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# The Unabomber Revisited: Reexamining the Use of Mental Disorder Diagnoses as Evidence of the Mental Condition of Criminal Defendants

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# The Unabomber Revisited: Reexamining the Use of Mental Disorder Diagnoses as Evidence of the Mental Condition of Criminal Defendants

ADAM K. MAGID\*

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## INTRODUCTION

What role, if any, should a mental disorder diagnosis play in a criminal case where a defendant’s mental condition is in dispute? Richard Bonnie and Christopher Slobogin argue that courts should consider diagnoses in criminal proceedings: “Without the conceptual aid offered by diagnostic constructs, the factfinder will confront a bare description of symptoms, with only lay conceptions of illness to assist in interpretation.”<sup>1</sup> In contrast, Stephen J. Morse argues that courts should not consider diagnoses and mental health expert witnesses should be limited to offering “full, rich, clinical descriptions of thoughts, feelings, and actions and relevant data.”<sup>2</sup> According to Morse, “[d]iagnoses and unvalidated speculations are simply irrelevant” to the issue of culpability in a criminal trial.<sup>3</sup> This Article attempts to reexamine this debate, at least with respect to the diagnosis of paranoid schizophrenia, in the context of the case of the Unabomber, Theodore Kaczynski.

The Unabomber first struck on May 26, 1978, when a package addressed to an engineering professor exploded in a parking lot at the University of Illinois, Chicago, and injured a police officer.<sup>4</sup> The Unabomber’s subsequent attacks included an

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\* J.D., Stanford Law School, 2008. Many thanks to Professor Christopher Slobogin for all of his help and inspiration in developing this Article.

1. Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, 468–69 (1980).

2. Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 823 (1985).

3. *Id.* at 821–22.

4. Court TV Online, *The Unabomber*, <http://www.courttv.com/trials/unabomber/bombings.html>. Unless otherwise indicated, the following factual account derives from this

explosive device in a cigar box, a defective bomb that caught on fire on an American Airlines flight, a package bomb addressed to the president of United Airlines, a pipe bomb left in the computer science department at the University of California, Berkeley, and a mail bomb at the University of Michigan. On December 11, 1985, a bomb containing nail fragments killed Hugh C. Scrutton, the owner of a computer rental store—the first of three Unabomber-related fatalities. The Unabomber attacked sporadically over the next ten years, resulting in severe injuries (for example, Yale computer scientist David Gelernter lost sight in one eye, hearing in one ear, and part of his right hand) and additional fatalities (including New York City advertising executive Thomas Mosser, whose firm worked for Exxon Corporation, and Gilbert Murray, the president of a timber lobbying group).

On April 24, 1995, the *New York Times* received a letter in which the Unabomber promised to stop sending bombs if it published his 37,000-word magnum opus on the evil of modern technology. On September 19, 1995, the *Washington Post* printed the manifesto. David Kaczynski of Schenectady, New York, while helping his mother move, saw some of his brother Ted's old journals and letters he had written to newspapers years earlier and noticed a similarity with the published manifesto.<sup>5</sup> David contacted a lawyer and cooperated with the FBI.<sup>6</sup> On April 3, 1996, in Lincoln, Montana, Theodore Kaczynski, a former University of California, Berkeley professor living in a one-room cabin without electricity, was arrested.<sup>7</sup>

At trial, Kaczynski's lawyers planned to argue that he suffered from paranoid schizophrenia and consequently could not form the intent to commit a premeditated crime.<sup>8</sup> On December 8, 1997, Kaczynski wrote a letter to the judge, saying that he wanted to represent himself to avoid being labeled "mentally ill" by his lawyers.<sup>9</sup> In response, his lawyers discarded the plan to make a mental illness defense during trial but convinced Kaczynski to allow them to use mental illness as a mitigating factor in the event of a sentencing phase.<sup>10</sup> Despite this compromise, Kaczynski insisted on representing himself and, in order to do so, submitted to a psychological evaluation by Dr. Sally Johnson, who diagnosed Kaczynski with paranoid schizophrenia.<sup>11</sup> After the judge denied Kaczynski's petition for self-representation, Kaczynski continued to tell the judge and his lawyers that he did not want to be labeled mentally ill. At the same

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source.

5. Nancy Gibbs, *Tracking Down the Unabomber; The Harvard Hermit Discarded Modern Life 25 Years Ago; But After a Long and Obsessive Manhunt, the Feds Are Convinced They've Finally Got Their Mad Bomber*, TIME, Apr. 15, 1996, at 38, 43.

6. *Id.*

7. Court TV Online, *supra* note 4.

8. David S. Jackson, *At His Own Request: Is Kaczynski's Rejection of His Best Chance for a Defense a Result of Paranoid Schizophrenia?*, TIME, Jan. 12, 1998, at 40, 40.

9. *Id.* It should also be noted that it is a common trait of people with paranoid schizophrenia to resist being labeled as mentally ill. *Id.* While thought-provoking, this does not necessarily mean that he suffered from paranoid schizophrenia, as one might expect the same response from someone without the disorder.

10. Nancy Gibbs & David S. Jackson, *In Fits and Starts: Kaczynski Throws the Unabomber Trial into Disarray. Is He a Master Manipulator or Just Desperately Confused?*, TIME, Jan. 12, 1998, at 26, 26. One might assume that the specter of the death penalty might have softened Kaczynski's convictions about not being labeled "mentally ill."

11. Tamala M. Edwards, *Crazy Is as Crazy Does: Why the Unabomber Agreed to a Guilty Plea for a Life Sentence*, TIME, Feb. 2, 1998, at 66, 66.

time, prosecutors, fearing reversal, acquittal, or mistrial because of Kaczynski's mental illness, offered Kaczynski a plea deal of life in prison. Kaczynski accepted the deal and currently resides at the federal "Supermax" prison in Florence, Colorado.<sup>12</sup>

In this Article, using the Unabomber case as a springboard, I discuss some of the perils associated with permitting expert testimony related to a diagnosis of paranoid schizophrenia in criminal proceedings where the mental condition of the defendant is at issue. In Part I, I juxtapose the implications of a paranoid schizophrenia diagnosis with a highly plausible explanation for Theodore Kaczynski's crimes and conclude that a paranoid schizophrenia diagnosis has strong potential to mislead a judge or jury in several important ways. In Part II, using Kaczynski as an example, I show how the misleading nature of a paranoid schizophrenia diagnosis can lead to criminal justice outcomes contrary to the purposes of the criminal law. In conclusion, I offer some tentative prescriptions.

### I. THE MISLEADING NATURE OF A PARANOID SCHIZOPHRENIA DIAGNOSIS

A diagnosis of paranoid schizophrenia suggests a lack of choice over one's conduct. In contrast, Theodore Kaczynski, the Unabomber, plausibly chose to target people with mail bombs not because of brain dysfunction, but because of a series of deliberate decisions made in response to his own personal problems. Thus, a diagnosis of paranoid schizophrenia, if presented as evidence, can mislead a judge or jury in determining the mental condition of a criminal defendant.

#### *A. Paranoid Schizophrenia*

The *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)* sets forth the diagnostic criteria for schizophrenia.<sup>13</sup> Two of the following "characteristic systems" must be present "for a significant portion of time during a 1-month period": (1) "delusions," (2) "hallucinations," (3) "disorganized speech (e.g., frequent derailment or incoherence)," (4) "grossly disorganized or catatonic behavior," or (5) "negative

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12. Stephen J. Dubner, "I Don't Want To Live Long. I Would Rather Get the Death Penalty Than Spend the Rest of My Life in Prison": Ted Kaczynski Talks About Life in Jail, His Appeal Plans and His Brother David, Who Still Struggles over the Decision to Turn in the Unabomber, *TIME*, Oct. 18, 1999, at 44, 44.

13. See AM. PSYCHIATRIC ASSOC., *DSM-IV-TR: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 312 (Michael B. First ed., 4th ed. 2000) [hereinafter *DSM-IV*]. It is important to note, and consistent with the conclusions of this Article, that the *DSM-IV* contains a "Cautionary Statement" warning that "[t]he specified diagnostic criteria for each mental disorder are offered as guidelines for making diagnoses, because it has been demonstrated that the use of such criteria enhances agreement among clinicians and investigators." *Id.* at xxxvii. However, "[t]hese diagnostic criteria and the *DSM-IV* Classification of mental disorders reflect a consensus of current formulations of evolving knowledge in our field. *They do not encompass, however, all the conditions for which people may be treated or that may be appropriate topics for research efforts.*" *Id.* (emphasis added). Accordingly, "[t]he clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability, determination, and competency." *Id.*

symptoms, i.e., affective flattening, alogia, or avolition.”<sup>14</sup> These symptoms must persist for at least six months and cannot be caused by either a schizoaffective or mood disorder (major depressive, manic, or mixed) or substance abuse.<sup>15</sup>

The *DSM-IV* defines paranoid schizophrenia as a subtype of the above. “The essential feature of the Paranoid Type of Schizophrenia is the presence of prominent delusions or auditory hallucinations in the context of a relative preservation of cognitive functioning and affect.”<sup>16</sup> The delusions are often of a particular variety, “persecutory or grandiose,”<sup>17</sup> but the *DSM-IV* notes that “delusions with other themes” may also occur.<sup>18</sup> The delusions usually are “organized around a coherent theme” and often are accompanied by “anxiety, anger, aloofness, and argumentativeness.”<sup>19</sup> People diagnosed with paranoid schizophrenia may be predisposed to violence as a result of the combination of these symptoms.<sup>20</sup>

According to the Mayo Clinic, people with paranoid schizophrenia “don’t perceive and respond to the world as most other people do.”<sup>21</sup> They exhibit social withdrawal, unusual behavior, anxiety, and decline in daily functionality.<sup>22</sup> They tend to suffer from delusions and auditory hallucinations.<sup>23</sup> The Mayo Clinic describes delusions as “untrue beliefs,” including beliefs that “essentially no one else in the culture believes,” interpretations of experience “despite evidence or reasoning to the contrary,” and delusions of grandeur.<sup>24</sup> These delusions can result in violence if the person with paranoid schizophrenia perceives a threat warranting self-defense.<sup>25</sup> The Mayo Clinic describes auditory hallucinations as the perception of sounds and voices that no one else hears.<sup>26</sup> The voices “are usually unpleasant” and may give a “constant critique of what the person is thinking or doing.”<sup>27</sup> In addition to delusions and auditory hallucinations, a person with paranoid schizophrenia may experience the following symptoms: disorganized thinking, disorganized or irrational behavior, physical immobility, mobility without purpose, absent or inappropriate emotional expression, little verbal communication, and the inability to initiate plans.<sup>28</sup>

The Mayo Clinic ascribes the incidence of paranoid schizophrenia primarily to organic, structural causes.<sup>29</sup> The staff asserts that most researchers believe

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14. *Id.* at 312.

15. *Id.*

16. *Id.* at 313.

17. *Id.*

18. *Id.*

19. *Id.* at 314.

20. *Id.*

21. Mayo Clinic Staff, Paranoid Schizophrenia Definition (Dec. 12, 2006), <http://www.mayoclinic.com/health/paranoid-schizophrenia/DS00862#>.

22. Mayo Clinic Staff, Paranoid Schizophrenia Symptoms (Dec. 12, 2006), <http://www.mayoclinic.com/health/paranoid-schizophrenia/DS00862/DSECTION=symptoms>.

23. *See id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *See id.*

29. *See* Mayo Clinic Staff, Paranoid Schizophrenia Causes (Dec. 12, 2006), <http://www.mayoclinic.com/health/paranoid-schizophrenia/DS00862/DSECTION=causes>.

schizophrenia results from “problems with early brain development.”<sup>30</sup> They point to studies which “have focused on the way brain cells communicate with each other through nerve pathways. Too many or too few connections in important pathways of emotional regulation may lead to psychotic symptoms.”<sup>31</sup> Thus, the Mayo Clinic paints a picture of paranoid schizophrenia as a debilitating, disorienting mental disease that can result in detachment from the real world and behavior driven by delusions and hallucinations beyond the patient’s control.

### *B. The Diagnosis of the Unabomber*

Dr. Sally Johnson diagnosed Kaczynski with paranoid schizophrenia.<sup>32</sup> Dr. Johnson relied largely on two delusional beliefs harbored by Kaczynski. The first was delusional thinking “involving being controlled by modern technology.”<sup>33</sup> The second was that his “dysfunction in life, particularly his inability to establish a relationship with a female, was directly the result of extreme psychological verbal abuse by his parents.”<sup>34</sup> In addition, Kaczynski’s “social and occupational dysfunction in the areas of work, interpersonal relations, and possibly at times self-care” contributed to the diagnosis.<sup>35</sup> The “paranoid” subtype derived largely from the “persecutory” nature of his delusions.<sup>36</sup> Consequently, he became “resentful and angry” toward the objects of his delusions (such as modern technology) and fantasized about and actually resorted to violence (the multi-decade crime spree of the Unabomber).<sup>37</sup> Dr. Johnson also noted that Kaczynski developed “idealized romantic attachments to women with whom he has little familiarity or contact.”<sup>38</sup> She believed that this tendency was consistent with schizophrenia, as she called such attachments “erotomantic delusions.”<sup>39</sup>

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30. *Id.*

31. *Id.*

32. SALLY C. JOHNSON, PSYCHOLOGICAL EVALUATION OF THEODORE KACZYNSKI (Jan. 16, 1998), <http://courttv.com/trials/unabomber/documents/psychological.html> [hereinafter JOHNSON EVALUATION]. Dr. Johnson also diagnosed Kaczynski with premorbid Paranoid Personality Disorder with Avoidant and Antisocial Features, on the basis that Kaczynski suspected, “without sufficient basis,” that others were exploiting, harming, or deceiving him. *Id.* Four other doctors diagnosed Kaczynski with paranoid schizophrenia, although without the detailed analysis of Dr. Johnson, including Dr. Raquel Gur, M.D., Ph.D.; Dr. Karen Froming; Dr. David Foster; and Xavier Amador, Ph.D. *See id.* However, the prosecution’s doctors, Phillip Resnick and Park Dietz, disagreed. They believed that Kaczynski’s problems merely fell in the Schizoid or Schizotypal range of personality disorders. *See id.* John T. Kenny, Ph.D., also disagreed with the paranoid schizophrenia diagnosis. *See id.*

33. *Id.*

34. *Id.*

35. *Id.* at 45.

36. *Id.*

37. *See id.* According to the Unabomber’s Manifesto: “The Industrial Revolution and its consequences have been a disaster for the human race.” THE UNABOMBER’S MANIFESTO, <http://www.time.com/time/reports/unabomber/wholemanifesto.html>. In the Unabomber’s mind, society was in desperate need of a brave and brazen savior who would not let murder stand in his way. *See id.*

38. JOHNSON EVALUATION, *supra* note 32.

39. *Id.*

*C. A Plausible Explanation: Cognitive Dissonance and Deliberate Choice*

Although a diagnosis of paranoid schizophrenia might suggest a lack of self-control, Kaczynski's transformation into the Unabomber was plausibly the product of careful planning and deliberation, not organic compulsion. Admittedly, there is no way to ascertain the truth of the matter; it could simply be coincidence that a choice-driven explanation fits with the facts of his life. However, the possibility alone highlights the potential, in any given instance, for a diagnosis of paranoid schizophrenia to misrepresent a person's mental condition.

1. Social Respect, Cognitive Dissonance, and Scapegoating

The literature on psychology indicates that people can exhibit violent aggression toward perceived external threats as a result of normal psychological mechanisms—the need for social respect, cognitive dissonance, and scapegoating. We all have an innate need for social respect and, consequently, hate to be ignored or dismissed as unimportant.<sup>40</sup> When we perceive a lack of respect or regard, we might experience cognitive dissonance, or an inconsistency between our expectations and reality.<sup>41</sup> When we experience cognitive dissonance, our tendency is to change our beliefs so as to regain internal consistency,<sup>42</sup> possibly by engaging in scapegoating—“a significant mechanism which underlies social aggression.”<sup>43</sup> “Scapegoating seems to be a mechanism that can bring out the very worst in human nature. As things get difficult, people become frustrated and angry and they take that anger out on the nearest clearly identifiable target.”<sup>44</sup> Accordingly, as described in the account below, Kaczynski's transformation into the Unabomber may have resulted from conscious choices to relieve his own cognitive dissonance, not from organic compulsion.<sup>45</sup>

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40. NICKY HAYES, *TEACH YOURSELF PSYCHOLOGY* 94 (3d ed. 2003).

41. “Cognitive dissonance is a psychological phenomenon first identified by Leon Festinger. It occurs when there is a discrepancy between what a person believes, knows and values, and persuasive information that calls these into question.” ProEthics, Ltd., *Definitions and Concepts for Ethical Analysis*, [http://www.ethicsscoreboard.com/rb\\_definitions.html](http://www.ethicsscoreboard.com/rb_definitions.html).

42. HAYES, *supra* note 40, at 96.

43. *Id.* at 97.

44. *Id.*

45. An important disclaimer in this discussion is that paranoid schizophrenia may not be caused simply by genetic or organic factors: varying proportions of genetic predisposition and life experiences may contribute to the ultimate onset of paranoid schizophrenia. *See generally* Jason Schiffman, Amy Abrahamson, Tyrone Cannon, Joseph LaBrie, Joseph Parnas, Fini Schulsinger & Sarnoff Mednick, *Early Rearing Factors in Schizophrenia*, 30 *INT'L J. MENTAL HEALTH* 3 (2001). Thus, even assuming that the scenario as described in this section is correct, that Kaczynski chose to become the Unabomber and carry out murder and mayhem as a result of life experiences, it is possible that he simultaneously possessed a genetic predisposition to become schizophrenic and that the combination of his genetic predisposition and his life choices resulted in the ultimate onset of the illness. Still, the point of this Part is to show that, even if Kaczynski *did* ultimately develop paranoid schizophrenia, the very paranoid schizophrenia that he possessed may have been misrepresentative of his actual mental condition. That is, the implications of the Mayo Clinic and, to a lesser extent, the *DSM-IV* may be incorrect: a person

Kaczynski's problems began early in life. Because of his precociousness, his parents focused on developing his intellectual and academic abilities at the expense of a "normal childhood."<sup>46</sup> As Kaczynski grew older—either because of his early childhood experiences or simply because of his innate personality characteristics—he developed a highly introverted personality: he played beside other children and not with them; he was often fearful of other people; and he was generally socially reserved. By age eight or nine, it was apparent that Kaczynski was not socially accepted by other children his age. Moreover, his family relocated several times, only compounding the problem. Kaczynski took tests that showed him to have an extremely high IQ, reportedly 170.<sup>47</sup> He proceeded to skip two grades. He was not involved in many school activities. In fact, in Kaczynski's own writings, he wrote that he skipped two grades because of his lack of social skills. "By the time I left high school, I was definitely regarded as a freak by a large segment of the student body."<sup>48</sup>

Kaczynski's social isolation and frustration increased when he enrolled at Harvard College at age sixteen (he graduated at age twenty).<sup>49</sup> In his own writings, Kaczynski described his extreme isolation as a Harvard student. He often became very angry and, because he could not express his anger openly, "indulge[d] in fantasies of revenge."<sup>50</sup> However, he "never attempted to put any such fantasies into effect because [he] was too strongly conditioned . . . against any defiance of authority."<sup>51</sup> Kaczynski later said that he "could not have committed a crime of revenge, even a relatively minor crime, because [his] fear of being caught and punished was all out of proportion to the actual danger of being caught."<sup>52</sup>

Kaczynski, by his own account, suffered from "acute sexual starvation."<sup>53</sup> He noted that

[M]y attempts to make advances to girls had such humiliating results that for many years afterward, even until after the age of 30, I found it excruciatingly difficult—almost impossible—to make advances on women . . . . At the age of 19 to 20, I had a girlfriend; the only one I ever had, I regret to say.<sup>54</sup>

This frustration reached such extreme levels that, while a graduate student at the University of Michigan, Kaczynski experienced "several weeks of intense and

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with paranoid schizophrenia—such as Kaczynski—may indeed have control over his actions and be able to exercise choice. Thus, although Kaczynski may have technically fulfilled the *DSM-IV* criteria, for example, he may not have carried with him the implication that illness causes behavior. On the contrary, it is possible that, at least in some cases, behavior may cause (or amount to) illness; that is, the choices that a person makes might satisfy diagnostic criteria without having any abnormal, organic, or compulsive force behind them.

46. See JOHNSON EVALUATION, *supra* note 32.

47. See Karl Stampfl, *He Came Ted Kaczynski, He Left the Unabomber*, MICH. DAILY, Mar. 16, 2006, available at <http://www.michigandaily.com/content/he-came-ted-kaczynski-he-left-unabomber>.

48. JOHNSON EVALUATION, *supra* note 32.

49. See Stampfl, *supra* note 47.

50. JOHNSON EVALUATION, *supra* note 32.

51. *Id.*

52. *Id.*

53. Dubner, *supra* note 12, at 47.

54. *Id.*

persistent sexual excitement involving fantasies of being a female. During that time period, he became convinced that he should undergo a sex-change surgery.<sup>55</sup> This obsession, however, passed.<sup>56</sup>

Also at the University of Michigan, he began to search for ways to blame his intense sadness and frustration on something other than himself. Thus, Kaczynski wrote that

I occasionally began having dreams . . . [in which] I would feel either that organized society was hounding me with accusation in some way, or that organized society was trying in some way to capture my mind and tie me down psychologically or both . . . But I would grow angrier and finally I would break out in physical violence against the psychologist and his allies . . . I would awake with a pleasurable sense of liberation.<sup>57</sup>

Kaczynski was ripe for a scapegoat and consequently found one. Since he already felt alienated from modern society, the ideas of author Jacques Ellul were particularly attractive to him. He read Ellul's book *The Technological Society*<sup>58</sup> six times and was captivated by Ellul's ideas, which he adopted into his own views: that continued scientific and technical progress within society would inevitably result in the extinction of individual liberty and that the power of society to control the individual was growing rapidly (through such means as propaganda, control over children's emotional development, operant conditioning, and direct control of emotions by way of electrodes and "chemitrodes," biofeedback training, memory pills, genetic engineering, super-human computers, and electronic surveillance).<sup>59</sup>

Armed with antipathy toward modernity, Kaczynski finally decided to isolate himself from the source of his pain when he quit his job as an assistant mathematics professor at the University of California, Berkeley and built a small cabin in the Montana woods in 1971. He subsequently wrote in his journal:

True I would not fit into the present society in any case but that is not an intolerable situation. What makes a situation intolerable is the fact that in all probability, the values that I detest will soon be achieved through science, an utterly complete and permanent victory throughout the whole world, with a total extrication of everything I value.<sup>60</sup>

As the culmination of a lifetime of isolation and frustration, Kaczynski—no longer impeded by the social mores of people around him—wrote that he was going to start to kill.<sup>61</sup> He would later describe the source of his hatred as perceived social rejection and the fact that organized society frustrated his "powerful urge for physical freedom and personal autonomy."<sup>62</sup>

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55. *Id.*

56. *See id.*

57. JOHNSON EVALUATION, *supra* note 32.

58. JACQUES ELLUL, *THE TECHNOLOGICAL SOCIETY* (1967).

59. *See* JOHNSON EVALUATION, *supra* note 32.

60. *Id.*

61. *See id.*

62. *Id.*

Dr. Johnson and other mental health professionals attributed Kaczynski's obsessions and violent behavior to paranoid schizophrenia, as though the illness was at fault, not Kaczynski's own decisions and choice.<sup>63</sup> This may have been incorrect. Kaczynski was a sad, unhappy man who was never able to fit in with society. It is not a surprise that, given his innate need for social respect and the dearth of such respect in his life, he experienced cognitive dissonance; the painful reality of his life did not match his innate social needs. He attempted to resolve this cognitive dissonance by finding a scapegoat in modern technology. And bereft of social influences to keep his angry fantasies in check once he isolated himself in Montana, he was free to relieve the painful cognitive dissonance he had suffered his whole life by finally lashing out in a violent way at his scapegoat. While this scenario is by no means a certainty, it is at minimum consistent with both his life story and the psychological literature.

## 2. Lay Opinions

The non-medical opinions of Kaczynski and his acquaintances support the above scenario. The views of Kaczynski's acquaintances in Lincoln, Montana suggest that, at least overtly, Kaczynski was not insane or out of control. Becky Garland, Kaczynski's friend, said, "I can't imagine anybody saying he's insane. You might say that anyone who makes mail bombs is insane . . . . But insane by law? I don't think he was that."<sup>64</sup> Teresa Garland, Becky's sister, said,

"Ted didn't have much of a childhood . . . he was very unhappy because he always had to study, and he didn't spend much time around other people . . . . They wanted to know if we felt he was normal when he came into town . . . . And I think it's fair to say that, yes, he was."<sup>65</sup>

Dave Rundell, another acquaintance, said, "I always thought he acted, for a person who was a recluse, well within the bounds of society. He always seemed a little jumpy. But I put that down to the fact that he was not a social person."<sup>66</sup> His neighbors described Kaczynski in a benign way: he was gentle, soft-spoken, and painfully shy.

Kaczynski himself, in an interview after he was imprisoned, asserted categorically that he was not insane.

"I'm confident that I'm sane, personally . . . . I don't get delusions and so on and so forth . . . . I mean, I had very serious problems with social adjustment in adolescence, and a lot of people would call this a sickness. But it would have to be distinguished between an organic illness, like schizophrenia or something like that."<sup>67</sup>

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63. It is not disputed here that Kaczynski may have technically qualified for paranoid schizophrenia under the official criteria. Even assuming that he suffered from paranoid schizophrenia, the point here is that this designation, by itself, has a tenuous relationship to reality.

64. David S. Jackson, *He's Not Crazy, He's Our Neighbor; In Montana, Ted Kaczynski's Acquaintances Insist He Was Normal*, TIME, Nov. 3, 1997, at 4, 4.

65. *Id.*

66. *Id.*

67. Dubner, *supra* note 12, at 44.

Although Kaczynski did not directly explain his multi-decade bombing spree, he did provide reason to think that his resort to violence was the product of measured consideration: “Well, let me put it this way . . . I don’t know if violence is ever the best solution, but there are certain circumstances in which it may be the only solution.”<sup>68</sup>

While these opinions are not definitive,<sup>69</sup> they do lend further support to the theory that Kaczynski was not out of control but rather chose to carry out violent and premeditated bombing attacks for other reasons. Dr. Johnson might call his views toward technology “delusional,”<sup>70</sup> but one could also view them as the product of scapegoating. The implications of this distinction are significant: while paranoid schizophrenia suggests the presence of a variety of symptoms and a lack of self-control, Kaczynski may have simply made a choice to become the Unabomber as a response to his personal dissatisfaction with the world.<sup>71</sup>

#### *D. Three Problems with a Paranoid Schizophrenia Diagnosis in Criminal Proceedings*

A judge or a jury tasked with making determinations about a criminal defendant’s mental condition may consider evidence by a mental health expert.<sup>72</sup> The above discussion, however, suggests that a mental health expert’s testimony about a diagnosis of paranoid schizophrenia can mislead a judge or jury in at least three ways: (1) by wrongly suggesting that a defendant exhibits certain symptoms; (2) by distorting the

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68. *Id.* at 52.

69. In fact, a characteristic trait of schizophrenia is to deny that one possesses it. Peter Weiden & Leston Havens, *How to Manage Five Common Symptoms of Schizophrenia*, SCHIZOPHRENIA.COM, <http://www.schizophrenia.com/family/mansymptoms.htm>. Thus, it is possible that people might feel that they have total control over their faculties and yet still be influenced by their mental illness. This possibility, however, does not eliminate the possibility that in other cases a person feels that he or she is in control and actually is in control. The matter of which is correct in a particular case is a difficult one and only highlights the need to approach each case in a factually specific way and not simply to apply the same catch-all diagnosis to every set of shared symptoms.

70. JOHNSON EVALUATION, *supra* note 32.

71. At the same time, it does not necessarily mean that Kaczynski’s diagnosis was “incorrect”; rather, it simply emphasizes the limitations of a paranoid schizophrenia diagnosis. Under Dr. Johnson’s definitions of “delusions” and “dysfunction,” Ted Kaczynski may have technically qualified for a diagnosis of paranoid schizophrenia. *See id.* However, a diagnosis implies *lack of a choice*, while Ted Kaczynski’s condition may have been the *product of choice*, of a highly intelligent man making life decisions in response to the circumstances he faced. While psychological diagnoses may be useful in other settings, the result, as described in the next Part, is that—at least in cases like that of Kaczynski—they can pose difficulties in the course of criminal proceedings.

72. *See, e.g.*, FED. R. EVID. 702; Pollard v. United States, 282 F.2d 450, 464 (6th Cir. 1960); Bonnie & Slobogin, *supra* note 1, at 468–70; Emily Bazelon, *Crazy Law: The Supreme Court Beats Up on the Insanity Defense*, SLATE, July 6, 2006, <http://www.slate.com/id/2145139> (describing the views of former D.C. Circuit Judge David L. Bazelon).

traits that a defendant actually does exhibit; and (3) by suggesting that organic factors, not individual choice, are responsible for a defendant's conduct.<sup>73</sup>

### 1. The Suggestion of Symptoms Not Actually Present

The *DSM-IV* and the Mayo Clinic both identify a wide range of symptoms associated with paranoid schizophrenia,<sup>74</sup> including delusions, auditory hallucinations (including voices and sounds that no one else hears), disorganized speech (“e.g., frequent derailment or incoherence”), disorganized or catatonic behavior, “negative symptoms, i.e., affective flattening, alogia, or avolition,”<sup>75</sup> anxiety, anger, aloofness, argumentativeness, disorganized thinking, disorganized or irrational behavior, physical immobility, mobility without purpose, absent or inappropriate emotional expression, little verbal communication, and the inability to initiate plans.<sup>76</sup>

A person with paranoid schizophrenia, however, may not exhibit all of these symptoms.<sup>77</sup> Dr. Johnson attributed Kaczynski's diagnosis primarily to the occurrence of delusions (being “controlled by modern technology”<sup>78</sup>) and his “social and occupation dysfunction in the areas of work, interpersonal relations, and possibly at times self-care.”<sup>79</sup> Absent are the following: auditory hallucinations, disorganized thinking or speech, disorganized or irrational behavior, physical immobility, mobility without a purpose, or the inability to initiate plans.<sup>80</sup>

Although the literature does not require all possible symptoms to be present in a diagnosed individual, extraneous, non-applicable characteristics could still be misleading to a judge or jury. First, regardless of the actual symptoms of the defendant, a judge or jury may be exposed to literature on the full range of possible diagnostic

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73. While this Article points out problems with mental disorder diagnoses, and a paranoid schizophrenia diagnosis in particular, I recognize that diagnoses may be useful in other settings. See, e.g., Steven R. Smith, *A Psychological Perspective on Diagnosis*, 81 J. PERSONALITY ASSESSMENT 187, 187 (2003) (book review) (“[C]ategorizing phenomena of nature is a survival strategy. We are compelled to group elements of our experience as to easily recognize what might be harmful or helpful to us. Categorization helps us remember, process, and assimilate new information.”). However, even in the scientific community, “[o]ne charge frequently levied against the *DSM* is that it creates artificial categories of disorder based on arbitrary distinctions.” *Id.*

74. Admittedly, at least in the case of the *DSM-IV*, certain symptoms, such as auditory hallucinations, are not required if others, such as delusions, are present. See *DSM-IV*, *supra* note 13. Once a person has a particular diagnosis attached to him or her, that clinical description itself is also attached. Thus, when Kaczynski was diagnosed with paranoid schizophrenia, the description one had to refer to in order to understand his condition was in fact a description that listed auditory hallucinations. The fact that these non-applicable symptoms are not relevant is why I advocate caution in using such diagnoses in criminal proceedings.

75. *Id.* at 312.

76. Mayo Clinic Staff, *supra* note 22.

77. As explained in Part I.A, the *DSM-IV* only requires two of five characteristics to establish a diagnosis of schizophrenia; more specific symptoms are required for the paranoid sub-type. See *DSM-IV*, *supra* note 13.

78. JOHNSON EVALUATION, *supra* note 32.

79. *Id.*

80. See *id.*

symptoms. While some judges or jurors may be able to block out irrelevant information, others may form stereotypes, wonder if other symptoms are simply latent or unidentified, or at least view the defendant in a slightly different light. Second, the introduction of all possible symptoms can create a burden-shifting problem. If a defendant is diagnosed with paranoid schizophrenia and paranoid schizophrenia is known to encapsulate certain characteristics, then it becomes the prosecutor's burden (assuming that it is in the defendant's interest to portray himself as mentally disabled as possible) to show that those characteristics or traits are not present. This means that the prosecutor will have to show evidence that the defendant does *not* have a certain trait or characteristic (probably from the psychological evaluation).<sup>81</sup> However, since it is difficult to prove a negative, there may be lingering thoughts in the judge or jury as to the presence of extraneous traits, which could influence their ultimate determinations. While the prosecutor may succeed in convincing the judge or jury of the absence of certain traits, it is by no means a certainty.

## 2. The Distortion of Actual Symptoms

A dictionary is generally thought to be a repository of the ordinary understanding of words.<sup>82</sup> The dictionary defines "delusion" as "a false conception and persistent belief unconquerable by reason in something that has no existence in fact."<sup>83</sup> This definition conjures the image of a complete lack of choice or control over one's thoughts. If it allowed for choice or control, then the delusional individual could presumably identify the disparity between his or her thoughts and the incontrovertible disproof and adjust his or her thoughts accordingly. Therefore, when most people hear the word "delusion," this sort of definition is what comes to mind.

The *DSM-IV* does not employ this definition. Instead, the *DSM-IV* uses multiple descriptive terms that allow for several different and less restrictive conceptions of a delusion.<sup>84</sup> One descriptive phrase is "a false belief based on incorrect inference about external reality."<sup>85</sup> There is, however, no uniform way to interpret external reality; different people invariably will come to different conclusions about the world. A second phrase in the *DSM-IV* definition is "firmly sustained despite what everyone else

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81. See e.g., *United States v. Madoch*, 935 F. Supp. 965, 968 (N.D. Ill. 1996) (containing an example of an expert who, after labeling the defendant with a particular diagnosis, proceeds to list the characteristics associated with the diagnosis, thus introducing a possible conception of the defendant that derives from diagnostic literature rather than from the defendant himself).

82. See, e.g., *Ferguson Beauregard/Logic Controls v. Mega Systems*, 350 F.3d 1327, 1338 (Fed. Cir. 2003).

83. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 598 (1993).

84. The full definition employed by the *DSM-IV* is as follows:

[A] false belief based on an incorrect inference about external reality that is firmly sustained despite what almost everyone else believes and despite what constitutes incontrovertible and obvious proof or evidence to the contrary. The belief is not one ordinarily accepted by other members of the person's culture or sub-culture.

Jaimie Leeser & William O'Donohue, *What Is Delusion? Epistemological Dimensions*, 108 J. ABNORMAL PSYCHOL. 687, 687 (1999) (reprinting the *DSM-IV* definition).

85. *Id.*

believes.”<sup>86</sup> This phrase suggests that the belief does not have to be absolute, only “firmly sustained.” It also suggests that the prevailing societal view on a matter is a relevant criterion in deciding whether a person is delusional. Galileo, however, was widely condemned for proclaiming that the earth traveled around the sun. The *DSM-IV* adds additional emphasis to this point by adding that the “belief is not one ordinarily accepted by other members of the person’s culture or sub-culture.”<sup>87</sup> Yet, it is possible to have a belief, and to have some choice over the matter, in the face of extreme divergence from the prevailing views of society; original thinkers or quirky eccentrics are all potential schizophrenics under the *DSM-IV*.

The *DSM-IV* does contain the qualification that the belief must be sustained “despite what constitutes incontrovertible and obvious proof or evidence to the contrary,”<sup>88</sup> but this language does not rectify the misleading nature of a diagnosis under the *DSM-IV*. First, the fact that this is not the only factor suggests that it is not the only relevant factor: the value judgments of the diagnostician and the beliefs of society are also relevant. Second, the difficulty of producing evidence that is literally “incontrovertible” suggests that “obvious proof” will usually be the basis for a delusion determination. “Obvious proof,” however, raises a question: obvious to whom? The only answer possibly supplied by the definition is the mental health diagnostician or, more likely, society at large. Thus, this circular definition leads the diagnostician back to a consideration of either his or her own value judgments or else the prevailing views of society.

More significantly, as evidenced in Dr. Johnson’s report, a diagnostician may not make a concerted effort to obtain incontrovertible falsification. Dr. Johnson simply noted that Kaczynski believed that he was “controlled by modern technology” and that he suffered verbal and physical abuse from his parents and, apparently, assumed that these observations might be good enough to qualify as diagnosable delusions.<sup>89</sup> The reality is that truly proving that something is “incontrovertible” is either impossible or else far too time-consuming for a standard mental disorder diagnosis. Therefore, even the watered-down standards of the *DSM-IV*<sup>90</sup> are probably significantly more demanding than those actually used by diagnosticians.

Thus, while Kaczynski was technically diagnosed with delusions, the type that he harbored may not have been of the strict dictionary variety. As discussed, Kaczynski may have formed his obsession and anger toward modern technology by choice, not compulsion. The belief in a scapegoat is not a dictionary-type of delusion in the sense that a person cannot consider alternatives. Moreover, although a diagnostician could rightly look to the *DSM-IV* and argue that Kaczynski’s belief system was delusional because it was out of sync with prevailing views about society, it could qualify equally as a “theory.” A “theory” is “a belief, policy, or procedure proposed or followed as the basis of action.”<sup>91</sup> Kaczynski clearly had a belief in the evil of modern technology and relied on it in justifying his violence as the Unabomber, but evidence that Kaczynski was devoid of any choice or self-control in harboring that belief is lacking. Thus,

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86. *Id.*

87. *Id.*

88. *Id.*

89. JOHNSON EVALUATION, *supra* note 32.

90. *See generally* Leeser & O’Donohue, *supra* note 84.

91. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2371 (1993).

although Dr. Johnson may have believed that Kaczynski was delusional, she simply may have disagreed with his theory about the world, a theory to which he passionately adhered.

A judge or jury, then, upon hearing that a defendant has paranoid schizophrenia, and that one of the defendant's defining characteristics is "delusions," may understandably think that the defendant harbors a truly psychotic belief over which he has no control. As seen above, the reality of how delusions are used in diagnosing patients with paranoid schizophrenia can be very different: a diagnosed delusion can simply be a theory possessed by the defendant with which the diagnostician, or most of society, does not agree. Thus, a judge or jury could end up making an incorrect determination as to the control and level of psychosis involved in a defendant's thinking simply because of the application of a diagnosis of paranoid schizophrenia.

### 3. The Suggestion of Organic Causation

A diagnosis of paranoid schizophrenia may lead a judge or jury to believe that the illness itself, and not individual choice, is responsible for symptomatic behavior. The Mayo Clinic attributes paranoid schizophrenia to "problems with early brain development" and "the way brain cells communicate with each other through nerve pathways."<sup>92</sup> Since a person has no volitional control over early brain development or the way brain cells communicate, this attribution suggests that brain dysfunction, not the defendant's own choice, is responsible for symptoms of the illness. Furthermore, the mere application of a diagnosis to a person's problems suggests determinism. For example, a diagnosis of bronchitis means that the illness, and not some other factor, is responsible for any congestion, coughing, or respiratory problems that a patient experiences. Given this common understanding of a diagnosis, it is possible that a judge or jury might apply the same causal connection to mental disorders.

As the Unabomber case shows, this causal connection may not always be accurate. Kaczynski possibly developed his symptoms by choice. In the plausible scenario described above, Kaczynski suffered cognitive dissonance and sadness from his social ostracism. Despite his desire for interpersonal relationships, Kaczynski was not able to achieve any. It is possible that Kaczynski then chose to withdraw from society in response to these problems. It is also possible that, alone, Kaczynski chose to read Ellul, latch onto notions about the evils of modern technology, and make modernity a scapegoat for his problems. Normal people, without mental disorders, do this on a daily basis when they refuse to acknowledge responsibility for the dissatisfaction in their lives.<sup>93</sup> Thus, the introduction of a paranoid schizophrenia diagnosis into evidence could lead a judge or jury to conclude incorrectly that a criminal defendant had no control over his symptoms.<sup>94</sup>

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92. Mayo Clinic Staff, *supra* note 29.

93. See HAYES, *supra* note 40, at 96–97. It is possible that these same symptoms could result in a different diagnosis, such as schizoid personality disorder or schizotypal personality disorder. See JOHNSON EVALUATION, *supra* note 32. However, these diagnoses would still pose the problem of over-inclusive diagnostic criteria.

94. Aside from organic causation, another form of causation discussed in criminological literature is ecological causation, or the impact that external or situational factors have on a person's decision making. See, e.g., Robert E. Park, *The City: Suggestions for Investigation of*

## II. HOW A DIAGNOSIS OF PARANOID SCHIZOPHRENIA CAN LEAD TO OUTCOMES INCONSISTENT WITH THE GOALS OF THE CRIMINAL LAW

In this Part, I use the Unabomber case to show how a diagnosis of paranoid schizophrenia can lead to legal outcomes diametrically opposed to the goals of the criminal law. A consideration of paranoid schizophrenia evidence could have led a judge or jury to find Theodore Kaczynski not guilty by reason of insanity or else ineligible for the death penalty; both of these conclusions, as I explain, would possibly have been inconsistent with the goals of the criminal law.

### A. *The Insanity Defense*

#### 1. The Rationale

Although a variety of conceptions of the insanity defense exist,<sup>95</sup> the two dominant forms in American jurisprudence are the M’Naghten test and the American Law Institute’s Model Penal Code test. The M’Naghten test, as generally applied, is that a criminal defendant is legally insane if he “did not know the nature and quality of [his] act or that the act was wrong.”<sup>96</sup> The Model Penal Code test, which has fallen out of favor in recent years, is that

[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.<sup>97</sup>

The rationale for the insanity defense, in its varied formulations, derives from the Punishment Model of criminal justice.<sup>98</sup> The goal of the Punishment Model is to ensure that those who commit antisocial acts receive their “just deserts.”<sup>99</sup> There have been many attempts to explain the Punishment Model’s emphasis on sanctioning past behavior. Kant believed that “punishment is a categorical imperative.”<sup>100</sup> Hegel

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*Human Behavior in the Urban Environment*, in *THE CITY* 1 (1925); CLIFFORD R. SHAW & HENRY D. MCKAY, *JUVENILE DELINQUENCY AND URBAN AREAS: A STUDY OF RATES OF DELINQUENTS IN RELATION TO DIFFERENTIAL CHARACTERISTICS OF LOCAL COMMUNITIES IN AMERICAN CITIES* (1942). However, ecological causation is not suggested by the diagnostic literature on paranoid schizophrenia, at least according to the *DSM-IV* and the Mayo Clinic; therefore, ecological theories are not directly relevant to the discussion.

95. *See generally* CHRISTOPHER SLOBOGIN, *MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY* 29–51 (2006) (explaining the historical development of the insanity defense).

96. *Id.* at 29.

97. MODEL PENAL CODE § 4.01(1) (1962).

98. *See* SLOBOGIN, *supra* note 95, at 24 (Since “the retributive principle that blameworthiness should be the predominating guidepost of the criminal law’s attempt to define the scope of liability . . . the punishment model should be the governing concept in this context.”).

99. *Id.* at 9.

100. *Id.* (quoting IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 120 (John Ladd trans., 1965) (1797)).

believed that punishment is necessary to “cancel the Wrong and restore the Right.”<sup>101</sup> Foucault believed that punishment eradicates the evil represented by a crime.<sup>102</sup> Paul Robinson believes that “people are more likely to abide by the commands of the criminal law if they believe it has ‘moral credibility,’ which it will lack if it imposes blame where there is none.”<sup>103</sup> The common theme in all these attempts to rationalize the Punishment Model is the “free will” postulate, explained as follows: “[i]f behavior is determined by forces over which the person has little or no control, then punishment would not be just, because it would not be deserved.”<sup>104</sup> Thus, for an actor to be held accountable for an act, proof is required that the actor “voluntarily” chose to engage in illegal conduct.<sup>105</sup>

The key issue related to the proper applicability of the insanity defense, therefore, should be whether the defendant manifested “free will” at the time of the offense. Unfortunately, the concept of free will is one of the most problematic in the field of philosophy of the mind. It is not clear that free will even exists.<sup>106</sup> Even if free will does exist, many “determinisms” could negate it in particular circumstances, including physical/causal, psychological, biological, and theological determinisms.<sup>107</sup> Finally, even if free will exists, different formulations abound as to what exactly it means,<sup>108</sup> such as the “ability to select a course of action as a means of fulfilling some desire.”<sup>109</sup>

## 2. The Insanity Defense and Paranoid Schizophrenia

A diagnosis of paranoid schizophrenia could possibly lead a judge or jury to find a defendant not guilty by reason of insanity. Under the M’Naghten test, a person who suffers from delusions or auditory hallucinations may not be able to differentiate between criminal and non-criminal conduct, such as a person who believes incurably that God is commanding her to kill her children.<sup>110</sup> Also, a person suffering from disorganized thinking may not be able to grasp the nature or quality of her conduct. Under the Model Penal Code test, furthermore, a person suffering from delusions or

101. *Id.* (citing GEORG W. HEGEL, *THE PHILOSOPHY OF RIGHT* 69 (T.M. Knox trans., 1962) (1820)).

102. *Id.* (citing MICHEL FOUCAULT, *DISCIPLINE AND PUNISHMENT: THE BIRTH OF THE PRISON* 3–16 (1977)).

103. *Id.* (quoting Paul Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 211 (1996)) (based on the premise that society deems punishment as legitimate).

104. *Id.* at 9.

105. *Id.*

106. See Timothy O’Connor, *Free Will*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed.), <http://plato.stanford.edu/entries/freewill>.

107. *Id.*

108. See generally *id.* Among these different formulations are free will as rational deliberation (including free will as choosing on the basis of one’s desires, free will as deliberative choosing on the basis of desires and values, and self-mastery or rightly-ordered appetite), free will as ownership, free will as causation and control, and theological conceptions of free will.

109. *Id.*

110. See, e.g., Katherine Ramsland, *Andrea Yates, The Texas Woman Who Drowned Her Five Children*, [http://www.trutv.com/library/crime/notorious\\_murders/women/andrea\\_yates/](http://www.trutv.com/library/crime/notorious_murders/women/andrea_yates/).

disorganized behavior caused by organic structural problems in the brain may not have any volitional control over her behavior. These outcomes comport with the rationale for the insanity defense, based on the free will postulate. A person with paranoid schizophrenia may not, as a result of delusional or hallucinatory thinking, have any choice over her conduct and may not be able to perceive multiple options and evaluate them. If the person with paranoid schizophrenia had this ability, then she would presumably be able to evaluate multiple courses of action with respect to her delusion, which is contrary to the theory behind an actual, unchanging delusion. Thus, to the extent that a judge or jury is influenced by literature on a paranoid schizophrenia diagnosis, a judge or jury could find a defendant otherwise responsible for a crime not guilty by reason of insanity.

### 3. The Insanity Defense and the Unabomber

In contrast, at least under the plausible scenario outlined in Part I, Theodore Kaczynski should not have been found legally insane. First, unlike the classical conception of paranoid schizophrenia, Kaczynski's life experiences, and the choices he made in response to them, resulted from his anger toward modernity, not organic causes beyond his control. Second, as Kaczynski himself asserted, his anger toward modern technology was not a delusion over which he had no control; rather, it was a theory to which he subscribed after years of contemplation.<sup>111</sup> Third, the fact that Kaczynski only started killing after he removed himself to a life of solitude in Montana suggests that moral and social influences constrained him prior to the move; if Kaczynski had no choice, if his drive to kill was truly an inexorable compulsion, then it would not have mattered who, or what, was influencing him. Fourth, the people who knew Kaczynski during the midst of his crime spree said that he did not exhibit any noticeable indicia of insanity or craziness.<sup>112</sup> Fifth, the fact that Kaczynski was able to understand his trial proceedings, consider different approaches to conducting his defense, and formulate a preference for a particular type of defense, suggests that he was probably engaging in the same consideration of multiple options at the time of his offenses. Finally, Kaczynski's numerous writings and time-consuming planning and preparation in connection with his Unabomber activities<sup>113</sup> suggest that he was able to engage in a long, deliberative consideration of his acts at the time of their commission;

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111. Kaczynski said, "I don't know if violence is ever the best solution, but there are certain circumstances in which it may be the only solution." Dubner, *supra* note 12, at 52.

112. "They wanted to know if we felt he was normal when he came into town. And I think it's fair to say that, yes, he was." Jackson, *supra* note 64, at 4.

113. Investigators found the following in Kaczynski's Montana cabin: "a fully-armed bomb"; "bomb-making parts and chemicals"; "carbon copies of the Unabomber's manifesto" (which detailed his reasons for engaging in violence against modern technology); "taunting letters to his victims and the news media"; "[T]housands of pages of diaries and journals"; "code . . . filled with the methodical observations of a man driven to kill his enemies by building the perfect bomb"; and "a long, detailed confession to every bomb the Unabomber sent," including passages with such damning lines as "I intend to start killing people" and "I came back to the Chicago area . . . so that I could more safely attempt to murder a scientist, businessman, or the like." Jackson, *supra* note 8, at 40. Prosecutors, therefore, wanted Kaczynski to receive the death penalty. *Id.*

this capacity is inconsistent with the lack of choice that underlies the rationale for the insanity defense.

### *B. The Death Penalty*

#### 1. The Rationale

In *Atkins v. Virginia*,<sup>114</sup> in the course of holding that the death penalty is unconstitutional as applied to defendants with mental retardation, the U.S. Supreme Court articulated a view of the rationale for and proper application of the death penalty. The rationale, like that of the insanity defense, lies in the Punishment Model, with additional reference to the Prevention Model<sup>115</sup>; the purpose of the death penalty is “retribution and deterrence of capital crimes by prospective offenders.”<sup>116</sup> The Court held that if the imposition of the death penalty does not “measurably contribute[] to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment.”<sup>117</sup>

With respect to retribution, the death penalty, like the insanity defense, seeks to ensure that the offender receives his “just deserts.”<sup>118</sup> *Atkins*, however, introduces a slightly different concept at the heart of death penalty application: “the severity of the appropriate punishment necessarily depends on the culpability of the offender.”<sup>119</sup> Since the death penalty is the most severe punishment an offender can receive, it should be reserved for “a narrow category of the most serious crimes.”<sup>120</sup> However, the Court explained that, “[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses . . . [the mentally retarded] do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.”<sup>121</sup> Therefore, the Court held that, “to ensure that only the most deserving of execution are put to death,” the death penalty is unconstitutional as applied to people with mental retardation.<sup>122</sup>

With respect to deterrence, “it seems likely that capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.”<sup>123</sup> The theory behind deterrence is that an increased punishment will deter would-be criminals from engaging in criminal acts.<sup>124</sup> However, because people with mental retardation have impaired reasoning, judgment, and control of their impulses, it is “less likely that they can process the information of the possibility of execution as a penalty and, as a

114. 536 U.S. 304 (2002).

115. “The goal of a prevention regime is reduction of harm to others.” SLOBOGIN, *supra* note 95, at 10. For additional information, see *id.* at 103–77.

116. *Atkins*, 536 U.S. at 319 (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

117. *Id.* (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982)) (internal quotation marks omitted).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 309.

122. *Id.* at 319.

123. *Id.* (quoting *Enmund v. Florida*, 458 U.S. 782, 799 (1982)).

124. *See id.* at 320.

result, control their conduct based upon that information.”<sup>125</sup> “Thus, executing the mentally retarded will not measurably further the goal of deterrence.”<sup>126</sup>

Thus, *Atkins* appears to set forth the following constitutional baselines for proper applicability of the death penalty: First, to be eligible for the death penalty, a defendant must possess “the level of moral culpability that characterizes the most serious adult criminal conduct.”<sup>127</sup> While defining the highest levels of moral culpability is difficult, this much is clear: impairment in reasoning, judgment, or control of one’s impulses reduces moral culpability. Second, a defendant cannot be so cognitively impaired that he has reduced appreciation for the existence and implications of the death penalty. Again, the line between permissible cognitive ability and impermissible cognitive ability is unclear. But the criteria at least provide a basis for determining the applicability of the death penalty after *Atkins*.

## 2. The Death Penalty and Paranoid Schizophrenia

A diagnosis of paranoid schizophrenia could possibly lead a judge or jury to find a defendant ineligible for the death penalty because, under *Atkins*, a person with paranoid schizophrenia appears to be at least on par with a person with mental retardation in terms of cognitive impairment. In terms of culpability, while a person with mental retardation might have impaired reasoning, judgment, and control, a person with paranoid schizophrenia might suffer from delusional thinking that *forces* certain acts. While a person with mental retardation may have difficulty making choices, the person with paranoid schizophrenia may have *no choice at all*. The impairment, combined with hallucinations, disorganized thinking, inability to initiate plans, and disorganized conduct,<sup>128</sup> suggests that a person with paranoid schizophrenia could actually be less culpable than a person with mental retardation. Moreover, since paranoid schizophrenia is theorized by many to be caused by organic problems in the brain, it may be analogous to mental retardation in that one cannot exercise control over one’s symptoms.

Furthermore, a person with paranoid schizophrenia may not be able to sufficiently appreciate the import of the death penalty for deterrence purposes. If a person is compelled by voices in his head to commit homicide, the death penalty probably will have little if any deterrent effect. In extreme cases, like the man who persistently but wrongly believed that he was shrinking,<sup>129</sup> the death penalty would not pose any deterrent effect because of his inexorable belief that he would ultimately not face its consequences. Even in less extreme cases, the mere presence of disorganized thinking might be a sufficient cognitive impairment to render the individual unable to appreciate fully the nature and effects of the death penalty. Thus, to the extent that a judge is influenced by literature on a paranoid schizophrenia diagnosis, a judge or jury could find a defendant ineligible for the death penalty because of a lack of free will and a lack of appreciation for the nature of the death penalty.

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125. *Id.*

126. *Id.*

127. *Id.*

128. See Mayo Clinic Staff, *supra* note 22.

129. Thanks to Professor Christopher Slobogin for this example.

### 3. The Death Penalty and the Unabomber

In contrast, at least under the plausible scenario described in Part I, Theodore Kaczynski was not only eligible for the death penalty, but arguably an ideal candidate due to his high degree of premeditation and understanding.<sup>130</sup> First, all indications are that Kaczynski extensively planned, prepared, and pondered before engaging in specific attacks, suggesting heightened culpability. In preparation for his trial, prosecutors were prepared to show jurors the following evidence from Kaczynski's cabin: "a fully-armed bomb"; "bomb-making parts and chemicals"; "carbon copies of the Unabomber's manifesto" (which detailed his reasons for engaging in violence against modern technology); "taunting letters to his victims and the news media"; "[T]housands of pages of diaries and journals"; "code . . . filled with the methodical observations of a man driven to kill his enemies by building the perfect bomb"; and "a long, detailed confession to every bomb the Unabomber sent," including passages with such damning lines as "I intend to start killing people" and "I came back to the Chicago area . . . so that I could more safely attempt to murder a scientist, businessman, or the like."<sup>131</sup>

Second, Kaczynski's "delusion" about the evil of modern technology, as discussed earlier, developed gradually as the culmination of a lifetime of pain and suffering with respect to society; he chose to direct his angst at an identifiable scapegoat. Third, as already shown, the opinions of Kaczynski's acquaintances in Lincoln and of Kaczynski himself regarding his sanity during the years as the Unabomber support the idea that his crime spree was the product of careful deliberation, not uncontrollable impulse or delusion. These observations suggest that Kaczynski not only had the capacity to make a choice, but was extremely culpable in the sense that he put great thought and preparation into his crimes.

Furthermore, Kaczynski apparently had the mental capacity to understand the nature of the death penalty. Kaczynski held a degree from Harvard and a Ph.D. in mathematics from the University of Michigan, and, prior to his move to Montana, he was a professor of mathematics at the University of California, Berkeley. He also reportedly had an IQ of 170.<sup>132</sup> This is not the resume of a person incapable, relative to the rest of society, of understanding the consequences of the death penalty. And, as already mentioned, Kaczynski himself indicated that he had considered the possibility of punishment for his crimes but decided to commit them anyway because they were the "only solution" to his problems.<sup>133</sup> Thus, Kaczynski fully understood the meaning and import of the death penalty.

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130. There are numerous ethical, moral, and legal objections to the death penalty. I do not take a position on these issues. The conclusion here, that Kaczynski was especially suited for the death penalty, is just in reference to the goals set forth in *Atkins* and not any broader views about the morality of the death penalty in general.

131. See Jackson, *supra* note 8, at 40.

132. See Stampfl, *supra* note 47.

133. See Dubner, *supra* note 12, at 52.

## CONCLUSION

In light of the foregoing discussion, judges and juries should be aware of the perils associated with considering a diagnosis of paranoid schizophrenia in the determination of legal issues related to the mental condition of a criminal defendant. One possible solution is simply to eliminate a diagnosis of paranoid schizophrenia as evidence that can be considered by judge or jury.<sup>134</sup> A second might be to focus more intently on the specific sources of confusion and limit any exclusion of evidence to symptoms not actually present and evidence that is likely to result in a distortion of actual symptoms.<sup>135</sup> A third might be to devise much stricter standards for the admissibility of diagnostic evidence, such as requiring the proponent of such evidence to show that its probative value is greater than its likely prejudicial effect. Regardless of the specific route pursued, the legal community should be aware of the problems that might accompany emphasis on a paranoid schizophrenia diagnosis in criminal proceedings so that it can move forward with its eyes wide open.

The extent to which the lessons in this paper should apply to other mental disorder diagnoses, however, remains an open question. As discussed at the outset of this Article, Morse believes that all mental disorder diagnoses should be eliminated from consideration in criminal proceedings,<sup>136</sup> while Slobogin and Bonnie believe the opposite because such diagnoses can be useful.<sup>137</sup> The analysis in this Article does not support either position completely. It is possible that other mental disorder diagnoses, in other circumstances, may in fact prove useful because they contribute to an accurate portrayal of the underlying mental condition of the criminal defendant at issue. For now, though, the conclusions in this Article should put the legal community on notice that the use of a mental disorder diagnosis can create the potential for outcomes diametrically opposed to the purposes of the criminal law, at least in some instances. The use of diagnoses in criminal proceedings should therefore be approached, at minimum, with caution.

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134. See GARY B. MELTON, JOHN PETRILA, NORMAN G. POYTHRESS & CHRISTOPHER SLOBOGIN, *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 17 (2d ed. 1997) for different types of evidence that still could be used in the absence of diagnostic evidence.

135. In the latter two cases, instead of eschewing expert testimony entirely in favor of per se rules of exclusion, courts should utilize expert testimony more than ever, not for the simple purpose of ascribing labels to defendants, but instead to determine the relevancy and risk of distortion attendant to any proposed use of diagnostic labeling.

136. See Morse, *supra* note 2, at 823.

137. See Bonnie & Slobogin, *supra* note 1, at 430.