

## PSYCHOTIC DELUSION AND THE INSANITY DEFENSE

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### ABSTRACT

I attempt to describe and defend an alternative definition of insanity. I claim that my definition follows from an adequate general understanding of legal excuse and that it describes correctly the question that jurors in the recent Andrea Yates case and others like it ought to be faced with. My essay has three parts. In the first, I briefly criticize M’Naghten- and Durham-inspired insanity statutes. In the second, I sketch and defend a general understanding of legal excuse and try to show how an adequate insanity statute follows from it. Finally, in the third section, I describe and defend a rough version of the statute itself. In the course of doing so, I try to explain why I believe that statute is superior to the American Law Institute’s various model insanity statutes.

Most will be familiar with “Andrea Yates,”<sup>1</sup> the Houston woman who drowned her five children perhaps in order to save them from eternal damnation or perhaps in order to secure her own execution, believing as she may have, that capital punishment by order of George Bush (then Governor of Texas) was the only way to kill the devil inside her.

In my view, jurors who must decide whether someone like “Andrea Yates” is guilty of murder have a difficult judgment to make. However, from the point of view of the M’Naghten-inspired insanity defenses on the books in most U.S. states, there’s nothing difficult about it. Did “Yates” know she was killing her children? Yes. Did she know that killing her children was illegal? Yes. Therefore, guilty. From the point of view of Durham-inspired insanity defenses, “Yates” case is easy but for a different reason. Was she mentally ill, perhaps a paranoid schizophrenic or perhaps suffering from postpartum psychosis? Yes. Did she kill her children on account of her mental disorder? Yes. Then, not guilty. Easy.

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ity. I claim, on behalf of my definition, that it follows from an adequate general understanding of legal excuse and that it describes correctly the question that jurors in the “Yates” case and others like it ought to be faced with. My essay has three parts. In the first, I briefly criticize M’Naghten- and Durham-inspired insanity statutes. In the second, I sketch and defend a general understanding of legal excuse and try to show how an adequate insanity statute follows from it. Finally, in the third section, I describe and defend a rough version of the statute itself. In the course of doing so, I try to explain why I believe that statute is superior to the American Law Institute’s various model insanity statutes.

### I. A. PROBLEMS WITH M’NAGHTEN-INSPIRED INSANITY STATUTES

The Pennsylvania insanity statute is typical, and most U.S. states have similar statutes. In Pennsylvania, a person will be found not guilty by reason of insanity if the defense can prove by a preponderance of the evidence that “the actor was laboring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing or, if the actor did know the quality of the act, that he did not know what he was doing was wrong.”<sup>2</sup>

For reference purposes, here is my version of a clearly expressed, M’Naghten-inspired insanity statute:

A defendant should be found not guilty on account of insanity just in case the defense proves by a preponderance of the evidence that, at the time of the act, and on account of a mental disorder, (a) the defendant didn’t know (and was not negligent in failing to know) the nature and quality of the act he was performing or, (b) if the defendant did know the nature and quality of the act he was performing, then he did not know (and was not negligent in failing to know) that what he was doing was illegal.

In my view, and as I will try to show, definitions like this one are defective for two main reasons: first, the judgments they ask jurors to make cannot in principle be made, and second, they point jurors away from the most salient fact about people like “Andrea Yates”—namely, that she killed her children on account of psychotic delusions.

I take it that no insanity definition can be acceptable unless it’s at least possible for someone to be found not guilty according to it. Therefore, consider this as a case in which someone might be found not guilty on account of provision (a) above. Consider if FBI agents knock on the door of a man’s house and, on account of psychotic delusions caused by schizophrenia, this man believes those agents are space aliens “coming to take him away.” In order to defend himself against what he believes are space aliens, this man shoots and kills one of the agents. In my view, this is an example of someone who, on account of mental illness, nonnegligently fails to know the nature and quality of the act he’s performing. He believes he’s shooting space aliens but, in fact, he’s shooting FBI agents. A

similar case could be constructed for provision (b), and everything I say about the case that I just described would apply to such a case.

On the surface, this seems to be a clear case in which juries would be bound to render a verdict of not guilty by reason of insanity if they correctly applied my disambiguated M'Naghten test. On account of his psychotic delusions, this man plainly doesn't know what he's doing. But is this, in fact, plain? After all, most of what he believes about the nature and quality of his act is true. For example, he knows he's shooting a gun. He knows his targets look like human beings. He knows he's shooting at his targets in order to kill them. He might also know that his targets look like FBI agents. And he probably knows many more things about the nature and quality of his act. For example, he doubtless knows whether it's day or night, he probably can make a good estimate of the distance of his targets from the door, he may know the kind of gun he's shooting and the number of bullets in the chamber, and on and on.

So, on the one hand, it's plain that if anyone could be found not guilty by reason of insanity because he didn't know the nature and quality of his act, then this man should be found not guilty. But, on the other hand, it's also true that, despite his psychotic delusions, this man knew quite a bit about the nature and quality of his act. Furthermore, *this has to be the case*: no one could do anything if he was completely deluded about what he was doing.

What are we to say about this? Did he or did he not know the nature and quality of the act he performed? He knew quite a bit about what he was doing, but he was also deluded about the nature of his targets. The jurors are supposed to answer "yes, he did know the nature and quality of the act he performed" or "no, he didn't." But, in fact, this question doesn't have an answer in what should be a crystal clear case. Or rather this is the answer: he knew some things and was deluded about others. But the jury is supposed to answer "yes" or "no," and they plainly can't because this question doesn't have a yes-or-no answer. Furthermore, and significantly, attempts to refine condition (a) would simply produce absurdity. If most of what he believed about what he did was true, but some of it was false, should he be found guilty? Or should he be found not guilty only if everything he believed about what he did was false? Or only if more than 50 percent of what he believed about the nature and quality of his act was false? And what about violent jihadists? Most of what they believe about the United States may well be false; should we therefore find them not guilty by reason of insanity?

Obviously, we should not try to answer these questions. Less obviously, trying to answer them yes or no points us away from the most important fact about this case: namely, that this man was psychotically delusional about the nature of his targets. He didn't believe he was shooting at men and therefore at beings with the sorts of purposes that men are likely to have, but rather that he was shooting at space aliens disguised as men and therefore at beings with the sorts of purposes that a psychotically delusional person might suppose disguised space

aliens would be likely to have (in this case, the purpose of taking him back to the mother ship). Calling his beliefs psychotic delusions merely labels them with psychiatric jargon, but the importance of that label, in my opinion (and as I will try to show), lies in this: unlike his other beliefs, his psychotic delusions are not produced by his reasoning—not by his good reasoning, obviously, but not by his defective or mistaken reasoning either.

The upshot is this: to ask jurors to determine whether someone does or doesn't know what he's doing is to ask a bad question. First, because it's not answerable in clear cases. Suppose, to give one more example, Jones killed Smith because an auditory hallucination directed him to do so; even so, Jones doubtless knew—and would have to have known—many true things about what he was doing at the time of the act, or otherwise he couldn't have killed Smith. In cases like these, one hopes jurors will ignore the complications. But complications they nonetheless are. Second, the question of whether the defendant does or doesn't know what he's doing points jurors away from the most salient fact about these cases: namely, that the defendant was acting on account of psychosis.

"Andrea Yates" may have killed her children as a result of her psychotic delusions, but the Texas jurors who decided her first case applied Texas law correctly and found her guilty of murder because "Yates" knew she was drowning her children and knew that drowning them was illegal. The jurors who decided her second case knew they were deciding it wrongly as a matter of law. The Associated Press quoted the foreman of the jury as follows: "We understand that she knew it was legally wrong. But in her delusional mind, in her severely mentally ill mind, we believe that she thought what she did was right." In other words, the foreman of the jury and the rest of the jurors ignored the plain meaning of the law. But the jury also knew she was delusional and knew that her delusional state was relevant to her legal guilt even though, according to Texas law, it's strictly irrelevant. The second jury simply ignored the law in order to reach what they believed was the correct conclusion.

"Russell Weston" is the paranoid schizophrenic who attacked the U.S. Capitol and killed two guards in the course of doing so. "Weston" attacked the Capitol, as he explained, in order to activate the Ruby satellite system, a time reversal machine that would save the world from cannibals and the "black heva plague." Despite these beliefs, "Weston" would be found guilty, according to the correct application of any unambiguous M'Naghten-type statute. "Weston" planned his assault on a thirty-hour drive from his home in Illinois. He knew what he was doing when he shot the guards, and he knew what he was doing was illegal. Interestingly, however, "Weston" has not yet, in fact, been found guilty of murder on account of this catch-22: He refuses to take his antipsychotic medicine and, unless he takes it, he's incompetent to stand trial. If he would agree to take his medicine, then he would be found competent, and he would then be found guilty of murder (as he should be, according to statute), even though he's not competent

to stand trial in his unmedicated state—the very state in which he attacked the Capitol. Yates, on the other hand, agreed to take her antipsychotic medication and so was competent to stand trial. However, the first panel of jurors—unaware that she was taking powerful antipsychotic medication—interpreted her drugged state as “lack of affect” and convicted her in part on account of that.

Consider finally “David Berkowitz,” the “Son of Sam.” This is a portion of a letter (complete with misspellings, etc.) “Berkowitz” wrote to Police Captain Joseph Borrelli during the period of months in which he terrorized the city of New York:

I am deeply hurt by your calling me a wemon hater. I am not. But I am a monster. I am the “Son of Sam.” I am a little brat. When father Sam gets drunk he gets mean. He beats his family. Sometimes he ties me up to the back of the house. Other times he locks me in the garage. Sam loves to drink blood. “Go out and kill,” commands father Sam. Behind our house some rest. Mostly young—raped and slaughtered—their blood drained—just bones now. Papa Sam keeps me locked in the attic too. I can’t get out but I look out the attic window and watch the world go by. I feel like an outsider. I am on a different wavelength then everybody else—programmed too kill . . .<sup>3</sup>

“Berkowitz” pleaded guilty but if he had gone to trial, he would have been found guilty of murder according to any of the statutes that I’ve quoted—so long as the jurors interpreted those statutes literally. “Berkowitz” planned to kill people, he knew he was killing them, he knew killing them was illegal, and he knew what he had to do in order to evade capture by the police. But, in my opinion, those undoubted facts shouldn’t settle the matter; in order for “Berkowitz” and all of the others like him to get a fair hearing, those facts need to be interpreted in the context of the beliefs and thought processes evident in the passage I just quoted. However, current, M’Naghten-inspired insanity statutes make that impossible. All that matters is whether “Berkowitz” knew what he was doing (understood narrowly) and knew it was illegal.

### I. B. PROBLEMS WITH DURHAM-INSPIRED STATUTES

So-called conservatives are enraged at the acts of “Yates” and “Berkowitz.” In their view, justice demands swift punishment. So-called liberals, supposing themselves to be scientific, feel pity: “Yates” and “Berkowitz” were victims of mental disorders they were powerless to control. In the “liberal” view, the scientifically informed response to killers like “Yates” and “Berkowitz” depends on adopting some form of the Durham Rule: an agent is not guilty by reason of insanity if he committed his offense as a result of a mental illness (or disease or disorder). “Yates,” “Weston,” and “Berkowitz” are plainly mentally ill, and they plainly killed people because they were mentally ill. Therefore, if that were the test, they’d be found not guilty.

Even though the Durham Rule appears to be an advance, I don't believe it should be adopted for this reason: whether someone suffers from a mental disorder is one question, but whether that person should be classified as legally liable is another and an *essentially unrelated* question.

Whether something is counted as a mental disorder depends currently on whether competent psychiatrists conclude that a particular pattern of thought, feeling, and behavior fits criteria in the latest edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM).<sup>4</sup> That manual has various functions in the mental health community. Its primary function is to define mental disorders for the purpose of federally funded research. But it's also used to help psychiatrists (and others) diagnose patients so they can effectively treat them. Whether someone fits the criteria for one or another mental disorder is a complicated matter rightly decided by psychiatrists. But whether a pattern of thought, feeling, and behavior that meets those criteria—whatever they are—should exempt someone from legal liability is, as I've said, a completely different and unrelated question. It's not a question about the classification of mental disorders for research purposes, and it's not a question about treatment; it's a question about legal liability, given the purposes of the criminal justice system.

In other words, legal liability should not be held hostage to (even correct) psychiatric diagnoses. Some psychiatrists believe that extreme forms of racism and bigotry constitute a specific mental disorder. The proverbial “man in the street” will be inclined to deride such a classification. But why mightn't the psychiatrists be correct about this? After all, it's a question about the relevance and efficacy of treatment (for someone who wants to be treated), not a legal or a moral question. Therefore, suppose psychiatrists conclude (and conclude rightly, in the sense that I've just explained) that extreme racism is a mental disorder with a specific diagnosis and treatment. Should we then exempt racist murderers from liability for punishment? I don't think we should. Psychiatrists might (and reasonably) reach a similar conclusion about some violent jihadists: perhaps some of them suffer from a treatable form of paranoia. Nonetheless, they might also be guilty of murder.

The point elaborated above seems to me to be a sufficient reason to reject any Durham-inspired insanity statute, but there are other reasons to reject statutes of that type. First, the point of the DSM is to classify and diagnose *disorders*—that is, relatively permanent complexes of thought, feeling, and behavior; the point of the criminal law is to evaluate particular *actions*. So, deriving conclusions about one from conclusions about the other is plainly a category mistake.

Second, suppose we restrict ourselves to schizophrenia. Perhaps “Andrea Yates,” “Russell Weston,” and “David Berkowitz” should be found not guilty. Perhaps their schizophrenia is sufficient to undercut their legal liability. But this need not be true in general. “Ted Kaczynski,” the “Unabomber,” may also be schizophrenic, and he may have killed people because he was schizophrenic; nonetheless, he may also be, as I believe, guilty of murder.

Finally, it's commonly (and in my opinion rightly) said that some violent jihadists are sick and crazy. They're sick in one of our ordinary understandings of that word (hence, no scare quotes needed) because they heartlessly kill innocent people, and they're crazy (again in our ordinary, no-scare-quotes-needed, understanding) because they kill based on beliefs that fly in the face of the facts. But even though, in my opinion, these are correct commonsensical judgments, they shouldn't exculpate—on the contrary. So we need to be able to distinguish between ordinary and correct judgments of sick and crazy, which don't excuse, and a different sort of judgment that may.

## 2. AN UNDERSTANDING OF LEGAL EXCUSE

An insanity defense will be a legal excuse of some kind; so, in this section, I am going to try to sketch what I hope is a clear and convincing understanding of legal excuse.

In my view, whether someone should be liable for legal punishment depends on the answer to two questions. First, did he conform his behavior to the requirements of the law; in other words, is what he did reasonable or justified from the point of view of the law? Second, if what he did wasn't reasonable from the point of view of the law, did he have an excuse for failing to conform his behavior to the requirements of the law? So, first, was he behaving reasonably from the point of view of the law? And second, if he wasn't, did he have an excuse for failing to behave reasonably? Someone who didn't behave reasonably and who doesn't have an excuse for failing to behave reasonably should be legally liable for punishment. (Whether he should then actually be punished and how, is a further question.)

Under what conditions and why should the law excuse someone for behaving unreasonably? I'll try to answer that question by exploring the basis for what I take to be three uncontroversial judgments of legal excuse. Jones loses control of his car and causes an accident that kills two people. Was losing control of his car and killing those people reasonable from the point of view of the law? Plainly not. So then does Jones have an excuse for losing control of the car and causing this accident? If he lost control of the car because the brakes gave out after he'd negligently failed to have his car inspected, then no. If he lost control of the car because he was recklessly cutting in and out of traffic at high speed, then again no. But if he lost control of his car on account of an unpredictable mechanical failure, then he has an excuse and consequently isn't legally liable for the two deaths.

Negligent and reckless drivers don't have a legal excuse; victims of unpredictable mechanical failures do. Why? What's the difference? Let's start with a negligent driver. What is it about him that makes him guilty of negligence? A negligent person is someone who should realize but, in fact, doesn't, that he's failing to exercise the degree of care that the law expects him to exercise in his circumstances. For example, he may simply have forgotten that his car has to be

inspected. He's different from a reckless person in that he's not aware of the risk he's running. A negligent person runs a risk without realizing he's running it.

Someone who runs a risk without realizing he's running it should be found liable for punishment just in case, at the time he ran the risk, he was capable of realizing that he was running an unreasonable risk from the point of view of the law. And this would be true just in case there was a plausible inference, from what he knew at the time, to the conclusion that driving an uninspected car was, from the point of view of the law, unreasonably dangerous. As a practical matter, it would be difficult to show that an ordinary person *lacked the capacity* to realize that he was running an illegal risk by driving an uninspected car. This explains the common, but I believe mistaken, saying: "ignorance of the law is no excuse." The point of that saying could be put correctly like this: in most realistic cases, lawbreakers will be unable to meet the burden of proof required to show that they were nonnegligently unaware of the existence of some law. However, extreme cases are possible. For example, suppose someone just arrived in the United States and suppose he was unable to speak English and consequently was unaware of the legal requirement to get his car inspected. In that case, although he behaved unreasonably from the point of view of the law, he shouldn't be found liable for punishment. He has an excuse for not meeting this legal requirement: there was no plausible inference from what he, in fact, knew and could be expected to believe to the conclusion that he was legally required to have his car inspected.

So, in my view, a negligent person doesn't have an excuse because he has the capacity to realize that he's acting unreasonably from the point of view of the law, and someone who doesn't have that capacity does have an excuse. Why? What's the basis for these judgments? Many believe, and I agree, that legal punishment may fairly be imposed only on those who had a fair opportunity to avoid it.<sup>5</sup> And if a particular person lacked the capacity to know about this requirement, then it would be unfair of the law to impose a punishment on him.

Now consider, by contrast, someone who was well aware of the legal requirement to have his brakes inspected and who, in fact, envisioned the risk he was running by ignoring the requirement, but who ignored it anyway, believing the risk was slight and consequently that, in his opinion, it was reasonable to ignore the requirement. Such a person should be found guilty of recklessness, not negligence, because he ignored a serious risk, believing that it was reasonable to ignore it. From the point of view of the law, that belief of his was itself unreasonable, and so he should be found guilty of recklessness—that is, guilty of unreasonably ignoring a serious risk of harm. We are assuming, of course, that he didn't have an excuse for behaving unreasonably from the point of view of the law; that is, we're assuming he had the capacity to realize that he was behaving unreasonably from the point of view of the law.

These are my main claims so far: Negligence is failing to exercise the degree of care that a reasonable person would exercise, and someone is *liable* for failing



to exercise that degree of care only if, at the time, he had the capacity to realize that he was acting unreasonably from the point of view of the law. Whether he had *that capacity* would depend on his knowledge and inferential capacities generally. Recklessness is consciously running an unreasonable risk, and someone is liable for running such a risk only if he had the capacity to realize that he was running an unreasonable risk from the point of view of the law. Whether someone had that capacity would depend on his knowledge and his inferential capacities generally. No one should be found liable for punishment if he doesn't have the capacity to realize that he's acting unreasonably from the point of view of the law, because people who lack that capacity don't have a fair opportunity to avoid punishment.

In light of this, it should be clear why the man whose car went out of control on account of an unpredictable mechanical failure is not liable for punishment—even though losing control of a car and causing an accident isn't a reasonable thing to do from the point of view of the law. He has an excuse. If the mechanical failure truly was unpredictable, then, almost by definition, he lacked the cognitive capacity to predict that it was going to happen, and he therefore lacked a fair opportunity to avoid the accident and so shouldn't be punished for creating it.

In other words, someone who doesn't have the capacity to realize that his brakes are going to fail has an excuse when his brakes, in fact, fail. However, this isn't the end of the matter: someone who has that capacity may also have an excuse. Suppose that, if Jones had examined the brakes—something he was capable of doing—before he went on his fateful drive, he would have noticed the problem that was going to lead to their failure. If that were true, then Jones would have had the capacity to realize that his brakes might fail. Nonetheless, Jones might still have a legal excuse. Someone who examines his brakes before every trip is being “maximally careful.” Jones would have an excuse if there was no reason (from the point of view of the law) for him to be any more careful than, in fact, he was on this particular occasion. In other words, in addition to those who entirely lack the capacity to realize they're running an unreasonable risk, those who have that capacity should nonetheless not be held liable if realizing that they're running an unreasonable risk would require them to exercise more care than they have any reason to exercise.

This isn't the end of the matter either, because those who have the capacity to realize that they're not behaving reasonably from the point of view of the law may also have a different kind of excuse. Suppose their capacity to realize that they're behaving unreasonably is impeded. Here's a simple example: someone is taking a multiple-choice test, and he has the cognitive ability to answer one of the questions correctly, but he's anxious. Anxiety can impede clear thinking, and if this person's anxiety is severe enough, perhaps he should be excused for answering incorrectly on this occasion. All sorts of factors can impede someone's ability to think clearly: emotions like anxiety, fear, and anger, or distractions of

various kinds—a brass band is playing in the room—or, important for my purposes, delusions and hallucinations produced by psychoses.

Consider two more cases related to this idea of impediment. The first is related to the law and, unfortunately, is true; the second isn't related to the law, but it could be true. A woman went into a convenience store in South Carolina to play video poker. Absorbed and excited by the game and her winnings, she forgot she had locked her child in the car with the windows up. The child died from the heat in the car. Here's the second case: Another woman, was playing the same game, similarly excited and absorbed, and, as a result, she lost track of the time and was unable to pick up her husband's shirts before the dry cleaners closed.

I draw these lessons from the two cases. The first is that neither woman was ever conscious of a reason to stop playing. Both may really have forgotten. The second is that excitement and absorption can be, and in these cases were, *impediments* to realizing something that someone, in fact, should have realized. The first woman should have realized that her child might die in the hot car; the second should have realized that she wouldn't be able to pick up her husband's shirts if she kept playing. Both women had the cognitive capacity to realize those things, but both were impeded from realizing what they should have realized by the excitement of playing the game. On account of their excitement, both of them temporarily forgot. The third point is this: in deciding whether either woman was liable for failing to realize what she should have realized, we need to take account, not just of the *severity* of the impediment to realizing what she should have realized but also of the *importance* of realizing it. In light of that difference in importance, it might make sense to say that a judge or jury would not be unreasonable for finding the first woman legally liable for failing to realize that her child might die if she didn't stop playing but that it might be unreasonable for the husband to find his wife liable for failing to realize that she would have to stop playing if she were going to pick up his shirts. The impediment to realizing that they ought to stop playing was the same in each case, but it was much more important for the first woman to realize that she should stop playing than it was for the second woman to realize that.

Now I am in a position to summarize my understanding of legal excuse. Someone who behaves unreasonably from the point of view of the law should nonetheless *not* be found liable for punishment in three circumstances. First, if he lacked the cognitive capacity to realize that he was acting unreasonably; second, if he lacked sufficient reason from the point of view of the law to exercise his cognitive capacity to the extent necessary to realize that he was acting unreasonably; and third, if his capacity to realize that he was acting unreasonably from the point of view of the law was impeded, and the impediment was severe enough in relation to the importance of realizing that he was acting unreasonably. I believe these three conditions provide a unified account of most of the commonly recognized legal excuses: honest mistake, ignorance of the law, retardation, juvenile status (sometimes), and, as I will try to show, insanity.

How does all of this apply to people like “Andrea Yates”? Obviously, she behaved unreasonably from the point of view of the law. So she’s liable unless she has an excuse. And, in my opinion, that issue boils down to the extent to which her cognitive capacities were impeded at the time she acted. We can be fairly certain that she had the cognitive capacity to realize that she was behaving unreasonably at the time because she would have realized it if she had taken antipsychotic medicine. Nonetheless, I hope it’s clear that it would be difficult to judge whether her cognitive capacities were sufficiently impeded to excuse her for performing the horrific acts she, in fact, performed, given that she hadn’t taken her antipsychotic medicine.

If that’s clear—and I will have more to say about this judgment in the next section of the paper—then I have discharged one of the main burdens of this essay. From the point of view of M’Naghten-inspired insanity defenses, Andrea Yates’ liability for punishment is easily judged: did she know that what she was doing was illegal? Case closed. From the point of view of Durham-inspired insanity statutes, it’s also an easy judgment: did she kill her children on account of a mental disorder? Case closed. But I disagree; I don’t believe her guilt is easily decided: To what extent did her delusions impede her capacity to realize that she was behaving unreasonably? That’s not an easy question to answer, but I believe it’s the correct question to ask.

### *Reason and Psychotic Delusion*

I will try to argue as follows. Some people act on account of psychotic delusions. Psychotic delusions seem, to the people who suffer from them, to provide reasons for action. However, psychotic delusions differ from beliefs that are produced by an agent’s reason in four specific ways. Because psychotic delusions differ in those ways from beliefs that are produced by an agent’s reason, someone whose mind is dominated by them may not have, at the time she acts, the capacity to realize that she has a decisive reason *not to do* what, in her deluded state of mind, she believes she has reason to do.

I doubt if anyone really knows what motivated “Andrea Yates” to kill her children. Despite that, I believe it’s clear that she killed them for what seemed to her at the time to be good reasons. And I believe it’s also clear that she knew she was killing them, that she planned to kill them, and that she knew killing them was illegal. In each of those respects, she was like “Timothy McVeigh.” He bombed the Murrah Building for what seemed to him to be good reasons, he knew what he was doing, and he knew that what he was doing was illegal. So why do I believe he’s plainly guilty of murder, and she isn’t?

My short answer is that she believed drowning her children was a good idea because her mind was dominated by psychotic delusions at the time she drowned them, but he didn’t believe blowing up the Federal Building was a good idea because his mind was, at the time, dominated by psychotic delusions. In the fol-

lowing, I will try to explain how the term “psychotic delusion,” *understood as a technical term in the law*, should be distinguished from other beliefs and why I believe those differences matter as to whether someone has an excuse that should be recognized by the criminal justice system.

First of all, psychotic delusions are frequently alterable by antipsychotic drugs, and the rest of our beliefs aren't. Most people's beliefs won't change if they're given an antipsychotic drug of the sort that “Andrea Yates” is currently taking. But “Andrea Yates,” “Russell Weston's,” and “David Berkowitz's” psychotic delusions will change. Or rather, and more specifically, their psychotic delusions will either disappear or recede in importance after taking antipsychotic medication. On an antipsychotic drug, “Andrea Yates” will no longer believe God wants her to drown her children (or that a George-Bush-ordered execution is needed to kill the devil inside of her), “Russell Weston” will no longer think about the Ruby Satellite System or about the black heva plague, and “David Berkowitz” will no longer believe that his neighbor's dead dog is telling him to kill women in Queens. But none of their other beliefs will be affected. For example, while on antipsychotic medication, “Andrea Yates” will continue to believe in God, she will continue to believe that killing her children was against the law, will continue to believe that children can be killed by drowning, and so forth.

I doubt that antipsychotic medication would have changed the beliefs that led “Timothy McVeigh” to bomb the Federal Building. After taking them, he would still have believed that the Federal Building in Oklahoma City was a legitimate target of war, that the government was about to take away his guns, that blowing up the Federal Building was a reasonable response to what the U.S. government did at Waco, and so forth. (If I am mistaken about this, then that would be one reason to believe that “Timothy McVeigh” suffered from psychotic delusions in my technical sense. However, there would, nonetheless, be three other reasons for believing that he didn't. Similarly, for the violent jihadists whom I consider next.) And antipsychotic drugs wouldn't change the beliefs that lead violent jihadists to kill innocent people. They would continue to believe in Allah, would continue to believe whatever they do about Osama bin Laden, would continue to believe that a Jewish conspiracy controls the U.S. government, would continue to believe that crashing a plane into the World Trade Center was a legitimate response to the crimes of the United States, and so forth. Antipsychotic drugs will doubtless affect *the behavior* of anyone who takes one—zoned out terrorists are likely to be less dangerous than hopped up terrorists. But I don't believe an antipsychotic drug would alter any of their basic beliefs about the social world and how it operates.

That psychotic delusions disappear or recede in response to medication and our other beliefs don't, suggests strongly that psychotic delusions are not products of reason—more specifically, that psychotic delusions disappear *in the absence of new information and in the absence of new inference* suggests that they weren't

formed by information and inference in the first place, because the rest of our beliefs do arise and do change on account of information and inference. And this idea of responsiveness to information and inference is true even of the sort of beliefs that led “Timothy McVeigh” to blow up the Murrah Building: those beliefs of his appear to have been produced by his reasoning, albeit by his defective reasoning. But “Andrea Yates”’ psychotic delusions do not appear to be produced by reasoning at all, even bad reasoning: that’s why her psychotic delusions disappear in the absence of new information and new inference.

Second, psychotic delusions differ from our other beliefs in that people don’t ever come to have them because they were persuaded to believe them by other people. As a result, psychotic delusions are not communicated from person to person in the way that the rest of our beliefs can be. For these reasons, psychotic delusions are never “current in a culture”; that is, they are not believed by significant numbers of people and then communicated, discussed, modified, and argued about. In addition, psychotic delusions are never presented in ways that other people could find persuasive or at least deserving of consideration. By contrast, “Timothy McVeigh” was not alone in believing what he did: he and his friends and others like them, in fact, discussed, modified, and argued about their views. The same is true of the Islamic radicals who plot against the United States. “The Unabomber” might seem to be an exception to this: he reasoned alone. But he was nonetheless able to formulate his critique of technological society in an orderly fashion such that it could appear in the *New York Times*, where it was then discussed, criticized, and argued about.<sup>6</sup> Furthermore, his beliefs about technology are, in fact, accepted by all sorts of people, and these people reach their conclusions about technology in the same way he did—namely, by inference from things they’ve read and seen. None of this is true with respect to the psychotic delusions of “Andrea Yates,” “Russell Weston,” or “David Berkowitz.” With respect to their delusions, each of them was completely alone.<sup>7</sup>

Third, psychotic delusions differ from our other beliefs in that we are often able to recognize objections to our nonpsychotic beliefs, and we typically will have some idea of how to defend our nonpsychotic beliefs against objections. Neither thing is true with respect to psychotic delusions. Someone in the grip of a psychotic delusion will neither recognize nor be able to respond to objections.

Delusion is sometimes defined as belief that persists despite awareness of accurate information to the contrary. That’s not how I’m defining psychotic delusion for legal purposes. Holocaust deniers maintain their beliefs in the face of accurate information to the contrary. I have no problem calling them deluded. But they’re not psychotically deluded, in what I believe should become a legally recognized sense of that term. Holocaust deniers come to believe what they do by being persuaded of its truth, and their beliefs are communicated, discussed, and argued about. They’re often well aware of objections to their beliefs and normally have

(poor) responses to those objections. Their thought processes doubtless fail to meet sensible standards of reasonable belief formation, but we can say that they fail to meet those standards only because their beliefs were formed, in the first place, on account of observation and inference. In my view, none of that is true with respect to psychotic delusion.

Fourth, as I've just suggested, psychotic delusion differs from defective belief formation in that dubious beliefs often result from identifiable inferential mistakes, and psychotic delusions don't. If someone is reasoning, and he reaches a dubious conclusion, we (and he) will often be able to identify his mistake. Perhaps he mistook one person for another because they look the same from the back. Perhaps he succumbed to the so-called gambler's fallacy. Perhaps he thought it was okay to cheat on his income tax because, as he says (and may believe) that "everyone else does." Perhaps he observed a biased sample. Perhaps he fell victim to confirmation bias. Perhaps he generalized hastily. Perhaps he thought, as Timothy McVeigh did, that "they did it, so I can too." And so on, through a long list of mistakes in reasoning that all of us make from time to time. But someone who believes that he has to deactivate the Ruby Satellite System located in the U.S. Capitol in order to prevent the black heva plague from breaking out, is not making a mistake in reasoning; something else is going on.

I have argued above that psychotic delusions can be distinguished sharply from the rest of our beliefs—from both our well supported and our poorly supported beliefs. A few comments about that distinction. First, it has nothing to do with what is or isn't statistically normal. According to my understanding of psychotic delusion, everyone in the world could suffer from one. Second, whether a belief is formed by observation and inference is one thing; whether it deserves to be believed in terms of sensible standards of belief appraisal is another. My point about psychotic delusions is that they aren't products of observation and inference, not that they don't deserve belief in terms of sensible standards of belief appraisal. Third, this distinction is, so to speak, cross-culturally valid. Believers in voodoo are rightly characterized as bizarre and illogical from the point of view of modern scientific culture. But it doesn't follow that believers in voodoo are psychotically delusional. Whether they are or aren't, depends on whether antipsychotic medicine makes their beliefs in voodoo disappear, on whether people come to believe in voodoo on account of persuasion, on whether belief in voodoo is communicated, on whether believers in voodoo can recognize objections to their beliefs and respond to them, and on whether belief in voodoo depends on inferential error. In short, psychotic delusions are not on a "belief-spectrum" that has rational, well-supported beliefs at one end and irrational, poorly supported beliefs at the other—*psychotic delusions are not on that spectrum*.

Consider the following. Jim fails to take his antipsychotic medicine; sometime later, he starts having auditory hallucinations, and those "voices" tell him to

do things. Jim is momentarily taken in by the “voices,” but then he remembers about the medicine and realizes what’s going on, so he takes his meds and directs his attention away from the “voices.” In other words, Jim uses his reason and is able to “see through” his hallucinations. But suppose Jim didn’t know anything about antipsychotic medicine or suppose his mind was completely dominated by psychotic delusions; in that case, it might not be possible for Jim to see through his delusions. Or it might be very difficult. Whether Jim is diagnosable as a schizophrenic is one thing; whether his mind is dominated by psychotic delusions is another.

This suggests the following argument. The beliefs that led “Timothy McVeigh” to believe he was justified in bombing the Murrah Building were products of his reason; therefore, he was capable of using his reason and *capable* of realizing that there was a decisive reason, from the point of view of the law, not to do what he did. “Andrea Yates” believed she was justified in killing her children on account of psychotic delusions, and at the time she killed them, her mind was dominated by those delusions; therefore, at the time she killed her children, she may not have had the capacity to use her reason to realize that she had a decisive reason not to kill her children.

On account of the distinction between beliefs produced by reason (that is, by information and good or bad inference) and beliefs produced by psychosis, I identify three types of killers: first, those like “Andrea Yates,” “Russell Weston,” “David Berkowitz,” and “John Hinckley,” who all killed (or tried to), in part, on account of psychotic delusions; second, those like the violent jihadist terrorists, American racists, “Timothy McVeigh,” and the “Unabomber,” who all killed on account of beliefs that were produced by morally and intellectually defective reasoning processes; and finally, killers like “Ted Bundy,” the “Green River” killer, “Jeffrey Dahmer,” “Eric Harris” (one of the Columbine killers), the “BTK” murderer, and the “Boston Strangler,” who all killed on account of a different sort of morally and intellectually defective reasoning process. This last group killed because they enjoyed killing—perhaps on account of the excitement they derived from it, perhaps on account of contempt for their victims, perhaps on account of power, or perhaps on account of some sort of buried hatred. (As should be obvious, I intend the above simply to identify three types of killers, not to produce an exhaustive classification of kinds of killers: there are many other kinds.)

Why not simply say that DSM-identified schizophrenics aren’t guilty but that sociopaths and others are? For two reasons. First, schizophrenics are not the only ones who suffer psychotic delusions—“Andrea Yates” delusions may have been the product of postpartum psychosis and not schizophrenia. Second, some schizophrenics may be guilty of murder. For example, the “Unabomber” may be a schizophrenic, but he killed on account of dubious reasoning processes and not on account of psychotic delusions.

### 3. THE PSYCHOTIC DELUSION DEFENSE

#### *Proposed Definition*

No one may be found guilty of an intentional offense (though that person may be found guilty of negligence), if (a) that person was led to perform the act for which he's accused by **psychotic delusions** and if (b) those **psychotic delusions** so dominated his mind at the time he acted that either (i) he was mistaken in significant respects about what he was doing or (ii) he didn't know (and wasn't negligent in failing to know) that what he was doing was illegal or (iii) if he did know that what he was doing was illegal, he was unable, because his delusions so dominated his mind, to take proper account of that fact.

A person's mind was dominated by **psychotic delusions** within the meaning of the law at the time he performed the act for which he's accused, just in case most of the following conditions are met.

1. The beliefs and thought processes that led the agent to act as he did disappear or recede in importance when the agent is given an antipsychotic drug.
2. The beliefs and thought processes that led the agent to act as he did were not formed, in any obvious way, as a result of observation, reading, or conversation.
3. The beliefs and thought processes that led the agent to act as he did were formed in part as a result of "voices" the agent heard that no one else could hear.
4. The beliefs and thought processes that led the agent to act as he did were formed in part because the agent believed that passages in books or lyrics in songs, etc., were specifically written for him when, in fact, those passages, or lyrics, etc., were not written specifically for him.
5. The agent is unable to give any sort of coherent explanation for the beliefs and thought processes that led him to act as he did. And the agent's attempts to explain the beliefs and thought processes that led him to act as he did are characterized by extreme disorganization and by "pressured speech."
6. The beliefs and thought processes that led the agent to act as he did are plainly inconsistent with what the agent believes based on observation, reading, conversation, and so forth.
7. The agent is unable to recognize inconsistencies between the beliefs and thought processes that led him to act as he did and his other beliefs, nor is he able to respond to criticisms of those beliefs.
8. Given the nature of the beliefs and thought processes that led the agent to act as he did, it's unlikely that the agent or anyone else would be able to



present those beliefs in a way that would persuade someone else to believe them.

9. The beliefs and thought processes that led the agent to act as he did are not, in fact, discussed, modified, or argued about in any venue.

### *Two Comments*

First, in my view, someone who meets the above conditions should not be found guilty of an intentional crime; however, such a person could be found guilty of a form of negligence if he'd been instructed to take antipsychotic medicine and his psychotic delusions and subsequent acts are the result of a failure to take it. Compare: an epileptic loses control of her car on account of a failure to take her medicine.

Second, no one should be found guilty of an intentional offense if the acts that brought him to trial were committed in an unmedicated state and if he is incapable of standing trial in that same state. "Russell Weston" cannot be brought to trial because he is incapable of assisting in his defense in his current unmedicated state. But if he takes his antipsychotic medicine and is then able to assist in his defense, he will be (and should be, according to current law) found guilty of committing an intentional crime—even though he committed the acts that would bring him to trial in the same state that makes him unfit to stand trial. This makes no sense.

### *Advantages of Adopting the Psychotic Delusion Defense*

If the psychotic delusion defense were adopted, a jury would have to make three difficult judgments. First, was the actor led to perform the act in question by psychotic delusions as the law defines them? Second, did those delusions dominate the actor's mind at the time? And, third, did they dominate his mind to such an extent that he was mistaken in significant respects about what he was doing and so forth?

None of these questions would be easy to answer in particular cases. But I believe those questions need to be faced if people like "Yates" and "Berkowitz" and "Weston" are to be given a fair hearing. "Yates" lawyers and psychiatrists should have the opportunity to describe her delusional beliefs to the jury, and their descriptions of her beliefs should be regarded as clearly relevant to her guilt or innocence. Prosecution psychiatrists should have to testify to more than whether "Yates" "knew she was killing her children and knew killing them was illegal." The jury could then decide whether psychotic delusions were significant factors in her decisions to kill her children and whether, given the extent to which they dominated her mind, she had the capacity to take proper account of the reasons not to kill them. The jury could decide, for example, that her delusions were not a severe enough impediment in view of the love that a mother ought to have for her children. In other words, according to the psychotic delusion definition of

legal excuse, the defense would have to prove that the defendant acted based in significant part on psychotic delusions. Therefore, the prosecution would have to dispute that; hence, something that could be called mental illness, but *in a properly restricted sense*, would become a central part of the trial.

Second, this definition would not open the door to terrorists (or their lawyers). Nor would it open the doors to religious fanatic killers. This definition clearly puts “Yates,” “Berkowitz,” and others on one side of a line and “Timothy McVeigh,” “the Unabomber,” and “Ramzi Yusef” on the other.

Third, this definition dispenses with overly broad terms like “disease of the mind,” “mental illness,” and “mental disorder” in favor of the more narrow “psychotic delusion,” and while that term is defined consistently with the DSM, it’s defined for legal and not diagnostic purposes. As such, it connects with our ordinary understanding of reasons and reasoning, and it also connects with a plausible understanding of legal excuse.

### *Reply to Objections*

Doubtless, my view is open to many objections; however, I want to respond to two that seem to me to be most important. First: “All this complexity just to evade one simple point—knowing what you’re doing and knowing that it’s illegal is a sufficient condition for legal guilt.”

In normal cases, that’s true because in normal cases, the person who knows these two things is capable of taking proper (from the point of view of the law) account of them. But in the case of someone whose mind is dominated by psychotic delusions, that may not be true, and if it isn’t true, then a necessary condition for legal guilt is missing. This is not a subtle point. The jurors at “Andrea Yates” second trial understood that someone suffering from delusions to the extent that she was, could nevertheless know what she was doing, know it was illegal, and still not be guilty of murder—because her delusions prevented her from taking proper account of what she knew.

This is the second objection: “Perhaps this understanding of legal insanity explains why significant cognitive impairment should constitute a legal excuse; however, it’s incomplete as an account of legal insanity because it ignores motivational impairment. Psychopaths and compulsives are motivationally impaired, and their motivational impairment should also constitute a legal excuse.”

I have three responses. First, my goal in this essay is to explain why someone suffering from psychotic delusions might, in some circumstances, have a legal excuse. I am not attempting to account for all of the legal excuses that might be derived from an understanding of mental disorder. Second, while I don’t, in fact, believe that psychopaths and compulsives have a legal excuse, a defense of that claim is beyond the scope of this paper. Nonetheless, and third, I will make one comment: because they lack empathy, psychopaths *may* lack the capacity to realize that the *moral wrongness* of some conduct constitutes a decisive reason

not to engage in that conduct.<sup>8</sup> Psychopaths like the BTK murderer or the Green River killer may have completely lacked empathy and, as a result, doubtless didn't care about their victims, and this may, as I said, make it difficult to assess the *morality* of their behavior. *But empathy is not required for conformity with the law.* If someone with a mind unimpeded by psychotic delusions knows that there's decisive reason not to do something from the point of view of the law, then he has everything that's required for legal liability.

In the remainder of this article, by way of summary, I will contrast my definition of legal insanity with the various definitions proposed by the American Law Institute in their Model Penal Code. Under "Section 4.01. Mental Disease or Defect Excluding Responsibility," the American Law Institute proposes three different tests for insanity. First: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."<sup>9</sup> Second: "His capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law is so substantially impaired that he can't justly be held responsible."<sup>10</sup> Third: "He lacks a substantial capacity to appreciate the criminality of his conduct or is in such a state that the prospect of conviction and punishment cannot constitute a significant restraining influence upon him."<sup>11</sup>

Each of these formulations exculpates if someone lacks some degree of capacity to "*appreciate* the criminality of his conduct" (my italics). I believe this clause should be understood as distinguishing between, on the one hand, merely knowing that some conduct constitutes an offense and, on the other, having the capacity to take proper account of that fact. In other words, someone who doesn't "appreciate the criminality of his conduct" is, in my terms, someone who knows that something is a legal offense but who is unable, because his mind is dominated by psychotic delusions, to take proper account of that fact. If the American Law Institute accepted that understanding of "appreciate," then I would be in essential agreement with respect to one of the disjuncts in each of their formulations.

However, important differences between my account and theirs would remain. First, each of the Model Penal Code definitions makes essential reference to mental disease or defect, and my psychotic delusion defense makes no mention of either. And, for reasons that I've already canvassed, I don't believe mental disease or defect has any relevance to legal liability. By contrast, the concept of psychotic delusion, as I've described it, has been *defined* for legal purposes: someone whose mind is dominated by psychotic delusions is suffering from a severe cognitive impairment that's manifestly relevant to determining his liability for legal punishment.

Second, none of the Model Penal Code definitions make mention of antipsychotic drugs, and I believe an adequate insanity defense must somehow incorporate recognition of their existence. "Andrea Yates" may have been guilty of a form

of negligence for not taking her medication; “Russell Weston” and others like him should not be put in this legal bind: take your medication and then be found guilty.

Third, the Model Penal Code supposes that someone could appreciate the criminality of his conduct but nonetheless lack the *capacity* to refrain from engaging in it. I don’t believe that’s possible. In my view, if someone has the capacity to take proper account of the fact that something is illegal, then he has the *capacity* to refrain from doing it—though, of course, he may not exercise his capacity.

I have tried in this paper to explain why I believe that someone whose mind is dominated by psychotic delusions may have an excuse that should be recognized by the law. Furthermore, I have tried to show how this particular excuse follows from a plausible general understanding of legal excuse. Finally, I have claimed that the legal recognition of this excuse would enable jurors to confront difficult questions that nonetheless need to be faced if they are going to determine the guilt or innocence of someone like “Andrea Yates.”

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## NOTES

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1. I put the name “Andrea Yates” in scare quotation marks because my “knowledge” of her beliefs depends primarily on newspaper accounts, and I take it for granted that these are likely to be unreliable. In other words, I don’t have any knowledge about the actual beliefs and motives of the real Andrea Yates. However, I don’t believe that anything in this paper hinges on my being correct about the real Andrea Yates or correct about the other cases I will refer to in scare quotation marks. My principal conclusion depends only on this: *some people are motivated to kill by psychotic delusions—a term that I’ll try to define, for legal purposes, later in this paper.*

2. *Pennsylvania Consolidated Statutes: Title 18*, chapter 3, section 315 (1990 edition).

3. David Berkowitz, letter to Police Captain Joseph Borrelli (April 17, 1977), [http://www.crimelibrary.com/serial\\_killers/notorious/berkowitz/letter\\_1.html](http://www.crimelibrary.com/serial_killers/notorious/berkowitz/letter_1.html).

4. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders IV* (Washington DC: American Psychiatric Association, 1994).

5. For example, see T. M. Scanlon, *What We Owe To Each Other*, (Cambridge, MA: Harvard University Press, 1998), pp. 256–267; and H. L. A. Hart, “Legal Responsibility and Excuses,” in *Punishment and Responsibility*, ed. H. (New York: Oxford University Press, 1968), pp. 28–53.

6. The full text of “The Unabomber’s Manifesto” can be found here (published pseudonymously, under its official title): “Industrial Society and Its Future,” *New York Times* (September 19, 1977), [http://fringe.davesource.com/Fringe/Politics/Unabombers\\_Manifesto](http://fringe.davesource.com/Fringe/Politics/Unabombers_Manifesto).

7. *Folie a deux* is an apparent exception to this. However, my fundamental distinction is not between one and two but rather between beliefs that are modifiable by drugs and beliefs that aren’t; beliefs that are communicated, discussed, and argued about and beliefs that aren’t; beliefs that plainly result from inference and beliefs that plainly don’t.

8. Shaun Nichols makes that argument in Nichols, “How Psychopaths Threaten Moral Rationalism: Is It Irrational to Be Amoral?” *The Monist*, vol. 85 (2002), pp. 285–304.

9. American Law Institute, “Model Penal Code, Article 4, Section 4.01,” reprinted in *Philosophy of Law* (8th edition), eds. Joel Feinberg and Jules Coleman (Belmont, CA: Thomson/Wadsworth, 2008), p. 621.

10. *Ibid.*

11. *Ibid.*