
**An End to Insanity: Recasting the Role of
Mental Disability in Criminal Cases**
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RECASTING THE ROLE OF MENTAL DISABILITY
IN CRIMINAL CASES

by Christopher Slobogin*

Abstract

This article argues that mental illness should no longer be the basis for a special defense of insanity. Instead, mental disorder should be considered in criminal cases only if relevant to other excuse doctrines, such as lack of mens rea, self-defense and duress, as those defenses have been defined under modern subjectively-oriented codes. With the advent of these subjectively defined doctrines (a development which, ironically, took place during the same period that insanity formulations expanded), the insanity defense has outlived its usefulness, normatively and practically. Modern official formulations of the defense are overbroad because, fairly construed, they exculpate the vast majority of people who commit serious crime. The most prominent alternative to the official tests—the irrationality threshold—is also flawed because it is based on the unprovable assumption that irrational people are less able to act for good reasons. Acquitting only those who lacked mens rea due to mental dysfunction or who acted on delusions that, if true, would sound in self-defense or duress better captures the universe of people who should be excused because of mental illness. This approach would also enhance the image of the criminal justice system, improve treatment of those with mental illness, and reduce the stigma associated with being mentally ill.

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Introduction

Insanity defense jurisprudence has long been in a state of chaos.¹ Some have responded to this unfortunate situation by calling for abolition of the defense,² while others have tinkered further with its scope.³ This article proposes what amounts to an intermediate position. It argues

¹. As long ago as 1927, Sheldon Glueck stated: “Perhaps in no other field of American law is there so much disagreement as to fundamentals and so many contradictory decisions in the same jurisdictions. Not a modern text or compilation begins the discussion of the subject of insanity and its relation to the criminal law without a doleful reference to chaos in this field.” SHELDON GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 187-88 (1927). Almost seventy years later Michael Perlin began his book length treatment of the insanity defense with the assertion that “[o]ur insanity defense jurisprudence is incoherent.” MICHAEL PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* 1 (1994).

². See e.g., Abraham L. Halpern, *The Politics of the Insanity Defense*, 14 AM. J. FORENSIC PSYCHIATRY 1 (1993); Joseph Weintraub, *Insanity as a Defense: A Panel Discussion*, 37 F.R.D. 365, 372 (1964). Most who have called for abolition of the defense continue to support the so-called “mens rea” alternative, which would permit the introduction of evidence about mental disorder to prove the absence of mens rea. See, e.g., Abraham Goldstein and Jay Katz, *Abolish the Insanity Defense—Why Not?* 72 YALE L.J. 853 (1963); NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* 53-70 (1982); American Medical Association, *Insanity Defense in Criminal Trials and Limitations of Psychiatric Testimony: Report of the Board of Trustees*, 251 J.A.M.MEDICAL ASS. 2967 (1984). Five states have abolished the defense, while maintaining the mens rea alternative. MONT. CODE ANN. § 46-14-201; § UTAH CODE ANN. 76-2-305; IDAHO CODE § 18-207; KAN. STAT. ANN. § 22-3220; NEV. REV. STAT. § 174.035 .

³. ABRAHAM GOLDSTEIN, *THE INSANITY DEFENSE* 215, 219 (1967) (arguing for a “broadened” test); Richard Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 197 (1983)(arguing for abolition of the volitional prong of the defense); AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Standard 7-6.1 & accompanying commentary (1988)(same). Several commentators have argued for an irrationality test or some version thereof. See *infra* notes 50-55.

that insanity should be eliminated as a separate defense, but that the effects of mental disorder should still carry significant moral weight. More specifically, mental illness should be relevant in assessing culpability only as warranted by general criminal law doctrines concerning mens rea, self-defense and duress.

While a few scholars and courts have toyed with this idea,⁴ it has yet to be fully endorsed or coherently defended by any of them. This article provides such a defense. It contends that, both morally and practically, the most appropriate manner of recognizing mental illness' mitigating impact in criminal cases is to recast mental disorder as a factor relevant to the general defenses, not treat it as a predicate for a special defense.

The starting point for this claim is the retributive principle that blameworthiness should be the predominating guidepost of the criminal law. One can imagine a system, like Lady Wooton has, which is agnostic about culpability and focused on prevention and treatment.⁵ In such a world we would not need to talk about the insanity defense because autonomy or its absence would be relevant, if at all, only in determining whether a person has sufficient control to avoid offending in the future. The reason Lady Wooton's approach has not yet gained significant ground is that a world in which the government imposes harsh penalties without considering blameworthiness is morally repugnant to many people.⁶ The human urge to condemn those who have done wrong is strong; at the same time, it is considered fundamentally unfair to visit such condemnation on a person who is not "culpable".⁷ Even if that noninstrumental position is

⁴. Those scholars who advocate the mens rea alternative, see *supra* note 2, could be said to adopt a very narrow version of this approach. See also JOEL FEINBERG, *DOING AND DESERVING* 272-73 (1970)(stating that "[m]ental illness should not itself be an independent ground of exculpation, but only a sign that one of the traditional standard grounds--compulsion, ignorance of fact or excusable ignorance of law--may apply", but offering no defense of this position and instead describing "lingering doubts" about it). Some courts have come somewhat closer to adopting this approach, but with virtually no explanation. See *infra* text accompanying note 38.

⁵. BARBARA WOOTON, *CRIME AND THE CRIMINAL LAW* (1963).

⁶. Paul Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 *BOSTON U. L. REV.* 201, 207-08 (1996)(noting that virtually every society maintains a separate criminal justice system and speculating that this is because a system based on moral condemnation is a universally important component of humankind). See also, PAUL H. ROBINSON & JONATHAN DARLEY, *JUSTICE, LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 208-09 (1995)(finding that participants in surveys consistently grade liability along a continuum based on assessments of culpability).

⁷. H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 47 (1968)(excusing conditions are necessary to "maximize the individual's power at any time to predict the likelihood

wrong⁸--because moral condemnation is the role of spiritual rather than secular entities, because culpability is not a necessary basis for condemnation, or because “hard” determinists are right that everything we do is inevitable and culpability is thus a meaningless concept--the state should *act* as if blameworthiness can be measured, so as to enhance the perception that our decisions about conduct matter and concomitantly encourage law-abiding behavior.⁹

Acceptance of blameworthiness as the touchstone of the criminal law means that individual culpability must be assessed. That is where the kind of inquiry the insanity defense mandates comes into play. It is meant to help us decide whom among those who commit criminal acts deserve to be the subject of criminal punishment.¹⁰

The central assertion of this article, however, is that the insanity defense does not adequately carry out this definitional task. At least in its modern guises, the insanity defense is overbroad. Instead, mental disorder should be relevant to criminal culpability only if it supports an excusing condition that, under the subjective approach to criminal liability increasingly accepted today, would be available to a person who is *not* mentally ill. The three most prominent such conditions would be: (1) a mistaken belief about circumstances that, had they occurred as the person believed, would amount to a legal justification; (2) a mistaken belief that conditions exist

that the sanctions of the criminal law will be applied to him” and to “introduce the individual’s choice as one of the operative factors determining whether or not these sanctions shall be applied to him”); DONALD HERMANN, *THE INSANITY DEFENSE* 93 (1983) (“[e]limination of the principle of responsibility would result in every attitude, disposition, or accidental movement seen by the state as undesirable, becoming a potential source of coercive intervention in the life of any and every citizen no matter how well intentioned he might be.”).

⁸. I have argued that the position is wrong, at least in the juvenile context. Christopher Slobogin, Mark R. Fondacaro & Jennifer Woolard, *A Prevention Model of Juvenile Justice: The Promise of Kansas v. Hendricks for Children*, 1999 WISC. L.REV. 185 (1999).

⁹. I develop these points further in Chapters Two and Six of *MINDING JUSTICE: DEPRIVING PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY* (American Psychological Association Press, in preparation). See also, Paul Robinson, *A Failure of Moral Conviction?*, 117 PUB. INTEREST 40, 44 (1994)(a criminal system that bases punishment on dangerousness “loses its ability to claim that offenders deserve the sentences they get . . . [and thus] dilutes its ability to induce personal shame and to instigate social condemnation.”); HERMANN, *supra* note 7, at 91 (“the interest of law and ethics in minimizing socially harmful conduct is promoted by fostering feelings of responsibility in society”).

¹⁰. See GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 835 (1978)(“The issue of insanity requires us to probe our premises for blaming and punishing. In posing the question whether a particular person is responsible for a criminal act, we are forced to resolve our doubts about whether anyone is ever responsible for criminal conduct.”).

that amount to legally-recognized duress; and (3) the absence of intent to commit crime (i.e., the lack of mens rea defined subjectively, in terms of what the defendant actually knew or was aware of).

Before justifying this position, some examples of how it would apply in well-known actual and hypothetical cases should be provided. Take first the famous M'Naghten case, from whence much of current insanity defense jurisprudence derives.¹¹ In 1841, Daniel M'Naghten killed the secretary of Prime Minister Peel, apparently believing the secretary was Peel and that killing Peel would bring an end to a campaign of harassment against him.¹² He was found insane by the trial court judges. Whether M'Naghten would have been acquitted under the proposed approach would depend upon whether he believed the harassment would soon lead to his death or serious bodily harm and whether he thought there was any other way to prevent that occurrence. Because in his paranoid state he feared he would be assassinated by his enemies and had on several occasions unsuccessfully applied to the police for protection,¹³ he may have had such a defense. If, on the other hand, the circumstances in which he thought he was involved would not amount to self-defense, no acquittal would result¹⁴ (although a conviction of manslaughter rather than murder might have been appropriate, analogous to the result under the modern theory of “imperfect” self-defense as it has developed in connection with provocation doctrine).

Now consider the case of John Hinckley, who convinced a jury he was insane when he tried to kill President Reagan.¹⁵ If, as even his defense attorneys asserted, John Hinckley shot President Reagan simply because he believed Reagan's death would somehow unite him with

¹¹. 8 Eng. Rep. 718 (H.L. 1843). M'Naghten has been called the “most significant case in the history of the insanity defense in England”. Donald H.J. Hermann & Yvonne S. Sor, *Convicting or Confining? Alternative Directions in Insanity Defense Reform: Guilty but Mentally Ill Versus New Rules for Release of Insanity Acquittees*, 1983 B.Y.U. L. REV. 499. A good description of the M'Naghten trial is found in THOMAS MAEDER, *CRIME AND MADNESS* ch. 3 (1985).

¹². *Id.* at 27.

¹³. *Id.* at 28-29.

¹⁴. Possibly relevant is the fact that M'Naghten was involved in a Scottish group vehemently opposed to Prime Minister Peel's policies. DANIEL N. ROBINSON, *WILD BEASTS & IDLE RUMOURS* 163-65 (1996).

¹⁵. For a brief account of the trial, see RALPH REISNER ET AL., *LAW & THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS* 538-39 (3d. ed. 1999).

actress Jodi Foster,¹⁶ he would be convicted under the proposed approach. Regardless of how psychotic Hinckley may have been at the time of the offense, he would not have an excuse under the proposed regime, because killing someone to consummate a love affair is never justified, nor is it deserving even of a reduction in charge.

Two other recent cases furnish additional exemplars. Jeffrey Dahmer killed and cannibalized thirteen individuals. The jury was right to convict him.¹⁷ As sick as his actions were, even he never thought they were justified, and he would not be excused under the proposal. Lorena Bobbitt, who cut off her husband's penis because he repeatedly beat her, was found insane.¹⁸ Whether she would have a complete defense under the proposal would depend, as it would with Daniel M'Naghten, on the extent to which she thought she had other ways of forestalling the beating and whether the option she chose was disproportionate to that threat. On the facts presented at trial,¹⁹ even on her own account her act would probably not be considered necessary by the factfinder, and she would therefore have been convicted of some version of assault.

In these cases, then, whether a defense existed under the proposed approach would depend upon self-defense principles, applied to the circumstances as the defendant believed them to be. Another variety of cases can be analyzed in terms of a similarly subjectified version of

¹⁶. According to one of the defense experts, on the day of the assassination attempt Hinckley was preoccupied with two things: "the termination of his own existence" and accomplishing a "union with Jodie Foster through death, after life." In a letter to Foster written on the day of the attempt he stated that in order to win her "respect and love", he was willing to give up his freedom and possibly his life in the perpetration of what he called a "historic deed." *Id.* at 539. Compare this thought process to that of Mark David Chapman, who believed that killing John Lennon would "fill his emptiness" and told Barbara Walters that "killing a celebrity makes you a celebrity." RALPH SLOVENKO, *PSYCHIATRY AND CRIMINAL CULPABILITY* 129-130 (1995).

¹⁷. For descriptions of the Jeffrey Dahmer case and the verdict, see *Found Sane*, *TIME*, Feb. 24, 1992, at 68; SLOVENKO, *supra* note 16, at 56-57 (recounting prosecution witness Parc Dietz' testimony that Dahmer killed his victims to ensure that they would stay with him forever and that would be unable to refuse his demands).

¹⁸. See *The Unkindest Cut of All*, *U.S. NEWS & WORLD REP.*, Jan. 31, 1994, at 14 (discussing facts of Bobbitt case).

¹⁹. According to Ms. Bobbitt, at the time of the assault, she was headed for the kitchen to get a glass of water, saw a knife, and started thinking of "things about the abortion. That I am not going to be a good mother . . . so many things. He torturing me [sic]. When he was beating me up, when he had forced sex with me." She then went back to the bedroom, took off the sheets, and cut her husband. See *The Reuter Library Report*, Sept. 23, 1993.

duress, which traditionally has excused crimes that are coerced by serious threats to harm the perpetrator. For instance, some people with mental illness who commit crime claim they were commanded by God to do so.²⁰ If the perceived consequences of disobeying the deity were lethal or similarly significant, such a person would deserve acquittal, perhaps even if the crime charged is homicide. On the other hand, contrary to Justice Cardozo's famous hypothetical suggestion,²¹ the mere fact that the defendant honestly believed God ordained a crime would not automatically be an excuse.²²

The third type of excuse that might apply when people with mental illness commit crime--lack of mens rea--is extremely rare. M'Naghten, Hinckley, Dahmer, Bobbitt and Cardozo's hypothetical defendant all intended to carry out their criminal acts. Indeed, most crimes in which mental illness plays a role are intentional; the person who is so disordered that he cannot form intent is often also so disorganized behaviorally that he is unlikely to be able to carry out a criminal act. Nonetheless, when mens rea is defined subjectively, there are at least four possible lack-of-mens rea scenarios: involuntary action, mistake as to results, mistake as to circumstances, and ignorance of the law.²³

First, a person may engage in motor activity without intending it to occur (e.g., a reflex action which results in a gun firing and killing someone). The criminal law typically classifies such events as involuntary acts.²⁴ Although mental disorder usually does not eliminate conscious control over bodily movements associated with crime, when it does (e.g., in connection with

²⁰. See, e.g., *McElroy v. State*, 242 S.W. 883 (Tenn. 1922)(defendant who believed his act was commanded by God found sane); *State v. Cameron*, 100 Wash.2d 520, 674 P.2d 650 (en banc 1983)(insanity based on similar facts).

²¹. *People v. Schmidt*, 216 N.Y. 324, 110 N.E. 945 (1915) (Cardozo, J.)(interpreting M'Naghten to permit an acquittal for a defendant who claimed to hear the voice of God calling upon him to kill as a sacrifice and atonement, even though the defendant realized the act was illegal).

²². A separate ground for excusing such a person might be that he honestly believed God's command rendered the act *legally* permissible. This "ignorance of the law" excuse is discussed more fully, *infra* text accompanying notes 30-31 & 154-159.

²³. The first three mens rea categories discussed below are meant to relate to the three actus reus components--conduct, result and circumstance--recognized by the Model Penal Code. See MODEL PENAL CODE § 1.13(9).

²⁴. See, e.g., MODEL PENAL CODE § 2.01 (requiring a "voluntary" act for criminal liability and defining as involuntary, *inter alia*, "a reflex or convulsion"; "a bodily movement during unconsciousness or sleep"; and "a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.").

epileptic seizures), a defense would exist if one accepts the premise that culpability requires actual intent.²⁵

Second, a person may intentionally engage in conduct but intend a different result than that which occurs (such as when firing a gun at a tree kills a person due to a ricochet). Distortions of perception caused by mental illness might occasionally lead to such accidental consequences; for instance, a mentally ill person driving a car may accidentally hit someone because his “voices” and hallucinations prevent him from perceiving the relevant sounds and visual cues. In such situations a subjectively defined mens rea doctrine would absolve him of criminal liability for any harm caused.

Closely related is the situation in which a person intentionally engages in conduct and intends the physical result that occurs, but is under a misapprehension as to the attendant circumstances (such as when a person intentionally shoots a gun at what he thinks is a dummy but which in fact is a real person). Of the various mens rea defenses, mental illness is most likely to play a role here (in what has sometimes been labeled the “mistake of fact” defense). For instance, a person who believes he is shooting the devil when in fact he is killing a person²⁶ or a person who exerts control over property he delusionally believes to be his²⁷ would be acquitted of homicide and theft, respectively, if mens rea is subjectively defined. Another, more subtle example of this type of mens rea defense is most likely to arise in connection with a person who is mentally retarded rather than mentally ill. Like a young child, such a person may kill not realizing that a life has been ended, because of an incomplete conception of what life is; for instance, the offender may believe the victim will rejuvenate like a cartoon character.²⁸ Mens rea, subjectively

²⁵. The cases often use the label “automatism” to describe application of the involuntary act doctrine to those who have mental disorder. WAYNE LAFAVE & AUSTIN SCOTT, CRIMINAL LAW 382 (2d ed. 1986). Professors LaFave & Scott also note that although the defense “is sometimes explained on the ground that such a person could not have the requisite mental state for commission of the crime the better rationale is that the individual has not engaged in a voluntary act.” *Id.* Be that as it may, for reasons of parsimony this article will continue to include involuntary acts in the lack-of-mens rea category.

²⁶. *See, e.g.*, the case of Joy Baker, described in PETER LOW ET AL., CRIMINAL LAW 664-73 (2d ed. 1986).

²⁷. *See, e.g.*, *People v. Wetmore*, 22 Cal.3d 318, 149 Cal.Rptr. 265, 583 P.2d 1308 (1978)(defendant found insane on burglary charges upon proof that as a result of mental illness he believed that he owned the apartment and belongings in which he was found).

²⁸. Or consider the case of John Barclay, who killed a friend for three pounds and a watch, vaguely knowing it was wrong to do so, but also believing that there was no difference between killing a human being and killing an ox. ISAAC RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY 93 (ed. Winfred Overholser, 1962). If Barclay thought a

defined, would be absent in such a case because murder requires not only an intentional killing, but also that the offender understands that the victim is a human being who is capable of dying.²⁹

Finally, a person may intentionally engage in conduct and intend the result, under no misapprehension as to the attendant circumstances, but still not intend to commit a crime because of an inadequate understanding of what crime is. There are actually two versions of this type of mens rea requirement. First, the person may not be aware of the *concept* of crime (as might be true of a three year-old). Second, the person may understand that criminal prohibitions exist but believe that his specific act is legally permissible (such as might occur when a person from a different country commits an act that would be perfectly legal in his culture, although illegal in ours). The first situation might be called “general” ignorance of the law, while the second might be called “specific” ignorance of the law. Outside of the insanity and infancy contexts, neither type of ignorance has been recognized as an excuse for mala in se crimes.³⁰ However, for reasons discussed in more detail later in this article,³¹ a subjectively defined mens rea doctrine should excuse at least general ignorance of the law, whether or not it is due to mental disability, a position which would excuse those rare individuals who intentionally carry out criminal acts without understanding the concept of good and evil.

In short, the proposal would treat people with mental disorder no differently from people who are not mentally ill, assuming (and this is admittedly a big assumption) a modern criminal justice system that adopts a subjective approach to culpability. The rest of this article will try to justify this proposal. It will do so from three perspectives: historical, moral, and instrumental. As an historical matter, the insanity defense was the only method of mitigating culpability for unreasonable actions; now that other aspects of criminal law doctrine have taken on this role, the defense has lost much of its *raison d’etre*. Ironically, the scope of the insanity defense began expanding at roughly the same time developments in other parts of the criminal law rendered the original defense redundant in many respects. Second, and most importantly, the proposal captures the universe of mentally disordered individuals who should be excused. The expansion of the defense which has occurred in modern times, whether it encompasses anyone with an “abnormal” condition or is limited to those who are viewed as “irrational”, does not adequately distinguish those we excuse from those we do not. Third, the proposal has several practical

person and an ox were essentially the same, he may not have had mens rea for homicide.

²⁹. Even defendants without mental disorder may have such a defense. *See e.g.*, Keeler v. Sup. Ct. Amador Cty., 2 Cal.3d 619, 87 Cal.Rptr. 481, 470 P.2d 617 (1970)(reversing a murder conviction for killing a fetus, in part because the defendant could not foresee that a fetus was a person for purposes of the homicide statute).

³⁰. LAFAVE & SCOTT, *supra* note 25, at 412.

³¹. *See infra* text accompanying notes 154-159.

advantages, including enhancing respect for people with mental illness, facilitating treatment, and promoting the legitimacy of the criminal justice system.

I. The Lessons of History

The insanity defense has been through several well-known permutations, generally in the direction of expansion, although in very modern times some retrenchment has occurred. Much less acknowledged by many who have focused primarily on the insanity defense is the trend toward subjectification of the rest of the criminal law. The intersection of these two trends suggests that the insanity defense, in its current form, has outlived its usefulness.

A. The Insanity Defense

For most of its existence in Anglo-American law, the "insanity defense" or its functional equivalent has required gross impairment. Although we have virtually no direct evidence about the facts of individual cases in medieval and renaissance times,³² commentators of the period consistently spoke of a requirement that the defendant lack understanding of good and evil or be devoid of all reason, and often equated the insane with animals or infants.³³ Thus, using the terminology introduced above, it appears that for several centuries of English law only mentally ill

³². In medieval times, the insanity finding was implemented not through a formal verdict after judicial instructions, but via pardon from the king. There are several accounts of pardons before the sixteenth century, but the precise grounds for these actions are not clear. *See, e.g.*, MAEDER, *supra* note 11, at 4, 5 ("There were no need for tests of exculpatory insanity because the only criteria for a pardon were those dictated by the king's opinion and conscience.").

³³. Bracton, writing in the thirteenth century, considered insane those who "lack sense and reason and can no more do wrong or commit a felony than a brute animal." HENRICI DE BRACON, DE LEGIBUS ET CONSEUTUDINIBUS ANGLIAE, quoted in Anthony Platt & Bernard Diamond, *The Origins and Development of the "Wild Beast" Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility*, 1 J. HISTORY BEH.SCIENCES 355, 357-58 (1965). Coke, writing in the sixteenth century held "that one who is insane does not know what he is doing, lacks the ability of mind and reason, and therefore cannot possess a felonious intent and purpose". HERMANN, *supra* note 7, at 24. Hale, in the seventeenth century, required the absence of "understanding and will" akin to the mental state of a youth. *Id.* at 25. Blackstone, in the eighteenth century, spoke of "total idiocy, or absolute insanity" as the gravamen of insanity. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Book IV), Chap. 2, at 24-25 (1898). Finally, in his famous jury charge, Justice Tracy asked the jury to consider whether the defendant could "distinguish between good and evil" or instead was "totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast." *Rex v. Arnold*, 16 How. St. Tr. 695 (1724) in Howell, T.B. (ed.).

defendants who lacked mens rea in the involuntary act, mistake or general ignorance senses were entitled to royal pardon or acquittal.

Beginning no later than the early 1800s, courts in both England and America increasingly referred to insanity as an inability to distinguish “right and wrong.”³⁴ The latter language could be construed to mean that a person who intentionally harmed another and was generally aware of the concept of crime might still be acquitted if, because of mental disorder, he either did not believe the law proscribed his particular act (i.e., the specific ignorance mens rea test described above) or delusionally perceived facts that amounted to a justification. In practice, most people tried under these tests were convicted, irrespective of whether they felt the act was legally permissible, so long as they intended harm.³⁵ At the same time, it is clear that at least *some* judges and juries prior to the mid-nineteenth century were willing to relax the legal threshold for insanity below the medieval devoid-of-reason test. Although the precise grounds for these results are unclear, these cases were not inconsistent with the notion that a person who, for instance, knew that he was killing someone might still obtain an insanity verdict if delusions convinced him his act was justifiable.³⁶

In any event, the M’Naghten test, promulgated by the House of Lords in 1843, appeared to recognize both versions of insanity by excusing those who, by virtue of mental disorder, either

³⁴. Anthony Platt & Bernard L. Diamond, *The Origins of the “Right and Wrong” Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 CAL.L.REV. 1227, at 1235-37 (England); 1250-57 (United States).

³⁵. Illustrative is Maeder’s account of the Arnold, Ferrers, Bellingham and Oxford cases in eighteenth and nineteenth century England, each of which involved defendants with serious mental problems who apparently felt justified in killing their victims but nonetheless intended to kill them. All were convicted. See MAEDER, *supra* note 11, at 9-22. See also, RAY, *supra* note 28, at 188 (“Instead of inquiring into the effect produced by the peculiar delusions of the accused on his ordinary conduct and conversation, and especially of their connexion with the criminal act in question, the [English] courts in these cases have been contented with laying down metaphysical dogmas on the consciousness of right and wrong, of good and evil, and the measure of understanding still possessed by the accused.”). In the ten early-nineteenth century American cases involving an insanity plea and a known disposition that are described by Platt & Diamond, eight resulted in guilty verdicts despite evidence of derangement (and one of the acquittals, Platt & Diamond aver, had more to do with the elevated social status of the defendant than mental state). Platt & Diamond, *supra* note 34, at 1251-56 & 1260 (Table II).

³⁶. The two most prominent examples are M’Naghten itself, the facts of which were described earlier, and *Rex v. Hadfield*, 27 How. St. Tr. 1281 (1800)(acquitting a defendant who believed God had told him to sacrifice himself to save the world and who chose assassination of the King as the best way of assuring his demise).

did not know the nature and quality of the act or that it was wrong.³⁷ The House of Lords also refined the latter test for those defendants who were not "totally" insane but rather experienced their delusions primarily in connection with the offense:

As to a person who labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.³⁸

This language explicitly allows a defense for a person who, regardless of his knowledge about the law, erroneously believes he is confronted by facts that, if true, make his act justifiable.

The next steps in insanity defense jurisprudence responded to two criticisms leveled at M'Naghten. First, M'Naghten was faulted because it focused solely on cognitive impairment, thus failing to recognize volitional impairment.³⁹ A person who knew what he was doing was wrong,

³⁷. The pertinent language from the House of Lords was as follows: “[T]o 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.” M’Naghten’s Case, 10 Cl & Fin. 200, 210 (1843).

³⁸. *Id.* at 211.

³⁹. For a summary of nineteenth century views on this matter, see *Parsons v. State*, 81 Ala. 577, 2 So. 854 (1886)(citing authorities who argued against cognitive-only tests and criticizing courts that continued to rely on such tests for “not [keeping] pace with the progress of thought and discovery in the present advanced stages of medical science.”). *Id.* at 582, 2 So. at 857. A vigorous pre-M’Naghten critic of cognitive-only tests was Sir Isaac Ray, who argued that such tests were “fallacious” because a person who “finds himself urged perhaps to the commission of every outrage, and, though perfectly conscious of what he is doing, unable to offer the slightest resistance to the overwhelming power that impels him” is convicted “because no delusion is present to disturb and distort the mental vision. In short, the very character that renders this mental disorder more terrible than all others is also that which is made to steel the heart against the claims of humanity in behalf of its miserable victim.” RAY, *supra* note 28, at 42-43. These types of views continued to be espoused in the twentieth century. See Benjamin Cardozo, *What Medicine Can Do for Law*, in *LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES* 70, 106 (1931)(M’Naghten rests on “antiquated and outworn medical and ethical concepts”); *United States v. Freeman*, 357 F.2d 606, 617 (2d Cir. 1966)(M’Naghten based on

but who felt “compelled” to commit the criminal act--say, a person suffering from kleptomania or manic-depressive psychosis--would be criminally punished in a M’Naghten jurisdiction. The second criticism was that, even if restricting the insanity defense to those who are cognitively impaired is legitimate, the M’Naghten test did not give the excuse broad enough scope.⁴⁰ Even many severely crazy people know in some sense the nature of their act and that it was legally wrong but either do not emotionally relate to or internalize the consequences of their act (as might have occurred in John Hinckley’s case), or believe, as in the command-from-God scenario, that they were *morally* justified in acting despite its “illegality” under the criminal law.

The law eventually responded to both these criticisms. A number of American jurisdictions added the so-called “irresistible impulse” test to the M’Naghten test, thereby recognizing volitional impairment as a defense.⁴¹ Many jurisdictions also interpreted the M’Naghten language loosely. Total cognitive impairment was not required, nor was mere awareness that the act was prohibited by statute a bar to acquittal; the focus was on whether the accused’s mental disease deprived him of the capacity to recognize the wrongfulness of the offense in some larger sense.⁴²

These developments culminated in the test found in the American Law Institute’s Model Penal Code. This test read as follows: “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 the law.”⁴³ Note that this language recognizes both cognitive and volitional

outmoded views of the human psyche) .

⁴⁰. Writing in 1943, Gregory Zilboorg, a psychiatrist, argued that if M’Naghten’s language were taken seriously, “it would excuse only those totally deteriorated, drooling hopeless psychotics of longstanding, and congenital idiots.” GREGORY ZILBOORG, *MIND, MEDICINE, AND MAN* 273 (1943). *See also*, SHELDON GLUECK, *LAW AND PSYCHIATRY: COLD WAR OR ENTENTE CORDIALE* 43-43 (1966)(calling test rigid and inflexible); HENRY WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 40 (1954)(use of language such as “know” and “wrong” was “ambiguous, obscure, unintelligible, and too narrow”).

⁴¹. At its peak in the 1920s, the “irresistible impulse test” formed part of the insanity defense in eighteen jurisdictions. GOLDSTEIN, *supra* note 3, at 241-2 n. 1 (1967)(collecting cases).

⁴². *Id.* at 49-53 (“most of the courts which have addressed themselves to the question [of defining “know” in the M’Naghten test] have favored a rather broad construction”).

⁴³. MODEL PENAL CODE § 401(1).

impairment as an excuse, and requires only substantial, not total, incapacity.⁴⁴ It also uses the broader term "appreciate", rather than "know", in defining the type of cognitive impairment that leads to insanity, in an effort to recognize lack of affective, or emotional, understanding as a defense.⁴⁵ Finally, it provides the "wrongfulness" option, meant to allow an insanity finding not only if the person did not know the act was illegal under the law, but also under circumstances where mental illness led to a belief that the act was morally permissible according to community standards.⁴⁶

Since the early 1950s, when the American Law Institute test was first promulgated, several other insanity defense formulations have been advanced. The two most expansive were both proposed in their modern American form by Judge David Bazelon, one of the giants of mental health law. In *Durham v. United States*,⁴⁷ he rejuvenated the so-called "product test". Derived from the writings of the nineteenth century medical scholar, Sir Isaac Ray,⁴⁸ this test excuses crime simply if it is caused by mental illness, with no particular proof of cognitive or volitional impairment required. Several years later, disenchanted with the medical model underlying the insanity defense and with the conclusory expert testimony the product test produced, Bazelon called for acquittal whenever the person cannot be held "justly responsible" for the criminal act.⁴⁹ This test is the most expansive of any of those discussed here, because it

⁴⁴. The drafters stated that "[t]he adoption of the standard of substantial capacity may well be the Code's most significant alteration of the prevailing tests." MODEL PENAL CODE AND COMMENTARIES [hereafter MPC COMMENTARIES], Vol. II, at 172 (1962).

⁴⁵. *Id.* at 169 ("The use of the 'appreciate' rather than 'know' conveys a broader sense of understanding than simple cognition.").

⁴⁶. More specifically, "criminality" in the MPC formulation was meant to refer to the illegality of the act, whereas "wrongfulness" was meant to refer to a community or personal belief that the act was wrong. *Id.* Although the drafters did not believe there were significant differences between the two options, they did state that a person who acted under a command from God or otherwise thought he was "morally justified" might more easily be acquitted under the latter formulation. *Id.* at 169-70.

⁴⁷. 214 F.2d 862 (D.C. Cir. 1954).

⁴⁸. In *State v. Pike*, 49 N.H. 399 (1870), the New Hampshire Supreme Court crafted a test which stated that "if the [crime] was the offspring or product of mental disease in the defendant, he was not guilty by reason of insanity." *Id.* at 442. The writer of this opinion, Judge Doe, was heavily influenced by Ray's work. See HENRY WEIHOFEN, *THE URGE TO PUNISH* 307 (1956).

⁴⁹. *United States v. Brawner*, 471 F.2d 969, 1032 (D.C.Cir. 1972)(Bazelon, C.J., concurring and dissenting). See generally, David Bazelon, *The Morality of the Criminal Law*, 49

entirely delinks the “insanity” test from any mental disorder predicate and thus gives the factfinder free rein to decide who should be held accountable for criminal acts. Alternatively, academics from the clinical and legal disciplines such as Fingarette,⁵⁰ Moore,⁵¹ Morse⁵², Sendor,⁵³ and Schopp⁵⁴ have proposed tests that focus on the rationality of the defendant, a construct which is cognitively oriented but which, its proponents claim, also captures those with volitional impairment who ought to be excused.⁵⁵ Although the rationality tests vary in form, they all look at the extent to which the thought content of the criminal defendant reflects reality and the manner in which the defendant processes information.

None of these latter tests has been adopted by any state, and the product test exists in only one state.⁵⁶ The ALI test, on the other hand, proved quite popular, at one time holding sway in

U.S.C. L.REV. 385 (1976).

⁵⁰. HERBERT FINGARETTE & ANN HASSE, *MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY* 218 (1979)(advocating a defense if the accused lacked “capacity for rational conduct”).

⁵¹. MICHAEL MOORE, *LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP* 245 (1985)(an excuse exists when the accused is “so irrational as to be nonresponsible”).

⁵². Stephen Morse, *Immaturity and Irresponsibility*, 88 J.CRIM.L. & CRIMINOL. 15, 24 (1997) (“Rationality . . . is the most general, important prerequisite to being morally responsible.”).

⁵³. Benjamin Sendor, *Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 GEO. L.J. 1371, 1415 (1986)(“[i]rrationality is a vital aspect of the exculpatory nature of insanity because rationality is an essential attribute of intelligible conduct, of behavior an observer, such as a jury, can interpret.”).

⁵⁴. ROBERT SCHOPP, *AUTOMATISM, INSANITY, AND THE PSYCHOLOGY OF CRIMINAL RESPONSIBILITY* 215 (1991)(“A person is not responsible for criminal conduct if he performed that conduct while suffering major distortion of his cognitive capacities that substantially impaired his ability to decide whether or not to perform that conduct through the process of practical reasoning that is ordinarily available to an adult who does not suffer major cognitive disorder.”).

⁵⁵. *See, e.g.*, Morse, *supra* note 52, at 29 (“Although the internal hard choice model is plausible . . . I prefer to analyze these cases in terms of irrationality.”); SCHOPP, *supra* 54, at 203 (“major cognitive dysfunction constitutes the type of volitional disorder that gives rise to the NGRI defense.”).

⁵⁶. New Hampshire retains the product test. *See supra* note 48.

virtually all the federal circuits and over half the states (with the rest using M'Naghten alone or combined with an irresistible impulse defense).⁵⁷ After John Hinckley's acquittal on charges of attempting to assassinate President Reagan, however, the federal government, as well as several states that had adopted the ALI test, eliminated the volitional prong and tried to narrow the scope of the defense in other ways.⁵⁸ Furthermore, at least five states have now eliminated the insanity defense altogether.⁵⁹

B. Other Defenses

Running parallel to the expansionary developments in insanity defense jurisprudence through the 1970s were much more significant developments (in terms of the number of cases affected) concerning the mens rea required for specific offenses and the scope of affirmative defense doctrines such as self-defense, provocation, and duress. These other legal defenses have also, over time, generally expanded. What is especially important for purposes of this article is a particular sense in which they have expanded: they have all moved toward a more subjective definition of culpability that makes evidence of mental disorder relevant independently of the insanity defense.

In early medieval times, proof of the act alone may have been sufficient to convict,⁶⁰ neither mens rea nor affirmative defense doctrine existed in the formal substantive criminal law. Even accidental harm or harm perpetrated in self-defense appears to have been punished criminally, although perhaps not as severely as intentional unjustified conduct.⁶¹ By the twelfth or thirteenth centuries the courts, under the influence of the church, did begin to speak of an evil or vicious mindset as a predicate for guilt,⁶² but this requirement was not particularly significant. It appeared to bar conviction for pure accident and objectively reasonable self-defense and perhaps for involuntary acts as well. Other than that, as already noted, non-insane individuals who committed crime--people who knew their acts were causing harm--were considered culpable

⁵⁷. See 3 MICHAEL PERLIN, MENTAL DISABILITY LAW § 15.07 at 302 (1989).

⁵⁸. REISNER ET AL., *supra* note 15, at 526-27.

⁵⁹. See *supra* note 2. See also Pouncey v. State, 297 Md. 264, 465 A.2d 475 (1983) (arguably abolishing the insanity defense in Maryland).

⁶⁰. Francis Bowes Sayre, *Mens Rea*, 45 HARV. L.REV. 974, 981 (1932)("[U]p to the twelfth century the conception of mens rea in anything like its modern sense was non-existent.").

⁶¹. *Id.* at 981-82.

⁶². HERMANN, *supra* note 7, at 22 (describing movement toward intent as a basis for liability, prompted by a "study of Roman law and the increased authority of ecclesiastically trained jurists drawing on canon law and the teachings of the Church Fathers.").

regardless of the degree of purposefulness behind their conduct or the precise goal of that conduct.⁶³

By the fifteenth century, the law regarding mens rea showed signs of progression toward a more refined subjective approach. Courts began to differentiate between mental states, so that in the law of homicide, for instance, those whose acts were "wanton and willful" were viewed as more culpable than those who acted less deliberately.⁶⁴ Many crimes were said to require what came to be called "specific intent" in both England and America,⁶⁵ that is, an intent to cause a result beyond that associated with knowingly engaging in particular conduct. Thus, burglary (defined as entering a dwelling with an intent to commit theft) was said to require the specific intent to commit theft.

In theory, a person who, because of mental disorder, did not kill "willfully" or did not possess the required specific intent should be acquitted of these types of offenses. In practice, however, the subjectification of mens rea only went so far. Prior to the mid-twentieth century, evidence of impaired mental state was rarely considered relevant outside of the insanity context even in the relatively more "liberal" United States.⁶⁶ Moreover, even the formal law of mens rea remained predominately objectively defined with respect to mistakes of fact (e.g., mistakes about ownership of property, consent, identity of the victim);⁶⁷ as noted earlier, mental illness is much more likely to lead to such mistakes than to an inability to form an intent to carry out the conduct or cause the particular result associated with the crime.

⁶³. As Sayre put it, mens rea in this period "smacked strongly of general moral blameworthiness", Sayre, *supra* note 60, at 988. With respect to homicide "[t]he line between murder and manslaughter was unknown; there was no legal distinction between voluntary and involuntary homicide." *Id.* at 994.

⁶⁴. *Id.* at 996.

⁶⁵. *Id.* at 99-1002 (discussing historical development); LAFAVE & SCOTT, *supra* note 25, at 216-17 (describing the "traditional view" with respect to specific and general intent).

⁶⁶. The U.S. Supreme Court's statement in *Fisher v. United States*, 328 U.S. 463 (1946), that admission of evidence of mental disorder for purposes other than showing insanity was a "radical departure from common law concepts" may have been somewhat of an overstatement, but not by much. Even as late as the year *Fisher* was decided, at most nine states permitted such evidence, and at least two of these did so only in dictum. Henry Weihofen & Winfred Overholser, *Mental Disorder Affecting the Degree of a Crime*, 56 YALE L.J. 959, 965-66 (1947).

⁶⁷. See Peter Low, *The Model Penal Code, the Common Law, and Mistakes of Fact: Recklessness, Negligence, or Strict Liability?*, 19 RUTGERS L. J. 539, 556 (1988)(describing the Model Penal Code's subjective approach to mistake of fact as a "reject[ion of] a judgment expressed in a common-law rule that was centuries in the evolution.").

Other defensive doctrines were even more clearly defined in objective terms, until well into this century. A person was acquitted on self defense grounds only if, as an objective matter, the harm he committed was no greater than the harm prevented.⁶⁸ A person who asserted provocation could prevail on that claim only if certain types of provoking events, derived from assumptions about how reasonable people react, were proven.⁶⁹ Duress was available only in a very limited number of objectively defined circumstances.⁷⁰ Under these defenses, the defendant's assertions about his or her feelings and feelings at the time of the offense, even if believed, were hardly dispositive, and often not even relevant. Certainly evidence of mental illness was not considered pertinent.⁷¹

Probably the single most important trend in American criminal law during the twentieth century has been the erosion of this position. The leader in this trend toward subjectively defined culpability, as with the insanity defense, was again the American Law Institute's Model Penal Code.

With respect, first, to mens rea, the Code expresses a strong preference for criminal liability based on proof of actual awareness that one is causing the result under the circumstances required for the crime,⁷² a position that, as discussed above, the common law never fully

⁶⁸. The “prevailing rule” in the first half of this century was that there be “a reasonable ground” for the belief that defensive action was necessary. MPC COMMENTARIES, *supra* note 44, at Vol. II at 35 & cases cited in n.3. Even in modern times, the law in most jurisdictions requires that “the defendant’s belief in the necessity of using force to prevent harm to himself be a reasonable one, so that one who honestly though unreasonably believes in the necessity of using force in self-protection loses the defense.” LAFAVE & SCOTT, *supra* note 25, at 457.

⁶⁹. Peter Ashworth, *The Doctrine of Provocation*, 35 CAMB.L.J. 292, 293 (1976) (describing development of provocation doctrine in the 17th century into four categories of “legally sufficient” provocation—angry words followed by an assault; the sight of a friend or relative being beaten; the sight of a citizen being unlawfully deprived of his liberty; the sight of one’s wife in adultery).

⁷⁰. As with self-defense doctrine, the law of duress in many jurisdictions *remains* objectively defined. See LAFAVE & SCOTT, *supra* note 25, at 439 [“The present law [requires] that the threat of harm produce in the defendant a reasonable (‘well grounded,’ as the cases sometimes say) fear that the harm will be inflicted if the defendant refuses to obey.”].

⁷¹. For instance, as to provocation, LaFave & Scott state that under the traditional test “[i]t is quite uniformly held that the defendant’s special mental qualities . . . are not to be considered.” *Id.* at 659. As to self-defense and duress, see *supra* notes 68 & 70.

⁷². “It was believed to be unjust to measure liability for serious criminal offenses on the basis of what the defendant should have believed or what most people would have intended.”

embraced. Following logically from this proposition, the Code permits evidence of mental abnormality to be introduced not only on the insanity issue, but also on the issue of whether the accused had the mens rea associated with the crime.⁷³ For instance, to repeat previous examples, if a person's mental disorder leads him to kill another accidentally, or to believe that he is shooting the devil rather than a person, he should be acquitted of both murder and manslaughter under the Model Penal Code,⁷⁴ regardless of his likely success with the insanity defense, because he did not intend to end the life of a human being, nor was he even aware of the risk of doing so. (Whether he would be convicted of negligent homicide is discussed later in this article⁷⁵). This idea is often referred to as the "diminished capacity" defense, but that is a misleading phrase to the extent it suggests a special defense for those with mental illness.⁷⁶ In fact, this provision of the Code is nothing more than a recognition that mental illness, like inadvertence and incompetence, can negate the requisite mens rea for the crime.

Even more significant is the Model Penal Code's approach to defensive doctrines such as self-defense, provocation and duress. In contrast to the common law, the Code permits the defendant asserting these defenses to submit evidence about his or her own feelings and thoughts at the time of the offense. For instance, in the justification domain the Code permits the use of deadly force whenever "*the actor believes* such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat."⁷⁷ This formulation makes the actor's beliefs, relevant to, although not dispositive of, a self-defense claim. As such, the defense is not a justification, in the sense of acquitting a person whose acts we condone or perhaps even encourage, but rather is an excuse, because it permits acquittal given the

MPC COMMENTARIES, *supra* note 44, Vol. I. at 235. The Code does recognize negligence as a sufficient ground for criminal liability in rare instances (including homicide, see § 210.3), but the commentaries also state that negligence "should properly not generally be deemed sufficient in the definition of specific crimes." *Id.* at 244.

⁷³. Model Penal Code § 4.02 ("Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind that is an element of the offense.").

⁷⁴. Under the Code, murder occurs when a person is killed purposely, knowingly or extremely recklessly and manslaughter occurs when a person is killed recklessly, MODEL PENAL CODE §§ 210.2; 210.3, with recklessness requiring an awareness of the risk of death. *Id.* at § 2.02(2)(c).

⁷⁵. See text *infra* accompanying notes 147-150.

⁷⁶. See AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 352-53 (1989)(hereafter ABA STANDARDS).

⁷⁷. MODEL PENAL CODE § 3.04(1)(emphasis added).

kind of person the defendant is.⁷⁸ One might call the Model Penal Code's approach "subjective justification" because, although the ultimate judgment as to whether the person's actions were justified depends upon an objective balancing of the harm caused against the harm prevented, the harms to be balanced are determined by the subjective perceptions of the actor, not those of the outside world.

The provision of the Code which is analogous to the common law provocation doctrine is somewhat more objectively defined but still incorporates subjective elements. It states that a homicide which would otherwise be murder is manslaughter if it is "committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse, . . . the reasonableness of such explanation or excuse to be determined *from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.*"⁷⁹ Similarly, with respect to duress, the Code provides for an affirmative defense when a person commits a crime "because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness *in his situation* would have been unable to resist."⁸⁰ The commentary to the Code makes clear that the intent of this latter provision "is to give effect to the defense when an actor mistakenly believes that a threat to use unlawful force has been made."⁸¹

Theoretically, therefore, evidence of mental abnormality could be relevant under any of these affirmative defenses.⁸² As with the insanity defense, many states have refused to follow the Model Penal Code's lead in defining the mens rea and affirmative defenses. But, in large part due to the impetus provided by the Code, the subjective approach to criminal culpability is now well-entrenched in criminal justice jurisprudence.

⁷⁸. On the difference between excuse and justification, see Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155 (1987).

⁷⁹. MODEL PENAL CODE § 210.3(1)(b)(emphasis added).

⁸⁰. MODEL PENAL CODE § 2.09(1).

⁸¹. MPC COMMENTARIES, *supra* note 44, Vol. I, at 380.

⁸². The major caveat to this view of the Model Penal Code is that, when negligence is grounds for criminal liability, as it is for negligent homicide under the Code, see § 210.4, then a negligent mistake as to the elements of the self-defense or duress also leads to liability. See § 3.09(2). However, under the Code, even negligence is defined relatively subjectively. More is said about negligence as a basis for liability *infra* at text accompanying notes 147-154.

C. Implications

From this brief overview, two facts should be clear. First, the insanity defense developed at a time when no other culpability doctrine mitigated punishment for nonaccidental crime. Even in relatively recent times, insanity was the only possible defense for a mentally ill person who acted "unreasonably" in committing an offense. For such persons, there was no mens rea, provocation or subjective justification plea.

In a sizeable number of jurisdictions today, on the other hand, anyone--mentally ill or not--whose actions are involuntary, who makes a mistake as to result or fact, or who believes he is confronted by circumstances that would lead to justification, provocation or duress may have a defense. Thus, the universe of excuses has expanded to the point where many of those who would be acquitted under an insanity defense could also succeed under another doctrine. For example, a criminal defendant who didn't know the nature and quality of the act will usually lack mens rea if the latter is subjectively defined, while a person who didn't think the act was wrong will often have a subjective justification. Although the subjectification trend pioneered by the Model Penal Code has its detractors,⁸³ it has also been vigorously defended,⁸⁴ and the rest of this article will be premised on the assumption, without further discussion, that it represents the morally appropriate view.⁸⁵

⁸³. The most famous is Justice Holmes, who argued that "when we are dealing with that part of the law which aims more directly than any other at establishing standards of conduct, we should expect there more than elsewhere to find that the tests of liability are external, and independent of the degree of evil in the particular persons' motives or intentions. . . . [These standards] take no account of incapacities, unless the weakness is so marked as to fall into well-known exceptions, such as infancy or madness." OLIVER WENDELL HOLMES, *THE COMMON LAW* 43 (1881). It also appears that the subjective view of culpability is not constitutionally required, at least under some circumstances. See *Montana v. Egelhoff*, 518 U.S. 37 (1996)(holding that due process is not violated by a statute which prohibits introduction of evidence showing that substance abuse negates the mens rea for the crime, largely because the intoxication defense is of "recent vintage", a description that would apply to virtually all the subjective defensive doctrines discussed here except the insanity defense).

⁸⁴. See, e.g., Jerome Hall, *Negligent Behavior Should be Excluded from Penal Liability*, 63 *COLUM L.REV.* 632 (1963); Glanville Williams, Section 3.09 Comment, Tentative Draft, Model Penal Code at 70-80 (1958), cited in MPC COMMENTARIES, *supra* note 44, Vol. II, at 152-53 n. 10 (arguing for a subjective approach to the affirmative defenses).

⁸⁵. If one accepts this position, the mens rea alternative endorsed by many enemies of the insanity defense, see *supra* note 2, clearly fails because it does not recognize subjective justification for those with mental illness. We can hardly deny a defense to those with mental illness that we freely grant to others.

One could conclude from all of this that the insanity defense is no longer needed. If, as this article eventually proposes,⁸⁶ general ignorance of the law is added to the list of excuses recognized in the Model Penal Code, the subjectively-defined defensive doctrines provide a broader basis for exculpation than both the pre-M’Naghten formulations of the defense and the M’Naghten test itself (at least if literally interpreted). Thus, if the latter formulation is morally sufficient for purposes of recognizing the exculpatory effect of mental disorder, the proposal advanced in this article should be.

However, some defendants who might be acquitted under more modern versions of the insanity defense clearly would not be under these other defensive doctrines. As illustrated at the beginning of this article, for instance, those whose beliefs, if true, would not amount to justification, would not be acquitted under any of the subjectified defenses; an insanity defense under the ALI or Bazelon tests would provide the only hope of avoiding conviction in such situations. Similarly, those who exhibit only volitional impairment would generally have a defense only under the volitional prong of the insanity test still recognized in some jurisdictions. The question thus becomes whether there are normative reasons for recognizing a separate, special defense in such situations.

II. Moral Considerations

Current insanity tests are overbroad because, if taken literally, they move too far toward the deterministic *reductio ad absurdum* that no one is responsible. The irrationality test favored by a number of scholars begins to deal with the problem, because it focuses on a person's reasons for committing crime as the dispositive cause of criminal behavior. But it too is overbroad, because it fails to explain why irrational reasons are necessarily exculpatory. Allowing subjectively defined defensive doctrines to do the work better captures the universe of people who should be excused.

A. The Assault of Determinism

The development of the modern behavioral sciences has made the criminal law's attempt to draw a coherent line between responsibility and non-responsibility ever more difficult. The claim embodied in the insanity defense, regardless of the specific language used, is that symptoms of mental illness over which the defendant had little or no control caused the crime. As long as mental disorder is kept narrowly defined, as was the case before the advent of modern psychiatry, this type of claim is not particularly threatening to the legal system and a culture which treasures a belief in autonomy. But when mental health professionals tell us that we have as little control over aspects of “character” as we do over mental illness, when science begins establishing clear correlates between physiology and aggression, and when the medical model of mental disease is supplemented with other, more exogenous models of disorder, determinism's assault on the citadel of free will begins to carry the day.

⁸⁶. See *infra* text accompanying note 155.

Consider first the number of mental impairments that fall under the rubric of “character” deficiencies, as distinguished from the psychotic dysfunctions such as schizophrenia (characterized by delusions and hallucinations) and the bipolar disorders (characterized by mania) that have traditionally formed the basis for the insanity defense. The official diagnostic manual of the American Psychiatric Association includes a plethora of disorders that fit in this category, including mental retardation, many types of impulse disorders (such as pedophilia), and an even larger number of so-called “personality disorders” (such as schizoid personality, borderline personality, dependent personality, paranoid personality, and antisocial personality).⁸⁷ All of these disorders are thought to be congenital or at least produced by early childhood influences, and many of them are even more immune to change than the psychoses.⁸⁸ At any given time in the United States, perhaps 15% of the general population,⁸⁹ and well over 40% of the prison population, suffers from one of these non-psychotic disorders.⁹⁰ All by themselves, people diagnosed as psychopaths, a well-studied subcategory of antisocial personality disorder, comprise perhaps 20% of those in prison.⁹¹

⁸⁷. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL 13-24 (4th ed. 1994)(hereafter DSM-IV)(listing disorders).

⁸⁸. See, e.g., AMERICAN PSYCHIATRIC GLOSSARY 153 (7th ed. 1994)(defining “personality disorder” as “[e]nduring patterns of perceiving, relating to, and thinking about the environment and oneself that begin by early childhood and are exhibited in a wide range of important social and personal contexts. These patterns are inflexible and maladaptive, causing either significant functional impairment or subjective distress.”).

⁸⁹. Laura J. Milazzo-Sayre, Marilyn J. Henderson, & Ronald W. Manderscheid, *Serious and Severe Mental Illness and Work: What Do We Know?*, in MENTAL DISORDER, WORK DISABILITY AND THE LAW 13, 15-16 (1997)(1994 data indicate that, in a one-year period, 22% of the U.S. adult population have a diagnosable mental or addictive disorder exclusive of substance use disorders; only 2.8% of these people suffer from “severe” disorders such as psychosis).

⁹⁰. In 1985, for instance, it was estimated that roughly 35% of the prison population suffered from character disorders alone, and another 9.5% to 29% were suffering from retardation. SAMUEL BRAKEL, JOHN PARRY, BARBARA WEINER, *THE MENTALLY DISABLED AND THE LAW* 736-37 (1985). Recent research indicates that approximately 75% of the population in *maximum* security prisons are people diagnosable with antisocial personality disorder. Conversation with Reid Maloy, Ph.D., Psychology Department, University of San Diego, September 8, 1999.

⁹¹. Mary K. Feeney, *Why They Kill: Psychopaths Have No Feelings for Their Victims*, HARTFORD COURANT, Oct. 21, 1997, at F1 (reporting estimates that 1 in 5 prison inmates are psychopaths). Another estimate is that 25% of those in maximum security institutions are psychopathic. Maloy, *supra* note 90.

Then there are numerous studies showing correlations between antisocial behavior and genetic makeup (e.g., an extra Y chromosome), hormonal imbalances, abnormal EEGs, certain deficiencies in intellectual capacities, and various types of brain dysfunctions.⁹² Although many of these studies are inconclusive, or are contradicted by other studies,⁹³ it is clear that some biological factors do strongly predispose people to commit crime.⁹⁴ The number of people afflicted by such physiological problems is substantial.⁹⁵

Finally, there are mental impairments that are more clearly caused by external factors such as bad relationships, trauma, and general stress. The “battered women syndrome” and “Vietnam veteran syndrome” (both based on the official diagnosis of post-traumatic stress disorder⁹⁶), “black rage”, and the “abuse excuse” are among the many legal creations meant to capture this notion.⁹⁷ Given their vague contours, the prevalence of such phenomena is hard to estimate, but it is not insubstantial.⁹⁸

These various psychological insights pose a potentially significant problem for the law of insanity as currently structured, because a vast number of people who commit crime can now

⁹². Deborah W. Denno, *Human Biology and Criminal Responsibility: Free Will or Free Ride?*, 137 U.P.A.L.REV. 615, 619-45 (1988)(summarizing studies).

⁹³. *Id.*

⁹⁴. *See* AGGRESSION AND VIOLENCE: GENETIC, NEUROBIOLOGICAL, AND BIOSOCIAL PERSPECTIVES (David M. Stoff & Robert B. Cairnes eds., 1996)(summarizing studies on correlations between aggressive behavior and family and genetic epidemiology, neurotransmitter and temporal lobe deficiencies, serotonin levels, autonomic reactivity, and so on); ADRIAN RAINE, *THE PSYCHOPATHOLOGY OF CRIME: CRIMINAL BEHAVIOR AS A CLINICAL DISORDER* 79 (1993)(“despite strong criticisms from social scientists, empirical data from several sources provide strong converging lines of evidence indicating some degree of genetic predisposition for crime . . . A very tentative and global estimate for the extent of heritability for crime is that genetic influences account for about half the variance in criminal behavior.”).

⁹⁵. *See, e.g., id.* at 91 (reviewing studies showing a correlation between aggressive offenders and low serotonin levels, with the percentage of such offenders ranging from 20 to 50%, depending upon the study).

⁹⁶. DSM-IV, *supra* note 87, at 427-28 .

⁹⁷. *See* Christopher Slobogin, *Psychiatric Evidence in Criminal Trials: To Junk or Not to Junk?*, 40 WM. & MARY L. REV. 1, 5-12 (1998)(describing various new psychiatric defenses).

⁹⁸. For example, DSM-IV reports studies indicating that the prevalence of post-traumatic stress syndrome in the general population is 1 to 14%. DSM-IV, *supra* note 87, at 426.

make a plausible claim that they were significantly impaired by a “mental disorder” at the time of the offense. Although courts for the most part have rejected exculpatory claims based on non-psychotic disorders,⁹⁹ it is not clear how this stance is justified under the more modern official insanity tests.¹⁰⁰ For instance, if the law wishes to inquire into whether defendants affectively understand their crime, as the ALI formulation purportedly does, psychopaths should be prime candidates for an insanity defense; their emotional capacity is far less substantial than many of those who suffer from schizophrenia.¹⁰¹ Because of their frequent difficulty in understanding the full consequences of their actions, people with mild and moderate mental retardation should also be eligible for the defense in its cognitive version.¹⁰² If the ALI's second prong, calling for an assessment of volitional impairment, is taken seriously, serial rapists, pedophiles and exhibitionists should have viable claims; from what we can tell, the subjectively-felt urges of these individuals are at least equal to the impulses experienced by people with manic-depressive illness and other psychoses.¹⁰³ The same can probably be said of people with other types of non-psychotic

⁹⁹. GARY MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS* 217 (2d ed. 1997)(table summarizing six studies showing that proportion of those found insane who were diagnosed with a “major psychosis” ranged from 67 to 97%)

¹⁰⁰. Cf. Professor Goldstein’s observation that, under the product test in the District of Columbia, “[t]he psychopath, the neurotic, the narcotics addict, the ‘emotionally unstable personality’ have all been held to qualify for the defense, provided that a psychiatrist is willing to testify that the condition in question is a ‘mental disease.’” GOLDSTEIN, *supra* note 3, at 213.

¹⁰¹. ROBERT D. HARE, *WITHOUT CONSCIENCE: THE DISTURBING WORLD OF THE PSYCHOPATHS AMONG US* 34, 44 (1993)(reporting that psychopaths, *inter alia*, seem “unable to ‘get into the skin’ or to ‘walk in the shoes’ of others, except in a purely intellectual sense;” are glib and superficial, lack remorse or guilt, lack empathy, have shallow emotions, and lack responsibility). *See also*, criteria for schizoid personality disorder, which include “emotional coldness, detachment, flattened affect”. DSM-IV, *supra* note 87, at 641.

¹⁰². *See Empirical Study: The Mentally Retarded Offender in Omaha-Douglas County*, 8 CREIGHTON L.REV. 622, 646 (1975)(arguing that, although mentally retarded persons may be able to distinguish right from wrong in the abstract, they have difficulty applying the abstract concepts to specific factual settings.).

¹⁰³. As will be emphasized later in this article, see *infra* text accompanying notes 128-145, measuring degrees of volitional impairment is impossible. However, plenty of evidence supports the intuition that some types of sex offenders experience very powerful urges. *See* DSM-IV, *supra* note 87, at 522 (describing “essential features of Paraphilia” as “recurrent, intense sexually arousing fantasies, sexual urges, or behaviors.”). *See also*, *Kansas v. Hendricks*, 521 U.S. 346, 355 (1997) (describing Hendricks, a “sexual predator”, as saying that he “can’t control the urge” to molest children and that the only sure way he could keep from sexually abusing children in the future was “to die.”).

disorders such as borderline and attention deficit disorder,¹⁰⁴ as well as at least some of those influenced by genetic and environmental factors.¹⁰⁵

Indeed, in theory, a whole host of *non*-“mentally ill” criminal actors could qualify under these modern tests, at least to the same extent as those who are afflicted with psychosis can. For instance, those individuals who commit crime after being provoked or while otherwise experiencing a fit of temper may fail the cognitive prong of insanity because, at the precise time of the offense, they do not “know”, much less “appreciate”, the consequences or wrongfulness of their act (thus the phrase, “blind rage”). Similarly, it is hard to say that the very greedy person who takes money he sees lying on the street is better able “to conform his behavior to the requirements of the law” than the insane person who commits a crime.¹⁰⁶

To these observations one might reply that the real justification for ignoring insanity pleas in such cases is that the personality disorders and like conditions do not fit the legal definition of “mental disease or defect”, the typical predicate for the insanity defense.¹⁰⁷ But this explanation,

¹⁰⁴See DSM-IV, *supra* note 87, at 654 (one criterion for borderline personality: “inappropriate, intense anger or difficulty controlling anger”); & at 84 (one criterion of attention-deficit/hyperactivity disorder: “is often ‘on the go’ or often acts as if ‘driven by a motor’”).

¹⁰⁵. With respect to genetics, see Laura Reider, *Toward a New Test for the Insanity Defense: Incorporating the Discoveries of Neuroscience into Moral and Legal Theories*, 46 UCLA L.REV. 289, 325 (1998)(concluding, after surveying the neuroscientific literature, that “the so-called irresistible impulse is perhaps less psychological in origin than physiological”). With respect to environmental influences, see Patricia Falk, *Novel Theories of Criminal Defense Based Upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication and Black Rage*, 74 N.C. L.REV. 731, 788 & n. 303 (1996) (arguing that there is “no doctrinal obstacle” to finding several of ten defendants who alleged urban psychosis, television intoxication and black rage insane under the volitional prong). See also, PHILIP Q. ROCHE, *THE CRIMINAL MIND*191-92 (1958)(asserting that a number of crimes, including kleptomania, fire setting and some homicides, are the result of strong urges spurred by an unconscious desire to resolve profound emotional conflicts).

¹⁰⁶. This example comes from Michael Moore. See MICHAEL MOORE, *PLACING BLAME* 511 (1997). Indeed, if one believes the hard determinists, *everyone* who commits a crime could be said to be “substantially unable” to conform, because of factors such as genetic makeup and environmental influences over which they have little or no control. *Id.* at 504 (“If one accepts determinism—the doctrine that every event, including human actions and willings, has a cause, then it is hard to see why everyone is not excused for all actions.”).

¹⁰⁷. A typical statement in this regard is that irresistible impulse “is to be distinguished from mere passion or overwhelming emotion not growing out of and connected with, a disease of the mind. Frenzy arising solely from the passion of anger and jealousy, regardless of how furious,

standing alone, is simple question-begging. Unless one can point to some functional difference between the psychotic and non-psychotic disorders, the nosological label is irrelevant as a normative matter.

B. The Rationality Test

This is where the rationality formulation endorsed by a number of commentators comes to the rescue, or at least appears to come to the rescue. Although no jurisdiction has adopted it, the rationality test rationalizes better than either the appreciation or lack of control test a threshold for insanity that puts the psychoses on one side and most other disorders and mental phenomena on the other. A person with psychosis is often demonstrably irrational, in the sense that he has fixed false beliefs and significantly impaired thought processes. People with personality disorders and purely volitional impairments, on the other hand, generally have no such impairment.

Furthermore, by focusing on one's reasons for acting rather than on emotional appreciation or control of conduct, the proponents of the rationality test have provided a plausible response to the determinist claim that we are not responsible for any of our behavior because all behavior is the result of factors over which we have no control. Michael Moore, one of the first proponents of this test,¹⁰⁸ *assumes* that all behavior is caused by biological, characterological, unconscious or environmental factors.¹⁰⁹ But, he argues, none of those causes necessarily disrupt one's ability to generate reasons for one's actions, based on one's desires and beliefs. These reasons, Moore demonstrates, are also causes of behavior, even if they themselves are caused by biological or other factors.¹¹⁰ Thus, when a person acts for reasons he is, so to speak, the "proximate" cause of his actions and generally should be held responsible for them (unless the reasons are irrational).¹¹¹

is not insanity.” *Thompson v. Comm.*, 193 Va. 704, 717, 70 S.E.2d 284, 291-92 (1952).

¹⁰⁸. Moore first broached this analysis in book form in *LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP*, *supra* note 51. He recently refined his views in *PLACING BLAME*, *supra* note 106.

¹⁰⁹. *LAW AND PSYCHIATRY*, *supra* note 51, at 33 (“My own determinist and mechanist assumptions are that human behavior is fully determined by mechanistic kinds of happenings in the human body.”).

¹¹⁰. *Id.* at 13-35.

¹¹¹. *Id.* at 190-245. For a more detailed summary of Moore’s reasoning in this regard, see Christopher Slobogin, *A Rational Approach to Responsibility*, 83 *MICH. L.REV.* 820, 822-27 (1985).

Stephen Morse, a colleague of Moore's, bolsters these arguments with observations about the incoherence of the traditional volitional impairment inquiry.¹¹² Aside from reflex events, everyone, no matter how compelled they feel, has choices at the time they act.¹¹³ When the pressure to act is external, as when someone puts a gun to one's head and orders a crime be committed, an excuse may make normative sense.¹¹⁴ But Morse suggests that when the pressure to act is internal, as might be the case with a drug addict or pedophile, a separate volitional excuse generally cannot be sustained for practical and conceptual reasons. First, "it will often be too difficult to assess the degree of threatened dysphoria that creates the hard choice".¹¹⁵ As Morse has said elsewhere, "[t]here is no scientific measure of the strength of urges."¹¹⁶ Second, "it is simply not clear that the fear of dysphoria would ever be sufficient to excuse the breach of important expectations, except in precisely those cases in which we would assume naturally that the agent's rational capacity was essentially disabled."¹¹⁷ For example, Morse says, the "policeman at the elbow" test, which limits the volitional prong of the insanity defense to situations in which the urge to commit crime is so strong that not even the presence of a law enforcement official disinhibits the person, "is . . . better interpreted as a rationality test."¹¹⁸ In sum, for Morse, irrationality defines the scope of excuse produced by internal, psychological causes.¹¹⁹

¹¹². Morse's arguments appear in several fora. His most elaborate exegesis on the point in the text is *Culpability and Control*, 142 U.P.A. L. REV. 1587 (1994), but this brief summary will come from several of his works.

¹¹³. Morse, *supra* note 112, at 1590-1605.

¹¹⁴. *Id.* at 1616-19.

¹¹⁵. Morse, *Immaturity and Irresponsibility*, *supra* note 52, at 30.

¹¹⁶. Stephen J. Morse, *Crazy Behavior, Morals and Science: An Analysis of Mental Health Law*, 51 S.CAL. L.REV. 527, 584 (1978).

¹¹⁷. *Id.*

¹¹⁸. Stephen Morse, *Causation, Compulsion and Involuntariness*, 22 BULL. AM. ACAD. PSYCHIATRY & LAW 159, 179 (1994).

¹¹⁹. Morse, *supra* note 112, at 29-30 ("Although the internal hard choice model is plausible and competing explanations that rely on so-called volitional problems are confused or lack empirical support, I prefer to analyze these cases in terms of irrationality."). Other advocates of the irrationality test make similar arguments. Herbert Fingarette rejects volitional tests of insanity because, regardless of how impaired a person is, it is still "the person himself who initiates and carries out the deed, it is his desire, his mood, his passion, his belief which is at issue, and it is he who acts to satisfy this desire, or to express this mood, emotion, or belief of his." HERBERT FINGARETTE, *THE MEANING OF INSANITY* 160 (1972). To Fingarette, what distinguishes

Moore, Morse and like-minded commentators make a solid argument against the argument that determinism defeats the law's effort to attribute culpability, as well as a convincing case for looking at a person's reasons for acting in deciding when culpability should be imposed. Where they are not as convincing is in explaining why *irrational* reasons are an automatic basis for exculpation. Moore states that rationality is the threshold because "[o]nly if we can see another being as one who acts to achieve some rational end in light of some rational beliefs will we understand him in the same fundamental way that we understand ourselves and our fellow persons in everyday life. We regard as moral agents only those beings we can understand in this way."¹²⁰ Morse offers a somewhat different rationale: irrationality is the preeminent excusing condition because, in his words, it will "make it too hard" for a person "to grasp or be guided by good reasons not to offend."¹²¹

One can concede Moore's point that we view irrational people differently without being forced to reach the conclusion that they thereby deserve exculpation from criminal offenses they commit. In fact, his explanation is tautological on the question of who should be considered responsible; it simply declares that irrational persons are not "moral agents."¹²² To bolster his point, he notes the medieval tendency to equate mentally disordered persons with beasts and infants, whom he says we do not regard as moral beings.¹²³ But that equation applies only in those cases in which the medieval cases applied it: when the offender did not know the nature and quality of the act (and thus lacked the capacity to form intent, or at least was ignorant of the law in the general sense). People who know they are harming another cannot so easily be consigned to the "non-human" category, assuming such a category should exist in the first place.

nonresponsible from responsible people is not lack of volition, but "the way in which [the nonresponsible come] to adopt one or another course of action"—the fact that they do so irrationally. *Id.* at 172. Robert Schopp likewise contends that the only appropriate conception of volitional impairment is one that focuses on whether there is "disorder of the capacities by which one engages in conscious and intentional action in response to deliberation and choice." SCHOPP, *supra* note 54, at 202.

¹²⁰. MOORE, *supra* note 51, at 244-45. Moore repeats this explanation in his later book, PLACING BLAME, *supra* note 106, at 608-09.

¹²¹. Morse, *supra* note 52, at 30.

¹²². Moore also equates a lack of responsibility with the inability to engage in practical reasoning, see MOORE, *supra* note 51, at 198-210, but he defines this inability in terms of irrationality, *id.* at 105, and thus the tautology stands. Robert Schopp makes the same initial move, SCHOPP, *supra* note 54, at 190, but explains defective practical reasoning more in terms of thought process than content. Schopp's analysis is described in more detail below.

¹²³. MOORE, *supra* note 106, at 609 ("Thus, it is easy to understand the historical tendency to analogize the mentally ill to infants and wild beasts.").

Morse provides a more cogent reason for using rationality as a test, but in doing so engages in the same reasoning he criticizes in those who support the volitionality inquiry. How do we know when, to use Morse's language, it is "*too hard* . . . to grasp or be guided by good reasons not to offend?" The assumption that irrational individuals find it more difficult to obtain or process information than do other people sounds remarkably like the proposition, rejected by Morse, that mentally ill people find it more difficult to control their behavior than do other people.¹²⁴

Although Morse does not go into detail as to why irrationality makes access to good reasons difficult, Robert Schopp, another advocate of a rationality-type test, provides a good description of the effects of psychopathology on one's practical reasoning abilities.¹²⁵ He notes that people with a major mental disorder such as schizophrenia can experience disturbances in three areas: cognitive focus, reasoning, and concept formation. With respect to cognitive focus, people with schizophrenia often have difficulty attending to essential information and become distracted by irrelevant stimuli; for instance, they may engage in "perseveration" (repeating references that are no longer relevant) or experience "thought blocking" (which involves a complete halt to thinking). Their reasoning ability is disturbed by the tendency to overgeneralize (by drawing conclusions without evidence or attributing elaborate meaning to something) and to engage in combinative thinking (e.g., condensation of impressions into beliefs that are completely unrealistic). Finally, they have difficulty forming abstract concepts correctly, often by including information in categories to which they bear virtually no relationship.

¹²⁴. Morse, *supra* note 112, at 1631 ("There is simply no scientific or clinical evidence that 'abnormal' desires are necessarily stronger than 'normal' desires and thus that abnormal desires uniquely threaten unbearable dysphoria and produce a consequently harder choice."). In a personal communication, Morse stated that "[t]he notion of hardness I am using in thinking about responsibility is not a matter of mechanism, physics or irresistible forces. It is a question of the general capacity a person has for rational practical reasoning . . . The addict's desire to have a fix or the pedophile's desire to molest a child are not irresistible forces. No one is 'forcing' the addict's or pedophile's hand. In some cases they just can't be guided by reason because they cannot access the good reasons not to behave badly." E-mail from Stephen Morse to author, Feb. 7, 2000. As Morse's examples illustrate, the "inability to be guided by reason" of which he speaks is not confined to people traditionally considered "mentally ill." This article argues that irrationality, so defined, is as impossible to measure as volitional impairment and at the same time excuses so many people that the culpability inquiry becomes vacuous. Morse himself is candid in noting that the irrationality threshold could end up being quite expansive. *See, e.g.*, Morse, *supra* note 112, at 1636 (wondering whether psychopaths should be excused on irrationality grounds); & at 1649 (suggesting that "crimes of 'passion', committed in heightened emotional states, such as fear and rage, . . . may seal off access to the ordinary desires, beliefs, and intentions that permit volitions to resolve the inevitable conflict by being properly responsive to . . . background factors.").

¹²⁵. SCHOPP, *supra* note 54, at 185-87.

Schopp illustrates many of these various disturbances in thought process with the story of Mary.¹²⁶ Mary stabbed to death a woman she had never met, as the woman came out of a church. Mary explained that she “had to” commit the crime because some “bad criminals” were going to kill her unless she convinced them that she too was bad. She knew of this threat because she had heard “them” talking about her on the phone (as she walked under the telephone wires), and because some people, whom she took to be the bad people, had been watching her on the subway. She chose the woman as her victim because a man she had thought about killing earlier “was too strong”, because she realized she was “supposed to” pick someone from a church after she found a dollar bill with “In God We Trust” on it, and because the woman had come out of the church just when Mary got there, “so I knew God wanted me to pick her.” Asked whether she was still being watched at the time of the interview, she answered: “Yes, but now they think I’m bad like them—but I’m good—I fooled them.” She blamed the act on her “delusions” and insisted the crime “wasn’t my fault.”

To Schopp, Mary demonstrated overgeneralized thinking when she concluded that people looking at her in the subway were “watching” her and poor abstraction ability when she interpreted the words “In God We Trust” as a symbolic message.¹²⁷ Her reasons for stabbing the victim—in particular, the glances of the subway passengers, the dollar bill motto, and the fact that the woman was leaving the church when she arrived—illustrated attention to irrelevant details and unwarranted interpretations. She also held flatly inconsistent beliefs, Schopp notes; for instance, she believed that criminals are bad but did not wonder how she could stab someone and remain good.¹²⁸ As Schopp says, these types of perceptions and thoughts “are not mere mistakes about the environment. They occur as part of a pattern of pathological cognitive functioning in which the person’s distorted cognitive processes allow him to accept these perceptual and cognitive distortions as accurate representations of the world and to interpret his other experiences in light of them.”¹²⁹ Thus, Schopp concludes, people like Mary “lack the capacity to generate action-plans through the normal process of practical inference.”¹³⁰

Clearly, Mary’s cognitive focus, reasoning and concept formation capacities are severely disturbed, much more so than those of someone who is not mentally ill. The key question, however, is whether this disturbance prevented her from assessing the good reasons for not killing, or at least made it relatively more difficult for her to access them. In this case, the principal reason for not committing the criminal act is that it is wrong to kill an innocent person.

¹²⁶. *Id.* at 160-62.

¹²⁷. *Id.* at 186-87.

¹²⁸. *Id.* at 195-96.

¹²⁹. *Id.* at 197

¹³⁰. *Id.* at 198.

Although we have no direct information on this point, it is improbable that this thought never occurred to Mary; despite her many inaccurate perceptions about the world, she knew the victim had not tried to harm her and insisted that the crime was not her “fault” after it occurred, suggesting a sense of guilt. Let us assume, however, that she did not, at the time of the act, consider the possible reasons the killing was the wrong thing to do, perhaps because, given the dollar motto and the serendipity of the woman’s egress from the church, she felt God was directing her. The crucial empirical question that must be answered is whether, to paraphrase a well-known expression used in the irresistible impulse context,¹³¹ this lack of consideration was because she *couldn’t* engage in such consideration at the time of the act or just *didn’t* do so. That question is not answerable.¹³²

It is also worth comparing Mary to people in similar situations who are not severely disordered. For instance, how is Mary different, in terms of coming up with reasons for not killing and giving them their due, from a would-be gang member who is told his life will end unless he kills someone as part of a gang initiation? Or from a woman with a dependent personality who kills at the direction of a dominant other?¹³³ The youth and the dependent woman are presumably more adept than Mary at assessing relevant information (including the possibility of jail time) and formulating a coherent action-plan. But, as Morse himself might say, we simply can’t know whether Mary, in formulating her action-plan, found it any harder to think about or follow reasons not to kill than someone in their position. Mary’s confused mental state may have led to her to believe, almost simultaneously, that the killing was both right and wrong, but the same could be true of the would-be gang member and the dependent woman. Mary said “I

¹³¹. As described by the American Bar Association, “[t]here is, in short, no objective basis to distinguish between offenders who are undeterrable and those who remained undeterred, impulses that were irresistible and those not resisted . . .” ABA STANDARDS, *supra* note 76, at 341 (also citing others who make the same type of statement).

¹³². In this regard, consider the comments of H.L.A. Hart:

[A] theory that mental operations like . . . thinking about . . . a situation are somehow “either there or not there”, and so utterly outside our control, can lead to the theory that we are *never* responsible . . . For just as [someone] might say “My mind was a blank” or “I just forgot” or “I just didn’t think, I could not help not thinking”, so the cold-blooded murderer might say “I just decided to kill, I couldn’t help deciding.”

HART, *supra* note 7, at 151. See also THOMAS SZASZ, IDEOLOGY AND INSANITY 271-72 (1987) (suggesting that the command from God cases are not different, in terms of “intentionality”, from the everyday occurrence of being asked to close a door by someone).

¹³³. See DSM-IV, *supra* note 87, at 668-69 (describing symptoms of dependent personality disorder, including going “to excessive lengths to obtain nurturance and support from others, to the point of volunteering to do things that are unpleasant”).

thought I had to do it”, but the other two might say the same thing. Indeed, the juvenile could also plausibly argue that killing an innocent is excused when necessary to prevent one’s own death (an argument that is cognizable under the Model Penal Code, although not under the common law¹³⁴). If Mary is to be excused it should be under this type of duress theory,¹³⁵ not on the unprovable judgment that it was harder for her than for a non-mentally ill person to act for, or be guided by, good reasons. That conclusion is bolstered by the intuition that if Mary had killed the woman from the church simply to prevent people from laughing at her, the urge to exculpate would not be nearly as strong, regardless of her cognitive distortions.¹³⁶

Mary’s case is apparently a hypothetical one. Consider three other actual cases involving individuals charged with murder. The first case involves Jon Miller.¹³⁷ Shortly after his release from jail, Miller stabbed a cab driver nine times and then raped her. Experts learned that he had a severe hatred of his mother, apparently because of her multiple marriages and continued refusal to see him over the years. Indeed, he had planned to kill her after his release. On several previous occasions he had suffered hallucinations in which he saw his mother in other persons, in a “yellow haze”; on one of these occasions he assaulted the person even though the victim was a stranger and had in no way provoked him. He was afflicted with the same type of hallucination at the time of the murder: he saw his mother’s face on the 56 year old taxi driver.

¹³⁴. Compare MPC COMMENTARIES, *supra* note 44, at 376 (“It is obvious that even homicide may sometimes be the product of coercion that is truly irresistible . . . This section is framed on [this] assumption”) to LAFAVE & SCOTT, *supra* note 25, at 434 (“the case law . . . has generally held that duress cannot justify murder.”).

¹³⁵. Mary would probably have to show, *inter alia*, that she felt the homicide was the only way to avoid being killed by the bad people. This is similar in type to the showing that women who rely on the battered woman syndrome try to make in attempting to justify killing their batterer despite what might seem, to the objective observer, other less violent options. See, e.g., *State v. Kelly*, 97 N.J. 178, 478 A.2d 364 (1984).

¹³⁶. Other attempts to differentiate these three individuals don’t work either. Schopp might say that Mary should be excused because her psychopathology causes disorganized, inconsistent thinking, e.g., she believes that killing is wrong one minute and not wrong the next. E-mail to author from Robert Schopp, Sept. 22, 1999. The same might be said of the juvenile (who is likely to very conflicted over what he should do), and the dependent woman may never even *consider* that killing at the behest of her lover is wrong. It might also be argued that, at the time of the crime, Mary is not “herself” and that, once medicated, she would never dream of killing. The same can be said of the juvenile once removed from his gang-dominated environment and of the dependent woman once her lover is gone.

¹³⁷. For the relevant facts, see *Miller v. State*, 373 So.2d 882, 883 n.1, 885 n.4 (Fla. 1979).

The second individual, Joseph Giarratano, was convicted and sentenced to death for killing a woman and her daughter.¹³⁸ As with Miller, Giarratano's relationship with his mother seemed to play a role in the crime. His mother had beaten him on a daily basis, often with a broom or a baseball bat. Over the years he stored up considerable secret anger and resentment toward her and reported that he frequently had fantasies of revenge. During his late adolescence his mother and sister began entertaining "streams of men" and his hatred of them increased. In explaining his crime, he noted that he had also regarded his victims as "sluts". With respect to the mother in particular he stated "I felt she deserved to die. She didn't love her daughter; she didn't care what she was like."

In the first case, the defendant believes, at least for a time, that his victim is his mother and demonstrates a very confused thought process; thus he might well be excused under an irrationality test. In the second, the defendant's reasons for acting, although also strange, are not as irrational; probably no one but a strict determinist would excuse Giarratano. But the two cases are not distinguishable in terms of the defendants' ability to act for good reasons. Miller's hallucinatory belief that his victim was his mother was presumably no more strongly held than Giarratano's belief that his victims were sluts. More importantly, we cannot be sure whether Miller's belief that his mother/victim should die was any less intractable or overpowering than Giarratano's belief that his victims deserved to die (indeed, Miller was caught trying to escape on a bus¹³⁹). All we can be sure of is that, if the defendants did kill for the reasons described, neither is justified in his actions, even under the Model Penal Code's subjectified provisions. Both defendants were mother haters who killed mother substitutes for no good reason.

Perhaps advocates of the rationality test would say that Miller wasn't "irrational" enough to be excused. Consider a third case, involving a man we shall call Ralph.¹⁴⁰ Ralph killed his father because he believed the father was sleeping with Ralph's wife and daughter. This information, which was clearly wrong, had been communicated to Ralph through "voices" that let him know everything his father did. On the day of the offense, Ralph woke up and, in his words, "found a knife by the side of my bed." He drove to his father's house, met his father outside the house, and stabbed him 12 times. During a post-offense interview, Ralph stated that he knew it was not "right" to kill his father for sleeping with his wife, but mentioned that his father had abused him as a child and that the voices continually harped on his father's indiscretions with Ralph's wife and daughter. Again, it is impossible to know whether this person's ability to be guided by good reasons was any more diminished than either that of a mentally ill person with

¹³⁸. For a description of this case see Richard Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA.L.REV. 427, 469-72 (1981).

¹³⁹. 373 So.2d at 883 n. 1. Miller was convicted of capital murder. *Id.* at 882.

¹⁴⁰. This individual was interviewed by the author under a promise of confidentiality, so the name and other identifying facts have been changed.

similar beliefs who doesn't kill his "tormentor" or that of a non-mentally person who kills when he discovers that his father *is* sleeping with his wife and daughter. As Dr. Drew Ross, a psychiatrist who has spent years evaluating murderers, notes, "psychosis may enhance and enact the drama already present, and the drama is not necessarily an innocent one."¹⁴¹

Examples can easily be multiplied that lead one to question whether rationality makes sense as the culpability threshold. Some people with paranoid schizophrenia harm those whom they inaccurately perceive are harassing them while other paranoid individuals, also irrationally fearful, do not.¹⁴² At the same time, those who are generally not irrational may be just as likely as people with paranoid schizophrenia to react disproportionately to perceived threats. The lawbooks are full of cases in which sensitive but otherwise normal people are convicted, albeit sometimes only of manslaughter, when they kill a person who has slighted them.¹⁴³ In short, just as there is no measure of how hard it is to *do* what is right, the existence or non-existence of irrationality usually cannot tell us how hard it is to *perceive* what is right.

D. Refining the Role of Mental Illness in Criminal Cases: The Role of Deterrence

Any test for insanity, whether it focuses on affective appreciation, volitionality, or irrationality, is a futile attempt to define a particular type of blamelessness: "controllessness". The question sought to be answered is the extent to which behavioral control is compromised due to an emotional inability to appreciate consequences, a physiological/psychological inability to

¹⁴¹. DREW ROSS, LOOKING INTO THE EYES OF A KILLER: A PSYCHIATRIST'S JOURNEY THROUGH THE MURDERER'S WORLD 87 (1998). Dr. Ross also states that patients with mental illness "usually . . . have a good heart underlying their loss of reality." *Id.* But most of his examples seem to belie this point when the patients are murderers. *See, e.g.*, case of Mark, *id.* at 83-87; cases of Ned and Horace, *id.* at 91-98; cases of Maria and Kara, *id.* at 129-40; case of Ernest, *id.* at 201-04.

¹⁴². Research indicates that one of the best predictors of violent behavior among those who are mentally ill are "threat override" symptoms, which involve erroneous beliefs of persecution. Nonetheless, the majority of those who experience such delusions do *not* commit violent acts against others. Bruce Link et al., *Violent and Illegal Behavior of Current and Former Mental Patients Compared to Community Controls*, paper presented at the Society for the Study of Social Problems (August, 1990); Richard Rogers, *APA's Position on the Insanity Defense*, 42 AM. PSYCHOLOGIST 44 (1987)(citing Goodwin, et al., 1971, for the proposition that "most schizophrenics are able to ignore or otherwise control their hallucinatory activity").

¹⁴³. *See, e.g.*, *Freddo v. State*, 127 Tenn. 376, 155 S.W. 170 (Tenn. 1913)(defendant who was particularly sensitive to insults to womanhood and who was an orphan killed after being called a "son of a bitch"); *Bedder v. Director of Public Prosecutions*, 2 All E.R. 801 (1954)(defendant who was sexually impotent and emotionally distressed by his condition killed after being taunted for his inability to have intercourse). *See also supra* note 124.

constrain behavior, or a cognitive inability to perceive reality and process information. Perhaps if it could be demonstrated that such people really could not control their behavior, but rather acted as if some giant hand propelled them into their criminal conduct against their will, then they would be blameless.¹⁴⁴ But as Morse and others have shown, even the most severely crazy people usually intend their acts and therefore have some control of them.¹⁴⁵ And while some people do seem to have more difficulty choosing the right behavior than others, determining who has the most difficulty is probably impossible. Even if some day we are able to determine whose choices are the most difficult, it is unlikely that serious mental illness or irrationality would provide the right dividing line.

For all of these reasons, the linchpin of culpability analysis should not be rationality, appreciation or volitionality, but rather the mens rea and subjective justification inquiries. If the exculpatory threshold is so defined, there would be no need to draw the lines made so difficult, so unfair, and, ultimately, so meaningless by our inability to decipher the deterministic influence. Hard decisions about the presence or absence of intent, the reasons for acting, and whether those reasons sound in justification, duress and so on would still have to be made.¹⁴⁶ But none of this would require explicit or implicit determinations about whether the person was capable of conforming behavior to the law.

To put the proposal advanced in this article in more positive terms: Mental disorder should have exculpatory effect when, and only when, its effects lead to a lack of the required mens rea or to reasons for committing the crime that sound in justification or duress. Two ambiguities about this rule left unresolved earlier in the article can now be taken up: (1) What role should mental illness play when negligence is the mens rea? and (2) When, if ever, should ignorance of the criminal law due to mental disorder be an excuse? Answering these questions

¹⁴⁴. Although modern cases provide few examples of this phenomenon, Sir Isaac Ray reported several cases “in which the desire to destroy life is prompted by no motive whatever, but solely by an irresistible impulse, without any appreciable disorder of mind or body.” RAY, *supra* note 28, at 149-68. But even in these cases the individual was usually aware of when the “irresistible impulse” was upon them and asked to be restrained in some manner or clearly intended the crime. *Id.*

¹⁴⁵. Morse, *supra* note 112, at 1595-1605; *see also supra* note 142.

¹⁴⁶. For instance, in the famous *Gorshen* case the defense argument was that had Gorshen not killed his supervisor (after being treated harshly by him) Gorshen would have “psychically disintegrated” into a world controlled by demons. *People v. Gorshen*, 51 Cal.2d 716, 336 P.2d 492 (1959). Under the regime proposed in this article, the question for the jury in that case would have been whether killing to prevent such disintegration is justified or at least sounds in mitigation. The command-from-God cases, *see supra* text accompanying notes 20-22, also present difficult issues concerning choice of evils defenses.

involves not only consideration of retributive issues, but also contemplation of the type of message the criminal law should send to people with mental illness and whether they will hear it.

Liability based on negligence, as defined at common law, can be imposed even on a person whose mental disability caused a mistake as to result or fact, if a reasonable person would not have made such a mistake¹⁴⁷--in other words, most of the time. Sound arguments have been made against negligence as a basis for criminal liability.¹⁴⁸ However, even the generally subjectively-oriented Model Penal Code retains negligence as grounds for conviction in a number of situations, including homicide,¹⁴⁹ so that a person who should have known of the risks attendant to his behavior will be found liable, albeit at a lesser grade of crime. At the same time, in line with its general orientation, the Code's definition of negligence is decidedly more "subjective" than the common law's, because it looks at whether the actor should have been aware of the mistake, "considering the nature and purpose of his conduct and the circumstances known to him."¹⁵⁰ Under this definition, a person whose mental illness leads him, erroneously yet firmly, to believe that he is about to be killed would not be acting negligently in killing the perceived assailant; in essence, under the Code as it would apply in the situations addressed in this article, negligence analysis would normally collapse into subjective justification analysis.

There may be one situation, however, where a person with mental disorder may be liable even if the criminal act was reasonable under the circumstances known to him at the time of the crime. Both the caselaw and modern statutes such as the Model Penal Code refuse to recognize an affirmative defense when the actor is responsible for the extenuating circumstances in which he finds himself. For instance, in defining its general choice of evils defense (the predicate for all of the justification defenses), the Model Penal Code states that "[w]hen the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils . . . the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability."¹⁵¹ Under this provision, a person with mental disability who knows that, while unmedicated, he is prone to engage in violent

¹⁴⁷. See LAFAVE & SCOTT, *supra* note 25, at 236 & n.19.

¹⁴⁸. See citations *supra* note 84.

¹⁴⁹. See MODEL PENAL CODE § 210.4.

¹⁵⁰. *Id.* at § 2.02(2)(d). Both courts and commentators have endorsed a similar standard. See, e.g., Trujillo v. People, 133 Colo. 186, 292 P.2d 980 (1956); Low, *supra* note 71, at 556 ("the concept of negligence takes as its base what the defendant actually knew about the situation, and asks whether an ordinary person would have inferred from this knowledge the need for circumspect behavior.").

¹⁵¹. MODEL PENAL CODE § 3.02(2). See also People v. Decina, 2 N.Y.2d 133, 157 N.Y.S.2d 558, 138 N.E.2d 799 (1956).

behavior may be liable for negligent or even reckless homicide if he fails to remain on medication and then kills, even if, at the time of the crime, his delusions otherwise satisfy the elements for subjective self-defense. The rationale for such a position is in the first instance retributive,¹⁵² but can also be seen as utilitarian, to the extent a person with mental illness can be cajoled by the commands of the criminal law into taking his responsibility toward others seriously.¹⁵³

Similar concerns suggest that recognition of ignorance of the law as an excuse should be limited. As noted earlier, even the most subjective approaches to mens rea and justification doctrines do not recognize such an excuse. Yet at least some people who intentionally commit criminal acts are either unfamiliar with the concept of crime (earlier referred to as general ignorance of the law) or believe that their particular act is consistent with the criminal law (specific ignorance of the law). An example of the first type of person would be an infant or someone who, from birth, has been so retarded or mentally ill that no socialization has taken place. An example of the second type of person would be an individual from a culture which does not criminalize the particular behavior in question or a person who, as a result of retardation or illness, believes that the criminal law permits something it clearly does not, such as killing in response to insults.¹⁵⁴

A person who is not cognizant of any of society's constraints cannot justly be held liable for violating those constraints. Even the medieval tests of insanity would excuse a person who is generally ignorant of the criminal law,¹⁵⁵ and the subjective mens rea concept should be construed so as to achieve the same result. Such a person is likely to lack mens rea in either the mistake as to result or mistake of fact sense in any event.

¹⁵². See generally, Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1 (1985). Empirical study indicates that laypeople consider one's culpability for bringing about one's mental condition highly relevant to criminal responsibility. Norman J. Finkel & Christopher Slobogin, *Insanity, Justification, and Culpability: Toward a Unifying Schema*, 19 LAW & HUM. BEH. 447, 460 (1995)(under a no-instruction condition, defendants responsible for their mental condition were more likely to be found culpable than those who were not).

¹⁵³. See David Wexler, *Inducing Therapeutic Compliance Through the Criminal Law*, 14 LAW & PSYCHOLOGY REV. 43 (1999)(discussing application of a "reckless endangerment" provision to mentally ill persons who fail to take medication knowing the possible consequences, principally as a means of enhancing treatment compliance).

¹⁵⁴. The author has interviewed a mentally retarded individual who asked whether it was "O.K." to kill someone who called him "retarded."

¹⁵⁵. See *supra* text accompanying notes 32-35.

The same cannot be said when the mentally disordered person misperceives the criminal law's application in a particular instance, however. Such a person is generally aware of societal prohibitions and intends to commit the crime under actual or imagined circumstances that do not amount to self-defense or duress, but argues that he thought the law recognized a justification or duress defense under those circumstances. Outside of the insanity context, the law has been resistant to ignorance as an excuse for two reasons: evidentiary concerns (how do we know that the person was ignorant of the law and whether the ignorance was his fault?),¹⁵⁶ and a desire to maintain the rule of law by ensuring that legislatures, not criminal actors, define the prohibitions of the criminal law, thus enhancing deterrence and fairness.¹⁵⁷ Both concerns might be thought to be mitigated in the insanity context, the first on the ground that mental illness is its own excuse for being ignorant and the second on the ground that the integrity of the law is not threatened when people known to be mentally ill define its scope. But neither distinction is persuasive.

First, even when a claim of specific ignorance is from a mentally ill person it will normally be incredible in the type of *mala in se* crimes that trigger the insanity defense. For instance, a defendant's claim that he thought killing a taunter is justifiable homicide under the law is unlikely ever to be true,¹⁵⁸ except perhaps when the claimant is so disordered he is generally ignorant of the law. Even if that is not the case, notions underlying the rule of law counsel against recognizing such a claim. Carried to its logical end, the specific ignorance excuse allows the defendant to define the scope of self-defense and other justificatory doctrines, disregarding completely society's views on the matter. The consequent insult to the principle of legality and the criminal law's deterrent effect might not be significant, but it is nonetheless real.¹⁵⁹

¹⁵⁶. JOHN AUSTIN, LECTURES ON JURISPRUDENCE 498-99 (3d ed. 1869).

¹⁵⁷. JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 380-83 (2d ed. 1960).

¹⁵⁸. Note that the patient used as an example of this situation, see *supra* note 155, asked whether such an action was justifiable, suggesting at the least an uncertainty on the issue.

¹⁵⁹. Thus, the concerns identified in the text have led courts to reject an excuse based on ignorance of the law due to cultural differences. See generally Paul Magnarella, *Justice in a Culturally Pluralistic Society: The Cultural Defense on Trial*, 19 J. ETHNIC STUDIES 65 (1991) (noting that courts do not formally recognize a "cultural defense" and recounting only one case, *People v. Kimura*, No. A-091133, L.A. Super. Ct. (1985), in which specific ignorance of the law due to culture may have played a role in mitigating punishment; even there the defendant was convicted on lesser charges). The M'Naghten test and other right-wrong tests could be interpreted to adopt a specific ignorance excuse, but in practice such an excuse appears to be recognized only if it is general. Cf. *supra* note 35 (re application of right-wrong test); *State v. Crenshaw*, 98 Wash.2d 789, 797, 659 P.2d 488, 493 (1983) ("[i]f wrong [in M'Naghten] meant moral wrong judged by the individual's own conscience, this would seriously undermine the criminal law, for it would allow one who violated the law to be excused from criminal

Limiting the exculpatory significance of ignorance of the law to the general ignorance category avoids these problems except in cases of the grossest disability, where the proof and legality dangers are not significant. In all other respects, the proposal advanced in this article fully reinforces the rule of law, because an excuse would be available only when the reasons given by the defendant sound in justification or duress. If so, the defendant prevails, but only after society, through the vehicle of a judge or jury, has assessed the circumstances as the defendant believed them to be from *society's* standpoint, thus signaling that the verdict depends ultimately upon communal, not individual, preferences.

III. Instrumental Benefits

The case for abolishing the insanity defense and substituting the subjective justification and excuse defenses is strengthened by three potential practical benefits, briefly noted here. First, such a reform of the criminal law's approach to mental disorder should improve the public's image of the criminal justice system. Second, it may well reduce the stigma associated with mental illness. Third, it should facilitate treatment of those with mental problems.

Frustration with the outcome in insanity cases has occasioned enmity not only toward the defense itself but toward the entire legal system.¹⁶⁰ To some extent this reaction may stem simply from the fact that a "factually guilty" person has escaped punishment. But it is also due to irritation that, regardless of the truth of the matter, "insanity" *seems* to be an unbounded condition that could apply to any number of people who commit serious crime.¹⁶¹ Although people with mental disorder would still be acquitted under the proposal, the rationale for the verdict would be more palatable to

responsibility solely because, in his own conscience, his act was not morally wrong.").

¹⁶⁰. As Michael Perlin has noted, "[t]he public's outrage over a jurisprudential system that could allow a defendant who shot an American president on national television to plead 'not guilty' (for *any* reason) became a 'river of fury' after the jury's verdict was announced." PERLIN, *supra* note 1, at 13. Judge Bazelon called the insanity defense "a scapegoat for the entire criminal justice system." David Bazelon, *The Dilemma of Criminal Responsibility*, 72 KY L.J. 263, 277 (1982-83).

¹⁶¹. See, e.g., PERLIN, *supra* note 1, 14-30 (recounting, *inter alia*, statements of William French Smith that "[t]here must be an end to the doctrine that allows so many persons to commit crimes of violence . . ." and of Edward Meese that eliminating the insanity defense would "rid . . . the streets of some of the most dangerous people that are out there, that are committing a disproportionate number of crimes"). Both statements, by men who had served as U.S. Attorney General, are based on completely inaccurate premises. See MELTON ET AL., *supra* note 99, at 187-88 (insanity defense is raised in far less than 1% of criminal prosecutions and only a small percentage of these go to trial) & *infra* note 163 (people with mental disability are not abnormally dangerous). As Perlin notes, however, these premises undoubtedly underlie the animosity toward the defense and the system generally.

a citizenry that is often outraged by insanity verdicts. Acquitting a person because he thought, albeit mistakenly, that he acted in self-defense is likely to make much more sense to the public than acquittal based on “insanity”.

More broadly, abolition of the insanity defense may well have a beneficial impact on society's view of people with mental illness. Michael Perlin has written about the “sanist” attitudes of society toward those with mental disorder.¹⁶² One particularly insidious sanist notion, clearly belied by the data,¹⁶³ is that those with mental illness are abnormally dangerous, and a second notion, also incorrect (if one agrees with the assertions in this article), is that they have significantly less control over their behavior than do people who are not “mentally ill.” Some have plausibly argued that the insanity defense, by drawing a direct connection between mental illness on the one hand and crime and nonresponsibility on the other, bears much of the blame for these discriminatory attitudes.¹⁶⁴ The elimination of a special defense of insanity, and the integration of mental illness claims into the same defensive framework used by those who are not mentally ill, would be at least a small step toward eradicating sanism. Of course, more people with mental illness would be labeled criminal under the proposal. But the argument here is not that the criminal label is less stigmatizing to a particular individual (although it probably is,¹⁶⁵ and it is certainly less stigmatizing than the double whammy inflicted by the phrase “criminally insane”¹⁶⁶). Rather the argument is that the insanity defense unfairly

¹⁶². Michael Perlin, *On “Sanism”*, 46 SMU L. REV. 373, 394 (1992)(defining sanism as “an irrational prejudice of the same quality and character of other irrational prejudices such as racism, sexism, heterosexism and ethnic bigotry”).

¹⁶³. The most recent and sophisticated data on the subject of violence and people with mental illness concluded that “[t]here was no significant difference between the prevalence of violence by patients without symptoms of substance abuse and the prevalence of violence by others living in the same neighborhoods who were also without symptoms of substance abuse.” Henry J. Steadman et al., *Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, 55 ARCH. GEN. PSYCHIATRY 393 (1998).

¹⁶⁴. Judi Chamberlin, *Choices and Chances: The Ex-Patient Self-Help and Advocacy Movement* (presented at Fifteenth Annual Conference of the National Association of Mental Health Program Directors, St. Petersburg, Fl., Sept. 19, 1994).

¹⁶⁵. See *supra* note 9. See also, Amerigo Farina et al., *Role of Stigma and Set in Interpersonal Interaction*, 71 J. ABNORMAL PSYCHOLOGY 421 (1966)(mentally ill persons described as less desirable as friends and neighbors than criminals).

¹⁶⁶. Deborah C. Scott et al., *Monitoring Insanity Acquittees: Connecticut’s Psychiatric Security Review Board*, 41 HOSP. & COMM. PSYCHIATRY, 980, 982 (1990)(insanity acquittees are the “most despised” and “morally repugnant” group of individuals in society).

perpetuates myths about mentally ill people *as a class* (whereas a guilty verdict can have no analogous effect on criminals as a class).

A third possible benefit of abolition is an improvement in the efficacy of mental health treatment for those charged with criminal offenses. For instance, one complaint sometimes heard from mental health professionals who work in forensic institutions is that those found "not guilty" by reason of insanity, influenced by the semantics of their verdict, refuse to admit they have done anything wrongful; this refusal is said to inhibit treatment, which is usually premised on an acceptance of responsibility.¹⁶⁷ A separate, but somewhat overlapping, impact of the insanity verdict is its labeling effect, which may exacerbate the perceptions of those found insane that they are dangerous outcasts with no prospects for change.¹⁶⁸ In contrast, to the extent the proposal advanced here leads to conviction of such individuals, it should impress upon them the seriousness of the crime and thus facilitate their rehabilitation (a process which could well receive more attention from the correctional authorities if it is no longer seen as the special preserve of the "insane" mentally ill¹⁶⁹). Even those who are acquitted may have a more contrite and less fatalistic attitude toward change, because they will know their acquittal resulted from the precise reasons for the offense, not because of some general trait of mental disorder they are said to be unable to control. If so, they too may respond better to treatment efforts, assuming they meet the relevant commitment criteria.¹⁷⁰

¹⁶⁷. See Robert Fein, *How the Insanity Acquittal Retards Treatment*, in THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT 49-54 (1990); ROSS, *supra* note 141, at 168 ("appreciation, both cognitively and emotionally, of the wrongfulness of the act . . . is harder to achieve for those acquitted by reason of insanity."). See also Joshua Dressler, *Reflections of Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.REV. 671, 689 (1988)("[I]t is often psychologically desirable and, in any case, morally right, for a wrongdoer to feel guilty").

¹⁶⁸. Bruce Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 1 PSYCHOLOGY, PUB. POL. & LAW 534, 603 (1995)("People who think they lack the capacity to control their harmful conduct because of an internal deficit that seems unchangeable predictably will develop expectations of failure. As a result, they may not even attempt to exercise self-control, or may do so without any serious commitment to succeed.").

¹⁶⁹. See Statement of Norval Morris, *Should the Insanity Defense Be Abolished? A Debate Between Richard Bonnie and Norval Morris*, 1 J. LAW & HEALTH 113, 119 (1986-87)("the special defense of insanity . . . distracts from . . . the organization and allocation of such psychiatric resources as we are prepared to bring to bear on the very serious and practical problems of the relationship between mental illness and crime").

¹⁷⁰. Every state allows commitment of those who are mentally ill and dangerous, REISNER ET AL., *supra* note 15, at 641, the investigative stages of which should probably be triggered by acquittal in such cases. Cf. ABA STANDARDS, *supra* note 80, Standard 7-7.2 (providing for evaluation of anyone found insane, upon motion of prosecution).

Our society has too long been unjustly leery of people who are mentally ill. Perhaps if the criminal justice system treats them more like others, significant changes in the attitudes of both society and those with mental illness will occur, along the lines suggested in the foregoing paragraphs. Although this article's justification for abolition of the insanity defense is primarily retribution-based, such attitudinal change would be a welcome byproduct.

Conclusion

This article has argued that the insanity defense should be abolished and that people with mental disorder should have a complete defensive claim only when they lack mens rea or act for reasons that sound in justification or duress. This position may strike some as unduly harsh. Responding to M'Naghten's (narrower) version of this approach, one court, writing over one hundred years ago, stated "It is probable no ingenuous student of the law ever read it for the first time without being shocked by its exquisite inhumanity."¹⁷¹

There is no doubt that, compared to current or proposed insanity tests, the proposal advanced here would result in fewer acquittals of those with mental illness. That result is not "inhumane," however. If there is concern about the dispositional consequences of convicting a person who is mentally ill, the proper response is better rehabilitative programs for all of those who need treatment, not a special defense which bears no necessary relationship to the rehabilitative needs of its beneficiaries.¹⁷² And the belief that some mentally ill persons do not deserve punishment even when they intentionally cause harm in the absence of delusion-based justification or duress reflects misguided intuitions about mental illness. People who are mentally disordered are not any less able to control their behavior than many other people who commit criminal acts. Accordingly, for purposes of the criminal law, they should be treated the same as those who are not mentally ill.

Of course, on the latter premise, we *could* opt for acquittal of many non-mentally ill people whom we currently convict. Or, because so many would thereby be excused, we might give up entirely on culpability assessments, adopting instead a preventive regime of the type imagined by Lady Wooton. On the twin assumptions that the blameworthiness inquiry is essential and that this inquiry should be based on something other than lack of control, the better approach is to convict all of those who act intentionally and in the absence of subjective justification or duress.

¹⁷¹. State v. Jones, 50 N.H. 369, 387 (1871).

¹⁷². One justification sometimes offered for the insanity defense is that it will ensure treatment for those who are ill. That justification is a hoax, given the small proportion of treatable mentally disordered offenders who are acquitted under the defense. See T. Howard Stone, *Therapeutic Implications of Incarceration for Persons with Severe Mental Disorders: Searching for Rational Health Policy*, 24 AM. CRIM. L. REV. 283, 285 (1997)(estimating 87,000 people with *severe* mental disorder in prison). Moreover, it suggests that those who are not found insane do not deserve treatment. Cf. Estelle v. Gamble, 429 U.S. 97 (1976)(Eighth Amendment obligates the government to provide medical treatment for prisoners).

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