ARTICLES

TEMPORARY INSANITY: THE STRANGE LIFE AND TIMES OF THE PERFECT DEFENSE

RUSSELL D. COVEY[*]

The temporary insanity defense has a prominent place in the mythology of criminal law. Because it seems to permit factually guilty defendants to escape both punishment and institutionalization, some imagine it as the "perfect defense." In fact, the defense has been invoked in a dizzying variety of

[*] Associate Professor, Georgia State University College of Law. This project is several years in the making, and thanks are due to those who have helped me along the way, including Paul Lombardo, Nirej Sekhon, Caren Morrison, and participants at the 2009 Southeast Association of Law Schools Conference, where an early draft of this paper was presented. Special thanks are due to Myrece Johnson for her invaluable research assistance on this project.

contexts and, at times, has proven highly successful. Successful or not, the temporary insanity defense has always been accompanied by a storm of controversy, in part because it is often most successful in cases where the defendant's basic claim is that honor, revenge, or tragic circumstance – not mental illness in its more prosaic forms – compelled the criminal act. Given that the insanity defense is considered paradigmatic of excuse defenses, it is puzzling that temporary insanity also functions as a sort of justification defense. This Article seeks to solve that puzzle by canvassing the colorful history and the conceptual function of the defense. Ultimately, it argues that temporary insanity should be viewed as an equitable doctrine that provides relief where the traditional legal rules exclude or are inadequate to the defendant's particular circumstances. Because the temporary insanity defense permits juries to resolve difficult cases in a manner consistent with the deep purposes of the criminal law, it is misleading to conceptualize that defense as merely a nullification doctrine.

INTRODUCTION

The temporary insanity defense has a prominent place in the mythology of criminal law. Because it seems to permit factually guilty defendants to escape both punishment and institutionalization, some imagine it as the "perfect defense." In fact, the defense has been invoked in a dizzying variety of contexts and, at times, has proven highly successful. Successful or not, the temporary insanity defense has always been accompanied by a storm of controversy, in part because it is often most successful in cases where the defendant's basic claim is that honor, revenge, or tragic circumstance – not mental illness in its more prosaic forms – compelled the criminal act. Indeed, the temporary insanity defense is often (though not always) raised in circumstances where the defendant asserts that his or her conduct should not be punished because, under the circumstances, it was justified. Given that the insanity defense is considered paradigmatic of excuse defenses, this function, as a sort of justification defense, is enigmatic.

Yet coming to terms with the enigma of temporary insanity helps us understand some of the enigmas of criminal law more generally. After all, if the law seeks to punish those who deviate from societal expectations about proper conduct, and certain provocations would cause even reasonable men or women to kill, then why don't those provocations provide a complete excuse, rather than only partial mitigation? If the law of legal responsibility establishes that a person is not responsible where he does not understand the nature or wrongfulness of his conduct, why doesn't extreme intoxication or blind rage that robs a person of that same understanding also establish a valid defense to a criminal charge? The law universally limits the insanity defense to cases where mental disease or defect causes the cognitive or volitional deficit, yet what good is such a requirement when there is no uniform scientific

or legal definition of mental disease or defect?[1] The temporary insanity defense touches upon each of these paradoxes of the criminal law. It demonstrates, perhaps better than most legal doctrines, the extent to which legal doctrine is formulaic while justice remains stubbornly holistic.[2]

Although the temporary insanity defense continues to be regularly invoked, it is far less robust than it once was. Indeed, for a variety of reasons, the temporary insanity defense has largely lost its standing as a distinct – or even a coherent – legal claim. Most importantly, the law governing the insanity defense has coalesced around a psycho-medical model of insanity predicated upon the existence of a clinical, diagnosable mental disease or defect.[3] Temporary insanity claims, like insanity claims in general that lack this psycho-medical foundation, rarely reach the jury. Although, as we will see, courts have struggled to draw reliable parameters around this concept by holding temporary insanity claims to the same psycho-medical threshold as regular insanity claims, courts have largely rejected attempts to establish temporary insanity as a distinct type of affirmative defense that might arise from causes or conditions that would not suffice for a regular insanity claim.

At the same time, if courts treat the basic requirements of the temporary insanity defense as a subset of regular insanity claims, the law governing the legal competency of criminal defendants to stand trial effectively reduces all insanity claims to temporary insanity claims. Because only legally competent defendants may stand trial (or enter valid pleas), the only type of insanity claim a defendant logically can assert is that he or she was legally insane at the time the crime was committed but not insane at present.[4] Of course, the legal standards defining competence to stand trial and those defining legal insanity are not identical. One might be presently insane and yet competent to stand

[1] *See* LAWRENCE P. TIFFANY & MARY TIFFANY, THE LEGAL DEFENSE OF PATHOLOGICAL INTOXICATION: WITH RELATED ISSUES OF TEMPORARY AND SELF-INFLICTED INSANITY 207-26 (1990).

[2] The claim here echoes what George Thomas describes as the primary function of ancient criminal procedures like trial by ordeal, battle, or oath, which were meant to discern "which party was innocent before God," where "[i]nnocence was a holistic state rather than a crude question of whether X did act Y." GEORGE C. THOMAS III, THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS 66-67 (2008).

[3] I use the term "psycho-medical model" to refer to the view that some diagnosable mental disease or defect must cause insanity, but that the disease or defect may have a biological, psychological, or neurological etiology; others describe this view as the "medical model." *See* GARY B. MELTON, JOHN PETRILA, NORMAN G. POYTHRESS & CHRISTOPHER SLOBOGIN, PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 195 (2d ed. 1997).

[4] TIFFANY & TIFFANY, *supra* note 1, at 230 ("There is, strictly speaking, no such defense as temporary insanity, or (what is closer to stating the case accurately) all claims of insanity are claims of temporary insanity. The defendant's mental state at the time of the act is all that is ever in question on an insanity plea.").

trial, although common sense suggests that such defendants will be atypical.[5] In any event, given the requirement of legal competence, the conceptual distinction between insanity and temporary insanity is quite thin. The principal distinction between temporary and permanent insanity lies in the consequences of success in asserting it. A verdict of not guilty by reason of (permanent) insanity invariably leads to institutionalization in an asylum. A finding of temporary insanity does not necessarily lead to the same outcome. Even here, however, the distinction between the two defenses has tended to shrink as jurisdictions mandate minimum observational periods for persons acquitted on all mental capacity grounds.[6]

Still, the strange history of and continuing popular fascination with the temporary insanity defense shows how deeply the defense resonates with popular ideas about criminal justice. That resonance is strengthened by those rare – and usually highly publicized – cases in which a temporary insanity defense not only succeeds but also seems to provide the complete exoneration of an "obviously guilty" defendant. Indeed, a sampling of the temporary insanity defense's history provides a virtual zoology of exotic and controversial criminal law defenses. Defendants have asserted successful temporary insanity defenses in cases involving infanticide,[7] battered spouses,[8] homosexual panic killings,[9] black rage,[10] pre-menstrual syndrome and menstruation-related dysfunctions such as "congestive dysmenorrhoea,"[11] post-

[5] The fact that criminal defendants can be found competent to stand trial and yet are mandatorily committed after acquittal based on a temporary insanity plea is only intelligible if those standards differ. *See* Irwin J. Block, *Temporary Insanity – First Line of Defense*, 15 U. MIAMI L. REV. 392, 392-93 (1961).

[6] See *infra* Part I.B.

[7] *See, e.g.*, People v. Massip, 271 Cal. Rptr. 868, 868 (Cal. Ct. App. 1990).

[8] The Lorena Bobbitt and Francine Hughes cases, discussed *infra* at Part III.B.2, are two prominent examples.

[9] *See* Joshua Hammer, *The "Gay Panic" Defense*, NEWSWEEK, Nov. 8, 1999, at 40, *available at* http://www.newsweek.com/1999/11/07/the-gay-panic-defense.html. For a detailed discussion of the defense, see generally Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471 (2008).

[10] Attorney Paul Harris successfully used the "black rage" defense on behalf of several clients, including unemployed music director Steve Robinson, who unsuccessfully attempted to rob a bank. *See* Shuba Satyaprasad, Book Note, 7 B.U. PUB. INT. L.J. 181, 182 (1998) (reviewing PAUL HARRIS, "BLACK RAGE" CONFRONTS THE LAW (1997)).

[11] Mary Harris won an acquittal on that basis after killing Adoniram J. Burroughs. *See* Robert M. Ireland, *Insanity and the Unwritten Law*, 32 AM. J. LEGAL HIST. 157, 161-62 (1988) [hereinafter Ireland, *Insanity and the Unwritten Law*]. Several other women, including Laura Fair, Fanny Hyde, and Theresa Sturla, prevailed with the same defense in cases involving sexual dishonor. *See* Robert M. Ireland, *Frenzied and Fallen Females: Women and Sexual Dishonor in the Nineteenth-Century United States*, 3 J. WOMEN'S HIST. 95, 105 (1992) [hereinafter Ireland, *Frenzied and Fallen Females*]; Becky L. Jacobs, *PMS HAHAcronym: Perpetuating Male Superiority*, 14 TEX. J. WOMEN & L. 1, 9 (2004) ("As

partum psychosis,[12] the cultural defense,[13] mercy killings,[14] war atrocities,[15] deific decrees,[16] so-called honor killings,[17] junk-food overdoses,[18] and adverse reactions to psychotropic medications,[19] to name only some. Many more exotic defenses predicated on temporary insanity have been tried

early as 1845, women claiming 'temporary insanity from suppression of the menses' were acquitted of criminal charges as diverse as murder and shoplifting." (citing Lt. Col. Michael J. Davidson, *Feminine Hormonal Defenses: Premenstrual Syndrome and Postpartum Psychosis*, 2000 ARMY LAW. 5, 8)).

[12] *See Massip*, 271 Cal. Rptr. at 868-69.

[13] Fumiko Kimura asserted a cultural version of the temporary insanity defense after drowning her three children in a failed infanticide-suicide, successfully mitigating the charges from first-degree murder to voluntary manslaughter. *See* Elaine M. Chiu, *Culture as Justification, Not Excuse*, 43 AM. CRIM. L. REV. 1317, 1318, 1349-54 (2006).

[14] See *infra* at Part III.B.3, for a discussion of the case of Justina Rivero.

[15] *See* William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L.J. 639, 708 n.198 (2004) ("Psychologists have explained that the frenzy of fear, bloodlust and primordial passion unshackled by the horrors of combat accounts for the denial of quarter and other abuses of POWs in such circumstances and that the grim practice of soldiers is or should be excusable under the defense of temporary insanity.").

[16] *See, e.g.*, *Crazed Knifeman Thought He Was Messiah*, NEWS SHOPPER (UK), July 28, 2008, *available at* 2008 WLNR 26053614 (reporting that a "knifeman who thought he was 'the Messiah' and stabbed his best pal to free him from the 'devil' walked free from court yesterday" after successfully arguing temporary insanity). Yigal Amir, who assassinated Israeli Prime Minister Yitzhak Rabin, also argued – albeit unsuccessfully – a temporary insanity defense based on claims of divine intervention. *See* Mark C. Alexander, *Religiously Motivated Murder: The Rabin Assassination and Abortion Clinic Killings*, 39 ARIZ. L. REV. 1161, 1161 (1997).

[17] Acquittals in honor cases were plentiful in the nineteenth century. Congressman Dan Sickles's acquittal of murder on temporary insanity grounds after shooting his wife's lover is the first, and perhaps most famous, of these. *See* WILLIAM OLIVER STEVENS, PISTOLS AT TEN PACES: THE STORY OF THE CODE OF HONOR IN AMERICA 245 (1940). These cases are discussed *infra* at Part II.C.

[18] The case infamous for introduction of the junk-food overdose defense, the Dan White case, actually did not rely on White's supposed overconsumption of Twinkies so much as on a general claim that a chemical imbalance caused by the ingestion of too much junk food exacerbated his pre-existing mental problems. Nonetheless, a jury recognized a diminished capacity defense in the case and convicted White of manslaughter, rather than murder, for killing Harvey Milk, the openly gay supervisor for the City and County of San Francisco, and George Moscone, the Mayor of San Francisco. *See* People v. White, 172 Cal. Rptr. 612, 615 (Cal. Ct. App. 1981); Kelly Snider, *The Infamous Twinkie Defense – Fact or Fiction?*, 9 ANNALS AM. PSYCHOTHERAPY ASS'N 42, 43 (2006).

[19] *See* John Alan Cohan, *Psychiatric Ethics and Emerging Issues of Psychopharmacology in the Treatment of Depression*, 20 J. CONTEMP. HEALTH L. & POL'Y 115, 151 (2003).

unsuccessfully.[20] Although the temporary insanity defense has deep roots in the common law and has almost universally been recognized as a legitimate defense, it has engendered a surprisingly large amount of notoriety and confusion over the years. Falling at the intersection of mens rea, mental illness, provocation, and intoxication, the temporary insanity defense has functioned as a kind of criminal law Rorschach test. It acts as a mirror of the fact-finder's own intuitions regarding the moral wrongfulness of the actor's conduct, permitting consideration of a great variety of justification and excuse rationales. In part, this is because the defense lacks any settled definition. This definitional vacuum has encouraged a wide variety of often desperate criminal defendants, and their clever defense lawyers, to put it in the service, sometimes successfully, of their own often idiosyncratic ends.

To detractors, such cases unmask temporary insanity as a gross and unseemly nullification of law. To sympathizers, however, such cases demonstrate the importance of a doctrinal space in which individuals charged with crimes might defend themselves, not based on conformity with long-accepted standards of conduct that have been codified in criminal statutes or common law but instead by reference to basic claims of justification or excuse that have escaped such codification. In this Article, I attempt to flesh out the argument that in certain norm-stressing contexts, law's forms often necessarily, and properly, are subsumed to equity's demands and that in such instances, juries and other legal actors must creatively refigure both fact and legal doctrine to ensure that outcomes do not diverge too far from moral intuitions about fairness and justice. Part I examines the myth and reality of the temporary insanity defense, describing the criticism that has been levied at it as well as the shifting understanding of what a temporary insanity claim signifies. Part II examines the primary causes of alleged temporary insanity and the law's traditional response to these various causes. Part III examines the most frequently recurring types of temporary insanity claims. It then attempts to place them within a broader theoretical framework, describing how the temporary insanity defense has been relied upon to perfect defenses otherwise anchored in different theories of justification or excuse. Part IV summarizes these observations and examines the ways that the defense does and does not function as a nullification doctrine.

[20] These include "television intoxication," *see* Florida v. Zamora, 361 So. 2d 776, 779 (Fla. Dist. Ct. App. 1978); "urban psychosis" and "urban survival syndrome," *see* Stefani G. Kopenec, *"Urban Survival Syndrome" Gets Blame in Slayings – Is Defense Realistic, or Does it Reinforce a Racial Stereotype?* SEATTLE TIMES, Apr. 15, 1994, at A1, *available at* 1994 WLNR 1230711; Dianna Marder, *Insanity "Excuse" Used More but not Working More Defendants Are Simply Ducking Responsibility, Some Are Saying*, WICHITA EAGLE, Feb. 19, 1994, at 3E, *available at* 1994 WLNR 4637103, and overcaffeination, *see* Brett Barrouquere, *Kentucky Man Kills Wife, Blames Caffeine*, SALON (Sept. 20, 2010, 10:40 AM), http://www.salon.com/news/feature/2010/09/20/us_caffeine_defense.

Although temporary insanity permits juries to return verdicts that do not accord with the law's formal policies, as Harry Kalven, Jr. and Hans Zeisel observed in their classic study of the American jury, it is sometimes the case that "the jury's sense of justice leads it to policies which differ from official legal policies."[21] When this happens, I argue, juries are performing their proper function. Because the temporary insanity defense permits juries to resolve difficult cases in a manner consistent with the deep purposes of the criminal law, it is misleading to conceptualize that defense as a nullification doctrine, as have many of its critics. Temporary insanity rather should be viewed as an equitable defense that provides relief where the traditional legal doctrines exclude or are inadequate to the defendant's particular circumstances. When the disjuncture between verdicts demanded by literal interpretation of the criminal laws, on the one hand, and a community's moral intuitions – often shaped by or grounded in fundamental principles of the criminal law itself – on the other, grow too acute, strange legal fictions, like the temporary insanity defense, are born.

I. THE MYTH AND THE REALITY OF THE PERFECT DEFENSE

A. *Myth*

In a California police station not too long ago, two criminal suspects were waiting together during a break in a police interview. Things apparently were not going well. One of the suspects leaned toward the other and said, "We are both being tried for murder Marc. There's no getting out of it except temporary insanity. You can do it. I can do it."[22] Unfortunately for the suspects, the exchange was caught on tape, and neither did it.[23] The idea that temporary insanity might provide a way out of a hopeless situation, however, is one that frequently recurs, perhaps because Hollywood films often feature criminals "getting off" on findings of temporary insanity.[24] In Hollywood

[21] HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 219 (1966).

[22] People v. Johnson, No. A096822, 2003 WL 21186656, at *17 (Cal. Ct. App. May 21, 2003).

[23] *Id*. at *5.

[24] *See, e.g.*, A TIME TO KILL (Regency Enterprises, Warner Brothers Pictures 1996) (temporary insanity); ANATOMY OF A MURDER (Carlyle Productions 1959) (temporary insanity); PRIMAL FEAR (Paramount Pictures, Rysher Entertainment 1996) (insanity). Defendants often boast to others that they can escape a criminal conviction by pleading temporary insanity. In the murder trial of Frederick Chase, witnesses testified that shortly before the defendant killed his wife, she reported that Chase promised that "he was going to kill her and plead temporary insanity, and that 'anybody with any sense can fool a psychiatrist.'" Chase v. State, 369 P.2d 997, 1004 (Alaska 1962). The jury, at least, was not fooled, as Chase was found sane, notwithstanding testimony from a psychiatrist to the contrary. *See id.* at 998, 1004-05; Phillips v. State, 863 S.W.2d 309, 310 (Ark. 1993) (quoting arresting officer's testimony that "appellant told them that he caught Angela

mythology, at least, temporary insanity continues to provide the perfect defense.

Films and television shows – indeed, productions in a variety of media – have helped construct the myth of temporary insanity as the perfect defense by depicting criminal defendants getting off "scot free" despite their clear factual guilt.[25] After all, if successful, a temporary insanity defense will free the defendant not only from criminal punishment for wrongdoing but also – because the excusing conditions causing irresponsibility were temporary – from any mandatory civil institutionalization. Typically, popular media productions construct an image of temporary insanity as a kind of wild-card defense or an outright sham. Hollywood has also invoked this image in more sinister ways to show dangerous, clearly guilty defendants escaping justice through temporary insanity pleas.[26] Perhaps unsurprisingly then, popular skepticism about the defense runs deep.[27] Where successful, temporary

Durden 'messing around on him' and he took care of 'the problem,'" and that "appellant also stated that 'it's going to be all right. . . . I'm going to plead temporary insanity. . . . I'll get off"); State v. Leitner, 34 P.3d 42, 50 (Kan. 2001) (describing how, after killing her ex-husband, defendant allegedly boasted that "she was such a good actress that she could plead temporary insanity or spousal abuse and get anybody to believe it"); Sheckles v. Ky. Parole Bd., No. 2004-CA-002210-MR, 2005 WL 3244326, at *1 (Ky. Ct. App. Dec. 2, 2005) (explaining that the defendant, after severely beating his wife upon finding her in bed with another man, stated to his wife "and her sister at separate times that by pleading temporary insanity he would not be convicted").

[25] Examples from television include an episode of the television legal drama *The Practice*, in which a defendant suffering from abuse-inflicted post-traumatic stress disorder is acquitted of murder due to temporary insanity. *See* Meredith Jowers, *Witnesses – Who Calls the Shots?*, 25 J. LEGAL PROF. 175, 175 (2001). Novelist Frances Trollope utilized this theme in her novel about infanticide, *Jessie Phillips*. In the novel, notwithstanding that "[t]he jury believes that Jessie killed her child," it nonetheless acquits on grounds of temporary insanity. Lenora Ledwon, *Melodrama and Law: Feminizing the Juridical Gaze*, 21 HARV. WOMEN'S L.J. 141, 159 (1998). Susan Glaspell's 1916 play, *Trifles*, and subsequent short story, *A Jury of Her Peers*, depicted a woman's ultimate acquittal "for the bizarre strangulation of her sleeping husband." Lillian Schanfield, *The Case of the Battered Wife: Susan Glaspell's "Trifles" and "A Jury of Her Peers,"* 5 CIRCLES BUFF. WOMEN'S J.L. & SOC. POL'Y 69, 69, 79 (1997) (theorizing that the basis for a successful defense would have been temporary insanity).

[26] See, for example, PRIMAL FEAR, *supra* note 24, in which an altar boy feigns multiple personality disorder to avoid conviction for murdering a priest who had sexually abused him. *See also* James Fife, *Mental Capacity, Minority, and Mental Age in Capital Sentencing: A Unified Theory of Culpability*, 28 HAMLINE L. REV. 237, 274 (2005).

[27] "In the words of a thirteen-year-old . . . writing about the O.J. trial to the *Fresno Bee*: 'Of course, if he did do it, there's always the good old temporary insanity defense, a sure-fire way to bail out of just about any heinous crime, especially murder.'" Michael L. Perlin, *"The Borderline Which Separated You from Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1407 (1997) (quoting Lisa Calvino, *Too Much Time*, FRESNO BEE, Feb. 12, 1995, at B10). A

insanity seems to provide the "perfect defense," relieving the actor of liability and permitting him or her to walk out of the courtroom a free citizen, notwithstanding often uncontested factual guilt.[28]

The fact that defendants do prevail in temporary insanity cases bolsters the mythmaking often enough to blur the line between myth and reality. In the eighteenth and nineteenth centuries, the defense was regularly relied upon to acquit women in infanticide cases.[29] In the nineteenth and early twentieth centuries, temporary insanity became a mainstay in intimate homicide cases under the guise of, or in conjunction with, the so-called "unwritten law."[30] In the latter half of the twentieth century, the most prominent cases to feature temporary insanity involved battered spouses.[31] Throughout, temporary insanity claims involving intoxication have been ubiquitous.

Two cases illustrate the exceptional degree of popular attention that the temporary insanity defense has attracted. These cases, involving defendants Harry Kendall Thaw and Lorena Bobbitt, undoubtedly helped to shape during their respective eras the popular perception of the defense.[32] The Thaw case, which arose at the turn of the century in New York, was embedded in the context of the "unwritten law" or "code of honor" that was a prominent feature of nineteenth century attitudes toward adultery and sexual indiscretion. In contrast, the more recent Bobbitt case raised controversial and timely questions about such issues as retaliation and self-defense in the context of abusive

Vermont citizen put it even more bluntly in commenting on a conviction in a local trial that she didn't believe the defendant's insanity claims: "I wasn't buying that insanity, temporary insanity bull crap," the citizen said. *See Essex Welcomes Williams Verdict*, BURLINGTON FREE PRESS (Vt.), July 19, 2008, at A01, *available at* 2008 WLNR 26982683.

[28] The defense's "perfection" can be seen in the appreciation shown to lawyers who succeed with the defense. One Arizona lawyer, for instance, was feted for winning three temporary insanity acquittals for clients in murder trials, permitting all three to "walk[] out of the courtroom as free as if they had never been charged." Tom Galbraith, *Remembering John Flynn*, ARIZ. ATT'Y, Sept. 2006, at 12, 24.

[29] PETER C. HOFFER & N.E.H. HULL, MURDERING MOTHERS: INFANTICIDE IN ENGLAND AND NEW ENGLAND 1558-1803, at 146 (1981); Michelle Oberman, *Mothers Who Kill: Coming to Terms with Modern American Infanticid*e, 34 AM. CRIM. L. REV. 1, 12-13 (1996).

[30] LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 146-47 (1993) (explaining that in nineteenth century, husbands who killed their wives' lovers invoked the so-called "unwritten law" defense, which blended provocation and temporary insanity claims). The New York trial of Harry Thaw in 1907, which has been referred to as the first "trial of the century," was one of the most celebrated of such cases. Jacob M. Appel, *The Girl-Wife and the Alienists: The Forgotten Murder Trial of Josephine Terranova*, 26 W. NEW ENG. L. REV. 203, 227-28 (2004); *see* discussion *infra* at Part III.B.1.

[31] *See* Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 322 (1992). The Hughes and Bobbitt cases received enormous public exposure thanks to the media.

[32] For a full discussion of the Thaw, Bobbitt, and other similar cases, see *infra* Part III.B.1-2.

domestic relationships. Both of these cases received massive attention in the popular media, and the acquittals of Thaw and Bobbitt were followed by a firestorm of controversy, largely because the temporary insanity defense allowed the defendants to admit to the attacks but escape criminal liability for them.

B. *Reality*

The temporary insanity defense is a recognized, viable defense in some forty-four states.[33] Two states – Colorado and Arizona – bar defendants from asserting temporary insanity as a defense.[34] Colorado courts have interpreted

[33] Decisions explicitly or implicitly affirming the validity of the temporary insanity defense include the following: Coffey v. State, 14 So. 2d 122, 126 (Ala. 1943); Chase v. State, 369 P.2d 997, 1004 (Alaska 1962), *overruled by* Schade v. State, 512 P.2d 907, 912 (Alaska 1973); Hill v. State, 458 S.W.2d 45, 52 (Ark. 1970); People v. Ford, 70 P. 1075, 1075 (Cal. 1902); Ney v. State, 713 A.2d 932 (Del. 1998); Yohn v. State, 476 So. 2d 123, 125 (Fla. 1985); Cooper v. State, 340 S.E.2d 19, 21 (Ga. 1986); Territory of Hawaii v. Alcosiba, 36 Haw. 231, 237 (1942); People v. Eckhardt, 465 N.E.2d 107, 109 (Ill. App. Ct. 1984); Ankney v. State, 825 N.E.2d 965, 969 (Ind. Ct. App. 2005); Housholder v. State, 734 N.W.2d 488 (Iowa Ct. App. 2007); Glodjo v. Commonwealth, No. 2003-CA-00858-MR, 2005 WL 326968, at *3 (Ky. Ct. App. Feb. 11, 2005), State v. Milby, 345 So. 2d 18, 21 (La. 1977); Commonwealth v. Vega, 843 N.E.2d 1119 (Mass. App. Ct. 2006); State v. Gonzalez, 654 S.W.2d 117, 118 n.1 (Mo. Ct. App. 1983); State v. Cortez, 218 N.W.2d 217, 219 (Neb. 1974); Miller v. State, 911 P.2d 1183, 1186-87 (Nev. 1996); State v. Wisowaty, 627 A.2d 572, 575 (N.H. 1993); State v. Jackson, 2009 WL 365267, at *3 (N.J. Super. Ct. App. Div. Feb. 17, 2009); State v. Silva, 545 P.2d 490, 490 (N.M. Ct. App. 1976); State v. McCluney, 571 S.E.2d 86 (N.C. Ct. App. 2002); State v. Jensen, 251 N.W.2d 182, 185 (N.D. 1977); State v. Thomas, 868 N.E.2d 1061, 1066-67 (Ohio Ct. App. 2007); Edinburgh v. State, 896 P.2d 1176, 1180 (Okla. Crim. App. 1995); Commonwealth v. Custor, 442 A.2d 746, 748 (Pa. Super. Ct. 1982); State v. Smith, 512 A.2d 818, 819 (R.I. 1986); State v. Lewis, 71 S.E.2d 308, 308 (S.C. 1952); Primeaux v. Leapley, 502 N.W.2d 265, 274 (S.D. 1993); State v. Dubose, No. E2005-02167-CCA-R3-CD, 2006 WL 2947425, at *10 (Tenn. Crim. App. Aug 15, 2006); State v. Ahearn, 403 A.2d 696, 700 (Vt. 1979).

[34] *See* ARIZ. REV. STAT. ANN. § 13-502(A) (2001) ("Conditions that do not constitute legal insanity include but are not limited to momentary, temporary conditions arising from the pressure of the circumstances, moral decadence, depravity or passion growing out of anger, jealousy, revenge, hatred or other motives in a person who does not suffer from a mental disease or defect or an abnormality that is manifested only by criminal conduct."); COLO. REV. STAT. ANN. § 16-8-101.5(1) (2011) ("The applicable test of insanity shall be: A person who is so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong with respect to that act is not accountable; except that care should be taken not to confuse such mental disease or defect with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or other motives and kindred evil conditions, for, when the act is induced by any of these causes, the person is accountable to the law . . . ."). In addition, at least one Wyoming court has held that a temporary insanity claim was unavailable because such a claim fell outside the scope of the statutory insanity defense. *See* State v. McKinney, Crim. Action No. 6381 (2d Jud.

Colorado statutes to preclude insanity claims based on "mental disease or defect" that are "temporary in nature."[35] Arizona similarly modified its insanity defense to exclude any "momentary, temporary conditions arising under the pressure of the circumstances" as well as "depravity or passion growing out of anger" in a person who "does not suffer from a mental disease or defect."[36] Four more states – Idaho,[37] Kansas,[38] Montana,[39] and Utah[40] – do not recognize insanity as a defense at all. It follows, *a fortiori*, that these states also do not recognize temporary insanity as a defense. The defense appears to be cognizable in the other states, as well as in the District of Columbia, although some states have placed limits on the insanity defense, making temporary insanity claims harder to raise. For instance, California has narrowed access to the temporary insanity defense by requiring that it result from "an organic mental disease or defect" in order to constitute an excuse.[41]

Like the insanity defense generally, but even more so, juries rarely acquit based on temporary insanity.[42] In addition, contrary to popular belief,

Dist. Ct., Albany County, Wyo. Oct. 30, 1999), *cited in* Peter Nicolas, *"They Say He's Gay": The Admissibility of Evidence of Sexual Orientation*, 37 GA. L. REV. 793, 815 (2003).

[35] People v. Sommers, 200 P.3d 1089, 1093 (Colo. App. 2008) (quoting People v. Garcia, 113 P.3d 775, 782 (Colo. 2005)); *see also* People v. Low, 732 P.2d 622, 632 (Colo. 1987).

[36] *In re* Natalie Z., 153 P.3d 1081, 1083 (Ariz. Ct. App. 2007) (discussing ARIZ. REV. STAT. ANN. § 13-502(A)). The Arizona law, the principal purpose of which was to eliminate the temporary insanity defense, was largely a reaction to the 1994 acquittal of Mark Austin, who stabbed to death his estranged wife and injured her lover, and who was released from the mental institution to which he had been placed approximately six months after his acquittal. *See* Renée Melançon, Note, *Arizona's Insane Response to Insanity*, 40 ARIZ. L. REV. 287, 288, 298, 310-11 (1998) (citing Margo Hernandez, *Tucsonan Faces Second Trial in Estranged Wife's Slaying*, ARIZ. DAILY STAR, Jan. 31, 1991, at 1B, and Christopher Johns, *Arizona's Crazy New Insanity Law: What's the Verdict?*, FOR THE DEFENSE (Maricopa Cnty. Pub. Defender's Office, Phoenix, Ariz.), Oct. 1994, at 1, 2).

[37] IDAHO CODE ANN. § 18-207 (2004) ("Mental condition shall not be a defense to any charge of criminal conduct.").

[38] KAN. STAT. ANN. § 22-3220 (1995) ("It is a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the mental state required as an element of the offense charged. Mental disease or defect is not otherwise a defense.").

[39] MONT. CODE ANN. §§ 46-14-102, 46-14-311 (2005) (stating that mental disease will only be a defense if defendant did not have requisite state of mind for offense; otherwise it will not be a defense to prosecution under any statute but can be considered for sentencing purposes).

[40] UTAH CODE ANN. § 76-2-305 (2003) (stating that mental illness is not a defense unless it caused defendant to lack mental state required for offense charged).

[41] *See* Stephanie K. Lashbrook, *Developments in California Homicide Law: The Insanity Defense*, 36 LOY. L.A. L. REV. 1596, 1603-05 (2003); *see also* People v. Robinson, 84 Cal. Rptr. 2d 832, 835-37 (Cal. Ct. App. 1999).

[42] Studies suggest that the insanity defense is raised in only a small number of cases, and that when it is raised, in about three out of four cases it fails. *See* MELTON ET AL., *supra*

defendants acquitted on grounds of temporary insanity do not always walk out of the courtroom free.[43] Some defendants are institutionalized for extended periods of time.[44] Some states require that temporary insanity acquittees spend a minimum period of time in a mental institution for observation and treatment. Arizona, for example, now mandates a minimum observational period of four months.[45] If some courts treated temporary insanity as a special plea during prior periods,[46] the claim no longer possesses much of a distinct character. Like regular insanity claims, virtually every jurisdiction that permits the defense requires temporary insanity claims to comport with the jurisdiction's general test for criminal responsibility.[47] In jurisdictions that follow the *M'Naghten* test, for example, a defendant pleading temporary insanity must, like any insanity pleader, establish that at the time of the crime, she was unable to understand the nature and quality of her acts or their wrongfulness.[48] In

note 3, at 187-88 (finding that insanity defense is raised in only 0.1% to 0.5% of cases in United States and that "the defense prevails one out of every four times it is raised"); Norman J. Finkel, John E. Burke & Leticia J. Chavez, *Commonsense Judgments of Infanticide Murder, Manslaughter, Madness, or Miscellaneous?*, 6 PSYCHOL. PUB. POL'Y & L. 1113, 1120 (2000).

[43] MELTON ET AL., *supra* note 3, at 188 ("Many states require automatic commitment of those acquitted on insanity grounds, usually for a minimum averaging 60 days.").

[44] Indeed, because terms of institutionalization in an asylum can often exceed those of imprisonment when a defendant wins an acquittal on insanity grounds, and the conditions of detention are often worse in the asylum than the prison, it may often be true, as one writer stated, that "only a lunatic would allow himself to be acquitted by reason of insanity." Joseph W. Bishop, Jr., Book Review, 78 HARV. L. REV. 1510, 1516 (1965).

[45] *See* ARIZ. REV. STAT. ANN. § 13-3994C-F (2001); Blake v. Schwartz, 42 P.3d 6, 11 (Ariz. Ct. App. 2002) (upholding constitutionality of 120 day mandatory evaluation period).

[46] At one point, a Washington statute required defendants pleading not guilty by reason of insanity to also specify if "the condition still exists, or [if] the defendant has since become sane." HENRY WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 358 (1954). Some states still permit, at least as a practice if not a legal requirement, defendants to enter separate pleas of "temporary insanity" and "insanity." *See, e.g.*, Jones v. State, 43 So. 3d 1258, 1279 (Ala. Crim. App. 2007).

[47] *See, e.g.*, People v. Carter, No. G037366, 2008 WL 2310134, at *5 (Cal. Ct. App. June 5, 2008) (quoting JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL JURY INSTRUCTIONS 3450 (2010)) (holding that trial court committed no error in instructing jury as to insanity defense generally where defendant claimed temporary insanity, because "[t]here is nothing in the instruction that limits the defense to permanent insanity; the language is 'defendant must prove that it is more likely than not that he was legally insane *when he committed the crime*'"); State v. Keaton, 223 N.E.2d 631, 637 (Ohio Ct. App. 1967).

[48] One New Jersey court explained:

> If, at the time of the shooting, the accused, by reason of temporary insanity, was incapable of distinguishing between right and wrong with respect to the act, he is not guilty of murder. Unless he was conscious that it was an act which he ought not to do, there was a lack of moral or criminal responsibility.

State v. Lynch, 32 A.2d 183, 185 (N.J. 1943).

addition, she must establish that the disabling condition was caused by a "diseased mind."[49] Occasionally, legal implications do flow from the decision to plead temporary rather than permanent insanity. In Florida, for instance, evidence that a defendant was insane prior to committing a crime creates a presumption that the defendant was insane at the time of the crime, which the state has the burden to overcome.[50] A defendant who pleads temporary insanity is not entitled to such presumption and must carry her burden to establish insanity at the time of the crime. Normally, however, a temporary insanity plea is treated indistinguishably from a general plea of insanity. Even more so than with the general insanity defense, the criteria for determining whether an individual's alleged cognitive or volitional dysfunction was the product of a "diseased mind" – and indeed, what such a thing is – lies at the heart of the controversy and confusion surrounding the temporary insanity defense.[51]

Nonetheless, the defense has been used with varying success during different eras, and some types of defendants historically have done well pleading temporary insanity. In intimate violence cases involving female defendants in the nineteenth century, for instance, women whom juries found temporarily insane "typically received neither punishment nor institutionalization in an insane asylum."[52] Lorena Bobbitt spent only forty-five days in a Virginia mental hospital before being released to community supervision, despite having admittedly cut off her sleeping husband's penis.[53] Francine Hughes, whose story was made into a television movie titled *The Burning Bed*, did not spend any time in a mental institution following her acquittal.[54] These exceptions no doubt have helped keep the myth of temporary insanity as the perfect defense alive.

C. *The "Diseased Mind" Requirement*

Every formulation of the legal test for the insanity defense, temporary or otherwise, requires evidence that the defendant's cognitive dysfunction was caused by a diseased mind.[55] Typically, an insanity defense will not succeed

---

[49] *Id.*

[50] *See* Yohn v. State, 476 So. 2d 123, 124-25 (Fla. 1985).

[51] *See infra* Part I.C.

[52] Carolyn B. Ramsey, *Intimate Homicide: Gender and Crime Control, 1880-1920*, 77 U. COLO. L. REV. 101, 154-55 (2006).

[53] Bobbitt did spend approximately five weeks in a Virginia mental hospital following her acquittal. *See* ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 265 n.11 (2000) (citing *Lorena Bobbitt Is Released, Ordered to Get Counseling*, ARIZ. REPUBLIC, MAR. 1, 1994, at 1).

[54] *See* THE BURNING BED (Tisch/Avnet Productions Inc. 1984).

[55] MELTON ET AL., *supra* note 3, at 195; Richard E. Redding, *The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century*, 56 AM. U. L. REV. 51, 87 n.225 (2006).

unless the defendant can proffer convincing evidence that the defendant suffered from a psychosis or mental retardation.[56] More broadly, many jurisdictions preclude assertion of the defense unless there is evidence of a "known diagnosable mental disorder."[57] Although the legal test of insanity requires proof of mental disease or defect, few jurisdictions have defined the term. The ABA has, rather unhelpfully, defined mental disease or defect as "(i) impairments of mind, whether enduring or transitory; or, (ii) mental retardation, either of which substantially affected the mental or emotional processes of the defendant at the time of the alleged offense."[58] Such a definition begs the question of how to identify an impairment of the mind or even whether such an impairment refers to a neurological, psychological, or cognitive characteristic of the individual. As one writer long ago stated, outside of the "central core of the concept," what constitutes mental disease depends wholly on the "philosophy" of the expert.[59] As a result, a diseased mind is often simply inferred from the cognitive or volitional incapacities of the individual, leading courts to conclude that a diseased mind is any condition that prevents a defendant from knowing or appreciating the nature of his or her circumstances or from distinguishing right from wrong.[60] As criminal law Professor Wayne LaFave has complained, "[I]t would seem that any mental abnormality, be it psychosis, neurosis, organic brain disorder, or congenital intellectual deficiency . . . , will suffice *if* it has caused the consequences described in the second part of the test."[61] Accordingly, notwithstanding its formal inclusion in the legal test, the diseased mind requirement only sporadically precludes defendants from asserting temporary insanity.

Not surprisingly, therefore, courts, lawmakers, and juries have struggled to ascertain whether an insanity pleader's mind is truly "diseased."[62] Temporary insanity cases are especially problematic in this sense, given that almost by definition, a temporary insanity pleader is usually not claiming to suffer from a major or well-recognized cognitive disorder. As a result, temporary insanity

[56] MELTON ET AL., *supra* note 3, at 196 (reporting that sixty to ninety percent of successful insanity defenses are based on psychosis or retardation).

[57] Robert J. Howell, *The Temporary Insanity Defense*, 2 AM. J. FORENSIC PSYCHOL. 83, 85 (1984).

[58] ABA CRIMINAL JUSTICE STANDARDS § 7-6-1 (1986).

[59] Robert Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. PA. L. REV. 378, 384 (1952).

[60] *See* TIFFANY & TIFFANY, *supra* note 1, at 219 (explaining that some courts have defined mental disease in terms of its cognitive symptoms – that is, "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls" is a mental disease or defect (quoting McDonald v. United States, 312 F.2d 847, 851 (D.C. Cir. 1962))); *see also* United States v. Brawner, 471 F.2d 969, 983 (D.C. Cir. 1972).

[61] WAYNE R. LAFAVE, CRIMINAL LAW, § 7.2(b)(1), at 377 (4th ed. 2003).

[62] *See* MELTON ET AL., *supra* note 3, at 195-96.

cases frequently give rise to hard philosophical questions about the nature of criminal responsibility, an individual's responsibility for his or her emotions, and the nature of mind itself.

Largely to limit overuse of the insanity defense, courts and lawmakers began at the start of the twentieth century to demand medical evidence as a prerequisite to any insanity defense. This movement to "medicalize" the insanity defense has been met by efforts to expand or creatively redefine the scope of mental disease. Not only do major mental illnesses such as psychosis and schizophrenia satisfy the diseased mind requirement, but so also do a vast array of syndromes, conditions, and hazily defined diagnoses of disassociation, trauma, and emotional crisis that are difficult, if not impossible, for lay jurors to evaluate. Such diagnoses may include well-recognized trauma syndromes, such as post-traumatic-stress-disorder (PTSD)[63] and battered women's syndrome (BWS),[64] as well as more exotic syndromes such as "postconcussion syndrome," "low serotonin syndrome,"[65] organic personality syndrome,[66] dissociative disorders,[67] psychological decompensation,[68] and a variety of controversial psycho-medical claims, such as hypoglycemia-induced insanity resulting from sugar overdose.[69]

[63] *Id.* at 195 (describing how Vietnam veterans have successfully attributed their behavior to their experiences at war when those experiences "led to trauma and confused thinking"); s*ee also* United States v. Rezaq, 918 F. Supp. 463, 470 (D.D.C. 1996) (finding that defendant's severe PTSD constituted a mental disease for purposes of insanity defense).

[64] *See* Marley v. State**,** 747 N.E.2d 1123, 1126-27 (Ind. 2001); People v. Seeley, 720 N.Y.S.2d 315, 322 (N.Y. Sup. Ct. 2000) (stating that New York courts have broadened definition of "mental disease or defect" to include any mental infirmity or "trauma syndrome," and characterizing BWS as a subset or subcategory of post-traumatic stress syndrome and thus as a "trauma syndrome" within definition of New York statute (citing People v. Berk, 667 N.E.2d 308, 311 (N.Y. 1996); People v. Kruglik, 682 N.Y.S.2d 440, 440 (N.Y. App. Div. 1998); People v. Rossakis, 605 N.Y.S.2d 825, 827 (N.Y. Sup. Ct. 1993))).

[65] MELTON ET AL., *supra* note 3, at 220-21.

[66] Although organic personality syndrome is not a defined mental disease or illness, State v. Plante, 594 A.2d 1279, 1281-82 (N.H. 1991), according to one authority, up to twenty-five percent of persons who successfully assert insanity defense are classified as having personality disorders. *See* MELTON ET AL., *supra* note 3, at 196.

[67] These can include dissociative identity disorder, formerly referred to as multiple personality disorder, dissociative amnesia, dissociative fugue, and depersonalization disorder. *See* MELTON ET AL., *supra* note 3, at 221-22.

[68] Experts used this term to describe Francine Hughes's mental condition at the time she killed her husband. *See* FAITH MCNULTY, THE BURNING BED 282-83 (1980).

[69] This was the basis of Dan White's Twinkie overdose defense. *See* MELTON ET AL., *supra* note 3, at 220. Hypoglycemia has also been treated as properly raising a defense of involuntary intoxication and not insanity or temporary insanity. *See* People v. Garcia, 113 P.3d 775, 783-84 (Colo. 2005). Treating such claims as involuntary intoxication rather than temporary insanity has permitted defendants to raise them despite their state's ban on the

While most jurisdictions have not attempted to define what constitutes a diseased mind, virtually all provide that some conditions do not, as a matter of law, constitute the requisite diseased mind. The revised federal test, for instance, does not define mental disease, but it does require that as a precondition for asserting the insanity defense the disease must be "severe."[70] Voluntary intoxication and strong emotion or passion are frequently identified as legally inadequate bases of an insanity defense.

In any event, the formal rule that insanity must be the product of a diseased mind, rather than merely a reaction to some external stimulus, has been generally followed. There is much confusion, however, regarding when evidence of an external stimulus, or "psychic shock," can be admitted to bolster or even establish the claim of mental disease. In a 1927 treatise, Harvard Professor S. Sheldon Glueck wrote, "When external circumstances are considered capable, to some extent at least, of inducing, intensifying, or precipitating mental disorder, they may 'always be admitted to evidence the probability of such affection'; but some additional foundation for probability must be laid by 'other evidence that there was a diseased mental condition.'"[71] Australia's highest court has effectively ruled that the *M'Naghten* test's diseased mind requirement cannot be met if the cognitive dysfunction is caused by an external stimulus.[72]

The diseased mind requirement has made the proffer of expert testimony in temporary insanity cases essential, even (and perhaps especially) where the primary claim is that external stimuli triggered or caused the defendant's temporary breakdown. This fact prompted some critics of the defense to complain that "what differentiates a crime due to temporary insanity from the so-called crimes of passion is chiefly the financial standing of the defendant" and the persuasiveness and creativity of the expert.[73] Regardless of the accuracy of that criticism, it is not difficult to adduce examples of testimony that seem designed to recast a defendant's emotional trauma or turmoil in medicalized terms that comport with the diseased mind requirement. In the famous "burning bed" case, for example, doctors testifying on behalf of defendant Francine Hughes claimed that when Francine killed her husband Mickey:

> [S]he was overwhelmed by the massive onslaughts of her most primitive emotions. Emotions she had suppressed for so many years overwhelmed

insanity defense. *See, e.g.*, Bieber v. People, 856 P.2d 811, 815-16 (Colo. 1993).

[70] 18 U.S.C. § 17 (2006).

[71] S. SHELDON GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 37 (photo. reprint 1993) (1927) (quoting 1 JOHN WIGMORE, EVIDENCE 483 (2d ed. 1923)).

[72] *See* C R Williams, *Development and Change in Insanity and Related Defences*, 24 MELB. U. L. REV. 711, 720-21 (2000) (discussing the Australian Supreme Court decision, *R v Radford* (1985) 42 SASR 266 (Austl.)).

[73] Maurice Floch, *The Concept of Temporary Insanity Viewed by a Criminologist*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 685, 687 (1954-1955).

> her. . . . She experienced a breakdown of her psychological processes so that she was no longer able to utilize judgment[,] . . . no longer able to control her impulses[, and] . . . unable to prevent herself from acting in the way she did.[74]

Another example is provided in the case of a man named Kiser, who, deeply depressed from a failing marriage, killed his wife's boyfriend a day after she asked him for a divorce. At his trial, a psychologist testified that Kiser "was a borderline personality . . . in the midst of a psychotic decompensation," which she described as involving "unstable emotional behavior, marked shifts, going from very angry to reasonably normal to angry to depressed. . . . Compulsive acts is another component of the diagnosis. It's primarily a diagnosis for those people who are extremely vulnerable, to psychotic decompensation under situations of separation and loss."[75] Another doctor testified that Kiser suffered from "depression reaching psychotic proportions."[76]

In sum, the diseased mind requirement continues to shape the form in which the temporary insanity defense is proffered, but because of the lack of consensus regarding what constitutes a mental disease, and because of the relative ease with which situational stressors can be characterized as mere catalysts of mental dysfunction, it arguably does little to bar criminal defendants with the means to hire expert witnesses from presenting a temporary insanity defense to a jury.

D. *Criticism*

The temporary insanity defense first became the subject of heated controversy in the mid-nineteenth century when it appeared in cases involving the so-called "unwritten law," which was typically invoked by husbands who killed their wives' lovers and was thought to sanction the killing of rogues and

---

[74] MCNULTY, *supra* note 68, at 282. For a more thorough discussion of Francine Hughes's disturbing story, see *infra* Part III.B.2.

[75] Kiser v. Boone, 4 F. App'x 736, 739 (10th Cir. 2001) (internal quotation marks omitted) (affirming grant of habeas corpus on ground of insufficient evidence of sanity).

[76] *Id.* Another example is the case of John Hogan, a British man who was cleared of a murder charge for throwing his six-year-old son to his death off a hotel balcony in Greece. The Greek court concluded that he was temporarily insane, based on testimony that "he suffered 'an earthquake of psychosis' after his then-wife Natasha told him she wanted a divorce." Julie Harding & Emily Koch, *Death Plunge Dad John Hogan Back in Bristol*, BRISTOL EVENING POST, June 18, 2009, at 1. Another case involving temporary insanity comes from Montana. *See* State v. Dist. Court of Second Judicial Dist., 566 P.2d 1382, 1384 (Mont. 1977) (describing testimony of psychiatrist in support of temporary insanity defense as stating that "[a]t the time of the incident which led to the present charges it is felt that the patient was unable to conduct himself according to the requirements of the law because he had reached the climax of a severe adjustment reaction which had temporarily assumed psychotic proportions").

libertines responsible for disgracing women.[77] Temporary insanity was the principal defense in these cases because the unwritten law was, as the name suggests, a moral concept lacking any formal codification and thus legally unavailable to defendants. In several high-profile unwritten law trials in the nineteenth century, jury acquittals on temporary insanity grounds were met with cheers from the gallery but scorn from the newspapers that followed the trials closely.[78] Newspaper editorialists alleged that the temporary insanity defense was a nullification doctrine, pure and simple.[79]

Academic interest in and criticism of the defense reached a minor peak around the midpoint of the twentieth century, when numerous commentators published highly critical complaints about the defense. Surveying cases through the late 1940s, editors of the *Michigan Law Review* cited an "apparently increasing number of cases" in which defendants asserted temporary insanity.[80] Commentators uniformly criticized temporary insanity as the "first line of defense"[81] – subject to "abuse by the unscrupulous defendant seeking his last avenue of escape"[82] – and as "an invention of the creative minds of the legal profession."[83] Critics complained that criminal defendants were winning acquittals in homicide cases despite experiencing only mild and fleeting neuroses (rather than "fixed or prolonged" psychoses)[84] at the time of the crime or, worse yet, simple "violent emotional explosions" that, when treated as the basis of an insanity defense, incoherently conflated it with the "heat of passion" doctrine.[85] Raising themes that surfaced in the

[77] *See* Allen D. Spiegel, *A Paroxysmal Insanity Plea in an 1865 Murder Trial*, 16 J. LEGAL MED. 585, 591 (1995).

[78] *See id.* at 600.

[79] *See, e.g.*, *The Lessons of the McFarland Case*, 1 ALB. L.J. 385, 386 (1870) ("Insanity, the press say, was the pretext for an acquittal according to the forms of law; the prisoner was no more insane than jealous, brutal, drunken husbands usually are when deprived of wives who have always supported them . . . .").

[80] Lewis R. Williams, *Criminal Law – "Temporary Insanity" – Arguments and Proposals for its Elimination as a Defense to Criminal Prosecution*, 49 MICH. L. REV. 723, 723-24 (1951). Not all discussions of the defense during this period were critical. *See, e.g.*, R.W. Medlicott, *Brief Psychotic Episodes (Temporary Insanity)*, 65 N.Z. MED. J. 966 (1966).

[81] *See, e.g.*, Block, *supra* note 5, at 394 ("How can the law and psychiatry work out their differences when there is no such medical phenomenon as temporary insanity, but psychiatrists remain willing to testify, time and again, that an accused is presently sane but was temporarily insane at the moment he committed the crime?").

[82] Williams, *supra* note 80, at 729.

[83] Block, *supra* note 5, at 401.

[84] Williams, *supra* note 80, at 733.

[85] *See, e.g.*, Floch, *supra* note 73, at 685 (arguing that "what differentiates a crime due to temporary insanity from the so-called crimes of passion is chiefly the financial standing of the defendant"). One recent Note author similarly complains that although media and defense attorneys would like society to believe otherwise, "people don't 'just snap.'"

1980s following John Hinckley's attempted assassination of President Reagan, a popular belief arose that temporary insanity was a trick foisted on "maudlin" juries by plainly guilty criminals "rich enough to hire lawyers and alienists" in their defense.[86] Critics also complained that defendants who successfully interposed a temporary insanity defense were routinely released without any type of treatment or institutionalization[87] and that their release back into society would be widely perceived as a "triumph over law and order."[88]

Prosecutors attempting to capitalize on the deep-seated popular distrust of the temporary insanity defense have often disparaged it to juries. One prosecutor urged a jury not to give a defendant invoking the defense a "free pass."[89] Another suggested to the jury – incorrectly – that the defense did not even exist, providing grounds for reversal on appeal.[90]

Helen Silving, in a study of euthanasia cases, framed the case against the temporary insanity defense, which she viewed as a "legal technicality," incisively:

> [T]he use of legal technicalities in their acquittal tends to give laymen the impression that the law is a magic formula rather than an honest tool of meting out justice. Public confidence in the administration of criminal justice is hardly strengthened when moral issues are shifted instead of being solved, or when the law relegates to juries the function of correcting its inequities.[91]

One might be tempted to argue, however (as I do below), that Silving has it precisely backwards. The law is filled with "legal technicalities." Sometimes, it is precisely those technicalities that stand between a jury's sense of justice and a legally valid verdict. Temporary insanity may function as much to overcome the "magic formula" image of law as to advance it.

In any event, the flurry of criticism of the temporary insanity defense quickly faded. Few legal academics have paid much attention to the temporary insanity defense since the 1960s, even though it continues to be regularly

---

Megan C. Hogan, Note, *Neonaticide and the Misuse of the Insanity Defense*, 6 WM. & MARY J. WOMEN & L. 259, 279 (1999) (quoting BARBARA R. KIRWIN, THE MAD, THE BAD, AND THE INNOCENT: THE CRIMINAL MIND ON TRIAL 25 (1997)).

[86] Bishop, *supra* note 44, at 1514.

[87] Block, *supra* note 5, at 392 (stating that author had "been unable to find a single case in this jurisdiction where a defendant acquitted by reason of temporary insanity was thereafter placed under any type of restraint").

[88] *Id*.

[89] People v. Jones, 931 P.2d 960, 995 (Cal. 1997). In another case, the state's psychiatric witness testified that the temporary insanity defense was "nonsense" and "a 'cop out.'" Kiser v. Boone, 4 F. App'x 736, 740 (10th Cir. 2001).

[90] *See* People v. Stack, 613 N.E.2d 1175, 1185 (Ill. 1993).

[91] Helen Silving, *Euthanasia: A Study in Comparative Criminal Law*, 103 U. PA. L. REV. 350, 354 (1954).

utilized by criminal defendants.[92] To the extent that it has received attention more recently, the suspicion that temporary insanity functions primarily as a nullification doctrine continues to predominate.[93]

II. CONCEPTIONS OF TEMPORARY INSANITY

There is little consensus about what it means to be "temporarily insane."[94] The term has been used variously during the past several centuries. Sometimes, temporary insanity has been understood to signify little more than a momentary lapse of sanity at the time of a crime. As one writer explained, "Under the plea of 'temporary insanity,' the defendant [allegedly] lapsed into this insane state while the crime is being committed, and immediately thereafter recovers his sanity."[95] One lawyer mockingly described temporary insanity in closing argument during a prominent nineteenth century trial as a "lightning bug insanity, the kind that covers the time of the shooting and then goes out."[96] Popular movies featuring the temporary insanity defense have typically adopted the "momentary lapse" theory of temporary insanity.[97]

Alternatively, others understand temporary insanity to mean that the cause of a defendant's inability to understand or conform her conduct to the law was something other than mental disease or defect, the traditional requirements to establish insanity.[98] Frequently, a case is styled as temporary insanity where the alleged cause of the defendant's loss of control is extreme anger, rage, or

---

[92] As of August 2011, a search for articles on criminal law with the term "temporary insanity" in the title turns up a single bar journal entry in the Westlaw database.

[93] *See, e.g.*, FRIEDMAN, *supra* note 30, at 147 (concluding after review of nineteenth century "honor" defense cases that "[i]n some cases, of course, 'insanity' merely disguised one form of jury nullification; it was an excuse for upholding this or that 'unwritten law'"); David N. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J.L. REFORM 861, 878, 880 (1995) (questioning whether jury acquittal in "abuse excuse" cases, including Lorena Bobbitt case, and hung juries in Menendez brothers cases, were "surrogates for impermissible concerns that a nullification instruction would otherwise permit").

[94] Chiu, *supra* note 13, at 1333.

[95] Block, *supra* note 5, at 392.

[96] Donald F. Paine, *Murder in the Churchyard*, 43 TENN. B.J. 14, 16 (2007). Mark Twain was an early critic of the temporary insanity defense:

> [T]he prisoner had never been insane before the murder, and under the tranquilizing effect of the butchering had immediately regained his right mind . . . . Formerly, if you killed a man, it was possible that you were insane – but now, if you, having friends and money, kill a man, it is evidence that you are a lunatic.

MARK TWAIN, *A New Crime*, *in* SKETCHES NEW AND OLD 220, 222, 225 (Harper ed. 1917), *quoted in* Bishop, *supra* note 44, at 1514.

[97] *See supra* note 24.

[98] Amanda C. Pustilnik, *Prisons of the Mind: Social Value and Economic Inefficiency in the Criminal Justice Response to Mental Illness*, 96 J. CRIM. L. & CRIMINOLOGY 217, 251-52 (2005).

jealousy.[99] In this view, temporary insanity is a synonym for emotional insanity, a condition understood as the temporary dethronement of a person's reason "not by disease, but by anger, jealousy, or other passion."[100] Emotional insanity has long been disfavored by courts and criticized by psychiatrists.[101] This understanding of temporary insanity has also been frequently borrowed by Hollywood and often criticized as a corruption or misapplication of the traditional heat of passion defense.[102] Courts have used strong language to condemn the defense so understood, describing it, as one California court did, as "always used as a pretext by weak-minded jurors, unmindful of their oaths, to render a verdict of acquittal in cases where guilt has been incurred."[103]

At still other times, temporary insanity has been understood as a synonym for irresistible impulse (or, insane impulse),[104] particularly where the allegedly irresistible impulse was the product of strong emotion.[105] Such a theory was

[99] *See, e.g.*, WEIHOFEN, *supra* note 46, at 122; *see also* Barbour v. State, 78 So. 2d 328, 340-41 (Ala. 1955).

[100] Bell v. State, 180 S.W. 186, 196 (Ark. 1915); *see also* Williams, *supra* note 80, at 727 n.15 (citing People v. Finley, 38 Mich. 482 (1878)).

[101] *See Bell*, 180 S.W. at 196 ("[O]ne who is otherwise sane will not be excused from a crime he has committed while his reason is temporarily dethroned, not by disease, but by anger, jealousy, or other passion . . . ."); Taylor v. United States, 7 App. D.C. 27 (1895), *discussed in* TIFFANY & TIFFANY, *supra* note 1, at 227; WEIHOFEN, *supra* note 46, at 122 (stating that temporary insanity as product of emotional stress "has no scientific validity"). Weihofen did observe, however, that it was entirely possible that a sane person might be so emotionally agitated that his consciousness was overwhelmed: "A state or dissociation may arise in which the person carries out a series of acts of which he later has little or no recollection." *Id.* Weihofen pointed out that courts had never recognized such a defense but argued that "it should constitute a defense" on voluntariness grounds, similar to sleepwalking. *See id.*

[102] *See, e.g.*, Floch, *supra* note 73, at 685. On this account, the jury apparently got it right in the case of Ellie Nesler. Nesler pleaded temporary insanity after she "shot and killed a man accused of molesting her son." Marder, *supra* note 20, at 3E.

> Nesler had waited three years for the molestation case to come to trial . . . . As she stood in the courtroom hallway, waiting to testify, Nesler heard from a previous witness that the case did not look good and that the defendant "was going to walk." So . . . a distraught Nesler shot the defendant as he sat handcuffed in the courtroom.

Id. Nesler was acquitted of premeditated murder but convicted of voluntary manslaughter, presumably because the jury believed that Nesler had killed in the heat of passion, not while temporarily insane. Nesler was sentenced to ten years in prison. *Id.*

[103] People v. Kernaghan, 14 P. 556, 574 (Cal. 1887) (rejecting "what is called emotional insanity, which begins on the eve of the criminal act, and leaves off and ends when it is consummated"); *see* Barnett v. State, 39 So. 778, 780 (Ala. 1905) (stating that one who is "insanely jealous" may have temporarily lost one's moral compass, but cannot claim a legal excuse on that basis).

[104] *See, e.g.*, State v. Buck, 219 N.W. 17, 20 (Iowa 1928).

[105] Collins v. State, 102 So. 880, 882 (Fla. 1925) (affirming conviction for killing wife's alleged rapist where there was no intermittent insanity or mental disorder, instead only "a

illustrated in *Anatomy of a Murder*[106] and was successfully utilized by Lorena Bobbitt.[107] Fyodor Dostoevsky also had this understanding when he described temporary insanity as a "darkening" or "clouding" of the mind.[108] In such instances, courts' receptivity to the defense has usually turned on whether the jurisdiction's insanity defense permits claims of irresistible impulse.[109] Because many jurisdictions continue to permit an insanity defense based on a claim of impaired volitional control, temporary insanity continues to be understood in some jurisdictions at least in part as a volitional defect.[110]

Although what it means to be temporarily insane has varied considerably among courts, the temporary insanity defense itself is a venerable one, readily found in the writings of the classic common law authorities. According to Coke, the *non compos mentis* fell into four camps: (1) idiots, i.e., those born with mental defect; (2) those who "by sicknesse, griefe, or other accident wholly loseth [their] memorie and understanding"; (3) lunatics, i.e, those whose understanding comes and goes; and (4) persons who are intoxicated.[111] Of these categories, only the first is incompatible with a claim that the mental affliction was temporary in kind, while irresponsibility due to intoxication

moment of uncontrollable impulse, or . . . a condition of mental irresponsibility equivalent to temporary insanity").

[106] *See* ANATOMY OF A MURDER, *supra* note 24.

[107] *See* David Margolick, *Lorena Bobbitt Acquitted in Mutilation of Husband*, N.Y. TIMES, Jan. 22, 1994, at A1.

[108] Michael A. Berch, *A Defense Plea for Leniency at the Mitigation Hearing*, 38 ARIZ. ST. L.J. 469, 477 (2006) (discussing FYODOR DOSTOYEVKSY, CRIME AND PUNISHMENT (Richard Pevear & Larissa Volokhonsky trans., 1993)); *see also* Robert Batey, *In Defense of Porfiry Petrovich*, 26 CARDOZO L. REV. 2283, 2297 (2005).

[109] One Georgia court, for example, found no error in the trial court's decision not to instruct the jury on temporary insanity where the defendant argued that "while ordinarily sane, his physical condition was such and his nerves were so unstrung that he was more easily excited than an ordinary man, and that, when thus excited, he became temporarily irresponsible." Carter v. State, 58 S.E. 532, 536 (Ga. 1907). The court reasoned that "[n]o decision has come under our observation where temporary insanity or loss of self-control, caused by physical infirmity, has been held to justify a killing or even to reduce the offense." *Id*.

[110] *See, e.g.*, Robey v. State, 456 A.2d 953, 959 (Md. Ct. Spec. App. 1983) (finding that a woman diagnosed with "atypical impulse disorder" was temporarily insane during beatings of her baby, and that insanity was triggered by and coextensive with the baby's cries, so that when the baby stopped crying, her insanity ceased as well).

[111] 1 COKE, PLEAS OF THE CROWN 6, *cited in* S. SHELDON GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW: A STUDY IN MEDICO-SOCIOLOGICAL JURISPRUDENCE 129 (1927). The fourth category is actually somewhat wider than the merely intoxicated. In Coke's words, it includes "hee that by his owne vitious act for a time depriveth himself of his memorie and understanding, as he that is drunken." *Id.* Coke's emphasis here is on those who are morally responsible for causing their mental lapse. It is unclear, though, how far beyond the intoxicated Coke would be willing to go.

directly contemplates it. While Coke rejected temporary insanity as a defense in cases of voluntary intoxication, his understanding of "lunacy" quite clearly accommodates an insanity claim in cases where the dysfunction is temporary, while nothing in his description of the *non compos mentis* precludes the defense from being raised based on durational concerns. Still, he was quite clear that only where the particular dementia causes "a total alienation of the mind or perfect madness," should it provide a valid defense.[112] Where such total alienation of mind accompanies the commission of a crime, however, no matter how brief its duration, Coke asserted that a defense should be available, for "the person that is absolutely mad for a day, killing a man in that distemper, is equally not guilty, as if he were mad without intermission."[113] "On the other hand, a lunatic who commits crimes during lucid intervals is subject to liability as if he had no such insanity."[114] Like the other classic common law writers, including Bracton and Hale, Coke strongly insisted that for a lunatic to prevail on an insanity defense, "he must prove that at the time of the act he was *furiosus* – totally insane."[115]

Like Coke, Hale distinguished idiocy – i.e., congenital mental defect – from what he referred to as *dementia accidentalis vel adventitia*, that is, dementia arising from causes varying from "distemper of the humours of the body, as deep melancholy or adjust choler; sometimes from the violence of a disease, as a fever or palsy; sometimes from a concussion or hurt of the brain."[116]

Such conditions, Hale noted, frequently disrupt rationality by causing, for instance, "excessive fears and griefs," and should not excuse crime in most cases since "doubtless most persons, that are felons of themselves, and others are under a degree of partial insanity."[117] Notwithstanding the advances of psychiatry, neurology, and medicine in the intervening years, thinking about the legal status of temporary insanity in the centuries since has brought only relatively minor changes, and the categories identified by Coke and Hale – hereditary or acquired mental illness (madness) or mental retardation (idiocy), emotional upset (melancholy and choler), recurrent or cycling mental conditions (lunacy), and intoxication – continue to substantially exhaust the main types of temporary insanity claims that tend to be brought.

---

[112] 1 MATTHEW HALE ET AL., HISTORIA PLACITORUM CORONAE. THE HISTORY OF THE PLEAS OF THE CROWN 29-30 (P.R. Glazebrook ed., Prof'l Books Ltd. 1971) (1847).

[113] *Id.* at 31; *see also id.* at 35 ("And it is all one, whether the phrenzy be fixd and permanent, or whether it were temporary by force of any disease, if the fact were committed while the party was under that distemper.").

[114] Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 ST. JOHN'S L. REV. 725, 782 (2004); *see also* State v. Sewell, 48 N.C. (3 Jones) 245 (1855).

[115] NORMAN J. FINKEL, INSANITY ON TRIAL 9 (1988).

[116] HALE, *supra* note 112, at 30.

[117] *Id.*

A. *Lunacy*

To the classic common law writers, "[l]unacy was a form of temporary insanity, which derived its name from the popular belief that it was caused by the phases of the moon."[118] Lunatics were thought to have a valid basis to assert an irresponsibility defense as long as their claims met certain criteria. Although today it is more common to speak of mental illnesses that "cycle," such as bipolar disorder, or that manifest periods of "remission," such episodic or transitory dementia described by Coke and Hale continues to provide a valid basis for an insanity defense.

After surveying the cases, leading twentieth century insanity defense authority Abraham Goldstein concluded that temporary insanity was a defense only where it resulted, as with the classic notion of lunacy, from a permanent condition marked by lucid intervals and where the defendant could carry his burden of proof that the crime was not committed during a period of lucidity.[119] Professor Goldstein cited epilepsy as a paradigmatic example of a recurrent mental disease that rendered persons legally insane during an episode but perfectly lucid, and hence criminally responsible, otherwise.[120] Assuming that the defendant can establish the authenticity of the diagnosis, such conditions provide a relatively uncontroversial basis for an insanity claim.[121] Indeed, insanity caused by such a condition is arguably not even truly "temporary" in that even during lucid periods the underlying condition still exists in a latent state.[122]

Episodic mental dysfunction caused by more ephemeral conditions, however, can be more problematic. The common law writers accepted that physical hardships might well trigger a bout of temporary insanity. Hale, for instance, approvingly cited the acquittal of a married woman of good reputation who shortly after childbirth killed her newborn baby in a "phrenzy" apparently brought about by an extended labor and lack of sleep. The jury was

[118] Milhizer, *supra* note 114, at 782.

[119] *See* ABRAHAM S. GOLDSTEIN, THE INSANITY DEFENSE 117 (1967).

[120] *Id.* That was precisely the theory asserted by the defendant in *State v. Cortez*, 218 N.W.2d 217 (Neb. 1974), where evidence that defendant had been subject to blackouts for decades and that he had a convulsive disorder equivalent to epilepsy was enough to put a temporary insanity charge to the jury. *See id.* at 217-18.

[121] An example of such a diagnosis whose authenticity is subject to challenge can be seen in *Phillips v. State*, 863 S.W.2d 309, 312 (Ark. 1993), in which defendant's psychiatrist attributed his temporary insanity to "intermittent explosive disorder," while admitting that the disorder was not widely accepted and was perhaps better classified as a mere "personality disorder." *Id.* at 311, 312.

[122] As a result, courts have supported continued institutionalization of persons acquitted by reason of temporary insanity on the grounds that a person may have a mental disease, even though presently free of symptoms, if the disease is judged to be in "remission." *See* Revels v. Sanders, 531 F.3d 724, 725 (8th Cir. 2008) (Colloton, J., dissenting from denial of rehearing en banc); United States v. Weed, 389 F.3d 1060, 1073 (10th Cir. 2004).

instructed that "if they found her under a phrenzy, tho by reason of her late delivery and want of sleep, they should acquit her,"[123] which, finding no evidence that she had feigned her condition, it did. Female lunacy has frequently been attributed to childbearing and more controversially to the hormonal fluctuations caused by female biology. "'Suppression of the menses'"[124] or "congestive dysmenorrhoea"[125] was commonly thought to cause women to become temporarily insane and was successfully utilized as the basis of a temporary insanity defense in numerous cases.[126] In addition, temporary insanity defenses have succeeded based on such scientifically questionable diagnoses as "puerperal mania," "lactational insanity,"[127] "transitoria mania," "ephemeral mania," and "morbid impulse."[128] Such theories, which generally reflected lay assumptions about human psychology more than proven psychiatric knowledge, have attempted to recognize a biologically identifiable dysfunction in order to excuse female aggression or criminality under sympathetic circumstances.[129]

---

[123] HALE, *supra* note 112, at 36.

[124] Jacobs, *supra* note 11, at 9-10 (quoting Thomas L. Riley, *Premenstrual Syndrome as a Legal Defense*, 9 HAMLINE L. REV. 193, 194 & n.5 (1986)).

[125] Severe congestive dysmenorrhoea was diagnosed by Dr. Calvin M. Fitch at the trial of Mary Harris for killing her seducer Adoniram J. Burroughs. *See* Ireland, *Insanity and the Unwritten Law*, *supra* note 11, at 161. Menstruation problems are still acknowledged as a potential basis for mental illness. *See* Nicole R. Grose, Note, *Premenstrual Dysphoric Disorder as a Mitigating Factor in Sentencing: Following the Lead of English Criminal Courts*, 33 VAL. U. L. REV. 201, 226 (1998) (arguing that premenstrual dysphoric disorder (PMDD) should be recognized as mitigating factor in criminal sentencing because "women who suffer from [PMDD's] severe symptoms have a legitimate and treatable illness").

[126] The dysmenorrheal-temporary insanity defense used by Mary Harris was also employed successfully in the sexual dishonor cases of Laura Fair, Fanny Hyde, and Theresa Sturla. Ireland, *Frenzied and Fallen Females*, *supra* note 11, at 105; *see also* Lindsey C. Perry, Note, *A Mystery of Motherhood: The Legal Consequences of Insufficient Research on Postpartum Illness*, 42 GA. L. REV. 193, 213 (2007) ("At the time of its enactment, the English Infanticide Act reflected the assumption that after childbirth women suffered from a type of lunacy and were considered to be seriously mentally debilitated." (internal quotation marks omitted)).

[127] Elizabeth Rapaport, *Mad Women and Desperate Girls: Infanticide and Child Murder in Law and Myth*, 33 FORDHAM URB. L.J. 527, 554-55 (2006) (citing George K. Behlmer, *Deadly Motherhood: Infanticide and Medical Opinion in Mid-Victorian England*, 34 J. HIST. MED. & ALLIED SCI. 403, 412-14 (1979)).

[128] Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 73, 993 (1995) (citing ANN JONES, WOMEN WHO KILL 164 (1980)).

[129] *See* Kirsten Johnson Kramar & William D. Watson, *Canadian Infanticide Legislation, 1948 and 1955: Reflections on the Medicalization/Autopoiesis Debate*, 33 CAN. J. SOC. 237, 239 (2008) ("[T]he biological theory . . . that women in childbirth, especially in difficult circumstances, were prone to temporarily lose reason or self-control, was a *lay, rather than a psychiatric, theory*." (citing Tony Ward, *The Sad Subject of Infanticide: Law, Medicine*

Courts routinely permit juries to consider temporary insanity that arises from such transitory causes as a blow to the head or body or a lightning strike.[130] Even major mental psychoses can "wax and wane," such that they render a defendant insane for only a short duration.[131] That was precisely the contention of the defendant in *People v. Gross*, a California case in which Gross was charged with and convicted of raping his wife.[132] At trial, experts testified that Gross suffered from a "psychotic and mood disorder" arising from "head trauma; polysubstance dependence; and schizoid personality traits."[133] Taking a page from Dostoyevsky, Gross testified that at the time of the attack "he felt 'total darkness' well up in him and take over so that he lost control over what he said or did" and "was insane when he digitally penetrated his wife and tried to have sex with her in the bedroom."[134] On appeal, the appellate court found that the trial court erred when it withheld a requested jury instruction on temporary insanity.[135] The appellate court explained that "a reasonable jury could be persuaded that appellant was temporarily insane by appellant's testimony during the guilt phase that he snapped out of the state he was in when his daughter appeared" and was "insane for a period of minutes" and by his experts' testimony that "he did not appreciate the difference between right and wrong during the offenses."[136]

B. *Irresistible Impulse*

Courts, commentators, and screenwriters occasionally have treated temporary insanity as a synonym for "irresistible impulse,"[137] generally defined as the "impairment of the power of volition, resulting from mental

and Child Murder, 1860-1938, 8 SOC. & LEGAL STUD. 163, 165-66 (1999))).

[130] *See* Ragland v. State, 27 So. 983, 985 (Ala. 1900) (describing defendant's argument that a blow to the head was the cause of "recurrent manifestations" of insanity); Hankins v. State, 201 S.W. 832, 833 (Ark. 1917) (reporting witness testimony that after being struck by lightning, defendant "did not seem like the same boy"); Mitra v. Commonwealth, 5 S.W.2d 275, 276-77 (Ky. 1928) (allowing the jury to consider a temporary insanity defense on the basis that the defendant had been struck by a meat cleaver right before murdering the victim, even though the defense was rejected by jury, undoubtedly in part because the defendant was at that time attempting to rob a grocery store); Crum v. Commonwealth, 259 S.W. 708, 709 (Ky. 1924) (holding that it was a reversible error to refuse to permit a doctor's testimony that if the defendant had been struck in the head by a big enough rock the blow could have made him temporarily insane).

[131] People v. Gross, No. D041448, 2004 WL 792093, at *9 (Cal. Ct. App. Apr. 14, 2004).

[132] *Id.* at *1.

[133] *Id.* at *2.

[134] *Id.*

[135] *Id.* at *9.

[136] *Id.*

[137] *See* Richard H. Kuh, *The Insanity Defense: An Effort to Combine Law and Reason*, 110 U. PA. L. REV. 771, 786 (1962).

disease."[138] In *Anatomy of a Murder*, the defendant's temporary insanity defense was alleged to consist of an "irresistible impulse" springing from a "dissociative reaction."[139] Lorena Bobbitt's defense likewise was predicated on the notion that "she cut off her husband's penis because of an 'irresistible impulse' born of temporary insanity."[140] In such cases the temporary insanity defense has absorbed the skepticism that surrounds the controversial irresistible impulse doctrine. For example, in *Howard v. Commonwealth*,[141] the defendant Howard was charged with and convicted of killing his mistress and fiancée by stabbing her in the breast after he found her "talking to a man by the name of Brown" with whom Howard suspected she had "illicit relations."[142] On appeal, the court found no error in the trial court's failure to give the jury an insanity instruction, given that "[t]here [was] no evidence that he was suffering from any mental disease, and it [was] only claimed that by reason of a jealous frenzy he became temporarily insane and acted under the influence of an irresistible impulse."[143]

The irresistible impulse doctrine was formulated as a supplement to the *M'Naghten* test by those critical of its exclusive focus on cognitive understanding of the wrongfulness of one's criminal conduct. Although a significant minority of jurisdictions has adopted it at one time or another, it has never won support in the majority of U.S. courts.[144] The concept of irresistible impulse came under heavy criticism by the middle of the twentieth century. In its influential report released in 1954, the British Royal Commission described it as "largely discredited" and "inherently inadequate and unsatisfactory."[145] Although few states continue to recognize irresistible impulse expressly as a defense, the ALI insanity test includes a volitional component and is currently utilized by a significant minority of the states.[146]

---

[138] WEIHOFEN, *supra* note 46, at 94.

[139] ANATOMY OF A MURDER, *supra* note 24.

[140] Maria E. Odum, *A Difficult Defense in Bobbitt Trial; Prosecution's Job Easier, Some Legal Scholars Say*, WASH. POST, Jan. 16, 1994, at B1. Bert Stacy presented a similar defense while on trial in Vermont for the murder of his wife. At trial, Stacy contended that "he did not shoot his wife, but that if he did he was temporarily insane at the time and governed by an irresistible impulse, caused by information he had received concerning her improper relations with other men, and certain incidents which he had observed which corroborated that information." State v. Stacy, 160 A. 257, 263 (Vt. 1932).

[141] 5 S.W.2d 1056 (Ky. 1928).

[142] *Id.* at 1056.

[143] *Id*. at 1057.

[144] *See* LAFAVE, *supra* note 61, § 7.3(a), at 389 n.1 (noting that three states – Georgia, New Mexico, and Virginia – currently recognize the irresistible impulse doctrine).

[145] *See* Jerome Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L.J. 761, 776 (1956) (quoting ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953 REPORT 109 (1953)).

[146] *See* LAFAVE, *supra* note 61, § 7.5(a), at 399-400.

Ultimately, whether lack of volitional control should render criminal conduct irresponsible is a matter of the breadth of a jurisdiction's insanity defense. In theory, just as a person might be temporarily unable to distinguish between right and wrong, a person might be temporarily unable to exercise volitional control, making clear that the occasional tendency to treat irresistible impulse and temporary insanity as synonymous is in error.

C. *Emotional Insanity*

Twentieth century critics of the temporary insanity plea were not incensed by use of the defense in circumstances the classical writers would have identified as "lunacy" but were instead focused on a more ephemeral, and historically problematic, alleged cause of temporary madness: extreme and violent emotion or passion. The classic common law writers did not believe that strong passions provided an appropriate basis for a temporary insanity defense.[147]

Despite that fact, emotional insanity claims flourished for a time during the nineteenth century. Such claims were at the heart of the so-called unwritten law or honor defense, typically asserted by men (and occasionally women) who murdered adulterous spouses or their lovers or who avenged rapes of wives, mothers, and daughters.[148] Because – as the term "unwritten law" suggests – virtually no jurisdictions in the United States codified the honor defense,[149] those charged with alleged honor killings frequently pled temporary insanity to provide a legal basis for acquittal. Juries frequently obliged these defendants in the nineteenth and, indeed, well into the twentieth century.[150]

Three early temporary insanity cases involving female defendants nicely illustrate the strong ties between the honor code, extreme passion, and temporary insanity. Pasqualina Robertiello was charged with first-degree murder after she shot and killed her betrothed, Nicolo Pierro, in front of two eyewitnesses.[151] Trial testimony established that after seducing, ravishing, and impregnating Pasqualina, Nicolo "grew weary of the girl" and abandoned

---

[147] *See* annotations to HALE, *supra* note 112, at 36 (citing Dew v. Clark, (1826) 3 Add. 79, 162 Eng. Rep. 410 (Prerog. Ct.), for proposition that "[d]ementation arising from unruly passion, is no excuse" and Parker, *arguendo* in Commonwealth v. Rogers, 48 Mass. (7 Met.) 500 (1844) 16-19, for statement that "I cannot allow the protection of insanity to a man who exhibits only *violent passions* and *malignant resentments* acting upon *real* circumstances").

[148] *See infra* Part III.B.1.

[149] Two exceptions were Texas, which enacted a statutory provision classifying a husband's killing of his wife's adulterer as justifiable homicide, and Georgia, whose courts interpreted Georgia's statutory definition of justifiable homicide to include killing an adulterer caught in the act with one's wife. *See* Comment, *Recognition of the Honor Defense Under the Insanity Plea*, 43 YALE L.J. 809, 809 (1934) (citing TEX. REV. PENAL CODE ART. 1220 (Vernon 1928); Gibson v. State, 161 S.E. 158 (Ga. 1931)).

[150] *See id.* at 812-13.

[151] Ramsey, *supra* note 52, at 118-20.

her.[152] Pasqualina argued that she "suffered from temporary insanity precipitated by her agonizing circumstances."[153] Popular sentiment throughout the trial was strongly in favor of Pasqualina. One contemporary commentator opined that Pasqualina "*should* have killed the man" as the killing, though technically murder, was sanctioned "according to the broad tenets of that high law by which communities are guided and nations governed."[154]

Passion and honor were also at work in an earlier reported American case in which the defendant, Margaret Garrity, successfully asserted the temporary insanity defense. According to contemporary newspaper accounts of the incident, Margaret was "seduced by a man who falsely promised marriage, only to abandon her for another woman after he compromised her virginity."[155] On trial for the seducer's murder, "Margaret pled temporary insanity, and the court allowed her to explain to the jury the 'many and enormous wrongs' she had suffered."[156] The jury acquitted, even though her unsworn statement was "not admitted as legal testimony."[157]

Then there is the 1897 case of Clara Fallmer, who was fifteen years old and pregnant when her lover refused to marry her. She shot him and argued at her trial that the killing occurred "'during a state of emotional insanity.'" [158] The jury agreed and acquitted her.[159]

In these cases, the type of violent passion sufficient to permit a jury to acquit on grounds of temporary insanity was typically of a sexually charged nature, usually involving romantic betrayal of some sort, including adultery or infidelity or the sexual assault of a wife, family member, or lover. In some cases, however, little more than a wife's nagging might have been enough to send a temporary insanity plea to a jury.[160]

---

[152] *Id.* at 120.

[153] *Id.* at 119.

[154] *Id.* at 120.

[155] Steven Lubet, *John Brown's Trial*, 52 ALA. L. REV. 425, 462 n.244 (2001) (quoting *The Case of Margaret Garrity*, N.Y. TIMES, Oct. 21, 1851, at 2:3).

[156] *Id.* (quoting *The Case of Margaret Garrity*, *supra* note 155).

[157] *Id.* (quoting *The Case of Margaret Garrity*, *supra* note 155).

[158] FRIEDMAN, *supra* note 30, at 147 n.91 (citing LAWRENCE M. FRIENDMAN & ROBERT V. PERCIVAL, THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870-1910, at 239-44 (1981)).

[159] *Id*.

[160] *See, e.g.*, State v. Borowczyk, 4 P.2d 1088, 1088 (Mont. 1931) (upholding a jury verdict finding the defendant sane, over evidence that defendant's "wife's conduct and treatment of him was of such a nature as to unseat his reason, resulting in a 'brain storm' or temporary insanity"). More recently, Steven Steinberg was acquitted on grounds of temporary insanity after killing his wife. At trial, Steinberg admitted that he was a compulsive gambler, that he was deeply in debt, and that his wife's "nagging and spending drove him over the brink." Anne W. O'Neill, *"Professional Victim" Pleads Guilty to Embezzling $900*, SAN JOSE MERCURY NEWS, Mar. 18, 1992, at 1B. Defense psychiatrists testified at trial that, as a result, he was "in a dissociative state" at the time of the killing. *Id.*

As a basis for a temporary insanity defense, emotional insanity eventually fell out of favor. An increasing number of courts began to reject insanity pleas absent evidence – typically expert testimony – of a diagnosable mental disease or defect. An 1895 case from the District of Columbia Court of Appeals illustrated, albeit with some degree of overstatement, the growing consensus that "the theory of emotional insanity . . . has sometimes been resorted to as a defence of crime, but . . . has always and uniformly been reprobated and repudiated by the courts" and that "[t]he theory of emotional insanity is untenable under any circumstances."[161]

Courts in the twentieth century continued to permit defendants to plead temporary insanity where the cause of the defendant's alleged insanity was violent passion resulting from sexual betrayal. In *State v. Liolios*,[162] for instance, the defendant intercepted a letter indicating that his wife was having an affair and that same day shot and killed her.[163] He argued that the affair made him temporarily insane.[164] Although the jury ultimately convicted him of murder, the judge allowed the jury to consider the defense and told the jury,

> [I]f you find and believe . . . that at the time defendant shot the said Tulla Liolios he was temporarily so deranged on one or more of his mental and moral faculties that it actually rendered him incapable of distinguishing between right and wrong . . . then you will acquit him on the ground of temporary insanity.[165]

Likewise, in a 1955 Alabama case, John Barbour was tried for murder after killing his wife's paramour.[166] According to appellate court, "[Barbour] was driven to insanity because his wife was running around with the deceased and because he was not allowed to see his children."[167] As the court summarized it, "The contention is that he was hurt to the point of insanity."[168] Although the appellate court pointedly asserted that "the law of this state does not sanction emotional or moral insanity as an excuse for crime,"[169] it nonetheless set forth a framework in which evidence of emotional shock or trauma – such as one might experience after learning of a spouse's infidelity – can provide the basis for a complete excuse as an insanity defense as well as a mitigation defense

Steinberg was subsequently convicted of embezzlement and was described as a kind of con man or "professional victim." *Id.*

[161] Taylor v. United States, 7 App. D.C. 27, 41, 44 (1895); *see also* State v. Lynch, 32 A.2d 183, 185 (N.J. 1943).

[162] 252 S.W. 621 (Mo. 1923).

[163] *Id.* at 621.

[164] *Id.* at 622.

[165] *Id*.

[166] *See* Barbour v. State, 78 So. 2d 328 (Ala. 1955).

[167] *Id.* at 332.

[168] *Id.*

[169] *Id.* at 340.

under the traditional heat of passion doctrine. In reaching that conclusion, the *Barbour* court relied in part on an earlier case, *Metcalf v. State*,[170] in which the defendant pleaded temporary insanity after killing a man who had allegedly assaulted his wife.[171] According to the *Barbour* court, the pertinent inquiry in *Metcalf* and other precedent was not whether the assault had in fact occurred but merely whether the impression the events made upon the defendant's mind was one that might plausibly have caused him to become temporarily insane.[172]

In stating this, the court noted that those facts might be relevant both to the question of whether the killing "was traceable solely to the passion thus engendered" and thus merely manslaughter, or whether "they came to the defendant [in such a way as to] render the defendant insane."[173] In short, the court had "no doubt" that Barbour, like Metcalf, could offer into evidence "an alleged shocking communication . . . to be considered with all other evidence in the case, as bearing on the plea of insanity."[174] Kalven and Zeisel also observed acquittals or extremely lenient treatment in such cases in their mid-century study of the jury.[175]

Although a simple claim of emotional insanity would undoubtedly fail today, defendants continue to proffer a wide variety of relatively exotic defenses that locate the cause of the defendant's insanity in an emotionally-charged situational stressor. These exotic defenses can be understood as variations on the emotional insanity theme. Women who kill abusive husbands sometimes prevail on a temporary insanity defense through reliance on evidence of battered spouse syndrome.[176] A similar dynamic underlies the "homosexual panic defense," which is predicated on the claim that the sexual advance toward a person of the same sex with latent homosexual tendencies "precipitated the homosexual panic that triggered the acute psychotic reaction."[177] Although "the de-medicalization of homosexuality by the APA in

[170] 81 So. 350 (Ala. Ct. App. 1919).

[171] *Id.* at 351.

[172] *Barbour*, 78 So. 2d at 337.

[173] *Id.*

[174] *Id.*; *see also* Ragland v. State, 27 So. 983, 987 (Ala. 1900) (holding that a letter written from daughter to mother alleging that the deceased had seduced and impregnated her "was competent evidence to be considered with all the other evidence in the case, as bearing on the plea of insanity").

[175] *See* KALVEN & ZEISEL, *supra* note 21, at 236 (reporting on a case in which the defendant attacked her husband's paramour with a knife and defended based on insanity, and jury convicted her of a minor offense and set the fine at one cent).

[176] *See infra* Part III.B.2.

[177] Jennifer Dumin, *Superstition-Based Injustice in Africa and the United States: The Use of Provocation as a Defense for Killing Witches and Homosexuals*, 21 WIS. WOMEN'S L.J. 145, 169 (2006) (quoting Christina Pei-Lin Chen, Note, *Provocation's Privileged Desire: The Provocation Doctrine, "Homosexual Panic," and the Non-Violent Unwanted Sexual Advance Defense*, 10 CORNELL J.L. & PUB. POL'Y 195, 203 (2000)).

1973 and the declassifying of [homosexual panic] in 1980 have rendered the latency argument specious from a psychological point of view,"[178] the defense continues periodically to be raised.[179]

These various manias and panic defenses are, like the honor code cases, ultimately predicated on the existence of an extreme situational stressor that triggers a strong emotional reaction as the cause of the alleged temporary insanity. In all such cases, the defendant attempts to identify extreme "agonizing circumstances" that can be blamed for causing her to become temporarily insane, thus relieving her of responsibility for her criminal acts.[180] As courts continue to permit such claims, the flat assertion that emotional insanity is not a valid basis for a temporary insanity defense would seem to be incorrect. Indeed, the continuing viability of the abuse excuse illustrates the extent to which emotion or passion remains a legally plausible basis of a temporary insanity defense.

D. *Intoxication*

Nothing is more likely to render a person temporarily out of his senses than an excess of intoxicants. Hale identified drunkenness as a type of dementia, explaining that "[t]his vice doth deprive men of the use of reason, and puts many men into a perfect, but temporary phrenzy."[181] It is thus no surprise that temporary insanity cases frequently involve intoxication claims. Precisely because intoxication is such a common partner of crime, however, the criminal law has long – and virtually without exception – barred defendants from asserting an insanity excuse under circumstances in which the defendant involuntarily consumed the intoxicants. Some, Hale noted, have argued that those who commit crimes while drunk should not be punished for the crime but rather merely for the drunkenness that was its cause.[182] Even today, such arguments continue to find support, if only because the contrary rule

---

[178] Casey Charles, *Panic in* The Project*: Critical Queer Studies and the Matthew Shepard Murder*, 18 LAW & LITERATURE 225, 234 (2006).

[179] *See id.* at 41.

[180] "Agonizing circumstances," for instance, were successfully argued to have caused a woman named Pasqualina Robertiello to shoot her seducer Nicolo Pierro in front of two eyewitnesses. As Carolyn Ramsey explains,

> At trial, the defense lawyer outlined a web of falsehood emanating from the seducer's family and argued that Robertiello suffered from temporary insanity precipitated by her agonizing circumstances. There was no question that she fired the fatal shots at Pierro: two eyewitnesses saw her do so, and Pierro identified her as the killer in his dying declaration. Nevertheless, a big crowd of people in the courtroom rose to their feet and cheered when the jury announced on May 27 that Robertiello was not guilty.

Ramsey, *supra* note 52, at 119-20 (footnotes omitted) (internal quotation marks omitted). The Robertiello case was described *supra* at Part II.C.

[181] HALE, *supra* note 112, at 32.

[182] *Id.* at 36.

sometimes leads to unjustified results.[183] Hale, however, summarily rejected this position, explaining that "by the laws of *England* such a person shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses."[184] Contemporary courts too have overwhelmingly barred defendants from asserting an insanity defense when the insanity was a product of intoxication.[185]

The oldest reported case in the United States mentioning the temporary insanity defense concerned a defendant who suffered from "mania a potu."[186] As Delaware's Court of Oyer and Terminer recognized in that case, where the use of intoxicants triggers, but is not the cause of, some other underlying physiological or psychological condition, an insanity defense is available notwithstanding the general bar in cases of voluntary intoxication.[187] A withdrawal reaction – such as delirium tremens – provides one example. Similarly, where the intoxicants trigger a pre-existing mental illness, a temporary insanity defense will usually be permitted notwithstanding that the resulting mental state was caused by the use of intoxicants.

In addition, under the "settled insanity" doctrine, insanity that results from habitual or extended use of intoxicants, even if the use of the intoxicants was voluntary, can be a defense if the effects of the extended use of the intoxicants have caused either temporary or permanent mental or physical damage to the defendant.[188] In such cases, "[t]he *plea of insanity avails* the party," just as with any other reason-inhibiting disease or condition, as long as the defendant can establish the necessary elements of the insanity defense – i.e., that he did "not know at the time he committed the act, that he was doing an immoral and unlawful act."[189] To assert a settled insanity claim, the defendant must establish that the triggering cause was the underlying condition brought about

[183] *See, e.g.*, JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 553 (2d ed. 1960); *see also* People v. Ray, 533 P.2d 1017, 1023 (Cal. 1975) ("[I]f an accused is unable to harbor malice and an intent to kill because of voluntary intoxication . . . he cannot be guilty of an unlawful homicide greater than involuntary manslaughter."); MODEL PENAL CODE § 2.08 (1985) (providing that voluntary intoxication is a defense if it negates element, except as for crimes in which recklessness is sufficient, since the act of getting intoxicated was itself reckless conduct).

[184] HALE, *supra* note 112, at 32.

[185] *See* Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87 J. CRIM. L. & CRIMINOLOGY 482 (1997).

[186] State v. Dillahunt, 3 Del. (3 Harr.) 551, 552 (1842) ("Doctor L. P. Bush, of Wilmington, testified that the prisoner was at the time laboring under confirmed mania a potu, brought on by abstaining from liquor, after free indulgence."). The condition resulting from alcohol withdrawal is today more commonly referred to as "delirium tremens."

[187] *Id.* at 553 ("The frenzy of *drunkenness* is no *excuse*, but there is a disease of *insanity* called *mania a potu*, which may be the result of a condition of the system produced by habitual *intoxication*, and yet is not the frenzy of drunkenness.").

[188] HALE, *supra* note 112, at 32.

[189] *Dillahunt*, 3 Del. (3 Harr.) at 553.

by extended use of intoxicants, and not the effects of the intoxicant, when the crime was committed.[190] Such a triggering effect was claimed in the *Gross* case discussed above, where the defendant's experts attributed his psychotic disorder in whole or part to "amphetamine or cocaine abuse."[191] The California Supreme Court reached a similar finding in overturning the conviction of Valerie Kelly, who, after taking mescaline and LSD some fifty to one hundred times over a two-month period, stabbed her mother with an assortment of kitchen knives.[192] Trial testimony established that Kelly was not acting simply as a person who, after ingesting drugs or alcohol, is unable to perceive reality and reason properly. Rather, the drug abuse was deemed the indirect cause of a legitimate, temporary psychosis that would remain even when the defendant was temporarily off drugs. [193]

A greater number of temporary insanity claims predicated on intoxication succeed where defendants claim the intoxication was involuntary or pathological. For example, defendants have found some success in cases in which the temporary insanity allegedly resulted from the use of Prozac, Halcion, or other selective serotonin reuptake inhibitors (SSRIs).[194] Such claims have been permitted, notwithstanding that the drugs were consumed voluntarily, on grounds that the resulting psychological reaction was unanticipated and thus "pathological" in nature.[195] In these cases, courts quite readily concede that the effects of intoxication are often indistinguishable from other disabling causes of cognitive dysfunction.[196]

Inadvertent consumption of or exposure to other types of chemicals has also been recognized as a valid basis for a temporary insanity defense. In one case, a defendant contended that "an acetylcholinesterase inhibitor, which was concentrated in the lawn care product, acted upon his nervous system to profoundly affect his ability to control his temper," causing him to kill the

---

[190] *See* People v. Travers, 26 P. 88, 91 (Cal. 1891).

[191] People v. Gross, No. D041448, 2004 WL 792093, at *3 (Cal. Ct. App. Apr. 14, 2004).

[192] People v. Kelly, 516 P.2d 875, 883 (Cal. 1973) (holding that defendant may have been insane at the time she stabbed her mother even if the insanity resulted from "repeated voluntary intoxication").

[193] *Id.* at 879.

[194] *See* Cohan, *supra* note 19, at 151; Todd Paul Myers, *Halcion Made Me Do It: New Liability and a New Defense – Fear and Loathing in the Halcion Paper Chase*, 62 U. CIN. L. REV. 603, 643-45 (1993).

[195] *See* Myers, *supra* note 194, at 640-43.

[196] As one Utah court explained,

> [T]he defense of involuntary intoxication is part of the defense of insanity when the chemical effects of drugs or alcohol render the defendant temporarily insane. As in any case in which the defendant interposes an insanity defense, it remains incumbent upon the defendant to demonstrate that the involuntary use of the drugs created a state of mind equivalent to insanity.

State v. Gardner, 870 P.2d 900, 902 (Utah 1993) (alteration in original) (quoting People v. Caulley, 494 N.W.2d 853, 858 (Mich. Ct. App. 1992)).

victim.[197] Sometimes, the border between settled insanity and pathological intoxication is murky. In *Britts v. State*, for example, the Florida Supreme Court overturned the defendant's conviction for killing a police officer where the evidence established that the defendant was experiencing "alcoholic hallucinosis" resulting from a ten-day "drunk."[198] In *State v. Lynch*, the defendant's acute case of "bromide poisoning" just prior to the shooting of a police officer was sufficient foundation for a temporary insanity defense.[199] Thus, although intoxication is not generally a defense, the line between intoxication and a valid temporary insanity defense is not always clear.

III. SQUARE PEGS AND ROUND HOLES

A review of the historical uses to which the temporary insanity defense has been put suggests that the defense tends to find favor in a particular set of circumstances. Temporary insanity pleas recur in contexts in which the law applied literally or formalistically leads to results that diverge from jurors' intuitive, or commonsense, assessments of culpability. The most notable cases where this happens are those in which the law's own contradictions are starkly displayed. Doctrines like temporary insanity, in other words, flourish where the gaps between doctrinal categories and social realities grow too great.

This section attempts to impose theoretical order on the seemingly chaotic use of the temporary insanity defense. I make three main claims about the defense. First, I argue that temporary insanity is a gap-filling doctrine that is usually invoked to supplement another criminal defense that on its own falls short. Second, I argue that the defense tends to succeed only where there is a perceived divergence between the legal and equitable application of those defenses. That is, temporary insanity serves this gap-filling function where the general moral justifications for recognizing a particular criminal law defense seem to apply, but the specific doctrinal rules that govern the defense exclude the defendant's claim. This use of the defense is consistent with Kalven and Zeisel's observation of the basic tendency "of the jury to expand a legal concept by analogizing to other situations."[200] Third, the temporary insanity defense is used where one or more of the basic presuppositions of the criminal law, given the particular facts of the case, is subject to challenge. What is distinctive about temporary insanity is its versatility; it can and does permit defendants in a wide variety of seemingly disparate circumstances to invoke what is, ultimately, a type of equitable defense where the criminal law's formal categories fail to fit the moral and social facts. That temporary insanity tends to function primarily as a type of safety valve is borne out by its chameleon-

[197] *See* Janet Brewer, *Violent Behavior Associated with Acetylcholinesterase Inhibitors and Liability of Prescribers of Donepezil*, 16 WIDENER L.J. 111, 121-22 (2006).

[198] Britts v. State, 30 So. 2d 363, 364, 365 (Fla. 1947).

[199] State v. Lynch, 32 A.2d 183, 184, 185 (N.J. 1943).

[200] KALVEN & ZEISEL, *supra* note 21, at 226.

like ability to function as a kind of excuse doctrine in some cases, a justification doctrine in others, and a mitigation doctrine in yet others.

A. *Temporary Insanity as an Excuse Doctrine*

Criminal law theorists have long distinguished between two types of affirmative defenses – justifications and excuses. Justification defenses are claims that the defendant's acts, though apparently in conflict with the law, are in fact consonant with it. A valid justification defense exists where society encourages, or at least tolerates, an exception to some criminal prohibition.[201] Excuses concern the blameworthiness of the actor rather than the desirability of the act. A valid excuse defense exists where circumstances establish that the defendant was not ultimately to blame for the harm or transgression at issue.[202] In other words, justifications concern acts, and excuses concern actors.

Like the conventional insanity defense, the temporary insanity defense is most typically thought of as an excuse doctrine, and it undoubtedly functions, like the conventional insanity defense, as an excuse in the majority of cases in which it is raised.[203] Insanity, after all, is usually cited as the paradigmatic excuse defense,[204] and as noted above, modern insanity law makes no formal distinction between temporary and non-temporary insanity claims.[205]

What distinguishes a temporary insanity claim from a conventional insanity claim, in most cases, is that the circumstances that produced the disabling mental condition frequently are alleged to originate from, or be caused by, an external source.[206] Conventional insanity claims, in contrast, usually involve mental disease or defects that are easier to picture as originating from an "internal" source. Professor Joshua Dressler's distinction between two types of excuses – incapacity claims on the one hand and "no-fair-opportunity" claims on the other[207] – is useful here. According to Dressler, an incapacity excuse is appropriate where "the actor suffered from some temporary or long-

---

[201] *See* LAFAVE, *supra* note 61, § 9.1(a), at 447.

[202] *Id.* at 448.

[203] *See, e.g.*, Sherry F. Colb, *The Three Faces of Evil*, 86 GEO. L.J. 677, 697 (1998) (reviewing ELYN R. SAKS WITH STEPHEN H. BEHNKE, JEKYLL ON TRIAL: MULTIPLE PERSONALITY DISORDER & CRIMINAL LAW (1997)).

[204] *See id*. at 695-98.

[205] *See supra* notes 42-50 and accompanying text.

[206] Michael Moore describes such claims generally as implicating a causal theory of excuse. *See* Michael S. Moore, *Causation and the Excuses*, 73 CALIF. L. REV. 1091, 1091 (1985) (explaining that under causal theory, "when an agent is caused to act by a factor outside his control, he is excused; only those acts not caused by some factor external to his will are unexcused"). Moore, it should be noted, ultimately rejects that theory as flawed. *See id.* at 1148.

[207] *See* Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671, 702 (1988).

term disabling condition . . . that substantially prevented him from acting freely."[208] In contrast, no-fair-opportunity excuses exist "if reasons unrelated to personal capacity made it extremely difficult for an actor to understand the relevant facts, society's moral norms or laws, or to conform his conduct to those norms."[209] Conventional insanity claims are incapacity claims, in that they assert a "defect in the human 'machine.'"[210] No-fair-opportunity claims, in contrast, contend that some external factor deprived the actor "of a fair-opportunity to conform her conduct to the law."[211] Temporary insanity claims frequently fall into the latter category.

1. Insanity

In its simplest form, temporary insanity is a straightforward incapacity claim, indistinguishable from insanity claims writ large. In such cases, the cause of a defendant's alleged irresponsibility stems from mental disease or defect as those terms are conventionally understood. Be it chronic mental illness characterized by periods of latency or acute mental illnesses that, for whatever reason, are not lasting in effect, some cases in which temporary insanity claims are made are entirely in conformity with the legal doctrine of insanity. These cases raise no special issues or concerns apart from those that generally bedevil the insanity defense.

As the prior discussion suggests, the classic common law writers would have treated such cases as instances of lunacy or transitory dementia.[212] Recent examples include the case of Peter Bradley, who committed an apparently inexplicable attack on the passengers and crew of an airplane as a result of encephalitis.[213] Other examples include cases where the defendant engaged in criminal acts after failing to take prescribed anti-psychotic medication,[214] during some forms of epileptic seizure,[215] or while experiencing

[208] *Id.*

[209] *Id.*

[210] Joshua Dressler, *Battered Women and Sleeping Abusers: Some Reflections*, 3 OHIO ST. J. CRIM. L. 457, 469 (2008).

[211] *Id.*

[212] *See supra* notes 111-123 and accompanying text.

[213] *See* Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 381-84 (2002) (describing the case and reporting that the charges were dismissed after psychiatrists agreed that he "had been 'either medically unconscious or temporarily insane'" (quoting Bob Egelko, *U.S. Willing to Drop Charges in Jet Attack: Passenger Threatened Crew While Ill*, S.F. CHRON., Dec. 19, 2000, at A26)).

[214] *See, e.g.*, Stuyvesant Assocs. v. Doe, 534 A.2d 448, 450 (N.J. Super. Ct. Law Div. 1998).

[215] For example, Robert Torsney, a white police officer, was acquitted on grounds of temporary insanity in the fatal shooting of a fifteen year-old black youth. Martin Gottlieb, *Beyond a Reasonable Doubt Often Puts a Jury on Trial*, N.Y. TIMES, Nov. 22, 1992, at 46. Torsney's experts testified at trial that he suffered from a "rare condition called

a psychotic state brought on by bipolar disorder.[216] Because the underlying mental disease or defect seems safely "psycho-medical" in origin, the use of the temporary insanity defense in such cases raises no red flags. This is not so, however, where the claimed mental disease or defect lacks a widely accepted psycho-medical status.

In some cases, a fit of temporary insanity appears to have been triggered by some cause other than mental disease or defect. One of the most controversial of such claims arises where the temporary insanity was allegedly caused by mistreatment or abuse.[217] Take, for example, a recent case involving a Filipino domestic helper named May Vecina who killed her seven-year-old Kuwaiti ward and wounded his siblings. According to Vecina, the attack occurred during "a fit of temporary insanity caused by the anger and depression she was feeling" after "her male employer had tried to rape her, she was starved, made to sleep on the floor, and was not paid her wages."[218] A case such as this, where the abused defendant lashes out at an innocent victim rather than her abuser, lacks any element of self-defense or provocation. Her claim is, in effect, that the abuse itself sufficiently unhinged her mind that it created, or perhaps even constituted, the mental disease or defect that the insanity defense requires. Where abuse is the supposed cause of a person's loss of control, rather than mental disease, temporary insanity diverges functionally from the conventional version of the defense. In the vast majority of cases, as will be discussed below, the temporary insanity defense's main function is to provide a doctrinal framework for claimed excuses under circumstances where the cause of the defendant's supposed lack of control can be traced to external, situational pressures rather than to some organic disease.

2. Infanticide and Situational Pressures

As the famous lifeboat cannibalism cases illustrate, a wide variety of situational pressures can induce normally sane people to commit terrible

psychomotor epilepsy." *Id.* Some questioned Torsney's acquittal, however, because "[h]e was released from a mental institution less than two years later after some doctors questioned what they were treating him for and whether he ever suffered from the malady supposedly responsible for the irrational shooting." *Id.*

[216] For example, George David Bean, Jr. was acquitted of all charges on grounds of temporary insanity after Bean crashed his car into the gates of the Christian Broadcasting Network, fired shots at a security guard, and attempted to escape police in a high-speed chase. *Judge Rules Man Insane During CBN Shooting*, DAILY PRESS (Newport, Va.), Oct. 18, 1991, at C5. Experts testified at trial that Bean suffered mental illness described as bipolar disorder with psychotic episodes that triggered "irresistible impulses." *Id.*

[217] The so-called "abuse excuse" differs from other instances of violence against "deserving victims" discussed below, where the resort to violence is neither necessary nor morally justifiable. *See infra* Part III.B.

[218] Jerome Aning & Cynthia D. Balana, *Grateful for Miracle, Doomed Maid Returns*, PHILIPPINE DAILY INQUIRER, July 1, 2009, at 2, *available at* 2009 WLNR 12479399.

crimes.[219] When those pressures are sufficiently powerful and apparent, the case for moral (and hence legal) condemnation diminishes.[220] A classic example of such situational pressures, as well as their complex role in assessing a defendant's blameworthiness, arises in the context of infanticide, where the temporary insanity plea has a long history. As far back as the eighteenth century, acquittals in infanticide cases based on temporary insanity were common.[221] The reasons women kill their infants are quite obviously varied, but some recurrent patterns appear. Those patterns – some of which echo justificatory concerns, others of which sound more firmly in excuse – demonstrate the complex nature of the moral issues confronting juries in such cases.[222]

According to Lawrence Friedman, a "positive epidemic" of infanticide swept England in the nineteenth century.[223] The mothers were often domestic servants, extremely poor, unmarried, and as a result quite economically vulnerable. Loss of a job meant economic disaster to these women, and the prospects of surviving on the streets with a child were at best negligible. Moreover, powerful social norms regarding extramarital sex marked such women as social outcasts and deeply stigmatized their illegitimate children. "[S]ince women who killed their illegitimate babies were conforming to society's moral standards, they were viewed as acting both 'irrationally' and 'properly.'"[224] Women who committed infanticide to avoid social stigmatization received mixed messages from society regarding appropriate choices. The temporary insanity defense provided a means to reconcile those mixed messages. It provided an excuse for criminal conduct triggered by an extreme social and moral predicament and motivated by "proper" moral sentiments.

Of course, society does not ultimately approve of infanticide, no matter how dire the mother's circumstances, so unlike an honor or mercy killing, an infanticide is not fully explicable in terms of justification. Yet the well-documented sympathy that juries repeatedly showed to defendants in infanticide cases suggests a willingness to condemn the act while forgiving the actor.

The sense that women in these cases were as much victims as wrongdoers was and continues undoubtedly to be aggravated by other deeply-rooted gender

---

[219] *See, e.g.*, Regina v. Dudley & Stephens, [1884] 14 Q.B.D. 273.

[220] After their justification defense for killing and eating the cabin boy failed, the Crown commuted Dudley's and Stephens's death sentences to terms of six months imprisonment. *Id.* at 288 n.2.

[221] HOFFER & HULL, *supra* note 29, at 146 ("Temporary insanity was neither a defense nor a road to pardon in the seventeenth century, but in the next 100 years it gradually became a successful plea to a charge of infanticide.").

[222] *See id.* at 100-01, 108-09.

[223] FRIEDMAN, *supra* note 30, at 231.

[224] Kramar & Watson, *supra* note 129, at 239.

stereotypes. Certainly, powerful social expectations always have and continue to surround the mother-child bond. To most, there are few ties stronger than this bond; a mother's love for her children is assumed, taken for granted, accepted as a "natural fact."[225] So powerful is the bond assumed to be that people may, in fact, fail to perceive a clear distinction in interest between the child and its mother. While modern abortion law recognizes that a child in the womb is both part of its mother and a distinct entity, people may widely perceive that unity beyond the moment of birth even when the law does not. This too, perhaps, evidences what Kalven and Zeisel described as the jury's "impatience with the nicety of the law's boundaries."[226] Thus, when a woman kills her own child, she seems in some ways to be attacking or wounding herself.[227] She is perpetrator and victim at the same time. As such, punishment may appear to be simply redundant. Where one victimizes oneself, punishment only compounds the victimization.

As Kalven and Zeisel also documented, juries sometimes conclude that "the defendant has been sufficiently punished by the death of a loved one."[228] It may be that juries are reluctant to convict in infanticide cases in part because they cannot perceive a sufficient social harm, or at least one that is sufficiently distinct from the mother's own interests, to view her as the perpetrator rather than the victim. The overlap of the homicidal mother's status as both victim and wrongdoer puts her in a position similar to that of one who attempts or commits suicide, where the act almost by definition can only be committed by one not in one's right mind.[229]

Even if the infant is not viewed as coterminous with its mother, the assumption that maternal love is an indelible and intransient feature of motherhood is so widely shared as to make infanticide almost by definition seem irrational. Such an unfathomable act thus looks like a quintessential case of temporary insanity. Idealization of motherhood explains the readiness of experts to link female aggression toward offspring with mental illness, as well

---

[225] *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 128 (2007).

[226] KALVEN & ZEISEL, *supra* note 21, at 240-41.

[227] Indeed, many cases of infanticide documented by Hoffer & Hull appeared to be, in essence, "delayed abortions." HOFFER & HULL, *supra* note 29, at 155-56. Abortion, even where illegal, was not homicide. *Id.* at 155 (stating that abortion, or any killing of the fetus prior to its full removal from the vaginal cavity "was no felony" because the child was not "in *rerum natura*").

[228] KALVEN & ZEISEL, *supra* note 21, at 302.

[229] Coroners in the eighteenth century deemed "every one who kills himself . . . *non compos* . . . ; for it is said to be impossible that a man in his senses should do a thing so contrary to nature and all sense and reason." Thomas J. Marzen et al., *Suicide: A Constitutional Right?* 24 DUQ. L. REV. 1, 61 (1985) (quoting 1 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 164 (T. Leach ed., 7th ed. 1795)), *quoted in* Lorraine Eisenstat Weinrib, *The Body and the Body Politic: Assisted Suicide Under the* Canadian Charter of Rights and Freedoms, 39 MCGILL L.J. 618, 631 n.52 (1994).

as the readiness of juries to find those experts credible, at least as long as the female defendant otherwise conforms to "stereotypical gender norms."[230]

In many cases where biological explanations appear dubious, childbirth has nonetheless been successfully claimed to cause a propensity to temporary derangement. As Sir James Fitzjames Stephens wrote in the nineteenth century, "[W]omen in that condition [having recently undergone childbirth] do get the strongest symptoms of what amounts almost to temporary madness, and . . . often hardly know what they are about, and will do things which they have no settled or deliberate intention whatever of doing."[231]

At the turn of the century, medical experts favored such diagnoses as "puerperal insanity"[232] and "lactational insanity"[233] to describe the seemingly obvious female abnormality. After all, "[i]f there is any condition of mind which can rightly be described as insane, it is that in which a mother loses all maternal instinct."[234] Experts thus reasoned backwards from the infanticidal act to infer the existence of a mental "disease" that may or may not have had any basis in biology.

Modern psychiatric science continues to recognize the potentially disruptive effects of childbirth on women's mental health. Conditions such as postpartum psychosis frequently are blamed for infanticidal conduct.[235] In other cases, infanticidal acts are attributed to vaguer forms of mental dysfunction, as in the case of Claire Moritt, who was charged with first-degree murder after drowning her newborn son in a dormitory toilet.[236] The jury acquitted Moritt by reason of temporary insanity, leading to Moritt's immediate release. According to newspaper accounts, at trial, "[t]en psychologists and psychiatrists testified that Ms. Moritt suffered from a rare dissociative disorder in which she detached herself from her pregnancy and was out of touch with

---

[230] *See* Cristie L. March, *The Conflicted Treatment of Postpartum Psychosis Under Criminal Law*, 32 WM. MITCHELL L. REV. 243, 250-51 (2005) (observing that media and juries often judge infanticidal women "suffering from post-partum psychosis along preconceived ideas of 'good' or 'bad' womanhood," extending sympathy to those perceived as good and condemnation of those perceived as bad).

[231] FINKEL, *supra* note 115, at 57 (citing SIR JAMES FITZJAMES STEPHENS, HISTORY OF THE CRIMINAL LAW OF NEW ENGLAND (1883)).

[232] Puerperal insanity was thought to affect "women at childbirth as a result of septicaemia, [and] was the closest medical-psychiatric analogue of the lay theory of women's propensity to temporary derangement during childbirth." Kramar & Watson, *supra* note 129, at 244.

[233] Lactational insanity was a diagnosis often given to "poor nursing mothers, often with many children," and was "conceived as an 'exhaustion psychosis.'" *Id.*

[234] *Id.* at 242 (quoting Carl Health, *Some Notes on the Punishment of Death*, LONDON: SOC'Y FOR ABOLITION CAP. PUNISHMENT (1908)).

[235] *See, e.g.*, Rapaport, *supra* note 127, at 528-29 (discussing the Andrea Yates and Susan Smith cases).

[236] Joanne Cavanaugh, *Dead Baby's Mother Wins Her Gamble Verdict of Insanity Means Her Freedom*, BUFFALO NEWS, Apr. 18, 1990, at B7, *available at* 1990 WLNR 805916.

reality when she gave birth."[237] Likewise, in many cases women with chronic mental disabilities are pushed past the breaking point by the stresses of childbirth and child-rearing in the absence of adequate assistance or supervision.[238]

The use of the temporary insanity plea in infanticide cases sometimes fits well within the long-recognized parameters of the defense. Post-partum psychosis provides an almost paradigmatic case in point, as the condition is characteristically "brief in duration and, even if untreated, symptoms virtually always disappear within several months of onset."[239] The temporary insanity plea, moreover, provides a means to seamlessly stitch together these various facts to produce a verdict that accords with the jury's sense of justice. In some cases, an infanticidal mother's break with reality will be so complete as to clearly require a verdict of not guilty because of insanity. Juries will readily perceive that such women need treatment rather than punishment. In other cases, the infanticidal conduct may appear to be the product of a complex of pressures, some situational, some psychological, some biological, and some moral. Where rational choice is clouded by such factors, juries might well find – as they so often do – that punishment is an inappropriate, unnecessary, and often cruel response. Here, the classic and often vilified image of temporary insanity is clearly at work since the defendant's "insanity" often will turn out to have been extinguished at the precise moment the criminal deed was completed – not because of any wondrous serendipity but because the act removed the situational pressures that prompted the deed.

The temporary insanity plea has been invoked in other circumstances where the pressures that caused the criminal act were allegedly situational in origin. The homosexual panic defense is one example. "Black rage,"[240] "urban psychosis," and "urban survival syndrome" are others. In all these cases, defendants attempt to convince juries that situational pressures – homosexual advances, desperation born of dire social and economic conditions in inner-cities, or the realities of life on the streets – are to blame for the defendants' criminal acts. While such claims find no traction in traditional criminal law defenses, the defendants rely on temporary insanity to provide a bridge to a viable legal claim. In each case, the theory is that some aspect of the defendant's mind – be it a latent homosexuality or a brain disfigured by urban conditioning – interacted with a specific situational pressure to cause the

[237] *Id.*

[238] Oberman, *supra* note 29, at 36.

[239] *Id.* at 35 (citing Michael W. O'Hara, *Postpartum "Blues," Depression, and Psychosis: A Review*, 7 J. PSYCHOSOMATIC OBSTRETRICS & GYNECOLOGY 205, 220 (1987)).

[240] The black rage defense was used successfully as the underpinning of a temporary insanity plea in at least one case. *See* Satyaprasad, *supra* note 10, at 182 (recounting attorney Paul Harris's defense in a bank robbery case in which Harris intertwined defendant's "personal life history; what it means to be black in America; and the law of temporary insanity" to win client's acquittal).

criminal conduct. The alleged insanity is temporary because the situation that triggered it is allegedly abnormal. To the extent that these claims have won some success in the courts (and they haven't won much), the abnormality of the situational trigger is probably a critical factor, which largely explains why black rage or urban survival syndrome claims – which one would imagine to be frequently triggered – have fared so poorly.[241]

3. Intoxication

If the temporary insanity defense often serves to bridge a gap in legal doctrine to exculpate defendants whom jurors view as undeserving of punishment, the law of intoxication suggests that exactly the opposite may occur as well. As Coke acknowledged, he who is drunk may well be *non compos mentis*.[242] An extremely intoxicated person is, in a very literal sense, temporarily mad. Indeed, as long as the intoxication is involuntary or pathological, the law generally treats the case precisely the same as it would in any temporary insanity case.[243] Where intoxication is voluntary, however, the resulting insanity, regardless of its degree or authenticity, provides at best a limited mitigation defense and normally no defense at all. Many jurisdictions expressly foreclose insanity claims based on voluntary intoxication.[244]

As a theoretical matter, the bar on voluntary intoxication as a defense is puzzling. After all, phenomenologically speaking, intoxication would seem to induce a condition, at least at its extremes, indistinguishable from temporary insanity caused by other factors.[245] As editors of the Harvard Law Review long ago observed, "[F]rom a pathological standpoint mere intoxication and some forms of insanity are largely identical and . . . the line separating drunkenness and temporary insanity caused by drunkenness is exceedingly

[241] Some have argued that the intense conditions of the battlefield are a comparable stressor that should support a temporary insanity defense if soldiers subjected to those conditions commit wartime atrocities. *See* Bradford, *supra* note 15, at 708 n.198.

[242] *See* COKE, *supra* note 111, at 6.

[243] PAUL ROBINSON, CRIMINAL LAW DEFENSES 341 (1984).

[244] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-503 (2001) ("Temporary intoxication resulting from the voluntary ingestion, consumption, inhalation or injection of alcohol, an illegal substance . . . or other psychoactive substances or the abuse of prescribed medications does not constitute insanity and is not a defense for any criminal act or requisite state of mind."); CAL. PENAL CODE § 25.5 (West 1998); FLA. STAT. ANN. § 775.051 (1999) ("Voluntary intoxication resulting from the consumption, injection, or other use of alcohol or other controlled substance . . . is not a defense to any offense proscribed by law."); MONT CODE ANN. § 45-2-203 (2009) (prohibiting use of voluntary intoxication to negate specific intent); TEX. PENAL CODE ANN. § 8.04 (West 1994) (providing that intoxication is not a defense); DEL. CODE ANN., tit. 11, § 401(c) (repealed 2001).

[245] *Cf.* MODEL PENAL CODE § 2.08 cmt. 3 (1985) (stating that involuntary intoxication may provide an excuse "only if the resulting incapacitation is as extreme as that which would establish irresponsibility had it resulted from mental disease").

vague."[246] But from a practical perspective, the criminal law's traditional reluctance to grant an excuse to intoxicated perpetrators is easily understood. Drug or alcohol use commonly accompanies criminality. If such voluntary conduct could insulate criminals from punishment, the criminal law would have little effectiveness. Moreover, intoxication does not necessarily obliterate an individual's capacity to know the nature or wrongfulness of her conduct or prevent one from forming a criminal intent. A rule barring intoxication-based defenses relieves the state of difficult evidentiary problems in establishing the defendant's culpability. In addition, even if the defendant lacked the degree of culpability normally required for conviction of a crime, the defendant's culpable act of voluntarily intoxicating himself has been thought an adequate stand-in. The traditional view of voluntary intoxication was well-summarized by Alabama's highest court in 1848:

> It is a general rule, too well established by an unbroken chain of authority to be now controverted, that although drunkenness reduces a man to a state of temporary insanity, it does not excuse him or palliate his offence committed in a fit of intoxication, and which is the immediate result of it. Lord Coke, in his classification of persons *non compos*, includes him who is drunk, but adds, that he is so far from coming within the protection of the law, that his drunkenness is an aggravation of whatever he does amiss.[247]

Thus, the voluntary intoxication doctrine carves out an exception to the temporary insanity doctrine by depriving otherwise deserving claimants of a defense when they are at fault for becoming intoxicated. Still, cases occasionally arise in which an intoxicated defendant's conduct was so clearly the product of an uncomprehending or out-of-control mind that holding such defendants fully culpable for their acts seems flatly incompatible with the basic premises of criminal responsibility.[248] Additionally, a defendant can assert a temporary insanity defense in such cases as long as he can proffer evidence

---

[246] *Criminal Responsibility of Insane Drunkards*, 15 HARV. L. REV. 755, 755 (1902).

[247] State v. Bullock, 13 Ala. 413, 417 (1848) (citation omitted). Many state court decisions acknowledge the similarity of extreme drunkenness and temporary insanity. *See, e.g.*, Cook v. State, 151 S.E.2d 155, 156 (Ga. Ct. App. 1966) ("If the drunkenness produced a temporary frenzy, madness or unsoundness of mind in the accused, he will not be excused or held irresponsible for the act done by him while laboring under such temporary insanity, madness or unsoundness of mind thus produced, because it is his own voluntary act; he put himself in that condition, and must abide all its consequences." (quoting Beck v. State, 76 Ga. 452, 470 (1886))); Tyra v. Commonwealth, 59 Ky. (2 Met.) 1, 1 (1859) ("Drunkenness, or the temporary insanity occasioned by the act of the defendant in getting drunk, constitutes no justification or excuse for the commission of crime.").

[248] Illinois is one of the minority of states that permits a voluntary intoxication defense, but only if the intoxication is "so extreme as to suspend all of defendant's powers of reason." People v. Kyse, 581 N.E.2d 285, 287 (Ill. App. Ct. 1991) (citing People v. Bradney, 525 N.E.2d 112, 122 (Ill. App. Ct. 1988)).

that the intoxicants triggered or induced a "latent" mental disease or condition,[249] or that the bout of temporary insanity was caused not by the intoxicants but by an underlying mental disease.[250]

Many courts are also willing to distinguish between "mere drunkenness" and actual insanity. For instance, after instructing the jury that "[d]runkenness is no excuse for the commission of crime" and that "[i]nsanity produced by intoxication does not destroy responsibility when the party, when sane and responsible, made himself voluntarily intoxicated,"[251] one California court provided the following additional instruction:

> The court instructs the jury that temporary insanity as a defense to a crime is as fully recognized by law as is permanent insanity, and if the jury finds that the defendant . . . was not insane prior to and after the commission of the alleged offense . . . through the use of alcoholic drinks or because of some other excitement at the time, he was temporarily in such a mental condition that he was not aware of the nature of the offense and had not the ability to discriminate between right and wrong, you must acquit the defendant on the ground of insanity.[252]

Although cases in which an individual voluntarily gets drunk or high and then commits a crime rarely provide grounds for excuse, when an individual's conduct while intoxicated exceeds a certain threshold of strangeness or seems sufficiently out of character for the defendant, then a different analysis might appear warranted. Arguably, it is precisely to create an exception for such cases, by drawing lines between the categories of "merely drunk" and "temporarily insane," that doctrines such as settled insanity and intoxication-as-catalyst of an underlying mental disease persist.

B. *Temporary Insanity as a Justification Doctrine*

In some ways, insanity and justification are directly at odds. A defendant who asserts a justification defense alleges that she was confronted with a choice of evils, and she purposely, and correctly, chose the lesser evil.

---

[249] Commonwealth v. Cutts, 831 N.E.2d 1279, 1286 n.8 (Mass. 2005) ("If voluntary consumption of a drug activated a latent mental disease or defect and, as a result of that mental disease or defect, the defendant lost the substantial capacity to understand the wrongfulness of his conduct or to conform his conduct to the requirements of the law, lack of criminal responsibility would be established, unless the defendant 'knew or had reason to know that the [drug] would activate the illness.'" (quoting Commonwealth v. Herd, 604 N.E.2d 1294, 1298 (Mass. 1992))). Temporary, drug-induced psychosis was the basis for the defendant's acquittal in *Foucha v. Louisiana*, 504 U.S. 71, 74-75 (1992).

[250] *See, e.g.*, People v. Carter, No. G037366, 2008 WL 2310134, at *3-5 (Cal. Ct. App. June 5, 2008) (permitting temporary insanity claim to go to jury, where defendant, while under the influence of marijuana, pinned victim behind automobile to cause her death, based on testimony that defendant was suffering a "psychotic episode" at the time of the incident).

[251] People v. Keyes, 175 P. 6, 7-8 (Cal. 1918).

[252] *Id.* at 8.

Generally, a defendant who asserts an insanity defense alleges that, at the time of her criminal act, she either did not know what she was doing or she did not know what she was doing was wrong.[253] In at least some theories of justification, what motivated an actor to engage in otherwise unlawful conduct matters, because the defense is only available where benefiting society "is not incidental to some self-interested goal of the actor" but rather "is the underlying motivation" for the conduct.[254] Justification thus suggests praise for persons who are able to see situations clearly and exercise sound judgment under difficult circumstances. Insanity suggests tolerance or empathy for those who cannot see clearly at all.

1. Extreme Provocation and the Unwritten Law

It might seem all the more puzzling, therefore, that some of the most prominent cases in which the temporary insanity defense has succeeded involve justification-type claims. These cases tend to involve various elements of provocation, self-defense, and necessity. A good example are cases involving the so-called "unwritten law," the first, and one of the most prominent, of which was the 1859 prosecution of New York Congressman Daniel Sickles for the murder of Philip Barton Key (the son of Francis Scott Key).[255] Key had been carrying on a notorious affair with Sickles's wife. Ultimately, Sickles discovered the infidelity and forced his wife to confess. The following day, upon spotting Key strolling near Lafayette Square, Sickles pulled a gun from his coat and cried out, "Key, you scoundrel . . . you have dishonored my house – you must die."[256] Sickles then shot and killed Key. At trial, Sickles contended that the killing was the product of "an uncontrollable 'irresistible impulse.'"[257] Often cited (incorrectly, it appears) as the first use of the defense in the United States, Sickles did not deny killing his wife's lover in a duel, but claimed that his wife's infidelity caused him to become temporarily insane. The jury acquitted, largely, it appears, because it concluded that Sickles's actions were justified under the unwritten law.[258]

---

[253] This is the traditional formula under the *M'Naghten* test:

> [T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.

M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843). The *M'Naghten* test is followed in most jurisdictions. *See* State v. Johnson, 399 A.2d 469, 472 (R.I. 1979) ("This dual-pronged test . . . rapidly became the predominant rule in the United States.").

[254] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 17.02[B], at 209 (5th ed. 2009).

[255] *See* NAT BRANDT, THE CONGRESSMAN WHO GOT AWAY WITH MURDER (1991).

[256] *Id.* at 121.

[257] *Id.* at 172.

[258] Alison L. LaCroix, *To Gain the Whole World and Lose His Own Soul: Nineteenth-Century American Dueling as Public Law and Private Code*, 33 HOFSTRA L. REV. 501, 561

Under the unwritten law – the subject of numerous high-profile murder trials in the nineteenth century – a husband who discovered that his wife was involved in an adulterous affair was thought justified in killing the "libertine" and perhaps the adulterous wife.[259] The unwritten law was also invoked to justify killings of male seducers by fathers and brothers of their once-virtuous daughters and sisters, and in a smaller number of cases, killings by women seduced and abandoned by men promising marriage.[260] In discussing the prominent unwritten law cases of the nineteenth century, legal historian Lawrence Friedman described the defense as a blend of provocation and temporary insanity, with the latter element functioning to elevate the defense from one that mitigated a murder to manslaughter to one that provided a complete excuse.[261]

Unwritten law cases followed logic similar to the common law heat of passion doctrine, which mitigates murder to manslaughter. To establish a provocation defense, the defendant must demonstrate that the killing occurred while the defendant was acting in the heat of passion; the passion must have been caused by a legally adequate provocation; the killing must have occurred before a reasonable cooling off period had elapsed; and there must have been a causal link between the provocation, the passion, and the killing.[262] Discovering one's wife engaged in an adulterous act was considered the quintessential adequate provocation.[263]

Defendants in the unwritten law cases, however, confronted two major obstacles to proffering a provocation defense. First, as a formal doctrinal matter, "the reasonable man, however greatly provoked he may be, does not kill."[264] Even where a provocation is legally cognizable, therefore, a successful provocation defense is merely a partial excuse that results in mitigation, not exoneration. Second, in the unwritten law cases, the defendants were almost uniformly unable to establish a provocation defense given the circumstances of the killings. In none of the cases discussed in Robert Ireland's history of the defense, for example, did the defendant actually catch his wife *in flagrante delicto*, as the provocation doctrine traditionally

(2004) ("Although the facts of the case were apparently clear-cut and not totally indicative of temporary insanity, the jury determined that the homicide was justifiable in that Key had been 'paying attention to' Sickles's young wife.").

[259] Ireland, *Insanity and the Unwritten Law*, *supra* note 11, at 157; Robert M. Ireland, *The Libertine Must Die: Sexual Dishonor and the Unwritten Law in the Nineteenth-Century United States*, 23 J. SOC. HIST. 27, 27 (1989) [hereinafter Ireland, *The Libertine Must Die*].

[260] BRANDT, *supra* note 255, at 173.

[261] FRIEDMAN, *supra* note 30, at 146-47.

[262] *See* DRESSLER, *supra* note 254, § 31.079[A], at 535.

[263] *See* Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 72 (1992).

[264] LAFAVE, *supra* note 61, § 15.2(b), at 777.

required.[265] In many cases, a significant time elapsed between the defendant's discovery of the adulterous affair and his killing of the paramour, which, because of the extent of the cooling period, would bar a heat of passion defense as a matter of well-established law. In one case, two years passed between the time the defendant learned of his wife's infidelity and the killing.[266] In another case, the defendant was tried for killing the victim after discovering that the victim had an adulterous affair with his wife. As the court stated to the jury, the jury could not return a verdict of voluntary manslaughter because "[t]he knowledge or information of its commission had been communicated to the prisoner . . . at least two or three days before, and a sufficient time, in the judgment of the law, had elapsed for the passions to cool."[267] The traditional limitation of the heat of passion defense to cuckolded husbands also rendered it unavailable to fathers and brothers of disgraced women, as they may have lacked standing to assert the defense and, without some alternative legal claim, would have been liable for murder.

Nonetheless, defendants typically presented unwritten law cases to the jury functionally as provocation cases. Trial defenses invariably dwelt upon the libertine's defilement of the marital bed to establish the moral enormity of the provocation. Defendants also invariably adduced evidence that the defendant killed in a state of extreme passion. As one scholar has stated, at trial, "[m]ost of the witnesses, lay and expert, recounted observing the defendants in highly agitated conditions; wild-eyed, tearful, sometimes screaming in agony."[268] Given the circumstances of these killings, the causal nexus between the adulterous provocation, the defendants' embroiled passions, and the killings was in little doubt. In cases where a substantial period of cooling time separated the discovery of the infidelity from the homicidal act, defendants implicitly questioned the premises of the cooling doctrine. For example, after Sickles killed Key a day after learning of Key's affair with his wife, Sickles's counsel contended that "there is no cooling off after such an offence. Talk about the cooling of the provocation of defiling a man's wife! A mere personal indignity can be cooled over; but if Mr. Sickles is cool now he is more than human."[269]

Juries were, in other words, asked to understand these killings through the lens of provocation, even though provocation was technically unavailable. Temporary insanity effectively permitted them to make an "end-run around the

---

[265] *See* CYNTHIA LEE, MURDER AND THE REASONABLE MAN 25 (2003) (explaining that under the early common law approach to provocation, the heat of passion defense was only available to husbands who "personally discover" their wives in the act of adultery); Ireland, *Insanity and the Unwritten Law*, *supra* note 11, at 159.

[266] Melissa J. Ganz, *Wicked Women and Veiled Ladies: Gendered Narratives of the McFarland-Richardson Tragedy*, 9 YALE J.L. & FEMINISM 255, 287 (1997).

[267] Cole's Trial, 7 Abb. Pr. (n.s.) 321, 338 (Albany Oyer and Terminer, 1868).

[268] Ireland, *Insanity and the Unwritten Law*, *supra* note 11, at 161.

[269] BRANDT, *supra* note 255, at 173.

cooling-time doctrine."[270] The frequent success of this strategy is apparent in the jury charge given in Cole's case. Immediately after informing the jury that heat of passion was legally barred as a defense because of the extent of the cooling period, the judge charged the jury that "if, notwithstanding this lapse of time, the crushing weight of this domestic tragedy had driven the prisoner's mind to absolute distraction, and dethroned the reason of the husband, he is permitted to find immunity from punishment in the mental alienation with which he was thus overwhelmed."[271]

One might also argue that the rigidity of the cooling doctrine virtually necessitated some other defense for sympathetic defendants. This necessity is well-illustrated in *Ragland v. State*,[272] where the defendant waited four hours before killing the victim after discovering a letter revealing that his daughter had been seduced and impregnated by a local shopkeeper.[273] According to the court, the defendant "had cooling time" enough to bar a heat of passion defense as a matter of law.[274] As a result, the jury was necessarily forced to choose between conviction for murder or acquittal on grounds of temporary insanity.[275]

The provocation defense contains elements of both excuse and justification.[276] Its requirements that the defendant's acts be committed in the heat of passion and without adequate time to cool pertain to the actor and are therefore elements of excuse.[277] Its requirement that the provocation be reasonable or adequate and the historical acknowledgement of a provocation as adequate only where the provocation constituted a significant criminal offense in its own right, however, are objective elements that lend provocation a justificatory flavor.[278] Provocation thus appears to possess a hybrid quality as part excuse, part justification.

Temporary insanity in some cases seems to share this hybrid quality. As with provocation, there is nothing conceptually incoherent in claiming that a criminal act was both partially justified (because reasonably provoked) and had grounds for excuse (because it was the product of insanity). Certainly, one could be grievously wronged by another and be so emotionally disturbed as a

[270] Ramsey, *supra* note 52, at 154 (citing People v. Foy, 34 N.E. 396, 397 (N.Y. 1893)).

[271] *Cole's Trial*, 7 Abb. Pr. (n.s.) at 338.

[272] 27 So. 983 (Ala. 1900).

[273] *Id.* at 988.

[274] *Id.*

[275] *Id.*

[276] Scholars heatedly debate whether provocation is a partial justification or partial excuse. For an excellent recent overview of the debate, see Stephen P. Garvey, *Passion's Puzzle*, 90 IOWA L. REV. 1672, 1692-1723 (2005).

[277] *Id.* at 1710.

[278] *Id.* at 1694; *see also* LAFAVE, *supra* note 61, § 15.2(b), at 777-80 (identifying common law categories of adequate provocation as battery, mutual combat, assault, illegal arrest, and adultery).

result that she does not know what she is doing or, instead, affirmatively believes that retribution is the morally appropriate response. Because not knowing that one's criminal acts are wrong meets the *M'Naghten* test for cognitive dysfunction, such a person seems entitled to an insanity defense – at least as long as she can satisfy the other elements of the defense. This is precisely the tack taken by New York attorney Delphin Delmas in the Thaw case.

In 1907, Harry Kendall Thaw was tried for the murder of New York architect Stanford White. Thaw shot White in a crowded New York rooftop theater – a theater designed by White himself – before crowds of onlookers.[279] Thaw's motive grew out of a sordid sexual affair between White and a beautiful chorus girl named Florence Evelyn Nesbit. At the time of the affair, Nesbit was sixteen, of working-class background, and new to the high-class Manhattan social scene, while White was married, in his early fifties, and a celebrated architect.[280] Soon thereafter, Thaw, another wealthy but eccentric man, courted Nesbit. Thaw proposed to Nesbit when she was seventeen, but Nesbit initially declined the offer. She eventually agreed to marry him, notwithstanding an incident in which Thaw brought Nesbit to an Austrian castle and subjected her to two weeks of whipping and abuse.[281] Thaw and Nesbit were married in 1905, and Nesbit confessed her sexual encounter with White and described to Thaw how White had drugged and raped her. Hearing these details, Thaw was "overcome with emotion to the point of hysteria."[282] In the following weeks, Thaw stewed about his wife's defilement at White's hands. This obsession ultimately led him fifteen months later to shoot and kill White at the theater.[283] When the titillating details became public, New York was electrified, and the media, fed in part by the Thaw family's campaign to discredit White and save Thaw, turned the case into what became the twentieth century's first, but not last, "trial of the century."[284]

In seeking an acquittal based on temporary insanity, Delmas attributed Thaw's homicidal rage to a condition he referred to as "dementia americana":

> It is a species of insanity which makes every home sacred . . . which makes a man believe that the honor of his wife is sacred . . . which makes him believe that whoever invades the sanctity of that home . . . whoever

[279] *See* Martha Merrill Umphrey, *The Dialogics of Legal Meaning: Spectacular Trials, the Unwritten Law, and Narratives of Criminal Responsibility*, 33 LAW & SOC'Y REV. 393, 398 (1999).

[280] *Id.* at 399.

[281] *Id.* at 400.

[282] *Id.* at 415.

[283] *Id.* at 398.

[284] *Id.* at 394. The Thaw case figures in E.L. Doctorow's celebrated novel *Ragtime*, in which he writes that "the newspapers called the shooting the Crime of the Century," but such a label might have been premature as "it was only 1906 and there were ninety-four years to go." E.L. DOCTOROW, RAGTIME 5 (1974).

> stains the virtue of that wife has forfeited the protection of human laws and must look to the eternal justice and mercy of God.[285]

This argument, which Martha Merrill Umphrey terms "oxymoronic," does in fact possess a certain internal logic.[286] It seeks in effect to establish that the defendant did not know his act was wrong at the time he committed it because it was, in fact, not wrong (or at least the defendant might reasonably have so believed given the facts, circumstances, and conceptions of "honor" appropriate to persons of his social class).

Of course, the reason that provocation mitigates, rather than justifies or excuses, is that we assume that one who kills in the heat of passion could and should have exercised greater restraint.[287] Most persons who discover their spouses engaged in an act of adultery or who are assaulted do not kill their spouse or their assailant. Indeed, one of the primary purposes of criminal sanctions in such cases is to provide a powerful incentive to persons to control their passions and resist their impulses to lash out in vengeance. But such calculating logic can seem cold, hard-hearted, and devoid of compassion. Who is to say that one caught up in an emotional frenzy brought on by transgressions against one's spouse or daughter has the capacity to resist the impulse to harm his or her transgressor? Moreover, treating provocation as a partial rather than a complete defense only makes sense if the reasonable person could be expected to exercise self-control in light of the provocation. But a provocation that would not only violently anger a reasonable person but also truly would cause such a person to kill should justify a complete defense. As Professor LaFave explains, "[O]ne who really acts reasonably in killing another (as in proper self-defense) is guilty of no crime."[288] That is the contention underlying the defense in cases such as Thaw's. In these "extreme provocation" cases, the claim proffered by the defendant is that, under the circumstances, killing was in fact the honorable (and thus reasonable) response of any self-respecting male in like circumstances. This appears to be a regular feature of jury reasoning, as Kalven and Zeisel observed in showing that juries frequently acquitted defendants in cases where the crimes were prompted by extreme provocation. In such cases, there seems to be a "jury rule of law . . . that the amount of force the defendant used is justified, even though there is no

---

[285] Umphrey, *supra* note 279, at 393 (citing *Thaw's Plea is Unwritten Law*, N.Y. TIMES, Apr. 10, 1907, at 1). Thaw's family initially sought to hire prominent attorney Harry Olson to defend Thaw but ultimately found another lawyer after Olson proposed a "hereditary insanity" defense. *See* PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES 82-83 (2008).

[286] Umphrey, *supra* note 279, at 393-94 (arguing that Delmas's appeal combined "competing medical and moral conceptions of responsibility in an attempt to persuade the jury to acquit Thaw of murder").

[287] *See* Uma Narayan & Andrew Von Hirsch, *Three Conceptions of Provocation*, 15 CRIM. JUST. ETHICS 15, 15-16 (1996).

[288] LAFAVE, *supra* note 61, § 15.2(b), at 777.

immediate threat to the defendant, when the conduct of the victim has been outrageously provoking."[289]

If the extreme provocation claim implicit in unwritten law cases mixed justification and excuse, defendants also frequently bolstered the provocation account with pure justificatory strategies based on analogies to other justification doctrines, such as self-defense and defense-of-others. The defense-of-others analogy was frequently invoked by defendants who killed the corruptors and debauchers of the women they loved in order "to protect the weaker sex."[290] Sickles did this rather creatively by likening his wife's adulterous affair to a kind of continuing rape and arguing that in killing Key, Sickles had in effect acted to prevent an imminent – indeed ongoing – felony:

> The wife's consent cannot shield the adulterer, she being incapable by law of consenting to any infraction of her husband's marital rights, and that in the absence of consent and connivance on his part every violation of the wife's chastity is, in the contemplation of law, forcible and against his will, and may be treated by him as an act of violence and force on this wife's person . . . . The husband beholds him in the very act of withdrawing his wife from his roof, from his presence, from his arm, from his wing, from his nest, meets him in that act and slays him, and we say that the right to slay him stands on the firmest principles of self-defence.[291]

And indeed, Sickles's theory was accepted as the law at least in Georgia, where the courts repeatedly held, based on a Georgia statute that permitted defendants to argue that a killing was justifiable homicide in circumstances analogous to statutorily-enumerated defenses such as self-defense and defense of others, that killing to prevent an imminent act of adultery was justifiable homicide.[292]

In addition to provocation and self-defense, defendants in unwritten law cases played upon yet a third line of justification by arguing that the victims deserved to die. Of all the themes developed by defendants in the unwritten

---

[289] KALVEN & ZEISEL, *supra* note 21, at 223-24 (discussing jury acquittal where defendant shot at victim after victim had come to defendant's house, called him out, shot at him, and then started driving away again).

[290] *See* Randall McGowen, Book Review, 54 U. TORONTO L.J. 465, 466 (2004) ("Though his defence was temporary insanity, the real subtext of the trial . . . was an appeal to the 'unwritten law' that justified a man taking the law into his own hands in order 'to protect the weaker sex.'").

[291] BRANDT, *supra* note 255, at 179-80.

[292] *See* Cloud v. State, 7 S.E. 641, 641 (Ga. 1888). *Cloud* distinguished killing in revenge of adultery, which is murder, from killing when necessary to prevent adultery, which might be justifiable. Said the judge, "Speaking for myself, I think that gunpowder and ball are great preservers of human virtue; and, if I were on a jury, I do not hesitate to say that I would acquit a man who would kill another under such circumstances." *Id.* at 642; *see also* Brown v. State, 184 S.E.2d 655, 657-58 (Ga. 1971).

law cases, the theme of revenge was one of the most prominent and consistently pursued. Defendants pointed to the relatively lenient penalties applicable to the crimes of adultery and seduction in order to justify private vengeance, arguing that "libertines would escape punishment unless loved ones were allowed to avenge the dishonor of their fallen women."[293] Accordingly, "a husband who killed his wife's seducer committed an honorable act of 'revenge for . . . attacks upon [his] proprietary rights as a married man.'"[294] In some sense, the act of vengeance was portrayed both as necessary to prevent further harm and as the lesser evil, in that the killing of the libertine was preferable to the continued humiliation of the cuckolded husband or fallen woman, or at least more tolerable. Dressler labels this justification theory "moral forfeiture," by which one whose conduct crosses some threshold of acceptability "forfeits" his or her moral claim to social concern.[295] The wrongdoer, it might be said, "no longer merits our consideration, any more than an insect or a stone does."[296] Regardless of label, the basic claim is that because the victim deserved what was coming to him, the defendant was justified in delivering it. Although it finds no footing in the formal criminal law, the notion that private vengeance is a morally acceptable response to bad acts and bad people is deeply embedded in the popular conscience, at least if popular film and television are a reliable guide.[297]

As legal historian Robert Ireland has explained, jurors frequently acquitted in unwritten law cases because they were convinced that the murdered scoundrel "got what he deserved."[298] Sickles's attorney certainly argued to the jury that the libertine Key got precisely what he deserved: "It may be tragical to shed human blood; but I will always maintain that there is no tragedy about slaying the adulterer; his crime takes away the character of the occurrence."[299] The victim-desert theme has also surfaced in other types of cases as well.[300]

---

[293] Ireland, *The Libertine Must Die*, *supra* note 259, at 30.

[294] Ganz, *supra* note 266, at 265 (quoting *The Lessons of the MacFarland Trial*, 2 OLD & NEW 476 (1870)).

[295] DRESSLER, *supra* note 254, § 17.02[C], at 209.

[296] Dressler, *supra* note 210, at 465 (quoting Hugo Bedau, *The Right to Life*, 52 MONIST 550, 570 (1968)).

[297] To give only one example of which there must be thousands, the Clint Eastwood film, *Unforgiven*, resolves with Eastwood's character, William Munny, killing Little Bill in retaliation for Little Bill's torture and murder of his friend, Ned Logan. *See* PETER A. FRENCH, THE VIRTUES OF VENGEANCE 38-40 (discussing UNFORGIVEN (Warner Brothers 1992)); *id.* at 173-206 (discussing the desert conditions justifying vengeance that are reflected in popular culture).

[298] Robert E. Mensel, *Right Feeling and Knowing Right: Insanity in Testators and Criminals in Nineteenth Century American Law*, 58 OKLA. L. REV. 397, 421 n.155 (2005) (citing Ireland, *Insanity and the Unwritten Law*, *supra* note 11) (discussing Ireland's analysis of the Cole verdict).

[299] BRANDT, *supra* note 255, at 173. Harry Thaw's lawyer made precisely the same argument to Thaw's jury. *See* Umphrey, *supra* note 279, at 397-98 (explaining that basic

These justificatory arguments, in varying combinations, were presented frankly in the unwritten law cases and commonly understood to be the primary substantive basis of the defense. Yet they were necessarily accompanied by temporary insanity pleas, which in some cases were the sole *legal* defense actually presented to juries.[301] To some, this made the insanity claim a legal fiction, a "pretext for an acquittal according to the forms of law."[302] Critics lambasted the temporary insanity defense as providing an easy out to juries in such cases. Regarding a case in which the defendant claimed to have killed while suffering from "transitory homicidal mania," one critic derided the defense as "invented by ingenious lawyers to afford the jury a safe bridge upon which to pass from the disagreeable technical duty to the accomplishment of their desire to acquit a murderer whose victim, according to the consensus of opinion, ought to have been killed."[303] Or, as Paul Biegler advises his client in *Anatomy of a Murder*, where the defendant acts to avenge a serious wrong to a loved one, he will have the jury's sympathy, in which case all the defendant will "need is a legal peg which will let the jury hang up their sympathy in the defendant's behalf."[304] Temporary insanity provides that legal peg. Time and again juries have accepted the defense in the wake of evidence of the victim's transgressions against the defendant.

At stake in the debate over the unwritten law was the fundamental relationship between law, passion, honor, and self-control. When people are confronted with truly outrageous personal affronts to themselves or their loved ones, must the law's black-letter prohibitions always apply? If a man responds to such affronts in a way society can readily understand, and perhaps even applaud, isn't condemnation of that response nonsensical, or perhaps even immoral? And once the psychological jargon of the day is set aside, how really should a juror understand such concepts as mind, memory, understanding, and self-control? If a man becomes so obsessed with avenging his wife's infidelity that he can think of nothing else, is it not reasonable to conclude that he has temporarily lost his powers of memory, or of

theme of Thaw's defense was to convince jury that it was not "wrong to rid the world of a libertine who had ruined Thaw's wife Evelyn Nesbit before her marriage").

[300] That theme arguably was at work in the case of Isaach Kalloch, for example, who won an acquittal after shooting the editor of the *San Francisco Chronicle* in full view of numerous witnesses. Kalloch's defense focused primarily on the "scurrilous stories" the newspaper had printed about his father. *See* Barbara A. Babcock, *A Unanimous Jury Is Fundamental to Our Democracy*, 20 HARV. J.L. & PUB. POL'Y 469, 470 (1997) (discussing the case and stating that it was unclear whether the acquittal was based on a theory of temporary insanity or justification).

[301] *See* Ireland, *Insanity and the Unwritten Law*, *supra* note 11, at 158.

[302] *The Lessons of the McFarland Case*, *supra* note 79, at 386.

[303] Appel, *supra* note 30, at 229.

[304] WENDELL MAYES, ANATOMY OF A MURDER 28 (1950), *available at* http://www.dailyscript.com/scripts/anatomy_of_a_murder.pdf.

understanding? If a healthy mind is one capable of knowing both the nature of circumstances and of the law and of conforming one's conduct in light of both, then why don't circumstances that preclude a calm adherence to legal norms necessarily indicate a diseased mind?

It was precisely because such questions were not settled by law that defense counsel could raise a temporary insanity defense where the underlying cause of the defendant's conduct was an external provocation. The temporary insanity plea permitted the defendant to persuade the jury that the defendant's conduct was justified notwithstanding that the formal doctrinal rules, such as the strict limitations on what counts as adequate provocation and the rules regarding cooling periods – or in the context of self-defense, an imminent threat – made such defenses otherwise unavailable.

2. Self-Defense and the Battered Spouse

Self-defense is rarely far from the surface in cases involving battered spouses. As in the unwritten law cases, elements of at least three types of justification defenses – provocation, self-defense, and necessity – are in play when a battered woman kills her abuser. But of these, self-defense plays a particularly prominent role. The iconic case in this genre is that of Francine Hughes, whose killing of her sleeping, abusive husband was dramatized in the book and made-for-TV movie, *The Burning Bed*.[305]

Francine had endured years of wretched abuse at her husband's hands. She testified at trial to countless humiliations, beatings, and physical and psychological torture. She also recounted incidents in which Mickey, her husband, had "come close to killing her: of being strangled until she blacked out, threatened with a knife, forced out of the house in her nightgown, and kept prisoner for hour after hour of verbal and physical abuse."[306] These experiences and Mickey's threats convinced her that "it was only a matter of time before she would be killed."[307]

Atmospherically, at least, Francine relied heavily on a claim of self-defense. Her defense focused largely on two arguments: (1) that Francine reasonably believed Mickey would either kill or seriously injure her, and (2) that she, in fact, had little practical ability to escape the threat. The defense put on testimony from deputy police officers detailing past domestic incidents at the Hugheses' home in which Mickey choked and beat Francine and, in the officers' presence, threatened to kill her as soon as the officers left.[308] The defense also put on witnesses who testified to the injuries Francine suffered from the ongoing abuse, about Mickey's bragging about beating his wife, and the extent to which Mickey kept Francine socially isolated from family and

[305] *See* MCNULTY, *supra* note 68.

[306] *Id.* at 270.

[307] *Id.*

[308] *Id.* at 262-63.

friends.[309] Through this evidence and her own testimony, Francine established that "it was only a matter of time before she would be killed."[310] She also showed that, given her inability to support her family in a new location, the fact that neither police nor the legal system was effective in protecting her or her children from Mickey after past attacks, and Mickey's credible threats that he would kill her if she ever tried to leave, "retreat" was not a viable option.[311] In effect, Francine could establish most of the elements of self-defense under Michigan law: Mickey was a perpetual "aggressor," she honestly feared for her life and bodily integrity, and her fear was reasonable.

The problem for Francine, as well as for other battered women who kill their sleeping spouses, is that traditional law permits lethal force to be used in self-defense only in response to an imminent threat – the proverbial raised knife.[312] At the least, as the Model Penal Code provides, lethal force must be "immediately necessary" to ward off a threat of death or serious bodily injury "on the present occasion."[313] For her self-defense claim to prevail, Francine was also required to show that she acted in response to such an imminent threat, and that killing Mickey was necessary "then and there to fend off death or serious injury and that [she] could not have left or stepped away."[314] With Mickey asleep in the bedroom, this element of self-defense, though Francine quite plausibly might have believed it to be true, was objectively implausible. Though battered women may well reasonably fear that a violent attack, or even a lethal one, is just around the corner, it is not, in a recognized legal sense, actually imminent. As a result, battered women like Francine Hughes find their self-defense claims difficult to sustain. After all, as long as the victim is asleep he poses no immediate threat; retreat seems like a viable option, and the killing seems like a choice rather than a necessity. Francine's use of force on this particular occasion, under these circumstances, was a preemptive strike, which the law of self-defense simply does not permit.

---

[309] *Id.* at 263-64.

[310] *Id.* at 270.

[311] *Id.*

[312] *See* Dressler, *supra* note 210, at 461 ("'[I]mminent' or 'immediate' has come to mean that the attack will occur momentarily, that it is just about underway.").

[313] MODEL PENAL CODE § 3.04(1) (1985).

[314] People v. Vronko, No. 279857, 2009 WL 348830, at *1 (Mich. Ct. App. Feb. 12 2009) ("The elements of self-defense include: 1) defendant was not the aggressor or, if defendant was the aggressor, defendant communicated that the fight was over and withdrew, 2) defendant honestly and reasonably believed that he was in immediate danger of death or serious injury, 3) defendant honestly and reasonably believed that he must act then and there to fend off death or serious injury and that defendant could not have left or stepped away, and 4) defendant's response was reasonable, i.e., whatever defendant did was, under the circumstances as they appeared to him, no more than necessary to prevent Whiting from killing or seriously injuring him.").

As a general proposition, the moral argument for formally permitting the preemptive use of lethal force would seem rather thin. It seems right that the law discourages killing where less drastic measures are available to potential victims to avoid harm. But data on gender violence suggest that there might be some reason to treat battered women cases differently. Most importantly, the documented frequency of so-called "separation attacks" severely limits the options available to female abuse victims to safely extricate themselves from abusive relationships.[315] Indeed, data suggest that women are most at risk when they attempt to separate from an abuser.[316] As the Francine Hughes case illustrates, credible threats of lethal separation attacks are often present when battered women kill their sleeping abusers.[317]

But because self-defense law makes no provision for the preemptive use of force, Francine's self-defense claim would likely have failed, notwithstanding that her conduct was easily understood in light of self-defense principles. Indeed, the law is littered with homicide convictions in cases where battered women, in circumstances similar to Francine's, tried and failed to characterize their conduct as self-defense under the common law's traditional requirements.[318]

Thus, on trial for murder, Francine declined to argue self-defense.[319] Instead, she argued that the years of violence, abuse, and terror rendered her temporarily insane when she poured gasoline around the bed in which her husband slept and lit a match. Francine's temporary insanity plea, moreover, offered an additional advantage over a self-defense plea. Self-defense typically requires an objective inquiry into the circumstances of the killing. That is, the actor claiming self-defense must believe that lethal force is

---

[315] *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 65 (1991).

[316] *See* Marina Angel, *Susan Glaspell's* Trifles *and* A Jury of Her Peers*: Woman Abuse in a Literary and Legal Context*, 45 BUFF. L. REV. 779, 810 nn.236-266 (1997) (discussing separation attacks and noting that "[s]eventy-five percent of women reporting battering are divorced or separated").

[317] Such threats were also a feature of the Lorena Bobbitt and Jessie Norman cases. *See id.* at 813 n.290 (explaining that John Bobbitt had repeatedly threatened to attack Lorena if she ever left him); Marina Angel, *Why Judy Norman Acted in Reasonable Self-Defense: An Abused Woman and a Sleeping Man*, 16 BUFF. WOMEN'S L. J. 65, 69-72 (2008) (describing Judy Norman's attempts to leave abusive husband and husband's threats to beat or kill her should she do so).

[318] *See, e.g.*, State v. Norman, 378 S.E.2d 8, 13 (N.C. 1989) (reinstating conviction of a brutally battered spouse who shot her sleeping husband, notwithstanding trial court's refusal to instruct the jury on self-defense, because it found as a matter of law that she could not establish the defense, as "[t]he defendant was not faced with an instantaneous choice between killing her husband or being killed or seriously injured . . . [and] had ample time and opportunity to resort to other means of preventing further abuse").

[319] Francine's lawyer described her case as one where "a plea of self-defense would be legitimate but legally shaky." MCNULTY, *supra* note 68, at 220.

necessary to avert an imminent threat of death or serious bodily injury, and that belief must be objectively reasonable.[320] Although the subjective state of mind of the defendant is relevant, the main focus of the self-defense claim will be the reasonableness of the use of force under the circumstances. An insanity plea, in contrast, focuses solely on the subjective mental state of the defendant. Pleading temporary insanity permitted Francine to tell her story in much finer detail, including historical events that might be deemed irrelevant and therefore inadmissible to a claim of self-defense. She took full advantage of the traditionally liberal rules of evidence admissible to support an insanity plea, putting on witnesses to testify at length about Francine's plight, about "what it had been like to be Francine Hughes."[321] That, in turn, meant painting a vivid picture of life with Mickey.

As in the unwritten law cases, the portrait of the victim painted during Francine Hughes's trial revealed a vile scoundrel and, as with those cases, suggests a second justification equally at work in battered woman cases: that victim desert was also an important underlying claim.[322] Francine's defense readily established that Mickey was a brute and a potential killer. Her testimony about the events immediately preceding the killing suggests, even more than a rational immediate fear for her life, that she killed Mickey in response to circumstances that can only be characterized as "extreme provocation."

Francine testified that, on the day of the killing, Mickey had assaulted her: "I don't know how it started or anything, but he began hitting me. The kids were outside. He told them to stay out. I remember he was pulling my hair and he was hitting me with his fist and he had hit me on the mouth and my lip was bleeding."[323] Francine's daughter summoned the police, but before they came, Mickey ripped up all of Francine's schoolbooks, which she used for classes she had only recently begun taking at a community college. "He made me put them in the burning barrel where we burn our trash and burn them up. Then he said he was going to take the sledgehammer to my car, smash up my car so that I wouldn't be able to drive to school any more."[324] After the police left, Mickey again commenced his domestic terrorism:

> I had the kids wash and we sat down to eat. None of us had eaten all day . . . . The kids were trying to be quiet and I was trying to be quiet. Then Mickey came into the kitchen. He got a beer from the freezer and started yelling at me all over again. He pounded the table and the kids'

[320] *See* People v. Heflin, 456 N.W.2d 10, 18 (Mich. 1990); People v. Vronko, No. 279857, 2009 WL 348830, at *1 (Mich. Ct. App. Feb. 12, 2009).

[321] MCNULTY, *supra* note 68, at 269.

[322] Victim desert was also clearly an important subtheme in the Lorena Bobbitt case. Evidence admitted at trial indicated that Lorena had suffered substantial abuse, including beatings and marital rapes, at the hands of her husband John. Angel, *supra* note 316, at 813.

[323] MCNULTY, *supra* note 68, at 3.

[324] *Id.*

> milk spilled. It was dripping on the floor. The kids jumped up and started crying. Mickey made the kids go upstairs. Then he picked up the plates and dumped all the food on the floor, . . . and said, "Now clean it up, bitch!"[325]

After she had cleaned up the mess, Mickey "took the garbage can and dumped all the stuff back on the floor," ordered Francine to clean it up again, and then "took a handful of food and started smearing it" on her back and in her hair.[326] Mickey beat her again and then retreated to the bedroom. Francine fixed her husband some food and brought it to him. After he ate it, he asked Francine for sex; she submitted, and then he fell asleep. Francine testified that she decided at that moment to flee with her children, but before leaving, she "decided that there wouldn't be anything to come back to. [She] was going to burn everything."[327]

In fact, at the moment she apparently decided to kill Mickey, Francine did not seem to be especially fearful for her immediate safety. Rather, she seemed to have been pushed past the tipping point by an unrelenting series of outrageous personal provocations. In destroying her schoolbooks and forbidding her return to school, Mickey symbolically destroyed, according to Francine, the one aspect of her life that had brought her any hope or happiness, as well as her prospects for economic independence.[328] The assaults, the smeared food, and Mickey's domineering commands and calculated assault on her sense of personhood, topped off with what was, in effect, a rape, are more than merely reasonable provocations. Few jurors could hear this testimony and feel anything but total and absolute loathing for Mickey. Clearly, the same basic moral justifications were apparent at Francine's trial as in the unwritten law cases. A jury might well have been convinced that Mickey simply deserved to die.[329] At the least, Francine's acquittal is consistent with the

---

[325] *Id.* at 4.

[326] *Id.*

[327] *Id.* at 271.

[328] After ripping her school books apart, Mickey forced her to say that she was not going to go to school any more, an effort at domination that in her words left her feeling "lost," "beaten, defeated, broken." *Id.* at 191.

[329] Like the libertines in the unwritten law cases, the abusers in BWS cases readily fit the "moral theory of forfeiture" argument and "had it coming." Dressler, *supra* note 210, at 465. Alan Dershowitz locates the "he had it coming" defense within a broader class of "abuse excuse" cases. *See* ALAN M. DERSHOWITZ, THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY 3 (1994). According to Dershowitz, juries' sympathy for such defendants can be traced to a pro-vigilante ethic that became popular in late twentieth century American culture. *Id.* at 4 (explaining that the abuse excuse "endangers our collective safety by legitimating a sense of vigilantism that reflects our frustration over the apparent inability of law enforcement to reduce the rampant violence that engulfs us"). Jurors acted on similar sentiments in a case documented by Kalven and Zeisel in which a wife killed her husband during a "drunken brawl." KALVEN &

observation that juries will sometimes depart from the formal rule of law and "recognize an insult as sufficient aggression to privilege violence."[330]

The Lorena Bobbitt case provides perhaps the quintessential example of a battered spouse case in which the battered spouse's use of force was motivated by provocation rather than fear.[331] Like Hughes, Lorena Bobbitt was a battered spouse who had suffered numerous beatings and rapes by her husband. After one such incident, Bobbitt used a kitchen knife to sever her sleeping husband's penis.[332] She threw the dismembered organ into a field as she drove away from their home.[333] Bobbitt's conduct is hard to characterize as an act of self-defense. Indeed, a comment she made to the police after the crime suggested that sexual frustration was as much a motive for the attack as fear.[334] Certainly, her highly symbolic wounding of her husband – the likely consequence of which would be to provoke, rather than prevent, a homicidal attack – seems explicable only if Bobbitt at the time was unafraid of reprisal. In most cases involving abused defendants who strike out at their abuser, elements of both self-defense and extreme provocation are likely present.[335]

For all its titillating details and the explosion of popular concern in the 1990s about the supposed outbreak of jury nullifications in "abuse excuse" cases following Bobbitt's acquittal,[336] the storyline of the case was nothing new. Indeed, in 1906, one year before the trial of Harry Thaw, New York was captivated by the case of another victim of abuse, a young girl named Josephine Terranova.[337] Josephine was sent from Sicily to live with her aunt and uncle in New York at the age of nine. She soon became the victim of terrible abuse: she was starved and forced to work twenty-hour days scrubbing, cleaning, and ironing. Beginning at the age of eleven, she was sexually abused

ZEISEL, *supra* note 21, at 282-83. According to the judge presiding in the case, the jury likely acquitted because it "thought itself well rid of decedent." *Id.* at 283.

[330] *Id.* at 229.

[331] *See* Angel, *supra* note 316, at 813.

[332] *See* Michael Posner, *Lorena Bobbitt Describes Knife Attack Husband Was Selfish About Sex, Accused Woman Told Policeman; Jury Sees Wound Photos*, DENVER ROCKY MOUNTAIN NEWS, January 12, 1994, at 3A, *available at* 1994 WLNR 597375.

[333] Angel, *supra* note 316, at 813.

[334] Posner, *supra* note 332, at 3A.

[335] Kalven and Zeisel describe one such case, in which the jury acquitted the defendant – a son who killed his stepfather who had for a long time been abusing the boy's mother in the boy's presence. KALVEN & ZEISEL, *supra* note 21, at 234 ("There is an occasional domestic quarrel in which it is not the wife who is the defendant. Thus, where a son shoots and kills his stepfather during a quarrel between the father and the mother in which the father was abusing the mother, the judge finds manslaughter, the jury acquits.").

[336] *See, e.g.*, DERSHOWITZ, *supra* note 329, at 18 (describing the number of abuse excuses as "mind-boggling" and listing more than forty examples, such as "UFO survivor syndrome," "[r]oid rage," and the "'minister made me do it' defense").

[337] *See* Appel, *supra* note 30, at 203-04.

by her uncle.[338] At the age of seventeen, her uncle arranged for her marriage to a Brooklyn contractor, but upon learning of her past degradation and that she was now pregnant with her uncle's child, her new husband renounced the marriage.[339] Shortly thereafter, Josephine purchased a "revolver and a long potato knife" and with them murdered her aunt and uncle.[340] At trial, Josephine proffered a temporary insanity defense, and the jury, moved by the pathetic state of the victim and the vile conduct of her victimizers, acquitted her for the murders.[341]

A similar conceptual structure seems present in other recurrent contexts that tend to involve temporary insanity claims. The homosexual panic defense, for example, combines an allegedly extreme provocation (unwanted sexual advances by a member of the same sex) with an emotionally wrought mental state equivalent to, or triggering, a "mental disease or defect"; a self-defense justification (the need to use force to repel an offensive assault); and a vilified or stigmatized victim who is blamed for instigating the conflict and portrayed, to greater or lesser extent, as "deserving" the lethal response.[342]

Imminence aside, it is not hard in some cases for battered spouses to establish that the killings were necessary in the sense that the battered woman sometimes may have had no practical or reasonable alternative. Where police or courts cannot promise effective protection and where exit is not a realistic

---

[338] *Id.* at 205-06.

[339] *Id.* at 207-08.

[340] *Id.* at 209, 210.

[341] *Id.* at 223-24.

[342] Temporary insanity claims based on alleged "urban survival syndrome" and "black rage" also combine elements of provocation, self-defense, diminished capacity, and victim desert. Temporary insanity caused by "urban survival syndrome" was asserted in the case of Daimion Osby, who was "accused of killing cousins Willie 'Peanut' Brooks . . . and Marcus Brooks . . . after the two [men] jumped him in a Fort Worth parking lot." Koponec, *supra* note 20. According to "an expert witness on black-on-black crime" that Osby's lawyer's planned to call to explain Osby's defense, "Osby 'was in a situation which unfortunately, in order to preserve his own life, he had to do the kind of violence that justifies the case we are making for him.'" *Id.* Temporary insanity caused by black rage was asserted in the bank robbery prosecution of Steven Robinson. *See* Satyaprasad, *supra* note 10, at 182 ("Robinson's attorney . . . defended his client [against bank robbery charges] by intertwining three elements: Robinson's 'personal life history; what it means to be black in America;[sic] and the law of temporary insanity.' Harris did not blame racism for Robinson's actions, but rather, entered it into the equation of Robinson's life that created Robinson's 'rage.' Based on the 'black rage' defense, the jury granted an acquittal." (quoting Harris, *supra* note 10, at 41)). Lawyers for Colin Ferguson, the so-called "Long Island Killer," intended to assert a black rage defense in Ferguson's trial for shooting several commuters on a Long Island commuter train, but Ferguson fired them and did not pursue an insanity defense. Patricia J. Falk, *Novel Theories of Criminal Defense Based upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N.C. L. REV. 731, 751-52 (1996).

option because of an abusive spouse's credible threats, economic necessity, or a combination of both, the array of alternatives open to a battered spouse greatly diminishes. Under these conditions, preemptive force may be both reasonable and necessary to prevent death or further felonious abuse. This reality is apparent in the well-known case of Jessie Norman.[343] Like Francine Hughes, Jessie was the victim of years of brutal abuse by her husband. The abuse, moreover, seemed to be escalating. Jessie was not merely a passive victim. She tried to obtain help from the police, but her efforts to obtain protection only aggravated the abuse. Her husband threatened to kill her if she again sought help or if she tried to leave. From Jessie's perspective, there were no options. Like Francine Hughes, Jessie chose what seemed to be the necessary course, to end the threats and abuse by killing her husband while he slept.[344]

The practical insight, or intuition, that deadly preemptive force may be permissible in these cases is bolstered by the moral forfeiture theory of self-defense. According to the theory, using lethal force in self-defense is justified because in unlawfully initiating the lethal confrontation, the assailant forfeits his or her moral claim to the protection of the law.[345] The theory helps explain certain aspects of the law of self-defense, including why killing multiple assailants to preserve a single life is still a justified act – i.e., preservation of one innocent life is more socially valuable than preservation of the lives of multiple aggressors since the aggressors have forfeited their claim to the moral protections of the law and, in the equation, even combined still count for zero. Notions of moral forfeiture are readily discernible in the rule that initial aggressors forfeit their entitlement to self-defense when they themselves are responsible for initiating the confrontation. In any fair moral characterization, Mickey Hughes and "J.T." Norman were initial and egregious aggressors who were deeply and shamefully responsible for the "affray" they found themselves in, and few tears were or will be shed for them. But "aggressor" is a term of art in the criminal law, and its specific meaning in the criminal legal context is sometimes at odds with its meaning as used in common parlance. Because the law parses a complex tapestry of circumstances into temporally-bounded panels, at the moment of the killing, Mickey and J.T. were in a legal sense no more aggressors than anyone else.[346]

---

[343] State v. Norman, 366 S.E.2d 586, 586-89 (N.C. Ct. App. 1988), *rev'd*, 378 S.E.2d 8 (N.C. 1989).

[344] *Id.* at 589.

[345] Dressler, *supra* note 210, at 465.

[346] The initial aggressor doctrine generally permits the aggressor to reclaim his or her right to use force in self-defense after withdrawing from the conflict and notifying the victim of his intent to withdraw. *See* LAFAVE, *supra* note 61, § 10.4(e), at 546. Presumably, leaving the victim and going to sleep would constitute withdrawal and sufficient notice under the rule.

The battered woman who kills preemptively may well believe that preemptive force is necessary to avert an otherwise unavoidable threat by an aggressor and that what she has chosen to do is therefore entirely consistent with the moral structure of the law of self-defense. To the extent that the law says she is mistaken in those judgments, the killing was not justifiable self-defense.[347] But to the extent she honestly believed in them, she did not know that her act was unlawful. At least with respect to the required degree of cognitive dysfunction, she is like an insane person under *M'Naghten* because she is honestly incapable of understanding that her act was either morally or legally wrong. And if the jury agrees with the substance of her judgments – that she really had no practical alternative, that sooner or later she would be the victim of lethal abuse, that waiting for her victim to strike first was not a reasonable strategy, and that the victim was fundamentally the aggressor – then she really was mistaken only about how the law would technically apply to her self-defense claim rather than about the principles that underlie the defense. At a deeper level, she is not culpable.

Moreover, although the black letter rules of self-defense law only permit the jury to conclude that an aggressor has morally forfeited his claim for the law's concern during the brief period in which the aggressor has threatened or launched an imminent deadly attack on the victim, there is no logical reason that the rules need be so constrained. Certain particularly heinous actors, including the Mickey Hugheses and the J.T. Normans of the world, quite rationally can be viewed as having forfeited their claim to the protections of the law. That is, if the moral principles animating self-defense are taken seriously, it is logical in certain cases to extend the right to use lethal force beyond the limited circumstances formally allowed under conventional legal principles. A verdict fully acquitting the battered woman may better capture the moral equities at play than defenses such as heat of passion or imperfect self-defense, under which the battered woman would likely be held culpable for felony homicide. Permitting a jury to come back with a temporary insanity verdict under such circumstances thus vindicates, rather than subverts, the moral structure of self-defense law.

Of course, one might say that in such cases it would be better still to acquit the battered woman based on self-defense. After all, we have posited that Francine Hughes and Jessie Norman are effectively, though not technically, justified in killing their abusers. That is, that killing their abusers in their cases was consistent with the moral principles that animate the law of self-defense, even if inconsistent with the rules of law developed to apply those principles. The problem with granting a self-defense claim to Francine and Jessie, however, is that any exception to the imminence requirement would be hard to cabin.[348] Perhaps the Model Penal Code formulation makes it easier for

[347] Formally, her claim in this scenario is "imperfect self-defense," which, where recognized, mitigates murder to manslaughter. *See supra* Part III.B.1.

[348] For just this reason, Professor Dressler has argued against expanding self-defense to

battered women to prevail on self-defense claims, but not by a whole lot. With its strong and long-standing preference for life, homicide law has attempted to limit access to self-help to situations where there truly are no other options.[349] The temporary insanity plea in such cases makes it possible to preserve that important teaching function of the criminal law while acknowledging the fundamental inappropriateness of punishment where the defendant is the true victim. In this context, temporary insanity claims predicated on battered spouse evidence provide a de facto amendment of the law of self-defense. By reconceptualizing self-defense to "encompass[] desperate acts to which people can claim they've been driven by the long-standing abuse of people close to them[, a] psychological component has been added to what was formerly a kind of 'frontier mentality' definition of self-defense."[350] Temporary insanity claims based on battered spouse evidence permit defendants to describe their desperate acts "in a way which makes it look like something other than a cold-blooded, rational killing."[351]

3. Imperfect Necessity and Mercy Killing

Mercy killings provide a final class of cases in which the temporary insanity defense appears grounded in justification. There are numerous examples of mercy-killing cases in which defendants have been acquitted, or in which grand juries have refused to indict, on grounds of temporary insanity. Take, for instance, the case of seventy-two-year-old Justina Rivero.[352] Rivero's husband, who was eighty-four years old, was afflicted with Alzheimer's disease. Ms. Rivero, who tried to kill herself and her husband with rat poison,

encompass the claims of battered women who kill their sleeping abusers. *See* Dressler, *supra* note 210, at 458 ("[T]he result of expanding self-defense law to the extent required to justify the killing of a sleeping abuser would be the coarsening of our moral values about human life and, perhaps, even the condonation of homicidal vengeance.").

[349] *But see* Victoria Nourse, *The New Normativity: The Abuse Excuse and the Resurgence of Judgment in the Criminal Law*, 50 STAN. L. REV. 1435, 1466 (1998) (reviewing JAMES Q. WILSON, MORAL JUDGMENT: DOES THE ABUSE EXCUSE THREATEN OUR LEGAL SYSTEM? (1997)) (explaining that law is not always protective of life, given exceptions to retreat rule such as the "castle" doctrine).

[350] Hope C. Lefeber, *Getting Away with Murder? Juries May – Soften – Verdicts of Those Claiming Abuse*, LEGAL INTELLIGENCER, July 18, 1994, at 9, *available at* 1994 WLNR 5416587.

[351] *Changing Times, Changing Defenses Reflections from a Women's Movement Pioneer*, RECORDER (S.F.) June 5, 2009, at 5, *available at* 2009 WLNR 22681025 (profiling defense attorney Susan Jordan) ("[T]he fundamental notion in the battered women's cases . . . is: – aYou have injured me one too many times in the past. I'm going to defend myself before you kill me. If I think that this time you're gonna kill me after all those other times I put up with your battering, your rape, whatever, and I am reasonable in believing that, then I don't have to wait for you to kill me.").

[352] *See* Nicole Sterghos & Diane Lade, *Judge Rules Wife Insane*, S. FLA. SUN-SENTINEL, Feb. 24, 1999, at 1B, *available at* 1999 WLNR 7062329.

claimed at trial that she had grown despondent over her and her husband's living situation and feared that her husband would be subject to abuse if she was unable to care for him.[353] The judge acquitted Rivero on grounds of temporary insanity.[354] Juries similarly acquitted defendants Carol Paight and Eugene Braunsdorf in cases involving mercy killings.[355] Paight, a college student, killed her father, who was hospitalized and dying of cancer.[356] Braunsdorf, a symphony musician, shot and killed his twenty-nine-year-old daughter, who had been crippled and hospitalized her entire life.[357] Both successfully asserted temporary insanity defenses at trial. In a more recent case, Dan McKay killed his newborn infant after discovering that the baby suffered severe deformities and would likely die within three months.[358] McKay argued temporary insanity at the trial, which ended in a mistrial after jurors could not reach a verdict.[359]

As in the unwritten law and battered spouse cases, widespread popular sympathy exists for defendants in mercy killing cases but for somewhat different reasons.[360] In mercy killing cases, judges and jurors are frequently persuaded that, in choosing to kill a suffering loved one, the defendants chose the lesser evil. Defendants contend that their acts were motivated by good reasons and resulted in a reduction of harm. The arguments against punishment in mercy killing cases thus parallel the necessity defense. But as in the unwritten law and battered spouse cases, although the types of arguments presented by the defendants are clearly justificatory, traditional criminal law precludes assertion of a justification defense (here, necessity) in circumstances involving mercy killing. A necessity or lesser-evil defense requires proof that the chosen course was necessary to avoid an imminent or immediate harm, and that no alternative course of action involving a lesser

---

[353] *Id.*

[354] Charles H. Baron, *Assisted Dying*, TRIAL, July 1999, at 46 (citing Sterghos & Lade, *supra* note 352, at 1B); *see also* DIVORCE, BLOOD TRANSFUSIONS, AND OTHER LEGAL ISSUES AFFECTING CHILDREN OF JEHOVAH'S WITNESSES, http://jwdivorces.bravehost.com/familicide3.html (last visited May 12, 2011).

[355] *See* Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803, 824 n.106 (1993) (citing Harold Faber, *Carol Paight Acquitted as Insane at Time She Killed Ailing Father*, N.Y. TIMES, Feb. 8, 1950, at 1; *Mercy Killer Freed as Insane at Time*, N.Y. TIMES, May 23, 1950, at 25).

[356] *Id.*

[357] *Id.*

[358] E.R. Shipp, *Mistrial in Killing of Malformed Baby Leaves Town Uncertain About Law*, N.Y. TIMES, Feb. 18, 1985, at A14, *available at* 1985 WLNR 645389.

[359] *Id.*

[360] Phebe Saunders Haugen, *Pain Relief for the Dying: The Unwelcome Intervention of the Criminal Law*, 23 WM. MITCHELL L. REV. 325, 353 (1997) (citing Leonard H. Glantz, *Withholding and Withdrawing Treatment: The Role of the Criminal Law*, 15 LAW, MED. & HEALTH CARE 231, 232-34 (1987)).

harm was available. This showing is difficult to make in mercy killing cases. After all, objectively speaking, there are almost always alternatives to killing. To prevail, the mercy-killer must convince the jury that killing the suffering victim was the only reasonable way to minimize the victim's pain. In some circumstances, such a claim might well be compelling, but despite popular sympathy for defendants caught in such circumstances, killing to relieve suffering is flatly foreclosed as a matter of law.[361] The common law, at least, has never recognized the necessity defense as viable in homicide cases,[362] and no jurisdiction in the United States recognizes euthanasia as a viable defense to homicide.[363] Accordingly, jurors who acquit on temporary insanity grounds in mercy killing cases reject or ignore the traditional limitation on the necessity defense that would preclude its assertion.

In mercy killing cases, the temporary insanity defense functions as a kind of rogue or "imperfect necessity defense," albeit one that is consistent with the moral principles underlying the defense.[364] As in the other contexts in which temporary insanity factors recurrently, the temporary insanity defense supplies a cognizable legal claim in circumstances in which some other defense – here, necessity – has moral appeal but lacks fit due to its doctrinal structure.

IV. A LEGITIMATE LEGAL FICTION?

More than any other recognized criminal law defense, temporary insanity creates space for what one court described as "common sense and the feeling for substantial justice possessed and applied by the average jury."[365] Cases involving the unwritten law in the nineteenth century, like battered spouse

[361] For example, in *State v. Sander*, a doctor was charged with murder after purposefully injecting air into the veins of an incurably-ill cancer patient. The trial court ruled at the outset of the case that "the question of mercy killing could not legally be an issue at the trial." Silving, *supra* note 91, at 353. The jury acquitted on grounds of inadequate proof of causation. *Id.*

[362] *See, e.g.*, Regina v. Dudley & Stephens, [1884] 14 Q.B.D. 273, 273 (exemplifying the common law rule that one who kills another for purpose of saving his own life "is guilty of murder; although at the time of the act he is in such circumstances that he believes and has reasonable ground for believing that it affords the only chance of preserving his life").

[363] Some foreign jurisdictions expressly treat mercy killings differently, and more leniently, than other homicides. *See* DAVID W. MYERS, THE HUMAN BODY AND THE LAW. A MEDICO-LEGAL STUDY 152-53 (1970) (explaining that "[t]he German Penal Code makes provision for 'homicide upon the request of the person killed,'" and that Norway and Sweden make "special provision for mercy-motivated or requested killing of hopelessly ill persons").

[364] Israeli Prime Minister Yitzak Rabin's assassin, Yigal Amir, tried unsuccessfully to defend himself in this manner, pleading temporary insanity but arguing at trial that Rabin's assassination was "necessary" to advance the greater good. *See* Alexander, *supra* note 16, at 1161.

[365] United States v. Fielding, 148 F. Supp. 46, 55 (D.D.C.), *rev'd*, 251 F.2d 878 (D.C. Cir. 1957).

cases today, intuitively imply such defenses as "extreme provocation" and "preemptive deadly force" – neither of which, of course, exists under the law. Infanticide cases put factfinders in the uncomfortable position of being asked to punish the victim, either because the law requires them to treat the infant and mother as legally distinct entities while social conventions suggest a fuzzier boundary or because the law does not permit them to take into account the social circumstances surrounding the act. Mercy killing cases, where the defendant is almost always a spouse or loved one of the victim, evoke similar conflicts between simple legal rules and nuanced factual contexts and similar practical uncertainties about victim and perpetrator that are obvious to factfinders but ignored by the law. Indeed, such cases illustrate a persistent failure of the criminal law in general: its wholesale tendency to ignore important social and moral facts when they lack direct relevance to pre-established legal categories. In all these cases, temporary insanity seems to serve as a way to correct a failure of the law to address some moral or social complexity that eludes redress through simple rulemaking.

In short, a temporary insanity defense is most likely to succeed where enforcement of the criminal law seems unwarranted but where a conventional defense falls short due to some doctrinal rule that forecloses it under the circumstances or because the asserted defense – while coherent and perhaps even intuitive – is not recognized by law. So used, the defense is fundamentally equitable in nature in that it is grounded not in the formal doctrinal rules of the criminal law but rather in the values and principles that shape it.

Such use of the defense is arguably a form of jury nullification. By anchoring acquittals in these cases on a formally permissible legal defense, juries are not simply refusing to bring back a guilty verdict against the evidence. They are, however, shifting the terms of the inquiry to an issue that might fairly be described as a legal fiction that serves as a "surrogate[] for the jury's true discomfort with the propriety of the conviction."[366]

While that characterization of jury conduct is probably accurate, dismissing the temporary insanity defense as "mere nullification" doctrine misrepresents the nature of the moral inquiry at the heart of these cases because it implies that the decisionmakers disregarded the law and, for reasons extraneous to it, refused to reach the appropriate result. That dynamic does not appear to be at work in most temporary insanity cases. More often than not, juries who accept the defense seem to be attempting to conform their verdicts to a set of principles that underlies, or is at least consistent with, the formal doctrinal rules.

No violence to the legal imagination results from characterizing the actions of defendants in these cases as the product of "temporary insanity." These defendants face a dilemma that can be framed in the language of the traditional standards that govern criminal responsibility: In some cases, the pressure of

[366] Dorfman & Iijima, *supra* note 93, at 864.

circumstances may well have rendered the defendant momentarily ignorant of right and wrong or engendered an "irresistible impulse" to commit a crime. In other cases, the defendant may not have chosen to do wrong simply because he or she, in fact, reasonably believed that killing was the right thing to do under the circumstances. Either way, such a claim has some objective merit to it.[367]

Whether the defendant's choice was "right" or at least not blameworthy, in turn, demands an inquiry into the very purposes of the criminal law. While those purposes are contested, we can see a significant degree of consistency in the application of various punishment theories to the moral dilemmas faced by the defendants in the temporary insanity cases. Consider three main variants of punishment theory: choice theory, character theory, and utilitarian theory.

Choice theorists posit that individuals deserve punishment when they make a morally blameworthy choice under circumstances in which they had an opportunity to make a better one.[368] The insanity defense, in this view, relieves individuals who cause harms because they lacked the capacity to choose. In temporary insanity cases, defendants frequently advance the claim that they did not make a blameworthy choice under the circumstances, not merely because the circumstances obscured their choice-making capacities but because the correct choice under the circumstances was itself obscure. In situations of deep moral ambiguity, application of "objective" moral principles is a difficult enterprise if the object is to honestly judge what a "reasonable" or "blameworthy" choice would be under the circumstances. Just as mental disease might obscure the difference between right and wrong, situational complexity can sometimes render the moral landscape so murky that an actor proceeding within that landscape might fairly be found by a rational factfinder blameless for choosing a course of action that in other circumstances is quite plainly wrong.

Character theorists might well reach the same result. Simply speaking, character theories posit that bad character, rather than merely bad acts, ultimately justifies criminal punishment.[369] Accordingly, criminal conduct

[367] Defendants in these kinds of justification-based temporary insanity cases might be thought of as operating under a mistake as to a justification. Mistake as to a justification provides a complete defense, at least where the mistake was reasonable. Mistake as to a justification, however, presumes a factual mistake. For instance, a defendant might properly invoke the defense where he killed an apparent assailant who reasonably appeared to be pointing a gun at him intending to shoot even if that assailant turns out to be prankster wearing a costume and holding a toy gun. Defendants in these cases, however, did not make a factual mistake. Rather, they made a legal mistake – believing that extreme provocation justified killing, that extreme suffering justified euthanasia, or that a sleeping husband presented an "imminent" threat – albeit a mistake that jurors can agree was reasonable.

[368] As one scholar notes, "in simplest terms [choice theory] says that an actor should be excused if he did not freely choose to break the law." Stephen Garvey, *supra* note 276, at 1698 n.69.

[369] *See* Anders Kaye, *The Secret Politics of the Compatibilist Criminal Law*, 55 U. KAN.

does not deserve punishment where factors unrelated to the character of the actor are responsible for causing the actor to engage in criminal conduct. Actors who engage in otherwise criminal conduct under circumstances warranting justification show no defect in character by so acting, because the conduct under the circumstances is morally appropriate. Excusing conditions, similarly, demonstrate that the conditions rather than the actor are to blame for the bad conduct. Because it fails to demonstrate bad character, conduct caused by excusing conditions is not morally blameworthy.[370] The situations that tend to trigger successful temporary insanity defenses are consistent with a character theory assessment of blameworthiness. By demonstrating that the criminal act committed by the defendant was, in essence, out of character and that the criminal act was not a true expression of his preferences, the defendant disclaims ownership of the act and seeks to attribute it to some external source. That is, the actor's bad character is simply not manifest in such situations. Juries often choose quite reasonably to withhold punishment when individuals avenge great harms to loved ones, assume the risk of criminal conviction to relieve a suffering loved one of unwanted pain, or engage in self-destructive conduct under circumstances for which they are not to blame. Such actors demonstrate no defect in character by acting consistently with social norms and expectations even when those norms and expectations run into legal prohibitions. Criminal conduct in such circumstances simply does not establish the actor's bad character.

Finally, one might think about the temporary insanity defense from the perspective of the utilitarian arguments for punishment, deterrence and incapacitation. Deterrence theories justify criminal punishment by its expected effects in deterring future criminal acts by others.[371] Incapacitation provides a justification for punishment where the actor's criminal conduct demonstrates that the actor poses a threat to others if left at liberty.

Deterrence would seem to provide critics of the temporary insanity defense the greatest ammunition. Plainly, temporary insanity is widely perceived as a cheat to the system, easily abused in order to escape punishment. Like any defense, the fact that temporary insanity provides a possible basis to avoid criminal liability weakens the deterrent effect of the law. But in the morally

L. REV. 365, 378 (2007).

[370] *See* Colb, *supra* note 203, at 697 ("[T]emporary insanity of whatever ilk is an excuse, because '[t]emporary insanity prevents the conduct from indicating a character trait – an undesirable disposition the actor still has.'" (alteration in original) (quoting Michael D. Bayles, *Character, Purpose, and Criminal Responsibility*, 1 LAW & PHIL. 5, 17 (1982))).

[371] *See* John D. Castiglione, *Qualitative and Quantitative Proportionality: A Specific Critique of Retributivism*, 71 OHIO ST. L.J. 71, 117 n.207 (2010) ("Deterrence theory relies on the threat of punishment to deter persons at large (general deterrence) or particular individuals (specific deterrence) from offending or re-offending, respectively." (quoting Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishments Clause*, 68 TENN. L. REV. 41, 60 (2000))).

complex settings in which temporary insanity defenses tend to succeed, deterrence considerations also tend to be complex. Unwritten law killings were often *defended* expressly in terms of deterrence where the extant criminal law was thought insufficiently robust in punishing adultery and seduction. Juries, as well as the communities that tended to support their temporary insanity acquittals, often felt that fear of the lethal wrath of the cuckolded husband or shamed father or brother would be more likely to deter sexual misconduct than mere reliance on the criminal law. Similar sentiments can be found in battered spouse cases and other abuse-excuse contexts, where the defendant exacts retribution from the abuser. Certainly, in all cases where the temporary insanity defense prevails there are strong reasons to believe that the defendant does not present a future danger to the community or require incapacitation. In cases where the criminal conduct is attributed to extreme and unusual circumstances rather than some more permanent characteristic of the defendant, acquitting juries can release the individual back to the community with reasonable confidence that the defendant will not reoffend.

In viewing the temporary insanity cases in light of the punishment theories that anchor justification and excuse, some of the paradoxes of the criminal law begin to recede. Implicit recognition of an "extreme provocation" defense rectifies the conventional provocation doctrine's refusal to fully excuse retaliatory violence committed under circumstances in which reasonable people would resort to it. Implicit recognition of an "anticipatory strike" defense rectifies a flaw in self-defense doctrine that quite plainly disadvantages women who lack the physical strength to defend themselves against their abusers but have no practical recourse to avert the inevitable next attack.

Exceptions to the insanity defense itself, carved out by the prohibition on basing a temporary insanity defense on voluntary intoxication, are explicable by referring to the underlying principles of punishment. Though voluntary intoxication induces a state of mind equivalent to temporary insanity, the voluntarily intoxicated actor is blameworthy for his or her criminal acts in ways that others invoking the temporary insanity defense are not. Choice theory would blame the actor's choice to become intoxicated, a choice which has little external social value. Character theorists might find intoxicated crime as evidence of bad character. Viewed in light of deterrence, punishing criminal conduct caused by intoxication provides a marginal deterrent to intoxication, and actors who commit crimes while intoxicated are likely to do so again in the future and thus are better candidates for incapacitation.

Similar arguments apply to the criminal law's treatment of passion. Individuals are expected by society to subordinate their emotions to their moral and legal obligations.[372] Such subordination is the very essence of civilization. As a result, the criminal law generally abides by the proposition that mere passion or strong emotion is no defense to criminality. Yet under certain

[372] *See* David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1144 (1986).

circumstances, overwhelming passions stoked by betrayal or abuse are not only socially tolerated, they are expected. When individuals succumb to such passions and respond in ways deemed consistent with community values, those individuals are seen as vindicating social norms. Such conduct is not viewed as blameworthy even when it conflicts with technical legal rules. The temporary insanity defense provides a neat answer to the resulting conflict of norms, thus providing a legally acceptable path to withhold punishment from individuals whose conduct is viewed as morally appropriate.

The temporary insanity cases thus repeatedly demonstrate juries resolving morally complex conflicts not by literally or mechanically applying established legal rules but by interpreting those rules in reference both to social norms and to the deeper purposes of the criminal law. To the extent that temporary insanity verdicts are acts of jury nullification, the cases indicate not lawless jury conduct but rather complex jury conduct. Nullification in this context is less an act of outlawry than an act of legal "interposition," by which the jury verdicts work to fill in, or smooth over, gaps or inconsistencies in formal legal doctrine.

Finally, what of the formal demand of the insanity defense for proof of a "diseased mind" or "mental disease or defect"? The problem, of course, is that under the traditional formulation of the insanity test it is not enough that the defendant be unaware of the wrongfulness of her conduct. She must also be able to point to a mental disease or defect, and that mental disease or defect must be the cause of her unawareness.

As noted above, the diseased mind requirement has never possessed much objective clarity. Notwithstanding centuries of scientific inquiry into the nature and processes of the human mind, the study of mental illness remains largely a phenomenological inquiry. Where disease or defect is identified largely in functional rather than physiological terms, the legal inquiry is inevitably tautological. For purposes of law, the diseased mind is the mind that fails to grasp the difference between right and wrong (or to exercise control over volition), and thus where the mind fails to grasp the difference between right and wrong (or exercise volition), it is diseased. Because of this, as is evident in the cases, the diseased mind requirement tends to act more as a procedural bar on the temporary insanity defense than as a substantive one. To get a temporary insanity defense to the jury, defendants need only present a circumstantial cause of dysfunction in terms sanctioned by expert diagnosis and testimony. By doing so, any legal bar to the jury's consideration of the defense is overcome.

For instance, whereas the assumption that extreme emotional stress is itself a type of mental disorder was widely accepted in the nineteenth century, the increasing medicalization of mental illness has tended to limit the number of justification-based temporary insanity claims that make it to the jury. Today such claims must be formulated in the context of "syndrome" evidence or accompanied by psychiatric evidence of a "psychotic break" or significant mental dysfunction to survive. Successful temporary insanity claims need only

establish the link between the triggering conditions justifying or excusing the conduct and its psycho-medical effect of disordering (or reordering) the actor's mind to satisfy the standard. The jury may not be persuaded, but the history of the temporary insanity defense suggests that the jury's verdict in such circumstances will turn on its evaluation of the moral equities of the situation, not on any scientifically valid theory of mental disease. At bottom, the jury's concern is whether the defendant's conduct was blameworthy, whether the defendant's character was defective, and whether the defendant posed a future threat to the community. Temporary insanity may thus ultimately be seen as a legal fiction, then, but one in the service of the community's quest to ensure that punishment is meted out consistently with the animating principles, rather than the technical legal doctrines, of the criminal law.

CONCLUSION

The overarching function of criminal law is to punish the blameworthy, to incapacitate the dangerous, and to deter persons generally from committing crimes. Affirmative defenses are available where the alleged criminal conduct is legally justifiable or the actor is not blameworthy for committing the crime. Such exceptions to criminal liability must necessarily be narrow to safeguard the integrity of the criminal law and to underscore the high value that society places on law-abiding conduct. In its zeal to keep these exceptions narrow, criminal law doctrine occasionally precludes the availability of defenses in cases in which the defendant has acted in conformity with the deeper values the defenses were intended to serve. In cases like these, the temporary insanity defense has been asserted successfully. The defense prevails where the defendant successfully demonstrates that his conduct was not blameworthy and that he presents no continuing danger to society. Acknowledging an exception under such circumstances should not, in theory, undermine the deterrent function of the criminal law with regard to those whose criminal acts are carried out under less extraordinary circumstances. In the majority of jurisdictions, therefore, temporary insanity is likely to continue to provide, in a select set of cases, the perfect defense.