NOTE

HOW TO GET AWAY WITH MURDER: THE NORWEGIAN APPROACH

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INTRODUCTION

What does it mean for one to be insane enough to not be held responsible for a criminal act one committed? The answer to this question varies across differing eras, cultures, countries, and laws. If one were to ask English legal-scholar Sir Matthew Hale, he would assert that to be insane enough to not

† J.D., Cornell Law School, 2023; B.S. (Business Management and Psychological Sciences), Rensselaer Polytechnic Institute, 2020. I would like to thank the entire *Cornell Law Review* staff for their dedication and assistance throughout the editing process. I would like to give a special thank you to Professor Stephen Garvey for his support and advice in the early stages of my seminar paper, which was later adapted into this Note. Finally, I would like to show my endless appreciation for my family and friends for their infinite support and encouragement during law school and beyond.

be culpable of a crime, one would need to experience "total alienation of the mind," to the point of essentially being a wild animal.[1] Conversely, Judge Bazelon, a former circuit judge for the District of Columbia, would insist upon acquittal any time someone could not "justly be held responsible."[2] Furthermore, if one were to abide by the *M'Naghten* Test, a defendant could only be insane if, at the time of the act, he suffered under a defect of reason such that he did not know the "nature and quality" of the act, or that his actions were wrong.[3] If analyzing this same question under Norway's unique Medical Model, one may be excused simply by determining that one has a certain mental disorder, without any further causal analysis.[4]

Although these are only a few examples of the many ways to find someone legally insane, they demonstrate the extent to which insanity is a difficult concept to define, and therefore why it is such a difficult concept to implement legally. Part I of this Note will explore the origins of insanity law, including instances of where the concepts of insanity first arose, and from where the origins of responsibility and non-culpability can be drawn. Part II will focus on the evolution of insanity law in the United States and the varying tests applicable to the defense. Part III will delve into insanity law as it is defined in Norway, starting first with the historical origins of the Medical Model, and moving on to discuss how it is utilized today. Part IV will analyze how Norway's Medical Model could be widely implemented in the United States through various legislative and judicial routes, including by way of amending the Federal Insanity Statute. Finally, Part V will review notorious cases in legal history and determine how they would have been resolved under the proposed amended Federal Insanity Statute, modeled after Norway's Medical Model. Part V further analyzes whether the resolutions promote the policies of rehabilitation and treatment that the proposal encourages, as well as if the outcomes reflect other goals of the criminal justice system.

This Note is not meant to provide a solution to all conflicts within the field of insanity law. It is merely analyzing various

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1 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 30 (1736).

2 United States v. Brawner, 471 F.2d 969, 1032 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part and dissenting in part).

3 M'Naghten's Case, 8 Eng. Rep. 718, 722 (H.L. 1843).

4 *See* Linda Gröning, Unn K. Haukvik, Stephen J. Morse & Susanna Radovic, *Remodelling Criminal Insanity: Exploring Philosophical, Legal, and Medical Premises of the Medical Model Used in Norwegian Law*, 81 INT'L J.L. & PSYCHIATRY, no. 101776, 2022, at 1, 3 [hereinafter Gröning, *Remodelling Criminal Insanity*].

types of insanity law and determining how a variation on the Norwegian Medical Model could be implemented in the United States in place of other tests and evaluating its implications. Norway's Medical Model is discussed and utilized in this Note specifically because of its unique nature contrasting against insanity theories in the United States and other European countries, which require an inquiry beyond merely the existence of a mental defect.[5] This Note in no way asserts that this is the best solution, or even a proper one, but is simply proposing an insanity theory that aims to promote the goals of rehabilitation and treatment in the criminal justice system.

I
ORIGINS OF INSANITY LAW

"A deaf-mute, an idiot and a minor are awkward to deal with, as he who injures them is liable (to pay), whereas if they injure others they are exempt."[6] As early as the third century, children and the insane were distinguished as a different class of individuals, separate and apart from responsible adults.[7] During the fifth century BCE, Aristotle recognized that children, similar to animals and the insane, were not morally responsible for the acts they committed.[8] In sixth century Roman law, someone who was deemed insane was excused and therefore not responsible for the criminal acts he committed.[9]

In 1256, Henry de Bracton similarly compared the insane to an animal in his "wild beast" test, which posited that if a madman lacked reason like a beast, then he could not have had the intention to injure and should therefore not be held liable.[10] Bracton was the first of his fellow English lawyers to consider the concept of mental elements in crime, focusing on

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5 *See* Linda Gröning, Unn Kristin Haukvik & Karl Heinrik Melle, *Criminal Insanity, Psychosis and Impaired Reality Testing in Norwegian Law*, 7 BERGEN J. CRIM. L. & CRIM. JUST. 27, 34 (2019) [hereinafter Gröning, *Psychosis and Impaired Reality Testing*]; *see also* Carl-Friedrich Stuckenberg, *Comparing Legal Approaches: Mental Disorders as Grounds for Excluding Criminal Responsibility*, 4 BERGEN J. CRIM. L. & CRIM. JUST. 48, 52 (2016).

6 1 THE BABYLONIAN TALMUD: BABA KAMMA 501–02 (I. Epstein ed., E. W. Kirzner trans., 1935) (originally collected and composed from the third to the sixth centuries).

7 *See id.*

8 *See* J. WALTER JONES, THE LAW AND LEGAL THEORY OF THE GREEKS: AN INTRODUCTION 264, 273 (1956).

9 JUSTINIAN DIG. 48.8.3 (Marcian, Institutes 14), 48.8.12 (Modestinus, Rules 8).

10 Anthony Michael Platt & Bernard L. Diamond, *The Origins and Development of the "Wild Beast" Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility*, 1 J. HIST. BEHAV. SCIS. 355, 355–56 (1965).

subjective intent as a requirement for criminal acts to be culpable.[11] English criminal legal scholars, specifically Sir Matthew Hale, Chief Justice of the Court of the King's Bench, also recognized that the insane person could be likened to that of a young child and should be held less responsible; notably, Sir Matthew Hale explained that the best way to determine insanity was to decide whether the accused had an understanding equivalent to that of an ordinary fourteen-year-old child.[12]

By the seventeenth century, the insane person was excused from punishment of a crime when he did not have the understanding of what the difference between good and evil was, because without an understanding of good and evil, one could have no felonious intent.[13] The good and evil test was regularly used in England beginning in the eighteenth century in dealing with insanity cases, with the one exception being *Hadfield*'s *Case*.[14] There, a defendant was acquitted on insanity grounds for attempting to assassinate the King because of his delusion that God had told him to sacrifice himself to save the world, and that killing the King was the only way to ensure his own death.[15]

Setting aside all of these formulations for insanity, however, the largest milestone in insanity law is the *M'Naghten* case.[16] In 1843, Daniel M'Naghten fatally shot Edward Drummond, the Prime Minister of England's secretary.[17] M'Naghten had the delusional belief that he was being persecuted, and that the only way he could stop the persecution was by shooting the Prime Minister, but instead shot his secretary, Drummond, thinking he was the Prime Minister.[18] M'Naghten was acquitted of murder by reason of insanity and sent to Bethlem Hospital.[19] In response to the uproar against M'Naghten's acquittal, the judges appeared before the House of Lords and answered their questions regarding the criminal law of in-

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11 *See id.* at 357–58.

12 Michael S. Moore, *The Quest for a Responsible Responsibility Test: Norwegian Insanity Law After Breivik*, 9 CRIM. L. & PHIL. 645, 678 (2015); *see also* Anthony Platt & Bernard L. Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 CAL. L. REV 1227, 1234 (1966) [hereinafter Platt, *Right and Wrong*].

13 MICHAEL DALTON, THE COUNTRY JUSTICE 244 (1630).

14 Platt, *Right and Wrong*, *supra* note 12, at 1236.

15 Hadfield's Case, 27 How. St. Tr. 1281, 1322–23, 1356 (1800).

16 *See generally* M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843).

17 *Id.* at 719.

18 Moore, *supra* note 12, at 662; *see also* United States v. Ewing, 494 F.3d 607, 618 (7th Cir. 2007).

19 Stephen P. Garvey, *Agency and Insanity*, 66 BUFF. L. REV 123, 125 (2018).

sanity, formulating what is today known as the *M'Naghten* Test:[20]

> [I]n all cases . . . every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.[21]

This case formulated two requirements to find a defendant insane.[22] The defendant must have some sort of mental disease or defect, and because of the mental illness (1) cannot have understood the nature of his act, or (2) that the act he was committing was itself wrong.[23]

II
FIVE MAIN TESTS OF INSANITY RECOGNIZED IN THE UNITED STATES

There are many insanity tests in the United States that vary across jurisdiction and span across time. The five main tests of insanity are the Irresistible Impulse Test, the *M'Naghten* Test, the Model Penal Code Test, the Product Test, and the Federal Insanity Statute.[24] This Note will discuss each in detail.

A. The Irresistible Impulse Test

The United States courts took the *M'Naghten* Test and expanded upon it in the Irresistible Impulse Test.[25] This was exemplified in *Parsons v. State* in 1887, where Nancy and Joe Parsons mortally shot Bennett Parsons (Nancy's husband and Joe's father).[26] Nancy claimed that she was under the delusion that her husband, Bennett, the deceased, had a supernatural

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20 Moore, *supra* note 12, at 659.

21 M'Naghten's Case, 8 Eng. Rep. 718, 722 (H.L. 1843).

22 Moore, *supra* note 12, at 659.

23 *Id.*

24 JOSHUA DRESSLER, *Putting the Insanity Tests in Historical and Legal Context*, *in* UNDERSTANDING CRIMINAL LAW, 327-333 (8th ed. 2018).

25 Cynthia G. Hawkins-León, *"Literature As Law": The History of the Insanity Plea and a Fictional Application Within the Law & Literature Canon*, 72 TEMP. L. REV. 381, 393 (1999).

26 Parsons v. State, 2 So. 854, 857 (Ala. 1887).

power to infect her with a disease and to kill her.[27] After being found guilty, a reversal and remand occurred, with the trial court ultimately concluding upon remand that the *M'Naghten* Test on its own contained shortcomings and was difficult to practically apply.[28] The court formulated a new test to be sent to the jury.[29] This test stated that a defendant could not be held criminally liable even if the defendant had knowledge of right from wrong if he lacked the power to choose between right and wrong due to his mental disease, and that the crime was solely a product of the mental disease.[30]

However, later cases had difficulty applying this test and determining when an impulse was irresistible or simply not resisted in that case.[31] The Irresistible Impulse Test was later summarized as:

> [A]n impulse induced by, and growing out of, some mental disease affecting the volitive, as distinguished from the perceptive, powers, so that the person afflicted, while able to understand the nature and consequences of the act charged against him and to perceive that it is wrong, is unable, because of such mental disease, to resist the impulse to do it. It is to be distinguished from mere passion or overwhelming emotion not growing out of, and connected with, a disease of the mind. Frenzy arising solely from the passion of anger and jealousy, regardless of how furious, is not insanity.[32]

The important takeaways of the Irresistible Impulse Test are that a person is insane if at the time of the crime they were completely deprived of any mental power to choose between right and wrong to avoid committing the crime, as their free agency had been destroyed at the time of the crime.[33]

B. The *M'Naghten* Test

As described above in Part I, the *M'Naghten* Test is based upon two prongs, holding that a person is insane if at the time of the crime committed, as a result of mental disease or defect, they (1) did not know the nature and quality of their act, or (2)

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27 *Id.* at 865.

28 *See* Hawkins-León, *supra* note 25, at 393-94.

29 *See* Parsons, 2 So. at 866–67.

30 *Id.*

31 *See* Eric Collins, *Insane: James Holmes,* Clark v. Arizona, *and America's Insanity Defense,* 31 J. L. & HEALTH 33, 38 (2018).

32 14 AM. JUR. *Criminal Law* § 35 (1938).

33 DRESSLER, *supra* note 24, at 330.

they did know the nature and quality of their act, but they did not know that what they were doing was wrong.[34]

In *Walker v. State* in Oklahoma, the *M'Naghten* Test was applied where the appellant burglarized the home of Eddie Cash in Oklahoma and killed him by striking the victim with a brick and strangling him with a vacuum cleaner.[35] Upon his arrest, the appellant confessed to the police, discussing his plans to burglarize Cash's home and how he killed him when he feared Cash would call the police.[36] The appellant told the detective, "I knew what I was doing, but I don't know why . . . I know right from wrong. I don't know why I did it, but I know I did do it."[37] He argued insanity, demonstrating evidence of abuse from his stepfather, psychological trauma from his brother's death, and a history of mental illness.[38]

On appeal, the appellant claimed that the State did not rebut his evidence of insanity at the time of the crime.[39] The court stated that in Oklahoma, the standard for insanity was the *M'Naghten* Test.[40] The court reviewed the evidence shown by the State regarding how the appellant calculated his arrival and had specific intent to burglarize the home, and that the murder was committed to prevent the police from being called.[41] Furthermore, when affirming the findings of the lower court, the appellate court discussed how the appellant had confessed to the police.[42] The court posited that this demonstrated his understanding of right and wrong as well as remorse for the crime, and determined that a jury would have no doubt as to his sanity.[43]

C. The American Law Institute's Model Penal Code Test

The Model Penal Code Test is a combined and revised version of the *M'Naghten* Test and the Irresistible Impulse Test and states that a person is not responsible for the crime if at the time of the crime, due to a mental disease or defect, they lacked the substantial capacity to (1) appreciate the criminality

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34 M'Naghten's Case, 8 Eng. Rep. 718, 722 (H.L. 1843).
35 Walker v. State, 723 P.2d 273, 276 (Okla. Crim. App. 1986).
36 *See id.*
37 *Id.*
38 *Id.*
39 *Id.* at 282.
40 *Id.*; *see also* OKLA. STAT. ANN. tit. 21, § 152.
41 Walker, 723 P.2d at 283.
42 *Id.*
43 *Id.*

of the crime, or (2) to conform their conduct to the standards that the law requires.[44]

The Model Penal Code Test is exemplified in *United States v. Freeman*.[45] The defendant, Charles Freeman, was found guilty of selling narcotics when the district court relied upon the traditional test of *M'Naghten*, despite Freeman claiming that he did not possess the sufficient capacity to be held responsible for his acts.[46] Upon appeal, the Second Circuit determined that the *M'Naghten* Test was not consistent with modern science, which does not support the division of the mind into emotions, will, and intellect, and instead determined that the more modern Model Penal Code § 4.01 was more appropriate and adopted it as the standard in the Second Circuit.[47] The court stated that the Model Penal Code formulation was more appropriate because it "views the mind as a unified entity and recognizes that mental disease or defect may impair its functioning in numerous ways."[48] The court also found that the Code's use of the terms "substantial" to modify "incapacity" and "appreciate" instead of "know" were important deviations from the traditional *M'Naghten* Test.[49]

D. The Product Test

The Product Test derives from *Durham v. United States*, a 1954 case from the Court of Appeals for the District of Columbia. In this case, Monte Durham was convicted of housebreaking, but he claimed that he was of unsound mind at the time of the crime.[50] Durham was discharged from the Navy after being diagnosed with a personality disorder that made him unfit for the position.[51] He then attempted suicide, was subject to a lunacy inquiry as a result of his conduct in jail, was diagnosed with a variety of psychopathic personality disorders, and suffered from various hallucinations.[52] Upon review, the court found that the standard used, the right-wrong test, requiring the defendant to not know the difference between right and

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44 DRESSLER, *supra* note 24, at 331.

45 *See* United States v. Freeman, 357 F.2d 606 (2d Cir. 1966).

46 *Id.* at 608.

47 *See id.* at 622.

48 *Id.*

49 *Id.* at 622–23.

50 Durham v. United States, 214 F.2d 862, 864 (D.C. Cir. 1954).

51 *Id.*

52 *Id.*

wrong, supplemented with the Irresistible Impulse Test, was not an appropriate test to determine criminal liability.[53]

In *Durham*, Judge Bazelon rejected the trial court's test, worrying that it left the jury with no true understanding of the defendant's actual state of mind, and instead stated an alternative test.[54] This test designated that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."[55] Judge Bazelon was inspired by a medical scholar from the nineteenth century, Isaac Ray.[56] Judge Bazelon believed that if the mental disease or defect that the defendant was suffering from caused his crime, then he should be found insane.[57] A few years later, in another decision, after growing frustrated with the focus on expert testimony and on the medical aspect of the analysis of the Product Test, Bazelon amended the standard and asked for acquittal if the defendant could not "justly be held responsible" for the crime he committed in a concurrence to *United States v. Brawner*.[58]

E. The Federal Insanity Statute

After John Hinkley was acquitted by reason of insanity of his assassination attempt on President Ronald Reagan under the American Law Institute's Model Penal Code standard, the public was outraged, and Congress in response passed the Insanity Defense Reform Act of 1984.[59] The Act calls for an affirmative defense if it is found that "as a result of a severe mental disease or defect, [the defendant] was unable to appreciate the nature and quality or the wrongfulness of his acts."[60] The defendant has the burden to prove by clear and convincing evidence the defense of insanity.[61] This Act resulted in the restriction of the applicability of the insanity defense for defendants in federal court as opposed to the more liberal Model

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53 *Id.* at 869, 871.

54 *See id.* at 874–75.

55 *Id.*; *see also* Garvey, *supra* note 19, at 139.

56 *See* Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1213 (2000).

57 *Id.*

58 *Id.*; *see also* United States v. Brawner, 471 F.2d 969, 1032 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part and dissenting in part).

59 David Kells Parker, *Insanity Defense Reform Act of 1984—Impact on Federal Courts*, *in* 5 JEFFREY JACKSON, MARY MILLER & DONALD CAMPBELL, MISSISSIPPI PRACTICE ENCYCLOPEDIA § 39:16 (2d ed. 2022).

60 18 U.S.C. § 17(a).

61 *Id.* § 17(b).

Penal Code Test.[62] The main changes were to modify the standard for insanity to be more stringent, place the burden of proof on the defendant, limit expert testimony scope, eliminate diminished capacity as a defense, create a special verdict triggering a commitment proceeding of "not guilty only by reason of insanity," and require federal commitment for those who became insane after being found guilty.[63]

III
INSANITY LAW IN NORWAY

Norwegian insanity law is of particular significance and intrigue.[64] It is currently governed by the Medical Model of Insanity.[65] This model defines insanity as being a mental disorder exclusively and does not require the disorder to have a causal relation to the crime.[66] Norway's current model does not require any such causality or additional criteria.[67] This differs dramatically from various American insanity theories, and is unique as compared to all other current insanity theories across the world.[68] For example, most other insanity theories employ a mixed approach, which contains two criteria: a mental defect and certain inabilities causally resulting from the defect.[69] Certain civil law jurisdictions, including Russia, Germany, Spain, and Italy, among others, require an inquiry into whether or not the defendant was unable to understand the wrong due to the mental defect.[70]

The legal code in Norway in the late eighteenth century had not codified the concept of legal responsibility.[71] However, two legal scholars, Ludvig Holberg and Lauritz Norregaard, separately addressed and analyzed the issue of legal responsibility, and both determined that free will was required for culpability of a crime, and if someone did not have free will, they could not be held to be legally responsible.[72] By the time of the early nineteenth century, medical experts were playing an increased

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62 Parker, *supra* note 59, at § 39:16.

63 U.S. Dept. Just., Criminal Resource Manual § 634 (2022).

64 *See generally* Gröning, *Psychosis and Impaired Reality Testing*, *supra* note 5.

65 Gröning, *Remodelling Criminal Insanity*, *supra* note 4, at 3.

66 *Id.*

67 Gröning, *Psychosis and Impaired Reality Testing*, *supra* note 5, at 27.

68 *See* Stuckenberg, *supra* note 5, at 52.

69 *Id.* at 52–53.

70 *Id.* at 54.

71 Svein Atle Skålevåg, *The Irresponsible Criminal in Norwegian Medico-Legal Discourse*, 37 INT'L J.L. & PSYCHIATRY 82, 83 (2013).

72 *Id.*

role in analyses of states of mind in criminal courts.[73] In 1842, the criminal code was codified (the "1842 Code"). This code was described as a "classical" criminal code and was influenced by French law.[74] It was based upon principles of free will, such that "an act shall not be punished when committed by someone mad (*galne*) or demented (*afsindige*) or someone deprived of their wits by illness or old age."[75] This type of defense was separate and apart from crimes of passion and the like.[76]

Psychiatric treatment and care of the mentally ill became a public responsibility as a result of legislation in 1848.[77] This forced the state to build and run mental asylums and have local counties provide for treatment and care for mental health, which was later divided between the state, counties, and municipalities.[78] This legislation posited that only those with a mental illness who had the potential to benefit from psychiatric treatment should be put in an asylum, and if they did not have the potential to benefit from such treatment, they would be left to be cared for in a family household, usually in the households of farmers and fisherman.[79] However, the Norwegian Criminal Act of 1842 did not allow insane criminals admission to ordinary asylums, and the first criminal asylum in Norway was not opened until 1895.[80]

In 1902, another criminal code was codified (the "1902 Code"), replacing the 1842 Code.[81] It was created in response to a variety of criminal reforms in Norway, including the creation of juries, asylums, and a permanent board of forensic medicine, consisting of national experts in forensic psychiatry, to look over the testimony and qualifications of experts in the courtroom.[82] The prevailing view resulting in the reforms was that the 1842 Code contained too much legal jargon and would not be understandable to laymen, specifically jurymen, who were introduced during this time.[83] The leading reformer was

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73 *Id.*

74 Jørn Jacobsen & Vilde Hallgren Sandvik, *An Outline of the New Norwegian Criminal Code*, 3 BERGEN J. CRIM. L. & CRIM. JUST. 162, 164 (2015).

75 Skålevåg, *supra* note 71, at 84.

76 *Id.*

77 Åshild Fause, *Mental Illness and Social Class in Northern Norway, 1900-1940*, *in* SOCIAL CLASS AND MENTAL ILLNESS IN NORTHERN EUROPE 38, 38 (Petteri Pietikäinen & Jesper Vaczy Kragh eds., 2019).

78 *Id.*

79 *Id.* at 38, 41.

80 Maria Antonie Saether, *The Ideal of the Respectable Woman*, *in* SOCIAL CLASS AND MENTAL ILLNESS IN NORTHERN EUROPE, *supra* note 77, at 175, 180–81.

81 *See* Skålevåg, *supra* note 71, at 85.

82 *Id.*

83 *See id.*

Bernhard Getz who was in charge of the commission and tasked with creating new criminal procedures and reforming the criminal code.[84] At the time, the focus of criminal law was shifted to three categories: children, vagrancy, and alcoholism.[85] One of the biggest difficulties with the 1842 Code was that there was an unaddressed space between mental illness and the criminal law.[86] This was because the criminal code itself did not mention those with mental illness, but the Mental Illness Act of 1848 coined the term "mental illness," so as a result, one could be considered sane under the Mental Illness Act, and be held not liable under the criminal code. Thus, they would avoid both forced commitment to a mental institution and jail.[87] Getz proposed an exemption to culpability that was conditioned upon the defendant's ability or inability to realize the illegality of the crime and ability to hold power over himself.[88] Physicians gave input on the drafting of the code and they argued to insert medical terms within the code, and they met with the parliamentary committee on judicial affairs to compromise the wording.[89] The 1902 Code ultimately stated that "[a]n act is not punishable when committed by someone who's mentally ill, unconscious *or otherwise unaccountable* due to insufficiently developed mental facilities or deterioration of or morbid derangement of these, or due to force or immediate danger."[90]

The 1902 Code was subject to a variety of amendments but was not replaced until the code of 2005 (the "2005 Code").[91] The 1902 Code was in part replaced due to the large number of amendments made to it, which fragmented the code, and because the Legislative Commission of the criminal code was appointed to perform a full revision due to the antiquated nature of the older code.[92] The Commission wrote a total of eight reviews, starting in 1983 and continuing for twenty years, and these reviews resulted in a proposal for the new code by the Ministry of Justice.[93] However, the new code was not passed

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84 *Id.*

85 Frode Ulvund, *Penal Reforms, Penal Ideology, and Vagrants in Norway ca. 1900*, 3 BERGEN J. CRIM L. & CRIM. JUST. 184, 184 (2015).

86 *See* Skålevåg, *supra* note 71, at 85.

87 *Id.*

88 *Id.*

89 *See id.* at 86.

90 *Id.*

91 Jacobsen & Sandvik, *supra* note 74, at 164.

92 *Id.* at 165.

93 *Id.*

until June 19, 2015, and, as a result, the 2005 Code was not actually entered into the force of law until October of 2015.[94]

The new code is mostly a modernization of the 1902 Code, however, there is no difference between misdemeanors and crimes in the 2005 Code, as there was in the 1902 Code, and the differences are only reflected in the level of punishment.[95] The new code's goal is to give a better account of the requirements for criminal responsibility, offenses, as well types and ranges of punishments.[96] The 2005 Code states in Section 20 that a perpetrator of a crime needs to be sane to be able to be punished, and will not be considered sane if at the moment of the crime they were (1) less than fifteen years old, (2) psychotic, (3) severely mentally disabled, or (4) suffering from severe impairment of consciousness that was not self-induced.[97] As long as the individual is not found to be sane, they are not guilty of the crime for reason of insanity, and no causal link between the insanity and the crime committed is needed.[98] The term psychosis in prong two refers to the medical definition of the condition, and requires that the state of psychosis is apparent at the time of the offense, and that the defendant cannot simply have a psychotic disorder that is lying dormant.[99] If found to be psychotic at the time of the offense, Chapter 12 of the 2005 Code discusses committal to a compulsory psychiatric treatment center instead of prison.[100] This compulsory treatment can be continued if there is still a chance of recidivism, and this treatment itself must be found to be necessary "to protect the lives, health and freedoms of others, and it is a condition that the committed criminal offence did (or could have) represent a violation of these rights."[101]

During trial, forensic experts are appointed by the court and are required to present the court with advice on whether or not the defendant had one of the required conditions at the time of the crime, and the court then takes this advice into

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94 *Id.* at 166.
95 *Id.* at 181.
96 *Id.*
97 Mislav Burazer, *The Breivik Case and the Comparative Issues of Criminal (In)sanity*, 1 ST-OPEN, 2020, at 1, 5.
98 *Id.* at 6.
99 Linda Gröning, Unn K. Haukvik, Gerben Meynen & Susanna Radovic, *Constructing Criminal Insanity: The Roles of Legislators, Judges and Experts in Norway, Sweden and the Netherlands*, 11 NEW J. EUR. CRIM. L. 390, 393–94 (2020) [hereinafter Gröning, *Constructing Criminal Insanity*].
100 Jacobsen & Sandvik, *supra* note 74, at 178.
101 *Id.*

account to determine whether or not the defendant is insane.[102] Two experts are usually appointed and use a standard mandate, which was created by the Prosecutor General, the Court Administration, and the Norwegian Board of Forensic Medicine.[103] The experts must first determine a diagnosis based in the ICD-10 manual of diseases, the international classification for mental disorders, and then evaluate whether or not the defendant was psychotic using the current mandate guidelines and under the Penal Code.[104] The Norwegian Board of Forensic Medicine oversees all of the evaluations of defendants.[105] The courts will then rely upon these experts' knowledge to support their legal conclusions about whether or not the defendant is psychotic and thus should be found to be not responsible.[106]

The Norwegian Penal Code came under scrutiny in July 2011 after the terrorist attack in Oslo and Utoya.[107] Anders Behring Breivik detonated a 950-kg fertilizer-based car bomb on July 22, 2011 in Oslo.[108] He killed eight individuals and severely injured nine others.[109] After reports of gunfire were called in two hours later at a summer camp for the Norwegian Labor Party's Youth Organization on the island of Utoya, it was determined that Breivik had traveled to the island after the bombing by dressing as a police officer to gain access to the island ferry.[110] He shot at 600 individuals, killed sixty-nine of them, severely injured many others, and then called the police to give himself up.[111] He told the police that he was "Commander Anders Behring Breivik from the Norwegian anti-communist resistance movement."[112]

During the course of preparation for trial, as required by the 2005 Code, two forensic psychiatric experts conducted an evaluation.[113] During these interviews, Breivik told them he

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102 Pål Grøndahl & Ulf Stridbeck, *When Insanity Has Gone Undiscovered by the Courts: The Practice of the Norwegian Criminal Cases Review Commission in Cases of Doubts About Insanity*, 26 CRIM. BEHAV. & MENTAL HEALTH 212, 214–15 (2016).

103 Gröning, *Constructing Criminal Insanity*, *supra* note 99, at 395.

104 *Id.*

105 *Id.*

106 *Id.* at 396–97.

107 *Id.* at 397.

108 Ingrid Melle, *The Breivik Case and What Psychiatrists Can Learn from It*, 12 WORLD PSYCHIATRY 16, 18 (2013).

109 *Id.* at 16.

110 *Id.*

111 *Id.*

112 *Id.*

113 *Id.* at 17.

had "precedence as the ideological leader for the Knights Templars organization, with the mandate of being both a military order, a martyr organization, a military tribunal, judge, jury and executioner."[114] It was not until August 24, 2012 that the court found him sane and sentenced him to twenty-one years in preventative custody, with a minimum period of time of ten years, determining that he did not meet the criteria for schizophrenia under the ICD-10.[115] However, the fact that there was even a consideration that he could be found not legally responsible for his crimes under the current criminal model enraged the public.[116] This backlash was met with the appointment of a law commission to investigate the need for changes in the current model for insanity.[117]

The Norwegian Ministry of Justice and Public Security announced their bill in response to the proposals of the commission, put into effect on October 1, 2020.[118] They determined that an expert's role should be limited to the discipline and education that they know, while leaving it up to the judge to decide conviction or acquittal, and experts should only assess the defendant's state of mind based solely on clinical and scientific determinations and the ICD-10.[119] They stated that the experts should make a determination based upon these medical systems but should not analyze whether or not the law's requirement of psychosis is satisfied.[120] The Ministry additionally proposed that the criterion of psychosis be removed, and they replaced it with a requirement of not being accountable as a result of a severely divergent state of mind.[121] When deciding whether this standard is met, they stated that a focus should be placed on the lack of understanding of reality and functional ability of the defendant.[122] The goals of this reform are to focus less on direct medical references and to allow a greater range of ability to legally assess the mental state of defendants.[123]

The major goals of Norwegian insanity law are to establish retributive and utilitarian justice.[124] It is retributive and utilitarian in the sense that it views those with mental disease to

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114 *Id.*
115 *Id.* at 19.
116 *Id.* at 18.
117 Gröning, *Constructing Criminal Insanity*, *supra* note 99, at 397.
118 *Id.* at 397–98.
119 *Id.*
120 *Id.* at 397.
121 *Id.* at 397–98.
122 *Id.*
123 Gröning, *Remodelling Criminal Insanity*, *supra* note 4, at 3.
124 *Id.*

not be blameworthy due to their lack of culpability for their behavior, and the belief that they do not need to be punished for something they do not have the capacity to be responsible for.[125] Furthermore, the system factors in deterrence, as it finds that there is no societal gain by punishing those who cannot be deterred due to their lack of culpability and criminal responsibility.[126]

The Medical Model of Insanity in Norway can also be found to have benefits of rehabilitation.[127] For example, in 2017, a man named Stein killed his mother during one single catastrophic psychotic episode.[128] This episode occurred during a severe depressive episode due to his bipolar disorder, in part from lack of sleep and periods of darkness in arctic Norway.[129] He beat his mother to death after a hallucination told him his mother was possessed by a demon, additionally believing that this demon would destroy the world and thinking that this act would kill the demon but his mother would survive.[130] After being found insane under Norwegian insanity law, Stein spent a year at Asgard, a hospital in Norway, as an inpatient, learned how his mental disease had accelerated to such an extent before the crime, and how to care for himself to prevent a similar episode, and now lives on hospital grounds in his own apartment, while continuing to take part in outpatient therapy.[131]

Norwegian insanity law saw many alterations throughout the country's legal history and will undoubtedly continue to change. Legal responsibility as a concept was first considered in the eighteenth century.[132] In 1842, the criminal code was codified, determining sanity as a form of free will.[133] The prevalence of medical experts in criminal law led to the 1902 Code that excused an act from punishment if the actor was mentally ill at the time of the act.[134] The 2005 Code defined insanity in terms of psychosis and gave various criteria for finding in-

125 *Id.*
126 *Id.*
127 Karen Bouffard, *Why Psychotic Killers Get Care, Not Prison Time in Norway*, THE DETROIT NEWS, Oct. 10, 2019, https://www.detroitnews.com/story/news/special-reports/2019/10/10/why-psychotic-killers-get-care-not-prison-time-norway/1636366001/ [https://perma.cc/TC29-U6RK].
128 *Id.*
129 *Id.*
130 *Id.*
131 *Id.*
132 Skålevåg, *supra* note 71, at 83.
133 *Id.* at 84.
134 *Id.* at 86.

sanity, a determination the court must make through guidance of medical experts who interview and diagnose the defendant.[135] This progression of the law ultimately left the public unsatisfied after the *Breivik* case, and resulted in another reform of the law, with a goal of focusing less on medical references and more on the legal assessment.[136]

IV
HOW THE MEDICAL MODEL COULD BE WIDELY IMPLEMENTED IN THE U.S.

This Note proposes a model based upon the unique Norwegian Medical Model of Insanity, which could be implemented as the main test of insanity in the United States. Its goals would be to promote rehabilitation and treatment of individuals. This Note also explores the implications of this proposal, as well as its potential drawbacks. There are various routes to implement this model, both legislatively and judicially. One way to allow the Medical Model to be widely implemented in the United States is to amend the current Federal Insanity Statute. The most feasible way would be for a bill to be passed by Congress, modifying or altering the current Federal Insanity Statute. Currently, the Federal Insanity Statute reads:

> It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.[137]

This Note argues that the following changes be made to the Federal Insanity Statute so that it contains elements found in the Medical Model, to read:

> It is an affirmative defense to a prosecution under any Federal statute that, according to three court-appointed psychiatric experts' independent evaluations, at the time of the crime the defendant suffered from a mental disease or defect consisting of symptoms of psychosis within the meaning of the DSM-5, is therefore criminally insane, and cannot be held criminally responsible within the meaning of the criminal justice system.

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135 Jacobsen & Sandvik, *supra* note 74, at 164; *see also* Burazer, *supra* note 97, at 5–6; Grøndahl & Stridbeck, *supra* note 102, at 214–15.

136 Gröning, *Constructing Criminal Insanity*, *supra* note 99, at 397; Gröning, *Remodelling Criminal Insanity*, *supra* note 4, at 3.

137 18 U.S.C. § 17(a).

The Model Penal Code could undergo revision, following the amended Federal Insanity Statute's new requirements, to remove the element of lacking capacity to appreciate criminality of the crime or to conform conduct to the law.[138] Instead, it would simply require a showing that the defendant suffered from a mental disease or defect consisting of psychotic symptoms within the DSM-5. States could then easily adopt the revised Model Penal Code approach to insanity.[139]

An alternative way for this Model to be implemented nationally would be judicially, such as to have the issue decided by the Supreme Court. Hypothetically, one could argue the unconstitutionality of a certain state's insanity law.[140] The Fourteenth Amendment requires due process,[141] and a petitioner could argue that a state's insanity law violated this right by requiring an incapacitated individual to demonstrate more than simply the existence of a mental defect. However, this route to implementation is unlikely to be successful in the first place, as the current composition of the Supreme Court is unlikely to grant *certiorari*. However, even if it were to do so, the Supreme Court has previously held in *Kahler v. Kansas* that the constitutional right of due process is not violated if a state does not provide an insanity defense that acquits a defendant unable to distinguish right from wrong.[142]

It should be noted that for the proposed model to be beneficial in any way, prior to implementation, there would need to be a better rehabilitation system in the United States. Currently, those found to be insane are "sent [to psychiatric institutions] until they have recovered or are considered stable

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138 DRESSLER, *supra* note 24, at 331.

139 Note also, however, that the order presented is not the order required for success. Implementing the proposed model could be just as successful were the Model Penal Code to be revised first, encouraging states to adopt the revised Code. The Federal Insanity Statute could later be amended. Similarly, states themselves could undergo legislation to promote a Medical Model of Insanity, which may then encourage the Model Penal Code to undergo revision and the Federal Insanity Statute to be amended.

140 Were this argument to eventually arrive before the Supreme Court under a *writ of certiorari,* the Court would then have the opportunity to make a majority ruling on this issue and set the grounds for state insanity rules. For example, such decision could opine that "although States retain the sovereignty to make their own laws, a defendant's due process rights are violated if they assert the insanity defense, and they are burdened with proving elements beyond simply the existence of the mental disorder itself."

141 U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

142 Kahler v. Kansas, 140 S. Ct. 1021, 1024–25 (2020).

enough to gradually return to the community . . . . For some of them, this never happens, and they stay in the hospital until they die."[143] These institutions are considered different from prisons because the individuals are called "patients" and not "inmates," they receive therapy and treatment, they dress in ordinary clothes, and they can have more visitors.[144] However, they are also very similar to prisons in that there are guards, instances to be put in solitary confinement, and the use of various punishments.[145] Additionally, North Texas State Hospital, the only maximum security mental health center in Texas, had a waitlist of 228 individuals in 2016 who were waiting to be restored to competency pre-trial.[146] Furthermore, mental health asylum reform has unintentionally resulted in mental health centers being unable to support individuals who had been released from larger institutions due to a lack of psychiatrists and health workers to support the demand, leading many former patients to wind up in jail.[147]

As a result, were the Medical Model to be implemented in the United States, there would need to be a major change to the mental healthcare system as a whole to support a larger demand for mental institution beds. The Medical Model does not have the "but-for" element that many other insanity tests have, which would undoubtedly increase the findings of insanity from its currently low percentage. Indeed, according to an eight-state study, the insanity defense is used in under one percent of all court cases, and is only twenty-six percent successful when it is used.[148]

One possible way to combat this higher demand would be to re-allocate resources, which are currently directed at prisons, to building and maintaining more mental health centers. Ultimately, this would save money, as treatment in a mental health center is significantly less costly than housing an in-

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143 Sarah Kuta, *What Life Is Like for The 'Criminally Insane' at a Maximum-Security Psychiatric Hospital*, A&E: TRUE CRIME BLOG (July 9, 2021), https://www.aetv.com/real-crime/patient-experience-at -forensic-psychiatric-hospitals [https://perma.cc/4B4X-LRJQ].

144 *Id.*

145 *Id.*

146 Ted Oberg, *ABC13 Goes Inside Hospital Where Accused Killers Receive Mental Health Treatment*, ABC13 (Nov. 16, 2019), https://abc13.com/north-texas-state-hospital-accused-killers-mental-health-mentally-insane/5700345/ [https://perma.cc/ZRJ9-YX58].

147 Salley Satel, *Out of the Asylum, Into the Cell*, N.Y. TIMES: OPINION (Nov. 1, 2003), https://www.nytimes.com/2003/11/01/opinion/out-of-the-asylum-into-the-cell.html [https://perma.cc/5TUQ-SHKS].

148 Kuta, *supra* note 143.

mate in prison.[149] For example, the average Michigan inmate costs the state over $34,000 annually, whereas intense case management for mentally ill individuals costs the state a little over $9,000 per year per individual.[150] Furthermore, reform of the mental health care system as a whole could help prevent these individuals with mental illnesses from committing crimes in the first place, if properly treated. One example could involve building more regional treatment facilities for those with extreme mental illnesses to obtain a proper system of treatment and care.[151] With more access points, individuals with mental diseases who become homeless or find themselves in other poor situations would have an easier time accessing mental health treatment, as long as there was adequate community and familial support for them to do so. Thus, the number of crimes committed, and thus the need for incarceration in the first place, could be severely reduced.[152]

Another important caveat to consider is that the Medical Model of Insanity, as implemented in the United States, could be interpreted as a "status defense," as the legal and philosophical academic Michael Moore defines it, finding that "[t]he 'status' of being mentally ill is a sufficient condition to exempt the defendant from punishment."[153] This could have some unintended consequences. Unlike other insanity tests, for instance the Product Test, the Medical Model does not provide a "but-for" interpretation of insanity linking the insanity to the cause of the crime.[154] Instead, the status of being insane may remove any responsibility from the individual, making them not a responsible agent at all, when really, this insanity may only occur periodically, and should therefore not absolve them from all actions.[155] This Model could therefore be overinclusive in the

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149 Joel Miller, *Doing Time for a Mental Illness Needlessly and Costing Taxpayers*, AM. MENTAL HEALTH COUNS. ASS'N: BLOG (July 23, 2015), http://connections.amhca.org/blogs/joel-miller/2015/07/23/doing-time-for-a-mental-illness-needlessly-and-costing-taxpayers [https://perma.cc/3M5F-EHEX].

150 *Id.*

151 Norm Ornstein & Steve Leifman, *Locking People Up Is No Way to Treat Mental Illness*, THE ATLANTIC (May 30, 2022), https://www.theatlantic.com/ideas/archive/2022/05/mental-illness-treatment-funding-incarceration/643115/ [https://perma.cc/6EPR-PAM5].

152 Miller, *supra* note 149 ("[A]dvocates say that one factor remains steady: with proper treatment, many of these incarcerations [of the mentally ill] could have been avoided.").

153 Johannes Bijlsma, *A New Interpretation of the Modern Two-Pronged Tests for Insanity*, 1 NETHERLANDS J. LEGAL PHIL. 29, 31 (2018).

154 Durham v. United States, 214 F.2d 862, 874–75 (D.C. Cir. 1954).

155 Bijlsma, *supra* note 153, at 33.

sense that it may act as a status defense under all circumstances.[156]

Furthermore, regarding insanity defenses in general, certain legal experts, prosecutors, lawmakers, and others worry that the defense as a whole enables criminals to avoid punishment, and thus does not promote the punitive and deterrence policies of the criminal justice system.[157] This concern would only be exacerbated by a more relaxed model, such as the one suggested.[158]

However, is it not more appealing to be overly inclusive rather than underinclusive? Imagine the other extreme: The insanity defense as a whole is abolished. Not only would prisons be even more overrun than they already are, but even fewer individuals would obtain any sort of treatment they so desperately need. Although expansive, the proposed Model, on the other hand, ensures that as many individuals who have mental illness have the opportunity to be treated as possible, regardless of whether or not they can demonstrate that the illness itself directly caused the crime.

V
APPLYING THE PROPOSED AMENDED FEDERAL INSANITY STATUTE MODELED AFTER NORWAY'S MEDICAL MODEL TO HISTORICAL CASES

This section will explore three important cases in legal history and examine how they would have been determined had they been decided under the proposed Federal Insanity Statute modeled after Norway's Medical Model of Insanity. It is important to note that this section does not attempt to supplant the knowledge and education needed of a medical expert, as is required by the proposed Model, nor is it meant to suggest the ease or ability to diagnose individuals. It is purely demonstrative, to illustrate the benefits and drawbacks of the proposal. Further, it aims to analyze if the hypothetical outcomes promote the Model's rehabilitation and treatment goals, as well as whether or not it meets the punitive and deterrence goals of the criminal justice system.[159]

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156 *See id.* at 31.

157 Christina L. Lyons, *The Insanity Defense*, 29 CQ RESEARCHER, no. 36, 2019, at 1, 3.

158 *Id.*

159 The punitive approach posits that the defendant is both bad and a threat to society and must be punished for his crimes. *See generally* F. B. Raymond, *Reasons We Punish,* 7 J. HUMANICS 65 (1979). The deterrence approach suggests that by imprisoning the defendant, not only is he punished, but other people will

A. M'Naghten

As discussed earlier, M'Naghten was a man who killed the Prime Minister's secretary, Edward Dummond, thinking Drummond was actually the Prime Minister, under the delusion that he was being persecuted, and that he needed to kill the Prime Minister in order to stop the persecution that he was experiencing.[160] While M'Naghten was being interrogated at the police station after his crime, he stated "The Tories in my native city have compelled me to do this. They followed me to France, into Scotland and all over to England. . . . [T]hey do everything in their power to harass and persecute me. In fact, they wish to murder me."[161] During the course of the trial, Dr. Monro, who had examined M'Naghten, stated that he found that M'Naghten's delusions were real, along with other doctors who asserted his insanity.[162]

Had M'Naghten's crime been committed in a post-reformed Federal Insanity Statute America, he would have been examined by three psychiatric experts and interviewed and analyzed according to the DSM-5. It is likely that M'Naghten would have been found to have schizophrenia under the DSM-5, and as a result of it being a disorder consisting of psychotic symptoms, he would have been found to have been suffering from a mental disease at the time of the crime, he would have been found to be insane, and he would therefore not be culpable for his crimes. In order to be diagnosed as schizophrenic, the DSM-5 requires a person to have two or more core symptoms, the first of which is hallucinations, delusions, or disorganized speech for at least one month and gross disorganization and diminished emotional expression.[163] It is likely that after tests and interviews, medical professionals would have found that he satisfied this criteria, based upon the information we have at this time regarding M'Naghten and the events surrounding the crime, and he would have been found to be insane under the amended Statute.

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see his imprisonment, and be deterred from committing similar crimes themselves. *Id.*

160 *See* M'Naghten's Case, 8 Eng. Rep. 718, 719 (H.L. 1843); *see also* Garvey, *supra* note 19, at 124.

161 T.V. Asokan, *Daniel McNaughton (1813-1865)*, 49 INDIAN J. PSYCHIATRY 223, 223 (2007).

162 *Id.*

163 *Schizophrenia*, CLEVELAND CLINIC, https://my.clevelandclinic.org/health/diseases/4568-schizophrenia [https://perma.cc/3Z3J-LLSC] (last reviewed June 28, 2023); *see also* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 87-90 (5th ed. 2013) [hereinafter DSM-5].

From a mental health perspective, this is a positive outcome. Hallucinations and delusions are the stereotypical exemplar of insanity, although not the exclusive designator. Under this Model, M'Naghten would be found to be insane and sent to a mental treatment center as opposed to prison, and thus would be given medication and treatment plans to help his condition improve. However, those who advocate for a deterrence-based approach may argue that this outcome is improper, as it does not provide any sense of punishment for the crime committed. Nonetheless, the proposal is aimed at primarily providing rehabilitation and treatment, rather than providing a method of punishment or deterrence.

B. Dahmer

Jeffrey Dahmer killed seventeen young men in Wisconsin between the years of 1978-1991 by meeting them in bars, bringing them home, strangling them, mutilating them physically and sexually, eating them, and storing their body parts in his apartment.[164] He pleaded his insanity at trial in 1994 after having been diagnosed with borderline personality disorder by a variety of psychiatrists, but due to the calculated nature of his crimes and cover up, the jury found him guilty of fifteen murders, he was sent to prison, and killed by a fellow inmate two years later.[165]

Had Dahmer pled insanity under the amended Federal Insanity Statute proposed in this Note, he would still likely have been found guilty and not insane. The DSM-5's criteria for diagnosing borderline personality disorder requires the finding of significant impairments in personality functioning, including impairments in identity or self-direction, impairments in empathy or intimacy, and pathological personality traits of negative affectivity such as emotional lability, anxiousness, separation insecurity, depression, as well as disinhibition including impulsivity and risk taking, and antagonism.[166] Despite the fact that borderline personality disorder is a mental disease in the DSM-5, and various psychiatrists found that Dahmer fit the criteria and diagnosed him with this disorder, psychosis is not

164 *Killers Who Claimed Insanity*, SWORD AND SCALE (Mar. 22, 2017), https://www.swordandscale.com/killers-who-claimed-insanity/ [https://perma.cc/X962-4TSV].

165 *Id.*

166 *DSM-5 and How It Affects the Diagnosis of BPD*, OPTIMUM PERFORMANCE INST., https://www.optimumperformanceinstitute.com/bpd-treatment/dsm-5-and-how-it-affects-the-diagnosis-of-bpd/ [https://perma.cc/2Z8M-349M] (last visited July 9, 2023).

a symptom of the disorder, and he therefore would not have met all the elements to be found insane under the proposed statute.

Those who advocate for a punitive-based system would argue that this outcome is proper. However, from a mental healthcare-based standpoint, one who has the propensity to eat human flesh requires serious mental health treatment, rather than being locked away in a cell. This example presents an instance where the proposed Model may not produce the outcome that best provides a route for rehabilitation and treatment, as is the goal of the proposal, and instead results in promoting punishment.

C. Steinberg

Steven Steinberg was accused of murdering his wife in 1981 with a kitchen knife by stabbing her twenty-six times.[167] At trial, he claimed temporary insanity due to his wife endlessly bothering him for money, and that he had done this while sleepwalking.[168] The jury acquitted him by finding that he was temporarily insane at the time of the murder and was therefore not responsible.[169]

However, if Steinberg's defense had been analyzed according to the Medical Model's amendment to the Federal Insanity Statute presented in Part IV, he likely would not have been found to be insane. The DSM-5 diagnoses sleepwalking as "[r]epeated episodes of rising from bed during sleep and walking about," as well as limited dream imagery recollection, existence of amnesia for the episodes, causing significant distress, not attributable to a substance, and co-existing mental disorders do not explain away these episodes.[170] He arguably does not even meet the criteria for a DSM-5 disorder, as his sleepwalking episode was not repeated, and it additionally is not a disorder involving psychosis, and he therefore would not have had a status defense of insanity under this proposed model.

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167 Tony Hillerman, *Crime/Mystery; The Defense Pleaded Nagging*, N.Y. TIMES (Oct. 9, 1988), https://www.nytimes.com/1988/10/09/books/crime-mystery-the-defense-pleaded-nagging.html [https://perma.cc/WJ9E-836W].

168 *Id.*

169 Lawrence Martin, *Can Sleepwalking Be a Murder Defense?*, LAKESIDE PRESS (2009), http://www.lakesidepress.com/pulmonary/Sleep/sleep-murder.htm [https://perma.cc/G9RM-FHE3].

170 *Sleepwalking*, PSYCHDB: PSYCHIATRY REFERENCE, https://www.psychdb.com/sleep/parasomnias/1-nrem-sleep-disorder/sleepwalking#dsm-5-diagnostic-criteria [https://perma.cc/PHQ8-WKLG] (last updated July 14, 2022); *see also* DSM-5, *supra* note 163, at 399–402.

From the rehabilitation and treatment perspective, he may require some sort of treatment, albeit a sleep-disorder treatment. This outcome is consistent with the rehabilitation aspect of the proposed Model. One who does not have a mental disorder does not require treatment in that sense. However, it appears as though he is not someone who would be found to be culpable, and thus from a punitive-policy perspective, would not be deserving of punishment.[171]

CONCLUSION

Ultimately, the insanity defense as a whole is a difficult concept to navigate. Norway's Medical Model certainly seems like a more predictable and pragmatic way of analyzing defendants who are claiming to be insane, by relying more on experts in the medical field to make the call of mental illness, as opposed to varying legal standards. However, the public pushed for a reform after the *Breivik* case in Norway, hoping for a focus more on a legal assessment and less on a medical reference, suggesting that the wide-spread implementation of the Medical Model in the United States might similarly not be well-received.[172]

Furthermore, there is potential that implementing the Medical Model would result in exceedingly more findings of insanity, meaning that it would absolve people of criminal lia-

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171 Additionally, because it may ease the burden on the defendant to prove insanity, the proposed amended Federal Insanity Statute may encourage more individuals who are actually insane to plead the defense of insanity in the first place. For example, the notorious "Son of Sam" serial killer claimed that he heard demons that forced him to commit murders, yet he pled guilty and did not assert the insanity defense. Anna Quindlen, *Berkowitz Pleads Guilty to Six 'Son of Sam' Killings*, N.Y. TIMES (May 9, 1978), https://www.nytimes.com/1978/05/09/archives/berkowitz-pleads-guilty-to-six-son-of-sam-killings-reference-to.html [https://perma.cc/8DB6-Z696]; *David Berkowitz: Son of Sam Killer*, CRIME MUSEUM, https://www.crimemuseum.org/crime-library/serial-killers/david-berkowitz/ [https://perma.cc/5AVT-HAGY] (last visited July 9, 2023). If he could demonstrate these delusions, he may have been found to have schizophrenia, as he was later diagnosed with, and under the amended Statute, he may have been successful in pleading insanity. *This Day in History: Son of Sam Serial Killer is Arrested*, HISTORY (Feb. 9, 2010), https://www.history.com/this-day-in-history/son-of-sam-arrested [https://perma.cc/6EMQ-JP9W]. Note, however, that he later admitted to making up the delusions, and experts would likely have found him to be malingering under the proposed Model. *Son of Sam: The Eerie Enigma of Killers Who "Hear Voices"*, CRIME & INVESTIGATION, https://www.crimeandinvestigation.co.uk/article/son-of-sam-the-eerie-enigma-of-killers-who-%25E2%2580%259Chear-voices%25E2%2580%259D [https://perma.cc/QRR3-V8M9] (last visited July 9, 2023).

172 Gröning, *Remodelling Criminal Insanity*, *supra* note 4, at 3; Gröning, *Constructing Criminal Insanity*, *supra* note 99, at 397.

bility even when they should be held accountable, due to the status nature of the defense. This may result in the public negatively reacting to these increased findings of insanity if it absolved those of criminal liability that they believed did not deserve to avoid punishment. But also, is that not the point of the Medical Model? Maybe certain individuals are currently found guilty when they really are insane, and the proposed model would provide for that, even if there was no "but-for" causal link between the disease and the cause of the crime.

Additionally, as mentioned previously, it is important to note the difficulty of the implementation of the Medical Model. It would inevitably lead to more findings of insanity, placing a heavier burden on the psychiatric system; a burden the country may be unable to support at this moment. If mental institutions are unable to support the heavy load of patients to oversee their recovery, then the insanity defense as a whole is useless from a rehabilitation standpoint. As a result, in order for this proposal to be effective, a widescale reform of the psychiatric system would need to occur to support the increased burden that would be placed on it.

This Note proposes a change to the current insanity system in the United States, which is a system that is presently incredibly varied and unpredictable. This proposal is meant to provide some unified test, and one that is based upon psychiatric experts' assessments, rather than primarily on the legal system, to determine if someone has a mental illness and should not be culpable for their crimes. Norway has seen benefits to this system, but it has also experienced drawbacks, and the United States could similarly experience difficulties with a new insanity test. It may enrage those looking for a stricter criminal justice system. It could result in the overflowing of mental institutions. It may cause other countries with stricter insanity rules to look down upon the United States when it comes to holding people accountable.

However, this Note stands for the belief that although no solution is perfect, focusing on treatment, rather than punishment, is a means to a better end for all involved. The proposed Model, as mentioned earlier, may be overly inclusive, but if implemented properly with a proper psychiatric reform, it has the potential to allow individuals who truly are suffering from serious mental illnesses to seek help, rather than prison time, and hopefully find the treatment they need to live a fulfilling life.