44 (discussing potential for malingering in forensic assessments).

159. *Cf.* SAKS, *supra* note 132, at 187 ("[M]any patients decide to accept treatment on the basis of an unconscious fantasy that their doctor is omnipotent and will protect them from all harm.").

160. *See* Christian, *supra* note 107.

161. *Dep't Human Servs. v. Northern*, 563 S.W.2d 197, 210 (Tenn. Ct. App. 1978).

seem to explain a particular action or decision suggests legally relevant disorder, it makes sense to conclude the disorder exists.

All things considered, the content model is probably only marginally easier to apply than the process model. But that is still an argument in its favor.

### *C. Stigma and Discrimination Under the Process and Content Models*

A final consideration is the impact of the two models on those who are labeled mentally ill. The three groups of people discussed in this article are the most stigmatized, maligned groups in society.<sup>162</sup> Called “criminally insane,” “dangerous madmen” or “predators,” and “incompetent,” they are perceived as and treated like outcasts.

One argument for the content model, already alluded to, is that it subjects fewer people to these stigmatizing labels than does the process model. But the positive impact of the content model may go deeper. In particular, under the integrationist approach to culpability assessments, there would no longer be a special defense for people with mental illness; they would instead be exculpated or convicted on the same basis as those who are not mentally ill. People excused in this regime would not be “criminally insane” but acquitted because they honestly believed they were justified or did not intend their acts, grounds which should be easier for the public to swallow than a verdict of “not guilty because of mental illness,” and thus grounds that are less likely to inspire disdain or repulsion.

To a lesser extent, the content model’s application in the prevention and protection settings should also alleviate the current system’s tendency—which the process model would not alleviate—to single out people with mental illness as a special, reviled class. Undeterrability analysis of the type advanced here would base commitment of dangerous people not on mental disorder but on obliviousness toward punishment, which would encompass not only those whose mental confusion leads them to believe antisocial acts are justified, but also those “rational” individuals, like terrorists, who characteristically choose crime over freedom. A regime that permits preventive confinement of individuals who are obviously not mentally ill, at the same time it minimizes preventive confinement of those who are, is less likely than today’s commitment law (which insists on mental disorder and defines that term broadly<sup>163</sup>)

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162. See, e.g., Deborah C. Scott et al., *Monitoring Insanity Acquittes: Connecticut’s Psychiatric Security Review Board*, 41 HOSP. & COMM. PSYCHIATRY 980, 982 (1990) (describing survey response that called insanity acquittes the “most despised and feared group in society”); see generally Bruce J. Winick, *Sex Offender Laws in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 PSYCHOL., PUB. POL’Y & L. 505, 547 (1998) (discussing stigmatizing effects of “mentally ill” and “mentally abnormal” labels).

163. See *supra* notes 2 & 71-78.

to feed the public's preconception that mental illness and abnormal dangerousness are synonymous.<sup>164</sup> Similarly, the basic rationality and self-regard test would find incompetent only those whose decisions are based on patently false beliefs, suggesting, contrary to current law, that mental illness and incapacity are not inevitably linked.

None of this, by itself, will eliminate the stigma associated with mental disorder or the discrimination that results from that stigma. But at least the content model of mental disorder minimizes the law's contribution to that stigma. Indeed, it moves far in the direction of erasing "mental disorder" as a discrete predicate for laws that authorize government deprivations of liberty.

### CONCLUSION

Elimination of "mental illness" and like terms from the legal lexicon may be too radical a step at this point in time. But, as a substantial move in that direction, it is worth considering the abolition of the special defense of insanity and the orientation of commitment and competency determinations toward an evaluation of thought content and away from amorphous assessments of predispositions, dysfunction, or irrational thought process. Those modifications would be far preferable to the law's current haphazard and under-conceptualized definitions of mental disorder. They also would be more consistent with the norms that drive the punishment, prevention, and protection regimes than models of disorder based either on predisposition or dysfunctional conduct, and at least as consistent with those norms as a process model of mental disorder. Finally, compared to the process model of disorder, the content model would be easier to implement and less stigmatizing and thus, in the long run, more beneficial to all who are unfortunate enough to be labeled "mentally ill."

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164. The public's association of mental illness with dangerousness has increased dramatically since the 1950s. John Phelan et al., *Public Conceptions of Mental Illness in 1950 and in 1996: Has Sophistication Increased? Has Stigma Declined?* Paper presented at the meeting of the American Sociological Association, Toronto, Ontario (August, 1997) (cited in SURGEON GENERAL'S REPORT, *supra* note 29, at 7).