

2003

# The Integrationist Alternative to the Insanity Defense: Reflections on the Exculpatory Scope of Mental Illness in the Wake of the Andrea Yates Trial

Christopher Slobogin

Follow this and additional works at: <http://scholarship.law.vanderbilt.edu/faculty-publications>



Part of the [Law Commons](#)

---

## Recommended Citation

Christopher Slobogin, *The Integrationist Alternative to the Insanity Defense: Reflections on the Exculpatory Scope of Mental Illness in the Wake of the Andrea Yates Trial*, 30 *American Journal of Criminal Law*. 315 (2003)

Available at: <http://scholarship.law.vanderbilt.edu/faculty-publications/284>

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law School Faculty Publications by an authorized administrator of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

---

# AMERICAN JOURNAL OF CRIMINAL LAW

---

Published at The University of Texas School of Law

---

VOLUME 30

SUMMER 2003

NUMBER 3

---

## The Integrationist Alternative to the Insanity Defense: Reflections on the Exculpatory Scope of Mental Illness in the Wake of the Andrea Yates Trial

Christopher Slobogin\*

### I. Introduction

On June 20, 2001, Andrea Yates took the lives of her five children by drowning them, one by one, in a bathtub.<sup>1</sup> At her trial on capital murder charges nine months later, she pleaded insanity. Despite very credible evidence that she had long suffered from serious mental disorder, a Texas jury convicted Yates of murder and sentenced her to life in prison.<sup>2</sup> Her tragic and controversial case led many to question whether the so-called “M’Naghten” test for insanity, which forms the basis for the insanity defense in Texas,<sup>3</sup> adequately defines the exculpatory effect of mental disorder.

This article is based on a talk given at a conference entitled “The Affirmative Defense of Insanity in Texas,” which took place in the wake of the Yates trial.<sup>4</sup> The organizers of the conference,<sup>5</sup> who wanted to solicit

---

\* Stephen C. O’Connell Professor of Law, University of Florida Fredric G. Levin College of Law.

1. Lisa Teachey, *Yates’ Lawyers Plan to Enter Insanity Plea*, HOUSTON CHRONICLE (July 31, 2001) at 1A.

2. *Id.*

3. TEX. PENAL CODE § 8.01 provides that “[i]t is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong.” This language is similar, but not identical, to the M’Naghten test. *See infra* text accompanying notes 15-19.

4. Christopher Slobogin, *The Integrationist and Mens Rea Alternatives to the Insanity Defense*, Address at The Affirmative Defense of Insanity in Texas Conference, Austin, Tex. (Feb. 7, 2003).

5. The sponsors of the conference were the Texas Society of Psychiatric Physicians, the Texas Criminal Defense Lawyers Association, the Texas District and County Attorneys Association, the State

varying views of the insanity defense, assigned to me the mission of defending the M’Naghten test. They also asked me to defend two alternatives to the M’Naghten test: the “Mens Rea Alternative,” which restricts evidence of mental disorder to the issue of whether the accused had the mens rea for the offense charged, and “Integrationist Alternative,” which links the defenses available to people with mental illness to those defenses available to defendants who are not mentally ill. In this article, I take on this somewhat contradictory set of tasks.

My principal method of defending M’Naghten, the Mens Rea Alternative and the Integrationist Alternative will be to attack all other formulations of the insanity defense as overbroad. But I will also say a few positive things about M’Naghten, and I will be particularly enthusiastic about the Integrationist scheme, an approach that I first proposed three years ago.<sup>6</sup> On the other hand the Mens Rea Alternative is difficult to support, and I will do so only half-heartedly. Judging from what I know of the her case, Andrea Yates should have been excused under all but the latter test,<sup>7</sup> and thus the jury in her case, had it correctly applied M’Naghten, should have acquitted her. The main purpose of this article, however, is not to second-guess the result in that particular case but to explore in some detail the exculpatory scope of mental disorder in criminal cases.<sup>8</sup>

## II. A Short History of the Insanity Defense through the M’Naghten Case

The insanity tests that preceded the M’Naghten formulation all focused on cognitive—as opposed to volitional—impairment, and all required an extremely high degree of impairment. In the 13th century, Bracton defined an insane person as one who lacks “sense and reason.”<sup>9</sup> In the 17th century, Lord Coke stipulated that to be insane the accused must not have known what

---

Bar of Texas Committee on Legal Services to the Poor in Criminal Matters and its Committee on Disability Issues, and the American Journal of Criminal Law.

6. Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199 (2000).

7. See *infra* text accompanying notes 124-25.

8. I do so recognizing that subtle changes in language of the type discussed in this paper may have no practical impact. See Norman Finkel et al., *Insanity Defenses: From the Juror’s Perspective*, 9 LAW & PSYCHOL. REV. 77 (1985) (finding no significant differences in outcome using six different insanity instructions). Consider these counter-arguments. First, some research suggests that changes in language are not futile. See Ingo Kielitz, *Researching and Reforming the Insanity Defense*, in CURRENT ISSUES IN MENTAL DISABILITY LAW 57, 57-61 (1987) (claiming that acquittal rates increased in five states when M’Naghten is replaced with a broader test). Second, even if jurors are not affected by changes in language, experts, attorneys and judges can be, as they make strategic and admissibility decisions. See American Bar Association, *Criminal Justice Mental Health Standards*, Commentary to Standard 7-6.1, at 343 (1989). Third, the test language used can affect public perceptions of the insanity defense, mental illness and the criminal justice system as a whole. See *infra* text accompanying notes 131-32. Finally, of course, there is theoretical value in constructing a formulation that correctly captures the exculpatory impact of mental illness.

9. See DONALD H.J. HERMANN, *The Insanity Defense: Philosophical, Historical and Legal Perspectives* 23 (1983) (quoting Henrici de Bracton, *De Legibus et Consuetudinibus Anglaie*).

he was doing and “lack[] the ability of mind and reason,”<sup>10</sup> and a century later Lord Hale demanded an absence of “understanding and will.”<sup>11</sup> At about the same time, Justice Tracy equated the insane with wild beasts, and required “a total[] deprivation of . . . understanding and memory”<sup>12</sup> for an acquittal on mental disorder grounds.

The early 1800s saw the advent of the “right-wrong” test that eventually developed into M’Naghten.<sup>13</sup> Under this test as well, winning an insanity claim was very difficult. Typically, the accused was convicted if he had intended to commit the crime, no matter how “crazy” he may have been at the time of the offense.<sup>14</sup>

Finally, in 1843, came the M’Naghten case. Suffering from what we would today call paranoid schizophrenia, Daniel M’Naghten came to believe that he was being harassed by members of the Tory Party, and eventually attempted to kill the head of the Party, Prime Minister Peel, (killing Peel’s secretary instead).<sup>15</sup> M’Naghten raised the insanity defense and was acquitted at trial. On appeal, the House of Lords devised the so-called “M’Naghten” Test. The first part of the test excuses “a defect in reason that results in the inability to know the nature and quality of the act,”<sup>16</sup> a formulation that is very similar to the medieval tests. But the second part of the test recognizes an excuse even if the person knew the nature and quality of the act, as long as he or she “did not know that the act was wrong.”<sup>17</sup>

A third part of the House of Lords’ opinion is not as well known. Toward the end of the M’Naghten opinion the Lords announced a special test for cases of “partial delusion,” or what today might be called an encapsulated delusion. According to the Lords, individuals with partial delusions should be placed “in the same situation as to responsibility as if the fact with respect to which the delusion exists were real.”<sup>18</sup> Putting that concept in modern English, a person is insane under this test if, assuming the delusion to be true, the person would be justified in committing the act. The Lords’ example of this situation posited a person who kills another because he delusionally believes that the victim was about to kill him. That person would be excused under the “partial delusion” formulation, the Lords said, because killing to defend oneself against deadly force is a justifiable action.<sup>19</sup> In contrast, the

---

10. *Id.* at 24.

11. MATHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 30 (1736).

12. *Rex v. Arnold*, 16 Ho.St.Tr. 764-65 (1724).

13. See Anthony Platt & Bernard 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, 1250-57 (1966).

14. See Slobogin, *supra* note 6, at 1209 n. 35.

15. See THOMAS MAEDER, CRIME AND MADNESS: THE ORIGINS AND EVOLUTION OF THE INSANITY DEFENSE 27-29 (1985).

16. M’Naghten’s Case, 8 Eng. Rep. at 722.

17. *Id.*

18. *Id.* at 723.

19. *Id.*

Lords opined, if a person kills another delusionally believing that the victim besmirched his character, there is no legal excuse, because killing in response to a slur on one's name is never justifiable.<sup>20</sup> I will return to this partial delusion test later, because it is very closely related to the Integrationist Alternative that I have proposed.

### III. Alternatives to M'Naghten

From its inception, the M'Naghten Test was criticized as too rigid.<sup>21</sup> Under M'Naghten, a person is excused only if he or she does not "know" about the wrongfulness of the act. The most famous modification of this language is the test proposed by the American Law Institute (ALI). In its Model Penal Code the ALI provided that insanity exists when, as a result of mental disease or defect, an offender "lacked substantial capacity to appreciate the criminality or wrongfulness of his conduct."<sup>22</sup> (There is also a lack-of-control prong to the ALI test, but discussion of that prong is deferred for the moment.<sup>23</sup>) This formulation works two changes in the M'Naghten Test. One is that, on its face, the ALI test does not require the black-or-white analysis that M'Naghten does. It speaks in terms of *substantial* lack of experience and capacity, as opposed to an *inability* to know the wrongfulness of the act. Second, the ALI test uses the word "appreciate" as opposed to the word "know." The latter modification was meant to provide an excuse to those who might "know" that the criminal act was wrong, but who are unable to internalize the wrongfulness of the act.<sup>24</sup>

The ALI test proved very popular; well over half the states adopted it in the two decades following its drafting.<sup>25</sup> But after the acquittal of John Hinckley on insanity grounds in 1982, a number of jurisdictions revisited the insanity issue. Representative of the kinds of changes that came after Hinckley's acquittal is the federal test for insanity, adopted in 1984. That test requires the presence of a *severe* mental illness, not just a "mental disease or defect."<sup>26</sup> The federal test also moves back toward M'Naghten's "either/or" approach by limiting insanity to those cases in which the person was *unable* to appreciate the wrongfulness of the act; the word "substantial" has been

---

20. *See id.*

21. *See* ISAAC RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY 42-43 (Winfred Overholser ed., 1962) (first published in 1833).

22. MODEL PENAL CODE § 4.01(1)(Proposed Official Draft 1962).

23. *See infra* text accompanying notes 33-34.

24. MODEL PENAL CODE § 4.01 cmt. 3 at 271 (Proposed Official Draft 1962). "The use of 'appreciate' rather than 'know' conveys a broader sense of understanding than simple cognition." *Id.*

25. MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 15.07, at 302 (1989).

26. 18 U.S.C. § 20 (1984). "It is an affirmative defense to a prosecution under any federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts." *Id.*

removed.<sup>27</sup> On the other hand, the federal test continues to use the appreciation language. Thus, the federal test is arguably broader than the original M’Naghten formulation using the word “know.”

Also noteworthy is one other kind of cognitive test, to date not adopted in any jurisdiction, which focuses on the rationality of the offender’s beliefs. The underlying theme of the various rationality formulations, of which there are several (all proposed by academics), is that knowledge of wrongfulness is not at the core of criminal insanity.<sup>28</sup> Instead, those who devised these tests suggest, the focus of an excuse based on mental disorder ought to be the desires and beliefs that seem to motivate the crime—in particular, the intelligibility, consistency and coherence of the desires and beliefs that explain the offense.<sup>29</sup> If those desires and beliefs are unintelligible and inconsistent with one another, or otherwise the result of a seriously defective reasoning process, then a person should be considered insane.<sup>30</sup>

Those are the most significant modern variations on the cognitive tests for insanity. But this listing does not bring to an end the litany of insanity formulations. M’Naghten has been criticized not only for its rigidity, but also on the ground that it does not take into account disordered people who might know right from wrong, but who nonetheless are “compelled” to commit the criminal act.<sup>31</sup> In other words, these critics argue, M’Naghten improperly ignores cases where the primary impact of mental disorder is *volitional* impairment. Thus, as early as the mid-nineteenth century, a number of jurisdictions also endorsed the so-called Irresistible Impulse Test, which focuses on whether the person “has lost the power to choose between the right and wrong and to avoid doing the act in question, such that free agency is destroyed.”<sup>32</sup>

Like M’Naghten, the Irresistible Impulse Test was criticized as too rigid,<sup>33</sup> because it requires an *irresistible* impulse, the *destruction* of “free agency.” Accordingly, the Model Penal Code drafters, as they did with

27. *Id.*

28. See HERBERT FINGARETTE & ANN FINGARETTE HASSE, *MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY* 218 (1979) (proposing a defense if the accused lacked “capacity for rational conduct”); MICHAEL S. MOORE, *LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP* 245 (1985) (An excuse exists when the accused is “so irrational as to be nonresponsible.”); Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15, 24 (1997) (“Rationality . . . is the most general, important prerequisite to being morally responsible.”); Benjamin B. Sendor, *Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 GEO. L.J. 1371, 1415 (1986) (“Irrationality is a vital aspect of the exculpatory nature of insanity. . . .”); ROBERT F. SCHOPP, *AUTOMATISM, INSANITY, AND THE PSYCHOLOGY OF CRIMINAL RESPONSIBILITY: A PHILOSOPHICAL INQUIRY* 215 (1991) (“A person is not responsible for criminal conduct if he performed that conduct while suffering major distortion of his cognitive capacities. . . .”).

29. One of the more complete expositions of the irrationality idea is found in MOORE, *supra* note 28, at 100-108. See also, SCHOPP, *supra* note 28, at 185-87.

30. MOORE, *supra* note 28, at 195-98.

31. See *Parsons v. State*, 2 So. 854, 856-57 (Ala. 1887) (summarizing authorities who argued against cognitive-only tests).

32. *Id.* at 866.

33. See MODEL PENAL CODE COMMENTARIES § 4.01(1)(Official Proposed Draft 1962), at 172.

cognitive impairment, broadened the volitional impairment test by providing that a person is insane if he or she lacked “substantial capacity to conform behavior to the requirements of the law.”<sup>34</sup>

One final volitional standard that should be mentioned is the “product” test, which states simply that a person should be found insane for any crime that is the product of a mental disease or defect. The product test first assumed prominence in 1954, when it was adopted by the District of Columbia Circuit Court of Appeals in the famous *Durham v. United States* decision.<sup>35</sup> After two decades, however, the imprecision and potential breadth of this test eventually led the court to reverse itself,<sup>36</sup> and today only one jurisdiction adheres to the product formulation.<sup>37</sup>

These are the predominant cognitive and volitional tests of insanity that have been adopted or proposed. My defense of M’Naghten, and of the alternatives to it that were noted earlier, will consist primarily of an attack on all the post-M’Naghten formulations. I start with the volitional tests, which I lump together under the rubric “Volitional Test”, then discuss the tests that focus on lack of appreciation of wrongfulness (the “Appreciation Test”), and end with an analysis of tests that look at the offender’s rationality (the “Rationality Test”).

#### A. Arguments Against the Volitional Test

The Volitional Test for insanity should be rejected for both conceptual and practical reasons. The conceptual problem is that an excuse based on volitional impairment is not consistent with a criminal justice system premised on free will. Before developing this point, two categories of “volitionally-impaired” people who *should* be excused need to be identified. First, some people, such as those subject to seizures, literally cannot control their bodily movements during certain actions and thus should be excused. This type of non-volitional activity rarely results in crime,<sup>38</sup> however, and in any event is best conceptualized as an “involuntary” act rather than as insanity.<sup>39</sup> Second, some people who have strong inclinations to commit criminal acts should be excused because they also meet the cognitive test for insanity. For instance, as developed further later, the person with “command hallucinations” who feels compelled to kill because God has told him that the

---

34. MODEL PENAL CODE § 4.01(1)(Official Proposed Draft 1962).

35. 214 F.2d 862 (D.C. Cir. 1954). The test was first proposed by Isaac Ray, over one century earlier. See HENRY WEIHOFEN, *THE URGE TO PUNISH: NEW APPROACHES TO THE PROBLEM OF MENTAL IRRESPONSIBILITY FOR CRIME* 5 (1956).

36. See *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

37. See *State v. Pike*, 49 N.H. 399, 442 (1870).

38. GARY MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 219 (2d ed. 1997) (arguing that “[e]pilepsy will rarely give rise to a mental state defense.”).

39. Deborah Denno, *Crime and Unconsciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 284-85 (2002).

world will otherwise be destroyed should be excused under a cognitive test as well as under a volitional one.<sup>40</sup> Aside from these two groups, people who appear to be compelled to commit crimes should not be excused in a society that assumes people are autonomous actors.

The volitional impairment argument proffered by those who do not fit in these two groups comes in one of two forms: the predisposition claim and the subjective urge claim. The former type of claim goes something like this: "I have characteristics or have experienced events that are highly correlated with criminal behavior; therefore I am compelled or strongly predisposed to commit crime." Defendants who assert the "extra male chromosome" defense,<sup>41</sup> an excuse based on abnormal brain patterns,<sup>42</sup> or the rotten social background defense<sup>43</sup> are making this type of claim. Note that, although these people can plausibly claim that they have a mental disorder, they do not claim that they did not intend the criminal act or that they committed it for "crazy" reasons. They are asserting simply that their criminal behavior is driven by factors outside their control.

As a dramatic illustration of why this type of claim should not prevail, consider a recent study reported in the journal *Science*, which found that 85% of a group of individuals who had both been abused as children and registered low MAOA neurotransmitter levels had committed crimes against persons by age twenty-six.<sup>44</sup> It is rare to find such a high correlation between just two variables and crime, on the surface making these individuals particularly strong candidates for a volitional defense. But note that 15% of the sample did not commit crimes. More importantly, even if the entire sample had committed violent acts, or even if we could identify one or more variables that distinguish the 85% from the 15% (such as more substance abuse or lower socioeconomic status), an excuse for these people on volitional grounds would be a conceptual mistake, because in principle we would then have to excuse *all* crime. The only difference between the sample described in *Science* and any other group of criminals is that with other groups more than two variables are needed to explain the criminal behavior. Identification of the correlates of crime (whether they are two, or a dozen, in

---

40. See *infra* text accompanying note 123. Cf. *Rex v. Hadfield*, 27 How. St. Tr. 1281, 1283, 1322, 1323, 1356 (1800) (acquitting under the medieval tests 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).

41. See, e.g., *People v. Yukl*, 83 Misc.2d 364 (N.Y. 1975).

42. This was one of the arguments made in the Hinckley case. See ALAN A. STONE, LAW, PSYCHIATRY AND MORALITY 86 (1984) (discussing CT scan of Hinckley, which showed a "widening" of sulci in the brain).

43. See, e.g., *United States v. Alexander and Murdock*, 71 F.2d 923 (D.C. Cir. 1972).

44. Caspi Avshalom et al., *Role of Genotype in the Cycle of Violence in Maltreated Children*, 297 SCIENCE 851 (2002) (Over 85% of a large sample of males who had both low levels of MAOA neurotransmitter and were mistreated as children developed some form of antisocial behavior by the time they were twenty-six.).



number) does not mean the crime is compelled; in the words of Michael Moore, “causation is not compulsion.”<sup>45</sup>

The second form of volitional claim, which might be combined with the first, is that the individual “feels” strong urges to commit crime at the time the criminal conduct takes place. For instance, the psychotic individual who hears voices telling him to kill may experience a powerful urge to commit crime. But that claim is also true of pedophiles, repeat rapists, “sudden” or serial murderers and assaulters, and thieves who steal to feed an addiction.<sup>46</sup> It may even be true of the greedy corporate executive who manipulates accounts, or of the teenage boy who, on a Friday night, wants to have intercourse with an underage girlfriend. The subjectively experienced urges of a person with mental illness are not provably greater than the urges of people we would never think of excusing.<sup>47</sup> If there is a distinction between the psychotic individual and the others mentioned above, it is based in cognitive, not volitional, impairment.

A proponent of the Volitional Test might object that the test is only meant to excuse offenders who are volitionally impaired because of a severe mental disease or defect, such as psychosis. But nothing about the Volitional Test explains why that should be. One would think that people who truly find it hard to stop themselves from committing a crime should be excused regardless of the type of disorder causing the crime. (The same psychosis-only argument is also made in an effort to save the Appreciation Test, and is discussed further in connection with that test.)

Even if compulsion can be an excuse in theory, these various observations suggest an independent, pragmatic reason why volitional impairment should not be an excuse. It is expressed in the old adage that distinguishing between the irresistible impulse and the impulse that is not resisted is difficult, if not impossible.<sup>48</sup> Considerable research on impulsivity has taken place in recent years. But we still do not know how to measure the

---

45. Michael Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1130 (1985).

46. See, e.g., AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL—TEXT REVISED 566 (4th ed. 2004) (hereinafter DSM-IV-TR) (The “essential” features of a paraphilia (e.g., pedophilia, exhibitionism, sexual sadism) are “recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) nonhuman objects, 2) the suffering or humiliation of oneself or one’s partners, or 3) children or other nonconsenting persons”); *Id.* at 674 (pathological gamblers experience “repeated unsuccessful efforts to control, cut back, or stop gambling” and may resort to “forgery, fraud, theft, or embezzlement to finance gambling.”). For actual cases, see *Kansas v. Hendricks*, 521 U.S. 346, 355 (1997) (recounting sex offender who stated that the only way he could stop molesting children would be “to die”); Rita Giordano, *Gambling Embezzler Gets 31 Months in U.S. Prison*, PHILA. INQUIRER, Jan. 4, 2002, at B5 (reporting a reduction in sentence for embezzlement by a compulsive gambler because, according to the judge, her disorder “significantly impaired her ability to control her wrongful behavior”).

47. Indeed, recent research indicates that people with serious mental illness are no more likely to commit violent crime than the general population. Paul S. Appelbaum et al., *Violence and Delusions: Data from the MacArthur Violence Risk Study*, 157 AM. J. PSYCHIATRY 566 (2000) (reporting data that suggest delusions do not increase the overall risk of violence in persons with mental illness).

48. *United States v. Lyons*, 741 F.2d 243, 248 (5<sup>th</sup> Cir. 1984) (quoting AMERICAN PSYCHIATRIC ASSOCIATION, STATEMENT ON THE INSANITY DEFENSE 11).

phenomenon. One review concluded that “[r]esearchers need to be very cautious when selecting impulsivity measures, because the different measures appear to be assessing very different constructs, even when they use the same methodologies.”<sup>49</sup> Another review found that “[s]tudies of adults, adolescents, and children show that impulsivity measures are often uncorrelated with one another, and that impulsivity is a multi-dimensional construct. There have been too few studies to determine the nature of the underlying factors.”<sup>50</sup> In short, when we discuss “impulsivity,” we literally do not know what we are talking about.

In sum, the Volitional Test creates a huge potential for chaos in the culpability-based criminal justice system we have today. Compulsion is not susceptible to measurement. If we nonetheless engage in guessing about volitional impairment, and conclude, for instance, that some psychotic individuals are so compelled that they should be excused, then we probably have to excuse pedophiles and many other garden-variety criminals as well, because they also claim to experience very strong urges. If we excuse those who were abused as children and have low serotonin levels because 85% of them commit crimes, then we probably also must excuse every criminal with an anti-social personality disorder (which would empty quite a few cells in today’s prisons), because at least 85% of people with this disorder commit crimes as well.<sup>51</sup> Those conclusions do not make sense in our present system of criminal justice.

## B. Arguments Against the Appreciation Test

The Appreciation Test suffers from the same type of conceptual problem that afflicts the Volitional Test: if the Appreciation Test is applied honestly, it will excuse numerous people whom we do not want to excuse. Take, for instance, the offender with a psychopathic personality. Dr. Robert Hare, the leading researcher on this particular diagnosis, summarizes the psychopathic personality as follows: “[Psychopaths] seem unable to ‘get into the skin’ or to ‘walk in the shoes’ of others, except in a truly intellectual sense. . . . [They] are glib and superficial, lack remorse or guilt, lack empathy,

---

49. James D.A. Parker & R. Michael Bagby, *Impulsivity in Adults: A Critical Review of Measurement Approaches*, in *IMPULSIVITY: THEORY, ASSESSMENT AND TREATMENT* 142, 154-55 (Christopher D. Webster & Margaret A. Jackson, eds., 1997) (hereinafter *IMPULSIVITY*).

50. Judy Zaparniuk & Steven Taylor, *Impulsivity in Children and Adolescents*, in *IMPULSIVITY supra* note 49, at 158, 174.

51. Indeed, antisocial personality disorder and criminality are almost congruent. DSM-IV-TR, *supra* note 46, at 706 (describing criteria for antisocial personality disorder to include “failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest,” “irritability and aggressiveness, as indicated by repeated physical fights or assaults,” “reckless disregard for safety of self or others,” and “evidence of conduct disorder with onset before age 15 years”).

have shallow emotions and lack responsibility.”<sup>52</sup> This type of person does *not* meet the M’Naghten Test; psychopaths know right from wrong, they know when they are committing a crime, and they know society views their crime as wrong. But they do not internalize the enormity of the criminal act. By definition, they do not emotionally appreciate its wrongfulness. If we apply the Appreciation Test straightforwardly, we have to excuse them.

Probably for that reason, the drafters of the ALI test declared, in a supplementary paragraph to their insanity formulation, that a mental disease or defect that is “manifested solely by repeated antisocial behavior” should not form the predicate for the insanity defense.<sup>53</sup> On its face, this language does not accomplish its apparent goal, since the diagnosis of psychopathy and its close relative, antisocial personality disorder, require other symptoms besides repeated crime.<sup>54</sup> But assuming psychopathy is meant to be subsumed by this provision, an insanity test that has to exclude by fiat a mental disorder that clearly falls within its terms has not done a good job of identifying the relevant excusing condition.

Another class of people who commit a large amount of crime is comprised of people with mild retardation, defined as those with an intelligence quotient of between 50 and 70.<sup>55</sup> Consider this observation about their mental capacity: “Mildly retarded persons may be able to distinguish right from wrong in the abstract, but they have difficulty applying abstract concepts in specific actual settings and are unable to appreciate the wrongfulness of what they do.”<sup>56</sup> If this statement is accurate, people with mild retardation, while generally sane under M’Naghten, should be found insane under the Appreciation Test. Yet the latter result would be repugnant to many people, including some advocates for people with mental retardation.<sup>57</sup> Criminals with mild mental retardation should escape

---

52. ROBERT D. HARE, *WITHOUT CONSCIENCE: THE DISTURBING WORLD OF THE PSYCHOPATHS AMONG US* 34, 44 (1993).

53. MODEL PENAL CODE § 4.01(2)(Proposed Official Draft).

54. See DSM-IV-TR, *supra* note 46, at 706 (indicating that the criteria for antisocial personality disorder can include “impulsivity or failure to plan ahead,” “consistent irresponsibility,” and “lack of remorse,” any one of which may be lacking in some recidivists).

55. It has been estimated that between 9.5% and 29% of people in jail or prison suffer from mental retardation. See SAMUEL BRAKEL, JOHN PARRY, & BARBARA WEINER, *THE MENTALLY DISABLED AND THE LAW* 736-37 (1985).

56. C. Benjamin Crisman & Rockne J. Chickinell, *The Mentally Retarded Offender in Omaha-Douglas County*, 8 CREIGHTON L. REV. 622, 646 (1975). See also, James Ellis, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 441 (1985) (arguing that, although the shift from “know” to “appreciate” is “. . . relevant to the mental condition of some mentally ill defendants, it is particularly important in cases involving mental retardation. When a retarded defendant’s understanding of the wrongfulness of his conduct is in question, it is often a ‘lack of appreciation for the subtleties of social interaction and abstract concepts of right and wrong that impair his behavior.’”).

57. See AMERICAN ASSOCIATION FOR THE MENTALLY RETARDED, POSITION STATEMENT ON CRIMINAL JUSTICE, available at [http://www.aamr.org/Policies/pos\\_criminal\\_justice.shtml](http://www.aamr.org/Policies/pos_criminal_justice.shtml) (“People with mental retardation must be exempt from the death penalty but not from other appropriate punishment, on a case-by-case basis.”).

execution, as the Supreme Court recently held,<sup>58</sup> but few should escape conviction.

The Appreciation Test, honestly applied, might also excuse many people whose principal dysfunction appears to be volitional rather than cognitive. Consider *State v. Companaro*,<sup>59</sup> involving a person who embezzled money to support his pathological gambling habit. Here is an excerpt from the expert testimony in the case:

Well, here's a man who is a law enforcement officer, who knows the law well, who knows about right and wrong, [and therefore would not meet the M'Naghten Test] but who is in a desperate strait. He's under a tremendous amount of stress at that point, does not consider right and wrong. I don't think that becomes part of the thinking process. His process then is to survive. He's losing his job, his family, his children, his reputation, everything is going down.<sup>60</sup>

Companaro was acquitted by reason of insanity under the Appreciation Test.<sup>61</sup> His case illustrates how that test permits volitional impairment to be described and excused in terms of cognitive impairment: People under stress, so the argument goes, do not think through the consequences of their actions, and thus do not appreciate the wrongfulness of what they are doing. If that argument is allowed, however, prohibition of volitionally-based insanity claims will accomplish very little, because virtually all volitional impairment cases, not just the small subset of them described earlier, could be re-characterized as cognitive impairment cases. Indeed, even many people who do not have “mental disorders” as we normally define them (*e.g.*, those with tempers or idiosyncratic reactions to provocation<sup>62</sup>) might not “consider right and wrong” at the time they commit crime, for reasons that could be said to be beyond their control.

One solution to the problems identified above would be to limit application of the Appreciation Test to cases of psychosis, as the federal test appears to do, and as Professor Richard Bonnie suggested in his paper for the Andrea Yates conference.<sup>63</sup> Although that move may conform to most

58. *Atkins v. Virginia*, 536 U.S. 304 (2002). See Christopher Slobogin, *Is Atkins the Antithesis or Apotheosis of Anti Discrimination Principles?: Sorting Out the Groupwide Effect of Exempting People with Mental Retardation from the Death Penalty*, \_\_\_ Ala. L. Rev. \_\_\_ (forthcoming).

59. Union County Indictment no. 632079 (Sup.Ct. N.J. Crim. Div. 1981) (cited in RALPH REISNER ET AL., *LAW & MENTAL HEALTH, CIVIL AND CRIMINAL ASPECTS* 429 (3d ed. 1998)).

60. *Id.*

61. *See id.*

62. *See, e.g.*, *Freddo v. State*, 155 S.W. 170 (Tenn. 1913) (involving the case of an orphan defendant, particularly sensitive to insults to womanhood, who killed after being called a “son of a bitch”); *Bedder v. Director of Pub. Prosecutions*, 1 W.L.R. 1119 (H.L. 1954) (involving the case of a sexually impotent and emotionally distressed defendant who killed after being taunted for his inability to have intercourse).

63. Richard Bonnie, *Why “Appreciation of Wrongfulness” is the Morally Preferable Standard for the Insanity Defense*, Address at The Affirmative Defense of Insanity in Texas, (Feb.7, 2003) (transcript available at The Texas Society of Psychiatric Physicians) [hereinafter, Bonnie, *Appreciation of Wrongfulness*]. Bonnie’s comments at the conference cross-referenced his earlier paper, *The Moral*

people's intuitions, the rationale for privileging psychosis over other forms of mental disorder is not obvious. Recent research indicates that people with psychosis are both less influenced by their delusions than intuition would lead us to believe,<sup>64</sup> and less dangerous than most lay people think.<sup>65</sup> In other words, as I suggested earlier, psychotic people may not be any more predisposed or compelled to commit crime than many other types of people.

We have also learned much more about other kinds of mental disorders. Consider, once again, psychopathy. Professor Bonnie describes the kind of "severe" disorder that should form the predicate for insanity as "a pathological process within the brain, over which the person has no control, leading to mental experience that is qualitatively different from ordinary experience."<sup>66</sup> Psychopathy is certainly pathological, possibly congenital and probably neurological.<sup>67</sup> Further, it is a condition that is not easily within the person's "control," and indeed is much less so than the condition of a severely mentally ill person for whom there is at least some meaningful treatment.<sup>68</sup> Finally, psychopaths are clearly alienated "from ordinary experience."<sup>69</sup>

The results of one simple study graphically make the latter point. A group of psychopaths and a control group were hooked up to a device that measures physiological responses, and both groups were read five words: "chair", "table", "apple", "house", "murder". The control group—the non-psychopathic group—registered a significant blip on the screen when the word "murder" was announced.<sup>70</sup> But that word occasioned no reaction from the psychopaths. Their emotional response was non-existent.<sup>71</sup> That kind of

---

*Basis of the Insanity Defense*, 69 A.B.A. J. 194 (Feb. 1983), which proposed that the definition of mental disease or defect be as follows: "those severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality and that are not attributable primarily to the voluntary ingestion of alcohol or other psychoactive substances." *Id.* at 197.

64. See Appelbaum et al, *supra* note 47.

65. 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) ("[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.").

66. Bonnie, *Appreciation of Wrongfulness*, *supra* note 63, at 11.

67. See 2 PSYCHIATRY 1299 (Allan Tasman et al., eds. 1997) ("[T]here is considerable support from twin, family, and adoption studies for a genetic contribution to the etiology of the criminal, delinquent tendencies of persons with ASPD [anti-social personality disorder].").

68. Compare Otto Kernberg, *The Psychotherapeutic Management of Psychopathic, Narcissistic, and Paranoid Transferences in PSYCHOPATHY: ANTISOCIAL, CRIMINAL, AND VIOLENT BEHAVIOR* 372, 377 (Theodore Millon et al. eds.) (1998) (The prognosis for effectively treating psychopathy "is practically zero.") to REISNER ET AL., *supra* note 59, at 49-50 (reporting response rates of people with psychosis to anti-psychotic medication of approximately 75%).

69. See Bonnie, *Appreciation of Wrongfulness*, *supra* note 63, at 6.

70. Reid Meloy, *Psychopaths and Criminal Responsibility*, Address at Mental Health Law in the 21st Century Conference, San Diego, Calif. (March 23, 2000).

71. *Id.* See also, Mary K. Feeney, *Why They Kill: Psychopaths Have No Feelings for Their Victims*, HARTFORD COURANT, Oct. 21, 1997, at F1 (Compared to individuals in the normal control group, psychopaths exhibit smaller changes in heart rate and in skin conductance when exposed to fear-provoking language and pictures.).

reaction is as out of touch with “ordinary experience” as delusions are, albeit in a different way.

Even if limiting the Appreciation Test to gross mental disorder makes sense, the test may excuse people who should not be excused. Charles Manson and his gang killed several wealthy white people, including the actress Sharon Tate.<sup>72</sup> Why? Manson, who has been diagnosed with schizophrenia,<sup>73</sup> apparently believed that the world would eventually be taken over by African-Americans, who would kill off most of the white race in a bloodbath. Manson meant to prevent that debacle by slaughtering white people and then planting evidence designed to frame African-Americans for the crimes; in that way, he believed, the white world would be alerted to the dangers presented by the black race.<sup>74</sup>

Manson would not meet the M’Naghten test because he knew it was wrong to kill Sharon Tate. However, a plausible argument could have been made (although it was not, because he refused to allow evidence of insanity to be introduced<sup>75</sup>) that Manson did not appreciate the wrongfulness of his conduct due to his mental disorder. Rather, he felt justified in doing what he did, for he saw his crimes as a necessary means of preventing the perceived impending massacre by African-Americans.

The same kind of analysis could be applied to the “Unabomber”, Ted Kaczynski. The people to whom he mailed letter bombs all were somehow involved with technology.<sup>76</sup> From what we know from public documents, Kaczynski, who was clearly suffering from schizophrenia,<sup>77</sup> chose these victims because he wanted to signal that if people like them failed to curb society’s reliance on scientific gimmickry, the world as we know it would end.<sup>78</sup> His crimes, to which he eventually pleaded guilty so that his motivations would not be labeled “crazy”,<sup>79</sup> were his way of preventing the destruction of the world by technology. Kaczynski knew that sending letter bombs would result in deaths and that it was wrong to kill people (thus his

72. See *People v. Charles Manson et al.*, 61 Cal.App.3d 102, 124 (2d Dist. 1976).

73. Brian Melley, *Charles Manson Denied Parole for a 10th Time*, at <http://userwww.sfsu.edu/~tamamail/april02wire.html> (April 24, 2002) (“[P]sychiatric reports show [Manson] is a violent schizophrenic.”).

74. VINCENT BUGLIOSI, WITH CURT GENTRY, HELTER SKELTER: THE TRUE STORY OF THE MANSON MURDERS 331-33 (1974).

75. Manson fired his first attorney for requesting a psychiatric evaluation. *Id.* at 370, 532.

76. See William Finnegan, *Defending the Unabomber*, NEW YORKER, Mar. 16, 1998, at 52.

77. William Glaberson, *Lawyers for Kaczynski Agree He Is Competent to Stand Trial*, N.Y. TIMES, Jan. 21, 1998, at A1 (noting that prosecution and defense experts agreed Kaczynski was suffering from schizophrenia, paranoid type).

78. See William Glaberson, *Kaczynski Can’t Drop Lawyers or Block a Mental Illness Defense*, N.Y. TIMES, Jan. 8, 1998, at A1 (describing a letter from attorney Tony Serra to Judge Burwell stating that Serra was willing to substitute as Kaczynski’s attorney and “suggested that he might argue that Mr. Kaczynski felt he had to engage in his anti-technology campaign to, ultimately, save lives”).

79. Stephen J. Dubner, *I Don’t Want to Live Long. I Would Rather Get the Death Penalty than Spend the Rest of My Life in Prison*, TIME, Oct. 18, 1999 at 44, 46 (Kaczynski “says he pleaded guilty last year only to stop his lawyers from arguing he was a paranoid schizophrenic.”).

efforts at maintaining seclusion and anonymity), so he did not meet the M’Naghten Test. But a strong argument exists that he did not appreciate the wrongfulness of his actions, because he felt they were in the service of a greater good.

One final example from a less publicized case illustrates the same point. *Cruse v. State*<sup>80</sup> involved a man who gunned down several people in a mall because he thought they were trying to turn him into a homosexual.<sup>81</sup> Again, like Manson and Kaczynski, he knew it was legally wrong to kill these individuals, and he was convicted in a M’Naghten jurisdiction.<sup>82</sup> But one can make a strong case that he did not appreciate the wrongfulness of his actions, because he felt justified in preventing these people from changing who he was.

Perhaps we *should* excuse people like Manson, Kaczynski or Cruse. But doing so amounts to providing a defense for virtually any criminal with a significant mental disorder, because people with psychosis are often convinced that their actions should be permissible (an attitude, it should be noted, that is held by many non-psychotic people as well<sup>83</sup>). The Appreciation Test, whether applied in its current former or (arbitrarily) limited to people with gross disorder, is thus overbroad.

### C. Arguments Against the Rationality Tests

Although, as noted earlier, the Rationality Test has not been adopted in any jurisdiction, it does begin to address a key problem associated with the Appreciation Test. Because it focuses on the intelligibility and consistency of the person’s motivations for crime, rather than on whether he or she “appreciates” its wrongfulness, the Rationality Test better differentiates between persons with serious mental disorders and persons who do not have such disorders. In other words, the Rationality Test limits the types of cases in which insanity can be raised to cases of serious disorder,<sup>84</sup> which is something the Appreciation Test fails to do on its face. The latter test can accomplish something similar only by defining mental disease or defect in terms of gross impairment, in which case it becomes either the same as the

---

80. 580 So.2d 983 (La. App. 1991).

81. *Id.* at 989.

82. *See id.* at 993 (affirming conviction and death sentence).

83. *See, e.g.,* DSM-IV-TR, *supra* note 46, at 571 (noting that pedophiles often explain their activities “with excuses or rationalizations that they have ‘educational value’ for the child, that the child derives ‘sexual pleasure’ from them, or that the child was ‘sexually provocative’”). Two other examples make the same point. John Gacy, who killed over 20 men, believed he was doing society a favor by ridding it of homosexual prostitutes. *See* STEVEN A. EGGER, *THE KILLERS AMONG US* 8-12 (2002). And the terrorists who threaten our country believe they are on the right side in a holy war.

84. The Rationality Test advocate who takes this position most unequivocally is Robert Schopp. SCHOPP, *supra* note 28, at 215 (defining insanity in terms of a person who is not able to engage in “the process of practical reasoning that is ordinarily available to an adult who does not suffer major cognitive disorder.”).

Rationality Test or a narrower version of it. As a practical matter, therefore, the Rationality Test more efficiently excludes psychopaths and others with “mere” personality disorders from the purview of the insanity defense (although, as I argue below, it too is not completely successful in this effort).

The Rationality Test also helps deal with the determinism problem associated with the Volitional Test. As noted earlier, the deterministic, all-behavior-is-caused position, which the Volitional Test comes close to endorsing, poses a substantial threat to a retribution-based criminal justice system. But those who advocate the Rationality formulation deal with this dilemma straightforwardly. They admit, or are willing to countenance, that all behavior is caused by environmental, biological and psychological factors over which people have little or no control. But they also insist that the only *legally relevant* causes for purposes of the insanity defense are the desires and beliefs that motivate the crime.<sup>85</sup> These are the “proximate” causes, the final causes, of the crime. All other correlates of crime should be irrelevant for legal purposes, rationality theorists argue. Thus, if the desires and beliefs that link the individual to the crime are irrational, we should excuse. If the desires and beliefs are rational, then we should convict regardless of what factors might contribute to the criminal conduct.

These aspects of the Rationality Test are positive contributions because they avoid problems associated with other formulations of insanity. But the rationality test has at least two negative aspects as well. First, as with the Volitional and Appreciation Tests, the Rationality Test might absolve people whom most of us would not want to excuse. Consider, for instance, the case of Jeffrey Dahmer, who killed people, cut them into pieces, put the body parts in the refrigerator and occasionally ate the remains.<sup>86</sup> Why? Because, according to him, he “didn’t want [his victims] to leave,” and because eating their flesh aroused him.<sup>87</sup> These desires are far from “intelligible.” They are also inconsistent with other beliefs Dahmer held: he knew, for instance, that killing his victims would ensure that they *would* leave him. The irrationality of his motivations is hard to deny. In contrast, Dahmer clearly would not be excused under M’Naghten, nor would he have success even under the pristine Appreciation Test, since he both knew and appreciated the wrongfulness of his conduct (in the sense that he did not believe his

---

85. See MOORE, *supra* note 28, at 190-245; Morse, *supra* note 28, at 29-30; SCHOPP, *supra* note 28, at 202.

86. Marilyn Bardsley, *Butt Naked!*, CRIME LIBRARY (2004), at [http://www.crimelibrary.com/serial\\_killers/notorious/dahmer/naked1.html](http://www.crimelibrary.com/serial_killers/notorious/dahmer/naked1.html) (accessed on Aug. 30, 2003).

87. K. Sifuentes, *Guess Who’s Coming to Dinner*, CRIME WEB, at <http://members.fortuncity.com/mastercrime/thecrimeweb/id8.html> (noting that, when asked why he killed his first victim, Dahmer stated “I didn’t want him to leave, that’s basically it. I just didn’t want him to leave, that’s why this whole nightmare began.”). See also, Bardsley, *supra* note 86, at [http://www.crimelibrary.com/serial\\_killers/notorious/dahmer/why\\_4.html](http://www.crimelibrary.com/serial_killers/notorious/dahmer/why_4.html) (accessed on Aug. 30, 2003) (recounting psychiatrist who stated that Dahmer “led a rich fantasy life that focused on having complete control over people”).



actions should be permissible).<sup>88</sup> In fact, a jury convicted him in an ALI jurisdiction.<sup>89</sup>

A rationality theorist might claim, however, that because Dahmer was not delusional,<sup>90</sup> his thought process was not disordered enough to warrant a finding of irrationality.<sup>91</sup> In other words, as suggested above, irrationality could and should be defined very narrowly, to require a formal thought disorder, like schizophrenia, that manifests a very high level of unintelligibility, inconsistency and incoherence in connection with the motivations for crime. If so, the question again becomes: why is psychosis singled out in this way?

This raises the second problem with the Rationality Test. Those who advocate for that test argue, I think correctly, that people who are irrational in the sense just described find it hard to access the right reasons for avoiding criminal conduct.<sup>92</sup> But the key question should be the *degree* to which they find this process difficult, as compared to people who are not “irrational.” There is no doubt that the minds of people with schizophrenia function very differently than the minds of most other people.<sup>93</sup> But the research noted earlier suggests that even people with paranoid ideation remember and are influenced by criminal prohibitions.<sup>94</sup> These findings indicate that people with delusions or confused thought processes are no more likely to commit violent acts than people who do not suffer from psychotic symptoms. In other words, people with mental illness seem to be able to access the right reasons for acting, perhaps not easily, but well enough to fight the thoughts or desires that push them in the opposite direction.<sup>95</sup>

---

88. Dahmer never contended, either in or out of court, that his actions were justified or explained by some higher or other good in the way Manson, Kaczynski and Cruse did.

89. Bardsley, *supra* note 86, at [http://www.crimelibrary.com/serial\\_killers/notorious/dahmer/trial\\_5.html](http://www.crimelibrary.com/serial_killers/notorious/dahmer/trial_5.html) (accessed on Aug. 30, 2003).

90. Even the defense never suggested as much. *See id.*

91. *See supra* note 84 (describing Schopp’s formulation, which in essence requires a formal thought disorder).

92. *See, e.g.,* Morse, *supra* note 28, at 30 (stating that irrationality is the preeminent excusing condition because it will “make it too hard” for a person “to grasp or to be guided by the good reasons not to offend”).

93. *See, e.g.,* COGNITIVE NEUROPSYCHIATRY (2003) (containing reports of studies finding that people with schizophrenia have significant impairments in nonverbal attributions of intentions in others, semantic memory, and temporal auditory processing); Volume 7 of COGNITIVE NEUROPSYCHIATRY (2002) (containing reports of studies finding that people with schizophrenia find it more difficult to inhibit irrelevant stimuli and to judge the duration of events).

94. *See supra* notes 47 and 65.

95. It should be noted that, in apparent contrast to the MacArthur study’s findings that delusions and hallucinations are not significantly correlated with violence, *supra* note 47, a more recent review of the literature concluded that mentally ill individuals are most likely to behave violently “when they (a) perceive that someone intends to do them harm, (b) believe they have been personally targeted for harm, (c) perceive the intended harm as a misdeed committed by the perpetrator, (d) believe that they are in imminent danger, (e) believe that physical force is the best means of protection or retaliation against the perpetrator, and (f) attribute blame to the perpetrator based on his or her dispositional qualities, e.g., ‘he wishes to harm me because he is evil.’” Dale E. McNeil et al., *The Relationship Between Aggressive Attributional Style and Violence by Psychiatric Patients*, 71 J. CONSULTING AND CLINICAL PSYCHOLOGY 404, 405 (2003). Far from undermining the assertion in the text, this finding

On the other hand, some *non*-psychotic persons have great difficulty accessing the right reasons for acting at the time they commit crime. According to the psychiatric profession's diagnostic manual, dependent personalities may "feel so unable to function alone that they will agree with things that they feel are wrong rather than risk losing the help of those to whom they look for guidance."<sup>96</sup> Or consider again the person who kills in a fit of temper, because of jealousy or out of disproportionate umbrage at a slur; at the moment of the crime, rage may make accessing the right reasons for acting impossible for such people.<sup>97</sup> It is unlikely that irrationality, *qua* serious mental disorder, is always the reason people have a hard time accessing the right reasons for acting.

Another perspective on the extent to which serious mental disorder is the appropriate focus of the insanity defense is to assess the notion—one that seems to underlie not just the Rationality Test but the insanity defense generally – that people with such disorders are basically good people. According to this view, the mental disease, not the person's "true" personality, makes them do bad things. That assumption is worth challenging. In a book devoted to examining homicides committed by mentally ill people, Dr. Drew Ross claims, as most people do, that people who are mentally ill "usually have a good heart underlying their loss of reality."<sup>98</sup> But he goes on to describe a large number of cases where psychotic people commit homicide for reasons that do not sound so innocent. For instance, there is the case of Mark, who killed out of delusional jealousy;<sup>99</sup> the case of Ned, who killed in large part because of anger at his mother;<sup>100</sup> the case of Maria, who killed a hated uncle;<sup>101</sup> and the case of Ernest, who stabbed a young girl perhaps to prevent detection or perhaps out of envy.<sup>102</sup> These are the same kinds of motivations that might lead a "normal" person to kill someone else. Is it irrationality *qua* mental illness that is causing people to commit these crimes? Or something else?

---

reinforces the claim that people with mental illness are attuned to societal mores, because they usually act violently only for "rational" reasons—when they feel threatened. As explained later, *see infra* text accompanying notes 119-122, this is precisely the kind of individual who is likely to have a defense under the Integrationist Alternative.

96. DSM-IV-TR, *supra* note 46, at 722.

97. Professor Morse, a rationality theorist, suggests that this might be the appropriate outcome under the irrationality test. Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1649 (1997) ("[C]rimes 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."); *see also id.* at 1636 (wondering whether psychopaths should be excused on irrationality grounds).

98. DREW ROSS, *LOOKING THROUGH THE EYES OF A KILLER: A PSYCHIATRIST'S JOURNEY THROUGH THE MURDERER'S WORLD* 87 (1998).

99. *Id.* at 83-87.

100. *Id.* at 91-93.

101. *Id.* at 129-32.

102. *Id.* at 201-04.

Because M’Naghten focuses on whether mental disorder undermines one’s knowledge of wrongfulness, that test is better at capturing the essence of insanity than any of the other formulations. The Volitional Test doesn’t work because compulsion should not be an excuse and because, even if it should be, resistible impulses are impossible to distinguish from impulses that are not resisted. The Appreciation Test is flawed because it is too broad and does not distinguish between people with and without significant mental disorder. The Rationality Test is also too broad or, if defined narrowly in terms of formal thought disorder, does not adequately identify all people who have difficulty accessing reasons for avoiding criminal action.

#### IV. The Integrationist Alternative

That is my defense (by negative implication) of the M’Naghten Test. As signaled at the outset, however, I believe that M’Naghten is only the second best means of taking mental disorder into account in our assessments of criminal culpability. As applied, the word “know” used in M’Naghten is not that different from the word “appreciate,” and broadly construed could trigger all the problems associated with the Appreciation Test.<sup>103</sup> More importantly, aside from the partial delusion component of M’Naghten, the test does not make clear when, if ever, a mentally ill person who believes that his or her crime is legally wrong, but morally permissible, should be excused. The Integrationist Alternative, which seeks to integrate people with mental illness into the system of punishment that already exists for people who are not mentally ill, addresses these concerns. In theory, at least, it is somewhat broader than a literal application of the M’Naghten test and is clearly broader than the medieval tests, but is generally more restrictive than the Volitional, Appreciation, and Rationality Tests.

The Integrationist Alternative builds on the recognition underlying modern criminal statutes that individual blameworthiness is the key inquiry of the criminal law, and that criminal liability should depend on the subjective beliefs of the individual who commits crime. The leading effort in advancing this point of view is, as with the insanity defense, the ALI’s Model Penal Code.<sup>104</sup> Its provisions regarding self-defense, duress, and mens rea all adopt a subjective approach to culpability.

With respect to defensive actions, the Model Penal Code promulgates what could be called the “subjective justification” excuse. According to the Code, for instance, deadly force may be used whenever “the actor believes

---

103. Professor Goldstein found, in his review of evidence and instructions in insanity cases, that M’Naghten’s test language is construed liberally, when it is defined at all. ABRAHAM GOLDSTEIN, *THE INSANITY DEFENSE* 49-53 (1967).

104. See MODEL PENAL CODE COMMENTARIES, § 2.02 cmt. 2, at 235 (Proposed Official Draft 1962) (“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.”).

that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat.”<sup>105</sup> This language states that an individual is excused from using deadly force even when the victim does not actually threaten the actor with death or the other listed consequences, as long as the actor honestly *thinks* he is threatened with them. Thus, this provision is virtually identical to the Partial Delusion Test that the House of Lords announced in the M’Naghten case; it asks what the criminal actor believes and excuses him if those beliefs amount to justification.

The Model Penal Code also subjectifies the duress defense. Classically, the duress defense exists when a person is coerced into committing a crime by a serious threat, as when someone holds a gun to the defendant’s head saying, “Commit robbery, or I’ll kill you.”<sup>106</sup> But the duress defense under the Model Penal Code also contemplates that an excuse exists when an actor mistakenly believes a threat to use unlawful force has been made. Even if the individual is not actually threatened, if the actor *thinks* he has been threatened with such force, then he may have a defense under the Model Penal Code.<sup>107</sup>

Finally, the Code subjectifies mens rea. Under the common law, an individual who committed a criminal act was often assumed to have intended it,<sup>108</sup> and could prevail on a “mistake of fact” defense only if the mistake was reasonable.<sup>109</sup> The Model Penal Code, in contrast, usually requires an inquiry into the individual’s *actual* intent and awareness at the time of the crime. That subjective inquiry, the drafters of the Code posited, is essential to assessing the blameworthiness of most crimes.<sup>110</sup> Thus, if the individual did not intend or was not aware he was committing the *conduct* that caused the crime, a defense exists.<sup>111</sup> Similarly, the individual who did not intend or was not aware of the *result* of his crime usually also has a defense. Most importantly for present purposes, if the individual made a mistake about the

105. MODEL PENAL CODE § 3.04(2)(Proposed Official Draft 1962).

106. See generally WAYNE LAFAYE, CRIMINAL LAW 467 (2000) (describing duress as available when the actor reasonably believes that crime short of homicide is necessary to avoid imminent death or serious bodily injury).

107. MODEL PENAL CODE § 2.09(1)(Proposed Official Draft 1962) (providing 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, that a person of reasonable firmness *in his situation* would have been unable to resist”) (emphasis added); MODEL PENAL CODE § 2.09(1) cmt. 3, at 380 (Proposed Official Draft 1962) (The intent of this provision “is to give effect to the defense when an actor mistakenly believes that a threat to use unlawful force has been made.”).

108. See generally, LaFave, *supra* note 106, at 239-240.

109. *Id.* at 434-37.

110. See *supra* note 104. The Model Penal Code does permit liability for homicide and a few other crimes on the basis of negligence, but even here liability accrues only after “considering the nature and purpose of [the actor’s] conduct and the circumstances known to him.” MODEL PENAL CODE § 2.02(2)(d)(Proposed Official Draft 1962).

111. If the individual was not in conscious control of his bodily movements then, as noted earlier, see *supra* text accompanying notes 38-39, an involuntary act defense is the proper defense.

*circumstances* that comprise the elements of the offense (as to ownership, identity and so on), then that can be an excuse as well.<sup>112</sup>

How does all this apply to people with mental illness? The integrationist argument is that if these defenses are made available to mentally ill people who commit crime, the insanity defense is unnecessary. Those mentally ill people who have a subjective justification, subjective duress, or lack of subjective mens rea defense constitute the universe of people with mental illness who should be excused.

Before exploring the point further, one final aspect of the Model Penal Code should be noted. The Code's section on defenses provides that a person cannot be exculpated if he is responsible for bringing about the situation requiring a choice of harm or evil.<sup>113</sup> For example, generally an individual who kills someone because the victim is about to use deadly force against him is acting in self-defense. But the Code provision just described indicates that if the perpetrator of the crime *provoked* the victim into using deadly force, reliance on self-defense should not succeed. Because the perpetrator started the confrontation, he is not entitled to a full defense.

Putting all of this together and applying it to people with mental illness, the Integrationist Alternative might read something like this: *A person shall be excused from an offense if at the time of the offense, by reason of mental disease or defect, he (a) lacked the subjective mental state for the conduct, circumstance, or result element of the crime; (b) believed circumstances existed that, if true, would have justified the offense; or (c) believed circumstances existed that, if true, would have amounted to duress, provided that (d) he did not cause any of these mental states by purposely avoiding treatment knowing that such states would occur without such treatment.*

Here are some examples of how the Integrationist Alternative would work.<sup>114</sup> Consider first cases involving the absence of subjective mens rea. In *People v. Wetmore*,<sup>115</sup> the defendant was charged with burglary after being found in another person's apartment wearing that person's clothing. Because of his mental illness, he thought that both the apartment and the clothing were

---

112. As Professor Low has noted, the Model Penal Code's subjective approach to mistake of fact "rejects a judgment expressed in a common-law rule that was centuries in its evolution." Peter W. Low, *The Model Penal Code, the Common Law, and Mistakes of Fact: Recklessness, Negligence, or Strict Liability?*, 129 RUTGERS L.J. 539, 546 (1988).

113. MODEL PENAL CODE § 3.02(2)(Proposed Official Draft 1962) ("When 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.").

114. Most of these examples are borrowed from my earlier article on the Integrationist approach. See Slobogin, *supra* note 6, at 1202-07. That article also argued that there should be a "general ignorance of the law" excuse, akin to the infancy defense, but that defense would rarely provide an independent excuse and is not discussed here. *Id.* at 1240-42.

115. 583 P.2d 1308, 1310 (Cal. 1978).

his.<sup>116</sup> Wetmore could be excused by reason of insanity. But he also could be excused because he lacked the requisite mental state for the crime charged. More specifically, he did not have the mens rea for burglary, which requires breaking into the house of another knowing it is another's and intending to commit a crime therein.

The centuries-old murder prosecution of John Barclay, reported by Isaac Ray, provides another illustration of how the mens rea component of the Integrationist Alternative would work. According to Ray, Barclay was a mentally retarded individual who was so confused at the time of the killing that he thought the victim was akin to an ox.<sup>117</sup> If so, he was probably insane under any test of insanity. But he could also be acquitted on lack-of-mens-rea grounds. He did not have the mens rea for homicide, because he intended to kill an animal, not a person.<sup>118</sup>

Now consider examples of the subjective justification component of the Integrationist Alternative. As noted above, this aspect of the Integrationist Alternative is virtually identical to the Partial Delusion defense announced by the House of Lords in M'Naghten, and the M'Naghten case itself provides an illustration of how it might apply. M'Naghten's paranoia apparently led him to believe that members of the Tory Party were trying to assassinate him. He went to the police on several occasions pleading that something be done, but the police paid no attention to him.<sup>119</sup> M'Naghten eventually came to believe he had to take preventive action himself, and devised a plan to eliminate the leader of the group whom he perceived was tormenting him, Prime Minister Peel.<sup>120</sup> On this version of the facts, he might well have had a subjective justification defense. If not, he would still be able to argue imperfect self-defense, and at least escape conviction for murder.<sup>121</sup>

Contrast that case to John Hinckley's and Theodore Kaczynski's. Hinckley supposedly tried to kill President Reagan because he thought that, if he did, Jodie Foster would fall in love with him or at least come to live with him.<sup>122</sup> Hinckley's case obviously presents a much weaker claim of subjective justification; no jury is likely to find that an attack on the President of the United States is justified by a desire to improve one's love life.

116. *See id.*

117. RAY, *supra* note 21, at 92-93.

118. Barclay would not even be guilty of negligent homicide under the Model Penal Code, because the Code defines negligence in terms of how a reasonable person would act under the "circumstances known to him." MODEL PENAL CODE § 2.02(2)(d). *See* Slobogin, *supra* note 6, at 1239. An individual in Barclay's situation would still be guilty of killing an animal, if such a crime exists. Of course, conviction would not preclude treatment, or transfer to a mental institution if the conditions of prison were not appropriate for him.

119. MAEDER, *supra* note 15, at 27-29.

120. *Id.*

121. *See generally*, Douglas Husak, *Partial Defenses*, 11 CAN. J. L. & JURISPRUDENCE 167 (1998) (describing imperfect self-defense and arguing that all defenses should be available on a partial basis).

122. *See* REISNER ET AL., *supra* note 59, at 539.

Similarly, a jury is unlikely to think Kaczynski was justified in mailing letter bombs to the people he did, even if it assumes as true his belief that our reliance on technology will bring disaster to the world within the next forty years.

The third component of the Integrationist Test looks at whether a person believed circumstances existed that, if true, would have amounted to duress. The kinds of cases involving mentally ill people that are most relevant to this defense involve command hallucinations. Assume, as we did earlier, a mentally ill person believed God ordered him to kill because otherwise the world would be destroyed.<sup>123</sup> Such a person could well have a viable defense under the Integrationist Alternative. On the other hand, if the command from God was, "Commit the crime or constant nightmares will be your lot," a successful defense would be unlikely. If the reader's reaction to this kind of conclusion is "But this person is crazy and should be excused!", be reminded that most people with such delusions do not commit crime, and that those who do are not provably less culpable than non-mentally ill persons who offend to impress a lover, make the world a better place, or alleviate stress.

Finally, consider the limitation on integrationist defenses that applies when the individual purposely avoids treatment, knowing that hostility-inducing delusional mental states are likely to occur without such treatment. The case of Andrea Yates is apposite here. If one subscribes to the defense theory of the case, Andrea Yates had a strong subjective justification defense to the homicide charges brought against her for drowning her five children. The leading defense expert, Dr. Resnick, believed Yates killed her children because she thought that by doing so she could assure their entry to Heaven, whereas if she failed to do so they would go to Hell.<sup>124</sup> Assuming that those delusions existed, and pretending that they represent reality, Yates was justified in her actions. She might still be convicted in an integrationist regime, however, if she were responsible for the delusions that she was experiencing and knew they would lead to hostility toward the children. The evidence presented at trial indicated that, prior to her crimes, she had hidden her symptoms from her therapist and avoided taking her medication, knowing that when off medication she became very irritable with her children and had experienced delusional desires to harm them on at least two previous occasions.<sup>125</sup> These kinds of facts would undermine a defense under the

---

123. See *supra* text accompanying note 40.

124. Associated Press, *Yates Claimed She Killed Kids to Keep Them From Going to Hell* (Mar. 1, 2002), available at [http://www.court tv.com/trials/yates/030102\\_pm.html](http://www.court tv.com/trials/yates/030102_pm.html). See also, Deborah W. Denno, *Who is Andrea Yates? A Short Story About Insanity*, 10 DUKE J. GENDER L. & POL'Y, 37 (2003) ("According to Andrea, the drowning would be a way out because the children 'would go up to heaven and be with God, be safe.'").

125. Park Dietz, Remarks at the Meeting of American Association of Psychiatry and Law (October 14, 2002) (an expert witness for the prosecution in the Yates case). See also, Associated Press, *Doctor: Yates Suffered Mental Illness* (Mar. 8, 2002), at <http://www.court tv.com/trials/>

Integrationist Alternative. On the other hand, if she did not believe she was ill, or was not aware that failure to take treatment would exacerbate her violent delusions and hostility toward her children, then she could still be excused.

Different people might apply integrationist analysis differently. The important point for present purposes is that, under this approach, “insanity” would no longer be a defense; instead judges and juries would apply the same defenses to people with mental illness that are applied to people who are not mentally ill. Professor Bonnie states that the Integrationist Alternative “draws arbitrary distinctions among equally severe symptoms, among equally distorted and irrational delusions, and among equally intense delusional motivations.”<sup>126</sup> But drawing distinctions based on the Model Penal Code’s choice-of-evils formulations is hardly arbitrary, as those formulations are bottomed on fundamental normative judgments of society, judgments even people with mental illness understand. What is arbitrary is drawing distinctions based on “the intensity of the psychotic experience,” the degree to which the person is “detached” from reality, and the extent to which he or she could have been more “restrained,” which is how Professor Bonnie describes the test he advocates.<sup>127</sup> The only distinguishing feature in all of these inquiries is the degree of psychosis, which, as previous discussion indicates, bears only a tenuous relationship to culpability. If the individual’s psychosis is so flagrant that he is not aware of the nature of his actions, he is excused under any of the formulations being discussed here, including the Integrationist test. But for those mental states that fall short of this sort of unawareness, Professor Bonnie’s “degree of psychosis” approach does not offer any identifiable rationale for separating those who should be excused from those who are not, whereas the Integrationist Alternative does. As a result, the insanity inquiry under modern formulations is much more prone to random outcomes than the inquiry required by the Integrationist approach.

In this regard, consider once again the Andrea Yates case. Yates, as I suggested, probably should have been acquitted unless she knowingly allowed her hostile delusions to go untreated (and even then, under the Model Penal Code, she would probably only be guilty of reckless homicide<sup>128</sup>). But I would be much more uncomfortable acquitting her if, assuming all else to be

---

yates/030802-illness\_ap.html (describing hiding of symptoms and refusal to take medication); Teachey, *supra* note 1 (reporting that Yates told a psychiatrist two years before the killings: “I had a fear I would hurt somebody. . . . I thought it better to end my own life and prevent it. There was a voice, then an image of the knife. I had a vision in my mind, get a knife, get a knife. . . . I had a vision of this person getting stabbed, and the after-effects.”); Denno, *supra* note 124, at 39.

126. Bonnie, *Appreciation of Wrongfulness*, *supra* note 63, at 12.

127. *Id.* at 9.

128. The Model Penal Code’s subjective justification defense is always available for intentional crimes, unless one causes the circumstances of one’s excuse with the *intention* of committing the crime. See *supra* note 113. Thus, Professor Bonnie’s suggestion that Yates’ reckless failure to seek treatment could result in conviction for first degree murder and a possible sentence of death, see Bonnie, *Appreciation of Wrongfulness*, *supra* note 63, at 9, could not occur under the Integrationist Alternative.



the same, her reason for killing her children was to prevent them from growing up to be bad teenagers.<sup>129</sup> In this scenario, regardless of her general “craziness,” she becomes much more like Susan Smith, the “sane” woman who drowned her three children so that she could pursue her extramarital affair unencumbered by them (according to the prosecution in the *Smith* case) or because she was suicidal and wanted to take them with her (according to the defense).<sup>130</sup> The reasons for committing the crime should be the all-important consideration; otherwise, the inquiry devolves into the normatively empty analysis described above.

In addition to capturing the essence of mental illness’ excusing function in a non-arbitrary way, the Integrationist Alternative might have several other beneficial consequences. First, it could improve public perception of the criminal justice system. Conspicuous insanity acquittals prompt a huge outcry not just against the insanity defense, but against the entire criminal justice system.<sup>131</sup> The Integrationist Alternative would make acquittals based on mental disorder easier for the public to swallow, because they would occur only when the accused lacked the intent to commit the crime or thought he needed to commit the crime due to the threat of a greater harm. The typical layperson should empathize with that type of acquittal more readily than one based on the concept of volitional impairment, lack of appreciation, or irrationality.

The Integrationist Alternative might also help de-stigmatize people with mental illness, because it treats them the same way we treat non-mentally ill people. The “criminally insane” are reviled and feared, probably more so than any other category of people besides terrorists.<sup>132</sup> If the insanity defense is eliminated, the “criminally insane” label is eliminated as well, which might be a small step toward rehabilitating the image of people with mental illness.

The third possible benefit of the Integrationist Alternative is the improvement of treatment for people with mental illness. No matter what formulation of the insanity defense we choose, there will continue to be large numbers of mentally ill people in our prisons and jails.<sup>133</sup> Thus, the notion

---

129. At one point, she suggested this was the case. See Associated Press, *supra* note 125 (reporting statement of Yates to psychiatrist to the effect that “she became frustrated by what she felt was a lack of development by her children”).

130. Rachel Pergament, *The Trial*, CRIME LIBRARY (2004), [ahttp://www.crimelibrary.com/notorious\\_murders/famous/smith/trial\\_9.html](http://www.crimelibrary.com/notorious_murders/famous/smith/trial_9.html).

131. See, e.g., MICHAEL J. PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* 13 (1994) (“The 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.”).

132. See Deborah C. Scott et al., *Monitoring Insanity Acquittes: Connecticut’s Psychiatric Security Review Board*, 41 HOSP. & COMM. PSYCHIATRY 980, 982 (1990) (describing survey response that called insanity acquittes the “most despised and feared group in society”).

133. T. Howard Stone, *Therapeutic Implications of Incarceration for Persons with Severe Mental Disorders: Searching for Rational Health Policy*, 24 AM. J. CRIM. L. 283, 285 (1997) (estimating there are 87,000 people with severe mental disorders in prison).

that the insanity defense should be used as a method for ensuring treatment for those with mental illness is not only conceptually nonsensical (since blameworthiness and treatability do not necessarily coincide), but futile as a practical matter. Elimination of the insanity defense might focus more attention on the treatment of *all* mentally ill people who commit crime. If so, overall therapeutic impact would be enhanced by substituting the Integrationist Alternative for the insanity defense, however framed.

#### V. The Mens Rea Alternative

The Integrationist Alternative may have at least one practical downside. A jury confronted with an integrationist defense will have to answer strange, perplexing questions such as: “Is it justifiable to kill people who are trying to turn one into a homosexual?”,<sup>134</sup> “Is it justifiable to send out letter bombs in an effort to prevent the destruction of the world through technology?”, or “Is a person who is threatened by God coerced?” Juries may have difficulty taking these kinds of inquiries seriously, or dealing with them sensibly.

That criticism leads to the last test that I was commissioned to defend, the Mens Rea Alternative. The Mens Rea Alternative would only provide an excuse for defendants who lacked mens rea. It thus coincides with the first part of the Integrationist Alternative. But it would not excuse people based on subjective justification or duress. Accordingly, it not only avoids the problems associated with existing tests (because it does not contemplate inquiries into volitionality, appreciation of wrongfulness, or rationality) but also evades the choice-of-evil conundrums connected with the Integrationist Alternative.

There are at least four states that have adopted the Mens Rea Alternative,<sup>135</sup> so we know something about how it works. Not surprisingly, it has reduced acquittals based on mental state defenses. In the state of Montana before the Mens Rea Alternative was adopted, about 23% of all mental state defenses succeeded.<sup>136</sup> After the adoption of the Mens Rea Alternative, only 2.3% of those who asserted mental state defenses prevailed.<sup>137</sup> Thus, the Mens Rea Alternative seems to have occasioned a

---

134. *Cf. Cruse v. State*, 580 So.2d 983 (La. App. 1991). The answer should presumably be “no”, given the usual rejection of “gay panic” defenses asserted by non-psychotic individuals who claim they killed when homosexual advances by the victim brought out repressed homosexuality that results in violence. This was the defense raised, and rejected, in the case of the two defendants who killed Matthew Shepard in Wyoming. See Bryan Robinson, *McKinney Convicted of First-degree Felony Murder in Matthew Shepard Murder Slaying* (Nov. 3, 1999), at [http://www.courtvt.com/trials/mckinney/110399\\_verdict\\_ctv.html](http://www.courtvt.com/trials/mckinney/110399_verdict_ctv.html).

135. See IDAHO CODE § 181-207 (1997); KAN. STAT. ANN. § 22-3220 (1995); MONT. CODE ANN. § 46-14-214 (2001); UTAH CODE ANN. § 76-2-305 (1999).

136. LISA CALLAHAN ET AL., POLICY RESEARCH ASSOCIATES, INC., *THE IMPACT OF MONTANA’S INSANITY DEFENSE ABOLITION* (July, 1988) (cited in REISNER ET AL., *supra* note 59, at 588).

137. *Id.*

huge decline in the number of acquittals by reason of mental state. At the same time, however, defendants who raise mental state defenses and are convicted in Montana today are much less likely to go to prison and much more likely to receive probation than before the adoption of the Mens Rea Alternative.<sup>138</sup> Additionally, there are now many more dismissals based on a finding of incompetency to stand trial.<sup>139</sup> In other words, Montana has experienced a balloon-squeezing phenomenon – an adjustment to one part of the system resulting in accommodations in other parts of the system. That suggests that the Mens Rea Alternative defines the scope of exculpatory mental disorder too narrowly, at least for the judges who make sentencing and incompetency decisions in Montana.

The Mens Rea Alternative has been attacked on constitutional grounds. The principal argument is that eliminating the insanity defense, which the Mens Rea Alternative does, infringes upon due process. But most state courts that have heard these arguments have rejected them. The Montana Supreme Court held, for instance, that so long as mental disease is considered at sentencing, abolition of the insanity defense is not unconstitutional.<sup>140</sup>

Nonetheless, it is worthwhile speculating what the United States Supreme Court would say about the Mens Rea Alternative. In *Leland v. Oregon*,<sup>141</sup> the Court held that the due process clause does not prohibit forcing a defendant to prove insanity beyond a reasonable doubt.<sup>142</sup> If that 1952 holding still stands, the insanity defense must not be a very crucial component of the criminal justice system. Based on *Leland*, in other words, one could predict that the Court would say the defense is not a fundamental aspect of due process. But then there is the more recent Supreme Court case of *Montana v. Egelhoff*,<sup>143</sup> which was decided in 1996. *Egelhoff* arose when the Montana legislature, apparently an entity that likes to eliminate defenses, abolished the intoxication defense. Challenged as an infringement of due process, the Montana statute was upheld by the Supreme Court.<sup>144</sup> But the primary reason the Court gave for this holding was that the intoxication defense is of “recent vintage” and thus not a fundamental aspect of criminal justice.<sup>145</sup> In contrast, of course, the insanity defense is *not* of recent vintage;

---

138. *See id.*

139. *Id.* *See also* HENRY STEADMAN ET AL., BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM 136 (1994) (recounting that in Montana after the reform those who normally would have been found insane were instead found incompetent and placed in the “same hospital and the same wards where they would have been confined if they had been found NGRP”).

140. *State v. Korrell*, 690 P.2d 992, 1002 (Mont. 1984). *See also*, *State v. Searcy*, 798 P.2d 914 (Idaho 1990). *State v. Herrera*, 895 P.2d 359 (Utah 1995). *But see* *Finger v. State*, 117 Nev. 548, 27 P.3d 66 (2001) (striking down Nevada’s mens rea alternative statute).

141. 343 U.S. 790 (1952).

142. *Id.* at 799.

143. 518 U.S. 37 (1996).

144. *Id.* at 51 (“Although the rule allowing a jury to consider evidence of a defendant’s voluntary intoxication where relevant to mens rea has gained considerable acceptance, it is of too recent vintage, and has not received sufficiently uniform and permanent allegiance, to qualify as fundamental.”).

145. *Id.*

it is ancient. Perhaps, therefore, when the Supreme Court hears a case challenging the Mens Rea Alternative, it will hold that mental disorder must be allowed to play a greater role in blameworthiness assessments.

That holding would not threaten the Integrationist Alternative, however. If M'Naghten is a constitutionally adequate formulation of insanity,<sup>146</sup> then the Integrationist Alternative should be as well. Because the latter approach is better than M'Naghten at giving mental illness its proper exculpatory scope, and at the same time avoids the pitfalls of the Volitional, Appreciation, and Rationality Tests, it should be seriously considered as a replacement for the insanity defense.

---

146. *Leland v. Oregon*, 343 U.S. 790, 792 (1952) suggested as much.

