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Racism in the Insanity Defense

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COMMENT

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I. INTRODUCTION

Although many historical and noteworthy events took place in 1994, the top story of the year was the brutal slaying of O.J. Simpson's ex-wife Nicole Simpson and her friend Ronald Goldman.¹ This case clearly involves more than Simpson's success and his notoriety. "Add the race angle (Simpson is black, the victims white)"² and a door opens on a new set of controversial issues. The American public has fixated on every detail of this case, including its ever-present racial overtones. How can a racial focus be avoided? It cannot. "Race always comes into play . . . we live in a racist society, and people experience different social worlds as a result of race."³

When the case against Simpson began in June of 1994, some speculation occurred as to whether Simpson would choose to raise the insanity defense.⁴ Some aspects of the case, however, cautioned against that defense: Simpson's "Mr. Clean" image, his flight, and the possibility that he could use another defense such as the "sudden quarrel" or the

1. Arlene Levinson, *O.J. Outruns Competition, He's Top Story of 1994; Elections are 2nd*, MIAMI HERALD, Jan. 1, 1995, at 31A.

2. *Id.*

3. Nina Burleigh, *Preliminary Judgments*, A.B.A. J., Oct. 1994, at 61 (quoting from Professor Peter Arenella, UCLA Law School).

4. See Donna Foote et al., *Now Comes the Legal Odyssey*, NEWSWEEK, June 27, 1994, at 22.

"heat of passion" to lessen the charge against him.⁵ The discussion of whether O.J. Simpson would plead insanity was one of the rare aspects of the case that was not analyzed with respect to the impact of race. Interestingly, despite voluminous data available on race and arrests, incarceration, and institutionalization, there is little discussion in the literature and few studies concerning the insanity defense as it relates to race.

Crime, incarceration and detention in the United States is intimately connected with race and racism. Studies repeatedly demonstrate that African-Americans, whether adults or youths, are involuntarily detained disproportionately more often than whites.⁶ In one study, overall arrest rates for blacks were four times that of whites, and the arrest rates for murder, in particular, were ten times that of whites.⁷ Additionally, blacks outnumbered whites in correctional institutions nine to one.⁸ Juvenile offender statistics are comparable, with approximately four nonwhite youths arrested for every white youth and an equal incarceration rate.⁹

African-Americans also comprise a disproportionate share of individuals involuntarily held in public mental health institutions. According to one study, the black population in these institutions exceeded the white population by fifty-two percent.¹⁰ The irony of this statistic is that the success of the insanity defense often turns upon prior contact with the mental health system. Greater contact with the mental health system appears, in many instances, to be a prerequisite, or at least a corequisite, to a successful insanity defense.¹¹ However, whether or not African-Americans are involuntarily held in mental institutions does not guarantee that they have the requisite contact with the mental health system to provide a basis for a successful insanity defense.

Studies of the insanity defense detail those who plead Not Guilty by Reason of Insanity ("NGRI") as "primarily single, Caucasian, somewhat older and better educated than the usual defendant group, unemployed at the time of the insane offense, and with a history characterized by chronic unemployment, prior psychiatric treatment, drug abuse, alco-

5. *Id.*

6. See generally Charles E. Owens, *Mental Health and Black Offenders* 1-13 (1980).

7. *Id.* at 6.

8. Mildred S. Cannon & Ben Z. Locke, *Being Black is Detrimental to One's Mental Health: Myth or Reality*, 38 *PHYLON* 408, 410 (1977).

9. Todd W. Martin & Henry J. Grubb, *Race Bias in Diagnosis and Treatment of Juvenile Offenders: Findings and Suggestions*, 20 *J. CONTEMP. PSYCHOTHERAPY* 259, 261 (1990).

10. Cannon & Locke, *supra* note 8, at 410.

11. See table *infra* note 84.

hol abuse, and previous arrests.”¹² Studies describe successful acquittees as “older and better educated . . . more likely to have been diagnosed as schizophrenic and less likely to have had a history of drug abuse.”¹³ These studies find no difference, however, with respect to other variables such as ethnicity.¹⁴ It is difficult to reconcile the finding that the plea of NGRI is entered primarily by Caucasians with the conclusion that there is no racial disparity in groups of successful insanity acquittees.

Studies of the impact of race upon the mental health and the correctional systems, and studies of the public’s attitude toward violence and race suggest that race has a considerable impact upon all areas of criminal justice. The conclusion of studies of the insanity defense, that they are race-neutral, seems curious.

This Comment will examine data on race and the insanity defense based on an eight-state study.¹⁵ Section I explores various studies treating racial disparities in the mental health and the correctional fields, the intersection of these fields in the juvenile and adult justice systems, and how these studies relate to the ethnicity data gathered in various studies on the insanity defense itself. Section II focuses on the sufficiency of legal mechanisms to prevent racism or to seek redress for racism in applying the insanity defense. It explains other possibilities for the use of empirical studies to assist in the administration of justice. Section III is a diagnosis of the present system and suggestions for improvement that would allow a more racially-balanced use of the insanity defense

12. Richard A. Pasewark et al., *Differentiating Successful and Unsuccessful Insanity Plea Defendants in Colorado*, J. PSYCHIATRY & L. 54, 55 (1987).

13. *Id.*

14. *Id.*

15. Lisa A. Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 18 BULL. AM. ACAD. PSYCHIATRY & L. 331, 331 (1991). This study, funded by the National Institute of Mental Health, compiles data detailing aspects of the insanity defense from pleas to acquittals for California, Georgia, Montana, New Jersey, New York, Ohio, Washington, and Wisconsin. Information in this study dates from 1975 to 1985; this is the most comprehensive insanity plea study to date.

According to the authors, data on insanity pleas are not centrally located, therefore, case files had to be examined individually to gather the appropriate information. *Id.* The acquittal data, however, are maintained by the individual mental health facilities where the offenders are placed for treatment. *Id.* The individual researchers completed a data abstract form which was compiled into the finished statistics. Some of the results of the study are presented in this paper.

The study identified those who entered the insanity plea at any point in their defense and followed the disposition of their case, whether acquitted by not guilty by reason of insanity (NGRI) or found guilty. *Id.* at 332. Any subsequent information as to post-acquittal treatment or entry into the prison system was gathered directly from the post-acquittal hospital facilities themselves or from the state officials for the prison systems. *Id.* at 333.

These data are analyzed for the first time in this paper thanks to the invaluable assistance of Henry J. Steadman, Ph.D., and the diligence and patience of Eric Silver of Policy Research Associates, Inc.

from a systemic perspective. This section questions the possibility of treating and neutralizing racism within the criminal justice system. Finally, Section IV integrates data on race and the suggestions of some practitioners.

II. WHAT DOES RESEARCH INDICATE?

Interestingly, over ninety percent of criminal defendants actually plead guilty.¹⁶ This means that less than ten percent of all defendants plead not guilty. Less than one percent of all "not guilty" pleas in the criminal justice system are insanity pleas.¹⁷ Of those asserting the insanity defense, only twenty-six percent are actually acquitted as NGRI.¹⁸ This translates to a minute segment of the criminal population; only .02% of all defendants who plead not guilty are acquitted NGRI. Yet, there is comparatively a large body of research dedicated to the insanity defense. Furthermore, the defense itself has aroused the public to the point of lobbying for legislative enactments and insanity defense "reforms . . . designed primarily to 'narrow the window' for insanity defense proceedings by making the laws governing insanity pleas more restrictive."¹⁹ Because the insanity defense is neither frequently utilized nor successful in many cases, the examination of racial factors in conjunction with the insanity defense raises diverse issues concerning how our legal system and our culture perceive the defense.

A. Population Case Studies

According to Alfred Blumstein:

One of the most distressing and troublesome aspects of the operation of the criminal justice system in the United States is the severe disproportionality between blacks and whites in the comparison of prison populations Although blacks comprise roughly one-eighth of the population, they represent about one-half of the prison

16. Steven K. Hoge et al., *Attorney-Client Decision-Making in Criminal Cases; Client Competence and Participation as Perceived by Their Attorneys*, 10 BEHAV. SCI. & L. 385, 386 (1992). The actual number of "not guilty" pleas is rather low; guilty pleas comprise a greater percentage of the total pleas in both the state and federal criminal justice systems. According to Hoge:

Guilty pleas outnumber trials by more than 5 to 1 at the Federal level and by about 10 to 1 at the state and local level. . . . Given the high crime rates and the enormous volume of cases that urban courts must contend with, the only way to dispense justice at all, it is argued, is by inducing the mass of defendants to plead guilty in return for a promise of leniency.

Id.; see also Barbara Boland & Brian Forst, *Prosecutors Don't Always Aim to Plead*, 49 FED. PROBATION 10, 10 (1985).

17. See Callahan et al., *supra* note 15, at 335.

18. *Id.*

19. HENRY J. STEADMAN ET AL., *BEFORE AND AFTER HINCKLEY* 14 (1993).

population.²⁰

Blumstein further explains that black males in their twenties are the most highly imprisoned group of people in the population; they are imprisoned at a rate that is at least twenty-five times that of the total population.²¹ He compares this to the actual likelihood of imprisonment of the total population and concludes that a great disparity exists between incarceration rates of whites and blacks.²² He argues that discrimination is not found in the disparity of imprisonment rates between men and women in the total prison population—ninety-six percent versus four percent—because men commit crimes more often and of a more serious nature than do women.²³

Racial differences in arrest rates may thus actually account for many of the differences in incarceration rates. In addition, this initial discrimination may serve as a mask for discrimination at a later stage of the process.²⁴ If blacks were arrested more often than whites, any subsequent step in the criminal justice system would still lead to a disproportionate outcome. Because there is no exact test for discrimination within the criminal justice system, examining the arrest patterns and eventual convictions may indicate the areas where underlying discrimination is present. For instance, Blumstein notes that police patrols are more often present in "poorer, more crowded and more crime-prone neighborhoods This difference in patrol intensity could account for some of the disproportionality in black arrest rates."²⁵ Blumstein further asserts that the types of crimes for which most African-Americans are arrested, such as homicide and robbery, are those which most likely carry prison terms.²⁶ If the crimes with which whites are associated, such as fraud or corporate crimes, were more heavily pursued, the disparity would lessen.²⁷

The actors in the criminal justice system can be seen as playing a particular role in deciding the fate of a defendant based upon race. "[D]ifferential treatment might also be associated with the degree to which prosecutors or judges might attempt to predict an offender's recidivism on the basis of his education or other socioeconomic factors that are often associated with an offender's ability to function effectively

20. Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259, 1259 (1982).

21. *Id.* at 1260.

22. *Id.*

23. *Id.* at 1262.

24. Martin & Grubb, *supra* note 9, at 263, 268.

25. Blumstein, *supra* note 20, at 1277.

26. *Id.* at 1279.

27. *Id.*

within the legitimate economy."²⁸ However, according to Blumstein, the potential for changing discriminatory practices is more likely to occur for lesser offenses than for those that are punishable by capital punishment because of the emphasis placed on a defendant's prior record, which may have been elongated due to some type of racial bias in decisionmaking.²⁹ Aggregation of the criminal processing stages served as an integral part of the research discussed in Blumstein's article. Thus, discrimination is seen at the final stage of incarceration, rather than as a discrete set of steps leading to imprisonment.³⁰ This final-step study, however, does not show the point at which discriminatory influences most often enter the defendant's trek through the legal system.

The legal system operates on the basis of objectively verifiable evidence, and, therefore, often clashes with the more subjective mental health system that is premised in the behavior of its clients.³¹ In other words, law looks to an achievable truth as the basis of the adversarial system, while mental health focuses on the unconscious processes, anxieties and defenses as the cause of human behavior.³² These systems do not always use similar methods in the treatment of those that come before them. One aspect that both systems have in common, however, is the need to maintain the perception that they are free of bias,³³ although one commentator has said that the phrase "neutral expert" is an oxymoron.³⁴

To understand the impact that the expert psychologist or psychiatrist has upon the insanity defense, it is necessary to examine literature that gives insight into the differential treatment of defendants in the correctional and the mental health fields. Two articles in particular, one focusing on the racial bias in the diagnosis and treatment of juvenile offenders,³⁵ and the other focusing on involuntary commitment,³⁶ shed light on the disparate treatment of the races within the juvenile justice and mental health systems.

The first article provides an overview of research regarding the

28. *Id.* at 1270.

29. *Id.* at 1276.

30. *Id.* at 1280.

31. Michael L. Perlin, *Morality and Pretextuality, Psychiatry and Law: Of "Ordinary Common Sense," Heuristic Reasoning, and Cognitive Dissonance*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 131, 131 (1991).

32. *Id.*

33. Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625, 640 (1993).

34. *Id.* at 641.

35. See Martin & Grubb, *supra* note 9.

36. See Kenneth Lindsey & Gordon Paul, *Involuntary Commitments to Public Mental Institutions: Issues Involving the Overrepresentation of Blacks and Assessment of Relevant Functioning*, 106 PSYCHOL. BULL. 171 (1989).

treatment of African-American juvenile offenders.³⁷ The authors focus on cultural differences as an important ingredient of racism in diagnosis. The article historically details the treatment and perception of African-Americans by the mental health system and the manner in which race determines the approach the therapist takes in evaluating the African-American patient.³⁸ According to the study: "The major-culture in this nation upholds the primacy of the individual. . . . The Black cultural perspective concerning the place of the member in his group is quite different. The member is understood to be *secondary to the group*."³⁹

In this culturally-disparate framework, white middle-class evaluators see white juvenile offenders as having a psychological problem if they exhibit certain behaviors, while they categorize black offenders as exhibiting behavior characteristic of their culture. Therefore, African-Americans do not receive the treatment that they require while being funnelled through the criminal justice system.⁴⁰ Some of the conclusions based upon mistaken cultural perceptions and detailed in various studies are summarized below.

According to one article, "black people are less often accepted for therapy, are more often assigned to inexperienced therapists, are seen for shorter periods of time."⁴¹ Similarly, when dealing with parents of children in need of therapy, these same therapists tend to give less advice to black parents.⁴² African-Americans, who often do not verbalize during therapy sessions, view the treatment and testing atmosphere as very stifling.⁴³ When therapists receive limited verbal responses or otherwise do not receive the sought after responses to questions, they use less projective tests that do not require verbalization.⁴⁴ These types of racially imbalanced encounters with the mental health system stem from therapist biases that, as most therapists are white, "are brought about by a lack of experience with the Black culture earlier in the clinician's training."⁴⁵

As a result of cross-cultural misunderstandings, "a disproportionate number of Black youth are treated more harshly for equivalent offenses to which their white cohorts are either released from or unofficially

37. Martin & Grubb, *supra* note 9, at 261.

38. *Id.* at 262-63.

39. *Id.* at 265. The African-American patient's strong association with the group often shadows the independence that is looked for in the Eurocentric therapist.

40. *Id.* at 259.

41. *Id.* at 262.

42. *Id.*

43. *Id.* at 263. Patients who do verbalize during testing sessions are seen as deviating from the anticipated behavior.

44. *Id.* at 263.

45. *Id.* at 262.

treated through the mental health system."⁴⁶ Not surprisingly, the article notes, for African-Americans to become successful in the majority system they must do so at the "expense of their own cultural identity."⁴⁷ Cultural identity appears to lead to this disparate diagnoses. An understanding of those perceptions that influence the evaluator is essential to the determination of the mental health condition of an offender and to the subsequent decision whether to utilize the insanity defense.

Involuntarily committed African-Americans are overrepresented in public mental health institutions.⁴⁸ "[T]hey are even more overrepresented among acute admissions . . . and tend to be assigned more severe diagnostic categories."⁴⁹ Frequently, misdiagnosis of black patients occurs with respect to schizophrenia.⁵⁰ As a result, these patients receive higher doses of medication than necessary.⁵¹ One hypothesis regarding the higher commitment rates is that vague commitment laws allow biased decisionmakers to discriminate against African-Americans.⁵² This type of cultural misinterpretation is much like that encountered in juvenile offender studies. Often, commitment laws are not well defined and permit discretionary and biased predictions of future behavior to determine commitment.⁵³ Culturally appropriate behaviors may thus be perceived through a biased eye as a mental disorder, which, in turn, may lead to commitment.⁵⁴ In addition, the study points to commitment criteria that are not properly defined in many instances so that accurate determination of future behavior is not possible, and may even promote decisionmaking in a stereotypical fashion.⁵⁵

In some cases, black patients are brought to a mental health facility at a "more deteriorated state of functioning,"⁵⁶ perhaps because they tend to avoid institutionalization and maintain the members of their community until those individuals can no longer function within society.⁵⁷ However, these socially-oriented aspects of African-American culture are not reflected in a common diagnostic session based upon "the predominant normative interpretations of typically White, middle-class

46. *Id.* at 269.

47. *Id.* at 259-60.

48. See Lindsey & Paul, *supra* note 36, at 171.

49. *Id.* at 172.

50. Susan Stefan, *Issues Relating to Women and Ethnic Minorities in Mental Health Treatment and Law*, in *THE LAW'S IMPACT ON MENTAL HEALTH* (Bruce D. Sales & Daniel W. Shuman eds., forthcoming 1996) (manuscript on file with the author).

51. *Id.*

52. See Lindsey & Paul, *supra* note 36, at 173.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 173.

57. *Id.*

mental health professionals."⁵⁸ This understanding of African-American cultural protectiveness may still allow a therapist to understand why treatment was not administered at an earlier stage.

Studies have shown that therapists generally appear to prefer and are more comfortable with middle- and upper-class clients, that is, clients who are more similar to themselves Psychologists tend to blame the lower-class clients for failure to make therapeutic gains and to ascribe more negative traits to this population Most studies suggest that black clients tend to remain in therapy for shorter periods (than white clients).⁵⁹

A subjective commitment standard, coupled with the inherent biases and prejudices of the evaluator, create a barrier to fair treatment for African-Americans in the mental health system.

Cultural biases in diagnoses will inevitably affect the insanity defense because the insanity defense often hinges on the strength of diagnostic testimony.⁶⁰ Moreover, the variable of a jury trial must also be considered. Research shows that jurors often share the same biases as therapists and administrators:

There is some empirical evidence which suggests that instructions and expert testimony in an insanity defense case may have lesser weight than was heretofore imagined Jurors may often disregard or reconstrue both the expert testimony and the instructions to the jury, choosing instead to follow their own, intuitive understanding or common sense notion of what is and is not insane.⁶¹

According to one author, mock jury studies are usually the best indicia of racial biases for the determination of guilt because all variables may be controlled;⁶² these mock studies support the theory that there is racial bias in guilt determinations.⁶³

A recent study involved reading transcripts of four crimes. White subjects were used and the race of the defendant was varied. This study concluded:

After reading otherwise identical transcripts, white subjects rated the

58. *Id.*

59. OWENS, *supra* note 6, at 78.

60. Michael Perlin notes that variables such as "race, sex, culture, gender preference, physical attractiveness and economic status significantly affect expert testimony." Perlin, *supra* note 33, at 642.

61. Norman J. Finkel et al., *Insanity Defenses: From the Jurors' Perspective*, 9 LAW & PSYCHOL. REV. 77, 79 (1982).

62. Sheri L. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985).

63. *Id.* at 1625. The mock jury studies are conducted either by giving a transcript or videotape of the trial to study participants, or by the researcher reading a summary of the trial. In these types of studies, "[b]ecause the only factor that has been varied is a participant's race, statistically significant differences can be interpreted as reflecting a causal relationship between race and guilt attribution." *Id.* at 1625-26.

probability that the white defendant had raped the black victim at 33%, but rated the probability of the black defendant's guilt of that crime at 52%; they also rated the probability that the white defendant had burglarized the white victim at 52% but the probability of the black defendant's guilt at 63%.⁶⁴

A biased jury is thus a great concern to the black defendant.

Indeed, thirty years of research documents the discrimination that underlies the general attitudes of mental health professionals and the criminal justice system. Many researchers have also studied the insanity defense itself. This focus is surprising, considering that a regional study of the United States indicates that "5,424 NGRI patients [were] served as inpatients in the United States on one day in 1986. Adjusted to population figures, this is a rate of 2.2 per 100,000 people,"⁶⁵ not a large number by any means.

Nonetheless, a dearth of information exists on the impact of race on the insanity defense. This appears to be attributable to explanations that the figures between the races were not statistically significant or not present because of the small pool of nonwhite defendants.⁶⁶ Understandably, this makes it more difficult to determine a racially-based breakdown. For example, one study in Colorado showed that the percentages of caucasian to African-American defendants were eighty percent to six percent, respectively.⁶⁷ Other studies of the insanity defense make little or no reference to race.⁶⁸

Conversely, a study conducted in 1976 found that race might have a significant effect on the outcome of an insanity plea.⁶⁹ In a hypothetical murder case with defendants of both races, white college students granted a verdict of NGRI less frequently to blacks than to whites.⁷⁰ "[B]lack males were held more criminally responsible for their maladapt-

64. *Id.* at 1630 (quoting Kitty Klein & Blanche Creech, *Race, Rape and Bias: Distortion of Prior Odds and Meaning Changes*, 3 BASIC & APPLIED SOC. PSYCHOL. 21, 24 (1982)).

65. Bruce B. Way et al., *Forensic Psychiatric Inpatients Served in the United States: Regional and System Differences*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 405, 411 (1991).

66. Pasewark et al., *supra* note 12, at 69-70.

67. *Id.* at 58.

68. See generally Jeffrey Janofsky et al., *Defendants Pleading Insanity: An Analysis of Outcome*, 17 BULL. AM. ACAD. PSYCHIATRY & L. 203 (1989); Hugh McGinley & Richard A. Pasewark, *National Survey of the Frequency and Success of the Insanity Plea and Alternate Pleas*, 17 J. PSYCHIATRY & L. 205 (1989). This study mentions that "[o]ther demographic factors such as age, number of dependents, educational level, severity of illness, and criminal background did not discriminate between [those found NGRI and those found guilty]. Janofsky, *supra*, at 203. Again the researchers found that "race . . . did not differentiate between the groups." *Id.* at 207.

69. Richard P. McGlynn et al., *Sex and Race as Factors Affecting the Attribution of Insanity in a Murder Trial*, 93 J. PSYCHOL. 93, 97 (1976).

70. OWENS, *supra* note 6, at 25-26.

tive behavior than any of the other groups,⁷¹ even though the actual case description was the same except for race and sex.”⁷² This study is one of the few that examines race as an integral aspect in the determination of criminal responsibility.

B. *Analysis and Changes in State Law*

The Callahan study, which formed the basis for the book *Before and After Hinckley*,⁷³ details many current statistics concerning the insanity defense, including plea and acquittal data for eight states.⁷⁴ One aspect of the study that the book does not cover in depth is the ethnic breakdown of plea and acquittal data. This information is vital to any examination of racism in the insanity defense.

The authors studied 8,979 insanity pleas entered in eight states from 1976 to 1987.⁷⁵ Although the years and numbers of defendants studied varied slightly by state, 2,555 defendants were acquitted.⁷⁶ Whites comprised approximately 44% of the total number of insanity pleas and blacks, approximately 40%.⁷⁷ The results are statistically significant and demonstrate racial differences in the success of the insanity defense.

To illustrate, of the 3,325 total white defendants in the study who pled NGRI, 2,259 or 67.9% were found guilty and 1,066 or 32.1% were acquitted NGRI.⁷⁸ Black defendants had a slightly more skewed out-

71. White males, white females and black females made up the other groups.

72. OWENS, *supra* note 6, at 26.

73. STEADMAN ET AL., *supra* note 19, at 5-10; *see also* Callahan et al., *supra* note 15, at 331.

74. *See* Callahan et al., *supra* note 15, at 331. The 8,979 insanity pleas found in this study came from an examination of over one million files. *Id.* at 333. Generally, the higher the plea rate in a state, the lower the acquittal rate for NGRIs. *Id.* at 334. The successful NGRIs in this study were older, female, better educated, and single, with a mean age of 30.3 years for insanity pleas and 32.1 for insanity acquittals. *Id.* at 335. However, the author did not mention racial factors in this characterization. Usually, acquittals in these cases occurred before a judge, not a jury. In addition, acquittees were more likely to have had a prior mental health facility hospitalization record. *Id.* at 336. Finally, the researchers found that 15% of the insanity acquittees never pled NGRI in the first place. *Id.* at 335.

75. This total stemmed from an attempt by the researchers to achieve an examination of at least two-thirds of the insanity acquittals in each of the eight states studied. *See* STEADMAN ET AL., *supra* note 19, at 21. To find the requisite number of insanity defense cases, researchers examined close to one million indictments in the eight states. *See* Callahan et al., *supra* note 15, at 333.

76. Callahan et al., *supra* note 15, at 336.

77. *Id.* at 336. Researchers categorized another 455 defendants as “other minority.” They did not designate the remaining 1,034 defendants. Raw data from Policy Research Associates showed a smaller comparison base with a total of 3,000 African-American defendants and 3,325 white defendants. The author obtained this data from, and uses it with the permission of, Henry J. Steadman, Ph.D., Policy Research Associates, Inc., 262 Delaware Avenue, Delmar, New York 12054.

78. *Id.*

come. From the 3,000 black defendants, 2,107 or 70.2% were found guilty, and 893 or 29.8% were found NGRI.⁷⁹ A comparison of both data sets show a lower success rate for blacks as a group. Researchers have found this data statistically significant ($p < .05$).

Data on prior mental health system contact and treatment for acquittees also shows the varying levels of success in the insanity defense which differentiates with regard to race.⁸⁰ Most acquittees of both races, 82.5% of the total, had at least one prior experience with the mental health system.⁸¹ Whites had more prior contact with the mental health system, and blacks needed more contact for acquittal.⁸² The population of white acquittees with no prior mental health treatment was 18.2%, compared to 14.9% for black acquittees. White acquittees who had previous contact with the mental health system comprised 81.8% of the total; and 85.1% of black acquittees had at least one mental health experience.⁸³ Researchers found this data statistically significant with respect to prior contact with the mental health system ($p < .05$).⁸⁴

An understanding of two issues helps explain the plea data and the significant results: First, which defendants plead NGRI and why? Second, who are these successful acquittees and what role does the mental health professional play in this determination? Defendants charged with felonies, such as homicide, more commonly raise the insanity defense.⁸⁵ Theoretically, a defendant may assert a plea of NGRI "when the act was committed with a state of mind (related to mental disorder) that renders the individual blameless."⁸⁶ Studies do not indicate that the defendant

79. *Id.*

80. See table *infra* note 84.

81. *Id.*

82. *Id.*

83. *Id.* Ohio, New York, and Wisconsin held blacks to a much stricter scrutiny than whites for prior mental health contact. In Wisconsin, for example, 20.0% of white acquittees had no prior contact with the mental health system, and 80.0% had at least one. In Wisconsin, 4.6% of black acquittees had no experience with the mental health system, and 95.4% had at least one visit.

84. See discussion *supra* note 77.

Acquittees and Prior Mental Health System Contact				
Race	Mental Health Contact	Total	%	Significance
White	None	162	18.2	.000
	At Least One	726	81.8	.000
Black	None	108	14.9	.000
	At Least One	617	85.1	.000

These data were statistically significant at the $p < .05$ level and demonstrated that African-Americans must, on average, show more mental health contact than their white counterparts in order to be found NGRI.

85. SEYMOUR HALLECK, *THE MENTALLY DISORDERED OFFENDER* 47 (1986).

86. THOMAS GRISSO, *EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS* 156 (1993). Blamelessness is often difficult for the public to accept for anyone

must have had prior contact with the criminal justice system.⁸⁷ Defendants who plead insanity often "do not fit [the] usual stereotype of criminals, such as police officers who commit violent crimes or mothers who attempt to murder their children."⁸⁸ These uncommon defendants often use the defense successfully. Generally, successful insanity acquittees are "predominantly white, single males who are unskilled or semiskilled workers in the age range of 25 to 35, with previous psychiatric hospitalization having occurred in less than half the cases."⁸⁹ John Hinckley is a prime example of this categorically successful defendant.⁹⁰ Of course, a defendant who intends to use the defense must first be evaluated by a mental health professional.

Psychologists and psychiatrists who test potential NGRI defendants contribute diagnoses that foster this racially-imbalanced outcome of insanity acquittals. According to one author: "There are two general conclusions that can be made about the research on black offenders. First of all, black behavior and responses are evaluated by white standards."⁹¹ This white "normalcy" standard finds African-Americans inadequate in almost every consideration.⁹² Second, "the mental health professional community has not accumulated a knowledge base on black offender behavior that can be used reliably by its membership to guide its interaction with black offenders. [T]he treatment of blacks has been simply tailored to the perceived socioeconomic and cultural realities of the day."⁹³ This quote echoes the sentiments of many authors of racial comparison studies: The races are not treated the same.

A comparison of these two racial groups shows that whites comprised 49.1% of those found guilty and 50.6% of those found NGRI, while blacks comprised 45.8% and 42.4%, respectively.⁹⁴ Although this

committing a criminal act. This is demonstrated by the outcry provoked by John Hinckley's insanity acquittal in 1982.

87. Prior contact with the mental health system does, however, appear to correlate with a successful insanity defense. See table *supra* note 84.

88. See HALLECK, *supra* note 85, at 47.

89. GRISIO, *supra* note 86, at 156.

90. John Hinckley attempted to assassinate former President of the United States, Ronald Reagan, in April 1981.

91. OWENS, *supra* note 6, at 16.

92. *Id.*

93. *Id.* at 16-17.

94. According to the data for those found guilty of both races, the percentages 49.1% and 45.8% do not total 100% because there are other categories such as Hispanic, Asian, Native American, and Other which comprise a relatively small percentage of defendants.

According to Steadman, in *Before and After Hinckley*, "[t]he sociodemographic characteristics of insanity acquittees [are] to be quite similar to those of the larger cohort of convicted felons. Insanity acquittals tend to be somewhat older and were more likely to be members of a racial minority than the larger cohort of convicted felons." STEADMAN ET AL., *supra* note 19, at 29. This statement comes close to claiming that insanity acquittees echo the arrested

disparity may not appear large, because of quantitatively fewer African-American than white defendants in the study, the relative percentage is larger for white defendants who were acquitted NGRI than for African-Americans.⁹⁵

Each of eight states in the study demonstrate a different rate of insanity pleas and acquittals in their populations. According to calculations from the raw data, California, New Jersey, Washington and Wisconsin show higher intraracial acquittal rates for white defendants than African-American defendants.⁹⁶ These results imply a greater disparity in percentages within each race, although the data have not been found to be statistically significant. Researchers indicate that they included New Jersey, Washington, and Wisconsin in the study as comparison states because these states had not altered their insanity defense statutes from 1979 to 1984.⁹⁷ Thus, these states provide a clearer picture of the

population. This finding, however, accounted for four of the study states: California, Georgia, Montana, and New York. *See supra* note 77.

95. *See* STEADMAN ET AL., *supra* note 19.

96. *See* discussion *supra* note 77.

Percentages of NGRI Acquittals in Four States (1)

State	Race	Guilty	NGRI	Total	Sign.
CA	White	49.5%	50.5%	547	.250
CA	Black	51.4%	48.6%	327	.250
NJ	White	46.7%	53.3%	199	.382
NJ	Black	51.9%	48.1%	235	.382
WA	White	9.7%	90.3%	310	.190
WA	Black	16.5%	83.5%	79	.190
WI	White	67.5%	32.5%	231	.771
WI	Black	70.0%	30.0%	227	.771

Although these figures are not statistically significant, ($p > .05$) a pattern emerges in which whites are more likely to be found NGRI than African-Americans. Georgia, Montana, Ohio and New York provide opposite results: higher acquittal rates for black defendants than for white defendants.

Percentages of NGRI Acquittals in Four States (2)

State	Race	Guilty	NGRI	Total	Sign.
GA	White	85.1%	14.9%	569	.160
GA	Black	79.7%	20.3%	991	.160
MT	White	88.0%	12.0%	392	.139
MT	Black	75.0%	25.0%	4	.139
NY	White	61.6%	38.4%	229	.462
NY	Black	57.3%	42.7%	241	.462
*OH	White	87.1%	12.9%	848	.001
*OH	Black	79.7%	20.3%	896	.001

*Ohio was the only state found to have statistically significant results. Unfortunately, neither the study nor the book outlines any further details about Ohio.

97. Callahan et al., *supra* note 15, at 332.

effects of race on the insanity defense for that time period.

The book, *Before and After Hinckley*,⁹⁸ provides a thorough discussion of the effects in California, a state which changed some of its insanity defense laws. Of the total study population of 547 white defendants in California, 49.5% or 271 were found guilty and 50.5% or 276 were found NGRI.⁹⁹ Of the total black population of 327 included in the study, 51.4% or 168 were found guilty and 48.6% or 159 were acquitted as NGRI.¹⁰⁰ Although these figures were not statistically significant, California serves as an example for state legislative change.

In response to Hinckley's acquittal, California changed its insanity test from the American Law Institute (ALI) test to the McNaughtan test. This change represents an attempt to restrict the use of the insanity defense.¹⁰¹ Although California felony indictments climbed steadily from 1979 to 1984, insanity pleas reached a low of 57 in 1984 from a high of 173 in 1980.¹⁰² The change in the insanity test was not the only factor that decreased the number of insanity pleas. Changes in legislation, such as stricter sentencing guidelines, also reduced the number of insanity pleas.¹⁰³

The success rate of the insanity plea in California dropped sharply from 52% to 38% between early 1981 and the second half of 1982.¹⁰⁴ Although the study suggests that the success rate was not necessarily attributable to the insanity test reforms of 1982, interestingly, the

98. STEADMAN ET AL., *supra* note 19, at 45-62.

99. *See* table *supra* note 96.

100. STEADMAN ET AL., *supra* note 19, at 45-62.

101. *Id.* at 45.

The McNaughtan test or "right-wrong" test states that:

[A] person is not criminally responsible if, "at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he/she was doing; or if he/she did know it, that he/she did not know he/she was doing what was wrong."

Id. at 46 (citation omitted).

The ALI test, which was replaced by the McNaughtan standard, claimed that:

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

Id. at 46 (citation omitted).

102. *Id.* at 50.

103. *Id.* at 52-53. The other sweeping change in California at that time was a program of determinate commitment. In response to a 1978 California Supreme Court case, *In re Moye*, 22 Cal. 3d 457 (1978), which ruled that insanity acquittees could not be held indefinitely, laws were passed calling for a maximum term for NGRI acquittees "equal[ing] the longest term of imprisonment that could have been imposed for the offense *disregarding* any 'good-time' credit applicable to those convicted." *Id.* at 52. The authors note further that this often caused longer sentences for NGRI defendants than if they had been found guilty. *Id.*

104. *Id.* at 53.

insanity plea success was at its lowest after the reforms went into effect.¹⁰⁵ In addition, the study advises that the characteristics of defendants who pled insanity did not change greatly during the study period from 1979 to 1984. "Defendants entering the insanity plea were in their early 30s, male (91%), and diagnosed with a major mental illness (69%). . . . Approximately half (46%) of those raising the insanity defense were nonwhite."¹⁰⁶

The researchers found that the acquittal group was similar in composition to the plea group. Approximately two-thirds of the plea group was involved in violent crimes such as rape or murder and almost three-quarters of those acquitted were charged with violent crimes.¹⁰⁷ Violent crime involvement, therefore, appeared to be an important indicator of success of the plea. Insanity acquittees were confined for longer periods than their counterparts who pled insanity whether they were found guilty for violent or nonviolent offenses. Over 95% of those acquitted were hospitalized and the severity of the crime primarily determined the confinement period.¹⁰⁸

C. *Standards and Burdens of Proof*

During the Hinckley trial in 1982, the government had the burden of proving Hinckley sane "beyond a reasonable doubt." The major criticism of this burden is that it is almost impossible to prove "beyond a reasonable doubt" that anyone is sane.¹⁰⁹ This has been a source of constant concern for scholars; the common law demands the state to prove that the act was committed, and that the defendant possessed the *mens rea*, or legal state of mind. Yet, the prosecution has no burden to prove the defendant's sanity.¹¹⁰ Changing the burden of proof for insanity left the burden of proving the elements of the crime with the state, but shifted the burden of proving insanity to the defendant.

The constitutionality of this burden-switching was affirmed in the United States Supreme Court case of *Leland v. Oregon*.¹¹¹ However, "[s]hifting the burden to the defendant *may* make acquittal much more

105. *Id.*

106. *Id.* at 56. "Nonwhite" includes black, Hispanic, Asian, Native American and "Other Defendants."

107. *Id.*

108. *Id.* at 58. The more serious the crime, such as murder or other violent offenses, the longer the NGRI acquittees stayed in the mental health institution. For example, "[o]ver 50% of NGRI acquittees charged with murder were still hospitalized 6 years (2,196 days) after they were admitted to the hospital." *Id.* As few as 5% of acquittees were not confined or released as outpatients for treatment. *Id.*

109. *Id.* at 64.

110. *Id.*

111. 343 U.S. 790 (1952).

difficult for the defense, as they must now establish insanity by either a preponderance of the evidence or by clear and convincing evidence."¹¹² However, one problem with shifting the burden of proof from the state is the defense's resulting heavier burden of establishing insanity. As will be discussed, many African-American defendants rely upon public defenders who maintain large caseloads and lack the time and funds to pursue an elaborate defense. As a result, an insanity plea may not be an option, even for those who are legitimately mentally ill.¹¹³

During the era of the study, both Georgia and New York changed their burdens of proof. These changes were fundamentally equivalent. "The burden was shifted from the prosecution to the defense and the standard of insanity was lowered from 'beyond reasonable doubt' to 'by a preponderance of the evidence.'"¹¹⁴ During the study period from 1982 to 1987, the numbers of insanity pleas and acquittals fell after the reforms were implemented.¹¹⁵ "For example, [in New York] out of the 21,730 felony indictments in the first 10 months of 1987 . . . only 18 cases (0.08%) . . . involved an insanity defense."¹¹⁶

An interesting change after the reforms in New York was the higher success rate; researchers believe that the reform worked to the extent that those who plead insanity post-reform are those who are most likely to succeed.¹¹⁷ In both New York and Georgia, NGRI acquittal rates were consistently higher for those with major mental illnesses and those who committed violent offenses.¹¹⁸ In Georgia, however, only 5% of insanity acquittals were determined by jury trial.¹¹⁹ The reform did not determine confinement, and the data were difficult to analyze because there were so few subjects in this area.¹²⁰ However, some important changes did take place, as will be discussed in Section III.¹²¹

The demographics of those who pled insanity and who were acquitted did not change during the period of these reforms. In both Georgia as New York, about 60% of those asserting the insanity defense were

112. STEADMAN ET AL., *supra* note 19, at 65.

113. *Id.*; see OWENS, *supra* note 6, at 76.

114. STEADMAN ET AL., *supra* note 19, at 66. Georgia changed its standard in January of 1978 and New York in November of 1984. *Id.* at 63.

115. *Id.* 68-69. According to the study, Georgia's change in its standard reduced the number of insanity pleas, yet the success rates remained constant. *Id.*

116. *Id.* at 76.

117. *Id.* at 77.

118. *Id.* at 83.

119. *Id.* at 81.

120. *Id.* at 82-83.

121. For example, one important change that surfaced was the number of acquittees diagnosed with a major mental illness. After the law changed, almost 90% of acquittees had some type of major mental illness compared to 60% prior to the reform. *Id.* at 70.

nonwhite, and this figure had steadily increased over time.¹²² The study finds that "most cases in which the defendant pleaded insanity were resolved by plea bargains (60%) both before and after the burden and standard reform."¹²³ This aspect of the insanity defense process is extremely significant, and raises an important question: Were the successful black defendants tried by a judge or a jury, or did they plea-bargain? There is no indication of this in the data.

D. *Guilty But Mentally Ill*

In contrast to the laws in New York, Georgia implemented the "guilty but mentally ill" ("GBMI") verdict in 1982.¹²⁴ "Defendants found GBMI are sentenced *as if* they had been found guilty, and mental health treatment is provided within available resources of the Department of Corrections."¹²⁵ Thus, "those who were found GBMI received longer sentences and had longer confinements than 'sane' defendants found guilty of similar charges."¹²⁶ Those who support GBMI reforms claim that it will lessen the number of insanity acquittals and increase the number incarcerated, yet there has been little impact on the insanity defense itself with the GBMI verdict.¹²⁷

Georgia adopted the GBMI verdict in 1983 after the U.S. District Court case of *Benham v. Edwards*,¹²⁸ in which the court found Georgia's procedures of committing all defendants acquitted NGRI and its strict release policies unconstitutional.¹²⁹ At the same time, Georgia adopted the GBMI verdict.¹³⁰ Following the adoption of this verdict, a slight increase in pleas occurred during 1984, although it eventually decreased. The study found that frequently an insanity plea would be raised, then it would be bargained down to a GBMI plea; 75% of the GBMI's who had pleaded insanity were disposed of by a plea bargain, with 19% adjudicated by a judge and 6% by a jury.¹³¹ The GBMI verdict did not appear to affect the decline in plea rates, yet the data clearly show that the

122. *Id.* at 71, 80.

123. *Id.* at 71.

124. *Id.* at 102.

125. *Id.* at 102.

126. *Id.* at 8. In contrast, "over the last two decades there has been a more rapid release of NGRI cases from hospitals in many states." *Id.* at 4.

127. *Id.* at 103.

128. 501 F. Supp. 1050 (N.D. Ga. 1980), *aff'd in part, vacated in part*, 678 F.2d 511 (5th Cir. 1982), *cert. granted and vacated sub nom.* Ledbetter v. Benham, 463 U.S. 1222 (1983) (for reconsideration in light of *Jones v. United States*, 463 U.S. 354 (1983)), *aff'd*, 785 F.2d 1480 (11th Cir. 1986).

129. The lower court's decision was ultimately overturned. *Benham v. Ledbetter*, 463 U.S. 1222 (1983).

130. STEADMAN ET AL., *supra* note 19, at 105.

131. *Id.* at 107.

Benham decision and Georgia's adoption of the GBMI verdict reduced the number of defendants acquitted NGRI.¹³²

"Prior to the reform, someone pleading insanity for a violent crime had better than a 1 in 4 chance of being acquitted; after the reform his or her chances dropped to 1 in 7."¹³³ Successful defendants are most likely to fit the following profile: "male, white, and to have committed a [more] violent offense than those found either guilty or NGRI."¹³⁴ One statistic, however, is clear from the study: defendants who were charged with murder and suffered from a major mental illness were more likely to be found GBMI (1 out of 4), than NGRI (1 out of 15).¹³⁵

In many states, the GBMI verdict is a compromise piece of legislation, often used to assuage society, including members of the jury, who may feel that crime should not go unpunished, whatever the source.¹³⁶ The GBMI verdict is also an apt vehicle for discrimination, as there is a sense of morality obtainable for the jury. Even if a defendant is found to have a mental incapacity, he can be detained for his entire sentence. The public may be more receptive to this verdict because there is an adjudication of guilt and a foreseeable punishment. At the same time, the defendant is sentenced to a mental health facility for treatment before being sent to prison. These convicted parties will not be subject to release on the same terms as a NGRI acquittee. Under this morality test defendants are subject to the covert biases and prejudices of the individual jurors who will decide their fate. Often, if there is a manner in which to keep defendants in prison, rather than allow them to go free on the streets, this will be a major consideration for the jury.

E. *Abolishing the Insanity Defense and Reconciling the Results*

Some of the results from the above data may be misleading. For example, Montana had only four insanity pleas during the study years and, since 1979, abolished its insanity defense.¹³⁷ "[T]he Act to Abolish the Defense of Mental Disease or Defect in Criminal Actions and to Provide an Alternative Sentencing Procedure . . . provided that 'sanity' could only be considered at sentencing."¹³⁸ Thus, in effect, by abolish-

132. *Id.* at 111.

133. *Id.*

134. *Id.* at 114.

135. *Id.*

136. HALLECK, *supra* note 85, at 76. In this manner also, the prosecution receives the conviction and the jury can have its proverbial cake and eat it too by making sure that the defendant is properly punished, but not too harshly because of the underlying mental defect.

137. Callahan et al., *supra* note 15, at 332.

138. STEADMAN ET AL., *supra* note 19, at 121.

ing the defense, the legislature has only permitted considerations of a defendant's sanity in relation to the intent, or *mens rea*, of the crime.

What was most interesting about the results in the Montana study is that the abolition of the defense did not stop its use by defendants. Still, the number of insanity pleas and acquittals did lessen as a result of the reform.¹³⁹ One change that was not accounted for as a result of the reform was an increase in the number of women and minority (Native American) users of the defense; yet after the reform took place, the acquittals sharply decreased.¹⁴⁰ According to the authors, some of the changes in the number of NGRI pleas may have been caused by a determination of incompetency to stand trial (IST).¹⁴¹ "People who, prior to the reform, would have gone to the hospital for an IST and/or NGRI evaluation and who then would have been returned to the court to stand trial were now being civilly committed to the hospital after being found IST with the charges dismissed."¹⁴²

As states reform their laws, percentages of NGRI pleas change for both black and white defendants. There are, however, factors to be considered that do not appear to be racially motivated. For instance, Washington has a higher percentage of NGRI to guilty verdicts than any other state.¹⁴³ Yet, there are obvious differences between the treatment of the races, as evidenced by the above data and cultural studies, concerning treatment in both the mental health and criminal justice systems. Insanity pleas, acquittals, and prior contact with the mental health system show a pattern of favoring white defendants. Some of the overt manifestations of the disparity between the races may be attributable to case law and legislation, which, although facially neutral, may have as strong an underlying discriminatory effect as any of the discouraged overt acts of racism.¹⁴⁴ Empirical evidence, such as that presented

139. *Id.* at 125.

140. *Id.* at 127-28.

141. GRISIO, *supra* note 86, at 3. Incompetency to stand trial derives from the common law notion that some defendants with mental inadequacies could not properly defend themselves at trial. The incompetency to stand trial (IST) standard is based upon the Supreme Court case of *Dusky v. United States*, 362 U.S. 402 (1960), where it was decided that the defendant's competency hinged upon "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "whether he has a rational as well as factual understanding of the proceedings against him." *Id.* at 402.

Incompetency is usually addressed before the criminal trial and it is accompanied by the diagnosis of a professional forensic examiner. These determinations are presented at an evidentiary hearing to the judge who makes the requisite finding. If the judge decides that the defendant is incompetent to stand trial he will undergo treatment to restore his competency so that he may be brought to trial.

142. STEADMAN ET AL., *supra* note 19, at 129.

143. See table *supra* note 96 with respect to Washington's acquittal data.

144. See Charles R. Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324-25, 381-83 (1987).

above, may be one of the only methods to prove an overall discriminatory effect on a group of people when courts and legislatures create and interpret facially neutral policies or statutes concerning the determination of whether a defendant is to be acquitted NGRI.¹⁴⁵

F. *Should the Results Be Any Different?*

As evidenced by the Callahan study, some of the states have a lower percentage of NGRI for whites than for African-Americans. This leads to questions concerning the systems of justice in those respective states. If the percentages of white insanity acquittees are lower than those for black acquittees, this may mean that there is a changing, more racially equal effect in the laws or in the administration of justice. Alternatively, it may mean that therapists are more willing to diagnose African-American defendants as mentally disordered. These are difficult issues which delve into topics which most studies do not discuss. What, then, shows racism in the insanity defense?

This question cannot easily be answered. The data in this study resulted in four states with lower percentages of African-American acquittees, and four states with higher percentages of African-American acquittees.¹⁴⁶ The researchers found that, in California and New York, even the reforms in state laws changed neither the composition of the defendant pools nor the success of the insanity defense itself.¹⁴⁷ A pattern of results indicates that black defendants are less successful than the white defendants. Does this point to racism?

It appears that, even with statistically significant evidence, it is very difficult to "prove" racism definitively. As Charles Lawrence advises:

Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. . . . At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions.¹⁴⁸

Authors and studies quoted in this section suggest that racism exists in various aspects of diagnosis and treatment in mental health facilities.

145. *Id.* at 385-86.

146. See table *supra* note 96 demonstrating the relative percentages of successful NGRI acquittees.

147. See *supra* sections C & D.

148. See Lawrence, *supra* note 144, at 3-4.

Some of these aspects will be further discussed in Section III. Yet, the paradox continues.

It is easier to claim racism or racist intent than it will ever be to prove it. As Lawrence suggests, however, because racism is so ingrained and so subconscious, empirical evidence and studies, such as those above, will be the most straightforward indicator of racism. However, empirical evidence should not be the stopping point. Racism is so pervasive that it should be examined from a sociological perspective, accounting for aspects of behavior of diagnosticians and the justice system itself that cannot be accounted for with raw data comparisons.

It is difficult to define which results would be more fair to African-American defendants. Even if black defendants are found NGRI and are transferred to a mental health facility, in many instances their treatment may not be any better, and may last longer than if they were incarcerated in the first instance.¹⁴⁹ However, African-American prisoners are often not given the mental health services which they need in prisons.¹⁵⁰ The result is a cycle of inhospitable treatment, regardless of which path is taken. Change in the case law is one area that has added to the difficulty of proving insanity for African-American defendants, and that may greatly influence a defendant's decision to plead insanity.

III. WHAT DOES CASE LAW DEMONSTRATE?

Even if statistics offer a reliable manner to indicate whether there are discriminatory effects in the insanity defense, the legal system may not be able to redress racism in the insanity defense. This section will examine the mechanisms for seeking a remedy for race discrimination in the insanity defense process. Before evaluating legal claims raised by race discrimination in the insanity defense, the nature of the insanity defense will be examined.

A. *The Insanity Defense Doctrines*

The insanity defense doctrine reflects the proposition that one who lacks the requisite mental capacity to conform to society's legal requirements should not be held responsible for criminal acts.¹⁵¹ The legal concept of insanity is not the equivalent of mental illness, but actually denotes a moral judgment about the defendant.¹⁵² "[T]he court and the mental health professional are faced with much the same kind of task in insanity cases as in questions of other legal competencies: that is, assess-

149. See generally Stefan, *supra* note 50.

150. See *infra* section III.

151. GRISSE, *supra* note 86, at 4.

152. *Id.* at 156.

ment and consideration of the person's psychological capacities."¹⁵³ The diagnosis often determines the success of the insanity plea.

Although the burden of proof in an insanity defense case varies by state, the United States Supreme Court determined that the burden of proof can be placed upon the defendant regardless of the standard's stringency.¹⁵⁴ However, judges often instruct the jury that although the defendant must plead the insanity defense, the prosecution must still prove beyond a reasonable doubt every element of the crime, including intent and deliberation.¹⁵⁵ These strict standards are upheld during judicial proceedings and subjected to the legal standards governing the insanity defense itself.

In his book *Evaluating Competencies*,¹⁵⁶ Thomas J. Grisso discusses the various standards of legal competency for the insanity defense and its applications as proposed by the American Law Institute (ALI) and the American Bar Association (ABA).¹⁵⁷ In 1962, the ALI adopted the following standard in its Model Penal Code, section 4.01, which a majority of states have subsequently accepted: "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."¹⁵⁸ The ALI standard does not refer to the act as a result of the disease or mental incapacity; rather, "it requires that 'but for the disease' the *incapacities* would not have been in effect at the time of the defendant's behavior."¹⁵⁹

In 1984, the ABA unsuccessfully proposed the eradication of the volitional component of the ALI standard. Grisso agrees that mental health experts cannot properly testify about defendants' volitional capacities because such testimony would be on moral assumptions, not scien-

153. *Id.*

154. See *Rivera v. Delaware*, 429 U.S. 877 (1976) (holding constitutional Delaware statute requiring criminal defendant raising the insanity defense to prove mental illness by a preponderance of the evidence); *Leland v. Oregon*, 343 U.S. 790 (1952) (Oregon statute requiring a defendant on an insanity plea to establish his defense "beyond a reasonable doubt" was constitutional even though it was a stricter standard than that required by most state and federal courts).

155. *Leland*, 343 U.S. at 794.

156. Grisso, *supra* note 86, at 156.

157. There is a difference, however, between the concepts of insanity and incompetence. See, e.g., Grisso, *supra* note 86, at 159-72. Insanity is not the equivalent of mental illness, but is a legal construct used to make ethical judgments about the defendant who is mentally ill. Incompetence is a judgment about the status of an individual, whether that individual is or can become a danger to him or herself or to society.

158. *Id.* at 159.

159. *Id.* at 160.

tific principles.¹⁶⁰ The ABA's proposed standard narrows the psychologist's testimony to purely observable behaviors measured by diagnostic tests based upon a normative scale of behavior, that, as discussed earlier, disfavors African-Americans. This paradox surfaces from the requirement of a "behavioral standard" conforming to white behavior. If therapists are biased and less culturally sensitive, imposing a standard will not help to meet the goals of the culturally sensitive therapist. However, eradication of a standard would make the administration of justice more difficult. What is the proper standard? There is no easy answer.

According to Martin and Grubb:

There exists the danger of a White therapist dismissing evidence of psychological disturbance as merely reflecting the subculture of the Black patient. . . . [S]ymptoms and behaviors such as hallucinating, extreme grandiosity, or even ingestion of sharp objects by Black children have been seen as culturally appropriate or manipulative by misguided or racially biased therapists.¹⁶¹

Empirical evidence also suggests that the cultural heritage of the therapist influences diagnosis, and diagnoses from therapists of similar cultural backgrounds may vary greatly.¹⁶² The therapist's moral assumptions are cloaked in bias. Although this is outwardly unacceptable, the bias inherent in our racist society cannot be eliminated.¹⁶³ Section IV, however, discusses some possibilities for effectuating more racially-balanced treatment.

B. *Constitutional Claims*

A great deal of litigation has involved racism under the facially neutral guise of the criminal justice system, but none specifically regarding race in the strictures of the insanity defense outside of Sixth Amendment claims of improper assistance of counsel. Examining racism litigation in the areas of the death penalty, and habitual offender statutes in particular, will expose a useful method of analyzing issues of racism in the insanity defense.

The United States Supreme Court made clear, in *Furman v. Georgia*,¹⁶⁴ that black defendants received the death penalty more often than whites, and declared unconstitutional all death penalty statutes existing at the time. Since that time, "[n]otwithstanding the implementation of

160. *Id.* at 161.

161. Martin & Grubb, *supra* note 9, at 262.

162. *Id.* at 261.

163. Lawrence, *supra* note 144, at 388.

164. 408 U.S. 238 (1972).

procedural safeguards in the past two decades to eliminate discrimination in death penalty sentencing, it vehemently continues to exist today.”¹⁶⁵ It persists in subtle forms of discrimination because “the judiciary and the prosecution generally do not make overt racist attempts (in death penalty sentencing).”¹⁶⁶ Consequently, covert racism results.

McCleskey v. Kemp,¹⁶⁷ decided in 1987, was the Supreme Court’s answer to a claim of racism in the capital punishment context. McCleskey, a black man convicted of killing a white victim, appealed a death sentence under the Eighth and Fourteenth Amendments, and attempted to use statistical evidence (the Baldus study) to show the racially discriminatory application of Georgia’s death penalty.¹⁶⁸ The Court determined that McCleskey’s attempt to use the study was not proper evidence of an Equal Protection Clause violation under the Fourteenth Amendment,¹⁶⁹ or of a violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment.¹⁷⁰ According to the Court, the Baldus study would, at most, indicate a discrepancy that appeared to correlate with race,¹⁷¹ since it did not demonstrate that Georgia’s capital punishment laws violated due process.

The Court determined that the Baldus study failed to prove that Georgia violated the Equal Protection Clause in passing and allowing a capital punishment statute to stay in effect in the face of discriminatory application.¹⁷² To show bias, McCleskey had to “prove that the decisionmakers in his case acted with discriminatory purpose.”¹⁷³ To support this claim, McCleskey had to demonstrate that the legislature enacted the capital punishment statute or continued its application for an anticipated discriminatory result.¹⁷⁴

The Court also held that the Baldus study failed to show that Georgia’s capital punishment system violated the Eighth Amendment’s prohibition against cruel and unusual punishment.¹⁷⁵ Because states had a great deal of discretion in the realm of capital punishment, McCleskey

165. Stan R. Gregory, *Capital Punishment and Equal Protection: Constitutional Problems, Race and the Death Penalty*, 5 ST. THOMAS U. L. REV. 257, 258 (1992).

166. *Id.* at 262.

167. 481 U.S. 279 (1987).

168. Specifically, the study was based on the results of over 2,000 murder cases in Georgia in the 1970s. The study examined the effects of the race of the victim and of the defendant and concluded that black defendants who killed white victims were most likely to receive the death penalty.

169. *McCleskey*, 481 U.S. at 291-92.

170. *Id.* at 308-09.

171. *Id.* at 312.

172. *Id.* at 298.

173. *Id.* at 292.

174. *Id.* at 298.

175. *Id.* at 308-09.

would have to have shown that the Georgia system "operates in an arbitrary and capricious manner."¹⁷⁶ The Court found that there was no indiscriminate sentencing decision in this case by the jury.¹⁷⁷

A great concern for the Court was its belief that McCleskey's claim would undermine the criminal justice system's foundational principles if the alleged inherent discrimination in the sentencing system could be shown by statistical evidence.¹⁷⁸ Ironically, the Court has permitted statistical evidence to show discrimination in "certain limited contexts,"¹⁷⁹ such as Title VII cases under the Civil Rights Act of 1964 and in jury selection cases under the justification of express statutory assent. Yet, it was not permitted in capital punishment cases.¹⁸⁰

C. *The Intent Requirement*

Another instance of discriminatory treatment in the context of the criminal justice system is the application of the habitual offender statutes.¹⁸¹ Data gathered by the Palm Beach County Office of the Public Defender¹⁸² supports the racially discriminatory impact concerning the application of the Florida Habitual Offender statutes.¹⁸³

176. *Id.* at 306.

177. *Id.* at 306-07.

178. *Id.* at 314.

179. *Id.* at 293.

180. *Id.* at 293-94.

181. Florida Statutes § 775.084(1)(a) defines habitual felony offender as:

a defendant for whom the court may impose an extended term of imprisonment if it finds that:

(1) The defendant has previously been convicted of any combination of two or more felonies in this state or other qualified offenses;

(2) The felony for which the defendant is to be sentenced was committed within 5 years of the date of the conviction of the last prior felony or other qualified offense of which he was convicted, or within 5 years of the defendant's release, on parole or otherwise, from a prison sentence or other commitment imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later;

(3) The felony for which the defendant is to be sentenced, and one of the two prior felony convictions, is not a violation of s.893.13 relating to the purchase or the possession of a controlled substance;

(4) The defendant has not received a pardon for any felony or other qualified offense that is necessary for the operation of this section; and

(5) A conviction of a felony or other qualified offense necessary to the operation of this section has not been set aside in any postconviction proceeding.

FLA. STAT. § 775.084(1)(a).

182. The Palm Beach County Public Defender's Office lies in Florida's Fifteenth Judicial Circuit.

183. Amicus Brief of the American Civil Liberties Union at 2, *Florida v. Robinson* (No. 91-10456 CF A 02 "V") (on file with the author).

[T]he average racial composition of all felony divisions at the time the Habitual Offender Court was created was: 42% white, 55% black, and 3% hispanic. From May 14, 1991 to August 30, 1991, the defendants assigned to the Habitual Offender

Based upon this data, case law precedent and various empirical studies, the American Civil Liberties Union (ACLU) filed an amicus brief in the Florida Circuit Court case of *State v. Robinson*,¹⁸⁴ seeking to have the Florida Habitual Offender Court declared unconstitutional.¹⁸⁵ The ACLU claimed that “[t]he administrative order creating the Habitual Felony Offender Division violates the Equal Protection Clause of the Florida Constitution because it has a discriminatory effect on black defendants.”¹⁸⁶

The difficulty in demonstrating actual incidents of discrimination is that “[a]bsent exceedingly rare instances of racist remarks by prosecutors or of formal policies that visibly target minorities for harsher treatment, virtually the only method of documenting actual racial discrimination is through empirical studies that statistically demonstrate the disparate treatment of minority defendants.”¹⁸⁷ The ACLU argues that assignments to the Habitual Offender Division are racially motivated and should be subject to strict guidelines and procedures for transfer rather than a vague “good faith” requirement.¹⁸⁸

According to the ACLU, all that is required from the prosecuting attorney in deciding whether to transfer a case to the Habitual Offender Division of the Circuit Court is a “good faith belief” that the defendant meets the criteria of Administrative Order 3.208-5/91.¹⁸⁹ The habitual offender penalties are much more severe than normal prosecution,¹⁹⁰ and under this “good faith” standard a defendant has no hard and fast rule to

Court were 25.8% white, 71.6% black, and 2.6% hispanic. These numbers show that blacks were overrepresented in Habitual Offender Court and that the overrepresentation is increasing. Between May 14, 1991 and November 21, 1991, the racial disparity increased. In that time frame defendants in the Habitual Offender court were 18.5% white, 77.9% black, and 3.6% hispanic.

Id.

184. This case was filed in the Fifteenth Judicial Circuit in Palm Beach County, Florida, Criminal Division, Case Number 91-10456 CF A 02 “V”.

185. Amicus Brief, *supra* note 183, at 11-14.

186. *Id.* at 3.

187. *Id.* at 9.

188. *See id.* at 5, 11-13.

189. *Id.* at 5.

190. FLA. STAT. § 775.084(4)(a) provides that if a defendant becomes a habitual offender by committing a specified number of offenses:

The court, in conformity with the procedure established in subsection (3) [the court must determine in a separate proceeding if the defendant is a habitual felony offender], shall sentence the habitual felony offender as follows:

1. In the case of a felony of the first degree, for life.
2. In the case of a felony of the second degree, for a term of years not exceeding 30.
3. In the case of a felony of the third degree, for a term of years not exceeding 10.

FLA. STAT. § 775.084(4)(a).

rely on to determine whether his case will be transferred. However, as the ACLU argues, a presumption of a violation by overassignment of African-Americans to the Habitual Offender Division¹⁹¹ would then shift the burden of proof to the prosecution, thereby leaving the prosecution the daunting task of refuting the presumption of racism.¹⁹²

As discussed in the above examples, the court requires the defendant to show an "intent to discriminate."¹⁹³ Proving the intent to discriminate against a defendant is an almost impossible burden for the defendant to shoulder, because the only conceivable manner to prove this intent is through overtly discriminatory remarks by the prosecution, judge or legislature.¹⁹⁴ Granted, to try a defendant as a habitual offender does not require expert testimony by a mental health professional. The insanity defendant, however, has to fight two layers of discrimination—that of the mental health professional, and that of the court system.

Although racial discrimination in the insanity defense has not been litigated, the insanity defense would surely fit into this "overwhelming burden of proof" category, because it too rests upon the unbiased decisionmaking of the court system. An additional layer to the burden of proving discrimination against a particular insanity defendant on behalf of the decisionmakers surfaces in the guise of the "neutral expert" who must testify to the mental condition of the defendant. The question is: Can there be a truly neutral expert? "[M]ental health experts have been criticized for offering testimony that may be intentionally or unintentionally biased. Biased testimony can be defined as issuing opinions, recommendations, or conclusions that are colored or distorted as a result of personal, theoretical, or overtly extraneous situational or individual factors."¹⁹⁵

Michael Perlin, in his article *Pretexts and Mental Disability Law: The Case of Competency*,¹⁹⁶ explores and suggests some of the ines-

191. Amicus Brief, *supra* note 183, at 13. This presumption would arise by way of a demonstration of statistical evidence showing that blacks rather than whites were more often assigned to the Habitual Offender Division. *Id.* at 11-12.

192. *Id.* at 13-14.

193. See *McCleskey v. Kemp*, 481 U.S. 279, 292-93 (1987); see also *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983) (holding that minority members of city's police force had to show intentional discrimination in challenging employment policies); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.* 429 U.S. 252 (1977) (finding that evidence did not support discriminatory intent, even where racial motives were present); *Washington v. Davis*, 426 U.S. 229 (1976) (failing to find discrimination against African-American candidates for police force, although results of civil service test, used as an indication of success on the force, showed that African-Americans failed at a rate of four times greater than for whites).

194. See Lawrence, *supra* note 144, at 317.

195. Jean C. Beckham et al., *Decision Making and Examiner Bias in Forensic Expert Recommendations for Not Guilty by Reason of Insanity*, 13 LAW AND HUM. BEHAV. 79, 80 (1989).

196. Perlin, *supra* note 33.

capable sources of bias in forensic expert testimony. "In a whole range of forensic mental health fact settings, social bias 'infects and hides behind scientific judgments. . . . Other evidence suggests that variables such as race, sex, culture, gender preference, physical attractiveness and economic status significantly affect expert testimony.'"¹⁹⁷ Perlin advises that the social conceptions of the expert, and the therapist's frequent misunderstanding of standards and legal tests by which to diagnose the patient, have important effects upon the conclusions of these experts.¹⁹⁸

According to Perlin, therapists may feel the need to find pathology to show that they have the ability to find it, or that their training may influence what diagnostic skills and tests will be utilized for patient evaluations.¹⁹⁹ "Most importantly, this tableau seemingly has arisen with little or no awareness on the part of the forensic experts themselves."²⁰⁰ These concepts imply significant ramifications when considering that legal decisionmakers, such as judges, often defer to the testimony of those mental health professionals.²⁰¹ "The image that professionals do not impose their own values on their clients and that they have no goals beyond advancing the client's interest is the source of much of their power and a principal reason that professional pronouncements are taken as persuasive."²⁰²

Unfortunately, if it is true that professionals' decisions and diagnoses are based upon normative values, and judges rely upon these decisions, personal bias of the decisionmakers in the courtroom is unescapable. Furthermore, no easy manner to prove these biases exists; nonetheless, it is important to recognize their existence. As Charles Lawrence discusses in his article *The Id, The Ego and Equal Protection: Reckoning with Unconscious Racism*,²⁰³ even though society does not outwardly accept racism, society is inherently racist.²⁰⁴ This juxtaposition of values, thus, causes racist feelings to go underground and manifest in covert racism.²⁰⁵

With respect to case law, "in the absence of proof of an intent to segregate, the Court will simply defer to the judgment of the govern-

197. *Id.* at 641-43.

198. *Id.* at 643.

199. *Id.*

200. *Id.*

201. Stefan, *supra* note 50, at 24.

202. Susan Stefan, *Leaving Civil Rights to the "Experts": From Deference to Abdication Under the Professional Judgment Standard*, 102 YALE L.J. 639, 655 (1992).

203. Lawrence, *supra* note 144, at 317.

204. *Id.*

205. *Id.*

mental decision-maker."²⁰⁶ These kinds of covert racist decisions are exemplified in cases involving discrimination in civil service exams. Two cases decided within six years of each other determined that civil service exams, although demonstrating a racially disparate impact, were not discriminatory because the plaintiff did not prove an intent to discriminate.²⁰⁷

In *Washington v. Davis*,²⁰⁸ two African-American applicants for the Metropolitan Police force in Washington, D.C. alleged that hiring practices were discriminatory. They cited a civil service examination called Test 21, that blacks failed at a proportionately higher rate than whites, claiming that the test was discriminatory in that it violated the Equal Protection Clause of the Fifth Amendment.²⁰⁹ The Court noted, "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."²¹⁰ Purposeful discrimination must be shown to prevail on a discrimination claim. However, the discrimination need not be express. The Court upheld the opinion of the district court in this case, finding that the supplemental efforts of the police department to recruit minorities was sufficient to dispel any question of discrimination and finding that Test 21 was proper because it directly related to preparation for duty.²¹¹

The second case, *Guardians Association v. Civil Service Commission of the City of New York*,²¹² involved both African-American and Hispanic members of the City of New York Police Department who challenged the City's "last-hired, first-fired" policy which provided that those with the lowest civil service test scores would be hired last and fired first. African-Americans and Hispanics tended to have the lowest test scores and were, therefore, subject to the penalties of the department policy, including lower pay and fewer benefits.²¹³ The minority members claimed that their rights under Titles VI and VII of the Civil Rights Act of 1964 had been violated.

The issue as designated by the Court concerned "whether the private plaintiffs in this case need to prove discriminatory intent to estab-

206. William E. Boyd, *Purpose and Effect in the Law of Race Discrimination: A Response to Washington v. Davis*, 57 U. DET. J. URB. L. 707, 708.

207. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983); *Washington v. Davis*, 426 U.S. 229 (1976).

208. 426 U.S. 229 (1976).

209. *Id.* at 232-33.

210. *Id.* at 239.

211. *Id.* at 250.

212. 463 U.S. 582 (1983).

213. *Id.* at 585.

lish a violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000 d . . . and administrative implementing regulations promulgated thereunder.”²¹⁴ First, the Court recognized that Title VI, when viewed through *Davis*, does not prohibit unintentional race discrimination.²¹⁵ The Court then explored case precedent and legislative intent, citing *Lau v. Nichols*²¹⁶ as the authority for the proposition that a discriminatory effect, if demonstrated, may prove a violation of Title VI in a private action, as in this case, and thereby rejected the contention that actual discriminatory intent must be shown.²¹⁷ The remedy that could be granted for a showing of disparate impact under Title VI regulations, however, would not allow the claimants monetary damages for their claims. At most, they would be entitled to a form of injunctive relief.²¹⁸

What is interesting about the opinion is the Court’s acceptance of discriminatory impact in the form of an affirmative defense for a “business necessity.”²¹⁹ It also continues that, if there is not intentional discrimination demonstrated, a defense may be presented that the agency was not aware of this impact.²²⁰ Almost in direct opposition to this defense is the Congressional intent quoted by the Court: “Title VI rests on the principle that taxpayers’ money, which is collected without discrimination, shall be spent without discrimination.”²²¹ Reconciling this with the intent requirement for receipt of monetary damages, the Court concludes that prospective relief will only be granted by allowing the officers input into future exams, leaving their past complaints unreachable in the absence of proof of intentional discrimination.²²²

Over ten years later these suits continue to arise. A complaint filed recently in the Dade County Circuit Court by twenty-nine police officers of different races alleged discrimination via the oral portion of the officer promotion examination.²²³ Although the officers were of mixed races, many complaints came from African-American officers whose videotaped oral examination was extremely unflattering. One officer’s tape was shot so poorly, all that was visible was “her gold eye glasses

214. *Id.* at 584 & n.1 (quoting Title VI, or 42 U.S.C. § 2000d: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

215. *Id.* at 589-90 (discussing *Davis*).

216. 414 U.S. 563 (1974).

217. *Guardians*, 463 U.S. at 587.

218. *Id.* at 597.

219. *Id.* at 598.

220. *Id.*

221. *Id.* at 599.

222. *Id.* at 607.

223. Noreen Marcus, *Officers: Sergeants’ Exam Unfair*, MIAMI DAILY BUS. REV., Mar. 15, 1995, at A1.

and her white teeth.”²²⁴ The attorney for the officers claimed that promotions were so arbitrary that one plaintiff, after completing the oral portion of the examination went from second place after the written exam to 116th place after the oral exam.²²⁵

Unfortunately, it appears that there will never be a clear solution to the claims of discrimination, unless the legal system can confront its own biases in cases of disparate impact. This is because courts have steadfastly adhered to the discriminatory intent test for claims of discriminatory sentencing or discriminatory application of statutes. However, if the defendant could use such studies to create a presumption of discriminatory intent, and the prosecution were given the opportunity to rebut this presumption, the burden of proof would be placed on the proper party, the party in a position to discriminate.

Charles Lawrence advises the proper question to ask when confronting a racially disproportionate effect of legislation or lawmaking is: “Have societal attitudes about race influenced the governmental actor’s decision?”²²⁶ He argues that racism is not a conscious process, but is an ingrained cultural response to those different from us, and that as society rejects racism, racial motives burrow further underground, and cannot be brought to light with speculation about those motives.²²⁷ He emphasizes that it is that much more difficult to determine responsibility when there is more than one decisionmaker.²²⁸ How is it possible to determine which of the parties is responsible for the discriminatory intent? Therefore, a discriminatory intent test does not fit within the cultural regime.

Lawrence proposes a “cultural meaning test” in which the court would evaluate government conduct based upon the historical and social context of decisionmaking.²²⁹ This approach would examine legislative history with the understanding of the times in order to understand the motives of the decisionmakers. Lawrence advises that often social science is consulted in court decisions for general premises, such as school desegregation, because it describes culture, but not for hard, scientific evidence.²³⁰ The cultural meaning test could be used in conjunction with the presentation of empirical data to demonstrate the cultural effects upon the outcome of pleas of NGRI.

As an alternative to claims of discrimination that are often impossible to prove, defendants bring claims of violation of the Sixth Amend-

224. *Id.* at A6.

225. *Id.*

226. Lawrence, *supra* note 144, at 328.

227. *Id.*

228. *Id.* at 319.

229. *Id.* at 357.

230. *Id.* at 360.

ment right to effective representation by counsel.²³¹ As many black defendants are poor, their cases are taken by public defenders who have neither the time nor the concern to pursue a full-scale insanity defense.²³² The deference given to defense counsel and to the court in sentencing is an essential underpinning of the criminal justice system in the United States, and yet it raises a number of issues. "With poor clients, lawyers seek a speedy and uncomplicated disposition of the case. Plea bargaining is the preferred method of closure since it is more expedient than a trial, whether or not there is a question about the person's guilt or innocence."²³³

According to one study:

Information from the State of California suggests that trial cases involving the insanity plea can be complicated and, perhaps, are worth avoiding if possible. In 1986, it took an average of 289 days to process a defendant from arrest to an NGRI disposition The average elapsed time for the various other dispositions ranged from 117 days to 230 days.²³⁴

The insanity plea in these cases may operate to limit the punishment that would normally befall a criminal defendant. This may not be a poor tactical decision, but it may backfire at the end in an adjudication of insanity that would keep the defendant incarcerated for a longer period of time. This rarely occurs, however, because the insanity plea itself is infrequent.

Representation by public defenders demonstrates another important reason for the lack of utilization of the insanity defense by the black defendant: "[T]he extent to which . . . blacks who might have been . . . mentally disordered and were channeled into prison rather than appro-

231. U.S. CONST. amend. VI provides that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

(emphasis added). *Strickland v. Washington*, 466 U.S. 668 (1984), advises that to establish an ineffective assistance of counsel claim, the attorney must have performed deficiently and prejudice must have resulted from that performance. See *Alvord v. Wainwright*, 469 U.S. 956 (1984) (holding that where defendant had been acquitted on a prior insanity defense, defense attorney has responsibility not only to accept the plea decided upon by client, but also to conduct a thorough investigation to determine whether that plea, or a plea of insanity, would be in defendant's best interest); *Clark v. Collins*, 19 F.3d 959 (5th Cir. 1994) (holding that reports by psychiatrist showing no mental defect does not require defense counsel to investigate further and that failure to inquire on voir dire about racial bias does not satisfy both prongs of *Strickland*).

232. OWENS, *supra* note 6, at 78.

233. *Id.* at 25.

234. McGinley & Pasewark, *supra* note 68, at 220.

priate mental health facilities because those institutions were not punitive enough will never be known.”²³⁵ In actuality, black defendants will spend more time incarcerated if they are diverted to mental health facilities. As a result, many attorneys persuade their clients to plea bargain in the criminal justice system, regardless of their mental status.²³⁶ Public defenders, therefore, must balance considerations of limited time and resources against the client’s wish to spend the least amount of time incarcerated. Thus, African-American defendants wishing to assert the insanity defense must convince not only mental health professionals and juries that their violent behavior was the result of a mental imbalance, but in many instances, they must convince their own attorneys.

Often Sixth Amendment claims of ineffective assistance of counsel fail for the same reason that other claims of disparate impact fail, because of the required demonstration of intentional discrimination. The primary question remains: As it is difficult to satisfy the discriminatory intent standard, is there another means of diminishing the racially disparate impact, perhaps through programs designed for this purpose in the criminal justice and mental health systems? This issue is examined in Section IV.

IV. WHAT CHANGES CAN BE MADE?

One important change that could be implemented in the criminal justice system, as previously discussed, is to permit empirical evidence showing disparate impact to create a presumption of discrimination and shift the burden of proof to the prosecution. The courts have summarily rejected this approach, and there appears to be no easy solution to change the intentional discrimination requirement.

Although there is no immediate solution to the biases existing in the criminal justice and mental health systems, some find long-term planning appears to be helpful. Programs may have to take a “trickle-up” approach, that is, begin with the entry levels of both systems and work upward to the judges and administrators. Suggestions for these bottom-up systems have been widespread, and are possibly easier to implement than it would be to change a social structure that has existed for many years under a covert system of discriminatory practices.

This “trickle-up” theory for early intervention has its place in facilities such as prison systems. A study of the New York State prison system,²³⁷ found that significantly more white, as compared to black

235. OWENS, *supra* note 6, at 27-28.

236. *Id.* at 79.

237. Henry Steadman et al., *Estimating Mental Health Needs and Service Utilization Among Prison Inmates*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 297, 297 (1991).

inmates, received mental health services. The purpose of the study was to examine the "prevalence of psychiatric and functional disability and service utilization."²³⁸ The subjects were a randomly selected group of 3,684 inmates from the prison system sampled in May 1986.²³⁹ The study group was 51.7% black and 21.6% white, which, the authors noted, was similar to the actual prison population.²⁴⁰

Comparing the two groups, 11.3% of black inmates had received mental health services within 30 days of the study and 19.4% received services within the past year. White inmates fared better; 20.1% received services within 30 days of the study and 29.0% within the previous year.²⁴¹ Moreover, the prison population had severe mental disabilities. Further, 45-56% of that group did not receive any mental health services and were nonwhite males.²⁴² Although African-Americans comprised a larger percentage of the prison population, they did not have equal access to mental health services. This was recognized as one of the problems of the system.²⁴³ Since the date of the study, New York implemented various programs in an attempt to equalize some of the racial inequities inherent in its system. Many psychologists have also proposed programs to attain these goals.

For instance, Dr. Linda Teplin has some suggestions for changing the first contact many have in the criminal justice system, the confrontation and arrest of the defendant by police officers.²⁴⁴ She advises that police officers often play the part of the "streetcorner psychiatrist."²⁴⁵ This is where the analysis begins, because without the arrest the defendant would not take part in the criminal justice system regardless of his or her mental state. According to Dr. Teplin, an improper arrest of a mentally ill individual stems from one of two sources, either an improper connection between the police and the mental health system or from the mental health system's failures.²⁴⁶ Often, an officer will attempt to bring a person into a mental health facility only to have him or her

238. *Id.* at 297.

239. *Id.* The authors indicate that random analyses allow the determination of the factors actually associated with the receipt of mental health services. They point to "demographic, criminal history, and type of disability" as some of those factors. *Id.* at 298.

240. *Id.* at 299. Hispanics comprised 25% and 1.7% were classified as "other." These percentages echoed closely those of the actual prison population: 50.3% black, 21.8% white, 27.3% Hispanic and 0.6% as other. *Id.*

241. *Id.* at 302.

242. *Id.* at 305.

243. *Id.*

244. Linda A. Teplin, *Policing the Mentally Ill: Styles, Strategies, and Implications*, in *MENTAL ILLNESS IN AMERICA'S PRISONS* 10 (Henry J. Steadman ed., 1990).

245. *Id.*

246. *Id.* at 14.

rejected.²⁴⁷ After exhausting the available alternatives, the officer often is forced to make an arrest to keep the person off the streets one more day until he or she can be brought to court and released.²⁴⁸ The time between arrest and trial seems to be a waiting period for the mentally ill offender, but there is not a great deal of literature covering this waiting period.

Dr. Teplin recommends that police officers should be trained in managing the mentally ill and have support from the mental health system. She also suggests that police officers should be rewarded for proper and prudent management of mentally ill arrestees.²⁴⁹ If this were achieved, those taken into police custody would have a better opportunity to receive the treatment they need, rather than being shuffled through the criminal justice system in a manner that they could not comprehend. Cases such as *Guardians Association*, in effect, defeat these purposes where the court finds that its power does not reach unintentional discriminatory effects.²⁵⁰ If multicultural police officers are kept off the force or not permitted to advance, there will certainly be a dearth of culturally understanding parties to assist those who encounter the criminal justice system, whether they have a mental deficiency or not.

In their article, *Using Intensive Case Management to Reduce Violence by Mentally Ill Persons in the Community*,²⁵¹ Joel Dvoskin and Henry Steadman set forth an important diagnosis of the criminal justice and mental health systems.

Traditional mental health programs are staffed by credentialed

247. *Id.* at 13. Dr. Teplin describes four situations in which this occurs: when the person is not disturbed enough to be accepted by a hospital, but cannot be ignored because of his egregious behaviors; when the hospital is concerned that the person may become a problem for the facility staff or its patients; when the person is too dangerous to be treated; or when the person has multiple problems.

248. The chapter presents a vignette of a large black man named Charlie, taken from a bus while intoxicated, who was ushered to a hospital by police and was refused admittance because the staff feared that he may be a problem for them. At that point the officers requested that the hospital sign a complaint so that Charlie could be arrested for disorderly conduct. The hospital obliged, although Charlie did nothing which would cause his arrest. *Id.* at 14. This is a rather disturbing observation because "[t]he police officer's decision to make an emergency psychiatric apprehension, arrest or manage a mentally ill person by informal means is based less on the degree of psychiatric symptomatology than on the socio-psychological and structural factors pertinent to each situation." *Id.* at 16.

The reason that this is such an uncomfortable observation is that Charlie's "arrest" was based upon the fact that he was a large black man who "looked dangerous," yet his only wrongdoing was intoxication.

249. *Id.* at 26-27.

250. See cases cited *supra* note 193.

251. Joel A. Dvoskin & Henry J. Steadman, *Using Intensive Case Management to Reduce Violence by Mentally Ill Persons in the Community*, 45 HOSP. & COMMUNITY PSYCHIATRY 679, 679 (1994).

mental health professionals who are typically white and middle-class. However, clients who are likely to be arrested do not share this demographic profile and may have opted not to use traditional mental health services because they feel disenfranchised To increase the relevance of case management services to these clients, mental health systems should try to employ case managers who are culturally similar to the clients they serve. [C]ultural similarity may be more important than an advanced degree in one of the mental health professions in preparation to serve high-risk clients.²⁵²

As previously discussed, to present a successful insanity defense, it is important for black defendants to have had prior access to the mental health system.²⁵³ Unfortunately, this has not been the case for the majority of black defendants.

In a 1989 article, Dvoskin and Steadman determined that a population of African-American inmates were significantly underserved in treatment; they therefore began an active recruiting plan for minority clinicians.²⁵⁴ The minority clinician aspect of the program is especially attractive because it allows the client to feel that he is in touch with the person who is handling his case. Examples of black patient/white therapist illustrate that there is a cultural gap that cannot be bridged when the patient feels disenfranchised from a system that is designed to help him.

The Seventh Circuit case of *Wellman v. Faulkner*²⁵⁵ makes an important point that "a language barrier between the inmate and the physician" . . . could interfere with the quality and effectiveness of medical care [and] can readily lead to misdiagnoses and therefore pain and suffering."²⁵⁶ This metaphor can carry over into the mental health system: If the patient and the psychologist do not speak the same cultural language, this may also result in misdiagnoses and similar pain and suffering. With recruitment of minority clinicians, perhaps some of these misunderstandings can be diffused at an earlier stage.

New York State appears to be taking steps toward some of the changes that would "re-enfranchise" African-American defendants in need of mental health care after entering the prison system.²⁵⁷ For instance, the Intermediate Care Programs (ICP) provide mental health services to inmates who do not require the intensive inpatient services and at the same time need more help than outpatient services offer.

252. *Id.* at 683.

253. *See, e.g.,* table *supra* note 84.

254. Joel A. Dvoskin & Henry J. Steadman, *Chronically Mentally Ill Inmates: The Wrong Concept for the Right Services*, 12 INT'L J.L. & PSYCHIATRY 203, 207 (1989).

255. 715 F.2d 269, 272 (7th Cir. 1983).

256. *Id.* at 272.

257. Ward S. Condelli et al., *Intermediate Care Programs for Inmates with Psychiatric Disorders*, 22 BULL. AM. ACAD. PSYCHIATRY & L. 63 (1994).

"This makes it possible to create a therapeutic community in which mentally ill inmates are sheltered from being taunted, exploited, or assaulted by predatory inmates in the general prison population."²⁵⁸ Data collected demonstrated that of the total number of 209 inmates in the program, 115 (55%) were black and 58 (28%) were white.²⁵⁹ This more closely echoes the actual prison population in the state. The study determined that of the "inmates who stayed in [this] program for six or more months, significant reductions were found in very serious rules infraction and suicide attempts, correctional discipline, and three mental health services: crisis care, seclusion, and hospitalization."²⁶⁰ The ICP program allowed inmates to re-enculturate themselves into the general prison population.

A final problem arises when the mentally ill offenders have terminated their sentences and will have the opportunity to return to the community. "The large majority of inmates identified in the jail as mentally ill appear to be discharged with no formal discharge plan or arrangements for community mental health services."²⁶¹ Eliot Hartstone suggests that upon release, it is vital that mentally ill individuals receive the treatment they need. This can be accomplished by combining the jail and community services to provide care for those who need it.²⁶² The importance of these services is their effect on preventing arrests and violent acts from happening repeatedly. To accomplish this the services must be racially responsive. If that goal can be accomplished, even for a small number of offenders, it will make communities safer and alleviate some of the pressures on the prison systems to release their prisoners quickly, although no provisions existed for their care.

V. CONCLUSION

According to Joel Dvoskin, "judgments about groups of people can only lead to stigma and discrimination, while judgments about individuals if based on reason and information, can lead to better treatment outcomes and increased safety for the individuals and their communities."²⁶³ This is the attitude that the criminal justice and mental health systems must adopt to provide due process and fair treatment for all that come before them. Racial discrimination is a very pervasive subject and

258. *Id.* at 64.

259. *Id.* at 66.

260. *Id.* at 69.

261. Eliot Hartstone, *The Mentally Ill and the Local Jail: Policy and Action*, in *MENTAL ILLNESS IN AMERICA'S PRISONS*, *supra* note 244, at 108.

262. *Id.*

263. Joel A. Dvoskin, *What Are the Odds on Predicting Violent Behavior*, 2 J. CAL. ALLIANCE FOR MENTALLY ILL 6 (1990).

often taboo in certain situations; yet, it does exist. Although discrimination cannot be proven outright in every situation, it is extremely important that professionals in both the legal and mental health professions be aware of discrimination, and make their decisions on conscious, reasoned information so as not to fall victim to unconscious racism.²⁶⁴ African-Americans have been found to be overrepresented in involuntary commitment, the death penalty, and discriminatory sentencing and underrepresented in the opportunity to be rehabilitated in the manner which would be most suitable to their treatment and eventual return to society. If the criminal justice and mental health systems would work together to put aside the prejudices that infiltrate their innerworkings, those who require treatment would have the opportunity to become more equal to those who received the treatment they needed.

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264. Lawrence, *supra* note 144, at 317.

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