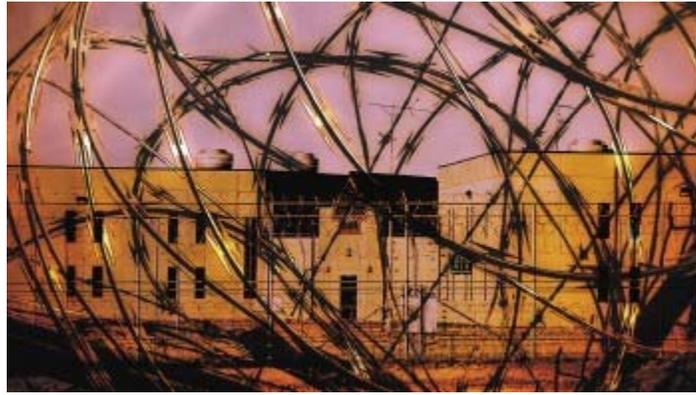


Insane Incarceration

Tennessee juries don't buy the insanity defense, so the mentally ill are often imprisoned—housed but not necessarily helped

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By Joseph Sweat



Photos by Eric England.

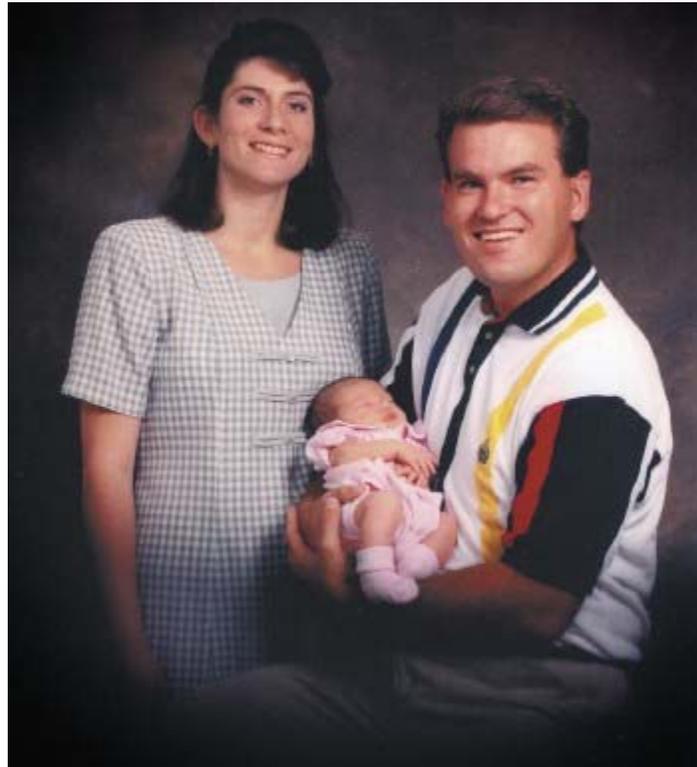
At the end of the road, Brian Kelley no longer hears the voice of God telling him to kill his daughter, Erin. The voice was powerful back when it compelled Kelley to place his right hand over the 13-month-old girl's mouth and then use his fingers to pinch her nose closed. He later likened his grip to that a minister uses when lowering someone into the water for Christian baptism. That grip tightened and stayed there for the estimated three to five minutes it took little Erin to suffocate. Then Kelley took a shower. When police arrived later, they found him standing naked in the middle of the house.

Now, confined at the end of the road, Kelley's memory of that hellish night some five-and-a-half years ago has been washed away in an ocean of powerful psychotherapeutic drugs. But 33-year-old Brian Val Kelley, certified as daffy as a loon when he killed his daughter, is not in a mental hospital. Far from it. The end of the road in this case is the Lois M. DeBerry Special Needs Facility, about as maximum security a prison as there is. It's located at the end of Cockrill Bend Industrial Road in Northwest Nashville. Housed there with Kelley—in a complex of concrete buildings surrounded by chain-link sensor fences topped with coiled razor wire, a no man's land and vguard towers—are some of the most dangerous men in Tennessee. Along with some of the most docile.

An appeal to be heard on March 8 before the Tennessee Court of Criminal Appeals asks that the first-degree murder conviction of Kelley be struck down on constitutional grounds and that Kelley be ruled innocent by reason of insanity. But also nestled in the 128-page appeal, filed by Nashville attorney David Raybin, is the assertion that Tennessee's current law on insanity innocence is meaningless. Within the appeal is a clear invitation for the court to strike down the law and have the General Assembly rewrite it—or at least apply it more fairly.

"I have conducted the only study ever conducted in the state of Tennessee on insanity defense to actually determine its success and failure rate," Raybin says.

Raybin found that since the current Tennessee insanity defense law was enacted in 1995, 13 people have been acquitted by reason of insanity. He and his paralegal, Shawn Mathis, "staked out all the courthouses, reviewed all 13 cases, talked with the lawyers—interviewed every one of them—to find out what the result of all this was." Raybin determined that "every one of the 13 were evaluated for insanity—these were all murder cases, now—and every one of the 13 had been by agreement, where the district attorney and the judge had agreed [that the accused was insane]. But where they didn't agree and there was a trial, every one of 'em was convicted. They're all in prison."



Happier Days: The Kelleys and Erin in a family portrait.

This certainly fit the pattern of Brian Kelley's case. In his September 2000 trial, the defense offered six expert witnesses, all mental health professionals, who testified to Kelley's insanity. The prosecution offered one expert, Dr. Daniel Martell, a California psychologist, who has testified for the state in a number of high-profile cases, including the murder trials of Paul Dennis Reid and Robert Glen Coe (who has since become the first person executed in Tennessee since 1960). Dr. Martell ended up testifying that Kelley was indeed insane, and thus, he also became a defense witness. Despite all the expert testimony to the contrary, the Wilson County jury rejected the insanity plea, convicted Kelley of first-degree murder, and the judge imposed a life sentence.

"There have been 1,200 murder convictions [in Tennessee] since 1995 when the current insanity law went into effect," Raybin says. "So of 1,200 murder convictions, the insanity plea has never been successful in a contested jury trial. What does that tell you? It tells you that it simply is not working. Jurors will not accept it, no matter what your proof is."

The trial, post-conviction and medical records all strongly indicate that Kelley was, as country folk say, "peach orchard crazy" in the days and nights surrounding his suffocation of little Erin, a toddler with brown curls who smiled through chubby cheeks. In the days leading up to the murder, Kelley talked of seeing God's face on a blank television screen, of signs like an eclipse in the Holy Land, of being convinced that Jesus was coming back on Aug. 16, 1999 (Kelley's birthday) and that Jesus would give him a new kneecap. Kelley, who worked at the Wilson County landfill and attended a Baptist Church with his family, talked of the significance of the number 777 he had seen on a golf scorecard and thought it was a number from the Bible. And a few hours before he killed his little girl, he rattled on about seeing the image of Jesus at a woodcarving booth at the Wilson County Fair.



He told investigators that when he went to Erin's bed shortly after midnight on Aug. 15, 1999, he was "getting visions of Abraham and Isaac from the Bible." In that story, God tells Abraham to kill his son Isaac and sacrifice him as a burnt offering. Abraham is so obedient to the commands of God that he goes so far as to hold the knife over the bound body of his son. At that point, the angel of the Lord stops Abraham and allows him to use a ram caught in a thicket as a sacrifice in the place of Isaac.

Kelley told police he was "being told to sacrifice his daughter because she was perfect, and it had to be done before Christ could return." He said he first tried to use Erin's white teddy bear to smother her and, when that didn't work, he used his hand. The prosecutor argued that this showed Kelley knew full well what he was doing.

When asked later if what he did was wrong, Kelley said, "What I did, according to the law of the country, yes sir, it was wrong. But I don't go by the laws of the land. I go by the laws of God."

When Kelley's wife Lori, a physical therapist, was awakened that night by her husband taking a shower, she went in and found that the little girl had turned blue from the suffocation. She then began yelling, "What did you do to her, what did you do to her, what did you do to her?" Kelley replied with the same words that he would repeat over and over to investigators and doctors, each time in a voice as calm as death: "Everything is going to be OK." He was convinced that Jesus would arrive the next day at the Wilson County Jail.

Kelley's appeal, and indeed part of Raybin's attack on the wording of Tennessee's insanity defense, hinges on one word: "wrongfulness." Right now, Tennessee law says an insanity defense must prove that "the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature or wrongfulness of such defendant's acts."

The appeal argues: "Unfortunately, in Tennessee there is confusion over the meaning of the word 'wrongfulness.' Mental health professionals take it to mean moral wrongfulness, while some legal professionals take it to mean legal wrongfulness." In other words, a defendant like Brian Kelley, diagnosed by a number of mental health experts as suffering from severe bipolar (manic-depressive) illness, might clearly understand that his act is legally wrong, but be convinced it is not morally wrong because it was ordered by God. This difference is why, in Kelley's case, so many mental health professionals have testified that he didn't understand the wrongfulness of his actions.

Tennessee insanity defense law, like those in the most of the rest of the country, is heavily weighted in favor of the prosecution in a number of ways. It wasn't always that way. But in Congress, and in numerous state legislatures, there was a wave of such laws being tightened in the wake of the 1982 trial of John Hinckley Jr. After his attempted assassination of President Ronald Reagan, Hinckley was found not guilty by reason of insanity and sent to a mental hospital.

The Hinckley verdict stunned and outraged many Americans. The ABC News poll taken the day after the verdict showed 83 percent of those polled thought "justice was not done."

At one time, the insanity defense law placed the burden on the prosecution, so the state had to prove that the person was sane. Now it's reversed; the burden is on the defense to prove the defendant insane. Previously, the law allowed for a defense of "irresistible impulse," which meant that the person lacked the ability to control his or her behavior. Now, that defense has been eliminated completely. And whereas before an expert witness could testify that, in his or her professional opinion, the defendant was mentally ill at the time of the act, expert witnesses are now prohibited from testifying on that point.

"The insanity plea?" Raybin says, leaning back in his chair and laughing. "I say you have to be crazy to use it."

Davidson County District Attorney General Torry Johnson says that even in years past the insanity defense was seldom used and that he's not willing to assume that the bar has been placed so high that it's meaningless.

"Where the bar is could be open for debate," Johnson says. "But even in years past, it [the insanity defense] was very rare. I think juries are skeptical of mental health professionals and mental health defendants because these are things that are difficult to demonstrate with any kind of real empirical data. So much of it is opinion from battling experts, between people saying he is or he isn't.

"The question is, what was the defendant's mental state at the time of the crime, but a lot of times he's not being looked at anywhere close to the time of the crime. He's being evaluated by doctors on both sides of the fence, all of whom are seeing him months, maybe even years, after the crime."

Brian Kelley was, indeed, evaluated by doctors over a span of years. And in his case these doctors were unanimous on the "he is" side. But unless the appellate courts agree with them, prison is the only place he's likely to get any mental health treatment until 2058, when he is first eligible for parole. Then he will be 87 years old.



Raybin: "The insanity plea? I say you have to be crazy to use it."

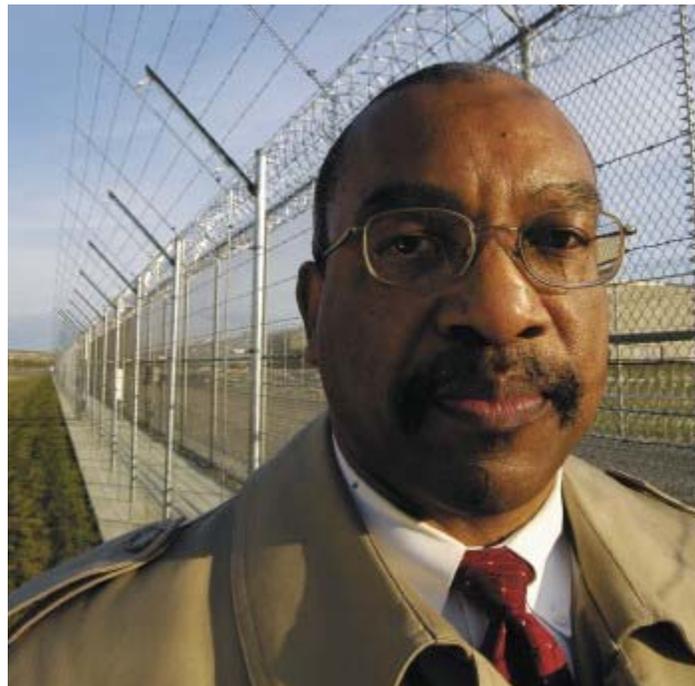
Attorney Raybin is trying to get Kelley out of prison and into a state-of-the-art mental hospital, where he can get more advanced treatment, the type the state can't afford. But Raybin, whom Kelley's family hired shortly after his trial, also cites other reasons for the appeal.

"Right now, he has a life sentence," Raybin says. "He's being medicated and what I call 'maintained' in prison. If he were sent to a mental hospital, he would have some semblance of normality in that his family could be with him more often. He wouldn't be with other prisoners, not all of whom are mental patients. Also, at some point he would be eligible in a mental hospital to have limited day passes where he might be able to go home during the daytime. If, in fact, he were released on a more permanent basis, the judge could approve certain conditions for release."

The limited financial resources of prison facilities, as opposed to state and private mental hospitals, does make a significant difference in the level of care mental patients receive. Liz Ledbetter, a mental health specialist with the state Department of Mental Health, sees this every day in dealing with area jails. She works with the Criminal Justice Mental Health Liaison, which seeks to forge a link between mental health and criminal justice in some 24 Middle Tennessee counties.

"Our county jails are living off the county dime," Ledbetter says. "It's very difficult for them to afford the best medication because it is sometimes the most expensive. So people who find themselves in jail with mental illnesses that require sometimes the more expensive medication don't always have access to them."

For the time being, what treatment Brian Kelley gets is under the direction of a psychiatrist and mental health team working for Robert Waller, the warden of the DeBerry Special Needs Facility. Commanding file cabinets of knowledge about his facility, its staff and its work, Waller talks a mile a minute and looks fit enough to play the tight end position on any pro football team in the country. One look at him and you're thinking: "A prisoner would have to be nuts to tangle with this guy."



Ill-Equipped: Even Warden Robert Waller concedes state prisons can't offer the best care for the mentally ill.

But as he walks you past the razor wire, through the electric gates and metal detectors, and on through the concrete buildings with windows too narrow for a man to crawl out of, Waller could pass for a principal showing you through his new elementary school. He hails guards and staff members by name, seldom missing an opportunity to zip in a little banter about the weather or joke a bit.

"We have 376 mental health beds filled right now," he says. "These include people with some type of mental health problem, bona fide mental illness, sex offenders, behavior problems. A lot of men come and go here."

Highly complimentary of the care that his staff gives the DeBerry mental patients, Waller also acknowledges that state financial constraints make a difference in the level of care available at DeBerry, as opposed to outside mental hospitals.

"I had a friend of mine," Waller says, "who was a psychiatrist at the old DeBerry. He called me when he became chief of staff at Alvin York (a federal facility for veterans) and he told me: 'Waller, if we had the staff at the old DeBerry that they have over here at Alvin York there isn't any telling what we could do.' The staff of the state is nowhere in comparison. [The non-prison mental hospitals] have a lot more resources."

In addition to all the guards, who get special training in dealing with mental patients, the DeBerry staff consists of a single full-time psychiatrist, clinical psychologists, social workers, nurses, mental health program specialists and counselors. Inmates coming into the facility are stripped of all their possessions—televisions and radios, cigarettes, reading material—and they earn these back as they show themselves to be cooperative. A big part of that often means learning to live with medication to maintain stability. David O'Rear, a unit director puts it this way: "Once an inmate understands, 'I am dependent on this medication. I am going to have to take this medication for the rest of my life,' you have got the biggest part of the monster killed."

There are 32 prisoners now in what amounts to an ultra-maximum security section of this maximum-security prison. These men are considered the most dangerous prisoners. They are locked down 23 hours a day. When they leave their cells, they have their feet shackled, their wrists handcuffed and a chain around their waists.

The staff at DeBerry likes to show off an innovation they've developed to facilitate group therapy for these particular prisoners. It's a circle of six chairs, each having metal attachments protruding out of its base so each handcuffed prisoner can have his leg shackled to his chair while the session is underway.

"Most of the guys that we get actually come from other institutions," Waller says. "We get some straight from the jails, for example, if the jail has an inmate that they can't manage. We handle almost everything that no other prison can handle, whether it be medical or mental health."

In addition to the 376 mental patients at DeBerry, the facility—with its total capacity of 736—has those who are strictly health care patients in its hospital and a number of low functioning (usually mentally retarded) prisoners who live at and do much of the caretaker work at the facility. Often, these low functioning inmates are there for their own protection.

"Many of the low functioning prisoners are kept at DeBerry," Waller says, "because they are preyed upon by other prisoners. They will steal his commissary items, rob him, assault him."



At DeBerry...prisoners are evaluated for mental illness.

While some of the toughest cases involving incarceration of the mentally ill are found in places like DeBerry, the heavy traffic is in the county jails. While the U. S. Department of Justice says that one in six inmates in prison suffer from significant mental illness, the ratio is even higher in county jails.

Each day, Jeff Blum, mental health coordinator for the Metro Davidson County Sheriff's Office, pulls up a computer list of everyone booked at the jail the day before. He e-mails that list to all the community health centers in Nashville, and each center in turn tries to spot anyone who has been getting mental health treatment at their facility.

"They run it through their computers," Blum says, "and they get back to me and say, "These are our people who have been arrested. They tell me their diagnosis, their medication, all kinds of stuff. So we can immediately start working on those people and making sure they are taken care of [with medication] here in the jail. If they have case managers on the outside, they get involved in the process on the ground floor so we can start working on their case. The whole idea being to get them out [of jail] as quickly as possible."

The Metro Sheriff's Office, which receives considerable praise from mental health and law enforcement professionals for its mental health program, has regular training sessions with jail personnel on spotting and dealing with prisoners who have mental illness. The office has developed an intake form to be filled out by each arresting police officer, and most of the form deals with questions designed to screen for mental illness. It's interesting to note that a few months before he shot President Reagan, John Hinckley was arrested in Nashville for attempting to bring three handguns onto an airliner. President Jimmy Carter was in Nashville at the time, and this was when Hinckley was flying around the country stalking Carter. Hinckley ended up

paying a fine of \$62.50, plus confiscation of the handguns. It's worth wondering: if Nashville had had its present mental health screening process back when Hinckley was arrested, might he have been identified as mentally ill and helped before trying to kill Reagan?

There's a full-time clinic in the Metro jail staffed under contract with Prison Health Services. A psychiatrist, Dr. Richard Treadway, former head of the state Department of Mental Health, makes evaluations while a full-time master's level nurse and a registered nurse carry out treatment. But Blum says budgetary constraints mean that those in jail don't usually get the newest and most expensive medication.

"Do you get the 50-cent pill or do you get the \$8 pill?" Blum asks rhetorically. "You're going to get the 50-cent pill when you're in jail."

A significant problem is that many of those arrested and jailed not only have mental health problems, but also are homeless and have alcohol and drug addictions. One recent day, Blum held up a computer list of those arrested within the past seven days. There was a column of numbers down the right side of the page, and the inmate at the top of the list had a 90 across from his name. It was the number of times he had been jailed in the past four years—90 arrests and incarcerations. Another person had 74 arrests in four years, and 71 and 68, and so on. These people, in effect, are serving life sentences a few days at a time each month.

Law enforcement officers on the street are often the first in the system to encounter the mentally ill. Lt. Glen Yates, a veteran Metro officer who now trains recruits at the Police Academy, says that his recruits receive training from both academy instructors and mental health professionals on how to deal with the mentally ill. Sometimes, however, an officer has to depend on his own ingenuity. That's what happened one bitter cold night not long ago when Sergeant Jack Vaughan of the Tennessee Highway Patrol got a call that a woman wearing only blue jeans, a T-shirt and a denim work shirt was walking down the middle of one of the traffic lanes on Interstate 40 trying to flag down cars.

"She stated that God had told her she had to get to Nashville right away," Sgt. Vaughan recalls. "I told her I thought I could help her out because God had told me to get her to Nashville. So she decided to get in the car with me." It was then that Vaughan realized just how long it must have been since the woman had been on speaking terms with soap and water.

"Oh man, I can't tell you how bad she smelled. She was just ripe. She was gagging me. I had to roll the window down and drive with it open even though it was bitter cold. She kept saying, 'Roll the window up.' And I said, 'Naw, I don't think God wants me to roll the window up.' That was the only way I could get her to hear me. I didn't know what to do with the lady. So I ended up dropping her off at a homeless shelter."

Another nexus for the mentally ill and the criminal justice system is Metro Nashville's much-praised Mental Health Court, currently presided over by General Sessions Judge Dan Eisenstein. It is for those who suffer from some form of mental illness and have committed nonviolent crimes—mostly misdemeanors, nuisance crimes, petty thefts and criminal trespassing.

Mental Health Court administrator Chip Stone says the court assesses the mental health needs of the accused, 65 percent of whom are homeless, and tries to get them into a treatment facility. The

accused signs a contract with the court promising to do what's ordered in the way of treatment and to follow up with any opportunities for housing and job placement. When a person in the program fulfills the requirements in the time specified, usually six months to a year, the charges are dropped.

"Seventy percent of our population who have chronic and persistent mental illness," Stone says, "also have drug and alcohol problems because they are self-medicating. Generally, they have been using some drug to mask or cover up the symptoms [of mental illness]."



In Another Life: Brian Kelley, playing with daughter Erin before God told him "to sacrifice my daughter."

A major problem with trying to make changes in the mental health-criminal justice nexus, whether it's getting the insanity defense changed or lobbying for more mental health resources, is that the mentally ill are largely a constituency without many advocates.

"The stigma of mental illness in this state," says the Department of Mental Health's Liz Ledbetter, "is very much alive and well, I am sorry to say. And our commissioner is devoted to working toward its elimination. I think that's one of the reasons that I'm doing the work that I'm doing in trying to work toward decriminalizing mental illness.

"Many people, whether you're a sheriff, or a judge, or just a regular Joe on the street, don't believe that mental illness is real. They just have a lack of education and understanding of what mental illness is all about."

Raybin says this misunderstanding affects juries that simply will not, in the face of overwhelming expert testimony to the contrary, believe that defendants are truly insane. He says the typical juror looks at the insanity plea and says: "I can see that broken leg you've got, because you've got a crutch and you are hobbling around. But now you're telling me that you're suffering from some sort of neurological disorder. I can't see it. I can't smell it. I can't taste it. I can't catch it. It doesn't seem real to me."

What's clear about the incarceration of the mentally ill is that (1) an awful lot of people behind bars are suffering from mental illness, (2) a considerable number of these inmates are getting no

treatment, or a reduced level of treatment, and (3) most of them one day will complete their sentences and get out.

While this definitely means a revolving door of expensive incarceration, psychiatrist Vatsal Thakker, medical director of the Vanderbilt Mental Health Center, says it doesn't necessarily mean a more dangerous society. He says that statistics don't seem to show that having a mental illness in and of itself leads to a higher incidence of violence or criminal behavior.

"That's the result you get in the laboratory," Thakker says in an interview. "But the reality is out on the street. Now, say you have a schizophrenic living on the street because he can't hold a job because he's schizophrenic. If there are no social services to provide him with food and shelter, why, he's going to have to steal for it. If you use that analogy, you see that the real world is saying that mental illness does put people at higher levels of risk because of criminal activity. But in terms of violence, the threat has never panned out. It makes the news: 'Mentally Ill Person Kills Somebody.' But it is not at a significantly higher rate than the general population."

Sitting at a table in Fido's restaurant in Hillsboro Village, Thakker points east toward downtown Nashville a few miles away.

"If you walked from here to downtown," he says, "you'd probably pass at least three or four schizophrenics. I don't think there's any danger in that. I'd probably be more scared of someone who wasn't schizophrenic who is lingering on the street."

In other words, there are insane people and there are bad people. And they're not necessarily the same. That's what Brian Kelley's lawyers are trying to make clear to the Tennessee appellate courts. Meanwhile, Kelley sits at the end of the road awaiting his fate