DEVELOPMENTS IN THE LAW

THE LAW OF MENTAL ILLNESS

"[D]oing time in prison is particularly difficult for prisoners with mental illness that impairs their thinking, emotional responses, and ability to cope. They have unique needs for special programs, facilities, and extensive and varied health services. Compared to other prisoners, moreover, prisoners with mental illness also are more likely to be exploited and victimized by other inmates."

HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 2 (2003), *available at* http://www.hrw.org/reports/2003/usa1003/usa1003.pdf.

"[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society . . . ."

Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(a)(7), 104 Stat. 327, 329 (codified at 42 U.S.C. § 12101 (2000)).

"We as a Nation have long neglected the mentally ill . . . ."

Remarks [of President John F. Kennedy] on Proposed Measures To Combat Mental Illness and Mental Retardation, PUB. PAPERS 137, 138 (Feb. 5, 1963).

"[H]umans are composed of more than flesh and bone . . . . [M]ental health, just as much as physical health, is a mainstay of life."

Madrid v. Gomez, 889 F. Supp. 1146, 1261 (N.D. Cal. 1995).

TABLE OF CONTENTS

I. INTRODUCTION

Three traditions have dominated mental health law scholarship: "doctrinal constitutional scholarship focusing on rights, therapeutic jurisprudence scholarship focusing on the therapeutic implications of different laws, and theoretical scholarship focusing on philosophical issues underpinning mental health law."[1] These strands are well represented in the six Parts of this Development, which focus on the interaction between mental illness and the law in its many forms. The separate Parts address the doctrines created by the Supreme Court and implemented by lower courts, federal and state legislation that enables or hinders the participation of the mentally ill in society, new institutional forms and their effects on the mentally ill, and underlying conceptual constructs about the nature of criminal punishment, competency, and active participation in society.

However, this Development does not take for granted the constructions of mental illness present in legal scholarship. The Parts delve into and recognize the law's impact on and therapeutic potential for the mentally ill, a nontrivial portion of the general population. An estimated 26.2% of Americans aged eighteen years and older suffer from a diagnosable mental disorder in a given year.[2] Because the criminal justice system has become home to many mentally ill individuals,[3] several of the Parts focus on this area. This Development notes that society has often failed to craft and interpret the law in ways that are cognizant of mental illness and sympathetic to mentally ill individuals. One might assume that the situation of the mentally ill in the legal system is continually improving as advocates demand more rights, but some Parts note that such a meliorative trend has not been present in recent years, especially in the criminal justice setting. However, the various Parts also note bright spots or opportunities ripe for legal solutions.

Part II discusses how lower courts have interpreted the Supreme Court's decision in *Sell v. United States*,[4] a case that discussed the standard for involuntarily medicating defendants in order to render them competent to stand trial. This Part finds that lower courts have on the whole misapplied *Sell*, leading to decreased protections for

---

[1] Elyn R. Saks, *Mental Health Law: Three Scholarly Traditions*, 74 S. CAL. L. REV. 295, 296 (2000).

[2] Ronald C. Kessler et al., *Prevalence, Severity, and Comorbidity of 12-Month* DSM-IV *Disorders in the National Comorbidity Survey Replication*, 62 ARCHIVES OF GEN. PSYCHIATRY 617, 617 (2005).

[3] *See* Fox Butterfield, *Prisons Replace Hospitals for the Nation's Mentally Ill*, N.Y. TIMES, Mar. 5, 1998, at A1.

[4] 539 U.S. 166 (2003).

mentally ill defendants. *Sell* set out four factors that must be met before a trial court can balance the state's interest in prosecution with the defendant's liberty interests against forced medication. Using the narratives of the defendants in two cases, Susan Lindauer in *United States v. Lindauer*[5] and Steven Paul Bradley in *United States v. Bradley*,[6] the Part focuses on the first and fourth factors of the *Sell* test. Lower federal courts have evaluated the first factor, which asks whether the government has an important interest in bringing the defendant to trial, by using the potential maximum sentence for the crime. This Part argues that such an approach is flawed, and courts should instead use the approach of *Lindauer* (set forth in an opinion written by then-Judge Michael Mukasey), which considers the totality of the circumstances in assessing the severity of an offense and whether an important government interest exists. The Part further argues that the fourth factor, whether the medication is appropriate or in the best interests of the patient given her medical condition, should be directly addressed by courts and given independent meaning, even if this inquiry requires grappling with difficult medical and legal issues.

Part III explores how *United States v. Booker*,[7] which invalidated the provisions of the Sentencing Reform Act of 1984[8] that made the Federal Sentencing Guidelines mandatory,[9] increased judicial discretion to the potential detriment of mentally ill defendants. The U.S. Sentencing Guidelines Manual deals with mental illness in only a limited way, noting that such conditions are not normally relevant to sentencing[10] and allowing departures only to a very limited extent.[11] This Part discusses two pre-*Booker* cases, *United States v. Hines*[12] and *United States v. Moses*,[13] to illustrate how the Ninth and Sixth Circuits took divergent approaches to mental illness during this period. After *Booker*, judges have the discretion to refer to the sentencing factors articulated in 18 U.S.C. § 3553(a)[14] to impose sentences outside the Guidelines framework. This Part contends that as applied to violent

---

[5] 448 F. Supp. 2d 558 (S.D.N.Y. 2006).

[6] 417 F.3d 1107 (10th Cir. 2005).

[7] 543 U.S. 220 (2005).

[8] Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

[9] *Booker*, 543 U.S. at 245 (Breyer, J., delivering the opinion of the Court in part).

[10] U.S. SENTENCING GUIDELINES MANUAL § 5H1.3 (2007).

[11] *See id.* § 5K2.0.

[12] 26 F.3d 1469 (9th Cir. 1994).

[13] 106 F.3d 1273 (6th Cir. 1997).

[14] These factors include the "nature and circumstances of the offense," "the history and characteristics of the defendant," and the "need for the sentence imposed" to do such things as "reflect the seriousness of the offense," "afford adequate deterrence," "protect the public from further crimes of the defendant," and provide the defendant "medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a) (2000 & Supp. IV 2004).

mentally ill offenders, such variances are likely to be upward ones. Noting that early sentencing decisions indicate that judges are using their discretion in this troubling way,[15] the Part puts this topic in the larger context of the purposes of criminal punishment of the mentally ill and ultimately favors a policy of post-prison civil commitment over above-Guidelines prison sentences.

The problems of the mentally ill do not end when they enter prison. Part IV examines the impact of the Prison Litigation Reform Act of 1995[16] (PLRA) on mentally ill inmates and offers interpretations of key provisions that would help lessen the law's negative effects on this vulnerable population. The PLRA's exhaustion requirement[17] places a special burden on mentally ill inmates, who may for various reasons relating to their illness be incapable of meeting the Act's stringent requirements. This Part argues for a contextual definition of availability of grievance procedures that recognizes individual capability and is sensitive to the needs of mentally ill inmates. The PLRA's "physical injury" requirement[18] similarly impairs suits by mentally ill inmates. The Part suggests that the provision should be read not to bar constitutional claims, including violations of the Eighth Amendment right to correctional mental health care. The Part concludes by documenting some of the systemic effects of the PLRA, such as the underelaboration of judicial standards caused by the reduced quantity of judicial decisions addressing PLRA provisions.

Part V looks at the Court's procedural, as opposed to substantive, focus in three areas of criminal law: mens rea, the insanity defense, and competency. It argues that in two recent cases, *Clark v. Arizona*[19] and *Panetti v. Quarterman*,[20] the Court avoided creating substantive standards to govern these important areas, instead opting for procedural regulation. This Part claims, however, that creating procedural standards without some underlying substantive norm is meaningless and gives states the incentive to provide minimal substantive protections while ensuring that procedural safeguards are in place. Although substantive lawmaking is difficult, the Court should not shy away from it, and instead should create a substantive floor for the constitutional rights of the mentally ill. The Part claims that such substantive regulation could be justified under the Eighth Amendment or the Due Process Clause of the Fifth and Fourteenth Amendments.

---

15 *See, e.g.*, United States v. Gillmore, 497 F.3d 853 (8th Cir. 2007).

16 Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321-66 (1996) (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.).

17 *See* 42 U.S.C. § 1997e(a) (2000).

18 *Id.* § 1997e(e).

19 126 S. Ct. 2709 (2006).

20 127 S. Ct. 2842 (2007).

Despite the problems discussed above, Parts VI and VII offer some hope that the rights of the mentally ill may expand through awareness and advocacy. Both Parts indicate trends that, on the whole, are likely to benefit the mentally ill — by offering mentally ill offenders treatment instead of punishment, and by protecting mentally ill individuals' voting rights.

Part VI discusses the rise of mental health courts, which focus on rehabilitation and treatment of mentally ill offenders, and considers whether this phenomenon might indicate a shift toward a more rehabilitative view of punishment in the larger criminal justice system. This Part begins by outlining the general parameters of mental health courts and discussing their considerable growth in recent years. Although the start-up costs of forming these courts may be high, these courts could offer considerable cost savings in the long run by reducing recidivism rates. Recognizing the success and potential of these courts, the federal government has increasingly provided funding.[21] Federal funding for starting mental health courts, this Part argues, may indicate the country's increased willingness to move from a punitive model of justice to a rehabilitative model. In support of this trend, the Part cites a 2003 speech by Justice Kennedy to the American Bar Association (ABA),[22] a subsequent ABA report urging greater emphasis on rehabilitation,[23] and an ABA commission developed to follow up on that report. Mental health courts are a subset of this larger trend, but some practitioners and commentators have questioned both the rehabilitative focus and the perceived decrease in procedural protections available in these courts. Despite continuing controversy, the Part concludes that the trend toward use of specialized, rehabilitative courts is increasing and is generally beneficial.

Part VII considers the disenfranchisement of the mentally ill by exploring recent legislative and case-based developments in state and federal law that indicate increased sensitivity to mentally ill individuals' right to vote. In the past, most states simply disenfranchised those under guardianship for mental illness without considering whether the illness actually affected the capacity to vote. This Part argues that, because equal access to voting is a fundamental right, procedures for disenfranchising the mentally ill should be narrowly tailored to serve a compelling state interest. In response to advocacy for reform, states have begun to tailor their laws more narrowly to the real capacities of their mentally ill citizens, both by creating forms of limited guardian-

---

[21] *See* President's New Freedom Commission on Mental Health, Exec. Order No. 13,263, 3 C.F.R. 233 (2003) (superseded 2003).

[22] JUSTICE KENNEDY COMM'N, AMERICAN BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 3–6 (2004), *available at* http://www.abanet.org/media/kencomm/rep121a.pdf.

[23] *Id.* at 24, 32–33.

ship and by changing outdated state laws and constitutional provisions. Beyond these legislative and constitutional reforms, advocates are turning to the courts as a means of changing the law. A victory in a Maine federal district court[24] by three disenfranchised women under guardianship identified some of the basic reasons that states should look to an individual's capacity to vote before disenfranchising that individual. In addition, a recent Supreme Court case, *Tennessee v. Lane*,[25] has great promise for advocates, opening the door to suits against the states for money damages resulting from the discriminatory removal of voting rights. This Part concludes by identifying possible ways to challenge remaining outdated disenfranchisement provisions and noting that the mentally ill could draw on lessons from and victories by the physically disabled.

II. *SELL V. UNITED STATES*: FORCIBLY MEDICATING THE MENTALLY ILL TO STAND TRIAL

For more than half a century, the Supreme Court has struggled to articulate the circumstances under which a court may force an individual to submit to medical procedures against his or her will.[1] In 2003, the Court concluded in *Sell v. United States*[2] that a nondangerous defendant could be forcibly medicated solely to achieve competence to stand trial, provided certain conditions, set out in a four-factor test, were met.[3] The Court offered little guidance on how to interpret these factors, and unsurprisingly, lower courts' methods of applying the *Sell* factors have varied significantly. This Part examines how lower courts have applied the *Sell* factors and argues that these courts have misinterpreted *Sell*. In order to avoid difficult questions at the intersection of medical and legal ethics, the lower courts have adopted weaker protections for the liberty interests of mentally ill defendants than what *Sell* requires.

Section A describes the decision in *Sell* and then discusses how the lower courts have applied each of the *Sell* factors. Section B focuses on the first factor, the so-called "importance" determination, and argues that courts have inconsistently and often incorrectly defined what constitutes an important state interest. Section C examines the fourth factor, whether forcible medication is medically appropriate, and argues that courts often conflate this determination with the earlier determination, under the second and third factors, of whether treatment

---

[24] Doe v. Rowe, 156 F. Supp. 2d 35 (D. Me. 2001).

[25] 541 U.S. 509 (2004).

[1] *See, e.g.*, Rochin v. California, 342 U.S. 165, 173 (1952) (holding unconstitutional the pumping of a suspect's stomach against his will to obtain evidence).

[2] 539 U.S. 166 (2003).

[3] *See id.* at 180–81.

will be necessary and effective. Section D briefly discusses the second and third *Sell* prongs, which hinge most directly on the facts of individual cases.

A. The Sell *Decision*

In the early 1990s, the Supreme Court concluded that criminal defendants and convicted inmates could be medicated against their will,[4] but only if leaving them unmedicated posed a danger to themselves or others.[5] Those cases left unresolved the question of whether a nondangerous defendant could be forcibly medicated for the sole purpose of making him or her competent to stand trial.

In *Sell*, Justice Breyer, writing for the Court, explained that medication may be forced only "in limited circumstances, *i.e.*, upon satisfaction of conditions that we shall describe."[6] The trial court first ought to consider whether there are other grounds, such as a defendant's dangerousness to himself or others, upon which to order his forcible medication.[7] If the only reason the government seeks to medicate the defendant is to make him competent to stand trial, then the court must consider four factors. First, "a court must find that *important* governmental interests are at stake" in bringing the defendant to trial.[8]

---

[4] Those cases in which a mentally ill defendant might be medicated against his will to achieve competence typically involve one of three types of psychological conditions: (1) schizophrenia, schizoaffective disorder, and other psychotic disorders; (2) bipolar and other mood disorders; and (3) melancholic depression. (Dementia is another principal psychological disorder that would render a defendant incompetent to stand trial, but because it cannot be reversed medically or otherwise, it is irrelevant to the present discussion.) Telephone Interview with Dr. Khalid Khan, Mount Sinai Sch. of Med., New York, N.Y. (Oct. 17, 2007). The characteristic symptoms of schizophrenia are "delusions," "hallucinations," "disorganized speech," "grossly disorganized or catatonic behavior," and "restrictions in the range and intensity of emotional expression . . . , in the fluency and productivity of thought and speech . . . , and in the initiation of goal-directed behavior." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 299 (4th ed., text rev. 2000). Psychiatrists estimate that 0.5% to 1.5% of the world population is schizophrenic. *Id.* at 308. Bipolar disorder is characterized by manic episodes and, sometimes, major depressive episodes. *Id.* at 382. Manic episodes are "period[s] of abnormally and persistently elevated . . . mood" that last at least one week and are severe enough to cause a "marked impairment" in occupational or social activities, involve psychotic features, or otherwise require hospitalization to prevent harm. *Id.* at 362. Many of the same medications can be prescribed for schizophrenic and bipolar patients, including Risperdal, Abilify, and Zyprexa. Researchers have not determined how these drugs work, although they believe that schizophrenia and bipolar disorder are caused by imbalances of neurotransmitters in the brain. Researchers believe these drugs regulate levels of dopamine and other neurotransmitters. *See* PHYSICIANS' DESK REFERENCE 882, 1676, 1830 (61st ed. 2007).

[5] *See* Riggins v. Nevada, 504 U.S. 127, 135 (1992); Washington v. Harper, 494 U.S. 210, 236 (1990).

[6] *Sell*, 539 U.S. at 169.

[7] *Id.* at 182; *see, e.g.*, United States v. Kourey, 276 F. Supp. 2d 580, 580–81 (S.D. W. Va. 2003) (holding forced medication to be inappropriate under *Sell*, but potentially appropriate on *Harper* grounds because the defendant was dangerous).

[8] *Sell*, 539 U.S. at 180.

Trial on a "serious" charge is an important government interest, but the government's interest may be lessened by "[s]pecial circumstances," such as if the defendant will likely be civilly committed if he is not tried or if he has already been confined for a significant amount of time.[9] Second, the trial court must conclude that the medication will be effective — that it will "*significantly further*" the goal of making the defendant competent to stand trial and that the medication's side effects are not likely to interfere with the defendant's ability to assist counsel.[10] Third, the trial court must find that no less invasive treatment is likely to produce the same result — that the medication is "*necessary*."[11] Finally, the court must determine that the medication is "*medically appropriate*, *i.e.*, in the patient's best medical interest in light of his medical condition."[12]

The Court implied that after a trial court evaluates these factors, it must then weigh these interests against the defendant's liberty interests in remaining free from unwanted medical treatment.[13] Still, the Court was somewhat ambiguous about what, if anything, a trial court must do, beyond determining whether the four factors have been met. The Court did not help matters by describing the test as a "standard"[14] while also setting a somewhat mechanical process by which courts should evaluate defendants. The proper reading of *Sell* embraces both approaches. A trial court must first ensure that each of the four factors is satisfied, and it then must weigh those factors against the defendant's Fifth Amendment liberty interest to be free from unwanted medical treatment.[15] But once the trial court has concluded that the four factors are satisfied, there is likely to be little balancing left to do. This is because there are few, if any, defendants who would be incompetent to stand trial but competent to make medical decisions. That is, the courts applying *Sell* are looking at a population that is very likely incompetent to make medical decisions and that, even if not in the criminal justice system, would have medical decisions made by a guardian or a court. Therefore, because the defendant would not otherwise be free from unwanted treatments that a third party found

---

[9] *Id.*

[10] *Id.* at 181.

[11] *Id.*

[12] *Id.*

[13] *See id.* at 183 ("Has the Government, in light of the [second through fourth factors], shown a need for that treatment sufficiently important to overcome the individual's protected interest in refusing it?").

[14] *Id.* at 180.

[15] *See id.* at 177; United States v. Schloming, Mag. No. 05-5017 (TJB), 2006 WL 1320078, at *4 (D.N.J. May 12, 2006) ("The *Sell* criteria, taken as a whole, must outweigh a Defendant's significant interest in avoiding the unwanted administration of antipsychotic drugs. . . . Each of the *Sell* criteria must be met in order to show that the Government's interests are overriding.").

medically appropriate, he or she would not have a meaningful liberty interest in this context either.[16]

B. An "Important" Government Interest

As early as age seven, Susan Lindauer claimed to have the gift of prophecy.[17] Through adulthood, she continued to believe she was the instrument of divine intervention, "suggest[ing] that she reported 11 bombings before they occurred, . . . plac[ing] herself at the center of events in the Middle East, and declar[ing] herself to be an angel."[18] A federal district judge summed up Ms. Lindauer's situation: "[E]ven lay people can perceive that Lindauer is not mentally stable."[19] In March 2004, FBI agents arrested Lindauer at her Maryland home.[20] A federal indictment charged her with four felonies: conspiracy to act as an unregistered agent of the government of Iraq, acting as an unregistered agent of Iraq, accepting payments from the Iraq Intelligence Service, and engaging in financial transactions with the government of Iraq.[21] The indictment alleged that Lindauer met with Iraqi officials in New York and Baghdad between 1999 and 2002, and that she delivered a letter on behalf of the Iraqis to the home of an unspecified government official, possibly Andrew Card, the then–White House chief of staff and a distant cousin of hers.[22] Government and defense mental health experts agreed that Lindauer was incompetent to stand trial.[23] On September 6, 2006, Judge Michael Mukasey[24] decided that *Sell* did not permit him to order Lindauer medicated against her will.[25] Two days later, Judge Mukasey ordered Lindauer released.[26]

Judge Mukasey's opinion, although atypical in its approach, provided a template for courts weighing the first *Sell* factor: the importance of the government interest in bringing the defendant to trial. Judge Mukasey began his analysis of the *Sell* factors with a remarka-

---

16 *See* Robert F. Schopp, *Involuntary Treatment and Competence To Proceed in the Criminal Process: Capital and Noncapital Cases*, 24 BEHAV. SCI. & L. 495, 503–08 (2006); *see also* CHRISTOPHER SLOBOGIN, MINDING JUSTICE 227–30 (2006).

17 United States v. Lindauer, 448 F. Supp. 2d 558, 562 (S.D.N.Y. 2006).

18 *Id.*

19 *Id.* at 564.

20 David Samuels, *Susan Lindauer's Mission to Baghdad*, N.Y. TIMES, Aug. 29, 2004, § 6 (Magazine), at 25.

21 *Lindauer*, 448 F. Supp. 2d at 560.

22 *Id.*

23 *Id.* at 559.

24 *Lindauer* was the last opinion Judge Mukasey published before retiring from the bench. On November 9, 2007, Mukasey was sworn in as the country's eighty-first Attorney General. *See Mukasey Takes Oath of Office*, N.Y. TIMES, Nov. 10, 2007, at A9.

25 *Lindauer*, 448 F. Supp. 2d at 559.

26 Anemona Hartocollis, *Ex–Congressional Aide Accused in Iraq Spy Case Is Released*, N.Y. TIMES, Sept. 9, 2006, at B1.

bly humanistic assessment of the *Sell* regime, quoting Justice Frankfurter's iconic decision in *Rochin v. California*[27]:

> Although the Court's discussion of a defendant's interest in avoiding forced psychotropic medication seems at times curiously anodyne, I think it is not inappropriate to recall in plain terms what the government seeks to do here, which necessarily involves physically restraining defendant so that she can be injected with mind-altering drugs. There was a time when what might be viewed as an even lesser invasion of a defendant's person — pumping his stomach to retrieve evidence — was said to "shock[] the conscience" and invite comparison with "the rack and the screw." The Supreme Court's rhetoric seems to have toned down mightily since then, but the jurisprudential principles remain the same.[28]

Judge Mukasey concluded that it was beyond dispute that no alternative to medication would render Lindauer competent (the third factor).[29] There was no evidence as to whether medication was particularly in Lindauer's interest (the fourth factor), but inquiry into this question was unnecessary because the judge also concluded that the government had failed to convince him by clear evidence that the government had an important interest in bringing Lindauer to trial (the first factor) or that the medicine would be effective in restoring Lindauer's competence (the second factor).[30]

The government argued that the court should conclude that it had a strong interest in bringing Lindauer to trial because of the ten-year maximum sentence Lindauer faced if convicted on even a single count.[31] Judge Mukasey disagreed.[32] In his view, "the high-water mark of defendant's efforts . . . was her delivery of a letter . . . to the home of an unspecified government official, in what is described even in the indictment as 'an unsuccessful effort to influence United States foreign policy.'"[33] "[T]here is no indication that Lindauer ever came close to influencing anyone, or could have."[34] He therefore concluded, even without evaluating whether the evidence was sufficient to secure a conviction, that the government did not have an important interest in bringing the defendant to trial.[35]

Despite the intuitive appeal of the *Lindauer* approach, it has not been adopted elsewhere. Indeed, it is at odds with what has become

---

[27] 342 U.S. 165 (1952).

[28] *Lindauer*, 448 F. Supp. 2d at 567 (alteration in original) (citation omitted) (quoting *Rochin*, 342 U.S. at 172).

[29] *Id.* at 571. The Second Circuit has ruled that the government must satisfy the *Sell* factors by clear and convincing evidence. *See* United States v. Gomes, 387 F.3d 157, 160 (2d Cir. 2004).

[30] *Lindauer*, 448 F. Supp. 2d at 571–72.

[31] *Id.* at 571.

[32] *Id.*

[33] *Id.* at 560–61.

[34] *Id.* at 571–72.

[35] *Id.* at 572.

the dominant approach. Most courts have judged the importance of bringing a defendant to trial based on the maximum penalty the defendant could face if convicted. The Fourth Circuit noted that although the *Sell* Court did not indicate how lower courts were to judge the seriousness of crimes, the Supreme Court in other contexts had condoned evaluating the seriousness of a crime based on the potential penalty a defendant faced if convicted.[36] Courts following this approach have focused on the potential maximum sentence, not the much lower probable sentence under the Federal Sentencing Guidelines.[37] Other courts that do not perform a specific analysis of a defendant's potential sentence have evaluated the seriousness of a charge based on its legislative classification.[38]

While strict adherence to legislative determinations of crime severity via maximum sentences is appealing because it creates "sharp, easily administrable lines" for judges,[39] this approach could not have been what the *Sell* Court intended. "Had it been the Supreme Court's intention to classify a charge as serious based on the maximum penalty, it could have done so."[40] Instead, *Sell* leaves the term "serious crime" largely undefined.[41] The majority of courts, which base state interest decisions on the potential sentence, appear to respect legislative decisions about the seriousness of the crime. This approach is consistent with other criminal doctrines, such as that of the Sixth Amendment jury right, that determine the seriousness of a crime by its potential sentence.[42] However, the *Sell* test for seriousness would seem to be

---

[36] United States v. Evans, 404 F.3d 227, 237 (4th Cir. 2005) (citing Duncan v. Louisiana, 391 U.S. 145, 159 (1968)).

[37] *See, e.g.*, *id.* at 237–38 (concluding that courts ought to refer to the statutory maximum, not a probable guideline range, because given the lack of a presentencing report and other information not available until sentencing, a pretrial estimate of a probable sentence would be too speculative); *see also* United States v. Palmer, 507 F.3d 300, 304 (5th Cir. 2007) (following *Evans*); United States v. Archuleta, 218 F. App'x 754, 759 (10th Cir. 2007) (same). *But see* United States v. Hernandez-Vasquez, 506 F.3d 811, 821 (9th Cir. 2007) (advising district courts to consider, among other factors, the Guidelines range, not the statutory maximum, when determining crime seriousness); United States v. Thrasher, 503 F. Supp. 2d 1233, 1237 (W.D. Mo. 2007) ("[T]he 'expected sentence' can be more fairly appraised by estimating a Guideline sentence . . . . The court should place itself in the position of a prosecutor who is fair-minded and objective. That should allow evaluation of the 'governmental interest,' not some abstraction like the statutory maximum.").

[38] *See* United States v. Kourey, 276 F. Supp. 2d 580, 585 (S.D. W. Va. 2003) ("Defendant is not facing serious criminal charges . . . . Defendant is charged with violating the terms and conditions of his supervised release imposed for his admitted commission of a Class A misdemeanor.").

[39] Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957, 1973 (2004).

[40] United States v. Schloming, Mag. No. 05-5017 (TJB), 2006 WL 1320078, at *5 (D.N.J. May 12, 2006).

[41] *See* Sell v. United States, 539 U.S. 166, 180 (2003).

[42] *See* Duncan v. Louisiana, 391 U.S. 145, 161–62 (1968); *see also* Welsh v. Wisconsin, 466 U.S. 740, 753 (1984) (imposing a higher standard for exigency on warrantless home arrests involving minor offenses); Duke v. United States, 301 U.S. 492, 494–95 (1937) (affirming the "well-settled

distinguishable from these other seriousness determinations because in other cases, the Court is concerned with whether the seriousness of the charge will entitle the defendant to certain rights, such as the right to a jury trial or indictment by a grand jury. Here, by contrast, the Court is determining whether the seriousness of the crime creates a sufficiently important state interest in bringing the defendant to trial that outweighs his or her independent right to be free from unwanted medical procedures. While the sentence length is a reasonable consideration for determining whether a defendant-protective right should apply, it is a less useful signal of whether there is a serious state interest in seeing a defendant brought to trial. Even when the defendant faces little or no jail time, the state may still have an important interest in bringing him to trial, for instance in symbolic prosecutions of high-profile defendants.[43]

Like the analogy to other situations in which courts evaluate the "seriousness" of crimes, the argument for honoring legislative intent does not quite fit the *Sell* setting either. Congress, after all, is not making individualized decisions about specific defendants, and certainly not about the specific question of whether the state has a strong interest in bringing the defendant to trial. Indeed, with the adoption of the Federal Sentencing Guidelines,[44] Congress seems to have urged the reverse: the seriousness of a crime, as judged by a sentence, cannot be determined by rote consultation of the maximum possible sentence, but can only be evaluated by looking to the circumstances of a particular offense and offender.[45] Given the broad determination that is being made here — whether or not a serious crime has been committed — reference to a potential Guidelines range is more effective, and fairer to the defendant, than reference to the statutory maximum.[46]

---

rule" that "any misdemeanor not involving infamous punishment might be prosecuted by information instead of by indictment").

[43] *See, e.g.*, Jeff Yates & William Gillespie, *The Problem of Sports Violence and the Criminal Prosecution Solution*, 12 CORNELL J.L. & PUB. POL'Y 145, 168 (2002) (advocating selective prosecution of assaults committed in the course of professional sports).

[44] Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

[45] The Sentencing Guidelines, of course, were adopted to restrain judges' sentencing discretion. *See* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993). But as modified by *United States v. Booker*, 543 U.S. 220 (2005), the Guidelines preserve a great deal of judicial discretion to tailor sentences to the severity of the crime, in light of all circumstances.

[46] In light of *Booker*, which rendered the Guidelines advisory, sentencing judges have more discretion to make individualized decisions. Still, the now nonbinding nature of the Guidelines does not mean they lose their value as indicia of crime seriousness. Indeed, the Guidelines will still be sufficiently predictive of actual sentences to make them a relevant indicator of crime seriousness. *See* Recent Case, 120 HARV. L. REV. 1723, 1730 (2007).

Sell asked the lower courts to consider the overall significance of the state interest in bringing a defendant to trial, taking into account both the seriousness of the crime and the consequences if the defendant is not brought to trial. The *Lindauer* approach is not popular among lower courts, but it appears to be the most faithful articulation of the *Sell* command. Judge Mukasey's suggestion that a *Rochin*-esque concern for defendants' Fifth Amendment liberty interests still applies must have informed his belief that judges are to make individualized determinations of the importance prong. Courts seeking to mirror Judge Mukasey's approach will need to consider the totality of the circumstances. Other judges might follow Judge Mukasey by looking at what harm the indictment alleges a defendant caused or could have caused. They might also consider the potential Guidelines sentencing range a defendant would face and the possible consequences of not bringing a defendant to trial. Courts should also consider other benefits of prosecution besides the potential incapacitation of the defendant, including the "retributive, deterrent, communicative, and investigative functions of the criminal justice system."[47] The process will not be mechanical or easy, but it will better fulfill the mandate of *Sell* than the current majority approach.[48]

C. "Medically Appropriate"

On January 30, 2003, Steven Paul Bradley, "dissatisfied with the purchase of a truck," drove by Cowboy Dodge in Cheyenne, Wyoming, and hurled a hand grenade at a group of salesmen in the parking lot.[49] "Attached to the grenade was a note [that] read[,] 'I want my $26,000.'"[50] Bradley was charged with attempted arson, possession of ammunition by a felon, extortion, and use of a firearm in a violent crime.[51] At a competency hearing, Bradley testified that he would not voluntarily take psychotropic medication that likely would have made

---

[47] United States v. Weston, 255 F.3d 873, 882 (D.C. Cir. 2001); *see also* Christopher Slobogin, *The Supreme Court's Recent Criminal Mental Health Cases: Rulings of Questionable Competence*, CRIM. JUST., Fall 2007, at 8, 10.

[48] The unavoidable consequence of the first *Sell* prong is that judges will be in the position of questioning prosecutorial decisions. The Court did not address the separation of powers implications of its holding, perhaps indicating it did not believe such review to be an incursion on Article II power. *Cf.* Eric L. Muller, *Constitutional Conscience*, 83 B.U. L. REV. 1017, 1070 (2003) (citing United States v. Miller, 891 F.2d 1265, 1272 (7th Cir. 1989) (Easterbrook, J., concurring)) (reporting Judge Easterbrook's identification of a "separation of powers concern that might arise equally in the context of judicial review of a prosecutor's exercise of his discretion to charge an offense"); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1546 (1981) ("Courts often justify their refusal to review prosecutorial discretion on the ground that separation-of-powers concerns prohibit such review.").

[49] United States v. Bradley, 417 F.3d 1107, 1110 (10th Cir. 2005).

[50] *Id.*

[51] *See id.* at 100 & nn.2–5.

him competent to stand trial: "[N]ot only did they take my money, they never gave me a truck either, and that's what the whole issue is over this here, was going out to buy a new truck, and I don't see where medication is going to help me with that."[52] The district court found that Bradley was incompetent and that the *Sell* criteria were met.[53] The court ordered Bradley to submit to the medication, on pain of civil contempt.[54] The defendant appealed from this order and the Tenth Circuit affirmed.[55]

The Tenth Circuit, however, appeared to misread *Sell* by equating the medical appropriateness of forced medication with its potential effectiveness.[56] The Tenth Circuit's approach illustrates the key difficulties in applying this fourth *Sell* factor, the medical appropriateness of treatment. The court addressed this factor first, but clearly mischaracterized it by saying that "[t]his necessarily includes a determination that administration of the drug regimen is 'substantially likely to render the defendant competent to stand trial.'"[57] The court thereby conflated the second and fourth *Sell* factors. Then, seeming to remember that there were supposed to be four factors, the court said the next factor to examine was whether "administration of the drugs is substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense."[58] Thus, the court merely created two factors out of *Sell*'s second factor, which included both whether the medication will be directly effective at restoring competence and whether the side effects from the drug will undermine its effectiveness.[59] In allowing this single factor to take up two slots, the court crowded out the distinct medical appropriateness factor.[60]

---

[52] Brief of Appellee at 10, *Bradley*, 417 F.3d 1107 (No. 03-8097), 2004 WL 3763208.

[53] *Bradley*, 417 F.3d at 1109.

[54] Brief of Appellee, *supra* note 52, at 13. In *Bradley*, the district court was not precisely in a *Sell* situation because it was not ordering that the defendant be *forcibly* medicated, only that the defendant submit to medication on pain of civil contempt. The *Sell* Court had suggested that courts consider the threat of contempt as an example of alternative mechanisms for achieving competence short of forcible mediation. *See* Sell v. United States, 539 U.S. 166, 181 (2003). On appeal, the Tenth Circuit ignored this distinction, treating *Sell* as directly applicable, *Bradley*, 417 F.3d at 1109, and so the case serves as an adequate example of the alternative approaches to *Sell*.

[55] *Bradley*, 417 F.3d at 1109, 1113.

[56] *Cf.* United States v. Lindauer, 448 F. Supp. 2d 558, 565 (S.D.N.Y. 2006) ("[T]he second element focuses on favorable and unfavorable outcomes only insofar as they affect a trial, whereas the fourth element focuses on the defendant's medical well-being in the large.").

[57] *Bradley*, 417 F.3d at 1114 (quoting *Sell*, 539 U.S. at 181).

[58] *Id.* at 1115 (quoting *Sell*, 539 U.S. at 181) (internal quotation mark omitted).

[59] *Sell* is quite clear that determining whether medication will have adverse side effects that will prevent a defendant from assisting counsel is part of the inquiry into whether the medication will be effective at rendering the defendant competent. *See* 539 U.S. at 181.

[60] This approach is well established in the Tenth Circuit. *See, e.g.*, United States v. Valenzuela-Puentes, 479 F.3d 1220, 1225–26 (10th Cir. 2007); United States v. Smith, No. 05-

Other courts have not been as cavalier as the Tenth Circuit about disregarding the fourth element, but even when they have considered it, they have tended to equate the patient's medical interest with restoring competency.[61] But given that these are separate factors, *Sell*'s implication is that medical appropriateness is a separate question with which lower courts need to wrestle, independent of the other factors.[62] Courts have been loath to address it and are perhaps somewhat dishonestly avoiding the question.[63]

Even though courts have not spent much time considering this fourth factor, it is possible to give independent meaning to the medical appropriateness prong. An initial stumbling block is that doctors may conclude that any treatment that could result in a patient being prosecuted may not be medically appropriate — such treatment could conflict with doctors' Hippocratic oath to "do no harm."[64] A definition of medical appropriateness limited to the treatment being the "right treatment for the condition," assuming the defendant was not on trial,

---

40002-01-JAR, 2007 WL 1712812, at *4 (D. Kan. June 12, 2007) (medical interest determination "includes the determination of whether administering [psychotropic medication] is 'substantially likely to render the defendant competent to stand trial'" (quoting *Sell*, 539 U.S. at 181)).

[61] *See, e.g.*, United States v. Morris, No. CR.A.95-50-SLR, 2005 WL 348306, at *6 (D. Del. Feb. 8, 2005) ("This final prong of *Sell* has been adequately addressed in the analysis of the other three prongs."). *But see* United States v. Milliken, No. 3:05-CR-6-J-32TEM, 2006 WL 2945957, at *13–14 (M.D. Fla. July 12, 2006) (evaluating appropriateness of proposed medical treatment in light of defendant's condition, independent of its anticipated effectiveness in restoring competence).

[62] *Cf.* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2536 (2007) ("[W]e have cautioned against reading a text in a way that makes part of it redundant."). The reference in *Defenders of Wildlife* is to statutory construction, but seems equally true for the interpretation of Supreme Court holdings.

[63] Courts of appeals vary in their willingness to disregard the medical appropriateness factor. The Fourth Circuit requires the government to describe in detail the prescribed treatment and requires doctors to submit testimony that the treatment is appropriate for the particular defendant. *See* United States v. Evans, 404 F.3d 227, 241–42 (4th Cir. 2005). The Second Circuit has allowed relatively conclusory testimony — that given the defendant's diagnosis, "he needs . . . treatment [with] anti-psychotics" — to satisfy the medical appropriateness prong. *See* United States v. Gomes, 387 F.3d 157, 163 (2d Cir. 2004).

[64] Psychiatrist Douglas Mossman concludes that psychiatrists can make medical appropriateness determinations because psychotropic medication would restore patient autonomy, not undermine it, and alternatively, because "[a] defendant's consent to treatment is one aspect of his larger consent to freedom under law within the original [social] contract." Douglas Mossman, *Is Prosecution "Medically Appropriate"?*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 15, 73, 77 (2005). *But cf.* Donald N. Bersoff, *Autonomy for Vulnerable Populations: The Supreme Court's Reckless Disregard for Self-Determination and Social Science*, 37 VILL. L. REV. 1569 (1992) (arguing that the courts are insufficiently deferential to autonomy concerns); Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1774–77 (1992) (suggesting the courts have been too quick to find individuals incompetent). Some argue that prosecution can be medically indicated for some psychiatric patients. *See, e.g.*, Robert D. Miller, *Ethical Issues Involved in the Dual Role of Treater and Evaluator*, *in* ETHICAL PRACTICE IN PSYCHIATRY AND THE LAW 129, 139–40 (Richard Rosner & Robert Weinstock eds., 1990) (arguing that prosecution may under some circumstances have direct therapeutic benefits).

largely avoids these difficult questions.[65] Others have argued that the medical appropriateness prong requires more difficult weighing of the competing values of justice and patient autonomy,[66] but neglect the fact that these values are entirely accounted for in the other *Sell* factors, including the test for an important state interest and the required search for effective alternatives.

Sell defines medical appropriateness as being "in the patient's best medical interest in light of his medical condition."[67] The Court intended this definition to mean more than that the treatment will be effective in rendering a patient competent to stand trial. A suitable definition is that the proposed treatment is right for the defendant's condition, given his medical history.[68]

D. "Effective" and "Necessary"

Sell factor three — whether a less intrusive, yet effective alternative is available — and factor two — whether the treatment is likely to be effective — are determinations that are closely linked to the facts of an individual case. Because of recent developments in psychopharmacology, there is likely to be progressively less dispute on these elements of the *Sell* test.

For the incompetent defendant, medical treatment will often be more effective than any alternative.[69] Although some disorders are more amenable to alternative treatments such as psychotherapy, both government and defense medical experts frequently testify that no treatment but medication has been shown to be effective.[70] And although the conditions of *Bradley* show that courts do try to coerce defendants into "voluntarily" accepting a medication order, when such

---

[65] *See* Mossman, *supra* note 64, at 35–36 (describing this view).

[66] *See id.* at 36 & n.89.

[67] Sell v. United States, 539 U.S. 166, 181 (2003).

[68] For instance, some antipsychotics may be contraindicated for diabetics because of their effects on metabolics. *See, e.g.*, PHYSICIANS' DESK REFERENCE, *supra* note 4, at 1677 (noting that hyperglycemia is associated with Risperdal and other atypical antipsychotics).

[69] *See* Douglas Mossman, *Unbuckling the "Chemical Straitjacket": The Legal Significance of Recent Advances in the Pharmacological Treatment of Psychosis*, 39 SAN DIEGO L. REV. 1033, 1048–49 (2002) (discussing improved effectiveness of medication for schizophrenia); *see also* Motion for Leave To File Brief and Brief for the American Psychiatric Ass'n et al. as Amici Curiae Supporting Respondent at 16–17, *Sell*, 539 U.S. 166 (No. 02-5664), 2003 WL 176630 ("With the newer medications, it is all the more firmly true that medications are commonly essential to responsible treatment of psychoses like schizophrenia."). *But see* Motion for Leave To File Brief for Amicus Curiae American Psychological Ass'n and Brief for Amicus Curiae American Psychological Ass'n at 11, *Sell*, 539 U.S. 166 (No. 02-5664), 2002 WL 31898300 ("There is a significant danger . . . that health-care professionals in a forensic setting may proceed immediately to medication without considering less intrusive alternatives that might be effective in restoring competence.").

[70] *See, e.g.*, United States v. Morrison, 415 F.3d 1180, 1183 (10th Cir. 2005); United States v. Cortez-Perez, No. 06-CR-1290-WQH, 2007 WL 2695867, at *3 (S.D. Cal. Sept. 10, 2007).

measures fail (as they often do), forced medication becomes "necessary."[71]

The effectiveness prong includes consideration of both the expected direct effectiveness of a drug regime in restoring a defendant to competency and whether the expected side effects of the drug will outweigh its benefits in rendering the defendant competent.[72] Dramatic "extrapyramidal" side effects that plagued early psychotropic drugs have greatly diminished in the current generation of pharmaceuticals.[73] These extrapyramidal symptoms appear to be the ones courts are most worried about.[74] Nevertheless, modern drugs still have significant side effects,[75] and depending on the conditions of the case, these effects could meaningfully affect the defendant's ability to receive a fair trial.[76]

E. Conclusion

Lower courts have not consistently applied the *Sell* standards, perhaps because the case asked lower courts to judge defendants according to standards that are ill-suited for application as bright-line rules. In both the importance and medical appropriateness prongs, courts have diverged from the *Sell* mandate, reading something that was not

---

[71] Some believe that the *Sell* Court overstated the potential effect of the contempt power in persuading a mentally ill defendant to consent to medication. *See* Paul S. Appelbaum, *Treating Incompetent Defendants: The Supreme Court's Decision is a Tough* Sell, 54 PSYCHIATRIC SERVICES 1335, 1336 (2003). Given the range of potential defendants, it is hard to dismiss entirely the possibility that civil contempt could encourage a defendant to submit to medication.

[72] *See supra* p. 1129.

[73] The earliest generation of antipsychotic medicine was developed in the 1950s. The first antipsychotic was chlorpromazine, the generic name of Thorazine. These drugs had severe "extrapyramidal" side effects, which could include "stiffness, diminished facial expression, tremors, and restlessness." Because these effects were so unpleasant, patients would often stop taking the drugs. Mossman, *supra* note 69, at 1062–63 & n.147, 1068; *see also* United States v. Gomes, 387 F.3d 157, 162 n.* (2d Cir. 2004) ("'Typical' anti-psychotic drugs can potentially produce more severe side effects, such as neuroleptic malignant syndrome (temperature disorder and muscle breakdown) and tardive dyskinesia (involuntary movement of the face and tongue)."). In late 1989, the FDA approved clozapine, the first drug without these extrapyramidal symptoms. Clozapine and its class were dubbed "atypical" psychotropics. Mossman, *supra* note 69, at 1069–70.

[74] *See, e.g.*, United States v. Grape, 509 F. Supp. 2d 484, 489 (W.D. Pa. 2007) ("The second generation medications are much less likely than first generation medications to cause neuroleptic malignant syndrome, tardive dyskinesia, or extrapyramidal side effects such as stiffness, and feelings of anxiety or agitation."); *see also* SLOBOGIN, *supra* note 16, at 223 ("[T]he recent developments of 'atypical' antipsychotic medications, which are purportedly more effective and have significantly fewer side effects, could be changing the terms of the debate . . . .").

[75] *See* Alex Berenson, *Schizophrenia Medicine Shows Promise in Trial*, N.Y. TIMES, Sept. 3, 2007, at A9 (describing newest generation of pharmaceuticals, which may be free from even the lesser side effects, such as weight gain and tremors, that had accompanied atypicals).

[76] *See, e.g.*, United States v. Dallas, No. 8:06CR78, 2007 WL 2875170, at *8 (D. Neb. Sept. 27, 2007).

quite there into the case and overlooking what was — no doubt because *Sell* required judges to wrestle with difficult questions.

III. *BOOKER*, THE FEDERAL SENTENCING GUIDELINES, AND VIOLENT MENTALLY ILL OFFENDERS

The Supreme Court's decision in *United States v. Booker*[1] dealt a strong blow to a system of federal sentencing guidelines that many viewed as unfair[2] and unsuccessful.[3] *Booker* granted judges more discretion, but such discretion is not a wholly positive outcome. This Part argues that, by permitting judges greater reliance on 18 U.S.C. § 3553(a) (the statute that sets forth Congress's sentencing objectives), the federal sentencing regime initiated by *Booker* allows for prison sentences for violent mentally ill offenders longer than those suggested by the Federal Sentencing Guidelines. The claim is not that defendants have been given longer sentences purely on account of mental illness. Rather, this Part argues that judges have imposed prison sentences beyond what the Guidelines recommend on some mentally ill offenders they view as dangerous or in need of treatment instead of supplementing Guidelines sentences as necessary with civil commitment.[4] Such lengthy prison sentences disregard the rights and interests of the offenders and provide little benefit to the public. Although this is not an area with many reported cases,[5] the cases that have been reported

---

[1] 543 U.S. 220 (2005).

[2] *See, e.g.*, Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 102–06 (2005) (arguing that the Federal Sentencing Guidelines failed to end disparities in sentencing along racial, gender, and ethnic lines); Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1319–20 (2005) (describing the Guidelines as "a one-way upward ratchet increasingly divorced from considerations of sound public policy and . . . the commonsense judgments of frontline sentencing professionals").

[3] For instance, despite the goals of the Guidelines' framers, implementing the Guidelines did not remove discretion from the federal sentencing system. Instead, the combination of determinate sentences for offenses, overlapping sentences within the federal criminal code, and plea bargaining invested discretion in prosecutors rather than judges. *See* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2550–62 (2004); Ronald F. Wright, *Trial Distortion and the End of Innocence*, 154 U. PA. L. REV. 79, 132 (2005).

[4] Civil commitment is an option provided by both state commitment statutes and 18 U.S.C. § 4246 (2000).

[5] The limited number of reported cases involving a sentence that departs upward from the sentence indicated by the Guidelines on the basis of an offender's mental illness may not accurately reflect the prevalence and effect of this sentencing practice. The vast majority of cases in the federal system end in pleas: in 2002, for instance, more than 95% of defendants in adjudicated cases pleaded either guilty or no contest. Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721, 1722 (2005) (book review); *see also* Blakely v. Washington, 542 U.S. 296, 337 (2004) (Breyer, J., dissenting) (noting that more than 90% of defendants reach plea agreements before trial). In cases involving violent crimes, a high sentence upheld on appeal creates a long shadow under which future parties in a plea "transaction" will bargain. *See* Stuntz, *supra* note 3, at 2563. In cases that do go to trial, sentencing judges are not

raise important questions about how society manages the often-difficult intersections between the rights of the mentally ill[6] and the safety needs and behavioral expectations of society at large.

Section A offers an introduction to the Guidelines and their approach to mental illness. Section B argues that *Booker*'s shift from mandatory to advisory guidelines has combined with certain dynamics of the criminal justice system and the language of 18 U.S.C. § 3553(a) to create an additional opportunity for judges to impose above-Guidelines prison sentences on violent mentally ill offenders. Section C discusses the potential disadvantages of such above-Guidelines prison sentences. In contrast, section D discusses some of the challenges inherent in civil commitment and makes an affirmative argument for a system in which mentally ill defendants receive the same prison sentences as non–mentally ill defendants, but are civilly committed after prison as necessary. Section E concludes.

A. The Federal Sentencing Guidelines and Mentally Ill Offenders

The Sentencing Reform Act of 1984[7] (SRA) created the U.S. Sentencing Commission to promulgate binding sentencing guidelines in response to a regime of indeterminate sentencing characterized by broad judicial discretion over sentencing and the possibility of parole.[8] The Act sought to create a transparent, certain, and proportionate sentencing system, free of "unwarranted disparity" and able to "control crime through deterrence, incapacitation, and the rehabilitation of offenders"[9] by sharing power over sentencing policy and individual sentencing outcomes among Congress, the federal courts, the Justice Department, and probation officers.[10]

The heart of the Guidelines is a one-page table: the vertical axis is a forty-three-point scale of offense levels, the horizontal axis lists six categories of criminal history, and the body provides the ranges of months of imprisonment for each combination of offense and criminal

---

required to issue a public, written sentencing opinion and are in practice only asked to provide very anemic information for appellate review. Steven L. Chanenson, *Write On!*, 115 YALE L.J. POCKET PART 146, 147 (2006), http://www.thepocketpart.org/2006/07/chanenson.html. The U.S. Sentencing Commission and other agencies collect data on sentencing, but whether offenders are mentally ill is not a datum that the Commission collects. *See* U.S. SENTENCING COMM'N, 2006 ANNUAL REPORT 31–46 (2006), *available at* http://www.ussc.gov/ANNRPT/2006/chap5_06.pdf.

[6] This Part does not seek to define mental illness; instead, it focuses on cases where courts believe that they are dealing with someone who is mentally ill.

[7] Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

[8] *See* Bowman, *supra* note 2, at 1318–23; *see also* Mistretta v. United States, 488 U.S. 361, 363 (1989).

[9] U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING, at iv (2004), *available at* http://www.ussc.gov/15_year/executive_summary_and_preface.pdf.

[10] *See* Bowman, *supra* note 2, at 1319.

history.[11] A sentencing judge is meant to use the guidelines, policy statements, and commentaries contained in the other 600-odd pages of the Guidelines Manual to identify the relevant offense and history levels, and then refer to the table to identify the proper sentencing range.[12] Though in all cases a sentence must be at or below the maximum sentence authorized by statute for the offense,[13] in certain circumstances the Guidelines allow for both upward and downward departures from the sentence that would otherwise be recommended.

Few of these circumstances involve the mental illness of an offender; in fact, the Guidelines deal explicitly with mentally ill offenders in only a limited way.[14] Section 5H1.3 of the Guidelines sets the tone, stating that "[m]ental and emotional conditions are not ordinarily relevant in determining whether a departure [from the range of sentences that would otherwise be given under the Guidelines] is warranted, except as provided in [the Guidelines sections governing grounds for departure]."[15] In general terms, that section permits departure from the Guidelines if there is an aggravating or mitigating circumstance "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines," and if the departure advances the objectives set out in 18 U.S.C § 3553(a)(2), which include elements of incapacitation, deterrence, rehabilitation, and retribution.[16] Downward departure is allowed when an offender suffers from a "significantly reduced mental capacity" and neither violence in the offense nor the offender's criminal history indicates a need to protect the public.[17]

This reticence is not wholly surprising: the Guidelines came along soon after the John Hinckley acquittal had helped turn public sentiment against the insanity defense[18] and at a time when the criminal justice system and the nation more generally were coping with the mass deinstitutionalization of the nation's mentally ill population.[19]

---

[11] U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, at 392 (2007).

[12] *See id.* § 1B1.1; Bowman, *supra* note 2, at 1324–25.

[13] *See* Bowman, *supra* note 2, at 1322.

[14] Interestingly, the Guidelines deal more extensively with crimes *against* the mentally ill, providing for heightened sentences for those committing crimes against victims deemed incompetent because of mental illness. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(10)(D) & cmt. n.20(B).

[15] *Id.* § 5H1.3.

[16] *Id.* § 5K2.0(a)(1).

[17] U.S. SENTENCING GUIDELINES MANUAL § 5K2.13. Although there is no necessary connection between a violent offense and future risk to the public, most courts construing section 5K2.13 have taken the position that an offense involving violence or the threat of violence disqualifies an offender from a downward departure under this section. *See* Eva E. Subotnik, Note, *Past Violence, Future Danger?: Rethinking Diminished Capacity Departures Under Federal Sentencing Guidelines Section 5K2.13*, 102 COLUM. L. REV. 1340, 1340–43, 1354–57 (2002).

[18] *See* Ronald Bayer, *Insanity Defense in Retreat*, HASTINGS CENTER REP., Dec. 1983, at 13.

[19] *See* TERRY A. KUPERS, PRISON MADNESS, at xv, 11–14 (1999).

Moreover, the Guidelines were crafted to ensure that drug dependence, which is perhaps most reasonably viewed as mental illness, would not act to mitigate sentences.[20] These factors coincided with the rise of the idea that punishment should be measured by offenders' dangerousness and not merely their culpability.[21] A key implication of the Guidelines' silence on mental illness was that downward departures for the mentally ill, and hence the dangerous or drug addicted among them, were rarely permitted.

Along with discouraging downward departure in cases of mental illness, prior to *Booker*, the Guidelines only allowed upward departure on the basis of mental illness under section 5K2.0, for extraordinary circumstances not otherwise taken into account by the Guidelines.[22] Courts were left to determine what manifestations of mental illness counted as sufficiently extraordinary. The Ninth Circuit's decision in *United States v. Hines*[23] suggested that lurid details and the specter of dangerousness fueled by mental illness might in combination count as extraordinary circumstances. Roger Hines was convicted of making threats against the President and being a felon in possession of a firearm.[24] In addition to traveling to Washington, D.C., apparently in hopes of killing President George H.W. Bush, Hines kept a diary and wrote letters in which he claimed to have molested and killed children.[25] At sentencing, the court gave Hines an upward departure because of his "extraordinarily dangerous mental state" and "significant likelihood that he [would] commit additional serious crimes."[26] The Ninth Circuit upheld the sentence, arguing that although upward departures based on a need for psychiatric treatment are barred, the sentencing court had departed not to treat Hines but because "Hines posed an '*extraordinary danger* to the community because of his serious emotional and psychiatric disorders.'"[27]

---

[20] *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 5H1.4 ("Drug or alcohol dependence or abuse is not a reason for a downward departure. Substance abuse is highly correlated to an increased propensity to commit crime.").

[21] Paul H. Robinson, Commentary, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1429–31 (2001).

[22] *See* United States v. Doering, 909 F.2d 392, 394–95 (9th Cir. 1990) (per curiam).

[23] 26 F.3d 1469 (9th Cir. 1994).

[24] *Id.* at 1473.

[25] *Id.* at 1472. Investigators found no evidence to corroborate these claims. *Id.*

[26] *Id.* at 1473 (quoting the district court's findings) (internal quotation marks omitted). The court justified this additional departure by reference both to Guidelines section 5K2.0 and to section 4A1.3, which allows departures where defendants' criminal histories do not adequately reflect their dangerousness. *Hines*, 26 F.3d at 1477. *But see* U.S. SENTENCING GUIDELINES MANUAL § 4A1.3 (2007) (enumerating the circumstances, which do not include mental illness, that may justify departures on these grounds).

[27] *Hines*, 26 F.3d at 1477.

The *Hines* court appeared to ignore the fact that in the criminal justice system — a system designed to deal with deviations from normal behavior — manifestations of mental illness are the stuff of everyday life.[28] In contrast, the Sixth Circuit in *United States v. Moses*[29] maintained that mental illness made poor grounds for extraordinary departures. The defendant, Dewain Moses, was a paranoid schizophrenic inhabited by "strange, violent fantasies" and "preoccupied with weapons" who had "overtly threatened the killings of several people, and fantasized the slaughter of still more."[30] He was convicted for making false statements in order to purchase guns and for receiving guns after having been adjudicated as a "mental defective."[31] In response to worries that Moses would cease taking the medications under which he had improved while in custody and return to his dangerous state, the sentencing court relied on section 5K2.0 of the Guidelines to give him a sentence almost six times greater than the sentence recommended by the Guidelines for his offense and criminal history.[32] The Sixth Circuit vacated the sentence, stating that, given the inclusion of section 5H1.3 in the Guidelines, upward departures for circumstances not taken into account in the drafting of the Guidelines did not apply to Moses.[33] Civil commitment, rather than an upward departure, was the appropriate mechanism for protecting the public.[34]

B. The Potential Impact of Booker *on Sentences for the Mentally Ill*

Following its decisions in *Apprendi v. New Jersey*[35] and *Blakely v. Washington*[36] on similar provisions in state sentencing schemes, the Supreme Court in *United States v. Booker* invalidated the provisions of the SRA that made the Guidelines mandatory, declaring them instead to be "effectively advisory."[37] *Booker* directed sentencing courts

---

[28] *Cf.* HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 17 (2003), *available at* http://www.hrw.org/reports/2003/usa1003/usa1003.pdf (reporting that over 300,000 mentally ill people may be in American prisons on any given day).

[29] 106 F.3d 1273 (6th Cir. 1997).

[30] *Id.* at 1275.

[31] *Id.*

[32] *Id.* at 1277.

[33] *Id.* at 1278–81.

[34] *See id.* at 1280; *cf.* United States v. Fonner, 920 F.2d 1330, 1334 (7th Cir. 1990) (noting that "[m]ental health is not a solid basis on which to depart upward," and that upward departures on the basis of a convict's potential to commit future crimes — perhaps due to mental illness — may impermissibly overlap with the recidivism penalties already included in the Guidelines). In particular, the Sixth Circuit noted that a civil commitment statute, 18 U.S.C. § 4246 (2000), was "directly designed to forestall [the danger to the community created by a convict's mental illness] through continued commitment after completion of the sentence." *Moses*, 106 F.3d at 1280.

[35] 530 U.S. 466 (2000).

[36] 542 U.S. 296 (2004).

[37] United States v. Booker, 543 U.S. 220, 245 (2005) (Breyer, J., delivering the opinion of the Court in part).

to continue to consult the Guidelines, but did not make clear how they should go about doing so. In two subsequent cases, *United States v. Rita*[38] and *Gall v. United States*,[39] the Court clarified somewhat the advisory role of the Guidelines by explaining how appellate courts may review sentencing decisions in light of the Guidelines: the two cases together suggest that this post-*Booker* advisory role will not itself much limit the discretion of judges in sentencing.[40]

For mentally ill defendants, *Booker*'s main effect may have been to create a second pathway for judges to impose above-Guidelines sentences. As was the case before *Booker*, a judge may use sections 4A1.3, 5H1.3, and subpart 5K2 of the Guidelines to depart *within* the Guidelines themselves. However, judges may now also look to the sentencing factors in § 3553(a) to make variances *outside* the Guidelines framework. Section 3553(a) directs courts to impose sentences "sufficient, but not greater than necessary"[41] to "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense[,] to afford adequate deterrence to criminal conduct"; "to protect the public from further crimes of the defendant"; and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."[42] Because the Guidelines already reflect the Sentencing Commission's reasoned interpretation of the § 3553 factors,[43] in many areas of the law, courts may only rarely resort to this new avenue to deviate.[44] The sentencing of mentally ill offenders is not such an area. Section 5H1.3 of the Guidelines limits consideration of mental illness to extraordinary circumstances, but the opportunity to refer

---

38 127 S. Ct. 2456 (2007).

39 128 S. Ct. 586 (2007).

40 In *Rita*, the Court held that "a court of appeals may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines," 127 S. Ct. at 2462, but that "the presumption is not binding," and "does not, like a trial-related evidentiary presumption, insist that one side, or the other, shoulder a particular burden of persuasion or proof lest they lose their case," *id.* at 2463. In *Gall*, the Court rejected the Eighth Circuit's requirement that "a sentence outside of the guidelines range must be supported by a justification that '"is proportional to the extent of the difference between the advisory range and the sentence imposed,"'" 128 S. Ct. at 594 (quoting United States v. Claiborne, 446 F.3d 884, 889 (8th Cir. 2006)), holding instead that "while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences — whether inside, just outside, or significantly outside the Guidelines range — under a deferential abuse of discretion standard," *id.* at 591.

41 18 U.S.C. § 3553(a) (2000 & Supp. IV 2004).

42 *Id.* § 3553(a)(2)(A), (a)(2)(C)–(D).

43 *See Rita*, 127 S. Ct. at 2463–64.

44 *Cf.* Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 525, 537 (2007) (asserting that since *Booker*, judges have shown little inclination to depart from the Guidelines, in part because of feelings of institutional incapacity).

directly to § 3553(a) in addition to the Guidelines is an opportunity to consider mental illness despite this limitation.[45]

More, even in an advisory Guidelines regime, cases involving violent mentally ill defendants, if they produce any departures or variances at all, seem likely to produce upward ones. To begin with, recall that violent mentally ill offenders are not eligible for downward departure under section 5K2.13 of the Guidelines. Second, downward variances have proved much less likely than upward ones to be sustained on appeal.[46] The threat of being overturned might influence a judge to forgo varying downwards. Third, the wording of the § 3553(a) factors appears to encourage higher sentencing. The two factors that most obviously pertain to violent mentally ill defendants are "to protect the public from further crimes of the defendant"[47] and "to provide the defendant with needed . . . treatment in the most effective manner."[48] Considering the need to protect the community would, if it led to a variance at all, lead to an upward one. Similarly, it seems unlikely that the need to provide a violent mentally ill defendant with effective treatment would lead to a downward variance from the Guidelines.[49] Finally, when confronted with an obviously mentally ill defendant in a courtroom accompanied by the lurid particularities of illness and violent crimes, judges may react by seeking to remove the frightening person before them from society for as long as possible.

This last point merits further discussion. Judge Easterbrook once said of jurors that "[w]hat little scientific data we possess implies that trying to persuade the jury that the accused is mentally ill is worse than no defense at all. . . . [I]f persuaded that the defendants are indeed nutty, jurors believe that death is the only sure way to prevent

---

[45] *See Rita*, 127 S. Ct. at 2473 (Stevens, J., concurring) ("Matters such as age, education, [or] mental or emotional condition . . . are not ordinarily considered under the Guidelines. These are, however, matters that § 3553(a) authorizes the sentencing judge to consider.") (citation omitted).

[46] *See* Regina Stone-Harris, *How To Vary from the Federal Sentencing Guidelines Without Being Reversed*, 19 FED. SENT'G REP. 183, 185–86 (2007); *see also* United States v. Meyer, 452 F.3d 998, 1000 n.3 (8th Cir. 2006) (opinion of Heaney, J.) (noting that since *Booker*, the Eighth Circuit had upheld twelve of thirteen sentences exceeding the Guidelines range, but had reversed sixteen of nineteen sentences lower than the Guidelines range). However, this trend may change with *Gall* and its directive that all sentences must be given abuse of discretion review. Gall v. United States, 128 S. Ct. 586, 591 (2007); *see also id.* at 595 (rejecting "an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range").

[47] 18 U.S.C. § 3553(a)(2)(C).

[48] *Id.* § 3553(a)(2)(D). *But see id.* § 3553(a)(2)(A) (calling for "just punishment for the offense").

[49] *Cf.* United States v. Mora-Perez, 230 F. App'x 836, 838 (10th Cir. 2007) (affirming a district court's refusal of a sentence below the Guidelines range on mental illness grounds for a previously deported alien convicted of illegal reentry, where the sentencing court refused to give the lower sentence because it believed the defendant would receive better treatment for his mental illness in prison than in his home country of Mexico).

future crimes."[50] Judges may not be driven to the same conclusion, but there is reason to think that they are subject to the same possibility of feeling fear and distaste.[51] This is not to claim that every judge, when faced with such a defendant, will seek to impose an upward departure or variance based on these effects; only that the possibility exists. Nor is it to claim that judges are biased against the mentally ill in the abstract; only that some may find it difficult to control their reactions to the mentally ill defendants they face in court.[52] While in general a system that empowers judges may be the best hope for justice,[53] in the case of mental illness, in which there is little to suggest that a judge will be any less susceptible to fear or revulsion than jurors, or particularly skilled at judging future dangerousness, judicial discretion has the potential to produce unjust sentences.

Cases since *Booker* bear out the above analysis. In a recent case with some resemblance to *Hines*, a convicted murderer who wrote letters from prison threatening to kill the President was sentenced by the district court to the statutory maximum of 60 months, an upward variance from the recommended Guidelines sentence.[54] In a memorandum opinion upon resentencing, the court offered a justification for its sentence for each of the § 3553(a) factors, but saved the bulk of its analysis for why the sentence was necessary "to protect the public from further crimes of the defendant."[55] The upward variance was necessary because "[t]he defendant's history of violent conduct, coupled with his obvious unstable mental condition . . . strongly suggest that [he] should never again be pardon [sic], paroled, or released into society."[56]

---

[50] Holman v. Gilmore, 126 F.3d 876, 883 (7th Cir. 1997); *see also* Jennifer Fischer, *The Americans with Disabilities Act: Correcting Discrimination of Persons with Mental Disabilities in the Arrest, Post-Arrest, and Pretrial Processes*, 23 LAW & INEQ. 157, 172–73 (2005) ("[P]eople have a variety of views of persons with mental illness that include seeing them as different, less than human, [or] dangerous and frightening . . . .").

[51] *Cf.* Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005) (arguing that like jurors, judges generally have difficulty not being influenced by relevant but inadmissible evidence). For a general discussion and some confirmatory evidence of the biases and cognitive illusions from which judges suffer, see Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001).

[52] Compare the neutral and even sympathetic stance of the Guidelines, which are prepared in general, abstract terms by a commission, some of whose members are judges, *see supra* pp. 1134–35, with the almost hysterical tone of the sentencing judge in *United States v. Cousins*, No. 5:04-CR-169, 2007 WL 1454275 (N.D. Ohio May 17, 2007), discussed below.

[53] *See* Wright, *supra* note 3, at 139.

[54] *Cousins*, 2007 WL 1454275, at *2–4. The sentencing court found in the alternative that a sixty-month sentence was justified under the Guidelines because Cousins's threat during the sentencing process to kill the judge's wife was close enough to his original crime of threatening to kill the President's wife to negate the reduction Cousins had received for showing contrition. *Id.* at *2.

[55] *See id.* at *7–8.

[56] *Id.* at *8.

A similar line of reasoning motivated *United States v. Gillmore*,[57] in which the Eighth Circuit upheld a 110% upward variance for a murder conviction, to 396 months, for a woman suffering from depression and Post-Traumatic Stress Disorder who, while trying to obtain money to buy drugs, killed a man with a hammer and a knife, then attempted to burn down his house to cover up the murder.[58] The district court found that "Gillmore's history of sexual abuse, chemical dependency, and mental illness . . . made her a danger to herself and the public, warranting a significantly longer sentence than the Guidelines range."[59] Like the district court in *Cousins*, the Eighth Circuit pointed to the need to protect the public as justification for the sentence.[60]

C. Above-Guidelines Sentences for Violent Mentally Ill Offenders

Imposing upward departures or variances on violent mentally ill defendants is an approach to protecting the public and treating such defendants that appears to fail both the public and the defendants. On the one hand, applying the § 3553 factors to impose an above-Guidelines sentence assumes a continuing need to protect the public and treat the offender in a confined setting — that the offender's dangerousness and need for treatment are immutable. If an offender, no matter the treatment he receives in prison, truly is so dangerous and so certain to reoffend as to warrant lengthening his sentence, using § 3553 to extend his sentence by adding years of imprisonment up to the statutory maximum offers only flawed protection to society; the next offense is merely postponed, not foreclosed.[61]

On the other hand, and just as importantly, this approach is unfair to the mentally ill defendant. Above-Guidelines sentences are imposed before prison and treatment, and do not account for the possibility that treatment will in fact work: that the offender may improve and no longer require incarceration.[62] Moreover, there is reason to think that judges have little ability to determine accurately the future dangerousness of a defendant.[63] When an offender is held in prison because of a

---

[57] 497 F.3d 853 (8th Cir. 2007).

[58] *See id.* at 854–58.

[59] *Id.* at 857.

[60] *See id.* at 861.

[61] Alternatively, if the defendant is not so immutably dangerous and, as such, is being imprisoned for no purpose, society may be harmed by a loss to the criminal justice system's moral credibility and a resulting loss of crime-control power. *See* Robinson, *supra* note 21, at 1455.

[62] Though "studies strongly suggest that prison often exacerbates psychiatric disabilities," Michael J. Sage et al., *Butler County SAMI Court: A Unique Approach to Treating Felons with Co-Occurring Disorders*, 32 CAP. U. L. REV. 951, 953 (2004), the possibility that mentally ill prisoners might grow worse in prison is no reason to either keep them there longer or fail to make allowances for those who do improve.

[63] *See* Erica Beecher-Monas & Edgar Garcia-Rill, *Danger at the Edge of Chaos: Predicting Violent Behavior in a Post-*Daubert *World*, 24 CARDOZO L. REV. 1845, 1845 (2003) (noting that

finding of dangerousness premised on a mental illness now controlled or in remission, that offender is being denied a fundamental liberty right.[64] Perhaps this dynamic is best understood in terms of the purposes of punishment outlined in § 3553(a). Where departure or variance is based on a dangerousness founded in mental illness, once the Guidelines-recommended sentence is exhausted, the retributive purposes of the punishment have been fulfilled — such an offender is not being retained because his potential dangerousness or need for treatment makes him more deserving of punishment. Nor is deterrence at issue; manifestations of mental illness are considered undeterrable.[65] Only rehabilitation and incapacitation remain, but ex ante upward departures and variances ignore the possibility of rehabilitation, and impose purposeless incapacitation if rehabilitation is achieved.[66]

D. Civil Commitment and Its Challenges

The most obvious alternative to upward departures and variances for violent mentally ill offenders is civil commitment following prison. In the ideal, at least, commitment keeps the mentally ill confined and in treatment only so long as they display the symptoms that make them dangerous to the public. Indeed, there is a federal commitment statute, 18 U.S.C. § 4246, that provides for the commitment of a "person in the custody of the Bureau of Prisons whose sentence is about to expire" who "is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another."[67]

Civil commitment following prison may not, however, be a perfect solution for dealing with violent mentally ill offenders. First, it is possible that the interrelation between retribution, treatment, and incapacitation is somewhat more nuanced than what was suggested above. Perhaps, to society — and to judges — a violent mentally ill person who has served out a Guidelines sentence is not blameless. Perhaps

---

neither psychiatrists nor non–mental health professionals — nor, presumably, judges — have any ability to accurately predict an individual's future dangerousness); Robinson, *supra* note 21, at 1452 ("It is difficult enough to determine a person's present dangerousness — whether he would commit an offense if released today. It is much more difficult to predict an offender's future dangerousness . . . . It is still more difficult, if not impossible, to predict today precisely how long a preventive detention will need to last.").

64 *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563, 575 (1975) ("A finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. . . . [T]here is . . . no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom."); *see also* Subotnik, *supra* note 17, at 1359–60 (arguing that dangerousness determinations under the Guidelines should take into account the potential that treatment might mitigate dangerousness).

65 *See* Kansas v. Hendricks, 521 U.S. 346, 362–63 (1997).

66 *See* Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 70 (2005).

67 18 U.S.C. § 4246(a) (2000).

once an individual is deemed blameworthy, all that follows, even treatment and incapacitation for the public safety, is tarred by the initial retributive purpose. Evidence for this possibility can be found in the text of § 3553, which plainly allows incarceration, rather than commitment, in order to protect the public and treat the offender.

Second, commitment is itself complicated.[68] It is not, for instance, clear that a violent mentally ill offender would actually be committed and, if committed, receive treatment. Commitment statutes are, with good reason, designed at least as much to avoid committing the sane as to provide an alternative to prison for the dangerously insane. A commitment statute is constitutionally sustainable if it combines "proof of serious difficulty in controlling behavior"[69] and "proof of dangerousness [coupled] with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'"[70] Moreover, no one besides the director of the facility in which the offender is held before the end of his sentence can petition to have the offender committed.[71] An offender who is still dangerous or might become dangerous immediately after release might not be committed in light of these protections, perhaps most plausibly in a case where an offender's symptoms improve while being treated in custody but worsen when the offender ceases treatment post-release.[72] In addition, offenders who are committed will not always get treatment, removing some of whatever difference exists between commitment and imprisonment.[73] Commitment without treatment may last indefinitely, a result far harsher than a fixed prison term.

---

[68] However, this complication does not extend to the legal question of whether commitment may immediately follow a prison sentence. So long as the commitment is not intended to punish the offender or to deter the offender or others in the offender's situation, and normal requirements for commitment are met, the commitment is civil and so does not violate the Constitution's prohibition on double jeopardy. *See Hendricks*, 521 U.S. at 370. The state's task is made easier by the Supreme Court's willingness to posit that commitment statutes for the mentally ill are not intended to deter, since persons with a mental abnormality are unlikely to be deterred by the threat of confinement. *See id.* at 361–63.

[69] Kansas v. Crane, 534 U.S. 407, 413 (2002). In *Hendricks*, the Court had suggested that a finding of mental illness would be sufficient "to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control." 521 U.S. at 358. In *Crane*, it modified this position to include a specific volitional element so as to limit commitment to the seriously mentally ill, rather than the "dangerous but typical recidivist." 534 U.S. at 413. At issue in *Hendricks*, *Crane*, and much of the recent scholarship on civil commitment was the post-prison commitment of sex offenders.

[70] *Hendricks*, 521 U.S. at 358.

[71] *See* United States v. Moses, 106 F.3d 1273, 1280–81 (6th Cir. 1997).

[72] Consider the sentencing court's concern in *Moses*, *id.* at 1280.

[73] The current state of the law appears to be that a state need not provide treatment to an individual who has been committed if that individual suffers from an untreatable condition. *See Hendricks*, 521 U.S. at 367; Saul J. Faerstein, *Sexually Dangerous Predators and Post-Prison Commitment Laws*, 31 LOY. L.A. L. REV. 895, 897 (1998).

Post-prison civil commitment is far from a perfect solution for dealing with violent mentally ill offenders. It seems, nevertheless, a better solution than giving such offenders above-Guidelines prison sentences. To impose post-prison civil commitment, the state is required to prove an offender's continuing dangerousness by clear and convincing evidence,[74] whereas an above-Guidelines prison sentence relies on a possibly unreliable prediction of what the offender's mental health will be at the end of the Guidelines sentence. Not all offenders will require confinement past the Guidelines range, and an option like civil commitment that allows those offenders their freedom at the point non–mentally ill offenders would receive theirs must be preferred. Prison presents an extremely unhealthy environment for the mentally ill,[75] and it is difficult to advocate any solution that extends a mentally ill person's time behind bars.

E. Going Forward

If post-prison commitment is preferable to above-Guidelines prison sentences as a means of dealing with violent mentally ill offenders, what measures might ensure that all such offenders get the one and not the other? At least two possibilities exist. First, there are some situations in which judicial discretion might be less desirable than in others. Defendants who have the potential to elicit strong reactions from judges, like violent mentally ill offenders, may in fact be better dealt with by abstracted, preformulated rules than by judges steeped in, and perhaps spooked by, the particulars of the situation. It may, for instance, make the most sense to recraft the standards of review for sentences such that upward departures and variances from the Guidelines in cases with mentally ill defendants are presumptively unreasonable. Alternatively, rather than force judges to sentence in a particular way, it might be possible to allay any fears they have that violent mentally ill offenders will slip through the cracks and not be committed post-prison, despite their continued dangerousness. One possibility would be to allow prosecutors — in addition to the directors of the facilities in which violent mentally ill offenders are held — to initiate commitment proceedings for such offenders, subject to strictures designed to prevent abuse or overuse.

---

[74] *See, e.g.*, 18 U.S.C. § 4246(d) (2000).

[75] *See* Sage et al., *supra* note 62, at 952–53; *see also* Nancy Wolff et al., *Rates of Sexual Victimization in Prison for Inmates with and Without Mental Disorders*, 58 PSYCHIATRIC SERVICES 1087, 1087 (2007) (reporting that the rate of sexual victimization of mentally ill inmates is nearly three times as high as for those without mental illness).

IV. THE IMPACT OF THE PRISON LITIGATION REFORM ACT ON CORRECTIONAL MENTAL HEALTH LITIGATION

Over the last four decades, prisons have replaced mental institutions as warehouses of the mentally ill.[1] The U.S. Department of Justice (DOJ) estimates that over one and a quarter million people suffering from mental health problems are in prisons or jails, a figure that constitutes nearly sixty percent of the total incarcerated population in the United States.[2] Yet psychiatric treatment in many correctional facilities is impaired by understaffing and underfunding, leaving many inmates with little if any therapy.[3] The mentally ill often have a particularly difficult time coping with prison conditions and complying with regulations.[4] In turn, many prison officials treat disordered behavior as disorderly behavior, responding with disciplinary measures that may reinforce the unavailability of treatment and exacerbate the illnesses contributing to the inmates' conduct.[5]

Consider one representative facility: Taycheedah Correctional Institution, a women's facility in Fond du Lac, Wisconsin. The DOJ inspected Taycheedah in 2005 and found that the prison failed "to provide for inmates' serious mental health needs."[6] As of the DOJ's report in 2006, two part-time psychiatrists attended to the approximately 600 prisoners at Taycheedah, leading to waits of two to four weeks before inmates received even an intake mental health screening and waits of up to four months before inmates diagnosed with mental illnesses saw a psychiatrist.[7] Medications were monitored by untrained correctional officers who were unable "to ensure that medication [was] taken properly or to identify the signs of potentially dangerous adverse reactions," which, for many medications, carry a significant risk of death.[8] Taycheedah "impose[d] a significant penalty on inmates whose behaviors [were] symptomatic of their mental illness" by placing them "in administrative segregation due to threats or

---

1 *See* TERRY A. KUPERS, PRISON MADNESS, at xv–xvi, 12–14 (1999).

2 DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 3 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf.

3 *See generally* HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 94–126 (2003) [hereinafter ILL-EQUIPPED], *available at* http://www.hrw.org/reports/2003/usa1003/usa1003.pdf.

4 *See id.* at 53–69; KUPERS, *supra* note 1, at 15–25.

5 *See* ILL-EQUIPPED, *supra* note 3, at 75–86; KUPERS, *supra* note 1, at 29–38; Jamie Fellner, *A Corrections Quandary: Mental Illness and Prison Rules*, 41 HARV. C.R.-C.L. L. REV. 391, 395–405 (2006).

6 Letter from Wan J. Kim, Assistant Att'y Gen., DOJ Civil Rights Div., to Jim Doyle, Governor of Wis. 2 (May 1, 2006) [hereinafter Doyle Letter], *available at* http://www.usdoj.gov/crt/split/documents/taycheedah_findlet_5-1-06.pdf.

7 *Id.* at 3–7.

8 *Id.* at 6.

attempts to kill themselves";[9] one inmate, for example, was placed in administrative segregation for punching herself in the eye.[10] Inmates in segregation received no treatment except for medication; even in the specialized unit for mentally ill inmates, the DOJ found a "lack of active treatment" that created "a high risk of exacerbating psychiatric symptoms and dangerous behavior."[11]

Institutional reform litigation is an essential tool for improving correctional mental health care and the treatment of the incarcerated mentally ill. However, such suits became far more difficult to bring, win, and enforce with the passage of the Prison Litigation Reform Act of 1995[12] (PLRA). This legislation was intended to reduce frivolous litigation and to curb judicial micromanagement of prisons;[13] its sponsors disavowed a desire to impede meritorious claims.[14] Yet the PLRA has inarguably made many legitimate claims harder to pursue.[15]

Although the effect of the PLRA on litigants generally has been extensively discussed,[16] its particular hardships for mentally ill inmates have not been analyzed. This Part will discuss provisions of the PLRA that particularly affect suits to redress deficits in correctional mental health care or mistreatment of the incarcerated mentally ill; it will also consider interpretations that moderate, although by no means erase, some of the serious impediments the PLRA has placed between mentally ill prisoners and the courts. Section A will look at the PLRA's strict administrative exhaustion requirement[17] and argue that the "availability" of grievance procedures should be judged in terms of the personal capacity of mentally ill inmates to avail themselves of

---

9 *Id.* at 10–12. Although administrative segregation at Taycheedah is not described in the letter, such segregation frequently involves conditions of total isolation that are particularly damaging for the mentally ill. *See infra* pp. 1153–54.

10 Doyle Letter, *supra* note 6, at 11.

11 *Id.* at 9.

12 Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321-66 (1996) (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.).

13 For a brief legislative history of the PLRA, see *Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1853–56 (2002). *See generally* A LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996 (Bernard D. Reams, Jr. & William H. Manz eds., 1997).

14 *See* Anh Nguyen, Comment, *The Fight for Creamy Peanut Butter: Why Examining Congressional Intent May Rectify the Problems of the Prison Litigation Reform Act*, 36 SW. U. L. REV. 145, 155 (2007) (quoting Sens. Thurmond and Hatch as expressing the intent that the PLRA bar only frivolous claims).

15 *See generally* John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429 (2001); Jennifer Winslow, Comment, *The Prison Litigation Reform Act's Physical Injury Requirement Bars Meritorious Lawsuits: Was It Meant To?*, 49 UCLA L. REV. 1655 (2002).

16 The most thorough primer on the PLRA is John Boston's unpublished treatise, John Boston, The Prison Litigation Reform Act (2006), *available at* http://www.law.yale.edu/documents/pdf/Boston_PLRA_Treatise.pdf.

17 42 U.S.C. § 1997e(a) (2000).

those procedures. Section B will suggest a reading of the PLRA's "physical injury" requirement[18] that is more cognizant of the physical nature of severe mental illness. Last, Section C will analyze the effect of the PLRA's reduction of the volume of prison litigation on the body of "clearly established" Eighth Amendment law and propose an alternate source of applicable precedent.

A. The "Availability" of Administrative Remedies to Acutely Mentally Ill Inmates

1. The Exhaustion Requirement and the Mentally Ill. — The PLRA's most significant limitation on access to courts might be 42 U.S.C. § 1997e(a), which requires that prisoners exhaust "such administrative remedies as are available" before filing actions "with respect to prison conditions."[19] Courts must dismiss any claim for which the plaintiff failed to comply with the confining institution's grievance procedures. Prior to the passage of the PLRA, grievance procedures had to be, among other things, "plain, speedy, and effective" before a court could bar a claim for failure to exhaust.[20] The PLRA made exhaustion mandatory and removed all substantive constraints on the rigor of grievance procedures.[21] Many institutions' procedures feature short windows in which prisoners must file or appeal their claims[22] while some leave officials significant discretion as to response time.[23]

As high a hurdle as the PLRA sets for any inmate, it is even higher for the mentally ill. Many grievances arise during acute psychotic breaks or other periods of decompensation, when inmates may be temporarily incapable of complying with grievance procedures.[24] Ad-

---

[18] *Id.* § 1997e(e).

[19] *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1649 (2003) ("The PLRA's exhaustion requirement has emerged as the highest hurdle the statute presents to individual inmate plaintiffs.").

[20] 42 U.S.C. § 1997e(a)(1) (1994).

[21] *See id.* § 1997e(a) (2000). *See generally* Woodford v. Ngo, 126 S. Ct. 2378, 2382–83 (2006); Schlanger, *supra* note 19, at 1627–28.

[22] Rhode Island, for example, requires that grievants file complaints "within three (3) days of the incident and/or actual knowledge of the origination of the problem," 06-070-002 R.I. CODE R. § 10 (Weil 2007), LEXIS, RIADMN File, and that they fulfill three levels of appeals, each similarly limited to three-day windows, *id.* § 5(B)(10), (C)(1), (D)(1), E(2). For a list of grievance procedures around the country, see Brief of the Jerome N. Frank Legal Services Organization of the Yale Law School as Amicus Curiae in Support of Respondents, at app., *Ngo*, 126 S. Ct. 2378 (No. 05-416), *available at* http://www.law.yale.edu/documents/pdf/woodford_ngo/Woodford_Amicus_brief.pdf.

[23] *See, e.g.*, ILL. ADMIN. CODE tit. 20, §§ 504.830(d), .850(f) (2007), LEXIS, ILADMN File (officials given two months to respond to grievances and six months to respond to appeals, but need only adhere to deadlines "where reasonably feasible under the circumstances").

[24] *See, e.g.*, Whitington v. Sokol, 491 F. Supp. 2d 1012, 1014 (D. Colo. 2007) (plaintiff was in a psychotic state throughout grievance window); Bakker v. Kuhnes, No. C01-4026-PAZ, 2004 WL 1092287 (N.D. Iowa May 14, 2004) (improperly medicated plaintiff experienced symptoms includ-

ditionally, drawn-out grievance procedures may produce months-long gaps in care before an inmate can seek an injunction to compel treatment.[25] In addition, many inmates fear losing access to medication or other forms of treatment as retaliation for filing grievances.[26]

2. Exceptions to Exhaustion. — Whether federal courts provide any recourse for plaintiffs who were temporarily (or permanently) incapable of completing grievance procedures turns on their interpretation of the PLRA's requirement that plaintiffs exhaust "such administrative remedies *as are available*."[27] A grievance procedure is arguably "unavailable" to a prisoner who cannot comply with it.[28] Indeed, one court recently held that a prisoner who was transferred to a state hospital while "'mentally incompetent' and 'psychotic'" might be incapable of grieving and thus have no available procedures to exhaust.[29]

Although this definition of availability based on personal characteristics has rarely been considered by courts,[30] some circuits interpret the statute as requiring more than the mere existence of procedures. First, several circuits have held that exhaustion is satisfied where prison officials' conduct made procedures effectively unusable.[31] The Second Circuit has the most robust form of this allowance, holding that "'special circumstances' may excuse a prisoner's failure to exhaust."[32] This exception is usually invoked for unclear or reasonably misinterpreted

---

ing seizures and dizziness during his grievance window); *cf.* Thomas C. O'Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 HARV. C.R.-C.L. L. REV. 299, 310–15 (2006) (describing difficulties mentally ill inmates face in complying with habeas corpus deadlines).

25 *See, e.g.*, Pratt v. Valdez, No. 3:05-CV-2033-K, 2005 U.S. Dist. LEXIS 30917, at *5 (N.D. Tex. Dec. 1, 2005) (rejecting argument that the plaintiff's need for immediate health treatment justified filing suit before the jail responded to his grievance).

26 Telephone Interview with Amy Fettig, Staff Counsel, ACLU Nat'l Prisons Project (Sept. 21, 2007); *see also* Boston, *supra* note 15, at 431 n.7 (compiling cases of "retaliation against prisoners who complain about their treatment, including those who use the grievance systems that the PLRA has now made mandatory").

27 42 U.S.C. § 1997e(a) (2000) (emphasis added).

28 *See* Days v. Johnson, 322 F.3d 863, 867 (5th Cir. 2003) (per curiam) ("[O]ne's personal ability to access the grievance system could render the system unavailable.").

29 *Whitington*, 491 F. Supp. 2d at 1014–15.

30 *See* Boston, *supra* note 16, at 114–15 ("[C]ourts have only begun to acknowledge the question whether administrative remedies are 'available' to prisoners who may lack the capacity to use them, by reason of mental illness or developmental disability . . . .").

31 *See, e.g.*, Miller v. Norris, 247 F.3d 736, 740 (8th Cir. 2001) ("[A] remedy that prison officials prevent a prisoner from 'utiliz[ing]' is not an 'available' remedy under § 1997e(a) . . . ."); *see also* Giano v. Goord, 380 F.3d 670, 675 (2d Cir. 2004); Jernigan v. Stuchell, 304 F.3d 1030, 1032 (10th Cir. 2002). *See generally* Boston, *supra* note 16, at 114–23. The majority in *Woodford v. Ngo*, 126 S. Ct. 2378 (2006), expressly deferred this question. *See id.* at 2392–93.

32 *Giano*, 380 F.3d at 675 (quoting Berry v. Kerik, 366 F.3d 85, 88 (2d Cir. 2003)); *see also* Vega v. U.S. Dep't of Justice, No. 1:CV-04-02398, 2005 U.S. Dist. LEXIS 29740, at *16 (M.D. Pa. Nov. 4, 2005) (noting, though not applying, the special circumstances exception); Baker v. Andes, No. 6:04-343-DCR, 2005 U.S. Dist. LEXIS 43469, at *25–26 (E.D. Ky. May 12, 2005) (finding that "special circumstances" existed).

grievance procedures[33] and has not yet been extended to cover non-exhaustion due to mental incapacity. A second doctrinal strand allows "substantial compliance" with grievance procedures to suffice for exhaustion.[34] These exceptions to proper exhaustion do not control the availability question,[35] but they signify courts' general attitude toward whether procedures must, in context, provide "a 'meaningful opportunity for prisoners to raise meritorious grievances.'"[36]

3. The Case for Personal Availability. — A contextual definition of availability recognizing personal capability is both preferable as a prudential matter and required under antidiscrimination principles. Even the majority in *Woodford v. Ngo*[37] recognized that "exhaustion requirements are designed to deal with parties who *do not want* to exhaust"[38] — not parties who are *incapable* of exhausting. An incentive mechanism has no benefit when applied against individuals who cannot change their behavior.

Moreover, a personal definition of availability may be necessary to avoid violating the Constitution and is certainly required to avoid a conflict with the Americans with Disabilities Act[39] (ADA). As many commentators have noted with regard to other provisions of the PLRA,[40] the Act seriously limits access to the courts; if its effects are

---

33 *See, e.g.*, Hemphill v. New York, 380 F.3d 680, 690 (2d. Cir. 2004).

34 *Compare* Artis-Bey v. District of Columbia, 884 A.2d 626, 639 (D.C. 2005) ("[P]rocedural defects in an inmate's pursuit of administrative remedies do not bar a civil suit *per se*, provided that the inmate substantially complied with the established procedure . . . ."), *with* Lewis v. Washington, 300 F.3d 829, 834 (7th Cir. 2002) (declining to adopt the substantial compliance exception for post-PLRA causes of action).

35 In addition, the validity of substantial compliance and the "special circumstances" exception is in some doubt after *Ngo,* which held that the PLRA required "proper exhaustion" of grievances. As Justice Breyer's concurrence makes clear, the majority opinion leaves room for some exceptions to exhaustion. 126 S. Ct. at 2393 (Breyer, J., concurring). Indeed, at least one circuit still finds "substantial compliance" sufficient after *Ngo*. *See* Roscoe v. Dobson, No. 07-1418, 2007 U.S. App. LEXIS 22773, at *4 (3d Cir. Sept. 25, 2007); *see also* Guillory v. Rupf, No. C-05-4395-CW, 2007 U.S. Dist. LEXIS 76122, at *15–16 (N.D. Cal. Sept. 27, 2007). The Second Circuit has expressly reserved the question of whether its special circumstances exception survives *Ngo*. *See, e.g.*, Reynoso v. Swezey, 238 F. App'x 660, 662 (2d Cir. 2007); *see also* Robin L. Dull, Note, *Understanding Proper Exhaustion: Using the Special-Circumstances Test To Fill the Gaps Under* Woodford v. Ngo *and Provide Incentives for Effective Prison Grievance Procedures*, 92 IOWA L. REV. 1929, 1953–55 (2007) ("The special-circumstances framework for proper exhaustion probably remains good law post-*Ngo*.").

36 *Ngo*, 126 S. Ct. at 2403 (Stevens, J., dissenting) (quoting *id.* at 2392 (majority opinion)).

37 126 S. Ct. 2378.

38 *Id.* at 2385 (emphasis added).

39 42 U.S.C. §§ 12101–12213 (2000).

40 *See* Randal S. Jeffrey, *Restricting Prisoners' Equal Access to the Federal Courts: The Three Strikes Provision of the Prison Litigation Reform Act and Substantive Equal Protection*, 49 BUFF. L. REV. 1099 (2001) (arguing that the PLRA's "three strikes" rule violates the Equal Protection Clause); James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly," Equal Protection Analysis*, 37 HARV. J. ON LEGIS. 105 (2000) (arguing that PLRA's physical injury requirement cannot withstand strict scrutiny); Julie M. Riewe, Note, *The*

so great as to deny certain individuals "the fundamental constitutional right of access to the courts,"[41] its provisions must be subjected to strict scrutiny.[42] Although appellate courts have consistently held that PLRA provisions increasing the cost of suit do not warrant heightened scrutiny,[43] they have yet to consider the impact of the exhaustion requirement as applied to a prisoner who is incapable of complying with grievance procedures.[44] Unlike the cost provisions, which are surmountable in theory (if not in practice, for many defendants), a strict exhaustion requirement as applied to prisoners who are mentally incapable of complying with grievance procedures bars access to courts altogether, a fundamental detriment that should receive strict scrutiny.

Even if an acontextual understanding of "availability" were to withstand strict scrutiny, or was found not to implicate fundamental rights, it would still have a severe exclusionary effect on the acutely mentally ill. Although the disabled, including the mentally ill, are not a suspect class for the purposes of the Equal Protection Clause,[45] they are protected by the ADA,[46] which mandates that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity."[47] Given that Congress expressed no intent to supersede the ADA in the context of disabled prisoners, § 1997e(a) should be read in harmony with the ADA by incorporating a definition of availability that recognizes personal capability.

Least Among Us: Unconstitutional Changes in Prisoner Litigation Under the Prison Litigation Reform Act of 1995, 47 DUKE L.J. 117 (1997) (arguing that PLRA's filing fee, three strikes rule, and physical injury requirement are unconstitutional).

41 Bounds v. Smith, 430 U.S. 817, 828 (1977); *see also* Tennessee v. Lane, 541 U.S. 509, 533–34 (2004).

42 *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-7, at 1454 (2d ed. 1988) ("Legislative and administrative classifications are to be strictly scrutinized . . . if they distribute benefits or burdens in a manner inconsistent with fundamental rights.").

43 *See, e.g.*, Johnson v. Daley, 339 F.3d 582, 586 (7th Cir. 2003) (holding that cap on fee-shifting did not implicate a fundamental right); Lewis v. Sullivan, 279 F.3d 526, 528 (7th Cir. 2002) (same with respect to three strikes rule); Tucker v. Branker, 142 F.3d 1294, 1299–1301 (D.C. Cir. 1998) (same with respect to filing fee provisions).

44 *Cf.* Woodford v. Ngo, 126 S. Ct. 2378, 2404 (2006) (Stevens, J., dissenting) (arguing that a strict exhaustion requirement would be subject to "searching judicial examination under the Equal Protection Clause").

45 *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985).

46 Albeit weakly; recent Supreme Court rulings have made it far harder for the mentally ill to claim the protections of the ADA. *See* Michelle Parikh, Note, *Burning the Candle at Both Ends, and There is Nothing Left for Proof: The Americans with Disabilities Act's Disservice to Persons with Mental Illness*, 89 CORNELL L. REV. 721, 723–24 (2004) ("The problem mentally ill plaintiffs face under the ADA [in employment discrimination cases] . . . is practically insurmountable.").

47 42 U.S.C. § 12132 (2000).

B. Mental Illness as a "Physical Injury"

The PLRA provision that seems on its face to strike the gravest blow against mental health litigation is 42 U.S.C. § 1997e(e), which provides that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."[48] This physical injury requirement's reach has been judicially cabined, however, as appellate courts have unanimously interpreted it to permit suits for injunctive and declaratory relief;[49] most circuits to consider the issue have found it to allow recovery of nominal or punitive damages as well.[50]

The physical injury requirement thus predominantly affects suits for compensatory damages. For mentally ill inmates, these claims have been made even harder by courts that disregard the fact that severe mental distress has a physical substrate[51] and deny that at least some kinds of mental suffering constitute physical injuries in and of themselves.[52] Given that physical injury must be "more than *de minimis*" to pass the § 1997e(e) threshold,[53] a greater recognition of the physical reality of mental illness would cover severe injuries without drawing in the apparently marginal cases that courts regularly reject.[54]

The capacious phrase "mental or emotional injury" perhaps suggests that the statute should be read to bar claims dependent on a modern understanding of mental illness.[55] Nevertheless, the dearth of legislative history[56] might signal that Congress intended a more moderate change in the law, preserving suits for severe exacerbation of mental illness as a result of Eighth Amendment violations.[57] Several

---

48 *Id.* § 1997e(e).

49 *See* Boston, *supra* note 16, at 139–40 & nn.563–66 (collecting cases).

50 *See id. But see* Smith v. Allen, 502 F.3d 1255, 1271 (11th Cir. 2007) (prohibiting punitive damages); Davis v. District of Columbia, 158 F.3d 1342, 1348 (D.C. Cir. 1998) (same).

51 *See generally* DENNIS S. CHARNEY & ERIC J. NESTLER, NEUROBIOLOGY OF MENTAL ILLNESS (2d ed. 2004).

52 *See, e.g.*, Weatherspoon v. Valdez, No. 3-05-CV-0586-P, 2005 U.S. Dist. LEXIS 9451, *5–6 (N.D. Tex. May 17, 2005) ("Plaintiff claims only that he experiences 'pain and suffering,' 'moderate to severe depression,' and 'mood swings.' This is insufficient to establish 'physical injury' under the PLRA." (citation omitted)).

53 *See* Boston, *supra* note 16, at 150.

54 *See, e.g.*, Pearson v. Wellborn, 471 F.3d 732, 744 (7th Cir. 2006); Herman v. Holiday, 238 F.3d 660, 665–66 (5th Cir. 2001).

55 Although there is no indication in the PLRA's legislative history that Congress considered the implications of the particular phrase used, the failure to use an established term such as "emotional distress," *see* BLACK'S LAW DICTIONARY 563 (8th ed. 2004), suggests that the statute's prohibition should not be limited to the tort system's conception of mental sequelae.

56 *Cf.* Royal v. Kautzky, 375 F.3d 720, 730 n.5 (8th Cir. 2004) (Heaney, J., dissenting) ("[T]here is almost nothing in the legislative history as to § 1997e(e) at all.").

57 The Eighth Amendment imposes upon prison officials a duty to ensure, among other things, "that inmates receive adequate . . . medical care," Farmer v. Brennan, 511 U.S. 825, 832 (1994),

courts have held that Congress did not intend § 1997e(e) to bar constitutional claims.[58] Although this contention is usually raised in support of constitutional claims such as First Amendment violations — claims in which the core harms are less tangible than those in the infliction or exacerbation of mental suffering — it is likely *stronger* with regard to substantial Eighth Amendment claims. Congress unquestionably *did* intend to prohibit some intangible rights claims; the litany of litigious excesses cited by supporters of the PLRA frequently included First Amendment claims.[59] By contrast, no legislator expressed an intent to exclude claims involving serious mental illness. Given the Supreme Court's dictum that "the integrity of the criminal justice system depends on full compliance with the Eighth Amendment,"[60] courts should preserve remedies for Eighth Amendment violations until Congress clearly expresses its intent to limit them.

C. Volume Reduction and the Elaboration of Constitutional Standards

1. The Importance of Clear Precedent to Correctional Litigation. — Another consequence of the PLRA's effort to reduce the volume of inmate litigation is a reduction in the number of reported decisions. Along with adding the substantive hurdles described above, Congress streamlined dismissal of prisoners' suits[61] and made filing more financially burdensome;[62] at the tail end of litigation, the PLRA made it more difficult to enter or maintain court orders for prospective relief,[63]

---

and to "take reasonable measures to guarantee the safety of the inmates," *id.* (quoting Hudson v. Palmer, 468 U.S. 517, 526–27 (1984)) (internal quotation marks omitted). This obligation extends to mental health care, *see, e.g.*, Gates v. Cook, 376 F.3d 323, 332 (5th Cir. 2004). Pretrial detainees' rights are protected under the Due Process Clause of the Fourteenth Amendment, rather than the Eighth Amendment, and are "at least as great as the Eighth Amendment protections available to a convicted prisoner." City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983).

58 *See* Boston, *supra* note 16, at 141 n.568 (compiling cases); *id.* at 142 ("[C]haracterizing [a First Amendment violation] as a mental or emotional injury seems to miss the point of constitutional protection . . . ."); *see also* Nguyen, *supra* note 14, at 164 ("To treat a constitutional rights claim as a mental or emotional injury claim is to ignore the true meaning of constitutional protection . . . .").

59 *See, e.g.*, 141 CONG. REC. 20,991–92 (1995) (statement of Sen. Reid); *id.* at 14,572 (statement of Sen. Kyl).

60 Johnson v. California, 543 U.S. 499, 511 (2005).

61 The PLRA empowered courts to dismiss claims sua sponte "if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief," 42 U.S.C. § 1997e(c)(1) (2000), and instructed courts to do so as early as possible — "before docketing, if feasible or, in any event, as soon as practicable after docketing," 28 U.S.C. § 1915A(a).

62 *See* 28 U.S.C. § 1915(b), (f). The PLRA also limited attorneys' fees awards. *See* 42 U.S.C. § 1997e(d); *see also* Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 593–94 (2006).

63 *See* 18 U.S.C. § 3626. Courts may only grant prospective relief if "the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." *Id.*

although it exempted private settlement agreements from its restrictions.[64] These provisions correlate with an unmistakable decrease in both inmate filings[65] and in ongoing court-order regulation of correctional facilities.[66]

This reduction in the volume of decisions has had the perhaps unintended effect of limiting judicial elaboration of standards for future cases. The clarity of such standards is especially important for plaintiffs' attempts to sue prison officials acting in their individual capacities, which are the only kind of Eighth Amendment suits in which plaintiffs can receive monetary damages from federal or state officials. Such defendants possess "qualified immunity" from suit; they may be held liable only if their conduct violated a statutory or constitutional right that was "clearly established" at the time of the violation.[67] By eliminating opportunities for judicial elaboration, the PLRA has stunted the establishment of clear constitutional standards.[68]

This effect is aptly illustrated by recent case law on the total isolation and understimulation found in supermax prisons and Security Housing Units (SHUs).[69] Although only one court has found supermax conditions unconstitutional as applied to all prisoners,[70] a line of

§ 3626(a)(1). Parties have several mechanisms by which they can seek termination of ongoing relief. *See id.* § 3626(b); *see also* Schlanger, *supra* note 62, at 590–92.

64 18 U.S.C. § 3626(c)(2).

65 *See* Woodford v. Ngo, 126 S. Ct. 2378, 2400 (2006) (Stevens, J., dissenting) ("[T]he number of civil rights suits filed by prisoners in federal court dropped from 41,679 in 1995 to 25,504 in 2000, and the rate of prisoner filing dropped even more dramatically during that period, from 37 prisoner suits per 1,000 inmates to 19 suits per 1,000 inmates."); Schlanger, *supra* note 19, at 1578–90.

66 *See* Schlanger, *supra* note 62, at 573–89. Judicial oversight of prisons may have been waning even before passage of the PLRA. *Compare* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 46 (1998) ("Since the late 1980s, the decline of momentum in prison conditions litigation has been abundantly evident."), *with* Schlanger, *supra* note 62, at 554 ("[A]t least as to correctional court orders, the claim that there was a decline in the reach of court-order regulation in the 1980s and 1990s is simply wrong.").

67 *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

68 This effect may not be entirely to plaintiffs' detriment, as the two types of provisions likely militate in opposite directions. By eliminating weak claims before courts determine their merits, the provisions impeding filing may prevent courts from developing standards in cases with unsympathetic plaintiffs. This development is counterbalanced by the PLRA's preference for private settlement agreements over judicial oversight, which removes cases from the courts' purview when they are most likely to result in judicially enforced standards of mental health treatment.

69 *Ruiz v. Johnson*, 37 F. Supp. 2d 855 (S.D. Tex. 1999), *rev'd and remanded for further findings sub nom.* Ruiz v. United States, 243 F.3d 941 (5th Cir. 2001), provides a vivid description of the effect of segregation on mentally ill inmates. *See id.* at 908–10; *see also* KUPERS, *supra* note 1, at 53–64 (describing SHUs and their effects on prisoners). *See generally* Peter Scharff Smith, *The Effect of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 471–500 (2006).

70 *See Ruiz*, 37 F. Supp. 2d at 861; *see also* Smith, *supra* note 69, at 444 ("There has been a 'general refusal of courts to find isolated confinement unconstitutional absent aggravating circum-

cases since 1995 has held that such confinement unconstitutionally risks serious harm to mentally ill inmates.[71] But despite this "increasingly clear judicial consensus that the Eighth Amendment is violated when the seriously mentally ill or developmentally disabled are held in supermax confinement,"[72] the lack of an unambiguous rule allows prison officials to win on qualified immunity.[73] One district judge described the relevant case law as "fuzzy" between 2000 and 2003,[74] even though she herself had concluded in 2001 that the conditions encountered by the plaintiff were likely unconstitutional.[75]

2. DOJ Investigations as an Entrenchment of Precedent. — Given the PLRA's throttling effect on already underelaborated judicial standards, plaintiffs' advocates might do well to look outside the courts for sources of clearly established law. DOJ investigations of jails and prisons under the Civil Rights of Institutionalized Persons Act[76] (CRIPA) could provide one such source of guidance. These investigations[77] consistently define a set of minimum constitutional standards for correctional mental health care and treatment of mentally ill inmates.[78] At times, the DOJ has even defined as "minimum remedial measures" such specific practices as "follow-up evaluations of [suicidal]

---

stances,' although specific conditions in specific facilities have been found to violate the Eighth Amendment." (citation omitted)).

71 *See, e.g.*, Jones'El v. Berge, 164 F. Supp. 2d 1096, 1116–17 (W.D. Wis. 2001); Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995); *see also* David C. Fathi, *The Common Law of Supermax Litigation*, 24 PACE L. REV. 675, 681 n.33 (2004) (collecting cases).

72 Fathi, *supra* note 71, at 681.

73 *See, e.g.*, Scarver v. Litscher, 371 F. Supp. 2d 986, 1003–05 (W.D. Wis. 2005), *aff'd on other grounds*, 434 F.3d 972 (7th Cir. 2006).

74 *See id.* at 1004.

75 *See Jones'El*, 164 F. Supp. 2d at 1117–21; *cf. Scarver*, 371 F. Supp. 2d at 1005 (noting that district court opinions "have no precedential weight").

76 42 U.S.C. §§ 1997–1997j (2000).

77 For a partial list of CRIPA investigations, complaints, and settlements, see DOJ Civil Rights Div., Special Litigation Section, Documents and Publications (Dec. 7, 2007), http://www.usdoj.gov/crt/split/findsettle.htm.

78 The DOJ requires that prisons have:

> (1) a systematic program for screening and evaluating inmates to identify those in need of mental health care; (2) a treatment program that involves more than segregation and close supervision of mentally ill inmates; (3) employment of a sufficient number of trained mental health professionals; (4) maintenance of accurate, complete and confidential mental health treatment records; (5) administration of psychotropic medication only with appropriate supervision and periodic evaluation; and (6) a basic program to identify, treat, and supervise inmates at risk for suicide.

Letter from Wan J. Kim, Assistant Att'y Gen., DOJ Civil Rights Div., to Linda Lingle, Governor of Haw. 4 (Mar. 14, 2007), *available at* http://www.usdoj.gov/crt/split/documents/oahu_center_findlet_3-14-07.pdf (quoting Coleman v. Wilson, 912 F. Supp. 1282, 1298 n.10 (E.D. Cal. 1995)); *see also* Letter from Wan J. Kim, Assistant Att'y Gen., DOJ Civil Rights Div., to Robert Dedman, Mayor of Lebanon, Tenn. 18–22 (Aug. 30, 2007), *available at* http://www.usdoj.gov/crt/split/documents/wilson_county_findlet_8-30-07.pdf; Doyle Letter, *supra* note 6, at 3–19.

new inmates within 14 days of intake,"[79] "15- and 30-minute checks of inmates under observation for risk of suicide,"[80] and no less than one "full-time master's level psychologist" and eight hours a week of psychiatric services for a jail population of 325.[81]

Although these investigations are rarely discussed in the literature, they could be taken as a significant interpretation of the floor required by the Eighth Amendment. The standards used by the DOJ are drawn from pre-PLRA case law,[82] but they have never been validated by an appellate court. Executive endorsement of these standards responds to a frequent concern of courts: that they are institutionally ill-suited to pass judgment on correctional systems.[83] To the extent that both deferential judges and Congress are leery of imposing judicially created requirements on prisons for reasons of institutional capacity, the measured opinions of the branch tasked with administrating federal prisons should provide assurance that such policies are both feasible and justified, thus making the CRIPA investigations as useful a source of precedent as the rare published opinions that they cite.

D. Conclusion

The PLRA was not meant to immunize the mistreatment of the mentally ill in prisons and jails, nor was it meant to disfavor mentally ill litigants in particular. Nevertheless, the Act has the potential to severely disadvantage their claims. Its most significant provisions, however, lend themselves to less disabling constructions, which courts should keep in mind when applying the PLRA.

---

79 Letter from Wan J. Kim, Assistant Att'y Gen., DOJ Civil Rights Div., to Ruth Ann Minner, Governor of Del. 16, 18 (Dec. 29, 2006), *available at* http://www.usdoj.gov/crt/split/documents/delaware_prisons_findlet_12-29-06.pdf.

80 *Id.* at 18.

81 Letter from Wan J. Kim, Assistant Att'y Gen., DOJ Civil Rights Div., to David Hudson, Judge, Sebastian County, Ark. 2, 15 (May 9, 2006), *available at* http://www.usdoj.gov/crt/split/documents/sebastian_findlet_5-9-06.pdf.

82 The formulation commonly used by the DOJ was first set forth by the District Court for the Southern District of Texas in *Ruiz v. Estelle* in 1980. 503 F. Supp. 1265, 1339 (S.D. Tex 1980), *aff'd in part and rev'd in part*, 679 F.2d 1115 (5th Cir. 1982), *amended in part and vacated in part*, 688 F.2d 266 (5th Cir. 1982) (per curiam).

83 *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 827 (1974) ("Such considerations are peculiarly within the province and professional expertise of corrections officials, and . . . courts should ordinarily defer to their expert judgment in such matters."); Shook v. Bd. of County Comm'rs, No. 02-CV-00651-RPM, 2006 U.S. Dist. LEXIS 43882, at *33 (D. Colo. June 28, 2006) ("This court is not the appropriate decision maker to determine what constitutes 'adequate' training for Jail staff, or what medications should be on the Jail's list of approved medications, or how many employees are needed for 'sufficient' Jail staffing. This court must respect its constitutional boundaries . . . .").

V. THE SUPREME COURT'S PURSUIT OF PROCEDURAL MAXIMA OVER SUBSTANTIVE MINIMA IN MENTAL CAPACITY DETERMINATIONS

In the course of a mentally ill defendant's journey through the criminal justice process, there are three main instances in which the defendant's mental capacity comes into play: the element of mens rea, the insanity defense, and the determination of competency. Traditionally, these three concepts exist in distinct doctrinal boxes. They are analytically differentiated. Courts define them in different ways. And lawyers rarely, if ever, cite them together.

Nevertheless, the three are closely related. Insanity and competency are related to each other in time — they both concern a defendant's ability to understand the nature of his act or circumstances, but the inquiry into this understanding is made at different times for different purposes. This pair is related to mens rea in scope — instead of looking at a macro level situational understanding and awareness, the mens rea inquiry homes in on the moment of the causal act and asks about the actor's intentionality. Together, these three doctrines are paradigmatic instances of the courts assessing mental capacity. They provide the key doctrinal means by which mentally ill defendants escape punishment. And constitutional law bears on all three concepts.[1]

In the past few years, the U.S. Supreme Court has developed a renewed interest in these doctrines. This heightened attention has manifested itself through intense focus on procedural justice rather than on the contours of substantive regulation.[2] This preoccupation with procedures is misplaced. The Court should invoke both substantive and procedural frameworks, despite the difficulties that doing so entails, to ensure that the rights of mentally ill defendants are adequately protected.

---

[1] *See, e.g.*, Montana v. Egelhoff, 518 U.S. 37 (1996) (mens rea); Leland v. Oregon, 343 U.S. 790 (1952) (insanity defense); Godinez v. Moran, 509 U.S. 389 (1993) (competencies to stand trial, plead guilty, and waive the right to counsel); Ford v. Wainwright, 477 U.S. 399 (1986) (competency to be executed).

[2] For definitions of "substantive" and "procedural" criminal law, see WILLIAM R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW (2d ed. 1986) § 1.1, at 2 ("The substantive criminal law . . . is mostly concerned with what act and mental state, together with what attendant circumstances or consequences, are necessary ingredients of the various crimes. Criminal procedure . . . is concerned with the legal steps through which a criminal proceeding passes, from the initial investigation of a crime through the termination of punishment."). For a normative description of what distinguishes substance from procedure more generally, see Frank I. Michelman, Commentary, *Process and Property in Constitutional Theory*, 30 CLEV. ST. L. REV. 577, 577 (1981) ("Substantive values are values deemed 'so important that they must be insulated from whatever inhibition the political process might impose, whereas a participational [or process goal is concerned] with how decisions effecting [substantive] value choices are made.'" (alterations in original) (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST 75 n.* (1980)).

A. The Three Instances of Capacity Defined

Mens rea ("guilty mind") is "[t]he state of mind that the prosecution . . . must prove that a defendant had when committing a crime."[3] It is an "essential element[] of every crime at common law,"[4] and is thus a part of almost every criminal prosecution. The inquiry into mens rea is a much narrower inquiry than that into culpability as a whole. For example, a mentally ill defendant who perceives his attacker to be a bear and kills it, only to discover later that he killed a person, would lack the requisite mens rea for homicide (intent to kill a human being). By contrast, a mentally ill defendant who believes that God commanded him to kill the person would not have a mens rea defense (he still had intent to kill a human being) but might be excused for reasons of insanity.[5] It is a rare case when a defendant is found to have lacked the ability to form the requisite mens rea.[6]

The insanity defense is an "affirmative defense alleging that a mental disorder caused the accused to commit the crime."[7] The defense has a long history, from its roots in the common law,[8] to its transformation in *M'Naghten's Case*,[9] to its decline after *United States v. Hinckley*.[10] Today, the defense takes a number of forms in forty-six states,[11] and four states have abolished it altogether.[12] Findings of insanity are more common than findings of inadequate mens rea, but less common than findings of incompetency.

In contrast to the insanity defense, which focuses on the defendant's mental state at the time of the offense, competency determinations assess a defendant's "present insanity"[13] or present mental fit-

---

[3] BLACK'S LAW DICTIONARY 1006 (8th ed. 2004).

[4] *Id.*

[5] These examples are taken from Susan F. Mandiberg, *Protecting Society and Defendants Too: The Constitutional Dilemma of Mental Abnormality and Intoxication Defenses*, 53 FORDHAM L. REV. 221, 226–27 (1984).

[6] *See* United States v. Pohlot, 827 F.2d 889, 900 (3d Cir. 1987).

[7] BLACK'S LAW DICTIONARY 810 (8th ed. 2004) (defining "insanity defense").

[8] 4 WILLIAM BLACKSTONE, COMMENTARIES *24–25.

[9] (1843) 8 Eng. Rep. 718 (H.L.) (setting forth the classical two-prong test).

[10] 525 F. Supp. 1342 (D.D.C. 1981), *clarified on denial of reconsideration*, 529 F. Supp. 520 (D.D.C. 1982), *aff'd*, 672 F.2d 115 (D.C. Cir. 1982); *see* Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post*-Clark *Era*, 18 U. FLA. J.L. & PUB. POL'Y 7, 13–28 (2007).

[11] Those forms include various versions of cognitive incapacity, moral incapacity, volitional incapacity, and product-of-mental-illness tests. Clark v. Arizona, 126 S. Ct. 2709, 2720–22 (2006).

[12] Those four states are Idaho, Kansas, Montana, and Utah. Stephen M. LeBlanc, Comment, *Cruelty to the Mentally Ill: An Eighth Amendment Challenge to the Abolition of the Insanity Defense*, 56 AM. U. L. REV. 1281, 1288–93 (2007).

[13] *E.g.*, Hopkins v. State, 429 So. 2d 1146, 1155 (Ala. Crim. App. 1983). Mens rea and insanity both concern the defendant's responsibility for the crime, whereas competency implicates the defendant's Fifth, Sixth, and Fourteenth Amendment rights to confrontation and a fair trial. *See* DONALD PAULL, FITNESS TO STAND TRIAL 8–9 (1993).

ness.[14] The idea of competency is also firmly rooted in common law tradition.[15] Competency determinations can take place at various phases of a prosecution, from arraignment to trial to execution, at the suggestion of either the defendant or the court. Findings of incompetency are by far the most common of the three mental capacity deficiencies.[16]

B. The Court's Proceduralism

The federal constitutional limits on the three doctrines just defined share an important characteristic: they are virtually all procedural. That proposition is clearer today than it was even a few years ago. Since 2003, the Supreme Court has taken more substantive criminal mental health law cases than it had averaged in each of the prior four decades.[17] Two of these recent cases — *Clark v. Arizona*[18] and *Panetti v. Quarterman*[19] — dealt with the capacity of mentally ill defendants.[20] Although both cases had the potential for significant substantive innovations, in each the Court more eagerly analyzed and engaged with the procedural issues of the case, passing on important opportunities to lay down even minimal substantive standards.

In *Clark*, the Court left unanswered the question whether the Constitution requires some minimum diminished capacity defense.[21] Faced with the issue of whether Arizona's *Mott*[22] rule — a rule that barred psychiatric testimony about a defendant's mental incapacity from being considered on the element of mens rea — violated due process, the Court could have approached the issue by focusing on "the substantive question of how states may define mens rea and defenses to it."[23] Indeed, this was the approach the Court had previously taken in *Montana v. Egelhoff*[24] when faced with a similar evidence channel-

---

[14] It should be noted that there are many people who may be incompetent but who are not mentally ill, and there are many people with mental illnesses who are perfectly competent.

[15] 4 BLACKSTONE, *supra* note 8, at *24–25.

[16] PAULL, *supra* note 13, at 5–6 (noting that one hundred defendants are found to be incompetent for every one found to be insane); *see also* United States v. Pohlot, 827 F.2d 889, 900 (3d Cir. 1987).

[17] Christopher Slobogin, *The Supreme Court's Recent Criminal Mental Health Cases*, CRIM. JUST., Fall 2007, at 8, 8.

[18] 126 S. Ct. 2709 (2006).

[19] 127 S. Ct. 2842 (2007).

[20] The third case, *Sell v. United States*, 539 U.S. 166 (2003), is discussed in Part II, *supra* pp. 1121–33, and the fourth case, *Atkins v. Virginia*, 536 U.S. 304 (2002), which deals with mental retardation, is outside the scope of this Development.

[21] A diminished capacity defense is essentially "a recognition that mental illness . . . can negate the requisite mens rea for the crime." Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1218 (2000).

[22] *See* State v. Mott, 931 P.2d 1046 (Ariz. 1997).

[23] *See* Slobogin, *supra* note 17, at 12.

[24] 518 U.S. 37 (1996).

ing question. In that case, the Court decided that the voluntary intoxication defense is not a fundamental principle of justice protected by the Due Process Clause, thus rendering evidence channeling unproblematic.[25] By contrast, in *Clark*, the Court wrangled with the matter as one involving evidentiary rules, and chose to comment upon the ability of states to channel testimony of mental illness toward the insanity defense and away from mens rea.[26] (This channeling question would be moot if the underlying substantive question — whether or not the Constitution requires a diminished capacity defense — were resolved.) Not only did the Court embark on this procedural tack from the outset, it went forth aggressively, contriving an elaborate (and arguably unnecessary[27]) construct to categorize the relevant evidence into three domains.[28] In all its procedural zeal, the Court failed to answer the underlying substantive question.

The *Clark* Court also avoided answering the question whether the Constitution requires states to maintain some minimum insanity defense. At issue in *Clark* was Arizona's formulation of the insanity defense, which asked only whether the defendant "was afflicted with a mental disease or defect of such severity that [he] did not know the criminal act was wrong."[29] This formulation eliminated the traditional first prong of *M'Naghten*: that the defendant not know the nature and quality of his act.[30] In determining the constitutionality of the Arizona standard, the *Clark* majority went so far as to declare, "History shows no deference to *M'Naghten* that could elevate its formula to the level of [a] fundamental principle" that limits the states' ability to define crimes and defenses.[31] But the Court went no further, leaving open the question what sort of standard *does* constitute a fundamental principle limiting the states. To be sure, this sort of evasion is not the same as the evasion engaged in by the Court with respect to mens rea. The mens rea issue was squarely before the Court, whereas judicial minimalists might argue that the Court would have had to go out of its way to answer the question whether the Constitution requires the states to provide some minimum insanity defense. But this is true only if one assumes that the constitutional minimum does not lie somewhere between *M'Naghten* and the Arizona standard, which it very well may. Consider this example: a mentally ill man shoots a row of

---

[25] *Id.* at 51, 56 (plurality opinion).

[26] *See* Clark v. Arizona, 126 S. Ct. 2709, 2724–26, 2731–36 (2006).

[27] *Id.* at 2738 (Kennedy, J., dissenting).

[28] *Id.* at 2724–25 (majority opinion) (describing categories of "observation evidence," "mental-disease evidence," and "capacity evidence").

[29] *Id.* at 2719 (alteration in original) (quoting ARIZ. REV. STAT. ANN. § 13-502(a) (West Supp. 2005)).

[30] (1843) 8 Eng. Rep. 718, 722 (H.L.).

[31] *Clark*, 126 S. Ct. at 2719.

apples at a fruit stand. Only, the fruit stand is a hallucination, and he is really shooting into a group of people. The man does not know the nature of his act (that he is shooting people), but does know that what he is doing is wrong (it is destruction of property). Under the Arizona standard, this man would be considered sane for the purposes of a homicide prosecution. However, the factual scenario presents clear doubts about the man's culpability and the proportionality of his punishment — misgivings that might implicate the Eighth Amendment.

In *Panetti*, the Court left unanswered the question of the proper standard for competency to be executed. The Court, in large part, engaged with the procedural matters of the case: it interpreted restrictions on "second or successive" petitions for habeas corpus[32] as containing an exception for certain competency claims,[33] and it held unconstitutional the trial court's failure to provide the defendant with a hearing and an independent psychiatric evaluation upon a "substantial threshold showing of insanity."[34] The Court then issued what Justice Thomas termed "a half-baked holding"[35] on the substantive matter of the proper competency standard, asserting that an individual who "cannot reach a rational understanding of the reason for the execution" cannot be competent to be executed.[36] As for a controlling definition of the competency standard, the Court left this to the states, saying: "[W]e do not attempt to set down a rule governing all competency determinations."[37] To be sure, this step in the substantive direction deserves some recognition, considering the Court could have resolved the case on procedural grounds alone. However, since it was just a small step (merely letting states know what was unacceptable), it did little in the way of demarcating the limits of what might be acceptable.

In the end, in its consideration of the capacities of mentally ill defendants, the Court is most proceduralist in the most substantive areas. On mens rea and the insanity defense — concepts that define criminal liability — the Court hesitates to provide definitive substantive minima. On competency — an inquiry made during the litigation process — the Court nears substantive innovation but ultimately shies away.

---

[32] 28 U.S.C. § 2244(b) (2000).

[33] Panetti v. Quarterman, 127 S. Ct. 2842, 2852–54 (2007) (excepting competency claims made pursuant to *Ford v. Wainright*, 477 U.S. 399 (1985), that are filed as soon as they are ripe). *Ford* held that the Eighth Amendment "prohibits a State from carrying out a sentence of death upon a prisoner who is insane." 477 U.S. at 410.

[34] *Panetti*, 127 S. Ct. at 2856–57 (quoting *Ford*, 477 U.S. at 426 (Powell, J., concurring in part and concurring in the judgment)).

[35] *Id.* at 2873 (Thomas, J., dissenting). Justice Thomas chided the Court for undertaking the substantive inquiry in the first place. *See id.*

[36] *Id.* at 2861 (majority opinion).

[37] *Id.* at 2862.

C. The Problem with a Primarily Procedural Approach

Procedural jurisprudence alone cannot properly protect the rights of mentally ill defendants. Substantive and procedural values or goals are "strictly relative to one another."[38] Procedures only work if they act to enforce or ensure enforcement of some background norm. Even the most thorough procedural constructs employed by the Court are empty without strong substantive guides for states to follow.[39] For this reason, the Court should not shy away from greater substantive engagement, or else the rights themselves may be rendered meaningless.

Excessive focus on procedural solutions can have the effect of preventing alignment between the law and prevailing notions of justice. To be sure, procedure is important to perceptions of fairness and compliance with the law.[40] But a fair procedure, by itself, cannot guarantee public satisfaction with an ultimate outcome. Indeed, people are less concerned about process when outcomes implicate and threaten "moral mandates," like those concerning innocence and guilt.[41] No amount of evidentiary rules, avenues of appeal, and rounds of review can make a guilty verdict right if, in fact, the defendant is innocent. Errors will occur, in part because total accuracy is both unattainable and unaffordable in procedural systems,[42] and in part because some of the error lies beyond procedure — undetected and undetectable by procedural mechanisms and lurking within the background substantive norm to which those mechanisms are tethered. That is why, despite rigorous litigation and appeal, the outcome "must in the end be submitted to a moral scrutiny."[43] Scrutiny is particularly warranted with respect to jurisprudence in the realm of mental illness, where a lack of substantive regulation of state-led determinations results in outcomes that fall short of nationally accepted moral sensibilities.[44]

---

[38] Michelman, *supra* note 2, at 577.

[39] *See* Parratt v. Taylor, 451 U.S. 527, 545 (1981) (Blackmun, J., concurring) ("I continue to believe that there are certain governmental actions that, even if undertaken with a full panoply of procedural protection, are, in and of themselves, antithetical to fundamental notions of due process."), *overruled on other grounds by* Daniels v. Williams, 474 U.S. 327 (1986); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 7–19 (1996) (arguing that procedural rules need substantive limits to work).

[40] *See* TOM R. TYLER ET AL., SOCIAL JUSTICE IN A DIVERSE SOCIETY 176 (1997) (noting that "people who experience procedural justice when they deal with authorities are more likely to view those authorities as legitimate, to accept their decisions, and to obey social rules").

[41] *See* Linda J. Skitka & David A. Houston, *When Due Process Is of No Consequence: Moral Mandates and Presumed Defendant Guilt or Innocence*, 14 SOC. JUST. RESEARCH 305, 315–16 (2001).

[42] Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 185–86 (2004).

[43] H.L.A. HART, THE CONCEPT OF LAW 210 (2d ed. 1994).

[44] *See* Ford v. Wainwright, 477 U.S. 399, 409 (1986) ("[T]he natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently

Procedural guidelines, unaccompanied by substantive ones, also create perverse incentives for states to formulate minimal substantive standards. State courts are, to a significant extent, motivated by a desire not to have their decisions overturned. In order to achieve this goal, lower courts implement weak substantive protections — standards that are narrowly defined and easily met — such that officials can easily comply with the procedural requirements set by the Court above. The phenomenon is well illustrated by guilty pleas. For a defendant to plead guilty, he must voluntarily, knowingly, and intelligently waive his right to trial.[45] This inquiry *should* delve into the mental and emotional health of the defendant,[46] and his ability to understand and assimilate to a set of legal warnings. Instead, in practice, the guilty plea colloquy consists of a series of "yes" or "no" questions.[47] Defendants often nod away their rights with the judge's goading and their lawyer's coaching.[48] Courts thus proceduralize a substantive inquiry: instead of actually evaluating the defendant's mental state, the standard requires only that officials jump through a few hoops. If anything, the procedure is a mask — it does not identify incompetency so much as hide it.

Indeed, this race to the bottom occurs even when the Court *does* set forth some substantive constitutional minimum. Consider the nature of lower court decisions interpreting *Ford v. Wainwright*[49] prior to *Panetti*. Justice Marshall's opinion in *Ford* banned execution of the incompetent, but declined to provide the relevant definition of competency.[50] Only Justice Powell, in a concurring opinion, provided some substantive guidance, arguing that the state should not execute offenders who "are unaware of the punishment they are about to suffer and why they are to suffer it."[51] Equipped with this substantive morsel, lower courts addressing the issue after *Ford* have applied and inter-

---

shared across this Nation."). *See generally* Lynnette S. Cobun, Note, *The Insanity Defense: Effects of Abolition Unsupported by a Moral Consensus*, 9 AM. J.L. & MED. 471, 475, 478 (1984) ("[T]he insanity defense reflects society's moral judgment that certain persons, due to mental disability, have not inflicted the same harm upon society as have others who have committed the same offense. . . . [The defense] illustrate[s] society's willingness to consider mental illness in determining culpability . . . .").

45 *See* Johnson v. Zerbst, 304 U.S. 458, 464–65 (1938).

46 *Cf.* Michael Mello, *Executing the Mentally Ill: When Is Someone Sane Enough to Die?*, CRIM. JUST., Fall 2007, at 30, 30 (noting that mental illness is relevant to plea negotiations).

47 Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1463 (2005).

48 *See id.* at 1463–64.

49 477 U.S. 399.

50 *See id.* at 405–10; *id.* at 410–18 (plurality opinion).

51 *Id.* at 422 (Powell, J., concurring in part and concurring in the judgment).

preted Justice Powell's language very narrowly.[52] The same has happened with standards for competency generally. In *Godinez v. Moran*,[53] the Court held that the standards for competency to plead guilty and competency to waive the right to counsel are no higher than the standard for competency to stand trial.[54] In addition to reaching this holding, the Court mentioned that "[s]tates are free to adopt competency standards that are more elaborate than [this] formulation."[55] Despite this explicit allowance for — and perhaps encouragement of — trial court–level formulation of higher standards, lower courts have largely followed the Supreme Court's lead, parroting the minimum.[56] At least one state has interpreted *Godinez*'s seemingly permissive equivocation of standards as a ceiling, not a floor, describing the Court as having held that the standard for competency to waive counsel "*may not* be higher than" the standard for competency to stand trial.[57] This interpretation exemplifies why the Court not only must prescribe constitutional minima that are substantive, but also must ensure that those minima are meaningful constitutional floors.

D. Toward Increased Substantive Engagement

The Supreme Court should grapple with substantive standards and establish constitutional minima, not simply leave this task to the states. A substantive approach is preferable because it can better ensure an acceptable set of outcomes by addressing those outcomes directly;[58] that is, it can better ensure that people whose mental capacities make them undeserving of punishment do not receive punishments that they do not deserve. While there are a number of reasons why substantive lawmaking may prove difficult, the Court still should consider this approach.

---

[52] Slobogin, *supra* note 17, at 14. Examples of courts to have addressed the language are *Billiot v. State*, 655 So. 2d 1, 6 (Miss. 1995); and *Barnard v. Collins*, 13 F.3d 871, 876–77 (5th Cir. 1994).

[53] 509 U.S. 389 (1993).

[54] *Id.* at 391. The Court adopted a standard requiring that a defendant need only have "sufficient present ability 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." *Id.* at 396 (quoting Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam)) (internal quotation marks omitted).

[55] *Id.* at 402.

[56] *See, e.g.*, Sims v. State, 438 S.E.2d 253, 254–55 (S.C. 1993).

[57] Edwards v. State, 854 N.E.2d 42, 48 (Ind. Ct. App. 2006) (emphasis added), *aff'd*, 866 N.E.2d 252 (Ind. 2007), *cert. granted*, 128 S. Ct. 741 (2007).

[58] *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 412–26 (1995); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 66–74 (1997).

Substantive standards can be hard to formulate because mental illness is difficult to define and categorize.[59] This difficulty may incline the Court to avoid them altogether. But substantive approximations are not *impossible* to formulate. The Court is in a position to create a functional and moral — if not purely scientific — definition.[60] This is precisely what the Court did in *Dusky v. United States*,[61] where it defined the test for competency to stand trial as "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as factual understanding of the proceedings against him."[62] The *Dusky* test was formulated in functional terms. The Court might take a similar approach with other mental capacity doctrines.

Indeed, a number of administrable standards exist and have been proposed in the courts and in the literature.[63] These include a diminished capacity defense only for specific intent crimes,[64] an insanity defense that includes cognitive, moral, and volitional prongs,[65] and a competency to be executed standard that requires that the defendant understand the nature and purpose of the punishment and appreciate the reason for its application in his case.[66] To be sure, such definitions inevitably involve some arbitrary line drawing. But, as the Court's jurisprudence has already evidenced in other areas,[67] with some substantive matters, this risk is worth taking.[68]

---

[59] *See* Andrew E. Taslitz, *Mental Health and Criminal Justice: An Overview*, 22 CRIM. JUST., Fall 2007, at 4, 4.

[60] *See id.* ("[B]ecause 'normalcy' unquestionably involves moral and social judgments, no definitions of mental health or illness can be purely 'scientific' ones.").

[61] 362 U.S. 402 (1960) (per curiam).

[62] *Id.* at 402 (quoting the Solicitor General's brief) (internal quotation mark omitted).

[63] *See, e.g.*, Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 BEHAV. SCI. & L. 291, 294 (1992) (advocating multifaceted evaluation of competence, including competence to assist counsel and decisional competence); Joshua Dressler, Commentary, *Reaffirming the Moral Legitimacy of the Doctrine of Diminished Capacity: A Brief Reply to Professor Morse*, 75 J. CRIM. L. & CRIMINOLOGY 953 (1984) (arguing that diminished capacity, in the form of partial responsibility, should be recognized as a legitimate excuse); Jodie English, *The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense*, 40 HASTINGS L.J. 1 (1988) (advocating a volitional insanity defense as a constitutional floor).

[64] *E.g.*, State v. Holcomb, 643 S.W.2d 336, 341–42 (Tenn. Crim. App. 1982).

[65] *E.g.*, State v. Hartley, 565 P.2d 658, 660–61 (N.M. 1977).

[66] AM. BAR ASS'N, COMM'N ON MENTAL AND PHYSICAL DISABILITY LAW, REPORT NO. 122(A), Recommendation § 3(d) (2006), *available at* http://www.abanet.org/disability/docs/DP122A.pdf.

[67] The Court's categorical exclusion of juvenile defendants, Roper v. Simmons, 543 U.S. 551 (2005), and mentally retarded defendants, Atkins v. Virginia, 536 U.S. 304 (2002), from death penalty eligibility drew lines that may have a less-than-perfect correlation with culpability.

[68] *See* Steiker & Steiker, *supra* note 58, at 418 (noting that the risk of underinclusion incurred by arbitrary line-drawing is preferable to the risk of overinclusion — that is, the risk that criminal punishment will be imposed on the undeserving — when no lines are drawn).

Though courts can formulate substantive standards, such standards, once formulated, may prove difficult in their application. Psychiatric evidence is often tough to interpret, and courts tend to lack the institutional competence to make such determinations. Instead, their comparative advantage lies in judging the adequacy and design of procedural protections.[69] Courts' familiarity with procedural decisionmaking may explain why they prefer to analyze cases using procedural formulations rather than substantive ones. Nevertheless, courts can still forge ahead on the substantive front with the help of experts.[70] Indeed, this is the precise purpose of expert testimony.[71] To be sure, there are many instances in which even the experts disagree.[72] But such disagreement does not occur with great frequency[73] or consequence,[74] and to the extent that it does occur, it is somewhat inevitable.[75] If the courts were to surrender to this inevitability, they would undermine the entire well-established practice of using psychiatric expert testimony — a practice the Court has repeatedly endorsed.[76]

Even if the Court, through the use of expert testimony, is well-equipped to engage in substantive formulation, the principle of federalism would rightly give it pause. Substantive criminal law standards are traditionally the domain of the states,[77] and for good reason. In a world in which large majorities of people in one place find a particular behavior offensive and wrong, and large majorities of people in another place find that same behavior trivial or acceptable, or even good, the best way to maximize individuals' satisfaction with the laws they

---

[69] *See* Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc., 498 U.S. 533, 565 (1991) (Kennedy, J., dissenting) (noting that courts have "expertise and some degree of inherent authority" in the area of "practice and procedure").

[70] Mental health professionals can assist courts, but ultimately it is the role of judges to balance the legal, moral, and social interests at stake. *Cf.* Donald N. Bersoff, *Judicial Deference to Nonlegal Decisionmakers: Imposing Simplistic Solutions on Problems of Cognitive Complexity in Mental Disability Law*, 46 SMU L. REV. 329, 371 (1992).

[71] *See* FED. R. EVID. 702 (allowing expert testimony only when it will "assist the trier of fact to understand the evidence"); Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 52 (1901) (noting that the role of an expert witness is to furnish "general propositions" that are outside of the common knowledge of the factfinder). Indeed, expert testimony is particularly valuable with respect to adjudications of mental states. *See generally* CHRISTOPHER SLOBOGIN, PROVING THE UNPROVABLE: THE ROLE OF LAW, SCIENCE, AND SPECULATION IN ADJUDICATING CULPABILITY AND DANGEROUSNESS (2007).

[72] *See, e.g.*, Mello, *supra* note 46, at 32 (noting the varied diagnoses of the defendant in *Ford*).

[73] Park Elliott Dietz, *Why the Experts Disagree: Variations in the Psychiatric Evaluation of Criminal Insanity*, 477 ANNALS AM. ACAD. POL. & SOC. SCI. 84, 85 (1985) (noting agreement in 92% of cases).

[74] Gerald E. Nora, *Prosecutor as "Nurse Ratched"?: Misusing Criminal Justice as Alternative Medicine*, CRIM. JUST., Fall 2007, at 18, 20 (noting that the "[mental] illnesses that are most relevant to public safety and criminal justice" are "subject to objective diagnoses").

[75] *See* Dietz, *supra* note 73, at 86.

[76] *See, e.g.*, Barefoot v. Estelle, 463 U.S. 880, 896 (1983).

[77] *See* United States v. Lopez, 514 U.S. 549, 561 n.3 (1995).

live under is to devolve decisionmaking to the local level.[78] Federal guidance that is merely procedural is more respectful of state-level substantive standards than federal substantive mandates to the states. But all behaviors do not fit under this rubric. In fact, the federal system has already incorporated at least some areas of criminal law into its own domain.[79] Mental capacity determinations should be next.[80]

Mentally ill defendants cannot rely on local democracy to enforce the proper moral outcome or to protect them. For there is a political process problem[81]: mentally ill defendants systematically lack access to local legislatures that could advocate for their interests.[82] And given that most state judges are elected, they too are too vulnerable to majoritarian pressures to protect the insular rights at issue. These factors justify the Court's stepping in[83]:

> Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life.[84]

Given the perversities of pure proceduralism in this area, the Court can only fully perform its role as buffer against majoritarian politics if

---

[78] *See* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1492–1511 (1987) (book review) (explaining how federalism "secure[s] the public good," "protect[s] private rights," and "preserve[s] the spirit and form of popular government" (quoting THE FEDERALIST NO. 10 (James Madison)) (internal quotation marks omitted)).

[79] *See* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 403–06 (1998) (noting that traditionally state-based American criminal law is subject to international treaty-making and related federal regulation). Criminal trial rules and procedures are also a traditional domain of the states, Chambers v. Mississippi, 410 U.S. 284, 302–03 (1973), but the Court has federalized that arena nevertheless, *see* Stuntz, *supra* note 58, at 16–19.

[80] Even staunch advocates of federalism acknowledge the need for exceptions. Federalism's ends of diversity and creative energy must be balanced against the goal of "achiev[ing] a unity sufficient to resist [a people's] common perils and advance their common welfare." Herbert Wechlser, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543 (1954). Protection of the mentally ill fits into this caveat, given that prosecution and execution of mentally ill defendants are unacceptable as a moral matter.

[81] ELY, *supra* note 2, at 135. The political process argument applies as forcefully to substantive protections as to procedural ones. *See* Stuntz, *supra* note 39, at 21.

[82] *See* Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817, 843 (1998) (noting that the mentally ill "have no political action committee or access to legislators or governors"); Laura B. Chisolm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L.J. 201, 269 (1987) (noting that the mentally ill lack "effective direct access to decisionmaking processes" and that "it is likely that their interests will not routinely be of much importance to those who do have access").

[83] *See* Alan M. Dershowitz, *John Hart Ely: Constitutional Scholar (A Skeptic's Perspective on Original Intent as Reinforced by the Writings of John Hart Ely)*, 40 STAN. L. REV. 360, 369 (1988).

[84] McCleskey v. Kemp, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting).

it agrees to engage in meaningful substantive analysis of the issues that affect mentally ill defendants.

E. Conclusion

The judicial values of minimalism and restraint undoubtedly suggest that, even given the benefits of judicial engagement in the substantive arena, the Court should proceed cautiously into this area.[85] But it is a mistake to assume that proceduralism is the most minimalist route. The reality of the Court's procedural jurisprudence suggests otherwise. In the realm of criminal procedure, the Court has meddled in the minutiae of even day-to-day investigative activities. With each decision, the Court defines the required processes in ever more detail.[86] A substantive turn in this area might in fact enable less activism in Supreme Court decisionmaking on the whole.

Moreover, substantive regulation of mental capacity determinations readily finds a place within the Constitution's provisions. To be sure, due process does say "process," and most of the Bill of Rights' provisions pertain only to process,[87] so, at first glance, it may appear difficult to give such regulation a constitutional home. Nevertheless, there are several plausible options. These include the Eighth Amendment's bar against cruel and unusual punishment,[88] an Eighth Amendment proportionality principle,[89] and Fourteenth Amendment substantive due process as applied to criminal law.[90]

Whichever path it chooses, the Court need not define the ultimate, optimal doctrine — it need only define a meaningful substantive floor. Only such an approach both respects state power and protects those whose voices are drowned out by the majoritarian chorus.

---

[85] *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

[86] *See* Stuntz, *supra* note 58, at 16–19 & nn.61–69.

[87] *See* Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring).

[88] *See generally* Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966). In this vein, the Court's stance in *Robinson v. California*, 370 U.S. 660 (1962), provides an apposite starting point. *But see* Powell v. Texas, 392 U.S. 514, 532–33 (1968) (distinguishing *Robinson* and limiting its logic). At the very least, *Robinson* provides precedent for the Court's limiting the government's penal powers by assessing the constitutionality of the definition of the crime, not simply the length of the punishment. *See Robinson*, 370 U.S. at 667.

[89] *See, e.g.*, Steiker & Steiker, *supra* note 58, at 415; Stuntz, *supra* note 58, at 72; *see also* Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 600–06 (2005).

[90] *See* Stuntz, *supra* note 58, at 68. *See generally* Herbert L. Packer, The Aims of the Criminal Law *Revisited: A Plea for a New Look at "Substantive Due Process*," 44 S. CAL. L. REV. 490 (1971).

VI. MENTAL HEALTH COURTS AND THE TREND TOWARD A REHABILITATIVE JUSTICE SYSTEM

In the last decade, diversionary programs known as mental health courts (MHCs) have been created all over the country. These programs work at the local level to divert mentally ill chronic reoffenders away from the traditional criminal justice system and into treatment. As MHCs become more widespread and their effectiveness becomes broadly recognized, their sources of support and funding have grown. Recently, MHCs have been increasingly promoted (and funded) by the U.S. Department of Justice as part of a bipartisan effort jointly sponsored by the President and Congress to increase access to mental health services.[1] No longer simply a few scattered programs, MHCs have now become a national project providing mentally ill individuals a way out of repeated imprisonment.

Because of their unconventional nature, MHCs may also prove to be a window into the evolution of America's criminal justice system. Historically, the prevailing theory of punishment has moved from rehabilitation to retribution and back again.[2] Since the mid-1970s, retribution has been the norm. Along with it have come overflowing prisons and an incarceration level higher than that of nearly all other developed countries.[3] The recent popularity, success, and widespread acceptance of MHCs (and other problem-solving courts[4]), with their focus on treatment and probation instead of incarceration and punishment, indicate that an important step has been taken toward a more rehabilitation-focused justice system as a whole.

Section A chronicles the rise of the MHC system and provides an overview of MHC mechanics. This section also discusses the social and fiscal costs and benefits of MHCs, as well as the effect of federal funding on the development of MHCs. Section B examines historical theories of punishment — particularly the divide between retributive

---

[1] In 2000, Congress enacted the America's Law Enforcement and Mental Health Project (ALEMHP) Act, Pub. L. No. 106-515, 114 Stat. 2399 (codified at 42 U.S.C. §§ 3796ii to 3796ii-7 (2000)). The ALEMHP Act would have created up to 100 new MHCs by 2004. However, funding was not immediately appropriated. Henry J. Steadman et al., *Mental Health Courts: Their Promise and Unanswered Questions*, 52 PSYCHIATRIC SERVICES 457, 457 (2001). Little progress was made on federal funding until President George W. Bush's 2003 New Freedom Commission, discussed *infra* pp. 1173–74.

[2] *See infra* pp. 1174–75.

[3] JUSTICE KENNEDY COMM'N, AMERICAN BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 4 (2004) [hereinafter KENNEDY COMM'N], *available at* http://www.abanet.org/media/kencomm/rep121a.pdf.

[4] Problem-solving courts, the group of courts to which MHCs belong, are criminal judicial proceedings that attempt to address defendants' actions at a causal level by imposing remedial discipline rather than retributive punishment. Such courts include drug courts, domestic violence courts, MHCs, and others. *See* Bruce Winick & David Wexler, *Introduction* to JUDGING IN A THERAPEUTIC KEY 3–5 (Bruce Winick & David Wexler eds., 2003).

and rehabilitative theories — and how they have affected the development of MHCs. Section C analyzes the current state of the retributive-rehabilitative divide, concluding that MHCs may provide a useful insight into the future direction of the criminal justice system as a whole.

A. Mental Health Courts: An Overview

America's court system has long struggled with the question of how to provide justice for mentally ill defendants. Are they to be treated like the rest of the population, tried, convicted, and confined without regard to their mental status? Or does their mental illness place them in a separate category? Are they more treatable than their "normal" fellow inmates — is their recidivism more preventable? One MHC-sponsoring judge states, "We've learned that [mentally ill] offenders do not do well in prison. . . . [T]heir illnesses just get worse. And what happens when they are released without having received effective treatment? They get recycled right back into the system. Everyone loses."[5] Mentally ill defendants whose offenses are linked to their conditions are unlikely to receive treatment in prison, and very likely to reoffend quickly after their sentences are over.[6] This situation presents a challenge to judges, prosecutors, and legislators alike: if there is a treatable mental condition at the root of a series of recidivist offenses, does the criminal justice system have the right, or perhaps the responsibility, to attempt to intervene at that root level?

In the last ten years, a new type of court has arisen to take on this challenge: the mental health court. Combining aspects of adversarial courts and other diversionary programs under the supervision of criminal court judges, MHCs actively seek out and divert from the normal criminal process repeat offenders whose offenses are linked to mental illness. Flagged for the program by the arresting officer, defense counsel, the judge, or even the prosecution, these individuals' cases are adjudicated in an MHC in hopes of granting offenders a way out of the cycle of recidivism. When identified as possible candidates for an MHC, defendants are given psychiatric evaluations and, if di-

---

[5] Jonathan Lippman, *Achieving Better Outcomes for Litigants in the New York State Courts*, 34 FORDHAM URB. L.J. 813, 826 (2007).

[6] By some estimates, 16% of inmates in prisons nationwide are mentally ill. Only 17% of these inmates receive any sort of treatment during their incarceration, which leaves thousands of untreated individuals, their diseases possibly worsened by their jail experience, to be released onto the streets — and often rearrested within months. *See* DEREK DENCKLA & GREG BERMAN, CTR. FOR CT. INNOVATION, RETHINKING THE REVOLVING DOOR: A LOOK AT MENTAL ILLNESS IN THE COURTS 3–4 (2003), *available at* http://www.courtinnovation.org/_uploads/documents/rethinkingtherevolvingdoor.pdf. Forty-nine percent of mentally ill inmates have three or more prior arrests, as opposed to only 28% of non–mentally ill inmates. *Id.* at 4.

agnosed with a mental illness that contributed to their offense, are offered "long-term treatment as an alternative to incarceration."[7]

1. The Rise of the Mental Health Court. — Since 1997, when the first MHC was set up in Broward County, Florida, MHCs have rapidly increased in number and size. Founded in order to "focus mental health services and resources on defendants whose mental illness was the primary reason for their recidivism," early MHCs accepted primarily inmates who had repeatedly committed misdemeanors.[8] In 1999, Anchorage, Alaska, set up a court to divert its own mentally ill recidivists.[9] By 2005, some 125 MHCs had been established in states across the nation.[10]

MHCs typically have dedicated personnel, including a judge, a prosecutor, and a public defender, each of whose entire docket consists of MHC participants.[11] Also present are various mental health professionals whose primary responsibility is their designated MHC. All personnel in an MHC, from judge to case worker, are thoroughly trained in mental illness and its treatment, as well as in the psychology underlying criminal behavior of the mentally ill. Because the administrative personnel of an MHC are so stable, the court takes on a unique

---

[7] Lippman, *supra* note 5, at 826. Some defense practitioners and advocates for the mentally ill have questioned whether MHCs and other forms of problem-solving courts are truly voluntary. A choice between jail and treatment, they say, is no choice at all. Furthermore, because a defendant must often plead guilty to the underlying offense in order to participate in some MHCs, some defense attorneys have expressed ethical and professional reservations at the dual role they must play — they must defend, but also must inform their client that the only way to obtain potentially life-saving mental health services is to surrender without a fight. For a detailed exchange on the problem of voluntariness and the dilemmas of the defense attorney in problem-solving courts, see David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 ST. THOMAS L. REV. 743 (2005); and Mae C. Quinn, *An RSVP to Professor Wexler's Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable To Join You, Already (Somewhat Similarly) Engaged*, 48 B.C. L. REV. 539 (2007).

[8] Tamar M. Meekins, *"Specialized Justice": The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 24–25 (2006).

[9] University of Alaska Anchorage Justice Ctr.: Mental Health Courts (2002) [hereinafter Anchorage MHCs], http://justice.uaa.alaska.edu/rlinks/courts/mentalhealth.html.

[10] *See* COUNCIL OF STATE GOV'TS, MENTAL HEALTH COURTS: A NATIONAL SNAPSHOT (2005) [hereinafter NAT'L SNAPSHOT], http://www.consensusproject.org/mhcp/national-snapshot.pdf.

[11] The stability of these three individuals is important because many legal professionals will have little or no background in psychology. Stability keeps training costs down and allows court personnel to reap the benefits of consistent and broad exposure to the mentally ill and their various symptoms and needs. *See* DENCKLA & BERMAN, *supra* note 6, at 15–16 (comparing the roles of traditional and problem-solving judges).

character[12] as a place where therapy can actually *begin*, not merely be prescribed.[13]

The relationship between MHCs and standard criminal courts is similar across jurisdictions, but can differ in the details. MHCs, like standard courts, derive their coercive power from the authority of the judge. Though MHCs vary in their use of jail as a sanction for noncompliance with the therapeutic requirements,[14] they all have in common the goal of transitioning the mentally ill defendants out of the prison system and into a treatment-oriented probationary period. MHCs vary as to whether they accept individuals who have already been convicted of or charged with a crime or those who have merely been arrested.[15] Regardless, nearly all MHCs use the promise of a cleared criminal record as an incentive for treatment compliance.[16] During their enrollment in an MHC, individuals receive outpatient treatment at local clinics, have regular meetings with court or probation officers, make appearances in court to confer with the judge over their treatment progress, and participate in group counseling programs. Though the initial MHC proceeding is usually still formulated as an adversarial process, it is certainly less so than a typical criminal court proceeding, and a defendant's subsequent court appearances often bear a strong resemblance to therapeutic appointments.[17]

2. The Expansion of the MHC System. — The types of defendants accepted by MHCs have evolved over the decade since the Broward County court was founded. Early MHCs refused to accept defendants charged with felonies, preferring instead to focus their efforts on misdemeanants who committed "quality of life crimes."[18] No violent

---

[12] One unique aspect is the cooperation between the defense attorney and prosecutor — as one scholar puts it, "the attorneys for both sides work on the same team and share information." Stacey M. Faraci, *Slip Slidin' Away? Will Our Nation's Mental Health Court Experiment Diminish the Rights of the Mentally Ill?*, 22 QUINNIPIAC L. REV. 811, 825 (2004).

[13] *See, e.g.*, LISA CONTOS SHOAF, OHIO OFFICE OF CRIMINAL JUSTICE SERVS., A CASE STUDY OF THE AKRON MENTAL HEALTH COURT 3 (2004), http://www.ocjs.ohio.gov/research/Akron%20MHC%20case%20study.pdf (describing the atmosphere of the Akron, Ohio, MHC as "less adversarial and more relaxed than what is seen in a traditional court session"). For a practical example of how this atmosphere is created, see Eliza Strickland, *Breaking the Cycle*, SFWEEKLY.COM, Aug. 8, 2007, http://www.sfweekly.com/2007-08-08/news/breaking-the-cycle (describing a typical day in a California MHC).

[14] *See, e.g.*, DENCKLA & BERMAN, *supra* note 6, at 13.

[15] *See* Meekins, *supra* note 8, at 16–17.

[16] *See* Faraci, *supra* note 12, at 829–30.

[17] For a thorough discussion on MHCs and their inner workings, see generally GREG BERMAN & JOHN FEINBLATT, CTR. FOR CT. INNOVATION, PROBLEM-SOLVING COURTS: A BRIEF PRIMER (2001) [hereinafter BRIEF PRIMER], *available at* http://www.courtinnovation.org/pdf/prob_solv_courts.pdf.

[18] Meekins, *supra* note 8, at 25. Such crimes include public urination, disruptive or verbally assaultive behavior, and the like.

criminals or sexual offenders were permitted into the programs,[19] although this restriction has changed in the last few years as MHCs have become more willing to accept individuals charged with minor felonies.[20] One of the natural concerns in a society contemplating the creation of an MHC is the safety of the surrounding population, as such courts frequently release into the community individuals who would likely otherwise have been incarcerated. However, participants in MHCs often have much lower rates of reoffense while on probation than do mentally ill individuals with similar backgrounds who are sentenced to jail or prison.[21]

MHCs, as might be expected, are highly treatment-oriented. Many of their entrance criteria deal, either directly or indirectly, with treatability, as do their retention criteria and their requirements for "graduating" the program.[22] This treatment focus has led to some interesting effects — the courtroom becomes less of a place where impersonal justice is given, and more like a group therapy room.[23] Treatment may be emphasized to the exclusion of all else: at times, even the "stick" of a potential jail sentence for noncompliance with treatment and probation requirements is off limits to the MHC because of the contrary effects that a stint in jail might have on a participant.[24]

3. The Long-Term Benefits of MHCs Outweigh Their Startup Costs. — Because MHCs require the active, dedicated participation of many trained professionals, administrative costs can mount quickly. Judges and prosecutors are often in short supply already;[25] public defender offices are busy and understaffed; mental health professionals are expensive. Some cities have been forced to cut back or eliminate their problem-solving courts because of their high cost. Other states and municipalities have begun imposing blanket fines on participation in their criminal justice systems — Illinois, for example, includes a uniform ten dollar "mental health court charge" in its court costs.[26] Nevertheless, counties acting on their own are often hard-pressed to pro-

---

[19] Faraci, *supra* note 12, at 826.

[20] *See* NAT'L SNAPSHOT, *supra* note 10.

[21] *See infra* p. 1173.

[22] *See* HENRY J. STEADMAN & ALLISON D. REDLICH, NAT'L INST. OF JUSTICE, AN EVALUATION OF THE BUREAU OF JUSTICE ASSISTANCE MENTAL HEALTH COURT INITIATIVE 14–15 (2006), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/213136.pdf.

[23] *See id.* at 15–16; *see also* Strickland, *supra* note 13 (describing participation in MHCs as a group-oriented therapeutic endeavor).

[24] *See* Meekins, *supra* note 8, at 25.

[25] *See In re* Certification of Need for Additional Judges, 842 So. 2d 100, 103 (Fla. 2003) (per curiam) ("Existing judicial resources are strained by . . . the creation and expansion of *effective, but labor-intensive*, specialized case processing techniques (e.g., juvenile and adult drug courts, mental health courts, elder courts, and domestic violence courts)." (emphasis added)).

[26] *See* People v. Price, 873 N.E.2d 453, 468–69 (Ill. App. Ct. 2007) (upholding the constitutionality of a $10 "fee" upon criminal conviction, even for nonparticipants in MHCs).

vide what has become an important part of their efforts at crime reduction and quality of life improvement.

Though the cost of starting an MHC is daunting, the potential social payout may be very high. In one drug court, recidivism has been reduced by over 40%, and employment rates exceed 90%.[27] Early data indicate that MHCs may similarly improve outcomes.[28] A study of one MHC program indicates that, within twelve months, MHC graduates are over 75% less likely to reoffend. Those graduates who do reoffend are almost 88% less likely to do so in a violent manner.[29] Another court saw its recidivism rates drop from 78% to 16%.[30] Of course, once a court is successfully established, reduced recidivism has its own financial rewards, not the least of which is an influx of stable, working individuals to a locality's tax base.[31]

In the first years of the MHC experiment, the initial startup costs were so high that they may have prevented rural communities, often poor, from starting an MHC.[32] The impact of high startup costs has dwindled with President George W. Bush's establishment of the New Freedom Commission on Mental Health.[33] The order established an investigative Commission "to conduct a comprehensive study of the United States mental health service delivery system, including public and private sector providers, and to advise the President on methods of improving the system."[34] The study was completed a year later.[35]

---

[27] *See* KENNEDY COMM'N, *supra* note 3, at 33.

[28] Because MHCs are so new, there has not been enough time to conduct a thorough, system-wide analysis of their effectiveness. However, some MHCs have conducted internal efficacy studies, many of which are catalogued at BJA Ctr. for Program Evaluation: Mental Health Courts, http://www.ojp.usdoj.gov/BJA/evaluation/psi_courts/mh6.htm (last visited Jan. 12, 2008). MHCs receiving DOJ money are required to collect statistics on the results of their programs, thus providing at least a minimal source of information. For an example of such a report, see SHOAF, *supra* note 13, at 1 (noting partial sponsorship of Akron MHC study by the DOJ Bureau of Justice Statistics).

[29] JOHN R. NEISWENDER, EXECUTIVE SUMMARY OF EVALUATION OF OUTCOMES FOR KING COUNTY MENTAL HEALTH COURT 4 (2004), *available at* http://www.metrokc.gov/KCDC/mhcsum32.pdf.

[30] KELLY O'KEEFE, CTR. FOR CT. INNOVATION, THE BROOKLYN MENTAL HEALTH COURT EVALUATION 53 (2006) [hereinafter BROOKLYN EVALUATION], http://www.courtinnovation.org/_uploads/documents/BMHCevaluation.pdf.

[31] DENCKLA & BERMAN, *supra* note 6, at 11 (noting that one established MHC had, with only 56 graduates, saved its locality nearly $400,000). Of course, as another commentator wryly noted, a "carrot-and-stick approach has successfully motivated thousands of offenders to get clean and lead productive (*and tax-paying*) lives." GREG BERMAN & JOHN FEINBLATT, GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE 9 (2005) (emphasis added).

[32] One-fourth of MHC-employing communities are rural. *See* NAT'L SNAPSHOT, *supra* note 10.

[33] Exec. Order No. 13,263, 3 C.F.R. 233 (2003) (superseded 2003).

[34] *Id.* § 3, 3 C.F.R. at 233.

[35] PRESIDENT'S NEW FREEDOM COMM'N ON MENTAL HEALTH, ACHIEVING THE PROMISE: TRANSFORMING MENTAL HEALTH CARE IN AMERICA (2003) [hereinafter NEW

With the encouraging recognition that "recovery from mental illness is now a real possibility,"[36] the Commission recommended an increase in federal funding to mental health facilities, and in particular to facilities dealing with mental illness in the criminal justice system.[37]

In 2004, Congress responded to the Commission's findings by reviving and passing bills to create and fund MHC programs.[38] The Department of Justice (DOJ), which administers the grant program, has taken up Congress's call with enthusiasm, and now has an active sponsorship program.[39] Since the inception of DOJ sponsorship the number of MHCs has grown steadily, from 70 in January 2004 to over 125 in December 2005.[40]

As federal funding to MHCs has increased, the national judicial and legislative support for these courts has become more apparent. Though they started as local initiatives and are still conducted at the local level (the federal government does not yet have a problem-solving court program), MHCs are gaining a national character as well. The use of federal tax dollars to provide startup money to MHCs, situated as these appropriations are within the increasing nationwide use of problem-solving courts, may indicate the country's willingness to accept a shift of focus from a punishment model of justice to a rehabilitative model.

B. The Criminal Justice System: Retribution or Rehabilitation?

The difference between the new theory of problem-solving courts and the jurisprudence of punishment that has dominated the criminal justice system during the last twenty-five years is striking. Throughout American history, the purpose of punishment has been a source of great debate. The pendulum of criminal theory has swung between the poles of retribution and rehabilitation for longer than America has been a nation.[41]

FREEDOM COMM'N], *available at* http://www.mentalhealthcommission.gov/reports/FinalReport/downloads/FinalReport.pdf.

[36] *Id.* at 1. The Commission "recommend[ed] a fundamental transformation of the Nation's approach to mental health care . . . ensur[ing] that mental health services . . . actively facilitate recovery, and build resilience to face life's challenges." *Id.*

[37] *Id.* at 43–44.

[38] In 2004, Congress appropriated funding for the ALEMHP Act and also passed the Mentally Ill Offender Treatment and Crime Reduction Act of 2004, Pub. L. No. 108-414, 118 Stat. 2327 (codified at 42 U.S.C. § 3797aa (Supp. IV 2004)).

[39] For further information on the DOJ sponsorship program, see Bureau of Justice Assistance Programs: Mental Health Courts, http://www.ojp.usdoj.gov/BJA/grant/mentalhealth.html (last visited Jan. 12, 2008).

[40] NAT'L SNAPSHOT, *supra* note 10.

[41] *See, e.g.*, Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339, 341 (1998) ("[T]he early penitentiary was founded on the hope of moral reform . . . . In contrast, [in] today's prison[s] . . . moral decay is more likely than moral reform."); Melvin Gutterman, *Prison Objec-*

By the middle of the twentieth century, theories of rehabilitation were the norm. Prisons were a place where treatment could be obtained, education could be had, and — hopefully — the groundwork for a normal life could be laid.[42] In the last few decades, however, the focus of the criminal justice system has swung with a vengeance toward a more standardized, punitive vision of punishment.[43] By the time the Sentencing Reform Act established the Federal Sentencing Guidelines in 1984, "the previously dominant rehabilitative ideal in criminal law had been called into question and replaced by a just desert theory of punishment."[44] Rehabilitation fell by the wayside, and with the introduction of mandatory minimums and high statutory maximums the "lock 'em up and throw away the key" perspective became the norm.[45]

Despite the general shift toward a more punitive theory of punishment, one academic theory continues to espouse rehabilitation and community-based remedies: Therapeutic Jurisprudence (TJ). TJ was developed by Professors Bruce Winick and David Wexler in the early 1980s in response to what they perceived as a harmful drift of the criminal justice system toward longer, harsher sentences and away from the rehabilitation of offenders. The basic assumption of TJ is that the purpose of the criminal justice system is treatment.[46] Thus, TJ theorists focus on incarceration's effect on defendants' mental and physical status. They consider "emotions, empathy, healing, and the psychological well-being of individuals" to be an important emphasis of the criminal justice system, a focus that leads naturally to a problem-solving approach.[47] Although TJ has never been a dominant theory in legal academia, the principles it espouses have become more accepted as problem-solving courts have risen in prominence. With the advent of problem-solving courts, TJ has found its place as the idea upon which drug courts, MHCs, and other such courts were struc-

---

tives and Human Dignity: Reaching a Mutual Accommodation, 1992 BYU L. REV. 857, 860–72 (1993) (providing detailed history of the development of the American prison system and chronicling its repeated swings from rehabilitation to harsh punishment and back again).

[42] *See* Gutterman, *supra* note 41.

[43] *See generally* Austin Sarat, *Putting a Square Peg in a Round Hole: Victims, Retribution, and George Ryan's Clemency*, 82 N.C. L. REV. 1345 (2004) (depicting the retributionist nature of the modern criminal justice system).

[44] James L. Nolan, Jr., Commentary, *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1548 (2003).

[45] The United States now incarcerates over two million of its inhabitants, or approximately 1 in every 143 persons. In contrast, England, Italy, France, and Germany have rates of approximately 1 in every 1000. *See* KENNEDY COMM'N, *supra* note 3, at 4; *see also* Jennifer Gonnerman, *Two Million and Counting*, VILLAGE VOICE, Feb. 29, 2000, at 56 (noting that "the U.S. has 5 percent of the world's population . . . [but] 25 percent of its prisoners").

[46] Meekins, *supra* note 8, at 15.

[47] *See* Nolan, *supra* note 44, at 1546.

tured.[48] As such, the academic theories underlying TJ are now codified in the criminal justice systems of cities and towns nationwide.[49]

C. Mental Health Courts: The Herald of a Fundamental Shift in the Criminal Justice System?

The recent growth of MHCs is illustrative of a broader trend — or, perhaps, the reversal of a trend. In a 2003 speech to the American Bar Association (ABA), Justice Kennedy issued a charge to legal practitioners not to forget that the criminal justice system is more than "the process for determining guilt or innocence."[50] Instead, "[a]s a profession, and as a people, [lawyers] should know what happens after the prisoner is taken away."[51] He went on to note that, though "[p]revention and incapacitation are often legitimate goals," it is nevertheless important "to bridge the gap between proper skepticism about rehabilitation on the one hand and the improper refusal to acknowledge that the more than two million inmates in the United States are human beings whose minds and spirits we must try to reach."[52] An ABA committee undertook this charge and presented its recommendations in a 2004 report urging the bar to adopt a greater emphasis on rehabilitation in sentencing.[53] The ABA report did not specifically focus on the situation of mentally ill defendants; its target was general rehabilitation for all offenders for whom such rehabilitation would be effective.[54] This report gave rise to the ABA Commission on Effective Criminal Sanctions, testimony before various state legislatures, and national conferences geared toward developing a more reentry-focused criminal justice system.[55]

Given the positions of such influential legal actors as Justice Kennedy, the ABA, and the scholars and judges cited in this and other pieces, a growing shift in the American criminal justice system is evident — a swing of the pendulum back toward rehabilitation and away from retribution. From an unquestionably retributive system that re-

---

[48] *See id.* at 1545–46; *see also* Peggy Fulton Hora, William G. Schma & John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999) (noting drug courts' reliance on TJ principles).

[49] *But cf.* Samuel J. Brakel, *Searching for the Therapy in Therapeutic Jurisprudence*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 461 (2007) (chastising mental health professionals for having "bought into" TJ).

[50] KENNEDY COMM'N, *supra* note 3, at 3.

[51] *Id.*

[52] *Id.* at 5–6.

[53] *Id.* at 24, 32–33.

[54] *See id.* at 9.

[55] *See generally* Criminal Justice Section: ABA Comm'n on Effective Criminal Sanctions (2007), http://www.abanet.org/dch/committee.cfm?com=CR209800 (cataloguing the many new ABA committees and working groups on criminal punishment).

lies upon mandatory minimums and restriction of judicial discretion, jail diversion programs and reduced sentences are emerging.[56] Though the dominant retributive regime is clearly still strong,[57] these rehabilitative innovations mark a notable and growing counterpoint.

Even the language of MHCs is fundamentally different from the rhetoric of standard retributive and incapacitative imprisonment justifications. For example, the Anchorage court was set up "to *address the needs* of mentally disabled misdemeanants."[58] The Brooklyn court exists to "link[] defendants with serious and persistent mental illnesses . . . to long-term treatment as an alternative to incarceration."[59] The federal impetus for expanding the MHC system came from the New Freedom Commission's finding that "[r]elevant Federal programs . . . must . . . better align their programs to *meet the needs* of adults and children with mental illnesses."[60] An individual involved in an MHC is not a defendant, but a "client" or a "court customer."[61] A problem-solving court judge describes his job not as "imposing punishment but as providing help."[62] In these and other ways, the criminal justice system, through its problem-solving courts, has incorporated the language of psychology — and, quite possibly, its therapeutic goals as well.

MHCs' emphasis on defendant rehabilitation has not been without criticism, both from rights advocates and from scholars. The intimate involvement that MHC judges and prosecutors have with defendants, and the coercive power of the choice between an MHC proceeding and a full trial that might lead to prison, have raised fears about MHCs' neutrality, detachment, and fairness, as well as concerns about due process and individual autonomy.[63] One commentator, concerned that "judicial activists" were using their "new position and influence in government . . . [to] become increasingly powerful social engineers,"

---

[56] JON WOOL & DON STEMEN, VERA INST. OF JUSTICE, CHANGING FORTUNES OR CHANGING ATTITUDES? SENTENCING AND CORRECTIONS REFORMS IN 2003, at 1 (2004), http://www.vera.org/publication_pdf/226_431.pdf ("[In 2003,] more than 25 states took steps to lessen sentences and otherwise modify sentencing and corrections policy."). Though the Vera Institute attributes this trend at least in part to concerns about the expense of incarceration, it is likely that the trend also has something to do with rehabilitative justice concerns.

[57] For example, California, which is known for its massive prison population and harsh three-strikes law, also has some of the best-functioning MHCs and other problem-solving courts in the country. This correlation may indicate a difficult internal conflict, as the instinct to punish harshly coexists with the instinct to divert those seen as having less culpability for their actions.

[58] Anchorage MHCs, *supra* note 9 (emphasis added).

[59] Lippman, *supra* note 5, at 826.

[60] NEW FREEDOM COMM'N, *supra* note 35, at 37 (emphasis added).

[61] *See, e.g.*, Randal B. Fritzler, *Ten Key Components of a Criminal Mental Health Court*, *in* JUDGING IN A THERAPEUTIC KEY, *supra* note 4, at 118, 118.

[62] Nolan, *supra* note 44, at 1556 (internal quotation marks omitted).

[63] *See supra* note 7; *see also* BRIEF PRIMER, *supra* note 17, at 10–15.

expresses worry that therapeutic courts open the door to judicial "manipulat[ion]," bringing about social change at the expense of individual rights.[64] Another notes that, because of their arguably less rigorous due process safeguards, MHCs risk "de-legitimiz[ing] the justice system" by undermining the protections present in a traditional court.[65]

The questions raised by advocates for the mentally ill and for criminal defendants are extremely important, and will likely structure this debate for years to come. Nevertheless, even in the early stages of the MHC movement, these questions seem to be finding answers. Perhaps most importantly, graduates of MHC programs nationwide have reported their satisfaction with the fairness of the process.[66] The reduction in recidivism rates reported in early studies,[67] an empirical indication that MHCs positively affect their clients' lives, is also telling of MHCs' legitimacy. Thus, despite the potential pitfalls of MHCs, their initial success seems to indicate that the benefits will justify the risks — especially if proper care is taken to ensure that a concern for defendants' rights and well-being remains at the fore.

Furthermore, if society is truly reentering an era of rehabilitative justice, MHCs and other problem-solving courts may only be the beginning. As medical and psychological knowledge progress, the "treatability" standard may broaden as well. If that occurs, there may eventually be substantially fewer limits on the types of disorders the justice system can address. A rehabilitative theory might be precisely what our overburdened system needs.[68] For those who object to the expense of providing such diversionary services to defendants, it is worth noting that, as therapeutic programs and focuses grow, a corresponding drop in the cost of imprisonment due to reduced recidivism will also result.[69] Thus, the idea of MHCs, and of problem-solving courts in general, is one that can appeal to many ideological perspectives.

---

[64] Frank V. Williams, III, *Reinventing the Courts: The Frontiers of Judicial Activism in the State Courts*, 29 CAMPBELL L. REV. 591, 592–96 (2007).

[65] Faraci, *supra* note 12, at 838–39. *But see* Greg Berman, Comment, *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 41 AM. CRIM. L. REV. 1313, 1314 (2004) (theorizing that inattention to due process in MHCs and other problem-solving courts may instead be endemic to the broader criminal justice system, and could in fact be lessened in the MHCs by the increased scrutiny brought about by their experimental natures).

[66] *See* BROOKLYN EVALUATION, *supra* note 30, at 39–42; NEISWENDER, *supra* note 29, at 9–10.

[67] *See supra* p. 1173.

[68] For a discussion on MHCs' potential to ease judicial strain, see sources cited *supra* note 31.

[69] *See, e.g.*, M. SUSAN RIDGELY ET AL., RAND, JUSTICE, TREATMENT, AND COST: AN EVALUATION OF THE FISCAL IMPACT OF ALLEGHENY COUNTY MENTAL HEALTH COURT 33 (2007) (noting that "over the longer term, the MHC program may actually result in net savings to government, to the extent that MHC participation . . . [reduces] criminal recidivism"), *available at* http://www.rand.org/pubs/technical_reports/2007/RAND_TR439.pdf.

Both opponents and proponents of a therapeutic approach to criminal justice agree: for good or ill, the trend toward problem-solving courts is increasing, and is fundamentally changing the way we think about justice.[70] No longer are courts solely places where punishment is meted out. Instead, some now employ holistic solutions aimed at solving the problem of the mentally ill misdemeanant recidivist before it truly begins. Far from punishing people who commit crimes because of their illness, MHCs provide treatment for mentally ill individuals who otherwise would not have access to (or realize their need for) therapy. MHCs also decrease the overall amount of money being spent on imprisonment, thus allaying taxpayers' concerns. Furthermore, the statistics show dramatic drops in recidivism for those who complete the programs, indicating that MHCs are achieving positive results both for the criminal justice system and for the mentally ill individuals they endeavor to help.

Many problems with MHCs remain to be solved, such as the disposition of violent but untreatable mentally ill offenders and others for whom rehabilitation would not be effective. However, it seems reasonable that the criminal justice system is beginning to trend toward a more rehabilitative focus for misdemeanants, and possibly for felons as well. If the problem-solving court experiment succeeds and becomes widely accepted, what might the next step be? If the emphasis is truly on rehabilitation, evidence suggests the potential usefulness of educational courts for young adult offenders, lifestyle-altering programs for interested inmates,[71] or other (even more controversial) programs[72] targeting specified communities that might be effectively rehabilitated. As medical and psychological understanding increases, the boundaries of realistic rehabilitation are pushed ever outward. Such considerations will continue to drive judges, legislatures, attorneys, and voters as the struggle to define the modern criminal justice system continues.

VII. VOTING RIGHTS AND THE MENTALLY INCAPACITATED

During a 1988 subcommittee hearing in the House of Representatives on the Americans with Disabilities Act, the chairwoman of the Rhode Island Governor's Commission on the Handicapped testified:

---

[70] *See, e.g.*, Williams, *supra* note 64, at 642 ("[T]he goal is to extend therapeutic techniques to the entire judicial system based upon the belief that the role of judges has changed from that of a dispassionate, disinterested magistrate to the role of a sensitive, caring counselor.").

[71] *See, e.g.*, Glenn D. Walters, *Recidivism in Released Lifestyle Change Program Participants*, 32 CRIM. JUST. & BEHAV. 50, 58 (2005) (noting a fifteen-percent recidivism reduction for program participants).

[72] For example, faith-based prisons such as Prison Fellowship's Carol Vance Unit in Texas. *See* The InnerChange Freedom Initiative, Program Details: Texas, http://www.ifiprison.org/generic.asp?ID=977 (last visited Jan. 12, 2008).

> I spoke to one of the social workers who came to me and explained to me that in the group homes, the people who were running the group homes . . . were deciding who they deemed competent to vote and who they deemed not competent. They were not telling all the people about this opportunity to be registered.[1]

Such arbitrary methods for deciding who gets to vote seem antithetical to the idea of a democracy, where all who are able should have a voice in the election of their leaders. However, the legitimacy of excluding certain citizens from voting because of their mental status has rarely been discussed or debated with any rigor. Federal law leaves the whole practice of disenfranchisement of the mentally incapacitated to the states, simply stating, "[T]he name of a registrant may not be removed from the official list of eligible voters except . . . as provided by State law, by reason of criminal conviction or mental incapacity."[2] Pursuant to this law, over forty states have constitutional or statutory provisions that disenfranchise the mentally disabled. In defining which people with mental disabilities lose their right to vote, most states use terminology that is vague, inconsistent, or outdated, and most do not directly address the capacity to vote. Instead, they use some proxy classification for disenfranchisement.

Fortunately, developments in the law of elections and of disability rights suggest that states may be reversing course on the arbitrary disenfranchisement of mentally incapacitated persons. Several states have reformed their disenfranchisement provisions, although these reforms are inconsistent and often not sufficiently comprehensive. A couple of federal cases have held that governments must provide fair access to voting or other "fundamental rights" of the disabled, and if there is not fair access, that individuals have a cause of action against the state. By capitalizing on the reasoning of these decisions, advocates for the disabled may be able to gain even more ground for the enfranchisement of the mentally incapacitated.

---

[1] *Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing of the Subcomm. on Select Educ. of the Comm. on Educ. and Labor, H.R.*, 100th Cong. 189 (1989) (statement of Nancy Husted-Jensen, Chairwoman, Governor's Comm'n on the Handicapped, Providence, R.I.).

[2] National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-6(a)(3), (a)(3)(B) (2000). This Part will use the term "mentally incapacitated" to refer to those with such severe mental disorders that they may be subject to some form of civil rights limitation, such as being placed under guardianship. This reference includes both the mentally ill and those incapacitated for other reasons, such as mental retardation.

A. The State of States' Laws

As of 2000, forty-four states disenfranchised the mentally incompetent, most often through their state constitutions.[3] Only a few of them did this through narrow statutory provisions tailored directly to voting capacity. Instead, nine states simply disenfranchised those under guardianship.[4] Fifteen used outdated language that "restrict[ed] voting by 'idiots,' the 'insane,' or 'lunatics.'"[5] Even those few that dealt directly with the capacity to vote did not generally identify any standard by which that capacity should be measured before the franchise is revoked.[6]

Granted, states have a compelling interest in ensuring that voters understand the election process at least well enough to make an independent choice about whom to vote for.[7] States also have an interest in minimizing abuses of the system that arise through voter fraud from caregivers and absentee ballot systems used by the mentally incapaci-

---

[3] Kay Schriner et al., *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 BERKELEY J. EMP. & LAB. L. 437, 439, 456 tbl.2 (2000).

[4] *See* Kingshuk K. Roy, Note, *Sleeping Watchdogs of Personal Liberty: State Laws Disenfranchising the Elderly*, 11 ELDER L.J. 109, 116 n.46 (2003) (listing ten statutes). An opinion of the Attorney General of Alaska, which states that disenfranchisement must be determined in a separate proceeding, qualifies as a narrowly tailored provision that limited the state's broad statute. *See infra* note 19. Guardianship is an involuntary procedure by which a person is deemed incapable of making day-to-day decisions and is either put into a group home run by the state or put under the authority of another person who "assumes the power to make decisions about the ward's person or property." BLACK'S LAW DICTIONARY 726 (8th ed. 2004) (defining "guardianship").

[5] Paul S. Appelbaum, *"I Vote. I Count": Mental Disability and the Right to Vote*, 51 PSYCHIATRIC SERVICES 849, 849 (2000).

[6] Jason H. Karlawish et al., *Addressing the Ethical, Legal, and Social Issues Raised by Voting by Persons with Dementia*, 292 J. AM. MED. ASS'N 1345, 1346 (2004). By 2004, ten states had statutes that specifically addressed voting capacity: California, Connecticut, Florida, Hawaii, Iowa, Massachusetts, New Mexico, Ohio, Oregon, and Wisconsin. *See id.*; Kay Schriner & Lisa A. Ochs, *Creating the Disabled Citizen: How Massachusetts Disenfranchised People Under Guardianship*, 62 OHIO ST. L.J. 481, 485 (2001).

[7] That this is a compelling state interest with respect to strict scrutiny review seems to be almost universally accepted by disability rights advocates and other interested parties. *See, e.g.*, Henry G. Watkins, The Right To Vote of Persons Under Guardianship — Limited and Otherwise (Ariz. Ctr. for Disability Law, Oct. 11, 2006), *available at* http://acdl.com/GUARDIANSHIP%20AND%20VOTING.htm (noting without comment that "those incapable of exercising the right to vote may be declared ineligible"); *see also* Doe v. Rowe, 156 F. Supp. 2d 35, 51 (D. Me. 2001) ("Additionally, for purposes of summary judgment, the parties agree that Maine has a compelling state interest in ensuring that 'those who cast a vote have the mental capacity to make their own decision by being able to understand the nature and effect of the voting act itself.'"). *But see* Roy, *supra* note 4, at 117–18 (noting that "there are many uninformed voters who will vote . . . without exercising what most people would consider amounts to reasonable judgment" and claiming therefore that laws that discriminate against the mentally incapacitated are "either grossly underinclusive or simply discriminatory").

tated.[8] However, those state interests do not overcome the fact that not all those who are deemed mentally incapacitated in general are specifically incompetent to vote.

Equal access to voting is a fundamental constitutional right,[9] and therefore voting rights of an otherwise qualified adult should not be denied except as the narrowly tailored consequence of a compelling state interest.[10] It seems almost a tautology, but those who can vote should be allowed to, and those who cannot should not. However, the prevalent methods of removing voting rights do not determine effectively or fairly the capacity *to vote* — the only capacity relevant either to the individual's fundamental right or the state's interest in fair elections. Rather, most states make disenfranchisement decisions by proxy variables, such as guardianship or being deemed generally incompetent. Their current procedures have been severely criticized in both the legal and medical communities.[11] The main point these advocates make is that the right to vote should not be denied categorically on the basis of some general classification of mental disability, such as a definition of "mental incapacity" adopted by a probate court.[12] If a person has opinions about and can understand voting, that person should be allowed to vote, even if he does not have the capacity to carry out other parts of his life independently.[13]

In response to this advocacy, states slowly have begun to tailor disenfranchisement more narrowly to the real capacities of their citizens. One broad innovation distinguishes between different levels of mental capacity in the context of guardianship by creating a lesser classifica-

---

[8] *See* Karlawish et al., *supra* note 6, at 1347–48.

[9] *See, e.g.*, Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.").

[10] *See* Dunn v. Blumstein, 405 U.S. 330, 336–37 (1972).

[11] *See, e.g.*, ROBERT M. LEVY & LEONARD S. RUBENSTEIN, THE RIGHTS OF PEOPLE WITH MENTAL DISABILITIES 293 & 324 nn.50–51 (1996) (arguing that the constitutional right to vote should apply to institutionalized persons); Appelbaum, *supra* note 5, at 849 (describing criticism of state disenfranchisement laws); Karlawish et al., *supra* note 6, at 1346–47 (advocating voting procedures that assess decisionmaking ability on a "specific functional capacit[y]" basis); Watkins, *supra* note 7 ("[S]uch a determination [of ineligibility to vote] must be based on an individualized assessment. Any process that denies the right to vote must . . . not extend[] this bar to those who may be capable of voting.").

[12] Professor Karlawish and his coauthors also advocate for a specific determination of voting capacity that is defined by whether the individual understands what voting is and what a vote will mean in that process. *See* Karlawish et al., *supra* note 6, at 1346–47.

[13] Instead, several states lump voting capacity with other mental abilities and treat capacity as an all-or-nothing proposition. *See, e.g.*, Doe v. Rowe, 156 F. Supp. 2d 35, 39 (D. Me. 2001) ("Although [the plaintiff] understood the nature and effect of voting such that she could make an individual decision regarding the candidates and questions on the ballot, the Maine Constitution prohibited Jane Doe from voting because she was under guardianship by reason of mental illness."); *id.* at 39–41 (describing similar mental capacities for the other plaintiffs).

tion called limited guardianship, whereby a person is deemed incapacitated and put under guardianship with respect to some rights but not others. Almost all states offer this type of guardianship,[14] though many older state disenfranchisement provisions do not directly deal with the distinction between full and limited guardianship.[15] In response to this discrepancy, state courts have attempted to use the notion of limited guardianship to cabin disenfranchisement provisions, finding that rules removing voting rights from individuals under guardianship refer only to those under full guardianship.

But the introduction of limited guardianship does not completely remove the problem of overbroad denials of the right to vote. Courts still impose full guardianships for a myriad of reasons, which means that some people who understand voting and have opinions on which to base a vote might be denied the right to vote for simply falling on the wrong side of the line between limited and full guardianship. As noted by the federal district court in *Doe v. Rowe*,[16] denying voting rights to all mentally incapacitated people under full guardianship could still result in unjustified removals of voting rights: "For example, a person placed under guardianship for an eating disorder could be disenfranchised because they are, in fact, considered to be suffering from a form of mental illness."[17]

More substantial reform has occurred in the context of laws specifically dealing with voting incapacity, as some states have worked to remove over- and underinclusive terminology from their laws.[18] In the 1990s, Alaska and California determined that courts must make individual determinations about voting capacity before disenfranchising anyone.[19] In 2003, Minnesota changed its law from one automatically

---

[14] John W. Parry & Sally Balch Hurme, *Guardianship Monitoring and Enforcement Nationwide*, 15 MENTAL & PHYSICAL DISABILITY L. REP. 304, 304 (1991).

[15] Watkins, *supra* note 7.

[16] 156 F. Supp. 2d 35.

[17] *Id.* at 55. Even when a probate court tries to prevent improper disenfranchisement, broad statutes or constitutional provisions can still cause problems. In *Missouri Protection & Advocacy Services, Inc. v. Carnahan*, 499 F.3d 803 (8th Cir. 2007), a man under full guardianship was mistakenly prevented from voting because of Missouri's constitutional provision even though his guardianship order expressly allowed him to vote. *Id.* at 811.

[18] *See* TRANSITION ELECTION WORK GROUP, OFFICE OF THE MARYLAND GOVERNOR, ELECTION WORK GROUP REPORT 14 (2007), *available at* http://www.governor.maryland.gov/documents/transition/Elections.pdf. Indeed, in *Doe v. Rowe*, the court noted that the very election in which the plaintiffs had been barred from voting included a ballot question asking, "Do you favor amending the Constitution of Maine to end discrimination against persons under guardianship for mental illness for the purpose of voting?," which failed. 156 F. Supp. 2d at 38 n.3.

[19] These two states' reforms occurred in 1992 and 1990, respectively. *See* 1992 Alaska Op. Att'y Gen. No. 123, 1992 Alaska AG LEXIS 74, at *3 (Aug. 28, 1992); Act of May 1, 1990, ch. 79, sec. 14, § 1910, 1990 Cal. Stat. 458, 549 (codified as amended at CAL. PROB. CODE § 1910 (West 2002)). These states' processes are still imperfect; Alaska's does not outline how that capacity

disenfranchising those under guardianship to one disenfranchising them only after judicial proceedings that specifically revoke their right to vote.[20] In November 2007, New Jersey voters approved amending the state constitution's provision that restricts the right to vote "by deleting the phrase 'idiot or insane person' and providing instead that a 'person who has been adjudicated by a court of competent jurisdiction to lack the capacity to understand the act of voting' shall not enjoy the right of suffrage."[21]

Other states have not fully moved to a narrowly tailored system that assesses a person's capacity to vote, but have at least moved toward less egregious disenfranchisement processes. In 2001, Delaware removed a reference to "idiot[s] and insane person[s]" from its constitution, making the right to vote contingent instead on being "adjudged mentally incompetent."[22] Nevada's voters approved a similar amendment in 2004.[23] These changes may not significantly alter the number of disenfranchised persons, but they signal that those states recognize that the old terminology is vague, offensive, and not narrowly tailored to an individual assessment of competence. Also in 2004, Louisiana made it clear that only those under full guardianship would have their voting rights revoked automatically, rather than anyone under any kind of guardianship,[24] and in 2006, Wisconsin changed its law to give courts the discretion to declare even persons under full guardianship competent to vote.[25]

However, those changes do not do enough, and several other states have yet to change their disenfranchisement clauses and statutes at all. The constitutions of Iowa, Mississippi, and New Mexico still exclude

---

should be measured, and California's standard measures the ability to fill out a voter registration form, rather than determining a person's true capacity to vote.

[20] Uniform Guardianship and Protective Proceedings Act, ch. 12, art. 1, § 37(c)(8), art. 2, § 2, 2003 Minn. Laws. 116, 140, 166 (codified as amended at MINN. STAT. §§ 524.5-313(c)(8), 201.014(2)(b) (2006)).

[21] S. Con. Res. 134, 212th Leg., 2d Reg. Sess., at 3 (N.J. 2007) (enacted), *available at* http://www.njleg.state.nj.us/2006/Bills/SCR/134_I1.pdf (amending N.J. CONST. art. II, § 1(6)). The ballot measure passed with almost sixty percent of the vote. *See* N.J. Office of the Att'y Gen., Ballot Questions Tally for November 2007 Election, at 4 (Dec. 3, 2007), http://www.nj.gov/oag/elections/2007results/07general-election/07-official-general-election-tallies(pub-ques)-12.3.07.pdf.

[22] Act of May 8, 2001, ch. 99, 73 Del. Laws 591 (amending DEL. CONST. art. V, § 2).

[23] Assemb. J. Res. 3, 2003 Leg., 72nd Sess. (Nev. 2003), 2003 Nev. Stat. 3726 (amending NEV. CONST. art. II, § 1); Nev. Sec'y of State, 2004 Official General Election Results: State Question 7 (Nov. 2, 2004), http://sos.state.nv.us/elections/results/2004General/ElectionSummary.asp (54.3% of voters approved the amendment).

[24] Act of June 25, 2004, No. 575, § 1, 2004 La. Acts 1955, 1955–56 (codified at LA. REV. STAT. ANN. § 18:102 (2004 & Supp. 2007)).

[25] Act of May 10, 2006, No. 387, § 1, 2005 Wis. Sess. Laws 1332, 1333 (codified as amended at WIS. STAT. ANN. § 6.03(1)(a) (West 2004 & Supp. 2007)). Under prior Wisconsin law, courts could preserve the right to vote only for persons under limited guardianships.

"idiots and insane" persons from voting.[26] The Maryland and Massachusetts constitutions refer to guardianship as the only criterion necessary to disenfranchise the mentally disabled.[27] Arkansas even seems to have gone backwards: prior to 2001, voting rights could be denied only with express court approval; since 2001, an incapacitated person under guardianship must receive express court approval to be authorized to vote.[28] In sum, most states still do not recognize the right to vote for those who are mentally incapacitated but who retain the mental ability to vote.

B. Judgments Facilitating Advocacy

With so many states still disenfranchising mentally incompetent or mentally incapacitated people through arbitrary and imprecise methods, advocates are turning to courts to help change state laws. In 2001, the U.S. District Court for the District of Maine ruled that the Maine Constitution violated the Fourteenth Amendment of the U.S. Constitution by "prohibiting voting by persons under guardianship for mental illness."[29] Three years later, the Supreme Court set the stage for further litigation over disenfranchisement provisions by upholding Title II of the Americans with Disabilities Act of 1990[30] (ADA) as a valid exercise of Congress's power to provide a right of action against states (and thereby abrogate state sovereign immunity) when state laws fail to protect "fundamental rights" — a category that may include the right to vote.[31] Analyzed together, these cases form a foundation for constructing new state law that reflects more accurately the protection of voting rights demanded by the Constitution and the ADA.

Leading up to the 2000 elections, three mentally ill Maine women under full guardianship were denied the right to vote.[32] The probate courts that put the women under guardianship did not specifically consider the right to vote as a distinct inquiry in their decision, nor did they notify the women that their right to vote would be automatically suspended when they were put under full guardianship.[33] One of the

---

[26] IOWA CONST. art. II, § 5; MISS. CONST. art. 12, § 241; N.M. CONST. art. VII, § 1.

[27] *See* MD. CONST. art. I, § 4 ("The General Assembly by law may regulate or prohibit the right to vote of a person . . . under care or guardianship for mental disability."); *see also* MASS. CONST. amend. III (outlining a similar disenfranchisement provision).

[28] *Compare* ARK. CODE ANN. § 28-65-302(a)(1)(E) (2007) (provisions applying before October 2001), *with id.* at (a)(2)(E) (provisions applying after that date).

[29] Doe v. Rowe, 156 F. Supp. 2d 35, 37 (D. Me. 2001).

[30] 42 U.S.C. §§ 12131–12165 (2000).

[31] Tennessee v. Lane, 541 U.S. 509 (2004); *see also* Michael E. Waterstone, Lane*, Fundamental Rights, and Voting*, 56 ALA. L. REV 793, 807 (2005).

[32] *See Doe*, 156 F. Supp. 2d at 39–40.

[33] *See id.* at 39–41.

three women, a thirty-three-year-old with bipolar disorder,[34] sought to regain her right to vote before the election and was granted a modification to her guardianship giving her back that right.[35] The other women were not able to obtain such modifications before the 2000 elections, even though their psychiatrists concluded that they had the mental capacity to vote.[36] After being prohibited from voting, they sued, claiming that the state constitution's disenfranchisement provision violated the Fourteenth Amendment of the U.S. Constitution.[37]

Maine's constitution states that only "persons who are 'under guardianship for reasons of *mental illness*' are prohibited from registering to vote or voting in any election."[38] By the time of litigation, both the plaintiffs and the State realized that much of the case turned on who qualified as mentally ill, since this classification was narrower than that of all the people who are sufficiently incapacitated for whatever reason to be under guardianship. The term "mentally ill" generally includes only people with mental disorders,[39] while incapacitated persons under guardianship in Maine can include anyone "who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause except minority to the extent he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person."[40] Realizing that simultaneously prohibiting mentally ill persons under guardianship from voting and allowing persons under guardianship for other reasons (such as mental retardation) to vote was discriminatory, the State posited that "mentally ill" in the Maine Constitution was meant to include all sorts of mental disabilities.[41] The State

---

[34] "Bipolar disorder is a recurrent mood disorder featuring one or more episodes of mania or mixed episodes of mania and depression." U.S. DEP'T OF HEALTH & HUMAN SERVS., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 246 (1999) [hereinafter SURGEON GENERAL'S REPORT], *available at* http://www.surgeongeneral.gov/library/mentalhealth/pdfs/c4.pdf.

[35] *Doe*, 156 F. Supp. 2d at 39.

[36] *Id.* at 40–41.

[37] *Id.* at 39.

[38] *Id.* (emphasis added) (quoting ME. CONST. art. 2, § 1). This terminology only entered the Maine Constitution in 1965; prior to that amendment, the Constitution had disenfranchised "paupers and persons under guardianship." *Id.* at 38–39 (internal quotation marks omitted).

[39] According to the Surgeon General, "*Mental illness* is the term that refers collectively to all diagnosable mental disorders. Mental disorders are health conditions that are characterized by alterations in thinking, mood, or behavior (or some combination thereof) associated with distress and/or impaired functioning." SURGEON GENERAL'S REPORT, *supra* note 34, at 5.

[40] *Doe*, 156 F. Supp. 2d at 42 (quoting ME. REV. STAT. ANN. tit. 18-A, § 5-101(1) (1997)) (internal quotation marks omitted).

[41] This argument rested at least partly on the fact that in the 1950s, the Maine legislature had defined "insane person" to "include idiotic, non compos, lunatic or distracted persons," and in 1959 had passed legislation changing the words "insane" and "insanity" to "mentally ill" and "mental illness" throughout Maine's statutes. The State asserted that the 1959 meaning of "men-

argued that this broad definition was incorporated into the Maine Constitution, even though the 1999 Maine Secretary of State's "Guide to Voter Registration Laws and Procedures" stated that "[t]he law does not restrict people under guardianship for reasons other than mental illness from voting."[42] The court admonished the State for trying to define "mental illness" broadly even though there was no indication that the broad definition had ever been the one followed by the State,[43] and proceeded to reject the disenfranchisement provision on two grounds.

First, the court held that the provision violated procedural due process under the Fourteenth Amendment because the practice of probate courts failed to "ensure[] uniformly adequate notice regarding the potential disenfranchising effect of being placed under guardianship."[44] Second, the court held that the provision violated the Equal Protection Clause because guardianship for reasons of mental illness was an inadequate proxy for the capacity to vote.[45] Since voting is a fundamental right, the provision was analyzed under strict scrutiny,[46] and the Court could find no definition of "mentally ill" that would correlate closely enough to the state's interests in fair elections to pass the requirements of the Equal Protection Clause.[47]

While *Doe v. Rowe* outlined the policy and constitutional reasons why a state should disenfranchise a person only after a specific determination of that person's incapacity to vote, most other states' provisions do not have the same problems of inadequate notice or the direct discrimination against the "mentally ill" that gave rise to the constitutional issues in that case. As a result, *Doe v. Rowe* provides only a few states with a strong reason to change their laws. However, in 2004, the Supreme Court's decision in *Tennessee v. Lane*[48] opened the door for litigation in other states by ruling that the abrogation of state sovereign immunity under Title II of the ADA was valid insofar as it applied to cases implicating a fundamental right.[49]

---

tally ill" included a broad assortment of mental disabilities, and that the same definition would have applied in 1965 when the Maine Constitution was amended to disenfranchise those under guardianship for mental illness. *Id.* at 53.

[42] *Id.* at 44.

[43] *Id.* at 46.

[44] *Id.* at 50.

[45] *Id.* at 54. The class of people "under guardianship for reasons of mental illness" includes plenty of people who have the capacity to vote, and excludes people who are clearly incapable of voting but not under guardianship for reasons of *mental illness*. *Id.* at 55; *see also id.* ("For example, it would be illogical to say that a person who slips into a coma or persistent vegetative state as a result of a physical injury or ailment was 'mentally ill' . . . .").

[46] *Id.* at 51.

[47] *Id.* at 56.

[48] 541 U.S. 509 (2004).

[49] *Id.* at 533–34.

Lane involved two paraplegic individuals who were unable to reach courtrooms above the ground floor. George Lane was a criminal defendant who was compelled to appear before the court on the second floor of a county courthouse with no elevator.[50] "At his first appearance, Lane crawled up two flights of stairs to get to the courtroom," but when he returned for a hearing, he refused to crawl or be carried up.[51] He was arrested and jailed for failure to appear.[52] The other plaintiff, Beverly Jones, was a court reporter who had lost work for not being able to access upstairs courtrooms.[53] Both sued under Title II of the ADA, "claim[ing] that they were denied access to, and the services of, the state court system by reason of their disabilities."[54]

From this description, *Lane* seems to have very little to do with voting rights and the mentally incapacitated. However, the case applies to this topic because the Court decided that states' sovereign immunity was properly abrogated by Title II of the ADA,[55] which prohibits discrimination against otherwise qualified persons with disabilities with respect to public works, including any department or instrumentality of a state or local government.[56] The Court ruled that the abrogation was appropriate under the ADA "as applied to the class of cases implicating the fundamental right of access to the courts,"[57] which suggests that Title II actions can now be brought against other discriminatory laws, such as state disenfranchisement provisions, that affect fundamental rights.[58]

Lane is also relevant because for "a case not about voting, it is striking that it mentions voting as an example of a fundamental right covered by the ADA no less than five times."[59] Future litigators can point to the Court's concern about several categories of discrimination other than courtroom access that it weighed in its analysis, including a

---

[50] *Id.* at 513–14.

[51] *Id.* at 514.

[52] *Id.*

[53] *Id.*

[54] *Id.* at 513.

[55] *See id.* at 533–34.

[56] 42 U.S.C. §§ 12131–12132 (2000).

[57] *See Lane*, 541 U.S. at 533–34.

[58] Indeed, this issue was also litigated in *Doe v. Rowe*, as it was then an open question. The ADA's definition of "qualified individual" requires that the person "meet[] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity," 42 U.S.C. § 12131, and in noting that the plaintiffs would have to be qualified individuals under the Act for their claim to succeed, the *Doe* court tacitly conceded that some mentally incapacitated persons would not be eligible to vote. Doe v. Rowe, 156 F. Supp. 2d 35, 58–59 (D. Me. 2001). However, the court declined to define "what level of mental capacity may be considered an 'essential eligibility criteri[on],'" saying instead that whatever that level might be, the past application of the provision by the State had been discriminatory and in violation of the ADA. *Id.* at 59.

[59] Waterstone, *supra* note 31, at 796 & n.15.

"pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including the penal system, public education, and voting."[60] Though *Lane* focused on the fundamental right to courtroom access, the Court's reasons for protecting that right also apply to voting; as the Court previously determined in *Wesberry v Sanders*,[61] the right to vote is a fundamental right[62] and therefore deserves a heightened level of protection.

The *Lane* Court also provided powerful historical policy arguments for why such protections are necessary, analyzing disability discrimination in general and pointing out a history of discrimination against the mentally incapacitated. Though *Lane* was a case about physical disabilities, the Court's accounts of state-induced discrimination and unequal treatment included discussion of unjustified commitment and the abuse and neglect of persons committed to state mental health facilities, as well as state laws that "categorically disqualify[] 'idiots' from voting" or marrying.[63] The Court found that the "sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services"[64] justified the ADA's requirements. Such reasoning implies that when dealing with a fundamental right, states should be particularly sensitive to the full history of discrimination against the disabled before broadly disenfranchising whole classes of people.

C. What's Next?

As described above, many states still have vague, confusing, or downright discriminatory provisions when providing for the disenfranchisement of the mentally incapacitated. Those statutes and constitutional provisions are unclear about the definitions of "disability," "mental illness," "mental incapacity," and "incapacity to vote." These ideas are all distinct, but are rarely distinguished. Instead, most states simply choose one term or another without definition or explanation. Current state constitutions disenfranchise citizens based on categories ranging from "idiots" and "insane persons,"[65] to those who are not "of a quiet and peaceable behavior,"[66] to those under guardianship,[67] to those who are mentally incompetent[68] or under guardianship because

---

[60] *Lane*, 541 U.S. at 525 (footnotes omitted).

[61] 376 U.S. 1 (1964).

[62] *See id.* at 17.

[63] Waterstone, *supra* note 31, at 821 (citing *Lane*, 541 U.S. at 524).

[64] *Lane*, 541 U.S. at 528.

[65] *See, e.g.*, IOWA CONST. art. II, § 5; MISS. CONST. art. 12, § 241; N.M. CONST. art. VII, § 1.

[66] VT. CONST. ch. II, § 42.

[67] *E.g.*, MD. CONST. art. I, § 4; MASS. CONST. amend. III.

[68] *See, e.g.*, ALA. CONST. art. VIII, § 177(b); N.D. CONST. art. II, § 2; S.C. CONST. art. II, § 7; UTAH CONST. art. IV, § 6; WYO. CONST. art. 6, § 6.

of mental incapacity[69] or adjudicated to be "incapacitated."[70] Even federal law switches back and forth between separating mental and physical disabilities and incapacities and lumping them together.[71] This ambiguity can be discouraging for advocates of voting rights for mentally incapacitated people who nonetheless have the capacity to vote; so many varying definitions mean that states and courts can pick and choose which definitions to use.[72]

After *Doe* and *Lane*, litigation is one possible avenue for changing these laws. The *Lane* decision can extend *Doe* beyond Maine's peculiar constitutional provision by allowing a private right of action for money damages under Title II of the ADA with respect to state violations of fundamental rights.[73] As a result, there is much promise for litigation in other districts in states that still constitutionally or statutorily endorse discrimination against the mentally incapacitated.

Doe's and *Lane*'s reasoning can also be used in legislative, rather than litigious, advocacy. In addition to the medical arguments about why general incapacity does not equal the incapacity to vote, *Doe* provides persuasive arguments about why disenfranchisement should be done on an individual basis. Both cases review the long histories of voting discrimination and discrimination against the disabled, which indicate just how important it is for disenfranchisement provisions to be clearly written and fairly applied in order to prevent further discrimination. In addition, the specter of adverse court rulings may loom large enough to impel some change from state legislatures; as noted above, one could infer from *Lane* that voting is fundamental enough, and past history discriminatory enough, to *require* specific and narrowly tailored procedures for disenfranchising the mentally incapacitated.

---

69 *See, e.g.*, MO. CONST. art. VIII, § 2.

70 *E.g.*, ARIZ. CONST. art. VII, § 2(C).

71 *Compare* National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-6(a)(3)(B) (2000), *with* Help America Vote Act of 2002, 42 U.S.C. § 15461 (Supp. IV 2004) (directing the Secretary of Health and Human Services to "ensure full participation in the electoral process for individuals with disabilities," a category that presumably includes both physical and mental disabilities).

72 *Cf.* Christina J. Weis, Note, *Why the Help America Vote Act Fails To Help Disabled Americans Vote*, 8 N.Y.U. J. LEGIS. & PUB. POL'Y 421, 447–50 (2005) (arguing that the Act's vague (or nonexistent) definition of the disabled voter could lead to underinclusive state protections).

73 Before *Lane*, courts were divided as to whether Title II claims properly abrogated state sovereign immunity. *Compare* Alsbrook v. Maumelle, 184 F.3d 999, 1007–10 (8th Cir. 1999) (en banc) (prohibiting a Title II claim for money damages because of the state's sovereign immunity), *and* Reickenbacker v. Foster, 274 F.3d 974, 985 (5th Cir. 2001) (same), *with* Garcia v. SUNY Health Scis. Ctr. of Brooklyn, 280 F.3d 98, 112 (2d Cir. 2001) (allowing a claim for money damages, albeit only in cases of "discriminatory animus or ill will due to disability"). *Lane* resolved this debate, at least to the extent that the Title II claims implicate fundamental rights. *See, e.g.*, Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 277 n.14 (5th Cir. 2005).

Finally, while the varying definitions and justifications for disenfranchisement may at first seem frustrating, that variation suggests that courts' and state legislatures' ideas about disenfranchisement of the mentally disabled are vague and unexplored, and therefore ripe for change. Diligent advocates may be able to convince lawmakers to take lessons learned from the civil rights struggles of one type of disability discrimination and apply them to another. For example, recently realized rights of the physically disabled might be translated into furthering the rights of the mentally disabled. Some states already evaluate both mental and physical disabilities together when informing the public about the right to vote by persons with disabilities.[74] Indeed, *Lane* also lumped mental and physical disabilities together in explaining why the ADA's abrogation of state sovereign immunity was appropriate, suggesting that accommodations and special procedures afforded to the *physically* disabled were justified partly because of the historical injustices against the *mentally* disabled.[75] It seems only fair that if past injustices against the mentally disabled should result in accommodations for the physically disabled, they should also translate into similar accommodations for the mentally disabled. By stressing the importance of making determinations based on capacity to vote rather than general mental capacity or some other proxy for capacity (such as guardianship), advocates may be able to remove the "uncertainty, inconsistency, and apparent confusion"[76] in the interpretation of states' voting laws, allowing states to disenfranchise those who truly lack the mental capacity to vote while ensuring that those who understand voting can vote.

---

[74] *See, e.g.*, Conn. Office of Prot. & Advocacy for Pers. with Disabilities, Your Rights as a Voter with a Disability (Oct. 31, 2004), http://www.ct.gov/opapd/cwp/view.asp?a=1759&q=284882.

[75] *See* Tennessee v. Lane, 541 U.S. 509, 524–25 (2004).

[76] Mo. Prot. & Advocacy Servs., Inc. v. Carnahan, 499 F.3d 803, 807 (8th Cir. 2007).