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A DEFENSE OF THE INTEGRATIONIST TEST AS A REPLACEMENT FOR THE SPECIAL DEFENSE OF INSANITY

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I. THE OVERBREADTH OF CURRENT TESTS	524
II. THE INTEGRATIONIST PROPOSAL	528
III. CRITICISM #1: NO POSITIVE THEORY	531
IV. CRITICISM #2: TOO NARROW	535
V. CRITICISM #3: TOO DIFFICULT AND BIZARRE	539
VI. CONCLUSION	542

In 2000, I published *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*,¹ which in a revised version became a chapter in my book, *Minding Justice*.² The principal argument advanced in the article and chapter is that the special excuse for people with mental disability known as the insanity defense should be reconsidered now that modern criminal law, in particular the Model Penal Code (MPC), has subjectivized affirmative defenses such as self-defense and duress for people who are not mentally ill.³ My claim is that these latter defenses capture the universe of people who should be excused due to mental illness. That position, if accepted, means that people with mental illness could be integrated into the culpability framework that applies to people who are not mentally ill and need no longer be handled through an independent excuse doctrine.⁴

Reaction to this “Integrationist Test” has been voluble. Some have found the idea attractive.⁵ Others have not. Richard Bonnie, one of the progenitors of

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1. Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199 (2000) [hereinafter Slobogin, AN END TO INSANITY].

2. CHRISTOPHER SLOBOGIN, *MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY* 23-61 (Harvard University Press 2006) [hereinafter SLOBOGIN, MINDING JUSTICE].

3. *See id.* at 51-58.

4. *See id.* at 60-61.

5. *See* Arnold Loewy, *The Two Faces of Insanity*, 42 TEX. TECH L. REV. 515 (2009) (arguing for a similar approach); Tom Lyons, *No Different Standard for Crimes of Delusion*, SARASOTA HERALD-TRIB., May 14, 2009, at BN1 (endorsing the integrationist approach).

the current federal insanity test, has called the Integrationist Test “arbitrary.”⁶ Stephen Morse and Morris Hoffman have said it is “neither more just nor more workable than a properly circumscribed defense of insanity.”⁷ Several others, including some of the professors featured in this Symposium book, have suggested the Integrationist Test fails to exculpate all of those who should be exculpated.⁸ I am gratified that so many people have seen fit to examine the proposal. This Article aims to defend it.

I. THE OVERBREADTH OF CURRENT TESTS

The defense of the Integrationist Test starts with a criticism of current tests for insanity, which come in three main variants: (1) inability-to-control, (2) inability-to-appreciate, and (3) irrationality.⁹ All of these tests, if applied honestly, excuse people “we” (meaning the vast majority of the populace) do not want to excuse. Because this argument was laid out in detail in the above-referenced works, it will only be briefly described here.¹⁰

The inability-to-control test, sometimes called the irresistible impulse test or the volitional prong of the insanity test, excuses people who, by reason of mental illness, lacked substantial capacity to conform their behavior to the requirements of the law at the time of the crime.¹¹ Honestly applied, this formulation excuses sex offenders with paraphilia (individuals who have extremely strong urges).¹² Yet virtually no one this side of John Gacy and Jeffrey Dahmer thinks these people should have an excuse.¹³ Also operating

6. Richard J. Bonnie, Why “Appreciation of Wrongfulness” Is the Morally Preferable Standard for the Insanity Defense, presentation at Conference on the Affirmative Defense of Insanity in Texas 59 (Feb. 7, 2003), available at www.txpsych.org.

7. Stephen J. Morse & Morris B. Hoffman, *The Uneasy Entente Between Legal Insanity and Mens Rea: Beyond Clark v. Arizona*, 97 J. CRIM. L. & CRIMINOLOGY 1071, 1131 (2007).

8. Michael Corrado, *The Case for a Purely Volitional Insanity Defense*, 42 TEX. TECH. L. REV. 483 (2009); Susan Rozelle, *Pure Insanity*, 42 TEX. TECH. L. REV. 543 (2009). Although Brian Shannon’s paper, which he described at the symposium, does not directly address the Integrationist Test, his endorsement of a volitional prong for the insanity defense suggests that he would oppose it. See Brian Shannon, *The Time is Right to Revise the Texas Insanity Defense*, 39 TEX. TECH. L. REV. 67, 83-88 (2006) (arguing for restoration of the volitional prong to the Texas insanity formulation); CRIMINAL LAW CONVERSATIONS 482-89 (Paul H. Robinson et al., eds., Oxford University Press 2009) (reactions to the Integrationist Test from Susan Rozelle, Sherry Colb, Paul Litton, and Matt Matravers.).

9. See Slobogin, *An End to Insanity* *supra* note 1, at 1208-22, 1237-39 (outlining the development of the three common tests for insanity).

10. See *id.* at 1237-46; SLOBOGIN, *MINDING JUSTICE* *supra* note 2, at 36-51. See also Christopher Slobogin, *The Integrationist Alternative to the Insanity Defense: Reflections on the Exculpatory Scope of Mental Illness in the Wake of the Andrea Yates Trial*, 30 AM. J. CRIM. L. 315, 318-32 (2004).

11. MODEL PENAL CODE (U.L.A.) § 4.01 (2001).

12. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 522-23 (4th ed. 2000) [hereinafter DSM-IV-TR] (describing the “essential” feature of a paraphilia, which includes pedophilia and sexual sadism, as “recurrent, intense sexually arousing fantasies, sexual urges or behaviors”).

13. Even Richard Bonnie, an advocate for a relatively broad insanity test, would not excuse offenders with “impulse disorders.” Richard Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 197 (1983). Sex offenders have typically been convicted despite strong evidence of impulsivity, as evidenced by

under very strong compulsions are the thousands of addicts who commit crime to feed their habits.¹⁴ Yet these individuals rarely receive mitigation, even at sentencing.¹⁵

Sometimes the inability-to-control argument takes the form of a but-for causation test.¹⁶ The argument goes something like this: But for a particular condition or event—a certain gene, an abnormal brain structure or chemical make-up, a bad upbringing, or the ingestion of a particular drug—the crime would not have occurred.¹⁷ The problem with this type of claim is that it logically leads to the end of the criminal justice system. All crime is caused in part by genetic, biological, and environmental factors and thus, under the but-for test, all crime would have to be excused.¹⁸ These factors should be legally irrelevant, unless they caused a legally cognizable impairment or help corroborate its existence.

Although the inability-to-appreciate test attempts to identify such an impairment, honestly applied it fares no better than the inability-to-control formulation. As typically expressed, this test excuses the actor if mental illness caused a “substantial” inability “to appreciate the criminality [wrongfulness]” of one’s criminal conduct.¹⁹ Yet the paradigmatic example of an offender who cannot emotionally appreciate the wrongfulness of his act is the psychopath, who is incapable of empathy and remorse.²⁰ Outside of philosophy departments,²¹ virtually no one is willing to excuse these individuals, who

the fact that sexual predator statutes, which require proof of “dangerousness” caused by a lack of control, are ordinarily applied to convicted offenders. See *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) (upholding preventive confinement of convicted sex offenders who have served their term if they “suffer from a volitional impairment rendering them dangerous beyond their control.”).

14. See Elaine M. Chiu, *The Challenge of Motive in the Criminal Law*, 8 BUFF. CRIM. L. REV. 653, 719 (2005) (“As numerous studies have concluded, the most common motive for criminal behavior is that criminal defendants are drug addicts.”).

15. For instance, the Federal Sentencing Guidelines prohibit a downward departure for addiction. See U.S. SENTENCING GUIDELINE MANUAL § 5H1.4 (2007). Despite the fact that the guidelines are no longer mandatory, federal courts continue to hold this stance, at least for mid-level and serious offenders. David M. Zlotnick, *The Future of Federal Sentencing Policy: Learning Lessons from Republican Judicial Appointees in the Guidelines Era*, 79 U. COLO. L. REV. 1, 64 (2008).

16. See *Durham v. United States*, 214 F.2d 862, 875 (D.C. Cir. 1954). The most explicit formulation is the so-called “product test” for insanity. *Id.*

17. See, e.g., *United States v. Alexander*, 471 F.2d 923, 959 (D.C. Cir. 1972) (Bazelon, J., suggesting that a “rotten social background” may serve as a defense); *State v. Pittman* 647 S.E.2d 144, 167-69 (S.C. 2005) (discussing the ingestion of Zoloft as a defense); *Turpin v. Mobley*, 502 S.E.2d 458, 463-65 (Ga. 1998) (discussing a defense based on abuse as a child and low serotonin levels); *People v. Yuki*, 372 N.Y.S.2d 313, 317-19 (1975) (discussing the presence of an extra Y chromosome as a defense).

18. See generally Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1592-93 (1994) (discussing determinism/universal causation as a control excuse).

19. See MODEL PENAL CODE (U.L.A.) § 4.01 (2001).

20. ROBERT D. HARE, *WITHOUT CONSCIENCE: THE DISTURBING WORLD OF THE PSYCHOPATHS AMONG US* 34, 44 (Pocket Books 1993). Some recent research indicates that these impairments may be due to deficits in the brain. See, e.g., JAMES BLAIR ET AL., *THE PSYCHOPATH: EMOTION AND THE BRAIN* 30 (Blackwell Publishing 2005).

21. Morse and Hoffman assert that “[v]irtually all philosophers who have addressed the issue argue that psychopaths are not morally responsible.” Morse & Hoffman, *supra* note 7, at 1126. As I will argue below,

occupy between 20-30% of the prison cells in this country²² and are often viewed as evil incarnate.²³ And psychopaths provide only the most conspicuous example of how the inability-to-appreciate test fails to capture common intuitions about blameworthiness. Countless other people can be said to have substantial inability to appreciate the consequences of their behavior, including those with mild mental retardation and offenders who act impulsively and therefore unthinkingly.²⁴ While some mitigation might be in order for such offenders, most people would not want to acquit them.²⁵

One might object that the inability-to-control and inability-to-appreciate tests are only meant to apply to those who are *seriously* mentally ill.²⁶ But, as the leading treatise on criminal law points out, no independent work is done by

moral responsibility and legal responsibility are not necessarily the same. *See infra* text accompanying notes 89-92. In any event, not all philosophers agree with the proposition that psychopaths should be excused. *See, e.g.,* Heidi Maibom, *The Mad, the Bad, and the Psychopath*, in *NEUROETHICS* 167, 168 (2008) (“The psychopath should not be excused under the insanity defense . . .”); Walter Glannon, *Moral Responsibility and the Psychopath*, in *NEUROETHICS*, *supra* note 21, at 159 (2008) (“The cognitive and affective impairment in psychopaths is enough to justify mitigated responsibility, but not excuse.”). Nor would many of the legal scholars who argue for a broad insanity defense agree that all psychopaths should be excused. *See, e.g.,* Bonnie, *supra* note 6, at 59; Corrado, *supra* note 8, at 507-08. The drafters of the Model Penal Code recognized that their formulation excused psychopaths, and thus added a paragraph specifically meant to exclude them from its scope. § 4.01(2).

22. Richard Rogers et al., *Prototypical Analysis of Antisocial Personality Disorder: A Study of Inmate Samples*, 27 *CRIM. JUST. BEHAV.* 234, 242-48 (2000) (finding that somewhat less than 30% of the sampled prison population meet criteria for psychopathy and over 50% of the population met criteria for antisocial personality disorder, a less impaired variant of psychopathy).

23. *See, e.g.,* Rachael Bell, *Ted Bundy*, www.trutv.com/library/crime/serial_killers/notorious/bundy/14.html (describing psychopath Ted Bundy as “evil reincarnate, a monster, the devil”). Juries routinely reject insanity defenses based on psychopathy. *See* David Greenberg & Alan R. Felthous, *The Insanity Defense and Psychopathic Disorders in the United States and Australia*, in *THE INTERNATIONAL HANDBOOK OF PSYCHOPATHIC DISORDERS AND THE LAW* 255 (Alan R. Felthous & Henning Sass, eds., John Wiley & Sons 2008); Marcus T. Boccaccini et al., *Describing, Diagnosing and Naming Psychopathy: How Do Youth Psychopath Labels Influence Jurors?* 26 *BEHAV. SCI. & L.* 487, 498 (2008). The Supreme Court has even implied that psychopaths who murder are the ideal candidates for execution. *Roper v. Simmons*, 543 U.S. 551, 573 (2005) (contrasting, for purposes of determining who deserves the most serious condemnation, “the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption,” and equating the latter with “antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others”).

24. *See* *State v. Companaro*, Union County Indictment No. 632079 (Sup. Ct. N.J. Crim. Div. 1981) (describing a defendant under tremendous stress as aware of right and wrong but unable to “consider” it); C. Benjamin Crisman & Rockne J. Chickinell, *The Mentally Retarded Offender in Omaha-Douglas County*, 8 *CREIGHTON L. REV.* 622, 646 (1975) (“Mildly retarded persons may be able to distinguish right from wrong in the abstract, but they have difficulty applying abstract concepts in specific actual settings and are unable to appreciate the wrongfulness of what they do.”).

25. In *Atkins v. Virginia*, the Supreme Court made clear that, while people with mental retardation must be exempted from the death penalty, they may not only be convicted, but sentenced to life in prison without parole. *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (The “deficiencies” of people with mental retardation “do not warrant an exemption from criminal sanctions”). In most states, people who act impulsively receive at most mitigation, not excuse, and then only in homicide cases. *See, e.g.,* MODEL PENAL CODE (U.L.A.) § 210.3(1)(b) (2001) (recognizing defense to murder for “extreme mental or emotional disturbance”).

26. *See, e.g.,* AMERICAN BAR ASSOCIATION, *CRIMINAL JUSTICE MENTAL HEALTH STANDARDS*, Std. 7-6.1(b) (requiring an impairment that “substantially affected the mental or emotional process of the defendant at the time of the alleged offense.”).

the mental disease or defect language in these formulations; given the wide array of disabilities that can fit under that predicate, the focus has been on the functional part of these tests.²⁷ That is why the irrationality formulation proposed by Michael Moore, Stephen Morse, and others has something to offer.²⁸ Although no jurisdiction has adopted it, this test is preferable because it more directly focuses on the precise type of mental disability that is excusing.²⁹

Unfortunately, the irrationality test also produces questionable results. As Morse would have it, irrationality excuses because it prevents people from grasping the right reasons for acting.³⁰ Thus, as he admits, the irrationality test, like the lack-of-appreciation test, would excuse not only people with schizophrenia who have fixed false beliefs, but also psychopaths, because psychopaths cannot grasp why they should care about hurting someone.³¹

Moreover, a test based on difficulty in grasping the right reasons for acting could well excuse the average Islamic fundamentalist, who cannot fathom why it is wrong to kill Americans simply because they are Americans. It will not suffice to argue that the fundamentalist can be distinguished from the person with severe mental illness by reference to the latter's brain defects or chemical imbalances. As Morse himself has argued (and as reiterated above), causative factors like these are irrelevant; what matters are the offender's desires and beliefs at the time of the act.³² Religious terrorists find it just as difficult to understand why their victims do not deserve to die as people with paranoia who erroneously believe their victim is threatening them.³³ Nor does the fact that religious fanatics might be persuaded that their beliefs are wrong distinguish them from mentally ill people whose delusions can be eliminated through medication; the only difference between the two is the type of intervention needed to effect change. Indeed, given the effectiveness of anti-

27. WAYNE R. LAFAVE, *CRIMINAL LAW* 377 (4th ed. 2003) ("It would seem that any mental abnormality, be it psychosis, neurosis, organic brain disorder, or congenital intellectual deficiency (low IQ or feeble-mindedness), will suffice if it has caused the consequences described in the second part of the test."); *id.* at 380 (even if psychopathy is not considered a mental illness for purposes of the insanity defense, "the 'disease of the mind' element of M'Naghten is not itself a unique limiting factor, as the psychopath likewise could not qualify under the lack-of-cognition requirement.").

28. See MICHAEL S. MOORE, *LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP* 100-08 (Cambridge University Press 1984); Stephen J. Morse, *Rationality and Responsibility*, 74 S. CAL. L. REV. 251, 252-58 (2000); see also Paul Litton, *Responsibility Status of the Psychopath: On Moral Reasoning and Rational Self-Governance*, 39 RUTGERS L.J. 349, 353 (2008) (explaining that the insane are exempt from obligations because they are irrational).

29. See SLOBOGIN, *MINDING JUSTICE*, *supra* note 2, at 46.

30. Stephen J. Morse, *Immaturity and Responsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15, 30 (1997). See also Morse, *supra* note 28, at 255 (defining rationality as "the ability to act for good reasons").

31. Morse, *supra* note 28, at 264 ("I believe that [psychopaths] are morally irrational and should be excused.").

32. See Morse, *supra* note 18, at 1595, 1653-54.

33. Terrorists are routinely described in terms of their "unshakeable" beliefs. See, e.g., Arie W. Kruglanski, *Inside the Terrorist Mind*, paper presented at the National Academy of Science, Apr. 29, 2002, www.hyd-masti.com/2008/09/inside-terrorist-mind-paper-by-arie-w.html ("One does not readily massacre innocents, or sacrifice one's own life unless one had an unshakeable belief in an ideology that legitimizes and requires this.").

psychotic medication and the adamancy of many religious believers, the latter group may well be more intransigent.³⁴

II. THE INTEGRATIONIST PROPOSAL

Mental illness can have an exculpatory effect. But because the various tests for insanity, applied literally, excuse people we clearly do not want to excuse, a different means of assessing the blameworthiness of offenders whose crimes are caused by mental disability would be preferable. I propose that we assess the culpability of such offenders under the same relatively subjectivized framework that the MPC applies to people who are not mentally ill. In other words, I propose the elimination of the special defense of insanity and the integration of defenses for people with mental illness into the other standard defenses. Below is a sketch of how this proposal would work. Subsequent sections explain its rationale.

In a break with tradition, the MPC requires that criminal liability be evaluated in terms of the defendant's actual knowledge and belief, not a reasonable person's knowledge and belief.³⁵ I argue below that this subjective focus holds true even when liability is based on negligence, given the way the MPC defines that term.³⁶ For now, however, put aside negligence crimes and consider how the MPC's subjective approach to all other crimes would affect offenders with mental illness.

First, note that all of the MPC's defensive force formulations—§§ 3.02 through 3.08—provide that use of force is excused if the actor believes justifying circumstances, such as an imminent threat to one's life or property, exist.³⁷ Applying this idea to an offender with mental illness, consider Daniel M'Naghten, the person with paranoid schizophrenia whose case led to the most famous insanity test.³⁸ M'Naghten shot at Prime Minister Robert Peel (killing his secretary instead) apparently believing that Peel had ordered his minions to assassinate him and after complaining to the police about the situation to no avail.³⁹ M'Naghten was obviously mistaken in his beliefs, but had they been true, those beliefs arguably provided a justification for his act.

34. On the efficacy of medication in treating serious mental disorder, see Douglas Mossman, 'Unbuckling the Chemical Straitjacket': *The Legal Significance of Recent Advances in the Pharmacological Treatment of Psychosis*, 39 SAN DIEGO L. REV. 1033, 1062-81 (2002).

35. See MODEL PENAL CODE § 2.02, cmt. 2 (1985) ("It was believed to be unjust to measure liability for serious criminal offenses on the basis of what the defendant should have believed or what most people would have intended.").

36. See *id.* § 2.02(d).

37. See, e.g., MODEL PENAL CODE (U.L.A.) § 3.02(1) (2001) ("Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that . . . the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged . . .").

38. See THOMAS MAEDER, CRIME AND MADNESS: THE ORIGIN AND EVOLUTION OF THE INSANITY DEFENSE 23-27 (Harper & Row 1985).

39. *Id.* at 24-25.

Section 2.09, the MPC's duress provision, provides a defense when a crime is a response to coercion that a person of reasonable firmness, in the actor's situation, would be unable to resist.⁴⁰ Despite the reasonableness language, the commentary to this provision makes clear that it is to apply "when an actor mistakenly *believes* that a threat to use unlawful force [against him] has been made."⁴¹ A case involving mental illness in which this defense might have been relevant is that of James Hadfield, who in the eighteenth century allegedly believed that God would end the world—and Hadfield—if he did not shoot the King (like M'Naghten and John Hinckley, he missed his target).⁴²

Finally, § 2.02 defines *mens rea* subjectively, meaning, for instance, that even if a reasonable person would know he or she is shooting a living person, an honest belief that the person one shoots is dead is an excuse to murder.⁴³ A possible example of a person with mental illness who might have had a *mens rea* defense under this formulation is Eric Clark, the defendant whose case went to the Supreme Court two terms ago.⁴⁴ If, as Clark alleged, he believed he was shooting an alien rather than a person, he did not have the *mens rea* for murder or reckless homicide.⁴⁵

Now assume that the charge in the *M'Naghten*, *Hadfield*, and *Clark* cases had been negligent homicide.⁴⁶ Homicide is one of the few MPC crimes for which negligence can lead to conviction, and negligence is usually based on assumptions about the mindset of the reasonable person, who presumably is never mentally ill.⁴⁷ Note, however, how § 2.02 defines negligence:

A person acts negligently . . . when he should be aware of a substantial and unjustifiable risk . . . [which] must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct *and the circumstances known to him*, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.⁴⁸

40. MODEL PENAL CODE (U.L.A.) § 2.09(1) (2001).

41. MODEL PENAL CODE § 2.09 cmt. 3 (1985) (emphasis added).

42. Richard Moran, *The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield* (1800), 19 LAW & SOC'Y REV. 487, 504-05 (1985) (describing defense attorney's argument that Hadfield shot at the King not to kill him but as a way of ending his own life, which he wanted to do because "[h]e thought that the world would end soon, and that like Jesus Christ he was to sacrifice his life for the salvation of others"). The *Hadfield* case is probably better analyzed, however, under MPC § 3.02, the Code's "general necessity" defense, which the Code's commentaries indicate would excuse the intentional killing of one person in order to save the lives of two or more persons. MODEL PENAL CODE § 3.02 cmt. 1 (1985).

43. See MODEL PENAL CODE (U.L.A.) § 2.02 (2001).

44. See *Clark v. Arizona*, 548 U.S. 735 (2006).

45. See *id.* at 745.

46. See MODEL PENAL CODE (U.L.A.) § 210.4 (2001).

47. See *id.* Simple assault and statutory rape are the only other two major crimes for which negligence can lead to criminal liability under the MPC. See *id.* §§ 211.1(1), 213.6(1).

48. § 2.02(2)(d) (emphasis added).

Even assuming a reasonable person would not be mentally ill and thus that mental illness should not be considered part of “the actor’s situation,” the “circumstances known” to the actor are supposed to define when the act is reasonable. The circumstances known to M’Naghten, Hadfield, and Clark involved, respectively, being stalked by government agents, the apocalypse, and threats from aliens; given those circumstances, a plausible (albeit bizarre) argument can be made that their actions were not a gross deviation from the standard of care.⁴⁹ In effect, § 2.02’s language can be said to fold a negligence analysis into an inquiry about whether the person’s beliefs, if true, would amount to justification, which is the same inquiry mandated under the other defensive force provisions.⁵⁰

These are the grounds for exculpation under the Integrationist Test.⁵¹ But they are all limited by two other sections of the MPC that place limitations on justification and duress. First, as § 3.09(1) makes clear, a defendant cannot succeed if his claim is a mistake about the criminal law rather than the facts.⁵² Thus, just as a non-mentally ill person from a foreign country would not be excused even if he honestly believed the law permits him to avenge adultery with homicide, an offender (such as a client I once had) whose mental retardation leads him to believe it is legal to kill in response to a taunt would not have a defense under the integrationist approach. Second, even if one of the three grounds described above is met, all the defensive force provisions provide that if a defendant causes the conditions of his excuse by, for instance, putting himself in danger, then the defense is not available.⁵³ The prosecution

49. Clark also alleged that he thought aliens were trying to kill him. *Clark*, 548 U.S. at 745.

50. Under this interpretation, people who would ordinarily be excused under the involuntary act doctrine could also be excused on lack of *mens rea* grounds. See MODEL PENAL CODE (U.L.A.) § 2.01 (2001). People who harm another as a result of a seizure or while sleepwalking are not only not in control of their bodies but are non-negligent in causing harm (unless, as indicated below, they know the danger posed by their condition and fail to avoid the dangerous situation). See *infra* text accompanying notes 52-53.

51. Originally, I also proposed an excuse based on ignorance of the concept of good and evil, which was meant to apply to individuals who are so impaired due to mental disability that, like two year-olds, they do not fathom the basic legal framework, much less its application in a specific context. See SLOBOGIN, MINDING JUSTICE, *supra* note 2, at 54-55. Morse and Hoffman argue that this component of the test would excuse psychopaths, who Morse and Hoffman claim cannot grasp the concept of good and evil. Morse & Hoffman, *supra* note 7, at 1126. There is a significant difference between infants and psychopaths, the latter of whom at least know *we* think that what they do is wrong. See *infra* text accompanying notes 89-92. Rather than enter this debate about epistemology, however, I am not advancing this particular aspect of the original proposal here for two reasons: (1) the MPC does not recognize such an excuse (and thus this component is not technically integrationist); and (2) the other components of the test, particularly the lack of *mens rea* component, will cover the offenders whom I think should be excused on this ground. See MODEL PENAL CODE (U.L.A.) § 2 (2001). The latter assertion is only likely to be wrong, if ever, in connection with crime committed by extremely young offenders, whom I believe should be handled through an entirely separate system in any event. Christopher Slobogin & Mark Fondacaro, *Juvenile Justice: The Fourth Option*, 95 IOWA L. REV. (forthcoming 2009).

52. MODEL PENAL CODE (U.L.A.) §§ 3.09(1), 2.09.

53. See, e.g., § 3.02(2) (“When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.”); see also § 2.09(2) (discussing the defense of duress in those

made this kind of argument in the Andrea Yates case, where evidence was introduced that Yates intentionally stopped taking her medication and thus caused her insanity at the time she drowned her five children.⁵⁴ To deprive mentally ill offenders of a defense on this ground, however, the prosecution would have to show either that they were aware or that they should have been aware of a substantial risk that discontinuation of treatment would lead to violence.⁵⁵

* * *

Now that the basic structure of the integrationist approach has been laid out, the various criticisms of it can be examined. These criticisms can be organized under three general categories: (1) the test is under-theorized; (2) it fails to exculpate offenders who clearly should be excused; and (3) it suffers from implementation difficulties. Each of these general criticisms comes in several guises.

III. CRITICISM #1: NO POSITIVE THEORY

The first lack-of-theory criticism comes from Stephen Morse and Morris Hoffman, who state that I fail to “provide an argument for thoroughgoing subjectivization of the criteria for justification and negligence,” which is the position that underlies the integrationist approach.⁵⁶ This criticism has both a descriptive and a prescriptive component. First, Morse and Hoffman note that under traditional legal theory offenders are not excused for mistakes that are unreasonable—which, as pointed out above, is usually true of mistakes by people with mental illness—and further argue that even under the MPC’s subjectivized approach to criminal liability people with mental disability should not be excused for negligence crimes; doing so, they say, would be “incoherent” because a “reasonable abnormal person is simply not reasonable.”⁵⁷ Second, Morse and Hoffman contend that exonerating “a culpably careless wrongdoer the same as a deluded wrongdoer makes a mockery of the moral differences between them.”⁵⁸

instances when the actor is negligent or reckless); *id.* § 3.09(2) (discussing negligently or recklessly held beliefs as related to the justified use of force).

54. According to the prosecution’s expert in the first trial, Yates intentionally failed to take her medication, despite knowing that failing to do so made her very irritable with her children. Timothy Roche, *Andrea Yates: More to the Story*, TIME, Mar. 18, 2002, available at <http://www.time.com/time/nation/article/0,8599,218445-2,00.html>.

55. More specifically, under the integrationist approach Yates would be guilty of murder only if she was practically certain or indifferent to the fact that going off her meds would lead to violence (not just to irritability, as the prosecution alleged). *Cf.* MODEL PENAL CODE (U.L.A.) § 210.2 (2001) (requiring at least extreme indifference to the value of human life for a murder conviction). She would only be guilty of negligent homicide if she should have been aware of this consequence. *See id.* § 210.4.

56. Morse & Hoffman, *supra* note 7, at 1128.

57. *Id.* at 1127-28. *See also* Paul Litton, *Against Integrationism*, in CRIMINAL LAW CONVERSATIONS, *supra* note 8, at 486, 486 (Paul H. Robinson et al., eds., Oxford University Press 2009).

58. Morse & Hoffman, *supra* note 7, at 1128.

Let us take these two sets of complaints one at a time. Although Morse and Hoffman are right that the common law does not excuse unreasonable mistakes, they are too quick to reach the same conclusion about the MPC's approach to negligence. As indicated above, that approach appears to rest the negligence analysis on the circumstances known to the actor.⁵⁹ Such an interpretation of the MPC is not "incoherent." If mental illness were considered part of the actor's "situation," thus allowing complete individuation of the legal inquiry into whether an offender with mental problems acted reasonably, the MPC's language would, as Morse and Hoffman assert, be rendered meaningless as a negligence standard. But a standard that requires the actor to act reasonably, given what he knows, can still be called a reasonable person standard.

Morse and Hoffman's second complaint is that excusing people with mental illness based on such a standard, rather than on one that focuses forthrightly on irrationality, makes a "mockery" of the differences between these wrongdoers and simply careless ones.⁶⁰ They contend that offenders with serious mental illness are "incapable of getting the facts right," whereas careless offenders "have the capacity to pay attention and to be as careful as we expect them to be," but do not exercise that capacity.⁶¹ I agree that many offenders with mental illness do not discern any possibility that their view of the world is wrong. But it is not clear that the people whom Morse and Hoffman call careless are, at the time of their offense, any more "capable" of discerning that possibility. Based on this concern as well as others, a number of scholars have rejected objectively defined negligence as a basis of criminal liability.⁶² These scholars continue to defend the position that Glanville Williams and Jerome Hall took years ago: culpability determinations should not be based on what a reasonable person would know or believe, but instead should be based on what the defendant actually knew or believed.⁶³ Morse and Hoffman are free to reject these contentions, but they are wrong to suggest the contentions are not plausible (or that I have not made them, since I cross-referenced these arguments in my earlier work).⁶⁴

Admittedly, in a jurisdiction that does not take the MPC's approach to the affirmative defenses or define negligence in the manner described above, the approach advocated in this article could no longer accurately be called

59. See *supra* Part II.

60. Morse & Hoffman, *supra* note 7, at 1128.

61. *Id.* at 1128-29.

62. See, e.g., Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931, 932, 950 (2000) ("Although one who is negligent on a particular occasion may in fact be one who would act recklessly when given the opportunity, only when he does act recklessly can we deem him to have acted culpably . . . Even if inadvertence to risk is sometimes the product of a culpable act, it is still not culpable. It is merely the nonculpable product of some prior culpable act."); Stephen Garvey, *When Should a Mistake of Fact Excuse?*, 42 TEX. TECH L. REV. 359, 359 (2009).

63. GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 32-34, 123 (2d ed. 1961); see Jerome Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 COLUM. L. REV. 632 (1963).

64. SLOBOGIN, MINDING JUSTICE, *supra* note 2, at 35.

“integrationist.” A “special defense” for offenders with mental illness would still be needed, albeit one that focuses solely on whether, at the time of the crime, they lacked subjectified *mens rea* or believed they were confronted by circumstances that would be justifying or coercive if true. In this technical sense, Morse and Hoffman are correct that integrationism has a shaky foothold.⁶⁵

A deeper challenge to the rationale for the Integrationist Test is that it is not based on a comprehensive view of human accountability. Morse and Hoffman assert that I do not “embed [my] critique in a concept of the person or a jurisprudence of responsibility”⁶⁶ Susan Rozelle avers that the Integrationist Test merely “explains who should be excused, not why.”⁶⁷ Paul Litton states that I provide no “account of responsibility’s basis.”⁶⁸ Matt Matravers suggests that, without looking at Kantian, Humean, Aristotelian, and other philosophical theories, we cannot determine who should be excused.⁶⁹ Litton and Matravers add that I rely too heavily on intuitions about community views concerning pedophiles, psychopaths, and the like; although they concede that such intuitions are relevant to the analysis, they believe that I make them dispositive.⁷⁰

These writers are correct that my earlier work did not set out a theory of personhood. Their suggestion that I should have said more in that work about my first premises is also well taken. But meeting their concerns does not require a particularly elaborate theoretical account, as I will now demonstrate.

All of these scholars conclude, in effect, that the integrationist approach is under-theorized because it fails to grapple sufficiently with the issue of when a person lacks “capacity.”⁷¹ I have never used the capacity terminology that is popular among scholars who write about the insanity defense because, as I develop later in this paper, the concept is so protean. The most direct response

65. A similar criticism made by Morse and Hoffman is harder to fathom. They contend that my recognition, in other work, of a broad defense for mental disability at sentencing (one that they liken to diminished rationality) is “fundamentally” inconsistent with the integrationist approach, because the latter is not based on irrationality. Morse & Hoffman, *supra* note 7, at 1131. This characterization of my approach is misleading. See SLOBOGIN, *MINDING JUSTICE*, *supra* note 2, at 82. But even assuming it is correct, their complaint doesn’t compute. My proposal for people with mental disability is identical to the approach the MPC adopts for people who are not mentally ill, to wit, a recognition of subjective *mens rea*, justification, and duress defenses at trial and a wide range of mitigation at sentencing, including “substantial grounds tending to excuse or justify the defendant’s criminal conduct, though failing to establish a defense.” See MODEL PENAL CODE § 7.01(2)(d). If the MPC’s approach to trial and sentencing is consistent, so is mine.

66. *Id.* at 1125.

67. Susan Rozelle, *No Excuse for You*, in *CRIMINAL LAW CONVERSATIONS*, *supra* note 8, at 482.

68. Litton, *supra* note 57, at 486.

69. Matt Matravers, *Justifying Defenses*, in *CRIMINAL LAW CONVERSATIONS* 489 (Paul H. Robinson et al., eds., Oxford University Press 2009).

70. Litton, *supra* note 57, at 487 (“Widespread intuitions about particular cases are important to theorizing and evaluating proposed standards, but especially when controversial, they neither control unconditionally nor necessarily trump our general commitments.”); Matravers, *supra* note 69, at 488 (“[W]ere we only to test our theories against our convictions, and always favor the latter, we would diminish the possibilities offered by philosophical reflection.”).

71. See, e.g., Litton, *supra* note 57, at 486-87.

to these types of criticisms, however, is that people who intentionally commit crime in the absence of beliefs that sound in justification or duress have whatever capacity the law demands. In suggesting otherwise, Morse and Hoffman state that “[w]e do not expect other animals to understand the reason for a rule or the deterrent value of punishment because other animals are not capable of the same degree of rationality as *homo sapiens*. There are no chimp legislatures or avian police.”⁷² But people with mental illness are very different from monkeys and birds; as Morse and Hoffman themselves state earlier in the same article, “mental disorder seldom disables a person’s moral compass. The person may be making a ‘moral mistake’ because his or her perceptions and beliefs are distorted by disorder, but the moral sense generally remains intact.”⁷³ If that is true,⁷⁴ no further justification is needed for focusing the criminal responsibility determination solely on the person’s perceptions and beliefs. The key issue should be whether the person, mentally ill or not, perceived reality in a way that renders his acts culpable, as defined by the moral compass we all share. That is precisely the determination the Integrationist Test demands.

From there, the theoretical justification for integrationism is straightforward. Looking, as it should, at the desires and beliefs of the offender at the time of the offense, the Integrationist Test evaluates people who are mentally ill in terms of the traditional purposes of punishment. People who kill because they think that otherwise they will be killed, that the world will end, or that an alien life form will accost them—which arguably describes M’Naghten, Hadfield, and Clark—are neither culpable nor deterrable, and should be excused even if their beliefs are unreasonable. In contrast, the case for excusing people, mentally ill or not, who intentionally offend in the absence of beliefs that sound in justification or duress is much weaker, from both a retributive and a deterrence perspective.⁷⁵ Although it should be clear from the foregoing that I agree with Litton and Matravers that “folk wisdom” should not be dispositive of criminal law issues,⁷⁶ it is also worth noting that the little research that exists on the topic indicates that the integrationist approach is

72. Morse & Hoffman, *supra* note 7, at 1117.

73. *Id.*

74. I think it is, even with respect to psychopaths. See *infra* text accompanying notes 89-92. Note that if a person does lack this moral sense, the Integrationist Test would not excuse because it would result in a mistake of criminal law. See *supra* text accompanying note 52. But in these extremely rare cases the mental impairment is probably so severe that *mens rea* will be lacking as well. See *supra* note 51.

75. Cf. Janine Young Kim, *Rule and Exception in Criminal Law (Or Are Criminal Defenses Necessary?)*, 84 TUL. L. REV. 247, 285 (arguing that “because the dominant and consistent theme of the law of offenses is harm, not culpability,” the criminal law could legitimately jettison the insanity defense but not the justification defenses).

76. See Christopher Slobogin, *Is Justice Just Us? Using Social Science to Inform Substantive Criminal Law*, 87 J. CRIM. L. & CRIMINOLOGY 315, 323 (1996) (“Beyond establishing the fundamental issues upon which virtually everyone agrees (e.g., that unjustified homicide should be a crime), lay opinions about the content of the criminal code are of questionable value.”).

better at capturing lay views about when mental illness should excuse than any of the other tests currently in use.⁷⁷

IV. CRITICISM #2: TOO NARROW

The next set of complaints about the Integrationist Test is that, even if it does have a plausible theoretical underpinning, it does not capture the proper scope of an excuse based on mental disability. A number of commentators have argued that the Integrationist Test fails because some people who commit crime intentionally and whose mistaken beliefs are not justificatory nonetheless clearly deserve to be exculpated.⁷⁸ This claim that the Integrationist Test is too narrow comes in three distinct forms.

The biggest broadside comes from commentators like Warren Brookbanks, who contends that regardless of their precise motivations for committing crime, “patently mentally impaired persons [should not be required] to bear the full weight of legal sanctions.”⁷⁹ The problem with this argument is that the insanity defense is an incredibly inefficient mechanism for assuring treatment for people with mental illness. Today, there are well over half a million offenders who have experienced serious mental problems.⁸⁰ The insanity defense cannot and should not be the vehicle for getting them the treatment they need. A narrow defense for people with mental illness is not inhumane; what is inhumane is failing to give these people treatment, whether they end up in the mental health or the correctional system.

Putting the treatment concern aside as a red herring, the focus can turn to whether the Integrationist Test captures all of those mentally ill people who should be excused due to a lack of blameworthiness. Richard Bonnie believes the answer is no. He believes, instead, that the focus of an excuse based on mental illness should be on the “intensity of the psychotic experience,”⁸¹ meaning the degree to which psychosis detaches the individual from reality.

77. See Norman J. Finkel & Christopher Slobogin, *Insanity, Justification, and Culpability Toward a Unifying Schema*, 19 LAW & HUM. BEHAV. 447, 457, 460 (1995). Tables 1 and 3 in this study can be used to compare laypersons' views on seven cases under a “No Instruction” condition, the two-prong ALI test, the federal insanity test (which is the current test most like the irrationality standard), and the Integrationist Test. *Id.* This comparison reveals that, in four of the seven cases, the latter test came closest to reaching the same results as the no instruction condition, while the ALI test came closest in two of the cases, and the federal test closest in the final case. *Id.* The Integrationist Test was second closest to the no instruction condition in two of the latter three cases and a close third in the third case. *Id.*

78. See *supra* notes 6-8 and accompanying text.

79. Warren Brookbanks, *Minding Justice: Laws that Deprive People with Mental Disability of Life and Liberty*, 11 NEW CRIM. L. REV. 172, 174 (2008).

80. According to a 1998 report from the federal government, 283,830 inmates in prison or jail reported previous treatment for mental or emotional problems, an overnight stay in a mental hospital, or both, and 547,800 offenders on probation reported symptoms of mental illness. PAULA M. DITTON, MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS, BUREAU OF JUSTICE STATISTICS REPORT (1998), available at <http://www.ojp.usdoj.gov/bjs/pub/press/mhtip.pr> (basing conclusions on surveys of federal and state systems conducted in 1995, 1996, and 1997).

81. Bonnie, *supra* note 6, at 59-60.

But, gauging the disability excuse by reference to the extent of psychosis or, as the irrationality theorists would do, the ability to correct factual premises,⁸² is simply too “arbitrary,” to use the word Bonnie applies to the Integrationist Test. As Dr. Drew Ross, who has studied psychotic killers, concluded: “[P]sychosis may enhance and enact the drama already present, and the drama is not necessarily an innocent one.”⁸³

People with psychosis, like people who are not mentally ill, often commit crimes out of anger, frustration, jealousy, and hate.⁸⁴ They should not be excused simply because they have a particular diagnosis, a confused thought process, or “uncorrectable” perceptions about the world. John Hinckley, Ted Kaczynski, and Charles Manson all had schizophrenia and all were highly delusional at times, with fixed false beliefs about their situation. Yet none of these people should have been excused—Hinckley because he tried to kill President Reagan to impress an actress,⁸⁵ Kaczynski because he sent out mail bombs to end the spread of technology,⁸⁶ and Manson because he slaughtered innocent white people to ignite a race war.⁸⁷ Professor Arnold Loewy’s paper for this symposium, which argues for a position very similar to the one advanced here, provides further examples of cases in which people with serious mental problems nonetheless have insufficiently exculpatory motives for crime.⁸⁸

If psychosis, even intense psychosis, should not automatically excuse, then presumably psychopathy, which is generally considered to be a lesser impairment, should not either. Those who think otherwise assert that the psychopathic offender is utterly incapable of understanding why we consider his actions reprehensible and harmful.⁸⁹ Assuming that to be the case, psychopaths still perceive reality accurately and understand that we do not want them to commit criminal offenses.⁹⁰ If they nonetheless commit crime, the

82. See Morse & Hoffman, *supra* note 7, at 1124 (“The responsibility-diminishing mental state in rationality tests consists of crazy perceptions and beliefs that are not a result of carelessness and not correctable by reason or evidence.”).

83. DREW ROSS, *LOOKING INTO THE EYES OF A KILLER: A PSYCHIATRIST’S JOURNEY THROUGH THE MURDERER’S WORLD* 87 (Plenum Trade 1998).

84. See Jeffrey W. Swanson et al., *Alternative Pathways to Violence in Persons with Schizophrenia: The Role of Childhood Antisocial Behavior Problems*, 32 *LAW & HUM. BEHAV.* 228 (2007) (providing evidence that “violence in schizophrenia patients may result from many factors besides the symptoms of schizophrenia”).

85. See CHRISTOPHER SLOBOGIN ET AL., *LAW & THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS* 563-64 (5th ed. 2009).

86. See William Glaberson, *Kaczynski Can’t Drop Lawyers or Block a Mental Illness Defense*, *N.Y. TIMES*, Jan. 8, 1998, at A1.

87. See VINCENT BUGLIOSI & CURT GENERY, *HELTER SKELTER: THE TRUE STORY OF THE MANSON MURDERS* 218 (W.W. Norton & Co. 1974).

88. Loewy, *supra* note 5, at 514-18.

89. See, e.g., Stephen J. Morse, *Psychopathy and Criminal Responsibility*, in *NEUROETHICS* 208 (2008) (“[Psychopaths] do not have the capacity for moral rationality, at least when their behavior implicates moral concerns, and thus they are not responsible.”).

90. Maibom, *supra* note 21, at 167 (“[P]sychopaths are able to correctly identify what actions they are performing, determine whether those actions are right or wrong, and control their actions.”).

pragmatic retributivist should have no problem finding psychopaths blameworthy, and from a general deterrence perspective the last thing we should want to do is tell these offenders that they will be excused rather than punished for their harmful behavior. In short, even if a person is morally insane, as psychopaths are sometimes said to be,⁹¹ that does not mean the person is legally insane.⁹²

Coming at the Integrationist Test from a different angle, Michael Corrado argues that cognitive impairment of the type contemplated by that test (as well as by the lack-of-appreciation and irrationality tests) is not the gravamen of insanity.⁹³ Rather, he argues that a person should be excused when he “cannot avoid performing the act.”⁹⁴ While such a person might also manifest an inability to reason or appreciate the wrongfulness of an action, Corrado contends that these defects of reason are “based upon defects of control”⁹⁵ This view contrasts with the views of commentators like Morse, who believe that a loss of control is best conceptualized as an inability to reason.⁹⁶

The circularity of this debate suggests that it is not resolvable. For present purposes, however, the important point is that, as a normative matter, this debate should also be irrelevant. Consider the case of Andrew Goldstein, which appears to provide a paradigmatic example of volitional impairment and which also might be seen as a good illustration of irrationality.⁹⁷ Clearly suffering from schizophrenia at the time, Goldstein pushed a woman whom he had never met in front of a subway, apparently acting on the spur of the moment.⁹⁸ Although he admitted he knew the woman might die from his action, he also stated, in describing this and other pushing incidents, that “[w]hen it happens, I don’t think; it just goes whoosh, whoosh, push, you know. It’s like a random variable.”⁹⁹

Assuming this is an accurate description of his mental state, Goldstein’s actions do seem extremely impulsive and irrational. But compare his case to the famous scenario proffered by Sir James Fitzjames Stephen as an example of the type of homicide that should be considered just as culpable as a premeditated killing: the man who sees a boy sitting on a bridge and, without knowing him or having any particular reason for doing so (“out of mere wanton

91. See Carl Elliott & Grant Gillett, *Moral Insanity and Practical Reason*, 5 PHIL. PSYCHOL. 53, 53 (1992) (quoting J. C. PRICHARD, A TREATISE ON INSANITY (1835)).

92. Cf. Robin Bradley Kar, *The Deep Structure of Law and Morality*, 84 TEX. L. REV. 877, 889-90 (2006) (distinguishing between moral and legal obligations in the case of psychopaths).

93. Corrado, *supra* note 8, at 502.

94. *Id.* at 508.

95. *Id.* at 484.

96. Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1064 (2002) (“Lack of capacity for rationality is almost always the most straightforward explanation of why we colloquially say that some people cannot control themselves when they experience intense desires.”).

97. See PAUL H. ROBINSON, CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES 579-83 (2d ed. 2008) (describing the Goldstein case).

98. *Id.* at 581-83.

99. *Id.* at 583.

barbarity”), pushes him off the bridge.¹⁰⁰ What is the difference between the latter, clearly culpable individual (call him Blackstein) and Goldstein? Intent? As far as we can tell, Goldstein’s act, although highly impulsive, was as intentional as Blackstein’s; Goldstein seemed to wait until the train got there.¹⁰¹ Was the act more “in character” for Blackstein? No, because Goldstein’s character includes his mental illness.

Did Blackstein perhaps possess a greater capacity to avoid killing, due either to a stronger “will” or better access to other options? The practical difficulty of answering this sort of question in cases like Blackstein’s and Goldstein’s, when the acts are both intentional and impulsive, is explored in the next section.¹⁰² The normative challenge raised by the question is exposed by this comment from H.L.A. Hart:

[A] theory that mental operations like . . . thinking about . . . a situation are somehow “either there or not there,” and so utterly outside our control, can lead to the theory that we are *never* responsible For just as . . . [someone] might say “My mind was a blank” or “I just forgot” or “I just didn’t think, I could not help not thinking,” so the cold-blooded murderer might say “I just decided to kill, I couldn’t help deciding.”¹⁰³

Hart’s observation suggests that if we exculpate Goldstein because he could not contemplate any options, we need to excuse Blackstein because he could contemplate only one.

Unless we want to exculpate people like Blackstein, we need a different method of assessing culpability than current insanity tests offer. The most obvious alternative method is the one we already use in ordinary cases. In determining the culpability of the ordinary offender (like Blackstein) we look at his desires and beliefs at the time of the crime.¹⁰⁴ Likewise, in determining the culpability of the offender with mental illness (like Goldstein), we should examine the desires and beliefs that accompany the crime, not the disability’s intensity (as Bonnie or Morse would have it) or its causative contribution (as Corrado wants to do). Under the integrationist approach, Goldstein might be found to have lacked the *mens rea* for first-degree murder (he said he did not do it “on purpose”), but he probably would be guilty of some form of homicide (and indeed, he was convicted of second degree murder despite assertion of an insanity defense).¹⁰⁵

100. 3 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW IN ENGLAND* 94 (1883).

101. ROBINSON, *supra* note 97, at 582.

102. *See infra* Part V.

103. H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 151 (2d ed., Oxford University Press 2008) (1968).

104. *See Morse, supra* note 18, at 1556.

105. Anemona Hartocollis, *A Subway Nightmare Will be the Focus of Yet a Third Trial*, N.Y. TIMES, May 23, 2006. The conviction was overturned on Sixth Amendment grounds and Goldstein eventually pleaded guilty to manslaughter, agreeing to a sentence of twenty-three years and five years of parole. *See Anemona Hartocollis, Nearly Eight Years Later, Guilty Plea in Subway Killing*, N.Y. TIMES, Oct. 11, 2006.

Many other people with mental illness would be excused in an integrationist regime, however. The cases of M’Naghten, Hadfield, and Clark have already been offered as illustrations of that possibility.¹⁰⁶ Consider two other examples. Andrea Yates was not culpable for drowning her children if, as her experts claimed, she thought that otherwise they would go to Hell and that their drowning would assure they would go to Heaven.¹⁰⁷ Wendell Williamson (a case mentioned by Corrado) should be excused if, like Hadfield, he thought his crimes would save the world.¹⁰⁸

V. CRITICISM #3: TOO DIFFICULT AND BIZARRE

Even if one buys the argument that, as a normative matter, the Integrationist Test is not too draconian, one might still be concerned about implementation issues. Brookbanks and Guyora Binder, among others, have suggested that making the assessments required by the Integrationist Test are simply too difficult.¹⁰⁹ This last complaint comes in a number of versions.

First, there is the straightforward concern about malingering. Once offenders find out that all they have to do to get a defense is prove they felt threatened by the victim, they might make up the appropriate story. Even people with real mental illness malingering to get what they want, and this test seems to give them an easy way to do so.¹¹⁰ The only response here is that the other tests create the same problem. The Appreciation Test excuses if the defendant can convince the factfinder that he could not internalize the wrongfulness of the act, the Irrationality Test excuses if the accused can prove he could not come up with noncriminal options, and most easily feigned of all, the Volitional Test excuses if the person can persuade the jury he could not help himself. Mental health professionals have been dealing with claims in all of these areas for years, and they are no worse at sizing up stories relevant to integrationism than they are at evaluating the validity of these other types of assertions.¹¹¹

Indeed, the Integrationist Test is superior to the other tests on a practical level because, as suggested by my earlier comments, it avoids a conundrum that

(also noting the prosecution’s argument that Goldstein had a history of using his mental illness to excuse his bad behavior).

106. See *supra* Part II.

107. Joel Anderson, *Andrea Yates Said She Drowned Children to Protect Them from Damnation, Psychiatrist Testifies*, ASSOCIATED PRESS, Mar. 2, 2002, available at www.highbeam.com/doc/1P1-51097723.html.

108. Corrado, *supra* note 8, at 496-97.

109. See Binder, personal conversation with author, Jan. 7, 2009; Brookbanks, *supra* note 79, at 174.

110. See GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 57 (3d ed., The Guilford Press 2007) (noting that people with mental illness often exaggerate their symptoms).

111. *Id.* at 56-62 (explaining the techniques for detecting “response styles” of people claiming mental illness).

the other tests cannot.¹¹² With the inability-to-control test, the conundrum has commonly been expressed as follows: How do we know when an impulse is irresistible or simply not resisted?¹¹³ Research shows that most people who experience command hallucinations do not act on the commands.¹¹⁴ How do we know whether the person with such hallucinations who *does* commit a crime was compelled to do so or instead simply “chose” this moment to give into them? The same conundrum arises with the two cognitive tests, which excuse when the person could not grasp the right reasons for acting conatively or cognitively. Research shows that even people with delusional paranoia usually do not act on perceived threats unless they are serious.¹¹⁵ How do we know whether a paranoid person who reacts to a perceived threat could not grasp the right reasons for acting or instead just ignored them?¹¹⁶

If instead we simply ask whether the mistaken perception, if true, confronts these people with a situation in which causing harm would be legally permissible (the Integrationist Test), we do not need to answer the intractable question of whether those who did not control, think, or feel at the time of the crime had the capacity to do otherwise and just did not exercise it, or instead lacked the capacity to do so. Nor do we need to figure out whether any lack of capacity that we think does exist is sufficiently congenital, an equally daunting question given the fact that many people with mental illness have lucid intervals even without medication, whereas many people who are not mentally ill routinely misperceive risk.¹¹⁷ Morse and Hoffman’s comment about assessing the capacity to formulate *mens rea* applies equally in this context:

112. See *supra* Part I.

113. Am. Psychiatric Ass’n, *Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681, 685 (1983) (asserting that making the distinction is not possible).

114. See David Heller Stein et al., *The Clinical Significance of Command Hallucinations*, 144 AM. J. PSYCHIATRY 219 (1987) (describing findings suggesting that command hallucinations alone are not associated with violent behavior); Dale E. McNeil et al., *The Relationship Between Command Hallucinations and Violence*, 51 PSYCHIATRIC SERVICES 1288 (2000) (detailing study of 103 patients and finding that “command hallucinations [did not make] a significant contribution in determining violence risk over and above . . . other predictors”).

115. See Dale E. McNeil et al., *The Relationship Between Aggressive Attributional Style and Violence by Psychiatric Patients*, 71 J. CONSULTING & CLINICAL PSYCHOL. 399, 400 (2003) (reporting literature review and concluding that patients are most likely to behave violently when they perceive someone intends to do them imminent harm).

116. In response to similar arguments in my earlier work, Morse and Hoffman state that I “confuse[] causation with excuse.” Morse & Hoffman, *supra* note 7, at 1124. But as this Article and my earlier work make clear, see, e.g., SLOBOGIN, *MINDING JUSTICE*, *supra* note 2, at 40–41, I fully endorse Morse’s excellent analysis showing that causation is not excuse. See Morse, *supra* note 18. The point here is the converse of the one that Morse thinks I am making: a factor cannot be excusing unless, at a minimum, it proximately causes behavior.

117. Cf. Thomas Grisso & Paul Appelbaum, *The MacArthur Treatment Competency Study (III): Abilities of Patients to Consent to Psychiatric and Medical Treatment*, 19 L. & HUM BEHAV. 149, 169 (1995) (finding that between 48% and 77% of patients with schizophrenia “did not perform more poorly than other patients and nonpatients” on measures of decisional abilities).

“Resolving questions about capacity requires a counterfactual inquiry that we lack the clinical and scientific resources to answer.”¹¹⁸

Litton argues that the Integrationist Test also requires determining capacities, specifically whether a person could have recognized that his claimed perceptions were wrong.¹¹⁹ But a truly integrationist approach would not be concerned with this issue. If a non-mentally ill person claims he honestly believed he was confronted with a situation that sounds in justification, we do not assess his capacity to have contrary beliefs, we simply try to figure out whether he is lying. We should follow the same analysis with people who are mentally ill. If we decide that such people are not malingering on this score—because, for instance, their claimed beliefs are consistent with other beliefs they have had in the past or with other people who have their particular type of mental illness—then they should have a defense. In contrast, even if we believe a person’s claim that he felt compelled or acted on irrational beliefs, we cannot grant an excuse simply on those grounds, unless we either excuse all offenders, such as people with pedophilia or psychopathy, who plausibly make such claims or unless we conjure up a method for determining their capacity to resist urges or discern better options.

Another version of the implementation complaint is that even if we can ascertain an offender’s real desires and beliefs at the time of the offense, the integrationist inquiry is often too bizarre to countenance giving the desires and beliefs dispositive weight.¹²⁰ How do we assess whether Yates’s belief about her children’s future would, if true, justify her act, given the fact that we do not live in a world where children go to Hell while they are still alive? Similarly, take the Florida case of William Cruse.¹²¹ He delusionally believed the people he killed were trying to turn him into a homosexual.¹²² A jury applying the Integrationist Test would have to decide whether that belief, if true, justified the crime.

No doubt these are unusual queries. But juries often ask themselves these types of questions in insanity cases¹²³ (as do commentators who purport to be applying other tests).¹²⁴ Additionally, there are usually analogues to such

118. Morse & Hoffman, *supra* note 7, at 1088.

119. Litton, *supra* note 57, at 487.

120. See Morse & Hoffman, *supra* note 7, at 1131.

121. See *Cruse v. State*, 588 So.2d 983, 989 (Fla. 1991).

122. *Id.*

123. See Finkel & Slobogin, *supra* note 77 (describing a study which suggests that laypeople left to their own devices reach conclusions closer to those reached under the Integrationist Test rather than the other tests). In *Cruse*, the jury was given an instruction that reflected the integrationist approach, and the Florida Supreme Court approved it. *Cruse*, 580 So.2d at 989 (“The guilt of a person suffering from such hallucinations or delusions is to be determined just as though the hallucinations or delusions were actual facts. If the act of the defendant would have been lawful had the hallucinations or delusions been the actual facts, the defendant is not guilty of the crime.”). Of course, *M’Naghten* itself recognized an “insane delusion” test that is very similar to the Integrationist Test. See *M’Naghten’s Case*, (1843) 8 ENG. REP. 718, 722 (H.L.).

124. See Morse & Hoffman, *supra* note 7, at 1148-49. At the end of their article, Morse and Hoffman discuss several specific cases and seem to prefer a test that asks “whether the defendant acted for a good

situations. The jury considering the Yates case might have thought that killing a child quickly was justifiable if necessary to prevent certain prolonged and horrible agony (although Professor Loewy instead suggests the better analogy to the Yates case is euthanasia, which juries normally do not excuse).¹²⁵ And there have been quite a few instances, most notably the prosecution of the men who killed Matthew Shepherd, where the jury has had to consider whether the homophobia of a non-mentally ill person should excuse killing a gay person who propositions him,¹²⁶ an issue very similar to the “bizarre” question raised by application of the Integrationist Test to Cruse’s case.

VI. CONCLUSION

Evaluating the culpability of people with mental illness using the same framework that is applied to people who are not mentally ill avoids excusing mentally ill people that society does not want to excuse. It also avoids excusing people with mental illness whom juries may initially want to acquit but who should not be acquitted because the motivations for their crimes are not appreciably different, as a moral matter, than the motivations of offenders who are sane. At the same time, the integrationist approach would excuse offenders whose mistaken beliefs about reality negate *mens rea* or sound in justification or duress, a group that is clearly not subjectively culpable and that is likely to be fairly large in size despite the reduced scope of the test compared to modern insanity formulations.¹²⁷ By integrating this latter group into the culpability framework applied to people who are not mentally ill, the Integrationist Test is not only more appealing normatively but is also less likely to stigmatize people with mental illness because it ensures that such people are no longer saddled with the double whammy associated with being called criminally insane.¹²⁸

justifying reason under positive law if the deluded reasons were true,” which they admit is identical to the justification component of the Integrationist Test. *Id.* at 1148 n.327; *see also id.* at 1147 (stating that several of these cases may have involved irrationality but expressing doubts about recognizing an excuse in the one case where “no plausible theory of justification or mitigation would apply even if the facts were true.”); Loewy, *supra* note 5, at 522 (adopting a test very similar to the Integrationist Test).

125. Loewy, *supra* note 5, at 522 & n.61.

126. *See* New Details Emerge in Matthew Shepard Murder, ABC News, Nov. 26, 2004, <http://abcnews.go.com/2020/story?id=277685>.

127. *See* McNeil et al., *supra* note 115, at 401-02 (describing the relationship between paranoia and crime).

128. Amerigo Farina et al., *Role of Stigma and Set in Interpersonal Interaction*, 71 J. ABNORMAL PSYCHOL. 421, 427 (1966) (explaining that insanity is a more stigmatizing label than criminal). *See also* Slobogin, *supra* note 2, at 58-60 (discussing the instrumental benefits of the Integration Test in more detail). Another potential benefit of the Integrationist approach is the greater likelihood that defendants with mental illness will support some type of defense on their behalf; many such defendants resist the “insanity” label and even fire attorneys who want to assert an insanity defense. *Cf.* Christopher Slobogin, *Mental Illness and Self-Representation: Faretta, Godinez and Edwards*, 7 OHIO ST. J. CRIM. L. 391 (2009).