The Criminalization of Mental Illness: How Theoretical Failures Create Real Problems in the Criminal Justice System

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The Criminalization of Mental Illness: How Theoretical Failures Create Real Problems in the Criminal Justice System

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When Andrea Yates drowned her five children, she believed she was preventing Satan from infiltrating their souls. Rusty Yates blamed both the mental health system and the criminal justice system for his wife’s actions and also for her initial conviction. Andrea Yates suffered from post-partum depression and psychosis; had attempted suicide twice; had been hospitalized on several occasions for psychiatric treatment; and was found not guilty by reason of insanity in her 2006 retrial. Although Yates likely will spend the rest of her life in a mental institution, she will receive mental health treatment throughout her time at the facility. Yates would have spent her life in prison without access to comparable mental health treatment if her original conviction had been upheld. Yates escaped this fate through her subsequent insanity verdict, but many individuals who suffer from mental health problems and who are convicted of crimes and incarcerated in the United States are not so fortunate.

Reaching a result contrary to Yates’s insanity verdict, the Supreme Court upheld the first-degree murder conviction of Eric Clark in 2006. Clark shot and killed a police officer because he

3. Sweetingham, supra note 1. Yates’s original conviction was overturned on appeal, in part because the false testimony of an expert medical witness could have wrongfully influenced the jury and in part because the trial court should have granted the defendant’s motion for rehearing. Yates v. State, 171 S.W.3d 215, 222 (Tex. Crim. App. 2005).
4. See generally Yates Not Guilty by Reason of Insanity, CNN.COM, July 26, 2006, http://www.cnn.com/2006LAW/07/26/yates.verdict/index.html?iref=newssearch (noting that Yates will go to a state mental facility until she is deemed no longer to be a threat). Yates’s former husband said the verdict was “really about Andrea’s quality of life . . . . Is she going to spend her time in a prison cell . . . or is she going to spend time in a hospital and get good medical treatment . . . ?” Id.
5. See Elaine Cassel, The Andrea Yates Verdict and Sentence: Did the Jury Do the Right Thing?, Mar. 18, 2002, FINDLAW, http://writ.news.findlaw.com/cassel/20020318.html (discussing Yates’s original conviction and noting that few mentally ill inmates “receive appropriate diagnoses or treatment. The treatment they do receive consists mostly of medications. There is little, if any, cognitive-behavioral therapy, the kind that would help prisoners actually effect change in their lives.”).
believed that aliens impersonating government agents were taking over Flagstaff, Arizona, and bullets were the only way to stop these aliens.\(^8\) The trial court found him guilty of first-degree murder, and he will serve a life sentence in prison even though the trial judge noted that Clark “was indisputably afflicted with paranoid schizophrenia at the time of the shooting.”\(^9\) The Court held that states may choose how to define insanity because “due process imposes no single canonical formulation of legal insanity.”\(^10\) Affording this interpretive freedom to the states is necessary, according to the Court, because mixing “legal concepts of mental illness” and “medical concepts of mental abnormality” creates a great deal of disagreement among medical professionals.\(^11\) The Court also held that preventing a defendant from relying on mental illness to negate the specific intent of the crime was not a due process violation.\(^12\)

Both Andrea Yates and Eric Clark committed terrible acts while suffering from severe mental illness. The disparate outcomes of these two cases serve as one indicator of the way in which the current criminal justice system fails people who suffer from mental disorders in the United States. Other indicators come from available data about the prevalence of mental illness within U.S. prisons and jails. One study estimated that roughly fifteen percent of inmates\(^13\) in the United States in 2004 suffered from severe mental disorders such as schizophrenia, schizo-affective disorder, bipolar disorder, and major depression.\(^14\) These numbers do not include inmates suffering from any other mental health disorders or undiagnosed mental health problems. The U.S. Department of Justice found that “[a]t midyear 2005 more than half of all prison and jail inmates had a mental health problem.”\(^15\) However, of the large number of inmates with mental health problems and disorders, only seventeen percent of local jail inmates, twenty-four percent of federal prisoners, and thirty-four percent of federal prisoners, and thirty-four percent of federal prisoners, and thirty-four

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8. Id. at 745.
9. Id. at 746.
10. Id. at 753.
11. Id. at 752.
12. Id. at 779.
13. This Note will use the term “inmate” or “incarcerated person” rather than “offender” or “convict” to refer to the individuals discussed. While “inmate” can refer to individuals who are incarcerated pre-trial and have not yet been convicted of any crime as well as individuals who have been convicted and are serving sentences, the discussion regarding theories of punishment will necessarily refer to those individuals who have been convicted of a crime and are therefore serving a sentence of some kind.
15. JAMES & GLAZE, supra note 6, at 1 (emphasis added).
percent of state prisoners received any mental health treatment after admission.\textsuperscript{16} These combined statistics paint a grim picture of the pervasiveness of mental health problems in the criminal justice system and the failures of that system to address such problems.

This Note argues that the policies and practices of the U.S. criminal justice system fail to achieve any articulated purpose of punishment when they provide inadequate mental health resources to incarcerated persons suffering from mental disorders. This Note ultimately demonstrates that, despite some drawbacks, emphasizing a rehabilitative approach that uses insights from the juvenile justice system is the best way to serve all people with mental disorders in the adult criminal justice system. In Part II, the Note defines central concepts such as mental disorders and also discusses the common federal and state justifications for criminal sanctions: retribution, deterrence, incapacitation, and/or rehabilitation. Part II includes a historical survey of the juvenile justice system, which is a potential model for addressing the government’s systemic failure to achieve its stated goals. Part III argues that the current justice system is failing to meet its stated goals because retribution, deterrence, and incapacitation are inappropriate purposes for punishing individuals with mental disorders, and that poor treatment in the current system renders any rehabilitation efforts inadequate. Part IV analyzes the benefits and drawbacks of using the juvenile justice system as a model for the rehabilitation and treatment of people with mental disorders in the criminal justice system. It examines the history of the juvenile justice movement and its principle tenets, and will suggest that the juvenile justice model for rehabilitation can provide useful guidance.

II. THEORIES OF PUNISHMENT AND THE DEVELOPMENT OF THE JUVENILE JUSTICE MODEL

A. Definitions and Terminology

Before delving into the complex issue of mental health treatment in the criminal justice system, it is important to identify the terms used in this discussion. “Mental illness” and “mental disorder” can hold a wide variety of meanings, in large part because, “like many other concepts in medicine and science, [the concepts] lack[] a

\textsuperscript{16.} Id. at 9.
consistent operational definition that covers all situations.”

Despite this difficulty, some baseline definitions are possible. The most recent edition of the Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV-TR") defines "mental disorder" as a syndrome or pattern of behavior that causes some type of actual distress (like pain) or in some other way interferes with a person's ability to function. The DSM-IV-TR goes on to define specific mental disorders, such as mood disorders, anxiety disorders, psychotic disorders, and personality disorders.

The definition of mental illness in common legal contexts is more convoluted. For example, civil commitment statutes universally require proof of a mental illness or disorder before a state may involuntarily commit one of its citizens. Many of these statutes define the term vaguely or intertwine the definition of mental illness with other commitment criteria. Statutory definitions of mental illness are widely varied across jurisdictions, usually apply only in specific legal contexts, and generally are useless as a comprehensive definition of "mental illness." Because this Note focuses on mental health treatment (in the context of the criminal justice system and correctional facilities), the American Psychiatric Association definition of mental disorders as presented in the DSM-IV-TR—which is intended as a manual to guide treatment—is more instructive than the inconsistent and circular statutory definitions created by state jurisdictions.

18. Id. at xxx–xxxii. DSM-IV-TR defines mental illness as:

[A] clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom. In addition, this syndrome or pattern must not be merely an expectable and culturally sanctioned response to a particular event, for example, the death of a loved one... [and] must currently be considered a manifestation of a behavioral, psychological, or biological dysfunction in the individual.

Id. at xxxi.

The DSM-IV-TR uses relevant criteria and objective indicia to classify mental disorders into identifiable groups, but this classification approach has some limitations. Id. The same mental disorder can produce quite varied symptoms, and clear dividing lines between identifiable disorders do not exist. Id. As such, the DSM-IV-TR often provides a checklist of symptoms, but specifies that only a set number (for example, five of nine) of these symptoms need be present in order to diagnose an individual with a specified illness. Id. at xxxi–xxxii.

19. See, e.g., id. at 429–85 (describing the particular criteria for anxiety disorders).
21. Id.
22. See id. (citing a variety of state statutory definitions, including definitions of mental illness as a condition that necessitates commitment or seriously impairs the mental health of an individual).
legislatures. Although the DSM-IV-TR cautions against employing its definition in forensic settings,\textsuperscript{23} this Note does not attempt to define mental illness as a legal construct, but rather employs a psychological definition within a legal context.

For two primary reasons, this Note focuses specifically on individuals in correctional facilities who suffer from mental disorders\textsuperscript{24} that have been or could be diagnosed under the DSM-IV-TR. First, much of the existing empirical research on mental disorders in the criminal justice system is limited to conditions recognized in the DSM-IV-TR (and often to only a few specific diagnoses).\textsuperscript{25} It would, therefore, be inadvisable to draw conclusions about other types of mental conditions not included in this research. Second, the criminal justice system is currently failing to meet the needs of all individuals with mental health issues, including those individuals with clearly identified and widely accepted clinical diagnoses. Even though inmates without diagnosed DSM-IV-TR disorders nevertheless may have problems in their lives that cause some degree of mental anguish, these difficulties cannot be identified or categorized easily. If the criminal justice system attempts to address the needs of individuals who do not fit into a DSM-IV-TR category without first creating a comprehensive approach to meet the more clearly identifiable needs of those who do, the justice system likely will be unable to create a comprehensive, cohesive system of addressing the needs of inmates with mental disorders.

Finally, this Note attempts to evaluate the current criminal justice system from the perspective of individuals who have a "severe" mental disorder according to a 2004 study, which only includes schizophrenia, schizo-affective disorder, bipolar disorder, and major depression.\textsuperscript{26} Each of these illnesses is diagnosed under Axis I of the

\textsuperscript{23} DSM-IV-TR, supra note 17, at xxxvii.

\textsuperscript{24} This Note will not use terminology such as "the mentally ill," "the mentally disordered," or "a schizophrenic." Instead, it will refer to "people with mental disorders" or "a person with schizophrenia," as recommended by the DSM-IV-TR, which takes note of the "common misconception that a classification of mental disorders classifies people, when actually what are being classified are disorders that people have." \textit{Id.} at xxxi. Since other scholars and advocates use the terms "mental illness," "mental disability," or "mental health problems" interchangeably, these terms may also appear in the discussion and, like "mental disorder," should be understood to encompass the general DSM-IV-TR definition and all included disorders. If research or analysis relates to a more specific definition or disorder, the narrower definition will be indicated.

\textsuperscript{25} \textit{See} JAMES & GLAZE, supra note 6, at 1 (using the DSM-IV-TR criteria to define the term "mental health problems" and basing statistical conclusions on this definition).

\textsuperscript{26} Lamb et al., supra note 14, at 783.
Schizophrenia and schiz-affective disorder are psychotic disorders, while bipolar disorder and major depression are mood disorders. Only about one percent of the U.S. population suffers from a type of schizophrenic disorder; only 1.6 percent of the U.S. population suffers from bipolar disorder; and only 5.3 percent of the U.S. population suffers from major depression. However, approximately fifteen percent of the current prison and jail population suffers from one of these severe mental disorders, while many more inmates suffer from other mental disorders not included in these categories. Limiting the discussion to individuals with severe mental illnesses provides a base from which the theories of punishment may be examined.

**B. Problems with the Theories Behind the Current Criminal Justice System**

Criminal codes often include purpose clauses to communicate the driving theories behind sentencing decisions within the state or federal criminal justice system. These guidelines generally reflect one or more of the four commonly cited goals of criminal punishment: retribution, deterrence, incapacitation, and rehabilitation. Professor Christopher Slobogin has recategorized these commonly cited purposes of punishment into three basic models: 1) the punishment model, which predominately deals with retribution and "just deserts"; 2) the prevention model, which incorporates deterrence and incapacitation principles; and 3) the protection model, which embodies more rehabilitative concepts.

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27. DSM-IV-TR, supra note 17, at 27–28. Axis I consists of clinical disorders (meaning all disorders addressed by the psychological classification system except for personality disorders and mental retardation) and “Other Conditions that May Be a Focus of Clinical Attention.” Id.


29. Id. at 304.


31. Lamb et al., supra note 14, at 783.

32. JAMES & GLAZE, supra note 6, at 1.

33. These arguments may also be applicable to individuals with other DSM-IV-TR diagnoses, as well as individuals who have mental health problems that meet no diagnostic criteria under the DSM. However, including such a broad range of mental health disorders in the discussion would make the present argument unwieldy.


According to Professor Slobogin, today’s criminal justice system looks most like the punishment model, which “focuses solely on sanctioning past acts” and “aims to exact retribution.”36 Although the U.S. Code notes that a sufficient criminal sentence complies with all of the major punishment purposes (retribution, deterrence, incapacitation, and rehabilitation),37 the current criminal justice system continues to place a heavy emphasis on retribution.38 Retribution differs from the other three purposes because it is not utilitarian in nature, but rather is used to sanction criminals for wrongdoing even when the punishment will produce no social benefit.39 In contrast, sentences based on utilitarian purposes are more likely to reflect the social goals of rehabilitation or deterrence, as they often incorporate needed treatment plans and may vary in length depending on the need for incapacitation and the probability of deterrence.40 Retributive sentences, however, focus only on the immorality of the criminal act and the severity of the “moral penalty” the individual deserves to suffer.41 Despite the obvious tensions between these purposes, statutes such as 18 U.S.C. § 3553(a)(2) sometimes list all four purposes, effectively creating a statute that purports to serve all four purposes at the same time.42 In practice, the conflict between the listed purposes means that judicial sentencing decisions cannot encompass all four of the goals equally, and certain purposes necessarily will be preferred over others.43

Scholars will continue debating the applicability and suitability of these four purposes of punishment for generations to come. However, these debates take place in a theoretical world far removed from the current criminal justice system, a system in which approximately half of those incarcerated have some type of mental health problem.44 In short, it does not matter whether scholars prefer

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36. Id. at 8–9.
38. See Michele Cotton, Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment, 37 AM. CRIM. L. REV. 1313, 1314 (2000) (referencing the “unorthodox measures” courts and legislatures have used to subvert utilitarian purposes and reinstate retribution as the primary purpose of the criminal justice system).
39. Id. at 1315–16.
40. Id. at 1318.
41. Id. at 1317.
42. Id.
43. See Cotton, supra note 38, at 1317 (identifying the conflict between a rehabilitative sentence, which focuses on ways in which the inmate might be helped, and a retributive sentence, which attempts to harm the inmate in return for the harm the inmate caused).
44. See JAMES & GLAZE, supra note 6, at 3 (identifying the prevalence of symptoms of mental disorders in jails (60.5%), federal prisons (39.8%), and state prisons (49.2%), while noting
one punishment purpose over another: for the reasons set forth in Part III, the current criminal justice system fails to serve any of them.

C. The Development of the Juvenile Justice System

To improve this system, it is useful to examine the rationale for treating children differently from adults and to determine if the same rationale might apply to individuals with mental disorders. If the rationale is comparable, the juvenile justice system can provide a model for an adult criminal justice system that adequately addresses the needs of inmates with mental illness.

The juvenile justice system differs in many ways from the adult criminal justice system, a distinction first and most clearly identified around the turn of the twentieth century. Judge Mack noted that prior to the passage of the Illinois Juvenile Court Act of 1899, criminal law did not distinguish between children and adults in terms of criminal responsibility. Judge Mack observed that these viewpoints were beginning to change as some jurisdictions examined how the criminal justice system might be more beneficial to juvenile inmates and how juvenile and adult inmates might be separated from one another within the system. Judge Mack then presented a vision for the new juvenile justice system, a system using the *parens patriae* power of the courts and focusing on rehabiliting and reforming young inmates. This vision included compassionate judges who do not focus on the child's guilt but instead ask: “[H]ow has he become what he is, and what had best be done in his interest?” This vision also included cottages in the country with fresh air and good educational opportunities instead of large prison-like structures with

that only 11% of the general United States population met the same criteria for symptoms of mental disorders under the DSM).

45. See, e.g., Illinois Juvenile Court Act, 1899 Ill. Laws 132 et seq. (creating a justice system for juvenile inmates separate from the adult system and emphasizing rehabilitation and non-adversarial proceedings).


47. *See id.* (noting that many of the attempts in the last fifty years to provide training and reform to juvenile inmates failed because states were making no effort to understand “the needs of the boy”).

48. *Parens patriae* is Latin for “parent of his or her country.” BLACK'S LAW DICTIONARY 1144 (8th ed. 2004). Under this doctrine, the State has the power to intervene like a parent in the best interest of the child when biological parents are not fulfilling their duties. BARRY C. FELD, *CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION* 3 (2d ed. 2004).


50. *Id.* at 119.
bars and locks, and most of all, a strong resolve to prevent a child from engaging in criminal activity at all.

The landmark Supreme Court decision of In re Gault noted that juvenile courts traditionally provided none of the constitutional protections available in adult criminal courts. This lack of protection was justified by the parens patriae power because children arguably do not have the same right to liberty that adults do, as they are always in “custody.” Despite these arguments, the Gault Court determined that the Due Process Clause requires that juveniles receive some of the same constitutional protections as adults in proceedings that could result in detention. Using the Gault rubric in subsequent cases, the Court determined the constitutional protections that should extend to juveniles on a case-by-case basis. It found, for example, that under the Due Process Clause, juveniles have a right to have their delinquency proven beyond a reasonable but do not have a right to a jury trial.

In the decades after Gault, the juvenile justice system has continued to shift from the purely rehabilitative vision of Judge Mack to a system focused more on punishment and prevention of juvenile crime. According to Professor Barry Feld, the debate over the structure and purpose of the juvenile court is animated by several binary conceptualizations of the juvenile and adult justice systems. Professor Feld identifies five relevant binary pairs: dependency versus responsibility, treatment versus punishment, informality versus formality, welfare versus just deserts, and discretion versus rule of law. The juvenile justice system originally embraced the former half

51. Id. at 114.
52. Id. at 122.
53. 387 U.S. 1, 14–16 (1967).
54. Id. at 17.
55. Id. at 33–34 (providing right to adequate notice), 41 (providing right to counsel in situations that implicate a juvenile's liberty interests), 55 (extending the privilege against self-incrimination to juveniles).
56. In re Winship, 397 U.S. 358, 359 (1970) (clarifying the test for extending new constitutional protections to juveniles: whether the right “is among the ‘essentials of due process and fair treatment’ required during the adjudicatory stage”). The “adjudicatory stage” is defined as the stage at which a delinquency determination is made and that determination could result in commitment to a state institution. Id.
57. Id. at 368.
60. Feld is a law professor and author of the casebook CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION, supra note 48.
61. Id. at 30.
62. Id. at 31.
of these binary pairs—believing that children were dependent and needed treatment—and structured the system to operate informally, focusing on the child’s welfare and making discretionary decisions. By contrast, today’s juvenile justice system focuses on the latter half of the binary pairs—viewing children as responsible individuals who need punishment—and makes decisions in a formal way while focusing on just deserts and the rule of law.

The reforms have called the future and the purpose of the juvenile justice system into question. It is currently unclear how much (if any) of the rehabilitative system that Judge Mack once envisioned for the juvenile system remains today. According to Professor Feld, “beginning in the mid-1980s, politicians manipulated and exploited public frustration with crime [and] fear of increases in youth violence... and adopted laws and policies to ‘get tough.’” Nevertheless, the theoretical history and current practical applications may yet be instructive. Specifically, juvenile justice’s concept of pretrial diversion can be seen in the mental health courts that are growing in popularity in the adult criminal system. Mental health courts, discussed more fully in Part IV, are special courts created exclusively to serve individuals who suffer from mental health problems and are charged with crimes. These specialty courts may provide an effective means of dealing with individuals suffering from mental illness in the criminal justice system, but without them, the adult criminal system fails to meet any of its proposed purposes of punishment.

III. HOW THE CRIMINAL JUSTICE SYSTEM FAILS TO MEET ANY ARTICULATED PURPOSE OF PUNISHMENT

The four justifications or goals articulated for criminal sanctions are retribution, deterrence, incapacitation, and rehabilitation. However, the current justice system fails to meet any of these articulated goals when people with severe mental illness are involved. Section A demonstrates that retribution, deterrence, and incapacitation are ineffective and inappropriate when applied to individuals with mental disorders, and the poor quality of mental health treatment currently available in today’s jails and prisons makes any rehabilitation efforts inadequate. Therefore, a different model is needed. In order to address this failure, Section B analyzes
the benefits and drawbacks of using juvenile justice as a model for the rehabilitation and treatment of people with mental disorders in the criminal justice system.

A. The Problem with Retribution

Retribution is problematic when it is used to justify punishing individuals with mental disorders. The basic concept of retribution, as noted earlier, is that "a just society is morally obligated to punish the blameworthy and, conversely, may not condone punishment of the blameless." This idea is premised on a "free will postulate," which assumes that individuals can choose their conduct freely and, thus, that they deserve punishment when they make poor or immoral choices. Thus, if an individual did not voluntarily choose to engage in criminal conduct, that individual is not morally culpable and does not merit punishment.

Statutory schemes already acknowledge this possibility through the availability of the insanity defense. For example, under the Model Penal Code, the test for escaping culpability reads as follows: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law." It is a misconception to think that the insanity defense will protect individuals with mental disorders from unjust punishment under the scheme of retribution. As Clark v. Arizona demonstrated, even individuals like Eric Clark (who believed that the person he shot and killed was an alien impersonating a police officer) who have significant mental illness may not escape retributive sanctions if they are unable to meet the stringent demands of the insanity defense. Therefore, according to Professor Slobogin:

[If] the concern is that people with mental illness should not be sent to prison or languish there without help for their suffering, the proper response is better rehabilitative programs for all those who need treatment... [T]his rationale for the insanity defense wrongly suggests that those who are 'sane' do not deserve treatment.

67. Id.
68. Id. at 9–10.
69. E.g., Cassel, supra note 5 (recognizing that "[a]ll but two states have laws creating an insanity defense").
70. SLOBOGIN, supra note 35, at 30–31 (quoting Model Penal Code § 4.01(1)).
72. SLOBOGIN, supra note 35, at 60.
The insanity defense currently suffers from a multitude of other problems as well. For example, one goal of the defense is “to help us decide whom [sic] among those who commit criminal acts deserve [sic] to be the subject of criminal punishment,” but the defense as it exists today “does not adequately carry out this definitional task.” In effect, the insanity defense is an attempt to sort individuals into two specific and inflexible categories (i.e. “culpable” or “not culpable”) based on their cognitive and functional limitations, even though mental health problems are so varied that the DSM-IV-TR uses five different axes to diagnose the same individuals’ cognitive and functional limitations.

The insanity defense attempts to distinguish the individuals who are not culpable and need treatment from the individuals who are culpable and deserve punishment. The Clark Court suggested that no singular standard for insanity could be determined—precisely because the complex interaction of legal constructs and medical concepts creates “such fodder for reasonable debate.” Given the complexity of mental health disorders, it is not surprising that many individuals suffering from severe mental disorders do not escape conviction and sentencing by virtue of the insanity defense. For Andrea Yates, two different juries came to vastly different conclusions about her culpability in her initial trial and her retrial, even though they were presented with substantially similar evidence regarding her mental health symptoms. Yates’s experience demonstrates the possibility that one jury might find an individual sane and culpable and a different jury, presented with the same evidence, might find the same individual to be insane and not culpable. Andrea Yates and Eric Clark both suffered from severe mental disorders that significantly influenced their behavior and their thought processes. Arguably, both Yates and Clark lacked understanding of the wrongfulness of

73. See id. at 23–24 (discussing the defense’s chaotic and incoherent history, its many permutations, and its overbreadth, which lead to a serious inability to identify those who deserve punishment).
74. Id. at 24.
75. DSM-IV-TR, supra note 17, at 27.
76. See Clark v. Arizona, 548 U.S. 735, 752–53 (2006) (holding that “due process imposes no single canonical formulation of legal insanity,” and therefore, the definition of legal insanity is largely a state choice).
78. See Clark, 548 U.S. at 745 (describing Eric Clark’s battle with mental illness); Yates, 171 S.W.3d at 216–19 (describing Andrea Yates’s mental disorder).
their actions, yet Clark was convicted of murder while Yates was found not guilty by reason of insanity. Such variable outcomes suggest that relying on the insanity defense to separate culpable individuals from those who should not be subject to retribution is wholly inadequate.

Additionally, those individuals suffering from mental disorders who do not escape conviction vis-à-vis the insanity defense may be punished more severely than similarly situated individuals without a mental disorder. This disproportionate result undermines the idea of "just deserts," an important principle to the retributive scheme.\(^7\) As previously discussed, most inmates with mental health problems do not receive mental health treatment while they are incarcerated.\(^8\) Thus, they suffer the full range of their mental health symptoms while incarcerated. One might argue that most inmates with mental health problems probably were not receiving adequate mental health treatment prior to incarceration and therefore are not suffering any additional symptoms during their confinement.\(^9\) However, the high rates of co-morbidity with mental disorders and alcohol or other substance abuse\(^10\) suggest that many individuals who are not receiving treatment in the community manage their short-term symptoms by abusing alcohol or narcotics.\(^11\) When these individuals are incarcerated and do not have access to their usual "medication" or to comprehensive mental health treatment, they experience the full impact of their symptoms. As a result, an inmate with mental illness not only receives the punishment of incarceration (like all individuals who commit the same crime), but also the further punishment of her unchecked and potentially severe mental health symptoms—a punishment that incarcerated individuals without mental illness do not receive.

Some research suggests that individuals with mental disorders serve longer sentences than individuals without mental disorders. First, state prisoners with mental disorders on average receive sentences five months longer than individuals without mental disorders.\(^12\) In addition, state prisoners with mental disorders often

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79. *See* Cotton, *supra* note 38, at 1315 (using the phrase "just deserts" as an alternate expression of the retributive principle that crime necessitates punishment).

80. *James & Glaze*, *supra* note 6, at 9.

81. *See* id. (noting that comparable percentages of individuals received treatment in the year prior to incarceration as those who received treatment while incarcerated).

82. *Id.* at 6.


84. *James & Glaze*, *supra* note 6, at 8.
serve on average four months longer than those without mental disorders.\textsuperscript{85} Second, inmates with mental health problems usually have served more prior sentences than inmates without mental health problems.\textsuperscript{86} While this research suggests a correlation between mental health problems and harshness of punishment, no data actually suggest a causation element.

Not only are inmates with severe mental disorders receiving the same or greater punishment than inmates who do not suffer from mental health problems, these inmates are not as morally blameworthy for their actions because of their mental illness. For example, someone suffering from schizophrenia often experiences hallucinations while in a conscious state.\textsuperscript{87} Auditory hallucinations, the most common type of hallucination associated with schizophrenia, often cause individuals to believe that voices are speaking to them, ordering them to act in a certain way, or accusing them of certain actions.\textsuperscript{88} Individuals with schizophrenia often also have delusions: "a faulty interpretation of reality that cannot be shaken despite clear evidence to the contrary."\textsuperscript{89} The delusional features of schizophrenia can explain Eric Clark's beliefs and actions.\textsuperscript{90} Approximately fifteen percent of individuals who suffer from major depressive disorder have some psychotic features, which are often delusional in nature.\textsuperscript{91} Andrea Yates's beliefs are prime examples of such delusions.\textsuperscript{92} Although individuals like Clark and Yates may engage in behaviors that result in horrifying crimes, it is difficult to argue that an individual driven to such behavior by the delusional beliefs and hallucinations caused by severe mental illness is as culpable as an individual who engages in the same behaviors after logical and reasoned reflection. However, with the exception of the few individuals who escape through the insanity defense, the current

\textsuperscript{85} Id. at 9.
\textsuperscript{86} Id. at 8.
\textsuperscript{87} SARASON & SARASON, supra note 28, at 356.
\textsuperscript{88} Id.
\textsuperscript{89} Id. at 355. Delusions can take many forms, including bizarre delusions (such as a belief that someone else is inserting or removing thoughts from an individual's mind), referential delusions (belief that certain gestures, songs, words, etc., are specifically intended to speak to the individual), and persecutory delusions. Id. Delusions can appear either logical or illogical, and they may also cause violent behavior. Id.
\textsuperscript{91} SARASON & SARASON, supra note 28, at 312. These delusional psychotic features often cause the individual to develop false beliefs about reality, typically including ideas about guilt and punishment. Id.
\textsuperscript{92} See Roche, supra note 2, at 1 (describing Andrea Yates's beliefs that it was her fault that her children were going to hell and that Satan would only leave her if she were executed).
criminal justice system promotes retributive punishments for individuals with mental disorders, even though the culpability of these individuals necessarily is diminished.

B. The Problem with Deterrence

Justifying the punishment of individuals suffering from mental disorders through deterrence principles also presents problems. Deterrence assumes not only that people act of their own free will (just as retribution does), but also that people “are reasonably rational and respond to their perception of the costs and benefits attached to alternative courses of action.” Therefore, punishments for crimes need only be severe enough to make the costs of punishment outweigh the benefits of committing the crime. Deterrence has a cognitive component; thus, the theory posits that an individual’s subjective perception of the certainty and severity of punishment will have a deterrent effect on her decision to violate the law. General deterrence occurs when others view the punishment an individual receives and subsequently decide not to engage in similar behaviors. Specific deterrence occurs when the individual decides not to engage in the behavior again after receiving punishment.

The theory driving the deterrence rationale breaks down when it is applied to a population with mental disorders. Both general and specific deterrence rely on a basic cost-benefit analysis: the costs of punishment versus the benefits of the crime. However, individuals with certain mental disorders have a distorted, subjective perception of the costs and benefits of their actions, and mental health treatment—rather than legal sanctions—is the only way to change that perception. Not only might people with mental illnesses be unable to engage in a cost-benefit analysis, but even if they are able to make a rational decision, they subsequently may be unable to correlate their behavior with their prior decision. For example, individuals with

95. Id. at 19.
96. For example, “[n]europsychological deficits are a consistent finding in groups of individuals with Schizophrenia. Deficits are evident across a range of cognitive abilities, including memory, psychomotor abilities, attention, and difficulty in changing response set.” DSM-TR-IV, supra note 17, at 305. One of the features of a manic episode associated with bipolar disorder is “poor judgment [which] often lead[s] to an imprudent involvement in pleasurable activities . . . even though these activities are likely to have painful consequences.” Id. at 358.
97. According to the DSM-TR-IV, individuals suffering from Obsessive-Compulsive Disorder often engage in compulsive behaviors (such as repetitive hand-washing or counting) in order to
serious mental illnesses may not believe their actions violate social norms. In the alternative, these individuals may be so impulsive that they engage in undesirable actions despite a high probability of punishment. In other words, Professor Slobogin suggests that some individuals with mental disorders may be “undeterrable,” either generally through observing the punishments of other individuals, or specifically by punishing these individuals to dissuade them from engaging in similar conduct in the future.

In addition, the majority of people with mental disorders do not receive mental health treatment while in prison. One study evaluating recidivism among individuals with certain types of mental disorders identified three elements necessary to prevent or reduce recidivism: competent mental health care, access to mental health and other social services, and legal leverage. Although the study discusses the access to and competency of care primarily in the context of community mental health services, it notes that individuals must be able to access care as they transition back into the community. This assertion necessarily assumes that individuals have access to competent services while incarcerated. While the specific deterrent effect of legal sanctions cannot be determined entirely by the recidivism rate of individuals (as recidivism merely addresses the rate of re-offense and not the rationale behind the behaviors that create the offense), recidivism is nevertheless an instructive measure to examine deterrence.

Overall, punishing individuals with mental disorders will not achieve much of a deterrence goal. The individuals with severe mental disorders are by nature “undeterrable,” as it is difficult for them to engage in the cost-benefit analysis upon which the deterrence theory is based. Treating individuals with mental health disorders will increase the likelihood that they can engage in the logical cost-benefit analysis required for specific deterrence. However, the current criminal justice system does not provide either competent care or

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98. SLOBGIN, supra note 35, at 106.
99. Id.
100. Id. (coining the term “undeterrability”).
101. See JAMES & GLAZE, supra note 6, at 9 (discussing the large number of individuals with mental illness who do not receive any treatment while incarcerated).
102. J. Steven Lamberti, Understanding and Preventing Criminal Recidivism Among Adults with Psychotic Disorders, 58 PSYCHIATRIC SERVICES 773, 777-78 (2007).
103. Id. at 777.
sufficient access to services, two key components in preventing recidivism among individuals with mental disorders.

C. The Problem with Incapacitation

The purpose of incapacitation is to separate the individual from society in order to protect society. 104 This rationale is essentially the same as the justification for involuntary confinement through civil commitment. 105 Although civil commitment statutes vary by jurisdiction, most statutes require a doctor to determine that an individual poses a danger to herself or others, or is gravely disabled, before she may be confined against her will. 106 For all practical purposes, the only difference 107 between incarcerating an individual with a mental disorder for incapacitation purposes and confining the same individual under a civil commitment statute is the type of mental health care available. Mental health care during incarceration for a criminal conviction often is inadequate or nonexistent, 108 while some type of treatment will be provided during the time an individual is civilly committed. 109 As such, there is little justification for employing criminal procedures and incarcerating individuals with mental disorders solely to incapacitate them 110 when civil commitment procedures are available to achieve the same purpose and may provide more appropriate mental health care. 111

104. Cotton, supra note 38, at 1316.
106. LA. REV. STAT. ANN. § 28:53(B)(1) (2008). The Louisiana civil commitment statute was selected as an example here because the decision in Foucha v. Louisiana, 504 U.S. 71 (1992), is integral to the civil commitment discussion. Foucha held that a state must first prove that an individual suffers from a mental illness before she may be civilly committed. Id. at 86.
107. Aside from the implications of a new criminal conviction on an individual’s record, that is.
108. See supra note 101.
109. See Virginia Aldigé Hiday & Heathcote Woolsey Wales, Civil Commitment and Arrests, 16 CURRENT OPINION PSYCHIATRY 575, 577 (2003) (reporting that individuals who are involuntarily hospitalized experience reduced symptoms and increased functioning not long after admission and continuing through discharge).
110. Even though incarceration may not be necessary to achieve the goal of incapacitating individuals with serious mental health disorders, civil commitment might not achieve the same practical effects as incarceration, such as the creation of a criminal record, the initiation of immigration proceedings, and the revocation of public housing eligibility. A legislature might determine that these practical effects are desirable. However, using the incapacitation rationale to justify incarceration may still be inappropriate to obtain these “desirable” side effects.
111. While civil commitment poses its own plethora of constitutional and statutory problems, this Note will not attempt to tackle these issues. Instead, it makes the broad assumption that civil commitment is a legal and viable means of incapacitation.
The Supreme Court originally held that citizens either may be involuntarily confined up to the length of their court-imposed criminal sentences (but no longer) or, under a state's civil commitment procedure, may be confined on the basis of two factors: dangerousness and severe mental illness. In the 1992 decision of *Foucha v. Louisiana*, the Court said that a Louisiana statute authorizing the continued involuntary confinement of an insanity acquittee “if found to be dangerous ... whether or not he is then mentally ill” was overly broad and therefore unconstitutional. Five years later, however, the Court upheld the involuntary confinement of individuals who are deemed to be dangerous, even in the absence of a serious mental disorder, in *Kansas v. Hendricks*. The Court confirmed this approach in 2002 in *Kansas v. Crane* when it found that the respondent could be involuntarily confined for longer than his court-imposed criminal sentence even though, like the inmate in *Foucha*, he did not suffer from a severe mental disorder. According to the Court’s holdings in *Hendricks* and *Crane*, dangerousness (based on a lack-of-control determination) is now sufficient to warrant involuntary confinement, even absent a serious mental illness. According to Professor Slobogin, this jurisprudence suggests that the Court has “abandon[ed] the traditional view that pure preventive detention is reserved for those who are severely mentally ill.”

Professor Slobogin further argues that preventive confinement is objectionable in these circumstances for four primary reasons. First, purely preventive detention is unreliable, because the government does not have the means to prove to a sufficient degree of certainty that a particular person will re-offend. Second, expanding the preventive detention scheme in this way opens the door for governments to avoid the civil commitment standards and effectively impose punishment on individuals while also circumventing the constitutional protections of the criminal system. Third, it gives the government too much power to detain individuals because it is not

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113. *Id.* at 73, 86.
116. SLOBOGIN, supra note 35, at 104–05 (discussing the *Hendricks* decision, which overruled the Kansas Supreme Court’s finding that Hendricks could not be involuntarily committed absent a specific finding that he suffered from a severe mental disorder, was dangerous, and was unable to make informed treatment decisions for himself).
117. *Id.* at 104.
118. *Id.* at 108.
119. *Id.* at 109.
120. *Id.* at 112–13.
possible to define “dangerousness” clearly and narrowly, and the
government cannot interfere with individual liberty unless the public
is on notice that such sanctions are possible.\textsuperscript{121} Fourth, “even if all the
other objections are met, a regime that deprives people of liberty based
on what they will do rather than on what they have done shows
insufficient respect for the individual.”\textsuperscript{122} Because of these concerns,
and because incarcerated individuals are less likely to receive
adequate mental health treatment than individuals who are
involuntarily committed, using criminal sanctions as a method of
incapacitation is inappropriate. Purely preventative detention through
criminal sanctions, therefore, is unwise and unnecessary.

Although far from a perfect solution, civil commitment
standards provide the more appropriate method of identifying
individuals who suffer from mental health disorders that are so severe
that the individuals must be confined to protect themselves and
society. These statutes provide a procedure for involuntary
confinement that focuses on the individual rather than her crime and
results in incapacitation combined with mental health treatment. A
frequent criticism of using civil commitment as a means of
incapacitation is that an individual may be confined indefinitely, while
criminal sentences endure for a fixed length of time. However, the
decisions in \textit{Hendricks} and \textit{Crane} suggest that individuals may be
confined even longer than their court-imposed criminal sentences
based on the sole determination of “dangerousness.”\textsuperscript{123} Civil
commitment procedures are both a sufficient and constitutional means
of preventing an individual with a mental disorder from harming
herself or others, and at the same time, they are a means of providing
needed treatment to that individual during the confinement period.
Criminal sanctions, therefore, simply are not needed to achieve the
goal of incapacitation.

\textbf{D. The Problem with Rehabilitation}

Of the four animating purposes of the criminal justice system,
rehabilitation is the least problematic for people with mental
disorders. Rehabilitation is an attempt to change or improve the
inmate for her own benefit and in the hope that she will not

\begin{itemize}
\item[121.] \textit{Id.} at 115, 118.
\item[122.] \textit{Id.} at 122.
\item[123.] \textit{See Kansas} v. \textit{Crane}, 534 U.S. 407, 411 (2002) (supporting the idea that an individual
convicted of a crime may be confined even after the term of her sentence has expired); \textit{Kansas} v. \textit{Hendricks}, 521 U.S. 346, 368–69 (1997) (same).
\end{itemize}
In recent years, the legal community continually has rejected rehabilitation as an appropriate criminal justice goal for most individuals convicted of crimes. For example, when it was drafted, the Model Penal Code suggested that rehabilitation should be a key justification for criminal sanctions. However, research conducted in the 1970s seemed to demonstrate that rehabilitation never works, and consequently, the rehabilitation purpose fell out of favor in the modern criminal justice system. A recent Model Penal Code Sentencing Report argues that rehabilitation should not be accepted unconditionally as the primary goal of punishment or as a major component of any sentencing decision. On the other hand, some commentators have argued that if retribution fails to achieve its goals, such outcome is due to resistance from judges and legislators who prefer a retributive form of justice. These commentators believe that rehabilitative sanctions could “effect[] hoped-for reductions in the future criminal behavior of inmates” if legislatures and courts allowed them to work.

Even if rehabilitation is an unattainable goal for many inmates, it could be considerably more attainable for inmates with mental disorders. Mental health treatment would be essential to improving the decisionmaking capacity of an inmate with a mental disorder. Adequate mental health treatment might help an individual to understand and manage her mental disorders better. For example, the symptoms of schizophrenia, such as hallucinations and delusions, can be managed through the use of antipsychotic medications and accompanying self-care skills training. Psychiatric medications such as lithium, mood stabilizers, and antidepressants also can be effective

125. See Model Penal Code § 1.02(2)(b) (Proposed Official Draft 1962) (listing “to promote the correction and rehabilitation of offenders” as a purpose second only to preventing offenses).
126. See Model Penal Code: Sentencing Report 28–29 (2003) (discussing the “Nothing Works” message about rehabilitation of the 1970s but acknowledging the existence of a limited number of rehabilitative programs that have “a demonstrated track record of success”).
127. Id. at 29.
128. See Cotton, supra note 38, at 1357–58 (positing that utilitarian laws could have created real change in the criminal justice system if the utilitarian purposes, including rehabilitation, had been “taken seriously”).
129. See Model Penal Code: Sentencing Report, supra note 126, at 28 (describing the interpretation of research in the 1970s as demonstrating the failures of rehabilitation).
130. See Sarason & Sarason, supra note 28, at 380–81 (noting that traditional antipsychotic medications may be effective in moderating certain symptoms, but may also cause undesirable side effects). Because traditional medications can cause undesirable side effects, behavioral skills training can teach individuals certain social and self-care skills like grooming and using public transportation, in addition to self-monitoring symptoms and medication. Id. at 381–82.
means for treating bipolar disorder.\footnote{131 See id. at 336 (mentioning a variety of psychotropic medications that may control the symptoms of bipolar disorder). Although lithium is the most effective treatment for bipolar disorder, the negative side effects cause many individuals to stop taking the medication. Id. Other medications have fewer side effects, but are less effective in controlling symptoms. Id. Antidepressants can bring on an undesirable rapid switch to a manic phase. Id. Additionally, the relapse rate is very high even for individuals who are receiving excellent pharmacotherapy. Id. at 337.} Antidepressants are one common treatment for individuals with severe depression.\footnote{132 Id. at 337.} These medications help individuals to manage their mental health symptoms and conform to societal norms.

Although medication may improve an individual’s functioning, other types of treatment are also needed. Over half of people with schizophrenia will stop taking the recommended medication after they are discharged from the hospital,\footnote{133 Id. at 380.} but behavioral skills training may help individuals with necessary self-care skills and increase their ability to monitor their own symptoms and medication needs.\footnote{134 Id. at 382.} Almost three-fourths of individuals with bipolar disorder will relapse in the five years following their first episode, even if their pharmacotherapy is excellent, but including psychoeducational therapy with family members can improve symptoms.\footnote{135 Id. at 383–84.} A combination of antidepressant medications and cognitive-behavioral therapy is more effective than either medication or therapy alone for treating severe depression.\footnote{136 Id. at 331.} Comprehensive mental health treatment, tailored to address the needs of each individual, might successfully rehabilitate inmates in the criminal justice system.

It would be a gross overgeneralization to assert that all inmates with mental disorders would not have engaged in the behavior for which they are being punished but for their mental health problems. However, only a system based on rehabilitation can take into account the unique situation of the inmate with a mental disorder.\footnote{137 Id. at 328.} A retributive scheme is flawed because it punishes arguably less culpable individuals equally or more severely than it punishes individuals who do not suffer from mental disorders.
Likewise, irrational actors cannot be deterred, and the high recidivism rate for people with mental disorders confirms that neither specific nor general deterrence is achieved by punishing this population. While incapacitation is arguably an appropriate reason to confine individuals with mental health problems who may pose a danger to the public, civil commitment statutes are better suited for that task than the criminal law. Rehabilitation, therefore, is the best articulated purpose to justify "punishing" individuals with mental disorders. Currently, however, the criminal justice system does not provide the rehabilitative programs these individuals need.

IV. APPLYING JUVENILE JUSTICE PRINCIPLES TO ADDRESS THE THEORETICAL FAILINGS OF THE CRIMINAL JUSTICE SYSTEM

The theoretical background of juvenile justice is an appealing starting point for rehabilitating individuals with mental disorders. In its most idealistic form, the juvenile justice system assesses the needs of each particular individual and responds to her unique interests. Although the current system looks more punitive than Judge Mack's purely rehabilitative vision, those who administer the adult criminal system nevertheless could learn much from the philosophies of juvenile justice. Mental health courts would provide a rehabilitative structure similar to that of the juvenile justice system to address the unique needs of adults charged with crimes and suffering from mental health problems.

A. Positive Contributions of the Juvenile Justice System

1. Diversion

The juvenile justice system attempts to divert youth away from delinquency adjudications and traditional detention and into rehabilitation programs such as counseling, drug and alcohol treatment, or after-school programming. Judge Mack's first vision of the reformed system involved preventing children from ever engaging in criminal activity, which speaks directly to both the rehabilitative nature of the juvenile justice system and to the use of diversion as one

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139. See Feld, supra note 48, at 345, 348 (describing diversion programs as gate-keeping mechanisms to keep youths out of the juvenile system in a less stigmatizing and more flexible manner).
140. Mack, supra note 46, at 122.
major way to rehabilitate would-be "offenders." Each state structures its diversion program differently, and diversion often can depend on the subjective impressions of prosecutors or probation officers and be influenced by factors such as race or family situation. However, the possibility of diversion before a petition ever is filed is nevertheless attractive, as it theoretically provides the possibility of avoiding the stigma of a formal charge.

Similarly, the ability to divert an individual suffering from mental illness away from the criminal justice system could avoid the stigma of a formal criminal charge, as well as provide more rehabilitative opportunities tailored to meet the individual's needs. Rehabilitation is the only appropriate criminal justice goal for individuals with severe mental health disorders. However, when serious allegations arise, such as in the cases of Andrea Yates and Eric Clark, it is unrealistic to assume that the public will accept pure diversion (as it is conceptualized in the juvenile justice system) as an appropriate sanction. In these cases, the juvenile justice principle of "least restrictive means" also may be informative.

2. Least Restrictive Means

When it is problematic to divert a child away from the juvenile justice system entirely, many juvenile courts use the principle of "least restrictive means"—which is the principle of limiting sentences or dispositions to the least invasive treatment that nevertheless will achieve the rehabilitative goal of the court—to determine the appropriate type of intervention. Juvenile courts often must decide between removing a child from her home and placing her in detention, or some lesser degree of intervention. Some courts interpret this language as a strict requirement: the court must take the least drastic step possible. This analysis requires consideration of the severity of the delinquency in comparison to the harshness of the intervention.

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141. FELD, supra note 48, at 345, 349.
142. Id. at 348. In the juvenile justice system, a petition formally charges the child with the violation of the law.
143. See supra notes 124–37 and accompanying text.
144. See, e.g., In re L.K.W., 372 N.W.2d 392, 403 (Minn. Ct. App. 1985) (finding the State did not provide the child with the constitutionally and statutorily required least restrictive means); State ex rel R.S. v. Trent, 289 S.E.2d 166, 170 (W.Va. 1982) (noting that a juvenile inmate is "constitutionally entitled to the least restrictive treatment that is consistent with the purpose of their custody").
145. FELD, supra note 48, at 348 (describing less severe forms of intervention).
146. In re L.K.W., 372 N.W.2d at 398.
147. Id.
Other courts hold that the least-restrictive-means analysis requires the court to consider the least restrictive alternatives as factors in determining the ultimate disposition, but the juvenile has no right to the least restrictive means if they are not currently practical or available.\textsuperscript{148}

For individuals with mental illnesses within the criminal justice system, the least-restrictive-means analysis could be useful for determining whether a term of confinement or a lesser intervention is appropriate. This determination might implicate the same concerns seen in the dangerousness prong of civil commitment proceedings.\textsuperscript{149} Although civil commitment in general and dangerousness determinations in particular are not always viewed in a positive light, a similar analysis could be useful for assessing individuals facing criminal charges who are suffering from mental disorders. The analysis to determine whether detention is appropriate for juveniles employs several factors, such as their danger to society, background, openness to rehabilitation, and cooperativeness.\textsuperscript{150} Applying the juvenile justice system's least-restrictive-means factors to adults with mental illnesses enables a court to evaluate each adult on a case-by-case basis. Overall, this type of analysis could be adapted from the juvenile justice system and would prove helpful in determining the type and severity of sanctions appropriate for individuals with mental disorders.


Mental health courts already are present in today's adult criminal justice system. These courts divert individuals with mental disorders away from the traditional criminal justice system and provide more rehabilitative services. A mental health court is an example of a "problem-solving court."\textsuperscript{151} Unlike traditional state courts, problem-solving courts "seek to broaden the focus of legal proceedings, from simply adjudicating past facts and legal issues to changing the future behavior of litigants and ensuring the well-being of communities."\textsuperscript{152} The focus on individuals and communities rather
than crimes and legal issues is an embodiment of the rehabilitative principles most commonly found in the juvenile justice system.

The first mental health court was established in Broward County, Florida, in 1997 to deal with the large number of people with mental disorders in the criminal justice system. In 2000, Congress passed a bill authorizing funding for the development of mental health courts in jurisdictions across the country. The bill authorized ten million dollars per year from 2001 to 2004 to develop this special court program and to provide additional training on mental illness for law enforcement and judicial personnel. The bill’s proponents hoped that the information gathered through the initial period of this pilot program could be used to implement permanent strategies for addressing the needs of offenders with mental illnesses. As of December 2005, a survey by the Criminal Justice and Mental Health Consensus Project found 113 mental health courts in operation across the United States.

Mental health courts vary by jurisdiction, but they generally seek to divert individuals with mental disorders away from the criminal system and to obtain mental health treatment for individuals who are accused of crimes. Usually the participants volunteer for these programs, and social and mental health workers often are available during proceedings. Individuals receive treatment “sentences,” not jail time. If they successfully complete treatment, they may have their charges dismissed, or they might be transferred back to criminal court to stand trial, but failing to complete treatment could result in a jail sentence.

A successful criminal mental health court provides a more rapid means of resolving an individual’s problem, a more efficient use of resources, and a specialized staff to focus on the individual and the

153. Richard A. Marini, Mental Health Courts Focus on Treatment; Criminals Often Overlooked in Traditional System are Sentenced to Hospital Care, reprinted in JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS 59, 59 (David B. Wexler & Bruce J. Winick eds., 2003) [hereinafter JUDGING IN A THERAPEUTIC KEY].
156. Id.
159. Marini, supra note 153, at 61.
160. Id.
161. Id.
crime. In order to be successful, a mental health court should, among other things, provide the following: 1) a therapeutic environment and dedicated team; 2) an environment free from stigmatizing labels; 3) opportunities for deferred sentences and diversion away from the criminal system; 4) the least restrictive alternatives; 5) decisionmaking that is interdependent; 6) coordinated treatment; and 7) a review process that is meaningful. The court also should use positive reinforcement, such as rewards for meeting deadlines, rather than sanctions to further its goals.

Critics argue that mental health courts are an inefficient use of resources because it is more expensive to send individuals to treatment than to jail. An effective mental health court may be cheaper in the long run, however, as studies have shown that participating in a mental health court “improves a defendant’s chances of success in undergoing treatment, finding housing, and developing other support systems,” and participation also makes individuals who participate “less likely to be re-arrested than those who chose not to participate.” Lower re-arrest rates suggest that even though the initial cost per individual is higher for treatment than jail time, the total cost per individual might be significantly less if treatment reduces the overall amount of contact between the individual and the criminal justice system.

Mental health courts serve as an example of the way in which an individual with mental health issues might be screened and diverted away from the criminal justice system. Receiving mental health treatment rather than jail time arguably would be more rehabilitative in the long run. However, some differences exist between mental health courts and the juvenile justice concept of diversion. For example, in the adult criminal justice system, individuals with mental health issues often must be charged formally before they can be diverted into a mental health court or other treatment program. In other words, either a grand jury must indict the individual or a judge must determine that probable cause for the allegation exists before an individual in the adult system may be diverted. Comparatively, a child may be diverted away from the juvenile justice system before a petition ever is filed against her. In

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162. Randal B. Fritzler, 10 Key Components of a Criminal Mental Health Court, reprinted in Judging in a Therapeutic Key, supra note 153, at 118, 118.
163. Id. at 118–21.
164. Id. at 122.
165. Marini, supra note 153, at 61.
166. Id.
order to realize fully the potential for rehabilitation modeled by the juvenile justice system, all mental health courts should change their structure so that individuals are not required to enter the criminal justice system officially through an indictment, a finding of probable cause, or a guilty plea in order to get mental health treatment.

Nearly all mental health courts exclude individuals charged with violent felonies from participating, and some exclude individuals charged with any type of felony.\(^{167}\) Although the public outcry for retributive sanctions may be louder for a more serious crime, the rationale for diversion to a mental health court remains strong. It is in this circumstance that the juvenile justice concept of least restrictive means should be instructive. A mental health court can use this juvenile justice principle to determine the appropriate outcome for each individual it serves in order to determine the appropriate mix of incapacitation through incarceration and rehabilitation through mental health treatment for each individual suffering from severe mental illness. Overall, revisiting the important concepts of diversion and “least restrictive means” that influence the juvenile justice system could improve the mental health courts that currently operate in some criminal justice jurisdictions.

**B. Challenges of the Juvenile Justice System as a Rehabilitative Model**

Despite the insights that the juvenile justice system has to offer, some of these ideas may be unpalatable to the public. Rehabilitation has not been widely accepted in the adult criminal justice system. For example, the Model Penal Code received a great deal of criticism when it attempted to establish rehabilitation as the basis for the entire criminal system.\(^{168}\) It may be easier to “sell” rehabilitation to the public as a theory of punishment when those being rehabilitated are young. However, the controlled structure and supervision provided by mental health courts could alleviate some of these fears.

Another problem with mental health courts is the difficulty in distinguishing the individuals who should be rehabilitated from the individuals who should be punished. While age provides a clear line to separate the juveniles who will receive rehabilitative sanctions from the adults who will receive retributive sentences, no such bright-line rule separates individuals with severe mental disorders from those

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167. See generally SURVEY, supra note 157, at 1–67 (describing eligibility information for all mental health courts in existence as of December 2005).

168. Cotton, supra note 38, at 1326.
without mental disorders. DSM-IV-TR diagnoses, psychological testing, and IQ testing could be possible methods for drawing a line in the mental health context, but these measures encompass a great deal of variability. Courts must determine which individuals qualify for rehabilitation, but the increased subjectivity found in the mental health context calls the applicability of the juvenile justice system into question.

Additionally, the paternalism tolerated in juvenile courts based on the state's parens patriae power may not be as acceptable in the context of adults with mental illness. When inmates are still considered children, it is easier to justify government intervention because they are not allowed to make legally binding decisions and are always under the control of others, such as parents and teachers. However, exercising the same control over adults, even adults with mental disorders, may be inappropriate. Such intervention, especially with adults suffering from mental disorders that impact their emotional and affective state rather than their cognitive abilities, could be viewed as patronizing. Unlike children, adults with mental disorders are not subject to the same parens patriae power that can justify governmental intervention in the juvenile justice concept.

A final concern about the applicability of the juvenile justice system is its lack of constitutional protection. Although Gault and its progeny have extended some constitutional protections to juveniles in certain circumstances, these protections are not absolute. Juveniles have the right to counsel, for example, but they do not have a right to a jury trial. As such, each juvenile justice principle should be evaluated critically before it is applied to adults with mental disorders because the constitutional protections of due process before deprivation of liberty are absolute in the adult criminal justice system.

Despite these concerns, the Supreme Court occasionally has considered adults with mental disorders to be similar to juveniles. The Court's death penalty jurisprudence, for example, is substantially similar when it examines the constitutionality of the death penalty for individuals under the age of eighteen and for individuals who suffer from mental retardation. On the same day in 1989, the Court decided both Stanford v. Kentucky and Penry v. Lynaugh, which held, respectively, that the death penalty was constitutional for juveniles

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169. See Feld, supra note 48, at 673 ("Despite the increasing convergence of juvenile with criminal courts, most states provide neither special procedures to protect juveniles from their own immaturity nor the full panoply of adult procedural rights.").

170. Compare In re Gault, 387 U.S. 1, 36 (1971) (holding that juveniles have the right to counsel), with McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (holding that "trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement").
between the ages of sixteen and eighteen and individuals with mental retardation. Then, in 2002, the Court determined that the death penalty was not constitutional for adults with mental retardation in its decision in *Atkins v. Virginia,* and three years later it used much the same reasoning to hold the death penalty unconstitutional for juveniles under age eighteen in *Roper v. Simmons.* Although these decisions focus solely on issues of mental retardation, the same concerns regarding the individual's culpability and ability to make rational choices also exist for individuals with mental disorders. Thus, the death penalty jurisprudence of the Court suggests that the adult criminal system is open to treating juveniles and individuals with mental disorders similarly under the law.

Although applying juvenile justice principles to the adult criminal justice system presents some challenges, the benefits greatly outweigh the risks. Concepts like diversion and least restrictive means will provide a theoretical framework for mental health courts as they address the unique needs of individuals suffering from mental illnesses in the criminal justice system. Mental health courts are needed in every jurisdiction in the United States. Mental health courts also should expand their scope to address the needs of individuals charged with more serious offenses. Without this expansion, a gap always will exist between the individuals charged with less serious, non-violent crimes and the few individuals who are found not guilty by reason of insanity.

V. CONCLUSION

The U.S. criminal justice system currently is failing to achieve any of its express goals of punishment when inmates suffer from a severe mental illness. Retribution is an inappropriate conceptualization of punishment for these inmates because their mental illnesses make them less culpable and therefore less deserving of sanctions. In addition, sanctions will not deter individuals with mental disorders from reoffending. Although punishment of inmates with mental disorders can be justified by incapacitation, this goal is better served through civil commitment proceedings. Finally, the

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171. 492 U.S. 361, 380 (1989) (holding that it was not cruel or unusual punishment to execute a sixteen- or seventeen-year-old); 492 U.S. 302, 340 (1989) (holding that it was not cruel or unusual punishment to execute a person who was mentally retarded).


173. 543 U.S. 551, 578 (2005) (holding that it would be cruel and unusual punishment to execute an inmate under the age of eighteen).
current inadequate access to treatment is far from rehabilitative, although rehabilitation is an appropriate purpose for sanctioning this population.

The juvenile justice system provides a meaningful model for improving the rehabilitative possibilities of the criminal justice system. Juvenile justice’s approach to rehabilitation emphasizes diversion and encourages the use of the least restrictive means to achieve an objective. These suggestions could be useful in reforming the criminal justice system and in making the system as a whole more rehabilitative. On the one hand, this perspective runs the risk of being paternalistic, but on the other hand, it values decisionmaking focused on the needs of one particular individual. In addition, mental health courts are consistent with the tenets of juvenile justice and could be expanded to provide more opportunities for treatment and rehabilitation in the adult criminal justice system.

Overall, these recommendations would improve the way the current criminal justice system treats individuals who, like Eric Clark, may pass the high hurdle of the insanity defense. Regardless of which theoretical approach the criminal justice system adopts with respect to individuals with mental disorders, the system as it exists now is untenable. Rehabilitation, the only purpose of punishment that is appropriate for individuals with mental disorders, cannot be achieved when the criminal justice system does not provide adequate mental health care for incarcerated individuals. Retribution, deterrence, and incapacitation, on the other hand, are inappropriate punishment purposes for this class of individuals. The fact that the current system is failing to meet any of its theoretical goals should concern the legal community. Not only is this conflict of goals a legal and intellectual conundrum, but the abundance of inappropriate punishment schemes and the lack of appropriate treatment suggest a moral and ethical dilemma as well.

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