No. 11-1515

In The Supreme Court of the United States

JOHN JOSEPH DELLING,

Petitioner,

v.

IDAHO,

Respondent.

On Petition For A Writ Of *Certiorari* To The Idaho Supreme Court

BRIEF OF *AMICI CURIAE* 52 CRIMINAL LAW AND MENTAL HEALTH LAW PROFESSORS IN SUPPORT OF PETITIONER

STEPHEN J. MORSE
Ferdinand Wakeman Hubbell Professor of Law
Professor of Psychology and Law in Psychiatry
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
3501 Sansom Street
Philadelphia, PA 19104-6204
(215) 898-2562
smorse@law.upenn.edu

RICHARD J. BONNIE
Counsel of Record
Harrison Foundation Professor of Law and Medicine
Professor of Psychiatry and Neurobehavioral Sciences
UNIVERSITY OF VIRGINIA SCHOOL OF LAW
580 Massie Road
Charlottesville, Virginia 22903-1789
(434) 924-3209
rbonnie@virginia.edu

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the Due Process Clause guarantee that a jurisdiction must provide criminal defendants with an affirmative defense of legal insanity?

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are a group of philosophically and politically diverse law professors in the fields of criminal law and mental health law who have been teaching and writing about the insanity defense and related issues throughout their careers. They include the authors of leading criminal law and mental health law treatises and casebooks and numerous important scholarly books and articles.

Amici believe this case raises important questions about principles of criminal responsibility, the integral role of the insanity defense in Anglo-American law, and the inadequacy of the "*mens rea* alternative" to the traditional affirmative defense. Their teaching and research on the subject have given them a unique appreciation of the historical and doctrinal significance of the defense of legal insanity.

A complete list of *amici* who reviewed and join in this brief is included in the attached Appendix. *Amici* file this brief solely as individuals and not on behalf of any institution with which they are affiliated.

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[1] The parties were given 10-days notice and have consented to the filing of this brief. Their written consents are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

Amici represent neither party in this action, and offer the following views on this matter.

SUMMARY OF ARGUMENT

The affirmative defense of legal insanity has such a strong historical, moral and practical pedigree and is so ubiquitous that providing such a defense is a matter of fundamental fairness in a just society. Jurisdictions have substantial leeway to decide what test best meets their legal and moral policies, but some form of affirmative defense is a prerequisite of justice and its constitutional status under the Due Process clause should be explicitly recognized. It is part of the legal tradition and conscience of the nation.

Legal insanity gives doctrinal expression to fundamental moral and legal principles that have been recognized by the common law and statute for centuries and that this Court has repeatedly acknowledged: State-imposed blame and punishment are not justified unless an offender is at fault. There is no dispute that severe mental disorder can strongly affect an individual's cognitive capacities and that in extreme cases, the cognitive defects are sufficiently grave to negate any inference of fault because such offenders do not understand or appreciate the wrongfulness of their actions. Criminal blame and punishment are fundamentally unfair because such offenders are not responsible for their criminal conduct. Aside

from four states in our country, some form of the insanity defense is universal in United States law, as well as in every other jurisdiction in the common law world.

The primary alternative to the insanity defense, which permits evidence of mental abnormality to be introduced only to negate the *mens rea* for the crime charged, is insufficient to achieve the goal of responding justly to severely mentally disordered offenders. In virtually all cases, mental disorder, including severe mental disorder, does not negate *mens rea*. Instead, the offender's delusional beliefs or those beliefs that arise as a result of hallucinations give the offender the reason to form *mens rea*. Thus, although an offender may act for reasons entirely detached from reality through no fault of his or her own and it would be unfair to blame and punish the offender, the *mens rea* alternative will almost always permit the defendant to be convicted of the most serious crime charged. Delling is a perfect example of this injustice. His delusional belief about the victims caused him to form the intent to kill, but he did not know that what he was doing was wrong. Indeed, because his material reason for action was a delusional belief about the victims, he also did not know what he was doing.

ARGUMENT

I. THE AFFIRMATIVE DEFENSE OF LEGAL INSANITY DOCTRINALLY EXPRESSES FUNDAMENTAL MORAL AND LEGAL PRINCIPLES LONG RECOGNIZED BY THE COMMON LAW, STATUTES AND SUPREME COURT JURISPRUDENCE

This section provides the positive argument in favor of the moral necessity of providing an insanity defense. It then considers the leeway of jurisdictions to establish a test for legal insanity that comports with the justice goals of individual jurisdictions.

A. The Moral Necessity of The Defense of Legal Insanity

Blame and punishment by the state are fundamentally unfair and thus a violation of Due Process if an offender was not responsible for his crime. The affirmative defense of legal insanity applies this fundamental principle by excusing those mentally disordered offenders whose disorder deprived them of rational understanding of their conduct at the time of the crime. Michael Moore, *Law and Psychiatry: Rethinking the Relationship* (1984); Herbert Fingarette & Ann Hasse, *Mental Disabilities and Criminal Responsibility* (1979); Stephen J. Morse, *Mental Disorder and Criminal Law*, 101 J. Crim. L. & Criminology 885, 925 (2011). This principle is simple but profound. Indeed, in recognition of this, the insanity defense has been a feature of ancient law and of English law

since the 14th Century. Thomas Maeder, *Crime and Madness: The Origins and Evolution of the Insanity Defense* (1985); 1 Nigel Walker, Crime and Insanity in England (1968); Brian E. Elkins, *Idaho's repeal of the insanity defense: What are we trying to prove?* 31 Idaho L. Rev. 151, 161 (1994). It was universal in the United States until the last decades of the 20th Century and there is still almost near consensus that the defense must be retained. *Clark v. Arizona*, 548 U.S. 735 (2006).

In both law and morals, the capacity for reason is the primary foundation for responsibility and competence. The precise cognitive deficit a person must exhibit can of course vary from context to context. In the criminal justice system, an offender who lacks the capacity to understand the wrongfulness of his actions as the result of severe mental disorder – a condition that is not the offender's fault – does not deserve full blame and punishment and must be excused in a sufficiently extreme case.[2] Moreover, such offenders

[2] A similar baseline principle explains the many competence doctrines employed in the criminal justice process. This Court has long recognized that at every stage justice demands that some people with severe mental abnormalities must be treated differently from those without substantial mental impairment because some impaired defendants are incapable of reason and understanding in a specific context. Competence to stand trial, *Drope v. Missouri*, 420 U.S. 162 (1975); competence to plead guilty and to waive counsel, *Godinez v. Moran*, 509 U.S. 389 (1993); competence to represent oneself, *Indiana v. Edwards*, 534 U.S. 164 (2008); and competence to be executed, *Ford v. Wainwright*, 477 U.S. 399 (1986); *Panetti v. Quarterman*, 551 U.S. 930 (2007),

(Continued on following page)

cannot be appropriately deterred because the rules of law and morality cannot adequately guide them. Failing to excuse some mentally disordered offenders thus is inconsistent with both retributive and deterrent theories of just punishment.

Legally insane offenders are not excused solely because they suffered from a severe mental disorder at the time of the crime. The mental disorder must also impair their ability to understand or appreciate that what they are doing is wrong or some other functional capacity that a jurisdiction believes is crucial to responsibility. The criminal acts of those found legally insane do not result from bad judgment, insufficient moral sense, bad attitudes, or bad characters, none of which is an excusing condition. Rather, the crimes of legally insane offenders arise from a lack of understanding produced by severe mental abnormality and thus they do not reflect culpable personal qualities and actions. To convict such people offends the basic sense of justice.

The impact of mental disorder on an offender's responsibility and competence is recognized throughout the criminal law. Even the few jurisdictions that have abolished the insanity defense recognize that

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are all examples in which the Constitution required such special treatment. It is simply unfair and offensive to the dignity of criminal justice to treat people without understanding as if their understanding was unimpaired. Evidence of mental disorder is routinely introduced in all these contexts to determine if the defendant must be accorded special treatment.

mental disorder affects criminal responsibility because they permit the introduction of evidence of mental disorder to negate the *mens rea* for the crime charged. *State v. Beam*, 710 P.2d 526, 531 (Idaho 1985); *State v. Searcy*, 798 P.2d 914, 917 (Idaho 1990). As this Court has recognized, state infliction of stigmatization and punishment is a severe infringement, *In re Winship*, 377 U.S. 358, 363-64 (1970). The insanity defense is based on a ubiquitous legal and moral principle and on routinely admissible evidence. Even if a defendant formed the charged *mens rea*, it is simply unfair to completely prevent a defendant from claiming that he was not at fault as a result of lack of understanding arising from a severely disordered mind. That is precisely the issue Delling raises.

Historical practice, the near universal acceptance of the need for an independent affirmative defense of legal insanity, and the fundamental unfairness of blaming and punishing legally insane offenders provide the strongest of reasons to conclude that fundamental fairness and the Due Process clause require an insanity defense. Abolishing this narrowly defined and deeply rooted defense could plausibly be justified only if an alternative legal approach could reach the same just result or if irremediably deep flaws preclude fair and accurate administration of the defense. The next two main sections of this brief argue that there are no such alternatives and that the defense is no more vulnerable to risks of mistake and abuse than any other disputed issue in the penal law.

B. The Test for Legal Insanity

This brief takes no position about what test for legal insanity any jurisdiction should adopt. This is as it should be. As Justice Marshall's plurality opinion in *Powell v. Texas* said,

> We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. *This process of adjustment has always been thought to be the province of the States.* 392 U.S. 514 at 535-536 [emphasis supplied]

Jurisdictions in our federal system have considerable constitutional leeway to decide what types of disorders and their consequent impairments are necessary to warrant a full excuse and what procedures should govern insanity defense cases. This brief's discussion has focused on lack of the capacity to understand the wrongfulness of one's actions because, in one form or another, this deficit best explains the predominant tests adopted by forty-six states and the federal criminal code. But how such lack of understanding should be defined doctrinally and whether more controversial control tests should be adopted at all are

matters within the province of the states and the federal government. Nevertheless, stigmatizing and punishing all severely disordered offenders, even those who were grossly out of touch with reality at the time of the crime, is simply unjust. Such an offender is not a morally responsible agent and not at fault. Only some defense of legal insanity can appropriately respond to this moral truth. The Due Process Clause should prohibit the blame and punishment of an offender who does not understand the wrongfulness of his actions.

II. PERMITTING A DEFENDANT TO INTRODUCE EVIDENCE OF MENTAL DISORDER TO NEGATE THE *MENS REA* FOR THE CRIME CHARGED OR AT SENTENCING ARE NOT ACCEPTABLE ALTERNATIVES TO LEGAL INSANITY BECAUSE THEY WILL NOT ACHIEVE EQUIVALENT JUSTICE

This section first addresses the "*mens rea* alternative" and then considers sentencing.

A. The *Mens Rea* Alternative

The negation of *mens rea* and the affirmative defense of legal insanity are different claims that avoid liability by different means and trigger different outcomes. The former denies the *prima facie* case of the crime charged; the latter is an affirmative defense that avoids liability in those cases in which the *prima facie case* is established. The post-verdict consequences are also different. The former leads to

outright acquittal; the latter results in some form of involuntary civil commitment. The two different claims are not substitutes for one another.

The primary reason that permitting a defendant to introduce evidence of mental disorder to negate *mens rea* cannot replace the affirmative defense of legal insanity to achieve justice is that the *mens rea* alternative is based on a mistaken view of how severe mental disorder affects human behavior. In virtually all cases, mental disorder, even severe disorders marked by psychotic symptoms such as delusions and hallucinations, does *not* negate the required *mens rea* for the crime charged. Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. Crim. L. & Criminology 1, 16 (1984); Morse, *Mental Disorder*, *supra*, at 933. It is difficult to prove a negative, but cases, especially those involving serious crime, in which most or all *mens rea* is negated are rare to the vanishing point. Rather, mental disorder affects a person's reasons for action. A mentally disordered defendant's irrationally distorted beliefs, perceptions or desires typically and paradoxically give him the motivation to form the *mens rea* required by the charged offense. They typically do not interfere with the ability to perform the necessary actions to achieve irrationally motivated aims.

Consider the following, typical examples, beginning with Daniel M'Naghten himself. *M'Naghten's Case*, 8 Eng. Rep. 718 (1843); M'Naghten delusionally believed that the ruling Tory party was persecuting him and intended to kill him. Richard Moran,

Knowing Right From Wrong: The Insanity Defense Of Daniel McNaughtan 10 (2000). As a result, he formed the belief that he needed to assassinate the Prime Minister, Peel, in order to end the threat. He therefore formed the intention to kill Peel. Thus M'Naghten would have been convicted of murder if a defense of legal insanity was not available. Indeed, his case has come to stand for one of the "rules" enunciated by the House of Lords – that a defendant should be acquitted on grounds of insanity if he "was laboring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong" *M'Naghten*, 8 Eng. Rep. at 722. For a more contemporary example, consider the case of Ms. Andrea Yates, the Texas woman who drowned her five children in a bathtub. She delusionally believed that she was corrupting her children and that unless she killed them, they would be tortured in Hell for all eternity. Deborah W. Denno, *Who is Andrea Yates? A Short Story About Insanity*, 10 Duke J. Gend. L. & Pol'y 1 (2003). She therefore formed the intention to kill them. Indeed, she planned the homicides carefully. Ms. Yates was nonetheless acquitted by reason of insanity because she did not know that what she was doing was wrong. Even if she narrowly knew the law of Texas and her neighbors' mores, she thought the homicides were fully justified by the eternal good of the children under the circumstances. If only society knew what she "knew," they would approve of her conduct as justified. For a final example, suppose an offender with aural

hallucinations believes that he is hearing God's voice or delusionally believes that God is communicating with him and that God is commanding him to kill. E.g., *People v. Serravo*, 823 P.2d 828, 830 (Colo. 1992) (en banc). If the offender kills in response to this "command hallucination" or delusion he surely forms the intent to kill to obey the divine decree. Nonetheless, it would be unjust to punish this defendant because he, too, does not know right from wrong given his beliefs for which he is not responsible.

In all three cases one could also claim that the defendant did not know what he or she was doing in a fundamental sense because the most material reason for action, what motivated them to form *mens rea*, was based on a delusion or hallucination that was the irrational product of a disordered mind. Nevertheless, in all three cases the defendant's instrumental rationality, the ability rationally to achieve one's ends, was intact despite their severe disorders. They were able effectively to carry out their disordered plans.

Delling's case is consistent with this most typical pattern of legal insanity claims in which the defendant clearly had the *mens rea* required by the definition of the crime but lacked capacity to understand or appreciate the wrongfulness of his conduct. Delling indisputably suffered from a major mental disorder, paranoid schizophrenia, and as a result, delusionally believed that his victims were stealing his powers and would thereby kill him. Delling therefore believed that he needed to kill the victims to save his own life. His grossly delusional belief was the cause of

his formation of the intent to kill. It is also undisputed that Delling carefully planned his victims' deaths and learned from one failed attempt. Such evidence of his instrumental rationality is consistent with having such delusional beliefs. The trial judge explicitly found that Delling did not know right from wrong under the circumstances. Nonetheless, he was convicted of murder because legal insanity was unavailable as a defense.

Delling was not a morally responsible agent. He was completely out of touch with reality concerning his victims and the actions necessary to save his own life. He does not deserve blame and punishment for his murders. Delling is no more to blame than someone suffering from dementia, for example, who acts on the basis of similarly disordered beliefs. It is true, of course, that Delling poses a genuine threat to social safety as long as he remains deluded, but commitment after an insanity acquittal is more than sufficient to protect public safety, as forty-six states and the federal jurisdiction have recognized in commitment statutes that require acquittees to prove their suitability for release and that establish tightly controlled programs of community supervision when they are released.

To further understand the injustice of the *mens rea* alternative, consider a case in which *mens rea* may plausibly be negated. Suppose a defendant charged with murder claims that he delusionally believed that his obviously human victim of a shooting was in reality a rag doll. If that were true, the defendant did

not intentionally kill a human being. Indeed, in a *mens rea* alternative jurisdiction, he could not be convicted of purposely, knowingly or recklessly killing a human being because his delusional beliefs negated all three mental states. After all, he fully believed that he was shooting at a rag doll, not a human being. The defendant would be convicted of negligent homicide, however, because the standard for negligence is objective reasonableness and the motivating belief was patently unreasonable.

Of course, convicting the severely disordered defendant of a crime based on a negligence standard is fundamentally unjust, as even Mr. Justice Holmes recognized in his rightly famous essays on the common law. Oliver Wendell Holmes, Jr., *The Common Law* 50-51 (Little, Brown & Co. 1945) (1881). The defendant's unreasonable mistake was not an ordinary mistake caused by inattention, carelessness or the like. Defendants are responsible for the latter because we believe that they had the capacity to behave more reasonably by being more careful or attentive. In contrast, the hypothetical defendant's delusional "mistake" was the product of a disordered mind and thus he had no insight and no ability to recognize the gross distortion of reality. He was a victim of his disorder, not someone who deserves blame and punishment as a careless perpetrator of manslaughter. He does not deserve any blame and punishment, and only the defense of legal insanity could achieve this appropriate result. Paradoxically, such a defendant's potential future dangerousness if he remains deluded would be better addressed by an insanity acquittal and

indefinite involuntary commitment than by the comparatively short, determinate sentences for involuntary manslaughter.

Thus, the *mens rea* alternative is not an acceptable replacement or substitute for the insanity defense. Only in the exceedingly rare case in which mental disorder negates all *mens rea* would the equivalent justice of a full acquittal be achieved, albeit for a different reason. But again, this is the rarest of cases. Most legally insane offenders form the *mens rea* required by the definition of the charged offense and only the defense of legal insanity can respond justly to their blameworthiness. Finally, a defendant who negated all *mens rea* would be entitled to outright release and subject only to traditional involuntary civil commitment, which is far less protective of public safety than post-insanity acquittal commitment.

B. Sentencing

Consideration of mental disorder for purposes of assessing both mitigation and aggravation is a staple of both capital and non-capital sentencing, but it is no substitute for the affirmative defense of legal insanity. On moral grounds, it is unfair to blame and punish a defendant who deserves no blame and punishment at all, even if the offender's sentence is reduced. Blaming and punishing in such cases is unjust, full stop. Sentencing judges might also use mental disorder as an aggravating consideration, as occurred in this case, because it might suggest that the defendant is especially dangerous as a result. Thus, sentences of

severely mentally ill offenders might not be reduced or might even be enhanced. Again, injustice would result, and public safety would not be protected as well as an indeterminate post-acquittal commitment would achieve. Third, unless a sentencing judge is required by law to consider mental disorder at sentencing, whether the judge does so will be entirely discretionary. Again, this is a potent source of injustice. In short, only a required insanity defense would ensure that arguably blameless mentally disordered offenders have an opportunity to establish that state blame and punishment are not justified.

III. THE OBJECTIONS TO THE INSANITY DEFENSE ARE TOO INSUBSTANTIAL TO PROVIDE SUFFICIENT JUSTIFICATION FOR ABOLITION

A number of objections to the insanity defense have been raised by proponents of abolition, including Idaho, but they are insubstantial and provide not even a rational basis for abolishing a defense with such a profound historical, moral and legal basis. They certainly cannot survive a more searching analysis. In general, these objections relate to supposed difficulties of administering the insanity defense fairly and accurately. Specific objections include: (A) administering the defense requires an assessment of the defendant's past mental state using controversial psychiatric and psychological evidence, a task that is too difficult; (B) acquitting insane defendants endangers public safety; (C) the defense produces "wrong" verdicts; and (D) defendants use it to "beat the rap."

A. Assessing Past Mental State Using Psychological and Psychiatric Evidence

It is often difficult to reconstruct past mental states and, as this Court has acknowledged, psychological and psychiatric evidence can be problematic. *Clark*, 548 U.S. at 740-41; *Kansas v. Crane*, 534 U.S. 407, 413 (2002). Nevertheless, if all jurisdictions, including *mens rea* alternative jurisdictions, concede the necessity of proving *mens rea* (for most crimes) before punishment may justly be imposed, then their argument against the insanity defense based on the difficulty of reconstructing past mental states must fail unless assessing past intent, knowledge, and other types of *mens rea* is easier than assessing whether the defendant was acting under the influence of severely abnormal mental states. After all, both *mens rea* and legal insanity refer to past mental states that must be inferred from the defendant's actions, including utterances. Indeed, the severe disorder that is necessary practically to support an insanity defense is in most cases easier to prove than ordinary *mens rea*. Despite the problems with mental health evidence, all but four jurisdictions believe that assessing legal insanity at the time of the crime with mental health evidence is feasible. Indeed, it is routine. Moreover, the abolitionist jurisdictions permit introduction of such evidence to negate *mens rea*. Unless abolitionist jurisdictions are prepared to argue – and none has – that assessing *mens rea* with mental health evidence is uniquely reliable, the argument based on the deficiencies of mental health evidence

lacks credibility. Finally, mental health evidence is routinely admitted in a vast array of civil and criminal contexts, including all the criminal competencies and sentencing.

B. Public Safety

As previously argued, the insanity defense poses no danger to public safety. Successful insanity defenses are so rare that deterrence will not be undermined because few legally sane defendants will believe that they can avoid conviction by manipulatively and falsely raising the defense. More important, every jurisdiction provides for commitment to a secure mental facility after a defendant has been acquitted by reason of insanity and this Court has approved the constitutionality of indefinite confinement (with periodic review) of such acquittees as long as they remain mentally disordered and dangerous. *Jones v. United States*, 463 U.S. 354 (1983); *Foucha v. Louisiana*, 504 U.S. 71 (1992); Morse, *Mental*, *supra*, at 932. Further, this Court has approved procedures for the commitments that are more onerous for acquittees than standard civil commitment. *Jones*, 463 U.S. 354. It is of course true that acquittees might be released earlier than if they had been convicted and imprisoned, but there is no evidence that released acquittees pose a special danger to the community. Michael K. Spodak, et al., *Criminality of discharged insanity acquittees: Fifteen year experience in Maryland reviewed*, 12 Bull. Am. Acad. Psychiatry L. 373, 382 (1984); Mark R. Wiederanders et al., *Forensic conditional release programs and outcomes in three states*, 20 Int'l J.L. &

Psychiatry 249, 249-257 (1997); Lisa A. Callahan & Eric Silver, *Revocation of Conditional Release: A comparison of individual and program characteristics across four states*. 21 Int'l J.L. & Psychiatry 177 (1998); George F. Parker, *Outcomes of assertive community treatment in an NGRI conditional release program*, 32 J. Am. Acad. Psychiatry & L. 291, 291-303 (2004); Henry J. Steadman et al., *Factors Associated With a Successful Insanity Plea*, 140 Am.J. Psychiatry 401, 402-03 (1983).

C. "Wrong" Verdicts

Another objection is that the insanity defense is especially prone to erroneous verdicts. This objection is unwarranted.

There is no evidence that the factual determinations concerning whether a defendant has a severe mental disorder incapacitating him from understanding the wrongfulness of his conduct are especially prone to error. Expert evidence on these issues is routinely admitted and is subject to the usual rules of cross-examination.

The ultimate value judgments the insanity defense requires, such as the question whether the defendant is incapable of understanding the wrongfulness of his conduct, are no more intractable or unreliable than the many other value judgments that the criminal law asks finders of fact to make, such as whether the defendant grossly deviated from the standard of care to be expected of a reasonable person, or

whether an intentional killer was reasonably provoked. In our American system of justice, it is entirely appropriate to leave to the jury considerable discretion to judge, in light of all the facts and circumstances of the particular case, whether the defendant's mental disorder undermined his criminal responsibility. Drawing the line between guilt and innocence is the task of the finder of fact as the legal and moral representative of the community.

Complaints about "erroneous" insanity acquittals are factually exaggerated because the incidence of such acquittals is low and the complaints are speculative. There is no reason to believe that the insanity defense is particularly prone to error compared to other, equally indeterminate, value-laden criminal law doctrines. The wrong verdict argument does not provide a legitimate policy reason for abolishing the insanity defense.

D. Beating the Rap

Few defendants who are actually legally sane in some objective sense "beat the rap" with the insanity defense. Experts using the proper diagnostic tools can reliably distinguish people who are faking major mental disorder. Michael L. Perlin, *"The Borderline Which Separated You from Me": The Insanity Defense, The Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 Iowa L. Rev. 1375, 1409-16 (1997). Further, it is best estimated that the insanity defense is raised in less than one percent of federal and state trials and is rarely successful. Nat'l Mental

Health Ass'n, *Myths and Realities: A Report of the Nat'l Comm'n on the Insanity Defense* 14-15 (1983); Richard A. Pasewark, *Insanity Pleas: A Review of the Research Literature*, 9 J. Psychiatry & Law 357, 361-66 (1981). The complaint that this defense allows large numbers of guilty criminals to avoid conviction and punishment is simply unfounded. Prosecutors and defense attorneys alike generally recognize that insanity is a defense of last resort that betokens an otherwise weak defense and that rarely succeeds. Insanity acquittals are far too infrequent to communicate the message that the criminal justice system is "soft" or fails to protect society. It is impossible to measure precisely the symbolic value of these acquittals, but it is also hard to believe that they have much impact on social or individual perceptions. So few insanity pleas succeed that neither aspiring criminals nor society assume that conviction and punishment will be averted by raising the defense. And, of course, if the defendant is legally insane and succeeds with the defense, he deserves to be acquitted and has not "beaten the rap" at all. The "tough on crime" justification that underlies this argument is based on a fundamental misconception about the meaning of an insanity acquittal. In cases of a successful insanity defense, the *prima facie* case for guilt has been established and the verdict thus announces that the defendant's conduct was wrong. Nonetheless, the defendant did not deserve blame and punishment and will be confined by commitment.

CONCLUSION

Until the latter part of the Twentieth Century, all American jurisdictions had some version of the insanity defense. Even now, only four states have abolished the defense. The historical practice and present near unanimity among jurisdictions that retain the defense recognize the profound moral truth that some criminal defendants so lack the capacity to understand or appreciate the wrongfulness of their actions at the time of the crime that it would be unfair and unjust to blame and punish them. This truth is so rooted in our moral and legal culture that this Court should recognize its constitutional status. Further, there is no alternative that will achieve equal justice by other means. Finally, the policy reasons that might override the fairness concerns are simply insufficient. We urge the Court to grant the petition for *certiorari*.

Respectfully submitted,

STEPHEN J. MORSE
Ferdinand Wakeman
Hubbell Professor of Law
Professor of Psychology
and Law in Psychiatry
UNIVERSITY OF PENNSYLVANIA
LAW SCHOOL
3501 Sansom Street
Philadelphia, PA 19104-6204
(215) 898-2562
smorse@law.upenn.edu

RICHARD J. BONNIE
Counsel of Record
Harrison Foundation
Professor of Law
and Medicine
Professor of Psychiatry
and Neurobehavioral
Sciences
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
580 Massie Road
Charlottesville, Virginia
22903-1789
(434) 924-3209
rbonnie@virginia.edu

Counsel for Amici Curiae

APPENDIX OF *AMICI CURIAE*

Larry Alexander is the Warren Distinguished Professor at The University of San Diego School of Law. He has written extensively on criminal law.

Robert Batey is Professor of Law at Stetson University College of Law. He teaches and has written extensively about criminal law.

Mitchell N. Berman is the Richard Dale Endowed Chair in Law and Professor of Philosophy, at The University of Texas at Austin. He has written extensively on criminal responsibility.

Guyora Binder is SUNY Distinguished Professor and Vice Dean for Research at the State University of New York at Buffalo Law School. He writes extensively about criminal law.

Richard J. Bonnie is Harrison Foundation Professor of Law and Medicine, Professor of Psychiatry and Neurobehavioral Sciences, Professor of Public Policy, and Director of the Institute of Law, Psychiatry and Public Policy at the University of Virginia. He is co-author of a leading casebook, *Criminal Law*, and, *A Case Study in the Insanity Defense: The Trial of John W. Hinckley, Jr.*

Deborah L. Borman is Clinical Assistant Professor of Communication and Legal Reasoning at Northwestern University School of Law, a Criminal Justice Attorney for pauper defendants facing appeals in the Seventh Circuit Court of Appeals, and a Licensed Social Worker with psychiatric patients in a major

trauma hospital. Professor Borman authored the legal chapter in the latest edition of *Criminal Interrogations and Confessions.*

Michael T. Cahill is Associate Dean for Academic Affairs and Professor of Law at Brooklyn Law School. He is co-author of *Law Without Justice* and the treatise, *Criminal Law*.

Gabriel J. Chin is Professor of Law at the University of California, Davis School of Law. He has taught and written about criminal law since 1995.

Russell D. Covey is an Associate Professor of Law at Georgia State University College of Law. He teaches and writes about criminal law and procedure.

Deborah W. Denno is the Arthur A. McGivney Professor of Law at Fordham University School of Law. She has published numerous books and articles on criminal law and responsibility and punishment.

Anthony M. Dillof is Associate Professor of Law at Wayne State University Law School. He has taught and published in the area of substantive criminal law for ten years.

Joshua Dressler is Frank R. Strong Chair in Law at the Michael E. Moritz College of Law at The Ohio State University. He is the author of dozens of scholarly articles on criminal law, and is the author of *Understanding Criminal Law*, the leading law school text, and West Publishing Company's leading criminal law casebook, used in more than 100 law schools.

Charles Patrick Ewing is Vice Dean for Academic Affairs and SUNY Distinguished Service Professor at SUNY Buffalo Law School and a board certified forensic psychologist. He is the author of numerous books and articles on the intersection between criminal law and mental health.

Claire O. Finkelstein is Algernon Biddle Professor of Law and Professor of Philosophy at the University of Pennsylvania. She has written extensively on criminal law.

Kimberly Kessler Ferzan is Professor of Law at Rutgers University, School of Law – Camden and an Associate Graduate Faculty, Rutgers University, Philosophy Dept. (New Brunswick). She has written extensively on criminal law.

Stanley Z. Fisher is Professor of Law at Boston University. He has been writing and teaching about criminal law for almost five decades.

Stephen P. Garvey is Professor of Law at Cornell Law School. He is co-author of a leading casebook, *Cases and Materials on Criminal Law* (forthcoming 2012) and the author of numerous articles about criminal law and responsibility.

Stuart Green is Distinguished Professor of Law and Nathan Jacobs Scholar at Rutgers Law School – Newark. His work includes several books and numerous articles on the moral theory of criminal law.

Bernard E. Harcourt is the Julius Kreeger Professor of Law, the Chair of the Political Science Department,

and Professor of Political Science at The University of Chicago. He is the author of numerous books and articles about criminal justice and the mental health system.

Erica Hashimoto is Associate Professor of Law at the University of Georgia School of Law. She teaches criminal law and her article, *Defending the Right of Self-Representation*, 85 N.Car.L.Rev. 423 (2007), was cited by the Supreme Court in *Indiana v. Edwards*.

Heidi M. Hurd is David C. Baum Professor of Law, Professor of Philosophy and Co-Director of the Program in Law and Philosophy at the University of Illinois. She has written extensively about criminal law and criminal law theory.

Douglas Husak is Professor of Philosophy and Law at Rutgers University. He has written extensively in criminal law theory.

Sanford H. Kadish is the Morrison Professor of Law Emeritus, School of Law, University of California – Berkeley. He was Editor in Chief of the *Encyclopedia of Crime and Justice* and his books include the leading casebook, *Criminal Law and its Processes* and *Blame and Punishment*.

Leo Katz is the Frank Carano Professor of Law at the University of Pennsylvania. He is the author of numerous books and articles about criminal law and theory, including *Bad Acts and Guilty Minds: Conundrums of the Criminal Law*.

Jeffrey L. Kirchmeier is a Professor of Law at City University of New York School of Law. He teaches and writes in the criminal law area and has written articles on competency and mental state issues.

Alex Kreit is Associate Professor of Law and Director of the Center for Law and Social Justice at Thomas Jefferson School of Law. He teaches criminal law, is an expert on drug law and policy, and is the author of the forthcoming casebook, *Controlled Substances: Crime, Regulation and Policy*.

Christopher Kutz is Professor of Law in the Jurisprudence & Social Policy Program, School of Law, University of California – Berkeley. He writes extensively on criminal law and legal and moral responsibility.

Youngjae Lee is Professor of Law at Fordham University School of Law. He has published extensively on constitutional regulation of punishment, especially in the Eighth Amendment context.

Paul Litton is Associate Professor at the University of Missouri School of Law. He teaches Criminal Law and has expertise in criminal responsibility law and theory.

Paul Marcus is the Haynes Professor of Law at the College of William and Mary and was formerly the law dean at the University of Arizona. His teaching and research interests are in criminal justice, and he is the author of numerous books and articles in the field.

Dan Markel is D'Alemberte Professor of Law at Florida State University. He has written extensively about criminal law and punishment theory.

John Monahan is the John Shannon Distinguished Professor of Law and Professor of Psychology and of Psychiatric Medicine at the University of Virginia. He is a forensic psychologist, the co-author of the casebook, *Social Science in Law*, and the author of numerous books and articles on mental health and criminal law.

Michael S. Moore is Charles R. Walgreen, Jr. University Chair, Co-Director of the Program in Law and Philosophy, Professor of Law in the College of Law, Professor of Philosophy in the College of Liberal Arts and Sciences, and a Professor in the Center for Advanced Studies, all at the University of Illinois. He is the author of numerous books and articles about criminal and mental health law, including, *Law and Psychiatry: Rethinking the Relationship*.

Stephen J. Morse is the Ferdinand Wakeman Hubbell Professor of Law and Professor of Psychology and Law in Psychiatry at the University of Pennsylvania and he is a board certified forensic psychologist. He has written extensively on the insanity defense and on criminal responsibility generally, including most recently, *Mental Disorder and Criminal Law*, 101 J. Crim. L. & Criminology 885 (2011), and, with Judge Morris Hoffman, *The Uneasy Entente Between Legal Insanity and Mens Rea: Beyond Clark v. Arizona*, 97 J. Crim. L. & Criminology 1071 (2007).

Michael S. Pardo is the Henry Upson Sims Professor of Law at the University of Alabama School of Law. He is the author of several academic articles in the areas of law and neuroscience and jurisprudence related to responsibility.

Michael L. Perlin is Professor of Law, and Director of the Mental Disability Law Program and of the International Mental Disability Law Project at New York Law School. He is the author of numerous books and articles about the intersection of criminal justice and mental health, including *The Jurisprudence of the Insanity Defense.*

Paul H. Robinson is the Colin S. Diver Professor of Law at the University of Pennsylvania Law School. He is the author of many books and articles on criminal law, including a leading casebook and text, and he is active in criminal law reform in the United States and worldwide.

Susan D. Rozelle is Professor of Law at Stetson University College of Law. She has written extensively about the insanity defense and about criminal responsibility more generally.

David Rudovsky is Senior Fellow at the University of Pennsylvania Law School. He has written extensively in criminal law and procedure and is an active criminal law practitioner at the trial and appellate level.

Elyn R. Saks is Orrin B. Evans Professor of Law, Psychology, and Psychiatry and the Behavioral Sciences at the University of Southern California Gould

School of Law, Adjunct Professor of Psychiatry at the University of California, San Diego, School of Medicine, and faculty of the New Center for Psychoanalysis. She has written broadly in the area of responsibility and competency.

Robert Schopp is the Robert J. Kutak Professor of Law, Professor of Psychology and Professor of Philosophy at the University of Nebraska. He is the author of numerous books and articles about the intersection of criminal law and mental health, including *Automatism, Insanity, and the Psychology of Criminal Responsibility.*

Stephen J. Schulhofer is the Robert B. McKay Professor of Law at New York University School of Law. He is a co-author of a leading casebook in criminal law and has written numerous articles on constitutional law and criminal responsibility.

Elizabeth S. Scott is the Harold R. Medina Professor of Law at Columbia Law School. Her work focuses on the intersection between developmental science and juvenile crime regulation and she teaches criminal law.

Kenneth W. Simons is Professor of Law and The Honorable Frank R. Kenison Distinguished Scholar in Law at Boston University School of Law. He has written extensively on issues of criminal responsibility, including *mens rea*.

Richard G. Singer is Distinguished Professor at Rutgers University, School of Law – Camden. He has written extensively on Criminal Law.

Christopher Slobogin is Milton Underwood Professor of Law at Vanderbilt University Law School. He is the co-author of the treatise, *Psychological Evaluations for the Courts*, and the textbook, *Law and the Mental Health System*, and the author of over fifty articles on mental health law, including several on the insanity defense.

Carol S. Steiker is the Henry J. Friendly Professor of Law at Harvard Law School. She has been a scholar of criminal justice for twenty years and is a co-author of one of the leading casebooks in criminal law, *Criminal Law and Its Processes*.

John Stinneford is Associate Professor of Law at the University of Florida. His chief area of expertise is the Cruel and Unusual Punishments Clause of the Eighth Amendment, and he is the author of several law review articles on the topic.

Andrew E. Taslitz is Professor of Law at the Washington College of Law, American University. He teaches Criminal Law, Criminal Procedure, and Evidence, and has published over 100 works, including a number on mental state defenses, excuses, and expert psychological evidence, most notably involving clinical judgment.

George C. Thomas III is Board of Governors Professor of Law and Judge Alexander P. Waugh, Sr. Distinguished Scholar at Rutgers School of Law, Newark. He has written extensively about criminal law and procedure, including numerous books and scholarly articles.

Robert Weisberg is the Edwin E. Huddleson, Jr. Professor of Law at Stanford University. He is founder and Co-Director of the Stanford Criminal Justice Center and teaches and writes in the fields of criminal law and criminal procedure.

Gideon Yaffe is Professor of Law and Professor of Philosophy at Yale Law School. He has published a book and several articles on criminal responsibility and is a member of the John D. and Catherine T. MacArthur Foundation Research Network on Law and Neuroscience.