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An examination of revisionist theories in criminal insanity jurisprudence

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AN EXAMINATION OF REVISIONIST THEORIES IN CRIMINAL INSANITY JURISPRUDENCE

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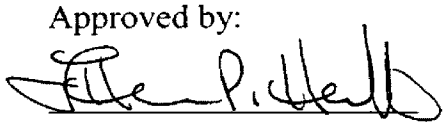

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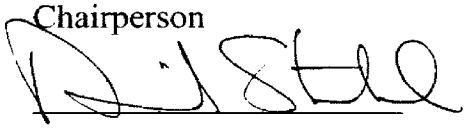

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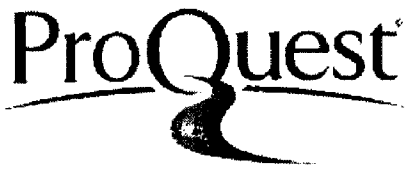

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An Examination of Revisionist Theories in Criminal Insanity Jurisprudence

Director: Tom Huff

The criminal insanity defense is a controversial area in the criminal law. One case in particular that exemplifies its controversial nature is that of Andrea Yates, the Texas woman who in 2001 drowned her five children. Under the Texas test for criminal insanity, which asks whether or not the defendant "knew right from wrong," a jury found Yates guilty of first-degree murder. However, as it has been voiced in the media in the weeks after the verdict, many thoughtful people find this verdict wrong.

This paper examines alternative tests for criminal insanity to those that are currently found in the criminal law, including that of Texas, in the hopes of finding a better test for determining criminal insanity. The alternative tests that are examined in this paper, are those of the philosophers Herbert Fingarette and Lawrie Reznek. Specifically, Fingarette's and Reznek's tests are examined from the perspective of five important issues that have occupied scholars in criminal insanity jurisprudence, as well some of the problems that have characteristically given rise to these issues. Finally, once Fingarette's and Reznek's tests for insanity are examined, they are applied to the case of Andrea Yates. According to Fingarette's and Reznek's tests, Yates should have been found not guilty by reason of insanity.

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I. Introduction

The insanity defense in the Anglo-American criminal law system is unusually controversial, indeed so controversial that it is sometimes thought of as presenting an intractable problem.[1] A very recent example that illustrates the controversial character of the insanity defense comes from the trial of Andrea Yates, a case which has received widespread attention from the media since we first learned of her horrific actions.[2]

On the Morning of June 20, 2001 the public learned that Yates had systematically drowned her five children, ages 2-7, in a bathtub inside her home; and that afterwards she set four of the children in bed, neatly covered by a sheet, while leaving her last child dead in the bathtub. Yates then proceeded to calmly call both her husband and the police to report her actions. She told the police in detail of the events, including the oldest child's attempts to escape her hold as she held him under the water until he took his last breath.[3]

On March 12, 2002, nine months after the murders, a jury spent less than three hours determining that Andrea Yates was not legally insane, and therefore was guilty of first degree murder.[4] The standard that Texas directed the jury to use to determine Yates

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[1] See generally, Abraham S. Goldstein, The Insanity Defense (New Haven and London: Yale University Press, 1967) 3-8.

[2] See generally, Bill Hewitt, "Life or Death?" People Weekly 4 March 2002, v57, i8, 82; Anne Belli Gesalman and Lynette Clemetson, "A Crazy System: As Yates' Family Assessed Andrea's Life Sentence, a Nation Ponders Its Method of Coping With Madness," Newsweek 25 March 2002, 30; Timothy Roche, "The Devil and Andrea Yates," Time 11 March 2002, vol. 159, 17.

[3] Marianne Szegedy, "Mothers and Murder," US News &World Report 18 March 2002, 23.

[4] Gesalman and Clemetson, 30.

mental status, is a version of the "Right-Wrong" Test.[5] The Texas test, which is a simpler, and some might say cruder, version of the 19th Century test called the *M'Naghten* Rule,[6] simply asks whether or not the defendant knew right from wrong with respect to the criminal act in question.[7] Thus, according to the jury's assessment of Yates' actions, Yates was legally sane under Texas' "Right-Wrong" test.

However, as evidenced from the substantial backlash currently being voiced in the public arena,[8] there is reason to doubt that the public thinks that this is the right test, and therefore the right verdict. For many, there is a profound sense that Yates was criminally insane, and thus should not be found guilty of first degree murder.[9] Perhaps part of what gives this strong impression, is her substantial history of psychological illness that was documented and sometimes treated, prior to the horrific events on June 20th. For instance, it was well known that Yates was plagued for many years by a variety of very serious psychological maladies.[10] These included severe post-partum depression that began with the birth of her first child, Noah, and reccurred after the birth of her fourth child, Luke.[11] When Luke was born, Yates became "agitated and withdrawn, with extreme anxiety and sadness," and then after four months, Yates tried to kill herself by taking 40-50 of her father's antidepressants. Subsequently, Yates was diagnosed with

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[5] The "Right-Wrong" test refers to a kind of test which makes reference to the moral concepts of "right" and "wrong." It has its modern origins in the *M'Naghten* Rule, which will be discussed in the Sec. II, B below.

[6] See sec. II, B below.

[7] Texas Penal Code, sec. 8.01 A (1994, amended).

[8] Gesalman and Clemetson, 30; Jennifer S. Bard, "Unjust Rules for Insanity," The New York Times 13 March 2002, A27 (N), A25 (L), col. 1 (18 col. in).

[9] Ibid.

[10] Hewitt, 82.

"major depressive disorder" and was placed on the antidepressant Zoloft.[12] Other indications of the severity of her psychological illnesses, were that she had "scratched several bald spots onto her scalp," because of tension and anxiety, and was plagued by hallucinations that "Satan was living in her and that she and Satan both must be punished."[13] Moreover, in the two weeks prior to the drowning of her children, though suffering from depression and suicidal impulses, Yates was taken off the powerful anti-psychotic drug Haldol.[14] Two days after being taken off Haldol, Yates was found by her brother, Randy, to be in very bad condition. She barely spoke and seemed indifferent to everything. According to Randy, "she carried the baby around on her hip more like a football or a loaf of bread ... not like she was a loving mother."[15]

The Yates case is a perfect example of how controversial, and for some deeply troubling, the insanity defense can be. On the assumption that Yates did indeed "know right from wrong," and thus was legally sane, many have argued that something must be wrong with the Texas test for criminal insanity.[16] However, this controversy is not limited to Texas' test for insanity, although perhaps it is particularly severe in this state.[17]

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[11] Ibid.

[12] Ibid.

[13] Ibid.

[14] Ibid.

[15] Ibid.

[16] See generally the discussion of the *M'Naghten* Rule in sec. II, B below. Specifically, see Bard, A27 (N), A25 (L), col. 1 (18 col in); Gesalman and Clemetson, 30.

[17] See sec. II, B below. The *M'Naghten* test for criminal insanity is highly controversial. Thus, Texas' test, which can reasonably be construed as a narrower form of *M'Naghten*, would be particularly controversial according to legal scholars and theoreticians.

Rather, the history of the insanity defense is littered with controversial cases.[18] The Yates case is simply one of the more recent, high profile cases in this longstanding controversy.

Although a variety of explanations for our continuing dissatisfaction with the various versions of the insanity defense have been offered by legal scholars and philosophers such as the version used in the Yates case,[19] there are five issues that arise most often in contemporary analyses of the topic. These issues are:

(1). The role that "*mental disease*" should play in determining criminal insanity.

(2). The role that "*volition*" should play in the insanity defense.[20]

(3). The role that "*rationality*" should play in the insanity defense.[21]

(4). Whether or not the defendant should have a *legal* understanding of the criminal act, as opposed to a *moral* understanding?[22]

(5). Whether or not the defendant should have a *noncognitive* understanding of the criminal behavior, as well as a *cognitive* understanding?[23]

In this paper, I will analyze two philosophers' perspectives on criminal insanity, and their responses to these difficult issues, in hopes of ultimately finding better alternatives than those offered by the state of Texas for determining criminal insanity. I will do this by first providing a fairly brief history of the insanity defense, attempting to explain some

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[18] Ralph Slovenko, Psychiatry and Criminal Culpability (New York: John Wiley and Sons, inc., 1995) 1-14.

[19] Goldstein, 45-96.

[20] Robinson, 302-305; Goldstein, 67-79; Fingarette, 158-172.

[21] Fingarette, 173-215; Michael Moore, Placing Blame (Oxford: Clarendon Press, 1997) 595-609; Lawrie Reznek, Evil or Ill: Justifying the Insanity Defense, 173-199.

[22] Robinson, 294-300; Goldstein, 51-53; Fingarette, 142-157.

of the problems that have characteristically given rise to the above five issues. This will be followed by an elucidation and explanation of the views of Herbert Fingarette[24] and Lawrie Reznek,[25] and finally, by an application of their views to the Yates case.

II. History Of The Criminal Insanity Defense

A. Pre-*M'Naghten* History

The history of the criminal insanity defense can be naturally divided into two broad phases: Pre-*M'Naghten* and Post-*M'Naghten.*[26] The Pre-*M'Naghten* phase began in the year of 1313 with a case involving the capacities of an infant under the age of seven.[27] At that time, the criminal law was dominated by Biblical faith, and thus developed a religiously motivated insanity test that became known as the "Good-Evil" test.[28] According to this view, persons who lack the necessary component for punishment, i.e., blameworthiness, ought to be thought of and treated like children. Just as we understand children to have not yet developed the capacity to "do the right thing" in certain relevant circumstances, so too is this the case with the criminally insane. The capacity for behaving in accordance with the good will that the Bible teaches is what the Good-Evil test is designed to measure. The following passage gives a flavor of the test: " ...

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[23] Robinson, 286-301; Goldstein, 49-50; Fingarette, 142-152.

[24] See fn. 19.

[25] See fn. 21.

[26] *M'Naghten* refers to the highly influential 1843 case involving Daniel M'Naghten, a defendant who pleads not guilty by reason of insanity. This case is discussed in the next section.

[27] Michael Perlin, The Jurisprudence of the Insanity Defense (Durham, North Carolina: Carolina Academic Press, 1994) 74-75.

[28] Ibid., 75.

sin[ning] against [their will] is restrained in children, in fools, and in the witless who do not have the reason whereby they can choose the good from the evil."[29]

For most of the Fourteenth, Fifteenth, and Sixteenth Centuries, England employed the Good-Evil test or some variant.[30] However, in 1724 with the case of *Rex v. Arnold*, this test for criminal insanity changed somewhat.[31] At the trial of a defendant who had shot and wounded a British Lord, the judge instructed the jury to determine the legal status of the act in accordance with the following proposition: " ... a mad man ... must be a man that is totally deprived of this understanding and memory, and doth not know what he is doing, no more than a *brute, or a wild beast,* such a one is never the object of punishment."[32] This test became known as the "Wild Beast" test.[33] It seems to equate the actions of criminally insane persons with a wild animal that lacks the right intellectual abilities to distinguish their violent actions from moral or legal wrongdoing. In this sense, the Wild Beast moves away from the Biblical concepts that are employed in the Good-Evil test, and adopts a more naturalistic understanding of criminal insanity.

The third Pre-*M'Naghten* test that developed, which is the most obvious precursor to the famous *M'Naghten* trial, is known as the "Right-Wrong" test. Developing from the *Parker* and *Bellingham* cases of 1812,[34] the jury was instructed to determine whether the defendant "had sufficient understanding to distinguish good from evil, right from

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[29] Anthony Platt and 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 Calif. L. Rev 1996, 1227.

[30] Slovenko, 6-8; Perlin, 75.

[31] Rex v. Arnold, 16 How St. Tr. 695 (1724).

[32] Ibid.

[33] Slovenko, 8-9.

wrong."[35] This test, in turn, was expanded in the *Regina v. Oxford*[36] trial of 1840 to include other language which proves to be an additional influence on *M'Naghten.* In *Regina v. Oxford*, Lord Denman further elaborates this criminal insanity determination: The jury must determine whether the defendant "from the effect of a diseased mind...was quite unaware of the nature, character, and consequences of the act he was committing."[37]

B. M'Naghten

The 1843 trial of Daniel M'Naghten marks the beginning of what can reasonably be called the first modern test for criminal insanity, and is therefore considered a pivotal event in criminal insanity jurisprudence.[38] After some 31 years of using a version of the Right-Wrong test, the English courts decided to alter the content of the insanity defense to include a seemingly more specific set of criteria that allowed for a more accurate and thorough evaluation of the accused. The important details that give rise to the new determination of criminal insanity come from two sources. The first is from the nature of the case itself. The second is from the reactions of important members of the English society after the verdict was announced.[39]

Daniel M'Naghten was accused of murder after he shot a man whom he thought was responsible for trying to kill him. The victim in this case was Edward Drummund, who M'Naghten mistakenly thought was the Prime Minister of England, Robert Peel.

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[34] Platt & Diamond, 1237 cit. in G.D Collinson, "A Treatise on the Law Concerning Idiots, Lunatics, and Other Persons Non Compos Mentis," W. Reed 1812, 477, 636, 656-657.

[35] Stephen R. Lewinstein, "The Historical Development of Insanity as a Defense in Criminal Actions," Part 1, 14 J. Journal of Forensic Science 1969, 275,279, qtd. in G.D Collinson, 671. See fn. 34.

[36] Regina v. Oxford, 9 Carr. and P. 525 (1840).

[37] Ibid.

[38] Slovenko, 9.

M'Naghten was under the illusion that there was a widespread plot to kill him by the Tories, and thus perceived his action as "self defense."[40] It was then up to the courts to determine whether M'Naghten acted on a delusion of self-defense, and what criteria should be employed in order to make this determination.

Ultimately, nine psychiatrists testified that M'Naghten was criminally insane and should not be held responsible for his action.[41] M'Naghten was subsequently declared not guilty by reason of insanity (NGRI), which had a large social impact on England as a whole, and specifically on Queen Victoria.[42] After hearing of the NGRI verdict, and upon great outrage that the courts could have come to such a decision, Queen Victoria proceeded to demand that the legislature "lay down the rule" in order to protect the public.[43]

In response to such commands, the House of Lords asked the Supreme Court of Judicature to answer a series of questions.[44] The answer to two of these questions essentially became what is known as the *M'Naghten* Rule. The famous words of the test are as follows:

> The jurors ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defense on the ground of insanity, it must be clearly proved that at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease

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[39] Perlin, 78-84.

[40] M'Naghten's Case, 10 Clark and Fin. 200 (1843).

[41] Slovenko, 7.

[42] Hermann & Sor, "Convicting or Confining? Alternative Directions in the Insanity Law Reform: Guilty But Mentally Ill Versus New Rules for Release of Insanity Acquitees," B.Y.U. L. Rev. 1983, 449,508, 510 qtd. in Benson, The Letters Of Queen Victoria, 1837-1861 1907, 587.

[43] Ibid.

[44] Perlin, 80.

> of the mind, as to not 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.[45]

Though *M'Naghten* was considered a fairer test for insanity than previous tests, a number of criticisms were made of the rule.[46] These include, first, the *interpretational* issues associated with defining such key words as "wrong" or "know." For example, it has traditionally been acknowledged, that "wrong" could be understood in a *legal* or *moral* sense, and likewise, that "know" could refer to a mere *cognitive* understanding, as opposed to *emotional* understanding.[47] Similarly, there are difficulties of interpreting the meaning of the term "disease." One clear ambiguity that runs through the interpretation of "disease" in *M'Naghten* concerns the distinction between the concept of disease as understood to obtain *at the time of* the criminal act, versus disease as understood as having a certain amount of *duration* in the defendant's life.[48] In other words, are we to think of disease as something that is in some sense *chronic*, or rather as something that can be *sudden*? Similarly, questions arose as to the meaning of the terms "nature and quality,"[49] as in "know the nature and quality of the act." Does "nature and quality," refer to the *physical* nature of the act, or some other aspect of the act? For instance, did the defendant know that when he stabbed the victim with a knife, that the victim might lose blood and eventually die? Or if the defendant knew that, did he understand that the victim didn't really want to die? There is a significant difference between knowing the

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[45] M'Naghten's Case, 10 Clark and Fin. 200 (1843).

[46] Slovenko, 21-22; Goldstein, 45-56.

[47] Goldstein, 49-53.

[48] Ibid., 47-49.

[49] Ibid., 50-51.

nature and quality of an act from the perspective of physical causation, versus knowing the nature and quality of an act from a more first or third person moral point of view.[50]

A second set of difficulties are more *logical* in nature.[51] These difficulties concern the possibility that certain aspects of the test were conceptually mistaken, because they fail to embody the necessary and sufficient conditions for criminal insanity. It has been argued, for example, that whether or not such key phrases such as "wrong," "know," and "disease" are interpreted in a legal/moral, cognitive/noncognitive, or sudden/chronic sense, none of these concepts may be necessary or sufficient for determining criminal insanity.[52] Thus, in a similar manner that having blond hair is neither necessary nor sufficient for being a bachelor, so too "knowing that the act was wrong" may be irrelevant for determining criminal insanity. This is because the meaning of "criminal insanity" as it is used for the purposes of the criminal law, may have no necessary connection to the meanings that are given by the terms "wrong," "know," and/or "disease." Thus, although these concepts may often be associated with criminal insanity, this association may prove to be coincidental, or at any rate, inadequate for determining criminal insanity. Examples of this sort of argument will be given later, in discussion of the analyses of Fingarette and Reznek.[53]

C. Irresistible Impulse

In direct response to these interpretational and logical difficulties, there was a general feeling amongst those both in and outside the criminal law that *M'Naghten* was too

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[50] Ibid.

[51] Fingarette, 173-175,149, 156; Moore, 600-601; Reznek,152-161.

[52] Fingarette, pg. 149,156.

restrictive and did not allow for a proper evaluation of the accused.[54] As a result, the courts began to consider additional concepts that might be relevant and useful in the determination of criminal insanity.[55]

The first of these concepts, "Irresistible Impulse," marks the point in which the fourth of the principal issues of this paper, "volition," becomes historically relevant. The "Irresistible Impulse Rule" was first successfully used in the 1886 case of *Parsons v. State*,[56] and was subsequently made the federal rule in the United States in *Davis*.[57] In *Parsons*, the jury was instructed to determine whether or not the defendant exhibited a radical loss of control such that his free agency is destroyed:

> Did he know right from wrong, as applied to the particular act in question? ... If he did have knowledge, he may nevertheless not be legally responsible if the following conditions occur: (1) If, by reason of the duress of such mental disease, he had so far lost the *power to choose* between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed; (2) and if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it *solely*.[58]

While this particular framing of the Irresistible Impulse Rule was considered somewhat narrow,[59] later versions, particularly in the Model Penal Code, allowed for a broader interpretation than the one given in *Parsons*.[60] In the Model Penal Code, it was

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[53] Fingarette, pg. 149, 156; Reznek, pgs. 200-204, 222; See, for instance, sec. III, A, 28-38, B, 56-59 below.

[54] Slovenko, 20; Goldstein, 46-47.

[55] Slovenko, 22-31; Goldstein, 67.

[56] Parsons v. State, 81 Ala. 577,2 So. 854 (1886).

[57] Davis v. United States, 165 W.S. (1897).

[58] Parsons v. State, 81 Ala. 577, 2 So. 854 (1886).

[59] Robinson, 302.

required that the agent "(lack) substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law," as opposed to "losing the power to choose between right and wrong."[61] This particular way of stating the Irresistible Impulse Rule was considered less restrictive than was the one in *Parsons* due to the open language of "substantial capacity."[62] In this sense, the language of "substantial capacity" explicitly allowed for *partial* impairment of a defendant's volitional ability as opposed to *total* impairment, whereas with *Parsons*, the language of "losing the power to choose between right and wrong," did not imply that the defendant's volitional impairment could be partial.[63]

Like *M'Naghten*, the Irresistible Impulse Rule was subject to interpretational and logical problems that allowed for inconsistent applications of the test. Perhaps the most prominent example of a difficulty in interpretation concerns an ambiguity that was made prominent in the case of *Snider v. Smith.*[64] This difficulty is evident in the distinction between a *sudden* and *gradual* loss of control.[65] This was a major complaint about the Irresistible Impulse Rule, and reveals why it was misleading to use the label of "Irresistible Impulse" to designate the phenomenon in question.[66] Irresistible Impulse was thought to imply a sudden loss of control, a "fit of rage," or something similar. However, in light of what was thought to be an overly restrictive understanding of

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[60] Ibid.

[61] ALI, Model Penal Code, Proposed Official Draft, Sec. 4.01.

[62] Robinson, 302.

[63] Ibid.

[64] Snider v. Smith, 187 F. Supp. 299, 302 (E.D. Va. 1960).

[65] Robinson, 302-303.

volition by legal scholars, some urged a version of the Irresistible Impulse Rule that allowed for a gradual loss of control.[67] One scholar even suggested that it would be more appropriate to put the Irresistible Impulse Rule under the heading of "Control Tests," due to the fact that the loss of control concept seems more neutral than does "Irresistible Impulse" with respect to the sudden/gradual distinction.[68]

A second problem interpreting this rule, concerned the distinction between *impaired resistance* and *overpowering urge*.[69] Although losing control is often thought of in the sense of overpowering urges, frequently defendants simply did not have the ability to resist what would be, under normal circumstances, quite easy for persons to resist. Thus, how "loss of control" is interpreted in the sense of impaired resistance and/or an overpowering urge, can have a great effect on the determination of insanity. Particularly this is the case when looking at which kind of medical condition might be responsible for the loss of control. As Paul Robinson has argued: "An obsessive compulsive disorder, resulting in uncontrollable 'recurrent, persistent ideas, thoughts, images, or impulses,' is an example of a disorder that produces an urge. But few others are so clearly capable of producing 'urges'."[70]

Another kind of criticism, concerns the *empirical* difficulty of determining when someone loses control.[71] This is evident when a court tries to determine what would

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[66] Ibid.

[67] Goldstein, 70-78; Robinson, 302-303.

[68] Goldstein, 70-78.

[69] Robinson, 302-303; Slovenko, 25.

[70] Robinson, 303.

[71] Slovenko, 25; Goldstein, 77; Reznek, 161.

distinguish the woman who lost control and stabbed her husband, from the woman who stabbed her husband out of anger? The sorts of observations that are required in making this distinction are difficult to specify, and it is a legitimate criticism of a conception of the insanity defense, that, if it can't give a clear and specific empirical account of one of its main concepts, then the conception will be useless to a jury.[72]

D. Durham

The third historically significant development of modern day, criminal insanity jurisprudence which can be seen as an attempt to provide a better alternative to *M'Naghten*, stems from the famous 1954 case of *Durham v. United States.*[73] In this case, Monte Durham, a person with a substantial history of psychological illness and criminal activity, came before U.S. Court of Appeals for the District of Columbia, after having been found guilty of housebreaking in a District Court. In the appeal, it was urged by the *Durham* defense that the *M'Naghten* and Irresistible Impulse Rules were inadequate for determining criminal responsibility. Judge David Bazelon, writing for the District of Columbia Court of Appeals, agreed. As a result, the test for criminal insanity in the D.C. Circuit was altered so that it read, "a person is criminally insane if they suffer from mental disease or defect."[74] With this new test for criminal insanity, a jury, on remand to the District Court, found Monte Durham NGBI.

The *Durham* Rule was certainly not without precursors, the most obvious of which was the disease component of *M'Naghten,* which said that the "the party must be laboring

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[72] See, for instance, Reznek, 75-90.

[73] Durham v. US, 94 US App DC 228, 214 F2d 862, 45 ALR 2d 1430 (1954).

[74] Ibid.

under a defect of reason from disease of the mind."[75] A second precursor to *Durham* comes from the 1953 report of British Royal Commission on Capitol Punishment.[76] The report, which considered the status of both *M'Naghten* and the Irresistible Impulse Rule and was heavily influenced by a large number of medical and legal scholars, asserts that the scholars were "in virtual agreement ... that the mind functions as an integrated whole and that it is impossible to isolate the separate functions of cognition and control."[77] Similarly, Bazelon said, in *Durham*, the following about validity of *M'Naghten* and the Irresistible Impulse Rule:

> We find that as an exclusive criterion the right-wrong test is inadequate in that (a) it does not take sufficient account of psychic realities and scientific knowledge, and (b) it is based upon one symptom and so cannot validly be applied in all circumstances. We find that the "irresistible impulse" test is also inadequate in that it gives no recognition to mental illness characterized by brooding and reflection and so relegates acts caused by such illness to the application of the inadequate right-wrong test. We conclude that a broader test should be adopted.[78]

An additional problem with *Durham*,[79] concerned its failure to give empirical content to the key theoretical tools employed, viz., "mental disease" and "defect." The only clear meaning that was given to these terms concerned the difference between disease and defect, where it was said that diseases have the capability of getting better, whereas

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[75] M'Naghten's Case, 10 Clark and Fin. 200 (1843).

[76] Goldstein, 80,82.

[77] Quoted in Goldstein, 80, as interpreted from Report of Royal Commission on Capitol Punishment.

[78] Durham v. US, 94 US App DC 228, 214 F2d 862, 45 ALR 2d 1430 (1954).

[79] Recall that these problems stemming from *M'Naghten* concerned, on the one hand, an interpretation of mental disease that required that it be a *chronic* condition in the actor's life, versus an interpretation which allowed for mental disease to obtain *suddenly* in his or her life. On the other hand, mental disease was criticized on the logical basis that it simply is not a part of the legal meaning of criminal insanity. Thus, whether an actor does or does not have a mental disease may be irrelevant to the determination of criminal insanity.

defects are permanent.[80] This, however, was considered far from sufficient empirical content to inform juries.[81]

The most significant attempt to try to remedy these problems came in *MacDonald v. United States,*[82] where the court focused on "impairment of mental or emotional processes and behavioral controls," instead of those processes being the product of a mental disease and defect.[83] By almost all accounts, however, the *MacDonald* attempt was unsuccessful due, either to the vagueness of the terms of "mental impairment" and "control,"[84] or to the practical difficulties associated with implementing the *MacDonald* conception in the courtroom.[85]

There are other important criticisms of the *Durham* notion of mental disease that are particularly relevant to the role it should occupy in contemporary insanity jurisprudence. The first concerns the general claim that mental disease is a *social* concept and not a *medical* one, which has the result that testifying psychologists use a different language and different concepts than required by the law.[86] In other words, when psychologists are asked to testify on behalf of the defendant as to whether or not he or she has a mental disease, the psychologist may be using a notion of mental disease that derives from the discipline of psychology, and not from the law.

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[80] David Bazelon, Questioning Authority (New York: Alfred A. Knoff Inc., 1966) 46-48.

[81] Fingarette, 128.

[82] McDonald v. United States, 312 F2d 847 (1962).

[83] Bazelon, 50, 63.

[84] Fingarette, 34.

[85] Bazelon, 49. Judge Bazelon argued that the two central difficulties with *Durham* concern, first, the fact that "psychologists did not live up to their promise to share all the information they knew," and second, that the participants in the court incorrectly tended to view the terms "mental disease" and "defect" in a technical scientific sense.

Durham was also criticized for making psychologists ethical experts.[87] To the extent that the law under *Durham* requires psychologists to make judgments about moral responsibility based on the simple formula of *Durham*, it was argued that the law was choosing a class of persons to make a decision concerning something in which they have no special expertise.[88] This is because psychologists are no better than anyone else at making judgments about moral responsibility, or so the criticism runs.[89] In this sense, the court's decision to make psychologists the ethical experts would be arbitrary.

Finally, some argued that mental disease is neither necessary nor sufficient for the negation of moral responsibility.[90] Examples that seem to provide some evidence of this, are depression and anxiety. In depression and anxiety, it is often the case that individuals do not commit crimes, and are not in any way compelled to do anything of the kind. This suggests that if and when these conditions do yield an excuse, there must be something *about* these conditions in each case that serves this function, not the mere presence of the conditions themselves.[91]

E. American Law Institute

The case of *Brawner v. United States*[92] marked the end of *Durham* and the point at which the American Law Institute (ALI) test became dominant in American Law.[93] The

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[86] Bazelon, 49; Fingarette, 31-34, 173-174.

[87] Ibid.

[88] Ibid.

[89] Ibid.

[90] Reznek, 200-204; Moore, 600-601.

[91] Robinson, 289-290.

[92] Brawner v. U.S. 471 F. 2d 969 (D.C. Cir. 1972).

ALI test for criminal insanity, which is the most prominent test used today, says the following:

> (1). A person is not responsible for criminal conduct if at the time of such conduct as a result of disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.
>
> (2). As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.[94]

The most prominent feature of the ALI test was its inclusiveness, meaning that it, in some sense, adopted many of the ideas of the previous *M'Naghten* and Post-*M'Naghten* tests. Thus, it is easy to see why ALI is commonly interpreted as a fusion of *M'Naghten* and the Irresistible Impulse Rule.[95] However, there are two important qualifications to this fusion. Whereas the Irresistible Impulse Rule refers to "lacking the power to choose between the right and wrong," ALI changes the wording to include "lacking a *substantial* capacity ... ." Thus, contrary to the Irresistible Impulse Test, ALI is interpreted as acknowledging that a lack of control can be *chronic* in the defendant's life, as well as that the substantial capacity can be partial, opposed to a *total*.[96]

The second difference is a change from "know" to "appreciate." In the *M'Naghten* test, the requirement was that the defendant not "know the nature and quality of the act or

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[93] Bazelon, 50.

[94] ALI, *Model Penal Code*, Proposed official Draft, Sec. 4.01 (1962).

[95] Goldstein, 87. This fusion is one which employs both a mental disease concept, and a functional test for "wrongness" (or criminality), both of which have their origins in *M'Naghten*. Similarly, ALI employs the "capacity" language, which is a concept used to determine the defendant's ability to control his or her actions with respect to the criminal act in question.

[96] Slovenko, 24.

that it was wrong."[97] The ALI test, however, required something other than that the defendant have a merely cognitive awareness of the criminality of his action. Here, the idea of emotional appreciation, as opposed to merely propositional understanding, was relevant, which can be seen as an attempt to capture our intuitive understanding of the paradigm cases of criminal insanity.[98] In other words, in order to subsume those cases in which it is obvious that a defendant is criminally insane under a criminal insanity test, the courts needed to employ a noncognitive concept, such as "appreciate."

Given the narrowness and/or ambiguity of the *M'Naghten*, Irresistible Impulse, and *Durham* tests, it is easy to appreciate that the move toward the ALI Test was viewed as a positive step. This is due to the fact that the ALI test either contains concepts that one of previous tests may omit (a volitional prong), or that it embodies a better understanding of the mental states that are required for a defendant to be culpable, viz., an appreciation of the criminality of the act. However, while these changes certainly seem to be improvements upon past tests, there were still problems that critics have raised.

In addition to all of the aforementioned problems that beset both *M'Naghten* and *Durham* which concern the interpretation of the term "mental disease," ALI was also subject to the problem that the phrase "substantial incapacity" is ambiguous, because it fails to address the causal connection that the incapacity has with the exculpating condition.[99] In other words, it was possible that the specific incapacity of the defendants may or may not be linked to the criminal act. ALI needs the further premise that the substantial incapacity is causally responsible for the criminal behavior. Or as one legal

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[97] Goldstein, 87.

[98] Fingarette, 146-148; Goldstein, 49-50.

scholar points out, "[the capacity to appreciate the criminality] ... only requires that the mental disease cause a particular mental condition, not that it cause a particular excusing condition in relation to the conduct constituting the offense."[100]

Another problem with ALI concerns the use of the term "criminality." Here, it appears that lacking a substantial capacity to appreciate the *criminality* of one's actions was overly restrictive. In a similar way that wrongfulness (understood as legally wrong) was criticized for being too restrictive in the *M'Naghten* Rule, the same criticism held for ALI.[101] In this narrow sense, it is only required that the defendant appreciate the criminality of his or her conduct, and not necessarily the *morality* of the conduct, which is a condition that even in the "paradigm cases" the defendant will usually satisfy.[102] For instance, regarding M'Naghten, it is quite clear that he knew that his actions were wrong in the sense that his attempting to kill the Prime Minister of England was against the law. However, he clearly did not believe that this was morally wrong. Rather, M'Naghten believed was that his action was that of self-defense.

Finally, there was the distinct interpretational difficulty that was associated with the meaning of the term "appreciate." "Appreciate" can be interpreted in two ways, in terms of *likelihood* and in terms of *degree*.[103] With regard to the former, it could be the case that the defendant "isn't sure" that the actions were wrong, and that there was only a *risk* that a harm may result. Thus, on this way of framing the rule, to appreciate the wrongfulness of one's actions was to acknowledge that it could be wrong. For the latter,

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[99] Robinson, 299.

[100] Ibid.

[101] Ibid., 295-296.

[102] Ibid.

it could be the case that while the action was wrong, the agent did not appreciate the gravity of his actions, or that while he appreciated that the action was wrong, he didn't know it "*as* wrong."[104]

The next section will explain the perspectives of two scholars, Herbert Fingarette and Lawrie Reznek, concerning the controversial role that the "legal/moral," "cognitive/noncognitive," "mental disease," and "volitional" elements should play in criminal insanity jurisprudence, as well as the issue of whether or not the concept of "rationality" should be included in insanity tests. This discussion will be carried out from the specific five-part framework proposed in this paper.[105] In other words, the works of these two philosophers will be explained in terms of the unique responses that they have to the various interpretational, empirical, and logical issues that have been associated with the use of these concepts in criminal insanity jurisprudence.

III. Two Approaches to the Central Issues of Criminal Insanity

A. Herbert Fingarette

1. Preliminary summary. Herbert Fingarette proposes revisions to all of the past and current insanity tests. Fingarette holds that *M'Naghten*, Irresistible Impulse, *Durham*, and ALI, should be amended in some form or another. There are a number of things that Fingarette finds objectionable in current criminal insanity doctrine(s) which are similar to the difficulties discussed in Sections I and II above. Summarized briefly, Fingarette holds, first, that the language of "understands" and "knows" that is contained

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[103] Ibid., 297.

[104] Ibid.

[105] See sec. I and II, 1-25 above.

in the *M'Naghten* Rule, is problematic.[106] This is partly because *M'Naghten* mistakenly leaves open the possibility for an exclusively cognitive interpretation of the defendant's mental states, and partly because these concepts are misplaced in the first place.[107] In this latter sense, Fingarette argues that the concepts of "understands" and "knows" are neither necessary nor sufficient for the meaning of criminal insanity as it is used in a court of law.[108] Instead, his account is both cognitivist and noncognitivist in nature and employs a different approach and different set of concepts than *M'Naghten* in order to correct what he believes is its overly narrow rule.[109]

A second aspect of the traditional insanity tests that Fingarette finds objectionable and to which he gives an alternative, concerns the inclusion of a mental disease prong (contained in the tests of *M'Naghten*, ALI, and *Durham*).[110] Fingarette believes that the mental disease prong (especially in *Durham*) needs revision, because a test which employs this concept runs the risk of incorrectly putting the psychologist in the role of ethical expert.[111] He also argues that the *M'Naghten* and *Durham* tests are problematic on account of the difficult nature of the concept of mental disease, understood in a

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[106] Fingarette, 148-149.

[107] Ibid., 146-148.

[108] Ibid., 177, 211.

[109] Herbert Fingarette and Ann Fingarette Hasse, Mental Disabilities and Criminal Responsibility (Berkeley: University of California Press, 1979) 237; Fingarette, 146-150, 27.

[110] Fingarette., 127-128, 173-174.

[111] Ibid., 31, 45-52, 173-174, 247.

medical sense.[112] Fingarette addresses these issues by arguing that, for the purposes of the insanity defense, mental disease is a social, not a medical, concept.[113]

Third, Fingarette's account also focuses on certain problematic conceptual or logical features of *M'Naghten*, ALI, Irresistible Impulse, and *Durham*.[114] He argues that a volitional prong should not be included in insanity tests due, primarily, to the fact that a volitional prong "does not bring out what is central in our concept of insanity."[115] Instead, he believes that the notion of "irrationality" successfully captures the necessary and sufficient conditions of criminal insanity. Fingarette similarly argues that this is the case with *M'Naghten* and ALI's employment of the moral concept of "wrongness."[116] "Wrongness" is considered by Fingarette to be irrelevant to the determination of criminal insanity in the courtroom. Instead, according to Fingarette, "wrongness," "volition," "mental disease," in the past and present insanity tests should be replaced by Fingarette's distinctive notion of "irrationality" insofar as it relates to the criminality of the defendant's conduct.[117]

2. Detailed Discussion. Fingarette argues for a general definition of criminal insanity that has three conceptual elements: "(a) irrational conduct, (b) from grave defect in the person's capacity for rational conduct, and (c) which is at least for the time an inherent part of the person's mental makeup."[118] The specific version of criminal insanity that he

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[112] Ibid., 22-25, 37. See generally, 19-52.

[113] Ibid., 37-52.

[114] Ibid., 123-125, 152, 156-159.

[115] Ibid., 71.

[116] Ibid., 154-156.

[117] Ibid., 211.

argues for is: "The individual's mental makeup at the time of the offending act was such that, with respect to the criminality of his conduct, he substantially lacked capacity to act rationally (to respond relevantly to relevance so far as criminality is concerned)."[119]

Fingarette explains and illustrates the central notion of "responding relevantly to relevance" by a series of thought experiments.[120] Jones, who is walking in a park one day, decides to throw a rock into some bushes. Jones does this in a manner that is unaware, i.e., he isn't really thinking about throwing the rock. Fingarette asks us what our intuitions tell us about the rationality of Jones? He tells us that there is a sense that Jones is acting non-rationally, but not irrationality.[121] Fingarette then poses the question: What is it that we are denying by saying that Jones' conduct is not irrational?[122] Ultimately, we are denying that "there is something crazy, bizarre, odd, or insane" about Jones. The issue, then, for Fingarette becomes trying to find the correct ascription of irrationality which is "distinctive in insanity."[123]

In order to find this ascription, Fingarette then asks us to consider a variation on this thought experiment.[124] Everything is the same as the first example, except that when Jones is about to throw the rock into the bushes, he sees a person, Smith, moving about. Then, because he notices Smith in the bushes, Jones chooses to throw the rock in another direction. What has happened? Basically, Jones has altered his actions based on a

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[118] Fingarette, 203.

[119] Ibid., 211.

[120] Ibid., 185-191.

[121] Ibid., 185.

[122] Ibid., 186.

[123] Ibid., 185.

relevant piece of data that entered the picture, viz., Smith's presence. And moreover, this relevant piece of data confers on Jones a basic moral responsibility, something to the effect of, "don't harm someone unnecessarily." In this case, Jones behaves rationally, because he responds in the right way to "essential relevance."[125] This begins to capture the sense of rationality that is pertinent to criminal responsibility and criminal insanity, according to Fingarette.

Fingarette next considers another variation:[126] Jones, in the situation with Smith in the bushes, decides to throw the rock anyway, quite aware of the consequences, but not caring. Perhaps Jones is in a bad mood. In this case, Fingarette tells us that it would be natural to describe Jones' behavior as rational and malicious.[127]

Finally, Fingarette asks us to conceive of another variation in order to help us understand the notion of irrationality that is relevant to criminal insanity.[128] Suppose that Jones believes "that he is being pursued and persecuted, and is the object of systematic attempts at assassination. He sees Smith appear in the bushes. He instantly and violently throws the rock at him." What do we conclude about Jones with respect to the rationality of his actions? First, we believe that the action is clearly irrational in the sense that he fails to respond in the right way to a something that, according to our norms, he should respond to. Second, as Fingarette argues, "the fanatic character of his belief [that he is being pursued and persecuted, and is the object of systematic attempts at assassination] in the face of everything, leads us to conclude that, in this connection, he is incapable of

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[124] Ibid.

[125] Ibid., 186-187.

[126] Ibid., 187.

[127] Ibid.

rationality, not merely a dedicated or stubborn man who is in error." This describes a situation in which the person cannot respond relevantly to essential relevance,[129] or, as Fingarette states it elsewhere, this is a situation in which the action simply is not intelligible in terms of the relevant norms of our society.[130]

Fingarette's account focuses on what Lawrie Reznek calls "*substantive rationality*."[131] According to Reznek, substantive rationality is to be distinguished from formal rationality, in that substantive rationality is understood relative to some value or belief that the agent *ought* to have, whereas formal rationality is understood relative to some value or belief that he actually has.[132] Thus, "someone is substantively rational if he not only chooses the best means to his ends, but also if his ends or desires themselves are rational."[133] The reason that Fingarette's analysis is substantive, according to Reznek, is that, in his hypothetical cases, it is the normative judgment about what Jones ought to believe or value regarding Smith's presence in the bushes, that leads to the judgment that Jones' behavior was rational or irrational. The following passage from Fingarette expresses what Reznek is talking about:

> Let it be reemphasized at once: to be able to act rationally with respect to the criminality of one's conduct is not the same as to obey the law or even to respect it. It is simply to be able to rationally take into account the implications of the act relevant to criminality ... If all rational persons always obeyed the law, it would be pointless to have courts and punishments. On the other hand if no person had the capacity for rationality, it would be pointless to appeal to law. The criminal may

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[128] Ibid., 190.

[129] Ibid., 190-191.

[130] Ibid., 192.

[131] Reznek, 177.

[132] Ibid.

[133] Ibid.

> be stupid, immoral, greedy, ruthless, imprudent, or impulsive ... But none of this implies that he has lost his reason in these matters, indeed quite the contrary. For if we do judge that he has lost his reason, we no longer think it appropriate to characterize him as being imprudent, unwise, or immoral. The opposites of "rational" in this context are "irrational," "senseless," unintelligible.[134]

In this passage, we can see the sorts of normative judgments that Fingarette employs in order to determine what should constitute "responding relevantly to essential relevance." These normative judgments are embodied in the adjectives "irrational," "senseless," or "unintelligible," and entail the sorts of judgements that are needed, according to Reznek, to determine how actors *ought* to respond to their circumstances, if they are to be considered "sane."[135] In the case of Jones, what justifies the judgment that Jones was insane, in Fingarette's view, is that Jones could not respond to his ideas about being persecuted in ways that would have prevented him from throwing the rock at Smith. How do we *know*, according to Fingarette, that Jones could not respond to his ideas about being persecuted in ways that would have prevented him from throwing the rock at Smith? Because Jones' behavior appears "crazy," "bizarre," "odd," or "insane."[136]

Fingarette's proposed conception of criminal insanity is different from any of the traditional tests described in Section II. Fingarette believes, for example, that instead of "knowing," "appreciating," or "understanding the nature and quality of the act or that it was wrong," the central concept that should be used is that of "responding relevantly to essential relevance." Thus, for example, whereas *M'Naghten* will lead a jury to determine insanity on the basis of the defendant's knowledge (or lack thereof) of the

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[134] Ibid., 211.

[135] Fingarette., 177, 185, 211; Fingarette and Hasse, 237.

nature and quality of the act or that it was wrong, Fingarette's test will lead a jury to focus on the defendant's capacity to respond in ways that are considered appropriate (i.e., respond relevantly) to those aspects in the defendant's life that criminally insane persons should respond to (i.e., essential relevance).[137] Perhaps these relevant responses to those aspects of the defendant's life that criminally insane persons should respond to, involve such things, as the defendant's emotional reactions to his mother, his beliefs about his church, or attitude towards society in general. In a paranoid schizophrenic's case like that of Jones, it appears that Fingarette's determination, specifically, is that Jones lacked a substantial capacity to respond with the proper beliefs and emotional outlook to his fear that he was being persecuted.[138]

Ultimately, then, the verdicts that derive from Fingarette's test can be quite different than the verdicts that derive from the traditional tests described in Section II. Whereas with *M'Naghten*, a defendant is sane, if the defendant knows the nature and quality of the act or that it was wrong, under Fingarette's test, the defendant may *still* be insane. This is because, although a defendant may know, for instance, that killing the victim would end his or her life and would likewise be against the law, the defendant may not be able to respond in the appropriate way to certain *other* aspects of his or her life that a jury considers relevant to the criminality of the defendant's conduct. Thus, as was said above, Jones may not have been able to respond with the proper beliefs and emotions to his fear that he was being persecuted, even though he may know that his act would hurt Smith,

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[136] Fingarette, 185. For a more in depth discussion of Reznek's perspective of Fingarette's view, and for an explanation as to precisely why Fingarette's insanity tests requires these normative judgements concerning what is "bizarre" or unintelligible, see sec. III, B, ii, 42-53 below.

[137] See the discussion below, sec. III, B, ii, 44-47; Fingarette, 185-191.

[138] Fingarette, 185-191.

and would be illegal. Fingarette's test and *M'Naghten*, then, are, according to Fingarette, logically independent of one another.[139]

As was alluded to, Fingarette reads "the ability to respond relevantly to essential relevance" both cognitively and noncogntively.[140] In this sense, the defendant must have both a propositional understanding of those aspects in his or her life that are relevant to criminality, as well as an understanding that comes from the emotions, desires, moods, etc. Consider, for example, what Fingarette says of individuals with "psychopathic personalities:"

> Individuals with psychopathic personalities may manifest a bizarre insensitivity or a purposefully cultivated but now deep-rooted callousness that enables them to commit crimes of peculiarly inhuman or cruel kinds. Could it be said, then, that on the whole each lacks capacity for rational conduct in regard to the criminal significance of the act because of a gross incapacity for emotional responsiveness? ... If the facts do show chronic generalized failure to develop human relationships-i.e., a generalized incapacity to respond with feelings to the sufferings, agonies or death of human beings—then we do indeed have grounds to view the individual as criminally irrational.[141]

Thus, we can see that the approach that Fingarette proposes to explain the way in which his test should be understood, will include noncognitive capacities. These capacities may involve the ability to *feel* the "suffering or agonies of human beings," or the extent to which a person may be "*calloused*." Accordingly, these noncognitive capacities may be deeply relevant, in fact essential, for Fingarette, for properly evaluating the mental status of the psychopathic defendant.

Finally, Fingarette's account is distinctive in at least the following two additional senses. First, it makes no mention of volition, as do the Irresistible Impulse Test and

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[139] Ibid., 138, 149-150, 176-177.

[140] Fingarette and Hasse, 237; Fingarette, 27, 146-150.

ALI, and indeed Fingarette does not believe that a volitional prong has any use in the courtroom.[142] This is because, as we shall see,[143] a volitional prong does not cohere with Fingarette's overall methodology for determining insanity, a methodology which relies heavily on common sense intuition and everyday language.[144] Second, the particular feature(s) of the defendant's behavior that is under consideration relates to the *criminality* of his or her actions, not the morality,[145] which likewise, is a feature that Fingarette argues is required by common sense moral intuition and everyday language. In this sense, as well as with the noncognitivist reading of the rule,[146] Fingarette's analysis employs an element that is contained in ALI. In ALI, the use of criminality is explicit, while the language of "substantially appreciates" is thought to connote noncognitive concepts.[147]

With the exception of the "mental disease" prong of the insanity tests, which will be discussed in the last part of this section, these are the basic features of Fingarette's position. But, while it should be clear what Fingarette's approach is, it has yet to be determined *why*. Why does Fingarette believe that criminal insanity *means* something

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[141] Fingarette and Hasse, 237.

[142] Fingarette, 69-84, 158-159, 166-168.

[143] See 35-37 below.

[144] Fingarette, 138, 140-141, 149-150, 155-156, 165-166, 170, 174-179.

[145] Ibid., 211.

[146] See sec. III, A, ii, 31-35 below.

[147] Obviously, Fingarette's test for criminal insanity is different than ALI. I am simply making the point that there are two senses in which Fingarette's account is similar. These are, that both tests make use of the idea that it is the defendant's understanding of the criminality of his or her actions that is relevant, and similarly, that this understanding is construed in both a cognitive and noncognitive sense.

other than what *M'Naghten* or ALI says, and why does Fingarette conclude that criminal irrationality understood as he proposes is the best characterization of criminal insanity?

Fingarette answers these two difficult questions with at least two types of arguments. The first is an *argument from common sense intuition* that often makes use of the "paradigm cases of criminal insanity."[148] The second type of argument, is a variation on an *argument from everyday language*.[149] Fingarette attempts to show in this second argument, that the everyday language contained in the current insanity tests, e.g. "loss of control" and "knowing that an the act was wrong," are really idioms that express the kind of criminal irrationality to which Fingarette is referring.[150] Fingarette says, in effect, that the meaning of the key terms contained in the tests of *M'Naghten*, ALI, and the Irresistible Impulse, is "nothing but" the meaning embodied in the phrase "responding relevantly to essential relevance," or one of its cognates.[151]

Fingarette argues that the case involving "Fish," one of the most prolific serial murderers that the world has ever known, is a paradigm case of insanity. Moreover, he argues that the traditional tests for criminal insanity do not insure that the correct verdict of NGBI is rendered:

> Fish, the complacently habitual child killer and child eater, was found sane under a traditional insanity test, but he was in fact the paradigm of insanity. His emotional reactions and desires were in some respects so distorted that he had not the capacity

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[148] See, for example, 174-175 where Fingarette says that an analysis of insanity "should coincide with our intuitive understanding of the term," and that "the paradigm cases of criminal insanity are discriminated readily" is a necessary feature of Fingarette's "model." Prominent examples of these so-called paradigm cases can be found on 138, 140-141, 149-150, 155-156, 175-179.

[149] See, for example, 174 where Fingarette says that a mark of his intuitive account of criminal insanity is that it will reflect "that common language characterizing insanity should be incorporated into or be clearly congruent with the account proposed." Examples of this kind of argument can be found on 165-166, 170, 175-179.

[150] Ibid., 175-179.

[151] Ibid.

> to act rationally insofar as these came into play. However, his intellectual and perceptual capacities were not ever substantially impaired, nor was he, apparently, dominated by depressed or manic moods. When he ate children or stuck sharp objects into his body, he knew what he was doing was contrary to law and public morality ...Under M'Naghten, Davis, or the Model Penal Code formula, Fish was sane ...Yet we do not strain language at all, indeed it is exactly apt, to say that his conduct was grossly irrational. And it is this notion that is the ground of our intuitive, but very clear, perception that he is insane.[152]

Here, Fingarette argues that an observation of the distorted and/or bizarre nature of Fish's actions, his sticking sharp objects in his body and his cannibalism of children, reveals that Fish is criminally irrational. Moreover, this criminal irrationality is not captured by traditional tests. Essentially, Fingarette argues that one can reasonably assert that Fish "knew that his actions were wrong," that he "had the capacity to appreciate the criminality of his actions," and similarly, that he may not have had a "mental disease" from a medical standpoint. However, according to Fingarette, Fish should be found NGBI because he was acting in a "grossly irrational" manner.

Another argument where our intuitions are alleged to contradict a so-called paradigm case of insanity comes from the famous case of *Hadfield v. United States.*[153] Hadfield was a soldier who acted under the delusion that he was "destined to save mankind if he became a martyr" when he attempted to kill King George III. In this case, Hadfield knew that what he did was specifically and explicitly contrary to the law. Thus, Hadfield did know that the action was wrong in a legal sense, and thus he was able to "appreciate the criminality of his conduct." However, Hadfield was found not guilty, because he

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[152] Ibid., 177.

[153] Hadfield's Case, 27 Howell 1281 (1800).

suffered from severe delusions that God was commanding him to be a martyr. He was, in his own mind, "trying to save mankind."[154]

Fingarette argues that the *Hadfield* case demonstrates that, on a reasonable interpretation of *M'Naghten* and ALI, these tests run the risk of directing the jury to reach the wrong verdict. In other words, a jury may be led to incorrectly determine that Hadfield was sane and guilty, due to the fact that he either "understood the wrongness of his actions," or that he "appreciated the criminality of his conduct."[155]

Yet another example that Fingarette uses to demonstrate his case, concerns a defendant who is eerily reminiscent of Andrea Yates. This case involves a mother suffering from post-partum psychosis, and who upon having her first child, had severe symptoms of hallucination, delusion, and psychotic behavior.[156] As it turns out, with regard to this first child, the mother suffered from destructive infanticidal thoughts, but she never acted on them, "and after weeks she had recovered, after experiencing a delusional ecstasy of rebirth herself."[157] However, four years later, eight weeks after the birth of her second child, the woman strangled that new baby.[158] What's interesting, is that in between the two episodes, she led a normal life and carried on quite well, but during the second episode, post-partum psychosis quickly took effect, and she killed the child. Fingarette, argues that in many respects this woman was rational, and on a reasonable interpretation, the woman purposefully, voluntarily, and knowingly strangled

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[154] Ibid.

[155] Fingarette, 138, 149-150, 176-177.

[156] Ibid., 140-141.

[157] Ibid., 140.

[158] Ibid.

the child.[159] But again, Fingarette argues that by following *M'Naghten* or ALI, the woman may be incorrectly found criminally sane, due to the fact that she "knew that what she was doing was wrong," or similarly, that she "appreciated the criminality of her actions."[160]

These examples are designed to demonstrate that neither *M'Naghten* nor ALI embodies our common sense intuition about criminal insanity.[161] These examples also are designed to show that the addition of a noncognitivist reading of the criminal insanity test is to be preferred to a purely cognitivist one, or, in other words, that an evaluation of the emotions, desires, wants, likes, and dislikes of the defendant is necessary for a proper determination of insanity.[162] Thus, while it may be reasonable to suppose that Hadfield, Fish, and the psychotic mother were able to respond relevantly to essential relevance in a simple propositional sense, it is not the case that these actors had the requisite emotional ability to respond relevantly to essential relevance. This, according to Fingarette, is at least partly what renders it clear that the actors cannot be sane.[163]

Fingarette's second type of argument, an argument from everyday language, claims that, contrary to how they might appear, the common sense idioms that we use to describe a case like *Hadfield* or the psychotic mother, really mean something about the irrationality of the actor. Here, in a long but informative passage, Fingarette expresses this view quite clearly:

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[159] Ibid., 176.

[160] Ibid., 139-141.

[161] Ibid., 137.

[162] Ibid., 139-141, 148.

[163] Fingarette, 177; Fingarette and Hasse, 237.

> We say of a person who is insane that he is irrational. When he manifests his insanity in his conduct, it is natural to speak of his conduct as irrational ... Hadfield was a man who wished to be put to death, as a scandal to his society, in order to play his God-Ordained role as the new Christ ...The psychotic mother, agonizingly depressed, feeling that the world was filled with suffering and sin, tortured by the conviction that her child faced a life of nothing but suffering and sin, skillfully arranged matters so that she could undisturbingly put her infant to a relatively quick and painless death ... Her act was irrational ... Her conduct, however, was self-initiated, voluntary, skillfully carried out toward the clearly conceived end she had in mind ...One could say, idiomatically, that the mother was in the grip of an irrational mood and that she could not help what she was doing. One could say of Hadfield that he did not really understand his act ...Then we might elaborate and go on to say that the mother could not help what she was doing because she was irrational, and that Hadfield did not really know what he was doing because he was irrational ... However, [the phrase] 'she could not control herself' is an idiom stressing that the irrationality shows itself most dramatically in the motive ... [and the phrase] 'he doesn't truly understand his action' is an idiom stressing that irrationality is most apparent in connection with his beliefs and attitudes.[164]

As these examples express, the most clear and obvious case where Fingarette focuses on the everyday language arguments, is the so-called "loss of control idioms."[165] Namely, Fingarette argues that when the meaning of "loss of control" is analyzed properly, we will find that it does not mean things like "being overwhelmed by emotion" or "losing one's free agency," but rather, typically means something else: "Thus, when we say idiomatically ... 'he couldn't control himself,' what we are getting at is that, although he literally could and did control what he was doing, he was doing something that was to a significant extent inconsistent with most of his other usual inclinations ... ."[166] Elsewhere Fingarette says:

> One source of error connected with the metaphors or analogies involved in these idioms lies in analogizing desire, mood, or emotion to "forces,"... forces that can

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[164] Ibid., pg. 175-177.

[165] Ibid., 158-172.

[166] Ibid., 166.

> be quantitatively too great for the "governing power of the will' to curb, and which therefor destroy the will or drive the person against his will.[167]

Thus Fingarette's fundamental position is that, according to the way we use everyday language, the common sense idioms such as "he couldn't control himself," usually do not mean something about the volition of the actor. Instead, they are claims about a persons normal actions, habits, or as Fingarette says, " ... something [that reveals that] to a significant extent [the persons actions] are inconsistent with most of his other usual inclinations." Thus, this alleged feature of the loss of control idioms, supports Fingarette's model for criminal insanity, because it conforms to the everyday ascriptions of people.[168]

The final element of Fingarette's analysis of criminal insanity concerns the role of mental disease. While mental disease is not mentioned in Fingarette's test for insanity, it is worth noting the special meaning that he gives to it in order to understand *why* it isn't mentioned and thus to properly understand his account.[169] For Fingarette, "mental disease" is a *social* concept, and not a *medical* one.[170] Specifically, "mental disease" is described as a "cross-dimensional concept."[171] By this, he means that it is a concept that must be understood by reference to various norms of society.[172] Just as the notion of "adequate vision" depends on the situation in which one is using the term (e.g., for

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[167] Ibid.

[168] See fn. 144 above.

[169] See generally, 19-52.

[170] Ibid., 23, 37-43.

[171] Ibid., 37-43.

[172] Ibid., 39-40.

getting a drivers license, or for being a jeweler), so too is this the case with mental disease. In criminal insanity, mental disease must be understood against the backdrop of the criminal law and its purposes.[173] This purpose concerns the morally correct determination of moral agency, which is to be justified by the "widely held ethical-legal notions of our culture:"[174]

> All of this surely suggests, indeed it almost certainly proves, that the concepts of insanity and mental disease, as relevant to the criminal law, must have a meaning and a rationale that are not tied to any specific causal or physical hypothesis at all. The meaning and rationale must be rooted deeply and widely in the ethical-legal notions of our culture, in our everyday notions of human nature and human relations, rather than a special, esoteric, or technical notion tied to some particular causal hypothesis or technical information.[175]

Fingarette thus argues that, for the purposes of the law, the concept of "mental disease" gives the necessary and sufficient conditions for criminal insanity.[176] Here, Fingarette says that the notion of mental disease "... amounts to the idea that the person whose mind is such that he lacks the capacity to act rationally cannot be a responsible person and hence cannot fairly be held morally responsible."[177] In this sense, the inclusion of the "mental disease" component in Fingarette's test for criminal insanity is simply redundant, because the determination of a lack of culpability would already be contained in the meaning of "mental disease." Thus, for the purposes of the criminal law, according to Fingarette, "mental disease" is just another word for "criminal insanity."[178]

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[173] Ibid., 45.

[174] Ibid., 23

[175] Ibid.

[176] Ibid., 23, 173.

[177] Ibid., 23.

In summary of Fingarette's model for criminal insanity, then, we can see that the most important feature of his account is the notion of criminal (ir)rationality, or as Fingarette's test says, the "substantial capacity to respond relevantly to essential relevance."[179] This central notion is meant to be interpreted in both a cognitive and noncognitive sense, as it applies to the criminality of the defendant's conduct.[180] In accordance with Fingarette's view, a jury should focus on whether or not the defendant has the requisite "rational beliefs" and "rational emotions" with respect to those aspects of the defendant's environment that are relevant to the criminal act, in order to determine whether or not he or she can "respond relevantly to essential relevance." In this sense, Fingarette's account is grounded in what Lawrie Reznek calls the notion of substantive rationality, meaning that what justifies Fingarette's test are judgments about what the defendant ought rationally to believe, feel, or value in certain situations.[181]

Implicit in Fingarette's adoption of criminal irrationality as the central determiner of criminal insanity is his rejection of the concepts of volition, mental disease, and wrongness, as well as the concepts of appreciate, know, understand, and nature and quality that are contained in *M'Naghten* and/or ALI.[182] Fingarette argues that these concepts should not be included in criminal insanity tests for a variety of reasons, most prominent of which are: (1) The inclusion of these concepts in insanity tests is

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[178] Ibid.

[179] See 25-28 above.

[180] Ibid., 29-30.

[181] Ibid., 28.

[182] Ibid., 28-29, 31-35, 38-39.

contradicted by common sense intuition in certain paradigm cases of insanity.[183] (2). These concepts fail to allow for the relevant legal-ethical norms of our culture to be subsumed under the test(s) that contains them.[184] (3). These concepts fail to conform to the everyday ascription's of human behavior that are relevant to criminal insanity.[185]

B. Lawrie Reznek

1. Preliminary Summary. Lawrie Reznek's test for criminal insanity is certainly different from both Fingarette's, and the tests of *M'Naghten*, Irresistible Impulse, *Durham*, and ALI. But while there are some significant differences between these accounts, there are also some similarities.

Reznek and Fingarette both find certain aspects of the current criminal insanity tests that were discussed in Sections I and II objectionable.[186] This includes the objection that *M'Naghten* represents an overly narrow test, in the sense that the language of "knows," and "understands," does not have sufficient noncognitive connotations.[187] Or at any rate, that even if "knows" and "understands" do allow for noncognitive interpretations, that these terms have often been construed by the courts in an exclusively cognitive sense, and as such, are too narrow.[188] Thus, like Fingarette, Reznek holds that his test for criminal insanity must include the noncognitive mental states of the defendant, and not merely his or her cognitive states.[189]

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[183] Ibid., 31-35.

[184] Ibid., 28-29, 37-39.

[185] Ibid., 35-37.

[186] See sec. III, A, 1 and 2 of this paper for specific citations of Fingarette's views.

[187] Reznek, 153-161.

[188] Ibid., 153-160.

A second area in criminal insanity jurisprudence that both Fingarette and Reznek find objectionable, is the inclusion of a mental disease prong found in *M'Naghten*, *Durham*, and ALI.[190] Both Reznek and Fingarette object to the use of "mental disease" in the traditional tests, because both view mental disease as a social concept, as opposed to a medical one.[191] Thus, like Fingarette, Reznek finds *M'Naghten*, *Durham*, and ALI in error, because these tests run the risk of incorrectly placing the psychologist in the fundamental role of ethical expert (particularly Durham). In short, this is because there is a strong tendency in the courts to treat mental disease as if it were a technical medical concept that requires a special expertise to apprehend, when, according to Fingarette and Reznek, mental disease is nothing of the kind.[192]

However, while there are significant overlaps between Fingarette and Reznek's views, they also differ with respect to many other important aspects of criminal insanity. While Fingarette basically rejects all of the central concepts that have traditionally been used in the insanity tests,[193] Reznek chooses to retain some of these concepts. The first concept that Reznek retains is that of volition.[194] Unlike Fingarette, Reznek argues that a volitional prong is needed to adequately capture our moral intuitions regarding certain

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[189] Ibid., 160.

[190] Reznek, 200-204 206, 222.

[191] Ibid.

[192] Ibid., 219-222.

[193] See sec. III, 1 and 2 above.

[194] Ibid., 307-310.

cases of criminal insanity.[195] Thus, Reznek retains this essential understanding which is contained in both the Irresistible Impulse test and ALI.[196]

Another area that Reznek finds acceptable in the traditional tests, but which is rejected by Fingarette, concerns the role that a criminality/wrongness prong should play in criminal insanity jurisprudence.[197] Whereas Fingarette's account of insanity employs the concept of criminality that is contained in ALI, Reznek argues that ALI's application is too narrow, thus running the risk of producing a guilty verdict when in fact it should yield NGBI.[198] In this sense, Reznek affirms the "wrongness" concept in *M'Naghten*. However, whereas *M'Naghten* requires that a defendant "know" that his or her action was wrong, Reznek essentially substitutes the concept of "know" with that of "appreciate," thus synthesizing these two aspects of ALI and *M'Naghten*.[199]

The final two senses in which Reznek's and Fingarette's accounts differ concern the role that criminal irrationality should play in the insanity tests, as well the unique role that the concepts of "good" and "evil" should play.[200] Regarding the role of criminal irrationality, Reznek denies that irrationality in Fingarette's sense is either necessary or sufficient for criminal insanity.[201] He has at least two basic reasons for this. First, he argues that the notion of substantive rationality used by Fingarette depends on a

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[195] Ibid., 29-32, 91-92.

[196] Specifically, Reznek's volitional prong differs from ALI and Irresistible Impulse. See 309.

[197] Reznek, 309.

[198] Although Reznek does not specifically say this, it follows from his test. See 309.

[199] Ibid., 309.

[200] Reznek, 173-188.

[201] Ibid., 199.

controversial objective value hierarchy that, when applied to cases, is unreasonable.[202] Second, he argues that there are persuasive counterexamples to using rationality for determining criminal insanity.[203] Thus, according to Reznek, not only does Fingarette's notion of criminal irrationality depend on controversial values, but it also seems to contradict our common sense intuitions.

Second, regarding the concepts of "good" and "evil," Reznek argues that a morally correct insanity test must include these concepts.[204] For Reznek, in order to have a proper understanding of criminal insanity, it is necessary to include the notion that a person can be "transformed from a good character into an evil one," and that this can provide an excuse.[205] This provision, which is interesting because it reverts back to the basic concepts that were used in Good-Evil test of 1313,[206] requires that a jury evaluate the character of the defendant in terms of whether or not he or she is a "good" or "evil" before he or she committed the crime.

2. Detailed Discussion. Reznek argues that an adequate test for criminal insanity should include four principal components. These are: (1). The noncognitive concept of "appreciate."[207] (2). The moral concept of "wrongness."[208] (3). The volitional prong of

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[202] Ibid., 174-184.

[203] Ibid.

[204] Ibid., 307-309.

[205] Ibid.

[206] See sec. II, A, 5-6 above. However, Reznek prefers to think of good an evil in "naturalized" sense, as opposed to a Biblical sense. "Evil," in this sense, is understood in terms of a "propensity to harm others in the pursuit of his own selfish interests." See Reznek, 13.

[207] Ibid., 309.

[208] Ibid.

being "unable to control his actions."[209] (4). A "good/evil" prong.[210] Reznek's test treats these components disjunctively. It reads:

> Someone is NGBI if he is suffering from a mental illness at the time of the offence such that (1) he was unable to appreciate what he was doing or whether it was wrong, or (2) he was unable to control his actions, or (3) he was transformed from a good character into an evil one.[211]

Since we have been considering Fingarette's model, which holds that a distinctive kind of irrationality is the central determiner for criminal insanity, I will first address the notable omission of irrationality from Reznek's insanity test. I will then proceed to explain Reznek's view with respect to the four remaining components of this paper, those of "volition," "criminality/morality," "mental disease," and "cognitive/noncognitive." Finally, I will address the unique role that Reznek ascribes to the concepts of "good/evil."

The first major criticism that Reznek has of Fingarette's account is that his test for insanity depends on the notion of substantive rationality,"[212] and that this notion assumes an objective[213] value hierarchy that is controversial and extremely difficult to justify when applied to cases.[214] This objective value hierarchy is made explicit by Fingarette when he discusses the "norms" that are to justify his appeal to the concept of "responding relevantly to essential relevance:" "These norms are not only norms of correct inference or valid argument; they are norms regarding what emotions, or moods, or attitudes, or desires are in some sense suitable or proper with respect to certain other aspects of one's

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[209] Ibid.

[210] Ibid.

[211] Ibid.

[212] Ibid., 178-179.

[213] Ibid., 178. What is meant by "objective" in this context is, "independent of the subjective preferences" of actors.

situation ... ."[215] In this sense, Fingarette's "norms" are treated as objective values through which third person observers like jurors can determine that an actor "failed to respond relevantly to essential relevance with respect to the criminality of his or her conduct."

In order to see specifically *how* these objective values that Reznek is talking about are exemplified in a paradigm case of insanity, and *why* Reznek holds that these values are needed in the determination of criminal insanity according to Fingarette's model, consider Fingarette's test as it applies to *M'Naghten*.[216] Recall that Daniel M'Naghten was a paranoid schizophrenic who, acting under the apparent delusion that he was being persecuted by the Tories, shot Edward Drummond, the man who he incorrectly thought was the leader of the Tories, Robert Peel.[217] Under Fingarette's test, in order to determine that M'Naghten was insane when he killed Drummond, a jury would need to determine that M'Naghten lacked a substantial capacity to respond relevantly to essential relevance with respect to criminality. However, simply knowing that M'Naghten lacked a substantial capacity to respond relevantly to essential relevance with respect to criminality, does not explicitly reveal the sense in which these objective values that Reznek is referring to are assumed by Fingarette's test for criminal insanity. In order to

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[214] Ibid., 174-184.

[215] Fingarette, 183.

[216] Reznek does not give any examples of *how* these "objective values" are exemplified by Fingarette's specific test for insanity, nor does he give any examples that demonstrate *why* these objective values are needed within the framework of Fingarette's test specifically. Therefore, I will attempt to fill in some of these gaps. Hence, these next four paragraph represents my most charitable attempt to demonstrate precisely how and why these objective values are required by Fingarette's account. I also want to make it clear that, although I agree with Reznek that Fingarette's account depends on *some* objective values, I do not necessarily agree that Fingarette's account *must* depend on the more specific values that Reznek argues it does. See 47-51 below.

[217] See sec. II, B, 7-10 above.

properly understand this, it is necessary to inquire into what the concepts of "responding relevantly" and "essential relevance" *mean* as they are used in the courtroom.

In accordance with Fingarette's previous illustration of responding relevantly to essential relevance,[218] the basic meaning of this central concept as it relates to M'Naghten's case can be captured by the following counterfactual. This counterfactual implicitly contains the objective values to which Reznek refers: If M'Naghten were sane, he would have been able to respond in *ways* that we feel he *should* (i.e., "respond relevantly") to those *things* or *beliefs* in his life that we feel he *should* respond to, or that sane and moral persons do in fact respond to (i.e., "to essential relevance").[219] Thus, in attempting to judge the relative sanity/insanity of M'Naghten in accordance with Fingarette's test, it is necessary for the jury pick out which aspects of M'Naghten's life *should* constitute "responding relevantly," and which aspects *should* constitute "essential relevance" with respect to criminality. These objective values, then, are values concerning "where to look," and "what to look for," in the defendant's life that are relevant to criminality. For instance, it is likely that if a jury were using Fingarette's test to determine the respective sanity/insanity of M'Naghten, the jury would have picked out M'Naghten's irrational belief that Drummond was the leader of the Tories (responding relevantly), insofar as it relates to M'Naghten's other belief that the Tories were trying to kill him (essential relevance), to determine that he was insane. That is, a jury would look

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[218] See sec. III, A, ii, 24-29 above of the case Jones and Smith case. This, recall, is a case that Fingarette uses to explain and illustrate his the central notion of "responding relevantly to essential relevance." The present application of Fingarette's test to M'Naghten parallels that of the Jones and Smith case. However, in the present application, the specific value terms in Fingarette's test are made explicit.

[219] See sec. III, A, ii, 24-28. This is, in essence, what Fingarette is saying in the Jones and Smith case, when Jones does not respond relevantly to Smith's presence in the bushes. That is, Jones lacks substantial capacity to behave in ways that we feel his should, with respect to certain other aspects in his life that are considered relevant to criminality.

at M'Naghten's *beliefs* and the way in which these beliefs are related to each other and to criminality, to determine that M'Naghten lacked a substantial capacity to respond relevantly to essential relevance. In this sense, the basic objective value that is assumed by Fingarette's test, is that M'Naghten's beliefs, and the way in which these beliefs are related to each other and to criminality, are *sufficient* for determining insanity.[220]

However, just as it is clear under Fingarette's test, that a jury could reasonably pick out M'Naghten's irrational beliefs in order to determine his criminal (ir)rationality, it is also clear that a jury could pick out *other* aspects of M'Naghten's life to determine his respective culpability.[221] These other aspects, in turn, would assume different objective values for determining that M'Naghten had or lacked a substantial capacity to respond relevantly to essential relevance. For instance, hypothetically, a juror, if he or she were so inclined, could pick out some strange fact(s) about M'Naghten's *behavior(s)* in order to determine that M'Naghten was criminally irrational. Perhaps a behavior of M'Naghten's that a jury might pick out would be that M'Naghten soiled his pants (responding relevantly) when he heard a chickadee sing (essential relevance). Or similarly, in a more realistic scenario, a jury might pick out the fact that M'Naghten previously had stuck needles in himself (responding relevantly) when a Tory member was present (essential relevance).[222] In these cases, a jury may believe that the bizarre

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[220] One can, however, break down this basic value judgment into more specific value judgements. For instance, there is the more specific value judgment that, the aspect of M'Naghten's life that is sufficient for determining insanity is his *beliefs*, as opposed to his actions, for instance. And there is the more specific value judgement that, the way the particular beliefs X and Y are related to each other and to criminality are sufficient for determining criminal insanity. For Reznek's argument against the latter value judgment, see the discussion in sec. III, B, ii, 52-57 below.

[221] Fingarette and Hasse, 237; Fingarette, 175-177.

[222] This description is meant to parallel the considerations that Fingarette treats as relevant in his description of Fish, viz., his sticking needles in himself. See Fingarette, 177.

nature of these behaviors are *proof* that M'Naghten must have been criminally insane when he shot Drummond, which is clearly a value judgement. "No sane man would act in such unintelligible ways," a juror might reason.

According to Reznek, then, Fingarette's test requires objective values in order to determine what should constitute "responding relevantly" to "essential relevance."[223] Fingarette's test requires, in other words, that a jury look at *the right aspects of the defendant's life* in order to determine the respective sanity/insanity of the defendant, and that a jury *correctly determine the way that these aspects are related to criminality*. However, as was alluded to in the above hypothetical scenarios regarding M'Naghten's bizarre behaviors, and as Reznek argues, it is clear that at least some of these aspects of a defendant's life that a jury may focus on to determine criminal insanity under Fingarette's test, and thus some of the objective values that are implicit in this determination, are controversial.[224] Particularly, if these aspects of a defendant's life, concern all or even most of the defendant's beliefs, moods, emotions, behaviors, etc. that are considered "bizarre," "strange," "unintelligible," or "inappropriate."

Ultimately Reznek argues that the notion of responding relevantly to essential relevance allows for, and perhaps requires, that a jury determine the sanity/insanity of the defendant using whatever norms or objective values they believe are relevant to the case.[225] This includes those objective norms that are implicit in the adjectives that Fingarette uses to describe cases of insanity, i.e., "distorted," unintelligible," "improper," "inappropriate," etc. Reznek cites Fingarette's description of Fish as evidence that the

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[223] Reznek, 178-179.

[224] Reznek, 174-184.

notion of responding relevantly to essential relevance relies on the controversial values that are in question: "[Fish's] emotional reactions and desires were in some respects so distorted that he had not the capacity to act rationally insofar as these came into play."[226] Similarly, Reznek argues that these objective values that, as Reznek says, get the notion of responding relevantly essential relevance "off the ground,"[227] are visible in Fingarette's assessment of psychopaths (cited previously on page 29):

> Individuals with psychopathic personalities may manifest a bizarre insensitivity or a purposefully cultivated but now deep-rooted callousness that enables them to commit crimes of peculiarly inhuman or cruel kinds. ... If the facts do show chronic generalized failure to develop human relationships-i.e., a generalized incapacity to respond with feelings to the sufferings, agonies or death of human beings—then we do indeed have grounds to view the individual as criminally irrational.[228]

In cases such as that of Fish and psychopaths in general, Reznek argues that it is the values that are entailed by such adjectives as, "insensitive," "callous," "improper," "distorted," and/or "unintelligible," that Fingarette specifically appeals to as the fundamental indicator of sanity/insanity.[229] In the case of psychopaths, the adjectives that are used are those of *insensitivity* and *callousness* as they relate to the psychopath's cruel acts. According to Reznek, Fingarette's use of such adjectives suggest that *any* beliefs, emotions, desires, values, and actions that a jury may find relevant to insanity may be used in the determination, so long as these aspects of the defendant's life are

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[225] Reznek, 174-184; see above discussion, 44-47.

[226] Fingarette, 177; Reznek, 179-180.

[227] Reznek, 178.

[228] Fingarette and Hasse, 237; Reznek, 176-177.

[229] Reznek, 174-181; See in Fingarette on 177, 185, 211where uses these types of adjectives to describe criminal insanity, and in Fingarette and Hasse, 237.

considered as sufficiently contrary to our norms.[230] Here Reznek says, "Fish's values are so flawed that Fingarette concludes that he is irrational and insane ... and Fingarette and Hasse argue that psychopaths are 'not rational in regard to law,' because they do not value human life."[231]

The ultimate problem that Reznek has with this broad understanding of what should constitute responding relevantly to essential relevance is that once these values concerning what beliefs or behaviors are "unsuitable," "improper," "distorted," "inappropriate," or "callous" "irrational," are actually applied to all criminal cases, many defendants that should be found guilty of a crime, will in fact be found NGBI.[232] Thus, although Fingarette's test works in the paradigm cases of criminal insanity, Reznek argues that Fingarette's test is far too easy to satisfy.[233] Indeed, according to Reznek, Fingarette's test runs the risk of providing an excuse for *all* criminals:

> When a person breaks the law or a moral rule, it is because he has different values. When a person steals, or murders, it is because he does not care sufficiently about the suffering he causes. But this does not mean that all criminals should be excused. This would make the category of criminal or evil person disappear.[234]

Here Reznek argues that Fingarette's account could entail that all criminals should not be held responsible for their behavior. This is because criminals often have subjective beliefs and values that contradict the objective beliefs and values concerning what is and what is not "appropriate," "proper," "intelligible," or "rational." As was mentioned

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[230] Reznek, 174-181.

[231] Ibid., 180.

[232] Reznek, 179-180. This includes psychopaths. According to Reznek psychopaths clearly are not insane.

[233] Ibid.

above,[235] this defiance of Fingarette's objective values concerning what should constitute responding relevantly to essential relevance, is exemplified in a criminal defendant's substantial incapacity to respond with the right beliefs, emotions, attitudes, actions, etc., (i.e., respond relevantly) to the defendant's other beliefs, emotions, attitudes, actions, etc., (i.e., to essential relevance) that are considered relevant to criminality. Thus, because all criminals seem, in some sense, to lack a substantial capacity to respond with the right beliefs, emotions, attitudes, actions etc., to those other beliefs, emotions, attitudes, actions etc., that are considered relevant to criminality, Reznek argues that all criminals, at least theoretically, have an excuse in accordance with Fingarette's account of "responding relevantly to essential relevance."[236]

Consider, for instance, how Fingarette's test for insanity seems to yield the same NGBI verdict in both the Fish case,[237] and in a case involving the "common criminal." In the Fish case, Fingarette assesses Fish's mental status by saying that, his "emotional reactions and desires were in some respects so distorted" that he could not "respond relevantly to essential relevance." However, if we consider these emotional reactions and desires as they apply to the common criminal who clearly is not insane (e.g., a watch thief), it can be argued that Fingarette's test seems to get the same verdict of NGBI, which is obviously incorrect. Just as Fish's desires and emotional reactions may be "distorted" to such an extent that they may contradict the norms that we believe are "proper or suitable," so too does this seem to be the case with a watch thief. Indeed, a

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[234] Ibid.

[235] See sec., III, A, ii, 44-45.

[236] Ibid.

[237] See sec. III, A, 32 above.

watch thief may easily believe that he "deserves" all the watches he can get his hands on because society treats him unfairly. Thus, in accordance with Reznek's critique of Fingarette's view, a jury may find the watch thief NGBI, because the watch thief may lack a substantial capacity to have the right beliefs and emotions (respond relevantly) with respect to the belief that society treats him unfairly (essential relevance).[238] Thus, being in the grip of such a belief, the watch thief continues to steal watches, i.e., he fails to respond relevantly to essential relevance.

In short, then, according to Reznek, Fingarette's notion of "responding relevantly to essential relevance" does not distinguish between these cases with respect to their differences in culpability.[239] That is, it does not distinguish a so-called paradigm case of insanity like that of Fish, from a case in which it is equally obvious that the criminal is sane. Both may have values that contradict norms that we consider proper. Both may have beliefs and emotions that we consider improper with respect to certain aspects of their lives about which we feel they should have different beliefs and emotions. Hence, both are not culpable in accordance with Fingarette's view.[240] But this, Reznek argues, is an absurd conclusion. Clearly a test which does not distinguish between a so-called paradigm case of insanity and a case involving the common criminal must be rejected.[241]

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[238] Reznek, 179-181.

[239] Reznek, 179-181.

[240] However, I do believe that Fingarette has a response to this criticism. Even though the notion of "responding relevantly to essential relevance" does require certain values for determining what can qualify as "responding relevantly" to "essential relevance," I believe that Fingarette would argue that, as a matter of fact, jurors will not let just *any* bizarre or inappropriate behavior or belief be used in the insanity test. It would only be the extremely bizarre behaviors and beliefs that are grounded in common sense intuition and everyday language ascriptions as they pertain to moral responsibility. See sec., III, A, ii, 24-39 above.

[241] Reznek, 176-184.

Reznek's second argument for the omission of a rationality prong from criminal insanity tests, is quite different. Whereas the first argument is a type of *reductio ad absurdem* of Fingarette's account, the conclusion of which is that many criminals might not be held morally responsible for their criminal behavior, this second type of argument rests on a set of hypothetical cases which are meant to provide counterexamples to Fingarette's view. In particular, these cases are meant to provide counterexamples to two of the senses in which criminal irrationality, or the "ability to respond relevantly to essential relevance," may manifest in the defendant-- cognitively and noncognitively.[242] Thus, in order for a jury to properly determine whether an actor is criminally insane under Fingarette's test, a jury must at least evaluate the actor's beliefs, attitudes, desires, emotions, etc., (i.e., his or her responding relevantly) with respect to those other beliefs, attitudes, desires, emotions, etc., (i.e., to essential relevance) that are related to the criminality in question.[243] This means, in accordance with Fingarette's view, that the jury must focus on at least whether or not the defendant had the requisite "rational emotions," or "rational beliefs" in order to determine whether or not the actor had the capacity to respond relevantly to essential relevance insofar as criminality is concerned. Reznek ultimately argues that, when these concepts such as "irrational emotion" and "irrational belief" are examined insofar as they relate to exculpation, Fingarette's account is mistaken, because, in and of themselves, irrational desires, emotions, and beliefs are not relevant to the determination of criminal insanity.[244] This is because there are obvious cases, according to Reznek, in which a criminal is irrational, but where our

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[242] Ibid., 174-184.

[243] See sec. III, A, ii, 31-36 above

common sense intuitions reveals that the criminal should not have an excuse simply based on his or her irrationality alone.

Reznek uses two sorts of examples to make this case.[245] Consider, first, a concept that Fingarette argues is particularly important in evaluating the Fish case.[246] This is the concept of an irrational emotion.[247] Because Fingarette does not explicitly discuss what is meant by an "irrational emotion," Reznek proposes a way of understanding this concept. His proposal relies on Phillipa Foot's analysis that, "an emotion is irrational if the belief on which it should be based is either absent or irrational."[248] With this analysis in mind, Reznek asks us to consider a pair of examples, where irrational fear of spiders is considered in relation to criminal responsibility:

> When I am frightened by a spider, my emotion is based on the belief that I am in danger. The emotion is rational if the spider is a black widow, and irrational if the spider is a harmless house spider. But, does this mean that a person fearful of house spiders is insane? What if Gertrude attacks such a person showing her a spider? Is she NGBI? If Gertrude believes her life is endangered, she has an excuse ... Contrast this with Bob who also has an irrational fear of spiders, and attacks the spiders in his house with cyanide fumes, knowing full well the risk to others. Someone is killed. Bob does not have an excuse because he does not suffer from exculpatory ignorance ... Irrational emotions per se do not excuse.[249]

In these passages, Reznek asks whether our common sense intuitions reject the claim that irrational emotions, in and of themselves, should provide an excuse. Thus, Reznek argues in the first part of his example, that Gertrude's irrational fear of house spiders is

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[244] Reznek, 175-179,199

[245] Ibid., 175-176, 180-181.

[246] Fingarette, 175-177.

[247] Ibid.

[248] Reznek, 175.

not the concept that does the work in demonstrating her criminal insanity (if she is indeed insane) when she "attacks a person showing her a spider." In order to see why this is the case, Reznek contrasts Gertrude's irrational fear of spiders with Bob's. In Bob's case, he too responds to his irrational fear of spiders by committing some form of possible violence against someone else. But, Bob does so by "using cyanide fumes, knowing full well the risk to others." Obviously, Bob is not criminally insane even though his actions spring from an irrational fear, and moreover, his actions may appear "bizarre," "senseless," or "unintelligible." However, Gertrude very well may have the defense of criminal insanity available to her. This is because, while Bob does seem to "appreciate his actions and that they are wrong," Gertrude does not. Reznek argues that these cases suggest that irrational emotions do not determine criminal insanity.[250] This is because our intuition tells us in these examples that the culpability of Bob and Gertrude was dependent, not on our knowing whether or not their emotions were based on rational beliefs, but rather whether they appreciated the harm they might inflict on others by their actions. These examples suggest that Fingarette's test, a test which *does* entail that irrational emotions, in and of themselves, *can* provide an excuse (depending on the extent to which they appear "bizarre," "senseless," or "unintelligible"), must be mistaken.[251]

Now consider the Gertrude and Bob example as it directly applies to the case of Fish, thus allowing us to see just how Reznek's and Fingarette's perspectives differ in an actual case. Whereas, under Fingarette's test, Fish is found criminally insane, because Fish's emotional reactions and desires were irrational with respect to those beliefs that he may

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[249] Ibid., 175-176.

[250] Ibid., 177, 180-183, 199.

have had that are associated with his cannibalism or his sticking needles in himself,[252] for Reznek, if Fish genuinely is criminally insane, it must be something specific *about* Fish's irrational emotions, viz., that they fail to correspond to the wrongness that is inherent in cannibalism and murder.[253] Thus, in a similar manner that Bob should not be found criminally insane simply because his criminal actions were associated with his irrational fear of spiders, so too is it the case that Fish's irrational emotions that were associated with his cannibalizing children, cannot, in and of itself, be grounds for exculpation. Instead, under Reznek's analysis, we would need to know certain other more specific facts about Fish's life that were connected to his irrational emotions.[254] We would need to know, for instance, that Fish's cannibalization of children was in response to his belief that God is commanding him, or something of the sort. In other words, for Reznek, the concepts which need to be employed in the judgment of Fish's culpability, are the more focused concepts of his ability to "appreciate his actions and that they are wrong," or as we see later see, those that concern volition, good, and evil.[255] Whereas, for Fingarette the concept that needs to be employed is that of "responding relevantly to essential relevance," as it pertains to the defendant's cognitive and noncognitive mental states.

Reznek proposes that a similar analysis applies to the notion of "irrational ends" or irrational beliefs.[256] In the exact same fashion that the concept of irrational emotions is

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[251] Ibid.

[252] See sec. II, A, ii, 32.

[253] Reznek, 197-199.

[254] Ibid.

[255] See sec. III, B, ii, 59-70.

[256] Ibid., 180-181.

neither necessary nor sufficient for the legal meaning of criminal insanity, so too is this the case with the concept of irrational ends, thus revealing that whether the irrationality is noncognitive or cognitive, the same considerations apply. Reznek offers a counterexample to challenge the claim that irrational ends, in and of themselves, can provide an excuse.[257] Suppose that someone's ultimate end is happiness and he or she believed that money will bring them to achieve it. Suppose that it in the process of robbing a bank to satisfy this end, he or she murdered one of the tellers. Clearly, we would not excuse this defendant based on this sort of irrationality.[258] This is because our moral intuitions do not suggest that an irrational end such as, "believing money will bring us happiness," is enough for the negation of moral responsibility. Thus, even if a defendant's end of "believing money will bring us happiness" (essential relevance) led to his or her other belief that he or she should attempt to "control the oil reserves" (respond relevantly), which resulted in the defendant "dropping a bomb on the entire state of Texas," (criminality), according to Reznek, these "bizarre" and "crazy" beliefs should not yield a NGBI verdict.

In short, then, for Reznek, the concepts that better explain the exculpatory force of criminal insanity (than that of irrationality) are the more traditional concepts of, "the inability to appreciate what he was doing or whether it was wrong."[259] According to Reznek, a test which employs these respective noncognitive and moral concepts, is much more consistent with our common sense moral intuition, and is not susceptible to obvious counterexamples, such as those involving Gertrude, Bob, and the person with irrational

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[257] Ibid.

[258] Ibid.

ends.[260] Moreover, an account such as this is also not subject to the earlier criticism that it depends on a highly controversial, and perhaps indefensible, objective value hierarchy.[261] This is because, for Reznek, the notion of appreciating what he was doing or whether it was wrong, does not depend on the controversial values that are implicit in the notion of responding relevantly to essential relevance. These values, recall, are those that are needed to determine both what *sorts* of things in the defendant's life should qualify as "responding relevantly" to "essential relevance," e.g., beliefs, values, actions, etc.; and similarly, which *specific* beliefs, values, actions, etc. should be used in the determination of sanity/insanity. For instance, in the case of Fish, Fingarette seems to indicate that Fish's bizarre *behavior*, i.e., his sticking needles in himself, and cannibalism are sufficient for exculpation.[262] Whereas, under the notion of appreciating what he was doing or whether it was wrong, these actions *cannot* serve to determine that Fish was sane/insane. This is because, obviously, the notion of appreciating of what one was doing and whether it was wrong pertains to the *mental states* of the defendant insofar as they relate to his or her perception of *wrongness*, as opposed to his physical actions. Thus, according to Reznek, the considerations of Fish's "bizarre behaviors" are the wrong considerations to determine insanity, and thus, Fish may in fact not be insane. Hence, to the extent that Fingarette's test does indeed allow a jury to focus on the above

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[259] Ibid., 184-189.

[260] Although the above represents a simplification of Reznek's views, in that this discussion does not take into account certain of Reznek's more sophisticated points about what motivates our intuitions that ALI is correct, as opposed to irrationality, the above simplification is sufficient for the purposes of this paper. For Reznek's more sophisticated understanding of why ALI is a better at capturing our intuitions than irrationality, see pgs. 64-74 where Reznek discusses the As-If Rule. Otherwise see pgs. 39-40, 174-188.

[261] See 43-50 above.

[262] See sec. III, A, ii, 32 above.

sorts of broad considerations concerning the "bizarre behavior" of the defendant, and to the extent that these considerations are misguided insofar as determining criminal insanity is concerned, then the notion of appreciating what one was doing and whether it was wrong depends on less controversial values, than does responding relevantly to essential relevance does.[263]

A second principal concept that Reznek rejects in criminal insanity jurisprudence, but this time where Reznek's and Fingarette's accounts agree, concerns the use of mental disease in criminal insanity tests.[264] Like Fingarette, Reznek argues that disease (or mental disease) is a social concept, not a medical one:

> It would be attractive to define disease in terms of something objectively discoverable...But it is a mistake to define disease in terms of biological malfunction. Deciding whether something is a disease depends on whether we are better off without it, not on whether our genes are better off without it. The same applies to psychiatric conditions."[265]

More specifically, Reznek argues that the concept of disease has five distinct features:[266] (1). A disease is a process rather than a static defect.[267] (2). A disease does harm.[268] (3). A disease is an abnormal process.[269] (4). A disease is a condition that does not have

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[263] See fn. 216.

[264] Reznek, 204, 219-222.

[265] Reznek, pg. 204.

[266] Ibid., 200-204.

[267] Ibid., 200-201.

[268] Ibid., 201-202.

[269] Ibid., 202.

an obvious external cause.[270] (5). A disease is an involuntary process over which we have no control.[271]

While it is beyond the scope of this paper to get into a comprehensive analysis of the concept of mental disease, it is sufficient for our purposes to notice the distinctly social aspect that Reznek finds in the concept. For instance, consider the features of (2) and (3), where the concepts of "harm" and "abnormal" are considered by Reznek as necessary for understanding mental disease. The important thing to notice about these concepts, is that they are *normative* in nature, and as such, must be understood in a way that is relative to various values of society. For instance, if the context in which "harm" is used, were that of "watering one's flower beds," then what we might call "harmful" as it relates to the watering of plants, concerns the lack of water that might be given to one's geraniums. This is because, obviously, some people like geraniums, and geraniums may die if they weren't watered enough. However, with regards to a different plant, say a dandelion, this same lack of watering may be construed as a good thing, precisely because it causes the plant to die, and because we may not like dandelions. Hence, in the same way that a lack of watering of one's plants can be construed as harmful or good, depending on the social context in which one is doing the watering, Reznek's analysis of mental disease reveals that the considerations are relevant.[272] These social considerations are essentially like those that Fingarette mentions in his analysis, i.e., that mental disease must be understood against the backdrop of the criminal law and its purposes.[273]

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[270] Ibid., 202-203.

[271] Ibid.

[272] Ibid., 200-204.

[273] See sec. III, A, ii, 36-38.

Thus, for Reznek a disease is not simply a medical or factual concept like eye color, or weight. It is, rather, something that "depends on whether we are better off without it." This social analysis of mental disease is, as was just alluded to, quite similar to Fingarette's. Fingarette argues that mental disease is a cross-dimensional concept that must be understood from the perspective of the criminal law and its purposes.[274] Just as does the notion of "normal vision" depend on the context in which it is being considered, so too is this the case with mental disease. Presumably, for Reznek, the above features (2) and (3) also make it a cross-dimensional concept. This is because, as was mentioned, the notions of harm and abnormal must be put in a particular context in order for these concepts to take on meaning. If this context were that of the criminal law, then mental disease would take on a meaning that would depend, as Fingarette says, on the "widely held ethical-legal notions of our culture" that are relevant to the determination of moral responsibility.[275]

Reznek summarizes his position, which ultimately is directed at the debate over the role that the psychologist should serve in the courtroom, with the following: "The disease status of a condition does not determine whether it excuses – this is determined by whether it causes exculpatory ignorance or compulsion. For this reason, changes in our disease classification will not influence what we regard as excuses."[276] Here, Reznek is essentially arguing that because mental disease in the criminal law is not a medical concept, the psychologist who classifies psychological phenomenon into medical categories such as "psychosis" and "depression," would not be in any special sense

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[274] Ibid.

[275] Ibid.

qualified to do so with respect to the concept of "mental disease" as it is used in the criminal law. This is because there is no a medical condition known as "mental disease" that entails that the person is criminal insane.[277] Instead, mental disease in a legal sense is a concept that depends on society, and what it considers "harmful" or "abnormal."

Reznek also argues that a volitional prong is needed in criminal insanity jurisprudence,[278] and thus that this concept, which is contained in one form or another in ALI and the Irresistible Impulse Test, should be preserved.[279] The specific version of the volitional prong that Reznek argues for, is that a defendant is criminally insane, if he or she was "unable to control his or her actions."[280]

In order to demonstrate the necessary role that a volitional prong should play in criminal insanity jurisprudence, Reznek argues that, contrary to Fingarette's view, there are clear cases of criminal insanity that jurors subsume under a volitional concept, rather then under a cognitive or moral concept.[281] Moreover, Reznek argues that as a result of these clear examples, we should conclude that losing control is uniquely sufficient for exculpation.[282]

The first example that Reznek uses to illustrate this, is that of automatism.[283] The legal definition of automatism, which comes from Viscount Kilmuir in Bratty's Appeal,

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[276] Ibid., 222.

[277] Ibid., 219-222.

[278] Ibid., 74-80, Ch. 5 generally.

[279] Although Reznek does not explicitly say this, it can reasonably be inferred from his test. See 309.

[280] Reznek, 309.

[281] Ibid., 75, 93, 95-96, 167-168.

[282] Ibid.

says the following: " ... I would prefer to explain automatism simply as action without any knowledge of acting, or action with no consciousness of doing what was being done."[284] Examples of automatism, which interestingly, the law has long acknowledged as providing exculpation,[285] are epilepsy, somnambulism (or sleepwalking), concussion, hypoglycemia, and multiple personality.[286] In these cases, particularly in a case of a epilepsy, a person's behavior is the involuntary product of an underlying abnormal physical condition, and as such, is clearly not controllable by the agent. Or, in a case like sleepwalking, if there is not an abnormal physical condition which underlies the involuntary behavior, the condition is at least known empirically to produce "total unconsciousness of what one is doing." Indeed, when people sleep, they often do not remember their behaviors, e.g., their coughing, talking, sneezing, eating, or dreaming. In accordance with these seemingly involuntary behaviors, particularly with a condition like epilepsy, Reznek argues that automatism provides obvious examples where a defendant should be found to have an inability to control his or her actions.[287]

Another more interesting sort of case in which Reznek argues that the need for a volitional prong can arise in criminal insanity jurisprudence, concerns a case of Premenstrual Syndrome (PMS).[288] Reznek argues "that PMS can dramatically reduce a

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[283] Ibid., 93-98.

[284] Paul Fenwick (1990) 'Automatism', in R. Bluegrass and P. Bowden (eds) Principles and Practice of Forensic Psychiatry, London, Churchill Livingstone, 273.

[285] Goldstein, 203; Reznek, 95.

[286] Reznek, 93-96.

[287] Ibid., 75, 93, 95-96, 167-168.

[288] Ibid., 167.

woman's capacity to control her impulses,"[289] and thus that PMS may impair her ability to resist what, under normal circumstances, she would normally have no problem resisting. For Reznek, the only thing that explains the fact that we feel that a woman has a legal excuse when she committed a crime while experiencing PMS, is that she lost control.[290] However, Reznek qualifies this by saying that the woman with PMS should take precautions in order to deal with her weakened resistance levels.[291] Thus, "being violent during PMS is much like taking alcohol when you know it will make you dangerous."[292] In other words, just because a woman is violent during a PMS phase, does not mean she has an excuse. Presumably, in a legitimate case of criminal insanity where a woman commits a crime while experiencing PMS, certain other factors would be present in the woman's life. These factors might include that she didn't know that she had PMS, or she didn't know what triggered the episodes that caused her to be violent while she is experiencing PMS, or something of the like. Nonetheless, as Reznek says, "there are many cases [such as PMS] where we judge that a person was not in control, and should be excused."[293]

However, these examples of automatism and PMS that Reznek argues should be subsumed under a volitional prong, lead to a more complicated discussion of the particular volitional prong that Reznek is advocating. As was mentioned in Section II of this paper in association with the discussion of the Irresistible Impulse Test, the

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[289] Ibid.

[290] Ibid.

[291] Ibid.

[292] Ibid.

[293] Ibid.

notoriously difficult problem of constructing empirical criteria for determining when this loss of control has occurred often arises here.[294] Thus, although these empirical criteria are much easier to construct in a case like that of epilepsy, the majority of the cases where the defendant "loses control," such as that of a PMS case, will not admit of such an obvious empirical determination.[295] Consider, for instance, the difference between someone who is suffering from a grand mal seizure, and someone who acts out of anger and "burns her husband's bed."[296] Whereas with the former, there is a well-acknowledged abnormal biological process that is responsible for the loss of control, there may not be such an obvious abnormal biological mechanism at work in the latter. Thus, if Reznek's version of the volitional prong were to be employed in the courts, it appears that there may be difficulty in making a determination in accordance with empirical principles, even though our intuition may tell us that the person who burned her husband's bed has an excuse.

Reznek is well aware of this empirical difficulty. His suggestion for dealing with this matter, is what he calls, "fixing the standard circumstances that would constitute reasons for an actor to do otherwise."[297] What this means in the abstract, essentially, is that for the practical purposes of determining when a person has lost control, Reznek holds that the courts should, in each particular case, construct a "set of circumstances" that would serve as a reason or set of reasons that should *under normal circumstances* deter the

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[294] See sec. II, C, 14 above.

[295] Reznek, 75-92.

[296] Richard J. Gelles , and Murray S. Straus, Intimate Violence, New York: Simon and Schuster 1989, 122.

[297] Reznek, 81-83.

defendant from doing that which he in fact did, i.e., commit a crime. Then, once these reasons are given or circumstances are set, the jury has an empirical standard by which to determine whether or not the defendant was able to control his or her actions with respect to the crime he committed.[298]

The concrete example that Reznek uses to illustrate the idea of "fixing the standard circumstances that would constitute reasons for an actor to do otherwise," is an example of eating cake.[299] Reznek explains that, if one were to consider eating a piece of cake, we might postulate that a sufficient reason for not eating the cake, is that it will produce heartburn or something similar. That is, we might "fix the standard reasons that would constitute reasons for an actor to do otherwise" to the fact that the cake will cause heartburn. But, suppose that one ate the cake anyway. In this situation where the "standard circumstances" are set broadly, we can conclude that one is "unable to control his or her behavior" (and is, thus, not responsible). On the other hand, Reznek asks us to suppose that the cake has cyanide in it. In this situation, the standard circumstances would be set more narrowly, so that the presence of cyanide in the cake would represent a sufficient reason not to eat the cake. Clearly, then, if the person did not resist eating the cake even though it had cyanide in it, it is reasonable to think that he or she was unable to control his or her actions, according to Reznek.[300]

Now consider this notion of "fixing the standard circumstances," as it relates to a hypothetical rendering of Fish's urges to cannibalize children.[301] Suppose, for instance,

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[298] Ibid.

[299] Ibid., 83.

[300] Ibid.

that we fix the standard circumstances that would constitute a reason for Fish not to cannibalize children, to the following proposition: Fish should be able to resist eating children *when someone is at his house*. Now suppose that Fish ate the calf of a young child when his grandmother was visiting. In accordance with this particular way of setting the standard circumstances, Fish could not control his actions. This is because Fish was not deterred by the standard circumstances that were set in this particular case (and that we deemed should deter him). However, suppose we set the standard circumstances more narrowly. In this case, suppose that the standard circumstances that should cause Fish to do otherwise, are captured by the proposition that, Fish should be able to resist eating children when his mother is home. In this case, just because Fish ate the calf of a young child *when his grandmother came to visit*, we would have to say that Fish was in control of his actions, and thus morally responsible for his behavior. This is because Fish was not deterred by reasons which we deemed he should have been deterred by.

So, Reznek suggests that, for the practical purposes of the court, we set the standard circumstances *somewhere* in order to determine when someone cannot resist a certain action.[302] In the cake-eating example, most likely we would set the standard circumstance somewhere in between the two examples. Thus, we would not want to fix the standard circumstances to "needing to die from eating the cake." Instead, we would need to set the standard circumstances somewhere in the middle, perhaps in a case where

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[301] See Fingarette's discussion of Fish in sec. III, A, ii, 32. The scenario involving Fish in this paragraph is used for purely illustrative purposes.

[302] Reznek, 80-91.

it is obvious that serious harm might result. But, as Reznek says, this will ultimately depend on our moral point of view.[303]

The final feature of Reznek's test for criminal insanity, which can perhaps be thought of as a naturalized version[304] of the Good-Evil test of 1313,[305] concerns the idea that there are cases in which the only concepts that properly explain the fact that a defendant is insane, are those of "good" and "evil."[306] Thus, Reznek argues that a defendant is criminally insane, if he or she "was transformed from a good character into an evil one:"[307]

> The notion of an evil character is central to the idea of excuses. Ignorance, compulsion, and automatism are all excuses because they are ways in which a good person comes to do something bad. We want to punish evil characters, and want our excuses to exempt good ones. Hence, these are excuses. The hypothesis is tested (and in fact suggested) by cases of insanity."[308]

As the above passage indicates, Reznek believes that the concept of an evil character occupies a deep place in our thinking about criminal insanity. Thus, for Reznek, not only is the notion of an evil character needed in order to get the right verdict in certain cases, but it also represents, in the deepest sense, the most basic of exculpating conditions. Reznek says in numerous places, that the volitional, cognitive, and moral concepts that are contained in the language being "unable to appreciate what he was doing or whether it was wrong," and being "unable to control his actions," all serve in the exculpatory role

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[303] Ibid., 82.

[304] Ibid., 13.

[305] See sec. II, A, 5 above.

[306] Ibid., 91.

[307] Ibid., 309.

that they do, *because* they reflect that the defendant is not an evil character. As Reznek succinctly puts it, "it is the notion of evil character that best explains why we accept the excuses that we do."[309]

However, while Reznek argues that the notion of an evil character best explains *why* we accept the excuses that we do, he also argues that the notion of an evil character is needed in the courtroom in order to get the just verdict in particular cases. Reznek argues that the following type of scenario illustrates the unique and necessary place that the good/evil prong should play in criminal insanity jurisprudence.[310] Suppose that a black man is taunted by a group of racists. Suppose that if there were a policeman at his elbow, the black man would not retaliate, and thus the "standard circumstances" would prevent him from doing so. However, suppose that if there were no police there, then the man would retaliate against the racist group. In this situation, if we set the standard circumstances broadly, that is, if we say that to lose control, the black man must attack the bullies in the presence of the cop, then black man will almost always be considered be in control of his actions, and thus be morally responsible.[311] This is because, obviously, most people in this sort of a situation would resist such actions. However, if we set the standard circumstances narrowly, that is, if we say that in order to lose control, the black man must attack the bullies if his friend is around, then often times individuals will "lose

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[308] Ibid., 307.

[309] Ibid., 12.

[310] Ibid., 91.

[311] Ibid.

control," and thus fail to be responsible.[312] Reznek argues that both of these results are unacceptable. The former is unacceptable, because when the standard circumstances are set broadly, the black man will be (incorrectly) found to be in control of his action, and thus guilty of assault. Whereas, with the latter, if the circumstances are set narrowly, it will many times be the case that the defendant will be incorrectly found to have lost control, and thus be NGBI. Similarly, Reznek argues that there seems to be no clear sense in which the black man "was unable to appreciate what he was doing or whether it was wrong."[313] To the contrary, in a case like this, the black man probably fully appreciated what he is doing, and might even believe that it is right. For Reznek, this case is one in which the defendant should have an excuse, and where the only test that will consistently capture our understanding of this excuse, is one in which "abnormal circumstances induces a temporary change in character."[314]

Other examples where Reznek argues that the person has an excuse of this sort, will come from those cases in which an individual fails to satisfy the loss of control rule, and where the person does not fall under the requirement that he or she is "unable to appreciate what he was doing or whether it was wrong." Reznek argues that the example of a psychotically depressed mother, much like that of Andrea Yates, who kills her children because she believes they are better off dead, fits this profile.[315] Thus, Reznek argues that, on a reasonable interpretation, a woman such as this was "able to appreciate what she was doing and whether it was wrong," and moreover, that there were no

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[312] Ibid.

[313] Ibid.

[314] Ibid., 92.

[315] Ibid., 233.

circumstances that would justify an appeal to loss of control. Reznek argues that the only way to justify this sort of case, is through the idea that the woman is a good person, but through her illness, was turned into a bad person temporarily.[316]

Finally, consider the category of defendant that Reznek mentions who is paranoid and believes that he or she is being persecuted, and decides to kill in retaliation.[317] Again, cases that are in this category, represent situations in which the person is not out of control, and similarly does not satisfy the "appreciation of what he was doing or whether it was wrong" prong. But, Reznek argues that "nevertheless, from *M'Naghten* onwards, such mentally ill offenders have been seen as paradigmatic cases of insanity."[318] Thus, Reznek argues, our common sense intuition tells us that, there should be another excuse besides those of loss of control and "an inability to appreciate what one was doing or whether it was wrong." This excuse is that the defendant is "transformed from a good character into an evil one."

In summary, we can see that Reznek both affirms and denies various parts of the traditional tests for criminal insanity. Similarly, there are distinct senses in which Reznek's account is both compatible and incompatible with that of Fingarette's. Where Reznek and Fingarette agree about the meaning of criminal insanity, is, first, in their rejection of a mental disease prong found in *M'Naghten*, *Durham*, and ALI.[319] This is because, contrary to the medical meaning that the courts assign to mental disease, Reznek and Fingarette argue that mental disease is a social concept. A second aspect of the

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[316] Ibid.

[317] Ibid.

[318] Ibid.

[319] See 36-38, 56-59 above.

traditional tests that both agree about, concerns the rejection of those concepts in traditional insanity tests which do not have sufficient noncognitive connotations.[320] These include the central concepts of "know" and "understand" that are found in *M'Naghten*. Instead, both theorists choose to employ a different set of concepts to convey the relevant noncognitive applications as well. In Reznek's case, it is the notion of appreciate that is found in ALI, whereas for Fingarette it is his own unique notion of criminal irrationality.[321]

However, as we've seen, their accounts differ with respect to a number of other issues. The most fundamental difference, concerns certain basic concepts that they believe give the necessary and sufficient conditions of criminal insanity. Whereas Fingarette holds that criminal irrationality as he defines it provides both the necessary and sufficient conditions for criminal insanity, Reznek holds that Fingarette's notion of criminal irrationality is irrelevant to the determination.[322] This is because, first, the notion of "responding relevantly to essential relevance" rests on a controversial objective value hierarchy that allows far too many criminals to qualify for exculpation, perhaps even all criminals. Second, that there are counterexamples to the different senses in which the notion of "criminal irrationality" might be interpreted, i.e., both cognitively and noncognitively. Instead, Reznek proposes that we rely on more traditional concepts in criminal insanity jurisprudence, than those of Fingarette's. These include, a volitional prong that is found in the Irresistible Impulse Test and ALI.[323] These also include, the

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[320] See 28-29, 46-50 above.

[321] Ibid., 24, 42.

[322] Ibid., 43-56.

[323] Ibid., 11-15, 42, 59-65.

concepts of appreciation and wrongness, which can be found in ALI and *M'Naghten*, respectively.[324] Finally, Reznek holds that a morally correct insanity test must include the concepts of good and evil, which originally were used in the Good-Evil Test of 1812.[325] In short, Reznek argues that in certain cases of criminal insanity, these good and evil concepts are the only ones that will allow a jury to reasonably reach a correct understanding of moral responsibility in some cases.

IV Conclusion

The purpose of this paper was to analyze two philosophers' perspectives on criminal insanity, in the hopes of finding better alternatives than that offered by the state of Texas for dealing with controversial cases such as the one involving Andrea Yates.[326] This analysis was carried out from a five-part perspective which involved the role that the concepts of mental disease, volition, rationality, legal/moral, and cognitive/noncognitive should play in criminal insanity jurisprudence. In Section II, I attempted, through an explication of the conceptual history of the insanity defense, to reveal some of the problems that have characteristically given rise to these five issues. In Section III, I attempted to present the revisionist perspectives of Herbert Fingarette and Lawrie Reznek in the context of this conceptual history. Now, I will apply their tests for criminal insanity to the Andrea Yates case, which is a fairly easy and straightforward application,

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[324] Ibid., 42, 46-50.

[325] Ibid., 42, 65-68.

[326] The purpose of this paper, however, has not been to *evaluate* the theories of Fingarette and Reznek. This includes an evaluation of their views, both in terms their responses to interpretational, logical, and empirical difficulties presented in Section II, and in terms of who's model for understanding criminal insanity is "better."

because both theorists have already tested their views against a case that is much like that of Yates.[327]

As was mentioned earlier in this paper,[328] Fingarette applied his test for insanity to the case of a woman with post-partum depression. This woman might as well have been Andrea Yates. Recall that in the case that Fingarette described, like Yates, the woman with post-partum depression began to have destructive, infanticidal thoughts after the birth of her first child. However, like Yates, this woman did not act on these psychotic thoughts. It wasn't until after the birth of her second child that the thoughts "took over," after which time the woman strangled her child.[329] In Yates' case, it was, of course, after the birth of her fifth child that Yates drowned all five of her children.

Fingarette argued that a defendant such as Yates should have an excuse.[330] However, he also argued that, it is reasonable to suppose that a defendant like Yates "purposefully," "voluntarily," and "knowingly" strangled the child, and thus that *M'Naghten*, ALI, and, of course, the narrower Right-Wrong test that Texas uses, would not provide such an excuse.[331] In this sense, Yates "knew" or "appreciated" that what she did was contrary to the law and wrong. When Yates called her husband and the police, quite cognizant that all of her children were dead, it appeared that Yates "knew and appreciated the nature and quality of the act and that it was against the law and wrong." It also appeared that Yates voluntarily chose to murder her children in the sense that she was well aware of her

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[327] Fingarette, 140-141; Reznek, 233.

[328] See sec. III, A, ii, 33-35, above.

[329] Ibid.

[330] Fingarette, 140-141.

[331] Ibid.

destructive infanticidal thoughts, and she had ample opportunity to put herself in a hospital, or to get some help elsewhere. Moreover, Yates had resisted acting on these thoughts after the birth of earlier children, and so based on these empirical observations, it is reasonable to suppose that Yates did not lose control.[332]

However, according to Fingarette's test, Yates would indeed lack a substantial capacity to respond relevantly to essential relevance. This was because, in the language that was used earlier,[333] Yates simply did not respond in ways that are considered appropriate to those aspects of her life that a sane and moral person would. She did not, for instance, respond with a rational set of beliefs to the voices that she heard from the devil. Her response, to drown her five children in the midst of these voices, was deeply irrational. Her being overcome by post-partum depression to such an extent that she could have let her thoughts and emotions "take over," was simply bizarre, horrific, and improper in the extreme. Under our norms constituting what sane behavior should look like, and how sane people should respond to certain aspects of their life that are relevant to criminality, Yates' behavior was "grossly irrational." She would be found NGBI in accordance with Fingarette's test.

While reaching the same verdict, Reznek would analyze the Yates case differently than would Fingarette.[334] While Reznek would agree with some of Fingarette's of the conclusions, he would reach these conclusions for different reasons. Regarding the volitional prong, Reznek argued that a psychotically depressed mother such as Yates is

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[332] See Intro. above.

[333] See 24-26, 43-48 above.

[334] See 67-68 above.

often an example of an actor who cannot reasonably be considered to lose control.[335] That is, in a similar manner as above, Reznek would hold that there are no empirical set of circumstances that would justify the determination that Yates lost control. She knew about her psychotic condition for many years, and could have dealt with it professionally. She resisted such infanticidal temptations with earlier births. She thought a great deal about doing what she did before she did it. She would not satisfy Reznek's loss of control rule.

Reznek would also argue that Yates did in fact appreciate what she was doing and that it was wrong.[336] Thus, according to this criterion of Reznek, Yates should be found guilty of first-degree murder. In the same manner as was discussed with Fingarette, it is reasonable to suppose that Yates did appreciate what she was doing and that it was wrong, in the sense that Yates' execution of her children seemed calculated (e.g., her laying her children in a neat row on the bed). Similarly, as was mentioned, she called both her husband and the police to report the case right after the murders, suggesting that she appreciated how society would perceive such actions.

For Reznek, the only test that can justify our intuitive sense that Yates should have been found criminally insane, is that she was "a good person who temporarily became evil."[337] Indeed, Yates does seem to fit this profile. Often times she was a good mother and wife. Yates was a valedictorian of her graduating class. She had many friends. She was likeable. She seemed, in general, to be "a well-meaning person." But, under the grip

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[335] Ibid.

[336] Ibid.

[337] Ibid.

of mental illness, Reznek argues that good people can temporarily become evil. Clearly, Yates would fit this profile, and should be found NGBI.

Though not immune from criticism, the revisionist perspectives of Reznek and Fingarette get the right verdict in the Yates case. Therefore, they provide, in this case, a better alternative to Texas' test for criminal insanity, which is too narrow. What the criminal law needs is a broader, more liberal test for criminal insanity than that of at least Texas' and *M'Naghten*, and most likely ALI as well. This is because, these tests do not satisfy our understanding of a morally correct conception of criminal insanity. Although jurors, when deciding cases of criminal insanity, can always choose to subsume their understanding of moral responsibility under more narrow conceptions than those of Reznek and Fingarette, the chances of them may be reduced. In other words, often the specific conception of criminal insanity does matter. In the case of Andrea Yates, a broader test for criminal insanity would most likely result in her being sent to a hospital instead of a prison.

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