

## Chapter 2

# Legal Insanity Standards: Their Structure and Elements

The variety of ways in which the moral notion that mental disorders may exculpate a defendant is reflected in criminal law, is impressive. In this chapter, several legal insanity standards are considered: the *M’Naghten* Rule, the irresistible impulse test, the Model Penal Code standard, the *Durham* Rule (also known as the product test), the Norwegian legal criterion, and insanity in the Netherlands. The Anglo-American standards are discussed because they are subject of many debates on legal insanity and because their components reflect some more general approaches to what insanity is about. In addition, the *M’Naghten* Rule has been highly influential in many jurisdictions, which justifies looking more closely at this test. The Norwegian and Dutch tests are included because they are significantly different from the Anglo-American tests as well as from each other.<sup>1</sup> We not only examine the structure and elements of the standards, but also evaluate their strengths and weaknesses. Three basic issues will be addressed. First, does the standard cover all cases that, according to our “common morality,”<sup>2</sup> should lead to

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<sup>1</sup>Although I focus on some Western legal systems, the insanity defense is also available in other legal systems, see *The insanity defense the world over* by Simon and Ahn-Redding (2006).

<sup>2</sup>The notion of common morality refers to what we *share* regarding moral rules and judgments. The term is used by Gert (2004, p. 8), who writes: “The existence of a common morality is supported by the widespread agreement on most moral matters by all moral agents.” It has also been adopted by Tom Beauchamp (2003, p. 260): “I define the ‘common morality’ as the set of norms shared by all persons committed to the objectives of morality. The objectives of morality, I will argue, are those of promoting human flourishing by counteracting conditions that cause the quality of people’s lives to worsen.” Beauchamp and Childress (2009, p. 3) use the same concept, defining the notion as follows: “The common morality is the set of norms shared by all persons committed to morality.” The notion of a shared morality may also be phrased differently. For instance, Appelbaum was, as American Psychiatric Association President-elect, quoted as follows (Moran 2002, emphasis added): “‘It is clear that when juries are asked to consider the insanity defense, they are doing something much more than simply applying the legal standard that is handed to them,’ Appelbaum said. ‘They are making a moral judgment as to whether punishment is deserved. That’s a reasonable function, and I think it is precisely what we should ask our juries to do—to represent *our morality at large*.’” I will use the term a bit more loosely than Beauchamp and Childress, more in line with the Appelbaum quote.

exculpation (sensitivity of the test)? Second, does it exclude cases that should not lead to exculpation (specificity of the test)? Third, can the standard be straightforwardly applied in actual cases, or is it hard to use in a court of law (applicability)? It will become clear that developing a standard that is sensitive, specific, and forthrightly applicable is no easy task. We start by briefly considering some historical roots of the insanity defense.

## 2.1 Historical Roots

The insanity defense dates back to ancient times, thus predating psychiatry as a medical discipline. Traces of the defense can be found in ancient Greek and Roman texts (Simon and Ahn-Redding 2006), for instance in an often-cited passage by Plato:<sup>3</sup>

I believe we had set down what pertains to those who plunder the gods and what pertains to traitors, and also what pertains to those who corrupt the laws with a view to the dissolution of the existing regime. Now someone might perhaps do one of these things while insane, or while so afflicted with diseases or extreme old age or while still such a child as to be no different from such men. If, on the plea of the doer or the doer's advocate, it should become evident to the judges chosen for the occasion that one of these circumstances obtains, and he should be judged to have broken the law while in such a condition, let him pay to the full exact compensation for the injury he has done someone, but let him be released from the other judicial sentences, unless he has killed someone and has hands that are not unpolluted by murder. In the latter case, he is to go away into another country and place, and dwell away from home for a year; if he comes back prior to the time which the law has ordained, or sets foot at all in his own country, he is to be incarcerated in the public prison by the Guardians of the Laws for two years, and then released from prison.<sup>4</sup>

This is Plato's proposal in *The Laws*. Several things are of interest here. First, insanity is apparently a defense that has to be raised *by the defendant*. The doer or the doer's advocate must plead for it. Second, insanity is on a par with other excusing conditions such as being afflicted with diseases or being very old or very young. In addition, although there will be no further judicial sentences, the person will still have to make restitution. I am not aware of such restitution as a component of the insanity defense in current Western criminal law systems. Furthermore, if murder has been committed, the person will be exiled for one year (the reason for such an exile is not mentioned in this quote). Finally, it is essential that the mental condition have been present at the exact moment of the crime: "he should be judged to have broken the law *while in such a condition*" (emphasis added).

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<sup>3</sup>See, e.g., Robinson (1996), p. 21 (in another translation). For Aristotle's relevance to the insanity defense, see Sect. 4.1.

<sup>4</sup>Cited from Plato (1980) 864D-E, see also Konstan (2013, p. 428). On mental illness in Plato, see, e.g., Sassi (2013).

Although this element is often taken to be central to insanity, it is not always explicitly mentioned. For instance, in the Netherlands, the law (Section 39, Dutch Criminal Code) does not mention such simultaneity.

A famous historical insanity standard is the “wild beast test” that goes back to Bracton in thirteenth century England (Simon and Ahn-Redding 2006). In *Rex v. Arnold* (1724), according to Justice Tracy, a defendant “must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast; such a one is never the object of punishment,” as cited in Robinson (1996, p. 134). Interestingly, this test refers to children and wild beasts, thus placing “insane” defendants, as it were, in another category of beings who are already excused: children and animals. The defendant’s mental state is, apparently and in a relevant way, *similar* to that of children and animals, and therefore he should not be punished. Note, that this test does not yet refer to a medical category, such as disease or disorder. Since there is no reference to medical or psychological terminology, expert testimony does not appear to be particularly relevant to the application of such a standard. We all know what animals are, and we all know what children are. Furthermore, there is something salient about the way in which young children and animals are excused. We need not first establish whether there was a relevant relationship between the mental state of a five year old and the act he committed, and then conclude that the child is not responsible.<sup>5</sup> No, being five years old unconditionally exempts one from punishment, just as being an animal unconditionally exempts one from punishment.

A case in which explicit reference to specific psychopathology was made is *Hadfield* (Robinson 1996).<sup>6</sup> James Hadfield attempted to kill King George III because of a delusion. His lawyer, Thomas Erskine, argued in 1800 that “*Delusion... is the true character of insanity*” (Robinson 1996, p. 146). Several doctors testified in this case. Hadfield was acquitted on the grounds of insanity. Here, the legal decision about a defendant’s insanity becomes founded on medical terminology and expertise. And, indeed, wouldn’t it be strange if, after the birth of psychiatry as a medical discipline, legal tests were to continue to refer to children and animals rather than to mental illness?

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<sup>5</sup>In many legal systems, a specific type of impact of the disorder must be determined—for instance, influence on a defendant’s knowledge or behavioral control—before the defendant can be considered legally insane. Norway is an exception; Norwegian General Civil Penal Code § 44 merely states: “A person who was psychotic or unconscious at the time of committing the act shall not be liable to a penalty. The same applies to a person who at the time of committing the act was mentally retarded to a high degree.” Quote taken from the English translation of the Breivik verdict, Lovdata TOSLO-2011-188627-24E.

<sup>6</sup>In this book, I cite a number of legal cases, some historical, some of recent date. The presentation and interpretation of these cases is based on generally accessible information, highlighting certain interesting aspects (often as an illustration), and should never be interpreted as “expert opinion” on the case or the defendant. I was not involved in any of the cases.

Current legal standards refer to mental states in terms that at least suggest the relevance of psychiatric and psychological testimony. Still, it has been emphasized that what counts as a disorder in the courtroom is ultimately a *legal* decision.<sup>7</sup> The DSM-5 even includes a “Cautionary Statement for Forensic Use of DSM-5” about its use in a court of law,<sup>8</sup> clarifying the fact that having a disorder according to the DSM-5 should not be considered the same as meeting “legal criteria for the presence of a mental disorder.” Still, at present, legal decisions on insanity are generally based on psychiatric and psychological evaluations and testimony.<sup>9</sup> But courts do not always follow the experts. For instance, in the Netherlands, there have been cases in which the psychiatrist was unable to diagnose a psychiatric disorder (because the defendant did not cooperate; the evaluations are court-ordered). Despite this, judges have concluded that the defendants were suffering from a mental disorder, because of which their criminal responsibility was considered diminished.<sup>10</sup> We will revisit the requirement of expert testimony for legal judgments about a defendant’s sanity in Chap. 7.

## 2.2 The *M’Naghten* Rule

The *M’Naghten* Rule (1854) was the outcome of what has been considered “the most important case in the history of the plea of insanity.”<sup>11</sup> In many jurisdictions, *M’Naghten*—or a variant thereof—is the standard for legal insanity. In addition,

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<sup>7</sup>Morse (2011b, p. 894), yet, differences between jurisdictions exist.

<sup>8</sup>DSM-5 (American Psychiatric Association 2013): “However, the use of DSM-5 should be informed by an awareness of the risks and limitations of its use in forensic settings. When DSM-5 categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis. In most situations, the clinical diagnosis of a DSM-5 mental disorder such as intellectual disability (intellectual developmental disorder), schizophrenia, major neurocognitive disorder, gambling disorder, or pedophilic disorder does not imply that an individual with such a condition meets legal criteria for the presence of a mental disorder or a specified legal standard (e.g., for competence, criminal responsibility, or disability). For the latter, additional information is usually required beyond that contained in the DSM-5 diagnosis, which might include information about the individual’s functional impairments and how these impairments affect the particular abilities in question.” See also DSM-5, ‘Definition of a mental disorder’: “Additional information is usually required beyond that contained in the DSM-5 diagnostic criteria in order to make legal judgments on such issues as criminal responsibility, eligibility for disability compensation, and competency (see ‘Cautionary Statement for Forensic Use of DSM-5’ elsewhere in this manual).”

<sup>9</sup>It is also possible that expert testimony about a certain disorder will not meet the standard for admissibility of evidence, see, e.g., on Posttraumatic Stress Disorder: Appelbaum et al. (1993), Berger et al. (2012).

<sup>10</sup>Court of Appeals Arnhem, 18 May 2011, ECLI:NL:GHARN:2011:BQ4981.

<sup>11</sup>Quote from Moran (1981, p. 1).

many other legal systems have insanity standards that reflect elements of *M’Naghten*.<sup>12</sup> Controversies regarding this standard are widespread as well.

Daniel M’Naghten, a Scotsman, suffered from a delusion that the Tories were persecuting him and, therefore, he planned to kill the British Tory Prime Minister, Sir Robert Peel. However, in what looks like a case of mistaken identity, M’Naghten killed Edward Drummond, the secretary to the Prime Minister, instead.<sup>13</sup> Eventually, M’Naghten was acquitted on grounds of insanity. After heated debates because of this verdict, the judges formulated what would become known as the *M’Naghten* Rule:

At the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know what he was doing was wrong.<sup>14</sup>

According to Yaffe (2013, p. 352), “There is no overstating the influence of this formulation of the insanity defense.” If we consider the structure of this standard, the following three elements can be distinguished:

1. The presence of psychopathology: disease of the mind, resulting in
2. a defect of reason, such that the person:
3. lacks knowledge concerning the nature, quality and/or wrongfulness of the act.

So, this standard consists of three components: psychopathology<sup>15</sup> (no reference to children or animals), defect of reason, and lack of knowledge. If any of the three is absent, the standard is not met. Yet, the second step—defect of reason—is not really a separate requirement, because, in practice, the defect of reason *exists* in the lack of knowledge, since the formulation is: “*such a defect of reason as not to know...*”<sup>16</sup> Using this interpretation, we need not evaluate step 2 independently, but we can immediately move on to step 3. And this is how *M’Naghten*, in general, appears to be interpreted, and how I will interpret it here.

Although mental disorders may impact people’s behavior in many different ways, the *M’Naghten* Rule clearly singles out the disease’s influence on types of

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<sup>12</sup>See Robinson (1996), Simon and Ahn-Redding (2006).

<sup>13</sup>On this famous case, see Moran (1981). Moran also investigated the correct spelling of the name, concluding that it should be McNaughtan. I will continue to use the usual spelling of the name in the legal standard.

<sup>14</sup>*M’Naghten’s Case*, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (H.L. 1843).

<sup>15</sup>Yet, it could be argued that this is not ‘real’ psychopathology, because it is a legal, not a clinical definition (see also Chap. 7 on the element of mental disorder in the insanity test).

<sup>16</sup>In *Kemp*, the meaning of defect of reason was clarified in English law. Lord Devlin stated: “A defect of reason is by itself enough to make the act irrational and therefore normally to exclude responsibility in law. But the Rule was not intended to apply to defects of reason caused simply by brutish stupidity without rational power.” *R v Kemp* [1957] QB 399.

*knowledge*. Still, *M'Naghten* leaves room for interpretation.<sup>17</sup> For instance, does the “wrongfulness of the act” refer to moral or legal wrongfulness? (Sinnott-Armstrong and Levy 2011) Should the defendant be ignorant about the fact that the law prohibits the act, or should the defendant not know that the act in this situation is morally wrong? In some cases, these two interpretations lead to a similar outcome. However, consider a psychopath; and let us assume that this particular psychopath is completely lacking in moral sensitivity while still being very much aware of the criminal law because he happens to be a lawyer. This psychopath knows very well that the act is legally wrong (prohibited), but is such a lawyer-psychopath really capable of knowing that the act is morally wrong? Does the psychopath have “access” to such a domain of moral knowledge? It has been argued that this is not the case and that psychopaths, therefore, should be excused.<sup>18</sup>

What I find particularly interesting about *M'Naghten* is that the rule does not mention a *causal* relationship between the lack of knowledge and the criminal act, at least not explicitly. It does not state that the defendant committed the crime *because* of that lack of knowledge, or that *if* he had known the nature, quality, or wrongfulness of the act, he would not have committed it.<sup>19</sup> Still, it appears to be an underlying assumption that *if* the defendant had known the nature or wrongfulness of the act—he would not have committed it.<sup>20</sup> Although this may be considered

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<sup>17</sup>As Yaffe puts it (2013, p. 352): “Numerous difficult, perhaps intractable, questions exist concerning what, exactly, a defendant’s disorder must do to his psychology if he is to meet this legal definition of insanity. For instance: Which features of one’s conduct are included in its ‘nature and quality’? For example, does a defendant who thinks he’s wielding a knife when he is actually wielding a broken bottle know the ‘nature and quality’ of his act? Or does a defendant who knows that his act is illegal but falsely believes it is morally obligatory, or at least morally permissible, know that ‘he is doing what is wrong’? What if he knows it is morally wrong but falsely believes it is legal, perhaps because he deludes himself to be an agent of the government who is licensed to commit crimes? And so on.”

<sup>18</sup>Levy writes: “I shall argue that psychopaths do not possess the relevant moral knowledge for distinctively moral responsibility; lacking this knowledge, they are unable to control their actions in the light of moral reasons. This conclusion is of obvious practical significance.” (Levy 2007, p. 128). See Vargas and Nichols (2007) for a response to Levy’s argument.

<sup>19</sup>It is of interest that under English law, as interpreted in *R v. Codere* [1916] 12 Cr App R 21 (CA), Lord Reading C.J. stated (Friedland 1978, p. 613): “It is said that ‘quality’ is to be regarded as characterising the moral, as contrasted with the physical, aspects of the deed. The court cannot agree with that view of the meaning of the words ‘nature and quality.’ The court is of the opinion that in using the language ‘nature and quality’ the judges were only dealing with the physical character of the act and were not intending to distinguish between the physical and moral aspects of the act.” According to Loughnan (2012, p. 121), in *Codere*, wrong was understood as moral wrongness, “However, since that decision, the courts have moved to a narrower interpretation of ‘wrongness’ that equates it with ‘legal wrong.’”

<sup>20</sup>Mackay (1995, p. 86) argues that causality has been tested in the “sense that the *M'Naghten* Rules have been interpreted to require a causal relation between the accused’s ‘defect of reason’ and his ‘disease of the mind.’”

self-evident, it is noteworthy because some other standards explicate the role of a mental disorder in the coming about of the crime. *M'Naghten* does not mention any sort of relationship other than an *epistemic* relationship: lack of knowledge about the nature, quality, or wrongness (whether moral or legal) of the act.

Let us now consider the three questions we set out to consider regarding a legal standard. First, does the standard cover all cases that, according to our common morality, should lead to exculpation (sensitivity)? Second, does it exclude cases that should not lead to exculpation (specificity)? Third, can the standard be straightforwardly applied in actual cases, or is it hard to use in the courtroom (applicability)? Answering these three questions, however, is complicated by the fact that there is considerable disagreement about what should and should not be covered by the standard. Bioethicist Carl Elliott (1999, p. 75) writes: “Ask a group of psychiatrists what sorts of mental disorders excuse a criminal offender from responsibility, and the number of answers you get will usually equal or exceed the number of psychiatrists in the group.” Usually it is helpful to start with “paradigm cases” most will consider clear examples of insanity. These are often cases in which the defendant is psychotic and in which there is a clear and direct relationship between the psychosis and the act. Consider a mother who suffers from the delusion that Satanists are persecuting her and her daughter. The mother also believes that these Satanists are on the verge of killing her daughter and herself, possibly in a horrendous way. She goes to the fourth floor of a department store in the center of a big city. After some time, she drops her daughter from the fourth floor, which results in the child’s death. Almost immediately afterwards, she herself jumps as well. Although she is grievously injured, the mother survives.<sup>21</sup>

In a way, this may be considered a classic tragedy, in which a mother does something terrible to her child in order to avoid some imagined danger.<sup>22</sup> Yet, although many may consider this case to be a “clear” example of legal insanity, it is worth noting that a psychiatric expert concluded that the mother was not fully insane, but that her responsibility should be considered strongly diminished (this is one of the five degrees of criminal responsibility in the Netherlands). However, eventually, she was considered legally insane.

Let us look at this case from a *M'Naghten* perspective. There is a disorder—psychosis; more precisely a paranoid delusion. The delusion entails a profound distortion of the mother’s knowledge about reality. Still, at least in a narrow sense, she knows the nature and quality of the act: she is intentionally killing her child. But because of her distorted view of reality, the mother apparently does not feel that what she is doing is morally wrong. Nevertheless, she may know that

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<sup>21</sup>A case in the Netherlands, Court of Appeals Amsterdam, 17 September 2010, ECLI:NL:GHAMS:2010:BN7345.

<sup>22</sup>See also the case of Andrea Yates, who “on June 20, 2001, in less than an hour...drowned all of her [five] children in the bathtub, one by one.” (Denno 2003). In fact, “According to Andrea, she killed her children to save them from Satan and her own evil maternal influences...” (Denno 2003).

dropping her daughter to her death from the fourth floor of a department store is legally wrong<sup>23</sup> (prohibited). Consequently, whether or not she will be exculpated may very much depend on the interpretation of the nature of the wrongfulness of the act that is used by the relevant court: legally wrong or morally wrong. Still, it looks like there is at least one interpretation of *M'Naghten*—not knowing that the act is morally wrong—that is compatible with the intuition that this mother is legally insane.<sup>24</sup>

Consider a second case. A patient diagnosed with schizophrenia suffers from auditory verbal hallucinations. Sometimes these hallucinations take the form of commands, and, in some rare cases, the patient somehow *cannot but obey* the commanding voice.<sup>25</sup> Suppose that in the past such voices said things like: “Make

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<sup>23</sup>Sinnott-Armstrong and Levy (2011) distinguish between four interpretations of wrongness: legal wrongfulness on the one hand and three senses of moral wrongfulness on the other: personal, social, and—as Sinnott-Armstrong and Levy call it—“plain *morally* wrong.” These three variants of moral wrongfulness are explained as follows (2011, pp. 302-303): “The second possibility [socially wrong] is that a responsible agent needs to know that the act is contrary to the moral beliefs of most people in the particular society—that is, *socially* wrong. To call an act socially wrong in this sense is to refer not merely to custom or etiquette but, instead, to moral beliefs and principles generally accepted in that community. In order for a defendant to know that an act is socially wrong, then, she must know something about what people in a given society generally believe about morality. A third possibility is that a responsible agent needs to know that the act violates that particular agent’s own moral principles or moral beliefs—that is, that it is *personally* wrong. In order for a defendant to know what is personally wrong, she must be aware of her own moral beliefs and how to apply them. Finally, a responsible agent might need to know that the act is just plain *morally* wrong. For a defendant to know this is not for the defendant to know what other people do or would say or believe about the act or about its moral status. Instead, it is to know something about the act itself—namely, that there is at least one property of the act that gives it the moral status of being wrong.” Although Sinnott-Armstrong and Levy refer to these three notions as “social, personal, and moral” wrongness, they all involve *moral* notions. Therefore, I consider them three senses of the moral explanation of wrongness in *M'Naghten* (see also Sinnott-Armstrong and Levy 2011, p. 313, and note 53 for support for this view).

<sup>24</sup>Sinnott-Armstrong and Levy (2011, pp. 303–304, references omitted) write: “*M'Naghten* jurisdictions do not agree about which kind of wrongness must be known in order for an agent to be responsible. Most seem to have remained silent, and at least two have explicitly refrained from adopting a position, on this issue. Regarding the jurisdictions that have taken a position, some of them maintain that defendants may generally be found not guilty by reason of insanity only if, as a result of mental illness, they did not know that their acts were *legally* wrong. Other jurisdictions explicitly specify that legal knowledge is not enough for responsibility; that even if defendants knew that their acts were illegal, they might still be eligible for a verdict of not guilty by reason of insanity if they did not know that their acts were *socially* wrong. No jurisdiction seems to accept the view that a defendant may be found not guilty by reason of insanity simply because he failed to know that his act violated his own personal moral beliefs.” On the issue of wrongness, see also Lord Goddard CJ who stated in *Windle*: “it would be an unfortunate thing if it were left to juries to decide whether some particular act was morally right or wrong. The test must be whether it was contrary to the law...” *R v Windle* [1952] 2 QB 826.

<sup>25</sup>See, on such command hallucinations that cannot be disobeyed Braham et al. (2004); Bucci et al. (2013).

some tea!”—the patient immediately complying by making tea. Today, however, the command is very different: “Attack your neighbor!” The patient, who cannot but obey, immediately complies with this command, attacking and thus harming his neighbor. Let us look at this case from a *M'Naghten* perspective. Is anything wrong with this patient’s knowledge? Does he hold certain beliefs that made him attack his neighbor, or that made the attack morally or legally justifiable in his own view? As far as we know, that is not the case. The explanation of why the neighbor was attacked is this: the patient experienced a certain—rare—type of hallucination that commanded him to do something *irrespective* of that patient’s own beliefs and desires. Knowledge about the nature, quality, or wrongfulness of the act was untouched by the commanding voice—it was the command *as such* that made the patient act as he did. So, distorted or absent knowledge is not part of the explanation of why the patient committed the crime.

Cases in which the defendant committed a crime because of such a commanding voice are sometimes considered the most powerful examples of legal insanity (Mooij 2012), because they do not leave the patient any other option but to act as ordered. This is significantly different from the mother in the first example. As far as we know, and in principle, she did have other options: at least she was not ordered to kill her child the way she did. The act was her own response to the terrifying situation and threat—as she perceived it. She may have contemplated a variety of options to escape from the Satanists, but eventually she chose this one. The commanding voice in the second example, however, leaves no other options open. Still, the criteria for insanity according to *M'Naghten* are not met; knowledge about the act is unaffected by the disorder, at least in the *M'Naghten* sense. Therefore, the defendant who acts on an auditory hallucination that he cannot but obey is not legally insane, and he is therefore criminally responsible and punishable. The fact that a compelling case like this—the commanding voice that cannot be disobeyed—is not covered by *M'Naghten* can be considered a profound problem with this legal standard. In other words, it does not cover all instances in which, according to our common morality, a defendant should be exculpated. Therefore, as far as the sensitivity of the test is concerned (does the standard cover all cases?), *M'Naghten* is problematic. Instances in which mental disorders decisively influence human behavior by ways other than impacting that person’s knowledge do not meet *M'Naghten*.<sup>26</sup> And such other ways do exist.

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<sup>26</sup>R. Jay Wallace (1994, p. 170) writes: “Almost from the time of their first formulation, the *M'Naghten* Rules have come under fire for their exclusive focus on cognitive defects or defects of reason in mental illness and insanity. It has been argued that mental illness may equally cause defects of the will, such as susceptibility to irresistible impulses...”

An additional issue concerns knowledge about *the nature and quality of the act*. Sometimes, psychosis may affect such knowledge. For example, the famous case of a defendant who killed a police officer believing that he was an alien disguised as a police officer (*Clark v. Arizona*). The defendant did not know the nature of this act: he believed he was killing an alien, while he was actually killing a human being. Still, in many cases, patients—even if they are very psychotic—know the nature and quality of the act in terms of attacking, harming, and killing another person.<sup>27</sup> They may even know that their acts are legally wrong. They commit them, however, because they have deeply distorted knowledge about the *context* of their acts.<sup>28</sup> In fact, delusions tend to affect the knowledge of crucial elements of the context of an act rather than of the act itself (although it may sometimes be hard to distinguish between an act and its context; for instance, an “act of self-defense” implies the context of being attacked). The distorted appreciation of the context is likely to make these defendants believe that what they are doing was not morally and/or legally wrong—perhaps that it is even good and justified.<sup>29</sup>

Therefore, the way in which part of the knowledge component in *M’Naghten* has been formulated does not straightforwardly reflect how knowledge is actually affected by psychopathology: psychotic people usually know the nature and quality of the act they are performing (at least in a narrow sense). Meanwhile, the act is often motivated by a distorted perception of the context. Still, the distorted context is likely to be covered by the fact that the defendant lacked knowledge that the act was *wrong* (i.e., the final component of the knowledge element), at least in the moral sense. The reason is that the moral evaluation of one’s acts is likely to take into account the context of those acts. Consequently, “not knowing the nature or quality of the act” may be a somewhat redundant element of this standard. Notably, some other standards lack the element of knowledge about the nature and

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<sup>27</sup>As Wallace (1994, p. 168) rightfully notes, “cases in which a mentally ill person literally has no idea about the nature and quality of her acts seem quite rare. More commonly, when someone in the grip of such conditions as depression or paranoia does something wrong (attacking a relative, say), she will know perfectly well that she is attacking the person; indeed, such actions are sometimes elaborately premeditated. But there will often be present a ‘defect of reason’ that prevents the agent from accurately assessing the moral quality of her act.”

<sup>28</sup>While I use the term “context,” Wallace (1994, p. 169) uses the term “situation”: “One must also be able to attain a clear and accurate view of the morally relevant features of the situation in which one is acting, and this is something that a delusion would appear to preclude.”

<sup>29</sup>Note that *M’Naghten* does not require the defendant to believe that his or her action was “good,” “justified,” or “praiseworthy.” It merely requires that the wrongfulness of the action was not known to the defendant due to a mental disorder’s impact on that defendant’s reason.

quality of the act, while including the appreciation of the wrongfulness of the act (e.g., the Model Penal Code test).<sup>30</sup>

If we look at the other two issues we have to consider evaluating an insanity standard, the general feeling is that *M'Naghten* passes both. These issues are: does the standard exclude cases that should not lead to exculpation (specificity) and can the standard be straightforwardly applied in a court of law (applicability)? *M'Naghten* is usually regarded as sufficiently strict to avoid overinclusion (the

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<sup>30</sup>Slobogin (2003, p. 317–18) writes about *M'Naghten*: “A third part of the House of Lords’ opinion is not as well known. Toward the end of the *M'Naghten* opinion the Lords announced a special test for cases of ‘partial delusion,’ or what today might be called an encapsulated delusion. According to the Lords, individuals with partial delusions should be placed ‘in the same situation as to responsibility as if the fact with respect to which the delusion exists were real.’” Cf. Simon and Ahn-Redding (2006, p. 201) refer to the insanity defense in Nigeria (Section 28 of the Nigerian Criminal Code Act 1990) as follows: “A person whose mind, at the time of his doing or omitting to do an act, is affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of the foregoing provisions of this section, is criminally responsible for the act or omission to the same extent as if the real state of things had been such as he was introduced by the delusions to believe to exist.” What is actually stated here is that the defendant’s actions should be judged based on the assumption that the delusional beliefs were *true*. See also Bortolotti et al. (2014, p. 380) who emphasize that not all delusions that help *explain* certain criminal behaviour provide an excuse: “In this respect, we want to draw a parallel with the case of a young man with a diagnosis of schizophrenia who attacked his neighbor after experiencing auditory hallucinations about the neighbor making loud noise and insulting him repeatedly.” Bortolotti et al. (2014, pp. 380–381) elaborate on the case as follows, based on an earlier publication: “[S]uppose Bill had actually had a very noisy neighbor. What kind of ascription of responsibility would we have made in relation to the harm inflicted on his neighbor in those circumstances? What kind of punishment would Bill have deserved for his attacking his truly noisy neighbor? Should the fact that the experiences were hallucinatory (and thereby that the neighbor was not in fact noisy) make a difference in relation to how we conceive of Bill’s responsibility for what he did and of the punishment he deserves? It is true that Bill was hallucinating: He was hallucinating that his neighbor was making loud noises, and the content of the hallucination explains in part why he attacked his neighbor. Had he not hallucinated that his neighbor was making loud noises, Bill would have probably not attacked and harmed his neighbor. But it is also true that having noisy neighbors does not morally justify assaulting them. That is, had Bill’s neighbor been truly noisy, Bill would have still been doing something blameable in assaulting his neighbor. If one has a noisy neighbor, then one should try to convince his neighbor to be less noisy, and, failing that, one should perhaps call the police.” They interpret the case as follows: “Here, what we find is that the psychotic symptoms experienced by Bill help explain his aggressive behaviour towards his neighbour, although they are not sufficient to motivate his actions.” In fact, what Bortolotti et al. have done is assume the truth of Bill’s psychotic belief and then evaluate Bill’s actions based on that assumption, concluding that what Bill did is still blame-worthy, even though the symptoms help explain why he acted as he did. Meanwhile, in some cases it may be difficult to assume the truth of a delusion and its possible consequences. For instance, if another person were an alien in disguise, what would be a permissible range actions? Or, assuming the existence of a demon, what should or shouldn’t we do? Certain delusions may even defy the laws of physics—how can we assume their truth and then reason about what is and is not permissible in a world in which our laws of physics no longer apply?

problem is rather that it is too strict). In addition, it is generally assumed that the presence or absence of the relevant knowledge can be *sufficiently* reliably assessed.<sup>31</sup>

In sum, with respect to the first case (the mother), *M’Naghten* appears to be flexible enough to explain why she should be excused: we can use the wrongfulness component of the standard, and interpret this as morally wrong. Yet, in the second case, in which psychopathology influences behavior in ways other than through impact on knowledge (namely, by commanding auditory hallucinations), *M’Naghten* seems to fall short.<sup>32</sup>

### 2.3 The Irresistible Impulse Test

Several variations of the “irresistible impulse test” (*Parsons v. State* 1887) exist. For instance, to explain the irresistible impulse test, Gerber refers to the Supreme Court of New Mexico: “if, by reason of disease of the mind, defendant has been deprived of or has lost the power of his will which would enable him to prevent himself from doing the act, he can not be found guilty.”<sup>33</sup> Becker (2003, p. 43) specifies the following requirements for the Irresistible Impulse test:

1. The defendant must have a significant mental illness.
2. The defendant’s impulse must arise directly from the mental illness.
3. There must be no evidence of planning or premeditation by the defendant before the criminal act was committed.

This irresistible impulse test can be used together with *M’Naghten* as the legal standard for insanity (Gerber 1975). In such a combination, the rule may be considered an improvement with respect to reflecting the morally relevant impact of a mental disorder on a person’s actions, compared to *M’Naghten* alone (see previous section). The reason is that it recognizes that mental disorders may have decisive influence on human behavior without affecting a person’s knowledge.

There is further philosophical and legal support for adding “irresistible impulse” to the standard for legal insanity. As Michael Moore (1984, p. 221)

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<sup>31</sup>However, see the next chapter, in which it becomes clear that some do not trust the reliability of psychiatric evaluations.

<sup>32</sup>Still, some people may feel that commanding voices as described in the second case should not lead to exculpation by reason of insanity, for instance, because they may be faked. Then, the fact that the influence of this psychopathological phenomenon is not covered by *M’Naghten* does not constitute a weakness of the standard, but rather the contrary. On faking command hallucinations, see McCarthy-Jones and Resnick (2014), Resnick and Knoll (2005). We will return to issue of faking in the next chapter.

<sup>33</sup>New Mexico Supreme Court, *State v. White*, 58 N.M. 324, 270 P.2d 727, 730 (1954).

writes: “In criminal law, as in morals, two general sorts of conditions excuse: ignorance that is not itself culpable, and compulsion.... These two moral excuses are as old as Aristotle and are embodied in contemporary criminal law.”<sup>34</sup>

Moral philosopher R. Jay Wallace (1994, p. 171) provides further support for adding a control prong to the ignorance part<sup>35</sup> as he writes about impulses related to addiction:

If these impulses are truly irresistible, then the agent will not genuinely have the ability to control his behavior in light of the moral obligations that the impulses lead him to violate. Even if he can perfectly grasp and apply the principles that support those obligations, so that he knows that what he is doing is wrong, the irresistibility of the impulses deprives the agent of the capacity to act in conformity with them. Of course, the resulting impairment of the powers of reflective self-control may be selective rather than total, leaving aspects of the addict’s behavior, or periods in the addict’s life, in which he retains the general powers to control his behavior by the light of moral obligations. But to the extent that irresistible impulses deprive the agent of those abilities, it would seem unreasonable to hold the agent morally accountable.

Although Wallace writes about addiction, it is clear that this line of thought applies to all mental disorders that lead to irresistible impulses. Note, however, that Wallace does not claim that addiction involves impulses that are truly irresistible; his statement is conditional. It is also relevant that Wallace points out that even if irresistible impulses do occur, the person may still retain control over many other actions. This implies, conversely, that the fact that a person has significant control over many actions does not rule out the possibility of lack of control regarding *some* of his actions. In other words, control may be selectively compromised. Within the context of forensic psychiatric evaluations of defendants, this means that the fact that some control was retained cannot in itself justify a conclusion that the defendant retained the legally relevant type of control.

Still, there is a serious problem attached to the irresistible-impulse component of a legal insanity standard. Morse (1985, p. 817) writes:

There appears to be a *prima facie* case for a compulsion branch of the insanity defense, but is it persuasive and would the test be workable? If or to what degree a person’s desire or impulse to act was controllable is not determinable: there is no scientific test to judge

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<sup>34</sup>Moore (1984) adds: “There are thus basically two kinds of traditional insanity tests: those based on the ignorance of the mentally ill accused person; and those based on some notion of his being compelled to act as he did.”

<sup>35</sup>Hart (2008, pp. 189–90) notes: “Angrily and enviously, many of the critics [of M’Naghten] pointed to foreign legal systems which were free of the English obsession with this single element of knowledge as the sole constituent of responsibility. As far back as 1810 the French Code simply excused those suffering from madness (*démence*) without specifying any particular connexion between this and the particular act done. The German Code of 1871 spoke of inability or impaired ability to recognize the wrongness of conduct or to act in accordance with this recognition. It thus, correctly, according to the critics, treated as crucial to the issue of responsibility not knowledge but the capacity to conform to law. The Belgian *Loi de Défence Sociale* of 1930 makes no reference to knowledge or intelligence but speaks simply of a person’s lack of ability as a consequence of mental abnormality to control his action.”

whether an impulse was irresistible or simply not resisted. At best, we may develop a phenomenological account of the defendant's subjective state of mind that will permit a common sense assessment of how much compulsion existed.<sup>36</sup>

On the one hand, Morse acknowledges the theoretical relevance of “not being able to control one's behavior” to legal insanity.<sup>37</sup> On the other, he points to the fact that, in practice, a lack of control cannot be *reliably assessed*. In 2011b (p. 929), Morse expresses a similar view: “I readily concede that lack of control may be an independent type of incapacity that should mitigate or excuse responsibility, but until a good conceptual and operational account of lack of control is provided, I prefer to limit the insanity defense to cognitive tests.”

In this quote, Morse adds conceptual concerns to the practical qualms already expressed. In fact, he voices an often-heard criticism—also voiced by Herbert Fingarette,<sup>38</sup> among others—that it is too hard to make a reliable distinction in a court of law between those who could and those who could not resist their impulses. Apparently, there is an epistemic problem here, not on the part of the defendant, but on the part of the evaluator: it is difficult for a psychiatrist or psychologist, and therefore for the judge or jury, to *know* whether a defendant really lacked the capacity to control his behavior at the moment of the crime. The problem is addressed in The American Psychiatric Association's 1983 position paper on the insanity defense as well: “The line between an irresistible impulse and an

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<sup>36</sup>See also Morse (2011b, p. 893, references omitted): “Lack of control is not well understood conceptually or scientifically in any of the relevant disciplines such as philosophy, psychology, and psychiatry, however, and we lack operationalized tests to accurately identify this type of lack of capacity. I have long been a critic of such standards for just these reasons. The American Bar Association and the American Psychiatric Association also urged the rejection of control tests for legal insanity on these grounds. I suggest that for all cases in which a control test may seem required, the reason can be better characterized as a rationality defect because control difficulties flow from lack of access to the good reasons not to act in the wrong way.” In the “Cautionary Statement for Forensic Use of DSM-5” we can read about control over one's behavior: “Nonclinical decision makers should also be cautioned that a diagnosis does not carry any necessary implications regarding the etiology or causes of the individual's mental disorder or the individual's degree of control over behaviors that may be associated with the disorder. Even when diminished control over one's behavior is a feature of the disorder, having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time.”

<sup>37</sup>See also Morse (2000, p. 264, footnote omitted): “I am not sure what it means to be *unable* to control oneself, but if this condition warrants preventive detention, it should also furnish an excuse to crime. After all, could it possibly be fair to blame and to punish those who genuinely cannot control themselves?”

<sup>38</sup>Fingarette (2004, p. 70): “First of all, the notion of irresistible impulse is for theoretical purposes a very troublesome notion. The problem has been well expressed in the question: How do we tell the difference between ‘He could not resist his impulse’ and ‘He did not resist his impulse’? This becomes in practice a very perplexing issue in the law. Typically, when it comes up openly, as in insanity cases, for example, it involves psychiatric testimony. Yet there is no theoretical understanding of how to apply the distinction.”

impulse not resisted is probably no sharper than that between twilight and dusk.”<sup>39</sup> In an interesting discussion of the control prong, Penney (2012, p. 101) articulates the consequences of the control prong that people often fear:

The main criticism of control tests, expressed by both courts and commentators, has always been that defendants who were capable of controlling their conduct will too often be excused from responsibility. (...) Given this alleged difficulty of measuring control, it is posited, a great many defendants (including those with disorders like kleptomania, pyromania, and pedophilia) would escape punishment. Commentators have objected to this prospect on moral and deterrence grounds and because it would engender popular dissatisfaction and disrespect for the law.<sup>40</sup>

The fear, in sum, is that including a control element in the insanity standard would result in injustice, in the sense that people who actually are responsible would be acquitted on the grounds of insanity. In defense of a control prong, one could respond that juries and judges handle similarly difficult evaluations all the time. For instance, they may have to determine whether a defendant was acting negligently, recklessly, knowingly, or purposefully.

What would the irresistible impulse test mean for both cases we discussed in the previous section (the mother with the paranoid delusion and the defendant hearing commanding voices)? Under the irresistible impulse test, the mother would probably be considered sane (unless the irresistible impulse test were used in combination with *M’Naghten*). She performed a deliberate action, and that action was the end-product of a decision-making process—not a mere impulse. How about the command hallucination? The commanding voice may be considered an irresistible impulse: the defendant could not but immediately comply with the command. Still, what should be considered an “impulse” is, to some extent, open to interpretation.

It becomes clear that, with respect to the control prong, the conditions for moral and legal excuse *diverge*—at least according to some authors. These authors do not deny that mental disorders may undermine a person’s behavioral control and that a lack of control diminishes one’s moral responsibility. Yet, they argue, the assessment of a lack of control in a court of law is hampered by theoretical, as well as practical, shortcomings. Such a concern about the applicability in legal practice should be taken very seriously. Because the stakes are high in a court of law, the evaluation of an excusing condition should be reliable. If the reliability is in doubt, this is clearly a reason to omit the control prong. At the same time, this type of prudence comes at a price: leaving out the control element for this reason implies that defendants who actually lacked control will be held responsible. Consequently,

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<sup>39</sup>Insanity Defense Work Group, American Psychiatric Association (“American Psychiatric Association statement on the insanity defense,” 1983, p. 685), also cited by Elliot (1996, p.14). See, e.g., Glannon (2011) on the problems of the notion of impulse control in mental disorder.

<sup>40</sup>References omitted. Penney (2012, p. 101) also writes here: “Even with the assistance of expert testimony, the argument runs, it is simply too difficult for judges and juries to distinguish between the capable and the incapable. ... Indeed, it was primarily this concern that led both the American Psychiatric Association (1983) and the American Bar Association (1989) to advocate for the removal of the control test in the aftermath of the Hinckley case.”

some defendants who do not deserve blame and punishment, at least in the moral sense, will nevertheless be blamed and punished. So, there is a tension here between moral and criminal responsibility. In my view, even though the assessment of lack of control may be more challenging than assessments of ignorance, a control prong should be part of a standard because of its moral significance (see the next section, and Chap. 7). Still, the concerns have to be acknowledged and, to the extent possible, dealt with (see also Penney 2012). In Chap. 6, we consider the possibility that neuroscience could be helpful in this respect.

## 2.4 Model Penal Code (American Law Institute)

The Model Penal Code standard for insanity was developed by The American Law Institute (1962) and it states: “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 (wrongfulness) of his conduct or to conform his conduct to the requirements of the law.”<sup>41</sup>

The standard became widely used in the United States. However, after John Hinckley attempted to assassinate President Ronald Reagan in 1981 and was acquitted on grounds of insanity under the Model Penal Code test, many U.S. states that had adopted the Model Penal Code test returned to *M’Naghten* (Becker 2003). Still, at present, a considerable number of states use this standard or a variant of it.<sup>42</sup>

The standard diverges from *M’Naghten* in several ways.

1. With respect to psychopathology, it uses the terms “mental disease or defect;” which means that “defect” is added to *M’Naghten*.
2. It uses the formulation “lack of *substantial* capacity” instead of “did *not* know” in *M’Naghten*. The *Explanatory Note* reads: “The standard does not require a total lack of capacity, only that capacity be insubstantial.” This allows leeway for exculpating defendants whose capacity was substantially affected, but who, nevertheless, retained some capacity.
3. Instead of “know,” this standard uses the word “appreciate,” which refers to a deeper form of understanding. It requires knowledge *plus* some form of appraisal. At least in principle, a defendant may have known that what he was doing was wrong, but still he may not have appreciated the wrongfulness of the action. Therefore, as a criterion, “appreciation” is more demanding than mere knowledge.<sup>43</sup>

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<sup>41</sup>Model Penal Code (American Law Institute 1985).

<sup>42</sup>See Packer (2009), Appendix A.

<sup>43</sup>See Sinnott-Armstrong and Levy (2011, p. 314): “The change from ‘know’ in the *M’Naghten* rule to ‘appreciate’ in the MPC [Model Penal Code] rule is arguably an attempt to move beyond a purely abstract account of knowledge. Appreciation requires the person not only to know the right answers to questions but also to understand those answers.” See also Mackay (1990) on “appreciate” in the Canadian standard for legal insanity, which is otherwise very similar to *M’Naghten*.

4. The phrasing “criminality (wrongfulness)” is used.<sup>44</sup> Jurisdictions could choose either term. Criminality refers to legal wrongfulness, while the term wrongfulness is generally considered to refer to moral standards (Packer 2009)—and, in principle, just as the wrongness in *M’Naghten*, it can be interpreted in different ways (Sinnott-Armstrong and Levy 2011). The Model Penal Code test is thus not really different in this respect: it may cover *legal* as well as *moral* wrongfulness, depending on how it is used.
5. Most importantly, this standard adds a control prong to the criteria for insanity. If, due to a mental disease or defect, a defendant was unable to conform his conduct to what the law requires of him, he is considered to have been insane.<sup>45</sup> Notably, the phrasing of the control prong is so broad that it may be interpreted in such a way that it also includes the appreciation prong. For we may argue that the defendant could not conform his conduct to the requirements of the law because he was unable to appreciate the criminality of his conduct. Having the ability to appreciate (both a situation and the law) is crucial to one’s ability to conform one’s behavior to the requirements of the law. Based on this interpretation, the control prong can even be considered to comprise *M’Naghten*, because we may say: he was unable to conform his conduct to the requirements of the law because, due to a defect of reason, either he did not know what he was doing or he did not know that it was wrong.<sup>46</sup> Still, in general, the incapacity to conform one’s conduct to the requirements of the law is considered to concern the inability to exercise control over one’s behavior even though one knows or appreciates that the action is wrong.

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<sup>44</sup>The Explanatory Note, Model Penal Code §4 (American Law Institute) reads: “An individual’s failure to appreciate the criminality of his conduct may consist in a lack of awareness of what he is doing or a misapprehension of material circumstances, or a failure to apprehend the significance of his actions in some deeper sense. Wrongfulness is suggested as a possible alternative to criminality, though it is recognized that few cases are likely to arise in which the variation will be determinative.”

<sup>45</sup>According to Becker (2003, p. 44), “The ALI [American Law Institute] test was viewed as a broader more expansive test of insanity as compared to the outdated M’Naghten test... The ALI test also broadened the insanity test to include a volitional or ‘irresistible impulse’ component. The test focused on the ‘defendant’s understanding of his conduct’ and also on the ‘defendant’s ability to control his actions.’”

<sup>46</sup>*Cf.* Hart (2008, p. 189): “From the start English critics denounced these [M’Naghten] rules because their effect is to excuse from criminal responsibility only those whose mental abnormality resulted in lack of knowledge: in the eyes of these critics this amounted to a dogmatic refusal to acknowledge the fact that a man might know what he was doing and that it was wrong or illegal and yet because of his abnormal mental state might lack the capacity to control his action. This lack of capacity, the critics urged, must be the fundamental point in any intelligible doctrine of responsibility. The point just is that in a civilized system only those who *could have* kept the law should be punished. Why else should we bother about a man’s knowledge or intention or other mental element except as throwing light on this?”

The Model Penal Code test makes it possible to exculpate both the mother who was deluded (at least as long as wrongfulness is understood in a moral sense) and the defendant who acted on an auditory hallucination he could not but obey.

In fact, the term appreciate may open up the possibility of exculpating a wider range of defendants suffering from mental disorder, e.g., those suffering from anti-social personality disorder, and from these, a subgroup considered psychopaths.<sup>47</sup> Although these people, it may be said, *know* perfectly well that what they are doing is wrong, they may not have the capacity to really *appreciate* the wrongfulness of their actions.

In the previous section, some quotes arguing against a control prong, which is included in the Model Penal Code test, were considered. According to Penney (2012, p. 101, emphasis added), however, the ignorance element is not unproblematic either:

Cognitive impairment typically stems from major mental illnesses (such as schizophrenia or bipolar disorder) that manifest with obvious, tangible symptoms (such as paranoid fantasies or command hallucinations). In the forensic context, these conditions are typically easy to diagnose and difficult to feign. That said, it may be *much more difficult* to assess whether defendants' mental illnesses rendered them incapable of appreciating the wrongfulness of their conduct. It is possible that a significant proportion of defendants excused on this basis retained some capacity, despite their illnesses, to understand that what they were doing was wrong.<sup>48</sup>

In other words, the assessment of a defendant's knowledge about the wrongfulness of the act is prone to possible mistakes or misjudgments as well. So, the view that the psychiatric evaluation of the cognitive prong is uncomplicated while the evaluation of the control prong would be fishy is not correct.<sup>49</sup> Penney adds that the "evaluative tools commonly used to assess impulse control differ little from those used to assess cognitive impairment. And while there has been a dearth of research on the question, studies have suggested that clinicians are able to measure control as accurately as cognitive impairment."<sup>50</sup>

Still, in my view, there is a reason why assessments of distorted knowledge or appreciation tend to be easier than assessments of impaired control. The distortion of a person's knowledge due to a delusion usually exists *over a longer period of time* and it is *stable*, in the sense that it does not suddenly come and go. Therefore, in the weeks preceding a crime, the defendant may have talked about his deluded worldview and his behavior may show clear indications of distorted beliefs. The act may thus be part of a *longer and stable pattern* of behavior and expressions. In contrast, control issues tend to come and go suddenly. The defendant may almost always have been able to control his actions, except for that very moment when he heard the commanding voice. But we may ask: did he really hear a commanding

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<sup>47</sup>Not all psychopaths, though, fulfil the criteria of antisocial personality disorder.

<sup>48</sup>References omitted.

<sup>49</sup>Penney (2012, p. 101) writes that it is not "evident that impulsivity is so clinically nebulous that courts cannot determine claims with reasonable reliability."

<sup>50</sup>Penney (2012, p. 101, references omitted).

voice at that particular moment in time? It may be harder to establish whether this was actually the case, than to establish whether a certain action fits within a longer-lasting, severely delusionally distorted view of reality. Of course, there are short-lived but very intense delusions as well, e.g., during a drug trip. But even they tend to be present for several *hours* at least—while a commanding voice (or other control problems) may only be present for a few seconds. In addition, the control problems tend to occur erratically, making it difficult to witness a person hearing voices or having control problems. If a psychiatrist interviews a defendant who is suffering from a delusion, the delusion is very likely to be evident during the interview. However, if a person hears voices from time to time, these voices may or may not occur during the interview: they come and go.

Penney also provides empirical data on successful insanity defenses to show that a control prong does not, as is sometimes feared, lead to extensive abuse of the insanity defense. He refers to three studies that, taken together, show low to modest percentages of defendants who are not considered criminally responsible *only* because of the control prong. These percentages varied from 9 to 24 %; the two larger studies found percentages of 9 and 11 %. Penney notes that the “vast majority” of the defendants considered not criminally responsible in one of these larger studies suffered from “major mental illnesses such as schizophrenia and bipolar disorder.” Kleptomania and pedophilia were not among the disorders that led to irresponsibility because of the control prong. Based on these findings, fears of an enormous increase of successful insanity pleas if a control prong were added appear to be unwarranted, as do possible fears that pedophiles would be considered insane.

Meanwhile, the fact that a small but significant percentage of defendants were considered not responsible on control grounds alone, Penney argues, shows that, in legal practice, the element of control *adds* something to the knowledge criterion.<sup>51</sup> He also uses this observation to counter a view expressed by Morse, among others, “that deserving candidates for the irresistible impulse defense should normally be exempt from responsibility under a proper interpretation of *M’Naghten*.”<sup>52</sup>

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<sup>51</sup>See Redding (2006, pp. 89–90, references omitted) on those who oppose a control prong: “Opponents of control tests have offered, and continue to offer, three rationales for their abandonment: (1) that cognitive tests for insanity are sufficient, since those with impaired impulse control will also be cognitively impaired; (2) that mental health professionals are incapable of reliably assessing the capacity for impulse control, particularly in relation to criminal behavior, or of differentiating between a truly irresistible impulse and an impulse that is merely difficult to resist; and, therefore, that control tests lead to erroneous insanity acquittals; and (3) that because ‘they directly pose the question of whether a person could control his or her behavior,’ control tests run counter to the law’s assumption of free will and notion that criminals should be held accountable for their crimes.” Adding to that: “As I demonstrate below, current neuroscience and clinical research challenges each of these claims.”

<sup>52</sup>Penney (2012, p. 101, references omitted).

However, to be able to consider Penney's findings a solid argument against this position, we would have to know the exact grounds for considering these defendants insane, and whether these grounds amount to a "proper interpretation of *M'Naghten*."

Morse's argument pro *M'Naghten* and contra the control prong relies, at least in part, on the notion of "capacity for rationality." In his view, insanity comes down to an incapacity for rationality. And lack of control, he argues, can be subsumed under rationality defects. Morse writes (2002, p. 1064): "No logical or legal reason prevents a court from understanding and interpreting 'control' problems as rationality defects ... 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."<sup>53</sup> And in the same paper he (2002, p. 1075) adds: "In sum, lack of capacity for rationality is the best explanation of and the most workable standard for non-responsibility. It is also the best explanation of what we really mean when we say that an agent cannot control himself. Control standards should be understood in terms of rationality defects."<sup>54</sup>

This line of thought is not unreasonable. Lack of control over one's behavior may be considered in terms of a lack of rationality, because the behavior was not under the control of a rational being. In fact, the notion of rationality appears to be very broad and flexible; it may cover a lot, especially when considering the human being a "rational animal" (see Chap. 4). It is less certain, however, that *M'Naghten* should be considered a complete rationality standard.<sup>55</sup> Although it is true that "lack of knowledge" is a rationality test, this does not necessarily mean that *M'Naghten* exhausts the concept of rationality. There is more to rationality than knowledge about the nature and quality of an act and its wrongfulness.<sup>56</sup> For instance, controlling one's behavior can easily be considered part of rational

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<sup>53</sup>Morse (2000, p. 257, emphasis added) writes: "I am firmly of the opinion that disorders of desire should excuse only in those cases in which the desire is so strong and overwhelming that the agent at least temporarily loses the capacity to be *guided by* reason. Thus, the problem would be irrationality and not compulsion."

<sup>54</sup>See also Morse (2002, p. 1065): "Indeed, as I argue below, if one examines closely most cases of alleged 'loss of control,' they essentially raise claims that, for some reason, the agent could not 'think straight' or bring reason to bear under the circumstances." Others, like Penney (2012) and Redding (2006), disagree with Morse on this issue.

<sup>55</sup>Morse (2002, p. 1041) writes: "The criteria for the dominant, 'cognitive' insanity defense tests include a mental abnormality that causes a further, necessary defect in rationality. For example, the *M'Naghten* test requires that the mental abnormality cause the person not to know the nature and quality of the act or not to know that it was wrong. The cognitive criteria of the American Law Institute's Model Penal Code test require mental abnormality to produce a lack of substantial capacity to appreciate the criminality or wrongfulness of one's act."

<sup>56</sup>In fact, rationally *controlling* one's behavior may well be considered to be a cognitive capacity. For example, the domain in neuroscience that studies such behavioral control—in health and disease—is often called "cognitive neuroscience." See, e.g., Astle and Scerif (2009).

behavior (just as Morse claims). Therefore, *M’Naghten’s* “lack of knowledge” can be considered part of, but not identical to, the concept of a rationality defect. In this vein, interpreting the notion of “rationality defects” as being central to insanity could just as well lead to the conclusion that *M’Naghten* is obviously too narrow and that, in addition to a “lack of knowledge,” a “lack of control” is required to constitute a “defect of rationality” test. Consequently, the Model Penal Code test would encompass more of what can be considered “rationality deficits” than would *M’Naghten*.<sup>57</sup>

Penney argues for including a control prong in the insanity standard, but only with a high threshold. The threshold should be “a total inability to exert control in the circumstances.”<sup>58</sup> This implies that urges that are extremely hard to resist do not qualify for insanity—because there is no *total* lack of control. Penney’s proposal appears to be stricter than the Model Penal Code standard, which reads “lacks *substantial* capacity” rather than *total* capacity. In addition, Penney argues that the burden of proof should be on the defendant. This second point is also aimed at allowing “decision makers to distinguish between deserving and undeserving claims.” In practice, it would just make it more difficult for a defendant to be considered insane, which may be at odds with another remark by Penney (2012, p. 101): “However few in number, defendants who are incapable of restraint despite knowing that their conduct is wrongful are as deserving of excuse as those who lack such an appreciation.” If the burden of proof is on the defendant, Penney deliberately takes the risk that some who “are as deserving of excuse” may not be considered insane, because, for instance, they lack the financial resources required for an effective defense in this respect.<sup>59</sup>

Finally, we should note that where the Model Penal Code is in use, it may also be a *variant*. The same is true for *M’Naghten*. Packer (2009, Appendix A) provides a nice overview of standards in U.S. jurisdictions, showing for example, that Alabama has a *M’Naghten* variant which uses “appreciate” instead of “know”; Alaska has a *M’Naghten* variant without “wrongfulness” and uses the term “appreciate”; Arizona has a *M’Naghten* variant without the “nature and quality” part; Arkansas has a Model Penal Code test variant without the word “substantial” (capacity), and so on. Only the first jurisdictions in alphabetical order are

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<sup>57</sup>See also Chap. 4 on irrationality.

<sup>58</sup>Penney (2012, p. 101). I assume that Penney has in mind an inability to exert control *regarding the criminal act* and that “total” does not refer to all aspects of human functioning (such as, e.g., bladder control, see Chap. 6).

<sup>59</sup>See Sinnott-Armstrong and Levy (2011, p. 324): “...shifting the burden to the defense might increase the chance of punishing people who are not guilty, if insane people really are not guilty.” See also the next chapter on arguments against the insanity defense.

mentioned here.<sup>60</sup> These variants clearly add to the variety of standards for legal insanity.<sup>61</sup>

In conclusion, the Model Penal Code allows leeway for the fact that mental disorders may influence people's behavior in ways other than by influencing their knowledge. It adds the notion of control to appreciation of the wrongfulness of the act. Still, expanding the insanity standard in this way has been met with criticism. The control prong, it is argued, is unhelpful because it would be (1) theoretically unclear (2) difficult to evaluate, or (3) unnecessary because *M'Naghten* covers the lack of control. We return to these issues, in particular in Chap. 6, on neuroscience and insanity.

## 2.5 Product Test or *Durham* Rule

According to the *Durham* rule (*Durham v. U.S.* 1954), also known as the “product” test, the defendant is “not criminally responsible if his unlawful act was the product of mental disease or mental defect.”<sup>62</sup> The test is currently used in the U.S. state of New Hampshire.<sup>63</sup>

This standard is significantly different from the *M'Naghten* Rule, irresistible impulse test, and the Model Penal Code. Each of these three standards defines a *specific area of human functioning* as legally relevant with respect to the impact of a mental disorder. *M'Naghten* defines knowledge of the act as the relevant area.

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<sup>60</sup>An extensive overview of legal insanity in U.S. jurisdictions can also be found in Janofsky et al. (2014). Note that differences regarding legal insanity across jurisdictions are not limited to the United States. For instance, Ferris (2010, p. 364–365) writes about Australia: “Although Australian states may apparently have given some support to this attempt at harmonization of the law, in practice the Model Code has been modified and applied in disparate ways. For example, South Australia has not included severe personality disorder as a condition capable of producing mental impairment (...). Victoria has not included the volitional element concerning control of conduct in its mental impairment legislation (...). New South Wales has ignored the Model Code altogether...”

<sup>61</sup>Helm et al. (2016) performed a “mock juror” study among 477 undergraduate students (who participated in the study for course credit) comparing *M'Naghten* to the Model Penal Code criteria. Their results appear to downplay the relevance of the differences between jurisdictions as far as the test for insanity is concerned: “The results of this study support the contention that jurors’ decisions in insanity cases are not affected by whether they are asked to decide based on the Model Penal Code test (with a rationality limb and a control limb) or on the McNaughten test (based entirely on rationality), even when considering a defendant suffering from a clear control disorder. This suggests that jurors are making decisions based on who they think is insane rather than on the specific legal standard they are given and is consistent with existing literature showing that jurors tend to use their own conceptions of insanity rather than legal definitions when making determinations.” Yet, even if this is true for jurors, the extent to which it is true for judges is unclear.

<sup>62</sup>*Durham v. United States*, 214 F. 2d 862 (D.C. Cir., 1954).

<sup>63</sup>See Packer (2009, Appendix A).

The irresistible impulse standard defines the ability to resist an impulse as the relevant area, while the Model Penal Code defines appreciation of the wrongfulness of the act and the ability to conform one's conduct as the legally relevant areas of human functioning. *Durham*, in contrast, does not specify such an area. So, in principle, there are no limitations regarding the domains of functioning that may be affected or compromised in order to meet the standard, just as long as the criminal act can be considered the *product* of the disorder or defect.

Theoretically, there is something interesting about this view, as articulated by Gerber (1975, p. 125):

The *Durham* standard views mental functioning as essentially unitary but multifaced. No single mental faculty determines the existence or nonexistence of sanity, just as no single faculty is responsible for the control of human behavior. Impaired control may result from a wide variety of causes in the psyche, not all of which are cognitional.

He further explains that "If a single theme pervaded Judge Bazelon's opinion in *Durham* it was encouraging the fullest possible range of psychiatric testimony on the question of responsibility."<sup>64</sup> According to Becker (2003, p. 43), in practice, this rule "leaves the ultimate decision of criminal responsibility to the expert medical witness without any limitation or guide as to which kinds of cases the law seeks to exempt from condemnation and punishment."

This standard for insanity highlights the fact that the disorder provides an excuse only if it *produced* the defendant's behavior. The idea that the illness is relevant *only insofar as* it directly contributed to the occurrence of the crime is not unreasonable. A fear of flying will not exculpate a defendant for robbing a shop because there does not appear to be any relationship between the fear and the act; the crime cannot be considered the "product" of the defendant's phobia. To complicate the matter, suppose now that the robber wanted to visit his daughter thousands of miles away. He cannot go by plane because of his fear of flying, so he has to go by boat. This boat trip, however, is much more expensive than a flight, and the defendant has no money for such an expensive trip. This is why he decided to rob the shop. Is the crime the product of the disorder? Without the disorder, he would have gone by plane, and he would have visited his daughter instead of standing trial. But does this amount to the crime being the "product" of the disorder? *M'Naghten* is probably more helpful here: because, as far as we know, the fear of flying did not cause a lack of knowledge about the nature and quality of

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<sup>64</sup>Gerber (1975, p. 124). He also writes on that page: "Before 1954 the District of Columbia employed the right-wrong rule of *M'Naghten* taken together with the irresistible impulse test. Two principal problems arose in attempting to apply this standard. First, the antiquated terminology of *M'Naghten* ceased to represent society's notion of who should be punished relative to the existing state of psychiatric knowledge. Second, expert witnesses felt obliged to go outside their expertise into the realm of law and social morality in testifying as to whether defendants knew right from wrong. The issue of responsibility was framed so narrowly that experts felt precluded from adequately describing the ramifications and manifestations of a defendant's illness relevant to an assessment of criminal responsibility." In *Durham*, the court concluded that "a broader test" than *M'Naghten* had to be adopted.

the robbing of the shop or its wrongfulness, the defendant will not be considered insane, which probably corresponds to our moral intuitions about such a case.

Becker (2003, p. 43–44) formulates the conceptual concern regarding the “product”<sup>65</sup> component of this standard as follows:

The question of causation or “product” is fraught with difficulties. The concept of single-ness of personality and unity of mental processes that psychology and psychiatry regards as fundamental, makes it almost impossible to divorce the question of whether the defendant would have engaged in the prohibited conduct if he had not been ill from the question of whether he was, at the time of the conduct, in fact ill.

Under this interpretation, if the defendant was ill, the actions would *have to* be considered the product of his illness, because the illness was part of the mind that formed the intention to commit the crime. Although I am not completely convinced by this line of thought, it is clear that there could be a theoretical issue here.

*Blocker v. United States* (288 F.2d 853 (D.C. Cir. 1961)) contains an interesting and influential concurrence from Warren Burger (future Supreme Court Justice) regarding the product test. He writes:

Since its adoption in 1954, the “disease-product” test has been both acclaimed and criticized; it has been called “vague,” “confusing,” “ambiguous,” “misleading,” and it has been condemned as taking the fact determination away from jurors and transferring it to experts. ... As I see it, our Durham opinion was a wrong step but in the right direction; its direction was correct because ... it sought to open the jury’s inquiry to include the expanding knowledge of the human mind and personality. The precise step—the “disease-product” test—is, however, subject to many valid criticisms which we must face.

One practical problem with the product test was that, allegedly, it led to “the domination of the courtroom by psychiatrists” (Gerber 1975, p. 127). In the absence of further legal criteria, it was basically up to psychiatrists to decide whether the crime was the product of the illness. As Gerber (1975, p. 125) states: “Clearly, it represents the psychiatrization of the criminal law.” Warren Burger illustrates this point in *Blocker v United States*:

We reversed Blocker’s first conviction because after his trial and while his appeal was pending in this court, another case, *In re Rosenfield*, D.C.D.C. 1957, 157 F. Supp. 18 was being heard on petition for release on a writ of habeas corpus. In that case a psychiatrist made it known to the District Court that between the court session on Friday and Monday morning, St. Elizabeths Hospital, by some process not then disclosed, altered its “official” view that sociopathic or psychopathic personality disorder was *not* a mental disease. It had been decided that commencing Monday, St. Elizabeths Hospital and its staff would thereafter call and classify the condition known to them as “psychopathic personality” as a “mental disease” or “mental disorder.”... I am now satisfied that our reversal of Blocker’s first conviction on the stated grounds without more, was an error (and one in which I participated at the time.) In holding as we did, we tacitly conceded the power of St. Elizabeths Hospital Staff to alter drastically the scope of a rule of law by a “week-end”

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<sup>65</sup>The term “mental disease or defect” in this standard has also been criticized, but I will focus on the product component, since that is the distinguishing feature of the *Durham* test.

change in nomenclature which was without any scientific basis, so far as we have any record or information.

This weekend-turnaround shows the “power” of the psychiatrist, or indeed the staff of one particular hospital, regarding a defendant’s insanity.<sup>66</sup> Note, that this weekend-turnaround had to do with what was considered a mental disease, rather than with the term “product.” Yet, without further criteria (such as *M’Naghten*’s nature, quality, and wrongfulness), it all hinges upon the presence of a mental disease; at least, this is how the standard apparently worked out in practice.

The standard became unpopular. Apart from the factors already mentioned—having to do with vagueness and (perceived) psychiatric dominance in the courtroom—there may have been another relevant factor for its unpopularity: under *Durham* the number of successful insanity defenses increased “dramatically” (Gerber 1975). Perhaps the increase was such that people felt that, at least in practice, the standard was overly broad.

In my view, the value of this standard lies in the fact that it recognizes the variety of ways in which mental disorders may influence a person’s actions. However, the standard is problematic because the term “product” is unclear, and because, in legal practice, it may be overly inclusive. In addition, the product test apparently resulted in blurred borders between psychiatry and law—which should be avoided.

## 2.6 Norway: “Medical Principle”

According to many legal standards, a relationship must be established between the disorder on the one hand and the criminal behavior on the other. For instance, according to *M’Naghten*, to be exculpatory, a mental disease must result in a lack of knowledge regarding the nature, quality, or wrongfulness of the act, while the product test, at least in theory, requires that the disorder *produce* the crime. In Norway, however, the situation is different. Section 44 of the Norwegian General Civil Penal Code states: “A person who was psychotic or unconscious at the time of committing the act shall not be liable to a penalty. The same applies to a person who at the time of committing the act was mentally retarded to a high degree.”<sup>67</sup> This means that: “Being psychotic at the time of committing the act will unconditionally exempt the person from punishment, regardless of whether the offence is a result of the psychosis. This is often referred to as the medical principle.”<sup>68</sup>

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<sup>66</sup>Note that, in *Blocker*, Judge Burger also recognized that “Of course legal rules should be flexible enough to embrace the bona fide, and scientifically recognized developments and discoveries of medicine.”

<sup>67</sup>Translation taken from Syse (2014), which is identical to the English translation of the Breivik verdict Lovdata TOSLO-2011-188627-24E. Since the section does not mention the terms “responsibility”, “liability” or a related concept, it is not completely clear to me that it concerns *insanity*. Still, since it is considered to concern insanity, I will refer to it as an insanity standard.

<sup>68</sup>Taken also from Lovdata TOSLO-2011-188627-24E, see also Syse (2014).

Notably, as Melle (2013, p. 17) writes, “‘Psychotic’ is here simply defined as ‘a condition that meets the criteria in the current diagnostic manuals.’”

This Norwegian criterion is an interesting addition to our list of standards, for two reasons. First, the mere *presence* of a mental disorder at the time of the act is sufficient—no other standard we discussed unconditionally exempts a defendant just because a mental disorder was present at the time of the act. Second, this standard defines the legally relevant *type* of mental disorder: psychosis.<sup>69</sup> So, only if a person suffers from psychosis, can he be excused. This is remarkable as well. Although “psychotic illness,” as Elliott (1996, p. 12) puts it, “seems to be the paradigm for an insanity defense,”<sup>70</sup> in other legal systems, non-psychotic disorders may also result in a successful insanity defense, for instance dementia, delirium,<sup>71</sup> and PTSD.<sup>72</sup> In any case, Section 44 of the Norwegian General Civil Penal Code makes clear that we cannot take it for granted that insanity standards require a *relationship* between the disorder and the crime—other than a temporal relationship.

There are several problems with this insanity test. The first is a lack of consistency between the test and our common morality. Morally, people suffering from non-psychotic illnesses (e.g., people suffering from dementia) may also be excused, whereas not everyone suffering from psychosis will be morally excused for his actions (e.g., a psychotic person who evades taxes). Another problem with this standard could be that patients know that as long as they are psychotic, they will be unconditionally exempted from punishment. Some people are in chronic psychotic conditions, hearing voices, or suffering from a delusion. Strictly interpreting Section 44, these people would be relieved of legal responsibility for whatever acts they commit in their lives—regardless of whether those acts relate to the

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<sup>69</sup>Unconsciousness is added, but this probably refers to highly exceptional cases. Committing crimes and being unconscious is a rare combination.

<sup>70</sup>See also Packer (2009, p. 30) on the U.S. context, “most successful insanity defenses involve a psychotic disorder.”

<sup>71</sup>See, e.g., Janofsky et al. (2014, S29) on the types of disorders that may be accepted for insanity defenses in the U.S. context: “There are clear trends in the courts’ acceptance of some diagnosable mental disorders and syndromes. Psychotic disorders, such as schizophrenia, schizoaffective disorder, and mood disorders with psychotic features are diagnoses that typically qualify as serious or severe mental disorders or mental disease. Other diagnoses differ in outcome, depending on the facts of the case, the degree and nature of the symptoms, and the jurisdictional precedent. For example, personality disorders, paraphilias, impulse-control disorders, dissociative identity disorders, and developmental disorders can vary widely in terms of acceptance. Certain cognitive disorders, such as dementia or delirium, may also qualify as mental disease or defect, depending on circumstances and jurisdiction.”

<sup>72</sup>On Post-traumatic stress disorder (PTSD), see Appelbaum et al. (1993), Berger et al. (2012), Packer (2009). As Berger et al. (2012, p. 512) write, “Shortly after its introduction into DSM-III in 1980, PTSD itself became the basis for successful insanity defenses. In *State of New Jersey v. Cocuzza*, the defendant, a Vietnam veteran who assaulted a police officer was found to be not guilty by reason of insanity. Mr. Cocuzza maintained that he believed he was attacking enemy soldiers, and his claim was supported by the testimony of a police officer that Mr. Cocuzza was holding a stick as if it were a rifle.”

psychosis. Furthermore, the fact that these people are unconditionally exculpated may give the impression that psychotic people are generally incapable of making competent decisions about their lives. This may obstruct the social inclusion of psychotic psychiatric patients; it may hamper the recognition of their autonomy in shaping their own lives. Perhaps unsurprisingly, Syse notes that “The Norwegian insanity defense has been questioned for years” and he suggests that changes may be made.<sup>73</sup>

There is an advantage of this standard as well: psychiatric assessments may be more reliable. Diagnosing a psychotic disorder may be less challenging than assessing, on top of that, whether, due to that disorder, the person did not know that what he was doing was wrong.<sup>74</sup> In fact, in Norway, psychiatrists are asked to do what they normally do, and what they have been trained for years to do: assess whether a disorder is/was present—without answering further, less common, and legally motivated questions about, e.g., knowledge or control related to the crime (such further questions depend on the legal test in that particular jurisdiction).

## 2.7 No Standard

In the Netherlands, there is no legal standard with criteria guiding judgments regarding a defendant’s criminal responsibility, such as the *M’Naghten* Rule or the Modal Penal Code standard.<sup>75</sup> According to Section 39 of the Dutch Criminal Code: “A person who commits an offence for which he cannot be held responsible by reason of mental defect or mental disease is not criminally liable.”<sup>76</sup> This section merely tells us that if a defendant cannot be held responsible due to a mental disorder, he is not criminally liable. But it does not tell us *under what conditions* a defendant cannot be held responsible.

Dutch psychiatrists and psychologists who evaluate a defendant answer a fixed set of questions:

1. Is the defendant currently suffering from a mental disorder?
2. Was the defendant suffering from a mental disorder at the time of the crime?
3. If so, did the disorder influence the defendant’s behavior?
- 4a. If so, in what way?
- 4b. If so, to what extent?

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<sup>73</sup>Syse (2014, p. 405). For criticism regarding the Norwegian criterion for insanity, see also Bortolotti et al. (2014).

<sup>74</sup>See also Penney (2012).

<sup>75</sup>Tak (2008). This situation is different from that in Sweden, where the insanity defense has been abolished. It is available in the Netherlands, but no specific criteria for legal insanity have been formulated to guide courts in ascertaining a defendant’s insanity, see also Meynen (2013b), Radovic et al. (2015).

<sup>76</sup>Section 39 of the Dutch Criminal Code, translation from *The American Series of Foreign Penal Codes* (Netherlands 1997, p. 73).

- 4c. What conclusions can be drawn from this regarding an advice concerning the defendant's criminal responsibility?<sup>77</sup>

Apparently, according to the format of these questions, the influence of the mental disorder or defect on the defendant's behavior is important, or even crucial. Yet, it remains unclear what *type* of influence will result in insanity or diminished<sup>78</sup> criminal responsibility. This is not defined. In practice, in their reports, psychiatrists and psychologists describe what they themselves consider relevant with respect to the question of legal insanity. For instance, the psychiatrist or psychologist may reason that the defendant "did not act of his own free will but based on his psychotic beliefs,"<sup>79</sup> and that, therefore, the defendant should be considered insane. Alternatively, they may state that the defendant "most probably due to a manic episode lost control of his behavior and was not able to foresee the consequences of his behavior,"<sup>80</sup> and that therefore the defendant is insane. So, behavioral experts develop their own arguments about a defendant's legal insanity in which they use the criteria they consider relevant to criminal responsibility in that particular case, rather than evaluating a defendant in light of the criteria of a legal standard. In fact, in practice, not having a standard is likely to result in *several*—more or less "improvised"—standards guiding the expert's advice to the court. The outcome of the psychiatric and psychological evaluation of a defendant, therefore, depends not only on the psychiatric and psychological findings, but also on the criteria a particular expert uses when drawing a conclusion about the defendant's sanity. This entails that the expert's own view of what insanity comes down to is likely to be important here. Notably, in the Dutch legal context, behavioral experts also give explicit advice to the Court (there is no jury, but professional judges, usually three) about the degree of the defendant's criminal responsibility. Eventually, the Court decides whether—or to what extent—it will follow the psychiatrist's advice. In a vast majority of the cases, the expert's advice is followed.

Interestingly, Van Esch (2012) has criticized some psychiatrists and psychologists in the Netherlands for not describing the exact relationship between the mental disorder and the crime in their reports about the defendant's insanity. Although such criticism is understandable, we should note that the requirement of such a description *may or may not* be formulated by the law or other rules or codes. Given the fact that no criteria for legal insanity have been specified in the Netherlands, the law provides no clear point of reference from which to criticize

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<sup>77</sup>Partially adapted from Van Kordelaar (2002). There are other questions about the risk of recidivism and possible ways to reduce that risk, but these have been omitted here. As of September 2016, the Netherlands Institute of Forensic Psychiatry and Psychology (NIFP) will use an adjusted format of three degrees of criminal responsibility.

<sup>78</sup>In the Netherlands, there are five degrees of legal responsibility: responsible, slightly diminished responsibility, diminished responsibility, strongly diminished responsibility, insanity—see also the introductory chapter.

<sup>79</sup>Cited and translated: District Court Haarlem, 2 February 2006, ECLI:NL:RBHAA:2006:AV0882.

<sup>80</sup>Cited and translated: District Court Utrecht, 19 October 2011, ECLI:NL:RBUTR:2011:BT8735.

these behavioral experts.<sup>81</sup> Suppose that these experts had prepared their reports in Norway: there would be no problem at all if they just diagnosed a psychotic disorder at the time of the crime and concluded that, therefore, the defendant was insane. The reason is that the Norwegian legal standard only requires the presence of a psychotic disorder (see previous section). This emphasizes the fact that *not* formulating clear criteria for insanity in principle allows experts a great deal of leeway.

Several points of criticism have been formulated regarding the forensic psychiatric and legal practice in the Netherlands just described. For instance, it has been argued that forensic psychiatrists and psychologists should not render an opinion on insanity because legal insanity is a legal concept that falls outside the realm of psychiatry and psychology.<sup>82</sup> Of course, this point is, basically, the “ultimate issue” question (Buchanan 2006). However, concerns about behavioral experts rendering an explicit opinion on a defendant’s criminal responsibility may be based on a variety of motives. There may be legal concerns about experts entering the legal domain because this may affect the integrity and quality of legal decision-making—a justified concern.<sup>83</sup> But there is another concern as well; it has to do with the “integrity” of psychiatry as a medical discipline. Psychiatrists will be taken seriously as long as they themselves take the limits of their professional expertise seriously. Knowing and respecting the limits of one’s expertise is a mark of the expert witness. To remain within the boundaries of one’s profession, therefore, is in the interest not only of the individual psychiatrist giving testimony before the court, but also in the interest of psychiatry as a medical discipline dealing with grave issues in a scientific and responsible manner.

The fact that no criteria for legal insanity have been defined in the Netherlands has also been criticized (Meynen 2013b). Recently Bijlsma showed that, indeed, judges have used different criteria for insanity, which is a problem for equality of justice (Bijlsma 2016). In addition, if psychiatrists and psychologists were to stop rendering opinions on insanity as long as no criteria for insanity have been defined, judges may find it difficult to interpret psychiatric findings in view of the legal question of insanity. A legal standard, defining what is relevant with respect to insanity, may assist the translation of medical findings to the legal norm. In their reports and evaluations, experts may even specifically address those aspects of mental functioning that are included in the legal standard. As the *AAPL Practice Guideline for Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense* writes, “The ability to evaluate whether defendants *meet a jurisdiction’s test* for a finding of not criminally responsible is a core skill in forensic

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<sup>81</sup>When evaluating Dutch legal and forensic practice, case law must also be taken into account.

<sup>82</sup>Beukers (2005), Hummelen and Aben (2015), Meynen and Kooijmans (2015).

<sup>83</sup>Buchanan (2006, p. 19) mentions a “longstanding and widespread concern that psychiatric testimony is more likely than other evidence to intrude into the jury’s realm.”

psychiatry.”<sup>84</sup> The jurisdiction determines the criteria, while psychiatrists and psychologists enable the court to reach a decision regarding the question of whether these criteria are met in a particular case.

Another reason for introducing a standard for insanity is that it would make legal decision-making more transparent (Meynen 2013b). All parties concerned, as well as the general public, would know beforehand which criteria would be used to determine the defendant’s insanity. In its verdict, the court will also be able to explain its judgment by referring to that standard’s criteria. Based on these considerations, in my view, it would be preferable to have a legal insanity standard.

Still, we may ask: why would we need such a standard specifically for legal insanity? One reason is that the final judgment on legal insanity is in part based on the evaluation of the defendant by a non-legal discipline, psychiatry or psychology. So, in principle, a translation will have to be made from one discipline (psychiatry or psychology) to the legal domain. A standard would be a valuable tool to ensure that this translation is clear and consistent. Another, related reason is that the views on the criteria for legal insanity diverge to such an extent that a standard is needed to ensure equality before the law within a legal system. Finally, one could argue that the quality of an official standard is likely to be higher than that of “improvised” standards.

In sum, in this chapter we have examined several legal insanity standards. They all have problems of their own, but not using a standard (the current situation in the Netherlands) is not a good solution either. The matter of insanity is too important, too complicated, and too much open to interpretation not to define the criteria for insanity in a standard. In any case, the Dutch approach to insanity underscores the variety of ways in which legal systems deal with insanity.

## 2.8 Conclusion

The intuition that mental disorders sometimes excuse a defendant may lead to very different rules or standards for insanity—or to no standard at all (the Dutch situation). The variety becomes even more pronounced if we take into account that there are also *variants* of the *M’Naghten* Rule and the Model Penal Code standard. Each of the approaches to insanity has strengths and weaknesses. *M’Naghten* covers a morally and legally relevant issue (knowledge about the act) and many feel

<sup>84</sup>Janofsky et al. (2014, emphasis added), see also Knoll and Resnick (2008) on the United States context. The 2014 AAPL Guideline reads, more specifically: “The forensic psychiatrist performing an insanity defense evaluation must answer three basic questions:

1. Did the defendant suffer from a mental disorder at the time of the alleged crime? (retrospective mental state evaluation)
2. Was there a relationship between the mental disorder and the criminal behavior?
3. If so, were the criteria met for the jurisdiction’s legal test for being found not criminally responsible?”

that it can be reliably tested—but isn't too strict? Is it fair to fail to take control problems into account? The Model Penal Code test does more justice to the many ways in which mental disorders may seriously affect mental functioning, but isn't its control prong overly inclusive? Moreover, can it be reliably tested? Irresistible impulses, if they occur due to a mental disorder, may be a very good reason for exculpation—such behavior seems to resemble epileptic seizures. Still, how can we distinguish between irresistible impulses and impulses that are simply not resisted? Is a “substantial” incapacity to control one's actions sufficient for insanity, or should a complete incapacity be required?

Furthermore, it makes plausible sense that criminal behavior can be excused because of the presence of a mental disorder, but only if that disorder *played a decisive role* in the commission of the crime, and somehow “produced” that criminal act. Still, the product test was not considered a success in legal practice.

In principle, it could be wise to restrict exculpation as a result of a mental disorder to those cases that are often considered the clearest regarding insanity: psychotic disorders. This is the Norwegian approach. But the mere *presence* of such a severe mental disturbance at the time of the crime does not seem to be sufficient to consider the defendant legally insane. People who are psychotic may well be able to bear responsibility for the decisions they make in their lives. Finally, not formulating a standard, and leaving it up to psychiatrists and psychologists to formulate an argument about a defendant's insanity based on concepts and facts considered relevant by that psychiatrist, may result in tailored advice to the court about a defendant's insanity, but it may also cause serious problems regarding equality before the law.

These are questions and issues that arise when we take a closer look at insanity in different legal systems, as we did in this chapter. In fact, we are confronted with profound disparities regarding the question of how criminal law should do justice to the deep impact mental disorders may have on a person's responsibility.

Basically, two types of concerns can be distinguished: theoretical and practical. Examples of theoretical concerns are: does the standard correspond to moral intuitions? To what extent are grounds for moral exculpation relevant in the context of criminal law? Examples of practical issues are: Is the standard clearly formulated? Can its components be reliably tested? Both types of concerns are highly relevant, and both may lead to different answers regarding the same topic. For instance, many feel that, theoretically, a lack of control is relevant to responsibility. At the same time, some of those who endorse that view believe that a lack of control cannot be reliably tested in forensic and legal practice. Practical qualms may outweigh the theoretical argument.

Developing a good standard for insanity has proved to be no easy task—and not having a standard is not a good option either. Then, why not abolish the insanity defense entirely, just as, for example, Idaho and Utah did in the U.S.? The next chapter considers arguments for such a drastic measure, as well as some responses to them.



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