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Rationality, Insanity, and the Insanity Defense: Reflections on the Limits of Reason

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The tacit assumption is that powers of self-control are strengthened by knowledge of sanctions; and that any injustices [that] might result—to those who nevertheless are unable to control their conduct—are less than exerting maximum possible pressure toward conformity with law.¹

I. Introductory Narrative: First Principles and Direction

Quantum superposition tells us that one particle can be in multiple states at the same time, but that one cannot measure the whole state of the system without collapsing the superposition into a single one of those states.¹ Insanity in some forms can present itself like that. If you push the individual in her full-blown paranoid delusional state (usually, the only kind there is), you are apt to find her in a state of utter collapse. When the spectator views the world historically, by focusing on the interdependence of cognition and affect prior to the descent, as opposed to the scattered non-rational thinking thereafter, he or she witnesses a devastating experience. The instantiation of unbearable helplessness that the collapse produces—especially for those who witness it in a close and very personal way—is unimaginable and so never fully explicable.


Sometimes, there are moments of calmness, the occasional loving rush that follows a wonderful shared moment or two together, the sharing of a good movie or book: they remain immeasurable. But one can, in an instant, stand with one’s jaws suddenly dropping and breathing significantly shallower than before: the joyful moment has passed. Her threats, her pain, and her demons are back, they can always come back. Firsthand observers of these phenomena are dazed and confused by the concomitant cognitive and affective disintegration. And all the while the law seeks conformity, even from individuals so afflicted. It’s an absurd demand foundering on an unjustifiable comprehensive moral grounding.

Clearly, we cannot demand conformity from victims of this disease who have collapsed to this state of almost total normative disconnection; nor can we hope that our threats will produce any meaningful and lasting measure of conformity. That’s utility run amok. No threats and few medications can affect the pain, the horror, and the potential deadliness of paranoid schizophrenia. The illness refuses to follow the logical pattern we expect of fully functioning adults because the major premise of their cognition and affect is meaninglessly twisted. The victims are often quite smart and never lose the ability to effectuate a simple syllogism that concludes with some hoped-for state closer to homeostasis. Treating these neuropsychologically wounded people and bringing some minimal level of quietude to them is as much as we can reasonably hope for, even for those who hurt others, and especially for those whom we love. Conformity of conduct, as a justificatory penal aim, is self- and other-defeating. It does not and cannot work; these individuals deserve genuine respect because, through no fault of their own, they suffer in and because of their inexplicable commitment to their own foreign realities. These are our deeply troubled sons and daughters and parents and spouses and lovers—members of our family. And
sometimes they do evil, terrible terrible evil, and we must respond.

Our laws naively tend to demand conformity, even when the capacity to conform is clearly fragile at best, and almost always broken just when their insight is called upon most urgently. The demand for conformity too often trumps the better norms of our moral psychology—our way of viewing human states at their most respectful. It’s as if we are willing to blame the blameless over and over and over again. We do not get that we cannot halt their demons. And so blaming goes on, but it is often wrong; it can be a misguided practice. Our thumb is too firmly planted in cognition. The moral justification for punishment should not rest on a principle of utility when the life of an damaged individual is at issue. Rather, it must rest on the most basic moral proposition: Before the state can fine or incarcerate individuals or worse, kill them, it must be shown that they did wrong under circumstances in which they could have done other than what

\[ \text{2See my } \text{The Problems with Blaming, in Michael Freeman and Oliver Goodenough, eds.} \]

\text{Error! Main Document Only. LAW, MIND, AND BRAIN (London: Ashgate Publishing 2009).} \]

\[ \text{3This is clearly not to say that punishment and the legislative processes that justify it are or should be free from aggregate utility calculations; they should incorporate utility, perhaps more often than they actually do. Surely the distribution of punishment should take utility into account. Nor is it to say that retribution is otherwise unnecessary to the process. We have strong moral instincts about conduct that is wrong. See, e.g., Jonathan Haidt, } \text{The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment, } 108 \text{ PSYCHOL. REV. 814 (2001) (summarizing social science research and suggesting that the cross-cultural intuitional uniformity on punishing serious wrongdoers “[is] the product of an evolutionarily developed mechanism that predisposes each human toward acquiring these intuitions”), and some of those instincts are retributive in nature. See Kent Greenawalt, } \text{Punishment, 74 J. CRIM. L. & CRIMINOLOGY 343, 347 (1983) (noting that from a retributive perspective, “punishment is justified because people deserve it”); Ernst Fehr and Simon Gächter, } \text{Altruistic Punishment, 415 NATURE 137 (2002); Robert Boyd et al., } \text{The Evolution of Altruistic Punishment, 100 PNAS 3531 (2003), www.pnas.orgcgidoiy10.1073ypnas.0630443100.} \]

\[ \text{Even Bentham found room for the retributive urge: “It is the vindictive satisfaction [that] often unties the tongue of the witnesses; . . . [that] generally animates the breast of the accuser; and engages him in the service of justice, notwithstanding the [many] expenses.” Jeremy Bentham, } \text{Principles of Penal Law, in THE WORKS OF JEREMY BENTHAM 383 (J. Bowring ed., 1843).} \]
they did; they did not simply choose poorly. We assume that their (mis)conduct was under their control, and so we blame and penalize them for their apparent operant intention and the action that follows therefrom and, when the act is completed, for the consequences of the harm inflicted still more. “When I am said to have done something of my own free will,” explains A. J. Ayer, “it is implied that I could have done otherwise; and it is only when it is believed that I could have acted otherwise that I am held to be morally responsible for what I have done.” Culpable omissions and agreements (sometimes tacit) aside, “doing,” as in performing a physical act of some sort, is a necessary condition for liability. The law thus requires proof beyond a reasonable doubt of both a voluntary act of will and mens rea, the guilty mind, where the two conditions are relatively co-occurring and largely co-extensive. If the prosecution proves these elements in a procedure

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4See J. L. Mackie, Morality and the Emotions, 1 CRIM. JUSTICE ETHICS 3,4 (1982) (describing “negative retributivism” as “the principle that one who is not guilty must not be punished”—guilt is a necessary condition for punishment). And the irony here is that this simple premise probably meets a rule utilitarian universe. See John Rawls, Two Concepts of Rules, 64 PHILOS. REV. 3 (1955).

5“Blame,” in these circumstances, refers to both disapproval and responsibility. See J. L. Austin, A Plea for Excuses, 57 PROC. ARISTOTELIAN SOC’Y 1, 7 n.2 (1956-1957), www.jstor.org/stable/4544570.


One necessary condition of the just application of a punishment is normally expressed by saying that the agent “could have helped” doing what he did, and hence the need to inquire into the [accused’s] “inner [mental] facts” is dictated not by the moral principle that only the doing of an immoral act may be legally punished, but by the moral principle that no one should be punished who could not help doing what he did.


7See, e.g., Model Penal Code §2.01(1) (1985) (requiring a “voluntary act” as a condition for criminal liability, with the exception of culpable omissions). On the many difficulties raised in determining whether an “act” has occurred and what act may be culpable, see Austin, supra note 5. On the need for a culpable state of mind, see Model Penal Code §2.02 (1985). The Supreme Court made this point emphatically in Morissette v. United States, 342 U.S. 246, 250 (1952): “The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty
free of prejudicial error, the law generally affirms findings of guilt unless the actor’s unlawful behavior is justified or excused, and the latter occurs, in theory, only when the wrongdoer (usually himself) proves his inability to control his behavior under circumstances in which he suffers no publically visible coercion. 8 “Control” and its synonym, “volition,” are loaded terms, a point to which we will return often.

In general terms, an excuse from responsibility, if it applies, reflects the product of one of two potential forms of coercion—external and internal—thereby placing the presumptive voluntary act at issue. The plea of external compulsion or duress, for example, is available when “the circumstances are such that no reasonable person would be expected to choose the alternative,” because it is more undesirable than what the person is commanded to do—“then the action I am made to do is not one for which I am held to be morally responsible.” 9 This form of excuse requires a time-referenced utility calculation based on the perceived risk and substantiality of immediate physical harm versus the risk of some future harm, such as a legal penalty. 10 In such cases, the defendant pleads, “I couldn’t help myself in these circumstances, and neither could any

8 I am not discussing justifications in this work; that would be a different, though related, endeavor. I am simply treating justifications as non-culpable acts, and the reader is welcome to take that place-holding phrase—“non-culpable acts”—and fill it as desired. On the basic distinction, see, e.g., Sanford H. Kadish, Excusing Crime, 75 CALIF. L. REV. 257, 258 (1987). I have addressed some of the potential neurobiological associations in The Neuropsychology of Justifications and Excuses: Some Cases from Self-Defense, Duress, and Provocation, 50 JURIMETRICS 391 (2010).

9 Ayer, supra note 6, at 20; JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 326-29 (4th ed. 2006); GEORGE FLETCHER, RETHINKING CRIMINAL LAW 829-33 (1978); Daniel Ward, The M’Naghten Rule: A Re-evaluation, 45 MARQ. L. REV, 506, 506-07 (1962). The defense of necessity operates the same way. Model Penal Code §3.02 (1985) (addressing the “choice of evils”). For a wide-ranging approach to how these decisions trigger cortical and sub-cortical mechanisms, see Blumoff, supra note 8 (reviewing some of the brain mechanisms and processes that are recruited in response to many threats).

other person of reasonable firmness.”

The voluntariness of the act requirement, in such circumstances, is deemed to have been undermined by the seriousness of the threat, although the defendant has made a choice, and a very hard one at that. To fail to make the same necessary calculation under such dire circumstances as other reasonable individuals would might result in death; and if the threat was not real or failed, potential heroism or ignominy. The plea of internal compulsion—youth, diminished capacity, insanity—in theory reflects the same moral paradigm premised on the same questioning: Could the individual, by virtue of his age or diminished mentation or lost sanity, have done otherwise in the circumstances? If not, then again the voluntariness of misconduct seems to disappear—only this time the defendant in fact lacked the ability to choose appropriately and was not deficient relative to the reasonable person of our construction: He was missing the necessary components of rationality and volition that are triggered in the duress condition. So the statement of the basic moral paradigm is accurate, but the context for applying the operative language—“couldn’t have done otherwise”—has changed.

It is at this point, then, that our legal mechanics too often forsake the deontic moral justification for punishment—the deeply-held belief in the inherent worth of the rational, autonomous person—and slide into a utility calculation based on culturally shaped notions of appropriate public fearfulness: The fear of the defendant’s inexplicable behavior wins, especially among those who are ill-educated and fearful. The basic excusing paradigm works fairly well in the limited domain to which the law has de facto consigned it. Youth aside, excusing conditions are recognized almost exclusively when the source of the compelled misconduct is external to the

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actor, as if the actor’s ability to choose had collapsed.  The legal proof requirements underlying the insanity defense, in contrast, produce a mixed factual and legal question that is less palpable to most of us, less obvious than the prototype of external compulsion: the image of a barrel of a gun to the head—accompanied by “Or Else!”—is unambiguous. Through our laws, we tend to blame actors who suffer serious psychopathology for their misconduct because we can’t understand their behavior; we can only experience it secondhand and give credence to those who have known it firsthand, or we remain in the default state of naïve fear. The causes are hidden from view in the neurobiology of our being. The insanity defense rests traditionally (and to a significant extent contemporaneously) not on what the wrongdoer could or could not have done; the traditional touchstone of all conduct, excusable or not; instead, it rests on what the wrongdoer knows, and thus an odd, almost unnoticed, change of perspective has occurred.

The cognitive core of the original M’Naghten test, which has been tweaked and mostly narrowed over time, is still in force in roughly half the states and all federal trial courts.  The original M’Naghten standards ask the fact-finder to decide five questions: whether “[1] at the time of the committing of the act, the party accused was [2] laboring under such a defect of reason, [3] from disease of the mind, as [4] not to know the nature and quality of the act he was doing; or, if he did know it, [5] that he did not know that he was doing was wrong.” Perhaps because the insane


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defendant is not like the rest of us, different standards apply but the basic question—Could he have done otherwise under the circumstances?—clearly covers insane conduct. Sometimes our fears of the unknown become pejoratives that seem to prevent us from standing behind our own humanity.

So the important questions from this perspective begin with [2], a defect of reason. What is a “defect of reason”? How do we know? Is it to be understood purely in terms of gross deficiencies in cognitive processing? That cannot be correct. The traditional defense played out in most courtrooms today begs the most important ontological questions: How does one get from knowing to doing, from some form of information—what is right or wrong in the circumstances—to the motivation for action? What are the triggers involved when irresistible motivational urges arise and compel a very unwelcome outcome? Just knowing that a doing or potential doing is wrong is clearly insufficient for a finding of insanity (or even action). Each of us “knows” immeasurable bits of information, however internally admixed, that do not provide motivation to do, and especially not to doing a wrong (and much that we know isn’t generally relevant to be do-ability anyway). Getting from knowing to doing seems to run through some modalities until the knowledge (or belief), however accumulated, achieves critical mass and activates the neurobiological substrates that control our motivational apparatus. The motivational gap between knowing and doing is wholly affective.

Thus the M’Naghten construct begins with “knowing,” which is presumed to reflect a singular rational faculty that exists apart from affect behind an impenetrable neuropsychological wall. There situated, rationality or reason is treated as if it exists apart from emotions, which we

15When the insanity began and its duration can raise significant evidentiary questions based on the opaqueness of logical relevancy.
know are absolutely necessary to catalyze the motivational centers that lead to doing. Where do priorities come from? Can reason alone, in any context, manipulate one’s priorities? Or does the whole notion of prioritizing assume some affective valence? One need not be a wholehearted Humean\textsuperscript{16} to reach that conclusion but one thing is clear: if an actor chooses to do something for a reason, he must have “some sort of pro attitude toward actions of a certain kind,”\textsuperscript{17} that is, some emotional commitment to it, whatever it is. Knowing must run through the emotions, the passions, or else the motivation to do lacks psychological valence. The traditional view of insanity as an excusing condition, although consistent with our actus reus requirement, is thus incomplete and sometimes even incoherent. And, by the way, just how does one balance the injustice of holding those responsible who lack control—the ability to refrain from doing—against the utility of enforced and tainted conformity, especially when the capacity to conform is clearly unavailing? How can we tolerate such a result and remain consistent with our better moral intuitions?

Finally, I provide some direction about an article that revisits an old and familiar landscape. I come to this well-covered ground from a neuroscientifically informed background and by deeply personal experiences with neurologically damaged friends and loved ones who met or continually seem to try to meet and mete out violent ends. My work places its emphasis on the seldom-noted distinction, explicit in M’Naghten or its progeny, between knowing and doing, and concludes that the moral price we pay as a society for failing to recognize that the way we tend to

\textsuperscript{16}David Hume, A Treatise of Human Nature 413 (L.A. Selby-Bigge and P. H. Nidditch eds., 1978) (stating that “reason alone can never be a motive to any action of the will” and that reason alone “can never oppose passion in the direction of the will”).

\textsuperscript{17}Donald Davidson, Actions, Reasons, and Causes, in Essays on Actions & Events 3-4 (Donald Davidson ed., 1980).
treat those who lack the facility to forbear from wrong-doing is wasteful of human capital and disrespectful of the person so suffering—a person someone loves—and thus simply too high. That conclusion follows from the confluence of several sources, among which is basic research in the brain sciences, which informs us that there are individuals who suffer some prefrontal cortex (PFC) anomalies—for example, retaining knowledge of the difference between right and wrong under some description—but who are nonetheless “organically incapable of appropriately regulating their behavior.”18 The time has come to stop the morally indefensible practice of warehousing neurobiologically damaged individuals in prisons, and to conclude, as the drafters of the Model Penal Code did years ago, that M’Naghten and its many narrowing variants “authorize[] a finding of responsibility in a case in which the actor is not seriously deluded concerning his conduct or its consequences, [but] in which the actor’s appreciation of the wrongfulness of his conduct is [a] largely detached or abstract awareness that does not penetrate the affective level.”19 They deserve the best practicable conditions of constraint. Those observations ground the work that follows. Mere cognition, a thin version of rationality, is insufficient for finding sanity; motivation, informed by human emotions, produces insane conduct and insane crimes even when cognition is apparently retained.

This article begins with two stories, real stories told with the best information practically available. It speaks of two actors, once considered fairly ordinary, productive individuals, who

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were (ultimately in the second case) adjudicated insane. Both committed murder, both were tried under M’Naghten or M’Naghten-hardened rules, and both knew that their conduct was morally and legally wrong at the time the acts were committed. How is it possible, then, to be found insane under the extant standards? It is possible because rationality or cognition, narrowly conceived, cannot bear the weight the law purports to put on it as an explanation for grossly abnormal human behavior. It just cannot work unless utility is the hidden moral justification for punishment of the insane, and even then juries sometimes see past the formal limits of M’Naghten.

So a brief look at the nature of rationality is the second topic addressed. The take-home point here is that rationality is never an unalloyed human capacity. Dualism really is dead, mothers don’t cause schizophrenia, and rationality is always influenced by (in fact, in constant entanglement with) affect. One does not do absent sufficient motivation to do, where to is catalytic. Loss of cognition is necessary but clearly not sufficient, and pathological harm to either cognition or volition and the neural correlates thereof can produce uncontrollable insane behavior.

Next, the paper briefly discusses the history of the insanity defense and then asks why, and

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20The distinction here between “actors” and “agents” is advertent. When I use the term “actor,” I am referring to any individual, man or woman, in the circumstances described by the context. In contrast, the term “agent” is limited to a different, more sophisticated, and more ideal citizen: an individual with practical reasoning abilities, which presupposes a reasonably full capacity for rational and altruistic thought of the sort one would expect from a person who would (at least) ask whether the proposed conduct and the expected (or hoped-for) effect thereof would be such that he or she would not wish that conduct to be directed at him or her. To speak of a moral agent, therefore, assumes sufficient capacity-in-fact of the sort I am addressing in this text. What I hope this distinction accomplishes is a separation between the formal neo-Kantian abstraction of the “fully cooperating member[] of society,” JOHN RAWLS, POLITICAL LIBERALISM 183 (1996), and the criminal defendant who lacks full capacity.

21Whether this constitutes jury nullification is beyond the scope of this article. Suffice it to say that jury nullification has a complex history in the United States. See, e.g., Travis Hreno, Necessity and Jury Nullification, 20 CAN. J L. JURIS. 351 (2007); Gary Simson, Jury Nullification in the American System: A Skeptical View, 54 TEX. L. REV. 488 (1976).
under what circumstances, the law recognizes the grievous harm the insane sometimes inflict, while it also understands, but rarely excuses conduct evincing the frailty of the human species. The last section suggests both accepting and even broadening the Model Penal Code provisions, and working more diligently in the pre-trial phase to avoid trial by placing damaged and dangerous actors where they belong: in secure medical facilities rather than in prisons. And in this particular domain, neuropsychological testing at the outset of the criminal process and broader visions of right may add to the technology necessary to bring our law in conformity with the better angels of our nature. A person as sick as Andrea Yates, who drowned her five children one at a time, should never have been brought to trial—never!

II. Two Killings Produced by Psychotic Thoughts

A. Some Observations on Phenomenology

Individuals who suffer from chronic paranoid ideations inhabit a haunted patch of mental real estate and some of them live in constant pain: bone-burning, bone-chilling, joint-wracked pain, the kind of pain that rejects soothing, that seems to explode from the top of the head and race down the back and spinal cord and into the joints. It’s as if the pathological thoughts that occupy their brains cause no end of painful peripheral sensations, and no amount of massage helps for more than a nanosecond—morbidity (and often mortality) prevail. They live with deeply embedded conspiratorial delusions that are sometimes accompanied by unwanted visual and/or auditory stimuli, and sometimes just by the ever-present psychotic delusions in which they feel as if they have lost control of their lives—and of course they have, albeit not from the invasions of foreign or third party forces. When those forces persevere over ever-longer periods of time, they can dictate evil deeds that the individual feels helpless to oppose. Not that they don’t try, usually
to the point of exhaustion, to escape the final harmful act. In any manifestation, they face
never-ending, self-reinforcing signs and signals, meaningless and invisible to the rest of us, that
they try almost tirelessly and nearly always unsuccessfully to comprehend and impose
coherence. If only we could comprehend! But the ordinary mechanisms of comprehension do
not apply; they do not work as they have and should. For those who love and have loved the
afflicted individual, they too often inhabit the land of the damned: they are freighted and often
berated as arrogantly “unwilling-to-understand,” and so they are often tossed in with the many
hated “others,” accused as members of a global conspiracy. She is in the grip of an illness that is
above all destructive of her ordinary understanding of the origins of rational thought; her condition
is sad and both emotionally and physically virulent and tragic for her and her closest loved ones.

That said, this phenomenology has a puzzling fictitious logic all its own, always wavering
along uncertain stochastic paths. If one could step into her shoes and view the world as informed
by her menacing controllers, then one could understand her attempts to find answers. Some, at
least, have a deeply logical, even linear, effect in the service of delusional premises. Every
inference from any source is pursued, to be elevated and ultimately abandoned as apodictic facts
become harder to deny. She pursues an unlimited list of alternative interpretations for her
madness, but for every explanation there is a dead end into which she flies that leads to another
potential explanation. There is always another potential explanation and another dead end.

22See Roisin Kemp et al., Compliance Therapy in Psychotic Patients: Randomised Controlled
Trial, 312 BMJ 345, 345 (1996) (estimating that up to 80% of psychotic patient who have been prescribed
neuroleptic drugs fail to comply); Hans Rittmannsberger et al., Medication Adherence Among Psychotic
Patients Before Admission to Inpatient Treatment, 55 Psychiat. Serv. No. 2 (2004),
of their patients—54 patients in all—were fully or partially noncompliant within a year after discharge from
inpatient treatment).
Alternative accounts usually begin with certainty, a global overstatement of complete understanding that, grievously, lacks careful thought and articulation—capacities that, in the past, were second to her nature. The patient struggles mightily to prove the existence of the tormentors until the pain is overwhelming, then violence often follows—to themselves or others.

What drives the disease? How our neurobiological and psychological mechanisms collapse and, more deeply, why those processes move into bizarre, inscrutable, and sometimes hateful intentions—that is, how they express themselves—are questions whose answers may finally elude the best science and observation, perhaps forever. I cannot be sure of this conclusion because I so thoroughly dislike its finality; perhaps, though, the expression of certain phenotypes are unknowable. Still (or at any rate) we know certain things about the behavior of these individuals, and the way it often tends to cycle. We also know a bit about the neurobiological correlates of some of this behavior, a topic for discussion in a later section. All the better to muddle through.

The basic stages in this horrific movement sometimes work like this. Start with a smart (sometimes very smart) but maybe slightly neurotic person, where the neuroses are odd but often charming and easily forgivable, not infrequently providing a rough and delightful sense of humor. Or so it was contemporaneously, before the tragic collapse. At some point (for men it is usually in the late teens or early twenties, for women it is typically somewhat later), a triggering event seems to set off a now-existing (and at least partially pre-set) signal that produces this accursed

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24Use of the term “preset” reflects no strong position on the fight between “nature” and “nurture.” It’s always both, and a numerical apportioning of relative contribution to the malady is not important, at least in this context. Suffice it to say that there is some genetic module at work in these cases. See, e.g.,
and unwanted nexus between ordinary (and sometimes spectacular) abilities to effect logical analysis, on the one hand, and, on the other, the bizarre premises and unwelcome desires that propel delusional thinking. And, as noted, it traps everyone—the individual so afflicted and his or her loved ones. The critical point concerning the phenomenology of persistent paranoid ideation is this: it is a delusion disorder that provides the locked-in premise that malevolent human forces beyond the individuals’ capacity to control have taken over their lives and someone, somewhere, has to halt their unending torture—or else. The painfulness they suffer is both palpable to and indescribable by those who witness but do not suffer the misfortune.

And now she faces the Law?

How should we treat this person we knew to be whole and smart and caring and funny and witty and endless other wonderful traits? Is she a blameworthy killer or blameless evildoer in need of our help, our understanding and our sheltering? Or something else? How the law should treat such tortured individuals when they act out with violent intentions is a question that often falls off our already overwhelmed radar screens, but the questions can never recede into unimportance. The law’s tendency is to withhold understanding and forgiveness despite the inability of the sufferer to control her misconduct. The line between can’t and won’t may be thin, but it is not indiscernible. Observation outside the etiology of delusional pathology is necessary and often sufficient to move our jurisprudence of insanity in a more compassionate direction.26

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26See, e.g., Randy Borum and Solomon M. Fulero, 23 L. and Human Beh. 375, 378 (1999) (noting that “on average the insanity defense is raised in less than 1% of all felony cases, and is only successful about 15-25% of the time”); Allyson L. Gay, Reforming the Insanity Defense: The Need for a Psychological
What follows in this section is a critical discussion of the seminal Anglo-American case in this area of the law, *M'Naghten's Case*, and the case of Andrea Yates, both of which I accept as rightly decided by the jury. *M'Naghten's Case* and its progeny clearly retain a deep foothold in contemporary analysis.

B. Daniel M’Naghten’s Case.

There are few cases in which the individual who seeks an excuse based on insanity did not both intend the murder he committed and know, within a reasonable time frame, that doing so was wrong. As Morse and Hoffman have pointed out, the Model Penal Code’s hypothetical actor who deserves an insanity-based excuse because he hallucinated that he was squeezing a lemon when he choked his wife to death “is silly because mental disorder does not work this way; it does not produce such beliefs.” More common is the crime committed by Daniel M’Naghten, who intended to shoot his victim—albeit he unintentionally targeted and hit the wrong man—and undoubtedly knew that doing so was wrong. Similarly, Andrea Yates clearly intended to and

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28 See note – supra.


30 Model Penal Code and Commentaries § 4.01, at 166.


32 See generally RICHARD MORAN, KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL MCNAUGHTAN (1981). Moran presses the case that the prosecution, to avoid political turmoil, did not vigorously pursue M’Naghten. I assume that the jury rightly found him insane. See infra --.
did kill her children and knew that doing so was wrong; at least she was presumed to have so known, and wishing death to herself under Texas law. At the time of the trial and retrial, Texas used a narrow form of the *M’Naghten* test. And yet both were found not guilty by reason of insanity (NGRI), Yates at retrial. How is that possible inasmuch as mens rea and actus reus were met?

The basic facts of *M’Naghten’s Case* were never disputed, although his motives were not entirely clear. Daniel M’Naghten of Glasgow was a journeyman woodturner (a bowl maker). (He may have had a somewhat compromised childhood; he was the progeny of what was then called and treated as an illicit affair.) Nevertheless, he was spirited and in his spare time he studied French and became involved in a political debating society, always on the side of the radical workers’ movements. He was at least motivated by the political climate in which he lived and in which he was, perhaps, somewhat gifted. At some point in his mid to late twenties, he

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34Tex. Penal Code § 8.01. (INSANITY. “(a) It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong.”).


36Read or watch a Masterpiece Theater production of a Jane Austen work.

37Age-wise, M’Naghten was within the ordinary range of onset for this devastating illness. *See When Does Schizophrenia Start and Who Gets It?*, NIMH (March 12, 2010), http://www.nimh.nih.gov/health/publications/schizophrenia/index.shtml.
began to run off the rails: he became certain that he was a target of persecution by his political foes, the Tory Party and the Catholic Church, among others. He had thus come to the pervasive, all-penetrating belief that he was the subject of a vast international conspiracy involving the Pope and the British Tory government, finding signs and signals of a diabolical conspiracy everywhere. By any well-educated standards of the day, the man was in fact insane; he clearly suffered from what we would now call paranoid delusions.38 Locked in an inescapable depraved mental state in which absolute moral certainty attaches to a set of integrated beliefs that are detached from reality, he traveled to London where he frequently complained to the police and other officials that he was being tailed by Tory spies. Sometime thereafter, and with fully developed psychotic premeditation, he sent his self-justified shot at his delusional foe, Tory Prime Minister Robert Peel. In fact, he didn’t shoot Peel, who was apparently not close by; instead he shot Edward Drummond, Peel’s secretary, who M’Naghten mistakenly identified as the Prime Minister. Drummond died within a week and a half thereafter. Daniel M’Naghten was arrested and charged with what we would today call first degree murder, or murder with malice aforethought. M’Naghten was represented by well-known counsel for whose services he put out a considerable sum (he was found with £750 in his pockets, and unlikely amount for a wood turner), and with some additional assistance from his father. M’Naghten pleaded not guilty, alleging, unsurprisingly, that he was not of sound mind at the time of the shooting. And, of course, he wasn’t, though he probably went to the end with certainty that the conspirators were real!39


There was ample contemporary medical testimony proffered to support both the plea and the verdict and, for counsel, ample ambiguity to ruffle existing (mostly civil) precedent. The expert observers gave testimony in early March 1843 before three respected justices in Old Bailey’s Central Criminal Court. The gist of their testimony was summarized by the High Court: M’Naghten labored under morbid delusions such that while he “might have a moral perception of right and wrong,” the power of the delusion could be such that it “carried him away beyond the power of his own control, and left him no such perception.” That summary description reflects reality for many paranoid schizophrenics. He had lost command over those processes that are conducive to normatively appropriate responses. Under such circumstances, the House of Lords noted that the trial court had found that M’Naghten was incapable of “exercising any control over acts [that] had connexion with his delusion.” In such a case, the strength of the delusion, which might vary over time, could reach a “climax, when it burst forth with irresistible intensity . . . [and] at once break out into the most extravagant and violent paroxysms.” The jury found M’Naghten not guilty; they were persuaded of his insanity by the expert testimony.40

The public, withal, was not happy. M’Naghten’s identity with the Tory opposition counted strongly against him in some circles, but the testimony about his multiple encounters with public officials and his ability to see signs and signals that others could not observe tell a different story: He was insane. Interestingly, however, the law under which M’Naghten was tried was not substantially different than the law that came to carry his name, with the exception of the evidentiary rules that allowed non-examining physicians to testify as “experts” on mental health.41


41See WAYNE R. LAFAVE, CRIMINAL LAW (4th ed. 2003) (noting that the judges in the M’Naghten
The Crown’s prosecutor, Sir William Follett, informed the jury that (a) it had to determine the defendant’s state of mind at the time he committed the crime, and (b) “[i]f you believe the prisoner . . . was incapable of distinguishing right and wrong . . . then, undoubtedly he is entitled to your acquittal.”

But counsel went further, telling the jury that “partial insanity upon some subjects—that he had a morbid delusion of the mind upon some subjects,” was not excusable; the delusion had to be complete and all-encompassing; he had to meet the ancient common law metaphor of the “wild beast.”

Although there was some play in the common law joints for “partial insanity,” which defense counsel, Alexander Cockburn, attempted to exploit, he too began where the prosecution had begun: “The law of God and man absolve a person who by the disease of insanity has been converted into ‘the similitude of the lower animal;’ to do otherwise would be ‘to violate every principle of justice and humanity.” Cockburn did, however, analogize within the loose joints of the common law to create a new approach in at least two ways: first, he medicalized M’Naghten’s case “were merely attempting to state the laws of England as [they] then existed”.

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42 MORAN, supra note 32, at 79 (quoting The Queen Against Daniel M’Naughton, in REPORT OF STATE TRIALS: 1839-1843, 850 (John Wallis ed., 1892)). Moran discusses the many spellings of the defendant’s name. MORAN, supra note 32 at xi-xiii. I have used the spelling most commonly found in American law books.

43 MORAN, supra note 32, at 79-80 (quoting REPORT OF STATE TRIALS: 1839-1843, supra note 42, at 850).

44 MORAN, supra note 32, at 82 (quoting William C. Townsend, The Trial of Daniel M’Naughton, 1 MODERN STATE TRIALS 332 (1850)). The metaphor of the “wild beast” is derived from ancient Greek and Roman characterizations of the insane: mania or paranoia, for the former, furiosi for the latter. ROBINSON, supra note 35 (especially Chs. 1-2).

condition, a movement that had its impetus on both sides of the Atlantic. Second, he used some stray comments from civil cases to argue for partial insanity. “A person’s conclusions may be ‘just and perfectly sound [but] the premise from which he reason[ed] . . . [may be] uniformly false.” M’Naghten’s premise, that the Church and Tory Party were out to kill him, was pathologically erroneous. M’Naghten was trapped by a delusion and the killing he committed was a product of his insane mind. Still, he could effect a simple syllogism.

M’Naghten’s acquittal caused a strident outcry, not least raising the ire of the Queen. It was sufficiently troubling that, at the urging of the Queen and at the request of the House of Lords, the Highest Court weighed in with guidance for the future. The advisory opinion hoped to provide clear answers to a number of questions concerning the standards to be applied in cases where insanity is alleged, as well as anticipating questions about legal mechanics, namely, the ability of non-examining physicians to render opinions on sanity based on the facts brought out during trial. The opinion of all but one of the justices became a pillar of Anglo-American law.

Their answer to these questions began this way: They recognized “the extreme and almost insuperable difficulty of applying those answers to cases in which the facts are not brought judicially before them.” Lord Chief Justice Tindal nevertheless wrote a general opinion on “abstract questions” of law. It seemed clear, and was no doubt intended to seem clear, that under

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46 ROBINSON, supra note 35 (especially Ch. 5).

47 ROBINSON, supra note 35, at 167-70.

48 MORAN, supra note 32, at 93 (quoting REPORT OF STATE TRIALS: 1839-1843, supra note 42, at 881).

49 MORAN, supra note 32, at 21. The Queen had herself been the target of three unsuccessful assassination attempts. Moran, supra note 32, at 71.

50 MORAN, supra note 32, at 21.
the new rules laid down, M’Naghten would likely have found himself hanging from the gallows.

Tindal began the core of the opinion by noting that all defendants enter the court with a presumption of sanity, about which the jury is to be informed,51 thereby unmistakably placing the throne’s thumb on the side of our folk psychological conception of free will and a verdict of guilty.

To overcome the presumption and prevail on an insanity plea, the court wrote,

> it must be clearly proved that, at the time of the committing of the act, the party accused as labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing wrong.

The language of the opinion has never been entirely clear, a point taken up momentarily. Among other issues in which ambiguity lie, the court sent mixed messages as to the kind of “wrong” involved, legal or moral.

> If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that every one must be taken conclusively to know it.

The court was by no account, therefore, sacrificing the common law doctrine “ignorantia juris non excusat”: It expounded a bit on what it meant for the defendant to “know” that what he was doing was wrong: “If the accused was conscious that the act was one [that] he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable.” Awareness that the act is “at the same time contrary to the law of the land” is at best indestructibly presumed; it speaks only to the existence of a law that proscribes his conduct. “Conscious that he ought not to do” seems to speak to mens rea—at least knowledge, if not the more rigorous standard of purpose. With what tools and measurements are such standards to be answered?

51M’Naghten's Case, 8 Eng. Rep. at 720.
Were it not for the fact that some version of the *M’Naghten* test is still in use in roughly half the states, and in all but four the defendant bears the burden of proof, we could dismiss *M’Naghten* as a bygone product of legal history. We would be mistaken. For the forces that anchor the jurisprudential pillars on which *M’Naghten* rests are still with us. We are left with many questions whose relevance never disappears, and one certainty: The *M’Naghten* test purports to be limited to cognition. The test would look at what the defendant knew about the nature and quality of the act he was doing; or, if he did know it, whether he knew that what he was doing was wrong. As one commentator has noted, going back as far as the ancients it was understood that the rule of law, “recognized as reason’s cardinal gift, is available only to and for rational beings and rational purposes.” Mired in the dualism from which the law still seeks to break free, it doubtless made little sense in mid-nineteenth century England to look beyond rationality to determine the constituents of sanity.

C. *State v. Andrea Yates*  

Texas outdid the House of Lords when it came to narrowing the criteria for finding insanity. It too stuck with a wholly cognitive test, embracing that same dualism that lies at the heart of Anglo-American jurisprudence. While much of the world hopes to move toward the recognition that there are causal relationships between neurobiological events and involuntary

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52See *supra* note 28. Four states that place the burden on the prosecution include Colorado, Florida, New Jersey, and Oklahoma. Four states, including Kansas, Montana, Idaho, and Utah, have abolished the insanity defense altogether.


conduct. Texas tolerated a verdict of not guilty by reason of insanity, NGRI, if but only if “at the
time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know
that his conduct was wrong.” The test thus included a contraction on the type of evidence
needed to demonstrate mental disease (“severe”) and eliminated half the cognitive test: whether
the defendant knew the nature and quality of the act she was doing. A legislature could conclude
that the sole condition reflecting insanity—knowledge of right or wrong—is adequate only if, as a
collective, it viewed or was willing to view the individual so afflicted as a beast to be destroyed.
Andrea Yates easily met the legislature’s criteria: She knew her conduct was wrong, under any
description. She was guilty, with or without the false testimony that may have convicted her in
her first trial. In fact, she fought against her counsel’s recommendation that they pursue the
insanity defense; she knew her conduct would be judged “wrong” and sought punishment for it.

Andrea Yates never lost access to the knowledge that she was killing her own five children,
seriatim: an unimaginably grotesque act. She knew she was doing it and she knew it was wrong

\footnote{ROBINSON, supra note 35, at 125.}

\footnote{Tex. Penal Code Ann. § 8.01 (emphasis added).}

\footnote{For the public reaction to the Hinckley shootings that brought about Texas’ rejection of a
narrowed version of the Model Penal Code approach, see Brian D. Shannon, \textit{The Time Is Right to Revise the
thought “over ninety percent of the residents in his senatorial district favored a restriction on the insanity
defense in response to polling that followed the Hinckley verdict”).}

\footnote{The false testimony concerned a “Law & Order” program that, according to the State’s expert,
provided the model for Yates’ conduct. In other words, she had seen the program and it provided
premeditation. \textit{Yates}, 171 S.W.3d at 222. \textit{See infra} note ___.}

and for that reason wished punishment.\textsuperscript{60} Public outrage was immediate: fear and retributive urges were unavoidable reactions. Yet prior to those acts, Yates was described by friends as a “wonderful mother” and a “supermom.”\textsuperscript{61} She was smart and attractive and athletic and well-educated and, by most accounts, a real catch.\textsuperscript{62} Following a long courtship, she married an engineer, her husband Rusty Yates. After the birth of her fourth child in fairly short order, Yates had suffered from postpartum depression after earlier pregnancies, a condition which, in less severe forms, affects many women after childbirth; in severe forms, it can induce psychotic

\textsuperscript{60}\textit{Id.} Yates apparently postponed her homicidal efforts for reasons that are unclear: she filled the bathtub because she “might need it.” \textit{Yates, 171 S.W.3d} at 217.

But the last word in the rules, “wrong,” is rarely litigated. That said, what constitutes a “wrong” could provide ample space for the necessary consideration of the effect of affect on rationality and thus our understanding of the cognitive requirements. Can one possibly come to believe that something is a wrong, without turning to our own breasts, to our emotions? \textit{See, e.g., ABRAHAM S. GOLDSTEIN, THE INSANITY DEFENSE} 51-53(1967).

This may be an under-analyzed view of what is a “wrong.” If one truly does not know that she is killing her child as she does so—say, she thinks she’s easing a doughnut into boiling oil as she drowns her child—she truly doesn’t know that what she is doing is wrong. This is an easy, uncontestable case that almost never goes to trial. Often, in this kind of context, it’s an unnecessary question to determine “blameworthiness”—whether the defendant “could he have done otherwise.” It is also inconsistent with Texas law. \textit{See infra note} \hspace{1em} .

But that is not the ordinary context in which litigation occurs. One might well know the nature of his act and its quality, under some definitions of wrong, but not the definitions of “nature and quality” under which someone like Yates labored. There is also a very narrow version of “wrong” known as a “deific decree,” i.e., God’s voice tells the actor to commit murder. \textit{Compare State v. Cameron, 674 P.2d 650} (Wash. 1983) (reversing conviction where there was evidence that the defendant was following the instructions of God) \textit{with State v. Crenshaw, 659 P.2d 488} (Wash. 1983) (affirming conviction where deific decree instruction was not given because defendant claimed his religion, rather than God, caused him to commit murder).


\textsuperscript{62}I am relying on a number of sources in addition to the reported case, and primarily the rich article by Deborah W. Denno, \textit{supra} note 59.
states. She tried to commit suicide twice, once stopped by her husband when she had a knife pressed to her neck. Despite being warned not to have additional children for fear that her psychosis would return, she had a fifth child roughly eighteen months later. In such a state, and with clearly premeditated intentions, on June 20, 2001 Yates killed all five of her young children, one at a time, by holding their heads under water in the same family bathtub she had used to bathe them in the days and weeks and months that preceded her fatal crisis. She was still a supermom, seeking her children’s redemption, only now she was clearly a very sick supermom.

What had happened? Prior to this unspeakable event, Yates, a devout fundamentalist Christian, had followed her husband’s and their spiritual adviser’s counsel and had the fifth child despite these increasingly difficult bouts of depression and decomposition following the births of her other children, and despite the fact that she didn’t want to have more children and had been advised against it by her doctor. Sometime after the birth of the last child, she came to the bizarre conclusion that she was possessed by Satan and that she was causing her children irreparable and eternal damage; heaven was not attainable for them as long as she remained their mother. The delusion had embedded and she underwent multiple inpatient treatments and multiple regimens of anti-psychotic and anti-depressant medications. Guided by the grotesque logic of psychosis, which fit into a religious perspective in which Satan was, it seems safe to say, a feature of her moral psychology, she lost control of the “normal” motives that had theretofore informed her

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64 Denno, supra note 59, at 32.
reasoning. She decided that the only chance the children had of salvation, given her unfitness to
mother them, required her to kill them one by one, a task she completed despite considerable
struggle. The examining psychiatrist agreed with the state that at least in some moments, Yates
knew that it was legally wrong to murder her children; she did not deny the existence of
information that she once embraced. Those thoughts, however, were no match for her occurrent
delusions: she believed irresistibly that she had no choice as a good mother and Christian. She
found the outcome to which her psychosis had driven her: “She believed that if she did not act, her
children would burn in hell for all eternity.”

According to psychiatric testimony, Yates believed at times that she had to sacrifice her own life to save her children from damnation. After killing the children, she explained that “[s]he was afraid Satan would hear it and make it happen.”

Yates was initially deemed “sane” at her first trial; competency—the ability to effectuate a simple
syllogism—was deemed sufficient. Her conviction was reversed on appeal; the jury returned a
NGRI verdict on retrial.

65Resnick, supra note 61, at 152.

66Psychiatrist: Yates Believed She Had No Choice, USA TODAY (March 5, 2002),

67Melinda Ruley, Suffer the Children, INDY WEEK (March 27, 2002),
http://www.indyweek.com/indyweek/suffer-the-children/Content?oid=1186154 ; Ronn Blankenship,
Going to Hell: Yates’ Spiritual Adviser Vehemently Warned Followers About Satan (March 26, 2002),
http://www.mail-archive.com/brin-l@cornell.edu/msg17076.html. “[T]wo experts were divided on the
competency issue, both recognized authentic psychosis in Yates's condition.” Despite all of this, the jury
deemed Yates competent to stand trial. Katherine Ramsland, The Art of Forensic Psychology:
Competency Examinations, CRIMELIBRARY,

68Associated Press, Woman Not Guilty in Retrial in the Deaths of Her 5 Children, N.Y. TIMES (July
27, 2006), http://www.nytimes.com/2006/07/27/us/27yates.html?_r=0. Yates’ conviction was overturned
when it was discovered that Dr. Park Dietz, a forensic psychiatrist who testified for the state, had lied on the
witness stand. Associated Press, Andrea Yates’ Conviction Overturned (January 6, 2005),
http://www.foxnews.com/story/2005/01/06/andrea-yates-conviction-overturned/. Had the statements he
Neither M’Naghten nor Yates lacked cognition in any form required by the full *M’Naghten* rules: They knew they were preparing to kill another human being or beings; they knew the natures and qualities of the acts they respectively undertook; they knew their acts were legally and morally wrong, under any accepted descriptions; and they achieved their homicidal goals. As noted, Yates battled her attorneys’ recommendation for an insanity plea: She wanted to be punished for her wrongful acts. After receiving neuroleptic medications, Yates informed a state psychiatrist that Satan had invaded her and the only way to be rid of him was through her execution. “And she had to kill the children, as Satan demanded, to get the death penalty.” And, of course, like M’Naghten, she was fully psychologically (neurobiologically) committed to that belief. She, like M’Naghten who stalked his victim, knew what she was doing, deliberately killing her children, and she knew that it was wrong, and wrong from any perspective recognized

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69 There are commentators who have argued that if the term “wrong” is defined as “moral” wrong, then the courts and juries have some room to move from cognition to a category of wrongs that includes, for example, crazy commands from God. DRESSLER, *supra* note 9, at 376; GOLDSTEIN, *supra* note 60, at 51; CHRISTOPHER SLOBOGIN, MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY 26 (2006). This view does not comport with Texas law, as articulated by its courts. See note 72 infra.


III. Rationality, Insanity, and the Absence of Volition

To this point, it has been fair to assume that, but for the insanity defense, M’Naghten and Yates were guilty of first degree murder and, at least in theory, candidates for death by hanging or (today) lethal injection. In the majority of non-Model Penal Code jurisdictions, moreover, the inability to conform to criminal norms due to gross and verifiable psychopathology, which produced the unlawful act, provides no defense.73 Beginning with the triggering inquiry, the crucial questions in M’Naghten-driven jurisdictions all address cognition: Did she labor under a defect or disease of the mind at the time of the crime’s commission? If so, did she know that her acts were harmful, i.e., did she know the nature and quality of the acts she committed? And if she did know that her acts were harmful, did she know that they were wrong, legally and/or morally?74

72In Bigby v. State, the court wrote:

Several expert witnesses testified appellant knew his conduct was illegal, however, these experts contended that appellant did not know the act was "morally" wrong. In other words, appellant believed that regardless of society's views about this illegal act and his understanding it was illegal, under his "moral" code it was permissible. This focus upon appellant's morality is misplaced. The question of insanity should focus on whether a defendant understood the nature and quality of his action and whether it was an act he ought to do. By accepting and acknowledging his action was "illegal" by societal standards, he understood that others believed his conduct was "wrong."

892 S.W.2d 864, 878 (Tex. Crim. App. 1994) (internal citation omitted). After Yates was found NGRI in her second trial, one of the prosecutors spoke up, apparently understanding the limited nature of lack of knowledge as exculpatory. “I’m very disappointed,” prosecutor Kaylynn Williford said. “For five years, we’ve tried to seek justice for these children.” Associated Press, Jury: Yates Not Guilty by Reason of Insanity (July 26, 2006), http://www.nbcnews.com/id/14024728/. For the view that Yates may not have known she was committing a moral wrong, see Denno, supra note 59, at 42-48 (text accompanying notes 435-65).

73See Model Penal Code §2.09, cmt. 2, at 374 (requiring a showing that the psychopathology the actor suffers from is “gross and verifiable” to warrant an excuse from criminal liability).

74In the U.K., “wrong” tends to be confined to knowledge of legal wrongs; American courts are less clear. See, e.g., Dressler, supra note 9, at 376.
Yes, yes, and yes. This section begins with a very brief history of the insanity defense from the Model Penal Code to variations on M’Naghten, then turns to the commitment to rationality as the touchstone for an insanity defense.

A. The Return to M’Naghten

Some recognition that insanity changes the legal landscape goes back as far as the Iliad (XIX, 86-134) where King Agamemnon, reconciling with Achilles, seeks to absolve himself by referring to the work of Zeus and Fate, which “struck me mad” when he stole the prize from Achilles.75 In Anglo-American law, pre-M’Naghten rules moved from a “good and evil” test (circa 1313), to a “wild beast” test (circa 1724), and then to the “right and wrong test,” not fully articulated for the first time until M’Naghten.76 But the story for our purposes begins much later. For roughly twenty years beginning in the early 1960s, the majority of jurisdictions had adopted the American Law Institute Model Penal Code’s (MPC) definition of insanity:

A person is not responsible for criminal conduct if [1] at the time of such conduct [2] as a result of mental disease or defect [3] he lacks substantial capacity either [4] to appreciate the wrongfulness of his conduct or [5] to conform his conduct to the requirements of the law.77

Several salient points about the MPC standards highlight its breadth and its commitment to compassion in sentencing: first, “wrongfulness” is an open, fact-specific determination, leaving much to the jury; second, “substantial capacity” replaces the complete lack of knowledge, an absurd criterion, so presented; third, the requirement of knowledge gives way to “appreciation,”

75 ROBINSON, supra note 35, at 8.


77 Model Penal Code § 4.01 (1).
widening the scope for finding insanity; and, finally, a deficit in one’s ability to conform to expected conduct is added—a significant advance beyond M’Naghten. Although the MPC drafters acknowledged section 4.01’s M’Naghten pedigree, they found the old Anglo-American standard significantly wanting in two significant, jurisprudential regards: first, it authorized a finding of sanity and legal responsibility in cases where “the actor is not seriously deluded concerning his conduct or its consequences, but in which the actor’s appreciation of the wrongfulness of his conduct is largely detached or [an] abstract awareness that does not penetrate to the affective level.”78 Here one could fill in the name Andrea Yates. The second deficit was a “more pervasive” but related problem with the older standard: its tendency to disregard cases where the “mental disease or defect destroys or overrides the defendant’s power of self-control.”79 The MPC standard was designed to fill both of those gaps, a nod to new learning in the social and biological sciences.

The jurisprudential retreat from this new learning that held sway in a majority of the states—from a more treatment-oriented, forgiving MPC test to ever-narrowing variations on M’Naghten—is well-known. It followed the public outrage that arose when John Hinckley was acquitted following the shooting of President Reagan and members of his entourage in March 1981.80 It is difficult to think of a clearer example of instant legislative gratification (and/or a response to the fear of uneducated public reprisal) producing a morally bankrupt, thoughtless

78Model Penal Code § 4.01, cmt. 2, at 166.
79Id. at 167.
law.\textsuperscript{81} From one perspective, giving up on the volitional strand, in light of a stream of expert opinion expressing fear of the profession’s ability to distinguish “would not” from “could not,”\textsuperscript{82} dismissing the “appreciation” approach to wrongfulness, and, in many jurisdictions, adding a feel-good bar raiser from defect to “severe defect,” all reflect mostly a combination of get-out-the vote, “get tough” politics, and the exploitation of fear and ignorance.\textsuperscript{83}

As a practical procedural (but nonetheless strategic) matter, the insanity defense retains the firmest of grips on its original purpose in one context only: the death penalty. It could occupy a more useful space in our jurisprudence if we had genuine concern about the mental health of our loved ones. The Supreme Court’s decision in Jones v. United States, where a schizophrenic young man offered an uncontested plea of NGRI to a non-violent, petit larceny charge of stealing a

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\textsuperscript{81}See Matthew L. Biben, An Examination of Mental Condition Defenses, 7 CRIM. L. FORUM 679, 684 (1996) (describing the “furious federal and state legislative response” to the Hinckley acquittal).

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\textsuperscript{82}This is a curious place to question one’s own discipline, inasmuch as mental health professionals opine daily on future dangerousness, a conclusion that has the potential for putting individuals into treatment regimens for a long time. See, e.g., Kansas v. Crane, 534 U.S. 407 (2002) (upholding the state statute permitting involuntary civil commitment for “sexually violent predators”); see generally Paul H. Robinson, Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice, 114 HARV. L. REV. 1429, 1446 (2001) (noting that post-conviction preventive detention “not only punishes an offense for which the detainee has not yet been convicted, but also punishes an offense that he has not yet committed”).

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\textsuperscript{83} Robinson, supra note 82 (citing R.D. MACKAY, MENTAL CONDITION DEFENCES IN THE CRIMINAL LAW 130 (1995)) (noting the rise of preventive detention statutes for NGRI acquittees). The federal insanity statute, 18 U.S.C. § 17, now places the burden on the defendant to produce “clear and convincing evidence” that “at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.” On other feel-good measures, see generally Markus Dirk Dubber, Recidivist Statutes as Arational Punishment, 43 BUFF. L. REV. 689 (1995), who concludes that “three-strike” statutes were passed and remain on the books despite the absence of a logical nexus between the punishment and its purported legitimate purposes. See also David Kohn, Three Strikes (July 9, 2003), http://www.cbsnews.com/stories/2002/10/28/60II/main527248.shtml; Lockyer v. Andrade, 538 U.S. 63 (2003). A bare majority of the United States Supreme Court affirmed the sentence against an Eighth Amendment challenge of disproportionality in Lockyer. That the ultimate justification for “three strikes” legislation may be incapacitation, see Ewing v. California, 538 U.S. 11, 31 (2003) (Scalia, J., concurring), but that does not absolve the approach of its unambiguously vengeful, unmerciful, and immoral nature.
coat, created a presumption of ongoing dangerousness and insanity after the defendant was confined for the maximum period of incarceration that would result if the insanity plea were not successfully used;\(^8\) in effect, he can be held indefinitely.\(^5\) It is simply a myth that the insane actor who is duly acquitted is left free to roam the streets, wreaking havoc as he goes. Contrary to uniformly uninformed public opinion, most defendants who obtain a NGRI verdict never leave a secure environment.\(^6\) Thirty-two years later, John Hinckley remains in a secure psychiatric ward, save for periodic visits with his mother.\(^7\)

As a formal matter, the insanity defense in most jurisdictions remains wedded to a thin, ill-defined conception of rationality. Doubtless this continuing marriage has a facile epistemological basis: When M’Naghten said he had shot the Prime Minister because he, the

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\(^8\) Jones v. United States, 463 U.S. 354, 366 (1983) (“It comports with common sense to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need of treatment.”).


Prime Minister, was a constant source of torment, it was reasonable to believe that M’Naghten’s thoughts, if honestly held, lacked a rational basis. Similarly, when Yates told the police she had killed her children to protect them from Satan’s grasp on her and their future, it was reasonable to conclude that her beliefs, if she held them, lacked a basis in fact. But both were acquitted despite the presence of cognition. Why? Because lack of rationality is inadequate to explain insanity. What is at stake is easily articulated and within our grasp as a matter of overcoming jurisprudential inertia: it is simply our willingness to commit to helping those most in need, while preserving our safety in the best way and to the maximum extent practicable.

B. Rationality and Motivation—Knowing and Doing

(1) “Thin” Rationality

Most commentators rightly acknowledge that there is “no uncontroversial definition of rationality or of what kind and how much is required to demonstrate in various legal contexts,” and they accept that there are “thick” and “thin” understandings of rationality. Still, many apparently opt for a mostly “thin” definition because (a) the topic in general carries a great deal of baggage that gets in the way, and (b) “our legal system has a preference for maximizing liberty and autonomy.” Some thus favor requiring only minimal rationality—the practical syllogism—but would append to it the ability “to be sensitive and responsive to relevant changes


90Morse, Crazy Reasons, supra note 88, at 193 & 193 n.3. To be fair, in both articles cited Professor Morse is willing to entertain a “generic partial excusing condition” for those who lack a well-developed conscience and capacity for empathy. See, e.g., Morse, Rationality and Responsibility, supra note 89, at 264-66.

91Morse, Rationality and Responsibility, supra note 89, at 255.
in one’s situation and environment—that is, to be flexible.”

Others go straight down the minimalist line. For them, the ability to effectuate a practical syllogism is necessary and sufficient to confer rationality: “a logical nexus between an actor’s goal when she undertakes an action and her beliefs about how to achieve them.” Motivation—what triggers desire—is missing:

\[
\begin{align*}
\text{STATEMENT 1:} & \quad XD(q) \\
\text{STATEMENT 2:} & \quad XB(p \supset q) \\
\text{STATEMENT 3:} & \quad p
\end{align*}
\]

Here, \( XD(q) \) means that “\( X \) desires to obtain \( q \), money;” \( XB(p \supset q) \) means that “\( X \) believes that \( p \), going to work for a living, is the only available means of producing money;” and \( p \) means that “\( X \) acts, going to work for a living.” If we assume that \( p \) in Statements 2 and 3 have identical meanings, and that \( q \) in Statements 1 and 2 also have identical meanings, we have presupposed that \( X \) is a rational actor who will see these relationships in selecting the means to a desired end, where desire seems to control the action but where ability to control is disregarded in the traditional test for insanity. No further justification is required.

Some understand that “thicker” definitions of rationality exist, but rest with the simple means-end rationale:

All relevant senses of “rationality” center on the ideas of reason-giving explanations and practical reason. In the most basic sense of “rational,” to describe an \( act \) as rational is to say that the actor had a set of beliefs and desires the contents of which, taken together with an act description, form a valid practical

\(^{92}\)Morse, Crazy Reasons, supra note 88, at 197 (quoting Susan Wolf, Freedom Within Reason 69 (1990)). I would add that Professor Wolf also insists that if an agent is psychologically determined to engage in certain acts, he is not morally responsible. Susan Wolf, Asymmetrical Freedom, in MORAL RESPONSIBILITY (John Martin Fischer ed., 1986).

\(^{93}\)Adapted from Michael Moore, The Moral and Metaphysical Sources of Criminal Law, in NOMOS XXVII: CRIMINAL JUSTICE 18 (J. Roland Pennock and John W. Chapman eds., 1985).
syllogism; in this sense, to say of an actor that he is rational is to say that he by-and-large acts on valid practical syllogism.94

The author allows that intentions are caused, but suggests that “there is no reason why those intentional states may not themselves be explainable by non-intentional states. That remains to be seen.”95 If it remained to be seen nearly thirty years ago, we need not speculate any longer. The neuroscience supports the now undoubted notion that the “desires” he alludes to are an ineradicable part of any description of what it means to be rational or act rationally. His major concern in this context, however, is with the possibility of merging badness into sickness, which, he claims, “is destructive of the law’s idea that a person is a being who has passed some threshold of rationality such that he can fairly be ascribed responsibility.”96 So if there’s any doubt about rationality in a particular state, we ride with the presumption and put all of them in jail.

(2) Thicker Rationality.

Are we stuck, then, with a form of rationality that is exhausted with simple means-end capacity of the sort: Desire → Belief → Action, where desire is disconnected from the decision to act in a manner best described as insane? We cannot be stuck and for a number of reasons. At the most basic level, this definition barely distinguishes us, if at all, from lower primates. “Primary consciousness—the ability to generate a mental scene in which a large amount of diverse information is integrated for the purpose of directing present or immediate behavior [food or sex, for example]—occurs in animals with brain structures similar to ours.”97

94Id. at 19-20.
95Id. at 38.
96Id. at 42.
97Gerald M. Edelman and Giulio Tononi, A UNIVERSE OF CONSCIOUSNESS: HOW MATTER
The lioness knows where to look for her food, as does the chimp in the wild and Pavlov’s dog. When we begin to refine our customary and legal understanding of human intentionality, we necessarily drill into desire, that is, we move toward an appreciation of the presence of motivation as a necessary constituent of rationality. Nothing gets done without emotion (or by fruitless efforts to deny its role). Thus a fuller description of the architecture and content of rationality cannot be avoided if we are genuinely committed to the strongest justifications for our treatment and punishment practices.

The issues that many commentators elude are difficult ones that, in large measure, exceed the boundaries of this work. Nevertheless, they affect our reasoning and should at least be mentioned if we hope to provide the moral justification for a broader, more compassionate approach to insanity, and, by the way, to demonstrate the shortcomings of the M’Naghten regime. First is the failure to distinguish between knowing and doing; we tend to dwell on the former but punish only for the latter, and we do so frequently when hypo-normal, pernicious motivation exceeds the actor’s ability to conform his conduct to the law— that is, when the braking mechanisms in the prefrontal cortex (PFC) stop functioning fully. More about this momentarily.

Second, they completely abandon any Humean sense of the role of reason and do so for a hodgepodge of concerns that seem to lack internal consistency. Andrea Yates could have spent the years of her life preceding her crime with absolute moral certitude that her failures as a mother condemned her children to purgatory at best, that is, she had complete knowledge of the wrongfulness of her desires, and still forbore infanticide until the pain was overwhelming. As Antonio Damasio pointed out nearly twenty years ago, even with all one’s “reasoning processes”

in place, one can have defects in “emotional reactivity and feeling” that lead to making no choices or poor ones.\textsuperscript{98} The take-home point here is that emotions are \textit{not} a “supernumerary mental faculty”; they are an “unsolicited, nature-ordained accompaniment to rational thinking.”\textsuperscript{99} They are critical to, and an inseparable part of, any description of intentional action and its movement from \textit{Desire} to \textit{Belief} to \textit{Action}. Thus, some “[r]eduction in emotion[al strength] may constitute an equally important source of irrational behavior” that drives the traditional accounts that focus on organic defects in cognition.\textsuperscript{100} And because “emotions constitute one of the chief mechanisms whereby attention is constrained and directed,”\textsuperscript{101} if the emotional processes are distorted, unwanted intentions and actions can follow. The syllogism must begin with an analysis of \textit{desire}—how and why they arise, what pressures they exert---and then seek to understand how they push the process beyond desire to knowledge about methods and their deployment, and then to irrational \textit{doing}. Leaving affect or capacity to control out of the definition of insanity can no longer holds the reins in this light.

The defect in Andrea Yates’ and Daniel M’Naghten’s rationality was not in the failure to \textit{know}; they knew who, what, where, when, and how.\textsuperscript{102} It was in the \textit{doing} itself: the action was irrepressible. And “to label an event an action is to attribute to it a want set and a belief set as


\textsuperscript{99} Id. at 52.

\textsuperscript{100} Id at 53 (emphasis in the original).


\textsuperscript{102}“When” deserves special mention because there is evidence that Yates had planned to drown the children earlier than she did, and, of course, M’Naghten shot the wrong “who.” See Denno, \textit{supra} note 59, at 33; Resnick, \textit{supra} note 61, at 148.
determining factors,” where the “want set” describes the goal and the “belief set” describes the circumstances and likelihood of achieving the goal. To put the case succinctly, the want and belief sets together constitute the motives, which are always driven by (a species of) emotions. The reward centers, however distorted, are triggered. Emotions and feelings “are just as cognitive as other processes. They are the result of a most curious physiological arrangement that has turned the brain into the body’s captive audience.” And curiously, although we perceive diseases or injuries to the brain as tragic—think Phineas Gage—diseases of the mind, “especially those that affect conduct and emotional control (all of them?) are seen as social inconveniences for which the sufferers have much to answer. Individuals are to be blamed for their character flaws, defective emotional modulation, and so on; lack of willpower is supposed to be the primary problem.”

Opting for minimal instrumental rationality has become the default position that permits the omission of some difficult questions. As Nozick points out, deputing the practical syllogism as the default definition of rationality seems to be self-justifying, whereas anything that exceeds instrumentality seems to require an elaborate justification. The absence of a perceived need to justify instrumental rationalism eliminates the satisfaction of needs and desires in the most


104 DAMASIO, supra note 98, at xv.

105 See, e.g., Hanna Damasio et al., The Return of Phineas Gage: Clues about the Brain from the Skull of a Famous Patient, 264 SCIENCE 1102 (1994).

106 DAMASIO, supra note 98, at 40. On some of the mechanisms that exemplify that lack of willpower, see Blumoff, supra note 8.

efficient way as given. But even this “truth” is subject to infinite epistemological regress: Why do we want to achieve our desires most efficiently? Why the untempered desire to rush her children to heaven? There may be no non-circular way to justify even instrumental rationality. As Nozick explains, any extension of instrumental rationality may itself require an instrumental answer, although it is not clear that the resultant form of rationality is thereby instrumental: “If other modes of rationality cannot justify themselves without circularity, the same can be said of instrumental rationality.”

So what constitutes rationality? Although a complete answer to this important question would require its own paper, one thing is certain: it is not simply a matter of information retained, access to it, and instrumental action that could follow therefrom. Implicit in the entire process of passage from knowing to doing requires prioritizing: Why retain that information? Why apply it now? Where did the urge come from? Irrationality is the key to M’Naghten, but how does one get from irrational thoughts to action—to doing? The role of motivation—be it homeostatic, hedonic or anhedonic—and its dysfunction is key. How does one set priorities without the drive of affect? Yates moved from what for many people in the real world is a rational desire: (a) I want my children to go to heaven to → (b) a belief about how to get them there in light of her own perceived shortcomings to → (c) action now—I know how to do—and I must. If (a), (b), and (c) are all that count when the law defines insanity, motivations aside, then in truth the lawmakers have never left the wild beast conception of insanity. Now cannot be explained by a simple syllogism. Under the current non-MPC regimes, we do not need a defense for Andrea Yates: padded housing and sedative medications will no doubt be needed but no special defensive

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108 Id. at 134.
pleading is required. The spectacle will of madness do.

The default approach to rationality thus ignores precisely what the drafters of the MPC put in their spotlight: the inability to control. It is impossible to know what moved M’Naghten or Yates to their felonious behavior. To make that determination requires tracing an individual’s entire causal history, and among the problems one finds here is determining the historical starting point. Sometimes one has to go all the way back “to explain the prepropositional but intentional habits of salience, organization, and interpretation. It is these which, through later intervening beliefs and attitudes—many of them false and inappropriate—explain the conservation of emotions.”

There are at least three “interwoven” foundational characteristics in the causal history of emotions:

(1) the formative events in a person’s psychological past, the development of patterns of intentional focusing and salience, habits of thought and response; (2) the socially and culturally determined range of emotions and the characteristic behavioral and linguistic expressions; and (3) a person’s constitutional inheritance, the set of genetically fixed threshold sensitivities and patterns of response.

When elements of insanity are limited to some narrow range of cognition, the person who committed the crime and seeks an excuse is utterly lost. And we have individuals trained better than most to provide data about these features.

And there is irony here: Those who opt for a thin version of rationality implicitly adopt the language of a thick, Kantian version of practical reason. For example, Professor Moore explains the reasoning schema set out above as an instantiation of practical reasoning, pure means-end:

109 Amélie O. Rorty, Explaining Emotions, in EXPLAINING EMOTIONS, supra note 103.

110 Id. at 105. I have taken up this challenge in the context of seriously abused and neglected children. WHEN NATURE AND NURTURE COLLIDE--Error! Main Document Only. EARLY CHILDHOOD TRAUMA, ADULT CRIME, AND THE LIMITS OF CRIMINAL LAW (Carolina Academic Press, Winter in press).
“The conclusion of a practical syllogism is accordingly directed to action, as distinguishing theoretical reasoning.”¹¹¹ He elaborates: “The concepts of practical reason and of basic action partly define our commonsense view of persons: persons are rational and autonomous agents, agents who exercise causal powers for reasons.”¹¹² In a similar vein, Professor Morse describes the law’s conception of the person as a “practical reasoning, rule-following being, most of whose legally relevant movements must be understood in terms of beliefs, desires, and intentions.”¹¹³

Practical reasoning, however, cannot be confined to a simple syllogistic formula; it is a normative concept that stands beside theoretical reasoning and does include “beliefs, desires, and intention.” It’s not a simple means-end process. The practically reasoning agent asks (roughly) what should be done in these circumstances. It is a standpoint from which one can make judgments about behavior.¹¹⁴ Jay Wallace elaborates that practical reason typically asks, of a set of alternatives for action none of which has yet been performed, what one ought to do, or what it would be best to do. It is thus concerned not with matters of fact and their explanation [theoretical reason], but with matters of value, of what it would be desirable to do. In practical reasoning agents attempt to assess and weigh their reasons for action, the considerations that speak for and against alternative courses of action that are open to them.¹¹⁵

What is important here is the disconnect between the language used by those who favor a narrow

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¹¹¹Moore, supra note 93, at 18-19.

¹¹²Id. at 23.

¹¹³Morse, Crazy Reasons, supra note 88, at 191.

¹¹⁴On the varieties of ways in which this concept might be understood as an elaboration of Kant’s assumption of compatibility, see Dana K. Nelkin, Two Standpoints and the Belief in Freedom, 97 J. PHILOS. 564, 570-75 (2000) (distinguishing among “interests,” “justification,” and “function” criteria used by different standpoint theorists).

¹¹⁵R. Jay Wallace, Practical Reason, STAN. ENCYCLOPEDIA OF PHILOS. (last revised Nov. 6, 2008), http://plato.stanford.edu/entries/practical.reason/.
rationality approach to insanity and the capacities of actors such as M’Naghten and Yates when they act on their paranoid delusions: They absolutely lack the core of practical reasoning skills—the ability to weigh and assess appropriately—despite their knowledge, from a theoretical standpoint, of both the nature and quality of their acts and that their actions are wrongful under any legally and normatively acceptable description of wrongfulness. The can effectuate a simple syllogism, that’s for sure, but their affective apparatus is grossly and pathologically damaged and it is time for all jurisdiction that have either abolished the insanity defense or retains some M’Naghter variation to take facts in the inferences therefrom into account.

(3) Damages to Neurobiological Processes

When one’s frontal lobe is visibly damaged, behavioral changes are predictable and they are almost always for the worse.\textsuperscript{116} The saga of Phineas Gage makes this clear.\textsuperscript{117} It is, therefore, entirely “possible to know the difference between right and wrong but, for reasons of organic impairment, to not be able to do the right thing.”\textsuperscript{118} For example, a respectable forty-year-old Virginia man with a teaching job, a family, a twelve year old stepdaughter, and no criminal history suddenly became fixed on pornography and, more specifically, child pornography. The man knew his behavior was way out-of-bounds, but “in his words, the ‘pleasure principle’


\textsuperscript{117}Jessica R. Gurley and David K. Marcus, The Effects of Neuroimaging and Brain Injury on Insanity Defenses, 27 BEHAV. SCI. L. 85, 94 (2009) (“A modern[-]day Phineas Gage would be more likely to be found NGRI than a defendant who could not demonstrate obvious neurological damage.”); Henry T. Greely, Proving ‘Can’t Help Himself’ as a Narrow Bar to Criminal Liability, in 13 LAW AND NEUROSCIENCE: CURRENT LEGAL ISSUES 67 (Michael Freeman ed., 2011); Sapolsky, supra note 18, at 1794.

\textsuperscript{118}Gurley and Marcus, supra note 117, at 94. See Shelley Batts, Brain Lesions and Their Implications in Criminal Responsibility, 27 BEHAV. SCI. L. 261 (2009).
overrode his restraint.”119 Just before beginning a lengthy stay in a Virginia prison, he was taken to the hospital where a tumor was found pressing against his PFC. When it was removed, the inappropriate urges disappeared. (Seven months later, the tumor reappeared, as did the unacceptable behavior. When the tumor was again removed, the urges disappeared again.)

Few neurobiological maladies present as fully and clearly as did the Virginia man’s.120 Paranoid schizophrenia does not often leave an easily imaged calling card; it tends to present atypical behavior accompanied by fear-driven delusions from which its victims desperately seek escape, lest they are sucked into the disease forever.121 A good deal of research is ongoing that examines the relationship between known cortical and subcortical mechanisms associated with emotion and their relationship to areas associated with cognition.122 There is ample evidence of


120Greely, supra, note 117, at 70-73 (discussing the Virginia case and noting the many difficulties in individualized neuroscientific exculpatory proof).

121This is emphatically not to say that neuroscientists have found no imaging information that distinguishes schizophrenics from “normal” individuals. See, e.g., Joseph H. Callicott et al., Physiological Dysfunction of the Dorsolateral Prefrontal Cortex in Schizophrenia Revisited, 10 CEREB. CORTEX 1078 (2000); A.L. Guillozet-Bongaarts et al., Altered Gene Expression in the Dorsolateral Prefrontal Cortex of Individuals with Schizophrenia, MOLECULAR PSYCHIATRY (2013), http://www.nature.com/mp/journal/vaop/ncurrent/full/mp201330a.html; Daniel R. Weinberger et al., Physiologic Dysfunction of Dorsolateral Prefrontal Cortex in Schizophrenia: I. Regional Cerebral Blood Flow Evidence, 43 ARCH. GEN. PSYCHIATRY 114 (1986).

genetic connections to the disease, suggesting that we take it into account. In a recent research update, investigators opined that although there are a number of candidate genes that may be implicated in schizophrenia, several studies have found a significant association between chromosome 6p and schizophrenia. The point here is not that we are on the brink of a great breakthrough in our understanding of crushing abnormal psychopathology. If only! Rather, the point is simpler. It begins with the observation that all of social cognition, emotion, and behavior emanate from the brain.

If one accepts that the brain causes all mental states, and mental states do come to bear on criminal responsibility and the appropriate punishment, then an increased understanding of the biological nature of relevant mental states—any organic disruptions to the brain that might exist—would provide an increasingly precise and truthful account of a defendant’s capacity to knowingly and purposefully commit crime.

Thus, our ability to detect the existence of brain lesions and genetic abnormalities, regardless of origin, provides logically relevant evidence of a mental defect, which could increase the likelihood that the defendant actually committed a crime or could reduce his ability to control his behavior.

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125John T. Cacioppo et al., Just Because You’re Imaging the Brain Doesn’t Mean You Can Stop Using Your Head: A Primer and Set of First Principles, 85 J. PERSONALITY & SOC. PSYCHOL. 650, 650 (2003) (discussing the basics of imaging and summarizing the work of James Spencer and Gordon Allport that shifted the paradigm for thinking about the source of human behavior in many of its important aspects).

126Batts, supra note 118, at 164.
and exercise good moral judgment.\textsuperscript{127} The time may come when gross and verifiable abnormal psychopathology will be evident even without colorful CT scans or an MRI; clinical evaluation and genomic research may provide answers sufficiently clear to change our current approaches. There are many hurdles to traverse,\textsuperscript{128} especially with respect to schizophrenia.

But here is what we do know: The PFC is among the critical performance centers within our brains; it is also connected to the amygdala. The PFC houses our executive functioning,\textsuperscript{129} that is, it is the “seat of intellection, of cognitive functioning, of personality and identity, and of emotions and thought. . . . Virtually every functional part of the brain is directly interconnected to this cortex, which plays a fundamental role in internally guided behavior.” Put otherwise, the PFC guides actions “influenced by intentions, decisions, and plans that originate in the individual’s brain,” as opposed to some external source.\textsuperscript{130} The PFC is also connected to centers of motor control and, importantly, to the oldest part of our brain, the brain stem, which houses our “fight or flight” response to fear. Properly functioning, it acts to suppress the more atavistic tendencies of the brain stem--this “most fundamental component” of the brain, one that “deviates

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\item[\textsuperscript{127}]Id.
\item[\textsuperscript{128}]See Eyal Aharroni et al., \textit{Can Neurological Evidence Help Courts Assess Criminal Responsibility? Lessons from Law and Neuroscience}, 1124 ANN. N.Y. ACAD. SCI. 145 (2008) (pointing to some gaps in our knowledge that may be unknowable, at least with current technology); Nicole A. Vincent, \textit{Madness, Badness, and Neuro-imaging-Based Responsibility Assessments, in NEUROSCIENCE: CURRENT LEGAL ISSUES}, supra note 117, at 79.
\item[\textsuperscript{129}]For a highly readable summary of this point, see Oliver Sacks, \textit{Inside the Executive Brain}, THE NEW YORK REVIEW OF BOOKS (April 26, 2001), http://www.nybooks.com/articles/archives/2001/apr/26/inside-the-executive-brain/ (reviewing ELKHONON GOLDBERG, \textit{THE EXECUTIVE BRAIN: FRONTAL LOBES AND THE CIVILIZED MIND} (2001) (noting that the frontal lobes are the most recently evolved—and last to be celebrated as the most important—region of the human brain)).
\item[\textsuperscript{130}]LAURENCE TANCREDI, HARDWIRED BEHAVIOR: WHAT NEUROSCIENCE REVEALS ABOUT MORALITY 38 (2005); accord Sacks, supra note 129, at 46.
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relatively little in a vast range of species, from reptiles to humans.”¹³¹

The PFC is thus implicated in all behavior. In particular, it “sends large inhibitory projections into the limbic system, particularly the amygdala, a region heavily implicated in aggressive behavior.”¹³² A core function of PFC activation is anticipation of reward via interactions between the neurotransmitter dopamine and the PFC. These interactions can change in strength and can “take the form of an enhanced capacity to sustain dopamine release as the interval between the onset of a task and its reward increases. This would constitute the neural basis of an increasing capacity for self-discipline and gratification of postponement.”¹³³ The major hypothesis today among neuroscientists who study abnormal behavior “is that in psychopathological criminals the PFC-amygdala connections are disrupted, leading to deficits in contextual fear conditioning, regret, guilt, and affect regulation.”¹³⁴ It is a brute fact that the dorsolateral PFC is compromised by schizophrenia,¹³⁵ as are the patient’s reward systems.¹³⁶


¹³²Sapolsky, supra note 18, at 1791. The amygdala works with the anterior cingulate cortex (ACC), which is also “implicated in emotional self-control, conflict resolution, and error recognition.” The ACC appears to dampen strong emotions and rein in the amygdala when negative emotions arise. TANCREDI, supra note 130, at 36. There is some evidence that treatment may play some role in amygdalar dysfunction. Roberta Rasetti et al., Evidence That Altered Amygdala Activity in Schizophrenia Is Related to Clinical State and Not Genetic Risk, 166 AM. J. PSYCHIATRY 216 (2009).

¹³³Sapolsky, supra note 18, at 1791.


¹³⁵See, e.g., D.S. Manoach et al., Schizophrenic Subjects Activate Dorsolateral Prefrontal Cortex During a Working Memory Task, as Measured by fMRI, 45 BIOL PSYCHIATRY 1128 (1999); W.M. Perlstein et al., Relation of Prefrontal Cortex Dysfunction to Working Memory and Symptoms in Schizophrenia, 158 AM. J. PSYCHIATRY 1105 (2001) (concluding that behavioral performance in the dorsolateral prefrontal cortex dysfunction is associated with “deficits in more associative components of working memory”).

¹³⁶James M. Gold, Reward Processing in Schizophrenia: A Deficit in the Representation of Value,
IV. A More Rational Insanity Defense

A. Clearing Some Underbrush

I write this aware of a nascent movement to abolish the insanity defense or morph it into
the mens rea element. These movements should come to a halt. 

The Yates case is a classic example of why we need separate doctrines. 

Yates clearly met the culpability requirements inherent in both the mens rea doctrine, some level of intentional conduct (here, purpose), and the actus reus doctrine, a voluntary act, i.e., one unconstrained by any external force; nor was she defending herself or her children in any recognizable way, though she certainly thought she was.

Some stand-alone insanity defense is needed. And although there are a number of reasons (some specious) offered in favor of abolishing the insanity defense, most jurisdictions have wisely chosen not to do so. The reasons given are specious because the defense is so infrequently used, and even less frequently successful, that the fear it generates is completely unfounded. There is,

34 SCHIZO. BULL. 835 (2013) (finding, among other things, “that decision[-]making in patients appears to be compromised by deficits in the ability to fully represent the value of different choices and response options”); M.O. Nielsen, Alterations of the Brain Reward System in Antipsychotic Naïve Schizophrenia Patients, 71 B.I.O.L PSYCHIATRY 898 (2012).

Five western states have done so: Idaho, Kansas, Montana, Nevada and Utah. The Nevada Supreme Court, however, held that the statute abolishing the defense was an unconstitutional deprivation of due process under state and federal law. It is doubtful if the United States Supreme Court would agree after Clark v. Arizona, 548 U.S. 735 (2006) (stating that there is “no particular [M’Naghten] formulation [that] has evolved into a baseline for due process,” and (a) leaving the matter to the states and (b) leaving the constitutional question open).

As to morphing insanity into mens rea, the “integrationist” approach lumps insanity together with duress and self-defense, i.e., incapacities that affect voluntariness. See SLOBOGIN, supra note 69, esp. Ch 2. I will be critiquing the underlying moral psychology of this very narrow position in a subsequent work. See infra note 138.

therefore, no empirical support for the argument that the defense is abused, or that it undermines the deterrent effect of the law; Jones v. United States saw to that. Nor does the insanity defense demand that the law reconcile free will with determinism. Put simply, schizophrenics enjoy no free will if that phrase means “the capacity to choose a course of action based on one’s beliefs and desires, and freedom from external or internal constrains when making such a choice.” Nor should the insanity determination be made after a finding of guilt to determine what kind of treatment the now-adjudicated felon should suffer. This last argument simply misunderstands the nature of the criminal law: If an actor, laboring under gross and verifiable psychopathology, commits a crime, she is not blameworthy. And if, as was the case with both M’Naghten and Yates, the actor actually believes and is overwhelmed by crazy desires, they should not be imprisoned, though they must be constrained for some period.

We retain the M’Naghten defense as is, and ignore moral balance, by consigning someone like Andrea Yates to prison, when she is clearly beyond the reach of any retributive justification for punishment or the “restraining influence of the law” is cruel and unjust. Gone are the days of Bedlam, where iron chains, stocks and locks confined the insane like wild beasts; for two

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139See text accompanying notes, supra notes 84 and 85.

140DRESSLER, supra note 9, at 386-87; Model Penal Code §4.01, cmt. 6, at 182-83.

141Steve Guglielmo et al., At the Heart of Morality Lies Folk Psychology, 55 INQUIRY 449, 462 (2009).

142See Model Penal Code §4.01, cmt. 6, at 183-84.

143On the general skepticism about the insanity defense, see FLETHER, supra note 9, at 844-46 (1978).

144Model Penal Code §4.01, cmt. 2, at 166.
pennies one could enter the asylum and enjoy the show.\textsuperscript{145} We now have a strong presumption of sanity, which embraces the “principle of individual autonomy,” a concept that has both a factual and normative component. The factual component describes “‘individuals in general [as] having the capacity and sufficient free will to make meaningful choices.’”\textsuperscript{146} The normative component holds that “‘individuals should be respected and treated as agents capable of choosing their acts or omissions, and that without recognizing individuals as capable of independent agency they could hardly be recognized as moral persons.’”\textsuperscript{147} The former is inapplicable to paranoid schizophrenics; the latter is surely applicable but too often ignored.

To be held responsible for one’s actions as a moral agent requires a moral education that accompanies a certain kind of moral discipline. This includes learning the idea of individual agency (the self as a source of effect on the world), learning praise and blame, and learning what being “held” responsible means, that is, being a target sensitive to the values of praise or blame and the appropriate moral psychological stances that follow that social knowledge.\textsuperscript{148} This requires opportunity, repetitive efforts at teaching and learning moral indignation.\textsuperscript{149} It also requires

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\item\textsuperscript{145}Proceedings of the Seventeenth Annual Convention of the Association of Trustees, Superintendents and Matrons of County Asylums for Chronic Insane of Wisconsin17, Pt. 1918 (1919), http://books.google.com/books?id=neVGAAAMAAJ&pg=PA16&dq=treatment%20of%20insanity%20and%20hebrew%20scriptures&hl=en&sa=X&ei=3TENUoWHNYvq2wWs24HgBg&ved=0CDQQ6AEwAQ#v=onepage&q=treatment%20of%20insanity%20and%20hebrew%20scriptures&f=false.
\item\textsuperscript{146}Lisa Claydon, \textit{Mind the Gap: Problems of Mind, Body and Brain in the Criminal Law, in LAW, MIND, AND BRAIN}, supra note 2, at 55, 58 (quoting A. ASHWORTH, \textit{PRINCIPLES OF CRIMINAL LAW} 26 (5th ed. 2006)).
\item\textsuperscript{147}Id.
\item\textsuperscript{148}See, \textit{e.g.}, JOHN MARTIN FISCHER AND MARK RAVIZZA, \textit{RESPONSIBILITY AND CONTROL: A THEORY OF MORAL RESPONSIBILITY} 208-210 (1998).
\item\textsuperscript{149}Id. Of course Aristotle made this point millennia ago in his Nicomachean Ethics. \textit{See supra} note 138, at §§1104\textsuperscript{b}11-13.
\end{enumerate}
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capacity. Deficiencies in capacity alone can place significant obstacles to appropriate social behavior. Because of their paranoid psychotic states, Daniel M’Naghten and Andrea Yates lacked the capacity to engage in socially sanctioned conduct. The ordinary incidents of praise and blame—of a genuine agent’s moral psychology—are useless as barriers to their insane misconduct. It is true of both that, at the time of their crimes, “the mind is operating and the actions are willed, but this is ‘mad reasoning.’” George Fletcher is clearly correct when he notes that “[r] respect for autonomy and compassion for the weak are too important to our culture to be easily shaken by skeptics.”

B. Pretrial Dispositions of Insane Actors

Daniel M’Naghten and Andrea Yates were insane by any common sense understanding, from a spectator’s view of sanity, and their insanity produced multiple deaths. One suspects that the pain they bore was excruciating, but their victims did not have to die. In a different world and at a different time (for M’Naghten), they might have been involuntarily committed for inpatient psychiatric treatment. There is no reason today to use the criminal process when it is clear, as it was for many years with Yates, that psychiatric treatment and strict oversight were necessary. Instead, we warehouse psychologically damaged individuals in our prison system. More than half of all individuals in prison today suffer some form of psychological damage. Needless to

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151 FLETCHER, supra note 9, at 846.

152 She and her caretakers, such as they were, were cautioned not to leave her alone with her children. Many systems failed.

153 U.S.: Number of Mentally Ill in Prisons Quadrupled, HUMAN RIGHTS WATCH (Sept. 6, 2006),
say, prisons are not well equipped to handle mental illness. A brief look into Yates’ background, for example, would have revealed the following:

June 17, 1999 - Overdoses on Trazodone, a medication used to treat depression, and is admitted to Methodist Hospital psychiatric unit where she is diagnosed with a major depressive disorder.

July 21, 1999 - Admitted to Memorial Spring Shadows Glen for psychiatric treatment after she tries to kill herself with a knife. She is treated there as an inpatient and later an outpatient for two months and is prescribed Haldol.

Spring 2001 - She is admitted twice to Devereux Texas Treatment Network for treatment of her mental illness. She is prescribed strong anti-psychotic medications, including Haldol.

June 4, 2001 - Psychiatrist Mohammad Saeed discontinues Yates' prescription of Haldol.

June 20, 2001 - Andrea Yates drowns her five children, one by one, in the bathtub at their home in Clear Lake, Texas.

These were easily discoverable facts from a woman who never denied the killing. Rather, she told the police shortly after her arrest, “My children were not righteous. I let them stumble. They


were doomed to perish in the fires of hell."\textsuperscript{156} And she believed it. And all around her was failure to comprehend her circumstances.

As one author noted at the time of her initial trial in 2002:

No one should ever have to see photos or videos of dead babies . . . No one should have to see close-ups of their legs and faces as they all lay together on the bed they must have once cuddled on with their parents. No one should ever have to see a little boy lying face down in a bathtub full of cloudy water or that same boy lying face up next to the tub.\textsuperscript{157}

And yet, in Harris County, Texas, the prosecution sought the death penalty.\textsuperscript{158}

The point here is that there are crimes committed that are so clearly the product of mental disease or defect that they are unworthy of taking the time and expense of trial, which utterly disrespects the human being so afflicted. That they are tried must be an illustration of the worst forms of retribution: an unvarnished desire for revenge and its spectacle. The Yates case should never have gone to trial. When there are reasonable grounds to believe that an individual has committed a crime and that the individual did so under circumstances powerfully suggesting insanity, that individual should be moved to a secure hospital for evaluation by neutral medical personnel immediately and before charges are filed, if time permits.

If we come to terms with the phenomenology of paranoid schizophrenia and remain wedded to the reality of the patients’ lives, we remind ourselves that (1) these are real people, (2) in unbearable situations, and (3) in dire need of the best help we can give them. Above all else they


\textsuperscript{157}Id.

\textsuperscript{158}Since 1976, there have been nearly 2.5 times as many death penalty cases in Harris County than in the next closest county. \textit{Death Penalties by County}, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/executions-county.
who suffer from this disease seek any means necessary to be free from their painful torment. They deserve our respect and treatment even as we mourn for those who have died unnecessarily.

So M’Naghten and Yates were operating in a world where just following desire to belief to act is far too simple to account for human thinking in all of its complexities. And on this account there is no internal/external moral divide. For M’Naghten there is an external world in which what he did was, he believed, justified; for Yates, there is an external world in which what she did she deemed to be required of her as a mother. This is not lawlessness in other words—not some horrible Scalian fear about each person becoming a law unto himself159—but a move towards law, towards good, towards morality. What is wrong, of course, is that the worlds they imagined did not exist and this defect in perception (with all of perception’s multiple requirements) was readily attributable to an illness—in one case without much need to examine an entire life and in the other a more difficult determination but still one we could make as a matter of justice, or so I think.

V. Conclusion – Back to Section 4.01 (When Necessary)

Taking someone as obviously possessed as Andrea Yates to trial should have shocked the conscience of every member of the Harris County Prosecutor’s office. Instead, they lamented losing their guilty verdict. So in addition to the suggestion that the rest of the states return to MPC § 4.01, all jurisdictions should produce standing procedures to bypass the judicial process, at least upon initial arrest, for in-depth neuropsychiatric evaluation by a medical team not clearly identified with the state, at least when it is obviously necessary for reasonable people to determine insanity and, thus, find no blameworthiness, and this should be accomplished ASAP—before jail-dom sets in. If she is found to be as psychopathologically damaged as it appears she was to

almost any sentient being, and if this finding is agreed upon by a diagnosis committee composed of lawyers, doctors, and everyday people, then involuntary civil commitment should follow with mandatory, state-scheduled and state-financed hearings at given intervals post-commitment. As long as she is a threat, she remains in a secure hospital environment. If her condition improves with neuroleptic medications or otherwise, or if the health care professionals providing her care believe she can be relieved of neuroleptics because there is no reliable evidence of potential danger to herself or others, the court should have the authority to permit her to be treated as an outpatient subject and, if necessary, to directly observe therapy.

The paranoid schizophrenics I have dealt with closely had collapsed: they were deathly frightened individuals; they were in tremendous pain and utter disbelief both that this inhabitation was occurring to them, and that the rest of us were unable to acknowledge that the demons were actual physical beings. The insane deserve our tender mercies because they do not know how to—they cannot—control their own behavior, that is, their violent passions. We as homo sapiens have been more likely to give some break to those who violate sacred norms and do so due to lack of knowledge entirely—pure Aristotle—than to those whose emotions and delusions press for irrational and often harmful action. We have rested too much of the law’s great weight on the “knowing” side for reasons that exceed this paper but probably have something to do with the biblically-inspired elevation of reason. Nevertheless, we have always recognized certain types of insane persons, who we label variably, but who have two conditions conducive to madness: they

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160 My intuition suggests that this standard for relief from heavy anti-psychotic drugs may be a woman-friendly requirement inasmuch as they may satisfy the standard more often. That is probably true, but the genders are not now similarly situated with respect to danger to others. See, e.g., Martin Gottschalk and Lee Ellis, Evolutionary and Genetic Explanations of Violent Crime, in VIOLENT CRIME: CLINICAL AND SOCIAL IMPLICATIONS (Christopher J. Ferguson ed., 2010).
are paranoid and perceive unending conspiratorial delusions; their insanity is rarely a reflection of lack knowledge. They are in the grips of a monstrous illness that robs them of choice: they cannot do otherwise. The insanity defense is about them and the unending and frequently unendurable suffering they bear. It is for them. It exists because there but for the greatest kind of good moral luck go any one of us.