Imperfect Insanity and Diminished Responsibility

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Imperfect Insanity and Diminished Responsibility

E. Lea Johnston∗

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 of Diminished Responsibility from Mental Disability, to be asserted as an affirmative defense at the option of the defendant. The excuse 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 may be so destructive of rationality that it merits a reduction in liability, even when not rising to the level of insanity. The verdict would render our justice system more capable of accurately expressing community condemnation and increase its legitimacy.

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

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prior proposals in four key respects. First, it limits its purview to rationality and volitional impairments 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, permit juries to find a defendant guilty but highlight their 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 disorder 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

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 pick-up truck. Moritz located the truck and pulled over 17-year-old Eric Clark, the truck’s driver. Shortly upon exiting his vehicle, Clark shot and killed Moritz. Clark fled on foot and discarded his gun in some bushes. He was soon arrested and charged with first-degree murder. 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.” 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. 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. 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.

Three verdicts were available to the trial judge in Clark’s case: guilty, not guilty, and not guilty by reason of insanity. The judge acknowledged Clark’s severe mental illness and active psychosis at the time of the shooting. However, he believed Clark’s mental disorder “did not… distort his perception of reality so severely that he did not know his actions were wrong.” Falling just short of the state’s insanity standard, Clark was found guilty of first-degree murder. He received a sentence of life in prison without the possibility of release for 25 years, the minimum mandatory sentence.

The Clark case 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 (which it rarely does), then it typically does not factor into the assessment of liability. But insanity’s status as an all-or-nothing defense contradicts commonly held intuitions about mental abnormality and gradations of responsibility and blameworthiness. The law conceives of a person as a “practical reason[er]” who uses legal rules to guide their

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3 Clark, 548 U.S. at 746 (quoting App. 334).
4 See infra notes 55–56 and associated text.
5 In addition, some states permit the defendant to use mental health evidence to rebut mens rea. See infra note 49.
6 See Paul H. Robinson, Criminal Law’s Core Principles, 14 WASH. U. JURIS. REV. 153, 182, 190 (2021); Stephen J. Morse, Diminished Capacity: A Moral and Legal Conundrum, 2 INT’L J. LAW & 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.”).
Criminal responsibility thus requires normative competence, or 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. Society has always recognized that mental abnormality may so impair these abilities that its corrosive impact must be recognized in responsibility assessments. But mental abnormalities—and their destructive effect on the capabilities necessary for criminal responsibility—exist along a spectrum. As mental disabilities vary by degree, so should criminal responsibility. Otherwise, individuals with mental disabilities—which constitute a significant proportion of justice-involved individuals—will continue to be systematically over-punished.

Recognizing partial responsibility due to mental disability is necessary for the criminal law to accurately express community condemnation, to accord with “the community’s shared intuitions of justice,” and to maintain its legitimacy. Research consistently documents that the imposition of a partial responsibility verdict reflects mock jurors’ perceptions of a defendant’s mental impairment, capacity for displaying rational behavior, and level of responsibility for the crime. Studies demonstrate that jurors view partial responsibility as offering a more moral, just, and appropriate option than the verdicts of guilty or not guilty by reason of insanity (NRGI) in mental

10 See Roy E. Pardee III, Fear and Loathing in Louisiana Confining the Sane Dangerous Insanity Acquitee, 36 ARIZ. L. REV. 223, 245 (1994) (recognizing that “insanity is not an all or nothing issue[—]there is a continuum of mental functioning, and a given defendant may come close to insanity without being truly insane”).
12 See infra notes 55 and 58 and accompanying text.
13 See infra note 57.
disability cases.\textsuperscript{16} Relatedly, jurors report feeling more confident reaching a partial responsibility verdict\textsuperscript{17} than reaching either of the other verdicts.\textsuperscript{18} These studies affirm the principle of blameworthiness proportionality\textsuperscript{19}—the principle that an offender’s liability and punishment should vary with their blameworthiness—which Paul Robinson has documented has “near universal appeal across demographics, cultures, and history.”\textsuperscript{20}

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 diminished responsibility.\textsuperscript{21} Most (but not all)\textsuperscript{22} 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, \textit{Mental Disabilities and Criminal Responsibility}.\textsuperscript{23} Their proposal assesses both the


\textsuperscript{17} See \textit{supra} note 15 and accompanying text (noting jurors’ equation of GBMI verdicts with verdicts of diminished responsibility).

\textsuperscript{18} Roberts, Golding & Fincham, \textit{supra} note 16, at 226.

\textsuperscript{19} Robinson, \textit{Core Principles, supra} note 6, at 182.


\textsuperscript{21} \textit{See FINGARETTE & HASSE, supra} note 9, at 247–57; app. I (outlining the Disability of Mind doctrine and plea—which focus on the capacity of rational conduct regarding the criminal significance of the act—and providing guidance for its execution, with culpable and nonculpable “Partial Disability of Mind” verdicts representing forms of diminished responsibility); Norman J. Finkel, \textit{Insanity on Trial} 292–96 (1988) (outlining an expanded Disability of Mind test as an affirmative defense); Brink, \textit{Partial Responsibility and Excuse}, \textit{supra} note 11, at 53–59 (proposing a tripartite or tetravalent responsibility structure that includes a culpability assessment either at the guilt phase or a separate culpability phase of adjudication); Stephen J. Morse, \textit{Diminished Rationality, Diminished Responsibility}, 1 Ohio St. J. Crim. L. 289, 300 (2003) (“The jury may find the defendant [Guilty But Partially Responsible or] GPR 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)); Federica Coppola, \textit{The Emotional Brain & 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, \textit{Dealing with Wayward Desire}, 3 Crim. L. & Phil. 1, 12 & n.11 (2009) (advocating a “supplement” to Morse’s GPR standard that recognizes defects of will in addition to defects of reason); \textit{Robinson, Mitigations, supra} note 20, 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, \textit{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”).

\textsuperscript{22} See \textit{Brink, Partial Responsibility and Excuse}, \textit{supra} note 11, at 52–59; \textit{Robinson, Mitigations, supra} note 20, at 255–62.

\textsuperscript{23} \textit{See FINGARETTE & HASSE, supra} note 9, at 254–57; Morse, \textit{Diminished Rationality, supra} note 21, at 299 n.23.
defendant’s ability to act rationally with regard to the criminal prohibitions bearing on their conduct and their culpability in inducing the mental disability responsible for that irrationality.24 Existing proposals have generated much scholarly enthusiasm,25 but, as of yet, no traction among state legislatures.

Several characteristics may account for prior proposals’ cool reception. First, some would extend the partial excuse to all rationality-diminishing impairments, regardless of origin.26 Professor Stephen Morse’s “Guilty But Partially Responsible” verdict, for instance, would permit a fixed sentence reduction for common conditions like grief, stress, fatigue, trauma, rage, jealousy, and poverty.27 Such a capacious partial excuse is at odds with criminal systems and popular norms of responsibility.28 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 adjudication29 and—when a disability of the mind is present—six possible verdicts.30 Third, and perhaps most fundamentally, prior proposals are insufficiently sensitive to and respectful of existing responsibility doctrines. These proposals’ disconnect from contemporary conceptions of criminal nonresponsibility renders their adoption extremely unlikely and possibly unworkable.

This Article offers a more pragmatic option.31 It proposes an affirmative partial defense of Diminished Responsibility from Mental Disability that is distinguished by four components. First, it limits its purview to rationality and volitional impairments 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 Mentally Ill (GBMI) verdicts inspire jurisdiction-specific modifications.32 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 disorder 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.33 Fourth, it draws upon nearly twenty foreign partial responsibility structures to glean possible

24 FINGARETTE & HASSE, supra note 9, at 206, 247–57, app. I.
26 See Morse, Diminished Rationality, supra note 21, 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).
27 See id.; Johnston & Leahey, supra note 15, at 1272–73 (discussing the implications of Morse’s proposal).
28 Id. at 1273.
29 See FINKEL, supra note 21, at 292–96.
30 Id. at 305 (listing the six DOM verdicts).
31 My proposal coheres with the broad strokes of Morse’s initial proposal of 1979, which he did not endorse but suggested as a workable model if one were to exist. See Morse, Diminished Capacity, supra note 6, at 295–96.
32 Jurors typically mistake GBMI verdicts as partial responsibility standards, see supra note 15, but this verdict typically carries no necessary sentencing or treatment consequences, see infra note 90 and accompanying text.
33 See infra Part II.D.3.c.
sentencing and treatment consequences that should accompany the verdict. The partial excuse of Diminished Responsibility from Mental Disability would be practical, would faithfully reflect the defendant’s culpability, and could serve a useful dispositional function.

The 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 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, this Part proposes a novel scheme, informed by study of eighteen partial responsibility standards around the world, in which punishment would be reduced by a statutory minimum combined 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 Arizona v. Clark, profiled in the introduction, illustrates the injustice of the current system and the need for a partial responsibility verdict. 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 permit relevant evidence of impaired cognition or moral awareness to rebut certain mens rea states. Second, virtually all states provide an insanity defense. 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 their act or (in fewer

34 For a more granular, comparative review of these partial responsibility measures, see E. Lea Johnston et al., Diminished Criminal Responsibility: A Multinational Comparative Review, 91 Int’l J. Law & Psychiatry 101919 (2023).

35 Clark was clearly delusional when he killed Moritz, as recognized by both the prosecutor and the trial judge. Kim, supra note 1. 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.

36 See infra note 49. These statutes are of limited utility to many defendants with mental disorder, however. Mental disorder more often skews the reasoning that motivates a defendant’s actions than obliterates their understanding of what they are doing.

37 See infra note 81.
states) unable to conform their conduct to the law. 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. However, as Clark demonstrates, mitigation may not be an option: a judge’s hands may be tied by a mandatory minimum sentence. This will often be the case with homicide and other serious offenses. Even when a judge may mitigate for diminished responsibility, mitigation is discretionary. Large disparities assuredly exist between judges as to whether, and how much, to mitigate on this basis. Exercises of discretion in the justice system are often plagued by inconsistency, unpredictability, and arbitrariness. 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 mitigating.

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. Responsibility—a dimension of desert—is a social construct, whereby the factfinder, as the moral representative of the community, determines whether the offender’s state of mind was so different from typical human beings that, for purposes of the criminal law, their culpability is either absent or different in kind. Jurors are competent to evaluate capacity; capacity is a central issue in insanity and provocation claims. Capacity is also a central issue in the 36 states that permit diminished

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38 See infra notes 82-86 and accompanying text.
41 Robinson, Criminal Law’s Core Principles, supra note 6, at 211.
42 See Morse, Diminished Rationality, supra note 21, at 298–99.
44 See Dix, supra note 11, at 263.
45 David O. Brink & Dana K. Nelkin, Fairness and the Architecture of Responsibility, in 1 OXFORD STUDIES IN AGENCY AND RESPONSIBILITY 284, 306 (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 9, at 203–04 (arguing 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 21, at 299; Robinson, Mitigations, supra note 20, at 265; see infra note 47.
46 See Morse, Excusing, supra note 7, at 383.
48 In addition to an assessment of the defendant’s subjective volitional control, provocation also includes objective criteria that limit the reach of the defense. See Paul H. Robinson, Criminal Law Defenses: A Systematic Analysis, 82 COLUM. L. REV. 199, 206 (1982).
capacity evidence to rebut (at least some forms of) mens rea. 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.” While some commentators have argued to the contrary, 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.

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. 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. An estimated 15% of state prisoners and 24% of jail inmates show signs of a psychotic disorder, but the insanity defense is raised in fewer than 1% of felony cases and is successful only around a quarter of the time. 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.

Failing to recognize partial responsibility due to mental disability has staggering consequences. Incarcerated people with serious mental illnesses are significantly more costly to house and treat than those without mental illnesses due in part to increased staffing needs, psychiatric medications,

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51 Arenella, supra note 39, at 852, 860.

52 See Robinson, Mitigations, supra note 20, at 265.

53 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 those whose passion stemmed from mental abnormality. See Johnston & Leahy, supra note 15, at 1255.

54 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 “the majority (60-90%) of defendants acquitted by reason of insanity are diagnosed as psychotic”).


57 See David O. Brink, Fair Opportunity and Responsibility 387 (2021) (figure 15.4) (illustrating the results of our bivalent system of responsibility, where guilt determinations tend to deviate significantly from just deserts).

58 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 Fred Osher et al., Adults with Behavioral Health Needs Under Correctional Supervision: A Shared Framework for Reducing Recidivism and Promoting Recovery 3–4 (2012), https://www.bja.gov/Publications/CSG_Behavioral_Framework.pdf [http://perma.cc/RY6W-3HLQ].
and psychiatric evaluations.\textsuperscript{59} Jails and prisons are ill-equipped to safely house and care for these inmates.\textsuperscript{60} 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 at the time of the interview.\textsuperscript{61}

Lack of treatment leads to health deterioration, predation, and suffering. People with serious psychiatric needs are more likely to be physically and sexually victimized.\textsuperscript{62} Less able to adapt successfully to carceral life, they are more likely to commit disciplinary infractions,\textsuperscript{63} which may be punished with loss of good-time credits, placement in disciplinary segregation, and longer stays in prison and jail.\textsuperscript{64} Indeed, the Bureau of Justice Statistics has documented that state prisoners with mental disorders, on average, spend five months longer in prison than those without mental disorders.\textsuperscript{65} Much of this time may be spent in solitary confinement, which may exacerbate inmates’ mental disorders or lead to psychosis.\textsuperscript{66} Reports suggest that Eric Clark has experienced this typical treatment, 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.\textsuperscript{67}

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,

\textsuperscript{59} See Jerilee Bennett, 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 (“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 58, at 8. It is difficult to determine these costs at the systemic level. See U.S. GOV’T ACCOUNTABILITY OFFICE, 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 selected states track only a subset of these costs).

\textsuperscript{60} See infra notes 271–284 and associated 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).

\textsuperscript{61} JENNIFER BRONSON & MARCUS BERZOFSKY, BUREAU JUST. STAT., U.S. DEP’T JUST., NO. NCJ 250612, INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011–12, 8 (June 2017). These findings were largely duplicated in a 2021 report. See LAURA M. MARUSCHAK & JENNIFER BRONSON, BUREAU JUST. STAT., U.S. DEP’T JUST., NO. NCJ 252643, INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS’ 1 (June 2021) (finding that 13\% of state and federal prisoners met the threshold for serious psychological distress but 60\% of those state and 74\% of those federal, prisoners were not receiving treatment).

\textsuperscript{62} See Johnston, Vulnerability and Just Desert, supra note 60, at 161–69 (detailing studies).

\textsuperscript{63} Id. at 171–72 (detailing studies).

\textsuperscript{64} 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 60, at 169–78.

\textsuperscript{65} JAMES & GLAZE, supra note 55, at 8.

\textsuperscript{66} See Johnston, Vulnerability and Just Desert, supra note 60, at 174–78.

\textsuperscript{67} Kim, supra note 1.
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. 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. 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 status as a responsible agent. Foreign partial responsibility standards are testament to the enduring, distinctive nature of mental disability. 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. Moreover, all insanity standards in the United States are similarly limited. If this limitation is acceptable for criminal nonresponsibility, it should likewise be acceptable for partial responsibility. 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.

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68 Other scholars have also limited their proposed partial excuses to mental disability. See FINGARETTE & HASSE, supra note 9, at 3.
69 Finkel & Fulero, supra note 15, at 385 (distinguishing between the variety of functions served by the insanity defense and the extent they can be at odds).
70 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.”).
71 See Appendix (delineating the full and partial nonresponsibility standards of eighteen civil law countries).
72 See Appendix; Johnston et al., supra note 34, at 3 (Table 2).
73 Spain recognizes two forms of partial responsibility. 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, 341, 343 (Alan Reed & Michael Bohlander eds., 2011) (Cancio Meliá, 2011). 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., Abstract, Trastornos de la personalidad en la jurisprudencia española [Personality disorders in Spanish jurisprudence], 42 SPANISH J. LEGAL MED. 62, 62, 64 (2016); Susana Mohíno et al., Personality Disorders and Criminal Responsibility in the Spanish Supreme Court, 56 J. FORENSIC SCI. 150, 152 (2011).
74 Morse, Diminished Capacity, supra note 6, at 295.
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 GBMI and foreign partial responsibility statutes to propose particular sentence-reduction and treatment 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, this Article does not endorse a single, universal partial responsibility standard. Rather, the most appropriate and feasible partial responsibility standard for a particular jurisdiction will depend on its nonresponsibility (insanity) standard, as well as its views on personality disorders and other matters. In prior work, a colleague and I have suggested that states derive partial responsibility standards from existing statutory structures, namely less stringent insanity standards and GBMI statutes. Foreign partial responsibility laws provide additional examples of acceptable partial responsibility definitions. Although it is unlikely that the wording of a partial responsibility test would affect verdict distributions, 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 structures suggests three ways in which a penal code could distinguish partial from full nonresponsibility: types of incapacity, degree of impairment, and 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.

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

A partial responsibility standard will naturally derive from a jurisdiction’s nonresponsibility standard. When composing a partial responsibility measure, it is therefore necessary to start with a jurisdiction’s insanity defense. Forty-eight jurisdictions in the United States currently provide an affirmative defense of insanity. Forty-six of these jurisdictions follow the traditional M’Naghten...
standard in recognizing “moral incapacity,” meaning they designate as insane a defendant who did not understand the wrongfulness of their criminal act due to mental disease or defect. In line with the Model Penal Code (the “MPC”), sixteen jurisdictions also include volitional incapacity, or an inability to conform one’s conduct to the requirements of law, in their insanity standards. While some jurisdictions’ statutes seemingly require total moral or volitional incapacity, others only require substantial incapacity for a finding of insanity. 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, are typically 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) (2010); OR. REV. STAT. §§ 161.295(1), 161.328 (2019). 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) (2016); KAN. STAT. ANN. § 21-5209 (Supp. 2018); MONT. CODE ANN. § 46-14-102 (2019); UTAH CODE ANN. § 76-2-305 (West 2017).

82 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 know he was doing what was wrong.”).

83 See Johnston, Delusions, supra note 73, at 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 (29 jurisdictions) follow the narrow M’Naghten standard and seemingly require total incapacity, see supra notes 82 & 86, while a substantial minority (16 jurisdictions) merely require substantial moral incapacity. See Kahler, 150 S.C. at 1051 (appendix) (Breyer, J., dissenting).

Twenty jurisdictions also include a “cognitive incapacity” component, which assesses the defendant’s ability to understand the nature and quality of their act. See Johnston, Delusions, supra note 73, at 309 & n.80 (listing jurisdictions); ALASKA STAT. § 12.47.010(a); N.D. CENT. CODE § 12.1-04.1-01(1) (only recognizing moral and cognitive incapacity for crimes with a mens rea of willfully). Cognitive incapacity is of marginal importance, however, because it is subsumed by moral incapacity and very few defendants exhibit this particular deficiency. See Clark, 548 U.S. at 753–54 (observing that a person who lacks the ability to comprehend the nature of her act cannot understand its wrongfulness); Elizabeth Poché, 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”).

84 See MODEL PENAL CODE § 4.01(1) (AM. L. INST. 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)).

85 See Johnston, Delusions, supra note 73, at 309–10 & n.81, 357 (appendix) (Connecticut, Hawaii, Kentucky, Maryland, Massachusetts, Michigan, Oregon, Rhode Island, Vermont, Wisconsin, Wyoming, District of Columbia, Arkansas, New Mexico, Virginia, West Virginia). Twelve of these states only require a substantial impairment, while four appear to require total volitional incapacity. See id.

86 See supra notes 83 & 85. Few jurisdictions require “total” incapacity in practice, as this would restrict successful insanity pleas to “totally deteriorated, drooling, hopeless psychotics of long standing, and congenital idiots.” GREGORY ZILBOORG, MIND, MEDICINE AND MAN 273 (1943).

87 ALASKA STAT. § 12.47.030 (2021); DEL. CODE ANN. TIT. 11, § 401 (2022); GA. CODE ANN. § 17-7-131 (2021); 720 ILL. COMP. STAT. 5/6-2 (2021); IND. CODE § 35-36-2-3 (2021); KY. REV. STAT. ANN. § 504.130 (WEST 2022); MICH. COMP. LAWS § 768.36 (2022); NEV. REV. STAT. § 174.035(1)(2020); OKLA. STAT. TIT. 22, § 1161(A)(1)(2022);
perceived as a “middle ground” verdict between “guilty” and “not guilty by reason of insanity.” These verdicts permit a jury to find guilty, but label as “mentally ill,” a defendant who was not legally insane at the moment of their criminal act but had a mental disorder that caused certain rationality-diminishing impairments.

Evidence suggests that states enacted these statutes to provide a “compromise” option for juries and to reduce undeserving insanity acquittals. Jurors tend to construe GBMI findings as partial responsibility verdicts, but they are not: they typically carry no diminution of punishment or mandatory treatment. Consequently, scholars have widely condemned GBMI statutes as confusing and unjust. Yet, courts have upheld and even lauded GBMI statutes, in part for their ability to clarify the nature of nonresponsibility. These verdicts have proven popular with juries, and empirical studies demonstrate their powerful effect on verdict distributions. 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, the partial responsibility standards of foreign countries—some of which have existed for more than a century—suggest approaches that might be particularly workable and likely to stand the test of time. The Appendix includes the full and partial nonresponsibility standards of eighteen civil law countries. These countries were selected because each recognizes a lesser form of impairment than that necessary for nonresponsibility, which (a) carries mandatory or discretionary consequences for liability, sentencing, or disposal, and (b) is included either in the responsibility portion of the country’s penal code or takes the form of an incomplete nonresponsibility defense. These standards are “generic” in the sense that they extend to all


88 See Pardee, supra note 10, at 245.

89 Johnston & Leahey, supra note 15, at Part III.B.2.c. (reviewing criteria of GBMI statutes).

90 Id. at 1282 n.337.

91 See supra note 15.

92 Johnston & Leahey, supra note 15, at 1282 & n.338. But see ALASKA STAT. § 12.47.050(b); KY. REV. STAT. ANN. § 504.150.

93 See Johnston & Leahey, supra note 15, at 1283 nn.338–39 (listing sources of criticism).


95 See Johnston & Leahey, supra note 15, at 1282–86; infra note 341 (discussing the minimal impact of the GBMI verdict on insanity acquittals).


97 See Appendix.
B. Forms of Incapacity

Depending on a jurisdiction’s insanity standard, one important difference between full and partial nonresponsibility could be its recognition of volitional incapacity.99 As discussed in the preceding Section, the insanity standards of most states include only moral incapacity.100 In these states, the grounds of volitional incapacity should be added to a diminished responsibility standard so that a state’s responsibility structure will encompass each capacity necessary for responsibility. Scholars agree that criminal responsibility requires the ability to conform one’s conduct to moral mores.101 Indeed, volitional incapacity is an established element of full and partial criminal nonresponsibility standards around the globe,102 and the standards of all eighteen surveyed countries include both features.103 Empirical research by Robinson and Professor John Darley has found that subjects in studies on juror behavior sharply reduce liability for offenders deemed to be suffering from a high degree of dysfunction, whether of the cognitive or conduct-control sort.104 The MPC’s insanity provision includes volitional incapacity,105 and this aspect of its standard was one of its most widely lauded innovations.106 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’ GBMI verdicts

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98 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, 13–14 (Ronald Roesch & Alana N. Cook, eds. 2017) (explaining this distinction and listing representative countries).

99 One state, Alaska, recognizes only cognitive incapacity. See supra note 83 (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 81 (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 note 101–106 and associated text.

100 See supra notes 81-85. Some states also include cognitive incapacity, which is of marginal significance. See supra note 83.

101 See, e.g., Joshua Dressler, Some Very Modest Reflections on Excusing Criminal Wrongdoers, 42 TEX. TECH. L. REV. 247, 253 (2009); Brink & Nelkin, supra note 45, at 284 (viewing cognitive and volitional capacities “as equally important to normative competence and, ultimately, responsibility”); supra note 8. But see Stephen J. Morse, Culpability and Control, 142 U. PA. L. REV. 1587, 1610–34 (1994) (arguing that internal coercion “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”).

102 See SIMON & AHN-REDDING, supra note 9.

103 See Appendix; Johnston et al., supra note 34, at 3.


105 See supra note 84.

distinguish themselves by including volitional incapacity, which is absent from their states’ insanity standards.  

Alternatively, a state could specify particular types of impairments that diminish responsibility in its partial responsibility verdict. This approach would hold the advantage of more clearly identifying the source of the excuse. Ten of thirteen existing GBMI statutes follow this approach. A partial responsibility standard modeled on Delaware’s GBMI verdict, for example, could read:

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

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.

C. Level of Impairment

A partial responsibility standard should recognize a lesser degree of impairment than that required for insanity. This is the primary way that foreign nations distinguish partial from full nonresponsibility. A number of the eighteen countries studied in the Appendix require total incapacity for criminal nonresponsibility and merely a reduced capacity for partial responsibility. Nearly half of surveyed countries’ penal codes, however, clarify that a cognizable impairment for partial responsibility must be significant, or even substantial or severe. GBMI

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109 See supra note 87.
110 DEL. CODE ANN. TIT. 11, § 401(b) (2022).
111 See, e.g., GA. CODE ANN. § 17-7-131(a)(3); MICH. COMP. LAWS § 330.1400(g); ALASKA STAT. § 12.47.130(5).
112 See Johnston et al., supra note 34, at 4.
113 See Appendix (Brazil, France, Luxembourg, Switzerland, China, and Russia). Other countries only reduce the degree of impairment for one of multiple incapacities. See Appendix (Greece: lowering necessary impairment level for moral incapacity (and not for volitional incapacity) from “did not have the capacity” to “the capacity … has not completely disappeared, but has been significantly reduced”; Turkey: for partial responsibility, lowering the degree of impairment for volitional incapacity (but not moral incapacity) from “significantly diminished” to “diminished”).
114 See Appendix (Portugal, Finland, and Poland); infra note 115 (standard for analogical mitigating factor in Spain).
115 See Appendix (Italy, Germany, and the Czech Republic); 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
standards in the United States also use decreased degrees of impairment to distinguish a GBMI finding from criminal nonresponsibility.116

**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 the 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 may opt to exclude certain conditions, such as personality disorders and voluntary intoxication. Jurisdictions should avoid, however, 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 of the countries surveyed in the Appendix (13 of 18) permit the same qualifying conditions to support both full and partial nonresponsibility determinations.117 As in U.S. jurisdictions,118 criteria of mental disability are typically broad.119 Countries’ legal terminology reflects the core intuition that mental abnormalities of many kinds can significantly corrode rationality and thus merit consideration in the responsibility calculus. Given the broad nature of qualifying mental disabilities, the focus of diminished responsibility determinations in most foreign jurisdictions (as with nonresponsibility determinations in the U.S.) tends to be on the specific impairments flowing from the defendant’s mental condition and the extent to which those impairments affected their normative competence at the moment of the criminal act—not on the type of mental abnormality itself.120

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


117 See Appendix (Brazil, France, Italy, Luxembourg, Germany, Greece, Turkey, China, Japan, Taiwan, Czech Republic, Poland, Switzerland).

118 See Johnston, Delusions, supra note 73, at 357 (appendix) (listing the mental criteria of existing U.S. insanity statutes).

119 See Appendix (e.g., Italy: “infirmity;” Japan: “disease of mind;” Poland: “mental disease, mental deficiency or other mental disturbance”).

120 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).
personality disorders are more often observed in groups found partially responsible. This reflects the consistent, global view that psychotic offenders whose actions are motivated by their psychosis are inappropriate subjects for punishment. Notably, the distribution of disorders among diminished responsibility populations varies between countries. One strong source of variation is the extent to which personality disorders tend to underlie diminished responsibility findings.

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” or otherwise to psychosis. 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 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

121 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 (2015) (figure 1) (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 PSYCH. & PSYCH. 604, 611 (2010) (table 3) (finding, in a study of 1,995 forensic assessments of responsibility conducted over a 10-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, Other Disturbances of Mental Function as a Cause of the Insanity of the Offender in Light of the Polish Criminal Code: Questions and Concerns, 2 HSOA J. FORENSIC, LEGAL & INVESTIGATIVE SCI. 1, 1, 4–5 (2016) (reviewing 179 forensic reports from 2004-2012 and finding 63% (33/55) of those found insane were diagnosed with paranoid schizophrenia, while “psycho-organic syndromes, post-traumatic conditions and damage to the central nervous system, alcoholism, and mild mental retardation are typically among those that can lead to a finding of diminished sanity”).


123 See infra notes 140–146 and accompanying text.

124 See A.L.A. CODE § 13A-3-1(a) (2015); OHIO REV. CODE ANN. § 2901.01(A)(14) (LexisNexis 2014); 18 U.S.C. § 17; United States v. White, 766 F.2d 22, 24–25 (1st Cir. 1985) (explaining the requirement of a “severe” mental disease “emphasize[s] that non-psychotic behavior disorders or neurosis such as an ‘inadequate personality, immature personality, or a pattern of antisocial tendencies do not constitute the defense’”).

imperfections legally relevant to moral incapacity. A greater span of disorders, such as those affecting impulse control, could produce impairments relevant to volitional incapacity.\textsuperscript{127}

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. More practically, narrowing the verdict to a smaller range of conditions could be motivated by a fear of juror misuse and concern over the allocation of scarce treatment resources. 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.

\textbf{a) Personality disorders}

Personality disorders’ relationship to criminal responsibility is contentious.\textsuperscript{128} In the United States, several states explicitly exclude personality disorders (in whole or in part) from the conditions that qualify for an insanity defense.\textsuperscript{129} This categorical exclusion may reflect generalizations about dangerousness,\textsuperscript{130} treatability,\textsuperscript{131} or a lack of cognitive dysfunction associated with personality disorders.\textsuperscript{132} Given the high prevalence of certain personality disorders in the offender population,\textsuperscript{133} jurisdictions may also be concerned that allowing the disorders to support an insanity defense could allow legions of undeserving (and dangerous) offenders to evade legal penalties.

\begin{footnotes}
\item[127] See Bonnie, \textit{Should a Personality Disorder, supra} note 120, at 762–63.
\item[128] Compare Robert Kinscherff, \textit{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 disorder could never be sufficiently disabling . . . is borne out neither by scientific research nor clinical experience”), with Bonnie, \textit{Should a Personality Disorder, supra} note 120, at 762–63 (arguing that permitting a broad range of mental diseases to qualify for insanity under a volitional prong “becomes a channel for purely causal accounts of criminal behavior”).
\item[129] See ORE. REV. STAT. § 161.295(2) (2019); ARIZ. REV. STAT. ANN. § 13–502(A) (2010); Commonwealth v. Christy, 656 A.2d 877, 882 (Pa. 1995) (asserting “a diagnosis of personality disorder is irrelevant to an insanity defense”); People v. Williams, 230 N.E.2d 224, 229 (Ill. 2d 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) (2022) (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”).
\item[130] See Mohino et al., \textit{supra} note 72 (discussing the relationship of various personality disorders to violence).
\item[131] See Anthony W. Bateman et al., \textit{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”).
\item[133] See Seena Fazel & John Danesh, \textit{Serious Mental Disorder in 23,000 Prisoners: A Systematic Review of 62 Surveys}, 359 LANCET 545, 545, 547 (2002) (finding an average 65% prevalence of any personality disorder and a 47% prevalence of antisocial personality disorder in male prisoners, and a 42% prevalence of any personality disorder and a 21% prevalence of antisocial personality disorder in female prisoners).
\end{footnotes}
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.  

Excluding personality disorders from responsibility assessment would be unwise. Personality disorders cannot always be reliably distinguished from those disorders typically recognized as diminishing responsibility. In addition, diagnostic exclusions ignore the overlap in impairments among disorders, 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. Also, categorically excluding personality disorders hinders the legal recognition of true diminished responsibility as science advances in this evolving area of research. 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 enlightening other countries’ treatment of personality disorders in their partial responsibility schemes. Foreign jurisdictions tend not to expressly exclude personality disorders from responsibility determinations. Instead, countries tend to require “considerable deviation from the psychological norm” in arguments for diminished responsibility. Consequently, responsibility is reduced only when a defendant’s mental state differed significantly from average offenders, a substantial proportion of whom have at least one personality disorder. Indeed, studies suggest that personality disorders alone usually do not suffice to reduce criminal responsibility. Diminished responsibility is found primarily in cases involving comorbidity with an Axis I disorder such as substance abuse. Countries vary widely

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134 However, unlike an offender found insane, an offender found partially responsible will not evade punishment. Rather, they should receive a reduced punishment.

135 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.”).

136 See Kinscherff, supra note 128, at 749–50.

137 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.”).

138 See id. at 750–51.

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

140 See Appendix; Salize & Dresing, infra note 145, at 39-40.


142 See supra note 133.


144 See Graf & Hachtel, supra note 141, at 335; Florencio Lorenzo García et al., Abstract, Trastornos de la personalidad en la jurisprudencia española [Personality disorders in Spanish jurisprudence], 42 SPANISH J. LEGAL MED. 62, 65 (2016).
in how often personality disorders support partial responsibility judgments, which may reflect differing optimism about treatment for these disorders. This comparative evidence suggests that allowing forensic mental health professionals to consider personality disorders would be workable and 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 impairment should disqualify them from a partial responsibility defense. In the United States, a number of jurisdictions disallow insanity verdicts based on voluntary intoxication or derivative conditions such as addiction. Other countries vary in their treatment of substance-use-related conditions, but their response tends to be less categorical. Exclusions reflect the commonsense notion that individuals who choose to ingest substances well known to result in 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.

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. 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.” As psychiatric researchers Hans Joachim Salize and Harald Dreßing 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).” Courts often exempt the permanent condition of “settled insanity” from the general rule that voluntary intoxication cannot excuse a criminal

145 See HANS JOACHIM SALIZE & HARALD DREßING, PLACEMENT AND TREATMENT OF MENTALLY ILL OFFENDERS: LEGISLATION AND PRACTICE IN THE EUROPEAN UNION 39–40 (2005) (Table 4) (depicting the mental disorders which qualify for inclusion under mental health legislation as a matter of practice in European states).

146 See supra note 131.

147 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 (1985); Russell L. Christopher, Exculpation as Inculpation, 49 ARIZ. ST. L.J. 1141, 1155–61 (2017).


149 See SALIZE & DREßING, supra note 145, at 39–40 (Table 4).

150 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, as to the harm that ultimately resulted. See Robinson, Causing the Conditions, supra note 147, at 28; supra note 147.

151 See infra notes 153–154, 192 (concerning the treatment of “settled insanity”).

152 SALIZE & DREßING, supra note 145, at 39.

153 Id.
act, but few insanity statutes in the United States differentiate between temporary and permanent conditions. Expressly doing so would provide important clarity and guidance to the law.

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 their diminished rationality through a voluntary act or culpable omission. In particular, some scholars have asserted that a person should be unable to benefit from a reduced responsibility excuse when the underlying impairment was caused by a decision, made in a rational state, not to take prescribed medicine, knowing that a failure to do so would likely cause the resurgence of symptoms and ultimate incapacitation. Several countries’ penal codes could be read to have this effect, but their use has apparently been confined to the context of intoxication.

This argument has surface appeal. Individuals with mental illnesses, even serious mental illnesses, are capable of rational thought. In order to acknowledge these individuals’ autonomy and dignity, society must recognize their competent decisions. This involves imposing

154 See, e.g., State v. Thompson, 498 P.3d 40, 46 n.6 (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 SVCS. 105, 106 (2022) (discussing the prevalence of jurisdictions’ recognition of settled insanity, identifying common elements, and discussing related medical diagnoses); infra note 192.

155 See MO. REV. STAT. § 562.010 (2016).

156 See Appelbaum, Settled Insanity, supra note 154, at 106–07.

157 See e.g., Morse, Diminished Rationality, supra note 21, at 300; FINGARETTE & HASSE, supra note 9, at 253; COPPOLA, supra note 21, at 158; FINKEL, supra note 21, at 296–98.

158 FINGARETTE & HASSE, supra note 9, at 199, 214 n.22; Morse, Diminished Rationality, supra note 21, at 300–01.

159 See CODE PÉNAL SUISSE [CP] [CRIMINAL CODE], Dec. 21, 1937, art. 19(4) (current as of June 2022), https://www.fedlex.admin.ch/eli/cc/54/757_781_799/en (Switz.) (“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 non- and diminished responsibility] do not apply.”); POINIKOS KODIKAS [P.K.] [CRIMINAL CODE] 2:36 (Official Gazette 83/A/3-4-2023) (in Greek), https://www.e-nomothesia.grkat-kodikes-nomothesias/nomos-4619-2019-phem-95a-11-6-2019.html (Greece) (translated by Maria Panezi on May 26, 2023) (“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.”); id. 2:35 (“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.”); infra note 160 (Taiwan).


consequences appropriate for those decisions. 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 such an 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. Indeed, research shows that “[w]ithin 7 to 10 days of medication initiation, 25% [of individuals prescribed antipsychotic medication] stop taking the medication; 50% stop after 1 year; and 75% stop after 2 years.” In insanity cases, nonadherence to treatment is a common factor. It is likely, then, 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.

(1) Why not disqualify individuals for medication noncompliance

The case against requiring a culpability assessment is strongest in the context of psychosis. A common symptom of psychotic disorders is anosognosia, or a lack of insight into one’s illness, the pathological source of one’s symptoms, or the need for treatment. Researchers estimate that 40% of individuals with bipolar disorder and 57 to 98% of individuals with schizophrenia have partial or no insight into those matters. 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. 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).

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162 Cf. G. W. F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 126 (Allen W. Wood ed., H. B. Nisbet trans., Cambridge Univ. Press 1991) (1821) (arguing that, as rational beings, criminals choose to commit acts to which punishments attach, and thus have a right to experience those punishments).
165 Id. at 233 (“Indeed, ‘going off medications’ is a typical trope found in defense psychiatric reports.”).
169 See Pijnenborg et al., supra note 166, at 322–26.
person with a psychotic disorder to treatment noncompliance. In addition, a decision to refuse medication could reflect and be thought-congruent with other aspects of mental disorder, such as paranoia, grandiosity, or hopelessness. For many individuals with a psychotic disorder, the “choice” to discontinue medication is likely a manifestation of pathology.

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. This capacity is requisite to choice. In addition, medications are rarely completely effective, and their effectiveness may diminish over time. A medication’s partial effectiveness could contribute both to the individual’s inability to recognize their need for medication and their risk-benefit calculus of whether to take it. Moreover, lack of community mental health options, termination of insurance coverage, inability to afford medication, theft or nonnegligent loss, and deep stigma toward both mental illness and its treatment often render a “decision” to terminate medication less than fully freely made.

Other common reasons to avoid taking medication—including those involving medications’ side effects—sound in justification. Many psychiatric medications carry a host of undesirable side-effects, ranging from weight gain to sedation, sexual dysfunction, dysphoria (generalized unhappiness), and movement disorders (such as jerky movements of one’s face and body). As Torry and Weiss have observed, when “a medication regimen offers more side effects than relief

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172 See Torry & Weiss, supra note 163, at 231.

173 Within the context of schizophrenia, scholars define lack of insight as “a manifestation of the illness itself rather than a coping strategy” and acknowledge that the lack of insight “predisposes the individual to noncompliance with treatment. Id. at 231.

174 See id. at 235.

175 See id.

176 Id. at 231; 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 RES. 51–68 (1999) (summarizing the efficacy and tolerability of several antipsychotics in schizophrenia).

177 See, e.g., United States v. Bums, 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.”).

178 Bruce G. Link & Jo C. Phelan, Labeling and Stigma, in A HANDBOOK FOR THE STUDY OF MENTAL HEALTH 571, 574 (Teresa L. Scheid & Tony N. Brown eds., 2d ed. 2010) (observing that perceived devaluation and discrimination associated with mental disorder is correlated with poor treatment adherence and treatment discontinuation).


180 See Perkins, supra note 163, at 1121, 1123 (listing various side effects and observing “the proportion of patients citing side effects as their primary reason for noncompliance ranges between one quarter and two thirds”); Ghashen 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).
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.”

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. Difficult choices must also be made as to the window of time to analyze, as symptoms, side effects, and external constraints are often not static. Such an analysis does not lend itself to general rules or consistency.

(2) Analogy to voluntary intoxication

Several scholars have argued that disallowing an excuse for voluntary intoxication, but not for treatment noncompliance, is illogical and inconsistent. However, this analogy is misplaced. First, unlike intoxication, stopping treatment involves an omission (a failure to act). Omissions are less susceptible to criminal liability than voluntary acts. Moreover, in declining to ingest medication, one is exercising a cherished aspect of liberty: the right to bodily integrity, to control one’s person, and to refuse unwanted treatment. Community members with mental disorders have as much a right to refuse unwanted treatment as those without mental pathology. 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 defendant. 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 their actions; this assumption may not apply in the context of a person dependent upon psychiatric medication to retain rationality.

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181 Torry & Weiss, supra note 163, at 234.
183 See, e.g., id. at 64–65.
186 See 22 CORPUS JURIS SECONDUM, CRIMINAL LAW: SUBSTANTIVE PRINCIPLES § 41 (Criminal Act or Omission; Causation) (2021) (“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.”).
187 See Cruzan v. Dir., Mo. 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”).
188 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.”). Avenues exist for overriding this right. See Washington v. Harper, 494 U.S. 210, 227 (1990); Sell v. United States, 539 U.S. 166, 179, 182 (2003).
189 See MODEL PENAL CODE AND COMMENTARIES, Part I, § 2.08 comment 1, at 359 (1962).
190 See Sherlock, supra note 179, at 493.
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. 191

Finally, as mentioned, most jurisdictions treat “settled insanity”—or permanent mental impairment resulting from the effects of voluntary intoxication over time—like insanity, as a full excuse. 192

As George Maliha, a resident in Internal Medicine, 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.” 193

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For the reasons expressed above, jurisdictions should not withhold a partial excuse for diminished responsibility due to mental disorder from a person who contributed to their impairment through medication noncompliance. Depending on the scope of the partial excuse, it may be that the likelihood of establishing a truly culpable instance of noncompliance (that was responsible for the criminal act) would be so unlikely, resource-intensive, and time-consuming that inclusion of this element would make the entire partial excuse unworkable. 194 In addition, the element of culpable responsibility would defy consistent application and could imperil legitimate claims. 195 Moreover, 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. 196

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 only roughly approximate an individual’s actual degree of diminished responsibility at the time of the act. 197 Thus, one way to conceptualize a guilty verdict and 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.

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191 See id. at 494.
192 See supra notes 153–154.
194 See Torry & Weiss, supra note 163, at 235.
195 See Shin, 16 N.E.3d at 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”).
197 See Brink, supra note 57, at 387.
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 pled 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. 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. Each partial responsibility standard should also require a finding that the defendant does not satisfy the jurisdiction’s insanity standard. The standard should not withhold mitigation for failing to adhere to treatment directives.

These criteria can be implemented in a variety of ways, depending upon a jurisdiction’s insanity defense. For example, if a jurisdiction’s insanity standard requires substantial moral incapacity, its diminished responsibility standard could recognize significant moral and volitional incapacity. Those jurisdictions that restrict exculpation due to mental disability to more limited circumstances (or prohibit it altogether) could limit partial responsibility to more

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198 This point of origin obviously would not be available to those states not offering an insanity defense. See supra note 99 (identifying these states and proposing a possible partial responsibility standard in these instances).
199 See supra note 101.
200 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 41–44 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 307. However, for the reasons articulated in Part I, partial responsibility—like other matters of responsibility—is rightfully considered at the guilt phase by the trier of fact. Moreover, 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.
201 See supra note 83.
202 See FINGARETTE & HASSE, supra note 9, at 234 (recognizing a “partial disability of mind” upon “material” impairment”); Robinson, Mitigations, supra note 20, at 254 (granting mitigation for “meaningful” reductions in blameworthiness).
203 See supra note 99 (discussing Alaska and the four states without insanity defenses).
substantial\textsuperscript{204} (or even severe) moral and volitional incapacity. The few jurisdictions with unique insanity standards, such as New Hampshire’s “product test,”\textsuperscript{205} 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,\textsuperscript{206} and evidence suggests that jurors only need general criteria to guide their normative determination of an intermediate level of responsibility. But deriving a partial responsibility standard from existing 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.\textsuperscript{207} Reduction of sentence and access to treatment are the two most obvious consequences that a verdict of diminished responsibility due to mental disability could carry. Contemporary GBMI statutes, although not providing for punishment reduction,\textsuperscript{208} include a variety of treatment approaches that could serve as sources of inspiration.\textsuperscript{209} Foreign partial responsibility structures typically carry both sentence reduction and treatment consequences,\textsuperscript{210} so these regimes provide useful guidance on both scores.\textsuperscript{211} 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.

\textsuperscript{204} The MPC provides one possible definition of substantial. See MPC § 4.01 cmt. 3, at 172 (Am. L. Inst. 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”).

\textsuperscript{205} See supra note 83.

\textsuperscript{206} See supra note 79 (discussing research involving various insanity tests).

\textsuperscript{207} See FINGARETTE & HASSE, supra note 9, at 202–05, 242 (advocating for the formulation of guidelines in regard to the specific mitigatory implications of a DOM finding and recognizing that a successful defense “always warrants . . . post-trial mental examination of the defendant” but opting not to opine on the post-verdict diagnostic, protective, or rehabilitative measures that should apply); Morse, Diminished Rationality, supra note 21, 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 21, at 306–09 (discussing sentencing, treatment, and involuntary civil commitment considerations).

\textsuperscript{208} 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; DEL. CODE ANN. tit. 11, § 401; GA. CODE ANN. § 17-7-131; 730 ILL. COMP. STAT. 5/6-2; IND. CODE ANN. § 35-36-2-3; KY. REV. STAT. ANN. § 504.130; Mich. COMP. LAWS § 768.36; NEV. REV. STAT. § 174.035(1); OKLA. STAT. tit. 22, § 1161(A)(1); 42 PA. CONS. STAT § 9727; S.C. CODE ANN. § 17-24-20; S.D. CODIFIED LAWS § 23A-26-14; UTAH CODE ANN. § 76-5-205.5.

\textsuperscript{209} See infra note 296.

\textsuperscript{210} See Johnston et al., supra note 34, at 6-8.

\textsuperscript{211} See Table 1 (detailing the penalty reduction measures associated with partial responsibility in eighteen civil law countries); infra notes 319–322 (discussing some countries’ allocation of treatment resources).
As a guiding principle, this Article subscribes to “limiting retributivism,” the dominant theory of punishment.\(^\text{212}\) Under this model, first proposed by Professor Norval Morris in 1974,\(^\text{213}\) 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.\(^\text{214}\) 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.

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.\(^\text{215}\) 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,\(^\text{216}\) intensive treatment programs should be provided to high-risk defendants\(^\text{217}\) when treatment is likely to significantly reduce their risk of recidivism.\(^\text{218}\)

### A. Mandatory Punishment Reduction

A finding of partial responsibility should carry a mandatory penalty reduction within a specified range.\(^\text{219}\) For example, the rule could require that the limits of a punishment range be


\(^{217}\) Actuarial risk assessment instruments can be used to identify defendants at high risk of recidivism or violence. See D.A. Andrews, James Bonta, J. Stephen Wormith, *The Recent Past and Near Future of Risk and/or Need Assessment*, 52(1) Crime & Delinquency 7 (2006). Scholars have identified a number of problems with the development and operation of these instruments. See, e.g., Jessica Eaglin, *Constructing Recidivism Risk*, 67 Emory L.J. 59 (2017).

\(^{218}\) Some countries allocate treatment resources in this way. See Johnston et al., *supra* note 34, at 8 (discussing criteria for involuntary hospitalization of partially responsible offenders in Japan and Germany).

\(^{219}\) This Article’s proposal differs from that suggested by Morse. See Morse, *Diminished Rationality*, *supra* note 21, at 303. Morse proposes “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. The first is that “[d]efendants who commit more serious crimes . . . are therefore more dangerous.” However, this assertion is inaccurate as an empirical matter. See James Bonta, Moira Law, & Karl Hanson, *The Prediction of Criminal and Violent Recidivism Among*
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 require.\(^{220}\) 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.\(^{221}\) Additionally, allowing for variance within a particular range permits judicial tailoring in light of the defendant’s actual impairments and their 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.\(^{222}\) Those who acted with partial responsibility should be exempted from otherwise mandatory penalties and ineligible for the death penalty.\(^{223}\) 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.\(^{224}\)

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.\(^{225}\) Nearly half (8/18) mandate or impose an automatic penalty reduction for partial responsibility,\(^{226}\) and an additional six countries suggest it.\(^{227}\) Among the total of fourteen countries that encourage sentence reduction,\(^{228}\) nine provide specific guidelines to direct

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\(^{220}\) See Morse, Diminished Rationality, supra note 21, at 304; supra note 219.

\(^{221}\) See Morse, Diminished Rationality, supra note 21, at 304 (warning that “leaving the amount of reduction entirely to judicial discretion would produce private and usually unprincipled sentences”).

\(^{222}\) See, e.g., Appendix (Turkey, mandating that “heavy life” sentences should be mitigated to 25 years imprisonment, while life sentences should be reduced to 20 years; Germany: suggesting a life sentence be punished by at least three years of incarceration; Finland: suggesting a life sentence be punished by between twelve and two years of incarceration; France: automatically reducing a life sentence to 30 years; Greece: ordering that a life sentence be mitigated to a term of incarceration).

\(^{223}\) 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).

\(^{224}\) 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. QUARTERLY 746, 762 (2014) (finding that release to parole supervision was associated with decreased rearrest and reconviction likelihoods of 29% relative to being released unconditionally without parole supervision).

\(^{225}\) See text near footnotes 97 and 98, explaining how these countries were selected.

\(^{226}\) See Table 1 (Brazil, France, Greece, Italy, Japan, Spain, Switzerland, and Turkey).

\(^{227}\) See Table 1 (Chile, China, Finland, Germany, Poland, Taiwan).

\(^{228}\) See supra notes 226 & 227. By “encourage sentence reduction,” I mean the countries’ penal codes either mandate a penalty reduction, suggest a penalty reduction, designate diminished responsibility as an extenuating
the degree of diminishment that must or may attend a diminished responsibility finding. Brazil compels courts to lower the penalty for a partially responsible offender by one- to two-thirds. Germany and Finland suggest reducing the maximum of a prescribed sentencing range by at least a quarter. 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 99% of cases going to trial)—the court may, after extensively stating its reasons, choose not to apply this reduction. Greece sets forth an elaborate set of mandatory penalty reductions that include caps, floors, and ranges for crimes carrying statutory penalties of up to ten years in prison, and then permits judges to “reduce the sentence freely up to the minimum limit of the type of penalty” for all crimes carrying lesser statutory sentences.

Table 1: Penalty Reduction Schemes for Partial Responsibility in 18 Civil Law Countries

<table>
<thead>
<tr>
<th>Mandatory penalty reduction</th>
<th>Mandatory or automatic specific restrictions</th>
<th>Brazil (“sentence [must] be reduced from one to two thirds”)&lt;sup&gt;235&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>France (“shall take this circumstance into account when it decides the penalty and determines its regime:” a life sentence is reduced to 30 years; a custodial sentence is reduced by 1/3; however, in the case of liability for a delit, 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)</td>
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<tr>
<td></td>
<td></td>
<td>Greece (“a reduced penalty is imposed:” life sentence is reduced to a term of imprisonment; imprisonment of at least 10 years is reduced to imprisonment of between 2 and 8 years; imprisonment of up to 10 years is reduced to imprisonment of between 1 and 6 years; “[i]f the law provides for a cumulative prison sentence and a fine, only the latter may be imposed”)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Spain (incomplete exemption: “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”)&lt;sup&gt;236&lt;/sup&gt;</td>
</tr>
</tbody>
</table>

circumstance, or direct the judge to consider the application of sentence mitigation provisions (e.g., Finland). See Table 1.

229 See Table 1 (Spain, Turkey, Chile, Brazil, Greece, France, Germany, Poland, Finland).

230 See Appendix.

231 See Appendix.


233 See Appendix.

234 This table was largely derived from Table 3 in Johnston et al., supra note 34, at 4. For citations and additional statutory detail, see Appendix.

235 See José G. V. Taborda, Criminal Justice System in Brazil: Functions of a Forensic Psychiatrist, 24 INT’L J.L. & PSYCHIATRY 371, 376-78 (2001) (specifying that, although the statutory language states the penalty “may” be reduced, authorities concur that the verb “may” be interpreted as “must”).

236 For an explanation of Spain’s two forms of partial responsibility, see supra notes 72 & 115.
<table>
<thead>
<tr>
<th>Country</th>
<th>Discretionary specific restrictions</th>
<th>Discretionary penalty reduction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Turkey</td>
<td>(“aggravated life imprisonment shall be” reduced to 25 years, and life imprisonment is reduced to 20 years)</td>
<td></td>
</tr>
<tr>
<td>Greece</td>
<td>(“shall reduce the sentence freely to the minimum”) (^{237})</td>
<td></td>
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<tr>
<td>Italy</td>
<td>(“the punishment is reduced”)</td>
<td></td>
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<tr>
<td>Japan</td>
<td>(“shall lead to the punishment being reduced”)</td>
<td></td>
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<tr>
<td>Switzerland</td>
<td>(“shall reduce the sentence”)</td>
<td></td>
</tr>
<tr>
<td>Chile</td>
<td>(operating as an extenuating circumstance that must be weighed together with other circumstances that attenuate and aggravate) (^{238})</td>
<td></td>
</tr>
<tr>
<td>Finland</td>
<td>([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 term of 2 to 12 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”)</td>
<td></td>
</tr>
<tr>
<td>Germany</td>
<td>(“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 3 years of imprisonment; lowers particular minimum terms of imprisonment)</td>
<td></td>
</tr>
<tr>
<td>Poland</td>
<td>(“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 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]”)</td>
<td></td>
</tr>
<tr>
<td>Spain</td>
<td>(mitigation ground: penalty response varies by the aggregate number of mitigating and aggravating circumstances)</td>
<td></td>
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</tbody>
</table>

\(^{237}\) This applies in “any other case” besides one with a particular punishment listed in the “mandatory specific restrictions” row above.

\(^{238}\) See Johnston et al., supra note 34, at 4-5, 8.
<table>
<thead>
<tr>
<th>No penalty reduction measure</th>
<th>Portugal (may result in no penalty, a reduced penalty, or an aggravated penalty)(^{240})</th>
</tr>
</thead>
<tbody>
<tr>
<td>No specified restrictions</td>
<td>China (“may be given a lesser or a mitigated punishment”)</td>
</tr>
<tr>
<td></td>
<td>Taiwan (“punishment may be reduced”)</td>
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<tr>
<td></td>
<td>Czech Republic (“shall take it into consideration when determining the type and extent of the sentence”)</td>
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<tr>
<td></td>
<td>Russia (“shall be taken into consideration…when it imposes punishment”)</td>
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<tr>
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<td>Luxembourg (“take into account this circumstance to determine the sentence”)</td>
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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 structure judges’ sentencing discretion within ranges.\(^{241}\) 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.\(^{242}\) 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,\(^{243}\) such as (1) reducing the grade of the offense by one offense level,\(^{244}\) (2) reducing the defendant’s liability to a lesser included offense,\(^{245}\) (3) sentencing within the lower half of the scheduled punishment range,\(^{246}\) or (4) shortening an individual’s initial parole eligibility date by a certain percentage

\(^{239}\) 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.

\(^{240}\) See Johnston et al., supra note 34, at 8.

\(^{241}\) Approximately half of states structure judges’ discretion in this way, providing guidance on the type and length of sentence for a particular offense. Alison Lawrence, National Conference of State Legislatures, Making Sense of Sentencing: State Systems and Policies 5 (2015).


\(^{243}\) I appreciate Christopher Slobogin for sharing his thoughts on possible sentencing approaches.

\(^{244}\) Paul Robinson has suggested a similar, but discretionary, sentencing response for a finding of diminished responsibility. See Robinson, Mitigations, supra note 20, at 263.

\(^{245}\) This form of mitigation would mimic that in provocation cases, where a successful defense will reduce a defendant’s liability from murder to manslaughter. Paul H. Robinson, Murder—Provocation/extreme Emotional Disturbance, 1 CRIM. L. DEF. § 102 (July 2022).

\(^{246}\) Spain provides this sentencing response for those with less severe forms of diminished responsibility. See C.P. art. 66(1).
(e.g., allowing a partially responsible person to be considered for parole after serving 25% of their sentence, as opposed to the 50% required for fully responsible offenders convicted of that offense).

None of these options is necessarily optimal. Some states’ offense levels are too large—consisting only of felony, misdemeanor, and violation—for reducing the offense level to be a viable solution.\(^{247}\) Additionally, some crimes do not have lesser included offenses. 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 illnesses, perhaps because of stigma associated with psychiatric disabilities (perceptions of dangerousness and instability),\(^{248}\) tendency to commit more disciplinary infractions while incarcerated,\(^{249}\) and greater accumulation of criminogenic risk factors.\(^{250}\) Individuals with mental disorders are also more likely to violate technical conditions of parole, leading to a return to prison.\(^{251}\) Consequently, individuals with mental illnesses are more likely than those without illnesses to opt to forgo parole and instead max out their sentences.\(^{252}\) 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 permit the consideration of less restrictive forms of penalties, at least for offenses of low severity. Examples of this tactic exist in other countries.\(^{253}\) 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.


\(248\) See Lynette Feder, Psychiatric Hospitalization History and Parole Decisions, 18 L. & Hum. Behav. 395, 402, 406–07 (1994) (finding that 79% of inmates without a psychiatric hospitalization while incarcerated were paroled, whereas only 21% with a psychiatric hospitalization were paroled); Joel M. Caplan, What Factors Affect Parole: A Review of Empirical Literature, 71 Fed. Probat. 16, 18 (2007) (in a literature review, concluding that mental health has an influential, negative impact on parole decisions).


\(251\) See, e.g., Ostermann & Matejkowski, supra note 224, at 761–62.


\(253\) See Appendix (Greece, Finland, Poland).
It is crucial that mitigation for partial responsibility not be purely discretionary, as France’s experience demonstrates. Prior to 2014, the French Penal Code did not require penalty reduction in response to diminished responsibility. Rather, it directed that “the court shall take [diminished responsibility] into account when it decides the penalty and determines its regime.” In practice, this terminology counterintuitively led to harsher punishments. 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.” In response, the French Parliament amended the responsibility article to provide for the automatic reduction of a custodial sentence by one-third. However, because judges can decline to apply this reduction in the vast majority of criminal cases through reasoned decision, this presumptive penalty reduction has had uncertain effect.

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 guide judicial discretion with sentencing ranges, this diminution should take the form of a mandatory punishment reduction within a specified range. 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 punishments when appropriate. In addition to penalty reduction, a partial responsibility verdict should carry certain assessment and treatment consequences. These will be 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 reduce recidivism. All individuals who receive a diminished responsibility verdict...
should receive a post-conviction evaluation, any necessary treatment, and periodic evaluations over the course of incarceration to assess their mental health needs. Upon release, any offender who received treatment during their incarceration should be given a reasonable supply of medications and/or prescriptions, patient education for ongoing treatment, and a warm handoff to a community service provider. If an offender remains dangerous and/or in serious need of treatment beyond the expiration of their sentence, the jurisdiction should pursue non-criminal measures such as civil commitment. This Section explores when treatment should be supplied as part of a sentence, either to respond to basic human needs or to reduce recidivism.

Correctional institutions have a constitutional duty to provide adequate mental health care to inmates. Therefore, if an individual with a mental disorder is incarcerated, they should receive any reasonably available treatment necessary to prevent deterioration and substantial suffering. Taking this constitutional obligation seriously would require a dramatic increase in inmate treatment. As previously mentioned, nationwide studies consistently reveal that 30% to 65% of

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261 See Fingarette & Hasse, supra note 9, at 202, 204–05.
262 Just because a person’s mental abnormality contributed to their criminal offense does not mean that they will necessarily benefit from treatment during the course of their 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 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 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”).
264 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 also id. at 406–24 (reviewing current approaches to reentry planning for inmates with serious mental illnesses).
265 Decades of research have established that mental disorder is largely an insignificant predictor of both general and violent recidivism. See Johnston, Reconceptualizing Criminal Justice, supra note 216, at 533–35; Bonta, Law, & Hanson, supra note 219, at 135–36. In addition, the severity of the crime of conviction is not predictive of recidivism. See supra note 219. 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 prior to the expiration of their carceral sentence. A number of GBMI statutes do this. See, e.g., ALASKA STAT. § 12.47.050(e).
266 For more on how correctional institutions should allocate their scarce programmatic resources regarding individuals with mental disorders, see Johnston, Reconceptualizing Criminal Justice, supra note 216, at 551–66.
268 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).
inmates with serious mental health needs receive no form of mental health treatment while incarcerated.\textsuperscript{269} Jails, in particular, do a poor job of providing necessary medication and therapy.\textsuperscript{270} Inadequate treatment is due in part to carceral institutions’ poor identification of individuals with serious psychiatric issues.\textsuperscript{271} Decades of research have documented that jails and prisons fail to detect a significant proportion of offenders with mental disorders at admission.\textsuperscript{272} 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\%, \( n = 314 \)).\textsuperscript{273} Studies have found similarly poor rates of detection in prison settings.\textsuperscript{274} These results mirror the dismal identification rates found in previous studies.\textsuperscript{275}

While nearly all carceral institutions report assessing individuals for mental illness during admissions,\textsuperscript{276} screening procedures vary from “cursory to extensive.”\textsuperscript{277} Many carceral institutions merely ask a couple of questions about prior mental health treatment, psychotropic

\textsuperscript{269} See supra note 61.
\textsuperscript{270} See, e.g., HUM. RIGHTS WATCH, supra note 64, at 16; supra note 256.
\textsuperscript{271} Prisons and jails currently rely upon a triage system to identify those who require treatment and special housing. See Humberto Temporini, Conducting Mental Health Assessments in Correctional Settings, in HANDBOOK, supra note 264, at 119, 129–39. The evaluation process begins with a short, initial mental health screen during admissions. See id. If an individual is 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. Temporini, supra, at 136–39; 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 ResearchCommons of the University of Texas at Arlington).
\textsuperscript{272} Denis Lafortune, Prevalence and Screening of Mental Disorders in Short-term Correctional Facilities, 33 INT’L J. L. & PSYCHIATRY 94, 94 (2010).
\textsuperscript{273} 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).
\textsuperscript{274} See Jennifer M. Reingle Gonzalez & Nadine M. Connell, Mental Health of Prisoners: Identifying Barriers to Mental Health Treatment and Medication Continuity, 104 AM. J. PUBLIC 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 notes 61 (detailing the high percentage of inmates with serious mental health needs who receive no form of mental health treatment while incarcerated).
\textsuperscript{275} See Linda A. Teplin, Detecting Disorder: The Treatment of Mental Illness Among Jail Detainees, 58 J. CONSULT. CLIN. PSYCHOL. 233, 234 (1990) (finding, in a sample of 728 jail inmates, that 67.5\% of inmates with severe mental illness were not detected at intake); TEXAS COMM’N ON JAIL STANDARDS, MENTAL HEALTH STUDY 3 (2005), https://www.tjcs.state.tx.us/wp-content/uploads/2019/09/MH-Study.pdf (finding that 34\% of sampled inmates had a history of mental health services that were unnoticed in the booking process).
\textsuperscript{277} HENRY J. STEADMAN & BONITA M. VEYSEY, NATIONAL INSTITUTE OF JUSTICE, PROVIDING SERVICES FOR JAIL INMATES WITH MENTAL DISORDERS 3 (1997); see Gonzalez & Connell, supra note 274, at 2328.
medication, and current symptoms. Because racial and ethnic minorities tend to have less access to mental health care, these screening procedures tend to under-identify members of minoritized communities with significant psychiatric issues. This results in greater rates of untreated mental disorder in carceral facilities, greater deterioration and suffering, and likely greater victimization for these populations. Use of evidence-based screening tools is rare. 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 to 75% of illness among inmates. Disabilities not posing a security concern, such as depression, are particularly likely to be missed. This is particularly concerning given that suicide is the leading cause of death in jails. In addition to poor detection of significant mental health needs at intake, carceral institutions struggle to fulfill referral requests and provide necessary treatment.

A partial responsibility verdict could improve institutions’ identification of, and provision of treatment for, individuals with serious mental health needs. A diminished responsibility verdict will often—although not always—signal significant mental health needs. Therefore, as a general

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278 See Henry J. Steadman et al., Validation of the Brief Jail Mental Health Screen, 56 PSYCHIATRIC SVCS. 816, 816 (2005); Michael S. Martin & Beth K. Potter et al., Mental Health Treatment Patterns Following Screening at Intake to Prison, 86 J. CONSULTING & CLINICAL PSYCHOL. 15, 15–16 (2018); Anna Scheyett, Jennie Vaughn, & Melissa Floyd Taylor, Screening and Access to Services for Individuals with Serious Mental Illnesses in Jails, 45 COMMUNITY MENT. HEALTH J. 439, 442 (2009).


280 See id. at 641.

281 See id. at 642.

282 Martin & Potter et al., supra note 278, at 15–16; Scheyett, Vaughn, & Taylor, supra note 278, at 15–16; Prins et al., supra note 279, at 642.

283 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, 279–81 (2013).

284 See Lafortune, supra note 272, at 99; Steadman et al., Validation, supra note 278, at 820; Teplin, supra note 275, at 235.


286 See Kubiak et al., supra note 273, at 174, 179 (finding that 31% of the individuals referred to treatment did not receive an assessment or service by a mental health professional within the three-month period of study); supra note 61 (detailing poor rates of treatment provision by carceral institutions).

287 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 responsibility to provide treatment and gives the public “a sound foundation upon which to demand that their state provide such facilities within the correctional system”).

matter, an individual receiving a partial responsibility verdict should skip the initial screen and be referred directly to a mental health professional for further assessment and testing. 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.” Because the mental disability must 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. Furthermore, to the extent that application of the verdict extends beyond psychosis and reflects factors other than receipt of prior treatment, the verdict could help identify categories of individuals often missed in intake screenings, including (disproportionately) people of color. In addition to this post-conviction evaluation, a diminished responsibility verdict should also require periodic evaluation over the course of a carceral term to ensure that inmates do not deteriorate and receive all necessary care.

GBMI statutes provide precedent for using a verdict to trigger evaluation and possible treatment. The vast majority of GBMI statutes enable either evaluation for mental health treatment, provision of treatment, or both, for individuals found GBMI. Interestingly, most studies and commentators have concluded (on rather weak evidence) that GBMI statutes do not materially increase inmate treatment. They have attributed this finding to GBMI statutes’ failure to

employed by the two evaluating bodies, improvement in mental health condition after the receipt of pretrial treatment, and the unavailability of treatment in the correctional system.  

289 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 Part II.D.3—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 299–300 (concerning treatment of GBMI inmates in Pennsylvania); note 301 and accompanying text.

290 Teplin, supra note 275, at 233.

291 See Martin & Potter et al., supra note 278, at 16 (“Extant evidence suggests that a high proportion of inmates present with symptoms that resolve naturally as they adjust to the correctional environment.”).

292 See supra note 121 (comparing diagnosis patterns between full and partial responsibility verdicts in foreign countries).

293 See supra notes 280.

294 See supra note 261.

295 See supra note 263; infra notes 314–315 and accompanying text (suggesting that legislatures authorize courts to retain jurisdiction to ensure receipt of mental health evaluations and necessary care).

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

297 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. POLICY 341, 354 (1996). These conclusions appear to rely primarily upon the opinions of administrators. See, e.g., Smith & Hall, supra note 288, at 105 nn. 137–38 (1982) (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 288, at 514 (asserting that available data suggest no material differences in the treatment of GBMI and guilty offenders and citing in support a “survey of…
guarantee treatment and previously existing statutory rights to treatment for offenders with mental health needs. However, evidence suggests the provision of treatment to GBMI inmates differs by jurisdiction and may reflect differing definitions of “mentally ill” in GBMI statutes (and thus differing levels of impairment among GBMI offenders). Better rates of treatment may also reflect states’ creation of distinct evaluation procedures for GBMI inmates.

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, both as a matter of statutory


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., Keilitz, supra, at 319 (finding, in a study of GBMI inmates in Georgia, Illinois, and Michigan, that “at least 90% of GBMI offenders actually received a post-conviction mental health evaluation,” “[r]oughly 2/3 . . . of the offenders evaluated were recommended for some form of mental health treatment and care,” and “[i]n 80% of the cases, the department of corrections provided [recommended] treatment” and stating, without providing comparative data for Georgia or Illinois, “According to interviewees who had direct knowledge of available mental health services, however, GBMI offenders are not 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); Klofas & Weisheit, supra note 95, at 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 288, at 518 n.115 (citing statements from administrators and other informed persons concerning the extent to which GBMI offenders receive hospital treatment). The (partial) exception is a study conducted by Ingo Keilitz and colleagues of the mental health services received by 231 GBMI offenders in Michigan and a comparison group of 201 defendants found guilty after raising the issue of mental aberration. Keilitz et al., supra note 288, 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.
design and because the verdict does not hold any sentence-reduction potential for the defendant. 303 In 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. 304 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. 305

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 be raised in felony cases and often result in prison sentences. 306 In contrast, a partial responsibility plea would likely be attractive both to individuals charged with felonies and with misdemeanors. These individuals 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. 307 Research suggests that a large proportion of the crimes for which individuals with serious mental illnesses are arrested are non-violent crimes against the public order and nonserious property offenses, typically classified as misdemeanors. 308 In addition, studies have consistently found higher rates of mental disorder in jails than in prisons. 309 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 or community sanctions. 310 Because jails have a considerably worse record than prisons of identifying individuals

303 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: “GBMI provisions currently doesn’t [sic] effect 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 require a defendant to plead insanity to be considered for a GBMI verdict and, if the defendant waives their right to trial, will not accept a plea of GBMI without the prosecutor’s consent. See Mich. COMP. LAWS § 768.36(1), (2); McGraw, Farthing-Capowich & Keilitz, supra note 296, at 133–35 (collecting prerequisites to a GBMI finding in each state).

304 See supra note 301.

305 See Slobogin, supra note 288, at 514 n.95 (recognizing that GBMI verdicts may increase the likelihood of receiving a post-conviction evaluation and, therefore, identifying treatment needs); supra note 301 and accompanying text.

306 See Lisa A. Callahan et al., Measuring the Effects of the Guilty But Mentally Ill (GBMI) Verdict, 16 L. & HUM. BEHAV. 447, 458–59 (1992); Keilitz, supra note 297, 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); Mich. COMP. LAWS §§ 768.36(1), 768.20a (confining insanity, and thus GBMI, verdicts to felony cases).

307 See Morse, Diminished Rationality, supra note 21, at 302–03. Studies have found that GBMI statutes have had a measurable impact on plea bargaining. See Keilitz, supra note 297, 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. at 315–16.


309 See JAMES & GLAZE, supra note 55, at 2 (finding that 60% of jail inmates and 49% of state prisoners reported symptoms of a mental health disorder); Scheyett, Vaughn, & Taylor, supra note 278, at 440.

310 As a partial responsibility verdict would reduce the length of leveraged treatment, effective discharge planning is essential. See supra note 264. Ideally many misdemeanants with mental disorders would be diverted from the
with mental health needs and providing necessary treatment, 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.”

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. Therefore, a partial responsibility statute should require treatment in conformance with an evaluating mental health professional’s recommendation for the length of confinement or until such a professional determines that treatment is no longer necessary. To ensure that partially responsible offenders receive proper evaluation and necessary treatment, jurisdictions should consider requiring carceral institutions to provide an evaluation and submit to the sentencing court a treatment protocol within a certain period of time. Jurisdictions also may wish to consider authorizing courts to retain jurisdiction over individuals receiving a partial responsibility verdict to monitor treatment provision.

Beyond providing treatment to counter substantial suffering and deterioration, forensic treatment resources should be allocated in the manner that best advances criminal justice aims like public safety. This is consistent with the dominant correctional assessment and treatment model, the Risk-Need-Responsivity model, which allocates high-intensity treatment to those at the highest

311 See supra notes 61 (concerning treatment differentials in jails and prisons); Scheyett, Vaughn, & Taylor, supra note 278, 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).

312 Smith & Hall, supra note 288, at 105–06 (making this observation in the context of GBMI statutes); see supra note 287.

313 See supra note 297; 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 treatment necessary to relieve or avoid substantial suffering or deterioration. They should not be required to provide all treatment useful for the flourishing of an individual. See infra notes 323–328 and accompanying text.

314 See supra note 313 (defining “necessary”); KY. REV. STAT. ANN. § 504.150 (“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, 914–15 (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 irrational, inappropriate, and inefficient use of resources. See Slobogin, supra note 288, at 514.

315 See Comment, supra note 301, at 94.

316 See Johnston, Reconceptualizing Criminal Justice, supra note 216, at 539–60. Many assume a strong and consistent causal relationship between mental disorder and crime, but this is not the case. Supra note 265.
risk of recidivism. Accumulating evidence supports applying this model to offenders with mental disorders.

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. For example, Japanese courts will only order forensic mental health treatment when an offender committed a serious offense in a state of reduced responsibility, the mental disorder that caused that reduced responsibility is still present and believed to be responsive to treatment, and without treatment the offender would pose a substantial risk of violent recidivism. Similarly, Portuguese courts will only order treatment for an offender with diminished responsibility when, “by virtue of the mental disorder and of the seriousness of the act committed, there is a reasonable fear that he will commit other acts of the same kind.” Indeed, twelve of the eighteen countries studied prioritize treatment for individuals deemed dangerous due to the mental disorder that diminished their responsibility.

This approach—meeting individuals’ basic human needs 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

319 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 (Goethals, K., ed. 2018); Peter Bal & Frans Koenraadt, Criminal Law and Mentally Ill Offenders in Comparative Perspective, 6 PSYCHOL. CRIME & L. 219, 244 (2000); Hans Ludwig Kröber & Steffen Lau, Bad or Mad? Disorders and Legal Responsibility: The German Situation, 18 BEHAV. SCI. L. 679, 683 (2000) (discussing the origin of diminished responsibility in Germany); Okada, supra note 96, at 367 (discussing the aim of the Medical Treatment and Supervision Act in Japan).
320 Okada, supra note 96, at 367–68.
321 CÓDIGO PENAL [Criminal Code], art. 91(1) (Enio Ramalho & William Themudo Gilman (Verbo Jurídico) unofficial translation, Oct. 2006), https://legislationline.org/sites/default/files/documents/ef/Portugal_CC_2006_en.pdf https://adsdatabase.ohchr.org/IssueLibrary/PORTUGAL_Criminal_Code.pdf (Port.). Portugal permits either a penalty or a security measure, depending on whether the court chooses to treat the offender with partial responsibility as imputable or imputable and whether the agent’s lesser imputability is considered an attenuating or aggravating factor. Johnston et al., supra note 34, at 8.
322 See Johnston et al., supra note 34, at 6 (Table 4) (identifying Brazil, the Czech Republic, Germany, Greece, Italy, Japan, Russia, Portugal, Spain, Switzerland, Taiwan, and Turkey).
approach would incentivize the arrest of individuals with apparent mental disorder and possibly the commission of crimes to obtain treatment. Indeed, correctional administrators and policymakers have voiced this concern. 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, with consequent budget ramifications. Indeed, prisons and jails are particularly ill-equipped to provide this care. As mental health care dollars continue to shift from social service 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. Finally, linking treatment with justice involvement deepens erroneous and damaging stereotypes of individuals with mental disorders as inherently dangerous, violent, and criminal in nature.

IV. Responses to Counterarguments

Skeptics could raise several objections against this proposal. Sources of apprehension may be grouped into three (overlapping) categories: adverse criminal justice consequences, juror competence and possible bias, and inducing structural changes that could harm individuals with mental abnormalities.

First, the partial excuse could endanger public safety. As the American Law Institute has observed, “diminished 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.” Civil commitment offers a sufficient response to any danger posed by shortened periods of incapacitation. The partial excuse could conceivably dampen the deterrence or education function of the law, but this concern is less salient when the defense is limited to

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324 See Frontline, Episode 8, The New Asylums (2005) (including this statement by prison mental health consultant Fred Cohen: “The better you make an institution (ie, prison) that shouldn’t be used for the purpose you’re improving (ie, lack of mental health treatment), the more you’re ensuring its use.”).


326 See Tapia v. United States, 564 U.S. 319, 329–31, 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).

327 See Adams & Ferrandino, supra note 263, at 916; Fentiman, supra note 313, at 633–34 (discussing the transformation of psychiatric practice in prisons).

328 See Johnston, Theorizing, supra note 161, at 540–42.

329 See supra note 265.

330 See supra note 265.

331 See Dix, supra note 11, at 252; Arenella, supra note 39, at 860–62.
mental disability (as opposed to extending to any rationality-diminishing impairment).\textsuperscript{332} Another concern is that the verdict could increase the involvement and necessary hiring of forensic mental health professionals.\textsuperscript{333} However, it is unclear the extent to which the verdict would encourage expert battles of the sort that characterize insanity litigation. Plea bargains are the most likely conduit for the verdict, as the history of GBMI litigation demonstrates.\textsuperscript{334} 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,\textsuperscript{335} but juries already make similar evaluations in other cases.\textsuperscript{336} Diminished responsibility judgments could be inconsistent,\textsuperscript{337} which (if widespread) could bring the criminal justice system into disrepute.\textsuperscript{338} However, studies have found that “jurors’ selection of the GBMI verdict appears to be discerning, not arbitrary, and correlates with evidentiary factors,”\textsuperscript{339} 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 the verdict could be applied in a biased manner, favoring women or white defendants.\textsuperscript{340} 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.\textsuperscript{341} A related concern is that the “middle alternative” could “sidetrack meaningful reform

\begin{itemize}
  \item \textsuperscript{332} See supra notes 27–28.
  \item \textsuperscript{333} I appreciate Rachel Kincaid for raising this objection. Cf. Slobogin, supra note 288, at 516 (comparing the number of trials litigating insanity before Georgia passed its GBMI statute (19 trials) to the number of trials involving GBMI and/or insanity after passage (24 trials), and discussing surveys documenting the belief that the verdict “had no effect on the nature and frequency of expert participation”).
  \item \textsuperscript{334} See supra note 307.
  \item \textsuperscript{335} Arenella, supra note 39, at 858.
  \item \textsuperscript{336} See supra notes 48–50.
  \item \textsuperscript{337} Arenella, supra note 39, at 856–57.
  \item \textsuperscript{338} Dix, supra note 11, at 252.
  \item \textsuperscript{339} Johnston & Leahey, supra note 15, at 1285–86.
  \item \textsuperscript{340} See Weithmann et al., supra note 323, 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 a 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, 3 RACE & JUST. 210, 228 (2013) (finding that prosecutors are more likely to grant pretrial diversions to white defendants than to Black or Latino defendants with similar legal characteristics).
  \item \textsuperscript{341} While somewhat mixed, the empirical data suggest the GBMI verdict has failed to significantly reduce the number of insanity acquittals. See Randy Borum & Solomon M. Fulero, Empirical Research on the Insanity Defense and Attempted Reforms: Evidence Toward Informed Policy, 23 L. & HUM. BEHAV. 117, 125 (1999) (observing, “[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
of the insanity test itself.342 The practical effect of any sidetracking would likely be minimal, though, since studies consistently have shown that large differences in the wording of criminal nonresponsibility standards do not significantly affect verdict distributions.343 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,344 pulling more individuals with mental disorders into the criminal justice system to receive care.345 Limiting the provision of mental health treatment to that 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.346 Finally, experience with the GBMI verdict suggests the Diminished-Responsibility-from-Mental-Disability verdict could be stigmatizing for inmates housed within the general population.347 But, to the extent that partially responsible offenders come to comprise a significant proportion of the incarcerated population—as research on serious mental disorder in prisons and jails suggests is possible348—the finding (and label) may become less stigmatizing.

V. Conclusion

As countries around the globe acknowledge, recognizing partial responsibility is a crucial component of a just criminal system. 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 section above are not insubstantial, a diminished responsibility verdict could carry important instrumentalist as well as retributive benefits. It could reduce mass incarceration by increasing the use of non-carceral responses to crime and shortening carceral sentences. It could connect defendants with 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, trauma, and histories of reviewing studies). Studies of mock jurors have consistently found that GBMI verdicts displace both insanity and guilty verdicts. See Poulson et al., supra note 95, at 744–45 (summarizing studies).

343 See supra note 79.
344 See Weithmann et al., supra note 323, at 2; see supra note 323.
345 See supra notes 325 & 344.
346 See supra Part III.B.
347 See Fentiman, supra note 313, 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”).
348 See supra notes 55 and 58 and accompanying text.
violence. The reduction of incarceration and increased treatment would reduce 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 recidivism. The substantial cost differential between incarceration and the community supervision (including treatment) of offenders with mental disorders suggests a probable, large cost savings. Better titrating of liability to blameworthiness should increase the justice system’s moral credibility and “promote compliance, cooperation, deference, and internalization of the law’s norms.” The most important reason to adopt a partial responsibility verdict, though, is the imperative to respond to the clarion call of justice.

349 See Robert L. Weisman, J. S. Lamberti, & Nancy Price, Integrating Criminal Justice, Community Healthcare, and Support Services for Adults with Severe Mental Disorders, 75 PSYCHIATRIC QUARTERLY 71, 78 (2004).

350 See supra note 59 (comparing costs of incarcerating individuals with and without mental disorder); U.S. Courts, Incarceration Costs Significantly More than Supervision (2017), https://www.uscourts.gov/news/2017/08/17/incarceration-costs-significantly-more-supervision (reporting that the average annual cost of imprisonment is $34,770 versus $4,392 to supervise a person in the community); Jennifer L. Skeem, Lina Montoya, & Sarah M. Manchak, Comparing Costs of Traditional Specialty Probation for People with Serious Mental Illness, 69 PSYCHIATRIC SVCS. 896 (2018) (finding that specialty probation costs 51% less per participant than traditional probation due to reduced emergency, inpatient, and residential costs).

351 Robinson, Criminal Law’s Core Principles, supra note 6, at 196.

352 George P. Fletcher, The Individualization of Excusing Conditions, 47 S. CAL. L. REV. 1269 (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

<table>
<thead>
<tr>
<th>CIVIL LAW COUNTRIES</th>
<th>Napoleonic Code Legal Family</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brazil</td>
<td>Art. 26:</td>
</tr>
<tr>
<td></td>
<td>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.</td>
</tr>
<tr>
<td></td>
<td>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.</td>
</tr>
<tr>
<td>France</td>
<td>Art. 122-1:</td>
</tr>
<tr>
<td></td>
<td>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.</td>
</tr>
<tr>
<td></td>
<td>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.</td>
</tr>
<tr>
<td></td>
<td>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 delit [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</td>
</tr>
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1 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 relating to treatment, as these often extend beyond a country’s penal code.

the disorder justifies it, the chosen sentence may allow for the convicted person to undertake treatment adapted to his health status.³

<table>
<thead>
<tr>
<th>Country</th>
<th>Art. 88:</th>
</tr>
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<tbody>
<tr>
<td>Italy</td>
<td>The person who, at the time of a crime, was, due to an infirmity, in a state of mind excluding the capacity to intend (intendere) or will (volere) is not criminally accountable.⁴</td>
</tr>
</tbody>
</table>

Art. 89:

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.⁵

<table>
<thead>
<tr>
<th>Country</th>
<th>Art. 71:</th>
</tr>
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<tbody>
<tr>
<td>Luxembourg</td>
<td>Is not considered responsible according to the penal law, the person who, at the time of the act, suffered from mental disorder suppressing discernment or control of her or his actions.⁶</td>
</tr>
</tbody>
</table>

Art. 71-1:

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⁴ **CODICE PENALE** [COD. PENALE] [CRIMINAL CODE] art. 88 (current as of May 24, 2023) (in Italian), [https://www.altalex.com/documents/codice-altalex/2014/10/30/codice-penale](https://www.altalex.com/documents/codice-altalex/2014/10/30/codice-penale) (Italy); Ester Messina et al., *Forensic Psychiatric Evaluations of Defendants: Italy and the Netherlands Compared*, 66 INT’L J. L. & PSYCHIATRY, Article no. 101473, 4 (2019) (providing unofficial translation); see also RITA J. SIMON & HEATHER AHN-REDDING, *Italy, in THE INSANITY DEFENSE THE WORLD OVER*, 89, 92 (2006) (translating Article 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.”).

⁵ **COD. PENALE**, supra note 4, art. 89; Messina et al., supra note 4, at 4 (providing unofficial translation of Article 89); see also SIMON & AHN-REDDING, supra note 4, 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.”).

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.\(^7\)

<table>
<thead>
<tr>
<th>Portugal</th>
<th>Art. 20-1:</th>
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<tbody>
<tr>
<td>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.(^8)</td>
<td></td>
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</tbody>
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<thead>
<tr>
<th>Spain</th>
<th>Art. 20.1:</th>
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<tbody>
<tr>
<td>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.(^9)</td>
<td></td>
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<thead>
<tr>
<th>Spain</th>
<th>Art. 20.1 (Incomplete exemption(^11)):</th>
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<tbody>
<tr>
<td>The following are mitigating circumstances: 1. The causes stated in [Art. 20], when not all the necessary requisites to exclude accountability in the respective cases concur.(^12)</td>
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<table>
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<tr>
<th>Spain</th>
<th>Art. 21.2, 21.3 &amp; 21.7 (General or analogous mitigation grounds):</th>
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</tbody>
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\(^7\) **Code Penal**, supra note 6, art. 71-1; Cloos, supra note 6, at 185.


\(^9\) *Id.* art. 20-2.


\(^12\) **Cód. Pen., supra** note 10, art. 20.1.
The following are mitigating circumstances: …

1. The convict acting due to his serious addiction to the substances mentioned in Section 2 of the preceding Article.
2. The convict acting due to his serious addiction to the substances mentioned in Section 2 of the preceding Article.
3. The convict acting due to causes or stimuli so overpowering that they produced fury, obstinacy or another similar state of mind. …
4. Any other circumstance of a similar importance to the aforesaid.13

Art. 68 (Sentencing re incomplete exemption14):
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.15

Art. 66 (Sentencing re mitigation grounds):
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:
   1. When only one mitigating circumstance concurs, the lower half of the punishment the Law sets for the criminal offence shall be applied.
   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. . . .
   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.
   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.

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13 Id. art. 20.2.
14 Cancio Meliá, supra note 11, at 343.
15 Cód. Pen., supra note 10, art. 68.
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.\(^\text{16}\)

Art. 71(2):
When, 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.\(^\text{17}\)

### Germanic Legal Family

<table>
<thead>
<tr>
<th>Country</th>
<th>Article</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chile</td>
<td>Art. 10, No. 1:</td>
<td>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.(^\text{18})</td>
</tr>
<tr>
<td></td>
<td>Art. 11:</td>
<td>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.(^\text{19})</td>
</tr>
<tr>
<td>Germany</td>
<td>Section 20:</td>
<td>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.(^\text{20})</td>
</tr>
<tr>
<td></td>
<td>Section 21:</td>
<td>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</td>
</tr>
</tbody>
</table>

\(^{16}\) Id. art. 66.

\(^{17}\) Id. art. 71.

\(^{18}\) CÓDIGO PENAL [CÔD. PENAL] [CRIMINAL CODE] art. 10, nº1 (in Spanish), https://leyes-cl.com/codigo_penal/10.htm (translated by Kendall Runyan on July 7, 2022) (Chile); see also Johnston et al., supra note 34, at 3.

\(^{19}\) CÔD. PENAL art. 11.

\(^{20}\) STRAFGESETZBUCH [STGB] [PENAL CODE], § 20 (current as of Nov. 2021), https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html (Ger.).
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).21

Section 49 Special Mitigating Circumstances Established by Law:

(1) If the law requires or allows for mitigation under this provision, the following applies:

1. Imprisonment for life is substituted by imprisonment for a term of at least three years;

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.

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.22

Greece

Art. 34:

Incapacity for imputation. 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.23

Art. 35:

Culpable disability […]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 state of complete inability to act or to refrain shall be imputed to him as an act committed negligently.24

21 Id. § 21.
22 Id. § 49(1); Rüdriger Müller-Isberner et al., Forensic Psychiatric Assessment and Treatment in Germany, 23 INT’L J. L. & PSYCHIATRY 467, 473–75 (2000).
24 Id. at 2:35.
**Art. 36:**

*Reduced capacity for imputation*

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).

2. This provision does not apply in the case of a guilty party within the meaning of Article 35 who causes the reduced ability.  

**Art. 83:**

*Reasons for reducing the penalty.* Where the general part provides for a reduced sentence without further specification, its context is defined as follows:

- a) instead of life imprisonment, [a term of] imprisonment is imposed;
- 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;
- c) instead of imprisonment of up to ten years, imprisonment of at least one year or imprisonment of up to six years is imposed;
- d) in all other cases, the judge shall reduce the sentence freely to the minimum.

If the law provides for a cumulative prison sentence and a fine, only the latter may be imposed.  

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**Switzerland**

**Art. 19:**

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.

2. If the person concerned was only partially able at the time of the act to appreciate that his act was wrong or to act in accordance with this appreciation of the act, the court shall reduce the sentence.

3. Measures in accordance with Articles 59–61, 63, 64, 67, 67b and 67e may, however, be taken.

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.  

**Turkey**

**Art. 32:**

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25 *Id.* at 2:36.

26 *Id.* at 2:83.

Insanity
(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.

(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.28

<table>
<thead>
<tr>
<th>Nordic Legal Family</th>
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<tbody>
<tr>
<td>Finland</td>
</tr>
</tbody>
</table>

Section 4 of Chapter 3:
(2) The perpetrator is not criminally responsible 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 (criminal irresponsibility).
(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 (diminished responsibility), the provisions in Chapter 6, section 8(3) and 8(4) are to be taken into account in the determination of the sentence.29

Section 8 of Chapter 6:

(2) At 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.

(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.

(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.30

Other Civil Law Jurisdictions

<table>
<thead>
<tr>
<th>Country</th>
<th>Article/Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>Art. 18</td>
<td>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.31</td>
</tr>
</tbody>
</table>
| 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.32 |

30 *Id.* at 6:8(2)–(4).


32 *KEIHÔ CRIMINAL CODE* art. 39 (last amended 2017), [https://www.japaneselawtranslation.go.jp/en/laws/view/3581](https://www.japaneselawtranslation.go.jp/en/laws/view/3581) (Japan); *see* Takayuki Okada, *The Forensic Mental Health System and Psychopaths in Japan*, in *THE WILEY INTERNATIONAL HANDBOOK ON PSYCHOPATHIC DISORDERS AND THE LAW: VOLUME II DIAGNOSIS AND TREATMENT* 359, 363 (Alan R. Felthous & Henning Saß eds., 2d ed. 2020) (“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 indefinite term. Imprisonment with definite term should reduce the prison term by half, and consequently some individuals may receive a suspended prison sentence.”).
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 diminished capacity, even if these capacities are not completely lost but severely impaired.”

<table>
<thead>
<tr>
<th>Taiwan</th>
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<tbody>
<tr>
<td>Article 19</td>
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<tr>
<td>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.</td>
</tr>
<tr>
<td>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.</td>
</tr>
<tr>
<td>Provisions prescribed in the two preceding paragraphs shall not apply to a person who intentionally brings the handicaps or defects.</td>
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**Former Communist Countries**

<table>
<thead>
<tr>
<th>Czech Republic</th>
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<tbody>
<tr>
<td>Chapter II Division 4</td>
</tr>
<tr>
<td>Section 26 Insanity</td>
</tr>
<tr>
<td>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.</td>
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| Section 27 Diminished Sanity |

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33 Okada, *supra* note 32, at 363 (quoting the Japanese Supreme Court ruling of December 3, 1931).

34 XING FA [CRIMINAL CODE] art. 19 (Feb. 18, 2022, translation by Ministry of Justice), https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=C0000001 (Taiwan); 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 insanity provision].”).

Anyone who due to a mental disorder suffers from a substantially diminished capacity to recognise the illegal nature of an act at the time of its commission or to control his/her conduct, is in a state of diminished sanity.  

Chapter V Division 2 Sub-Division 1
Section 40 Imposing Penalties to an Offender with Diminished Sanity
(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.
(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.

Poland
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.
§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.
§ 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 foreseen.

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:
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;

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36 Id. at (II)(4)(§27).
37 Id. at (V)(2)(1)(§40).
38 KODEKS KARNY [K.K.] [CRIMINAL CODE] art. 31 (Oct. 12, 2016), https://legislationline.org/sites/default/files/documents/6a/Poland_CC_1997_en.pdf (Pol.). The document was published on legislationonline.org on Oct. 12, 2016, but it is unclear whether the translation is current as of 2016 or an earlier version.
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;

3) If the act in question constitutes a misdemeanour, and the lower statutory level of the penalty is less than one year's deprivation of liberty, the court shall impose either a fine or the penalty of restriction of liberty.39

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].40

### Russia

**Art. 21. Insanity**

1. A person who, at the time of the committing of a socially dangerous act, was insane, that is, was 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.

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.41

**Art. 22 Criminal Liability of Persons with Mental Derangement that Does Not Equal Sanity**

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.

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.42

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39 *Id.* art. 60.6.

40 *Id.* art. 60.7. For a discussion of the variety of penal measures available under the Polish Criminal Code, see Krzysztof Indecki & Justyna Jurewicz, The Key Issues of Polish Penal Law 54-65. (2014).

41 UGOLOVNYI KODEKS ROSSIISKOF FEDERATSI [UK RF] [CRIMINAL CODE] art. 21 (current as of Jan. 29, 2013), https://legislationline.org/search?q=lang%3Aen%2Csort%3Amost_read_first%2Clegislation_category%3A48%2Ccountry%3A80%2Cpage%3A1# (Russ.). This version of Article 21 was current through March 25, 2022.

42 *Id.* art. 22.