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Idaho's Abolition of the Insanity Defense—an Ineffective, Costly, and Unconstitutional Eradication

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IDAHO’S ABOLITION OF THE INSANITY DEFENSE—AN INEFFECTIVE, COSTLY, AND UNCONSTITUTIONAL ERADICATION

The fury of a demon instantly possessed me. I knew myself no longer. My original soul seemed at once to take its flight from my body. And a more than fiendish malevolence, gin nurtured, thrilled every fiber of my frame.¹

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I. INTRODUCTION

Late on a Sunday night in 1987, Robert Serravo returned home from work.² He sat in his kitchen and read from the *Bible*.³ Overcome with religious delusions, Serravo believed that God sent him on a mission to convert others to his religious ideals.⁴ To accomplish his mission, Serravo believed he needed to “establish a religious community by constructing a sports complex dedicated to God.”⁵ But he felt his wife did not support his mission, and he believed that God wanted him to kill her “to prevent her from being an obstacle in his way.”⁶ After reading the *Bible*,

1. EDGAR ALLEN POE, *The Black Cat*, in *TALES OF EDGAR ALLEN POE* 22, 25 (1965).

2. *People v. Serravo*, 823 P.2d 128, 130 (Colo. 1992).

3. *Id.*

4. *People v. Serravo*, 797 P.2d 782, 782 (Colo. App. 1990).

5. Margaret E. Clark, *The Immutable Command Meets the Unknowable Mind: Deific Decree Claims and the Insanity Defense after People v. Serravo*, 70 DENV. U. L. REV. 161, 175 (1992).

6. *Serravo*, 797 P.2d at 782.

Serravo went upstairs to his bedroom where his wife was asleep.⁷ He stood over her for a few minutes, and then he stabbed his sleeping wife in the back with a knife.⁸ The stab wound was not fatal and his wife woke up.⁹ Because she survived, Serravo believed she had passed a “divine test” and “would no longer be uncooperative” with his mission.¹⁰ Serravo then told his wife that an intruder stabbed her.¹¹ Encouraging her to wait in bed, he went downstairs to call for medical assistance.¹² When the police arrived, Serravo told them that he was downstairs reading the *Bible* when he heard the front door slam shut.¹³ Serravo claimed he went upstairs to check on his wife when he saw her bleeding in bed.¹⁴

Weeks later, Serravo’s wife found letters he wrote, in which he confessed to stabbing her.¹⁵ The letters read, “I have gone to be with Jehovah in heaven for three and one-half days,” and “I must return for there is still a great deal of work to be done.”¹⁶ When Serravo’s wife confronted him, he told her that God commanded him to stab her.¹⁷ Serravo’s wife informed the police of the letters and Serravo’s confession, and he was arrested and charged with attempted murder.¹⁸

Because Colorado has an insanity defense statute,¹⁹ Serravo pled insanity as a defense to his crime.²⁰ Colorado articulates the insanity defense standard as, “A person who is so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong with respect to that act is not accountable.”²¹ At trial, the court instructed the jury that the phrase “incapable of distinguishing right from wrong” refers to a person who understands that his conduct is criminal but, as a result of a mental disease or defect, believes that conduct is morally right.²² The jury returned a verdict of not guilty by reason of insanity.²³ The Supreme Court of Colorado approved the verdict, noting that “a defendant may be judged legally insane where, as here, the defendant’s cognitive ability to distinguish right from wrong with respect to an act charged as a crime has been destroyed as a result of a psychotic delusion that God has ordered him to commit the act.”²⁴ Because Serravo suffered from such psychotic delusions in which he believed that God commanded him to murder his wife, the court affirmed Serravo’s

7. *Id.*

8. *Serravo*, 823 P.2d at 130.

9. *Id.*

10. *Serravo*, 797 P.2d at 782.

11. *Serravo*, 823 P.2d at 130.

12. *Id.*

13. *Id.* at 130–31.

14. *Id.*

15. *Id.* at 131.

16. *Id.*

17. *Serravo*, 823 P.2d at 131.

18. *Id.*

19. COLO. REV. STAT. ANN. § 16-8-103 (West 2014).

20. *People v. Serravo*, 797 P.2d 782, 782 (Colo. App. 1990).

21. COLO. REV. STAT. ANN. § 16-8-101 (West 2014).

22. *Serravo*, 797 P.2d at 782.

23. *Id.*

24. *People v. Serravo*, 823 P.2d 128, 130 (Colo. 1992).

acquittal under the insanity defense.²⁵ And pursuant to Colorado's insanity defense statute, the court committed Serravo to a state hospital for treatment.²⁶

Fast-forward fifteen years later, to June 29, 2002. John Cope was watching TV in his Lewiston, Idaho, apartment.²⁷ His landlord, Brian Elliot, knocked on the door to remind Cope that he had three days to move out.²⁸ Cope initially refused to answer the door.²⁹ But when Elliot came back seconds later and again knocked, Cope believed he heard God command him, "finish him off he's the mark of the beast. Get your knife and answer the door."³⁰ Cope opened the door.³¹ Because he thought "[Elliot] was the mark of the beast," Cope murdered Elliot.³² He slit Elliot's neck and then mutilated the severed head.³³ Upon cutting his own hand during the murder, Cope went to the hospital covered in blood, acting "psychotic," and rambling on about "letting the beast out."³⁴ Cope told the police that he was "'being tormented by the mark of the beast' and when the 'mark of the beast' came to his door, he cut the beast's head off with a knife."³⁵

The state charged Cope with first-degree murder.³⁶ He was initially found unfit to proceed with trial, but four months later the court determined that he was competent to proceed.³⁷ At trial, expert witnesses testified as to Cope's mental health problems.³⁸ Prior to the murder charge, Cope was involuntarily committed on three separate occasions in Idaho.³⁹ Even when he was released, Cope was non-compliant with his outpatient treatment, which made his mental health further deteriorate and caused him to be aggressive and violent.⁴⁰ In addition, he was homeless, suffered from alcoholism, and lacked a support system.⁴¹ The trial judge noted, "I am concerned, I have to be concerned about the fact that there does not seem to be any kind of outpatient setting that can handle your state of mental illness."⁴² And yet, despite the seriousness of Cope's condition, Idaho's ban on the insanity defense precluded Cope from pleading insanity in hopes of receiving necessary treatment.⁴³ While the trial judge recognized Cope's serious mental health problems, he also understood that releasing Cope back into society, untreated, would pose a threat to himself and to his community.⁴⁴ With nowhere else to send Cope, the trial

25. *Id.* at 132.

26. *Id.*; COLO. REV. STAT. ANN. § 16-8-105(4) (West 2014) ("If the trier of fact finds the defendant not guilty by reason of insanity, the court shall commit the defendant to the custody of the department of human services until such time as he is found eligible for release.").

27. *State v. Cope*, 129 P.3d 1241, 1243, 142 Idaho 492, 494 (2006).

28. *Id.*, 142 Idaho at 494.

29. *Id.*, 142 Idaho at 494.

30. *Id.*, 142 Idaho at 494.

31. *See Cope*, 129 P.3d at 1243, 142 Idaho at 494.

32. *Id.*, 142 Idaho at 494.

33. *Id.*, 142 Idaho at 494.

34. *Id.*, 142 Idaho at 494.

35. *Id.*, 142 Idaho at 494.

36. *Id.*, 142 Idaho at 494.

37. *Cope*, 129 P.3d at 1244, 142 Idaho at 495.

38. *Id.* at 1249–51, 142 Idaho at 500–02.

39. *Id.* at 1250, 142 Idaho at 501.

40. *Id.*, 142 Idaho at 501.

41. *Id.*, 142 Idaho at 501.

42. *Id.*, 142 Idaho at 501.

43. IDAHO CODE ANN. § 18-207 (West 2004).

44. *Cope*, 129 P.3d at 1251, 142 Idaho at 502.

judge sent him to prison.⁴⁵ Aware of the need to protect society, the trial judge sentenced Cope to a fixed life sentence.⁴⁶ But an insanity defense would have enabled the judge to send Cope to a state mental hospital.⁴⁷

What is the difference between Robert Serravo and John Cope? Both men heard voices from God, commanding them to kill their victims, and both men acted on those commands.⁴⁸ Both men took similar actions based on similar states of mind. But while their states of mind were similar, their states of residence were different—and the difference mattered: Serravo went away to be rehabilitated, while Cope, perhaps the more delusional of the two, went to prison to be punished.⁴⁹ Because Idaho abolished the insanity defense, a sick man sits in an overburdened, underprepared prison instead of in a hospital suited to treat him, costing Idaho money and security in the process.⁵⁰ This Article suggests that is the wrong approach.

Idaho must repeal its ban on the insanity defense. The insanity defense is required under due process of the law, it promotes justice because it advances the goals of punishment, and it effectively rehabilitates mentally insane criminal defendants and lowers recidivism rates, thereby saving money.⁵¹ Part II of this Article describes the origins and transformation of the insanity defense throughout ancient history and also explores the modern concepts of the insanity defense. Part III focuses on various challenges to the abolition of the insanity defense, specifically in Washington, Nevada, Mississippi, Arizona, and, most relevant to this Article, Idaho. Part IV describes the goals of punishment in relation to mentally insane criminals, in an effort to demonstrate that the insanity defense advances the goals of punishment, whereas the lack of an insanity defense actually impedes the accomplishment of these goals. Part V explains that *mens rea*, which is the “state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime,” has two components.⁵² These two components are intent and moral blameworthiness, one of which has been abandoned in some states, including Idaho.⁵³ Part V also argues that said elimination has been justified by an argument

45. *Id.* at 1251, 142 Idaho at 502.

46. *Id.* at 1232, 142 Idaho at 494.

47. *See, e.g.*, COLO. REV. STAT. ANN. § 16-8-105(4) (West 2014) (“If the trier of fact finds the defendant not guilty by reason of insanity, the court shall commit the defendant to the custody of the department of human services until such time as he is found eligible for release.”); N.C. GEN. STAT. ANN. § 15A-1321 (West 2014) (a “defendant [who] has been found not guilty by reason of insanity of a crime” will be committed to a “Forensic Unit operated by the Department of Health and Human Services . . .”); *Jones v. United States*, 463 U.S. 354, 363–64 (1983) (holding that a finding of insanity at trial is “sufficiently probative of mental illness and dangerousness to justify commitment” to a mental hospital); *United States v. Ecker*, 543 F.2d 178, 181 (D.C. Cir. 1976) (defendant who was convicted of murder and rape was sent to a psychiatric hospital because he was mentally insane).

48. *Compare* *People v. Serravo*, 797 P.2d 782, 782 (Colo. App. 1990), *with* *Cope*, 129 P.3d at 1243, 142 Idaho at 494.

49. *Compare* *People v. Serravo*, 823 P.2d 128, 132 (Colo. 1992), *with* *Cope*, 129 P.3d at 1251, 142 Idaho at 502.

50. *See infra* Part VI.

51. *See generally* Daniel J. Nusbaum, *The Craziest Reform of Them All: A Critical Analysis of the Constitutional Implications of “Abolishing” the Insanity Defense*, 87 CORNELL L. REV. 1509, 1541 (2002) (stating that “one can only arrive at the conclusion that due process prohibits the elimination of the extrinsic insanity defense.”).

52. BLACK’S LAW DICTIONARY 1075 (9th ed. 2009).

53. *See infra* Part V.

that a single-prong interpretation of mens rea is sufficient to stand in for an insanity defense, but in fact such an interpretation constitutes a violation of due process rights. Finally, Part VI illustrates how adopting an insanity defense will save Idaho money in the long run. The goal of this Article is to portray the need for an insanity defense in order to comply with the fundamental principles of the law and to effectively rehabilitate in order to treat those who need to be treated, such as John Cope, and to subsequently reduce crime and save money in Idaho.

II. HISTORY OF THE INSANITY DEFENSE

A. Ancient History

The origins of the insanity defense trace back to second century Jewish law.⁵⁴ The Talmud, a collection of Jewish codes dating back to biblical times, reads, "It is an ill thing to knock against a deaf mute, an imbecile, or a minor. He that wounds them is culpable, but if they wound others they are not culpable . . . for with them only the act is a consequence while the intention is of no consequence."⁵⁵ While imbeciles, as we know them today, are not necessarily mentally insane, the ancient Talmud reflects an attempt to relate criminal culpability to one's state of mind and mental faculties.⁵⁶ Specifically, the Talmud distinguished between a criminal defendant of sound mind, who is legally responsible for his actions, and a criminal defendant of a lower mental capacity, an "imbecile," who is not legally responsible for his actions.⁵⁷ Thus, while defendants who harmed those with a diminished mental capacity were held morally blameworthy and legally responsible, defendants with a diminished mental capacity were precluded from moral blameworthiness and, subsequently, legal responsibility.⁵⁸

Traces of legal codes that established insanity defenses and distinguished mentally insane defendants from sane defendants are also found in Ancient Roman history.⁵⁹ For instance, the Justinian Code in the sixth century declared mentally insane criminals unaccountable due to their illnesses.⁶⁰ The Digest of Justinian reads, "An infant or a madman who kills a man [i]s not liable . . . [he is] excused by the misfortune of his condition."⁶¹ Because the mentally insane lacked the overt intention to commit wrongdoings, such individuals were incapable of producing wrongdoings under the Justinian Code.⁶²

54. RITA J. SIMON & DAVID E. AARONSON, *THE INSANITY DEFENSE: A CRITICAL ASSESSMENT OF LAW AND POLICY IN THE POST-HINCKLEY ERA* 10 (1988).

55. *Id.*; Marvin H. Firestone, *Psychiatric Patients and Forensic Psychiatry*, in *LEGAL MED.* 621 (Am. Coll. of Leg. Med. ed., 7th ed. 2007), available at http://www.ablminc.org/Model_Curriculum_LMME_2010/BOOK_Legal%20Medicine-7th_2007/Ch67-Psychiatric%20Patients%20and%20Forensic%20Psychiatry.pdf.

56. See *THE BABYLONIAN TALMUD*, BABA KAMMA 501-02 (Isidore Epstein ed., 1935), available at http://halakhah.com/babakamma/babakamma_87.html#87a_14.

57. *Id.*

58. See *id.*

59. SIMON & AARONSON, *supra* note 54, at 10.

60. *Id.*

61. 4 *THE DIGEST OF JUSTINIAN*, BOOK 48, 8: *Lex Cornelia* on Murders and Prisoners, 12: Modestinus (Paul Kreuger et al. eds., 1985).

62. *Id.*; SIMON & AARONSON, *supra* note 54, at 10.

Anglo-Saxon law further developed the insanity defense.⁶³ In the fourteenth century, King Edward III of England recognized insanity as a complete defense to crimes.⁶⁴ In fact, the earliest record of an English jury acquitting a defendant due to insanity dates back to 1505.⁶⁵ And by 1581, the insanity defense was well established in English common law.⁶⁶ That year, William Lambarde, an English legal writer and scholar, wrote, “[i]f a madman or natural fool, or a lunatic in the time of his lunacy do [kill a man], this is no felonious act for they cannot be said to have any understanding will.”⁶⁷ Thus, English common law maintained that without “any understanding will,” such as a specific intention to harm at the time of the wrongdoing, no accountability rested upon the insane defendant.⁶⁸

In 1723, an English court in *Rex v. Arnold* applied the “wild beast test,” holding that an insane defendant could only use the insanity defense if he was “totally deprived of his understanding and memory so as to not know what he is doing, no more than an infant, a brute, or a wild beast.”⁶⁹ Simply put, the “wild beast test” required a defendant lack any sense of reasoning power,⁷⁰ so that the defendant had acted less, if at all, like a human and more similar to a beast, which almost completely lacks mental faculties. The wild beast test remained the insanity defense standard for more than a century.⁷¹

In an attempt to leave the wild beast test behind, shifting focus more towards morality, an English judge presiding over a murder case in 1812 held that “distinct and unquestioned evidence” must demonstrate that the defendant was unable to distinguish between right and wrong.⁷² But the “right and wrong” test proved difficult to apply to mentally insane criminal defendants, since even knowledge that an act is wrong does not necessarily mean the defendant is culpable.⁷³

Such standards were abandoned over time, largely due to difficulties in applying the different rules and disagreements over the meaning of terms and phrases.⁷⁴ But an English case, *Queen v. M’Naghten*,⁷⁵ left its mark in the history of the insanity defense that still influences criminal jurisprudence today.⁷⁶

63. See SIMON & AARONSON, *supra* note 54, at 10.

64. *Id.*

65. *Id.*

66. *Id.*

67. *From Daniel M’Naughten to John Hinckley: A Brief History of the Insanity Defense*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/crime/trial/history.html> (last visited Oct. 15, 2014) [hereinafter *From Daniel M’Naughten to John Hinckley*].

68. *Id.*

69. *Rex v. Arnold*, (1724) 16 How. St. Tr. 695 (Eng.); SIMON & AARONSON, *supra* note 54, at 10–11 n.16.

70. Christopher Hawthorne, “Deific Decree”: *The Short, Happy Life of a Pseudo-Doctrine*, 33 LOY. L.A. L. REV. 1755, 1793 (2000).

71. See Grant H. Morris & Ansar Haroun, “God Told Me to Kill”: *Religion or Delusion?*, 38 SAN DIEGO L. REV. 973, 998–99 (2001); Norman J. Finkel et al., *Insanity Defenses: From the Jurors’ Perspective*, 9 LAW & PSYCHOL. REV. 77, 77 (1985).

72. EDWIN MAXEY, *INSANITY AS A DEFENSE IN CRIMINAL CASES* 21 (1915).

73. *Id.*

74. See Brief of American Psychiatric Ass’n & American Academy of Psychiatry & the Law as Amici Curiae in Support of Petitioner, *Delling v. Idaho*, 133 S. Ct. 504 (2012) (No. 11-1515), 2012 WL 2930901, at *5–6 [hereinafter Brief of American Psychiatric Ass’n].

75. *Queen v. M’Naghten*, [1843] 2 Eng. Rep. 718 (H.L.); 10 Clark & F. 200.

76. J.C. Oleson, *Is Tyler Durden Insane?*, 83 N.D. L. REV. 579, 605 (2007). The following states have adopted the rule from *M’Naghten*, or a modification of the *M’Naghten* rule, as the insanity defense

B. Modern History

1. The *M’Naghten* Test

In the highly influential 1843 *M’Naghten* case, a jury found the defendant, a paranoid schizophrenic who was charged with murder, not guilty on grounds of insanity.⁷⁷ The defendant, Daniel M’Naghten, believed, due to his paranoid schizophrenia, that the Prime Minister of England, Sir Robert Peel, was persecuting him and attempting to murder him.⁷⁸ M’Naghten sought help from the police, but the police rejected his requests for protection.⁷⁹ Thus, M’Naghten, believing he had no other resort, took matters into his own hands and attempted to assassinate Sir Robert Peel.⁸⁰ But M’Naghten mistook Sir Robert Peel’s secretary, Edward Drummond, for his actual target.⁸¹ And with premeditation and intention, M’Naghten shot and killed Drummond.⁸²

At trial, the House of Lords instructed the jury, “[i]f the prisoner was not sensible at the time he committed the act, that it was a violation of the law of God or of man, undoubtedly he was not responsible for that act or liable to any punishment flowing from that act.”⁸³ Somewhat creating a hybrid of the wild beast test and the right and wrong test, each of which proved inadequate on its own, the House of Lords held that “persons [lacked] criminal capacity if they did not know what they were doing or were unable to distinguish between right and wrong, even if their mental derangement fell a little short of total deprivation of mind and memory.”⁸⁴ Thus, under the *M’Naghten* test, the defendant must have either not known the “nature and quality of [what] he was doing” or, if he knew the nature and quality of what he was doing, he was unaware of the wrongfulness of his crime.⁸⁵ The jury

standard: Alabama, Alaska, Arizona, California, Colorado, Florida, Georgia, Iowa, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Virginia, and Washington. ALA. CODE § 13A-3-1 (2014); ALASKA STAT. § 12.47.010 (2014); ARIZ. REV. STAT. ANN. § 13-502 (2014); CAL. PENAL CODE § 25(b) (West 2014); COLO. REV. STAT. § 16-8-101.5 (2014); FLA. STAT. § 775.027 (2014); GA. CODE ANN. § 16-3-2 (2014); IOWA CODE § 701.4 (2014); LA. REV. STAT. ANN. § 14 (2014); MINN. STAT. § 611.026 (2014); MO. REV. STAT. § 552-030 (2014); NEB. REV. STAT. § 29-2203 (2014); NEV. REV. STAT. § 174.035 (2013); N.J. STAT. ANN. § 2C:4-1 (West 2014); OHIO REV. CODE ANN. § 2901.01(A)(14) (West 2014); 18 PA. CONS. STAT. ANN. § 315 (West 2014); S.C. CODE ANN. § 17-24-10 (2014); S.D. CODIFIED LAWS §§ 22-5-10, 22-1-2 (2014); TEX. PENAL CODE ANN. § 8.01 (West 2013); WASH. REV. CODE § 9A.12.010 (2014); *In re M.E.*, 584 P.2d 1340, 1347 (Okla. Crim. App. 1978); *White v. Commonwealth*, 636 S.E.2d 353, 356–57 (Va. 2006); *see also* *Laney v. State*, 486 So.2d 1242, 1245 (Miss. 1986).

77. *M’Naghten*, 2 Eng. Rep. 718; 10 Clark & F.200; Oleson, *supra* note 76, at 603–05; SIMON & AARONSON, *supra* note 54, at 12.

78. 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, 15 (2007); Jenny Williams, *Reduction in the Protection for Mentally Ill Criminal Defendants: Kansas Upholds the Replacement of the M’Naghten Approach with the Mens Rea Approach, Effectively Eliminating the Insanity Defense*, 44 WASHBURN L.J. 213, 218 (2004).

79. Williams, *supra* note 78, at 218.

80. *Id.*

81. *Id.*

82. SIMON & AARONSON, *supra* note 54, at 12.

83. SIMON & AARONSON, *supra* note 54, at 13; *Queen v. M’Naghten*, [1843] 2 Eng. Rep. 718 (H.L.); 10 Clark & F. 200.

84. SIMON & AARONSON, *supra* note 54, at 14; *M’Naghten*, 2 Eng. Rep. 718; 10 Clark & F.200.

85. Judith A. Morse & Gregory K. Thoreson, *Criminal Law – United States v. Lyons: Abolishing the Volitional Prong of the Insanity Defense*, 60 NOTRE DAME L. REV. 177, 179 (1984).

had to find the defendant not guilty on grounds of insanity if the jury found that the defendant either did not know the nature and quality of what he did, or did not know that what he did was wrong.⁸⁶ So, unlike the wild beast test, the *M'Naghten* test held that the defendant need not suffer from a total departure of the mind.⁸⁷

Because the jury was persuaded by testimony that M'Naghten suffered from delusions that impaired his ability to know the nature and quality of what he was doing, and because the jury believed that M'Naghten's paranoid schizophrenia prevented him from distinguishing right from wrong, the jury acquitted M'Naghten.⁸⁸ The court subsequently committed M'Naghten to an asylum, where he spent the rest of his life.⁸⁹

By 1851, courts all over the United States adopted the *M'Naghten* rule as an insanity defense standard that functioned as an affirmative defense to the crime charged.⁹⁰ In fact, in 1946, the United States Supreme Court first upheld the Court of Appeals' application of the *M'Naghten* standard in *Fisher v. United States*.⁹¹ For over 100 years, until the mid-1990's, the United States judicial systems and legislatures used the *M'Naghten* rule to exonerate mentally insane criminal defendants.⁹² During that time, only one state, New Hampshire, departed from the *M'Naghten* rule.⁹³

2. The *Durham* Test

In 1954, the Court of Appeals for the District of Columbia modified the *M'Naghten* rule and adopted what became known as the "product rule."⁹⁴ In *Durham v. United States*, the Court held "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."⁹⁵ In effect, the Court in *Durham* adopted a rule favorable to mentally insane criminals because it rendered mental diseases and defects as justifications for criminal acts, thus avoiding criminal responsibility.⁹⁶ Moving away from the moral right versus wrong implications in the *M'Naghten* standard, the *Durham* rule applied science to formulate an insanity defense standard.⁹⁷ But the rule was not widely accepted outside the psychiatry world.⁹⁸ Because the test opened up the doors for any defendant with any kind of mental disease or defect to plead insanity, many critics of the *Durham*

86. Oleson, *supra* note 76, at 605.

87. *See id.*

88. Fradella, *supra* note 78, at 16.

89. *Id.*

90. SIMON & AARONSON, *supra* note 54, at 14.

91. *Fisher v. United States*, 328 U.S. 463, 493 (1946). The jury was instructed, "[i]nsanity, according to the criminal law, is a disease or defect of the mind which renders one incapable to understand the nature and quality of his act, to know that it is wrong, to refrain from doing the wrongful act." *Id.* at 467 n.3.

92. *From Daniel M'Naughten to John Hinckley*, *supra* note 67.

93. *See infra* Part II.B.3.

94. *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954); *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

95. *Durham*, 214 F.2d at 874-75.

96. *See id.*

97. *From Daniel M'Naughten to John Hinckley*, *supra* note 67.

98. SIMON & AARONSON, *supra* note 54, at 52.

rule were concerned that the rule would lead to acquittals of defendants who needed to be held accountable.⁹⁹

3. The Model Penal Code Test

Less than a decade later, in response to the debates over an adequate insanity defense standard, the American Law Institute (ALI) formulated a model insanity test.¹⁰⁰ The test, articulated in Model Penal Code § 4.01 and created in 1962, states,

[A] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.¹⁰¹

In effect, similar to the *Durham* test, the ALI test incorporates scientific evidence to determine whether an alleged mentally insane criminal defendant should be held responsible for his crime.¹⁰² But unlike the *Durham* test, the Model Penal Code test does not apply to defendants “whose mental illness or defect only manifests itself in criminal or antisocial conduct.”¹⁰³ In effect, the Model Penal Code test excludes defendants who only exhibited their mentally insane symptoms through criminal acts.¹⁰⁴ Such mentally insane symptoms had to have been exhibited through various aspects of the defendants’ lives,¹⁰⁵ not only through their criminal conduct. Thus, this test limits the number of defendants held unaccountable due to the insanity defense. Deemed the most “influential and widely used” insanity test in the United States, “half of the states and the federal courts” adopted the Model Penal Code test.¹⁰⁶

4. The *Brawner* Test

The Supreme Court adopted a variation of the Model Penal Code test when it overruled *Durham* in 1972.¹⁰⁷ Finding the *Durham* insanity defense test impractical and difficult to carry out,¹⁰⁸ the Court in *United States v. Brawner* adopted a hybrid rule.¹⁰⁹ *Brawner* first incorporated a definition articulated in *McDonald v. United States*, a 1962 case that defined a mental disease or defect as “any abnormal condition of the mind which substantially affects [mental] or emotional processes and

99. From *Daniel M’Naughten to John Hinckley*, *supra* note 67.

100. *Id.*; MODEL PENAL CODE § 4.01 (2013).

101. MODEL PENAL CODE § 4.01 (2013).

102. See *From Daniel M’Naughten to John Hinckley*, *supra* note 67.

103. *Id.*

104. *Id.*

105. See, e.g., *Jackson v. United States*, 76 A.3d 920, 924 (D.C. 2013) (noting that the defendant had suffered from delusions since a young age).

106. Deborah Giorgi-Guarnieri et al., *Practice Guideline: Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense*, 30 J. AM. ACAD. PSYCHIATRY & L. S6 (Supp. 2002), available at <http://www.aapl.org/docs/pdf/Insanity%20Defense%20Guidelines.pdf> [hereinafter *Practice Guidelines: Insanity Defense Evaluations*].

107. *United States v. Brawner*, 471 F.2d 969, 981 (D.C. Cir. 1972).

108. *Id.*

109. *Id.* at 991.

substantially impairs behavior controls.”¹¹⁰ Next, *Browner* adopted the Model Penal Code insanity defense standard.¹¹¹ Thus, the *Browner* insanity defense rule is two-fold.¹¹² First, the Court defines a mental disease or defect according to the *McDonald* definition.¹¹³ The second component of the test derives from Model Penal Code § 4.01, which, as previously discussed, excuses a mentally insane defendant from criminal responsibility if the defendant, at the time of the crime and due to his mental illness, either “(i) lacks substantial capacity to appreciate that his conduct is wrongful, or (ii) lacks substantial capacity to conform his conduct to the law.”¹¹⁴ The *Browner* test was formulated in an effort to be narrow and strict,¹¹⁵ unlike the *Durham* test, which, when applied, resulted in an increased number of insanity defense acquittes.¹¹⁶

5. The *Hinckley* Effect

Insanity defense jurisprudence dramatically changed in 1982 after John W. Hinckley Jr.’s trial, which resulted in a controversial application of the *Browner* insanity defense standard.¹¹⁷ In an effort to impress actress Jodi Foster, Hinckley attempted to assassinate President Ronald Reagan.¹¹⁸ At Hinckley’s trial, the D.C. court applied the *Browner* test and the prosecution carried the burden to prove, beyond a reasonable doubt, that Hinckley was sane.¹¹⁹ But evidence presented at trial suggested that Hinckley suffered from schizophrenia.¹²⁰ Because the prosecution was unable to rebut the insanity claim with evidence of Hinckley’s sanity, the jury concluded the prosecution failed to meet its burden of proof.¹²¹ Subsequently, Hinckley was found “not guilty” by reason of insanity on all counts.¹²²

Hinckley’s acquittal produced outrage across the nation.¹²³ The public felt the “president’s attacker was being ‘let off.’”¹²⁴ Such outrage sparked a debate on the reformation, and even the abolition, of the insanity defense.¹²⁵ A law professor stated,

110. McDonald v. United States, 312 F.2d 847, 851 (D.C. Cir. 1962).

111. *Browner*, 471 F.2d at 991.

112. *Id.*

113. *Id.*

114. *Id.*

115. Captain Charles E. Trant, *The American Military Insanity Defense: A Moral, Philosophical, and Legal Dilemma*, 99 MIL. L. REV. 1, 50 (1983).

116. Michele Cotton, *A Foolish Consistency: Keeping Determinism Out of the Criminal Law*, 15 B.U. PUB. INT. L.J. 1, 8 n.33 (2005) (citing THOMAS MAEDER, CRIME AND MADNESS: THE ORIGINS AND EVOLUTION OF THE INSANITY DEFENSE 92–93 (1985)).

117. Vincent J. Fuller, *United States v. John W. Hinckley Jr.* (1982), 33 LOY. L.A. L. REV. 699, 699 (2000); *Practice Guidelines: Insanity Defense Evaluations*, *supra* note 106 at S6.

118. Fuller, *supra* note 117, at 699; *Practice Guidelines: Insanity Defense Evaluations*, *supra* note 106, at S6.

119. Donald H.J. Hermann, *The Insanity Defense*, 44 OHIO ST. L.J. 987, 1023 (1983); Fuller, *supra* note 117, at 699.

120. Hermann, *supra* note 119, at 1023; Fuller, *supra* note 117, at 699.

121. Hermann, *supra* note 119, at 1023; Fuller, *supra* note 117, at 699.

122. *Practice Guidelines: Insanity Defense Evaluations*, *supra* note 106, at S6.

123. *Id.*

124. *Id.*

125. *Id.*

The great irony is that [Hinckley] was in some ways the poster boy for the insanity defense. He was insane. But people wanted revenge. They wanted him held accountable. They were angry. And they couldn't take out that anger on John Hinckley. So instead they took it out on the criminal code.¹²⁶

Indeed, prior to the *Hinckley* trial, all fifty states and the federal government administered some formation of an insanity defense.¹²⁷ But since the *Hinckley* trial, thirty-six states have reformed their insanity defense laws, and four of these states even completely abolished the insanity defense.¹²⁸ Idaho, the state most relevant to this article, repealed its insanity defense statute in 1982,¹²⁹ just months after the controversial *Hinckley* verdict.¹³⁰ In each of the four states that abolished the insanity defense, evidence of mental disease or defect is admissible to rebut and negate the mental element (the intent) of the offense charged.¹³¹ Thus, instead of implementing an insanity defense, these states have a "Mens Rea Model evidentiary rule" that permits evidence of mental insanity only in reference to the required intent of the offense charged.¹³² But such evidence is otherwise prohibited, and no affirmative defense exists regarding mental insanity.¹³³

The federal government responded to the aftermath of Hinckley's trial by codifying the insanity defense in an attempt to compromise between those who wanted the insanity defense abolished and psychiatric and legal professionals who argued merely for a modification of the insanity defense.¹³⁴ The Insanity Defense Reform Act of 1984 abandoned the Model Penal Code insanity defense standard.¹³⁵ The act called for strict qualifications in an effort to "[limit] the scope of insanity acquittals."¹³⁶ In order to use the insanity defense, under the act, a defendant must "show that his mental disease or defect is 'severe.'"¹³⁷ Further, a defendant must show that, as a result of his "severe" mental disease or defect, "[he] was unable to appreciate the nature and quality or the criminality or wrongfulness of his acts."¹³⁸ The law shifted the burden of proof from the prosecutor onto the defendant in order

126. Jim Acosta et al., *Documentary Portrays Criminally Insane — Through Their Own Eyes*, CNN (July 4, 2011, 6:09 AM), <http://www.cnn.com/2011/CRIME/07/02/insanity.defense/>.

127. Andrew M. Levine, *Denying the Settled Insanity Defense: Another Necessary Step in Dealing with Drug and Alcohol Abuse*, 78 B.U. L. REV. 75, 79 (1998).

128. See *From Daniel M'Naughten to John Hinckley*, *supra* note 67. The states that have abolished the insanity defense include Idaho, Montana, Utah, Kansas, and Nevada. Marc W. Pearce & Lori J. Butts, *Insanity in the State of Idaho*, 44 Monitor on Psychol. 28, 28 (2013), available at <http://www.apa.org/monitor/2013/02/jn.aspx>. However, in 2011, Nevada's abolition of the insanity defense was ruled unconstitutional. *Finger v. Nevada*, 27 P.3d 66 (Nev. 2001).

129. Pearce & Butts, *supra* note 128, at 28.

130. See *From Daniel M'Naughten to John Hinckley*, *supra* note 67.

131. Jean K. Gilles Phillips & Rebecca E. Woodman, *The Insanity of the Mens Rea Model: Due Process and the Abolition of the Insanity Defense*, 28 PACE L. REV. 455, 460–61 (2008).

132. *Id.*

133. IDAHO CODE ANN. § 18-207 (West 2014); KAN. STAT. ANN. § 21-5209 (West 2014); MONT. CODE ANN. § 46-14-102 (West 2014); UTAH CODE ANN. § 76-2-305 (West 2014).

134. *From Daniel M'Naughten to John Hinckley*, *supra* note 67; see also The Insanity Defense Reform Act of 1984, 18 U.S.C. § 17(a) (2014).

135. *From Daniel M'Naughten to John Hinckley*, *supra* note 67; see also 18 U.S.C. § 17(a).

136. *Practice Guidelines: Insanity Defense Evaluations*, *supra* note 106, at S6; *From Daniel M'Naughten to John Hinckley*, *supra* note 67.

137. 18 U.S.C. § 17(a); *From Daniel M'Naughten to John Hinckley*, *supra* note 67.

138. 18 U.S.C. § 17(a).

to establish, by clear and convincing evidence, that he was “legally insane at the time of the crime.”¹³⁹ Combining elements of two previous insanity defense tests, Congress adopted the “nature and quality” language from the *M’Naghten* test and incorporated the term “appreciate” from the Model Penal Code test.¹⁴⁰ Further, Congress used the “wrongfulness” element of the Model Penal Code test to “describe the types of appreciation in question.”¹⁴¹ Thus, the law essentially returned to the historic “right/wrong” test.¹⁴² If the defendant met his burden of proof in establishing the affirmative defense, the Act created a “special verdict” of “not guilty by reason of insanity,” similar to the verdict reached in the Hinckley trial.¹⁴³ But such a verdict was more difficult to obtain, being that the burden, under this act, rested upon the defendant.¹⁴⁴

Courts around the country began to embrace the Insanity Defense Reform Act, adding some modifications and clarifications.¹⁴⁵ While many states have modified their insanity defense tests, few states have continued to avoid readopting the defense.¹⁴⁶ But such abolitions have produced constitutional challenges across the court system.¹⁴⁷ Some challenges have been successful,¹⁴⁸ while others have not.¹⁴⁹

III. CHALLENGES TO THE ABOLITION OF THE INSANITY DEFENSE

A. The United States Beyond Idaho

In some states that previously abolished the insanity defense, the courts have overturned such abolitions, holding that due process of the law requires some kind of formation of an insanity defense.¹⁵⁰ Thus, these states now have the insanity defense, as required under either the federal Constitution, various state Constitutions, or, in some cases, both.¹⁵¹

For instance, the Washington State Supreme Court ruled that a defendant is denied state constitutional guarantees when he is precluded from consideration of his insanity at the time he committed the charged offense.¹⁵² In fact, in 1910, the

139. *From Daniel M’Naughten to John Hinckley*, *supra* note 67; 18 U.S.C. § 17(a).

140. *Practice Guidelines: Insanity Defense Evaluations*, *supra* note 106, at S6.

141. *Id.* at S6–S7.

142. *From Daniel M’Naughten to John Hinckley*, *supra* note 67.

143. *Practice Guidelines: Insanity Defense Evaluations*, *supra* note 106, at S6.

144. *From Daniel M’Naughten to John Hinckley*, *supra* note 67.

145. *See, e.g.*, *Shannon v. United States*, 512 U.S. 573 (1994). The Court held that under the Insanity Defense Reform Act, there was no provision requiring a jury instruction regarding the special verdict of “not guilty by reason of insanity.” *Id.* at 575. The Court held that such an instruction was not required, except in “certain limited circumstances.” Masha Bach, *The Not Guilty by Reason of Insanity Verdict: Should Juries be Informed of its Consequences?*, 16 WHITTIER L. REV. 645, 647 (1995).

146. *See State v. Searcy*, 798 P.2d 914, 917, 118 Idaho 632, 635 (1990); *State v. Bethel*, 66 P.3d 840, 852 (Kan. 2003); *State v. Korell*, 690 P.2d 992, 1001 (Mont. 1984); *State v. Herrera*, 895 P.2d 359, 390 (Utah 1995).

147. *See Searcy*, 798 P.2d at 916, 118 Idaho at 634; *Bethel*, 66 P.3d at 851; *Korell*, 690 P.2d at 999; *Herrera*, 895 P.2d at 362.

148. *See, e.g.*, *State v. Strasburg*, 110 P. 1020, 1022–25 (Wash. 1910).

149. *See Searcy*, 798 P.2d at 917, 118 Idaho at 634; *Bethel*, 66 P.3d at 851; *Korell*, 690 P.2d at 999; *Herrera*, 895 P.2d at 362.

150. *See, e.g.*, *Strasburg*, 110 P. at 1022; *Finger v. Nevada*, 27 P.3d 66, 79 (Nev. 2001); *Sinclair v. State*, 132 So. 581, 581–82 (Miss. 1931).

151. *See, e.g.*, *Strasburg*, 110 P. at 1022; *Finger*, 27 P.3d at 77; *Sinclair*, 132 So. at 581–82.

152. *Strasburg*, 110 P. at 1024–25.

Supreme Court of Washington was the first court to declare the abolition of the insanity defense unconstitutional.¹⁵³ In that case, *State v. Strasburg*, the court first recognized that the Washington State Constitution prohibits the deprivation of any person of “life, liberty, or property without due process of law.”¹⁵⁴ Next, the court ruled that the issue of insanity is “inherently related to the guilt or innocence” of a criminal defendant.¹⁵⁵ Finally, the Court emphasized that even in common law, criminal intent was an “essential element in every crime.”¹⁵⁶ And therefore, in refusing to consider evidence of mental insanity in determining whether criminal intent exists and in refusing the defendant an opportunity to put forth such evidence to negate criminal intent, the court in *Strasburg* declared Washington’s ban on the insanity defense a violation of due process.¹⁵⁷

Further, the Nevada Supreme Court used both the due process clause of the Nevada Constitution and the Due Process Clause of the United States Constitution to conclude that Nevada’s abolition of the insanity defense was unconstitutional.¹⁵⁸ While recognizing that neither the state nor federal Constitution expressly requires the insanity defense, the court in *Finger v. State* found that “both Constitutions prohibit an individual from being convicted of a criminal offense without possessing the requisite criminal intent to commit the crime.”¹⁵⁹ The court stated that its reasoning was based upon history.¹⁶⁰ Specifically, the court held that the history of American law demonstrates the fundamental and deeply rooted principle of criminal law that a defendant cannot be convicted of a crime if he lacks understanding of his actions and the requisite criminal intent.¹⁶¹ While the court did not further delve into the history of American law, it likely referred to the various insanity defense tests that have gone through the American courts and legislatures throughout the years. Indeed, the court emphasized that “Congress, even in the face of the public outrage following the *Hinckley* trial, refused to completely abolish the concept of legal insanity, recognizing that culpability is a prerequisite to a criminal prosecution.”¹⁶² In sum, the court in *Finger*, similar to the court in *Strasburg*, concluded that due process requires the opportunity for a criminal defendant to present evidence of his insanity in order to demonstrate that he lacked the required criminal intent for the crime charged.¹⁶³

Finally, the Mississippi Supreme Court, in *Sinclair v. State*, determined that a statute maintaining insanity was not a defense to the crime of murder was unconstitutional because it violated state due process.¹⁶⁴ The concurring opinion relied on history to argue that the insanity defense has been and is afforded constitutional

153. Jonas Robitscher & Andrew Ky Haynes, *In Defense of the Insanity Defense*, 31 EMORY L.J. 9, 51 (1982).

154. *Strasburg*, 110 P. at 1021; WASH. CONST. art. 1, § 3 (West 2014).

155. *Strasburg*, 110 P. at 1024–25.

156. *Id.* at 1022.

157. *Id.* at 1021.

158. *Finger v. Nevada*, 27 P.3d 66, 68 (Nev. 2001).

159. *Id.*

160. *Id.* at 79.

161. *Id.*; Phillips & Woodman, *supra* note 131, at 476.

162. *Finger*, 27 P.3d at 80.

163. *Id.*; *State v. Strasburg*, 110 P. 1020, 1021 (Wash. 1910).

164. *Sinclair v. State*, 132 So. 581, 582 (Miss. 1931).

protection.¹⁶⁵ “So closely has the idea of insanity as a defense to crime been woven into the criminal jurisprudence of English-speaking countries that it has become a part of the fundamental laws thereof, to the extent that a statute that attempts to deprive a defendant of the right to plead it will be unconstitutional and void.”¹⁶⁶ Thus, similar to the court in *Finger*, the court in *Sinclair* based its argument on the history of American law regarding mentally insane defendants.¹⁶⁷ But the court did not solely rely on history.¹⁶⁸ Indeed, the court further proclaimed, “it is certainly shocking and inhuman to punish a person for an act when he does not have the capacity to know the act or to judge of its consequences.”¹⁶⁹ And so, drawing on morality, *Sinclair* confirms the historic principle that criminal defendants who do not understand their actions or the consequences of their actions should not be held criminally responsible.

On the other side, the United States Supreme Court recently affirmed Arizona’s limited use of the insanity defense.¹⁷⁰ In *Clark v. Arizona*, the Court held that Arizona’s narrow definition of insanity is constitutional.¹⁷¹ Arizona incorporates the *M’Naghten* standard into its insanity defense statute, but it eliminated one component of the *M’Naghten* standard, cognitive incapacity.¹⁷² The cognitive incapacity prong asks whether a defendant, due to a mental defect, was prevented from understanding what he was doing when he committed the charged offense.¹⁷³ Thus, with the elimination of the cognitive capacity prong, Arizona only permitted evidence of mental insanity to disprove moral incapacity, so a defendant could only obtain a “guilty but mentally insane” verdict if he proved he did not know his criminal act was wrong.¹⁷⁴ In sum, mental insanity, under Arizona’s statute, could not be used to negate mens rea. The Court found the narrowed insanity defense statute did not violate due process because the *M’Naghten* standard “did not rise to the level of a fundamental right.”¹⁷⁵ But the Court refused to determine whether the insanity defense itself is protected by the Constitution.¹⁷⁶

B. Idaho

Today, four states prohibit the insanity defense, including Idaho.¹⁷⁷ Years ago, Idaho had an insanity defense written into law.¹⁷⁸ The Idaho Supreme Court adopt-

165. *Id.* at 584 (Ethridge, J., concurring).

166. *Id.*

167. *Id.*; *Finger*, 27 P.3d at 79.

168. *See Sinclair*, 132 So. at 584 (Ethridge, J., concurring).

169. *Id.*

170. *Clark v. Arizona*, 548 U.S. 735, 779 (2006).

171. *Id.*

172. *Id.* at 748.

173. *Id.* at 747.

174. *Id.* at 752; *see also* Jennifer Gibbons, Note, *Clark v. Arizona: Affirming Arizona’s Narrow Approach to Mental Disease Evidence*, 48 ARIZ. L. REV. 1155, 1159–60 (2006).

175. Trent Echard, Comment, *Clark v. Arizona: Has the Court Painted Itself Into a Corner?*, 1 PHOENIX L. REV. 213, 223 (2008).

176. *See Clark*, 548 U.S. at 752–53.

177. *Practice Guidelines: Insanity Defense Evaluations*, *supra* note 106, at S6. The other states include Kansas, Utah, and Montana. *The Insanity Defense Among the States*, FINDLAW, <http://criminal.findlaw.com/criminal-procedure/the-insanity-defense-among-the-states.html> (last visited October 17, 2014).

ed the 1962 ALI Model Penal Code test,¹⁷⁹ as previously discussed in Part II. However, shortly after the *Hinckley* trial, in response to public concern and following many states' lead, the Idaho legislature reconsidered its adoption of the insanity defense.¹⁸⁰ And in 1982, Idaho completely abolished the insanity defense.¹⁸¹

The Idaho statute that prohibits the insanity defense reads, "Mental condition shall not be a defense to any charge of criminal conduct."¹⁸² But the statute, I.C. § 18-207, further indicates that evidence relating to the state of mind (*mens rea*) will not be prohibited, even if it relates to mental insanity.¹⁸³ Thus, in Idaho, evidence of mental insanity is allowed in for the narrow purpose of demonstrating that the defendant lacked the required criminal intent (i.e., mental element of the offense) for the crime charged.¹⁸⁴ This is an example of a *Mens Rea* Model evidentiary rule, as previously discussed,¹⁸⁵ that some states have adopted to replace the insanity defense.

In 1990, defendant Barryngton Eugene Searcy challenged Idaho's ban on the insanity defense in I.C. § 18-207.¹⁸⁶ Searcy argued that the unavailability of the insanity defense violates due process.¹⁸⁷ But the Supreme Court of Idaho upheld the statute.¹⁸⁸ Holding that neither the Idaho Constitution nor the United States Constitution expressly requires the insanity defense, the court found that Idaho did not deprive Searcy of his constitutional rights, specifically due process rights, when Idaho precluded him from using an insanity defense.¹⁸⁹ The court reasoned that because I.C. § 18-207 does not prohibit evidence of mental illness if it relates to the required *mens rea* of the charged offense, the statute does not violate due process.¹⁹⁰ Because Searcy could offer evidence of mental insanity to negate the required *mens rea* of the offense, the court found he was afforded his due process rights — despite the fact he could not offer evidence of mental insanity as a separate, affirmative defense to the crime.¹⁹¹ The existence of a *mens rea* doctrine in Idaho was enough for the court in *Searcy* to affirm the abolition of the insanity defense.¹⁹²

But *Searcy* carries with it notable dissenting opinions. One justice, for instance, noted that Idaho's abolition of the insanity defense violates the Idaho Constitution.¹⁹³ He pointed to Idaho history, emphasizing that "[t]he insanity defense was well established in the Territory of Idaho at the time of the Idaho Constitution-

178. See *State v. White*, 456 P.2d 797, 802, 93 Idaho 153, 158 (1969).

179. *Id.*

180. Brian E. Elkins, *Idaho's Repeal of the Insanity Defense: What Are We Trying to Prove?*, 31 IDAHO L. REV. 151, 155 (1994).

181. *Id.*

182. IDAHO CODE ANN. § 18-207(1) (West 2013).

183. *Id.* § 18-207(3).

184. See *id.*

185. See *supra* Part II.B.5.

186. *State v. Searcy*, 798 P.2d 914, 915, 118 Idaho 632, 633 (1990).

187. *Id.*; 41 AM. JUR. 2D *Proof of Facts* § 615 (1985).

188. See *Searcy*, 798 P.2d at 919, 118 Idaho at 637.

189. *Id.*

190. *Id.* at 917, 118 Idaho at 635; 41 AM. JUR. 2D *Proof of Facts* § 615 (1985).

191. *Searcy*, 798 P.2d at 918, 118 Idaho at 636.

192. See *id.* at 918–19, 118 Idaho at 636–37.

193. *Id.* at 921, 118 Idaho at 639. The Idaho Constitution reads, "No person shall be . . . deprived of life, liberty or property without due process of the law." IDAHO CONST. art. 1, § 13.

al Convention and continued to be part of our jurisprudence until the legislature purposed to abolish it in 1982. It has been part of the process that was due defendants in criminal cases for virtually the entire existence of our Idaho legal system. It is fundamental to our jurisprudence and is protected by the due process clauses of art. 1, § 13.¹⁹⁴ In sum, according to this justice, because the insanity defense is rooted in Idaho history, it is a fundamental principle of criminal law and, therefore, an abolition of the insanity defense offends due process under the Idaho Constitution.¹⁹⁵

Another justice, in a separate dissent, stated that the abolition of the insanity defense violates the 14th Amendment Due Process Clause of the United States Constitution.¹⁹⁶ In response to the majority's argument that due process is satisfied when a defendant has the opportunity to disprove criminal intent with evidence of mental insanity, this dissent noted that criminal blameworthiness goes beyond criminal intent, in relation to the required mens rea.¹⁹⁷ In fact, the doctrine of mens rea relating solely to intent, as adopted by the court of Idaho, and the insanity defense are two separate concerns.¹⁹⁸ Rather, criminal blameworthiness "implies a certain quality of knowledge and intent transcending a minimal awareness and purposefulness."¹⁹⁹ This dissent indicated that the insanity defense would be rendered useless if a mens rea doctrine focusing solely on criminal intent could substitute its place.²⁰⁰ Idaho's mens rea doctrine, according to this justice, is only concerned with the culpability of the mind.²⁰¹ But the insanity defense is concerned with "whether the guilty mind with which the act is done is a product of voluntary and rational choice."²⁰² Thus, a mens rea doctrine that addresses only intent and not moral blameworthiness is inadequate in providing due process to mentally insane criminal defendants.²⁰³ The separate and independent existence of the insanity defense, as demonstrated in history, is of "significance to entitle it to a place in our American concept of 'ordered liberty.'"²⁰⁴ Because this dissent concluded that the abolition of the insanity defense violates the United States Due Process clause, it did not proceed to address the due process clause of the Idaho Constitution.²⁰⁵

More recently, defendant John Joseph Delling challenged the constitutionality of I.C. § 18-207.²⁰⁶ In 2007, Delling was arrested for the murders of three young men.²⁰⁷ All three of the victims, his former friends, were shot – one in Boise, Idaho,

194. *Searcy*, 798 P.2d at 922, 118 Idaho at 640.

195. *See id.*

196. *Id.* at 927, 118 Idaho at 645. The United States Constitution reads, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV § 1.

197. *Searcy*, 798 P.2d at 935, 118 Idaho at 653.

198. *Id.* at 927, 118 Idaho at 645.

199. *Id.* at 935, 118 Idaho at 653 (quoting the ABA Criminal Justice Mental Health Standards at 337 (1984)) (emphasis omitted).

200. *Id.* at 922, 118 Idaho at 635.

201. *See id.*

202. *Id.* at 935, 118 Idaho at 653.

203. *See Searcy*, 798 P.2d at 926–27, 935, 118 Idaho 632, 644–45, 653.

204. *Id.* at 927, 118 Idaho at 645.

205. *Id.* at 928, 118 Idaho at 646.

206. *State v. Delling*, 267 P.3d 709, 711, 152 Idaho 122, 124 (2011).

207. *Man Accused of Shooting 3 during Cross-Country Road Trip; High School Link Probed*, USA TODAY (Apr. 10, 2007, 9:18 PM), http://usatoday30.usatoday.com/news/nation/2007-04-10-nev-shooting-probed_N.htm.

one in Moscow, Idaho, and one in Tucson, Arizona.²⁰⁸ There is no doubt that Delling was mentally insane at the time of the crime.²⁰⁹ Indeed, one of the motivating factors for killing his victims was his belief that they were “stealing [his] powers,” he told his brother.²¹⁰ In fact, Delling believed that the victims were trying to “destroy his brain.”²¹¹ His mother confirmed in an interview, “John was very sick, and that’s all I can tell you.”²¹² As indicated in the record before the district court, Delling, at the time of the murders, suffered from “severe paranoid schizophrenia, a mental illness that has, as one of its defining characteristics, delusions that affect an individual’s beliefs and understandings of what he is doing.”²¹³ Testimony at trial revealed that Delling “truly believed, delusionally and tragically, that in order to save his own life, to keep him [from] being destroyed, he had to stop the people that he thought were harming him . . . He thought he was doing what he had to do in order to save himself.”²¹⁴ Thus, Delling’s paranoid schizophrenia fostered delusions that ultimately led Delling to kill his victims.²¹⁵

The state charged Delling with two counts of first-degree murder.²¹⁶ A year after being declared unfit to proceed with trial, the district court found that Delling’s mental state had improved, and he was declared fit to stand trial.²¹⁷ The trial judge recognized that Delling, at the time of the murders, was unable to appreciate the wrongfulness of his criminal conduct.²¹⁸ But the court convicted Delling of murder because he was unable to plea insanity under Idaho law.²¹⁹ In effect, “[t]he state was saying that a man who was so insane that he could not understand that it was wrong to kill two of his friends was just as culpable as a sane person.”²²⁰ Upon entering into a conditional plea of guilty to two counts of second-degree murder, in exchange for the prosecutor’s recommendation of concurrent sentences, the court sentenced Delling to determinate life in prison.²²¹ Delling appealed the judgment, challenging the constitutionality of I.C. § 18-207.²²²

But Delling lost on appeal.²²³ Similar to the majority opinion in *Searcy*, Justice Burdick on the Idaho Supreme Court held that because Idaho’s statute allows evidence of mental insanity to be considered if it relates to the required mens rea of the charged crime, the abolition of the insanity defense does not violate a criminal

208. *Id.*

209. *Delling*, 267 P.3d at 720, 152 Idaho at 133.

210. Rebecca Boone, *Classmate Slaying Suspect Called Erratic*, WASH. POST (Apr. 11, 2007, 8:15 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/11/AR2007041101994.html>.

211. Pearce & Butts, *supra* note 128.

212. Boone, *supra* note 210.

213. Brief of American Psychiatric Ass’n, *supra* note 74, at *3.

214. *Id.* at *18.

215. *See id.* at *3.

216. *State v. Delling*, 267 P.3d at 711 152 Idaho at 124.

217. *Id.*

218. Emily Bazelon, *Crazy Making: The Supreme Court Is Wrong to Let Idaho Have No Insanity Defense.*, SLATE (Nov. 28, 2012, 2:38 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/11/the_supreme_court_shouldn_t_allow_idaho_to_have_no_insanity_defense.html.

219. *Id.*

220. *Id.*

221. *Delling*, 267 P.3d at 711, 152 Idaho at 124.

222. *Id.*

223. *Id.*

defendant's due process rights.²²⁴ Citing *Searcy*, Burdick emphasized, "[a]lthough no longer a separate defense, evidence of mental illness or disability is expressly permitted by statute to rebut state's evidence offered to prove criminal intent or mens rea."²²⁵ Burdick further noted, "[i]n the absence of an insanity defense, Delling is still able to present a defense; it just takes a different form."²²⁶ But Idaho's mens rea doctrine and the insanity defense produce dramatically different results for a mentally insane defendant, such as Delling, who had the specific intent to kill. The mens rea doctrine serves no helpful purpose for Delling and in fact inculpates Delling, whereas an insanity defense would exculpate Delling.

Delling appealed to the United States Supreme Court in 2012, but the Court denied his petition for a writ of certiorari.²²⁷ Justice Breyer, joined with Justice Ginsburg and Justice Sotomayor, dissented.²²⁸ In his opinion, Justice Breyer gave two examples of mentally insane criminal defendants.²²⁹ One of the defendants believed the victim was a wolf, and he shot and killed the victim, in fear of the perceived wolf.²³⁰ The other defendant believed that a wolf ordered him to kill the human victim, so he shot and killed the human to comply with the wolf's demand.²³¹ The first defendant, because he lacked the requisite mens rea for the crime of murder in that he lacked intent to kill a human, is not guilty.²³² But the second defendant, even though mentally insane, would have no defense to the crime of murder, because he knew he killed a human and he had the requisite criminal intent to kill the human.²³³ Under the current Idaho law, even though both defendants are mentally insane, the second defendant would be guilty.²³⁴ In Delling's case, because he knew he was in fact killing human beings, even though he suffered from delusions that motivated his killings, he had the requisite mens rea and thus had no defense to his crimes under Idaho law.²³⁵ While Delling was unable to appreciate the wrongfulness of his conduct, he had the criminal intent to kill humans.²³⁶ Thus, John Joseph Delling is currently in solitary confinement in Idaho's Maximum Security Institution with a life sentence and no possibility of parole.²³⁷

The American Psychiatric Association and American Academy of Psychiatry and the Law wrote an Amici Curiae brief in support of Delling.²³⁸ The brief first focused on history to argue that the abolition of the insanity defense is unconstitutional.²³⁹ Pointing to Anglo-American history, the brief stressed the rich and deeply rooted tradition to avoid punishing mentally insane defendants when the crimes

224. *Id.* at 715–17, 152 Idaho at 128–30.

225. *Id.* at 716–17, 152 Idaho at 130–31.

226. *Id.* at 717, 152 Idaho at 130.

227. *Delling v. Idaho*, 133 S. Ct. 504 (2012).

228. *Id.*

229. *Id.* at 505.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Delling*, 133 S. Ct. at 505.

234. *Id.*

235. Brief of American Psychiatric Ass'n, *supra* note 74, at *20.

236. *See id.* at *18.

237. *State v. Delling*, 267 P.3d 709, 711, 152 Idaho 122, 124 (Idaho 2011); Brief of American Psychiatric Ass'n, *supra* note 74, at *3.

238. Brief of American Psychiatric Ass'n, *supra* note 74, at *4–5.

239. *Id.* at *6.

result from an inability to logically understand the nature of one's act.²⁴⁰ Noting the adoption of various insanity defense standards in American history, the brief stated, "From 1900 through the 1950's, the *M'Naghten* standard governed in most jurisdictions, while about one-third of the States added [another variation of the insanity defense]" and "[by] the early 1980's the ALI formulation, or some close variant, governed in the federal courts and in 'a majority of the country's jurisdictions.'" ²⁴¹ The brief then reached deeper into history, noting the ancient criminal principle that at least some level of understanding is a prerequisite for culpability.²⁴² Pointing to English common law, the brief quoted Sir William Blackstone, who explained that an act of will is required for criminal culpability.²⁴³ But, according to Blackstone, a defect or lack of will may arise "in an *idiot* or a *lunatic*," and therefore such individuals are "not chargeable for their acts, if committed when under these capacities."²⁴⁴

The Amici Curiae brief then argued that due to the consensus among the states to adopt and implement some form of an insanity defense, the insanity defense is a fundamental principle of justice.²⁴⁵ In fact, an overwhelming majority of forty-six states have an insanity defense, and the Court has held that a consensus among the states is "persuasive evidence" that a "practice is indeed a fundamental principle of justice."²⁴⁶ And if both history and the vast majority of the states embrace that principle of justice, the principle is, in fact, fundamental.²⁴⁷ The United States Supreme Court has repeatedly held that the Due Process Clause is violated if an act or a failure to act, such as the failure to incorporate the insanity defense, "offends some principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."²⁴⁸ Prior to *Delling*, the Idaho Supreme Court addressed this due process argument in *State v. Searcy*,²⁴⁹ as previously discussed. But the court used the lack of a uniform insanity defense standard to rebut the argument that the insanity defense has a deep, important history in America and in Idaho.²⁵⁰ The court held,

The insanity defense has had a long and varied history during its development in the common law. As the understanding of the mental processes changed over the centuries, the implications of a criminal defendant's insanity have changed. . . . Not surprisingly, there has resulted a wide dis-

240. *Id.*

241. *Id.* at *9–10.

242. *Id.* at *7.

243. *Id.* at *7–8.

244. Brief of American Psychiatric Ass'n, *supra* note 74, at *8 (citing William Blackstone, *Commentaries* 24).

245. *Id.* at *12–13.

246. *Practice Guidelines: Insanity Defense Evaluations*, *supra* note 106, at S6; Brief of American Psychiatric Ass'n, *supra* note 74, at *12–13 (citing *Kennedy v. Louisiana*, 554 U.S. 407, 426 (2008); *Cooper v. Oklahoma*, 517 U.S. 348, 360–62 (1996)).

247. See Brief of American Psychiatric Ass'n, *supra* note 74, at *4.

248. *Patterson v. New York*, 432 U.S. 197, 201–02 (1977); see also *Cooper v. Oklahoma*, 517 U.S. 348, 367 (1996); *Herrera v. Collins*, 506 U.S. 390, 407–08 (1993); *Rochin v. California*, 342 U.S. 165, 169 (1952).

249. *State v. Searcy*, 798 P.2d 914, 916–17, 118 Idaho 632, 634–35 (1990).

250. *Id.* at 917, 118 Idaho at 635.

parity in the positions taken on this issue both by legislatures and courts in the various states.²⁵¹

However, the court in *Searcy* failed to appreciate the basic notion and common, historical understanding that a defendant who lacks a rational understanding of his actions is precluded from criminal culpability. While insanity defense standards have varied throughout the years, the mere fact that the insanity defense lives on in the vast majority of the states reflects its fundamental nature and appropriate place in American law.

IV. THE GOALS OF PUNISHMENT

The Amici Curiae brief further argued that the lack of an insanity defense does not promote the goals of punishment.²⁵² There are four primary goals of punishment: retribution, deterrence, rehabilitation, and incapacitation.²⁵³ Idaho's ban on the insanity defense fails to advance any of them.

A. Rehabilitation

Rehabilitation, the first goal of punishment, aims to prevent recidivism, which is the return to criminal activity after incapacitation.²⁵⁴ In order to prevent recidivism, prison rehabilitation programs help offenders transition back into society as law-abiding citizens.²⁵⁵ But prison rehabilitation programs do not adequately assist mentally insane offenders, who require specialized treatment and therapy.²⁵⁶ Instead of prioritizing rehabilitation, prisons focus primarily on security.²⁵⁷ The executive director of the American Academy of Psychiatry and the Law stated, "Generally speaking, correctional institutions are not well equipped to deal with the mentally ill."²⁵⁸ Rather, such offenders would be more effectively rehabilitated in psychiatric institutions.²⁵⁹ Even the chief psychologist for the Idaho Department of Correction, confirmed that, "people with severe mental illness are better treated outside the prison setting, if possible."²⁶⁰ But mentally insane criminals, if unable to use the insanity defense because the state they are in has abolished the insanity defense, will not go to a psychiatric institution upon conviction.²⁶¹ Instead, mental-

251. *Id.*

252. Brief of American Psychiatric Ass'n, *supra* note 74, at *14.

253. 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, 1314–23 (2007).

254. *Id.* at 1319.

255. *Id.*

256. *Id.* at 1319–20.

257. Marsha M. Yasuda, *Comment, Taking a Step Back: The United States Supreme Court's Ruling in Overton v. Bazetta*, 37 LOY. L.A. L. REV. 1831, 1847 (2004) ("[The Court's] holding recognizes a valid interest in maintaining the internal security of prisons, but it is carried out at the expense of the goal of rehabilitation. A more accurate test would be to balance the legitimate interests rather than allowing the prison to point to just one interest.").

258. Elizabeth Ommachen, *Mentally Ill Criminals Treated Unevenly and Money Talks Cases Illustrate Challenges Facing Judicial System*, SPOKESMAN-REV. (Aug. 18, 1996) <http://www.spokesman.com/stories/1996/aug/18/mentally-ill-criminals-treated-unevenly-and-money/>.

259. LeBlanc, *supra* note 253, at 1319.

260. Ommachen, *supra* note 258.

261. See LeBlanc, *supra* note 253, at 1319.

ly insane criminals are forced to use the inadequate prison rehabilitation programs while serving their sentences.²⁶² Ultimately, such criminals are unlikely to be rehabilitated and more likely to return to prison upon release.²⁶³

B. Retribution

According to the second theory, retribution, the goal of punishment is to impose a suffering on the offender proportional to the harm that his crime caused.²⁶⁴ Retribution is a backward-looking theory that justifies punishment because crime is morally wrong and criminals must be held accountable for their wrongdoings.²⁶⁵ While some critics of retribution view the theory as a revenge-seeking goal of punishment, retribution actually seeks to punish primarily because criminals deserve punishment.²⁶⁶ Retribution does not seek to punish criminals because society wants them to be punished and society craves revenge—it seeks to punish because the individual criminal deserves punishment for his actions.²⁶⁷ But mentally insane criminals do not deserve a punishment proportional to their crimes. Retribution only serves the interests of culpable criminal defendants who act with free will.²⁶⁸ Because mentally insane criminals, by definition, lack free will over their actions at the time of their crimes, they are inculpable.²⁶⁹ Indeed, their actions are a result of their mental illness, rather than their “controllable conscious choice.”²⁷⁰ Thus, punishing such individuals in proportion to their crimes does not advance the goal of retribution. Instead, mentally insane criminals should receive lesser sentences reflective of diminished culpability. Recognizing this, the insanity defense enables courts to send mentally insane criminals to psychiatric institutions.²⁷¹

But opponents of the insanity defense maintain that the defense gives criminals a “get out of jail free” card.²⁷² However, this viewpoint fails to acknowledge the low number of attempts to excuse crime by proving mental insanity in states that do have the insanity defense.²⁷³ In fact, the insanity defense is attempted in less than 1% of felony cases.²⁷⁴ And even when a defendant pleads the insanity defense, success is a long shot due to strict insanity defense standards.²⁷⁵ When a defendant is acquitted under the insanity defense, according to the most recent available data,

262. *Id.* at 1320.

263. *Id.* at 1319–21.

264. *Id.* at 1314.

265. Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815, 818 (2007).

266. Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1835–36 (1999).

267. *Id.*

268. See LeBlanc, *supra* note 253, at 1315–16.

269. *Id.* at 1316.

270. *Id.*

271. See, e.g., COLO. REV. STAT. ANN. § 16-8-105(4) (West 2014); N.C. GEN. STAT. ANN. § 15A-1321 (West 2014); *Jones v. United States*, 463 U.S. 354, 363–64 (1983); *United States v. Ecker*, 543 F.2d 178, 181 (1976).

272. Acosta, *supra* note 126; ABRAHAM S. GOLDSTEIN, *THE INSANITY DEFENSE* 143 (1967).

273. GOLDSTEIN, *supra* note 272, at 143.

274. *Id.*

275. *Id.*; see also, e.g., MODEL PENAL CODE § 4.01 (2013) (excludes defendants who only exhibited symptoms of mental illness through criminal acts).

85% of the time such defendant is immediately committed to a mental hospital.²⁷⁶ The remaining 14% of acquitted defendants are subject to conditional release and outpatient treatment.²⁷⁷ Thus, only 1% of acquitted defendants are actually released into society without restrictions. Further, to compare a mental hospital commitment to a “get out of jail free” card is to disregard the nature of mental hospitals—they are not country clubs but instead, they are heavily secured institutions full of sick patients. Thus, acquittals under the insanity defense are not “ticket[s] to freedom.”²⁷⁸

Even still, defendants attempt to plea insanity in states that do not even have the insanity defense.²⁷⁹ But without an insanity defense in place to regulate insanity pleas, courts lack guidance on handling mentally insane defendants. An insanity defense would assist courts in weeding out frivolous insanity pleas. It would provide courts with strict requirements a defendant must meet to be acquitted under the insanity defense,²⁸⁰ and would, in turn, deter defendants from pleading insanity unless they thought they met the required standard.

In sum, while the insanity defense does not necessarily promote retribution in the sense that the punishment should fit the crime, it also does not completely fail to hold mentally insane criminals accountable. The insanity defense does not “let off” criminals. Rather, it gives mentally insane criminals what they truly deserve—adequate treatment in a secured facility.

C. Deterrence

Next, the deterrence theory aims to punish in order to discourage the individual offender from committing the crime again and to discourage other potential offenders from committing the crime.²⁸¹ The ultimate goal of deterrence is to prevent future crimes.²⁸² But mentally insane criminals, through punishment, are not deterred from committing future crimes.²⁸³ Individuals are only deterred if they “view the lessons” that punishment attempts to teach.²⁸⁴ But insane people, both criminals and non-criminals, are unlikely to learn the lessons of what happens when an offense is committed if such individuals are incapable of even understanding the nature and consequences of their own criminal actions.²⁸⁵ Indeed,

[i]f the purpose of the law is not only to inflict punishment for the commission of prohibited acts, but to set examples which will restrain others from doing like acts, it is manifest that the punishment of the insane will

276. Allyson L. Gay, *Reforming the Insanity Defense: The Need for a Psychological Defect Plea*, STUDENT PULSE: 2 INT’L STUDENT J. 10, 3 (2010); see also *Commitment Following An Insanity Acquittal*, 94 HARV. L. REV. 605, 605 (1981).

277. See Gay, *supra* note 276, at 3.

278. *Commitment Following an Insanity Acquittal*, *supra* note 276.

279. See Benito Baeza, *Twin Falls Murder Trial Delayed Again*, FOX NEWS RADIO (Sept. 30, 2013) <http://newsradio1310.com/twin-falls-murder-trial-delayed-again/>; see also *State v. Delling*, 267 P.3d 709, 152 Idaho 122 (2011).

280. See, e.g., MODEL PENAL CODE § 4.01 (2013).

281. Garvey, *supra* note 266, at 1830.

282. LeBlanc, *supra* note 253, at 1317.

283. *Id.* at 1318.

284. *Id.*

285. *Id.*

not prohibit or deter another insane person from doing another similar act;
it can have no effect upon another insane person²⁸⁶

Also, sane people would not be deterred from the punishment of mentally insane criminals, since sane people cannot identify with mentally insane criminals and because the kind of crimes that mentally insane criminals commit are outside the normal spectrum of crimes.²⁸⁷ Thus, deterrence fails as a justification for punishing mentally insane criminals because they are unlikely to be deterred from committing future crimes.

D. Incapacitation

Finally, some people believe that mentally insane criminals, and criminals in general, should be incarcerated for the duration of their lives because they pose a danger to their communities.²⁸⁸ Such a belief is based upon the final goal of punishment, incapacitation.²⁸⁹ Under the theory of incapacitation, criminals should be punished in order to keep them separate from society so that they no longer pose a danger to their communities.²⁹⁰ Prison sentences indeed incapacitate mentally insane criminals. However, psychiatric institutions also incapacitate such individuals. But psychiatric institutions do not release mentally insane criminals until they demonstrate they are no longer a threat to society, which is primarily accomplished through rehabilitation.²⁹¹ Prisons release mentally insane criminals when their sentences are up, whether or not they still pose a threat to society.²⁹² Prisons may, in fact, worsen a mentally insane criminal's condition because prison conditions can be counter-therapeutic.²⁹³ Consequently, prisons may release individuals back into society in an even more dangerous state than when they entered prison.²⁹⁴ Indeed, once mentally insane individuals are incarcerated, it becomes a "tough cycle to break."²⁹⁵ For if mentally insane criminals are not adequately treated, their chances of recidivism significantly increase and their mental conditions likely worsen.²⁹⁶ Even courts have taken notice of how ill-suited prisons are for the mentally ill, opining that it is

deplorable and outrageous that [prisons] appear to have become a repository for a great number [of] mentally ill citizens. Persons who with psy-

286. *Sinclair v. State*, 132 So. 581, 584 (Miss. 1931).

287. Julie E. Grachek, *The Insanity Defense in the Twenty-First Century: How Recent United States Supreme Court Case Law Can Improve the System*, 81 IND. L.J. 1479, 1482 (2006).

288. LeBlanc, *supra* note 253, at 1321.

289. *Id.*

290. *Id.*

291. *Id.*; *see also, e.g.*, COLO. REV. STAT. § 16-8-105(4) (2014) ("If the trier of fact finds the defendant not guilty by reason of insanity, the court shall commit the defendant to the custody of the department of human services until such time as he is found eligible for release.").

292. LeBlanc, *supra* note 253, at 1321; *see also, e.g.*, § 16-8-105(4).

293. *Id.*; HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 27 (2003), available at <http://www.hrw.org/reports/2003/usa1003/usa1003.pdf>.

294. LeBlanc, *supra* note 253, at 1319.

295. Alana Horowitz, *Mental Illness Soars in Prisons, Jails While Inmates Suffer*, HUFFPOST (Feb. 4, 2013, 3:33 PM), http://www.huffingtonpost.com/2013/02/04/mental-illness-prisons-jails-inmates_n_2610062.html.

296. *Id.*

chiatric care could fit will into society, are instead locked away, to become wards of the state's penal system. Then, in a tragically ironic twist, they may be confined in conditions that nurture, rather than abate, their psychoses.²⁹⁷

Thus, incapacitation as a justification for not having an insanity defense fails because mentally insane criminals would be incapacitated in a psychiatric institution, where they could potentially be kept longer than in prison and where they would be adequately rehabilitated.

In sum, the abolition of the insanity defense does not promote rehabilitation, retribution, deterrence, or incapacitation. Rather, rehabilitation would be best served through the insanity defense, and the lack thereof most harms this goal of punishment. The insanity defense would also advance retribution and incapacitation. Deterrence may simply not be accomplished through punishing or treating mentally insane criminals, and thus fails to justify the abolition of the insanity defense. Therefore, in order to best promote the goals of punishment, Idaho should adopt the insanity defense.

V. THE 2-PART MENS REA TEST

State legislatures and courts, including those in Idaho, have ignored an essential component of mens rea—moral blameworthiness.²⁹⁸ Moral blameworthiness requires that the defendant have acted with a “free, voluntary, and rational choice to do evil.”²⁹⁹ However, those who support the abolition of the insanity defense have interpreted mens rea as pertaining only to intent, specifically, the mental element of the charged offense.³⁰⁰ History indicates, however, that mens rea is composed of both elements, criminal intent and moral blameworthiness.³⁰¹

The dual nature of mens rea can be traced back to ancient history.³⁰² St. Augustine, around 600 AD, likely coined the term “mens rea” in his writings.³⁰³ The dual nature of mens rea was first introduced in the thirteenth century.³⁰⁴ During that time, Henry Bracton, a judge who influenced common law, wrote, “[W]e must consider with what mind . . . or with what intent . . . a thing is done For take away the will and every act will be indifferent, because your state of mind gives meaning to your act, and a crime is not committed unless the intent to injure . . . intervene”³⁰⁵ To summarize, while the “with what intent” component speaks to the mental element of the charged offense, the “with what mind” component speaks to moral blameworthiness.³⁰⁶ “With what mind” asks whether the defendant either acted

297. Ruiz v. Johnson, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999).

298. See KAN. STAT. ANN. § 21-5209 (West 2014); IDAHO CODE ANN. § 18-207 (2014); Mont. Code Ann. § 46-14-102 (West 2014); Utah Code Ann. § 76-2-305 (West 2014).

299. Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 665 (1993).

300. See, e.g., State v. Searcy, 798 P.2d 914, 118 Idaho 632 (1990).

301. *Id.* at 917, 118 Idaho at 635; Phillips & Woodman, *supra* note 131, at 463–67.

302. See Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 988 (1932).

303. Phillips & Woodman, *supra* note 131, at 463.

304. See *id.* at 464.

305. *Id.* (alteration in original).

306. See *id.*

with a morally blameworthy state of mind, so as to make him culpable, or failed to recognize or appreciate the wrongfulness of his act, so as to make him inculpable.³⁰⁷ The early courts adopted the duality of mens rea when they chose to examine both intent and moral blameworthiness.³⁰⁸ And in the fourteenth century, courts began to use the absence of moral blameworthiness and criminal intent as a complete defense to crimes.³⁰⁹

Perhaps more importantly, the dual nature of mens rea is also rooted in English common law, which has guided American law in determining fundamental principles of law.³¹⁰ In 1765, Sir William Blackstone wrote the *Commentaries on the Laws of England*, a treatise on English common law that has heavily influenced American law.³¹¹ In the treatise, Blackstone wrote, “to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.”³¹² By requiring a vicious will, English common law embraced the moral blameworthiness component of mens rea.³¹³ In addition, the insanity defense test in *M’Naghten*, as discussed in Part II, required that a defendant must either not have known the “nature and quality of what he was doing” or, if he knew the nature and quality of what he was doing, “he did not know that [what] he was doing was wrong.”³¹⁴ The test, which inquired into whether a defendant could choose between right and wrong, sought to determine criminal responsibility based on moral blameworthiness.³¹⁵

Toward the end of the nineteenth century, the United States Supreme Court recognized the duality of mens rea.³¹⁶ Explaining that criminal responsibility goes beyond a specific intent to act, the Court noted,

One who [acts] cannot be said to be actuated by malice aforethought, or to have deliberately [acted], or to have ‘a wicked, depraved, and malignant heart,’ or a heart ‘regardless of society duty and fatally bent on mischief,’ unless at the time he had sufficient mind to comprehend the criminality or the right and wrong of such an act.”³¹⁷

Essentially, the Court emphasized the importance of focusing not solely on intent, but also on moral blameworthiness—whether the defendant comprehended the right or wrong nature of his act.³¹⁸ Going back to Justice Breyer’s dissent in *Delling v. Idaho*,³¹⁹ under the dual nature of mens rea, the second defendant, who killed a human because he believed a wolf ordered him to kill, would not be held criminally

307. See *id.*

308. Gardner, *supra* note 299, at 665.

309. *Id.* at 665–66.

310. Phillips & Woodman, *supra* note 131, at 462–63, 467.

311. See *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 491–92 (E.D.N.Y. 1993).

312. Kelly A. Swanson, *Criminal Law: Mens Rea Alive and Well: Limiting Public Welfare Offenses—In Re C.R.M.*, 28 WM. MITCHELL L. REV. 1265, 1266–67 (2002).

313. See Phillips & Woodman, *supra* note 131, at 466.

314. Morse & Thoreson, *supra* note 85, at 179.

315. Phillips & Woodman, *supra* note 131, at 468.

316. *Davis v. United States*, 160 U.S. 469, 485 (1895).

317. *Id.*

318. *Id.*

319. *Delling v. Idaho*, 133 S. Ct. 504, 505–06 (2012) (Breyer, J., dissenting from the denial of certiorari).

responsible.³²⁰ Instead, because he lacked the ability to understand and appreciate the wrongfulness of his murder, the second defendant, along with the first defendant, would escape criminal culpability and instead be sent to a psychiatric institution.³²¹

However, over time, courts and legislatures narrowed the concept of mens rea to solely address intent and consequently disregarded moral blameworthiness altogether.³²² Rather than acknowledge the dual nature of mens rea, and as a result of confusion over the proper and historical two-fold nature of mens rea, some states have collapsed the two components into a single concept that strictly refers to the mental element (intent) of the charged offense.³²³ Indeed, in the four states that lack the insanity defense, a mens rea doctrine exists, but the doctrine speaks only to intent.³²⁴ Moral blameworthiness is not given weight in any of those states. In effect, the historic and fundamental principle of criminal law that mentally insane defendants are not morally blameworthy, and thus should not be held criminally responsible, has been abandoned in those states.

And yet, the failure to incorporate both aspects of mens rea is a violation of the Due Process Clause.³²⁵ A statute or some other kind of state action infringes due process rights if it “offends some principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”³²⁶ Given that the dual nature of mens rea is rooted in both common law and ancient history, it is indeed a fundamental principle of justice.³²⁷ Therefore, the insanity defense is protected by due process. While the Idaho Supreme Court in *Searcy* recognized that the insanity defense has “a long and varied history during its development in the common law,” the court found that due to its lack of uniformity, the insanity defense is not so deeply rooted in American legal history.³²⁸ But what the court fails to appreciate is that while the insanity defense has taken many forms throughout English common law and American history, every jurisdiction in England and the United States, at some point, has adopted a variation of the insanity defense,³²⁹ thus recognizing it as an essential defense and fundamental principle of criminal law. While some states have since abolished the insanity defense, there is a modern trend to again adopt the insanity defense and rule the ban on the insanity defense unconstitutional.³³⁰ Indeed, even today all but four states have the insanity defense.³³¹ As such, Idaho’s abolition of the insanity defense is unconstitutional be-

320. *Id.* at 505.

321. *See id.*

322. *See* IDAHO CODE ANN. § 18-207 (West 2014); KAN. STAT. ANN. § 21-5209 (West 2014); MONT. CODE ANN. § 46-14-102 (West 2014); UTAH CODE ANN. § 76-2-305 (West 2014).

323. Phillips & Woodman, *supra* note 131, at 469–70.

324. *See* IDAHO CODE ANN. § 18-207 (West 2014); KAN. STAT. ANN. § 21-5209 (West 2014); MONT. CODE ANN. § 46-14-102 (West 2014); UTAH CODE ANN. § 76-2-305 (West 2014).

325. *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV.

326. Phillips & Woodman, *supra* note 131, at 462–63.

327. *See id.* at 469, 494.

328. State v. Searcy, 798 P.2d 914, 917–19, 118 Idaho 632, 635–37 (1990).

329. Daniel J. Nusbaum, *The Craziest Reform of Them All: A Critical Analysis of the Constitutional Implications of “Abolishing” the Insanity Defense*, 87 CORNELL L. REV. 1509, 1538 (2002).

330. *See generally* Sinclair v. State, 132 So. 581 (Miss. 1931); Finger v. Nevada, 27 P.3d 66 (Nev. 2001); State v. Strasburg, 110 P. 1020 (Wash. 1910).

331. *See* IDAHO CODE ANN. § 18-207 (2014); KAN. STAT. ANN. § 21-5209 (West 2014); MONT. CODE ANN. § 46-14-102 (West 2014); UTAH CODE ANN. § 76-2-305 (West 2014).

cause it violates due process. In order to comply with the Due Process Clause, Idaho should again adopt an insanity defense.

VI. THE INSANITY DEFENSE WOULD SAVE IDAHO MONEY

Constitutional issues aside, adopting the insanity defense would serve Idaho's financial interests in the long run.³³² While the annual costs of housing and treating a mentally insane patient in a state hospital are more than housing and treating a mentally insane inmate in prison, effective rehabilitation in a state hospital would ultimately save money.³³³ And because the money that goes into the prison system comes from tax dollars, all of society is invested in the issue of imprisoning mentally insane criminals.³³⁴

In 2013, according to the Idaho Department of Correction, the average cost to house a prisoner in Idaho, per day, was \$55.50.³³⁵ Per year, this averages out to approximately \$20,250 per prisoner. On the other hand, state hospitals cost approximately \$90,000-\$100,000 per year to house a patient.³³⁶ Thus, while looking solely at the surface of these figures, some states have been economically incentivized to send mentally insane criminals to prisons rather than state mental hospitals.³³⁷

But prisons spend more money on housing and treating mentally insane prisoners than other prisoners.³³⁸ In 2013, about 33% of the prison population in the Idaho Department of Correction consisted of prisoners with mental health needs.³³⁹ The numbers are up since 2012, when 27% of the prison population had mental health needs.³⁴⁰ That year, almost half of the 27% of prisoners with mental health needs needed special housing or treatment.³⁴¹ Special housing or treatment adds extra costs to prisons.³⁴² In Idaho, the cost per-inmate to treat mental health needs

332. See Simon McCormack, *Prison Population Reduction Must Be Coupled with Effective Rehab, Experts Say*, HUFFINGTON POST (June 21, 2012 1:04 PM), http://www.huffingtonpost.com/2012/06/21/prison-population-reduction-rehab_n_1613643.html (quoting Robert Weisberg, a Stanford law professor, "Weisberg also said that deficit hawks should pony up money for rehabilitation and job training programs because it could end up cutting costs in the long term."); see also Rose Hoban, *NC State Study Shows Why it Costs Less to Treat Mentally Ill than Incarcerate Them*, N.C. HEALTH NEWS (July 1, 2013), <http://www.northcarolinahealthnews.org/2013/07/01/nc-state-study-shows-why-it-costs-less-to-treat-mentally-ill-than-incarcerate-them/> (quoting Sarah Desmarais, an assistant professor of psychology at N.C. State, "[I]t's more cost efficient to give treatment instead of [relying on] criminal justice . . . treating the mentally ill is less expensive.").

333. See McCormack, *supra* note 332.

334. *Policy Basics: Where Do Our State Tax Dollars Go?*, CENTER ON BUDGET & POL'Y PRIORITIES (April 12, 2013), <http://www.cbpp.org/cms/?fa=view&id=2783>.

335. IDAHO DEP'T OF CORR., ANNUAL REPORT: DECEMBER 2013, at 4, available at http://www.idoc.idaho.gov/content/document/annual_report_fy13.

336. HUMAN RIGHTS WATCH, *supra* note 293, at 25 (quoting Dr. Fred Maue, the chief of clinical services at the Pennsylvania Department of Corrections).

337. See *id.*

338. See PEW CHARITABLE TRUSTS, *Managing Prison Health Care Spending*, PEWSTATES.ORG: STATE HEALTH CARE SPENDING PROJECT 8 (Oct. 2013), http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2014/PCTCorrectionsHealthcareBrief050814pdf.pdf.

339. IDAHO DEP'T OF CORR., *supra* note 335, at 6.

340. Scott Ki, *A Race for a Cure That Hasn't Started: Where is Popular and Policy Support for Mental Health Services?*, THE BLUE REV. (June 24, 2013), <http://thebluereview.org/idaho-mental-health-service/>.

341. *Id.*

342. See PEW CHARITABLE TRUSTS, *supra* note 338, at 8.

rose to approximately \$4,188 in 2012.³⁴³ If that number did not change much in 2013, the total cost to house and treat such inmates adds up to around \$24,500 when factoring in both mental health services and regular bed costs. But the costs may be bigger now or may continue to grow. Indeed, the average cost for treating and housing seriously mentally ill prisoners in America is approximately \$35,000 per person a year.³⁴⁴ And, as explained in Part IV.D., defendants may end up spending more time in prison than a mental hospital, where they may be released when they are proven to no longer be a threat to themselves and their community, whereas in prisons they are required to serve their entire sentence.³⁴⁵ Thus, it is more expensive to incarcerate a mentally ill prisoner than other prisoners.³⁴⁶

But is it more expensive to place mentally insane defendants in mental hospitals, as opposed to prisons? As the numbers demonstrate, per year, yes.³⁴⁷ As previously noted, state hospitals across America, on average, cost about \$90,000-\$100,000 to house patients.³⁴⁸ But, as illustrated in Part IV.A., mental hospital patients receive better treatment and are more effectively rehabilitated than prison inmates. And when inmates are effectively treated and rehabilitated, once they are released back into their communities, they are less likely to commit more crimes.³⁴⁹ Less crime in society saves money.³⁵⁰ And, also illustrated in Part IV.D., state hospitals may not hold onto patients as long as prisons would hold onto them, depending on when the patients can demonstrate they are no longer a threat to themselves and their communities. Indeed, when patients are better rehabilitated and treated, they are released into society sooner and their recidivism rates are lower.³⁵¹ Thus, with lower recidivism rates, fewer offenders enter back into the expensive prison system.³⁵²

Further, an insanity defense would preclude mentally insane murderers from going through the expensive process of capital litigation. Idaho is one of thirty-two states that administers the death penalty.³⁵³ Due to the cost of state-paid lawyers, appeals, hearings, and other legal fees, death penalty cases are more expensive than any other kind of litigation, especially because a life is at stake.³⁵⁴ And death penalty cases last many years, with the average case lasting twenty-one years just be-

343. *Id.* at 5.

344. HUMAN RIGHTS WATCH, *supra* note 293, at 25 (quoting Dr. Fred Maue, the chief of clinical services at the Pennsylvania Department of Corrections).

345. LeBlanc, *supra* note 254, at 1319.

346. See PEW CHARITABLE TRUSTS, *supra* note 338, at 8.

347. HUMAN RIGHTS WATCH, *supra* note 293, at 25.

348. *Id.*

349. LeBlanc, *supra* note 253, at 1319–21.

350. Annie Lowrey, *True Crime Costs: Does Every Murder in the United States Really Cost Society \$17 Million?*, SLATE, Oct. 21, 2010, http://www.slate.com/articles/arts/everyday_economics/2010/10/true_crime_costs.html.

351. See LeBlanc, *supra* note 253, at 1319–21.

352. *Id.*

353. *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Oct. 13, 2014).

354. *Death Penalty Cost*, AMNESTY INT'L USA, <http://www.amnestyusa.org/our-work/issues/death-penalty/us-death-penalty-facts/death-penalty-cost> (last visited Oct. 13, 2014); *Costs: Why the Death Penalty Costs So Much*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/costs-why-death-penalty-costs-so-much> (last visited Oct. 13, 2014).

tween sentencing and execution.³⁵⁵ In fact, in Idaho, one inmate, Gene Stuart, joined death row in 1982 – thirty-two years ago.³⁵⁶

The combination of various legal fees with the long life span of death penalty cases leads to shocking costs – approximately \$2 million for each death penalty case in America.³⁵⁷ In Idaho, taxpayers spend millions of dollars towards capital litigation.³⁵⁸ But if mentally insane murderers were committed to mental institutions rather than thrown on death row, ultimately taxpayers would avoid funding expensive executions and the drawn-out legal process that comes with them.³⁵⁹ Currently, some of the current death row inmates are mentally ill.³⁶⁰ For instance, the Chief Psychologist at the Idaho Maximum Security Institution determined that inmate Timothy Dunlap has a “psychiatric illness requiring treatment.”³⁶¹ The psychologist further determined that Dunlap needs to be housed in the mental health unit due to his mental illness.³⁶² In addition to Dunlap, death row inmate David Card is mentally insane.³⁶³ Specifically, he suffers from paranoid schizophrenia.³⁶⁴ Card has been on death row since 1989, and Dunlap since 1992.³⁶⁵ But the insanity defense would have likely sent these two inmates to a mental institution, rather than to death row.³⁶⁶

VII. CONCLUSION

Mentally insane criminals in Idaho have little hope of rehabilitation and becoming law-abiding members of their communities without an insanity defense in place. Instead, these criminals are sent to prison where their mental conditions likely worsen. And if they are released back into society, their exacerbated mental conditions increase their likelihood of ending back up in prison, costing the state more money and failing to reduce crime rates.³⁶⁷

But Idaho can solve such problems by again adopting an insanity defense that incorporates the dual nature of mens rea, intent and moral blameworthiness. Through doing so, Idaho would ensure that those who are precluded from criminal responsibility, such as mentally insane defendants who lack both intent and the

355. *Costs: Why the Death Penalty Costs So Much*, *supra* note 354.

356. *Death Row*, IDAHO DEP’T OF CORR., http://www.idoc.idaho.gov/content/prisons/death_row (last visited Oct. 13, 2014).

357. Paula Landholm Kluksdal, *The New Idaho Death Penalty Statute: Will it Reduce Appeals?*, 33 IDAHO L. REV. 259, 261 (1996); Rebecca Boone, *Correction: Death Penalty Costs Story*, WASH. TIMES, Mar. 20, 2014, <http://www.washingtontimes.com/news/2014/mar/20/idaho-death-penalty-cost-report-finds-limited-data/?page=all>.

358. *Idaho Counties Struggle With Costs of the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/921> (last visited Oct. 13, 2014) (“[I]t costs Idaho taxpayers about \$1 million to imprison somebody for life, but a death penalty case may cost five times that.”).

359. *Id.*

360. See Reply Brief of Appellant at 50, *Dunlap v. Idaho*, No. 37270-32773 (Dec. 13, 2011), 2011 WL 6939609 at 50; *State v. Card*, 825 P.2d 1081, 1083, 121 Idaho 425, 427 (1992).

361. Reply Brief of Appellant at 50, *Dunlap v. Idaho*, No. 37270-32773 (Dec. 13, 2011), 2011 WL 6939609 at 50.

362. *Id.*

363. *Card*, 825 P.2d at 1083, 121 Idaho at 427.

364. *Id.*

365. *Death Row*, *supra* note 356.

366. Elkins, *supra* note 180, at 152.

367. See LeBlanc, *supra* note 253, at 1319–21.

ability to appreciate the wrongfulness of their crimes, are not punished. And through recognizing the dual nature of mens rea, Idaho would promote fundamental principles of criminal law and, in turn, enforce due process of the law.

Even more, adopting the insanity defense would advance the goals of punishment. By adequately treating mentally insane criminals, the insanity defense would promote rehabilitation. In John Cope's case, the man who believed God commanded him to kill "the mark of the beast,"³⁶⁸ the trial judge could have committed Cope to a state mental hospital to effectively treat his severe mental conditions. Instead, with no insanity defense statute in place, the trial judge had no choice but to sentence Cope to prison. Additionally, by giving mentally insane criminals what they truly deserve—treatment in a secure location—an insanity defense in Idaho would promote retribution. While Cope committed a heinous crime, his crime was a product of religious delusions. Cope does not deserve to be locked behind prison bars and subjected to prison conditions, which would ultimately worsen his mental conditions. Rather, Cope deserves to be committed to a hospital that will treat his conditions, help him cope with his delusions, and steer him away from future criminal conduct. But instead, Idaho's only intention with Cope is to keep him in prison until he dies.

Also, by keeping mentally insane criminals off the streets until they are no longer a threat to themselves and their communities, the insanity defense in Idaho would promote incapacitation. While Cope is behind bars, the state of Idaho is paying hundreds of thousands of dollars to keep him there for the duration of his life. And yet, Cope's mental conditions are likely deteriorating even more than when the state first sentenced him to prison. But if Cope were sent to a mental institution, Cope would still be isolated from his community in a secured facility. Lastly, while the insanity defense does not necessarily promote deterrence, deterrence fails to justify a ban on the insanity defense. If a paranoid schizophrenic learned of Cope's punishment, but suffered from similar religious delusions, he would not be deterred from committing violent crime because his mental conditions would prevent rational thought from reminding him of the punishment he would get from committing the crime.

Cope's similarities to Robert Serravo, the mentally insane man who attempted to murder his wife in order to carry out his mission from God, suggest that the two men would be similarly treated by the justice system. Both men committed crimes motivated by religious delusions. Both men recognized the criminality of their conduct, but failed to appreciate the nature and quality of their crimes because they were blinded by mental insanity. Yet Serravo was rehabilitated in a mental hospital, while Cope was punished in prison. These inconsistent outcomes are due to Idaho's ban on the insanity defense. But to better promote justice and advance the goals of punishment, to implement due process guarantees, to save Idaho money, and to recognize the historical, dual-nature of mens rea, Idaho should again adopt the insanity defense and declare its current ban on the insanity defense unconstitutional.

368. *Supra* Part I.

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