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Introduction

Good morning everyone. My talk today is on the calls to abolish the insanity defense.

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My thesis statement is as follows:

"Given the differences relating to culpability & responsibility between defendants with mental illnesses & defendants without mental illnesses, is the practice of the insanity defense required under the US criminal law, or is it discriminatory? What can the human rights paradigm teach us about equality and whether we should abolish the insanity or reform it?"

** However, today's presentation is centered on the rationales put forward to abolish the insanity defense. It will also cover counterarguments to this, and possible alternatives to current practice.

So what is the insanity defense?

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"The insanity defense refers to an affirmative defense that a defendant can plead in a criminal trial. In an insanity defense, the defendant admits the action, but asserts a lack of culpability based on a mental illness."[1]

[1] The Insanity Defense, Wex Dictionary, (Legal Information Institute) https://www.law.cornell.edu/wex/insanity_defense.

** There are numerous tests used in different jurisdictions to determine whether a defendant was legally insane at the time the crime was committed. We will now briefly discuss the three dominant tests used across the US.

The primary traditional insanity test stems from the M'Naghten case in 1843. Under the M'Naghten test, a defendant is deemed to be legally insane if, as a result of a disease of the mind, he does not understand the nature and quality of the act or does not understand the wrongfulness of the act.

The Irresistible Impulse Test assesses insanity on the basis of volition, whereas the M'Naghten test focuses on the defendant's cognition. A defendant is deemed to be insane under the Irresistible Impulse Test if he was unable to control his impulses and so committed the crime due to his mental disease.

The third main test used is the that put forward in the Model Penal Code. Under the Model Penal Code test, a defendant is deemed to be legally insane if, because of a mental defect, the defendant failed to understand the criminality of his act or was unable to act within the confines of the law.

**The insanity defense has been around a long time, with references to its underlying rationale found in the bible and in the works of scholars in other ancient civilizations, such as Aristotle and Plato.[2] But even since its inception in the common law with the M'Naghten case in 1843, it has been a controversial topic. That controversy continues to this very day, and has actually intensified in recent years.

[2] James F. Hooper, *The Insanity Defense: History and Problems*, 25 ST. LOUIS UNIV. PUBLIC LAW REV. 409–416 (2006), 409-411.

** At this early stage, it is worth pointing out that approx. 50-60% of prisoners have a mental illness, according to a Bureau of Justice Statistics study.[3] Yet, the insanity defense is raised in less than 1% of felony cases, and is successful in far fewer cases.[4] We can see here the disconnect between medical insanity and legal insanity.

After this brief introduction, what will we cover in today's presentation?

** Our main discussion point will be the objections to the insanity defense and the reasons why we should abolish it. One of the main alternatives to the insanity defense put forward by the abolitionists is the *mens rea* alternative. After discussing this alternative, we will briefly touch on the myths that surround persons with mental illnesses. We will then turn to the counterarguments to abolitionism. This then leads us to discuss the court's assessment of defendants' dangerousness. Finally, we will conclude with a brief analysis of how the general theories of punishment apply to defendants with mental illnesses.

** Objections to the insanity defense

One of the sources of criticisms of the insanity defense has come from a human rights standpoint, and interestingly from within the disability community itself. Objections to the insanity defense from a human rights perspective find the insanity defense troubling in its discriminatory impact against those with mental illnesses. They argue, as a matter of equality and equal treatment, there should be no separate defense for defendants with mental illness. Some like Minkowitz & Slobogin believe that the insanity defense lessens defendant's decision-

[3] D. J. James, & L. E. Glaze, (2006). Mental health problems of prison and jail inmates. Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics.

[4] Ira Mickenberg, A Pleasant Surprise: The Guilty But Mentally Ill Verdict Has Both Succeeded in Its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense, 55 U. Cin. L. Rev. 943, 968 (1987).

making capacities in that they are not held fully accountable to the same degree as all other defendants.

**Slobogin has said in relation to persons with mental illness, that "if the decisions they make violate a criminal law, they are to pay the consequences to the extent everyone else does."[5] Minkowitz has said previously that the "capacity to be held accountable for harm... is a corollary of the capacity to exercise rights"[6] and is a corollary of our "mutual obligations towards others".[7]

** From a brief literature review, it appears that there are two extreme points of view - first, there are those such as Slobogin and Minkowitz calling for the abolition of the insanity defense; and then there are those calling for the status quo of maintaining the insanity defense.[8]
Those who are looking for abolition, have put forward the notion of introducing disability-neutral defenses and doctrines that would be available to all defendants equally.
This is what Chrisopher Slobogin calls "Integrationism".[9] This would involve subjectifying all defenses and all forms of *mens rea*.[10] But how would this look in action? Luckily we have real-world experience of such an approach in Sweden. Under Swedish law, there is no special defense for persons with mental illnesses. Instead, a defendant's mental illness is only relevant in so far as it negates the *mens rea* requirement of a given crime, such as intent for the crime of murder. Is

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[5] Christopher Slobogin, - *Eliminating Mental Disability as a Legal Criterion in Deprivation of Liberty Cases: The Impact of the Convention on the Rights of Persons with Disabilities on the Insanity Defense, Civil Commitment, and Competency Law*, 40 LAW PSYCHOL. REV. 297–319 (2015), at 299.
[6] Tina Minkowitz, Some Thoughts on Insanity Defense, MAD IN AM. (July 12, 2014).
[7] Tina Minkowitz, Rethinking Criminal Responsibility from a Critical Disability Perspective: The Abolition of Insanity/ Incapacity Acquittals and Unfitness to Plead, and Beyond, 23 GRIFFITH L. REV. 434 (2014), at 447.
[8] C. Slobogin, REPLACING THE SPECIAL DEFENSE OF INSANITY WITH SUBJECTIVELY DEFINED STANDARD DEFENSES (2008); T. Minkowitz, *Rethinking Criminal Responsibility from a Critical Disability Perspective*, 3 GRIFFITH L. R. 23 (2014); S. Morse & M. Hoffman, The Uneasy Entente between Legal Insanity and Mens Rea: Beyond Clark v. Arizona, 97 J. CRIM. L. CRIMINOLOGY 4 (2007).
[9] Slobogin, *supra* note 1, at 297, 319.
[10] *Id, at 305.*

it possible or desirable for the criminal law to ignore a mental illness that impacts upon a defendant's culpability?

** The abolitionists have found great support in the UN Office of the High Commissioner on Human Rights, who calls for the abolition of the insanity defense on the basis that persons with mental illnesses need to be provided with full decision making capacity and autonomy.[11]The UN OHCHR has said that "recognition of the legal capacity of persons with disabilities requires abolishing a defence based on the negation of criminal responsibility...."[12] It should be noted that this UN body is discussing the requirements from an international human rights standpoint, more specifically from the perspective of the CRPD. Furthermore, the US has failed to ratify the CRPD as of yet. However, given that the US has signed the CRPD treaty, it seems likely that it will eventually ratify it, so domestic US criminal law will have to come in line with CRPD law in the future.

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The insanity defense has faced some unfair criticisms, many of which are based on stereotypes, myths and misconceptions, as Kachulis has explained.[13] For instance, much of the public believe that the insanity defense is used widely as a get out of jail free card or as a loophole,[14] where defendants can easily feign insanity[15] and escape due punishment.[16] In fact, the insanity defense

[11] H. Wales, *Analysis of Proposal to "Abolish" the Insanity Defense*, 124 UPENN. L. R. 687 (1976), at 710.
[12] UN OHCHR, Thematic Study on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities, (UN OHCHR, 2009), at 15.
[13] A. Dardashtian, Colorado Shooter's Urge to Kill Could Set Him Free, HUFF. POST (July 17, 2015); Kachulis, note 7, at 364.
[14] Perlin, *supra*, note 5, at 497.
[15] M. Perlin, *"The Borderline which Separated You from Me": The Insanity Defense, The Authoritarian Spirit, The Fear of Faking, and The Culture of Punishment*, 82 IOWA L. R. 1375 (1997), at 1408.
[16] M. Perlin, *Myths, Realities, and the Political World: The Anthropology of Insanity Defense Attitudes*, 24 BULL. AM. ACAD. PSYCH. L.1 (1996), at 11; Ellis, note 7, at 962.

is rarely used, and even more rarely is it successful.[17] %%%Furthermore, defendants who plead the insanity defense often face longer periods of confinement.[18]

** Argument against abolition

I would argue, like many others, that, given that the criminal law generally imposes less severe punishment according to the propotionatlity principle and according to the level of culpability; defendants with mental illnesses should deserve a lesser punishment.[19] The insanity defense itself is well-intentioned, in that it acknowledges the lesser responsibility on the parts of defendants who have mental illnesses, who are not *as* deserving from a culpability standpoint as defendants who freely choose to commit a crime without the influence of a mental illness.

I would also argue that what some of these commentators really have issue with is not the insanity defense *per se* but its *application*,[20] namely indefinite detention in a mental health facility, involuntary psychiatric treatment therein and stigma.[21]

The need for the insanity defense is far from academic, it has been described as central to our "beliefs about human rationality, deterrability, and free will".[22] The US courts have stated that the insanity defense "goes to the very root of our criminal justice system."[23]

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[17] L. Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study* , 19 BULL. AM. ACAD. PSYCH. L. 4 (1991); C. Cirincione et al., *Rates of lnsanity Acquittals and the Factors Associated with Successful Insanity Pleas*, 23 BULL. AM. ACAD. PSYCH. L. 3 (1995).

[18] T. Gutheil, *A Confusion of Tongues: Competence, Insanity, Psychiatry, and the Law*, 50 PSYCH. SERV. 6 (1999), at 773.

[19] H. Ahn-Redding & R. Simon, THE INSANITY DEFENSE THE WORLD OVER (2008); M. White, THE INSANITY DEFENSE: MULTIDISCIPLINARY VIEWS ON ITS HISTORY, TRENDS, AND CONTROVERSIES (2017), at 98.

[20] Michael Perlin, - *God Said to Abraham/Kill Me a Son: Why the Insanity Defense and the Incompetency Status Are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence*, 54 AM. CRIM. LAW REV. (2017), at 504.

[21] Ellis, note 7, at 969-1012.

[22] Richard J. Bonnie & Christopher Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 VA. L. REV. 427, 448 (1980).

[23] *State v. Curry*, 543 N.E.2d 1228, 1230 (Ohio 1989).

** Michael Perlin is leading the way in the efforts to argue against abolitionism. He believes that abolishing the insanity defense will not only make a **mockery** of the fair-trial rights of defendants but will "likely lead to the torture of (persons with mental illnesses) in jails and prisons".[24] The abolitionists and UN bodies that call for abolition, appear to **ignore** the rest of the CRPD and fail to take a holistic approach looking at all of the articles of the CRPD.[25][26] Perlin points out that abolishing the insanity defense "would disregard **millennia** of experience and violate the most basic concepts of due process." This is because defendants with mental illnesses are situated differently than defendants without mental illnesses. They have less responsibility for their actions in that they cannot tell the difference between right & wrong, or cannot control their behavior. Either way, their criminal behavior is heavily influenced, and sometimes determined, by their disability, and as they are not as blameworthy as defendants who freely choose to commit crime without the influence of a mental illness.

By only allowing mental illness to act as evidence relating to the negating of mens rea, as Sweden, Greenland, Montana, Idaho, Utah and Kansas have done,[27] there will be a decline in the number of defendants capable of introducing evidence of their mental illness. there will also be an increase in the conviction rates of persons who have a mental illness.[28] This is because the Integrationist approach is a much more narrow approach than the insanity defense,[29] in that it is open to a lesser amount of defendants.

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[24] Perlin, *supra* note 5, at 480.
[25] *Id, at 481*.
[26] Meron Wondemaghen, *Testing Equality: Insanity, Treatment Refusal and the CRPD*, 25 PSYCHIATRY PSYCHOL. LAW 174–185 (2018), at 176.
[27] Sofia Moratti & Dennis Patterson, - *Introduction*, *in* LEGAL INSANITY AND THE BRAIN: SCIENCE, LAW AND THE EUROPEAN COURTS 1–9 (2016), at 6.
[28] Paul S. Appelbaum, Protecting the Rights of Persons with Disabilities: An International Convention and Its Problems, 67 PSYCHIATRIC SERVS. 366, 367 (2016).
[29] Marc Rosen, Insanity Denied: Abolition ofthe Insanity Defense in Kansas, 8 KAN. J.L. & PUB. POL'Y 253, 262 (1999).

As stated, if we decide to follow the logic of the abolitionists and abolish the insanity defense, there will undoubtedly be an increase in the number of prisoners who will have a mental illness. Current data shows that prisoners with mental illness experience physical and sexual abuse at higher rates than prisoners who don't have mental illnesses.[30] As Perlin predicts, there will likely be an increase in the abuse of persons with mental illnesses, specifically those who would have previously pleaded an insanity defense and who would have been confined in a more protective psychiatric institution. So as stated previously, this debate is not purely academic, but will have real-world negative implications for persons with mental illnesses.

** Dangerousness

One of the consequences of successfully pleading the insanity defense is that the defendant will face indefinite detention in a psychiatric institution. In order to be released, the defendant must prove that he is no longer a danger to society.

Of relevance here is the misperception surrounding persons with mental illnesses that they are inherently dangerous,[31] and that they are disproportionately responsible for more violent crime. In fact, there is no heightened relationship between persons with mental illness committing dangerous crimes like murder when compared to persons without mental illness.[32] However, it should be noted firstly that "The primary responsibility of the criminal justice system is to protect society from the dangerous".[33] As Bageric has explained, here mental illness can act as an aggravating factor. Having said all that, I think it should be noted here, as Slobogin as done, that while the myth associating

[30] E. Lea Johnston, Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness, 103 J. CRIM. L. & CRIMINOLOGY 147 (2013).
[31] Slobogin, *supra* note 1, at 309.
[32] Joseph H. Rodriguez, Laura M. LeWinn & Michael L. Perlin, The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders, 14 RUTGERS L.J. 397, 401-02 (1983)., at 402
[33] Moratti & Patterson, *supra*, note 24 at 2.

mental illness & dangerous crime is merely a myth, there are some persons with mental illnesses who are "truly undeterrable".[34] This is why we now turn the issue of ascertaining what defendants are deserving of indefinite detention on the basis of future dangerousness.

**The idea of compulsory treatment & indefinite detention requires a finding of future dangerousness. The US courts in *US v Freeman* 357 F.2d 606 (2d Cir. 1966) have upheld the constitutionality of compulsory confinement in non-punitive settings for those who pose a continuing danger to society. Dangerousness and protection of the public and protection of the defendant him or herself act as reasons for indefinite detention, which has received constitutional backing from the Supreme Court in *Jones v United States* 463 U.S. 354, (1983). Having said that, the US Supreme Court *has* previously struck down one system of civil commitment related to the insanity defense, in the *Foucha v. Louisiana* 504 U.S. 71 (1992) case. While the Court did not find that civil commitment itself is unconstitutional, the facts of the case relating to that particular system of civil commitment was unconstitutional on the grounds that it violated due process. Here the defendant had previously raised an insanity defense, and was found not guilty by reason of insanity. Foucha was then sent to a psychiatric facility for indefinite detention. The Supreme Court found difficulty with the fact that the punishment was not sufficiently tailored to the public-safety goals put forward as the rationale for the civil commitment. Contrary to this, the Supreme Court upheld pretrial detention for a defendant in the *United States v. Salerno* 481 U.S. at 747 (1987) case on the basis that it was "strictly limited in duration", and due to the existence of substantive and procedural mechanisms to carefully limit detention to the acutely dangerous.

[34] *Id*, at 303.

** Theories of Punishment

To conclude, we now turn briefly to examine the theories of punishment and how they apply or not apply to defendants with mental illnesses. With deterrence, can we really deter defendants if they cannot control their actions or don't even understand what they did was wrong?[35] With retribution, if the defendant was not really responsible for the act, it is fair to punish as if he was fully criminally culpable?[36] Generally, in the criminal justice system we assume humans have free will and are responsible for the choices they freely make.[37] However, where individuals don't have the mental **capacity** to make certain choices, we cannot conclude that they freely and voluntarily committed the crime at hand.[38] The US courts have held that individuals who cannot understand or control their actions cannot be held criminally responsible for their actions.[39]

The insanity defense, and in particular its consequence of sending inmates to psychiatric hospitals rather than prison, is in its essence rehabilitative in nature.[40] The insanity defense is designed to divert individuals who are not suited to prison, and who require treatment.[41] At least within the academic literature there appears to be a move towards a more therapeutic rationale when it comes to those with mental illnesses, on the basis that deterrence and retribution are not as effective or as relevant for this population.[42] Such a move towards therapeutic jurisprudence may hold the key in transforming the paradigm through which we assess the culpability of defendants with mental illnesses.

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[35] *The King v. Porter* (Australia 1933) 55 Commw LR 182.
[36] R. Frase, JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM (2012), at 6.
[37] G. Parmigiani et al., *Free will, neuroscience, and choice: towards a decisional capacity model for insanity defense evaluations*, 52 RIV .PSYCHIATRY 1 (2017).
[38] M. Moore, PLACING BLAME: A THEORY OF THE CRIMINAL LAW (2010), at 596.
[39] *United States v Freeman*, 357 F.2d 606, 615 (2d Cir. 1966).
[40] Kachulis, note 7, at 359; Maidman, note 17, at 1841.
[41] J. Hooper, *The Insanity Defense: History and Problems*, 25 ST. LOU. U. PUB. L. R. 409 (2006), at 413.
[42] J. Peay, *Mental incapacity and criminal liability: Redrawing the fault lines?* INT. J. L. PSYCHIATRY 40 (2015); J. Parry, CRIMINAL MENTAL HEALTH AND DISABILITY LAW, EVIDENCE AND TESTIMONY (2009), at 4-5.

- Mental illness, not intellectual disability
- Therapeutic jurisprudence- Winick & Wexler
- Take disability into account under some circumstances, when relevant and don't take it into account when its not relevant.