

# IMPERFECT INSANITY AND DIMINISHED RESPONSIBILITY

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## Abstract

Insanity's status as an all-or-nothing excuse results in the disproportionate punishment of individuals whose mental disorders significantly impaired, but did not obliterate, their capacities for criminal responsibility. Prohibiting the trier of fact from considering impairment that does not meet the narrow definition of insanity contradicts commonly held intuitions about mental abnormality and gradations of responsibility. It results in systemic over-punishment, juror frustration, and, at times, arbitrary verdicts as triers of fact attempt to better apportion liability to blameworthiness.

This Article proposes a generic partial excuse: Diminished Responsibility from Mental Disability. This excuse could be asserted as an affirmative defense at the option of the defendant and would be expressed as a fourth verdict in addition to the traditional forms of guilty, not guilty, and not guilty by reason of insanity. The partial excuse would recognize that the capabilities necessary for criminal responsibility exist along a spectrum. It would respond to the widespread belief that mental dysfunction, even when not rising to the level of insanity, may be so destructive of rationality that it merits a reduction in liability. The resulting verdicts would render our justice system more capable of accurately expressing community condemnation, increasing its legitimacy.

Evidence suggests that jurors would thoughtfully apply a partial responsibility verdict and that having that option would lead jurors to experience greater confidence and satisfaction

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than in the current all-or-nothing system. Outside the United States, numerous countries recognize partial responsibility for mental impairments, demonstrating the feasibility and benefits of the partial excuse. Because a diminished responsibility verdict would mitigate a defendant's sentence, its operation over time should reduce the mass incarceration and unjustified suffering of those with mental disabilities. The verdict could also connect defendants with treatment necessary for their clinical stability and well-being, as it has done in other countries.

Over the decades, several prominent scholars have offered proposals for partial excuses for diminished responsibility. None gained legislative traction. This Article's proposal differs from prior proposals in four key respects. First, it limits its purview to rationality and volitional impairment from mental disabilities, a traditionally recognized form of diminished blameworthiness. Second, to be workable and attractive to states, this proposal recommends that states draw definitions of partial responsibility from existing statutory frameworks, namely contemporary insanity and Guilty But Mentally Ill standards. The latter, present in about a dozen states, permits juries to find a defendant guilty while highlighting the defendant's mental illness; however, these verdicts carry no necessary sentencing or treatment consequences. Deriving a partial responsibility standard from existing statutes should carry greater local legitimacy than wholly new language. Third, in light of the realities of mental disorders and its lived experience, this proposal does not advocate for withholding mitigation from defendants who contributed to their impairment through failure to comply with medical directives. Finally, the proposal draws upon foreign partial responsibility statutes to glean possible sentencing and treatment consequences that could accompany the verdict and respond to any public safety threat.

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## INTRODUCTION

At around 4:30 a.m. on June 21, 2000, Officer Jeffrey Moritz drove to a residential subdivision to investigate complaints of loud music coming from a pickup truck.<sup>1</sup> Moritz located the truck and pulled over seventeen-year-old Eric Clark, the truck's driver.<sup>2</sup> Shortly after exiting his vehicle, Clark shot and killed Moritz.<sup>3</sup> Clark fled on foot, hiding his gun in a knit cap and discarding it in a nearby yard.<sup>4</sup> He was soon arrested and charged with first-degree murder.<sup>5</sup> At a bench trial, Clark raised the affirmative defense of insanity, which required him to prove that, "at the time of the commission of the criminal act, [he] was afflicted with a mental disease or defect of such severity that [he] did not know the criminal act was wrong."<sup>6</sup> Lay and expert witnesses testified to Clark's severe paranoid schizophrenia and increasingly bizarre behavior in the months before the shooting, including his belief that aliens were impersonating government agents and trying to kill him.<sup>7</sup> A psychiatrist testified that Clark, fueled by delusions, shot Moritz believing he was a hostile alien; therefore, Clark was incapable of understanding the wrongfulness of his act.<sup>8</sup> In rebuttal, a psychiatrist for the State testified that, although psychotic during the shooting, Clark's hiding of the gun and attempt to evade capture demonstrated his appreciation of the wrongfulness of his conduct.<sup>9</sup>

Three verdicts were available to the trial judge in Clark's case: guilty, not guilty, and not guilty by reason of insanity (NGRI).<sup>10</sup> The judge acknowledged Clark's severe mental illness and active psychosis at the time of the shooting.<sup>11</sup> However, he believed Clark's mental disorder "did not . . . distort his perception of reality so severely that he did

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1. These facts are based on those in *Clark v. Arizona*, 548 U.S. 735, 743 (2006). For a more complete (and accurate) rendition of the facts in *Clark*, see generally Janine Young Kim, *The Story of Clark v. Arizona: The Incredible Shrinking Insanity Defense*, in *CRIMINAL LAW STORIES* (Robert Weisberg & Donna Coker eds., 2013).

2. See Kim, *supra* note 1, at 277.

3. *Id.*

4. *Id.*

5. *Clark*, 548 U.S. at 743.

6. *Id.* at 744; ARIZ. REV. STAT. ANN. § 13-502(A) (2006).

7. *Clark*, 548 U.S. at 745.

8. See *id.*

9. See *id.*

10. See Kim, *supra* note 1, at 274.

11. *Clark*, 548 U.S. at 746.

not know his actions were wrong.”<sup>12</sup> Falling just short of the state’s insanity standard, Clark was found guilty of first-degree murder.<sup>13</sup> He received a sentence of life in prison without the possibility of release for twenty-five years, the minimum mandatory sentence.<sup>14</sup>

*Clark v. Arizona*<sup>15</sup> demonstrates the law’s current treatment of mental disorder at the guilt phase of a criminal adjudication: if the mental disorder does not meet the threshold and manifest in the particular form of legal insanity required (which it rarely does),<sup>16</sup> then it typically does not factor into the assessment of liability.<sup>17</sup> But insanity’s status as an all-or-nothing defense contradicts commonly held intuitions about mental abnormality and gradations of responsibility and blameworthiness.<sup>18</sup> The law conceives of a person as a “practical reason[er],” who uses legal rules to guide their actions.<sup>19</sup> Criminal responsibility thus requires normative competence: the abilities to apprehend one’s situation, draw upon moral and legal standards, evaluate options in a rational manner, and act for the good reasons supplied by the law.<sup>20</sup> Society has always

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12. *Id.* (quoting Joint Appendix at 334, *Clark v. Arizona*, 548 U.S. 735 (2006) (No. 05-5966)).

13. *Id.*

14. *Id.*; Kim, *supra* note 1, at 281.

15. 548 U.S. 735 (2006).

16. See DORIS J. JAMES & LAUREN E. GLAZE, BUREAU JUST. STAT., MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 3 (2006); Lisa A. Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 BULL. AM. ACAD. PSYCHIATRY L. 331, 334 (1991).

17. *Clark*, 548 U.S. at 744–46. In addition, some states permit the defendant to use mental health evidence to rebut *mens rea*. See Paul H. Robinson, *Murder Mitigation in the Fifty-Two American Jurisdictions: A Case Study in Doctrinal Interrelation Analysis*, 47 TEX. TECH L. REV. 19, 22–23 (2014) (explaining that a minority of jurisdictions allow evidence of mental illness to “negate any element” of a crime) [hereinafter Robinson, *Murder Mitigation*].

18. See Paul H. Robinson, *Criminal Law’s Core Principles*, 14 WASH. U. JURIS. REV. 153, 182, 190 (2021) [hereinafter Robinson, *Core Principles*]; Stephen J. Morse, *Diminished Capacity: A Moral and Legal Conundrum*, 2 INT’L J.L. & PSYCHIATRY 271, 274 (1979) (“The insanity defense establishes a dividing line between only two classes of offenders—the responsible and nonresponsible—thus arguably violating strong moral intuitions about degrees of responsibility and blameworthiness.”) [hereinafter Morse, *Diminished Capacity*].

19. Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, 23 CRIME & JUST. 329, 339 (1998) [hereinafter Morse, *Excusing and the New Excuse Defenses*].

20. See David O. Brink, *The Nature and Significance of Culpability*, 13 CRIM. L. & PHIL. 347, 355 (2019); R. A. Duff, *Who Is Responsible, for What, to Whom?*, 2 OHIO ST. J. CRIM. L. 441, 444–45 (2005) [hereinafter Brink, *The Nature and Significance of Culpability*].

recognized that mental abnormality may so impair these abilities that its corrosive impact must be recognized in responsibility assessments.<sup>21</sup> But mental abnormalities—and their destructive effect on the capabilities necessary for criminal responsibility—exist along a spectrum.<sup>22</sup> As mental disabilities vary by degree, so should criminal responsibility.<sup>23</sup> Otherwise, individuals with mental disabilities—which constitute a significant proportion of justice-involved individuals<sup>24</sup>—will continue to be systematically over-punished.<sup>25</sup>

Recognizing partial responsibility due to mental disability is necessary for criminal law to accurately express community condemnation, to accord with “the community’s shared intuitions of justice,” and to maintain the law’s legitimacy.<sup>26</sup> Research consistently documents that the imposition of a partial responsibility verdict reflects mock jurors’ perceptions of a defendant’s mental impairment, capacity for displaying

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21. See HERBERT FINGARETTE & ANN FINGARETTE HASSE, *MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY* 206 (1979) (arguing that defenses on the basis of mental disability stem from “acceptance by the courts of the general proposition that irrationality necessarily vitiates responsibility”); Carl-Friedrich Stuckenberg, *Comparing Legal Approaches: Mental Disorders as Grounds for Excluding Criminal Responsibility*, 4 BERGEN J. CRIM. L. & CRIM. JUST. 48, 51 (2016) (“It seems that mental disturbances have served as valid excuses from liability and punishment from time immemorial.”). See generally RITA J. SIMON & HEATHER AHN-REDDING, *THE INSANITY DEFENSE, THE WORLD OVER* (2006) (providing a comparative analysis of the defenses of insanity and partial responsibility).

22. See Roy E. Pardee III, Note, *Fear and Loathing in Louisiana: Confining the Sane Dangerous Insanity Acquittee*, 36 ARIZ. L. REV. 223, 245 (1994) (recognizing that “insanity is not an all or nothing issue[,] that there is a continuum of mental functioning, and a given defendant may come close to insanity without being truly insane”).

23. See David O. Brink, *Partial Responsibility and Excuse*, in *MORAL PUZZLES AND LEGAL PERPLEXITIES: ESSAYS ON THE INFLUENCE OF LARRY ALEXANDER* 39 (Heidi M. Hurd ed., 2018) [hereinafter Brink, *Partial Responsibility and Excuse*]; George E. Dix, *Psychological Abnormality and Capital Sentencing*, 7 INT’L J. L. & PSYCHIATRY 249, 252 (1984).

24. See JAMES & GLAZE, *supra* note 16, at 3; FRED OSHER ET AL., COUNCIL STATE GOV’TS JUST. CTR., *ADULTS WITH BEHAVIORAL HEALTH NEEDS UNDER CORRECTIONAL SUPERVISION: A SHARED FRAMEWORK FOR REDUCING RECIDIVISM AND PROMOTING RECOVERY* 3–4 (2012), [https://www.bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/CSG\\_Behavioral\\_Framework.pdf](https://www.bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/CSG_Behavioral_Framework.pdf) [<http://perma.cc/R6W-3HLQ>].

25. See DAVID O. BRINK, *FAIR OPPORTUNITY AND RESPONSIBILITY* 387 fig.15.4 (2021) [hereinafter BRINK, *FAIR OPPORTUNITY*].

26. See Paul H. Robinson et al., *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 1942–43 (2010).

rational behavior, and level of responsibility for the crime.<sup>27</sup> Studies demonstrate that, in mental disability cases, jurors view partial responsibility as offering a more moral, just, and appropriate option than the verdicts of guilty or NGRI.<sup>28</sup> Relatedly, jurors report feeling more confident reaching a partial responsibility verdict<sup>29</sup> than reaching either of the other verdicts.<sup>30</sup> These studies affirm the principle of blameworthiness proportionality<sup>31</sup>—the principle that an offender’s liability and punishment should vary with the offender’s blameworthiness—which, as Professor Paul Robinson has documented, has “near universal appeal across demographics, cultures, and history.”<sup>32</sup>

A chorus of scholars has decried the injustice of our current binary system of guilt. Scholars disagree, however, as to the best means of redress. Over the decades, a number of prominent scholars have offered proposals for partial excuses for

27. See E. Lea Johnston & Vincent T. Leahey, *Psychosis, Heat of Passion, and Diminished Responsibility*, 63 B.C. L. REV. 1227, 1284–86, 1284 n.344 (2022) (collecting studies). Most relevant research on this topic originated in the 1980s and early 1990s and concerned jurors’ perceptions and use of Guilty But Mentally Ill verdicts. See ERIN E. COTRONE, *THE GUILTY BUT MENTALLY ILL VERDICT: ASSESSING THE IMPACT OF INFORMING JURORS OF VERDICT CONSEQUENCES* 4–5 (Nov. 12, 2016) (Ph.D. dissertation, University of South Florida), <https://digitalcommons.usf.edu/cgi/viewcontent.cgi?article=7683&context=etd> [<https://perma.cc/HQ5JE7AD>]. Trial judges typically do not inform jurors of the consequences of this verdict. *Id.* Empirical research indicates that jurors equate Guilty But Mentally Ill (GBMI) verdicts with verdicts of lesser responsibility. See Norman J. Finkel & Solomon M. Fulero, *Insanity: Making Law in the Absence of Evidence*, 11 MED. & L. 383, 395–96 (1992); Caton F. Roberts et al., *Verdict Selection Processes in Insanity Cases: Juror Construals and the Effects of Guilty but Mentally Ill Instructions*, 17 L. & HUM. BEHAV. 261, 273 (1993). They appear to use these verdicts to “correct” both NGRI and guilty verdicts. See Johnston & Leahey, *supra*, at 1283–84, 1284 n.341 (discussing research).

28. See Caton F. Roberts & Stephen L. Golding, *The Social Construction of Criminal Responsibility and Insanity*, 15 L. & HUM. BEHAV. 349, 366 (1991); Caton F. Roberts et al., *Implicit Theories of Criminal Responsibility: Decision Making and the Insanity Defense*, 11 L. & HUM. BEHAV. 207, 226 (1987) [hereinafter Roberts et al., *Implicit Theories*] (“The overwhelming majority (86%) of subjects fel[t] that the GBMI sentencing alternative was moral, just, and an adequate means of providing for the treatment needs of mentally ill offenders.”).

29. See Johnston & Leahey, *supra* note 27, at 1284 (noting jurors’ equation of GBMI verdicts with verdicts of diminished responsibility).

30. Roberts et al., *Implicit Theories*, *supra* note 28, at 226.

31. Robinson, *Core Principles*, *supra* note 18, at 182.

32. *Id.* at 182, 192. To effectuate blameworthiness proportionality, Robinson has proposed a generic mitigation provision. See *id.* at 211; Paul H. Robinson, *Mitigations: The Forgotten Side of the Proportionality Principle*, 57 HARV. J. ON LEGIS. 219, 254–62 (2020) [hereinafter Robinson, *Mitigations*].

diminished responsibility.<sup>33</sup> Most (but not all)<sup>34</sup> proposals derive from the groundbreaking work of Professor Herbert Fingarette and attorney Ann Fingarette Hasse, who proposed the “Partial Disability of the Mind” verdict in their seminal 1979 book, *Mental Disabilities and Criminal Responsibility*.<sup>35</sup> Their proposal assesses both the defendant’s ability to act rationally with regard to the criminal prohibitions bearing on his conduct and the defendant’s culpability in inducing the mental disability responsible for that irrationality.<sup>36</sup> Existing

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33. See FINGARETTE & HASSE, *supra* note 21, at 247–57, app. I at 263–72 (outlining the Disability of Mind (DOM) doctrine and plea—which focus on the defendant’s capacity for rational conduct regarding the criminal significance of the defendant’s act—and guiding their execution, with culpable and nonculpable “Partial Disability of Mind” verdicts representing forms of diminished responsibility); NORMAN J. FINKEL, *INSANITY ON TRIAL* 292–96 (1988) (outlining an expanded DOM test as an affirmative defense); Brink, *Partial Responsibility and Excuse*, *supra* note 23, at 53–59 (proposing a tripartite or tetravalent responsibility structure that includes a culpability assessment either at the guilt phase of adjudication or at a separate culpability phase); Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289, 300 (2003) (“The jury may find the defendant [Guilty But Partially Responsible] if, at the time of the crime, the defendant suffered from substantially diminished rationality for which the defendant was not responsible and which substantially affected the defendant’s criminal conduct.” (emphasis omitted)) [hereinafter Morse, *Diminished Rationality*]; FEDERICA COPPOLA, *THE EMOTIONAL BRAIN AND THE GUILTY MIND: NOVEL PARADIGMS OF CULPABILITY AND PUNISHMENT* 158 (2021) (proposing this situational prong for addition to Morse’s GPR standard: “The jury may find the defendant GPR if, at the time of the crime, the defendant acted under a non-culpable state of substantial psychological distress for which there is a reasonable explanation or excuse”); Stephen P. Garvey, *Dealing with Wayward Desire*, 3 CRIM. L. & PHIL. 1, 12, 12 n.11 (2009) (advocating a “supplement” to Morse’s GPR standard that recognizes defects of will in addition to defects of reason); Robinson, *Mitigations*, *supra* note 32, at 263 (outlining the proposal that “[a]n offender is entitled to a mitigation in liability and punishment if the offense circumstances and the offender’s situation and capacities meaningfully reduce the offender’s blameworthiness for the violation” and listing three factors to consider); cf. Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 360 (2002) (proposing, in light of the science of consciousness, that the voluntary act requirement be broadened to recognize a “third category of semi-voluntary acts,” which “would include individuals who were either previously shoehorned into the first two categories [of voluntary or involuntary acts] or wrongly given the insanity defense”).

34. See Brink, *Partial Responsibility and Excuse*, *supra* note 23, at 52–59; Robinson, *Mitigations*, *supra* note 32, at 255–62.

35. See FINGARETTE & HASSE, *supra* note 21, at 254–57; Morse, *Diminished Rationality*, *supra* note 33, at 299 n.23.

36. See FINGARETTE & HASSE, *supra* note 21, at 206, 247–57, app. I. at 263–72.



proposals have generated much scholarly enthusiasm<sup>37</sup> but, as of yet, no traction among state legislatures.

Several characteristics may account for the cool reception of prior proposals. First, some proposals would extend the partial excuse to all rationality-diminishing impairments, regardless of origin.<sup>38</sup> Professor Stephen Morse's "Guilty But Partially Responsible" (GPR) verdict, for instance, would permit a fixed sentence reduction for common conditions such as grief, stress, fatigue, trauma, rage, jealousy, and poverty.<sup>39</sup> Such a capacious partial excuse is at odds with criminal systems and popular norms of responsibility.<sup>40</sup> Second, some proposals call for the creation of a complicated and cumbersome adjudicatory structure. Professor Norman Finkel's proposal, for instance, would result in three phases of adjudication<sup>41</sup> and—when a disability of the mind is present—six possible verdicts.<sup>42</sup> Third, and perhaps most fundamentally, prior proposals are insufficiently sensitive to and respectful of existing responsibility doctrines. The disconnect of these proposals from contemporary conceptions of criminal nonresponsibility renders their adoption extremely unlikely and possibly unworkable.

This Article offers a more pragmatic option.<sup>43</sup> It proposes an affirmative partial defense of Diminished Responsibility from Mental Disability, which is different from the other options in four ways. First, it limits its purview to rationality and volitional impairment from mental disabilities, a traditionally recognized form of diminished blameworthiness. Second, to be workable and attractive to states, it proposes partial responsibility standards that extend from each jurisdiction's existing standard for insanity. Broader, contemporary insanity standards and the impairments included in Guilty But

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37. See Douglas Husak, "Broad" Culpability and the Retributivist Dream, 9 OHIO ST. J. CRIM. L. 449, 468 (2012).

38. See Morse, *Diminished Rationality*, *supra* note 33, at 300 (proposing a verdict that would recognize "substantially diminished rationality for which the defendant was not responsible and which substantially affected the defendant's criminal conduct" regardless of its source) (emphasis omitted).

39. See *id.*; Johnston & Leahey, *supra* note 27, at 1272–73 (discussing the implications of Morse's proposal).

40. Johnston & Leahey, *supra* note 27, at 1273.

41. See FINKEL, *supra* note 33, at 292–96.

42. *Id.* at 305 (listing the six DOM verdicts).

43. My proposal coheres with the broad strokes of Morse's initial 1979 proposal, which Morse did not actually endorse but instead suggested as a workable model if one were to exist. See Morse, *Diminished Capacity*, *supra* note 18, at 295–96.

Mentally Ill (GBMI) verdicts inspire jurisdiction-specific modifications.<sup>44</sup> Partial responsibility standards derived from existing statutes should carry greater local legitimacy than wholly new language, and the current use of their statutory derivatives should inspire confidence and render adoption more likely. Third, mindful of the realities of mental disorders and its lived experience, this proposal deviates from others by mitigating the punishment of defendants who contributed to their diminished rationality through failure to comply with medical directives.<sup>45</sup> Fourth, it draws upon nearly twenty foreign partial responsibility structures to glean possible sentencing and treatment consequences that should accompany the verdict.<sup>46</sup> The partial excuse of Diminished Responsibility from Mental Disability would be practical, would faithfully reflect the defendant's culpability, and would serve a useful dispositional function.

This Article proceeds in the following fashion. Part I responds to arguments that mitigation at sentencing offers a sufficient and more appropriate response to the partial responsibility of offenders with a mental disability. It also establishes the urgency of adopting a partial responsibility standard by surveying the massive problem of undertreated serious mental illness in U.S. carceral facilities.

Part II offers a practical, partial solution to the disproportionate punishment of those with mental disorders: an affirmative partial defense of Diminished Responsibility from Mental Disability. Drawing from contemporary statutes in the United States and foreign jurisdictions, the Part first evaluates appropriate components of a partial responsibility standard, including forms of incapacity, levels of impairment, and qualifying mental disabilities. The Part ends by suggesting forms of implementation, each dependent upon a jurisdiction's insanity defense.

Part III concerns the consequences that should attend this verdict. Rooted in the theory of limiting retributivism, the Part proposes a novel scheme, informed by a study of eighteen

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44. Jurors typically mistake GBMI verdicts as partial responsibility standards. See *supra* note 27 and accompanying text. However, this verdict typically carries no necessary sentencing or treatment consequences. See *infra* text accompanying note 102.

45. See discussion *infra* Part II.D.3.c.

46. For a more granular, comparative review of these partial responsibility measures, see generally E. Lea Johnston et al., *Diminished Criminal Responsibility: A Multinational Comparative Review*, INT'L J.L. & PSYCHIATRY, Sept. 13, 2023, at 1, 1–6 [hereinafter Johnston et al., *Diminished Criminal Responsibility*].

partial responsibility standards around the world. This scheme would reduce punishment by combining a statutory minimum with a fixed range within which a judge can vary the sentence. It also draws upon contemporary statutory structures, within and beyond the United States, in detailing treatment measures that should attend the verdict.

## I. THE CASE FOR A PARTIAL EXCUSE FOR IMPERFECT INSANITY

The real case of *Clark v. Arizona*, profiled in the Introduction, illustrates the injustice of the current system and the need for a partial responsibility verdict.<sup>47</sup> Currently, a defendant's mental disorder may factor into a criminal adjudication in three ways, two at the guilt phase and one at sentencing. First, some states allow relevant evidence of impaired cognition or moral awareness to rebut certain forms of *mens rea*.<sup>48</sup> Second, virtually all states provide an insanity defense.<sup>49</sup> In these states, the trier of fact may acquit the defendant if, at the time of the criminal act, the defendant's mental disorder rendered them unable to appreciate the wrongfulness of the act or (in fewer states) unable to conform their conduct to the law.<sup>50</sup> Third, a judge may consider the defendant's mental disorder at sentencing.

Critics argue that judicial consideration at sentencing renders a partial responsibility verdict unnecessary.<sup>51</sup> However, as *Clark* demonstrates, mitigation may not be an option: a judge's hands may be tied by a mandatory minimum sentence. This is often the case with homicide and other serious offenses.<sup>52</sup> Even when a judge may mitigate for diminished

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47. Clark was clearly delusional when he killed Moritz, as recognized by both the prosecutor and the trial judge. Kim, *supra* note 1, at 279–81. Indeed, given Clark's delusional structure—homicidal aliens posing as law enforcement officers—his crime may have been a manifestation of his severe mental illness.

48. See Robinson, *Murder Mitigation*, *supra* note 17, at 22–23. These statutes are of limited utility to many defendants with mental disorders, however. Mental disorders more often skews the reasoning that motivates a defendant's actions than it obliterates the defendant's understanding of the actions.

49. See *infra* note 93 and accompanying text.

50. See *infra* notes 94–98 and accompanying text.

51. See Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 850–51 (1977).

52. See, e.g., JAMES ORLANDO, CRIMES WITH MANDATORY MINIMUM PRISON SENTENCES—UPDATED AND REVISED, 2017-R-0134 (2017), <https://www.cga.ct.gov/2017/rpt/2017-R-0134.htm> [<https://perma.cc/KC9F-8V53>] (identifying crimes with mandatory minimum sentences in Connecticut).

responsibility, mitigation is discretionary.<sup>53</sup> Large disparities assuredly exist between judges as to whether, and how much, to mitigate on this basis.<sup>54</sup> Exercises of discretion in the justice system are often plagued by inconsistency, unpredictability, and arbitrariness.<sup>55</sup> Variance is particularly likely in the context of mitigation due to mental disability. Sentencing judges must balance lessened responsibility with assessment of dangerousness, and evidence suggests that mental disorder (often erroneously equated with dangerousness) is as likely to be aggravating as it is to be mitigating.<sup>56</sup>

Moreover, partial responsibility should not be considered at the opaque, largely unreviewable stage of sentencing. Partial responsibility is a proper subject for the trier of fact.<sup>57</sup> Responsibility—a dimension of desert—is a social construct;<sup>58</sup> the factfinder, as the moral representative of the community, determines whether the offender's state of mind was so atypical that, for purposes of criminal law, the offender's culpability is either absent or different in kind.<sup>59</sup> Jurors are competent to evaluate capacity, which is a central issue in insanity and provocation claims.<sup>60</sup> Capacity is also a central issue in the thirty-six states that permit diminished capacity evidence to

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53. Robinson, *Core Principles*, *supra* note 18, at 211.

54. See Morse, *Diminished Rationality*, *supra* note 33, at 298–99.

55. See, e.g., Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 805–22 (2012) (exploring the possible operation of racial bias in each phase of prosecutorial discretion).

56. See Dix, *supra* note 23, at 263.

57. David O. Brink & Dana K. Nelkin, *Fairness and the Architecture of Responsibility*, in 1 OXFORD STUDIES IN AGENCY AND RESPONSIBILITY 284, 306 (David Shoemaker ed., 2013) (“If complete incompetence is relevant to the guilt phase and a full excuse, then partial competence is also relevant to the guilt phase and a partial excuse, because it appeals to the very same factors that a full excuse appeals to, only to a reduced degree.”); FINGARETTE & HASSE, *supra* note 21, at 203–04 (arguing that issues pertaining to their proposed partial responsibility doctrine must be resolved by the verdict, “for the trial is the forum specifically designed to assure due process and justice in rendering society’s judgment on the defendant’s criminal culpability”); Morse, *Diminished Rationality*, *supra* note 33, at 299; Robinson, *Mitigations*, *supra* note 32, at 265; see Herbert Fingarette, *Diminished Mental Capacity as a Criminal Law Defence*, 37 MOD. L. REV. 264, 268 (1974) [hereinafter Fingarette, *Diminished Mental Capacity*].

58. See Morse, *Excusing and the New Excuse Defenses*, *supra* note 19, at 383.

59. Fingarette, *Diminished Mental Capacity*, *supra* note 57, at 268.

60. See Arenella, *supra* note 51, at 852. In addition to assessing the defendant’s subjective volitional control, provocation also includes objective criteria that limit the defense’s reach. See Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 206 (1982).

rebut (at least some forms of) *mens rea*.<sup>61</sup> Indeed, allocating the subject of partial responsibility to community surrogates may be particularly appropriate given the “complicated nature of the decision to be made—intertwining moral, legal, and medical judgments.”<sup>62</sup> While some commentators have argued to the contrary,<sup>63</sup> there is no compelling reason to treat partial responsibility differently from other forms of capacity assessment currently entrusted to the jury. Indeed, as Robinson has recently observed, the U.S. Constitution may compel jury deliberation over partial responsibility.<sup>64</sup>

Maintenance of the current, predominantly binary structure of responsibility at the guilt phase results in the gross over-punishment of many criminal defendants with mental abnormalities.<sup>65</sup> Criminal law sets a low threshold for responsibility. The insanity plea is intended as exceptional, and very few of the sickest defendants benefit from it. Most successful insanity pleas involve psychosis.<sup>66</sup> An estimated 15% of state prisoners and 24% of jail inmates show signs of a psychotic disorder,<sup>67</sup> but the insanity defense is raised in fewer than 1% of felony cases and is successful only around a quarter of the time.<sup>68</sup> These figures suggest that many individuals with serious, reality-distorting mental abnormalities will be found as responsible as individuals with fully intact decision-making abilities.<sup>69</sup>

Failing to recognize partial responsibility due to mental disability has staggering consequences. Due in part to

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61. Robinson, *Murder Mitigation*, *supra* note 17, at 22–23 (reporting that “[t]hirteen states permit mental illness to negate only a specific intent” while “twenty-three jurisdictions . . . take the Model Penal Code approach of allowing mental illness evidence to negate any element”).

62. *King v. United States*, 372 F.2d 383, 389 (D.C. Cir. 1966).

63. Arenella, *supra* note 51, at 852, 860.

64. See Robinson, *Mitigations*, *supra* note 32, at 265.

65. A limited exception is the recognition of the heat of passion partial defense, which can reduce an intentional homicide upon adequate provocation to voluntary manslaughter. This partial excuse is typically not available to those whose passion stemmed from a mental abnormality. See Johnston & Leahey, *supra* note 27, at 1255.

66. See GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* § 8.02, at 206 (4th ed. 2018) (asserting that “the majority (60-90%) of defendants acquitted by reason of insanity are diagnosed as psychotic”).

67. JAMES & GLAZE, *supra* note 16, at 3.

68. Callahan et al., *supra* note 16, at 334.

69. See BRINK, *FAIR OPPORTUNITY*, *supra* note 25, at 387 fig.15.4 (2021) (illustrating the results of our bivalent system of responsibility, where guilt determinations tend to deviate significantly from just deserts).

increased staffing, psychiatric medications, and psychiatric evaluations, it is significantly more costly to house and treat incarcerated people with serious mental illnesses<sup>70</sup> than those without.<sup>71</sup> Jails and prisons are ill-equipped to safely house and care for these inmates.<sup>72</sup> A 2017 report by the Bureau of Justice Statistics found that approximately two-thirds (64%) of prisoners who reported symptoms of serious psychological distress and three-fourths (70%) of similarly reporting jail inmates were not receiving mental health treatment when interviewed.<sup>73</sup>

Lack of treatment leads to health deterioration, predation, and suffering. People with serious psychiatric needs are more likely to be physically and sexually victimized.<sup>74</sup> Less able to adapt successfully to carceral life, they are more likely to commit disciplinary infractions,<sup>75</sup> which may be punished with loss of good-time credits, placement in disciplinary segregation,

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70. Researchers estimate that roughly one in seven male inmates (14%) and one in three female inmates (31%) suffer from a serious, disabling mental illness, such as schizophrenia, bipolar disorder, or major depressive disorder. See OSHER ET AL., *supra* note 24, at 3–4.

71. See Rachel Riley, *The Cost of Caring for Mentally Ill Inmates*, GAZETTE (May 19, 2019), [https://gazette.com/life/health/the-cost-of-caring-for-mentally-ill-inmates/article\\_86b44a74-7352-11e9-9170-b79662bf61ec.html](https://gazette.com/life/health/the-cost-of-caring-for-mentally-ill-inmates/article_86b44a74-7352-11e9-9170-b79662bf61ec.html) [https://perma.cc/BA9P-EAFX] (“Nationwide, jails spend 2 to 3 times more on inmates who require mental health care than on inmates who don’t have those needs, the National Association of Counties estimates.”); OSHER ET AL., *supra* note 24, at 8 (describing that it is difficult to determine these costs at the systemic level); U.S. GOV’T ACCOUNTABILITY OFF., *FEDERAL PRISONS: INFORMATION ON INMATES WITH SERIOUS MENTAL ILLNESS AND STRATEGIES TO REDUCE RECIDIVISM* 17–21 (2018) (finding that the Bureau of Prisons does not track the cost of inmates with serious mental illness and that selected states track only a subset of these costs).

72. See *infra* notes 293–306 and accompanying text (detailing shortcomings in mental screening and referral procedures); E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. CRIM. L. & CRIMINOLOGY 147, 158–83 (2013) (discussing the likelihood of physical and sexual assaults, housing in solitary confinement, and psychological deterioration during incarceration) [hereinafter Johnston, *Vulnerability and Just Desert*].

73. See JENNIFER BRONSON & MARCUS BERZOFKY, U.S. DEP’T JUST., *INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011–12*, 8 tbl.6 (2017). These findings were largely duplicated in a 2021 report. See LAURA M. MARUSCHAK ET AL., U.S. DEP’T JUST., *INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS 1* (2021) (finding that 13% of state and federal prisoners met the threshold for serious psychological distress but that 60% of those state and 74% of those federal prisoners were not receiving treatment).

74. See Johnston, *Vulnerability and Just Desert*, *supra* note 72, at 161–69 (detailing studies).

75. See *id.* at 171–72 (detailing studies).

and longer stays in prison and jail.<sup>76</sup> Indeed, the Bureau of Justice Statistics has documented that state prisoners with mental disorders spend, on average, five months longer in prison than those without mental disorders.<sup>77</sup> Much of this time may be spent in solitary confinement, which may exacerbate inmates' mental disorders or lead to psychosis.<sup>78</sup> Reports suggest that *Clark v. Arizona*'s Eric Clark has had this typical experience: exhibiting "odd behaviors and bizarre beliefs," serving time in isolation due to his "trouble handling interactions with other inmates," and spending most of his period of imprisonment in a maximum-security unit.<sup>79</sup>

Recognizing partial responsibility would not end the incarceration of individuals with mental disability. But, depending on the verdict's consequences, its widescale adoption could reduce the proportion of offenders with mental disorders housed in carceral facilities, shorten sentences, increase the use of non-carceral punishment, and expand access to treatment. Most importantly, liability and punishment would better reflect the blameworthiness of offenders with mental abnormalities.

It is important to acknowledge the animating goals of this Article and the extent to which limiting its proposed partial excuse to mental disability departs from an ideal standard.<sup>80</sup> The partial excuse of Diminished Responsibility from Mental Disability is driven by practicality and the goals of faithfully tracking culpability, minimizing wrongful verdicts, existing in a workable form, and serving a defensible dispositional function. While mindful of the dictates of retributive justice and the science of mental abnormality, this Article is not focused on resolving "knotty matters of justifying and excusing conditions" or on identifying and defending the most theoretically defensible standard.<sup>81</sup> Myriad sources of irrationality undoubtedly exist, but throughout history societies around the globe have recognized mental disability as distinctly capable of generating the kind of irrationality that undermines a person's

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76. See Jamie Fellner, *A Corrections Quandary: Mental Illness and Prison Rules*, 41 HARV. C.R.-C.L. L. REV. 391, 401–02 (2006); Johnston, *Vulnerability and Just Desert*, *supra* note 72, at 169–78.

77. JAMES & GLAZE, *supra* note 16, at 8.

78. See Johnston, *Vulnerability and Just Desert*, *supra* note 72, at 174–78.

79. Kim, *supra* note 1, at 298.

80. Other scholars have also limited their proposed partial excuses to mental disability. See FINGARETTE & HASSE, *supra* note 21, at 200–02.

81. Finkel & Fulero, *supra* note 27, at 385 (distinguishing between the variety of functions served by the insanity defense and the extent that they can be at odds).

status as a responsible agent.<sup>82</sup> Foreign partial responsibility standards are a testament to the enduring, distinctive nature of mental disability.<sup>83</sup> Of the eighteen nations whose responsibility standards are reviewed in the Appendix, all countries except Spain limit their diminished responsibility provisions (like their nonresponsibility provisions) to mental abnormalities.<sup>84</sup> Moreover, all insanity standards in the United States are similarly limited.<sup>85</sup> If this limitation is acceptable for criminal nonresponsibility, it should be acceptable for partial responsibility.<sup>86</sup> Indeed, the global consistency in limiting partial responsibility to mental disability suggests that failing to bound the standard in this way would doom the proposal.

The remainder of this Article proposes possible statutory approaches to partial responsibility. Part II evaluates discrete components of a possible diminished responsibility standard drawn from existing insanity and GBMI statutes and suggests various forms of implementation. Part III uses insights from both GBMI and foreign partial responsibility statutes to propose particular sentence-reduction and treatment

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82. See Stephen J. Morse, *The Ethics of Forensic Practice: Reclaiming the Wasteland*, 36 J. AM. ACAD. PSYCHIATRY L. 206, 209 (2008) (discussing the role of folk psychology in shaping our understanding of ourselves as persons responsive to the good reasons supplied by the law); *id.* at 212 (“The reason that we excuse some defendants with disorders is that they were sufficiently incapable of rationality or incapable of controlling their behavior in the context in question.”).

83. See *infra* Appendix (delineating the full and partial nonresponsibility standards of eighteen civil law countries).

84. See *id.*; Johnston et al., *Diminished Criminal Responsibility*, *supra* note 46, at 3 tbl.2. Spain recognizes two forms of partial responsibility. *Id.* An incomplete irresponsibility defense exists when the elements for a complete exemption for irresponsibility due to mental anomaly or alteration exist only to a diminished or partial degree. See Manuel Cancio Meliá, *Partial Defences Due to Loss of Control and Diminished Responsibility Under Spanish Criminal Law*, in LOSS OF CONTROL AND DIMINISHED RESPONSIBILITY: DOMESTIC, COMPARATIVE AND INTERNATIONAL PERSPECTIVES 341, 343 (Alan Reed & Michael Bohlander eds., 2011) [hereinafter LOSS OF CONTROL]. Spain also recognizes “diminished responsibility by analogy,” which permits attenuation of punishment based on “similarity and analogy to mental disorder.” Florencia Lorenzo García et al., *Trastornos de la personalidad en la jurisprudencia española* [Personality Disorders in Spanish Jurisprudence], 42 SPANISH J. LEGAL MED. 62, 62, 64 (2016); Susana Mohino et al., *Personality Disorders and Criminal Responsibility in the Spanish Supreme Court*, 56 J. FORENSIC SCI. 150, 152 (2011).

85. See E. Lea Johnston, *Delusions, Moral Incapacity, and the Case for Moral Wrongfulness*, 97 IND. L.J. 297, 357–63 (2022) (reporting legal standards for insanity across states); CAL. PENAL CODE §§ 25, 29.8 (West 2024) (setting forth the jury instructions for the insanity defense in California).

86. Robinson, *Core Principles*, *supra* note 18, at 295.



consequences that should attend the verdict. The final Part concludes and evaluates possible weaknesses of this approach.

## II. THE DEFINITION OF PARTIAL RESPONSIBILITY

Unlike other proposals,<sup>87</sup> this Article does not endorse a single, universal partial responsibility standard. Rather, the most appropriate and feasible partial responsibility standard for a particular jurisdiction depends on its nonresponsibility (insanity) standard, as well as its views on personality disorders and other matters.<sup>88</sup> In prior work, a colleague and I suggested that states derive partial responsibility standards from existing statutory structures, namely less stringent insanity standards and GBMI statutes.<sup>89</sup> Foreign partial responsibility laws provide additional examples of acceptable partial responsibility definitions.<sup>90</sup> Although it is unlikely that the wording of a partial responsibility test would affect verdict distributions,<sup>91</sup> using language from an existing statutory framework should enhance the legitimacy of the new standard and lower its threshold for adoption. A review of existing insanity, GBMI, and foreign partial responsibility statutes suggests three ways in which a penal code could distinguish partial from full nonresponsibility: (1) types of incapacity, (2) degree of impairment, and (3) qualifying mental health conditions. These existing laws also highlight potential sources of contention and differentiation, including the treatment of personality disorders and of impairments for which the defendant may be wholly or partially responsible.

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87. See *supra* note 33 (outlining others' proposals).

88. See discussion *infra* Part II.D.3. Responsibility is ultimately a normative assessment, so insanity standards must reflect the values of each community. See Johnston & Leahey, *supra* note 27, at 1278.

89. See Johnston & Leahey, *supra* note 27, at 1277–93.

90. See *infra* Appendix; Johnston et al., *Diminished Criminal Responsibility*, *supra* note 46, at 3 tbl.2.

91. See Finkel & Fulero, *supra* note 27, at 397 (finding “no significant difference[s]” in the verdict distributions or responsibility ratings of defendants between the diminished responsibility (no instructions) and the GBMI (instructions) groups). Similarly, numerous empirical studies demonstrate that words are of little, if any, consequence in insanity verdict distributions. See Johnston & Leahey, *supra* note 27, at 1279 n.308 (collecting studies).

### A. Sources of Inspiration: Insanity, GBMI, and Foreign Partial Responsibility Standards

A partial responsibility standard will naturally derive from a jurisdiction's nonresponsibility standard.<sup>92</sup> Therefore, when composing a partial responsibility measure, it is necessary to start with a jurisdiction's insanity defense. Forty-eight jurisdictions in the United States currently provide an affirmative defense of insanity.<sup>93</sup> Forty-six of these jurisdictions follow the traditional *M'Naghten* standard in recognizing "moral incapacity,"<sup>94</sup> meaning they designate as insane a defendant who did not understand the wrongfulness of her criminal act due to mental disease or defect.<sup>95</sup> In line with the

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92. The partial responsibility standards of countries around the globe bear out this intuition. See *infra* Appendix.

93. Johnston, *supra* note 85, at 308 n.67; see also *id.* at 357–63 n.408 (setting forth central components of all insanity standards in the United States as of January, 2022); Kahler v. Kansas, 140 S. Ct. 1021, 1051–59 (2020) (listing all jurisdictions' insanity standards except Alaska's). Two states—Arizona and Oregon—provide a "Guilty Except for Insanity" verdict, which does not result in acquittal but serves as a conduit for treatment limited to the maximum sentence permitted by the statute for the crime for which the person was found guilty. See ARIZ. REV. STAT. ANN. § 13-502(A) (2023); OR. REV. STAT. §§ 161.295(1), 161.328 (2023). Four states—Idaho, Kansas, Montana, and Utah—do not afford an insanity defense but allow mental health evidence to rebut the *mens rea* of a charged offense. See IDAHO CODE § 18-207(1), (3) (2023); KAN. STAT. ANN. § 21-5209 (2023); MONT. CODE ANN. § 46-14-102 (2024); UTAH CODE ANN. § 76-2-305 (West 2023).

94. See *M'Naghten's Case* [1843] 8 Eng. Rep. 718, 722 (HL) ("[I]n all cases . . . 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, [sic] know he was doing what was wrong.").

95. See Johnston, *supra* note 85, at 308, 308 n.68; State v. Fichera, 903 A.2d 1030, 1034 (N.H. 2006) ("A defendant asserting an insanity defense must prove two elements: first, that at the time he acted, he was suffering from a mental disease or defect; and, second, that a mental disease or defect caused his actions."). Most (twenty-nine) jurisdictions follow the narrow *M'Naghten* standard and seemingly require total incapacity. See *supra* text accompanying note 94; *infra* note 98. A substantial minority (sixteen jurisdictions) merely require substantial moral incapacity. See Kahler, 150 S. Ct. at 1055–56 (listing the jurisdictions that require moral incapacity). Twenty jurisdictions also include a "cognitive incapacity" component, which assesses the defendant's ability to understand the nature and quality of an act. See Johnston, *supra* note 85, at 309 n.80 (listing jurisdictions with this component); ALASKA STAT. § 12.47.010(a); N.D. CENT. CODE § 12.1-04.1-01(1) (recognizing moral and cognitive incapacity only for crimes with a "willfully" *mens rea*). However, cognitive incapacity is of marginal importance because it is subsumed by moral incapacity, and very few defendants exhibit this particular deficiency. See

Model Penal Code (MPC),<sup>96</sup> sixteen U.S. jurisdictions also include volitional incapacity—an inability to conform one’s conduct to the requirements of law—in their insanity standards.<sup>97</sup> While some jurisdictions’ statutes seemingly require total moral or volitional incapacity for a finding of insanity, others only require substantial incapacity.<sup>98</sup> These differences in forms and degrees of incapacity provide useful fodder for partial responsibility standards.

GBMI and foreign partial responsibility statutes exemplify other ways to formulate partial responsibility standards. GBMI verdicts, which currently exist in thirteen states,<sup>99</sup> are typically perceived as a “middle ground” verdict between “guilty and not guilty by reason of insanity.”<sup>100</sup> These verdicts allow a jury to find guilty, but label as “mentally ill,” a defendant who was not legally insane during the criminal act but who had a mental

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Clark v. Arizona, 548 U.S. 735, 753–54 (2006) (observing that a person who cannot comprehend the nature of her act cannot understand its wrongfulness); Elizabeth Poché, Note, *Kahler v. Kansas: A Defense Denied*, 98 DENV. L. REV. 867, 894–95 (2021) (explaining that “mental illness rarely renders defendants so out of touch with reality as to not understand the nature of their acts”).

96. See MODEL PENAL CODE § 4.01(1) (AM. L. INST., Official Draft and Revised Comments 1985) (“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 law.”) (alteration in original).

97. See Johnston, *supra* note 85, at 309–10, 310 n.81, 357 (including Arkansas, Connecticut, Hawaii, Kentucky, Maryland, Massachusetts, Michigan, New Mexico, Oregon, Rhode Island, Vermont, Virginia, West Virginia, Wisconsin, Wyoming, and the District of Columbia); *supra* note 93 and accompanying text. Twelve of these states require only a substantial impairment, while four appear to require total volitional incapacity. See Johnston, *supra* note 85, at 357–63.

98. See *supra* notes 95, 97 and accompanying text. Few jurisdictions require “total” incapacity in practice, because this would restrict successful insanity pleas to “totally deteriorated, drooling, hopeless psychotics of long standing, and congenital idiots.” GREGORY ZILBOORG, MIND, MEDICINE, & MAN 273 (1943).

99. ALASKA STAT. § 12.47.030 (2023); DEL. CODE ANN. tit. 11, § 401(b) (2024); GA. CODE ANN. § 17-7-131 (2024); 720 ILL. COMP. STAT. 5/6-2 (2024); IND. CODE § 35-36-2-3 (2024); KY. REV. STAT. ANN. § 504.130 (West 2024); MICH. COMP. LAWS § 768.36 (2024); NEV. REV. STAT. § 174.035(1) (2024); OKLA. STAT. tit. 22, § 1161(A)(1) (2024); 18 PA. CONS. STAT. § 314 (2024); S.C. CODE ANN. § 17-24-20 (2021); S.D. CODIFIED LAWS § 23A-26-14 (2022); UTAH CODE ANN. § 76-5-205.5 (LexisNexis 2022). Two additional states offer “Guilty Except for Insanity” (GEI) verdicts. See *supra* note 93 (referring to Arizona and Oregon). However, these states, like Utah, do not recognize full irresponsibility with acquittal through a “not guilty by reason of insanity” verdict. *Id.*

100. See Pardee III, *supra* note 22, at 245.

disorder that caused certain rationality-diminishing impairments.<sup>101</sup>

Evidence suggests that states enacted these statutes to provide a “compromise” option for juries and to reduce undeserving insanity acquittals.<sup>102</sup> Jurors tend to construe GBMI findings as partial responsibility verdicts,<sup>103</sup> but they are not: they typically carry no diminution of punishment or mandatory treatment.<sup>104</sup> Consequently, scholars have widely condemned GBMI statutes as confusing and unjust.<sup>105</sup> Yet courts have upheld and even lauded GBMI statutes, in part for their ability to clarify the nature of nonresponsibility.<sup>106</sup> These verdicts have proven popular with juries, and empirical studies demonstrate their powerful effect on verdict distributions.<sup>107</sup> Juror experience, courts’ endorsement, and the language used by GBMI statutes to convey a “middle ground” between nonresponsibility and guilt may make these statutes fruitful sources of inspiration for a partial excuse of diminished responsibility due to mental disability.

In addition, foreign partial responsibility standards—some of which have existed for more than a century<sup>108</sup>—suggest approaches that might be particularly workable and likely to stand the test of time.<sup>109</sup> The Appendix includes the full and

101. Johnston & Leahey, *supra* note 27, at pt. III.B.2.c (reviewing criteria of GBMI statutes).

102. *Id.* at 1282 n.337.

103. *See supra* note 27.

104. Johnston & Leahey, *supra* note 27, at 1283 n.338. *But see* ALASKA STAT. § 12.47.050(b) (requiring treatment until he is no longer dangerous to the public); KY. REV. STAT. ANN. § 504.150(1) (requiring treatment “until the treating professional determines that the treatment is no longer necessary or until expiration of his sentence”).

105. *See* Johnston & Leahey, *supra* note 27, at 1283 nn.338–39 (listing sources of criticism).

106. *See, e.g.,* *People v. Bailey*, 370 N.W.2d 628, 630 (Mich. Ct. App. 1985) (“[S]uch [statutes], by disclosing the full spectrum of criminal responsibility, may afford the jurors a better understanding . . . .”); *People v. Lantz*, 712 N.E.2d 314, 321 (Ill. 1999) (“The separate verdict helps clarify . . . the differences between insanity and mental illness that falls short of insanity.”).

107. *See* Johnston & Leahey, *supra* note 27, at 1282–86; *infra* note 363 (discussing the minimal impact of the GBMI verdict on insanity acquittals).

108. *See, e.g.,* Takayuki Okada, *The Forensic Mental Health System and Psychopaths in Japan*, in 2 THE WILEY INTERNATIONAL HANDBOOK ON PSYCHOPATHIC DISORDERS AND THE LAW 359, 363 (Alan R. Felthous & Henning Saß eds., 2020) (discussing Japanese law); Allan Seppänen et al., *Forensic Psychiatry in Finland: An Overview of Past, Present, and Future*, INT’L J. MENTAL HEALTH SYS., Apr. 16, 2020, at 1, 2 (discussing Finnish history and law).

109. *See infra* Appendix (reporting legal standards from eighteen countries).

partial nonresponsibility standards of eighteen civil law countries. These countries were selected because each recognizes a lesser form of impairment than necessary for nonresponsibility. These partial responsibility standards (a) carry mandatory or discretionary consequences for liability, sentencing, or disposal, and (b) are included in the responsibility portion of the country's penal code or take the form of an incomplete nonresponsibility defense. They are also "generic" in the sense that they extend to all criminal offenses.<sup>110</sup> Examining these standards and their evolution yields useful insight into how to compose practicable standards for states within the United States that would enjoy popular support.

### B. *Forms of Incapacity*

Depending on a jurisdiction's insanity standard, one important difference between full and partial nonresponsibility could be the jurisdiction's recognition of volitional incapacity.<sup>111</sup> As discussed in the preceding Section, the insanity standards of most states include only moral incapacity.<sup>112</sup> In those states, the grounds of volitional incapacity should be added to a diminished responsibility standard so that each state's responsibility structure encompasses every capacity necessary for responsibility. Scholars agree that criminal responsibility

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110. Unlike the partial responsibility standards that exist in many common law countries, these generic standards are not confined to the crime of murder. See Anne G. Crocker et al., *Forensic Mental Health Systems Internationally*, in HANDBOOK OF FORENSIC MENTAL HEALTH SERVICES 3, 8–9, 13–14 (Ronald Roesch & Alana N. Cook eds., 2017) (explaining this distinction and listing representative countries).

111. One state, Alaska, recognizes only cognitive incapacity. See *supra* note 95 (defining cognitive incapacity). The four states without an insanity standard allow mental health evidence to rebut *mens rea*, in effect recognizing cognitive incapacity. See *supra* note 93 (reporting on Idaho, Kansas, Montana, and Utah); *Kahler v. Kansas*, 140 S. Ct. 1021, 1025–26 (2020) (discussing this equation in the context of Kansas). In these states, a legislature might find attractive a partial responsibility standard that includes moral incapacity, in this way expanding beyond the extremely narrow form of criminal nonresponsibility currently recognized and bringing the state into greater alignment with the moral values of the rest of the country. A better standard, however, would reflect the full gamut of capacities necessary for responsibility and include both moral and volitional incapacity. See *infra* notes 113–18 and accompanying text.

112. See *supra* notes 93–97. Some states also include cognitive incapacity, which is of marginal significance. See *supra* note 95.

requires the ability to conform one's conduct to moral mores.<sup>113</sup> Indeed, volitional incapacity is an established element of full and partial criminal nonresponsibility standards around the globe,<sup>114</sup> and the standards of all eighteen surveyed countries include both features.<sup>115</sup> Empirical research by Robinson and Professor John Darley shows that subjects in juror-behavior studies sharply reduce liability for offenders deemed to be "suffering from a high degree of dysfunction, whether . . . of the cognitive or conduct-control sort."<sup>116</sup> The MPC's insanity provision includes volitional incapacity,<sup>117</sup> and this aspect was one of the standard's most widely lauded innovations.<sup>118</sup> Thus, for those states currently employing a stringent *M'Naghten* insanity test of moral incapacity, the MPC standard provides a sound and time-tested model for a partial responsibility standard. Reflecting this principle, three states distinguish their GBMI verdicts by including volitional incapacity, which is absent from their insanity standards.<sup>119</sup>

Alternatively, a state could specify types of responsibility-diminishing impairments in its partial responsibility verdict.

113. See, e.g., Joshua Dressler, *Some Very Modest Reflections on Excusing Criminal Wrongdoers*, 42 TEX. TECH. L. REV. 247, 253 (2009) (theorizing that justice requires the ability to abide by "everyday moral practices"); Brink & Nelkin, *supra* note 57, at 284 (viewing cognitive and volitional capacities "as equally important to normative competence and, ultimately, responsibility"); Brink, *The Nature and Significance of Culpability*, *supra* note 20, at 348 (explaining that an action is not wrong unless the agent "lacks the right sort of mental capacities to recognize [the] wrongdoing"); Duff, *supra* note 20, at 444–45 (discussing the conformal capacity required for criminal responsibility). But see Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1634 (1994) (discussing internal coercion and arguing that "it must be irrational to want to produce unjustified harm so intensely that failure to satisfy that desire will create sufficient dysphoria to warrant an excuse").

114. See SIMON & AHN-REDDING, *supra* note 21, at 92.

115. See *infra* Appendix (surveying eighteen countries that maintain standards requiring moral capacity and volitional capacity); Johnston et al., *Diminished Criminal Responsibility*, *supra* note 46, at 3.

116. PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 132–33, 132 tbl.5.2 (1995).

117. See MODEL PENAL CODE § 4.01(1) (AM. L. INST., Official Draft and Revised Comments 1985) ("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 law.") (alteration in original).

118. See Eugene M. Fahey et al., "The Angels That Surrounded My Cradle": The History, Evolution, and Application of the Insanity Defense, 68 BUFF. L. REV. 805, 819 (2020).

119. See Johnston & Leahey, *supra* note 27, at 1289–90 (discussing the standards of Pennsylvania, Alaska, and South Carolina).

This approach would hold the advantage of more clearly identifying the source of the excuse.<sup>120</sup> Ten of the thirteen existing GBMI statutes follow this approach.<sup>121</sup> A partial responsibility standard modeled on Delaware's GBMI verdict,<sup>122</sup> for example, could read:

A person is guilty but partially responsible when, at the time of the conduct charged, that person, although physically capable of the conduct, suffered from a mental disorder that (a) substantially disturbed the person's thinking, feeling, or behavior in relation to the criminal act, or (b) left the person with insufficient willpower to choose whether to act or refrain from acting.

Drawing from other states' GBMI statutes, a partial responsibility standard could also recognize impairments in judgment, capacity to recognize reality, or ability to cope with the ordinary demands of life.<sup>123</sup>

### C. *Level of Impairment*

A partial responsibility standard should recognize a lesser degree of impairment than what is required for insanity. This is the primary way that foreign nations distinguish partial from full nonresponsibility.<sup>124</sup> A number of the eighteen countries listed in the Appendix require *total* incapacity for criminal nonresponsibility and merely a *reduced* capacity for partial responsibility.<sup>125</sup> Nearly half of the surveyed countries' penal codes, however, clarify that a cognizable impairment for partial

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120. See Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 986 n.114 (2002).

121. See *supra* note 99 and accompanying text.

122. DEL. CODE ANN. tit. 11, § 401(b) (2024).

123. See, e.g., GA. CODE ANN. § 17-7-131(a)(3) (2023); MICH. COMP. LAWS ANN. § 330.1400(g) (West 2023); ALASKA STAT. § 12.47.130(5) (2023).

124. See Johnston et al., *Diminished Criminal Responsibility*, *supra* note 46, at 4.

125. See *infra* Appendix (listing Brazil, France, Luxembourg, Switzerland, China, and Russia). Other countries only reduce the degree of impairment for one of multiple incapacities. See *id.* (discussing Greece lowering the necessary impairment level for moral incapacity (and not for volitional incapacity) from "did not have the ability" to "the capacity . . . has not completely disappeared, but has been significantly reduced" and Turkey, for partial responsibility, lowering the degree of impairment for volitional incapacity (but not moral incapacity) from "significantly diminished" to "diminished").

responsibility must be significant,<sup>126</sup> or even substantial or severe.<sup>127</sup> GBMI standards in the United States also use decreased degrees of impairment to distinguish a GBMI finding from a criminal nonresponsibility finding.<sup>128</sup>

#### D. *Qualifying Mental Conditions*

One fundamental issue to address is which mental health conditions will qualify for a partial responsibility finding. In particular, a jurisdiction must decide how general its terminology addressing cognizable mental conditions should be and whether to allow the same conditions to support both partial and full nonresponsibility verdicts. This issue is complex. Arguments exist for maintaining or enlarging the qualifying sources in a partial responsibility standard, but precedent suggests that jurisdictions will opt to exclude certain conditions, such as personality disorders and voluntary intoxication.<sup>129</sup> However, jurisdictions should avoid the categorical exclusion of personality disorders and culpably induced conditions.

##### 1. Same Qualifying Conditions as Nonresponsibility

Other countries' approaches suggest that many U.S. jurisdictions will choose to employ the same mental conditions in their partial as in their full nonresponsibility standards. About three-quarters (thirteen) of the countries surveyed in the Appendix permit the same qualifying conditions to support both full and partial nonresponsibility determinations.<sup>130</sup> Like U.S.

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126. See *id.* (listing Portugal, Finland, and Poland); *infra* note 127 (reporting the standard for analogical mitigating factors in Spain).

127. See *infra* Appendix (Italy, Germany, and the Czech Republic); *cf. id.* (depicting Japan, whose case law interprets statutory terms to require that a defendant be without ability for nonresponsibility and have abilities strongly impaired for partial responsibility). In addition, Spain requires "a severe degree of diminished cognitive and volitional capacities" for an incomplete irresponsibility defense but only a "mild degree of diminished cognitive and volitional capacities" for an analogical mitigating circumstance. Mohino et al., *supra* note 84, at 151.

128. See ALASKA STAT. § 12.47.030 (2023); 18 PA. CONS. STAT. § 314 (2023); S.C. CODE ANN. § 17-24-20 (2023).

129. See, e.g., *infra* Appendix (noting Switzerland finds that "[i]f it was possible for the person concerned to avoid his state of mental incapacity or diminished responsibility and had he done so to foresee the act that may be committed in that state," certain mitigations do not apply).

130. See *infra* Appendix (listing Brazil, France, Italy, Luxembourg, Germany, Greece, Turkey, China, Japan, Taiwan, Czech Republic, Poland, and Switzerland).



jurisdictions,<sup>131</sup> their criteria of mental disability are typically broad.<sup>132</sup> Their legal terminology reflects the core intuition that mental abnormalities of many kinds can significantly corrode rationality and thus merit consideration in the responsibility calculus.<sup>133</sup> Given the broad nature of qualifying mental disabilities, the diminished responsibility determinations in most foreign jurisdictions (like the nonresponsibility determinations in the United States) tend to focus on specific impairments flowing from the defendant's mental condition and the extent to which those impairments affected the defendant's normative competence at the moment of the criminal act—not on the type of mental abnormality itself.<sup>134</sup>

Allowing the same qualifying conditions to support both partial responsibility and insanity verdicts does not result in similar distributions of pathologies among individuals found fully and partially nonresponsible. Research in foreign jurisdictions shows that psychotic disorders are most often represented in groups judged irresponsible, while intellectual, neurocognitive, and personality disorders are more often observed in groups judged partially responsible.<sup>135</sup> This reflects

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131. See Johnston, *supra* note 85, at 357–63 (listing the mental criteria of existing U.S. insanity statutes).

132. See *infra* Appendix (providing examples, such as Italy (“infirmity”); Japan (“disease of mind”); and Poland (“mental disease, mental deficiency or other mental disturbance”)).

133. See Johnston, *supra* note 85, at 308 n.68.

134. Many have argued this focus on legally relevant impairment, rather than on diagnosis, is appropriate. See, e.g., Richard J. Bonnie, *Should a Personality Disorder Qualify as a Mental Disease in Insanity Adjudication?*, 38 J.L. MED. & ETHICS 760, 761 (2010) (observing that the legal relevance of experienced impairments matters in a given case, not a particular diagnosis).

135. See, e.g., V. Mahé, *Auteurs d'infractions dont le discernement était altéré ou aboli au sens de l'article 122-1 du Code pénal: étude descriptive sur 180 sujets* [Offenders Whose Judgment was Altered or Abolished Within the Meaning of Article 122-1 of the Penal Code: Descriptive Study on 180 Subjects], 6 LA REVUE DE MÉDECINE LÉGALE [REV. OF LEGAL MED.] 70, 73 fig.1 (2015) (describing 180 cases in France with full or partial abolition of discernment and finding that schizophrenia and chronic delusions accounted for 80% of the fully irresponsible group, while intellectual disability and organic brain damage constituted significant portions (27% and 14%, respectively) of the partial irresponsibility group); Junmei Hu et al., *Forensic Psychiatry Assessments in Sichuan Province, People's Republic of China, 1997–2006*, 21 J. FORENSIC PSYCHIATRY & PSYCH. 604, 611 tbl.3 (2010) (finding, in a study of 1,995 forensic assessments of responsibility conducted over a ten-year period in Sichuan Province, that 74% (820/1108) of those diagnosed with schizophrenia were judged as nonresponsible; disorders more common in findings of partial responsibility included dementia, personality disorder, and organic brain syndrome); Anna Danuta Golonka,

the consistent, global view that psychotic offenders whose actions are motivated by their psychoses are inappropriate subjects for punishment.<sup>136</sup> Notably, the distribution of disorders among diminished responsibility populations varies between countries.<sup>137</sup> One strong source of variation is the extent to which personality disorders tend to underlie diminished responsibility findings.<sup>138</sup>

## 2. Expanding Qualifying Conditions for Diminished Responsibility

Expanding the mental conditions that could support a partial responsibility verdict may be an attractive option for those U.S. jurisdictions that limit insanity to a “severe mental disease or defect”<sup>139</sup> or otherwise to psychosis.<sup>140</sup> Recognizing a greater variety of conditions could reflect a desire to better account for culpability judgments in liability determinations and a commitment to proportionate punishment. Additionally, the move could broaden the reach of some dispositional

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*Other Disturbances of Mental Function as a Cause of the Insanity of the Offender in Light of the Polish Criminal Code-Questions and Concerns*, J. FORENSIC LEGAL & INVESTIGATIVE SCI., Oct. 14, 2016, at 1, 4–5 (reviewing 179 forensic reports from 2004–2012 and finding that 63% (35/55) of the people found to be insane had been diagnosed with paranoid schizophrenia, while diminished sanity findings typically followed psycho-organic syndromes, post-traumatic conditions and damage to the central nervous system, alcoholism, and mild mental retardation).

136. FINGARETTE & HASSE, *supra* note 21, at 23–24; Richard J. Bonnie, *Why “Appreciation of Wrongfulness” is a Morally Preferable Standard for the Insanity Defense*, Presentation at the Conference on the Affirmative Defense of Insanity in Texas 50, 54 (Feb. 7, 2003) (transcript), <https://www.txpsych.org/wp-content/uploads/2016/02/insanitytranscript.pdf> [<https://perma.cc/9D7K-SAW2>].

137. Compare Mahé, *supra* note 135, at 70, with Hu et al., *supra* note 135, at 611 and Golonka, *supra* note 135, at 4–5 (reporting the distribution of disorders among responsibility populations in three countries).

138. See *infra* notes 158–64 and accompanying text.

139. See ALA. CODE § 13A-3-1(a) (2023); OHIO REV. CODE ANN. § 2901.01(A)(14) (LexisNexis 2023); 18 U.S.C. § 17; S. REP. NO. 98-225 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3411 (explaining that the requirement of a “severe” mental disease “emphasize[s] that non-psychotic behavior disorders[,] or neuroses such as an ‘inadequate personality,’ ‘immature personality,’ or a pattern of ‘antisocial tendencies[,]’ do not constitute the defense”).

140. See *Finger v. State*, 27 P.3d 66, 84–86 (Nev. 2001). Other states define the qualifying mental health condition in a way that practically limits it to psychosis. See, e.g., COLO. REV. STAT. § 16–8–101.5(2)(c) (2023) (limiting “mental disease or defect” to “only those severely abnormal mental conditions that grossly and demonstrably impair a person’s perception or understanding of reality . . .”); IND. CODE § 35-41-3-6(b) (2023) (limiting “mental disease or defect” to “only those severely abnormal mental conditions that grossly and demonstrably impair a person’s perception or understanding of reality”); ME. STAT. tit. 17-A, § 39(2) (2023) (similar).

outcomes for defendants, such as guaranteed clinical assessment or treatment opportunities.

Allowing a broad swath of mental abnormalities to support diminished responsibility determinations is particularly appropriate in jurisdictions that recognize volitional incapacity. Psychotic disorders (which affect a person's grasp of reality) are most likely to produce impairments that are legally relevant to moral incapacity.<sup>141</sup> A greater span of disorders, such as those affecting impulse control, could produce impairments relevant to volitional incapacity.<sup>142</sup>

### 3. Limiting Qualifying Conditions for Diminished Responsibility

Finally, a jurisdiction could opt to restrict diminished responsibility judgments to a smaller range of mental health contexts than those accepted for nonresponsibility verdicts. This decision could reflect the intuition that some conditions are inherently culpable or otherwise unworthy of mitigation.<sup>143</sup> More practically, narrowing the verdict to a smaller range of conditions could be motivated by fear of juror misuse and concern over the allocation of scarce treatment resources.<sup>144</sup> U.S. insanity statutes and foreign partial responsibility laws suggest those concerns are most likely to arise in the context of personality disorders, voluntary intoxication, and other culpably induced impairments.<sup>145</sup>

#### a. Personality Disorders

The relationship of personality disorders to criminal responsibility is contentious.<sup>146</sup> In the United States, several

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141. See, e.g., *Finger*, 27 P.3d at 84–85 (“To qualify as being legally insane, a defendant must be in a delusional state such that he cannot know or understand the nature and capacity of his act, or his delusions must be such that he cannot appreciate . . . that the act is not authorized by law.”).

142. See *Bonnie*, *supra* note 134, at 761–63.

143. See Johnston et al., *Diminished Criminal Responsibility*, *supra* note 46, at 5.

144. *Id.*

145. See, e.g., OR. REV. STAT. § 161.295(2) (2023) (stating that the term “qualifying mental disorder” does not include “any abnormality constituting solely a personality disorder”).

146. Compare Robert Kinscherff, *Proposition: A Personality Disorder May Nullify Responsibility for a Criminal Act*, 38 J.L. MED. & ETHICS 745, 745–52 (2010) (arguing that the “proposition that a personality disorder should not nullify responsibility for a criminal act [because] impairments arising from a personality

states explicitly exclude personality disorders (in whole or in part) from the conditions that qualify for an insanity defense.<sup>147</sup> This categorical exclusion may reflect generalizations associated with personality disorders about dangerousness,<sup>148</sup> treatability,<sup>149</sup> or lack of cognitive dysfunction.<sup>150</sup> Given the high prevalence of certain personality disorders in the offender population,<sup>151</sup> jurisdictions may also be concerned that allowing the disorders to support an insanity defense could allow legions of undeserving (and dangerous) offenders to evade punishment. This apprehension may be magnified in the context of partial (as opposed to full) nonresponsibility, which would presumably apply to a greater proportion of defendants.<sup>152</sup>

Excluding personality disorders from responsibility assessment is unwise.<sup>153</sup> Personality disorders cannot always

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disorder could never be sufficiently disabling . . . is borne out neither by scientific research nor clinical experience”), *with* Bonnie, *supra* note 134, at 762 (arguing that permitting a broad range of mental diseases to qualify for insanity under a volitional prong turns that volitional prong into “a channel for purely causal accounts of criminal behavior”).

147. See OR. REV. STAT. § 161.295(2) (2023); ARIZ. REV. STAT. ANN. § 13–502(A) (2023); *Commonwealth v. Christy*, 656 A.2d 877, 882 (Pa. 1995) (asserting that “a diagnosis of personality disorder is irrelevant to an insanity defense”); *People v. Williams*, 230 N.E.2d 224, 229 (Ill. 1967) (“It is clear that a personality disorder alone cannot constitute a mental defect within the statute.”); OKLA. STAT. tit. 22, § 1161(A)(1), (H)(7) (2023) (disqualifying a person otherwise entitled to an insanity defense if antisocial personality disorder “substantially contributed to the act for which the person has been charged”).

148. See Mohíno et al., *supra* note 84, at 153–54 (discussing the relationship of various personality disorders to violence).

149. See Anthony W. Bateman et al., *Treatment of Personality Disorder*, 385 LANCET 735, 735 (2015) (concluding that “[n]o convincing evidence exists” that the “core domains” of personality disorder “improve significantly or reliably with treatment”).

150. See Hans Ludwig Kröber & Steffen Lau, *Bad or Mad? Personality Disorders and Legal Responsibility—The German Situation*, 18 BEHAV. SCI. L. 679, 686 (2000).

151. See Seena Fazel & John Danesh, *Serious Mental Disorder in 23,000 Prisoners: A Systematic Review of 62 Surveys*, 359 LANCET 545, 545, 547 (2002) (finding, in male prisoners, an average 65% prevalence of any personality disorder and 47% prevalence of antisocial personality disorder and, in female prisoners, an average 42% prevalence of any personality disorder and 21% prevalence of antisocial personality disorder).

152. However, unlike an offender found insane, an offender found partially responsible will not evade punishment. See Johnston et al., *Diminished Criminal Responsibility*, *supra* note 46, at 4 tbl.3. Rather, the offender should receive a reduced punishment. See *id.*

153. See *United States v. Freeman*, 357 F.2d 606, 622 (2d Cir. 1966) (“It seems clear that a test which permits all to stand or fall upon the labels or classifications employed by testifying psychiatrists hardly affords the court [or jury] the opportunity to perform its function of rendering an independent legal and social judgment.”).

be reliably distinguished from those disorders typically recognized as diminishing responsibility.<sup>154</sup> In addition, diagnostic exclusions ignore the overlap in impairments among disorders,<sup>155</sup> as well as the high rates of co-occurring disorders that could compromise experts' abilities to reliably discern the origin of a defendant's impairments.<sup>156</sup> Also, categorically excluding personality disorders hinders the legal recognition of true diminished responsibility as science advances in this evolving area of research.<sup>157</sup> Instead of concretizing one moment's scientific understanding of a particular class of mental abnormalities, legal rules should permit scientific advance. Legislative and judicial attention should focus on the types of impairments that imperil normative competence, not on diagnostic categories.

In considering this issue, jurisdictions may find other countries' treatment of personality disorders in their partial responsibility schemes enlightening. Foreign jurisdictions tend not to expressly exclude personality disorders from responsibility determinations.<sup>158</sup> Instead, they often require "considerable deviation from the psychological norm" in arguments for diminished responsibility.<sup>159</sup> Consequently, responsibility is reduced only when a defendant's mental state differs significantly from average offenders, a substantial proportion of whom have at least one personality disorder.<sup>160</sup> Indeed, studies suggest that personality disorders alone usually do not suffice to reduce criminal responsibility. Diminished responsibility is found primarily in cases involving comorbidity

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154. See Kinscherff, *supra* note 146, at 749–50.

155. See *id.* at 750 (“[P]ersons with personality disorders commonly have acute episodes of psychotic or psychotic-like disturbances of experience, intense emotional dysregulation . . . , distortions of perceived threat . . . , and intense experiences of despair and desperation contributing to poorly considered actions.”).

156. See *id.* at 750–51.

157. See Bernard L. Diamond, *From M’Naghten to Currens, and Beyond*, 50 CALIF. L. REV. 189, 198 (1962).

158. See *infra* Appendix (surveying eighteen countries); HANS JOACHIM SALIZE & HARALD DREBING, PLACEMENT AND TREATMENT OF MENTALLY ILL OFFENDERS – LEGISLATION AND PRACTICE IN EU MEMBER STATES 39–40 (2005).

159. Marc Graf & Henning Hachtel, *Psychopathic Disorders and the Criminal Law in Switzerland*, in 2 THE WILEY INTERNATIONAL HANDBOOK ON PSYCHOPATHIC DISORDERS AND THE LAW 323 (characterizing rulings of the Swiss Federal Appeals Court and the German Federal Court).

160. See Fazel & Danesh, *supra* note 151, at 545, 548.

with an Axis I disorder<sup>161</sup> such as substance abuse.<sup>162</sup> Countries vary widely in how often personality disorders support partial responsibility judgments,<sup>163</sup> which may reflect differing optimism about treatment for these disorders.<sup>164</sup> This comparative evidence suggests that allowing forensic mental health professionals to consider personality disorders in their evaluations would be workable and would allow the flexibility necessary to provide accurate, nuanced, and legally relevant functional assessments.

### b. Substance-Related Conditions

A more appropriate subject for legislative policy is the extent to which a defendant's culpability in causing their own impairment should disqualify them from a partial responsibility defense.<sup>165</sup> In the United States, multiple jurisdictions disallow insanity verdicts based on voluntary intoxication or derivative conditions such as addiction.<sup>166</sup> Other countries vary in their treatment of substance-use-related

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161. See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xxxiii (4th ed. rev. 2000) [hereinafter DSM-IV-TR]. The DSM-5 eliminated the multi-axis system. See, e.g., HEATHER RINGEISEN ET AL., CTR. FOR BEHAV. HEALTH STAT. & QUALITY, DSM-5 CHANGES: IMPLICATIONS FOR CHILD SERIOUS EMOTIONAL DISTURBANCE 5 (2016) ("One of the key changes . . . is the elimination of the multi-axial system.").

162. See Graf & Hachtel, *supra* note 159, at 335; García et al., *supra* note 84, at 65.

163. See SALIZE & DREBING, *supra* note 158, at 39–40, 40 tbl.4 (depicting the mental disorders that qualify for inclusion under mental health legislation as a matter of practice in European states).

164. See Bateman et al., *supra* note 149, at 740.

165. A rich literature explores the thorny problems for criminal law doctrine presented by causing the conditions of one's defense. See, e.g., Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, 2–3 (1985) (discussing how law in the 1980s addressed conditions for one's own defense) [hereinafter Robinson, *Causing the Conditions*]; Russell L. Christopher, *Exculpation as Inculpation*, 49 ARIZ. ST. L.J. 1141, 1155–61 (2017) (discussing scholarship around Robinson's approach that "[creating the conditions for the defense] should almost never bar the defense") (alteration in original).

166. See, e.g., ARIZ. REV. STAT. ANN. § 13-502(A) (2010) (excepting the insanity defense where insanity resulted from "voluntary intoxication" or similar); COLO. REV. STAT. § 16-8-101.5(2)(c) (2019) (same); CONN. GEN. STAT. § 53a-13(b)–(c) (2017) (same), amended by 2023 Conn. Legis. Serv. P.A. 23-19 (S.B. 1102) (West); 720 ILL. COMP. STAT. 5/6-3 (2002) (stating that a voluntarily intoxicated person is "criminally responsible for conduct"); ME. STAT. tit. 17-A § 39(2) (2024) (excepting conduct that results from voluntary use of alcohol, drugs, or similar substances). At least one state prohibits an insanity defense when the defendant's "condition of mind" was "proximately induced by [their] voluntary act." WASH. REV. CODE § 10.77.030 (2023).

conditions, but their responses tend to be less categorical.<sup>167</sup> Exclusions reflect the commonsense notion that individuals who choose to ingest substances well-known to cause impairment, and then engage in behavior that poses a risk of harm, should not benefit from any resulting lack of awareness of risk of harm.<sup>168</sup>

To the extent a jurisdiction chooses to exclude voluntary intoxication from the scope of conditions qualifying for an insanity defense, it should carefully consider—and be express about—its treatment of substance-abuse-related conditions that result in permanent damage.<sup>169</sup> Intoxication at the time of an offense may represent “a singular pathological drug or alcohol intoxication; a chronic state of intoxication due to addiction disorder; dementia due to alcohol; [or] paranoid or hallucinatory states induced by drugs or alcohol.”<sup>170</sup> As psychiatric researchers Hans Joachim Salize and Harald Dreböing observe, “[t]hese states form different syndromes from a medical point of view, and thus require different and complex judicial consideration (e.g., when judging the degree of individual responsibility).”<sup>171</sup> Courts often exempt the permanent condition of “settled insanity” from the general rule that voluntary intoxication cannot excuse a criminal act,<sup>172</sup> but few insanity statutes in the United States differentiate between temporary and permanent conditions.<sup>173</sup> Expressly doing so would provide important clarity and guidance to the law.<sup>174</sup>

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167. See SALIZE & DREBÖING, *supra* note 158, at 39–40, 40 tbl.4.

168. See, e.g., *State v. Huey*, 128 P.2d 314, 317 (Wash. 1942). Scholars have challenged this simplistic position by stressing the importance of the defendant’s *mens rea* at the time of the culpable act and the harm that ultimately resulted. See Robinson, *Causing the Conditions*, *supra* note 165, at 28; Christopher, *supra* note 165, at 1176.

169. See *infra* notes 170–72, 210 (concerning the treatment of “settled insanity”).

170. SALIZE & DREBÖING, *supra* note 158, at 39.

171. *Id.*

172. See, e.g., *State v. Thompson*, 498 P.3d 40, 46 n.7 (Wash. App. Div. 1 2021) (“When long-term voluntary drug use produces a ‘permanent mental disease amounting to insanity,’ distinct from the temporary ‘mental excitement’ of present intoxication, it may result in insanity.”); Paul S. Appelbaum, *Settled Insanity: Substance Use Meets the Insanity Defense*, 73 PSYCHIATRIC SERVS. 105, 106 (2022) (discussing the prevalence of jurisdictions’ recognition of settled insanity, identifying common elements, and discussing related medical diagnoses).

173. See MO. REV. STAT. § 562.086 (2023) (distinguishing between permanent and temporary conditions).

174. See Appelbaum, *supra* note 172, at 107.

### c. Culpably Created Impairments

Relatedly—but much more broadly—some scholars have argued that a partial responsibility standard should disqualify or reduce the degree of mitigation afforded to an offender who culpably contributed to her diminished rationality through a voluntary act or culpable omission.<sup>175</sup> In particular, some scholars have asserted that a reduced responsibility excuse should not be available to a person who caused their own underlying impairment when they, in a rational state, chose not to take prescribed medicine, knowing that it would likely cause the resurgence of symptoms and ultimate incapacitation.<sup>176</sup> Several countries' penal codes could be read to have this effect,<sup>177</sup> but their use has apparently been confined to the intoxication context.<sup>178</sup>

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175. See, e.g., Morse, *Diminished Rationality*, *supra* note 33, at 300 (endorsing a jury instruction that finds the defendant GPR if he is responsible for his own diminished rationality); FINGARETTE & HASSE, *supra* note 21, at 253 (finding the defendant guilty where he played a “chief role” in his “disability of mind”); COPPOLA, *supra* note 33, at 158 (excepting the insanity defense where defendant is responsible for his own compromised judgment); FINKEL, *supra* note 33, at 296–98 (finding that a defendant is culpable where he takes actions to compromise his own judgment).

176. FINGARETTE & HASSE, *supra* note 21, at 199, 214 n.22; Morse, *Diminished Rationality*, *supra* note 33, at 300–01.

177. See CODE PÉNAL SUISSE [CP] [CRIMINAL CODE] Dec. 21, 1937, S.R. 311.0, art. 19, para. 4 (current as of January 2024) (Switz.), [https://www.fedlex.admin.ch/eli/cc/54/757\\_781\\_799/en](https://www.fedlex.admin.ch/eli/cc/54/757_781_799/en) [<https://perma.cc/7Q23-38JY>] (“If it was possible for the person concerned to avoid his state of mental incapacity or diminished responsibility and had he done so to foresee the act that may be committed in that state, paragraphs 1–3 [concerning nonresponsibility and diminished responsibility] do not apply.”); POINIKOS KODIKAS [P.K.] [CRIMINAL CODE] 2:36 (Greece), <https://www.e-nomothesia.gr/kat-kodikis-nomothesias/nomos-4619-2019-phek-95a-11-6-2019.html> [<https://perma.cc/3WY2-CRJJ>] (“This [partial responsibility] provision does not apply in the case of a guilty party within the meaning of Article 35 who causes the reduced ability.”) (translated by Maria Panezi on May 26, 2023); POINIKOS KODIKAS [P.K.] [CRIMINAL CODE] 2:35 (Greece), <https://www.e-nomothesia.gr/kat-kodikis-nomothesias/nomos-4619-2019-phek-95a-11-6-2019.html> [<https://perma.cc/BLE4-MG83>] (“An act which a person foresaw or could foresee he might commit if he were brought into a state of disturbed conscience or into a state of complete inability to act or to refrain shall be imputed to him as an act committed negligently.”) (translated by Maria Panezi on May 26, 2023); *infra* note 178 (discussing Taiwan).

178. See XINGZHENG FAGUI (中華民國刑法) [CRIMINAL CODE] (promulgated by Ministry Just., May 31, 2023, effective May 31, 2023) art. 19 (translation by Ministry Just.) (Taiwan), <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=C0000001> [<https://perma.cc/5DW7-SCD9>] (“Provisions [regarding nonresponsibility and diminished responsibility] shall not apply to a person who intentionally brings the handicaps or defects.”); Tien-Wei Yang et al., *Analysis of Concordance Between Conclusions of Forensic Psychiatric Evaluation and Court Decisions after 2005*



This culpable contribution argument has surface appeal. Individuals with mental illnesses, even serious mental illnesses, are capable of rational thought.<sup>179</sup> In order to acknowledge these individuals' autonomy and dignity, society must recognize their competent decisions. This involves imposing consequences appropriate for those decisions.<sup>180</sup> However, the peculiarities of mental disorder, its lived experience, and the nature of the omission involved—as well as the messy and complicated nature of this inquiry—militate against withholding a partial excuse from a person who contributed to an impairment related to mental disorder.

Whether to include a culpable contribution element is not a trivial concern. According to researchers, “[a]t least half of patients prescribed long-term medication for chronic diseases do not fully comply with treatment,” including those with psychotic disorders.<sup>181</sup> Indeed, research shows that “[w]ithin [seven] to [ten] days of medication initiation, 25% [of individuals prescribed antipsychotic medication] stop taking the medication; 50% stop after [one] year; and 75% stop after [two] years.”<sup>182</sup> In insanity cases, nonadherence to treatment is a common factor.<sup>183</sup> Thus, it is likely that—if culpable impairment were disqualifying—this element would become a major issue in many, if not most, cases involving Diminished Responsibility from Mental Disability.

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*Criminal Code Amendment in a Taiwan Psychiatric Hospital*, 54 INT’L J.L. PSYCHIATRY 148, 153 (2017) (explaining that intentional or negligent intoxication is a necessary element for intentional induction of diminished responsibility).

179. E. Lea Johnston, *Theorizing Mental Health Courts*, 89 WASH. U. L. REV. 519, 558, 558 n.216 (2012) [hereinafter Johnston, *Theorizing Mental Health Courts*].

180. See G. W. F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 126 (Allen W. Wood ed., H. B. Nisbet trans., 1991) (arguing that, as rational beings, criminals choose to commit acts to which punishments attach and, thus, have a right to experience those punishments).

181. Diana O. Perkins, *Predictors of Noncompliance in Patients with Schizophrenia*, 63 J. CLINICAL PSYCHIATRY 1121, 1121 (2002); Zachary D. Torrey & Kenneth J. Weiss, *Medication Noncompliance and Criminal Responsibility: Is the Insanity Defense Legitimate?*, 40 J. PSYCHIATRY & L. 219, 230–31 (2012).

182. Torrey & Weiss, *supra* note 181, at 231.

183. *Id.* at 233 (“Indeed, ‘going off medications’ is a typical trope found in defense psychiatric reports.”).

*Why not disqualify individuals for medication noncompliance?*

The case against requiring a culpability assessment is strongest in the context of psychosis.<sup>184</sup> A common symptom of psychotic disorders is anosognosia, which is the lack of insight into one's illness, the pathological source of one's symptoms, or the need for treatment.<sup>185</sup> Researchers estimate that 40% of individuals with bipolar disorder and 57%–98% of individuals with schizophrenia have partial or no insight into those matters.<sup>186</sup> Mounting neuroscientific evidence suggests anosognosia is the product of anatomical and functional brain derangement, especially in the frontal areas, that affects a range of cognitive and self-evaluative processes.<sup>187</sup> When these areas of the brain are damaged, a person can no longer properly update her self-image. Importantly, anosognosia (a pathological inability to grasp reality due to brain defects) differs from denial (a psychological means of coping in healthy individuals).<sup>188</sup> Not surprisingly, this lack of insight predisposes a person with a psychotic disorder to treatment noncompliance.<sup>189</sup> Additionally, a decision to refuse medication could reflect and be thought-congruent with other aspects of mental disorder, such as paranoia, grandiosity, or hopelessness.<sup>190</sup> For many individuals with a psychotic

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184. See G.H.M. Pijnenborg et al., *Brain Areas Associated with Clinical and Cognitive Insight in Psychotic Disorders: A Systematic Review and Meta-analysis*, 116 *NEUROSCIENCE & BIOBEHAVIORAL REVS.* 301, 301–02 (2020).

185. See *id.*; Anthony S. David, *Insight and Psychosis*, 156 *BRIT. J. PSYCHIATRY* 798, 805 (1990) (proposing the three distinct, overlapping dimensions of insight).

186. See Douglas S. Lehrer & Jennifer Lorenz, *Anosognosia in Schizophrenia: Hidden in Plain Sight*, 11 *INNOVATIONS CLINICAL NEUROSCIENCE* 10, 11 (2014); Shmuel Fennig et al., *Insight in First-Admission Psychotic Patients*, 22 *SCHIZOPHRENIA RSCH.* 257, 259–60 (1996); *Agnosia*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/diseases/22832-anosognosia> [<https://perma.cc/8K36-4GJ9>].

187. See Pijnenborg et al., *supra* note 184, at 322–26.

188. See Tiffany L. Baula, *Awareness of the Unaware: Anosognosia as a Comorbidity in Mental Health Conditions 7* (2020) (B.S.N. thesis, University of Central Florida), <https://stars.library.ucf.edu/cgi/viewcontent.cgi?article=1820&context=honorsthesis> [<https://perma.cc/656P-V3S3>].

189. Torrey & Weiss, *supra* note 181, at 231. *But cf.* Tania M. Lincoln et al., *Correlates and Long-Term Consequences of Poor Insight in Patients with Schizophrenia. A Systematic Review*, 33 *SCHIZOPHRENIA BULL.* 1324, 1328 (2007) (critically examining studies on the subject).

190. See Torrey & Weiss, *supra* note 181, at 231.

disorder, the “choice” to discontinue medication is likely a manifestation of pathology.<sup>191</sup>

Other factors may also excuse a person’s decision to refuse psychiatric medication. As psychiatrists Zachary Torry and Kenneth Weiss have observed in this context, some patients lack the capacity to manage their illnesses independently through self-administration of medication.<sup>192</sup> This capacity is requisite to choice.<sup>193</sup> In addition, medications are rarely completely effective, and their effectiveness may diminish over time.<sup>194</sup> A medication’s partial effectiveness could contribute both to the individual’s inability to recognize the need for medication and the individual’s risk-benefit calculus of whether to take it. Moreover, lack of community mental health options, termination of insurance coverage, inability to afford medication,<sup>195</sup> theft or nonnegligent loss, and deep stigma toward both mental illness and its treatment<sup>196</sup> often render a “decision” to terminate medication less than fully freely made.

Other common reasons to avoid taking medication—including those involving medication side effects—sound in justification.<sup>197</sup> Many psychiatric medications carry a host of undesirable side effects, including weight gain, sedation, sexual dysfunction, dysphoria (generalized unhappiness), and movement disorders (such as jerky movements of one’s face and

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191. *Id.* Within the context of schizophrenia, scholars define a lack of insight as “a manifestation of the illness itself rather than a coping strategy” and they acknowledge that the lack of insight “predisposes the individual to noncompliance with treatment.” *Id.*

192. *Id.* at 235.

193. *See id.*

194. *Id.* at 231; *see generally* S. Leucht et al., *Efficacy and Extrapyramidal Side-Effects of the New Antipsychotics Olanzapine, Quetiapine, Risperidone, and Sertindole Compared to Conventional Antipsychotics and Placebo. A Meta-Analysis of Randomized Controlled Trials*, 35 SCHIZOPHRENIA RSCH. 51 (1999) (summarizing the efficacy and tolerability of several antipsychotics in schizophrenia).

195. *See, e.g.*, *United States v. Burns*, 812 F. Supp. 190, 192 (D. Kan. 1993) (“The defendant testified that at the time of the episode leading to the indictment, he had ceased taking his medications because of the cost.”).

196. Bruce G. Link & Jo C. Phelan, *Labeling and Stigma*, in *A HANDBOOK FOR THE STUDY OF MENTAL HEALTH* 525, 528 (Teresa L. Scheid & Tony N. Brown eds., 2010) (observing that perceived devaluation and discrimination associated with mental disorder is correlated with poor treatment adherence and treatment discontinuation).

197. *See* Richard Sherlock, *Compliance and Responsibility: New Issues for the Insanity Defense*, 12 J. PSYCHIATRY & L. 483, 495–99 (1984) (discussing the difficulty of applying principles of justification in this context).

body).<sup>198</sup> As Torrey and Weiss have observed, when “a medication regimen offers more side effects than relief from symptoms, thereby putting the individual in an uncomfortable and tenuous position with whether or not to remain compliant[,] . . . there is a balance of pain and/or discomfort with the risk of harm.”<sup>199</sup> Balancing negative side effects against the efficacy of a drug and the apprehended risk of harm would be a difficult endeavor, made even more complicated by possible lack of insight and external constraints on freedom of choice. Picking the window of time to analyze would also be difficult because symptoms, side effects, and external constraints are often not static.<sup>200</sup> Such an analysis does not lend itself to general rules or consistency.

### *Analogy to voluntary intoxication*

Several scholars have argued that disallowing an excuse for voluntary intoxication, but not for treatment noncompliance, is illogical and inconsistent.<sup>201</sup> However, this analogy is misplaced.<sup>202</sup> First, unlike intoxication (a voluntary act), stopping treatment involves an omission (a failure to act).<sup>203</sup> Omissions are less susceptible to criminal liability than voluntary acts.<sup>204</sup> Moreover, in declining to ingest medication,

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198. See Perkins, *supra* note 181, at 1121, 1123 (listing various side effects and observing that “the proportion of patients citing side effects as their primary reason for noncompliance ranges between one quarter and two thirds”); Ghassen Saba et al., *Patients’ Health Literacy in Psychotic Disorders*, 3 NEUROPSYCHIATRIC DISEASE & TREATMENT 511, 512 (2007) (discussing the relationship between adverse side effects and compliance with medication).

199. Torrey & Weiss, *supra* note 181, at 234.

200. See Edward W. Mitchell, *Culpability for Inducing Mental States: The Insanity Defense of Dr. Jekyll*, 32 J. AM. ACAD. PSYCHIATRY L. 63, 66–67 (2004) (discussing the difficulty and problematic nature of determining the proper time frame for analysis).

201. See, e.g., *id.* at 64–65 (arguing that exacerbating one’s mental disorder through failure to take prescribed medication and choosing to induce a murderous persona through active ingestion of a substance are “scarcely different” and parallel the situation of intoxication, where “a mental condition defense is not available, because the individual is culpable for getting himself into that situation in the first instance”).

202. Some courts have agreed. See *Commonwealth v. Shin*, 16 N.E.3d 1122, 1127 (Mass. App. Ct. 2014).

203. See *State v. Eager*, 398 P.3d 756, 757–58 (Haw. 2017).

204. See 22 C.J.S. *Criminal Law: Substantive Principles* § 41 (2023) (“Criminal liability cannot be premised on a failure to act unless the party so charged has a specific legal duty to act, and even in such a case, the person must be physically capable of performing the act.”).

one is exercising cherished aspects of liberty: the right to bodily integrity, to control one's person, and to refuse unwanted treatment.<sup>205</sup> Community members with mental disorders have as much a right to refuse unwanted treatment as those without.<sup>206</sup> Second, part of the justification for holding a person who becomes voluntarily intoxicated responsible for future acts is that the dangers of intoxication are well-known and thus attributable to the person.<sup>207</sup> That may not be the case for deviating from a particular drug regimen. Third, unless the person has a substance abuse disorder, a person who chooses to become intoxicated generally is of sound mind and able to weigh the risks and benefits of his actions; this assumption may not apply in the context of a person dependent upon psychiatric medication to retain rationality.<sup>208</sup> Fourth, no conditions excuse or justify a person's intoxication and consequent risk to others, but, as discussed, a number of factors may excuse or justify nonadherence to treatment directives.<sup>209</sup> Finally, as mentioned, most jurisdictions treat "settled insanity"—or permanent mental impairment resulting from the effects of voluntary

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205. See *Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 270 (1990) ("The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment."); *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."); *Riggins v. Nevada*, 504 U.S. 127, 137 (1992) (acknowledging "the defendant's liberty interest in freedom from unwanted antipsychotic drugs").

206. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1094 (E.D. Wis. 1972) ("Persons in need of hospitalization for physical ailments are allowed the choice of whether to undergo hospitalization and treatment or not. The same should be true of persons in need of treatment for mental illness unless the state can prove that the person is unable to make a decision about hospitalization because of the nature of his illness."), *vacated*, 414 U.S. 473 (1974). Avenues exist to override this right. See *Washington v. Harper*, 494 U.S. 210, 227 (1990) (finding that the Due Process Clause permits a state to treat prison inmates with serious mental illness against their will with antipsychotic drugs if the inmate is a danger to themselves or others); *Sell v. United States*, 539 U.S. 166, 179, 182 (2003) (finding that the government can administer antipsychotic drugs to mentally ill defendants against their will, when they are facing serious criminal charges, to make them competent at trial).

207. See MODEL PENAL CODE § 2.08 cmt. 1, at 359 (AM. L. INST., Official Draft and Revised Comments 1985).

208. See Sherlock, *supra* note 197, at 493.

209. See *id.* at 494.

intoxication over time—like insanity, as a full excuse.<sup>210</sup> As Dr. George Maliha, a former resident in Internal Medicine and now lawyer, has argued,

settled insanity teaches that it is irrelevant whether the initial decision to stop medication was ‘voluntary,’ ‘involuntary,’ or something in-between. Indeed, considering that schizophrenia is not self-induced or does not have a ‘voluntary phase,’ if courts are willing to brook ‘settled insanity,’ they should be able to permit non-compliant insanity.<sup>211</sup>

For the reasons expressed above, jurisdictions should not withhold a partial excuse for diminished responsibility due to mental disorder from people who contributed to their impairment through medication noncompliance. Depending on the scope of the partial excuse, it may be that establishing the truly culpable instance of noncompliance (that was responsible for the criminal act) would be so unlikely, resource-intensive, and time-consuming that including the culpable responsibility element would make the entire partial excuse unworkable.<sup>212</sup> Additionally, the element would defy consistent application and could imperil legitimate claims.<sup>213</sup> As Professor Richard Bonnie has observed, precluding a responsibility defense (and thus exposing someone to the full measure of punishment for a crime) would often be a grossly disproportionate response to an earlier, blameworthy decision to cease medication.<sup>214</sup>

A partial excuse is merely that—partial. A defendant who benefits from this excuse would still be found culpable and thus guilty of a criminal act. The award of formal mitigation would likely be static and thus would only roughly approximate an individual’s actual degree of diminished responsibility at the

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210. See SALIZE & DREBING, *supra* note 158, at 39; see, e.g., *State v. Thompson*, 498 P.3d 40, 46 n.76 (Wash. App. Div. 1 2021) (“When long-term voluntary drug use produces a ‘permanent mental disease amounting to insanity,’ distinct from the temporary ‘mental excitement’ of present intoxication, it may result in insanity.”); Appelbaum, *supra* note 172, at 106 (discussing the prevalence of jurisdictions’ recognition of settled insanity, identifying common elements, and discussing related medical diagnoses).

211. George Maliha, *Noncompliant Insanity: Does It Fit Within Insanity?*, 41 HARV. J.L. & PUB. POL’Y 647, 674 (2018).

212. See Torrey & Weiss, *supra* note 181, at 235.

213. See *Commonwealth v. Shin*, 16 N.E.3d 1122, 1129 (observing that allowing disqualification for culpable noncompliance with treatment directives “could be used to argue that every mentally ill defendant who had ever taken helpful medication in the past, but discontinued it, was criminally responsible”).

214. See Bonnie, *supra* note 136, at 55–56.

time of the act.<sup>215</sup> Thus, one way to conceptualize a guilty verdict and its consequent punishment in a case of diminished responsibility would be as absorbing and reflecting any culpability for proximally inducing the impairment. To the extent appropriate, a judge could factor any culpability into the punishment actually imposed, so long as that punishment falls within the range dictated by the partial responsibility statute.

*E. Proposal: Jurisdiction-Specific Partial Responsibility Standards*

In summary, this Article advocates for the adoption of a partial excuse for diminished responsibility due to mental disability. This affirmative, partial defense would be pleaded at the defendant's option and would take the form of a fourth verdict. It would recognize that capabilities necessary for responsibility exist along a spectrum and would lessen the gross over-punishment of those whose mental abnormalities significantly—but not utterly—impaired their rationality or volitional control at the time of the criminal act.

Drawing from experience with insanity standards of various breadths, GBMI verdicts, and foreign graduated responsibility structures, this Article suggests that each jurisdiction derive a partial responsibility standard from its insanity standard.<sup>216</sup> The former would differ from the latter in its degree of impairment and perhaps in its aspects of nonresponsibility and qualifying conditions. The standard of Diminished Responsibility from Mental Disability should include components of both moral and volitional incapacity. In this way, each jurisdiction's responsibility structure will reflect the gamut of capacities considered central to normative competence.<sup>217</sup> Each partial responsibility standard should require a finding that the defendant does not satisfy the jurisdiction's insanity standard. The standards should also not withhold mitigation for failing to adhere to treatment directives.

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215. See BRINK, FAIR OPPORTUNITY, *supra* note 25, at 387.

216. This point of origin obviously would not be available to those states not offering an insanity defense. See *supra* note 111 and accompanying text (identifying these states and proposing a possible partial responsibility standard in these instances).

217. See Brink & Nelkin, *supra* note 57, at 284 (reflecting that cognitive and volitional capacities must be factored into and treated as equally important to normative competence).

These criteria can be implemented in a variety of ways depending upon a jurisdiction's insanity defense.<sup>218</sup> For example, if a jurisdiction's insanity standard requires substantial moral incapacity,<sup>219</sup> its diminished responsibility standard could recognize significant moral and volitional incapacity.<sup>220</sup> Those jurisdictions that restrict exculpation due to mental disability to more limited circumstances (or that prohibit it altogether)<sup>221</sup> could limit partial responsibility to more substantial<sup>222</sup> (or even severe) moral and volitional incapacity. The few jurisdictions with unique insanity standards, such as New Hampshire's "product test,"<sup>223</sup> could model their diminished responsibility statutes on GBMI standards that include impairments to rationality and self-control. Again, the wording of a partial responsibility standard is unlikely to matter in practice,<sup>224</sup> and evidence suggests that jurors only need general criteria to guide their normative determination of an intermediate level of responsibility.<sup>225</sup> But deriving a partial responsibility standard from existing

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218. In lieu of a partial responsibility defense, a jurisdiction could choose to use criteria of diminished responsibility in a structured sentencing system where the circumstance carries a necessary, defined mitigating effect and is subject to appellate review. This remedy would address certain shortcomings associated with the discretionary consideration of diminished responsibility at sentencing, including inconsistency and unpredictability. *See supra* notes 53–56 and accompanying text. It also might result in more consistent mitigation given jury inconsistencies and, more importantly, the likely use of the partial responsibility verdict as a chip in plea negotiations. *See infra* note 329 and accompanying text. However, for the reasons articulated in Part I, partial responsibility—like other matters of responsibility—is rightfully considered by the trier of fact at the guilt phase. Moreover, the availability of a partial responsibility verdict should lower the trial penalty, incentivizing defendants to exercise their right to trial if they do not receive appropriate mitigation through plea bargaining. I appreciate Richard Bonnie for urging me to consider the structured sentencing option.

219. *See supra* note 95 and accompanying text.

220. *See* FINGARETTE & HASSE, *supra* note 21, at 234 (recognizing a "partial disability of mind" upon "material" impairment); Robinson, *Mitigations*, *supra* note 32, at 254 (granting mitigation for "meaningful" reductions in blameworthiness).

221. *See supra* note 111 and accompanying text (discussing Alaska and the four states without insanity defenses).

222. The MPC provides one possible definition of "substantial." *See* MODEL PENAL CODE § 4.01 cmt. 3 (AM. L. INST., Official Draft and Revised Comments 1985) (defining "substantial" as "of some appreciable magnitude when measured by the standard of humanity in general, as opposed to . . . [a] vagrant and trivial dimension[]").

223. *See supra* note 95.

224. *See supra* note 91 and accompanying text (discussing research involving various insanity tests).

225. *See* Johnston & Leahey, *supra* note 27, at 1284 n.344.



statutory structures would increase the standard's perceived legitimacy and likelihood of passage.

### III. CONSEQUENCES

The next component of a diminished responsibility standard—and, to date, the one that scholars most neglect—is the consequences that should attend the verdict.<sup>226</sup> Sentence reduction and treatment access are the two most obvious consequences that a verdict of diminished responsibility due to mental disability could carry. Although contemporary GBMI statutes do not provide for punishment reduction,<sup>227</sup> they do include a variety of treatment approaches that could serve as sources of inspiration.<sup>228</sup> Foreign partial responsibility structures typically carry both sentence reduction and treatment consequences,<sup>229</sup> so they provide useful guidance on both scores.<sup>230</sup> Studying these penal code provisions, their application, and their evolution over time yields useful suggestions for what consequences could, and should, attend a state's partial responsibility verdict.

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226. See FINGARETTE & HASSE, *supra* note 21, at 242, 244 (advocating for the formulation of guidelines regarding the specific mitigatory implications of a DOM finding and recognizing that a successful defense always warrants post-verdict mental examination but opting not to opine on the post-verdict diagnostic, protective, or rehabilitative measures that should apply); Morse, *Diminished Rationality*, *supra* note 33, at 303 (proposing, in recognition that “in many cases the defendant’s impaired rationality may present a continuing, substantial danger,” that “the amount of punishment reduction should be inversely related to the seriousness of the crime”); FINKEL, *supra* note 33, at 306–09 (discussing sentencing, treatment, and involuntary civil commitment considerations).

227. All thirteen states with GBMI statutes provide that such individuals shall be sentenced the same as any defendant convicted of the same crime. ALASKA STAT. § 12.47.030(a) (2023); DEL. CODE ANN. tit. 11, § 408(b) (2023); GA. CODE ANN. § 17-7-131(g)(1) (2023); 730 ILL. COMP. STAT. 5/5-2-6(a) (2023); IND. CODE § 35-36-2-5(a) (2023); KY. REV. STAT. ANN. § 504.150(1) (West 2023); MICH. COMP. LAWS § 768.36(3) (2023); NEV. REV. STAT. § 174.035(5) (2023); OKLA. STAT. tit. 22, § 1161(A)(2) (2023); 42 PA. CONS. STAT. § 9727(a) (2023); S.C. CODE ANN. § 17-24-70 (2023); S.D. CODIFIED LAWS § 23A-27-38 (2023); UTAH CODE ANN. § 77-16a-104(3) (West 2023).

228. See *infra* note 318 and accompanying text (outlining how twelve states treat GBMI).

229. See Johnston et al., *Diminished Criminal Responsibility*, *supra* note 46, at 7–8.

230. See *infra* Table 1 (detailing the penalty reduction measures associated with partial responsibility in eighteen civil law countries); *infra* notes 341–44 and accompanying text (discussing some countries’ allocation of treatment resources).

As a guiding principle, this Article subscribes to “limiting retributivism,” the dominant theory of punishment.<sup>231</sup> Under this model, first proposed by Professor Norval Morris in 1974,<sup>232</sup>

the offender’s desert defines a range of morally justified punishments, setting upper and lower limits on the severity of penalties that may fairly be imposed on a given offender. . . . within the range of deserved penalties, case-specific incapacitation, rehabilitation, deterrence, and other sentencing goals may be pursued, but only to the extent that they are needed in a given case.<sup>233</sup>

Accordingly, a jurisdiction should limit punishment to that which is deserved and—within those limits—may take measures to ensure public safety while safeguarding the rights of incarcerated persons. Under this theory, neither rehabilitation nor a prediction of dangerousness is a sufficient basis for extending a term of punishment.<sup>234</sup> In addition, all treatment regimens imposed during a term of punishment should be evidence-based, likely to ameliorate the defendant’s condition, and the least restrictive and least invasive option available. In accord with modern correctional principles,<sup>235</sup>

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231. Limiting retributivism animates the sentencing provisions of the MPC, see MODEL PENAL CODE § 1.02(2) cmt. 3(b) (AM. L. INST., Official Draft and Revised Comments 1985), as well as the sentencing structures of many, if not most, states. See Richard S. Frase, *Limiting Retributivism*, in THE FUTURE OF IMPRISONMENT 83, 85 (Michael Tonry ed., 2004); Christopher Slobogin, *Preventive Justice: How Algorithms, Parole Boards, and Limiting Retributivism Could End Mass Incarceration*, 56 WAKE FOREST L. REV. 97, 111 (2021). Others’ reception of limiting retributivism has not been as favorable. See, e.g., Edward Rubin, *Just Say No to Retribution*, 7 BUFF. CRIM. L. REV. 17, 82–83 (2003) (arguing that retributivism “can only serve to prolong addiction” to incarceration); James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85, 107 (2003) (arguing that retributivism as a central tenet of criminal law must be abandoned for the public good).

232. See NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 73–74 (Sanford H. Kadish et al. eds., 1974).

233. Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 76–77 (2005) (citing MORRIS, *supra* note 232, at 59–62); see also Marah Stith McLeod, *A Democratic Restraint on Incarceration*, 76 FLA. L. REV. (forthcoming 2024) (manuscript at 9), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4531087](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4531087) [<https://perma.cc/JFU6-RJS3>] (“[Morris] eschewed a purely utilitarian approach that would allow undeserved punishment simply for future benefits.”).

234. See Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME & JUST. 363, 369 (1997).

235. See E. Lea Johnston, *Reconceptualizing Criminal Justice Reform for Offenders with Serious Mental Illness*, 71 FLA. L. REV. 515, 539–40 (2019) (discussing the Risk-Need-Responsivity model) [hereinafter Johnston, *Reconceptualizing*].

intensive treatment programs should be provided to high-risk defendants<sup>236</sup> when treatment is likely to significantly reduce their risk of recidivism.<sup>237</sup>

### A. *Mandatory Punishment Reduction*

A finding of partial responsibility should carry a mandatory penalty reduction within a specified range.<sup>238</sup> For example, the rule could require that the limits of a punishment range be reduced between one- and two-thirds. Lesser punishment must automatically follow from a jury's finding of lesser responsibility if punishment is to be proportionate to wrongdoing, as retributivism and just deserts demand.<sup>239</sup> Requiring a reduction by a fixed percentage would help cabin judges' discretion, lead to more uniform application, and ensure that the jury's finding of diminished responsibility holds meaningful consequences.<sup>240</sup> Additionally, allowing for

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236. Actuarial risk assessment instruments can be used to identify defendants with a high risk of recidivism or violence. See D.A. Andrews et al., *The Recent Past and Near Future of Risk and/or Need Assessment*, 52 CRIME & DELINQ. 7, 22 (2006). Scholars have identified several problems with the development and operation of these instruments. See, e.g., Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 101–03 (2017) (noting that the interests of instrument developers differ from those of society at large, causing conflicting and contradictory sentencing law and policies).

237. Some countries allocate treatment resources in this way. See Johnston et al., *Diminished Criminal Responsibility*, *supra* note 46, at 8 (discussing criteria for involuntary hospitalization of partially responsible offenders in Japan and Germany).

238. This Article's proposal differs from that suggested by Morse. See Morse, *Diminished Rationality*, *supra* note 33, at 303. Morse proposes that "the amount of punishment reduction should be inversely related to the seriousness of the crime" and justifies this inverse relationship with two rationales. *Id.* at 303–04. First, Morse argues that "[d]efendants who commit more serious crimes . . . are therefore more dangerous . . ." *Id.* at 303. However, this assertion is inaccurate as an empirical matter. See James Bonta et al., *The Prediction of Criminal and Violent Recidivism Among Mentally Disordered Offenders: A Meta-Analysis*, 123 PSYCH. BULL. 123, 127 (1998) (finding, in a meta-analytic study, that "[s]cales measuring the seriousness of the offense did not predict general recidivism"). Second, Morse argues that, "[a]ssuming, in general, equal degrees of impairment across defendants, criminals engaged in serious crimes have more reasons weighing against offending and are therefore more culpable for failing to heed those reasons." Morse, *Diminished Rationality*, *supra* note 33, at 303–04. But Morse's proposal of penalty reduction by inverse proportionality is unnecessary to address the severity of crimes: the larger harm of a greater offense is already reflected in its more severe punishment.

239. See Morse, *Diminished Rationality*, *supra* note 33, at 303; *supra* note 238.

240. See Morse, *Diminished Rationality*, *supra* note 33, at 304 (warning that "leaving the amount of reduction entirely to judicial discretion would produce private and usually unprincipled sentences").

variance within a particular range permits judicial tailoring in light of the defendant's actual impairments and relationship to the criminal act. The mandatory minimum reduction and available range of statutory mitigation are appropriate matters for democratic decision-making. While courts or legislatures could reduce most sentences (carceral terms, probationary terms, or fines) by a given percentage, life sentences should be replaced with a particular fixed sentence or range of years.<sup>241</sup> Those who acted with partial responsibility should be exempted from otherwise mandatory penalties and ineligible for the death penalty.<sup>242</sup> Legislatures should avoid disqualifying partially responsible offenders from programs to which others are eligible, such as parole, furlough, and opportunity to earn good- or earned-time credits.<sup>243</sup>

Several foreign jurisdictions have adopted penalty-reduction measures along these lines. Table 1 depicts the mitigation approaches of eighteen civil law countries with generic partial responsibility structures.<sup>244</sup> Nearly half (eight) mandate or impose an automatic penalty reduction for partial responsibility,<sup>245</sup> and an additional six countries suggest it.<sup>246</sup> Of those fourteen countries that encourage sentence reduction,<sup>247</sup> nine provide specific guidelines to direct the

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241. See, e.g., *infra* Appendix (reporting on several states, including Turkey (mandating that "heavy life" sentences should be mitigated to twenty-five years' imprisonment, while life sentences should be reduced to twenty years); Germany (suggesting a life sentence be punished by at least three years of incarceration); Finland: (suggesting a life sentence be punished by between two and twelve years of incarceration); France (automatically reducing a life sentence to thirty years); and Greece (ordering that a life sentence be mitigated to a term of incarceration)).

242. Cf. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that executions of individuals with intellectual disability are cruel and unusual punishments prohibited by the Eighth Amendment).

243. Studies suggest that parole supervision substantially decreases the likelihood of recidivism for those with mental illness. See Michael Ostermann & Jason Matejkowski, *Exploring the Intersection of Mental Health and Release Status with Recidivism*, 31 JUST. Q. 746, 758 (2014) (finding that being released with parole supervision was associated with a twenty-nine percent decrease in the likelihood of rearrest and reconviction relative to being released unconditionally without parole supervision).

244. See *supra* Section II.A (explaining how these countries were selected).

245. See *infra* Table 1 (Brazil, France, Greece, Italy, Japan, Spain, Switzerland, and Turkey).

246. See *infra* Table 1 (Chile, China, Finland, Germany, Poland, and Taiwan).

247. See *infra* Table 1 (Chile, China, Brazil, Finland, France, Germany, Greece, Italy, Japan, Poland, Spain, Switzerland, Taiwan, and Turkey). By "encourage sentence reduction," I mean the countries' penal codes either mandate a penalty

degree of diminishment that must or may attend a diminished responsibility finding.<sup>248</sup> Brazil compels courts to lower the penalty for a partially responsible offender by one- to two-thirds.<sup>249</sup> Germany and Finland suggest reducing the maximum of a prescribed sentencing range by at least a quarter.<sup>250</sup> France applies an automatic penalty reduction for any term of incarceration, but—if the offense is liable to less than ten years’ imprisonment (which constitutes ninety-nine percent of cases going to trial)—the court may, after extensively stating its reasons, choose not to apply this reduction.<sup>251</sup> Greece sets forth an elaborate set of mandatory penalty reductions that includes caps, floors, and ranges for crimes carrying statutory penalties of up to ten years in prison, and it permits judges to “reduce . . . sentence[s] freely[,] up to the minimum limit of the type of penalty,” for all crimes carrying lesser statutory sentences.<sup>252</sup>

**Table 1: Penalty Reduction Schemes for Partial Responsibility in Eighteen Civil Law Countries<sup>253</sup>**

Mandatory penalty reduction	Mandatory or automatic specific restrictions	<ul style="list-style-type: none"><li>• Brazil (“sentence [must] be reduced from one to two thirds”)<sup>254</sup></li><li>• France (“the court shall take this circumstance into account when it decides the penalty and determines its regime”: a life sentence is reduced to thirty years; a custodial sentence is</li></ul>
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reduction, suggest a penalty reduction, designate diminished responsibility as an extenuating circumstance, or direct the judge to consider the application of sentence-mitigation provisions (e.g., Finland). *See id.*

248. *See infra* Table 1 (Spain, Turkey, Chile, Brazil, Greece, France, Germany, Poland, and Finland).

249. *See infra* Appendix.

250. *See infra* Appendix.

251. *See* Audrey Guinchard, *The Insanity Defence in French Law: Are Prisons the New Asylums?*, in *THE INSANITY DEFENCE: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 223, 227 (Ronnie Mackay & Warren Brookbanks, eds., 2022); *infra* Appendix.

252. *See infra* Appendix.

253. This table was largely derived from Table 3 in Johnston et al., *Diminished Criminal Responsibility*, *supra* note 46, at 4. For citations and additional statutory details, *see infra* Appendix.

254. *See* José G. V. Taborda, *Criminal Justice System in Brazil: Functions of a Forensic Psychiatrist*, 24 INT’L J.L. & PSYCHIATRY 371, 377–78 (2001) (specifying that, although the statutory language states that the penalty “may” be reduced, authorities concur that the verb “may” should be interpreted as “must”).

		<p>reduced by one-third; however, in the case of liability for a <i>delit</i>, which carries a possible sentence of less than ten years, the court can “after having extensively stated its reasons” decide not to apply this sentence reduction)</p> <ul style="list-style-type: none"> <li>• Greece (“a reduced penalty is imposed”: life sentence is reduced to a term of imprisonment; imprisonment of at least ten years is reduced to imprisonment of between two and eight years; imprisonment of up to ten years is reduced to imprisonment of between one and six years; “[i]f the law provides for a cumulative prison sentence and a fine, only the latter may be imposed”)</li> <li>• Spain (incomplete exemption: “[j]udges or [c]ourts . . . shall impose a lower punishment in one or two degrees . . . considering the number and entity of the requisites absent or concurring, and the personal circumstances of the offender”)<sup>255</sup></li> <li>• Turkey (“aggravated life imprisonment shall be” reduced to twenty-five years, and life imprisonment is reduced to twenty years)</li> </ul>
	Discretionary specific restrictions	<ul style="list-style-type: none"> <li>• Greece (“the judge shall reduce the sentence freely to the minimum”)<sup>256</sup></li> </ul>
	No specified restrictions	<ul style="list-style-type: none"> <li>• Italy (“the punishment is reduced”)</li> <li>• Japan (“diminished capacity shall lead to the punishment being reduced”)</li> <li>• Switzerland (“the court shall reduce the sentence”)</li> </ul>

255. For an explanation of Spain’s two forms of partial responsibility, see *supra* notes 84 & 127.

256. This applies in “any other case” besides one with a particular punishment listed in the “mandatory specific restrictions” row above. See Johnston et al., *Diminished Criminal Responsibility*, *supra* note 46, at 4 tbl.3.

Discretionary penalty reduction	Discretionary specific guidance	<ul style="list-style-type: none"><li>• Chile (operating as an extenuating circumstance that must be weighed together with other circumstances that attenuate and aggravate)<sup>257</sup></li><li>• Finland (“[sentence mitigation provisions] are to be taken into account in the determination of the sentence:” “at most 3/4 of the maximum sentence of imprisonment or fine and at least the minimum sentence provided for the offence”; life term is reduced to a term of two to twelve years of imprisonment; “[i]f the maximum punishment for the offence is imprisonment for a fixed period, the court may . . . impose a fine as the punishment instead of imprisonment, if there are especially weighty reasons for this”)</li><li>• Germany (“the penalty may be mitigated”: for a fixed term or fine, “no more than 3/4 of the statutory maximum . . . may be imposed”; life term is reduced to at least three years of imprisonment; lowers particular minimum terms of imprisonment)</li><li>• Poland (“may apply an extraordinary mitigation of the penalty”: for a crime, “the court shall impose a penalty of not less than 1/3 of the lower statutory level”; for a misdemeanor with a statutory minimum at not less than one year’s deprivation of liberty, “the court shall impose either a fine, the penalty of restriction of liberty or deprivation of liberty”; for a misdemeanor with a statutory minimum at less than one year’s deprivation of liberty, “the court shall impose either a fine or the penalty of restriction of liberty”; “[i]f the act in question is subject, alternatively, to [a</li></ul>
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257. See *id.* at 4–5, 8.

		<p>fine, restriction of liberty, or deprivation of liberty], the extraordinary mitigation of a penalty shall consist in renouncing the imposition of the penalty, and [in] the imposition of a penal measure [such as interdiction on driving vehicles or on practicing certain professions]”)</p> <ul style="list-style-type: none"> <li>• Spain (mitigation ground: penalty response varies by the aggregate number of mitigating and aggravating circumstances)</li> <li>• Turkey (“the penalty . . . may be reduced by no more than 1/6”)<sup>258</sup></li> </ul>
	No specified restrictions	<ul style="list-style-type: none"> <li>• China (“may be given a lesser or a mitigated punishment”)</li> <li>• Taiwan (“punishment may be reduced”)</li> <li>• Czech Republic (“the court shall take it into consideration when determining the type and extent of the sentence”)</li> <li>• Russia (“shall be taken into consideration . . . when it imposes punishment”)</li> <li>• Luxembourg (“take into account this circumstance to determine the sentence”)</li> </ul>
No penalty reduction measure		<ul style="list-style-type: none"> <li>• Portugal (may result in no penalty, a reduced penalty, or an aggravated penalty)<sup>259</sup></li> </ul>

The configuration of formal mitigation endorsed by this Article—imposing a percentile range of penalty reduction across offenses—would work especially well in those U.S. jurisdictions that provide for presumptive sentences or that

258. The permissive abatement of one-sixth of the prescribed punishment applies to sentences other than “heavy life” or life sentences, which appear in the “mandatory specific restrictions” row above. See Johnston et al., *Diminished Criminal Responsibility*, *supra* note 46, at 4.

259. See Johnston et al., *Diminished Criminal Responsibility*, *supra* note 46, at 8–9.



structure judges' sentencing discretion within ranges.<sup>260</sup> However, in approximately half of U.S. jurisdictions, legislatures provide very wide sentencing ranges (e.g., zero to twenty years) for offenses and permit broad judicial discretion.<sup>261</sup> In these states, reducing the maximum and any available minimum sentence may have little practical effect. These states may opt for an alternative form of mandatory penalty reduction,<sup>262</sup> such as (1) reducing the grade of the offense by one offense level;<sup>263</sup> (2) reducing the defendant's liability to a lesser included offense;<sup>264</sup> (3) sentencing within the lower half of the scheduled punishment range;<sup>265</sup> or (4) shortening an individual's initial parole eligibility date by a certain percentage (e.g., allowing a partially responsible person to be considered for parole after serving 25% of the sentence, as opposed to the 50% required for fully responsible offenders convicted of that offense).<sup>266</sup>

None of these options are necessarily optimal. Some states' offense levels are too large—consisting only of felony, misdemeanor, and violation—for reducing the offense level to

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260. Approximately half of the states structure judges' discretion in this way, providing guidance on the type and length of sentence for a particular offense. Alison Lawrence, NAT'L CONF. STATE LEGISLATURES, MAKING SENSE OF SENTENCING: STATE SYSTEMS AND POLICIES 5 (2015), <https://www.nmlegis.gov/handouts/CJRS%20072919%20Item%201%20NCSL%20Making%20Sense%20of%20Sentencing.pdf> [<https://perma.cc/Q6X4-SA66>].

261. See MARY FAIRCHILD, NAT'L CONF. OF STATE LEGISLATURES, DETERMINE SENTENCING LAWS: A COMPARISON OF THE PROVISIONS OF STATE DETERMINE SENTENCING LAWS 1 (1980), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/determine-sentencing-laws-comparison-provisions-state-determinate> [<https://perma.cc/GFH5-FW9J>].

262. I appreciate Christopher Slobogin for sharing his thoughts on possible sentencing approaches.

263. Paul Robinson has suggested a similar but discretionary sentencing response for a finding of diminished responsibility. See Robinson, *Mitigations*, *supra* note 32, at 263.

264. This form of mitigation would mimic that used in provocation cases, where a successful defense will reduce a defendant's liability from murder to manslaughter. Paul H. Robinson, *Abnormal Mental State Mitigations of Murder — the U.S. Perspective*, in LOSS OF CONTROL, *supra* note 84, at 292.

265. Spain provides this sentencing response for those with less severe forms of diminished responsibility. See CÓDIGO PENAL [C.P.] [CRIMINAL CODE] art. 66(1) (Spain) (illustrating Spanish law).

266. See Stephen J. Morse, *Mental Disorder and Criminal Justice*, in 1 REFORMING CRIMINAL JUSTICE: A REPORT BY THE ACADEMY FOR JUSTICE 251, 306 (Erik Luna ed., 2017).

be a viable solution.<sup>267</sup> Additionally, some crimes do not have lesser included offenses.<sup>268</sup> Dictating that a sentence must fall within the lower half of a scheduled punishment range may yield little effect if judges generally tend to sentence near or below the middle of the range. Finally, accelerating parole eligibility merely permits parole consideration at an earlier date; it does not guarantee a shorter sentence. Indeed, studies show that individuals with mental illnesses typically are denied parole at higher rates than those without, perhaps because of their tendency to commit more disciplinary infractions while incarcerated,<sup>269</sup> their greater accumulation of criminogenic risk factors,<sup>270</sup> and the stigma associated with psychiatric disabilities in general (perceptions of dangerousness and instability).<sup>271</sup> Individuals with mental disorders are also more likely to violate technical conditions of parole, leading them to return to prison.<sup>272</sup> Consequently, individuals with mental illnesses are more likely than those without mental illnesses to

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267. See PAUL H. ROBINSON ET AL., UNIV. PA. CRIM. L. RSCH. GRP., REPORT ON OFFENSE GRADING IN NEW JERSEY 9, 9 n.72 (2011), <https://www.law.upenn.edu/live/files/183-nj-grading-report> [<https://perma.cc/X9BS-L6AE>] (identifying fourteen states with grading schemes that “simply us[e] terms of felonies, misdemeanors, and some form of lesser violations”).

268. *Id.* at 7.

269. See Jason Matejkowski et al., *The Impact of Severe Mental Illness on Parole Decisions: Social Integration Within a Prison Setting*, 37 CRIM. JUST. & BEHAV. 1005, 1006, 1020 (2010).

270. See Kimberly A. Houser et al., *Mental Health Risk Factors and Parole Decisions: Does Inmate Mental Health Status Affect Who Gets Released*, 16 INT’L J. ENV’T. RSCH. & PUB. HEALTH 2950, 10, 13–14 (2019) (finding that most mental health measures were statistically significantly related to parole decisions at the bivariate, but not multivariate, level and discussing the likely indirect impact of mental illness through the accumulation of criminogenic risk factors). But see Jason Matejkowski et al., *Mental Illness, Criminal Risk Factors and Parole Release Decisions*, 29 BEHAV. SCI. & L. 528, 528 (2011) (finding that mental illness had “neither a direct nor indirect effect on release decisions”).

271. See Lynette Feder, *Psychiatric Hospitalization History and Parole Decisions*, 18 L. & HUM. BEHAV. 395, 402 tbl.1, 406–07 (1994) (finding that 79% of inmates without a psychiatric hospitalization while incarcerated received parole, whereas only 21% with a psychiatric hospitalization were paroled); Joel M. Caplan, *What Factors Affect Parole: A Review of Empirical Research*, 71 FED. PROB. 16, 18 (2007) (reviewing literature and concluding that mental health has an influential, negative impact on parole decisions).

272. See, e.g., Ostermann & Matejkowski, *supra* note 243, at 761–62 (“The largest effect size . . . was contained within the model used to predict the likelihood that a parolee would experience a parole revocation stemming from a technical infraction.”).

forgo parole and instead max out their sentences.<sup>273</sup> States granting wide sentencing latitude will need to select the form of formal mitigation that works best given their particular sentencing structures.

A final means of recognizing partial responsibility—appropriate for all jurisdictions—would be to allow the consideration of less restrictive forms of penalties, at least for offenses of low severity. Examples of this tactic exist in other countries.<sup>274</sup> Employing a non-carceral option would both recognize the individual's reduced responsibility and permit the provision of mental health treatment in a setting more conducive to therapeutic success.

It is crucial that mitigation for partial responsibility not be purely discretionary, which France's experience demonstrates. Before 2014, the French Penal Code did not require penalty reduction in response to diminished responsibility.<sup>275</sup> Rather, it directed that "the court shall take [diminished responsibility] into account when it decides the penalty and determines its regime."<sup>276</sup> In practice, this terminology counterintuitively led to harsher punishments.<sup>277</sup> The diminished responsibility provision resulted in a "half-insane, double penalty," meaning that, in addition to the criminal act, the law "punishe[d] the underlying psychiatric dangerousness while forgetting the infirmity component of the mental illness in [the discussion of] criminality."<sup>278</sup> In response, the French Parliament amended the responsibility article to provide for the automatic reduction of a custodial sentence by one-third.<sup>279</sup> However, because judges can decline to apply this reduction in the vast majority of

273. See Jason Matejkowski & Michael Ostermann, *The Waiving of Parole Consideration by Inmates with Mental Illness and Recidivism Outcomes*, 48 CRIM. JUST. & BEHAV. 1052, 1052, 1064 (2021).

274. See *infra* Appendix (reporting on Greece, Finland, and Poland).

275. Caroline Fournet, *Between Lack of Responsibility and Dangerousness: Determinism and the Specificity of the French Criminal Law on Lack of Intellectual Insight and Loss of Control*, in LOSS OF CONTROL, *supra* note 84, at 353, 357.

276. *Id.* at 357.

277. Denis Salas, *La Responsabilisation des Fous Criminels A L'ère Neoliberale* [*The Responsibility of Criminal Madmen in the Neoliberal Era*], 88 L'INFORMATION PSYCHIATRIQUE [NEOLIBERAL INFO.] 423, 427 (2012) ("[T]he actual practice of courts is to punish individuals with diminished [responsibility] more harshly.") (translation by Lindsey O'Brien); see Fournet, *supra* note 275, at 358 ("[O]nce criminal responsibility [was] judicially recognized, mere alterations of intellectual insight and/or of control [were] more often than not . . . interpreted as aggravating circumstances . . .").

278. Salas, *supra* note 277, at 427.

279. Code pénal [C. pén.] [Penal Code] art. 122-1 (Fr.).

criminal cases through reasoned decision, this presumptive penalty reduction has had an uncertain effect.<sup>280</sup>

The dictates of retributivism and just deserts—plus, on balance, the experience of foreign jurisdictions with similar statutory schemes—militate toward recognizing partial responsibility with a mandatory penalty reduction. In jurisdictions that employ presumptive sentencing or that guide judicial discretion with sentencing ranges, this diminution should take the form of a mandatory punishment reduction within a specified range.<sup>281</sup> Those who acted with partial responsibility should be exempt from mandatory penalties and ineligible for the death penalty. Jurisdictions should also encourage courts to consider less restrictive forms of punishment when appropriate. In addition to penalty reduction, a partial responsibility verdict should carry certain assessment and treatment consequences. These are explored in the next Section.

### B. *Treatment Consequences*

Prisons and jails should provide treatment during an offender's sentence if necessary to prevent suffering or to reduce recidivism.<sup>282</sup> All individuals who receive a diminished responsibility verdict should receive a post-conviction evaluation,<sup>283</sup> any necessary treatment,<sup>284</sup> and periodic

280. Guinchard, *supra* note 251, at 224. Courts must also consider the advice of medical experts and “ensure that the sentence imposed punishes the convicted individual in accordance with his mental condition.” C. pén art. 122-1 (Fr.).

281. Additionally, a jurisdiction should reduce a life sentence to a particular fixed term or range of years. For sentence reduction options appropriate for jurisdictions providing very wide sentencing ranges, see *supra* notes 263–67 and accompanying text.

282. See CRIM. JUST. STANDARDS ON MENTAL HEALTH, No. 7-10.1(a) (A.B.A. 2016); ABA STANDARDS FOR CRIM. JUST.: TREATMENT OF PRISONERS, No. 23.6-11 (A.B.A. 2011).

283. See FINGARETTE & HASSE, *supra* note 21, at 202, 204–05.

284. CRIMINAL JUSTICE STANDARDS ON MENTAL HEALTH, STANDARD 7-1.2(c) ABA (2016). Just because a person's mental abnormality contributed to her criminal offense does not mean that she will necessarily benefit from treatment during the course of her punishment. For instance, impairments from dementia, intellectual disability, or psychopathy may decrease rationality and diminish responsibility, but a jurisdiction may not consider these conditions treatable in the sense that an intervention exists capable of substantially improving the symptoms. In addition, an offender's mental disorder may manifest in only a mild degree of functional impairment. See Janelle N. Beaudette & Lynn A. Stewart, *National Prevalence of Mental Disorders Among Incoming Canadian Male Offenders*, 61 CAN. J. PSYCHIATRY

evaluations over the course of incarceration to assess their mental health needs.<sup>285</sup> Upon release, any offender who received treatment during incarceration should be given a reasonable supply of medications, prescriptions, or both, as well as patient education for ongoing treatment and a warm handoff to a community service provider.<sup>286</sup> If an offender remains dangerous or in serious need of treatment beyond their sentence's expiration, the jurisdiction should pursue non-criminal measures such as civil commitment.<sup>287</sup> This Section explores when treatment should be supplied as part of a sentence, either to respond to basic human needs or to reduce recidivism.<sup>288</sup>

Correctional institutions have a constitutional duty to provide adequate mental health care to inmates.<sup>289</sup> Therefore, if an individual with a mental disorder is incarcerated, he should receive any reasonably available treatment necessary to

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624, 624 (2016) (finding that “57% of offenders with a current Axis I mental disorder were rated as experiencing minimal to moderate functional impairment . . . , indicating that most participants do not require intensive psychiatric services”).

285. See Kenneth Adams & Joseph Ferrandino, *Managing Mentally Ill Inmates in Prisons*, 35 CRIM. JUST. & BEHAV. 913, 925 (2008).

286. See Henry A. Dlugacz & Erik Roskes, *Clinically Oriented Reentry Planning*, in HANDBOOK OF CORRECTIONAL MENTAL HEALTH 395, 400–06 (Charles L. Scott ed., 2d ed. 2010) (discussing clinical and legal bases for reentry planning); see generally *id.* at 406–24 (reviewing current approaches to reentry planning for inmates with serious mental illnesses).

287. Decades of research have established that mental disorder is largely an insignificant predictor of both general and violent recidivism. See Johnston, *Reconceptualizing*, *supra* note 235, at 533–35; Bonta, et al., *supra* note 238, at 135–36. In addition, the severity of the crime of conviction is not predictive of recidivism. See *supra* note 238. Therefore, offenders found partially responsible due to mental disability should be subject to the state's general civil commitment statute (not less stringent criteria) upon sentence expiration. To address public concern over the earlier release of offenders under mandatory penalty-reduction provisions, jurisdictions adopting partial responsibility laws should consider providing for an offender's evaluation before the expiration of their carceral sentence. Some GBMI statutes do this. See, e.g., ALASKA STAT. § 12.47.050(e) (2023) (“Not less than 30 days before the expiration of the sentence . . . , the commissioner of corrections shall file a petition . . . for a screening investigation to determine the need for further treatment . . .”).

288. For more on how correctional institutions should allocate their scarce programmatic resources regarding individuals with mental disorders, see generally Johnston, *Reconceptualizing*, *supra* note 235, at 551–66.

289. See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977).

prevent deterioration and substantial suffering.<sup>290</sup> Taking this constitutional obligation seriously would require a dramatic increase in inmate treatment. As previously mentioned, nationwide studies consistently reveal that 30%–65% of inmates with serious mental health needs receive no form of mental health treatment while incarcerated.<sup>291</sup> Jails, in particular, do a poor job of providing necessary medication and therapy.<sup>292</sup>

Inadequate treatment is due in part to carceral institutions' poor identification of individuals with serious psychiatric issues.<sup>293</sup> Decades of research have documented that jails and prisons fail to detect, at admission, a significant proportion of offenders with mental disorders.<sup>294</sup> In a 2020 analysis of 2,961 individuals screened for mental health across eight jails, Professor Sheryl Kubiak and colleagues found that jail staff failed to detect over half of the individuals later identified by a validated screening instrument as having a serious mental illness (54%,  $n = 314$ ).<sup>295</sup> Studies have found similarly poor

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290. See *Bowring*, 551 F.2d at 47–48; *Ruiz v. Estelle*, 503 F. Supp. 1265, 1339 (S.D. Tex. 1980) (outlining six minimum requirements for correctional mental health treatment programs to be constitutionally acceptable).

291. See *supra* note 73 and accompanying text.

292. See Johnston, *Vulnerability and Just Desert*, *supra* note 72, at 161, 161 n.62.

293. Prisons and jails currently rely upon a triage system to identify those inmates requiring treatment and special housing. See Humberto Temporini, *Conducting Mental Health Assessments in Correctional Settings*, in HANDBOOK OF CORRECTIONAL MENTAL HEALTH, *supra* note 286, at 119, 130–31. The evaluation begins with a short, initial mental health screening during admission. See *id.* If individuals are flagged as having significant mental health needs, they are referred to a mental health professional for a more detailed assessment, which may include diagnosis and recommended treatment options. *Id.* at 136, 139; Illandra Denysschen, *Mental Health Screening for Prisoners Upon Entrance to State Prisons 18–19* (May 2018) (M.A. thesis, University of Texas at Arlington) (on file with Research Commons of the University of Texas at Arlington).

294. Denis Lafortune, *Prevalence and Screening of Mental Disorders in Short-Term Correctional Facilities*, 33 INT'L J.L. & PSYCHIATRY 94, 94 (2010).

295. Sheryl Kubiak et al., *Identification, Referral, and Services for Individuals with Serious Mental Illness Across Multiple Jails*, 26 J. CORR. HEALTH CARE 168, 174, 176 (2020).

rates of detection in prison settings.<sup>296</sup> These results mirror the dismal identification rates found in previous studies.<sup>297</sup>

While nearly all carceral institutions report assessing individuals for mental illness during admissions,<sup>298</sup> screening procedures vary from “cursory to extensive.”<sup>299</sup> Many carceral institutions merely ask a couple of questions about prior mental health treatment, psychotropic medication, and current symptoms.<sup>300</sup> Because racial and ethnic minorities tend to have less access to mental health care,<sup>301</sup> these screening procedures tend to under-identify members of minoritized communities with significant psychiatric issues.<sup>302</sup> This results in greater rates of untreated mental disorders in carceral facilities, greater deterioration and suffering, and likely greater victimization for those populations.<sup>303</sup> The use of evidence-

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296. See Jennifer M. Reingle Gonzalez & Nadine M. Connell, *Mental Health of Prisoners: Identifying Barriers to Mental Health Treatment and Medication Continuity*, 104 AM. J. PUB. HEALTH 2328, 2328 (2014) (finding, in a representative sample of 18,185 state and federal prisoners, that “more than 50% of those who were medicated for mental health conditions at admission did not receive pharmacotherapy in prison” and attributing the lack of treatment continuity in part to “screening procedures that do not result in treatment by a medical professional”); *supra* note 73 and accompanying text (detailing the high percentage of inmates with serious mental health needs who receive no form of mental health treatment while incarcerated).

297. See Linda A. Teplin, *Detecting Disorder: The Treatment of Mental Illness Among Jail Detainees*, 58 J. CONSULTING & CLINICAL PSYCH. 233, 234 (1990) (finding, in a sample of 728 jail inmates, that the severe mental illness of 62.5% of inmates was not detected at intake); TEX. COMM’N ON JAIL STANDARDS, MENTAL HEALTH STUDY 3 (2005), <https://www.tcjs.state.tx.us/wp-content/uploads/2019/09/MH-Study.pdf> [<https://perma.cc/8L3P-7QQ9>] (finding that 34% of sampled inmates had histories of mental health services that were unnoticed in the booking process).

298. See KARISHMA A. CHARI ET AL., NAT’L HEALTH STAT. REP., NATIONAL SURVEY OF PRISON HEALTH CARE: SELECTED FINDINGS, 1, 4 (2016), <https://www.cdc.gov/nchs/data/nhsr/nhsr096.pdf> [<https://perma.cc/N3H7-KAJ3>]; Anna Scheyett et al., *Screening and Access to Services for Individuals with Serious Mental Illnesses in Jails*, 45 COMTY. MENTAL HEALTH J. 439, 442 (2009).

299. HENRY J. STEADMAN & BONITA M. VEYSEY, NAT’L INST. J., PROVIDING SERVICES FOR JAIL INMATES WITH MENTAL DISORDERS 1, 3 (1997); see Gonzalez & Connell, *supra* note 296, at 2328.

300. See Henry J. Steadman et al., *Validation of the Brief Jail Mental Health Screen*, 56 PSYCHIATRIC SVCS. 816, 816 (2005); Michael S. Martin et al., *Mental Health Treatment Patterns Following Screening at Intake to Prison*, 86 J. CONSULTING & CLINICAL PSYCH. 15, 15–16 (2018); Scheyett et al., *supra* note 298, at 442.

301. Seth J. Prins et al., *Exploring Racial Disparities in the Brief Jail Mental Health Screen*, 39 CRIM. JUST. & BEHAV. 635, 641–42 (2012).

302. See *id.* at 638–40.

303. See *id.* at 642.

based screening tools is rare.<sup>304</sup> Even facilities that use these instruments consistently miss a substantial proportion of those with significant mental health needs; the best screening tools detect at most 70%–75% of illnesses among inmates.<sup>305</sup> Disabilities not posing a security concern, such as depression, are especially likely to be missed.<sup>306</sup> This is particularly concerning given that suicide is the leading cause of death in jails.<sup>307</sup> In addition to poor detection of significant mental health needs at intake, carceral institutions struggle to fulfill referral requests and provide necessary treatment.<sup>308</sup>

A partial responsibility verdict could improve institutions' identification of, and provision of treatment for, individuals with serious mental health needs.<sup>309</sup> A diminished responsibility verdict will often—although not always<sup>310</sup>—

304. Martin et al., *supra* note 300, at 15–16; see Scheyett et al., *supra* note 298, at 442.

305. Michael S. Martin et al., *Yield and Efficiency of Mental Health Screening: A Comparison of Screening Protocols at Intake to Prison*, 11 PLOS ONE 1, 2 (2016); see Michael S. Martin et al., *Mental Health Screening Tools in Correctional Institutions: A Systematic Review*, 13 BMC PSYCHIATRY 275, 279 (2013).

306. See Lafortune, *supra* note 294, at 99; Steadman et al., *supra* note 300, at 820; Teplin, *supra* note 297, at 235.

307. E. ANN CARSON, BUREAU OF JUST. STAT., MORTALITY IN LOCAL JAILS, 2000–2019 — STATISTICAL TABLES 2 (2021), <https://bjs.ojp.gov/content/pub/pdf/mlj0019st.pdf> [<https://perma.cc/77YX-5G96>].

308. See Kubiak et al., *supra* note 295, at 174, 179 (finding that 31% of the individuals referred for treatment did not receive assessment or service by a mental health professional within the three-month period of study); *supra* note 73 and accompanying text (detailing poor rates of treatment provision by carceral institutions).

309. See Bernard L. Diamond, *Criminal Responsibility of the Mentally Ill*, 14 STAN. L. REV. 59, 84–85 (1961) (arguing that a finding of diminished responsibility serves as a public acknowledgment that the convicted person is sick and in need of treatment, which emphasizes correctional institutions' moral and legal responsibilities to provide treatment and gives the public “a sound foundation upon which to demand that their state provide such facilities within the correctional system”).

310. See Beaudette & Stewart, *supra* note 284, at 624; Gare A. Smith & James A. Hall, *Evaluating Michigan's Guilty but Mentally Ill Verdict: An Empirical Study*, 16 U. MICH. J.L. REFORM 77, 105 n.138 (1982) (noting that testing at one Michigan prison “revealed that upon entering prison, only 50% of those defendants diagnosed as GBMI show signs of mental disorders”). Scholars have concluded that “a significant proportion (ranging between 25% and 75%) of those found [GBMI] do not need treatment.” Christopher Slobogin, *The Guilty but Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494, 518 n.115 (1985). Contributing factors could include differences in the timing and focus of assessment, differences in the expression of symptoms, differences in standards and policies



signal significant mental health needs. Therefore, as a general matter, an individual receiving a partial responsibility verdict should skip the initial screening and be referred directly to a mental health professional for further assessment and testing.<sup>311</sup> Using a partial responsibility verdict to shunt an individual into a more rigorous mental health evaluation should help cut through “[t]he cacophony of jail milieus, [which] makes it particularly difficult to differentiate between mental disorder and behaviors that are merely disorderly.”<sup>312</sup> Because the mental disability would have been a significant factor in the criminal offense, a partial responsibility verdict may tend to identify individuals whose mental symptoms would not naturally resolve on their own.<sup>313</sup> Furthermore, to the extent that the application of the verdict extends beyond psychosis and reflects factors other than the receipt of prior treatment,<sup>314</sup> the verdict could help identify categories of individuals often missed in intake screenings, including (disproportionately) people of color.<sup>315</sup> In addition to this post-conviction evaluation,<sup>316</sup> a diminished responsibility verdict should also require periodic evaluation over the course of a carceral term to ensure that inmates do not deteriorate and that they receive all necessary care.<sup>317</sup>

GBMI statutes provide precedent for using a verdict to trigger evaluation and possible treatment. The vast majority of

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employed by the two evaluating bodies, improvement in mental health conditions after the receipt of pretrial treatment, and the unavailability of treatment in the correctional system. INGO KEILITZ ET AL., NAT’L CTR. FOR STATE CTS., *THE GUILTY BUT MENTALLY ILL VERDICT: AN EMPIRICAL STUDY* 1–80 (1985) (discussing the factors contributing to low treatment rates).

311. For inmates with serious treatment needs—which, depending on a jurisdiction’s qualifying criteria, might regularly be indicated by a partial responsibility verdict, see *supra* Introduction—a psychiatrist or other appropriately credentialed mental health professional should perform a comprehensive mental health evaluation within a time frame appropriate to the offender’s level of urgency. See *infra* notes 321–33 and accompanying text (concerning the treatment of GBMI inmates in Pennsylvania); note 323 and accompanying text.

312. Teplin, *supra* note 297, at 233.

313. See Martin et al., *supra* note 300, at 16 (“Extant evidence suggests that a high proportion of inmates present with symptoms that resolve naturally as they adjust to the correctional environment.”).

314. See *supra* note 135 (comparing diagnosis patterns between full and partial responsibility verdicts in foreign countries).

315. See *supra* text accompanying note 302.

316. See *supra* text accompanying note 283.

317. See *supra* text accompanying note 285; *infra* notes 336–37 and accompanying text (suggesting that legislatures authorize courts to retain jurisdiction to ensure receipt of mental health evaluations and necessary care).

GBMI statutes enable either evaluation for mental health treatment, provision of treatment, or both, for individuals found GBMI.<sup>318</sup> Interestingly, most studies and commentators have concluded (on rather weak evidence) that GBMI statutes do not materially increase inmate treatment.<sup>319</sup> They have attributed

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318. See ALASKA STAT. § 12.47.050(b) (2023); DEL. CODE ANN. tit. 11, § 408(b) (2023); GA. CODE ANN. § 17-7-131(g)(1) (2023); 730 ILL. COMP. STAT. 5/5-2-6(b) (2023); IND. CODE § 35-36-2-5(b) (2023); KY. REV. STAT. ANN. § 504.140 (West 2023); MICH. COMP. LAWS § 768.36(3) (2023); NEV. REV. STAT. § 176.057(1)(b)(2) (2023); 42 PA. CONS. STAT. § 9727(a) (2023); S.C. CODE ANN. § 17-24-70(A) (2023); S.D. CODIFIED LAWS § 23A-27-38 (2023); UTAH CODE ANN. § 77-16a-104(2) (West 2023).

319. See, e.g., Mark A. Woodmansee, *The Guilty but Mentally Ill Verdict: Political Expediency at the Expense of Moral Principle*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341, 354 (1996) (explaining that the GBMI statutes in most states fail to guarantee treatment, but basing his conclusion on another nonempirical, non-statutory-study law review article). These conclusions appear to rely primarily upon the opinions of administrators. See, e.g., Smith & Hall, *supra* note 310, at 105 nn. 137–38 (quoting Dr. John Prelesnik, Superintendent of the Reception and Guidance Center at Jackson State Penitentiary, who stated that “in reality[,] GBMI prisoners are treated like any other prisoners; they will get extra treatment if they need it, but that’s the same treatment we give everyone else”); Slobogin, *supra* note 310, at 514 (asserting that available data suggest no material differences in the treatment of GBMI and guilty offenders and citing a “survey of . . . administrators familiar with the services provided for [GBMI] offenders” as support); Ingo Keilitz, *Researching and Reforming the Insanity Defense*, 39 RUTGERS L. REV. 289, 319 (1987) [hereinafter Keilitz, *Researching and Reforming*] (relying on the opinion of “interviewees who had direct knowledge of available mental health services”). Several empirical studies have investigated the treatment received by GBMI inmates, but that research did not compare the treatment received by GBMI inmates to that received by inmates not found GBMI but identified by an assessment instrument after admission as having a mental health issue that would fall within the GBMI statute’s definition of “mentally ill.” See, e.g., *id.* at 319 (finding, in a study of GBMI inmates in Georgia, Illinois, and Michigan, that “at least ninety percent of GBMI offenders actually received a post-conviction mental health evaluation[;] [r]oughly two-thirds . . . of the offenders evaluated were recommended for some form of mental health treatment and care[; and i]n eighty percent of the cases, the departments of corrections provided [the recommended] treatment”; and stating, without providing comparative data for Georgia or Illinois, that “[a]ccording to interviewees who had direct knowledge of available mental health services . . . GBMI offenders are no more likely to receive treatment than mentally disordered offenders in the general inmate population to whom the GBMI label is not applied”); Randy Borum & Solomon M. Fulero, *Empirical Research on the Insanity Defense and Attempted Reforms: Evidence Toward Informed Policy*, 23 L. & HUM. BEHAV. 117, 126 (1999) (discussing research on the hospitalization of GBMI inmates in Georgia, Pennsylvania, and Illinois); John Klofas & Ralph Weisheit, *Guilty but Mentally Ill: Reform of the Insanity Defense in Illinois*, 4 JUST. Q. 39, 45 (reporting that “as many as two-thirds of GBMI offenders receive ‘no regular psychiatric or psychological treatment’ while in Illinois prisons” (internal citation omitted)); cf. Slobogin, *supra* note 310, at 518 n.115 (citing statements from administrators and other informed persons concerning the extent

this finding to the statutes' failures to guarantee treatment and to previously existing statutory rights to treatment for offenders with mental health needs.<sup>320</sup> However, evidence suggests the provision of treatment to GBMI inmates differs by jurisdiction<sup>321</sup> and may reflect differing definitions of "mentally ill" in GBMI statutes (and thus differing levels of impairment among GBMI offenders).<sup>322</sup> Better rates of treatment may also reflect states' creation of distinct evaluation procedures for GBMI inmates.<sup>323</sup>

For several reasons, partial responsibility statutes could yield a more substantial effect than GBMI statutes in identifying individuals with significant mental health needs and, ultimately, facilitating treatment provision. First, GBMI verdicts are rare,<sup>324</sup> both as a matter of statutory design and because they do not hold any sentence-reduction potential for

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to which GBMI offenders receive hospital treatment). The (partial) exception to the fact that most conclusions are based on weak evidence is a study conducted by Professor Ingo Keilitz and colleagues on the mental health services received by 231 GBMI offenders in Michigan compared to a group of 201 defendants found guilty after raising the issue of mental aberration. KEILITZ ET AL., *supra* note 310, at 3-78, 3-87. This study found "that at least two[-]thirds of the GBMI population received treatment in prison and/or at CFP" while "[46% of the guilty sample] received such services . . ." *Id.* at 3-87.

320. See, e.g., Slobogin, *supra* note 310, at 512-13, 512 n.82.

321. See George L. Blau & Richard A. Pasewark, *Statutory Changes and the Insanity Defense: Seeking the Perfect Insane Person*, 18 L. & PSYCH. REV. 69, 92-93 (1994); R.D. Mackay & Jerry Kopelman, *The Operation of the "Guilty but Mentally Ill" Verdict in Pennsylvania*, 16 J. PSYCHIATRY & L. 247, 256 (1988) (examining the use of Pennsylvania's GBMI statute from 1983-1987 and determining that 72.5% of GBMI individuals were immediately treated at a mental health facility).

322. See Mackay & Kopelman, *supra* note 321, at 252 (noting the narrower GBMI standard in Pennsylvania, as compared to Michigan and Illinois); *id.* at 256 (attributing the considerably higher hospitalization rate of GBMI offenders in Pennsylvania to diagnosis).

323. Compare KEILITZ ET AL., *supra* note 310, at 2-40, 2-41 (reporting that some GBMI offenders are more likely to receive mental health treatment because they receive more attention during the post-conviction evaluation and providing an example from Indiana, where GBMI offenders are provided an "intensive mental health evaluation" at the point of entry "(i.e., they are examined by a psychologist and a psychiatrist on an individual basis, whereas other offenders are subjected only to group psychological testing)"), with Andrew J. Black, Commentary, *People v. Lloyd: Michigan's Guilty but Mentally Ill Verdict Created with Intention to Help is Not Really a Benefit at All*, 79 U. DET. MERCY L. REV. 75, 89 (2001) (concluding, from interviewing a former treatment provider in a Michigan prison, that insufficient treatment is more a product of poor evaluation than quality of care).

324. See Keilitz, *Researching and Reforming*, *supra* note 319, at 317; Smith & Hall, *supra* note 310, at 107 tbl.A.

defendants.<sup>325</sup> By contrast, defendants would be much more likely to seek a Diminished Responsibility from Mental Disability verdict carrying mitigation consequences, and partial responsibility verdicts should play a more prominent role in verdict patterns. The greater number of partially responsible inmates should induce the creation of a distinct evaluation procedure to ensure statutory compliance.<sup>326</sup> Because current assessment practices are not reliable, the overall effect of addressing existing deficiencies would be greater within the context of a system offering a partial responsibility verdict than within one offering a (lesser employed) GBMI determination.<sup>327</sup>

Second, a partial responsibility verdict would be much more likely to result in a jail (or other non-prison) sentence than a GBMI verdict. GBMI verdicts tend to arise in felony cases and often result in prison sentences.<sup>328</sup> By contrast, a partial responsibility plea would likely attract both individuals charged with felonies and individuals charged with misdemeanors. They could raise the partial defense at trial or, if they plead guilty (a much more likely scenario), use the partial defense as a “chip” in plea negotiations.<sup>329</sup> Research suggests that a significant proportion of the crimes for which

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325. See Lauren G. Johansen, *Guilty but Mentally Ill: The Ethical Dilemma of Mental Illness as a Tool of the Prosecution*, 32 ALASKA L. REV. 1, 12–13 (2015) (quoting the Deputy Director for the Public Defender Agency, Criminal Division, as testifying that “GBMI provisions currently doesn’t [sic] effect [sic] a great many clients, because defense counsel will do everything possible to avoid a GBMI verdict because it results in greater punishment for the client”). Some GBMI statutes both require a defendant to plead insanity before he can be considered for a GBMI verdict and will not accept a plea of GBMI without the prosecutor’s consent if the defendant waives the right to trial. See MICH. COMP. LAWS § 768.36(1)–(2) (2023).

326. See *supra* note 323 and accompanying text.

327. See *id.*; Slobogin, *supra* note 310, at 514 n.95 (recognizing that GBMI verdicts may increase the likelihood of receiving a post-conviction evaluation and, therefore, identifying treatment needs).

328. See Lisa A. Callahan et al., *Measuring the Effects of the Guilty But Mentally Ill (GBMI) Verdict: Georgia’s 1982 GBMI Reform*, 16 L. & HUM. BEHAV. 447, 458–59 (1992); Keilitz, *Researching and Reforming*, *supra* note 319, at 307, 318. Some statutes provide that GBMI verdicts are only available in felony cases. See, e.g., GA. CODE ANN. § 17-7-131(b)(1)(D) (2023) (confining insanity, and thus GBMI, verdicts to felony cases); MICH. COMP. LAWS §§ 768.36(1), 768.20a(1) (2023) (same).

329. See Morse, *Diminished Rationality*, *supra* note 33, at 302–03. Studies have found that GBMI statutes have had a measurable impact on plea bargaining. See Keilitz, *Researching and Reforming*, *supra* note 319, at 315. Most GBMI determinations result from pleas as opposed to jury or bench trials, and “the availability of GBMI appears to increase the willingness of parties to enter into plea negotiation.” *Id.*

individuals with serious mental illnesses are arrested are non-violent crimes against the public order and nonserious property offenses, typically classified as misdemeanors.<sup>330</sup> In addition, studies have consistently found higher rates of mental disorders in jails than in prisons.<sup>331</sup> These findings suggest that a partial responsibility verdict may be a plausible option for a substantial subset of would-be jail inmates, resulting in shorter jail sentences and community sanctions.<sup>332</sup> Because jails have a considerably worse record than prisons of identifying individuals with mental health needs and providing necessary treatment,<sup>333</sup> a partial responsibility verdict could be particularly impactful in remedying existing shortcomings. Indeed, merely by shining a larger spotlight on problems of mental health care in our nation's jails and prisons, partial responsibility laws "may provide the impetus necessary to improve the treatment of the mentally ill criminal."<sup>334</sup>

The U.S. experience with GBMI statutes suggests, however, that unless psychiatrically indicated treatment is mandated, carceral institutions may not provide necessary treatment to partially responsible offenders.<sup>335</sup> Therefore, a partial

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330. William H. Fisher et al., *Patterns and Prevalence of Arrest in a Statewide Cohort of Mental Health Care Consumers*, 57 PSYCHIATRIC SERVS. 1623, 1625–26 (2006).

331. See JAMES & GLAZE, *supra* note 16, at 3 (finding that 60% of jail inmates and 49% of state prisoners reported symptoms of a mental health disorder); Scheyett et al., *supra* note 298, at 440.

332. Because a partial responsibility verdict would reduce the length of leveraged treatment, effective discharge planning is essential. See *supra* note 286 and accompanying text. Ideally, many misdemeanants with mental disorders would be diverted from the criminal justice system altogether. See Pamela K. Lattimore et al., *A Comparison of Prebooking and Postbooking Diversion Programs for Mentally Ill Substance-Using Individuals with Justice Involvement*, 19 J. CONTEMP. CRIM. JUST. 30, 30 (2003) (presenting findings that suggest prebooking diversion achieves better outcomes than postbooking diversion).

333. See *supra* note 73 and accompanying text (concerning treatment differentials in jails and prisons); Scheyett et al., *supra* note 298, at 440 (noting that, "since jails are largely municipal administrative organizations tied to local budgets[,] while prisons are state institutions, variations among screening procedures and system resources can be great[er]" in the former context than in the latter).

334. Smith & Hall, *supra* note 310, at 105–06 (making this observation in the context of GBMI statutes); see *supra* note 309 and accompanying text.

335. See *supra* note 319; Linda C. Fentiman, "Guilty but Mentally Ill": *The Real Verdict is Guilty*, 26 B.C. L. REV. 601, 629 (1985) (describing the "minimal" care that GBMI inmates receive in prison). An important issue is how "psychiatrically indicated" or "necessary" treatment should be defined. In general, carceral institutions should provide the treatment necessary to relieve or avoid substantial

responsibility statute should require treatment that conforms with a mental health professional's recommendation either throughout the length of confinement or until the professional determines that the treatment is no longer necessary.<sup>336</sup> To ensure that partially responsible offenders receive proper evaluation and necessary treatment, jurisdictions should consider requiring carceral institutions to evaluate the offender and submit a treatment protocol to the sentencing court within a certain period of time.<sup>337</sup> Jurisdictions also may wish to consider authorizing courts to monitor treatment provision.

Beyond providing treatment to counter substantial suffering and deterioration, correctional institutions should allocate forensic treatment resources in the manner that best advances criminal justice aims such as public safety.<sup>338</sup> This is consistent with the Risk-Need-Responsivity model, which is the dominant correctional assessment and treatment model; it allocates high-intensity treatment to those at the highest risk of recidivism.<sup>339</sup> Accumulated evidence supports applying this model to offenders with mental disorders.<sup>340</sup>

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suffering or deterioration. They should not be required to provide all treatments useful for the flourishing of an individual. *See infra* notes 345–50 and accompanying text.

336. *See supra* note 335 (defining necessary treatment); KY. REV. STAT. ANN. § 504.150 (West 2023) (“If the defendant is found [GBMI], treatment shall be provided the defendant until the treating professional determines that the treatment is no longer necessary or until expiration of his sentence, whichever occurs first.”). At least one state supreme court has interpreted its state’s GBMI statute to grant a right to necessary treatment. *See People v. McLeod*, 288 N.W.2d 909, 914 (Mich. 1980). Importantly, the treatment needs of partially responsible offenders should not be satisfied at the expense of other inmates with serious mental health needs; this would be unfair and result in an irrational, inappropriate, and inefficient use of resources. *See Slobogin, supra* note 310, at 514.

337. *See Black, supra* note 323, at 94.

338. *See Johnston, Reconceptualizing, supra* note 235, at 552. Many assume that there is a strong and consistent causal relationship between mental disorders and crime, but this is not the case. *See supra* note 287.

339. *See Hanneke Kip & Yvonne H. A. Bouman, A Perspective on the Integration of eHealth in Treatment of Offenders: Combining Technology and the Risk-Need-Responsivity Model*, FRONTIERS PSYCHIATRY, Sept. 2021, at 1, 2.

340. *See Jennifer L. Skeem et al., Applicability of the Risk-Need-Responsivity Model to Persons with Mental Illness Involved in the Criminal Justice System*, 66 PSYCHIATRIC SVCS. 916, 916 (2015); Drew A. Kingston & Mark E. Olver, *Psychometric Examination of Treatment Change Among Mentally Disordered Offenders A Risk-Needs Analysis*, 45 CRIM. JUST. & BEHAV. 153, 155 (2018); Johnston, *Reconceptualizing, supra* note 235, at 545–49. Researchers have cautioned, however, against strict adherence to the Risk-Need-Responsivity model for offenders with

Many foreign jurisdictions allocate treatment in this manner and compel treatment for partially responsible offenders only when likely (and necessary) to reduce an offender's risk of violent or serious recidivism.<sup>341</sup> For example, Japanese courts order forensic mental health treatment only when (1) an offender committed a serious offense in a state of reduced responsibility; (2) the mental disorder that caused that reduced responsibility is still present and believed to be responsive to treatment; and (3) the offender would pose a substantial risk of violent recidivism without treatment.<sup>342</sup> Similarly, Portuguese courts order treatment for an offender with diminished responsibility only when, by virtue of the mental disorder and of the seriousness of the act, reasonable fear exists that the offender will commit similar acts in the future.<sup>343</sup> Indeed, twelve of the eighteen countries studied prioritize treatment for individuals deemed dangerous due to the mental disorder that diminished their responsibility.<sup>344</sup>

This approach—meeting individuals' basic human needs and then apportioning care in a manner that advances public safety objectives—is contrary to a philosophy that the criminal justice system should provide mental health care to every justice-involved individual with a mental health condition. In communities where behavioral healthcare cannot be easily accessed, the latter approach would incentivize the arrest of

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mental disorders because mental disorder likely has a nuanced and multifaceted relationship with criminogenic needs and recidivism. See Skeem et al., *supra*, at 918–20; Kingston & Olver, *supra*, at 169; Johnston, *supra*, at 554–58.

341. Indeed, shunting dangerous offenders with mental disorders into a treatment system appears to be the primary aim of many of these statutes. See Michael van der Wolf & Hjalmar van Marle, *Legal Approaches to Criminal Responsibility of Mentally Disordered Offenders in Europe*, in FORENSIC PSYCHIATRY AND PSYCHOLOGY IN EUROPE: A CROSS-BORDER STUDY GUIDE 31, 37 (Kris Goethals ed., 2018); Peter Bal & Frans Koenraadt, *Criminal Law and Mentally Ill Offenders in Comparative Perspective*, 6 PSYCH. CRIME & L. 219, 244 (2000); Kröber & Lau, *supra* note 150, at 683 (discussing the origin of diminished responsibility in Germany); Okada, *supra* note 108, at 367 (discussing the aim of the Medical Treatment and Supervision Act in Japan).

342. Okada, *supra* note 108, at 367–68.

343. CÓDIGO PENAL [Criminal Code] art. 91, no. 1 (Port.) (translated by Enio Ramalho & William Themudo Gilman in 2006). Portugal permits either a penalty or a security measure, depending on whether the court chooses to treat the offender with partial responsibility as unimputable or imputable and whether the agent's lesser imputability is considered an attenuating or aggravating factor. See Johnston et al., *Diminished Criminal Responsibility*, *supra* note 46, at 8–9 (Portugal).

344. See Johnston et al., *Diminished Criminal Responsibility*, *supra* note 46, at 6 tbl.4 (Brazil, Czech Republic, Germany, Greece, Italy, Japan, Portugal, Russia, Spain, Switzerland, Taiwan, and Turkey).

individuals with apparent mental disorders and possibly incentivize individuals to commit crimes to obtain treatment.<sup>345</sup> Indeed, correctional administrators and policymakers have voiced this concern.<sup>346</sup> Moreover, accepting the criminal justice system as a general provider of mental health care—beyond what is necessary to prevent substantial suffering and reduce recidivism—would further cement and normalize the criminal justice system as the primary purveyor of behavioral healthcare, spurring consequent budget ramifications.<sup>347</sup> Indeed, prisons and jails are particularly ill-equipped to provide this care.<sup>348</sup> As mental health care dollars continue to shift from social service budgets to criminal justice budgets, the nature of mental health care likely shifts as well, focusing more on security, surveillance, and social control and less on the flourishing of the individual.<sup>349</sup> Finally, linking treatment with justice involvement deepens erroneous and damaging stereotypes of individuals with mental disorders as inherently dangerous, violent, and criminal in nature.<sup>350</sup>

#### IV. RESPONSES TO COUNTERARGUMENTS

Skeptics could raise several objections against this Article's proposal. Sources of apprehension may be grouped into three (overlapping) categories: adverse criminal justice consequences, juror competence and possible bias, and

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345. See Gerd Weithmann et al., *Comparison of Offenders in Forensic-Psychiatric Treatment or Prison in Germany*, INT'L J.L. & PSYCHIATRY, Sept. 8, 2019, at 1, 2; Michael C. Seto et al., *The Criminogenic, Clinical, and Social Problems of Forensic and Civil Psychiatric Patients*, 28 L. & HUM. BEHAV. 577, 585 (2004); Erika M. Jansman-Hart et al., *International Trends in Demand for Forensic Mental Health Services*, 10 INT'L J. FORENSIC MENTAL HEALTH 326, 333 (2011).

346. See *Frontline: The New Asylums* (PBS television broadcast May 10, 2005) (transcript on file with author) (including this statement by prison mental health consultant Fred Cohen: "The better you make an institution (i.e., prison) that shouldn't be used for the purpose you're improving (i.e., lack of mental health treatment), the more you're ensuring its use").

347. See Thomas Fovet et al., *Mental Health and the Criminal Justice System in France: A Narrative Review*, FORENSIC SCI. INT'L MIND & L., July 31, 2020, at 1, 5.

348. See Adams & Ferrandino, *supra* note 285, at 925; Fentiman, *supra* note 335, at 633–34; *Tapia v. United States*, 564 U.S. 319, 335 (2011) (holding that, under federal law, "a court may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation" because prison is not suitable for rehabilitation).

349. See Adams & Ferrandino, *supra* note 285, at 925; Fentiman, *supra* note 335, at 633–34 (discussing the transformation of psychiatric practice in prisons).

350. See Johnston, *Theorizing Mental Health Courts*, *supra* note 179, at 540–42.



unintended consequent structural changes that could harm individuals with mental abnormalities.

First, the partial excuse could endanger public safety. As the American Law Institute has observed, “[D]iminished responsibility brings formal guilt more closely into line with moral blameworthiness, but only at the cost of driving a wedge between dangerousness and social control.”<sup>351</sup> Civil commitment offers a sufficient response to any danger posed by shortened periods of incapacitation.<sup>352</sup> The partial excuse could conceivably dampen the deterrence or education function of the law,<sup>353</sup> but this concern is less salient when the defense is limited to mental disability (as opposed to extended to any rationality-diminishing impairment).<sup>354</sup> Another concern is that the verdict could increase the involvement and necessary hiring of forensic mental health professionals.<sup>355</sup> However, the extent to which the verdict would encourage expert battles of the sort that characterize insanity litigation is unclear. The history of GBMI litigation demonstrates that plea bargains are the most likely conduit for the GBMI verdict.<sup>356</sup> Also, because less would be at stake than with an insanity verdict, the parties might be more likely to rely on prior mental health records in the partial responsibility context.

Second, concerns may arise about the rationality and equity of verdicts. Scholars have asserted that juries are incapable of partial responsibility assessments.<sup>357</sup> Yet juries already make similar evaluations in other cases.<sup>358</sup> Diminished responsibility judgments could be inconsistent,<sup>359</sup> which (if widespread) could bring the criminal justice system into disrepute.<sup>360</sup> However, studies have found that “jurors’ selection of the GBMI verdict appears to be discerning, not arbitrary, and [it] correlates with

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351. MODEL PENAL CODE § 210.3 cmt. 5, at 71–72 (AM. L. INST., Official Draft and Revised Comments 1985).

352. See *supra* note 287 and accompanying text.

353. See Dix, *supra* note 23, at 251.

354. See *supra* notes 39–40 and accompanying text.

355. I appreciate Rachel Kincaid for raising this objection. Cf. Slobogin, *supra* note 310, at 516 (comparing the number of trials litigating insanity before Georgia passed its GBMI statute (nineteen trials) to the number of trials involving GBMI, insanity, or both after Georgia passed it (twenty-four trials) and discussing surveys documenting the belief that the verdict “had no effect on the nature and frequency of expert participation”).

356. See *supra* note 329 and accompanying text.

357. Arenella, *supra* note 51, at 858.

358. See *supra* notes 60–62 and accompanying text.

359. Arenella, *supra* note 51, at 857.

360. Dix, *supra* note 23, at 252.

evidentiary factors,”<sup>361</sup> suggesting that jurors would be unlikely to employ a diminished responsibility verdict arbitrarily. A more substantial concern may be partiality. Studies of the application of partial responsibility in foreign jurisdictions and of diversionary options in the United States suggest that the verdict could be applied in a biased manner, favoring women or white defendants.<sup>362</sup> This is a serious concern that warrants tracking and study.

Third, use of the verdict could engender societal changes detrimental to the interests of individuals with mental disabilities. For instance, a partial responsibility verdict could reduce the proportion of insanity acquittals. However, empirical studies in the GBMI context suggest this is unlikely.<sup>363</sup> A related concern is that the middle alternative could “sidetrack[] meaningful reform of the insanity test itself.”<sup>364</sup> The practical effect of any sidetracking would likely be minimal, though, because studies consistently show that large differences in the wording of criminal nonresponsibility standards do not significantly affect verdict distributions.<sup>365</sup> A broader concern is that expanding the resources allocated to the forensic mental health system could detract from resources available for community mental health treatment,<sup>366</sup> pulling more individuals with mental disorders into the criminal justice

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361. Johnston & Leahey, *supra* note 27, at 1285–86.

362. See Weithmann et al., *supra* note 345, at 7 (comparing the demographic characteristics of offenders with diminished responsibility in German prisons and forensic-psychiatric settings and finding that women are proportionately more likely to receive psychiatric disposal than men); Traci Schlesinger, *Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged with Felonies and Processed in State Courts*, RACE & JUST., July 1, 2013, at 210, 228 (finding that prosecutors are more likely to grant pretrial diversions to white defendants than to Black or Latino defendants with similar legal characteristics).

363. While somewhat mixed, the empirical data suggest that the GBMI verdict has failed to significantly reduce the number of insanity acquittals. See Borum & Fulero, *supra* note 319, at 125 (observing that, “[i]n general, data from states in which outcomes have been studied (Michigan, South Carolina, Georgia, and Illinois) suggest that the implementation of GBMI did not significantly reduce the overall rate of insanity acquittals” and explaining the relevant studies). Studies of mock jurors have consistently found that GBMI verdicts displace both insanity and guilty verdicts. See, e.g., Norman J. Finkel et al., *Insanity Defenses: From the Jurors’ Perspective*, 9 L. & PSYCH. REV. 77, 81–92 (1985) (finding, in the verdict distributions of mock jurors, no significant effects from using six insanity instructions); Johnston & Leahey, *supra* note 27, at 1279 n.308 (collecting studies).

364. Arenella, *supra* note 51, at 854–55.

365. See *supra* note 91 and accompanying text.

366. See Weithmann et al., *supra* note 345, at 2.

system to receive care.<sup>367</sup> Limiting the provision of mental health treatment to what is necessary to ameliorate or prevent substantial suffering should mitigate this concern, at least somewhat. Moreover, this Article's proposal would not be creating a *new* right to treatment; rather, it would (hopefully) make the existing right to treatment more meaningful in practice.<sup>368</sup> Finally, experience with the GBMI verdict suggests that the Diminished Responsibility from Mental Disability verdict could be stigmatizing for inmates housed within the general population.<sup>369</sup> But, to the extent that partially responsible offenders come to comprise a significant proportion of the incarcerated population—which research on serious mental disorders in prisons and jails suggests is possible<sup>370</sup>—the finding (and label) may become less stigmatizing.

### CONCLUSION

As countries around the globe acknowledge, recognizing partial responsibility is a crucial component of a just criminal system.<sup>371</sup> U.S. jurisdictions should adopt a generic partial excuse of Diminished Responsibility from Mental Disability to be asserted as an affirmative defense and expressed as a fourth verdict. Functioning as a kind of imperfect insanity defense, the partial excuse would recognize that diminished rationality exists along a continuum. The verdict should carry formal mitigation consequences and would better proportion criminal liability and punishment to blameworthiness.

While the concerns raised in the counterarguments Part are not insubstantial, a diminished responsibility verdict could carry important instrumentalist and retributivist benefits. It could reduce mass incarceration by increasing the use of non-carceral responses to crime and by shortening carceral sentences. It could connect defendants with the treatment necessary for their clinical stability and help counterbalance the tendency of community mental health providers to neglect difficult-to-treat patients with significant comorbidities,

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367. See *supra* text accompanying notes 347, 366.

368. See *supra* Section III.B.

369. See Fentiman, *supra* note 335, at 629 (noting that “[t]hose prisoners found [GBMI] but not afforded psychiatric treatment often have special restrictions placed on their freedom of movement within the prison . . . and they may be stigmatized by their fellow prisoners as mentally ill ‘weirdos,’ making their adjustment to prison life even more difficult”).

370. See *supra* notes 67, 70 and accompanying text.

371. See *infra* Appendix.

trauma, and histories of violence.<sup>372</sup> The reduced incarceration and increased treatment would decrease the unjustified suffering of inmates with mental disabilities. If paired with effective discharge planning, the verdict could also improve reintegration and continuity of care, resulting in decreased use of emergency services and decreased rates of recidivism. The substantial cost differential between incarceration and community supervision (including treatment) of offenders with mental disorders suggests a probable large cost savings.<sup>373</sup> Better titrating of liability to blameworthiness would increase the justice system's moral credibility and "promote compliance, cooperation, deference, and internalization of the law's norms."<sup>374</sup> The most important reason to adopt a partial responsibility verdict, though, is the imperative to respond to the clarion call of justice.<sup>375</sup>

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372. See R.L. Weisman et al., *Integrating Criminal Justice, Community Healthcare, and Support Services for Adults with Severe Mental Disorders*, 75 PSYCHIATRIC Q. 71, 78 (2004).

373. See *supra* note 71 and accompanying text (comparing costs of incarcerating individuals with and without a mental disorder); *Incarceration Costs Significantly More than Supervision*, U.S. COURTS (Aug. 17, 2017), <https://www.uscourts.gov/news/2017/08/17/incarceration-costs-significantly-more-supervision> [<https://perma.cc/6PJ9-5JKV>] (reporting that the average annual cost of imprisonment is \$34,770 versus the average \$4,392 cost to supervise a person in the community); Jennifer L. Skeem et al., *Comparing Costs of Traditional Specialty Probation for People with Serious Mental Illness*, 69 PSYCHIATRIC SVCS. 896, 896 (2018) (finding that specialty probation costs 51% less per participant than traditional probation due to reduced emergency, inpatient, and residential costs).

374. Robinson, *Core Principles*, *supra* note 18, at 196.

375. George P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1308 (1973) ("The imperatives of a situation command our attention, not because our response will maximize utility, but because we have no choice but to respond to the perceived demands of justice.").

APPENDIX: Eighteen Generic Full and Partial Nonresponsibility Standards Around the Globe<sup>376</sup>

CIVIL LAW COUNTRIES	
<i>Napoleonic Code Legal Family</i>	
Brazil	<p>Art. 26:</p> <p>It is exempt from punishment the agent who, on account of mental illness or incomplete or retarded mental development, was at the time of the action or omission completely incapable of understanding the illicit nature of the fact or of taking decisions based on this understanding.</p> <p>Single paragraph. The sentence may be reduced from one to two thirds if the agent, in virtue of mental disorder or incomplete or retarded mental development, was not completely capable of understanding the illicit nature of the fact or is incapable of taking decisions based on this understanding.<sup>377</sup></p>
France	<p>Art. 122-1:</p> <p>A person is not criminally liable who, when the act was committed, was suffering from a psychological or neuropsychological disorder which abolished his discernment or his ability to control his actions.</p> <p>A person who, at the time he acted, was suffering from a psychological or neuropsychological disorder which reduced his discernment or impeded his ability to control his actions, remains punishable. However, the court shall take this circumstance into account when it decides the penalty and determines its regime.</p>

376. This table includes substantive standards for full and partial nonresponsibility and provisions relevant to sentence length. It omits some provisions specific to addiction and dangerous offenders. By and large, it does not include provisions related to treatment, as those often extend beyond a country’s penal code.

377. Decreto No. 7.209 de 11 de Juhlo de 1984, Diário Oficial da União [D.O.U.] de 11.7.1984 (Braz.), [http://www.planalto.gov.br/CCIVIL\\_03/Decreto-Lei/Del2848.html](http://www.planalto.gov.br/CCIVIL_03/Decreto-Lei/Del2848.html) [<https://perma.cc/CBB2-PX8L>]; Taborda, *supra* note 254, at 376 (2001) (translating D.O.U. Law No. 7.209/84, Art. 26). Although the language of the single paragraph denotes that the penalty “may” be reduced, Brazilian authorities report that “may” is consistently interpreted as “must,” and a judge is required to reduce the penalty of a semi-imputable defendant. *Id.* at 377–78.

	<p>If the sentence is of imprisonment, it is reduced by one third or, in the case of a crime with an imprisonment penalty or life imprisonment penalty, the sentence is brought down to 30 years' imprisonment. In case of liability for a <i>delit</i> [which carries a possible sentence of less than ten years], the court can, however, decide not to reduce the sentence after having extensively stated its reasons. When, after medical advice, the court considers that the nature of the disorder justifies it, the chosen sentence may allow for the convicted person to undertake treatment adapted to his health status.<sup>378</sup></p>
Italy	<p>Art. 88:</p> <p>The person who, at the time of a crime, was, due to an infirmity, in a state of mind excluding the capacity to intend (<i>intendere</i>) or will (<i>volere</i>) is not criminally accountable.<sup>379</sup></p> <p>Art. 89:</p> <p>The person who, at the time of the crime was, due to an infirmity, in a state of mind greatly affecting, but not excluding, the capacity to intend or will, is criminally accountable, but the punishment is reduced.<sup>380</sup></p>
Luxembourg	<p>Art. 71:</p> <p>Is not considered responsible according to the penal law, the person who, at the time of the act,</p>

378. Code Pénal [C. Pén.] [Criminal Code] art. 122-1 (Fr.), [https://www.legifrance.gouv.fr/codes/texte\\_lc/LEGITEXT000006070719](https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070719) [<https://perma.cc/FM6B-3L8K>]; Guinchard, *supra* note 251, at 227 n.25 (translating C. Pén., *supra*, art. 122-1).

379. Codice Penale [C.p.] [Criminal Code] art. 88 (It.), <https://www.altalex.com/documents/codici-altalex/2014/10/30/codice-penale> [<https://perma.cc/ARW2-29TC>]; Ester Messina et al., *Forensic Psychiatric Evaluations of Defendants: Italy and the Netherlands Compared*, INT'L J.L. & PSYCHIATRY, July 16, 2019, at 1, 4 (providing unofficial translation); *see also* SIMON & AHN-REDDING, *supra* note 21, at 89, 92 (translating C.p., *supra*, art. 88 as: "A person who, at the moment in which he/she committed a crime, was, because of an infirmity, in such a state of mind as to exclude the capacities of understanding or willing, is not imputable").

380. C.p., *supra* note 379, art. 89; Messina et al., *supra* note 379, at 4 (providing unofficial translation of article 89); *see also* SIMON & AHN-REDDING, *supra* note 21, at 92 (translating article 89 as: "A person who, at the moment in which he/she committed a crime was, because of an infirmity, in such a state of mind as to greatly diminish, without excluding, his/her capacities of understanding or willing, is imputable, but the sentence will be shortened").

	<p>suffered from mental disorder suppressing discernment or control of her or his actions.<sup>381</sup></p> <p>Art. 71-1:</p> <p>The person who, while committing the acts, suffered from a mental disorder impairing his/her discernment or the control of his/her actions remains punishable; however, jurisdictions take into account this circumstance to determine the sentence.<sup>382</sup></p>
Portugal	<p>Art. 20-1:</p> <p>A person is not imputable if, due to a disease of the mind, he is incapable, at the time of committing the act, to appreciate its unlawfulness or to conform his conduct in accordance with that appreciation.<sup>383</sup></p> <p>Art. 20-2:</p> <p>A person may be declared not imputable if, due to a serious disease of the mind, not accidental and whose effects he cannot control, without being thereby censurable, has, at the time of committing the act, the capacity to appreciate its unlawfulness or to conform his conduct in accordance with that appreciation, sensibly diminished.<sup>384</sup></p>
Spain	<p>Art. 20.1:</p> <p>The following persons shall not be criminally liable: 1. Those who, at the time of committing a criminal offence, due to any mental anomaly or alteration, cannot comprehend the unlawful nature of the deed, or to act in line with that comprehension.<sup>385</sup></p>

381. Code Pénal [C. Pén.] [Criminal Code] art. 71 (Lux.), <https://legilux.public.lu/eli/etat/leg/code/penal/20211224> [<https://perma.cc/33HV-WLFP>]; Jean-Marc Cloos et al., *Luxembourg*, in *PLACEMENT AND TREATMENT OF MENTALLY ILL OFFENDERS – LEGISLATION AND PRACTICE IN EU MEMBER STATES*, *supra* note 158, at 184, 185 (quoting the law of Aug. 8, 2000, which is currently in force).

382. C. Pén., *supra* note 381, art. 71-1; Cloos et al., *supra* note 381, at 185.

383. CÓDIGO PENAL [Criminal Code] art. 20-1 (Port.), [https://legislationline.org/sites/default/files/documents/ef/Portugal\\_CC\\_2006\\_en.pdf](https://legislationline.org/sites/default/files/documents/ef/Portugal_CC_2006_en.pdf) [<https://perma.cc/FUX7-UWTQ>] (translated by Enio Ramalho & William Themudo Gilman in 2006).

384. *Id.* art. 20-2.

385. CÓDIGO PENAL [C.P.] [CRIMINAL CODE] art. 20.1 (Spain), [https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal\\_Co\\_de\\_2016.pdf](https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal_Co_de_2016.pdf) [<https://perma.cc/SH6H-NSKX>].

	<p>Art. 21.1 (Incomplete exemption<sup>386</sup>):</p> <p>The following are mitigating circumstances:</p> <ol style="list-style-type: none"> <li>1. The causes stated in [Art. 20], when not all the necessary requisites to exclude accountability in the respective cases concur.<sup>387</sup></li> </ol> <p>Art. 21.2, 21.3 &amp; 21.7 (General or analogous mitigation grounds):</p> <p>The following are mitigating circumstances: ...</p> <ol style="list-style-type: none"> <li>2. The convict acting due to his serious addiction to the substances mentioned in Section 2 of the preceding Article.</li> <li>3. The convict acting due to causes or stimuli so overpowering that they produced fury, obstinacy or another similar state of mind.</li> <li>...</li> <li>7. Any other circumstance of a similar importance to the aforesaid.<sup>388</sup></li> </ol> <p>Art. 68 (Sentencing re incomplete exemption<sup>389</sup>):</p> <p>In the cases foreseen in circumstance one of Article 21, the Judges or Courts of Law shall impose a lower punishment in one or two degrees to that stated in the Law, considering the number and entity of the requisites absent or concurring, and the personal circumstances of the offender, without prejudice to application of Article 66 of this Code.<sup>390</sup></p> <p>Art. 66 (Sentencing re mitigation grounds):</p> <ol style="list-style-type: none"> <li>1. In application of the punishment, in the case of malicious criminal offenses, the Judges or Courts of Law shall abide by the following rules, according to whether or not there are mitigating or aggravating circumstances: <ol style="list-style-type: none"> <li>1. When only one mitigating circumstance concurs, the lower half of the punishment the</li> </ol> </li> </ol>
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386. Meliá, *supra* note 84, at 341–46.

387. C.P., *supra* note 385, art. 21.1.

388. *Id.* arts. 21.2, 21.3, 21.7.

389. Meliá, *supra* note 84, at 343–44.

390. C.P., *supra* note 385, art. 68.



	<p>Law sets for the criminal offence shall be applied.</p> <p>2. When two or more mitigating circumstances concur, or one or [sic] several highly qualified ones, and there are no aggravating ones whatsoever, they shall apply the punishment that is lower by one or two degrees to that established by Law, in view of the number and entity of those mitigating circumstances. . . .</p> <p>7. When mitigating and aggravating circumstances concur, these shall be valued and compensated rationally to individualise the punishment. In the event of a qualified ground of attenuation persisting, the lower degree of punishment shall be applied. If a qualified ground of aggravation is maintained, the upper half of the punishment shall be applied.</p> <p>8. When Judges or Courts of Law apply a punishment that is more than one degree lower, they may do so to its full extent.</p> <p>2. In petty criminal offences and those arising from negligence, the Judges or Courts of Law shall apply the penalties at their prudent discretion, without being subject to the rules set forth in the preceding Section.<sup>391</sup></p> <p>Art. 71(2):</p> <p>[W]hen, due to application of the above rules, it is appropriate to hand down a sentence of imprisonment under three months, this shall be substituted in all cases with a fine, community work or permanent traceability, even though the law does not provide for these penalties for the criminal offence in question, substituting each day of imprisonment with two fine quotas or with a day of work or with a day of permanent traceability.<sup>392</sup></p>
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391. CÓDIGO PENAL [C.P.] [CRIMINAL CODE] arts. 66.1.1, 66.1.2, 66.1.7, 66.1.8, 66.2 (Spain), [https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal\\_Code\\_2016.pdf](https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal_Code_2016.pdf) [<https://perma.cc/SH6H-NSKX>].

392. *Id.* art. 71.2.

<i>Germanic Legal Family</i>	
Chile	<p>Art. 10, No. 1:</p> <p>They are exempt from criminal responsibility: 1. The mad or demented, unless he has acted in a lucid interval, and the one who, for any reason independent of his will, is totally deprived of reason.<sup>393</sup></p> <p>Art. 11:</p> <p>The following are extenuating circumstances: 1. Those expressed in the previous article, when all of the requirements necessary to exempt responsibility in their respective cases do not occur.<sup>394</sup></p>
Germany	<p>Section 20:</p> <p>Whoever, at the time of the commission of the offence, is incapable of appreciating the unlawfulness of their actions or of acting in accordance with any such appreciation due to a pathological mental disorder, a profound disturbance of consciousness, mental deficiency or any other serious mental abnormality is deemed to act without guilt.<sup>395</sup></p> <p>Section 21:</p> <p>If the offender's capacity to appreciate the unlawfulness of the act or to act in accordance with any such appreciation is substantially diminished at the time of the commission of the offence due to one of the reasons indicated in Section 20 ["pathological mental disorder, profound disturbance of consciousness, mental deficiency or any other serious mental abnormality"], the penalty may be mitigated pursuant to Section 49 (1).<sup>396</sup></p>

393. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 10, no. 1 (Chile), [https://leyes-cl.com/codigo\\_penal/10.htm](https://leyes-cl.com/codigo_penal/10.htm) [<https://perma.cc/6YCQ-F9DQ>]; see also Johnston et al., *Diminished Criminal Responsibility*, *supra* note 46, at 3, 3 tbl.2 (discussing the responsibility provisions in Chile) (translated by Kendall Runyan in 2022).

394. CÓD. PEN., *supra* note 393, art. 11, no. 1.

395. Strafgesetzbuch [StGB] [Penal Code], § 20, [https://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html](https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html) [<https://perma.cc/A225-6YWT>] (Ger.).

396. *Id.* at § 21.

	<p>Section 49 Special Mitigating Circumstances Established by Law:</p> <p>(1) If the law requires or allows for mitigation under this provision, the following applies:</p> <ol style="list-style-type: none"><li>1. Imprisonment for life is substituted by imprisonment for a term of at least three years;</li><li>2. In cases of imprisonment for a fixed term, no more than three quarters of the statutory maximum sentence may be imposed. In case of a fine, the same applies to the maximum number of daily rates.</li><li>3. Any increased minimum statutory term of imprisonment is reduced as follows: in the case of a minimum term of ten or five years, to two years; in the case of a minimum term of three or two years, to six months; in the case of a minimum term of one year, to three months; in all other cases to the statutory minimum.<sup>397</sup></li></ol>
Greece	<p>Art. 34:</p> <p><u>Incapacity for imputation.</u> The act is not imputed to the perpetrator if, due to mental or intellectual disorder or disturbance of consciousness at the time of its commission, he/she did not have the ability to perceive the wrongfulness of his/her act or to act according to his/her perception of this wrongfulness.<sup>398</sup></p> <p>Art. 35:</p> <p><u>Culpable disability</u> [...]3. An act which a person foresaw or could foresee he might commit if he were brought into a state of disturbed conscience or into a</p>

397. *Id.* at § 49(1); Rüdiger Müller-Isberner et al., *Forensic Psychiatric Assessment and Treatment in Germany*, 23 INT’L J.L. & PSYCHIATRY 467, 468 (2000).

398. POINIKOS KODIKAS [P.K.] [CRIMINAL CODE] 2:34 (Greece), <https://www.e-nomothesia.gr/kat-kodik-es-nomoth-esias/nomos-4619-2019-phek-95a-11-6-2019.html> [<https://perma.cc/B8YD-QLQ3>] (translated by Maria Panezi on May 26, 2023).

	<p>state of complete inability to act or to refrain shall be imputed to him as an act committed negligently.<sup>399</sup></p> <p>Art. 36:</p> <p><u>Reduced capacity for imputation</u></p> <ol style="list-style-type: none"> <li>1. If, due to one of the mental states mentioned in Article 34, the capacity for imputation has not completely disappeared, but has been significantly reduced, a reduced penalty is imposed (Article 83).</li> <li>2. This provision does not apply in the case of a guilty party within the meaning of Article 35 who causes the reduced ability.<sup>400</sup></li> </ol> <p>Art. 83:</p> <p><u>“Reasons for reducing the penalty.</u> Where the general part provides for a reduced sentence without further specification, its context is defined as follows:</p> <ol style="list-style-type: none"> <li>a) instead of life imprisonment, [a term of] imprisonment is imposed;</li> <li>b) instead of imprisonment of at least ten years, imprisonment of not less than two years or imprisonment of up to eight years is imposed;</li> <li>c) instead of imprisonment of up to ten years, imprisonment of at least one year or imprisonment of up to six years is imposed;</li> <li>d) in all other cases, the judge shall reduce the sentence freely to the minimum.</li> </ol> <p>If the law provides for a cumulative prison sentence and a fine, only the latter may be imposed.<sup>401</sup></p>
Switzerland	<p>Art. 19:</p> <ol style="list-style-type: none"> <li>1. If the person concerned was unable at the time of the act to appreciate that his act was wrong or to act in accordance with this appreciation of the act, he is not liable to a penalty.</li> <li>2. If the person concerned was only partially able at the time of the act to appreciate that his act was</li> </ol>

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399. *Id.* at 2:35.

400. *Id.* at 2:36.

401. *Id.* at 5:83.

	<p>wrong or to act in accordance with this appreciation of the act, the court shall reduce the sentence.</p> <p>3. Measures in accordance with Articles 59–61, 63, 64, 67, 67b and 67e may, however, be taken.</p> <p>4. If it was possible for the person concerned to avoid his state of mental incapacity or diminished responsibility and had he done so to foresee the act that may be committed in that state, paragraphs 1–3 do not apply.<sup>402</sup></p>
Turkey	<p>Art. 32:</p> <p>Insanity</p> <p>(1) A penalty shall not be imposed on a person who, due to mental disorder, cannot comprehend the legal meaning and consequences of the act he has committed, or if, in respect of such act, his ability to control his own behaviour was significantly diminished. However, security measures shall be imposed for such persons.</p> <p>(2) Notwithstanding that it does not reach the extent defined in paragraph one, where a person’s ability to control his behaviour in respect of an act he has committed is diminished then a term of imprisonment for a term of twenty-five years where the offence committed requires a penalty of aggravated life imprisonment and to twenty years imprisonment instead of life imprisonment shall be imposed. Otherwise the penalty to be imposed may be reduced by no more than one-sixth. The penalty to be imposed may be enforced partially or completely as a security measure specific to mentally disordered persons, provided the length of the penalty remains the same.<sup>403</sup></p>
<i>Nordic Legal Family</i>	
Finland	<p>Section 4 of Chapter 3:</p> <p>(2) The perpetrator is not criminally responsible</p>

402. CODE PÉNAL SUISSE [CP] [CRIMINAL CODE] Dec. 21, 1937, SR 311.0, art. 19 (Switz.), [https://www.fedlex.admin.ch/eli/cc/54/757\\_781\\_799/en](https://www.fedlex.admin.ch/eli/cc/54/757_781_799/en) [<https://perma.cc/79SV-BB2J>].

403. TÜRK CEZA KANUNU [TCK.] [PENAL CODE] art. 32 (Turk.), <https://mevzuat.gov.tr/mevzuat?MevzuatNo=5237&MevzuatTur=1&MevzuatTertip=5> [<https://perma.cc/D532-PPD4>] (translated by Cennet Sert in 2023).

	<p>if at the time of the act, due to mental illness, severe mental deficiency or a serious mental disturbance or a serious disturbance of consciousness, he or she is not able to understand the factual nature or unlawfulness of his or her act or his or her ability to control his or her behaviour is decisively weakened due to such a reason (<i>criminal irresponsibility</i>).</p> <p>(3) If the perpetrator is not criminally irresponsible pursuant to subsection 2 but, due to mental illness, mental deficiency, mental disturbance or disturbance of consciousness, his or her ability to understand the factual nature or unlawfulness of his or her act or his or her ability to control his or her behaviour is significantly weakened (<i>diminished responsibility</i>), the provisions in Chapter 6, section 8(3) and 8(4) are to be taken into account in the determination of the sentence.<sup>404</sup></p> <p>Section 8 of Chapter 6:</p> <p>(2) [A]t most three fourths of the maximum sentence of imprisonment or fine and at least the minimum sentence provided for the offence may be imposed on the offender. If the offence is punishable by life imprisonment, the maximum punishment is instead twelve years of imprisonment and the minimum punishment is two years of imprisonment.</p> <p>(3) What is provided in subsection 2 also applies in determining the sentence for a person who committed an offence in a state of diminished responsibility. However, diminished responsibility does not affect the applicable maximum punishment.</p>
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404. RIKOSLAKI [RL.] [CRIMINAL CODE] 3:4(2)–(3) (with amendments up to 766/2015) (Fin.), <https://leap.unep.org/countries/fi/national-legislation/criminal-code-finland> [<https://perma.cc/Q4T2-5PLA>]; see Allan Seppanen et al., *supra* note 108, at 1, 3 (describing conditions of diminished responsibility and irresponsibility). The sections of the criminal code cited here appear to be current as of July 14, 2022. This conclusion came after review of the titles of all acts and decrees passed by Finland's parliament between 2016 and 2021 in Finlex, an online database of up-to-date legislative information owned by Finland's Ministry of Justice. *Translations of Finnish Acts and Decrees*, FINLEX, <https://www.finlex.fi/en/laki/kaannokset/> (last visited Feb. 4, 2024).

	(4) If the maximum punishment for the offence is imprisonment for a fixed period, the court may in cases referred to in this section impose a fine as the punishment instead of imprisonment, if there are especially weighty reasons for this. <sup>405</sup>
<b>Other Civil Law Jurisdictions</b>	
China	Art. 18: If a mental patient causes harmful consequences at a time when he is unable to recognize or control his own conduct, upon verification and confirmation through legal procedure, he shall not bear criminal responsibility, but his family members or guardian shall be ordered to keep him under strict watch and control and arrange for his medical treatment. When necessary, the government may compel him to receive medical treatment. ... If a mental patient who has not completely lost the ability of recognizing or controlling his own conduct commits a crime, he shall bear criminal responsibility; however, he may be given a lighter or mitigated punishment. <sup>406</sup>
Japan	Art. 39. (Insanity and Diminished Capacity): (1) An act of insanity is not punishable. (2) An act of diminished capacity shall lead to the punishment being reduced. <sup>407</sup> According to the Japanese Supreme Court (1931), “a person is insane, if at the time of the offense as a result of disease of mind the person lacks capacity either to appreciate good and bad or to conform his conduct to the appreciation . . . a person has

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405. RL., *supra* note 404, at 6:8(2)–(4).

406. Zhonghua Renmin Gongheguo Falu Huibian (中华人民共和国刑法) [Criminal Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Mar. 14, 1997, effective Mar. 14, 1997), art. 18; *see* Lilou Jiang, *The Insanity Defence in China*, in THE INSANITY DEFENCE: INTERNATIONAL AND COMPARATIVE PERSPECTIVES, *supra* note 251, at 316, 320 (translating art. 18).

407. KEIHŌ [PEN. C.] art. 39 (Japan), <https://www.japaneselawtranslation.go.jp/en/laws/view/3581> [<https://perma.cc/MG52-BLM2>]; *see* Okada, *supra* note 108, at 359, 363 (“If the person is of diminished capacity, which is legally regarded as bearing partial responsibility, the court shall declare a verdict of guilty but shall mitigate the sentence. For example, the death penalty should be mitigated to imprisonment with [an] indefinite term. Imprisonment with [a] definite term should reduce the prison term by half, and consequently[,] some individuals may receive a suspended prison sentence.”).

	diminished capacity, even if these capacities are not completely lost but severely impaired.” <sup>408</sup>
Taiwan	<p>Article 19:</p> <p>An offense is not punishable if it is committed by a person who is mentally disorder[ed] or [has mental] defects and, as a result, is unable or less able to judge his act or lack the ability to act according to his judgment.</p> <p>The punishment may be reduced for an offense committed for the reasons mentioned in the preceding paragraph or as a result of obvious reduction in the ability of judgment.</p> <p>Provisions prescribed in the two preceding paragraphs shall not apply to a person who intentionally brings the handicaps or defects.<sup>409</sup></p>
<b><i>Former Communist Countries</i></b>	
Czech Republic	<p>Chapter II Division 4:</p> <p>Section 26 Insanity</p> <p>Anyone who due to a mental disorder cannot identify the illegal nature of an act at the time of its commission or control his/her conduct, shall not be criminally liable for such an act.<sup>410</sup></p> <p>Section 27 Diminished Sanity:</p> <p>Anyone who due to a mental disorder suffers from a substantially diminished capacity to recognise the illegal nature of an act at the time</p>

408. Okada, *supra* note 108, at 384 (quoting the Japanese Supreme Court ruling of Dec. 3, 1931).

409. XINGZHENG FAGUI (中華民國刑法) [CRIMINAL CODE] (promulgated by Ministry Just., May 31, 2023, effective May 31, 2023) art. 19 (translation by Ministry Just.) (Taiwan), <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=C0000001> [<https://perma.cc/FR7L-JK9G>]; see Wai-Cheong Carl Tam, *Comparison of Adult Defendants’ Forensic Psychiatric Evaluation in Criminal Courts Between Mainland China and Taiwan China: From Law to Clinical Practice*, 8 J. FORENSIC SCI. MED. 32, 34 (2022) (“Article 19 states that if the defendant cannot judge the illegality of their behavior or act conforming to their judgment due to mental illness or psychological defect while committing an offense, the offense is unpunished. The penalty may be reduced if there is a noticeable diminution in the above judgment or behavior control ability [(referencing the insanity provision)].”).

410. Trestní zákoník [Criminal Code], Zákon č. 40/2009 Sb. (II)(4) (§ 26) (2011) (Czech), [https://legislationline.org/sites/default/files/documents/05/Czech%20Repub%20lic\\_CC\\_2009\\_am2011\\_en.pdf](https://legislationline.org/sites/default/files/documents/05/Czech%20Repub%20lic_CC_2009_am2011_en.pdf) (Czech) [<https://perma.cc/3UJ8-KYR9>].



	<p>of its commission or to control his/her conduct, is in a state of diminished sanity.<sup>411</sup></p> <p>Chapter V Division 2 Sub-Division 1:</p> <p>Section 40 Imposing Penalties to an Offender with Diminished Sanity</p> <p>(1) If an offender commits a criminal offence in a state of diminished sanity that he/she has not, even negligently, incurred to him-/herself by an addictive substance, the court shall take it into consideration when determining the type and extent of the sentence.</p> <p>(2) If the court believes that with regard to the medical condition of the offender referred to in Subsection (1) it would be possible to achieve the possibility of his/her correction also by a sentence of shorter extent with parallel imposition of protective therapy (Section 99), it shall reduce a sentence of imprisonment below the lower limit of the term of sentence; therein the court shall not be bound by the restriction referred to in Section 58(3) and shall at the same time impose a protective therapy.<sup>412</sup></p>
Poland	<p>Art. 31 § 1. Whoever, at the time of the commission of a prohibited act, was incapable of recognizing its significance or controlling his conduct because of a mental disease, mental deficiency or other mental disturbance, shall not commit an offence.</p> <p>§ 2. If at the time of the commission of an offence the ability to recognize the significance of the act or to control one's conduct was diminished to a significant extent, the court may apply an extraordinary mitigation of the penalty.</p> <p>§ 3. The provisions of § 1 and 2 shall not be applied when the perpetrator has brought himself to a state of insobriety or intoxication, causing the exclusion or reduction of accountability which he has or could have</p>

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411. *Id.* at (II)(4) (§ 27).

412. *Id.* at (V)(2)(1) (§ 40).

	<p>foreseen.<sup>413</sup></p> <p>Art. 60 § 6. The extraordinary mitigation of a penalty shall consist in the imposition of a penalty below the lower statutory level, or the imposition of a penalty of lesser severity, in accordance with the following principles:</p> <ol style="list-style-type: none"> <li>1) if the act in question constitutes a crime, the court shall impose a penalty of not less than one-third of the lower statutory level;</li> <li>2) if the act in question constitutes a misdemeanour, and the lower statutory level of the penalty is not less than one year's deprivation of liberty, the court shall impose either a fine, the penalty of restriction of liberty or deprivation of liberty;</li> <li>3) if the act in question constitutes a misdemeanour, and the lower statutory level of penalty is less than one year's deprivation of liberty, the court shall impose either a fine or the penalty of restriction of liberty.<sup>414</sup></li> </ol> <p>Art. 60 § 7. If the act in question is subject, alternatively, to [a fine, restriction of liberty, or deprivation of liberty], the extraordinary mitigation of a penalty shall consist in renouncing the imposition of the penalty, and [in] the imposition of a penal measure as specified in Article 39 §§ 2-8 [pertaining to penalties such as interdiction on driving vehicles or on practicing certain professions].<sup>415</sup></p>
Russia	<p>Art. 21. Insanity:</p> <ol style="list-style-type: none"> <li>1. A person who, at the time of the committing of a socially dangerous act, was insane, that is, was</li> </ol>

413. KODEKS KARNY [K.K.] [CRIMINAL CODE] art. 31 (Pol.), [https://legislationline.org/sites/default/files/documents/6a/Poland\\_CC\\_1997\\_en.pdf](https://legislationline.org/sites/default/files/documents/6a/Poland_CC_1997_en.pdf) [https://perma.cc/A96G-TPG8]. The document was published on legislationline.org on Oct. 12, 2016, but it is unclear whether the translation is current as of the 2016 version of the code or an earlier version.

414. *Id.* art. 60, at § 6.

415. *Id.* art. 60, at § 7. See generally KRZYSZTOF INDECKI & JUSTYNA JUREWICZ, THE KEY ISSUES OF POLISH PENAL LAW 54–65 (2014) (discussing the variety of penal measures available under the Polish Criminal Code).

	<p>unable to understand the actual character or social danger of his actions (inaction) or to govern them as a result of a chronic or temporary mental derangement, mental deficiency or any other mental condition, shall not be subject to criminal liability.</p> <p>2. Compulsory medical treatment, as envisaged in this Code, may be imposed by a court of law on a person who has committed a socially dangerous deed in a state of insanity.<sup>416</sup></p> <p>Art. 22 Criminal Liability of Persons with Mental Derangement that Does Not Equal Sanity:</p> <p>1. A person of sound mind, who during the commission of a crime, by virtue of mental derangement could not in full measure comprehend the actual character and social danger of his actions (inaction), or control them, shall be subject to criminal liability.</p> <p>2. Mental derangement that does not equal sanity shall be taken into consideration by a court of law when it imposes punishment, and may serve as grounds for the imposition of corrective medical treatment.<sup>417</sup></p>
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416. UGOLOVNYI KODEKS ROSSIJSKOI FEDERATSII [UK RF] [Criminal Code] art. 21 (Russ.), [https://legislationline.org/search?q=lang%3Aen%2Csort%3Amost\\_read\\_first%2Clegislation\\_category%3A48%2Ccountry%3ARU%2Cpage%3A1#](https://legislationline.org/search?q=lang%3Aen%2Csort%3Amost_read_first%2Clegislation_category%3A48%2Ccountry%3ARU%2Cpage%3A1#) [https://perma.cc/LW48-JMVA]. This version of article 21 was current through March 25, 2022.

417. *Id.* art. 22.

