Miles To Go Before We Sleep: Arizona’s “Guilty Except Insane” Approach to the Insanity Defense and Its Unrealized Promise

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* Georgetown Law, J.D. 2009; Harvard University, B.A. 2006. © 2009, Michael Stoll. I would like to thank Professor Heathcote Wales for his provocative feedback on early drafts of this Note, and the staff of The Georgetown Law Journal—particularly Melissa Jackson Veneziano and Andrew March—for seeing it through to completion. I would also like to give special thanks to Jessica Greenbaum, Jessie Stoll, my mom, and my dad, who each deserve a medal for all I put them through, but sadly, yet not uncharacteristically, will have to settle for this little inscription.
CONCLUSION: TOWARD A JUST AND VISIONARY INSANITY LAW

The woods are lovely, dark and deep,
But I have promises to keep,
And miles to go before I sleep,
And miles to go before I sleep.
—Robert Frost, Stopping by Woods on a Snowy Evening

INTRODUCTION

The insanity defense has invoked the wrath of legal scholars, the media, and the public like no other feature of the criminal law. Academics, media members, and lay people have all assailed the defense for being premised on unsound science and discredited notions about the promise of rehabilitation. They have ridiculed it for resulting in the imposition of meager “slap-on-the-wrist” punishments and for being especially prone to malingering and deception. They have labeled the defense, among other pejoratives, “a ‘travesty,’ a ‘loophole,’ a ‘refuge,’ a ‘technicality,’ [an] ‘absurdity of state law,’ and . . . a ‘monstrous fraud.’”

At the core of society’s collective consternation over the availability of the insanity defense, however, is a moral conviction. Many people believe the insanity defense excuses from criminal liability people who are blameworthy and deserve to be punished for their crimes. They believe that by failing to treat people as rational agents and hold them accountable for their actions, the insanity defense affects a profound miscarriage of justice and undermines the moral basis of the law.

Given this climate of grave skepticism about the moral and practical efficacy of the insanity defense, and given the wave of rampant insanity defense reform

3. See PERLIN, supra note 2, at 3.
4. Id. at 4; see COREY J. VITELLO & ERIC W. HICKLEY, THE MYTH OF A PSYCHIATRIC CRIME WAVE: PUBLIC PERCEPTION, JUROR RESEARCH, AND MENTAL ILLNESS 97–98 (2006) (describing how the public attributes most insanity acquittals to “gullible juries” and thinks defendants found not guilty by reason of insanity are quickly reintegrated into society).
5. Michael L. Perlin, “The Borderline Which Separates You From Me”: The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment, 82 IOWA L. REV. 1375, 1403 (1997); see also PERLIN, supra note 2, at 195–96 (denouncing many widely held conceptions about the insanity defense, such as the idea that the insanity defense is oft-used and enables defendants to shirk serious punishment for puny alternatives, as mythical and unsupported by the empirical evidence).
6. See PERLIN, supra note 2, at 1–4.
that followed the acquittal of John Hinckley after his assassination attempt on President Reagan,\(^7\) it is no real surprise that the Arizona legislature enacted a law designed to curtail its insanity defense in the early 1990s\(^8\) or that this move was hailed as righteous and just in the media.\(^9\) Called the “Guilty Except Insane” (GEI) statute, section 502 of the Arizona Criminal Code introduced a new twist on the affirmative defense of insanity.\(^10\) Under section 502(A), a jury may find a defendant “guilty except insane,” as opposed to simply guilty or not guilty by reason of insanity, if

at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong . . . . Mental disease or defect does not include disorders that result from acute voluntary intoxication or withdrawal from alcohol or drugs, character defects, psychosexual disorders or impulse control disorders.\(^11\)

Arizona’s “guilty except insane” approach to insanity is unique to Arizona and, in many ways, represents one of the toughest in the country.\(^12\) Among the most restrictive features of the statute are: (1) its requirement that defendants seeking the GEI verdict suffer from a “severe” mental disease;\(^13\) (2) its requirement that defendants seeking the GEI verdict not be able to discern right from wrong;\(^14\) (3) its requirement that defendants seeking the GEI verdict prove their


\(^{9}\) The immediate impetus for insanity defense reform in Arizona was the public outcry that erupted following the acquittal by reason of insanity and subsequent release of Mark Austin in *State v. Austin*. Austin had been accused of murdering his wife, Laura Griffin-Austin, after learning that she was having an affair. Several of the elements of the “guilty except insane” statute, now currently in force, were introduced in a bill called “Laura’s Law,” in honor of Mark Austin’s slain wife. See Renée Melanc, *Note, Arizona’s Insane Response to Insanity*, 40 ARIZ. L. REV. 287, 288–90 (1998).

\(^{10}\) ARIZ. REV. STAT. ANN. § 13-502(A).

\(^{11}\) Id. In addition to excluding from its parameters disorders that result from intoxication or withdrawal from drugs or alcohol, character defects, psychosexual disorders, and impulse control disorders, the “guilty except insane” verdict also does not extend to “momentary, temporary conditions arising from the pressure of the circumstances, moral decadence, depravity or passion growing out of anger, jealousy, revenge, hatred or other motives in a person who does not suffer from a mental disease or defect.” *Id.*


\(^{13}\) See ARIZ. REV. STAT. ANN. § 13-502(A) (“A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease of such severity that the person did not know the criminal act was wrong.” (emphasis added)).

\(^{14}\) See id. Arizona’s “right/wrong” formulation of the insanity test is uniquely narrow, at least on its face, because most U.S. jurisdictions provide that a defendant can prove his insanity *either* by showing inability to discern right from wrong at the time of the act or *by* establishing incapacity to appreciate the nature and quality of the proscribed act. See Clark v. Arizona, 548 U.S. 735, 750 (2006) (observing that seventeen states and the federal government permit a defendant to prove his insanity by either a showing of “moral” or “cognitive” incapacity). The Supreme Court has nevertheless held that requiring
insanity by “clear and convincing evidence”, and (4) its express exclusion of certain disorders from insanity consideration, including disorders resulting from intoxication or alcohol or drug withdrawal, character defects, psychosexual disorders, and impulse control disorders. In other ways, to be discussed later, Arizona’s approach to insanity is one of the most progressive and judicious anywhere in the United States.

In this Note, I argue that Arizona’s “guilty except insane” experiment, now more than fifteen years old, has failed for several reasons, but nevertheless insist that with some modifications the statute and its unique verdict would not only be salvageable, but more consistent with the philosophical justifications for an insanity defense and the current science on mental illness than perhaps any other approach.

In Part I, I survey the history of the insanity defense in the United States and England to place Arizona’s “guilty except insane” approach in its historical context and convey the ways in which Arizona’s statute is both a return to, and departure from, past insanity tests. I also identify ways in which the Arizona statute, like many other attempted reforms of insanity law, appears to have been an emotional, political response to a pandemic of fear, as opposed to a detached and reasoned approach to the problem of how to regard the actions of the mentally ill.

In Part II, I discuss how Arizona’s insanity regime, although born of political exigency and widely-regarded as one of the most imbalanced “law-and-order”-style approaches in all of the United States, has the potential to be one of the nation’s most balanced and considerate systems. In particular, I argue that considerable hidden promise inheres in three features of the Arizona approach: (1) in the “guilty except insane” verdict itself, with its paradoxical message of condemnation and excuse; (2) in Arizona’s procedures for caring for people found GEI; and (3) in the series of statutory safeguards Arizona has imposed to prevent abuse of the insanity defense.

In Part III, I lodge my first substantive objection to the Arizona law in its proof of inability to discern right from wrong, as Arizona does, does not offend due process. See id. at 742.


16. Compare Ariz. Rev. Stat Ann. §13-502(A) (“Mental disease or defect does not include disorders that result from acute voluntary intoxication or withdrawal from alcohol or drugs, character defects, psychosexual disorders or impulse control disorders.”), with Ky. Rev. Stat. Ann. § 504.020(2) (West 2008) (“As used in this chapter, the term ‘mental illness or retardation’ does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.”), and Haw. Rev. Stat. § 704-400(2) (2008) (“As used in this chapter, the terms ‘physical or mental disease, disorder, or defect’ do not include an abnormality manifested only by repeated penal or otherwise anti-social conduct.”).

17. See infra Part II.
current form, arguing that its narrow right/wrong test of insanity, absent any volitional component, is inconsistent with long-settled theories of punishment and philosophical principles upon which our legal system is based.

In Part IV, I maintain that Arizona’s exclusion of “impulse control disorders”—such as intermittent explosive disorder, pyromania, and kleptomania—is inconsistent with modern insights from behavioral science and psychiatry. Specifically, I argue that there is a growing consensus in psychiatry and medicine that impulse control disorders have a biological etiology and severely impair an individual’s capacity for “control” over his actions. Based on these medical revelations and on certain moral precepts concerning justification for punishment, I advocate a more expansive legal definition of insanity that encompasses impulse control disorders.

In closing, I reinforce what features of Arizona’s “guilty except insane” approach are commendable as currently constituted and what features need to be changed to better accord with morality and empirical evidence.

This Note is not a critique of the Supreme Court’s much-maligned recent decision in *Clark v. Arizona*, supporting over due process objections Arizona’s prohibition against the use of expert testimony on mental illness to negate proof of mens rea. While I, like many other commentators, am alarmed and saddened by the extent to which *Clark* calls into question the validity of psychiatry and threatens the future of diminished capacity defenses by limiting the uses of expert testimony outside the insanity context, *Clark* does not foreclose defendants from introducing expert evidence for the purpose of proving insanity. So while I agree with the likes of Professor Henry Fradella when he suggests that Arizona and the *Clark* Court are not models of good judgment on some of the


19. Id. at 742. The *Clark* Court also upheld Arizona’s elimination of the cognitive prong of the *M’Naghten* test, but the significance of this second holding is largely vitiated by the Court’s observation that proof of cognitive incapacity is sufficient to establish moral incapacity. See id. at 753–54 (“In practical terms, if a defendant did not know what he was doing when he acted, he could not have known that he was performing the wrongful act charged as a crime.”).

20. See id. at 777 (describing clinical judgments about a defendant’s capacity to form the requisite mens rea for a crime as of “potentially tenuous character”); see also Henry F. Fradella, *How Clark v. Arizona Imprisoned Another Schizophrenic While Signaling the Demise of Clinical Forensic Psychology in Criminal Courts*, 10 N.Y. CITY L. REV. 127, 151–52 (2006) (“By upholding the overbroad Mott rule, the *Clark* Court allows states to severely limit a mentally ill criminal defendant from offering some of the most probative evidence concerning his or her guilt . . . .”); Jennifer Gibbons, *Clark v. Arizona: Affirming Arizona’s Narrow Approach to Mental Disease Evidence*, 48 ARIZ. L. REV. 1155, 1167 (2006) (“Looking to the future, the Arizona rule, as interpreted by the Court, will force juries to determine guilt without the benefit of expert testimony . . . which has the potential to cause unnecessary jury confusion and a denial of justice for the mentally ill.”); Elizabeth Aileen Smith, *Did They Forget to Zero the Scales?: To Ease Jury Deliberations, The Supreme Court Cuts Protection for the Mentally Ill in Clark v. Arizona*, 26 LAW & INEQ. 203, 230–31 (2008) (“By preventing the introduction of expert testimony on the element of mens rea, the Supreme Court suggested the practice of psychiatry lacks sufficient legitimacy to have a proper place in our legal system.”).

21. See *Clark*, 548 U.S. at 760–62 (interpreting the Mott rule to forbid the use of expert testimony as to “mental disease” or “capacity” to negate mens rea, but not to forbid the use of such evidence for purposes of an affirmative insanity defense).
issues immediately peripheral to insanity, like diminished capacity,\textsuperscript{22} my focus here is squarely on Arizona’s insanity defense and its vast potential if revised.

I. THE HISTORY OF THE INSANITY DEFENSE: FROM “WILD BEAST” TO WILD WEST

A. EARLY INCARNATIONS

The idea that a certain class of people should not be held responsible for their criminal acts has its origins, at least in the Anglo-American legal tradition, in eighteenth-century England.\textsuperscript{23} Justice Tracy of King Edward’s court instructed the jury in \textit{Rex v. Arnold} that

\begin{quote}
  it should acquit by reason of insanity if it found the defendant to be a madman which he described as ‘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.’\textsuperscript{24}
\end{quote}

Tracy’s “wild beast test” was the operative test in English courts through the end of the eighteenth century.\textsuperscript{25} As its references to animals and infants suggest, only those utterly devoid of cognitive function could be excused from punishment.\textsuperscript{26}

B. THE \textit{M’NAGHTEN} “RIGHT AND WRONG” TEST

The “wild beast test” remained a part of Anglo-American jurisprudence until the arrival of the landmark \textit{M’Naghten} test in 1843. In \textit{M’Naghten’s Case},\textsuperscript{27} Daniel M’Naghten attempted to assassinate the British Prime Minister, Robert Peel, but inadvertently shot and killed the Prime Minister’s secretary, Edward Drummond.\textsuperscript{28} During a protracted trial, it was established that M’Naghten meant to kill the Prime Minister because he believed him to be spreading lascivious rumors about him and tarnishing his reputation.\textsuperscript{29} The jury ultimately found M’Naghten not guilty by reason of insanity.\textsuperscript{30} Following the trial, the British House of Lords adopted a new formulation of the insanity test that

\begin{quote}
  22. See Fradella, \textit{supra} note 2, at 120–21; Fradella, \textit{supra} note 20, at 151–54.
  23. See Fradella, \textit{supra} note 2, at 17.
  25. See \textit{id}.
  26. See \textit{id.}, at 17–18.
  29. See \textit{id.} (indicating that M’Naghten was suffering from persecutory delusions that might today be regarded as symptomatic of paranoid schizophrenia). \textit{But see} Jacques M. Quen, \textit{Psychiatry and the Law: Historical Relevance to Today, in By Reason of Insanity: Essays on Psychiatry and the Law} 153, 160 (Lawrence Zelic Freedman ed., 1983) (maintaining that there was no evidence to support the proposition that M’Naghten thought the Prime Minister was part of the Tory conspiracy against him).
\end{quote}
remains good law in many U.S. jurisdictions today. Under the *M'Naghten* rule, a defendant is insane if, at the time of the commission of his criminal acts, he was “labouring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.” With its conception of insanity as the inability to discern right from wrong or to comprehend the nature and quality of a relevant criminal activity, the *M'Naghten* rule clearly expanded the class of persons whom the law would consider insane. However, the *M’Naghten* rule was very cautious not to open the floodgates too wide; only persons lacking reason, and not those lacking self-restraint or strength of “will” due to some mental defect, would be considered insane under *M'Naghten*.

C. POST-*M’NAGHTEN* REFORMS

The *M'Naghten* formulation of insanity sparked intense criticism. Opponents of the test thought the scope of its inquiry was too narrow and that it should have considered whether the defendant was in control of his actions, in addition to whether the defendant had the cognitive and moral facility to distinguish right from wrong. This conception of criminal responsibility as linked to free will ultimately gave rise to the “irresistible impulse test,” which required “freedom of will”—that is, the power to choose between right and wrong—for liability. The irresistible impulse test was adopted in many jurisdic-

31. See Keilitz & Fulton, supra note 2, at 6, 15.
33. Fradella refers to the two potential conditions that could give rise to a legal judgment of insanity under *M'Naghten* as cognitive and moral incapacity. See Fradella, supra note 2, at 22 & n.100 (citing the Supreme Court’s recent use of the terms to describe the *M’Naghten* prongs in Clark v. Arizona, 548 U.S. 735, 747–48 (2006)). In Part III, I will argue that the Arizona test, derived from *M’Naghten*, is under-inclusive in its conceptualization of moral incapacity as consisting exclusively in an inability to distinguish right from wrong. Moral incapacity, I will contend, can also result from an absence of “free will” produced by the coercion of irresistible urges.
34. Whether *M’Naghten* was properly acquitted under this new, more expansive formulation of insanity is an interesting and provocative question. According to Jacques M. Quen, the jury was heavily influenced by the unanimous conclusions of eight testifying physicians that the defendant “was undoubtedly insane.” Quen, supra note 29, at 160. Had the jury evaluated *M’Naghten*’s sanity absent the insights of these medical experts and solely on the basis of the legal definition of insanity and *M’Naghten*’s testimony as to his persecutory delusions, it is quite possible that the jury could have found that the defendant was sane and knew what he was doing was wrong, even if his action was not without the influence of a strong compulsion to avoid imagined persecution.
35. It should be noted that the *M’Naghten* test is not applied uniformly by all jurisdictions that use it. See Benjamin B. Sendor, *Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 Geo. L.J. 1371, 1383 (1986). Some courts will find a defendant insane under the test if he is devoid of the capacity for empathy and emotional appreciation of the circumstances surrounding his conduct, whereas others will only find insanity in individuals lacking “perceptual and intellectual awareness of the physical circumstances, nature, consequences, and legal wrongfulness of conduct.” Id.
36. Fradella, supra note 2, at 23.
37. Id.
38. See Sendor, supra note 35, at 1383–84 (citing Parsons v. State, 2 So. 854 (Ala. 1886)).
tions as a supplement to the *M’Naghten* test—a third prong—rather than as a replacement of the cognitive test.  

In 1962, the American Law Institute (ALI) published its Model Penal Code, in which it proposed yet another approach to insanity in the criminal law:

A person is not responsible for criminal conduct if at the time of such conduct as a result of a 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.

The cognitive and volitional features of the Model Penal Code test—its excuse of actions undertaken while unable to “appreciate the criminality” of one’s conduct or to conform that conduct to the law’s dictates—make it, fundamentally, a hybrid between the *M’Naghten* and irresistible impulse tests previously described. According to Gerald Robin, the ALI’s motivation for conjoining the *M’Naghten* cognitive prong with a volitional prong was its conviction, supported by new developments in behavioral science, that people’s freedom of will is often constrained by mental illness. Buttressed by the

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39. Id.  
Dissatisfaction with the *M’Naghten* rule also prompted the development of what is called the product test. Announced in *Durham v. United States* by Judge David Bazelon, a well-known champion of the mentally ill and mentally disabled, the product test stipulated that a defendant was not criminally responsible “ . . . if his unlawful act was the product of mental disease or defect.” *Durham* v. United States, 214 F.2d 862, 874–75 (D.C. Cir. 1954), overruled by, United States v. Brawner, 471 F.2d 969, 991 (D.C. Cir. 1972). The product represented a radical departure from previous iterations of the insanity test because it did not require that a defendant exhibit particular deficiencies, cognitive or volitional, in order to be excused from guilt. Rather, it provided that evidence of a defendant’s inability to distinguish right from wrong, or to refrain from doing an unlawful act, could furnish proof of insanity, but were not essential to such a showing. *See* McDonald v. United States, 312 F.2d 847, 851–52 (D.C. Cir. 1962) (holding that, under the *Durham* test, “capacity, or lack thereof, to distinguish right from wrong and ability to refrain from doing a wrong or unlawful act may be considered in determining whether there is a relationship between the mental disease and the act charged,” but cautioning “that these considerations are not to be regarded in themselves as independently controlling” (emphasis added)).  
The product test also reduced the defendant’s burden of demonstrating a strong causal relationship between the mental disease and the criminal act. Whereas under the *M’Naghten* test and the irresistible impulse test the defendant had to prove that the mental disease or defect was the factual or “but for” cause of the criminal behavior, the *Durham* product test excused a defendant from liability if he could show that his mental disease or defect was a proximate cause of the criminal behavior, if not the only cause. *See Durham*, 214 F.2d at 875. Ultimately, however, the *Durham* rule was overruled due to displeasure with the wave of expert psychiatric testimony it prompted and concerns over its potential to excuse all persons with mental illnesses from responsibility for their actions. *See Fradella, supra* note 2, at 24–25.


philosophical belief that people should not be held accountable for actions over which they have little or no control, ALI members set boundaries for criminal responsibility that wouldn’t ensnare persons suffering under severe mental coercion in criminal liability.

While the ALI Model Penal Code test has numerous characteristics of previous tests, the ALI test also contains some noteworthy differences. Whereas the M’Naghten test, especially in its application as opposed to its plain language, required near total cognitive or moral incapacity to excuse a crime, the Model Penal Code test requires a lesser degree of mental impairment: namely, “substantial” incapacity. The Model Penal Code’s substitution of the word “know” from the M’Naghten test for the word “appreciate” also reduces the showing that has to be made to prove insanity by enabling emotional unawareness of the wrongfulness of one’s acts, in addition to intellectual awareness, to qualify an individual for the defense. Perhaps even more important than the impact these linguistic modifications have on the defendant’s burden of proof, however, is the effect they have on who makes the ultimate insanity determination. By reducing the degree of cognitive or volitional incapacity that a defendant has to establish as a matter of law in order to successfully plead insanity, the Model Penal Code test wrests the decision as to an individual’s mental condition and ultimate responsibility from judges and places it more firmly in the hands of the jury. The Model Penal Code definition of insanity is also novel because it excludes a particular category of disorder from the purview of qualifying “mental diseases or defects”: anti-social personality disorder. The ALI’s recommendations, including these unique features, were well-received by both state and federal jurisdictions, at least in the immediate aftermath of the Model Penal Code’s publication. A majority of states and all except one federal circuit adopted the Model Penal Code test.

43. See Model Penal Code § 4.01 cmt. 3 at 171 (Official Draft and Revised Comments 1985) (criticizing the “irresistible impulse” test for restricting the insanity defense to people utterly without self-control and suggesting that people with extreme, but not total impairment of control also lack blameworthiness for punishment).

44. See Model Penal Code § 4.01 cmt. 1 at 165 (Official Draft and Revised Comments 1985) (clarifying that the ALI test was addressed to the problem of maintaining an appropriate separation between persons who belong in the correctional system and persons better relegated to public health facilities).

45. See Sendor, supra note 35, at 1383.

46. Id. at 1389.

47. See id. at 1387.

48. The desire to place the insanity decision more squarely in the hands of the jury was also a driving force behind Judge Bazelon’s announcement of the product test in Durham. See Durham v. United States, 214 F.2d 862, 876 (“[I]n leaving the determination of the ultimate question of fact to the jury, we permit it to perform its traditional function which, as we said in Holloway, is to apply ‘our inherited ideas of moral responsibility to individuals prosecuted for crime.’”).

49. The Model Penal Code test does not, by its terms, expressly exclude anti-social personality disorder, but rather abnormalities “manifested only by repeated criminal or otherwise antisocial conduct.” Model Penal Code § 4.01(2).

50. See Fradella, supra note 2, at 28.
The stability that the Model Penal Code brought to insanity defense law would prove to be short-lived, however; in 1981, the now-infamous John Hinckley case shattered any ostensible calm. The prosecution stemmed from Hinckley’s assassination attempt on President Reagan on March 30, 1981. According to defense experts, Hinckley’s deranged motive for attempting to assassinate the President was to make Jodie Foster, Hinckley’s obsession, fall in love with him. At the time, the District of Columbia relied on the ALI’s Model Penal Code version of the insanity test. After a lengthy trial, the jury found Hinckley not guilty by reason of insanity and the public broke into an uproar. According to Michael Perlin, overwhelming fear—of the prospect of dangerous criminals escaping punishment, walking free, and continuing to terrorize communities—was the animating force behind the public’s outrage. Upon learning that several of the jurors had felt compelled against their consciences to find Hinckley not guilty by reason of insanity based on the elements and burden of proof of the Model Penal Code test, the focus of the public’s collective ire—of its fear—settled squarely on insanity defense law. Almost instantaneously, a wave of legislative reform sent this area of the law into a tailspin.

Congress was the first to act, passing the Insanity Defense Reform Act of 1984 (IDRA) to stem the hysteria. The IDRA effectively reinstated the M’Naghten test in federal courts, providing that a defendant who is “unable to appreciate the nature and quality or the wrongfulness of his acts” due to a “severe” mental disease or defect may avail himself of insanity as a defense. Like the M’Naghten test, the IDRA looks at the cognitive and moral functioning of the defendant to the exclusion of looking for any encumbrances on his free will. The IDRA test is explicitly more stringent than the Model Penal Code test in that it asserts that an insanity defense may only be triggered by a “severe mental disease or defect” and in that it places the burden on the defendant to affirmatively demonstrate his insanity “by clear and convincing evidence.”

52. See Fradella, supra note 2, at 29.
53. Hinckley, 525 F. Supp. at 1346.
54. See Fradella, supra note 2, at 29.
55. See Perlin, supra note 2, at 5 (quoting H. Steadman et al., Reforming the Insanity Defense: An Evaluation of Pre- and Post-Hinkley Reforms (1993)) ("No matter what their final form, these reforms [to the insanity law] stem from one primary source: ‘the public’s overwhelming fear of the future acts of [released insanity] acquittees.’") (second alteration in original). Perlin goes on to assert that the legislatures, and especially Congress, knew many of the public’s fears surrounding the insanity defense to be unfounded and irrational, but that they nevertheless went ahead with reforms that would cut back on the availability of the defense as a means of achieving political capital in an era when law and order were the catch words of the day. See id. at 28–29.
56. See Fradella, supra note 2, at 29 (describing how “[n]one juror reported feeling ‘trapped’ by the [Model Penal Code] test” into denying the dictates of his conscience).
58. See Perlin, supra note 2, at 28–29.
60. Id. Compare id., with Model Penal Code § 4.01 (declaring that a person may be found insane if he or she lacks “substantial capacity either to appreciate the criminality . . . of his [acts] or to conform
the years following the IDRA’s enactment, many states followed in lockstep, promulgating laws modeled after the IDRA. A minority of states, including Arizona, devised alternative verdicts to address the problem of how to fit the insanity defense into their criminal justice systems. Four states—Montana, Utah, Idaho, and Kansas—swore off the enterprise of distinguishing between “sane” and “insane” offenders and eliminated the defense altogether.

D. “GUILTY EXCEPT INSANE”: CONTOURS AND CONTEXT

The history of Arizona’s treatment of the insanity defense closely dovetails with the national blueprint. For much of the twentieth century, Arizona, like most other states, applied what is essentially the M’Naghten test. When other jurisdictions experimented with slightly broader conceptions of insanity, however, Arizona clung steadfastly to its M’Naghten rule. Only after insanity acquittals inspiring an upsurge of public vitriol did the Arizona legislature ever take steps to reform its insanity laws, and in both cases, as one might expect, the scope of the defense was narrowed.

The Arizona legislature first slashed its insanity defense following Hinckley and two high-profile Arizona insanity acquittals. Steven Steinberg stabbed his wife to death in 1981 and was found not guilty by reason of insanity after asserting that he had been sleepwalking at the time of the killing. Later the same year, William Gorzenski shot his wife and her lover when he discovered their affair and was found not guilty by reason of insanity after establishing severe depressive illness. In 1983, the Arizona legislature responded by amending its insanity defense statute to require the defendant to prove insanity “by clear and convincing evidence.” The prosecution previously had the burden of proving a defendant’s sanity beyond a reasonable doubt.

The second wave of legislative reform to Arizona’s insanity law, which ultimately produced the GEI statute that is the focus of this Note, was similarly prompted by delirium over an insanity acquittal. On April 11, 1989, Mark Austin, the 26-year-old son of an Arizona pediatrician, brutally murdered his

[them] to the requirements of the law”). See also United States v. Freeman, 804 F.2d 1574, 1575 (11th Cir. 1986) (describing how one of the principal effects of the IDRA was to shift the burden of proof on the question of sanity to the defendant, and upholding this burden shift as constitutional).

61. FraDELLA, supra note 2, at 33.
62. Id. at 33. Most of the states that offer alternative verdicts use some version of the “guilty but mentally ill” verdict first enacted in Michigan. See id. at 34. A survey of the variations on these alternative verdicts and their disparate rationales is outside the scope of this analysis.
63. Id. at 33. In each of those states, evidence of mental illness is admissible only to show that the defendant lacked the requisite mens rea to commit the crime under the law and not to establish insanity as a stand-alone defense. Id. at 41.
64. See Melançon, supra note 9, at 294.
65. See id.
66. See id. at 295–96.
67. See id. at 296.
68. See id.
24-year-old estranged wife, Laura Griffin-Austin, after discovering her in bed with another man. 70 Two trials and one hung jury later, 71 Austin was acquitted by reason of temporary insanity. 72 And just six short months after that, a judge ordered Austin’s conditional release, concluding that his “brief reactive psychosis” no longer posed a danger to the community. 73 The public’s reaction to these decisions can only be described as palpably irate. In one letter to the editor of The Arizona Daily Star, an incensed reader wrote: “Temporary insanity my foot! The reported smile on Mr. Austin’s face . . . indicates that Mr. Austin got away with murder.” 74 Another commenter described the outcome as “outrageous,” and asked with heavy rhetorical flourish: “Where is the justice? Is human life so meaningless?” 75 Indeed, public opinion was so aligned against Austin following the acquittal and subsequent release order that, in order to protect him, a judge ordered that Austin be transported out of the county for his release. 76

Laura Griffin-Austin’s parents harnessed this public disgust in leading the push for insanity reform. They formed a political action committee 77 and later presented a bill called “Laura’s Law,” in memory of their slain daughter, to the Chair of the House Judiciary Committee for sponsorship. 78 The purpose of the bill, as testified to by the Chair of the Judiciary Committee, was to prevent sane persons from having the protection of the insanity defense. 79 The Arizona House of Representatives struck down several versions of Laura’s Law before one was finally pushed through and enacted as the “guilty except insane” statute. 80

Arizona’s “guilty except insane” statute defines an insane person as a person

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72. See Letter to the Editor, Unpunished Violence, ARIZ. DAILY STAR, Mar. 20, 1991, at A10 (lamenting the recent acquittal of Mark Austin and suggesting that “Austin got away with murder”).
74. Letter to the Editor, supra note 72.
78. See Melançon, supra note 9, at 297.
79. Id. at 297 n.85 (citing Arizona House of Representatives Judiciary Committee Notes 3 (Mar. 18, 1993)); see also Kim Kelliher, Bid to Revise Insanity Law Stirs Concern for Mentally Ill, ARIZ. DAILY STAR, Oct. 27, 1991, at A1 (“The Griffins, with the help of Pima County Attorney Stephen D. Neely and Rep. Patricia A. ‘Patti’ Noland, R-Tuscon, have drafted a revision of the state insanity law that makes it much less attractive to plead temporary insanity.”).
“afflicted with a mental disease or defect of such severity that [he or she] did not know the criminal act was wrong.” 81 It excludes disorders stemming from “acute voluntary intoxication or withdrawal from alcohol or drugs, character defects, psychosexual disorders or impulse control disorders.” 82 A comparison of the elements of the Arizona test to the elements of other tests reveals that its closest relative is undoubtedly M’Naghten, or the IDRA, which is a descendant of the M’Naghten rule. Like M’Naghten, and unlike other tests we have examined, the Arizona insanity test is concerned solely with the question of whether the defendant sufficiently understood the immorality of his actions to be held responsible for them. Arizona’s test is notably narrower than M’Naghten, however, in that a showing of inability to comprehend the “nature” or “quality” of one’s actions is insufficient to qualify a person as insane. 83 The Arizona test is also appreciably tougher on defendants than M’Naghten in that it contains a provision limiting the mental illnesses that may qualify a person for the defense and in that the defendant has the burden of proving his insanity “by clear and convincing evidence.” 84

In sum, Arizona’s insanity test takes after the M’Naghten test and the IDRA but has a slightly harder edge. Its history—and the history of insanity defenses in the U.S. and England more generally—indicates that changes to legal definitions of insanity are animated as much by political exigencies as they are by revised understandings of the philosophy of action or new insights into the workings of the human mind. Given this reality, it is imperative that the precepts of any such law be subjected to rigorous inquiry rather than taken on faith. In the sections that follow, I will subject Arizona’s conception of insanity to the scrutiny that I think its rich and problematic history illustrates it deserves, my overarching goal being to isolate the strengths of the Arizona approach, while also putting into relief what features of the Arizona test need to be changed to better comport with morality and science.

II. DESERT OASES: THE STRENGTHS OF THE ARIZONA APPROACH

Ironic though it may be given Arizona lawmakers’ penchant for changing state insanity laws when tempers are at their hottest, Arizona’s “guilty except insane” (“GEI”) statute actually has several features that make it a model of temperance and good judgment or, at least, a decided step in that direction. The three most important of these features are: (1) its “guilty except insane” verdict, expressing a level of reprobation for the defendant and his wrongful act that, to the maximum extent possible, reconciles competing retributive and utilitarian objectives; (2) its procedures for tending to people found GEI, at once protective of society’s interests and considerate of the rights and interests of the

82. Id.
83. See supra note 14 and accompanying text.
mentally-disordered person; and (3) its statutory safeguards against abuse of the insanity defense, simultaneously protecting society from pretenders to insanity and the mentally ill from the stigma of being perceived as con-artists and frauds.

A. THE “GUilty EXCEPT INSANE” VERDICT: A SOLOMONIC COMPROMISE

Arizona’s “guilty except insane” verdict has been ridiculed as a “contradiction in terms.” The notion that a person could be both “guilty” and “insane” at the same time, its detractors have insisted, is preposterous because insanity, by legal definition, entails an absence of criminal culpability. However, while Arizona’s GEI statute may play somewhat fast and loose with long-settled legal concepts, its unique label for individuals who have perpetrated crimes while under the duress of severe mental illness is actually quite pragmatic and judicious.

By calling someone who commits a crime due to mental illness “guilty except insane,” Arizona’s criminal justice system—either deliberately or serendipitously—achieves an optimal level of expressive condemnation of the defendant and his criminal act. The “guilty” prong of the label avoids the retributive pitfall of excessive leniency—it espouses, for all to hear, the state’s considerable contempt for the defendant’s crime, and, in so doing, affirms the dignity of the victim and the victim’s family. But, by the same token, the “except insane” qualifier steers the verdict clear of becoming too condemnatory of the defendant in his own right by acknowledging the substantial role mental illness played in the commission of the crime. To the extent that the expressive scales are at all tilted against the defendant by any suggestion of moral responsibility intrinsic in the term “guilty,” this consideration is, I think, overborne by the important role the “guilty” label plays in educating the public as to the unwavering heinousness of malum in se crimes and by the commendable accommodations made for people found GEI in Arizona, to be discussed shortly.

In his seminal work on the symbolic function of punishment, Joel Feinberg wrote that “it is social disapproval and its appropriate expression that should fit the crime, and not hard treatment (pain) as such.” Elizabeth Anderson and Richard Pildes convey a similar sentiment when they describe as the categorical

85. See Melançon, supra note 9, at 313 (quoting Arizona House of Representatives Judiciary Committee Notes 5 (Mar. 18, 1993)).
86. See id.
87. See Jean Hampton, Correcting Harms Versus Righting Wrongs: The Goal of Retribution, 39 UCLA L. Rev. 1659, 1691 (1992) (contending that, “[f]rom a retributive [standpoint], punishments that are too lenient are . . . sometimes worse than[.] punishments that are too severe” because they signal the state’s greater compassion for the wrongdoer than the victim).
88. See id. at 1686 (arguing that the fundamental purpose of retribution is to “vindicate the value of the victim denied by the wrongdoer’s action”).
89. See infra section II.B.
imperative of expressive state action to “[a]ct in accordance with norms that express the right attitudes toward persons.” By characterizing the severely mentally-disordered perpetrator of crime as “guilty except insane,” Arizona achieves that elusive goal of attaching an appropriate amount of scorn to the defendant’s wrongdoing, while treating both the wrongdoer and the victim as human beings worthy of consideration and ends unto themselves.

B. FAIR “TREATMENT” OF PEOPLE FOUND GEI

Arizona’s GEI regime is also laudable for the emphasis it places on treatment. The history of insanity reform in Arizona suggests that legislators could probably have placated the public—eager for harsh justice after a series of questionable insanity acquittals—with a scheme that emphasized pure restraint and retribution against mentally-disordered offenders to the detriment of other values. But, to the legislators’ credit, the laws that ultimately emerged show they were committed to the loftier ideal of protecting the interests of the mentally ill person in addition to those of the public. A couple features of the Arizona regime particularly embody this compassionate commitment to mutual respect for the public and to the mentally ill offender.

First, and perhaps most important from a mutual respect standpoint, Arizona diverts people adjudged GEI from prison to state run mental health facilities. By diverting the mentally ill offender to a mental health facility, Arizona spares him the incomparable punishment that inheres in languishing in prison for any length of time and gives him the chance to be relieved of the maladaptive symptoms of his disease. By the same token, the public’s legitimate concern for its own safety is honored as Arizona law requires people found GEI to be committed to “secure” mental hospitals. While, concededly, there is something intuitively compelling to the widely-held view that commitment of the mentally ill has a punitive edge to it and is not completely in the interest of the mentally ill person, it can scarcely be argued that a protracted stay in a mental

92. See supra section I.D.
96. See, e.g., Thomas S. Szasz, Law, Liberty, and Psychiatry: An Inquiry into the Social Uses of Mental Health Practices 143 (1963) (“In criminal commitment the penal character of the detention can no longer be covered up by psychiatric makeup.”); see also Grant Morris, Acquittal By Reason of Insanity: Developments in the Law, in Mentally Disordered Offenders: Perspectives from Law and Social Science 65, 76 (John Monahan & Henry J. Steadman eds., 1983) (discussing a 1971 “study of
health facility is worse than prison, notorious for its total deprivation of liberty and dignity.

Arizona’s GEI regime also embodies a commitment to “balancing the equities” through its release provisions. The interests of the GEI offender in his liberty are accorded substantial weight in the sense that Arizona law allows a person found GEI to obtain a conditional release if a board of psychiatrists finds that his illness is in “stable remission” and that he is no longer dangerous.97 And the interests of the GEI offender are protected by a separate provision that requires the release of those offenders not involved in crimes resulting in death or serious injury who no longer suffer from mental illness or pose a danger to themselves or others.98 But by no means are the release provisions entirely, or even essentially, in the mentally ill offender’s favor; on the contrary, they allow for the indefinite commitment of GEI offenders who remain dangerous or whose diseases never go into stable remission.99 Hence, while Arizona’s procedures for commitment and release of the insanity defendant do a good job of reconciling the public’s interest in safety with the offender’s interest in his liberty, they perhaps do so at the expense of reducing the GEI verdict’s strategic appeal to instances when the defendant faces death or an extremely daunting prison term.100

C. MEASURED SAFEGUARDS TO PROTECT AGAINST ABUSE OF INSANITY DEFENSE

Arizona’s insanity regime also achieves balance and mutual respect in some of the ways it limits who may successfully assert the defense. By requiring would-be insanity acquittedees to have a “severe” mental illness to plead GEI101 and to affirmatively prove their insanity by “clear and convincing evidence”102 tall but not insurmountable obstacles to the successful assertion of the defense—the Arizona insanity laws simultaneously protect society from abuse of the insanity defense and, ironically, protect the insanity acquittedee, and mentally-disordered people like him, from the pervasive myth of their own dishonesty.

The benefits that accrue to society by virtue of preventing abuse of the insanity defense are rather self-evident. If only those people who are truly unable to comport their activities with the law can avail themselves of the defense, then the criminal justice system will seamlessly fulfill its retributive mandate—namely, to punish those who deserve punishment and to pardon those who deserve pardoning.103 If, on the contrary, people who are not severely

98. See id. § 13-3994(B)-(C).
99. See id. § 13-3994(F).
102. Id. § 13-502(A).
deprived of their cognitive, volitional, or moral capacities are excused, not only is there the potential for dangerous criminals to go free and harm others, but there is the inevitable consequence that a man fails to be punished according to his “just desert.”

Less obvious, but no less real, are the ancillary benefits that flow to the insanity acquittee, and, correspondingly, to all mentally-disordered people, by virtue of a rigorous insanity test. When a person is excused from criminal responsibility on the basis of a mental disease or defect after thorough inquiry into the validity and severity of that condition, the legitimacy of mental illness as a real and disabling phenomenon is reified. Granted, many mentally ill people revile at the prospect of being perceived as “disabled” or “mentally ill”; indeed, the Unabomber, Ted Kaczynski, even went so far as to try to represent himself when his lawyers tried to introduce evidence of mental illness in the guilt phase of his highly publicized mail bombing trial. But, at the very least, tall barriers to the successful assertion of an insanity defense mean that insanity acquittees and the mentally ill are less likely to be saddled with the stigma that they are “liars,” “fakers,” or “frauds,” a widely-held misconception according to many scholars.

In sum, Arizona’s “guilty except insane” statute is in many ways an unlikely oasis of temperance, balance, and pragmatism in a landscape rife with stereotypes and rushes to judgment. In other ways, to be discussed momentarily, Arizona’s GEI regime falls victim to many of the same traps as its corollaries, and needs to be changed if it is going to serve as a model for other jurisdictions.

III. A MORAL AND PRAGMATIC CRITIQUE OF ARIZONA’S INSANITY LAW

It is a fundamental precept of our criminal justice system, and of the retributive theory upon which it is based, that people should not be held

punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime . . . . He must first be found to be deserving of punishment before any consideration is given to the utility of this punishment for himself or for his fellow citizens.”).

104. See United States v. Kaczynski, 239 F.3d 1108, 1111–12 (9th Cir. 2001).

105. See, e.g., Perlín, supra note 2, at 229–30 (“It is taken as ‘common wisdom’ that the insanity defense is an abused, over-pleaded and over-accepted ‘loophole’ used as a ‘last-gasp’ plea solely in grisly murder cases to thwart the death penalty; that most successful pleaders are not truly mentally ill; that most acquittals follow sharply-contested ‘battles of the experts’; that most successful pleaders are sent for short stays to civil hospitals.”); Valerie P. Hans, An Analysis of Public Attitudes Toward the Insanity Defense, 24 CRIMINOLOGY 393, 408 (1986) (observing, based on a survey of public attitudes related to the insanity defense, that the public vastly overestimates the number of people who are acquitted by reason of insanity and attributing a lot of this overestimation to the belief that many completely sane criminals plead insanity to “get off the hook”).

106. In addition to the retributive or Kantian theory of punishment, legal scholars have also identified specific and general deterrence, rehabilitation, and restraint as highly formative and influential theories of punishment underlying our criminal system. See, e.g., Sendor, supra note 35, at 1427. According to most scholars, however, retributivism has emerged as the single most important contemporary justification for punishment. See Perlín, supra note 2, at 54.
responsible for acts for which they are not blameworthy.\textsuperscript{107} By limiting the insanity defense to persons unable to distinguish right from wrong, and thereby failing to excuse from responsibility people who may know right from wrong but nevertheless are powerless to avoid doing wrong, Arizona’s law offends that principle.

To step back for a moment, though, what does it mean to characterize someone as powerless to avoid doing wrong? Can mental illness really deprive a person of all control, such that a mentally ill person could not justly be said to be any more responsible for his actions than is a tree when it falls on a house or an avalanche when it tumbles down a mountain?\textsuperscript{108} Stephen J. Morse forcefully argues that the influence of “irresistible impulses” should not excuse an individual from criminal liability because, essentially, there are no irresistible impulses.\textsuperscript{109} Actions undertaken under even the most pressing and persuasive of urges, Morse insists, still have a component of voluntariness that counsels in favor of the treatment of the actor as willful and accountable.\textsuperscript{110} While in the Part that follows I will attempt to refute Morse’s intuition about the absence of irresistible urges with empirical evidence, here I simply want to deconstruct how Morse builds his philosophical argument for holding out-of-control defendants responsible for their crimes. In so doing, I hope to establish that even the strongest case for holding people coerced by inner desires fully accountable for their actions relies on distortions, if not perversions, of the concepts of action, rationality, and compulsion that are so central to our criminal justice system.

The first part of Morse’s rationale for holding people at the mercy of “irresistible impulses” responsible for the consequences of their impulsivity turns on conceptions of intent.\textsuperscript{111} Intent is at the epicenter of the controversy surrounding criminal responsibility and the insanity defense because the defense is predicated on a showing that the accused lacked the requisite criminal state of mind to deserve punishment for his acts.\textsuperscript{112} According to Morse, even the individual who steals out of pure impulse and without conscious thought or
desire acts intentionally when he takes an item from a store, and correspondingly deserves punishment. 113 Certainly, in the most formal-literal sense, Morse’s proposition that the thoughtless and impulsive criminal *intends* his actions is tenable. While the thief may not be consciously aware of what he is doing or why, some part of his executive apparatus makes him pick up the item when nobody is looking and put it in his pocket in lieu of taking any of a whole universe of alternative actions. But the real question at issue with respect to intent in the law is not about whether there was action originating in the mind of the defendant; the actus reus element exists to address that issue, at least to the extent that it incorporates a voluntariness requirement. 114 Rather, the fundamental question underlying the criminal intent requirement is a moral one: at the time of the crime, did the defendant have the requisite disregard for society and its values—the requisite “guilty mind”—to deserve punishment? 115 The answer to this question, with respect to our hypothetical thief, is a considerably more difficult one that hinges on our feelings about the thief’s free will and concomitant motivation for acting. 116 Morse’s initial justification for the denial of an insanity defense to persons overborne by irresistible impulse—based on formalistic definitions of intention—therefore, seems to confuse the issue.

On the more critical issue of free will and the extent to which its absence militates against criminal punishment, Morse first insists that his readers concede that the potential determinism of the universe does not—and should not—excuse human action. 117 In support of excising concerns about the possibility of universal causation from the debate about excuses in our criminal law, Morse offers the following explanation: “Most human movement is not literally compelled and most *acts* are not done under unusual constraints that might

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113. See Morse, supra note 109, at 1595.
114. See Northrup, supra note 40, at 799.
115. According to Benjamin Sendor, criminal conduct that is the product of free will is condemned by our legal system because it evidences disrespect for prevailing norms and values, whereas coerced criminal conduct is not because it does not communicate the same disrespect. See Sendor, supra note 35, at 1415.
116. When I say that an actor’s blameworthiness depends on whether he has “free will,” I mean to convey that the degree to which an actor is the true arbiter of his own actions—and the extent to which an actor’s behaviors are really his own choosing and not compelled by hard or non-existent choices—ought to play a decisive role in the determination of his moral and legal liability. Morse rails against the use of the term “free will” in discussions about criminal responsibility on the grounds that “free will” is not an actual criterion of any legal doctrine of responsibility and on the theory that free will is not really essential as a justification for holding people responsible at all. See Stephen J. Morse, The Non-Problem of Free Will in Forensic Psychiatry and Psychology, 25 BEHAV. SCI. & L. 203, 212 (2007). According to Morse, the real issues of consequence in criminal responsibility debate, and in the context of excuses more broadly, are action, rationality, and compulsion, and the amorphous language of “free will” only distracts from and confuses those issues. See id. at 207. I choose to use the term “free will” to describe what is relevant to determinations of criminal responsibility, over Morse’s impassioned objections, because I think it encompasses all of the doctrinal formulations of what is essential to responsibility—action, rationality, and absence of compulsion—and because I think it does some important rhetorical work, namely, conveying on its face that responsibility requires a high level of self-control.
117. See Morse, supra note 109, at 1592.
justify an excuse . . . .” 118 That Morse is ill-equipped to make such assertions about the scope of human agency and the relationship between human beings and the cosmos is beyond reproach.

Nevertheless, there is still good reason to adopt Morse’s premise that unless proven otherwise (to the extent possible), human action should be regarded as the product of will and should impute responsibility to the relevant actor. First, this assumption of autonomy has been made by every legal system in history and is essential to the legitimacy of punishment under almost any theory. 119 Second, as Morse indicates, a flat rejection of human agency would excuse all action and therefore render moot any discussion about the selective extension of excuses to persons lacking control over their actions. 120 Hence, while Morse perhaps steers the debate about the proper scope of excuses away from determinism too hastily, 121 it is probably better for the sake of precision and relevance that a presumption of human agency be admitted.

Morse’s main grievance with excusing from responsibility wrongdoers with impulse control disorders is that impulse control disorders do not deprive their possessors of all choice in, or control over, whether or not they engage in criminal behavior. 122 The characterization of an impulse as “irresistible,” Morse elaborates, perpetrates a kind of fraud on the public which he refers to as the “lure of mechanism.” 123 Those impulses labeled “irresistible” are really no more than intense desires that create a hard choice—sometimes a very hard choice—and the fact that an individual is faced with a hard choice when he commits a crime should not diminish his responsibility. 124

118. Id.

119. See Rogers M. Smith, The Constitution and Autonomy, 60 TEX. L. REV. 175, 175–80 (1982) (discussing the seminal place of the autonomy principle in the Anglo-American legal tradition); see also HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 74–75 (1968) (“Very simply, the law treats man’s conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were.”).

120. See Morse, supra note 109, at 1592.

121. Morse also steers the responsibility debate away from determinism because he rejects the proposition, accepted in this Note, that free will is essential to any theory of culpability. See Morse, supra note 116, at 212. According to Morse, even if a deterministic world is assumed, the differential legal treatment of defendants could be justified based on behavioral differences among actors, such as differences in their capacities for reason and their ability to resist compulsion. See id. at 215. Assuming everyone’s actions to be predetermined, in other words, an individual who committed a crime while in full possession of his reason could be regarded as more liable for his criminal actions than a person who lacked comparable capacity for reason. The problem with Morse’s argument as to the possibility of a coherent system of responsibility in a deterministic universe is that differences in punishment on the basis of such characteristics as one’s capacity for reason could only be justified if it is assumed that individuals can moderate their actions based on the presence or absence of those characteristics, which is impossible, assuming all actions are predetermined. It is as if Morse posits a deterministic world, but implicitly assumes that some level of choice, which would defeat his deterministic assumption, endures.

122. See Morse, supra note 109, at 1600.

123. Id.

124. See id. Morse concedes that there are instances in which an exceedingly hard choice might negate responsibility; for example, when a choice is so hard that it does not even appear to the agent as
An important secondary assumption on which Morse relies is that people suffering from impulse control disorders feel the same desires and yearnings that normal people do; any difference, Morse suggests, is one of degree or of frequency of occurrence, but not of kind. As has already been discussed, Morse further assumes that actors responding to purportedly irresistible impulses nevertheless act intentionally and have functioning seats of reason that enable them to bring their desires to fruition. Taken together, all of these features of the impulsive agent’s behavior compel Morse to conclude that excuses based on an alleged lack of control are not generally justifiable, and especially not so in the context of irresistible impulses. Those people in support of control excuses, Morse surmises, really just want to apologize for individuals who have difficulty controlling their desires and making hard choices.

Morse’s position suffers from two fundamental moral-philosophical problems: (1) it understates the hallowed connection between free will and blameworthiness in law and morality and (2) it overstates the extent to which a person’s will needs to be overborne before he can assert blamelessness for his actions. While Morse’s argument about the non-existence of genuinely “irresistible” impulses implicitly concedes that choice is relevant to the criminal culpability inquiry, Morse is not willing to fully acknowledge the extent to which authentic, genuine choice has been and continues to be instrumental to our concepts of moral and legal responsibility. Although, as has already been discussed, our criminal justice system adopts the legal fiction that individuals are autonomous actors with functioning wills, it endures as a core feature of our concept of justice that individuals must really be reasoning, choosing agents in order to incur responsibility for their actions. The concept is as old as Aristotle, who many centuries ago denounced the idea that people should be held morally and legally responsible for acts committed “owing to ignorance” or those committed “under compulsion.” And the concept has continued vigor in the courts and

a choice. See id. at 1604. However, Morse insists that such hard choices should only excuse an actor from responsibility because the actor is unaware of his options, and not because he is compelled by the strenuousness of the circumstances to act unlawfully. Id. at 1605.

125. See id. at 1600.
126. See id. at 1594–95.
127. See id. at 1601–02.
128. See id.
129. See Sendor, supra note 35, at 1395 (“The distinctive quality of mental illness that prompts us to treat mentally ill offenders fairly is . . . the inability to make a choice: our sense of fairness requires that we excuse a person whom we cannot expect to have chosen to comply with the law.”); see generally Smith, supra note 119 (discussing the history and importance of autonomy in legal reasoning through a survey of Supreme Court cases).
130. See Harry J. Philips, Jr., Comment, The Insanity Defense: Should Louisiana Change the Rules?, 44 LA. L. REV. 165, 180 (1983) (“The relationship of free will to culpability for one’s actions has become a cornerstone of our entire criminal justice system.”).
131. See Sendor, supra note 35, at 1372–73 (citing ARISTOTELE, ETHICA NICOMACHEA 1109b (W. ROSS trans., 1925)).
legislatures of the present day.\textsuperscript{132} Morse’s persistent refusal to acknowledge that
the choice which is intended to give rise to responsibility is a full and authentic
one therefore undermines long-standing notions of fairness that uphold our
criminal justice system.

Just as Morse underemphasizes the importance of free will to our concepts of
justice, he also exaggerates the degree to which an individual’s control over his
actions needs to be impaired before he may appropriately deny responsibility
for their consequences. An actor’s criminal behavior does not have to be
functionally equivalent to a “patellar reflex”—rendering the actor incapable of
choosing some alternative action—in order for the stain of reprehensibility that
warrants punishment to be purged from his act.\textsuperscript{133} On the contrary, an action
need only be \textit{essentially} or substantially coerced in order to mitigate criminal
responsibility. This moral proposition garners expression in the law in the arena
of duress. The individual who commits a crime while apprehending imminent
harm to himself or others is excused from punishment even though he could
conceivably have avoided the proscribed activity and endured the harm.\textsuperscript{134} In
the same way, an individual unconsciously apprehending severe mental distress
if he does not engage in a proscribed activity should be excused from responsibil-
ity for his illegal actions, even if, on a conscious level, he knows his actions to
be wrong and knows there are conceivable alternatives. There is simply no
principled justification for viewing incredibly powerful psychic pressures as
totally different from, and less exculpating than, physical pressures, especially if
the level of subjectively experienced coercion is equal, if not greater.

Returning now to Arizona’s insanity law, we see that it suffers from the same
defects as Morse’s arguments. With its exclusive reliance on a “right and
wrong” formulation of insanity and its lack of a volitional prong making the
absence of free will an excuse, the law ignores the settled fairness principle that
blameworthiness requires a highly unobstructed will.\textsuperscript{135} Likewise, with its
exclusion of impulse control disorders from the ambit of mental diseases

\begin{footnotesize}
\begin{enumerate}
\item[132.] See, e.g., \textsc{Model Penal Code} § 2.09(1) (excusing from criminal responsibility defendants who
inflict harm on another while “coerced” by the use, or threatened use, of unlawful force against them or
another person); \textsc{Morrisette v. United States}, 342 U.S. 246, 250 n.4 (1952) (“\textit{C}riminal law is based
upon . . . punishing the vicious will. It postulates a free agent confronted with a choice between doing
right and doing wrong . . . .” (quoting Roscoe Pound, \textit{Introduction} to \textsc{F. Sayre, Cases on Criminal Law
(1924)})).
\item[133.] See \textsc{Morse, supra} note 109, at 1598.
\item[134.] See \textsc{Model Penal Code} § 2.09(1) (“\textsc{I}t is an affirmative defense that the actor engaged in
the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to
use, unlawful force against his person or the person of another, that a person of reasonable firmness in
his situation would have been unable to resist.”).
\item[135.] Whether or not the Arizona test asks the correct cognitive question is another challenging issue.
It is not entirely clear to me that a person who knows his conduct will be “wrong” or “illegal” is always
blameworthy when he acts with such knowledge. Consider, for example, \textsc{Daniel M’Naghten}. M’Naghten
knew that attempting to kill another person was wrong, but was nevertheless found not guilty by reason
of insanity because the evidence established he was suffering from paranoid schizophrenia. \textsc{See Keilitz & Fulton, supra} note 2, at 6.
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\end{footnotesize}
potentially justifying excuse, Arizona law evidences a profound misunderstanding of the extent to which an individual’s free will needs to be encumbered to morally justify excuse. The exclusion of ICDs from the defense also shows an irrational propensity to view physical compulsion as somehow more real and more pardoning than equivalent mental or emotional compulsion.

Theories of punishment other than retributivism, which I have already emphasized is the predominant theory in American jurisprudence, also fail to adequately justify Arizona insanity law’s lack of a volitional prong and exclusion of impulse control disorders from qualifying mental illnesses. Consider specific deterrence theory, for example. The thrust of specific deterrence theory is that punishing wrongdoers is appropriate because it encourages those wrongdoers to abstain from future criminal activity, thereby increasing social utility. Specific deterrence theory does not support Arizona’s decision to exclude from the purview of its insanity test a volitional component, or impulse control disorders, because any person afflicted with a lack of control due to mental illness cannot, by definition, purposefully bring his behavior into conformity with law even if he knows it. Nor is general deterrence—the notion that wrongdoers should be punished so that other potential wrongdoers abstain from future criminal activity—a sufficiently persuasive justification. While as a general theoretical matter a more limited set of excuses might endow the public with greater fear of punishment for wrongful acts, it is highly untenable that a slightly more expansive definition of insanity would persuade individuals deciding whether or not to perpetrate crimes to walk the straight and narrow. And in terms of restraint, nothing is lost by expanding the insanity test to include a volitional prong or impulse control disorders. People found “guilty except

136. Even Morse concedes that persons entirely without the ability to control themselves through no fault of their own would not be punishable under any theory: “If it is true that an agent really could not help or control herself and was not responsible for the loss of control, blame and punishment are not justified on any theory of morality and criminal punishment.” Morse, supra note 109, at 1587–88.

137. See, e.g., Morris, supra note 95, at 2 (“The prevention theory (specific deterrence) is premised on the assertion that subjecting the individual to the highly unpleasant experience of imprisonment or other sanction will deter him from engaging in future crimes because he will not want to be punished again.”); Judd F. Sneirson, Black Rage and the Criminal Law: A Principled Approach to a Polarized Debate, 143 U. Pa. L. Rev. 2251, 2259–60 (1995) (discussing utilitarian theories of punishment in the context of “black rage”).

138. See Sneirson, supra note 137, at 2260 (“Without free will, the deterrent effect of utilitarianism breaks down because actors can no longer choose to forego criminal conduct in order to avoid criminal punishment.”).

139. See id. at 2259.

140. Although the rehabilitation of wrongdoers has been largely denounced as a sound justification for punishment in recent years, it is worth observing that Arizona’s use of a restrictive definition of insanity is not likely to facilitate the reformation of wrongdoers because those additional wrongdoers that would be incarcerated under Arizona’s narrow “right and wrong” test, but not under an irresistible impulse test, lack the capacity to fully moderate their actions. On the contrary, a strong case could be made that narrow conceptions of insanity actually undermine any rehabilitative mission intrinsic in the criminal justice system by damaging the perception of mental illnesses as real phenomena and, in so doing, stigmatizing criminals as pure evildoers rather than persons who are sick and unable to fully help themselves. Concededly, though, the insane label has its own countervailing set of stigmatizing effects.
insane” in Arizona are diverted to mental health facilities where they cannot be released back into society until they prove, to the satisfaction of a review board, that they pose no danger to others.\textsuperscript{141}

In sum, Arizona’s exceedingly narrow insanity test—defining insanity exclusively in terms of the inability to discern right from wrong and expressly foreclosing impulse control disorders from consideration as mental diseases—suffers from profound moral and legal shortcomings. Most glaringly, Arizona’s test refuses to accord full dignity to the principle, well-established in law and morality, that blame should only be attributed to persons with real ownership over their actions. Secondly, Arizona’s test fails to accept the proposition that a person’s mental state can engender feelings of compulsion just as powerful, and therefore inviting of exculpation from guilt, as physical threats. Thirdly, Arizona’s test does not cohere with the principle, observed elsewhere in criminal law, that an individual’s freedom of will can be sufficiently overborne to excuse responsibility without coercion foreclosing all options save the illegal one. Finally, it has been demonstrated that other potential justifications for a narrow conception of insanity fail to bridge this gaping moral and philosophical chasm.

IV. A SCIENTIFIC CRITIQUE OF ARIZONA’S INSANITY LAW

Arizona’s exclusion of “impulse control disorders” from the category of “[m]ental disease[s] or defect[s]” that potentially qualify an individual for the insanity defense is not very surprising considering the strained relationship that has always existed between psychiatry and law.\textsuperscript{142} Since the emergence of psychiatry as a formal discipline, judges, legislatures, and legal scholars have all been extremely dubious of the reliability of psychiatric findings and of the ability of psychiatrists and other medical professionals to explain human behavior.\textsuperscript{143} A recent proliferation of “syndrome excuses” of questionable validity as syndromes—with such colorful names as “television intoxication,”\textsuperscript{144} “black rage,”\textsuperscript{145} and even “UFO survivor syndrome”\textsuperscript{146}—has only stoked public and scholarly skepticism further, and promoted greater resolve and outspokenness among proponents of a narrow insanity defense. Even with the percolation of all

\textsuperscript{141} See ARIZ. STAT. REV. ANN. § 13-3994(B)–(C) (2007).
\textsuperscript{142} Id. §13-502(A).
\textsuperscript{143} See FRADELLA, supra note 2, at 49–50 (observing that not every psychiatric condition in the discipline’s most reputed diagnostic manual, the DSM-IV, is recognized by courts or even all psychiatrists); PERLIN, supra note 2, at 143 (“The legal system’s continuing and unremitting failure to take seriously either empirical or scientific data about virtually all aspects of the insanity defense reflects its ongoing and generalized rejection of psychodynamic principles as a means of explaining human behavior.”).
\textsuperscript{144} See FRADELLA, supra note 2, at 94.
\textsuperscript{146} See ALAN M. DERSHOWITZ, THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY 19 (1994). For a more extensive list of syndromes allegedly “concocted” by psychiatrists and lawyers, see id. at 18–19.
these new excuses of questionable validity, however, it appears the root source of the animus against expanding conceptions of insanity is the conviction that we just don’t know why people behave the way they do, and thus we have to err on the side of agency and responsibility. Morse expresses precisely this sentiment, when he writes, “[T]he correct account of the metaphysics of action is a mystery still.”147

But while the nature of human action remains shrouded in mystery, science is beginning to expose it to the light of understanding. Specifically, there is a growing body of evidence that impulse control disorders are “real” syndromes with a biological etiology and that they deprive individuals of the control over their actions, which, I have argued previously, is critical to our conceptions of just punishment. At the core of my analysis is the conviction that, while the decision about what constitutes a “mental disease or defect” for the purposes of the insanity law is ultimately a moral and legal one,148 our moral and legal judgments should be informed by science and what it tells us about reality.

A. WHAT ARE “IMPULSE CONTROL DISORDERS”?

Like so many of the so-called “abuse excuses” that have been denounced as idle “psychobabble” in the media and legal scholarship,149 impulse control disorders (ICDs) are a relatively recent phenomenon.150 The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) identifies five stand-alone impulse control disorders: intermittent explosive disorder, kleptomania, pyromania, pathological gambling, and trichotillomania.151 Intermittent explosive disorder (IED) is characterized by “failure to resist aggressive impulses”;152 kleptomania by “failure to resist impulses to steal objects that are not needed”;153 pyromania by “deliberate and purposeful fire setting”;154 pathological gambling

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147. Morse, supra note 109, at 1589.
148. See United States v. Lyons, 731 F.2d 243, 246 (5th Cir. 1984) (“[W]hat definition of ‘mental disease or defect’ is to be employed by courts enforcing the criminal law is, in the final analysis, a question of legal, moral, and policy—not of medical—judgment.”).
149. Fraedella, supra note 2, at 94 (asserting that one could easily conclude that abuse excuses are mere “psychobabble” upon observing how they are vilified in the popular press).
151. See Am. Psychiatric Ass’n, Diagnostic and Statistical Manual of Mental Disorders 663 (4th ed. 2000) [hereinafter DSM]. It should be noted that impulse control disorders are often found by clinicians to be comorbid with other disorders, including bipolar spectrum disorders, substance abuse, OCD, anxiety disorders, ADHD, and depressive disorders. See Clinical Manual, supra note 150, at 9. For the purposes of this Note, however, I am only interested in cases in which a person is diagnosed exclusively with an impulse control disorder because courts are already at least moderately inclined to fit persons suffering from major depressive disorders, bipolar disorders, or psychoses into the framework of the insanity defense. See Fraedella, supra note 2, at 51. An individual will only be diagnosed with a specific impulse control disorder, like intermittent explosive disorder, if his symptoms “are not better accounted for by another mental disorder.” DSM, supra, at 667.
152. DSM, supra note 151, at 667.
153. Id. at 669.
154. Id. at 671.
by “[p]ersistent and recurr[ing] maladaptive gambling behavior”;\textsuperscript{155} and trichotillomania by “recurrent pulling out of one’s hair.”\textsuperscript{156} Each of the described behaviors associated with the disorders—aggression, stealing, fire setting, gambling, and hair pulling—must occur with some frequency, and must prove maladaptive, in order for a patient to be classified as having an impulse control disorder.\textsuperscript{157} Each of the five impulse control disorders are also characterized by a common pattern of symptomatic behavior.\textsuperscript{158} First, the person experiences increased tension or arousal, coinciding with a strong urge to act in some socially unacceptable way. Next, he fails to resist the urge and acts inappropriately. Third, he feels a heightened sense of arousal for having engaged in the activity. Fourth, there is a sense of relief attending the cessation of the urge. And finally, the individual experiences guilt and remorse for having perpetrated the bad act.\textsuperscript{159}

The single most salient feature of impulse control disorders is that they all require some pathological inability to resist internal “impulses.”\textsuperscript{160} Impulsivity is conceptualized in psychiatry as being, in many ways, the antithesis of compulsivity.\textsuperscript{161} Compulsive people are highly risk-averse; they engage in destructive ritualistic activity because they believe it will ward off some perceived harm.\textsuperscript{162} Dispositionally impulsive people, meanwhile—persons who might be classified as suffering from an impulse control disorder—engage in high-risk behavior because it gratifies their internal wants and desires and relieves their intense urges.\textsuperscript{163}

Although no drugs have yet been approved by the FDA for the treatment of impulse control disorders, there are strong indications that ICDs respond to medicinal therapy.\textsuperscript{164} Pharmacotherapy studies, while limited, suggest that antidepressants and mood-stabilizers may be effective in controlling the symptoms of some ICDs.\textsuperscript{165} Recent studies in which patients with pathological gambling disorders were administered medications targeting their serotonin transmission have yielded especially promising results.\textsuperscript{166}
B. WHY SHOULD ARIZONA LEGISLATORS REMOVE IMPULSE CONTROL DISORDERS FROM THE LIST OF DISORDERS EXCLUDED FROM ITS INSANITY TEST?

The main reason Arizona lawmakers should remove impulse control disorders from the series of disorders excluded from the purview of the insanity defense is because behavioral science and psychiatry are proving impulse control disorders to be “real” syndromes with biological origins that render their sufferers unable to resist internal urges and exert authentic control over their actions.\footnote{In The Non-Problem of Free Will in Forensic Psychiatry and Psychology, Morse argues that determining whether a behavior has a biological cause, as opposed to, say, a psychological or sociological one, is insignificant for purposes of determining whether the actor is legally or morally responsible. See Morse, supra note 116, at 217. A cause, in other words, is a cause, whether biological or environmental, and the question is whether the “cause” alleviates moral responsibility. While I would generally agree that the most important question is whether the cause—in this case, impulse control disorders—deprives the individual of moral responsibility for his actions, I am still resolute in the belief that proof of impulse control disorders’ biological etiology is germane to this responsibility inquiry. I maintain this if only because we as a society are more inclined at this moment in history to believe that an individual lacks an authentic choice in what he does if his behavior can be shown to be the product of biology as opposed to upbringing or socialization.}

The fact that ICDs have been shown by strong correlational evidence to have a biological etiology and to diminish individuals’ capacity for restraint, along with the fact that people cannot choose their genetic dispositions (at least not yet), compels the conclusion that people with ICDs lack the requisite blameworthiness for punishment.\footnote{The fact that impulse control disorders have been shown to have a biological etiology is also significant because it reinforces the notion that they are treatable by modern medical techniques and, correspondingly, indicates that the diversion of people with ICDs to mental health facilities would not be in vain. See Bruce J. Winick, Ambiguities in the Legal Meaning and Significance of Mental Illness, 1 PSYCHOL. PUB. POL’Y & L. 534, 558–59 (1995) (observing that the Supreme Court has accorded weight to the organic-psychosocial etiology distinction in determining what illnesses justify involuntary hospitalization under the assumption that the techniques of the modern psychiatric hospital are more apt to be effective on diseases with biological causes).}

Research has demonstrated that the impulsivity that is the salient characteristic of impulse control disorders correlates with both neurochemical and neuropsychological abnormalities in subjects.\footnote{See Robert M. Wettstein, Violence and Mental Illness: Additional Complexities, in GENETICS AND CRIMINALITY: THE POTENTIAL MISUSE OF SCIENTIFIC INFORMATION IN COURT 109, 111 (Jeffrey R. Botkin et al. eds., 1999).} The observed neurochemical difference between people with impulse control disorders and people without is that people with impulse control disorders have lower serotonin levels in their prefrontal cortices.\footnote{See CLINICAL MANUAL, supra note 150, at 11 (asserting that “[e]xtensive evidence in animals and humans suggests that a deficiency of central serotonin . . . is associated with greater impulsivity”); Grant et al., supra note 159, at 64; Lindsey Tanner, That Guy on Your Bumper Has Intermittent Explosive Disorder (Hint: Road Rage), GLOBE & MAIL, June 6, 2006, at A15 (describing a 2006 study completed by Harvard and University of Chicago Medical faculty finding inadequate production of serotonin in persons with impulse-control disorders).} Many people speculate that it is this decreased serotonin function in
impulsive people that is primarily responsible for their impulsive behavior. Reduced serotonin levels have also been observed in people with major depressive illnesses; the difference, though, is that major depressive illnesses are not among the disorders expressly barred by Arizona law from constituting a “mental disease or defect” for the purposes of the insanity defense. Other neurochemical abnormalities identified in impulsive populations include lower levels of platelet monoamine oxidase and other neurotransmitters, such as norepinephrine and dopamine, linked to impulse and aggression regulation.

People with impulse control disorders have also been found to have different neuropsychological characteristics than other populations. In Evidence For a Dysfunctional Prefrontal Circuit in Patients with Impulsive Aggressive Disorder, Mary Best et al. reported finding that subjects with IED behaved comparably on tests of brain function to people with lesions on the orbital and medial prefrontal cortex. Other lesion studies have similarly reinforced the idea that impulsivity has a neuroanatomic basis. Studies documenting a high frequency of multiple ICDs in the same family have also buttressed the proposition that ICDs have a strong genetic and biological component and are not the fault of their sufferers.

One reason the Arizona legislature was likely wary of conferring legal legitimacy on impulse control disorders in the past, and perhaps rightfully so, is that ICDs were previously conceptualized by the foremost experts in psychiatry as diseases of addiction. Courts and legal scholars have traditionally been reluctant to excuse individuals for criminal behaviors compelled by addiction because, among other reasons, addiction is at least the partial fault of the addict. While an addict perhaps lacks substantial control over some of his

171. See, e.g., Grant et al., supra note 159, at 64.
175. See CLINICAL MANUAL, supra note 150, at 12 (discussing studies suggesting that lesions in both rats and humans “are correlated with impulsive behavior”).
176. Id. at 12 (citing one study that found that twenty percent of pathological gamblers “have a first-degree relative who is also a pathological gambler”).
177. Id. at 2; see also Tanner, supra note 170, at A15 (“For a couple of decades, intermittent explosive disorder, or IED, has been included in the manual psychiatrists use to diagnose mental illness, though with slightly different names and criteria. That has contributed to misunderstanding and underappreciation of the disorder . . . .”).
178. See, e.g., Powell v. Texas, 392 U.S. 514, 532 (1968) (affirming appellant’s conviction for being drunk in a public place despite evidence of alcoholism, and narrowly circumscribing the holding of Robinson v. California, 370 U.S. 660 (1962), which had previously overturned the conviction of an appellant for addiction to narcotics). It should be noted, however, that the Court in Powell did not definitively resolve the question of whether addiction should, under any circumstances, excuse or mitigate criminal liability, asserting that this was more properly a question for the states. One other conceivable explanation for the harsh treatment of addicts under the law is that they can cause social damage. Lawmakers may be reluctant to excuse addicts because they want to express their contempt for this destructiveness and to deter the onset of addiction, to the extent possible.
actions once his body has developed a physical dependence on drugs or alcohol, the addict presumably has full control over his faculties before taking his first sip of alcohol or first dose of narcotics. The voluntariness of that initial encounter with drugs or alcohol, coupled with the foreseeability of addiction and its deleterious consequences, makes the addict responsible for what flows from his addiction. It is quite conceivable, then, that the stigma of the “addiction” label attached to ICDs in the early stages rubbed off on them and led to their inclusion in the list of medical diseases or defects not qualifying an individual for the insanity defense. But impulse control disorders are not analogous to addictions, and the psychiatric community has demonstrated as much by removing ICDs from the addiction spectrum of disorders and giving them their own category.

Arizona legislators may also have been initially disposed against extending the insanity defense to ICD sufferers because they were thought to be motivated by “hedonistic” desires for arousal and gratification as opposed to compulsive fears and inner urges to avert perceived harms. Political pressures, which, I have already argued, have proven instrumental in the development of insanity law, could easily have compelled legislators to distinguish between individuals who commit bad acts to gratify uncontrollable yearnings for arousal and others who commit bad acts under the compulsion of mental anxiety. However, if we assume blameworthiness to rest on the extent to which an agent’s bad actions are the product of his free will, as I have tried to show both law and morality do, there is no real moral distinction between the individual who acts to gratify an irrepressible desire and the individual who acts to dispel an overwhelming anxiety. Assuming each stimulus to be overbearing, both the impulsive and the compulsive person lack blameworthiness because they could not control their respective behaviors. This moral argument notwithstanding, science is also demonstrating that ICDs often have a distinctly compulsive component. Recent studies have shown that compulsivity frequently occurs concurrently with

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179. Although it could be argued that the first theft of a kleptomaniac is indistinguishable from the first sip of alcohol taken by an eventual alcoholic in terms of the extent to which it is voluntary, I see several important differences. At the time the kleptomaniac steals his first item, he is already under the duress of a “hard choice” due to intense internal urges. He probably knows the theft will gratify his internal wants and desires because something comparable to stealing, perhaps lying, gave him a similar feeling of release earlier in life. The individual who takes his first sip of alcohol, meanwhile, may not be compelled by any strong internal urge to do so and knows on some level that consumption of alcohol poses a risk of addiction. The addict, therefore, is more responsible for the consequences of his condition than the individual afflicted with an impulse control disorder is responsible for his actions, at least to the extent that the addict does not prove to have an underlying ICD. Ironically, studies suggest that the rates of comorbidity between ICDs and other DSM-IV disorders may actually be quite high. See, e.g., Jon E. Grant et al., Impulse Control Disorders in Adult Psychiatric Patients, 162 Am. J. Psychiatry 2184, 2184 (2005) (finding that 30.9% of adult psychiatric inpatients screened for pathological gambling, trichotillomania, kleptomania, pyromania, intermittent explosive disorder, compulsive buying, and compulsive sexual behavior could be diagnosed with at least one ICD).

180. See DSM, supra note 151, at 663.

impulsivity in people with impulse control disorders. There is even speculation that the publishers of the DSM-V may expand the category of impulse control disorders to include four new disorders, which would be called impulsive-compulsive disorders.

Recent developments in Arizona law, like recent developments in psychiatry, also militate against excluding impulse control disorders from the Arizona insanity defense. As I alluded to earlier, the primary effect of the Court’s 2006 decision in Clark v. Arizona was to uphold the Mott rule, requiring defendants who want to introduce expert evidence of mental illness or incapacity to plead “guilty except insane.” One perverse and perhaps unanticipated consequence of this holding is that it means if people with ICDs cannot plead insanity, they are, effectively, completely foreclosed from being able to present expert testimony related to their illness. Granted, the court in State v. Mott distinguished, rather than reversed, a prior case in which the state supreme court held that the exclusion of expert testimony related to defendant’s habitually impulsive reactions to stress violated due process. But the notion that there remains any real window for the presentation of expert testimony on impulse control disorders, outside the context of an affirmative insanity defense, seems wishful at best after Clark. Justice Souter was, by all appearances, unequivocal when he stated that Mott was meant “to confine to the insanity defense any consideration of characteristic behavior associated with mental disease.” In sum, to ensure that people with ICDs have a fair opportunity to present evidence related to their mental illness, it is imperative that ICDs be removed from the list of disorders forbidden from insanity coverage.

To restate the thrust of this entire section: it is now morally, legally, and scientifically untenable to argue that impulse control disorders should be excluded from those disorders qualifying as a “mental disease or defect” under the Arizona Code.

C. COUNTERARGUMENTS AND REPLIES

Opponents of extending the insanity defense to impulse control disorders might argue that ICDs, unlike schizophrenia or the major affective disorders, are not full-fledged “mental diseases or defects” by medical standards, but mere
labels for people with certain maladaptive behavioral or personality traits. Antisocial personality disorder, for example, is conceptualized in this way—as a thick description of a person’s counterproductive habits rather than as a disease. For reasons already discussed, though, impulse control disorders are not susceptible to this criticism. Whereas antisocial personality disorder does not have a biomedical explanation and does not respond to organic treatment, like psychotropic medication, there is an ever-growing literature that shows impulse control disorders have biological correlates and are responsive to medicinal therapies. That impulse control disorders are, to a large extent, defined and diagnosed by their behavioral manifestations does not mean that they are purely behavioral descriptions rather than diseases; indeed, many of the paradigmatic examples of mental illness, such as schizophrenia and major depressive disorder, “are diagnosed primarily by their behavioral manifestations.”

A second potential argument against removing impulse control disorders from the list of disorders prohibited from qualifying an individual for the insanity defense in Arizona is that ICDs are simply too difficult to diagnose to merit inclusion in the list of qualifying diseases. Concededly, measures for identifying the presence of an impulse control disorder are still limited. Nonetheless, there are several tests that have been either specifically designed, or modified, to accomplish that purpose—namely, the Barratt Impulsiveness Scale (BIS-11), the Overt Aggression Scale-Modified (OAS-M), the South Oaks Gambling Screen, the Buss-Durkee Hostility Inventory (BDHI), the Hostility and Direction of Hostility Questionnaire (HDHQ), and the Yale-Brown Obsessive-Compulsive Scale (Y-BOCS). More importantly, the main problem that has been observed with respect to ICD diagnosis is underreporting of impulsivity—not overreporting. Underreporting of impulsivity should be far less worrisome to opponents of an expansive insanity defense than overreporting because it means fewer diagnoses and not more. Also undercutting the notion that ICDs should be excluded from the insanity defense due to diagnostic shortcomings are the empirical realities surrounding the dangers of malingering. While the prospect of people escaping punishment by feigning disorder is a legitimate concern—a concern amplified by the lack of diagnostic sophistication—evidence shows that fear of such trickery is grossly disproportionate to the actual number of times a defendant is able to “beat the system.” Such fear

188. See, e.g., Winick, supra note 168, at 566.
189. Id. at 566–67.
190. See supra notes 164–76 and accompanying text.
191. Winick, supra note 168, at 562.
192. See CLINICAL MANUAL, supra note 150, at 13.
193. See id.
194. See id. at 15.
195. See PERLIN, supra note 2, at 19 n.30 (quoting H.R. REP. NO. 98-577, at 9 (1983)) (“[A]buses of the insanity defense are few and have an insignificant direct impact on the criminal justice system.”).
is made even less rational in the ICD context given certain facts about impulse control disorders: the diagnostic criteria are “hard to meet”196 and ICDs are estimated to have a low prevalence in both adult and child populations.197

One could also argue against expansion of the insanity defense to cover ICDs under the theory that evidence of such disorders could too easily mislead jurors on issues of blameworthiness, when really the condition of having the disorder says nothing about the defendant’s cognitive, moral, or volitional capacity. Indeed, the Clark Court relied heavily on such reasoning when it upheld Arizona’s prohibition against diminished capacity evidence.198 The problem with such reasoning, at least as applied to the question of whether to make ICDs a possible predicate for insanity, is that the condition of having an impulse control disorder does say something about the afflicted person’s volitional capacity. While the condition of having an impulse control disorder does not necessarily mean that the diagnosed so lacked control over his actions at the time of the wrongful act as not to deserve punishment, behavioral science suggests that it does mean that the diagnosed had certain unique biological characteristics that make it exceedingly difficult to exercise appropriate restraint.199 And on a related note, if the real fear animating this critique is a fear about people abusing the insanity defense, there are other ways—besides completely excluding ICDs from the insanity defense—to protect against such a result. For example, legislatures could require, as did the Arizona legislature, that those individuals seeking excuse on the basis of insanity prove by clear and convincing evidence that, at the time of the crime, they suffered from a “severe” mental disease or defect that caused the relevant criminal activity.200 Or legislatures could impose stiffer limits on the admissibility of expert testimony related to impulse control disorders, short of excluding ICDs from insanity consider-

196. Janet Cromley, Rage Has a New Name, L.A. TIMES, June 14, 2006 (quoting Dr. Darrell Regier, Director of Research for the American Psychiatric Association as saying, “This is an exceptional disorder with criteria that are hard to meet . . . . The likelihood that 7 percent of the population would meet the criteria is not very high.”).
197. See Bernardo Dell’Osso et al. Epidemiologic and Clinical Updates on Impulse Control Disorders: A Critical Review, 256 EUR. ARCHIVES PSYCHIATRY & CLINICAL NEUROSCIENCE 464, 465 tbl.1 (2006) (providing a series of prevalence estimates for impulse control disorders: pathological gambling (1%–3% of the adult population), pyromania (2.4%–3.5% of children and adolescents), intermittent explosive disorder (1%–2% of respondents in psychiatric surveys), and kleptomania (0.6% of adults)). But see Ronald C. Kessler et al., The Prevalence and Correlates of DSM-IV Intermittent Explosive Disorder in the National Comorbidity Survey Replication, 63 ARCHIVES GEN. PSYCHIATRY 669, 669 (2006) (concluding that intermittent explosive disorder is a much more common condition than previously thought).
198. See Clark v. Arizona, 548 U.S. 735, 776 (2006) (“Evidence of mental disease . . . can easily mislead; it is very easy to slide from evidence that an individual with a professionally recognized mental disease is very different, into doubting that he has the capacity to form mens rea, whereas that doubt may not be justified.”).
199. See supra sections IV.A & IV.B.
By enabling an impulse control disorder to potentially qualify an individual for the insanity defense, the Arizona legislature would not be dangerously lowering the threshold for excuse. The main result would simply be that people with real mental illnesses affecting their ability to control their behavior would have a morally and scientifically appropriate opportunity to raise a legal defense.

CONCLUSION: TOWARD A JUST AND VISIONARY INSANITY LAW

Arizona’s “guilty except insane” approach to the insanity defense has several features that make it an improbable repository of justice in a jurisprudence fraught with its opposite. By calling someone who commits a crime due to mental illness “guilty except insane,” Arizona’s criminal system proclaims the dignity of victims, while acknowledging the reality that our conception of criminals as pure, unabashed evildoers is often inaccurate and overly simplistic. By diverting people found guilty except insane to mental health facilities for treatment, the Arizona system spares people who have done wrong—albeit through no fault of their own—the indignity of prison in favor of health care, while in the meantime ensuring the public’s interest in safety is vindicated. And by imposing significant but fair obstacles to the successful assertion of an insanity defense, Arizona protects society’s interest in treating people according to their just deserts, while in the same motion helping to relieve insanity acquitted, and the mentally ill more generally, of the stigma that they are tricksters and frauds.

But Arizona’s “guilty except insane” regime is not without sin; indeed, it is miles from moral and pragmatic unassailability. Where Arizona’s “guilty except insane” approach falls especially short is in its definition of who may qualify as “insane” for the purposes of being excused from criminal responsibility. In this Note, I have advocated two changes to Arizona’s definition of insanity that would make it morally, scientifically, and, therefore, legally coherent: (1) expanding the definition to include a volitional prong that would excuse people who lacked control over their actions due to severe mental illness and (2) removing impulse control disorders from the list of disorders altogether proscribed from insanity consideration. With these changes, the Arizona law would not only stand on solid moral and scientific ground, but would stand on the proverbial shoulders of giants as a progressive beacon for the insanity laws of other jurisdictions.

201. Taken too far, however, limits on the admissibility of expert testimony to prove the presence or absence of an impulse control disorder could undermine the removal of ICDs from the category of non-qualifying “mental diseases or defects” altogether.