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Stephen J. Morse

University of Pennsylvania Carey Law School

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Moore on the Mind

Stephen J. Morse

Introduction

Michael Moore has been much and consistently on my mind since I first became acquainted with him by reading his early paper, “Some Myths About `Mental Illness’” .¹ Michael had applied for a faculty position at USC School of Law and, I was on the appointments committee. I was bowled over by the conceptual clarity, the depth of the analysis and the sheer analytic penetration. It was an easy case for appointment and those same formidable intellectual powers have never waned and indeed have waxed over Michael’s long and distinguished career. It has been my clichéd but genuine pleasure and privilege to have been his friend and colleague for four decades. With respect to the exceptional other colleagues from whom I have learned so much, including the authors in this volume, Michael has been the most powerful and enduring influence on my thought and scholarship.

Michael and I agree about almost everything methodologically and substantively. As a result, one wag referred to us as the “USC Twins.” I took this as a compliment to me and backhanded dig at Michael. There are differences, to be sure, but they have little practical importance and they are swamped by the similarities. I attribute this mostly to Michael’s outsized influence as a result of his power and erudition. Thus, this chapter is an homage to Michael, who is henceforth conventionally called, Moore.

The first section of this chapter addresses metaphysical and other philosophical foundational problems. The next section addresses the criteria for action in the context

¹ Michael S. Moore, “Some Myths About `Mental Illness’,” 32 *Archives of General Psychiatry* 1483 (1975).

of cases in which consciousness is divided. The following section considers whether mental disorder sometimes excuses because it is a status excuse. This next section covers the continuing controversy about the validity of a control excuse. The last part surveys the burgeoning but vexed relation of neuroscience to law. A brief conclusion follows.

II.Philosophical Foundations and Spockian Methodology

As Moore, famously a metaphysical realist about law, morality and the relations between them (and much else), would observe, one is always wittingly or unwittingly “doing” metaphysics. I agree. About some issues, it scarcely matters, but about the types of issues that mutually concern us, such as the causation of action (the mind-body problem) and the criteria for responsibility (compatibilism v. incompatibilism), metaphysical assumptions matter. The question is whether one must resolve or even defend one’s metaphysical and other philosophical foundations in these fraught areas. Moore thinks that one must, but I disagree for legal purposes. I make no claim for metaphysical or philosophical quietism because I believe that metaphysical questions are conceptually and practically important in many cases.² I shall suggest, however, that when one’s philosophical position is foundational and practically important, it must be acknowledged, but need not be defended or, *a fortiori*, resolved.

Please do the following thought experiment. Imagine that you do a content analysis of high level introductory texts in metaphysics or in any other area in philosophy, such as the philosophy of mind and action. The intrepid investigator will find, without exception, that each text will describe many different, often contradictory, approaches to the central questions. What is the relation of the potential truth of

² See generally, Charles Barzun, , “Metaphysical Quietism and Functional Explanation in the Law,” 34 *Law & Philosophy* 89 (2014) (arguing for metaphysical engagement).

determinism to the possibility of “free will” and responsibility? Every text will discuss libertarianism, hard determinism and incompatibilism. Are there moral truths independent of our constructs and practices? Every text will discuss varieties of realism, antirealism and everything in between. What is the relation of the brain to consciousness, mind and action? Every text will present various forms of physicalism and the like. There will almost always be good arguments for and against the various positions, but among the survivors of ongoing philosophical dialogue none will have clearly dominated. Consequently, all the contenders will be left standing. To paraphrase the noted metaphysician, Lewis Carroll, everyone has won (at least in their own eyes) and all must have prizes.

What is a poor country lawyer-scholar supposed to do in such circumstances when trying to make normative arguments about doctrine, practice and policy? One possibility is to master all the metaphysical arguments relevant to the question being addressed, take a position and try to defend it against the counter-arguments. This seems like a bootless enterprise because arguing the metaphysics or other basic philosophical issues is not the country lawyer-scholar’s comparative advantage and it will not lead to an uncontroversial position,. Further, the history of the law suggests that country lawyers can “run the railroad” without even recognizing the foundational issues that are implicated. If philosophical understanding is not the goal, it is in large measure a distraction. So, the original question remains: What to do?

My current preferred approach is what I call Spockian solutions or, what to do until the doctors of metaphysics and science arrive to cure our metaphysical and empirical ills. By Spockian, I do not mean the cold-bloodedly rational Vulcan, Dr.

Spock, of Star Trek fame. I refer to the famous pediatrician and author, Dr. Benjamin M. Spock, whose many editions of the influential child care manual, Baby and Child Care,³ guided young parents over many generations. The book is replete with home remedy formulas for ameliorating the common ills that beset children until the doctor came or until the parents and child could make it to the doctor.

In the spirit of Dr. Spock, my legal home remedy is to start with a normative position that is attractive at the non-metaphysical level of applied ethical, moral, political, and legal theory. If this position is consistent with a reasonable metaphysics that does not conflict with relatively uncontroversial or at least plausible empirical assumptions and with other reasonable philosophical theories, then one can proceed without defending the philosophical position. Importantly, commonsense should enter the analysis, too. Any position that violates commonsense should meet the most demanding burden of persuasion. The scholar does have the duty, however, to avoid adopting normative positions that require inconsistent metaphysical positions unless there is good reason for the inconsistency.

The home remedy requires intellectual effort. A plausible basic position must be taken, which requires reasonable understanding. If a critic point out the reasons that the chosen philosophical position, we know that a sophisticated metaphysician who adheres to the chosen metaphysics would have answers and there would be no decisive arguments to refute the sophisticate. Trying to defend a metaphysics at the level of professional philosophy involves too much “inside baseball” analysis when one is trying to “do” law.

³ Benjamin Spock & Robert Needlman, *BABY AND CHILD CARE (9TH ED.)* (2011).

Let us turn to examples of the home remedy that are relevant to the topics this chapter addresses. The basic questions that run through most are the relation of the brain to mind and action and the implications of the truth of determinism. I am a physicalist about the former. The brain enables the mind and action, but we have no idea how despite all the astonishing advances in neuroscience and other disciplines.⁴ The problem of consciousness may be insoluble,⁵ but perhaps progress can be made on mental states and actions.⁶ How do we know that the brain enables the mind and action? Well, if your brain is dead, you are dead and, to the best of our knowledge, you have no mental states.

Assuming that the brain enables the mind and action, is the relation reductive or not? Is property dualism true? Can mental states cause changes in physical states or does the exclusion principle require that causation can only run from the physical to the mental? At present, non-reductive physicalism is probably the dominant view, but neither I nor anyone else can decisively answer the foregoing and similar questions.

Like Moore,⁷ I subscribe to the causal theory of action (CTA), of which there are many forms and many criticisms.⁸ CTA roughly holds that an event (behavioral or mental) is an action if it is caused in the right way by mental states. In his recent chapter, Moore ably updates his earlier account and defends it against various critics. The critics will not be persuaded, but I am happy to adopt the same or a similar view, not least because it accords with commonsense and the folk psychological theory that we always

⁴ Ralph Adolphs, "The Unsolved Problems in Neuroscience," *Trends in Cognitive Sciences (TiCS)* 3 (2015); Paul McHugh & Philip Slaveney, *THE PERSPECTIVES OF PSYCHIATRY* (2D ED.) 11-12 (1998).

⁵ See, e.g., Colin McGinn, *THE MYSTERIOUS FLAME: CONSCIOUS MINDS IN A MATERIAL WORLD* (1999).

⁶ Adolphs, note XX supra.

⁷ Michael S. Moore, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* (2013); "Renewed Questions About the Causal Theory of Action," in Jesus H. Aguilar & Andrei A. Buckareff, eds., *CAUSING HUMAN ACTIONS* 27 (2010).

⁸ Jesus H. Aguilar & Andrei A. Buckareff, "The Causal Theory of Action: Origins and Issues, Aguilar & Buckareff, note XX supra, at 1 (providing a useful overview).

use to explain ourselves to ourselves and to others. I have elsewhere addressed whether recent work in neuroscience and psychology proves, as some claim,⁹ that we are not agents and concluded that such claims are unconvincing at present.¹⁰ As Jerry Fodor wrote, if we are wrong about the commonsense causation of action, that is the wrongest we've been about anything except belief in the supernatural.¹¹ It would be a disaster to believe the contrary, even if we were capable of doing so, which Fodor doubts. Moreover, there is a plausible philosophical argument that causation can run from the mental to the physical despite the exclusion principle.¹² I am not suggesting anything mysterious or any form of *sui generis* agent-causation. How action happens will be explicable according to whatever scientific laws that govern the rest of the universe might be discovered. The task of neuroscience should be to explain agency, not to explain it away reductively.

Moore is a reductive identity theorist about brain and mental states. He believes that brain states simply are mental states and vice versa. I assume, however, that in his account the reduction only runs downward from the mental to the physical. Nonetheless, because Moore adheres to CTA, he must accept the standard view that mental causation that is itself nonactional can cause actions (or omissions). This is the role volitions play in his theory. In contrast, I am most attracted to non-reductive physicalism. We have a mind/brain, which is only one substance, but it has both physical and mental properties.

⁹ Joshua Greene & Jonathan Cohen, *For the law, neuroscience changes nothing and everything*, In S. Zeki and O. Goodenough, Eds., *LAW & THE BRAIN* 207, 217-218 (2006).; Daniel M. Wegner., *THE ILLUSION OF CONSCIOUS WILL* (2013).

¹⁰ E.g., Stephen J. Morse, "Lost in Translation: An Essay on Neuroscience and Law," in Michael Freeman, ed., *LAW AND NEUROSCIENCE* 529 (2011),

¹¹ Jerry A. Fodor, *PSYCHOSEMANTICS: THE PROBLEM OF MEANING IN THE PHILOSOPHY OF MIND* xii (1987).

¹² Christian List & Peter Menzies, "Non-Reductive Physicalism and the Limits of the Exclusion Principle," *CVI Journal of Philosophy* 425 (2009).

The latter are emergent and cannot be reduced fully to the former. This appears the most commonsensical view and there is no scientific reason to doubt it at present. The greatest experts cannot resolve this issue, no less a poor country lawyer-scholar. Luckily I do not have to. It is sufficient that there are plausible philosophical accounts that are consistent with CTA and folk-psychological explanations. I am perfectly content opportunistically to adopt any of them.

I take no position on the vexed question of whether anyone can do otherwise even if the CTA is true. There is dispute about how the principle of alternative possibilities (PAP) should be interpreted, and, like Jay Wallace, I doubt that foundational questions of responsibility will be decided by exquisite deployment of modal logic.¹³ There are sufficient, albeit controversial, arguments to suggest that PAP is not a problem.¹⁴ This question will not be solved to everyone's satisfaction and we have a railroad to run. I am a compatibilist, a perfectly plausible metaphysics, and will continue to believe that robust responsibility is possible until an incontrovertible argument that all would accept requires me to jettison this view.

In short, CTA and compatibilism are my bedrock metaphysics. If Moore or anyone else claims that I need a particular type of CTA theory or compatibilism, I am happy to take that as a friendly amendment. Giving up CTA or compatibilism would undermine my work, but, happily, nothing in philosophy or science suggests that I must do so.

III. At Action's Border

¹³ R. Jay Wallace, *RESPONSIBILITY AND THE MORAL SENTIMENTS* (1994).

¹⁴ E.g., Kadri Vihvelin, *CAUSES, LAWS AND FREE WILL* (2013).

The title of this section is taken from my contribution¹⁵ to a symposium celebrating the publication of Moore's brilliant book, Act and Crime, which is still the most important contribution to action theory in criminal law jurisprudence. I took issue with Moore's view that bodily movements performed while the agent is in a dissociative state are not actions and therefore do not meet the criminal law's *prima facie* culpability requirement of a "voluntary act." I believed with reservations that such movements are actions, a view that Bernard Williams also took (1994).¹⁶ I suggested that if the dissociation was sufficiently severe, the agent should be excused. I argued this position using Moore's own theory of action in Act and Crime and in his magisterial, Law and Psychiatry: Rethinking the Relationship.¹⁷ Moore's reply¹⁸ was a paragon of gracious courtesy and friendly dispute that stuck to his guns but concluded that there was little space between us.

I'm still not certain if dissociated movements should legally be treated as "voluntary actions," but I am increasingly sure that that the philosophy of mind and action and the relevant sciences cannot answer this question because it is unlikely that action is a natural kind with clear boundaries. There are clear cases, to be sure, but there is a huge range of intermediate cases that resist easy classification.

Let us begin with the relatively uncontroversial phenomenology. At one end of the continuum are consciously intentional movements, such as booting up my computer to work on this chapter. On the other end are movements, such as spasms and reflexes, that are not intentional. How should we think about movements that appear automatic,

¹⁵ Stephen J. Morse, "Culpability and Control," 142 *University of Pennsylvania L. Rev.* 1587 (1994).

¹⁶ Bernard Williams, "The Actus Reus of Dr. Caligari," 142 *University of Pennsylvania L. Rev.* 1661 (1994).

¹⁷ Michael S. Moore, *LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP* (1984).

¹⁸ Michael S. Moore, "More on Act and Crime," 142 *University of Pennsylvania L. Rev.* 1749 (1994).

habitual or thoughtless, such as the body language we use when we lecture? These movements are not consciously intentional, but we rightly believe that they can be brought under conscious intentional control if we have reason to do so. These types of habitual or automatic movements are treated by both commonsense and by the criminal law as actions. There is nothing wrong with the agent's consciousness and he can bring it to bear if necessary. How should we treat movements performed thoughtlessly on the impulsive spur of the moment or in cases involving intense emotions such as anger? It may be difficult for such agents to be self-conscious and to bring reason to bear, but once again we think the agent is capable of doing so in virtually all cases.

But then there are dissociated movements, what I call the "actish" cases, such as sleepwalking or severe intoxication. The agent's movements indicate awareness of the environment, accurate feedback from it and goal-directedness. Consider Ms. Cogdon, who very effectively axe-murdered her adult daughter while sleepwalking. Moore believes that access to the full reasons for action is "sealed off" and cannot be retrieved. Ms. Cogdon had good reason not to kill her innocent daughter, but at that moment could not access them. Her consciousness was transiently partial, divided, dissociated, or like terms. We know many of the causes of such states, but we do not well-understand the neural mechanism.

Are dissociated movements more like clear cases of action or non-action? This question ignores, however, the continuous nature of dissociation. An agent may be more or less dissociated. Imagine someone who is continuously drinking alcohol and becoming progressively more intoxicated. At first the intoxication will be slight and the agent can force herself to snap back to self-consciousness and to regain access to

countervailing reasons. As the level of intoxication increases, this will be increasingly difficult. Finally, it will be supremely difficult and perhaps impossible. Where on the continuum should we draw the line between action and non-action? Even if we had a complete neural description of each discrete level of dissociation—a science fiction fantasy--it would not answer the question. Where on the continuum we should draw the line is a moral and legal question not answered by saying that action is a natural kind and the line should be drawn at its border.

Why does the criminal care about whether something is an action or not? Criminal responsibility is based on a folk-psychological concept of agency and instantiates the moral consequences of that conception. Our underlying legal theory will guide our concept of action and not the reverse. I continue to think that whether dissociated movements are not actions or are excused actions is a very difficult question. I believe that the argument for excused action is stronger, but still inconclusive. Alas, the philosophy of mind and action and the new neuroscience cannot neatly resolve the issue.

In either case, the defendant is found not responsible, but there are doctrinal issues that suggest that treating dissociated movements as excused actions makes more legal sense. Retrospective mental state evaluations are difficult to make, but deciding how dissociated an agent was in the past can be fearsomely difficult. It is an easy claim to make and hard to disprove if the prosecution must prove the act element beyond a reasonable doubt because the usual inferences about mental states from behavior do not apply in cases of dissociation. If dissociation is an excusing condition, however, the burden of persuasion can be placed on the defendant, reducing the risk of wrongful acquittals.

If the defendant is acquitted because the *prima facie* is negated, the defendant is freed entirely. Much like an acquittal by reason of legal insanity, an acquittal by reason of dissociation would provide the state with a justification for some form of commitment in appropriate cases.¹⁹ Unlike present English law and in some U.S. jurisdictions, dissociation or automatism should not be considered under the rubric of legal insanity, however. Most cases of automatism do not arise from mental disorder. Furthermore, many dissociated defendants do not need involuntary mental hospitalization because the cause of the dissociation is transient or can be medically managed. Shoehorning these cases into legal insanity makes no sense, but some form of commitment or quarantine might be needed in some cases of untreatable, permanent conditions.

The most attractive reason to treat dissociation as an excusing condition is moral because it permits more finely calibrated responsibility ascription. Whether dissociated movements are actions is a binary decision. Dissociation is a degree phenomenon, however, and it lends itself to a continuum of moral ascription ranging from full responsibility through mitigation to full excuse depending on the resulting level of rationality impairment. No legislature has adopted a generic mitigating verdict, but this would be a perfect vehicle for having the finder of fact reach more morally responsive decisions in cases of dissociation and other rationality impairments. At present, then, if dissociation were considered an excusing condition, sentencing would be the only option for considering it in cases not warranting a full excuse.

IV. Legal Insanity

¹⁹ Jones v. United States, 463 U.S. 354 (1983) (upholding the constitutionality of indefinite civil commitment for insanity acquittees).

Michael Moore has intermittently and illuminatingly written about law and mental disorder for over four decades. His most recent foray²⁰ brilliantly distills his thinking in this field, demonstrating the influence of his general thought about philosophy of mind, action and personhood. Moore and I concur that a test for legal insanity is morally required and inevitably legal and moral and that we cannot use medical, psychiatric or psychological proxies for the moral and legal judgment that must be made. We also agree that testifying mental health professionals often fail to distinguish moral/legal from medical/psychological judgments. Finally, for decades we have tried to correct what I have termed the “fundamental psycholegal error,” the benighted, misguided claim that causation, including abnormal causation, does not per se excuse.²¹ Even if abnormal mental states play a causal role in explaining criminal behavior, it does not follow that the person must be excused. The abnormal mental states must satisfy the law’s genuine excusing criteria.

We disagree about why mental disorder sometimes warrants an excuse. I am more skeptical than Moore about the validity of the diagnostic categories in the American Psychiatric Association’s diagnostic manual,²² but there is no doubt that severely abnormal mental phenomena, such as delusions and hallucinations, exist, and we agree that what is relevantly wrong with such people is usually a severe cognitive defect that impairs reality testing. We disagree, however, about whether mental disorder justifies legal insanity because it is the basis of a status excuse.

²⁰ Michael S. Moore, “The Quest for a Responsible Responsibility Test, *Criminal Law and Philosophy* (forthcoming).

²¹ Morse, “Culpability and Control, note XX supra, at 1592-94.

²² American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (FIFTH EDITION)- DSM-5 (2013).

Before continuing, it is useful to ask whether Moore's account is meant to be a "goodness of fit" positive account of current Anglo-American and perhaps continental tests or whether it is his normative vision of what the test should be. Even if a different view better explains our actual practices, Moore's view may still be normatively desirable. I conclude that his account is not the best positive explanation and his proposal would lead to undesirable outcomes for the law and for people with mental disabilities.

Moore claims that at least some people with severe mental disorder lack fundamental conditions for personhood and are not moral agents. Severe disorder is a status excuse and thus deprives people of responsibility *tout court*. In short, such people are not excused for specific actions, but instead are simply exempt from responsibility ascription. Moore lists nine criteria for moral personhood: mental states: consciousness₁: phenomenal experience; consciousness₂: privileged access; intentionality; three parts to the soul (the platonic functional appetitive, rational and executory); practical rationality; emotionality and the rationality of emotion; character structure at a time and over time; and, autonomy. These criteria are an attractive account of agency, but I fear they won't do the work for moral agency that Moore wishes.

Many people who are clearly legally insane and most 10-13 year olds meet these nine criteria, but Moore nonetheless denies their status as potential moral agents. Needed is a particular deficit that unites those we potentially excuse. In other parts of the paper, Moore notes that practical rationality, his 6th criterion, must involve some degree of substantive and not simply instrumental rationality. I think that this is the key to understanding the excusing condition rather than severe "madness" itself. We excuse

when substantive irrationality impairs the agent's practical reasoning in the context in question.

People with severe mental disorder are not their disorders. They are persons with a disability, which is why the preferred locution at present is not to characterize people as their disorder, e.g. a "schizophrenic," but as a "person with" schizophrenia. This is cumbersome, but it is all too easy, in contrast to cases of physical disease, to think mistakenly that mental disorder is the entirety of a person. As DSM-5 recognizes, all mental disorders, including the most severe, are heterogeneous in presentation. Severe disorder heterogeneously affects the sufferer's life depending on a large number of factors, many of which are external. It need not affect every aspect of their lives. The category of "Delusional Disorder" is an example. Sufferers are psychotic but their delusional beliefs operate only in those contexts in which the belief is motivating. People with psychotic disorders may be perfectly capable of substantive and instrumental rationality in some, indeed most areas of their lives. Contra Bleuler, who Moore quotes approvingly, they are not "stranger to us than the birds in our gardens," nor are they "beyond good and evil" in the non-Nietzschean sense, as Moore claims. They are recognizably one of us.

Moore draws an analogy to children, but even with children, the law does not uniformly treat infancy as an excuse and takes different views of their capacities depending on their age and what is at stake. Consider the common law excuse of infancy, which is often considered a status excuse: children 6 and younger are categorically exempt; children 7-13 are presumed non-responsible; and children 14 and older are presumed responsible. This is quite consistent with what we know about

cognitive development. Although some outlier youngsters might have the cognitive ability to be responsible, this would be such a rare case that individuation would be inefficient. For the intermediate group, cognitive development is generally incomplete, but the presumption of non-responsibility is rebuttable. Infancy is simply a proxy for lacking certain cognitive capacities and isn't really a status excuse.

The Supreme Court has held that minors categorically are insufficiently rational to deserve the death penalty or to be sentenced to mandatory life without parole for non-homicide crimes,²³ but there was a strong argument that the decisions should have permitted individuation, at least for older adolescents. I believe the Court drew a bright line for the sake of administrative convenience and to avoid the horrendous error of potentially wrongfully imposing these dreadful sentences. In *Miller v. Alabama*, the Court rejected mandatory life without parole for minors committed of homicide crimes, but permitted individuation in imposing this sentence.²⁴ In many jurisdictions, minors are considered sufficiently rational to make an independent decision about whether to use birth control or to have an abortion. Even infancy is not clearly a “status” for all purposes.

“Intellectual Disability” (formerly retardation or developmental disability) is a similar example. The Supreme Court categorically excluded people with ID from capital punishment because of rationality defects that mark this condition,²⁵ but conceded that such people could be criminally responsible and insisted on careful individuation about whether the convicted capital defendant did have ID. The Court could have once again

²³ *Roper v. Simmons*, 543 US 551 (2005); *Graham v. Florida*, 130 S Ct 2011, (2010).

²⁴ *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

²⁵ *Atkins v. Virginia*, 536 U.S. 304 (2002).

insisted on individuation even for those defendants concededly suffering from ID, which also presents heterogeneously, but for the same reasons as in *Roper* and *Graham*, opted for a categorical rule. Finally, in the civil context, whether people with ID should be treated as competent is a functional test that differs from context to context.

The same considerations are true of people with severe mental disorders. They may be competent or morally responsible for some conduct. Involuntary civil commitment, for example, no longer has the consequence of declaring the person committed civilly incompetent for all purposes, such as making contracts or voting. Moreover, those people who are omni-disabled are usually too disorganized to engage in criminal conduct other than simple assaultive or disorderly conduct, for which no sensible defendant raises an insanity defense. Those with severe disorders who commit crimes are usually quite instrumentally rational and mostly substantively rational as well. A specific cognitive deficit that irrationally and materially motivated the defendant is doing the work in most legal insanity cases. Consider M’Naghten, who delusionally believed the Tories were persecuting him and were a threat to his life,²⁶ or Andrea Yates, who delusionally believed that she was morally corrupting her children and thus they would be tortured for all eternity in hell unless she killed them when they were still “innocent.”²⁷ Both carefully planned their conduct and executed it successfully (although M’Naghten’s victim was Peele’s private secretary, Drummond, who M’Naghten non-delusionally but mistakenly believed was Peele).

²⁶ Richard Moran, *KNOWING RIGHT FROM WRONG: THE INSANIITY DEFENSE OF DANIEL MAC NAUGHTEN* (1981).

²⁷ Deborah W. Denno, “Who Is Andrea Yates? A Short Story About Legal Insanity,” 10 *Duke Journal of Gender Law and Policy* 1 (2003).

Moreover, the moral compass of those with severe disorders is often unimpaired. Suppose one believed what Andrea Yates believed. If these facts were true, as Ms. Yates sincerely believed, then it would be morally permissible and perhaps obligatory to kill one's children. To suggest that Ms. Yates or other legally insane people lack all moral agency is contrary to the facts and I fear demeans them. It is preferable to say that she is not responsible for killing the children because she was psychotically motivated to do this particular crime, but she was responsible for much else in her life that had moral import.

It is useful to compare psychopathy to assess this issue. At the extreme, people with psychopathy, a personality disorder of unknown origin, completely or almost completely lack conscience, a sense of morality, and the capacity for empathy.²⁸ They are incapable of recognizing the normatively best reasons for respecting the rights of others. I believe that they are morally irrational, although they can be instrumentally rational and do understand criminal prohibitions and the potential costs of offending. I have argued elsewhere that severe psychopathy should be a predicate for excuse.²⁹ If the law permitted using psychopathy as a basis for legal insanity, it would best be explained by the lack of moral rational capacity, and not because psychopathy is a status.

Although plausible insanity defense cases are akin to mistakes of fact and law, the materially irrational motivation is the foundation of the excuse. Moore's views and mine are very similar, but I do not agree that a delusional person who engages in criminal behavior unrelated to his delusion is not responsible because he is not a moral agent. If his conduct is rationally motivated although he is wildly out of touch with reality in other

²⁸ See Robert M.Hare, *WITHOUT CONSCIENCE: THE DISTURBING WORLD OF THE PSYCHOPATHS AMONG US* (1999)..

²⁹ Stephen J. Morse, "Psychopathy and Criminal Responsibility," 3 *Neuroethics* 205 (2008).

domains of his life, which is commonly the case, what good moral theory would exempt him from responsibility for rationally motivated actions?

Moore is correct that knowledge of right and wrong or knowledge of what one is doing is not precisely the issue because everything turns on how narrowly knowledge is interpreted. This is a normative question unanswered by adopting equally vague terms such as “understand” or “appreciate.” As an aside, most legally insane defendants did think their conduct was permissible or necessary, even according to conventional reality, if the facts were as the defendant believed” Consider Andrea Yates again.

If “knowledge” is properly interpreted morally, most people who are legally insane do not know what they are doing in the sense that they are motivated by a non-culpable error about reality. The deific decree exception to a narrowly interpreted *M’Naghten* test does not prove that madness itself excuses. It confirms that material, irrational motivation about what one is doing is necessary for excuse. Contra Moore, we do need mental disorder plus Factor X and mental disorder must “cause” the criminal conduct by severely impairing the person’s practical rationality in the particular circumstances. We have a mental disorder criterion and do not treat Factor X independently not because madness is a status excuse. As many have pointed out, mental disorder is used as an objective indicator that proves that the defendant’s mistake about the motivating reality is not an “ordinary” mistake.

The hardest case for my view is the person who is materially delusionally motivated, but knows that what he is doing is wrong. An example is the person who delusionally believes that his spouse is unfaithful, is wildly jealous, cannot be convinced by evidence or logic to the contrary, and indeed weaves counter-evidence and logic into

the delusional belief system and thereby reinforces it. If he kills his spouse, should he be excused? He is clearly and severely mad. The DSM-5 diagnosis would be “Delusional disorder, jealous type,” a psychotic disorder, but note that the law virtually everywhere would not find him legally insane because he knew that what he was doing is wrong. Would Moore’s status view excuse him? Perhaps so, because a psychotic belief motivated him, but is he a non-responsible agent generally? Seemingly not. If he committed theft, he should surely be responsible. For years I waffled on this issue, but now believe that the delusional spouse must be convicted, unless his moral compass is independently compromised by mental disorder. Even if all the facts and circumstances as he believes them to be were true, he would still be guilty of a crime. Faithlessness does not justify intentional homicide even if it reduces the degree of guilt in some circumstances. I would convict him of murder, but this well might be an appropriate case for my proposed “guilty but partially responsible” verdict because he had a severe rationality defect in the context.³⁰

In conclusion, I don’t think that the status account of legal insanity best explains current law. More important, I worry that if adopted, it would contribute, albeit marginally, to common misunderstandings and fear of mental disorder that continue to stigmatize and exclude people with such disorders.

V. The “Volitional” Excuse

The first major, modern proponents of a control test were Sir James Fitzjames Stephen³¹ and the Alabama Supreme Court, which adopted the “irresistible impulse”

³⁰ Stephen J. Morse, “Diminished Rationality, Diminished Responsibility,” 1 *Ohio St. J. Crim. L.* 289 (2003).

³¹ James Fitzjames Stephen, II *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 120 (1883).

test.³² Both specified the folk psychological mechanism that caused the failure of control. Fitzjames believed that the problem was the failure to keep future consequences firmly in mind.³³ The *Parsons* decision spoke of the destruction of the power to choose between right and wrong, and, quoting an authority on medical jurisprudence, attributed this to reason losing its “empire” over the passions.³⁴ In short, both proposed a rationality defect as the source of loss of control capacity. By the time of the Hinckley verdict in 1982, the Model Penal Code test, which famously includes a “control” prong was dominant, but that dominance came to an end. In the wake of the unpopular acquittal, the American Psychiatric Association and the American Bar Association criticized control tests for failure of conceptualization and operationalization, and political pressure led to abolition of the control test in all but a small minority of jurisdictions.

I think that the APA and the ABA were right. All cases that plausibly seem to require a control test are in fact better explained, as Fitzjames and *Parsons* understood, as involving rationality defects. I am not an opponent in principle of a control test independent of a rationality defect if such a test has a conceptual and operational foundation. By an independent test, I mean cases in which there is no rationality problem, but in folk psychological parlance, the agent “can’t help himself.” This is precisely what Leroy Hendricks, a serial child molester, said about himself.³⁵

³² *Parsons v. State*, 81 Ala. 854,859 (1887).

³³ Stephen, note XX supra, at 120.

³⁴ *Parsons*, supra note XX., at 859.

³⁵ *Kansas v. Hendricks*, 521 U.S. 346 (1997) (upholding the constitutionality of involuntary civil commitment for “mentally abnormal sexually violent predators”). See also, *Kansas v. Crane*, 534 U.S. 407 (2002) (requiring a “serious difficulty “controlling oneself” criterion for committing sexual predators).

As Moore notes, I have challenged control test proponents to provide the non-cognitive folk psychological mechanism that causes loss of control and method for its accurate identification. In his excellent paper on the volitional excuse,³⁶ Moore accepts the challenge and defends a volitional test. I will focus on his analysis of the “incapacity” justification for a control excuse and not on the interesting things he writes about the “fair opportunity” justification. Although I am willing in principle and mostly in fact to accept Moore’s premises, I do not think that the conclusion he draws follows and his analysis of doctrine is better explained by different rationales.

A preliminary word on terminology and the subjects of agreement is in order. Moore holds that volitions are independent executory intentions.³⁷ In virtually all cases that involve the excuse Moore defends, he recognizes that volitions successfully execute the defendant’s motivating intentions. Thus, it is somewhat strange for him to talk about a volitional excuse rather than a control or compulsion excuse. Consequently, I shall use the term, control, because it more accurately describes what we care about. We agree about virtually everything, including the following: there are cases calling for excuse that go beyond the strictures of current cognitive tests; the defendant must not be culpable for causing the condition of his own excuse; the defendant’s capacity is the crucial question; the can’t/won’t distinction is actually scalar although the law treats it as binary; and, counterfactual analysis will be necessary to draw the can’t/won’t line.

Moore’s characterization of cases requiring a control excuse are those in which the defendant did not do “what he most wants to do,” either because the agent is unable to

³⁶ Michael S. Moore, “The Neuroscience of Volitional Excuse,” forthcoming, in Dennis Patterson, Ed., *LAW AND NEUROSCIENCE: STATE OF THE ART* (Oxford University Press).

³⁷ *ACT AND CRIME*, note XX supra; “The Neuroscience of Volitional Excuse,” note XX supra.

form the “right intention” or because the agent is able to form the “right” intention, but is unable to execute it. Moore begins his analysis of the folk psychology of loss of control with a number of stipulations about “desire, strongest desire, and intention” that he concedes are contested in the philosophy of mind and action. I accept his stipulations, but once again, what is a poor country lawyer-scholar to do if others contest them? Moore then proposes and evaluates six models of the folk psychology of the lack of control, ranging from desire bypassing the will entirely to unstable preference shifts (described in terms of hyperbolic discounting by many addiction specialists). He is properly skeptical that most of the models he canvases are the underlying, unitary foundation for a control excuse, but he does settle on one of them: motivation by “ego-alien desires that refuse to be integrated into one’s sense of the self,” that “seem alien to (rather than part of) the reason-responsive...self.” I would analyze the folk psychology differently and paradoxically think that Moore underweights some of the models he rejects, but I will accept his psychology for the purpose of analysis.

I concede the psychology because all the models exemplify rationality defects properly understood. Moore’s preferred model of ego-alien desires is a prime example. Generically, the “ego-alienated” agent’s desires are sealed off from the reason-responsive self. Moore quotes from many other thinkers who have reached similar conclusions about cases “when a strong, emotion-laden, not-identified-with-self desire conflicts with a less strong, probably less emotion-laden but more identified-with-self desire, and wins.” The essence of all, I believe, is that the disjunct occurs because the agent is not fully rational, as Michael Smith, who Moore cites approvingly, suggests.

All core criminal offenses infringe on the rights of victims and communicate disrespect for the victim and for society. Everyone thus has supremely good reason not to commit core criminal law offenses. I could quibble with how often genuinely ego-alien desires arise in criminal law cases and with Moore's account of them, but even if Moore's psychology is accepted, the problem that might excuse is a rationality defect best explained by the agent's inability to "think straight," to access the good reasons not to offend, under circumstances that seem to disable those abilities, such as craving, intense emotion, and the other variables Moore properly notes. I think this better explains the excusing and mitigating conditions in law that Moore addresses, such as provocation/passion, "diminished capacity," involuntary intoxication, and legal insanity. The other doctrines Moore adduces, such as necessity, duress and innocent aggressor, are better explained by a common-sense hard choice situation the agent does not create and in which the agent on balance whole-heartedly harms another. No control excuse is necessary.

Even if a control test may be justified, Moore argues that it should only apply if the agent cannot, as opposed to will not, control himself. This is a scalar concept and probably every agent has this capacity to some degree, as demonstrated by the assumption that all those agents with a control problem would manage to resist offending if they were threatened with instant death. The ability of an agent to exercise control under such circumstances does not entail that he must be responsible. No just legal regime would be so unforgiving. It is sufficient to excuse if the agent lacks "substantial" capacity, with that lack given varying normative content depending on the general stance of the legal system to the expansiveness of excuses.

Moore and I agree that counterfactual analysis is the primary way to evaluate an agent's control capacity. It is no surprise to learn that Moore metaphysically analyzes capacity using David Lewis' possible worlds modal logic. The concept of capacity is contested within professional philosophy and Moore freely concedes some of the problems with his approach. More fundamentally for the law, how could the legal system ever practically use Lewis' methodology, even if it is metaphysically the most potent? Even Lewisians differ about how close the possible worlds must be. What is a country lawyer-scholar supposed to do?

I start, of course, by conceptualizing control capacity in terms of cognitive deficits and then suggest a purely common-sense folk-psychological counterfactual methodology. Consider that refraining from most core criminal behavior, such as not killing, not raping, not burning, not stealing and so on, is low skill behavior. If one has the general capacity to refrain as demonstrated by the agent's behavior in other, similar circumstances--does the agent always attempt to kill people who provoke him to anger? does the pedophile always touch kids when there is no witness?—then it is fair to infer that the agent probably had similar capacity at the time when the prohibited action occurred. This conclusion is defeasible by showing that the specific circumstances of the instant case make it distinguishable from apparently similar circumstances, but the metaphysics of counterfactuals will not help with the practical determination that must be made. There will be no easy answers in many cases, but all one can do is attend to the relevant history and compare it to the present facts and circumstances.

Neuroscience and psychology simply cannot help solve these problems. What good research now exists isn't remotely ecologically valid and there is serious question

whether such research could be done at all, even if an institutional review board would allow the types of experimental interventions that would be necessary. We shall have to accept the necessity of behavioral evaluation.

In short, I welcome Moore to the ranks of those who understand control problems as rationality problems (anyone wants Moore as an ally) and hope that he will join me in challenging the proponents of control tests to provide a test independent of rationality defects.

VI. The New Neuroscience and Law, especially Criminal Law

In a 2002 editorial published in *The Economist*, the following warning was given: “Genetics may yet threaten privacy, kill autonomy, make society homogeneous and gut the concept of human nature. But neuroscience could do all of these things first.”³⁸ This type of claim was fueled by the early 1990s discovery of non-invasive functional magnetic resonance imaging (fMRI) that permits neuroscientists to study not only brain structure, but also brain physiology. Scanners for non-clinical purposes became common in academic departments of psychology and neuroscience in the early part of this century and there has been a logarithmic increase in studies of cognitive, affective and social neuroscience, which are the subfields of neuroscience most relevant to law.

Those bedazzled by the impressiveness of the technique and the cascade of data have succumbed to what I call “brain overclaim syndrome”.³⁹ Sufferers with this dire malady claim that the new neuroscience will revolutionize law and especially criminal law. Moore, as is so often the case, distinguishes nine challenges to responsibility that

³⁸ ‘The Ethics of Brain Sciences: Open Your Mind’ *The Economist*, 23 May 2002, 77, www.economist.com/node/1143317/print (accessed 5 October 2011).

³⁹

allegedly flow from the new neuroscience that include, *inter alia*, eliminativism, epiphenomenalism, and hard determinist incompatibilism.⁴⁰ All, I believe, are forms of the claims that neuroscience “proves” that determinism is true and that no one is responsible and the even more extravagant assertion that we are not really agents. According to neuroscientists Joshua Greene and Jonathan Cohen, for example, neuroscience allegedly proves that we are only “victims of neuronal circumstances” and the law should adapt accordingly.⁴¹ Traditional notions of responsibility, desert and morally justified punishment that are at the core of current criminal justice should be replaced with a consequentially justified prediction and prevention scheme of social control.

The new neuroscience is indeed impressive, but virtually all these claims are based on too little data⁴² and often on conceptual confusion.⁴³ Moore has entered the overclaiming thicket to clarify the conceptual space as only he can do. He has shown the following: compatibilism is not defeated and should be embraced by neuroscientists; Wegner’s claims in The Illusion of Conscious Will that virtually all actions are automatism and mental states are post hoc rationalizations the brain creates are conceptually confused and empirically incorrect; also confused and false is the claim based on the work of the neuroscientist, Benjamin Libet, showing that brain activity in the supplemental motor area precedes conscious awareness of an urge to move proves

⁴⁰ Michael S. Moore, “Responsible Choices, Desert-Based Legal Institutions,, and The Challenges of Contemporary Neuroscience,” 29 *Social Philosophy and Policy* 233 (2012); “Compatibilism(s) for Neuroscientists,” in, Enrique Vallenzeuella, ed., *LAW AND THE PHILOSOPHY OF MIND* (2014); “Libet’s Challenge(s) to Responsible Agency,” in, Walter Sinnott-Armstrong & Lynn Nadel, eds., *CONSCIOUS WILL AND RESPONSIBILITY* 207 (2011).

⁴¹ Greene & Cohen, note XX supra, at 217-18.

⁴² Morse, “Lost in Translation,” note XX supra.

⁴³ Michael Pardo & Dennis Patterson, *MINDS, BRAINS AND LAW: THE CONCEPTUAL FOUNDATIONS OF LAW AND NEUROSCIENCE* (2013).

that one's brain is the only cause of the behavior; the neuroscience of the can't/won't distinction will be fearsomely hard to perform and probably will not answer the question; and eliminativists and epiphenomenalists will have immense and perhaps insurmountable difficulties proving their case with neuroscience, even if they understand the precise nature of their claims, which the neuroscientists often do not. Many others and I⁴⁴ have also addressed these issues, but no one has done so with the overwhelming sophistication and depth that Moore deploys. And I am happy to report that the "Libet industry" that overclaimed about its alleged moral and legal implications appears bankrupt on empirical and conceptual grounds⁴⁵ and I doubt that it will emerge.

I agree with Moore completely about all the foregoing. We may disagree about brain/mind identity and reductionism, but since we agree on the CTA and its implications for responsibility, the disagreement scarcely matters for legal purposes. Our bedrock core agreement is that folk psychology is the foundation of law and criminal law in particular. Because we so thoroughly agreed about the relation of current neuroscience to criminal law, I will focus briefly on issues that are not central to Moore's writing, but which are complementary to it.

In virtually all cases, good psychology precedes good behavioral neuroscience. Neuroscientists do not go on fishing expeditions, with one important exception.⁴⁶ They

⁴⁴ E.g., Stephen J. Morse, "Lost in Translation," note XX supra.

⁴⁵ E.g., Alfred Mele, *EFFECTIVE INTENTIONS: THE POWER OF CONSCIOUS WILL* (2009); Moore, *Libet's Challenge(s)*, note XX supra; Parashkev Nachev & Peter Hacker, "The Neural Antecedents of Voluntary Action: A Conceptual Analysis," 5 *Cognitive Neurocience* 193 (2014); Aaron Schurger Jacobo D. Sitt & Stanislas Dehaene, "An accumulator model for spontaneous neural activity prior to self-initiated movement," 109 *PNAS* E2904 (2012); Aaron Schurger & Sebo Uithol, "Nowhere and Everywhere: The Causal Origin of Voluntary Action," *The Review of Philosophy and Psychology* (2015), available at, DOI 10.1007/s13164-014-0223-2

⁴⁶ Craig M. Bennett, et al, "Neural correlates of interspecies perspective taking in the post-mortem Atlantic Salmon: An argument for multiple comparisons correction," 1 *Journal of Serendipitous and Unexpected Results* 1(2009). Available at,

begin with a behaviorally well-characterized condition or task and then correlate brain activity with it. For example, to determine the structural or functional brain correlates of schizophrenia, one must first clearly identify based on behavioral criteria an “experimental” group of subjects who have the disorder and a control group that does not. Legally relevant and valid neuroscience will always depend on clear behavioral criteria. If the behavioral differences are clear, we don’t need the neuroscience because the law’s criteria are behavioral, although it is comforting if the neuroscience is consistent with behavioral observation. Further, actions speak louder than images. If there is a disjunct between the two, malingering aside (which neuroscience cannot diagnose for behavioral disorders), we must believe the behavior. For example, if structural images showed no difference on average between adolescent and adult brains, we would not conclude that adolescents behaved no differently than adults.

Most of what we know about cognitive, affective and social neuroscience is correlational and coarse-grained, rather than causal and fine-grained.⁴⁷ fMRI is a relatively recent technique and we are constantly discovering new methodological artifacts as this young science progresses.⁴⁸ The publication bias that exists in the social sciences generally exists in neuroscience.⁴⁹ Virtually no current neuroscience addresses legal issues, virtually none is directly legally relevant, and only a small amount is

<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.161.8384&rep=rep1&type=pdf>. The study scanned a dead Atlantic salmon to demonstrate that significant results can be obtained from the most unpromising investigation unless the research design properly controls for chance findings (false positives).

⁴⁷ ., Gregory A Miller, “Mistreating Psychology in the Decades of the Brain,” 5 *Perspectives on Psychological Science* 716 (2010)

⁴⁸ E.g., Craig M. Bennett et al, “The Principled Control of False Positives in Neuroimaging,” 4 *Social, Cognitive and Affective Neuroscience* 417 (2009).

⁴⁹ E.g., John PA Ioannidis, “Excess Significance Bias in the Literature on Brain Volume Abnormalities,” 68 *Archives of General Psychiatry* 773 (2011)

inferentially relevant, though often requiring extravagant chains of inference.

Replications are seldom attempted. None of this is a critique generally of behavioral neuroscience. It is a young field using new technologies that is addressed to one of the thorniest problems in science and philosophy: the relation of the brain to the mind and action. It is not surprising that progress, impressive as it is, is slow.

Neuroscience also shares with other sciences the G2i problem, which is how to make inferences about a particular individual based on group data.⁵⁰ Scientists are interested in how the world works and produce general information. Law is often concerned with individual cases and it is difficult to know how properly to apply relevant group data. For example, a neuroscience study that reports increased activation in some brain region of interest bases its conclusion on averaging the activation across all the subjects, but no subject's brain may have activated precisely in the area identified. If such group data are permitted, as they now are for functions such as predictions, the question is how to use probabilistic data to answer what is often a binary question.

Finally, suppose, counterfactually, that the radical critics are right. We are not agents and our mental states do no work (if they exist at all). We are simply victims of neuronal circumstances. What follows? Greene and Cohen think consequentialism follows. In contrast, I think nothing does because the radical position is normatively inert, a thought first prompted by Mitch Berman in the context of determinism.⁵¹ Reasons are mental states. If the reasons we believe motivate action are not real or lack causal efficacy, then we have no reason to do anything, except perhaps, to wait for determinism

⁵⁰ David L. Faigman, John Monahan, & Christopher Slobogin, "Group to Individual Inference (G2i) in Scientific Expert Testimony," 81 *U Chi. L. Rev.* 417 (2014).

⁵¹ . Mitchell Berman, "Punishment and Justification," 118 *Ethics* 258, 271 (2008).

to happen. I certainly do not deserve criticism or blame for failing to accede to the truth.
My brain made me do it.

VII. Conclusion

No legal scholar and few philosophers have written as illuminatingly about the mind as Michael Moore. That is why he is continuously on my mind and will be as long as I continue to think about and work on these issues.