

## NOTE

# WITHOUT THE FORBIDDEN FRUIT: RETURNING TO THE WILD BEAST TEST

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*From Daniel M’Naghten to James Kahler, the question that the insanity defense begs is not whether they committed their respective crimes, but rather whether we should punish them for the crimes they committed. Thus, often in the realm of insanity, we blur the lines between the legal and the moral, the descriptive and the normative. The philosophers squabble with the legal scholars who squabble with the psychiatrists and psychologists—around and around the debate goes, maddeningly so. In conversation with these conflicting authorities, this Note attempts to define who the truly insane are and argues that the wild beast test is the proper baseline for insanity. The wild beast test captures the amorality of the truly insane as a total deprivation of the capacity to know moral right from wrong and, in so doing, urges us to excuse the insane from punishment.*

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And the Lord God commanded the man, saying, “You may surely eat of every tree of the garden, but of the tree of the knowledge of good and evil you shall not eat, for in the day that you eat of it you shall surely die.” . . . But the serpent said to the woman, “You will not surely die. For God knows that when you eat of it your eyes will be opened, and you will be like God, knowing good and evil.” So when the woman saw that the tree was good for food, and that it was a delight to the eyes, and that the tree was to be desired to make one wise, she took of its fruit and ate, and she also gave some to her husband who was with her, and he ate. Then the eyes of both were opened, and they knew that they were naked. And they sewed fig leaves together and made themselves loincloths.<sup>1</sup>

INTRODUCTION

With the newfound capacity to know right from wrong, Adam and Eve experience shame, guilt, and embarrassment as they cover themselves and later hide from God.<sup>2</sup> The Judeo-Christian story of the creation and fall of humanity ends with punishment—Adam and Eve are banished from the Garden of Eden, and God clearly communicates why and how they are being held responsible for disobeying the word of God.<sup>3</sup> But what do we make of someone who has not eaten from the tree of the knowledge of good and evil, and therefore does not have the capacity to know right from wrong? Would we go so far to say that such a person is not “human,” and if so, how does the criminal law treat this “non-human” person?<sup>4</sup>

The criminal law can offer this person an excuse from punishment by way of the insanity defense. Our legal definitions of insanity have undergone variation after variation to the point where modern insanity defenses are less connected to the contours of criminal responsibility and

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<sup>1</sup> *Genesis* 2:16–17, 3:4–7. Interestingly, the fruit has popularly been depicted as an apple, potentially stemming from a misunderstanding of or pun on *mālum*, a native Latin noun meaning “evil,” and *malum*, another Latin noun, which comes from the Greek word *μηλον*, meaning “apple.” C. D. YONGE, *A PHRASEOLOGICAL ENGLISH-LATIN DICTIONARY* 179 (1855); *A LATIN DICTIONARY* 1104 (Charlton T. Lewis & Charles Short eds., 1879).

<sup>2</sup> *See Genesis* 3:7–8.

<sup>3</sup> *Genesis* 3:16–19, 23–24.

<sup>4</sup> *See infra note 39 and accompanying text.*

more intertwined with psychiatry and mental illness.<sup>5</sup> Part of why the insanity defense has evolved over time is because our understanding of mental illnesses has evolved.<sup>6</sup> However, because calling someone legally insane is not necessarily synonymous with diagnosing someone as severely mentally ill, the modern insanity defense in its various forms has been criticized as simultaneously overinclusive and underinclusive.<sup>7</sup> Conflating legal insanity and mental illness does not consistently promote the function of the insanity defense, which is to determine whether someone should not be legally responsible and punishable for her culpable acts.

The first conception of the insanity defense, the wild beast test, truly gets at the heart of what insanity means—to be not-human—as well as the moral basis of punishment. If we stipulate that there is such a person, a not-human person, a wild beast who does not have any moral framework at all, that person should not be subject to punishment under the law because she is not morally responsible for her actions given her incapacity to know moral right from wrong, which informs her inability to morally reason. Ultimately, the wild beast is “stranger to [us] than the birds in [our] garden”<sup>8</sup> in that criminal law and punishment are like unintelligible fences to the wild beast just as much as the wild beast is an unintelligible, amoral agent to us.

Part One will provide an overview of the four different formulations of the insanity defense that have been popularly used and debated in the United States. This overview will include the criticisms of these formulations of the insanity defense and show that a major reworking of the modern insanity defense is necessary. In particular, deconstructing the M’Naghten test will illustrate how an insanity defense that includes a mental-disease-or-defect element results in an overinclusive and underinclusive test for insanity. Part Two proposes that the wild beast test provides a truer baseline understanding of insanity that addresses the criticisms of the modern insanity defense. This Part walks through the origins of the wild beast test and explains how the wild beast test best captures what insanity is at baseline from historical, psychological, and moral philosophical perspectives. Throughout this Part, Legion will be the prototypical wild beast in order to illustrate how the wild beast test

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<sup>5</sup> See *Kahler v. Kansas*, 140 S. Ct. 1021, 1025–26 (2020).

<sup>6</sup> *Id.* at 1035.

<sup>7</sup> Accordingly, throughout this paper, references to “the insane” will specifically refer to persons who would meet the criteria for legal insanity. While “insanity” has subsumed clinical diagnoses, the rhetoric in this paper concerning legal insanity is extricated from its relation to mental illness.

<sup>8</sup> Eugen Bleuler, who coined the term “schizophrenia” in 1911, is believed to have referred to his patients in this way. RONALD DAVID LAING, *THE DIVIDED SELF: AN EXISTENTIAL STUDY IN SANITY AND MADNESS* 28 (1999).

more effectively describes legal insanity. Finally, Part Three addresses potential criticisms of using the wild beast test to define insanity. At first blush, the wild beast test appears to be an archaic and obsolete test, but in responding to these criticisms, this Part exemplifies how the wild beast test is actually doctrinally consistent within criminal law principles and case law.

### I. CURRENT FORMS OF INSANITY

In the United States, states have generally defined insanity vis-à-vis a mental disease or defect.<sup>9</sup> Not all states, however, have an insanity defense; some jurisdictions have decided that the traditional insanity defense is no longer viable and have repealed the defense altogether.<sup>10</sup> The dissatisfaction with the traditional insanity defense can be broken into several grievances: (1) “defendants who are not really mentally ill” should be punished but are exculpated; (2) dangerously mentally-ill defendants should actually be imprisoned and confined instead of exculpated; (3) trials with mentally-ill defendants become a battle of the experts which renders trials by jury meaningless.<sup>11</sup> The evolution of our contemporary understanding of legal insanity, which has now become enmeshed with psychiatry and modern medicine, illuminates what insanity really is at baseline and what, if anything, is salvageable of the traditional insanity defense that can address the above grievances.

Broadly speaking, there are four iterations of the insanity defense that have been popularly adopted:

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<sup>9</sup> See *Clark v. Arizona*, 548 U.S. 735, 749–50 (2006).

<sup>10</sup> Idaho, Montana, Utah, and Kansas have a *mens rea* defense instead. See, e.g., IDAHO CODE § 18–207 (2020); MONT. CODE ANN. § 46-14-101(a)(ii) (2019); UTAH CODE ANN. § 76-2-305 (West 2020). Kansas’s defense is the following: “It shall be a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the offense charged.” Kan. Stat. Ann. § 21–5209 (2018).

Thus, a defendant in Kansas can successfully claim a *mens rea* defense when she proves that she lacked the requisite mental state or *mens rea* required to be found guilty of the offense. For example, under the *mens rea* defense, a defendant is not guilty if she killed someone under the impression that the person was an animal because she did not actually intend to kill a person. However, a defendant is guilty if she killed someone, knowing that she was killing a human being, even if she believed an animal deity told her to kill the person.

<sup>11</sup> Alexander D. Brooks, *The Merits of Abolishing the Insanity Defense*, 477 ANNALS AM. ACAD. POL. & SOC. SCI. 125, 126 (1985); Henry Weihofen, *Eliminating the Battle of Experts in Criminal Insanity Cases*, 48 MICH. L. REV. 961, 962 (1950).

The push to abolish or reform the insanity defense can be traced back to John Hinckley’s acquittal in 1982. The trial involved a lengthy “battle of the experts” after which the jury acquitted Hinckley based on his delusional obsession with Jodie Foster, which the jury believed resulted in an inability or substantial incapacity to appreciate that his acts were wrong. See generally LINCOLN CAPLAN, *THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINCKLEY, JR.* (1st ed. 1984).

1. A person is insane if, due to a mental disease or defect, she does not know or appreciate the nature of what she was doing.
2. A person is insane if, due to a mental disease or defect, she does not know or appreciate that what she was doing is wrong, even though she knew or appreciated the nature of what she was doing.
3. A person is insane if, due to a mental disease or defect, she was suffering from an irresistible and uncontrollable impulse, and thus, substantially lacked the capacity to control her actions.
4. A person is insane if what she was doing, a culpable act, was the result or product of a mental disease or defect.<sup>12</sup>

Starting with the most recently created, but least popular iteration, iteration 4 is the Durham rule. As put forth by the court in *Durham v. United States*, the Durham rule is the following: “[A]n accused is not criminally responsible if his unlawful act was the product of mental disease.”<sup>13</sup> The Durham rule was borne from the criticism of iterations 1, 2, and 3, specifically with respect to the under-inclusivity of the combination of these iterations of the insanity defense.<sup>14</sup> While Judge Bazelon’s intention was to take into consideration the advances in modern psychology by accounting for the broad range of mental disorders, the overwhelming criticism of the Durham rule was that the rule was in fact far too broad in scope.<sup>15</sup> Any culpable act could be feasibly tied to a person’s mental disease or defect, even if the causality between the culpable act and mental disease or defect was not entirely clear. Taken to its logical conclusion, under the Durham rule, any person with a mental illness who commits a crime is legally insane and will never be legally responsible for her crimes. Ultimately, the same court that rendered the Durham rule rejected the rule in an en banc decision eighteen years later.<sup>16</sup> Currently, the Durham rule is only adopted by New Hampshire, where this

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<sup>12</sup> These are the “four strains” recognized by the Supreme Court. See *Clark*, 548 U.S. at 749–50. These iterations are meant to portray the basic concepts behind insanity defenses in the United States. These iterations are not meant to be perfect analogues to any actual insanity defenses employed by particular states. The language involving the degree of incapacity (i.e. knowledge versus appreciation or “substantially lacked the capacity”) is derived from the Model Penal Code, discussed *infra*, to reflect the variance in how states have decided to define the contours of the incapacity that they have deemed the concept behind insanity.

<sup>13</sup> *Durham v. United States*, 214 F.2d 862, 874–75 (D.C. Cir. 1954).

<sup>14</sup> See *id.* at 870–74.

<sup>15</sup> See Abe Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L. J. 905, 905 (1961).

<sup>16</sup> See *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

iteration of the insanity defense originated well prior to *Durham v. United States*.<sup>17</sup>

The next iteration, iteration 3, is known as the irresistible impulse test. Under the irresistible impulse test, insanity is conceived as a type of duress—a person is insane if, despite knowing right from wrong, she was driven to commit a culpable act by an irresistible impulse caused by a mental disease or defect.<sup>18</sup> This form of insanity emerged around the same time as iterations 1 and 2, but focuses instead on the volitional capacity of a person.<sup>19</sup> Standing alone, the irresistible impulse is simultaneously overinclusive and underinclusive. With respect to its over-inclusivity, the irresistible impulse test does not provide a way to distinguish the impulses, even amongst those caused by mental disease or defect, which may be perceived as irresistible but are in fact resistible.<sup>20</sup> The reasonable person could be used to distinguish between irresistible and resistible impulses, but the test provides no guidance as to whether the reasonable person is the reasonable *neurotypical* person or the reasonable *mentally-ill* person.<sup>21</sup> For neurotypical jurors, the attempt to place themselves in the mind of a reasonable mentally-ill person, who suffers from the particular mental illness that the defendant suffers from, is futile, and thus, a battle of experts is nearly inevitable. With respect to the irresistible impulse test's under-inclusivity, by defining insanity in terms only related to one's volitional capacity, those who are cognitively impaired but who seem intuitively insane (like someone who unknowingly strangles a person because she cannot perceive the difference between human beings and lemons) are necessarily excluded.<sup>22</sup>

Turning finally to the iterations that would capture someone who is cognitively impaired: iterations 1 and 2 comprise the first and second prongs of the modern M'Naghten test, respectively, which has long been

<sup>17</sup> See N.H. REV. STAT. ANN. § 628:2 (2018).

<sup>18</sup> 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 102 (15th ed. 2020); see also *Parsons v. State*, 2 So. 854, 866–67 (Ala. 1887).

<sup>19</sup> See ISAAC RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY 263 (1838); FORBES WINSLOW, THE PLEA OF INSANITY, IN CRIMINAL CASES 74 (1843).

<sup>20</sup> TORCIA, *supra* note 18; see also Jess Spier, *The Psychology of Irresistible Impulses*, 33 J. CRIM. L. & CRIMINOLOGY 457, 462 (1943).

<sup>21</sup> See, e.g., *Pollard v. United States*, 282 F.2d 450, 462 (6th Cir. 1960) (“While anger, greed, and passion are said, in ordinary parlance, to result in acts because of desires that have become irresistible, this is not, in law, the ‘irresistible impulse’ that results from a mental defect or mental disease.”). Thus, the court suggests that there are impulses which “ordinary” people may deem irresistible, but do not actually qualify as irresistible. Irresistibility, then, is a higher threshold which must presumably be from the point of view of the defendant, the mentally-ill person. A neurotypical juror must then go through the mental acrobatics of trying to set aside her perception of what is irresistible, without conflating insanity and mental illness, in order to deeply comprehend the defendant's psyche.

<sup>22</sup> See TORCIA, *supra* note 18.

the popular standard in the United States.<sup>23</sup> The M’Naghten rule, which later became the M’Naghten test, emerged in 1843 in a response to the acquittal of Daniel M’Naghten.<sup>24</sup> In a discussion with the House of Lords, a panel of judges gave the following definition of insanity:

Every man is to be presumed to be sane, and . . . that to establish a defence [sic] on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of 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.<sup>25</sup>

While the original formulation of the M’Naghten test entails a complete lack of knowledge with respect to the culpable act, section 4.01 of the Model Penal Code is a contemporary model of how the M’Naghten test’s original phrasing has evolved over time.<sup>26</sup> Many jurisdictions have adopted the term “appreciation,” which is used in section 4.01 of the Model Penal Code, in place of “knowledge” in order to convey a deeper sense of understanding or cognitive capacity, separate from merely being aware or in touch with one’s own reality, like realizing that a trigger was in fact being pulled by one’s own finger, for example.<sup>27</sup> The Model Penal Code also illustrates the main conceptual building blocks for the M’Naghten test: (1) a mental disease or defect (2) that causes someone to be cognitively incapable with respect to her actions and their consequences.<sup>28</sup>

Notably, what still remains in both the original M’Naghten test and Model Penal Code is the requirement that a mental disease or defect must be the cause, presumably the but-for cause, of the relevant cognitive incapacities. Accordingly, similar to the Durham rule, the M’Naghten test has a broad scope that begins to blur the line between mental illnesses, which are recognized by the medical community for the purposes of diagnosis, and legal insanity, which is recognized by the legal community for the purposes of culpability and punishment.

Furthermore, while both the Model Penal Code and the original M’Naghten test reference the cognitive capacity to recognize or appreci-

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<sup>23</sup> *Id.* at § 101.

<sup>24</sup> *See* M’Naghten’s Case, 10 Cl. & Fin. 200 (1843).

<sup>25</sup> *Id.* at 210.

<sup>26</sup> TORCIA, *supra* note 18, § 104.

<sup>27</sup> *See* 2 CRIM. L. DEF. *Insanity* § 173, Westlaw (database updated July 2019).

<sup>28</sup> *See* MODEL PENAL CODE § 4.01(1) (“A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.”).

ate the wrongfulness of one's culpable act, neither indicates whether the "wrongfulness" at issue is legal wrongfulness, due to a particular act being proscribed by law, or moral wrongfulness, due to a particular act being proscribed by morals. The Model Penal Code uses "criminality" interchangeably with "wrongfulness," which seems to suggest that wrongfulness should refer to legal wrongfulness.<sup>29</sup> However, an interpretation of the M'Naghten test that focuses on the awareness or understanding of the *legal* wrongfulness of one's actions is inconsistent and stands at odds with a tenet of criminal law—ignorance of the law is no excuse<sup>30</sup>—and provides a caveat for culpable acts that are caused by a mental disease or defect. Thus, this interpretation falls prey to criticisms similar to those of the Durham rule because, for no clear apparent reason, such an interpretation draws the line of culpability at a defendant's "moral luck" in suffering from a mental disease or defect that is plausibly attributable to a defendant's ignorance to the fact that what she was doing was a crime or was proscribed by law.<sup>31</sup>

Alternatively, the M'Naghten test could instead be interpreted as turning on someone's awareness or understanding of *moral* wrongfulness. This interpretation of the M'Naghten test would make the ability to distinguish moral right from wrong a prerequisite to moral responsibility. This alternative reading of M'Naghten is derived from a prior understanding and a truer baseline of insanity—thus, enter the wild beast test.

## II. THE WILD BEAST TEST

### A. *Origins*

The wild beast test is best understood as a concept or analogy that has been articulated in different ways. The wild beast test is typically credited to Judge Robert Tracy in 1724, presiding over the trial of Edward Arnold, who asserted that a person is insane if she or he was "totally deprived of his [or her] understanding and memory, and doth not

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<sup>29</sup> See *Crime*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/crime> (last visited April 15, 2020) (defining "crime" as an illegal act).

<sup>30</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 27 (4th ed. 1770) ("For a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence. *Ignorantia juris, quod quisque tenetur scire, neminem excusat*, is as well the maxim of our own law, as it was of the Roman.") (footnote omitted); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 48 (1881).

<sup>31</sup> See Sherry F. Colb, *Does the Constitution Require the Insanity Defense?*, VERDICT (June 5, 2019), <https://verdict.justia.com/2019/06/05/does-the-constitution-require-the-insanity-defense> ("The word 'insane' sounds like it means afflicted with a mental illness. It does not mean that, or at least it means something far narrower than that. . . . Why is an act undertaken because of the same belief 'insane' if the person has the belief due to a mental illness and 'sane' and responsible if the person holds the belief because of his parents' warped values or because of his selfishness?").



know what he is doing, no more . . . than a brute, or a wild beast.”<sup>32</sup> However, Judge Tracy’s articulation of the wild beast test comes well after Judge Henry de Bracton’s first systematic treatise in 1256, which asserted that an insane person is not morally responsible because he was “not far removed from brute beasts.”<sup>33</sup> Thereafter, Sir Edward Coke incorporated Bracton’s theory into his treatises on criminal law, which took a more scientific approach to insanity.<sup>34</sup>

In some ways, the M’Naghten test is a logical outgrowth of the wild beast test. The presumption of sanity for every human in the M’Naghten test is logically related to the assertion under the wild beast test that when someone is insane, she is less like a human and more like a beast or animal. While the wild beast test’s language of total deprivation or global incapacity is not explicitly laid out word-for-word in the M’Naghten test, as mentioned earlier, the language does call upon a total deprivation with respect to “not knowing,” which is read as a total lack of knowledge with respect to the nature and quality of a person’s act or to the fact that the act was wrong.<sup>35</sup>

However, this is in fact where the major difference lies between the wild beast test and the M’Naghten test—the M’Naghten test specifically and exclusively focuses on the exact moment that a person committed a culpable act.<sup>36</sup> Thus, under the M’Naghten rule, when we say Daniel M’Naghten was insane, we do not mean that Daniel M’Naghten is not morally responsible all the time in all that he does. Rather, we mean that Daniel M’Naghten is not morally responsible with respect to killing Ed-

<sup>32</sup> *Rex v. Arnold*, 16 How. St. Tr. 695, 764–65 (1724).

<sup>33</sup> 4 BRACTON ON LAWS AND CUSTOMS OF ENGLAND 308 (S. Thorne transl. 1968); Anthony M. Platt, *The Origins and Development of the “Wild Beast” Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility*, 1 ISSUES CRIMINOLOGY 1, 2, 9 (1965).

Bracton was very sophisticated, even by modern standards, in his description of the criminal offender who was insane. Such a person could not be guilty of a crime because he did not have a “corrupt intent” or the “will to harm” or “malice”; he was protected by the “imbecility of the deed”, his lack of “reason”, “sense” and “understanding”, and his likeness to a “young child” or “brute animal”.

*Id.* at 6. Platt notes that in late Latin, “brutus” was used to distinguish animals or beasts from humans, but that prior to this development, “brutus” was understood to literally mean “heavy” and figuratively mean “insensible” or “unreasonable.” *Id.* at 9.

<sup>34</sup> Platt, *supra* note 33, at 7.

<sup>35</sup> See TORCIA, *supra* note 18, § 101.

<sup>36</sup> The M’Naghten test was in response to two questions: (1) “What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with *insane delusion* respecting one or more particular subjects or persons, is charged with the commission of a crime . . . ?” and (2) “In what terms ought the question to be left to the jury, as to the prisoner’s state of mind *at the time when the act was committed?*” M’Naghten’s Case, 10 Cl. & Fin. 200, 203 (1843) (emphasis added). Thus, the M’Naghten definition of insanity was specifically tailored to a situation in which the defendant claims she was suffering from delusions and the jury is inquiring into the particular moment the crime was committed.

ward Drummond because, at the exact moment when he shot Drummond, M’Naghten either did not know the nature and quality of what he was doing or did not know that shooting Drummond was wrong. By defining insanity vis-a-vis the particular culpable act, the M’Naghten rule was in fact a significant break from prior understandings of insanity such as the wild beast test.<sup>37</sup>

Unlike the M’Naghten rule, the wild beast test defines insanity as a global sense of incapacity that attaches to an entire person, not as a component of someone’s behavior or byproduct of a mental disease or defect.<sup>38</sup> Under the wild beast test, the insane person is associated with animals or beasts because she, like an animal, lacks the will or intent to do harm, which precludes her from punishment when she commits a culpable act.<sup>39</sup> Insanity, therefore, is a lack of humanity, and the insane person is distinctly “not-human.”

To illustrate what insanity is at baseline, let us draw up a person named Legion and see what qualities or lack thereof make Legion insane.<sup>40</sup> Returning to the story of Adam and Eve, let us put Legion in the Garden. Let us stipulate that Legion, like the other animals in the Garden, did not eat from the tree of knowledge of good and evil.<sup>41</sup> Thus, unlike Adam and Eve, Legion does not know the difference between moral right and wrong. While Legion could engage in morally wrong behavior, one might appropriately hesitate in deeming Legion morally blameworthy in the way that one might deem Adam and Eve morally blameworthy because Legion lacks moral belief altogether.<sup>42</sup> In this way, Legion arguably has diminished moral blameworthiness when he commits a culpable act because, while Legion could perhaps exercise rational thought and self-control, Legion lacks the concept of moral wrongness, which precludes him from moral responsibility. Add the element of mental disease or defect and this is what the M’Naghten test postulates is insanity. Ultimately, however, Legion would not be morally blameless forever.<sup>43</sup> Legion could directly eat from the tree of the knowledge of

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<sup>37</sup> See Platt, *supra* note 33, at 8 (pointing out that “demens et furians” was the usual legal description of an insane person); JOSHUA DRESSLER & STEPHEN P. GARVEY, *CRIMINAL LAW: CASES AND MATERIALS* (7th ed. 2015).

<sup>38</sup> Doctrinally, this understanding of insanity would be a status-based defense. See *infra* Part III.B.

<sup>39</sup> Platt, *supra* note 33, at 9.

<sup>40</sup> Legion is a demon-possessed man that Jesus exorcises by sending the demons into a herd of pigs. *Mark* 5:1–12. The pigs then drown themselves in a nearby lake. *Mark* 5:13. Through the exorcism, the man is freed from his wild madness and is clothed with his restored humanity. *Luke* 8:27–29, 35.

<sup>41</sup> See *Genesis* 3:1–13, 16–19.

<sup>42</sup> See RONALD D. MILO, *IMMORALITY* 57–58 (1984).

<sup>43</sup> See *id.* at 60.

Indeed, I am inclined to think that even in the case of a very small child who has not yet acquired (or fully acquired) the concept of moral wrongness, if such a child has

good and evil or, like a child, Legion could be socialized by Adam and Eve and indoctrinated with their moral beliefs. Children, unlike brutes and wild beasts, have the capacity to learn and to internalize the beliefs and morals that their parents and society writ large impress upon them.<sup>44</sup>

However, let us now stipulate that not only does Legion not know moral right from wrong, but he is also in fact *incapable* of knowing moral right from wrong. Let us stipulate that not only is the tree of knowledge of good and evil foreclosed to Legion, but that Legion enters the Garden after Adam and Eve have been exiled. Accordingly, more like a brute or a wild beast, Legion is uniquely defined by an enduring and permanent amorality.<sup>45</sup> His insanity or lack of humanity is broader than merely his conduct alone and is broader than whether or not he *knows* moral right from wrong at the particular moment when he may commit a culpable act. Rather, Legion's insanity is tied to the fact that Legion is, in moral terms, cognitively incapable altogether and operating inside the Garden, in a world very different than our own.

### B. *Historical Perspective*

Inanimate objects also share this incapacity to learn and engage in moral reasoning altogether, and consequently, inanimate objects are not punished.<sup>46</sup> When someone is injured in a car accident, we do not put the cars on trial; instead, we punish the humans that were driving the cars.<sup>47</sup>

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learned to appreciate the consequences of his acts for others (if, e.g., he is able to understand what sticking the pin into baby does to baby), then the mere lack of the concept of moral wrongness on his part does not preclude his being blameworthy—although other things, such as his not yet having acquired adequate capacities of rational self-control, may.

However, note the emphasis on the child's *ability* to learn, which sheds light on what qualities human beings possess that justify their punishment under the law.

<sup>44</sup> Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 *PSYCHOL. REV.* 814, 827–28 (2001). While a child has the capacity to learn morals, when a child commits a culpable act, she is viewed as having diminished moral responsibility because, in that moment, it is possible that she lacks the knowledge of moral right and wrong that adults have. Platt, *supra* note 33, at 16–17. See *Deuteronomy* 1:39 (“And as for your little ones, who you said would become a prey, and your children, who today *have no knowledge of good or evil*, they shall go in there.” (emphasis added)).

<sup>45</sup> Our understanding of amorality will be the incapacity to know moral right from wrong. However, amorality may also be defined as an indifference to moral right and wrong, which can manifest as a lack of motivational moral judgments and convictions. MILO, *supra* note 42, at 57–58, 63–4.

<sup>46</sup> *Holloway v. United States*, 148 F.2d 665, 666 (D.C. Cir. 1945) (“To punish a man who lacks the power to reason is as undignified and unworthy as punishing an inanimate object or an animal. A man who cannot reason cannot be subject to blame.”) Of course, inanimate objects also cannot meet the requisite actus reus and mens rea for crimes, since they do not make willed bodily movements and do not have mental states.

<sup>47</sup> *But see* Walter Woodburn Hyde, *The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times*, 64 *PENN. L. REV.* 696, 696 (1916) (“Many Greek writers mention [curious murder] trials, which appear to have compre-

Animals have a particularly interesting and illuminating history with respect to punishment. In European countries in the Middle Ages, in order to justify punishment, an animal could be imputed with a moral sense (e.g., Satan had allegedly entered the animal) and then punished for its culpable behavior.<sup>48</sup> Thomas Aquinas first raised the question of whether punishing “irrational creatures” was justified and concluded that it was right only to “curse” creatures that could have impressions of good and bad.<sup>49</sup> As a contemporary of Bracton, Aquinas used “brutis” in a similar manner, noting that animals also lacked “free judgment,” which he contended was the product of thoughtful deliberation and a deeper “apprehensive” understanding that entails perceiving reality and determining the appropriate or good end.<sup>50</sup> Similarly, when God punishes the serpent in the Garden of Eden, it is because the serpent deceived Eve, which arguably evidences the ability to have impressions of good and bad, a human-like ability that distinguishes the serpent from other animals and condemns the serpent “above all livestock and above all beasts of the field.”<sup>51</sup> This “personification theory” by its very name suggests that animals must be personified in order to be punished because “only human

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hended . . . inanimate things—such as stones, beams, pieces of iron, *etc.*,—which had caused the death of a man by falling upon him.”). The willingness to put inanimate objects on trial may very well stem from the fact that the Greeks saw “something divine” in inanimate objects. *Id.* at 699. Inanimate objects were also punished in Norway, England, China, *etc.* *Id.* at 724–26.

<sup>48</sup> See *id.* at 708; Platt, *supra* note 33, at 13. Historical examples of animals that were allegedly possessed include pigs, cats, dogs, goats, wolves, birds, and skunks. Hyde, *supra* note 47, at 712. Notably, in the Middle Ages, some argued that the Christian church did not have the authority to punish animals because animals were ignorant creatures that had never made a contract with God, whereas humans, through Adam, had. See *id.* at 704.

<sup>49</sup> See THOMAS AQUINAS, *SUMMA THEOLOGICA PART II SECOND PART* 312–13 (Fathers of the English Dominican Province transl., Benziger Brothers 1918); Hyde, *supra* note 47, at 716. Aquinas’s only justification for punishing creatures without impressions of good and bad was that Satan was using them as agents or instruments to actualize his own evil purposes. Hyde, *supra* note 47, at 717. Thus, those creatures without impressions of good and bad had to lack agency or ownership of their actions due to Satan’s control in order to be punished. Conceiving of animals as agents of Satan may be related to a seeming lack of agency in insane humans. See Stephen P. Garvey, *Agency and Insanity*, 66 *BUFF. L. REV.* 123, 190–91 (2018) (suggesting a lost-agency theory of insanity: “Blame presupposes a sense of agency, and insanity precludes blame because insanity defeats the sense of agency.”).

<sup>50</sup> Man has free choice . . . In order to make this evident, we must observe that some things act without . . . free judgment; as brute animals. For the sheep, seeing the wolf, judges it a thing to be shunned, from a natural and not a free judgment; because it judges, not from deliberation, but from natural instinct. . . . But man acts from judgment, because by his *apprehensive power* he judges that something *should* be avoided or sought.

THOMAS AQUINAS, *BASIC WRITINGS OF ST. THOMAS AQUINAS: VOLUME 1*, 787 (A.C. Pegis ed. 1945) (emphasis added).

<sup>51</sup> *Genesis* 3:13–14. The serpent in the Garden of Eden was referenced to support punishment of grasshoppers in 1565. Hyde, *supra* note 47, at 707.

beings can commit crimes” and only human beings can be held responsible for those crimes.<sup>52</sup>

Thus, defining insanity as the incapacity to know moral right from wrong digs deeper at the notion that there is something distinctly non-human about the truly insane among us. Let us return to Adam and Eve and watch the narrative play out to see the differences between an insane person and sane person. Let us say that Legion is now also in the Garden with Adam and Eve prior to their exile, but that Legion had still not eaten from the tree of knowledge of good and evil as Adam and Eve had. Let us also stipulate, however, that Legion is somehow similarly disobedient, perhaps eating from a placebo tree that God told Legion not to eat from. The non-humanity of Legion would perhaps be discernable in Legion’s different response to when God appears in the Garden. While Adam and Eve would experience shame, guilt, and embarrassment, Legion would not, neither on his behalf or on Adam and Eve’s behalf.<sup>53</sup> This lack of an emotional response would be corroborated by Legion’s actions; perhaps Legion would not cover his body or hide from God in the way that Adam and Eve would.<sup>54</sup> Adam and Eve would likely be puzzled by Legion’s lack of response, just as much as Legion would be puzzled by Adam and Eve’s responses and their subsequent exile, even though Legion superficially understood and knew what God told them all not to do.

### C. *Psychological Perspective*

In sum, Legion would lack *affective* knowledge, which goes beyond cognitively knowing right from wrong or good from evil at a particular moment. Affective knowledge entails a capacity to emotionally appreciate the wrongfulness of one’s actions and to internalize the enormity of that wrongfulness.<sup>55</sup> This emotional appreciation might manifest as empathy or compassion.<sup>56</sup> Psychologist Dacher Keltner argues that, as a part of human nature, human beings have a compassionate instinct, which informs spontaneous and nonverbal actions including our facial expressions, heartbeats, hormonal levels, and brain activities.<sup>57</sup> For example, when young children empathize, their eyebrows turn oblique in a con-

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<sup>52</sup> This theory was coined by Swiss jurist Edouard Osenbrüggen. *Id.* at 719.

<sup>53</sup> See *Genesis* 3:7–8, 10.

<sup>54</sup> *Id.*

<sup>55</sup> Paul Litton, *Criminal Responsibility and Psychopathy: Do Psychopaths Have a Right to Excuse?*, in *HANDBOOK ON PSYCHOPATHY AND LAW* 275, 276 (Kent A. Kiehl & Walter P. Sinnott-Armstrong eds., 2013).

<sup>56</sup> See Samuel H. Pillsbury, *Why Psychopaths Are Responsible*, in *HANDBOOK ON PSYCHOPATHY AND LAW* 297, 299 (Kent A. Kiehl & Walter P. Sinnott-Armstrong eds., 2013).

<sup>57</sup> For example, when someone feels empathy, her heart rate will drop below the base level, or when someone observes others behaving in a caring way hormonal levels of Oxytocin will increase. Dacher Keltner, *The Compassionate Instinct*, in *THE COMPASSIONATE INSTINCT: THE SCIENCE OF HUMAN GOODNESS* 9–11 (Dacher Keltner, Jason Marsh & Jeremy Adam

cerned manner.<sup>58</sup> This empathic distress is grounded in a deeper metacognitive understanding of the pain or discomfort that another person is experiencing, despite not actually experiencing the same pain or discomfort at that exact moment.<sup>59</sup> While not exclusive to humans,<sup>60</sup> there is something distinct about the “natural” ability of human beings to understand, internally experience, and externally communicate empathy and compassion without needing words at all.

Psychological and neurological research shows that emotions are in fact a powerful motivator behind moral behavior.<sup>61</sup> Jonathan Haidt, a social psychologist, first proposed the social intuitionist model, which is an alternative to rationalist models on moral judgment.<sup>62</sup> The rationalist model approaches moral judgment as the product of a balancing test through which an individual weighs the reasons for passing moral judgment against the reasons against passing moral judgment, which may include “harm, rights, justice, and fairness.”<sup>63</sup> Comparatively, the social intuitionist model treats moral judgment as more of a product of intuitions, which are unconscious and spontaneous evaluations or perceptions that are more informed by social and cultural influences than they are reason.<sup>64</sup> Haidt uses incest as an example: by removing the main arguments against incest, like the harmful biological or emotional side effects, what remains is not a reasoned explanation of why incest is morally wrong, but rather an inexplicable feeling of inherent wrongfulness.<sup>65</sup> Thus, emotions inform the moral judgment, which then informs the post hoc moral reasoning. Under the social intuitionist model, a normal response to observing other humans in harm or distress is an aversive emotional response and empathy with the potential pain.<sup>66</sup> Corroborating

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Smith eds., 2010). *See generally* MARTIN L. HOFFMAN, *EMPATHY AND MORAL DEVELOPMENT: IMPLICATIONS FOR CARING AND JUSTICE* (2000).

<sup>58</sup> Keltner, *supra* note 57, at 11.

<sup>59</sup> HOFFMAN, *supra* note 57, at 63.

<sup>60</sup> *Id.* at 3.

<sup>61</sup> Andrea L. Glenn, Adrian Raine & William S. Laufer, *Is It Wrong to Criminalize and Punish Psychopaths?*, 3 *EMOTION REV.* 302, 303 (2011).

<sup>62</sup> Haidt, *supra* note 44, at 814.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* *See also* Jonathan Haidt, Silvia Helena Koller & Maria G. Dias, *Affect, Culture, and Morality, or Is It Wrong to Eat your Dog?*, 65 *J. PERSONALITY & SOC. PSYCHOL.* 613, 613–17 (1993) (finding that participants deemed offensive yet harmless actions, such as eating a chicken carcass one had just used for masturbation, wrong and universally wrong despite no plausible harm); Jonathan Haidt, Fredrik Björklund & Scott Murphy, *Moral Dumbfounding: When Intuition Finds No Reason* 10–11 (Aug. 10, 2000) (unpublished manuscript) (finding participants would maintain initial judgments of condemnation, despite failing to find supporting reasons, but would be “morally dumbfounded” e.g. laugh, say “um”).

<sup>66</sup> *See* Haidt, *supra* note 44, at 824–25; *see also* Keith J. Yoder & Jean Decety, *The Neuroscience of Morality and Social Decision-Making*, 24 *PSYCHOL. CRIME & L.* 279, 288 (2018).

neuroimaging studies indicate that, during moral decision-making, brain regions involved in emotional processing become more active when individuals contemplate causing direct harm to another individual.<sup>67</sup>

#### D. *Moral Philosophical Perspective*

From the standpoint of moral philosophy, emotions have also long been perceived as a strong motivating force behind behavior, separate from reason.<sup>68</sup> David Hume refers to “violent” emotions as the motivating force behind hurting another human: “When I receive any injury from another, I often feel a violent passion of resentment, which makes me desire his evil and punishment, independent of all considerations of pleasure and advantage to myself.”<sup>69</sup> Hume argued that while reason informs perception and our ability to gather and make sense of our physical reality, reason alone cannot produce or prevent any volition, including those informed by passion or emotion.<sup>70</sup> The futility of reason as a motivating force behind moral behavior and judgment is evident in the case of Andrea Yates.<sup>71</sup> Yates drowned her five children because she thought that doing so would save them from Satan.<sup>72</sup> Yates truly believed that by sacrificing her own life, through being arrested and executed for drowning her children, Satan would die as well.<sup>73</sup> Assuming that Yates was correct in her belief, her behavior is technically not unreasonable; in a reasoned balancing between the harm caused and the good accrued, the good accrued could arguably outweigh the harm caused. The disconnect

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<sup>67</sup> Yoder & Decety, *supra* note 66, at 286. Abnormal activity and a variety of impairments in the amygdala ventromedial prefrontal cortex (vmPFC) have been linked to high Psychopathy Checklist – Revised (PCL-R) scorers. The vmPFC is involved in social cognition and decision-making that entails identifying reward (rewarding stimuli), and the amygdala is involved in social cognition and decision-making that entails identifying punishment (aversive stimuli). *Id.* at 282, 287.

<sup>68</sup> See, e.g., Alexander Nehamas, *Pity and Fear in the Rhetoric and the Poetics*, in ARISTOTLE’S RHETORIC: PHILOSOPHICAL ESSAYS 262 (David J. Furley & Alexander Nehamas eds., 1994). Aristotle defined an emotion as something with concomitant pain and pleasure that changes a human so as to affect her judgment. *Id.*

<sup>69</sup> DAVID HUME, A TREATISE OF HUMAN NATURE 418 (L.A. Selby-Bigge ed. 1896). These “violent” emotions are conceptually similar to the broad meaning of *mens rea*, “vicious will” or “guilty mind.” See DRESSLER & GARVEY, *supra* note 37, at 158 (internal quotation marks removed).

<sup>70</sup> See HUME, *supra* note 69, at 414–15.

Where a passion is neither founded on false suppositions, nor chuses [sic] means insufficient for the end, the understanding can neither justify nor condemn it. ‘Tis not contrary to reason to prefer the destruction of the whole world to the scratching of my finger. . . . ‘Tis as little contrary to reason to prefer even my own acknowledged lesser good to my greater, and have a more ardent affection for the former than the latter.

*Id.* at 416.

<sup>71</sup> See *Yates v. State*, 171 S.W.3d. 215 (Tex. App. 2005).

<sup>72</sup> DRESSLER & GARVEY, *supra* note 37, at 676.

<sup>73</sup> *Id.*

for Yates was not in her reasoning, but in her cognitive ability to accurately perceive her reality, which was instead plagued by episodic delusions and voices.

Yates is not a wild beast, however, because she presumably had the capacity to know moral right from wrong. Somewhere in Yates's mind, she was able to understand and believe that it was good and right to save her children's souls and that it was evil and wrong for Satan to get to her children first. Someone who is still able to operate with moral understanding, albeit distorted or skewed, is someone who has the capacity to know moral right from wrong. Someone who has a strong moral belief that is contrary to what most or some people in society would believe is also not someone who lacks the capacity to know moral right from wrong. Someone who mixes up the labels for what is right and wrong is not the paradigm of insanity. This is not to say that Yates is undeserving of sympathy or is precluded from the possibility of excuse from punishment for other reasons, but what if her disconnect with reality went deeper?

#### *E. Ending Legion's Story*

Returning back to our narrative, what is God to make of Legion? The M'Naghten test at first glance appears to be a reasonable option. The M'Naghten test would certainly capture someone like Yates, but what about when applied to Legion? The lack of Legion's affective knowledge and its relationship to Legion's lack of moral judgment could potentially be accounted for by the M'Naghten test, since both would go toward a person's inability to know or appreciate the wrongfulness of her actions and their consequences. But the M'Naghten test does not define insanity as a freestanding inability to know or appreciate the wrongfulness of one's actions and their consequences.<sup>74</sup> Ultimately, the M'Naghten test defines insanity as a byproduct or derivative of a mental disease or defect. Under the M'Naghten test, if Legion was not suffering from a cognizable mental disease or defect that in fact caused his incapacity, he would still be punished, and God would send Legion into exile along with Adam and Eve.

Comparatively, the wild beast test does not refer to mental disease or defect as the line between the insane and the sane; mental illness is neither a necessary or sufficient condition for legal insanity.<sup>75</sup> Consistent with principles of criminal responsibility, psychology, and moral philosophy, the wild beast test draws the line between the insane and the sane by distinguishing Legion from Adam and Eve on the basis of his lack of

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<sup>74</sup> See *infra* Part II.A.

<sup>75</sup> See *Rex v. Arnold*, 16 How. St. Tr. 695, 764–65 (1724).



humanity, stemming from the fact that Legion has not eaten from the tree of the knowledge of good and evil. The wild beast test appropriately embraces insanity as the dehumanizing term that it is, rather than dressing insanity up in medical diagnoses and conflating insanity with mental illness. Under the wild beast test, we are not invited to diagnose Legion, but rather to determine whether or not Legion is in fact an intelligible moral agent worthy of blame and punishment, given his incapacity to think in moral terms and incapacity to intelligibly behave perhaps due to some deficiency or brokenness in his experience of emotions. If the insanity defense is meant to separate the “bad” from the “mad” and “wickedness” from “sickness,”<sup>76</sup> and if insanity is a moral judgment of an individual’s blameworthiness, then the wild beast test can assume the mantle.

### III. UNPACKING CRITICISMS

#### A. *What About Psychopaths?*

Generally speaking, there are several potential criticisms stemming from inconsistencies that the wild beast test would have with positive law. For example, one possible criticism against using the wild beast test is that psychopaths would be the only possible group of persons who could successfully use the insanity defense, which is inconsistent with the fact that psychopaths are the exact group that can be understood to be excluded from the insanity defense under the Model Penal Code.<sup>77</sup> An extension of this criticism is that practically speaking, the insanity defense would be evidentiarily impossible to prove and would be merely a heuristic for calling someone a psychopath and stigmatizing her as insane.

The commentary to the Model Penal Code merely indicates that the drafters were cautious to exclude people suffering from particular types of mental illnesses due to “conceptions of psychopathy and sociopathy as forms of mental illness that were thought to warrant caution.”<sup>78</sup> The caution that the drafters were acting upon is not further explained, so there is limited rationale behind excluding psychopaths in the first place.<sup>79</sup> Formally speaking, the Model Penal Code does not actually exclude psychopaths, but instead sociopaths.<sup>80</sup> But if we read the Model Penal Code to

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<sup>76</sup> DRESSLER & GARVEY, *supra* note 37, at 648.

<sup>77</sup> See MODEL PENAL CODE § 4.01(2) (AM. LAW INST., Official Draft and Revised Comments 1985) (defining a cognizable mental disease or defects for the purposes of the insanity defense as an abnormality that *does not* “manifest[ ] only by repeated criminal or otherwise antisocial conduct”).

<sup>78</sup> See *id.* at § 4.01 cmt. 4.

<sup>79</sup> See *id.*

<sup>80</sup> See *id.* at § 4.01(2).

exclude psychopaths, the psychopath is not legally insane for three reasons: (1) the psychopath does not have a cognizable mental disease or defect, since psychopathy is not formally listed as a diagnosis in the DSM-5,<sup>81</sup> and because her condition may entail repeated criminal conduct,<sup>82</sup> (2) assuming the same capacities and mental wherewithal as a neurotypical person, the psychopath is aware of her physical reality and self-aware of the basics of her own conduct,<sup>83</sup> and (3) the psychopath is superficially aware or knows what is legally proscribed by society.<sup>84</sup>

Alternatively, under the wild beast test, one would have to individually investigate whether the psychopath in fact lacked the capacity to know moral right from wrong. This individualized investigation could include an inquiry into whether a defendant lacks affective knowledge, which might be corroborated by a defendant's behavior that is inconsistent with behavior that someone would reasonably exhibit if she was experiencing shame, guilt, or embarrassment. While there might be greater instances of legal insanity amongst those who suffer from psychopathy, psychopathy would not be synonymous with legal insanity.<sup>85</sup>

Thus, even if Legion was diagnosed with psychopathy, the wild beast test would address at least one of the issues with the modern-day insanity defense: a battle of the experts. The wild beast test would divide the mere diagnosis of mental illness from the condition of legal insanity, thereby separating the nuances of a medical condition like psychopathy from the legal determination of insanity. The inconsistency between the wild beast test and the Model Penal Code would stem from the fact that the wild beast test addresses the condition of insanity directly, rather than invoking the mental-disease-or-defect element. What *would* be consistent between the wild beast test and the modern insanity defense would be the fact that a diagnosis of psychopathy alone would be insufficient to allow someone to successfully assert the insanity defense, an aspect that should be preserved.

Turning back to Adam and Eve's rewritten narrative, while a potential diagnosis for Legion *might* be psychopathy, given his lack of affective knowledge, Legion need not be suffering from psychopathy. Most relevant for Legion's case is the fact that some psychopaths may have unimpaired superficial reasoning, but may still be unable to appreciate or

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<sup>81</sup> THE DSM-5 ALTERNATIVE MODEL FOR PERSONALITY DISORDERS 212 (Christopher J. Hopwood, Abby L. Mulay, & Mark H. Waugh eds., 2019).

<sup>82</sup> See Litton, *supra* note 55, at 276. *But cf.* Stephen J. Morse, *Preventive Detention of Psychopaths and Dangerous Offenders*, in HANDBOOK ON PSYCHOPATHY AND LAW 321, 330 (Kent A. Kiehl & Walter P. Sinnott-Armstrong eds., 2013).

<sup>83</sup> Morse, *supra* note 82, at 331; see Haidt, *supra* note 44, at 824.

<sup>84</sup> Morse, *supra* note 82, at 331; see Yoder & Decety, *supra* note 66, at 288.

<sup>85</sup> Whether psychopaths should be legally insane is beyond the scope of this paper, but for a *prima facie* argument for excusing psychopaths, see Litton, *supra* note 55, at 278–87.

be motivated by moral considerations.<sup>86</sup> The degree to which Legion or any given psychopath might be morally impaired would likely vary; some would cross the line of incapacity and others would not.

### B. *Why a Status-Based Defense?*

And yet, even if one agrees that wild beasts should be excused, there might be a sense that perhaps the wild beast test excuses too much. Another possible criticism might be that because the wild beast test transforms insanity into a status-based defense that attaches to the person, not the action or moment in time in which a crime is committed, such a person would have unrestrained license to do whatever she wants without consequence.<sup>87</sup>

The wild beast test would embrace a condition or state of being as being the defense itself, but the wild beast test would not be alone in the world of criminal law in that respect. Michael Moore defines insanity as a status defense that exempts the insane person from everything done while insane.<sup>88</sup> As Moore writes, “[t]he seriously crazy, like animals, stones, corpses, infants, etc., generally lack the attributes making them moral agents; as such, they are not blamable *in general*, without regard to there being some connection between their craziness and their wrongful and criminal acts.”<sup>89</sup> The infancy defense, which Moore references, is based upon the notion that, by virtue of simply being a child, a child is not morally blameworthy, due to a lack of moral responsibility or capacity, which excuses the child from punishment.<sup>90</sup> Like the wild beast test, the infancy defense is a status defense that hinges on the capacity to know right from wrong.<sup>91</sup> There is nothing inherently wrong or impermissible in defining insanity as a status defense, but the concern over seemingly giving the insane unrestrained license perhaps comes from a fear that without the threat of punishment, the insane will commit heinous crimes freely, frequently, and without remorse.

### C. *How Are the Purposes of Punishment Furthered?*

This leads us to another possible criticism, which is that using the wild beast test to define the insanity defense does not doctrinally align

<sup>86</sup> Litton, *supra* note 55, 279–80; Haidt, *supra* note 44, at 824.

<sup>87</sup> See Garvey, *supra* note 49, at 145. This criticism is similar to the criticism of the Durham test.

<sup>88</sup> See Michael S. Moore, *The Quest for a Responsible Responsibility Test: Norwegian Insanity Law After Breivik*, 9 CRIM. L. & PHIL. 645, 681, 688–89 (2015).

<sup>89</sup> *Id.* at 681.

<sup>90</sup> DRESSLER & GARVEY, *supra* note 37, at 701 (reprinting *In re Devon T.*, 584 A.2d 1287 (Md. Ct. Spec. App. 1991)).

<sup>91</sup> See *id.* Note that the wild beast test in fact references an infant along with the brute and wild beast. *Rex v. Arnold*, 16 How. St. Tr. 695, 764–65 (1724).

with the utilitarian or retributivist purposes of punishment. Turning first to utilitarianism, broadly speaking, punishment is justified if and only if the result of punishment is a net benefit to society.<sup>92</sup> Punishment serves to generally deter other people from committing future crimes and specifically deter a particular wrongdoer from committing future crimes.<sup>93</sup> In order to accomplish specific deterrence, punishment may include incapacitation in order to prevent a wrongdoer from acting upon her destructive tendencies and/or rehabilitation in order to eliminate the desire or need to commit crimes.<sup>94</sup>

Under principles of utilitarianism, punishment will not effectively deter the wild beast from committing future crimes or generally deter other wild beasts from committing the same crimes. As noted by the Second Circuit: "And how is deterrence achieved by punishing the incompetent? Those who are substantially unable to restrain their conduct are, by definition, undeterrable and their 'punishment' is no example for others[.]"<sup>95</sup> While the wild beast is not volitionally impaired, she does not have the same moral emotions or reasons that are the driving motivation behind the behavior of her human counterparts.<sup>96</sup> In that way, she is not "restrained" by the motivating force of moral emotions or reasons. Furthermore, the wild beast cannot be effectively "rehabilitated" by punishment since any attempt to instill moral emotions or reasons into the wild beast are definitionally bound to fail, given her incapacity to know moral right from wrong. Punishment then fails to accomplish meaningful deterrence by way of rehabilitation because the wild beast cannot morally comprehend her punishment.

The only goal punishment could possibly achieve for the utilitarian is temporary or perpetual incapacitation. The utilitarian can only justify punishment as an effective way to remove an unwittingly dangerous wild beast from unintentionally and continually harming the humans around her. Ultimately, the utilitarian is forced to punish the wild beast for future acts she has not committed yet, in the hope that a greater good is in fact being achieved.<sup>97</sup> Even then, the utilitarian must recognize that there is a distinction between punishing a person and incapacitating a *non-person*.

<sup>92</sup> DRESSLER & GARVEY, *supra* note 37, 36–37.

<sup>93</sup> *Id.* at 38–39.

<sup>94</sup> *Id.* at 39.

<sup>95</sup> United States v. Freeman, 357 F.2d 606, 615 (2d Cir. 1966).

<sup>96</sup> See MODEL PENAL CODE § 4.01 cmt. 3, n.12 (AM. LAW INST., Official Draft and Revised Comments 1985) (recognizing that deterrence is not furthered when someone is incapable of realizing the culpable nature of her conduct).

<sup>97</sup> See DRESSLER & GARVEY, *supra* note 37, at 40.

However, because utilitarians believe that punishment is a mischief that should not be imposed unless it will result in a net benefit to society, punishment based on incapacitation is only justifiable to the extent that the sentencing authority can reliably predict an offender's risk of future dangerousness (and, then, only if the pre-

Incapacitating a non-person would be more akin to correcting an animal's behavior through coercive means, and there are alternative forms of risk management that do not condemn the wild beast through punishment but can work to reduce the wild beast's ability to harm herself and others.

Turning next to retributivism, punishment is justified if and only if the wrongdoer deserves punishment; moral culpability is a sufficient and necessary condition for punishment.<sup>98</sup> Punishment serves to express societal condemnation, which is more than a simple "thou shalt not," but instead a shared understanding of why the wrongdoer's behavior is morally wrong: "Functioning as a richer signal, punishment can also tap our human capacity for communicating to an offender not only that conduct is wrong and will result in painful consequences for the offender, but also *why* it is wrong."<sup>99</sup> Accordingly, a "crime" is conduct that incurs "a formal and solemn pronouncement of the moral condemnation of the community," and thus punishment, in response to the wrongdoer's behavior.<sup>100</sup>

Under principles of retributivism, punishing the wild beast is like speaking to the wild beast in a foreign language she cannot understand and expecting the wild beast to understand why what she did was wrong. The irrationality of punishing a wild beast is especially pronounced with respect to *malum in se* crimes. *Malum in se* crimes, such as murder, are "inherently immoral."<sup>101</sup> Such a crime is "inherently immoral" in the view of society writ large, but the wild beast does not recognize the in-

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dicted reduction in crime from incapacitation outweighs the hardships that will be imposed on those incarcerated and the economic costs of their incarceration).

*Id.*

<sup>98</sup> *Id.* at 42–43, 44.

<sup>99</sup> Benjamin B. Sendor, *Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 GEO. L. J. 1371, 1427 (1986). There is something uniquely human about the ability to morally comprehend punishment. As political philosopher Jean Hampton explains:

[U]nlike the animal in the pasture, a human being will also be able to reflect on the reasons for that fence's being there, to theorize about *why* there is this barrier to his freedom.

Punishments are like electrified fences. At the very least they teach a person, via pain, that there is a 'barrier' to the action she wants to do, and so, at the very least, they aim to deter. But because punishment 'fences' are marking *moral* boundaries, the pain which these 'fences' administer (or threaten to administer) conveys a larger message to beings who are able to reflect on the reasons for these barriers' existence: they convey that there is a barrier to these actions *because* they are morally wrong.

*Id.* (footnotes omitted) (citing Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208, 212 (1984)).

<sup>100</sup> DRESSLER & GARVEY, *supra* note 37, at 2–3.

<sup>101</sup> *Malum in se*, BLACK'S LAW DICTIONARY (11th ed. 2019). The perceived inherent morality or truth value of certain beliefs necessarily informs the law. For example, the Declaration of Independence identifies that there are "self-evident" truths which must order society and

herent immorality of such a crime because she does not view her actions or others' actions in moral terms in the first place. Thus, the wild beast is not morally blameworthy because she lacks the requisite *scienter* or guilty knowledge, which is generally required for *malum in se* crimes.<sup>102</sup> The wild beast's lack of *scienter* might manifest as, for example, a perception that murder is akin to merely driving on the left side of the road instead of the right side.<sup>103</sup>

Furthermore, unlike its human counterpart, the wild beast is not put on notice in the way that her human counterparts are regarding the wrongfulness of *malum in se* crimes. Explicit notice might arguably exist, given that *malum in se* crimes are written and codified as positive law. However, the distinction between *malum in se* and *malum prohibitum* crimes lies in the very fact that *malum in se* crimes are extralegal, and thus, while the law might be able to put a wild beast on notice regarding *malum in se* crimes, the law cannot do the work of internalizing the self-evident nature of *malum in se* crimes within the wild beast.

The only purpose for punishment, then, would be to exclusively communicate to society that the wild beast is not above the human victims of her crimes because, from the point of view of society, the moral disequilibrium caused by the wild beast's act still exists.<sup>104</sup> However, if the wild beast is not blameworthy, then expressing moral criticism or blame in the form of punishment is necessarily false and unjust to the wild beast insofar as the wild beast is harmed by the punishment.<sup>105</sup>

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government, both of which are constructed by the law. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>102</sup> Richard L. Gray, *Eliminating the (Absurd) Distinction Between Malum In Se and Malum Prohibitum Crimes*, 73 WASH. U. L.Q. 1369, 1369–70 (1995); see also Morissette v. United States, 342 U.S. 246, 251–52 (1952) (reasoning that the notion that wrongdoing must be conscious was unanimous in the United States, despite the omission of the “evil-meaning mind” in the codification of common law crimes); United States v. Balint, 258 U.S. 250, 251–52 (1922) (“While the general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it[.]”).

Note, for some *malum prohibitum* regulatory offenses, the Supreme Court has also incorporated the “guilty mind” requirement. See Staples v. United States, 511 U.S. 600, 602 (1994); Liparota v. United States, 471 U.S. 419, 423, 427–28 (1985).

<sup>103</sup> One could go so far to say that the wild beast does not even commit a crime in the first place, as Bracton puts it: “a crime is not implied unless the will to harm intervenes, and the will and the purpose reveal malice (maleficium) . . . this is in accordance with what might be said of the infant or madman, since . . . the imbecility of the deed excuses [the madman].” Platt, *supra* note 33, at 5 (internal quotation marks removed).

<sup>104</sup> DRESSLER & GARVEY, *supra* note 37, at 49–50. This understanding of punishment is a reflection of the *lex talionis*, which calls for the wrongdoer to suffer something similar to what her victim suffered as a result of her culpable act. JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 128 (1988). Notably, the prosecution of animals extending from Europe in the Middle Ages back to ancient Athens can also be considered the manifestation of the *lex talionis*. Hyde, *supra* note 47, at 721–22.

<sup>105</sup> Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 265 (1987).

Ultimately, for both the utilitarian and the retributivist, the presumption is that punishment is for humans. Utilitarianism and retributivism are theories that explain why punishing a *human person* is permissible. As Kent Greenawalt puts it, “[punishment] is performed by, and directed at, agents who are responsible in some sense. God and humans can punish; hurricanes cannot. People, but not faulty television sets, are fit subjects of punishment.”<sup>106</sup> The wild beast operates outside of both the utilitarian and retributivist theories of punishment, thus, exculpating the wild beast by way of the insanity defense does not affect either theory of punishment.

*D. What Does the Supreme Court Have to Say About All This?*

A final criticism is that the Supreme Court has essentially declared that insanity does not need to be in reference to one’s capacity for moral judgment at all. In its recent decision in *Kahler v. Kansas*, the Supreme Court held that insanity need not be defined by a person’s inability to know moral right from wrong in order to meet the requirements of due process under the Fourteenth Amendment.<sup>107</sup> In doing so, the majority opinion heavily weighed the fact that there are “perennial gaps in knowledge [which] intersect with differing opinions about how far, and in what ways, *mental illness* should excuse criminal conduct” that should be left up to the states to decide.<sup>108</sup>

The majority opinion makes reference to the wild beast test as a test that looks for a cognitive impairment that prevented a defendant from understanding the nature of his acts, thereby failing to intend the crime committed.<sup>109</sup> History, in the majority’s view, reflects a conception of insanity that centers on a person’s ability to think in terms of reason and cognition, rather than a person’s belief as to the moral character of her act.<sup>110</sup> Irrationality or a “total[ ] want of reason” begets or is evidenced by an incapacity to think morally.<sup>111</sup> Thus, the majority opinion concludes with the assumption that moral thought is a byproduct of general reasoning and understanding.

Indeed, in some senses the wild beast test does not look toward one’s subjective belief as to the moral character of her act. For example, a person would not be able to successfully assert the wild beast test if she claimed that she thought killing her family was the morally right thing to do. The claim itself would evidence the person’s ability to know moral

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<sup>106</sup> Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 344 (1983).

<sup>107</sup> *Kahler v. Kansas*, 140 S. Ct. 1021, 1024–25 (2020).

<sup>108</sup> *Id.* at 1028 (emphasis added).

<sup>109</sup> *Id.* at 1033.

<sup>110</sup> *Id.* at 1034.

<sup>111</sup> *Id.* (internal quotation marks removed).

right from wrong. However, to expunge the wild beast test from its context regarding the punishment of animals, as the majority opinion does, overlooks the fact that a person's ability to think is not merely a prerequisite to that person's ability to know moral right from wrong, but is in fact deeply tied to the ability to know moral right from wrong, which distinguishes the person from the beast. As Justice Breyer writes in dissent, "[a] brute animal may well and readily intend to commit a violent act without being able to judge its moral nature. For example, when a lion stalks and kills its prey, though it acts intentionally, it does not offend against the criminal laws."<sup>112</sup>

Setting aside the majority's incomplete picture of the wild beast test, the jurisprudence of the insanity defense that *Kahler* places itself in is with respect to an act-based insanity defense. As discussed earlier, the wild beast test is distinct from the other insanity defenses in that the wild beast test is a status-based defense that attaches to the person, rather than her actions.<sup>113</sup> The Supreme Court has yet to conclude anything regarding a status defense for insanity. Given the decision in *Kahler*, one can surmise how the Supreme Court would likely respond to the wild beast test.

More broadly speaking, the Supreme Court is also bound to the reality that states have defined insanity as a function of extreme mental illness. The mental-disease-or-defect element is what has driven states and the Supreme Court into an unresolvable crossroads between law and psychiatry that still does not capture what insanity is at baseline. While the Supreme Court makes clear that it is leaving the decision up to the states, the states continue to look toward the Supreme Court for guidance.

## CONCLUSION

The dissatisfaction with the modern insanity defense in its various forms stems from the fact that mental illness is considered a necessary prerequisite to insanity. Our religious, philosophical, and psychological views of the nature of humanity, however, suggest that baseline insanity is grounded in something deeper than a cognizable mental illness. The wild beast test properly captures what baseline insanity is—the opposite of humanity. The truly insane among us leave us morally dumbfounded, shocked, and befuddled. The seemingly inherent unintelligibility of the truly insane reflects what is seemingly inherent in their human counterparts—the capacity to be a moral agent, the capacity to know moral right from wrong. Without this capacity, punishment is at worst a cruel act and at best a falsehood.

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<sup>112</sup> *Id.* at 1040 (Breyer, J., dissenting).

<sup>113</sup> *See supra* Part III.B.



By returning to the wild beast test, we can more narrowly define insanity at baseline in a way that more holistically captures what it means to be not-human. Eating from the tree of the knowledge of good and evil has given humans the inherent capacity to feel, reason, and speak in moral terms. But for those of us who do not have that capacity—the truly insane among us—the criminal law need not banish them from the Garden.

