REINVIGORATING FIRST YEAR CRIMINAL LAW LAW: INTEGRATING MENTAL DISABILITY ISSUES INTO THE CRIMINAL LAW COURSE©

by

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INTRODUCTION

Teaching criminal law is one of the great passions of my life. In the twenty years that I have been lucky enough to do this, I have found that integrating mental disability law themes into the course materials and class discussions makes criminal law a much richer class. Including mental disability law issues achieves four important goals. The first goal is to make explicit the tensions inherent in our criminal justice system, which assumes that behavior is "chosen" as it seeks to hold people accountable for their actions, even as an expanding body of scientific evidence demonstrates that much, if not all, human behavior is shaped profoundly by environmental and genetic factors. As a result, normative questions of when a biological/psychological/environmental "explanation" for behavior ought to mitigate or excuse a person's criminal responsibility permeate the entire criminal law course, arising in such diverse arenas as the purposes of punishment, the requirements of mens rea, actus reus, and causation, the substantive law of homicide,

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and affirmative defenses such as self-defense, insanity, and duress. Exposing students directly and explicitly to these questions makes it easier for them to understand the complex moral and policy concerns that underlie every doctrinal question in criminal law. The second goal in teaching about mental disability issues is to increase students' awareness of, and comfort with, the language of neuroscience, psychiatry, and psychology, so that they can better understand and evaluate judicial opinions and other public pronouncements. The third goal is to help students understand the significant connections between mental disability issues and gender discrimination. Last, but not always least, I teach about mental disability in the criminal law course in order to recruit students for my upper level seminar on mental disability law.

Mental disability[1] issues can be discussed on a multitude of occasions in the course on criminal law. My own idiosyncratic approach emphasizes mental disability's

[1] In this article, I will generally use the term "mental disability" to include both mental illness, which encompasses the increasingly broad range of mental disorders recognized by the American Psychiatric Association in its Diagnostic and Statistical Manual (DSM) (DSM IV-TR (2000), and mental retardation. Mental retardation is defined similarly by the American Psychiatric Association (APA) and the American Association for Mental Retardation, as noted in Atkins v. Virginia, 536 U.S. 304, 309 (2002) (holding that the execution of mentally retarded defendants violates the Eighth Amendment). According to the Supreme Court, [t]he American Association of Mental Retardation (AAMR) defines mental retardation as follows:

> *Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992).

Id. at 309 (emphasis in original). The Court quoted the APA's similar definition:

> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological

intersections with the doctrinal aspects of criminal law.[2] These intersections fall into five categories: 1) the justifications for punishment; 2) the definition of crime in general, to wit, the requirements of a voluntary act, mens rea, and causation; 3) the definition of particular crimes, such as murder, manslaughter, rape, and burglary; 4) defenses to crime, including mistake of law and of fact, as well as justification (including self-defense) and excuse (including insanity and duress); and 5) considerations in sentencing, including the death penalty and sex offenses. The examples I use are drawn from a variety of criminal law case books.[3]

I. Bases for Punishment

At the outset of most criminal law courses, students will consider the purposes of punishment: retribution, deterrence, incapacitation, and rehabilitation. This is a good time to ask students to consider the relevance of mental disability in deciding how the purposes of punishment may be achieved, both in general and in particular cases. For

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processes that affect the functioning of the central nervous system.

American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000). 'Mild' mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. *Id*., at 42-43."

Atkins v. Virginia, 536 U.S. at 309. In particular sections of this article, I will focus more specifically either on mental illness or mental retardation.

[2] Another interesting approach, taken by Villanova Law Professor Richard Redding, focuses on exposing students to the practical, procedural aspects of having a criminal client with a mental disability. Richard E. Redding, *Why It is Essential to Teach About Mental Health Issues in Criminal Law (And a Primer on How To Do It),* 14 Wash U. J. Law & Pol. 407 (2004).

[3] These include Kate E. Bloch and Kevin C. McMunigal, CRIMINAL LAW: A CONTEMPORARY APPROACH: CASES, STATUTES, AND PROBLEMS (2005); Richard J. Bonnie, Anne M. Coughlin, John C. Jeffries, Jr., and Peter W. Low, CRIMINAL LAW (2d ed. 2004); Ronald N. Boyce, Donald A. Dripps, and Rollin M. Perkins, CRIMINAL LAW AND PROCEDURE (9th ed. 2004); Joshua Dressler, CASES AND MATERIALS ON CRIMINAL LAW (3d. ed 2003); Martin R. Gardner and Richard G. Singer, CRIMES AND PUNISHMENT: CASES, MATERIALS, AND READINGS IN CRIMINAL LAW (3d. ed. 2001); Sanford H. Kadish and Stephen J. Schulhofer, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS (7th ed. 2001); and John Kaplan, Robert Weisberg, and Guyora Binder, CRIMINAL LAW: CASES AND MATERIALS 275-84 (5th ed. 2004).

example, a discussion of retribution should include materials which permit students to understand that mental illness or mental retardation can render persons less culpable for their behavior, even as their conduct prompts outrage or horror. In discussing deterrence, students should be asked to consider whether a defendant's mental disability makes it more or less likely that he can be specifically deterred from future criminality and whether others will be deterred if he is punished.[4] Although the rehabilitative model has largely been rejected by this country's legislatures, students can be exposed to the idea that rehabilitation, including mental health treatment, may render some people less dangerous and therefore less in need of incapacitation through physical confinement. Discussions of punishment also provide an excellent opportunity to expose students to rudimentary concepts of mental disability, for example, the differences between mental illness (including psychosis, neurosis, mood disorders, and personality disorders) and mental retardation, and to help understand and critique the role of psychiatrists, psychologists, and neuroscientists as expert witnesses in criminal trials.

II. The Requirements of a Crime – Act, Causation, and Mens Rea

A. Actus Reus

Discussing the general requirements of criminal culpability also provides the occasion for discussing mental disability. When we address the essential requirements of a voluntary act, mens rea, and causation, mental disability figures prominently. In the

[4] This is also an appropriate occasion for discussing whether a defendant's substance abuse should affect his culpability. *See also* discussion of Robinson v. California, 370 U.S. 660 (1962) and Powell v. Texas, 392 U.S. 514 (1968), *infra* in text accompanying n's 10-11.

classic case of *People v Newton*,[5] Huey Newton's conviction for manslaughter was reversed for failure to instruct the jury that unconsciousness is a complete defense under California law.[6] In the Kadish and Schulhofer casebook, the *Newton* case is followed by notes on other "involuntary act" cases, including the epileptic driver in *People v. Decina*,[7] and the sleepwalking Mrs. Cogdon, discussed by Norval Morris.[8] These cases can and should be updated by Professor Deborah Denno's recent article on Crime and Consciousness.[9] Denno argues that the classic dichotomy between conscious and unconscious, and voluntary and involuntary acts needs to be revised in light of modern neuroscience research, in order to achieve more consistent, and therefore more just, results for individuals relying on the defenses of insanity or unconsciousness.

The emphasis on volitional behavior in Anglo-American criminal law could also be explored at this juncture by discussing drug and alcohol addiction, and students should be made aware of the large number of criminal defendants who suffer both from mental illness and substance abuse. Using the cases of *Robinson v. California*,[10] *Powell v.*

[5] People v. Newton, 87 Cal. Rptr. 394 (Cal. Ct. App. 1970). In reversing the conviction, the California District Court of Appeal noted that the jury had been instructed on diminished capacity as a mitigating factor, and observed that "[t]he difference between the two states – of diminished capacity and unconsciousness – is one of degree only," as the former provides a "'partial defense'" by negating the relevant mens rea, while the latter "negates capacity to commit any crime at all." *Id.* at 405-06. Thus, the *Newton* case also provides the opportunity to discuss the continuum of mental states and mental state defenses.

[6] At the time, Cal. Pen. Code § 26 provided that, "All persons are capable of committing crimes except those belonging to the following classes: … Five--Persons who committed the act charged without being conscious thereof." This rule continues today in a renumbered Section Four.

[7] 238 N.E.2d 799 (N.Y. 1956).

[8] Norval Morris, *Somnambulistic Homicide: Ghosts, Spiders, and North Koreans*, 5 Res Judicatae 29 (1951).

[9] Deborah Denno, Crime and Consciousness, Science and Involuntary Acts, 87 Minn. L. Rev. 269 (2002).

[10] 370 U.S. 660 (1962).

Texas,[11] and *United States v. Moore*,[12] students can understand the difficulties in neatly conceptualizing behavior as either volitional, and therefore blameworthy, or involuntary, and therefore non-criminal. While drawing these fuzzy lines may be inconvenient at this early point in the semester, when we seek to help students develop some clear organizing principles for criminal law, addressing these cases now has the advantage of putting students on notice that there are few black and white principles in the criminal law. Furthermore, introducing students to the expert testimony of neuroscientists, psychiatrists, and psychologists will make them more attuned to the significant role such experts play in framing and answering questions about criminal responsibility and more alert to the pitfalls of reliance on this expertise. Discussion of cases like *Moore,* in which the defendant sought unsuccessfully to introduce expert testimony that due to his heroin addiction he lacked the substantial capacity to conform his behavior to the laws prohibiting possession of heroin is also a chance to show students how significant expert testimony can be. In addition, cases on addictive or compulsive behavior make clear how difficult, though important, it is to separate clinical and scientific expertise from the legal question that the expert is being asked to address.[13]

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[11] 392 U.S. 514 (1968).

[12] 486 F.2d 1139 (D.C. Cir. 1973) (holding in a five to four decision that heroin addiction was not a defense to possession of heroin).

[13] This issue is raised, *inter alia,* in the insanity defense and self-defense contexts, but it is not too early in the course to consider efforts to reign in the role of experts, such as Congress's enactment of the Insanity Defense Reform Act in response to John Hinckley's acquittal on grounds of insanity. In this Act, Congress amended the federal insanity defense to declare that:

> …It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

B. Causation

The subject of causation in criminal law also provides an excellent opportunity to talk about mental disability issues. Here, one can confront directly the arbitrariness of the criminal law in deciding when subsequent human action cuts off a causal chain set in motion by the defendant, and when it does not. Causation also provides a vehicle for addressing stereotypes about mental disability and gender. A comparison of the cases of *People v. Campbell*,[14] *People v. Kevorkian*,[15] *Persampieri v. Commonwealth*,[16] *State v. Bier*,[17] and *Stephenson v. State*[18] can be very useful.[19] In *Campbell*, the defendant was angry with a man who had previously had sex with his wife, and encouraged him to kill himself, going so far as to provide him with the weapon. The victim obliged, and Campbell was charged with murder. On appeal, the Michigan Court of Appeals quashed the prosecution, because the court found that the victim's independent actions had caused his death. This view was reiterated in *State v. Kevorkian*, in which the Michigan Supreme

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18 U.S.C. §17 (a).

At the same time, Congress amended Rule 704 of the Federal Rules of Evidence to provide that:

> Opinion on Ultimate Issue.
> (a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
> (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

As the Court of Appeals for the Seventh Circuit noted in United States v. West, 962 F.2d 1243 (7th Cir. 1992), Congressional action in the Insanity Defense Reform Act reflects its "skepticism not about the spectacle of competing mental health experts and their conflicting testimony but about their competence to testify about moral questions of criminal responsibility." *Id*. at 1248.

[14] 335 N.W.2d 27 (Mich. App. 1983).

[15] 527 N.W.2d 714 (Mich. 1994).

[16] 175 N.E.2d 387 (Mass. 1961)

[17] 591 P.2d 1115 (Mont. 1979).

[18] 179 N.E. 633 (Ind. 1932).

[19] These cases are discussed in Kaplan, Weisberg, and Binder, *supra* n.3, at 275-84, and the *Stephenson, Campbell,* and *Kevorkian* cases are discussed in Kadish and Schulhofer, *supra* n. 3, at 530-45.

Court held that when the defendant's involvement in causing the victim's death was limited to furnishing the means of causing death, and the victim herself did the final acts necessary to cause death, the defendant should not be charged with murder, but rather with the crime of assisting in a suicide.[20]

In contrast, in *State v. Bier* and *Persampieri v. Commonwealth*, when male defendants gave a female victim a weapon to use to kill themselves, the defendants' actions were seen as setting in motion a chain of causation which the victims' actions did not interrupt. In both cases, the husbands gave their intoxicated wives a gun, and, in *Persampieri,* advice on how to use it. In upholding the husbands' homicides convictions, the courts focused on the risk created by the husbands' conduct in making a firearm available to their wives, without commenting on the victims' apparent decision to kill themselves, implicitly viewing women as choiceless non-actors, due to their gender, as well as intoxication.

This disempowerment of female victims was made explicit in *Stephenson v. State.* In *Stephenson* the defendant, who was the head of the Indiana Ku Klux Klan, was convicted of murder when the victim of his kidnapping and rape swallowed poison in an effort to escape both him and the public shame of having been attacked and degraded by him. In affirming the conviction, the Indiana Supreme Court declared that a failure

[20] 527 N.W.2d at 738-39.

to find causation "would be a travesty on justice."[21] One can view the Court's decision as warranted by the extreme brutality and dangerousness of the defendant and the long period in which either he or one of his associates held the victim captive, thus increasing her fear and reducing her ability to resist. However, as law teachers we should be concerned with the stretch the court made in order to justify affirmance of the conviction, as it was necessary to find the victim absolutely mentally irresponsible in order to conclude that her act of taking poison did not sever the causal chain set in motion by the defendant.

The *Stephenson* case, and to a lesser extent, the cases of *Persampieri* and *Bier*, thus offers a good opportunity for students to observe a court's gendered response to alleged mental incapacity and vulnerability. Stephen Miles and Allison August have discussed the gendered nature of judicial analysis of incompetent individuals' previously expressed preferences about foregoing life-sustaining medical treatment, finding that courts tend to ignore or disparage statements made by competent women about their wish to die if particular circumstances arise, frequently dismissing the women's previous statements as "unreflective and emotional."[22] So too, by commenting on the different judicial approaches to the male and female victims in this group of causation cases, we can explore gender stereotypes about mental illness, intoxication, and

[21] *Id.* at 649.
[22] Stephen Miles & Allison August, *Courts, Gender and "The Right to Die*," 18 Law Med. & Health Care 85, 88 (1990).

voluntary and involuntary human action.[23] Planting the seeds of this discussion now can bear fruit later in the criminal law course, when students address discuss rape and rape shield laws, the battered women's syndrome in the context of self-defense and duress, and the gendered aspects of capital sentencing.

III. MENS REA AND SPECIFIC CRIMES

A. Homicide

Much of criminal law, and particularly the law of homicide, focuses on identifying the mens rea necessary to commit a specific crime, and the policy implications of that choice. Discussions of "the reasonable person" as a way to understand a particular mens rea provide an important lens through which students can consider mental disability issues. A classic method of exploring the dimensions of the reasonable person is by comparing the common law defense of provocation/heat of passion[24] to the more modern Model Penal Code defense of extreme emotional disturbance.[25] The latter defense permits mental illness and other psychological abnormalities not rising to the level of insanity to mitigate murder to manslaughter, when the traditional heat of passion defense would not. At the same time, as the case of

[23] Of course, these cases are factually distinguishable, on the question of whether the defendant was present at the time of death, the extent to which the victim and defendant were intoxicated at the time of the killing, and the question, at least in *Bier,* of whether the defendant had actually wielded the gun himself. 591 P.2d at 1117-18.

[24] For classic statements of this doctrine, *see* Maher v. People, 10 Mich. 212, 81 Am. Dec. 781 (Mich. 1862) and Girouard v. State, 583 A.2d 718 (Ct. App. Md. 1991), both discussed in Kadish and Schulhofer, *supra* n. 3, at 405-10, and Dressler, *supra* n. 3, at 260-64.

[25] Model Penal Code § 210.3 provides that a criminal homicide "which would otherwise be murder" is mitigated to manslaughter when "(b) … [it] is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such

People v. Casassa[26] indicates, even the more generous extreme emotional disturbance defense provided under the Model Penal Code and the New York Penal Code[27] has its limits, because extreme emotional disturbance encompasses both a subjective and an objective component. Thus, the defense requires the jury to find both that the defendant actually, subjectively, was suffering from an extreme emotional disturbance at the time that he killed and that the defendant's emotional suffering can be understood as reasonable when the jury puts itself in the defendant's shoes.[28] According to the New York Court of Appeals in *Cassasa*, this means that the defense of extreme emotional disturbance authorizes "the finder of fact to mitigate the penalty when presented with a

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explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."

[26] People v. Casassa, 404 N.E. 2d 1310 (N.Y. 1980). In this case, the defendant became obsessed with his neighbor, Ms. Lo Consolo, whom he dated briefly. After Ms. Lo Consolo informed defendant "that she was not 'falling in love' with him[,]" the defendant began keeping her apartment under surveillance, and broke into it and lay in her bed. On the night of the murder, defendant brought gifts to the victim's door, and when she declined them, he stabbed her in the throat and then drowned her "to 'make sure she was dead.'" *Id.* at 1312.

[27] N. Y. Penal Code § 125.25 tracks the language of the Model Penal Code closely. In pertinent part, it provides that:

> A person is guilty of murder in the second degree when:
> 1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:
> (a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime….

The primary difference between the New York Penal Code and the Model Penal Code is that the former makes extreme emotional disturbance an affirmative defense.

[28] The defense has been criticized for improperly merging the concept of heat of passion, which is "a concession to human weakness, to a universal condition[,]" with the concept of diminished capacity, which "is an effort to reduce punishment because the defendant is *not* like all humans" due to a "mental disturbance which peculiarly involves the killer." Joshua Dressler, *Criminal Law: Rethinking Heat of Passion: A Defense in Search of a Rationale,* 73 J. Crim. L. & Criminology 421, 459 (1973) (emphasis added).

situation, which, under the circumstances, appears to them to have caused an *understandable* weakness in one of their fellows."[29] Not all mental disability will be seen as mitigating criminal responsibility, but only that which would render a reasonable person, similarly situated, likely to kill.[30]

The question with which the drafters of the Model Penal Code struggled in crafting the defense of extreme emotional disturbance - how far to subjectivize the reasonable person - is a perennial dilemma in the criminal law, which arises in many other contexts. The difficulties in establishing the parameters of the reasonable person for the purposes of criminal negligence are illustrated by the poorly educated Native American parents in the *Williams*[31] case, who were convicted of manslaughter based on child neglect, the adolescent defendant aggrieved by being sodomized and then laughed at in *Camplin*,[32] and the squishy notions of the reasonable person in self-defense, be it battered women or the "reasonable racist"[33] in the *Goetz*[34] case. An explicit discussion of mentally disabled defendants and the questions of how, if possible, to operationalize the

[29] 404 N.E.2d 1310, 1317 (emphasis added).
[30] The court in *Cassasa* held that the trial court had appropriately concluded "that the murder in this case was the result of defendant's malevolence rather than an understandable human response deserving of mercy." I*d.* at 1317.
[31] State v. Williams, 484 P.2d 1167 (Wash. Ct. App. 1971), discussed in Dressler, *supra* n. 3, at 296-303, Gardner and Singer, *supra* n. 3, at 625-28, Kadish and Schulhofer, *supra* n. 3, at 431-438. Kadish and Schulhofer also note the case of State v. Everhart, 231 S.E.2d 604 (N.C. 1977), in which a young mentally retarded women's mental disability was deemed relevant to the question of whether she was culpably negligent in the death of her newborn baby. *Id.* at 438, n. 8.
[32] D.P.P. v. Camplin, [1978] A.C. 705 (2 All E.R. 168), discussed in Dressler, *supra* n. 3, at 269-76.
[33] See Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Beyesians, and Involuntary Negrophobes,* 46 Stanford L. Rev. 781 (1994), cited in Kadish and Schulhofer, *supra* n. 3, at 757-59.
[34] People v. Goetz, 497 N.E. 2d 41 (N.Y. 1986).

reasonable mentally ill or mentally retarded defendant will assist students in understanding the problem of the reasonable person in the criminal law.

B. Rape

The crime of rape permits the discussion of several important mental disability issues. First, the question of whether mental disability can affect consent or related mens rea issues should be examined from the perspective of both a mentally disabled defendant[35] and a mentally disabled victim.[36] The limits on aggressive cross-examination of the prosecutrix, including the desirability and constitutionality of rape shield laws and the extent to which the victim's mental health may be explored by defense counsel, have long been controversial.[37] There is ongoing debate about whether motions to compel the release of the victim's psychotherapy records or even to compel her to submit to a psychiatric evaluation prior to trial are a necessary aspect of the defendant's Sixth Amendment right to confront the witnesses against one[38] or, rather,

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[35] *See* State v. Maggard, 995 P.2d 916 (Kan. App. 2000) (holding in the case of a defendant charged with attempted rape who was mentally retarded and had been "diagnosed with Intermittent Explosive Disorder, an inability to control emotions resulting in especially explosive behavior," *id.* at 918, that the jury should have been instructed on diminished capacity, because his mental illness and mental retardation could have negated the requisite specific intent to commit rape); *but see People v. Castillo*, 238 Cal. Rptr. 207 (Cal. App. 1987) (holding that because, under California law, the affirmative defense of consent to rape requires the defendant to show "both a reasonable and a bona fide belief …[in the victim's consent], the defendant's mental illness and mental retardation were not relevant, since "[m]ental deprivation …has never been considered an attribute of the reasonable man." *Id.* at 211).

[36] *See, e.g.,* Jackson v. State, 890 P.2d 587 (Alaska App. 1995) (holding that there was ample non-expert testimony about a victim's significant mental retardation to support the defendant's conviction of sexual assault based on his "act of sexual penetration 'with a person who the offender knows is …mentally incapable,'" cited in Boyce, Dripps, and Perkins, *supra* n. 3, at 252, n. 6, and *see generally* Wayne R. LaFave, CRIMINAL LAW 872-73 (4th ed. 2003).

[37] *See generally* Wayne R. LaFave, CRIMINAL LAW 882-83 (4th ed. 2003).

[38] *See, e.g.,* Pennsylvania v. Ritchie, 480 U.S. 39 (1987) (holding in the case of a father charged, *inter alia,* with rape and incest, that the defendant's Sixth Amendment right to confrontation and compulsory process were not violated by a failure to disclose his daughter's statements to a state child protective agency); People v. Baranek, 733 N.Y.S. 2d 704 (N.Y. App. Div. 2001) (holding that in a burglary case the

serve as examples of the gender bias of an inequitable criminal justice system, which places the victim on trial and forces her to suffer further humiliation and mental anguish.[39] An open exploration of the connection between gender bias and our socially constructed notions of mental illness will bear fruit throughout the criminal law course.

IV. DEFENSES TO CRIME

A. Mistake Of Law

Mental disability issues often arise in the context of a "cultural defense" case, when a defendant claims that her actions, while not legal in the United States, would be lawful under the law of her home country or culture. In the *Kimura*[40] case, a Japanese-American woman drowned her two children in an "attempt [ ] to commit *oyakoshinju*, or parent-child suicide, after learning of her husband's extramarital affair." 'In traditional Japanese culture, the death ritual was an accepted means for a woman to rid herself of the shame resulting from her husband's infidelity.'"[41] In this case, the defendant sought initially to assert a defense of mistake of law or a cultural defense, but the district attorney found this unacceptable. Instead, the defendant entered a plea bargain in which she agreed to accept psychiatric treatment and one year in jail. Thus, to reach

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defendant's right to confrontation was violated when the scope of his cross-examination of the complaining witness about her psychiatric history was limited); Commonwealth v. Kyle, 533 A.2d 120 (Pa. Super. 1987) (holding that a defendant charged with rape and sexual assault was not entitled to see the victim's post-crime psychological counseling records); and Commonwealth v. Sciuto, 623 F.2d 869 (3rd Cir. 1980) (upholding the trial court's refusal to order a psychiatric examination of the prosecutrix as within the court's discretion).

[39] *See generally* Wayne R. LaFave, supra n. [35], at 882-83, Susan Estrich, *Palm Beach Stories,* 11 Law & Phil. 5, 17-18 (1992), cited in Kadish & Schulhofer, *supra* n. 3, at 385-86.

[40] People v. Kimura, cited by Michelle Oberman, *Criminal Law: Understanding Infanticide in Context: Mothers Who Kill, 1870-1930 and Today,* 92 J. Crim. L. & Criminology 707 (2002).

what was seen as a just result without opening the Pandora's box of cultural defenses, mental disability, perhaps manufactured, was used as mitigation, if not excuse.

B. Mistake of Fact

Defendants' mental disabilities are often relevant in determining whether they have a mistake of fact defense. As noted above, in rape cases, a defendant's mental disability can bear on the question of whether he mistakenly believed the victim was consenting to intercourse.[42] In the context of burglary, a defendant's mental illness has also been deemed relevant to whether he was acting under a mistake of fact which precluded his possessing the mental state necessary to commit burglary. In *People v. Wetmore*,[43] the defendant had a long history of hospitalization for mental illness. On release from a Veterans Administration hospital, he entered an unlocked, temporarily unoccupied apartment and made himself at home, wearing the owner's clothes and cooking his food, under the delusion that this was his own apartment. The trial court refused to permit the defendant to offer psychiatric testimony about his mental disability to show that he lacked the specific intent required for burglary – the intent to

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[41] *Id.* at 733, n. 112, citing Note, *The Cultural Defense in the Criminal Law,* 99 Harv. L. Rev. 1293, 1293-94 (1986).

[42] As noted above, this depends on each jurisdiction's mens rea requirements. *See* State v. Maggard, 995 P.2d 916 (Kan. App. 2000) (holding in the case of a defendant convicted of attempted rape who was mentally retarded and had been "diagnosed with Intermittent Explosive Disorder, an inability to control emotions resulting in especially explosive behavior," *id.* at 918, that the jury should have been instructed on diminished capacity, because the defendant's mental illness and mental retardation could have negated the requisite specific intent to commit rape); *but see People v. Castillo*, 238 Cal. Rptr. 207 (Cal. App. 1987) (holding that because, under California law, the affirmative defense of consent to rape requires the defendant to show "both a reasonable and a bona fide belief …[in the victim's consent], the defendant's mental illness and mental retardation were not relevant, since "[m]ental deprivation…has never been considered an attribute of the reasonable man." *Id.* at 211).

[43] 149 Cal. Rptr. 265, 583 P.2d 1308 (Cal. 1978).

commit a felony in the dwelling of another.[44] The California Supreme Court reversed, holding that such mental state evidence must be admitted whenever it is relevant on the question of mens rea.[45]

Thus, rather than viewing mental illness or retardation as raising a separate "diminished capacity" defense, students should consider it as going to the very heart of mens rea – a lack of specific intent due to mistake of fact. The *Wetmore* case would prove useful on a multiple levels – in teaching the elements of burglary, as well as exposing students to the breadth and complexity of mental disabilities that exist, and the fact that they range along a continuum, with multiple shades of gray, rather than existing as black/white, on/off phenomena. In addition, the *Wetmore* case, along with a judicious selection of the voluminous scholarly writing on "diminished capacity" and "diminished responsibility"[46] also provides the opportunity for students to address the difficult doctrinal issues arising from these vague and ambiguous terms, and to distinguish them from the separate problems that arise from the effort to translate clinical concepts to the law.[47]

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[44] Under California Penal Code § 459, "Every person who enters any house, room, apartment … with intent to commit grand or petit larceny or any felony is guilty of burglary.…"

[45] 149 Cal. Rptr. at 269, 583 P.2d at 1312.

[46] For a good introduction to these two concepts, and references to some of the relevant literature, see Bonnie, Coughlin, Jeffries, and Low, *supra* n. 3, at 603-21.

[47] Personal communication from Robert F. Schopp. See generally the difficulty the California Supreme Court has had over the years in enunciating a clear theory of diminished capacity, reflected in its doctrinal twists and turns in such cases as People v. Goedecke, 423 P.2d 777 (Ca. 1967), People v. Conley, 411 P.2d

C. THE INSANITY DEFENSE

Many criminal law professors shy away from teaching insanity, often claiming the press of time. However, I suspect that this choice often reflects a professor's own lack of interest in, or comfort with, the subject matter. In contrast, since I love the insanity defense, I always teach it. I have found that focusing on the details of the ALI-Model Penal Code,[48] *M'Naghten*,[49] and *Durham*[50] tests is less successful than using one case to illustrate many of the strengths and weaknesses of the insanity defense. In recent years, I have used with considerable success the case of Charles Heads, presented in the Reisner, Slobogin, and Rai book, Law and the Mental Health System: Civil and Criminal Aspects.[51] The *Heads* case involved a Vietnam vet experiencing post-traumatic-stress disorder who killed his brother-in-law, ostensibly while Heads experienced a

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911 (Cal. 1966), People v. Wolff, 394 P.2d. 959 (Cal. 1964), People v. Gorshen, 336 P.2d 492 (Cal. 1951), and People v. Wells, 202 P.2d 53 (Cal. 1949).

[48] The American Law Institute's Model Penal Code § 4.01 provides:

> (1) 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.
>
> (2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

[49] The rule in M'Naghten's Case was announced after an outpouring of public opinion against a jury's finding that Daniel M'Naghten was not guilty by reason of insanity for murdering Edmund Drummond, the secretary to Prime Minister Robert Peel, whom M'Naghten mistook for Peel. Responding to a parliamentary inquiry, the English judges told the House of Lords that:

> To establish a defense on the ground of insanity, it must be clearly proved that, 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 was doing; or, if he did know it, that he did not know he was doing what was wrong.

10 Cl. & F 200, 8 Eng. Rep 718 (1843).

[50] The *Durham* test, which governed in the D.C. Circuit from 1954 to 1972, provided that "an accused is not criminally responsible if his unlawful act was the product of mental disease or defect." Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

[51] Ralph Reisner, Christopher Slobogin, and Arti Rai, LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS (4th ed. 2004).

"flashback" in which he believed that he was in Vietnam, under attack.[52] This case permits students to understand the various doctrinal approaches to the insanity defense, particularly the difference between the cognitive and volitional prongs of the insanity standard. The *Heads* case also helps students with more subtle tasks. Students can observe the difficulty of translating lay descriptions of a defendant's conduct into clinically and legally relevant factors, appreciate the role of psychiatric expert witnesses, and consider that unless a particular psychiatric or psychological condition is recognized by the Diagnostic and Statistical Manual[53] the defendant is unlikely to be successful in asserting an insanity defense.[54]

In addition, almost every year there is a celebrated media case – a few years ago, it involved Andrea Yates[55] – that helps dramatize the issues of insanity. Over and over, I have been struck by how resistant students are to the idea of the insanity defense, illustrating what Michael Perlin calls "sanism."[56] Teaching the insanity defense using current as well as older cases exposes students to important issues about mental disability and criminal responsibility and can help them confront their own prejudices and preconceptions, including gender biases, about what constitutes "craziness."

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[52] *Id.* at 540-45.
[53] American Psychiatric Association, Diagnostic and Statistical Manual IV-TR (2000).
[54] *See also* United States v. Torniero, 735 F.2d 725 (2d Cir. 1984) (holding that the trial court correctly excluded the defendant's proffered expert testimony that he suffered from a pathological gambling disorder, which was included in the DSM), discussed in Bonnie, Coughlin, Jeffries, and Low, *supra* n. 3, at 580-84.
[55] Yates v. State, 2005 Tex. App. LEXIS 81 (Tex. Ct. App. June 6, 2005) (reversing the murder conviction of a mother of five children who drowned them, believing because of psychotic delusions that they would be better off dead than "perish[ing] in the fires of hell" because of the false statements of a key psychiatric expert witness).

In addition, it is possible to develop research and writing problems using the insanity defense. At Pace University Law School, where criminal law is taught as a two-semester course combining legal research and writing with substantive criminal law, I was able to give students more in-depth exposure to the insanity defense by devising a problem which raised the issue of whether the insanity defense should be available in juvenile court.[57] Using this problem permitted me to educate students about the juvenile court system, and to explore the similarities and differences between incapacity due to age and due to mental illness or mental retardation.

D. DURESS

Duress provides an excuse to crime when the criminal act was performed in response to an imminent threat of serious bodily harm or death to the defendant or another, under circumstances in "which a person of reasonable firmness…would have been unable to resist."[58] The note cases in Kadish & Schulhofer,[59] among others, are very

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[56] Michael Perlin, *"You Have Discussed Lepers and Crooks": Sanism in Clinical Teaching,* 9 Clinical L. Rev. 683 (2003).

[57] State courts are divided on this issue. *See, e.g.,* In re Winburn, 145 N.W.2d 178, 184 (holding that due process requires that an insanity defense be permitted in juvenile delinquency proceedings) and People v. Golden, 21 S.W.3d 801, 803-04 (Ark. 2000) (holding that neither due process nor equal protection principles require states to provide an insanity defense for juveniles, even if such a defense is authorized for adult criminal defendants).

[58] *See, e.g.,* Model Penal Code § 2.09 (1).

[59] Kadish and Schulhofer, *supra* n. 3, at 851-52. These notes raise the question of how much the reasonable person should be subjectivized, and include Zelenak v. Commonwealth, 475 S.E.2d 853 (Va. App. 1996) (holding in a robbery case that it was error to exclude evidence of the defendant's multiple personality disorder because it was relevant to the question of whether the defendant "acted out of a subjectively reasonable fear"); Regina v. Bowen, [1996] Crim L. Rev. 577, 578 (rejecting the defendant's argument that due to his mental retardation he was more easily intimidated, and thus more likely to feel under duress); United States v. Willis, 38 F.3d 170 (5th Cir. 1994)(holding that battered women's syndrome evidence was not admissible to support the defendant's claim of duress); and United States v. Marenghi, 893 F. Supp. 85

useful in pushing students to confront the outer limits of duress, and permit consideration of difficult issues related to mental disability. The cases ask whether mental retardation, multiple personality disorder, and battered women's syndrome are relevant, and therefore admissible, on the question of duress. Discussion of these cases helps students explore the fundamental purposes of making duress an excuse[60] and also helps them confront latent gender bias in the law.

E. SELF-DEFENSE

Discussion of battered women's syndrome and other mental illnesses clarify some of the difficulties with self-defense. The classic requirements of self-defense are that there be an immediate threat of deadly force, a reasonable belief in the necessity of deadly force, and the lack of a duty to retreat.[61] When we consider the meaning of these requirements, we explore the cultural and gendered underpinnings of self-defense law, and confront again the difficulty of subjectivizing the reasonable person, whether it is the reasonable battered woman,[62] the reasonable racist,[63] or the reasonable battered child.[64] At the same time, many scholars have made clear not only the questionable empirical support for the battered women's syndrome, but also the practical consequences and doctrinal distortions that flow from developing a defense predicated

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(D. Me. 1995) (holding that battered women's syndrome evidence was admissible on the defendant's claim of duress).

[60] For example, Gardner and Singer, *supra* n. 3, ask "whether the basis of duress [is] a lack of *mens rea* or a lack of *actus reus?" Id.* at 997-98.

[61] United States v. Peterson, 483 F.2d 1222 (D.C. Cir. 1973), State v. Abbott, 174 A.2d 881 (N.J. 1961).

[62] See, e.g., Victoria F. Nourse, *Self-Defense and Subjectivity*, 68 U. Chi. L. Rev 1235 (2001), excerpted in Bloch and McMunigal, *supra* n. 3, at 526-28.

on a gender-specific mental disability, [65] as opposed to taking into account some of the unique characteristics of every defendant in evaluating the reasonableness of her use of deadly force in response to threats by a victim.

V. SENTENCING CONSIDERATIONS

A. The Death Penalty

The role of mental disability in sentencing brings us full circle in criminal law, as we reexamine the justifications for punishment. This happens with special poignancy in the death penalty context, when we consider whether a defendant's mental disability constitutes a mitigating circumstance and also when we examine cases in which mental disability is cited as an aggravating factor. In both types of cases, students are forced to confront their own stereotypes about the extent to which mentally ill or mentally retarded individuals are less competent and less morally responsible, as well as more likely to be violent, than the average person.[66] Finally, consideration of mental disability in capital sentencing provides an appropriate complement to discussion of racial and gender disparities in jury assessments of death penalty appropriateness.[67]

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[63] People v. Goetz, 497 N.E.2d 41 (N.Y. 1986), Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Beyesians, and Involuntary Negrophobes, supra* n. 33.

[64] Jahnke v. State, 682 P.2d 991 (Wyo.1984).

[65] Robert Schopp, Barbara Sturgis, Megan Sullivan, *Battered Women's Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse,* 1994 U. Ill. L. Rev. 45 (1994); Susan Estrich, *Defending Women (Book Review, Cynthia Gillespie, Justifiable Homicide: Battered Women, Self-Defense, and the Law (1989),* 88 Mich. L. Rev. 1430, 1434-37 (1990), excerpted in Kadish & Schulhofer, *supra* n. 3, at 772-73; Anne M. Coughlin, *Excusing Women,* 82 Cal. L. Rev 1 (1994), excerpted in Bloch and McMunigal, *supra* n. 3, at 525-26.

[66] *See generally* the discussion in Reisner, Slobogin, and Rai, *supra* n. 51, at 463-68 and 470-74, summarizing the literature.

[67] *See, e.g.,* McCleskey v. Kemp, 481 U.S. 279 (1987) (holding that statistical disparities in the rates at which the death penalty was imposed in Georgia on white and black defendants convicted of murder and of those murderers convicted of killing black v. white victims was not in itself grounds for invalidating the

For example, the case of *Barefoot v. Estelle*[68] offers students the opportunity to ask whether future dangerousness should be considered in imposing the death penalty,[69] and also whether the likelihood of the defendant's future dangerousness has been established by reliable evidence in a particular case.[70] Through an examination of the justices' sharp disagreements about the reliability of psychiatric predictions generally, and in particular, the largely discredited testimony of the infamous Dr. Grigson, students are able to gain valuable insights into the role of expert witnesses, particularly psychiatrists and psychologists.

Similarly, the Supreme Court's decision in *Atkins v. Virginia*[71] to prohibit the execution of the mentally retarded has opened a new era in death penalty jurisprudence, in which entire classes of persons are excluded from death penalty eligibility due to shared class characteristics. When taken together with the Court's decision this term in

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death sentence imposed in this case, absent a showing that the jury acted on the basis of race here), *cf.* James Liebman, Jeffrey Fagan & Valerie West, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (2000); Craig Haney, *Condemning The Other In Death Penalty Trials: Biographical Racism, Structural Mitigation, And The Empathic Divide*, 53 DePaul L. Rev. 1557 (2004); Coker v. Georgia, 433 U.S. 584 (1977) (holding that the death penalty is a grossly disproportionate sentence for the crime of rape); Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Murder in the Post-Furman Era*, 49 S. M. U. L. Rev. 1507, 1510 (1986) (finding significant gender differences in the imposition of the death penalty) and Elizabeth Rapaport, The Death Penalty and Gender Discrimination, 25 Law & Society Rev. 367, 368 (1990) (arguing that "[t]he chivalry from which women supposedly benefit [in being sentenced less often to death when circumstances might otherwise warrant] is too costly: In ideological coin it is supposed to be repaid with tacit recognition of the moral inferiority of females and our lack of aptitude for full citizenship.").

[68] 463 U.S. 880 (1983).

[69] *See also* Jurek v. Texas, 428 U. S. 262 (1976).

[70] 463 U.S. 880.

[71] 536 U.S. 304 (2002).

Roper v. Simmons,[72] declaring a categorical exception to the death penalty for persons who committed crimes when they were less than eighteen, *Atkins* leads directly to the question of whether the seriously mentally ill, however identified, should also be exempt from the death penalty. In addition, discussion of the implementation of *Atkins,* including the factors and processes that are likely to be used by the lower courts in deciding whether or not a specific defendant is mentally retarded[73] can enhance students' understanding of the ranges of retardation and developmental disabilities, as well as the differences between mental retardation and mental illness.

B. Mental Disability and Sex Offenders

Finally, discussion of specialized sex offender legislation permits students to confront again the purposes of punishment and the elusive nature of the "mad vs. bad" distinction. Sex offender statutes, and the indefinite "civil" commitment which they authorize,[74] provides an opportunity to explore in a new context the distinction between explaining and understanding human behavior and appropriately holding persons accountable when they injure others. Here again, the gap between what neuroscience

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[72] 125 Sup. Ct. 1183. Of course, another significant aspect of both *Atkins* and *Roper* was the extent to which the majority opinions relied on law from other jurisdictions to support its conclusions about the content of "evolving standards of decency" under the Eight Amendment. *See e.g.,* Rex D. Glensy, *Which Countries Count? Lawrence v. Texas and the Selection of Foreign Persuasive Authority,* 45 Va. J. Int'l L. (2005).

[73] *See, e.g.,* Bill Lockyer and Taylor S. Carey, *Capital Punishment and the Mentally Retarded: Implementing Atkins***,** 15 Stan. L. & Pol'y Rev 329, 334-40 (2004).

[74] *See, e.g.,* Kansas v. Hendricks, 521 U.S. 346 (1997) (upholding Kansas' Sexually Violent Predator Act, which permitted the indefinite confinement for "treatment" for those who had served a term of imprisonment who were found to suffer from "a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence" against a substantive due process challenge), and Kansas v. Crane, 534 U.S. 407 (2002) (holding that the Kansas Sexually Violent Predator Act was constitutional because it required the state to show that the alleged sexual predator had a substantial volitional impairment).

and psychological research tells us and the responses of state legislatures and judiciaries to sex offenders is wide indeed. In discussing the involuntary commitment of sex offenders, students are called upon to confront the arbitrary and unclear line between confining people for purposes of punishment and confining them in order that they be "treated" and incapacitated for public protection, in order to round out their understanding of the purposes of punishment and the limits of the police power.[75]

VI. CONCLUSION

The criminal law course can be greatly enhanced by choosing cases involving mentally disabled offenders to illustrate a wide variety of doctrinal principles. Exposing students to the complexities of mental illness and mental retardation makes the course more nuanced and more "real," and provides a useful lens through which to examine the policy choices underlying penal legislation and decisions in individual cases. Far from being an "add-on" or an additional burden, discussing mental disability issues throughout the criminal law course permits students to emerge from the course with a deeper understanding of the fundamental conundrums of the criminal law.

[75] Indeed, one leading casebook begins the study of criminal law with Kansas v. Crane, 534 U.S. 407, and the Kansas Sexually Violent Predator Act. Boyce, Dripps, and Perkins, CRIMINAL LAW AND PROCEDURE: CASES AND MATERIALS, *supra* n. 3, at 3-8.