Is Insanity a Demeaning Defense? Examining the Ethics of Offender Pathologization through the Lens of the Classics

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This article considers the question: is the insanity defence demeaning to the accused and if it is how should actors in the criminal justice system, defence counsel in particular, take into consideration the self-respect interest of the accused in advising on which defence to advance at trial? To explore this question I draw on two literary texts which show the defence as demeaning: Don Quixote de la Mancha by Cervantes and Crime and Punishment by Dostoyevsky as well as two texts which show insanity as an honour or face-saving defence: Homer’s Iliad and Shakespeare’s Hamlet.

KEYWORDS insanity defence, self-respect, ethics, law and literature, Cervantes, Don Quixote, Dostoyevsky, Crime and Punishment, Shakespeare, Hamlet, Homer, Iliad

We blame the ill for their sicknesses even as we paradoxically try to exculpate the guilty by defining them as sick, which in turn will subject them to blame for being so infected. The muddle-headed reformers who seek to make crime a matter of illness rather than culpable intention fail to realize that we do not cease blaming just because someone is sick. Sickness, we think, is a punishable offense. AIDS is as blameworthy as leprosy once was. Even mundane illnesses are blamable, if not as the wages of sin, then as failures to take care of oneself properly.

William Ian Miller, Anatomy of Disgust, 1997

Of all the calamities to which the condition of mortality exposes mankind, the loss of reason appears, to those who have the least spark

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INTRODUCTION

The insanity defense has long been viewed with suspicion. Its premise—that an insane person is not responsible for his or her criminal conduct and, therefore, that concepts of culpability and punishment are inapplicable if not incoherent in relation to him or her, though theoretically unassailable, is thought by many to give rise to much opportunity for distortion and abuse in its practical application. Distrust of the insanity defense has a number of sources, beginning with a general distrust of psychiatry. There is a sense that psychiatrists are professionally predisposed both to pathologize troubled behavior and to expand the diagnostic categories of mental disorder. This makes many skeptical about the reliability of their conclusions about the fundamentally moral issue of responsibility. A related concern is the possibility of faking it. When no other defense is in sight, someone skilled enough to mimic the symptoms of mental illness can potentially convince even prosecution psychiatrists of his or her insanity.1

There is also the concern of over-breadth. Though the defendant may genuinely be suffering from mental illness, the unlawful act in question may not have been directed by that illness.2 Just because a person suffers from delusions does not mean he or she cannot murder for revenge, jealousy, hatred, or any other responsible and culpable motive. Further, some would say that though they may not be to blame for the wrongful conduct itself, mentally ill offenders are to blame if they failed to seek treatment for mental illness when they knew failing to seek treatment rendered them liable to violent conduct. Finally, there is an enduring moral discomfort that a verdict of not guilty by reason of insanity ousts the norms of proportionality in relation to wrongdoing and replaces them with the judgment of psychiatrists about recovery. The idea that consequences should be proportional to the severity of an offense is tenacious even when we concede that the correct response is treatment, not punishment. We find it jarring that someone who takes another’s life might be free in as little as six months simply because psychiatrists are of the view that he or she is cured. Likewise, years or even potentially a lifetime of incarceration in a mental hospital seems far too

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1 See Kesey, Ken (1973) *One Flew Over the Cuckoo’s Nest*. London: Picador, which lent pop-cultural preeminence to this anxiety through the character of McMurphy who feigns mental illness and tragically gets more than he bargained for when he is transferred from a prison to a mental hospital. See also the movie adaptation: Michael Douglas and Milos Forman (1975). *One Flew Over the Cuckoo’s Nest* [Motion Picture]. Available from Warner Home Video, 4000 Warner Blvd., Burbank, CA.

severe a consequence for the mentally ill offender who commits a minor offense.

For the most part, these concerns about the legitimacy of the defense assume the “law and order” perspective. They take the side of the victim and denounce the insanity defense for letting the criminal off too easily. However, the public attitudes and concerns about the legitimacy of the insanity defense along with anxiety about mental illness in general often result in a stigma attaching to offenders who try to avail themselves of this defense. Thus, even those offenders who ostensibly stand to benefit from the defense may themselves have legitimate qualms about it. Such qualms may go beyond the purely pragmatic calculation of whether it really is better—that is, safer and more comfortable—to be in a mental institution than a prison or the equally pragmatic calculation of where one is likely to do less time. Beyond these purely practical concerns and in part because of the public skepticism about the defense, offenders face additional concerns. These include whether they are willing to be classified as mentally ill; whether they are willing to take the position that they are unable to give a rational account of their conduct; and whether they are willing to present themselves to the court as objects of psychiatric analysis rather than as accountable members of the moral community.3

There are many obvious senses in which the defense is demeaning. By invoking mental illness as vitiating responsibility, offenders ask the court and society to stop viewing them as those to be reasoned with and to begin viewing them as persons to be managed. They ask the court to cease viewing them as someone from whom we can demand an explanation and begin viewing them only as an object of investigation and treatment.4 By offering the insanity defense, defendants (or the lawyers and psychiatrists acting on their behalf) ask us to view them as incapable of giving any rational account

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3 For an interesting discussion of the ethics of putting evidence of mental illness before the court in opposition to a client’s wishes, see “Autonomy vs. A Client’s Best Interests: the defense lawyer’s dilemma when a mentally ill client seeks to control their own defense,” by Josephine Ross, 1998, American Criminal Law Review, 35, 1343.

4 Here we can get assistance from Peter Strawson’s famous essay, “Freedom and Resentment” in P. F. Strawson, (2008). Freedom and Resentment and Other Essays. New York: Routledge (Originally published by Methuen in 1974). Strawson contrasted the reactive attitude toward others in which we engage with them as fellows responsible members of moral community with the objective attitude toward others in which we view them as a mere object of causal analysis and control. Strawson wrote at p. 9:

To adopt the objective attitude to another human being is to see him, perhaps, as an object of social policy; as a subject for what, in a wide range of sense, might be called treatment; as something certainly to be taken account, perhaps precautionary account, of; to be managed or handled or cured or trained; perhaps simply to be avoided, though ibis gerundive is not peculiar to cases of objectivity of attitude (emphasis in original).

of their actions. Their representatives present them as individuals in relation to whom we cannot aspire to a shared moral understanding.

The defense entails taking offenders out of the category of responsible individuals who can give a rational account of their actions. Therefore, it may be that offenders have a dignity interest in eschewing the insanity defense. That dignity interest may be rightly overborne by countervailing interests. However, Gardner & Macklem (2004) have argued that it is an interest that still merits the attention of actors in the criminal justice system, be they prosecutors, defense counsel, or judges (pp. 216–218).

Although such actors should never suggest that an offender who has a legitimate psychiatric defense ought not to put it forward because of the risk of stigma or loss of self-respect, questions remain about the ethics of persuading offenders to run an insanity defense. Is it not sometimes false that a defendant’s interests are best served by avoiding a criminal conviction no matter the cost to her or his self-respect? Is there a potential risk to the self-respect of offenders if counsel, psychiatrists, and judges use their expertise to expand the insanity defense in step with the current psychiatric expansion of the kinds of behavior the profession considers pathological? Should defense counsel consider the potential stigma of an insanity defense in proposing the defense to clients and in deciding how rigorously they should try to persuade a reluctant client to submit to psychiatric examination? Should prosecutors be mindful of the dignity interests of the defendant when making the decision to attempt to raise an insanity defense over the objection of the defendant?

Such questions might well be explored through empirical research on public and offender attitudes toward the defense and the stigma surrounding it. Certainly one could learn much by interviewing offenders to determine how their sense of self was affected by running the defense, whether they were pressured by their lawyer to put the defense forward, how they experienced the process of psychiatric evaluation and the presentation of psychiatric evidence in court, and how they felt friends, family, associates, and others treated them after their running of the defense.

All this would be illuminating and valuable. However, what I propose to do is to examine the question of whether the insanity defense is demeaning from a very different angle. Here I intend to explore the question by examining the works of some of the great literary figures. By turning to literature, I hope to unearth some of the emotional subtleties involved in denying responsibility for an action by raising mental illness as a defense. The great novelists, though they may not have a greater capacity than offenders themselves to understand the psychology of presenting or acknowledging oneself as not responsible due to mental illness, have

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5 Criminologist Jamie Livingstone is conducting such a study, and it is anticipated that his research will be published in 2011. The results of his interviews promise to be very interesting.
an opportunity to communicate ideas about mental illness and responsibility in detailed, vivid, and thought-provoking ways. Sigmund Freud himself knew that the study of mental illness had much to learn from literature. Freud (1959) wrote, “The creative writer cannot evade psychiatry nor the psychiatrist the creative writer” (pp. 43–44). Indeed, the great novelists, playwrights, and poets have long grappled with the nature of madness and its consequences for moral and legal accountability. Their works remind us that moral perplexity about either punishing the criminal madman or letting him or her off the hook, stigmatizing the mentally ill offenders or extending compassionate understanding to them, are perennially human reactions and have been intractable through the ages.

In what follows, I propose to examine some texts that I think cast light on the dynamics of offender pathologization and its threats to self-respect. I begin by looking at Miguel de Cervantes’s masterpiece *Don Quixote de la Mancha* and will argue that although the principle that the mentally ill should not be seen as responsible for their wrongdoing is firmly in evidence in his text, Cervantes still ends his novel with a poignant look at the ways in which mentally ill persons maybe feel demeaned by their illness and by the ways in which they have been excluded from shared understanding of the world because of their illness. Here I also discuss the desire of mentally ill persons to redeem themselves by taking or assuming responsibility for their actions even when they were in fact not responsible due to their illness. I then move to Fyodor Dostoyevsky’s *Crime and Punishment*. Here I look at the trend beginning in the nineteenth century toward medicalization of insanity and the professionalization of knowledge about the insane. Dostoyevsky’s Raskolnikov is demeaned by the insanity defense, in part because it locates ultimate understanding about him in the professional assessments of doctors rather than in his own self-understanding.

Next I consider the question from the opposite point of view. What is it that makes the insanity defense—and the concomitant denial of responsibility it entails—appealing in a moral sense to some offenders? Under what circumstances does the insanity defense protect offenders from stigma and allow them to save face in their response to allegations of wrongdoing? Here I begin with an analysis of Agamemnon’s insanity defense in Homer’s *Iliad*: that Zeus had deprived him of his reason when he took the prize girl Briseis away from Achilles. I then proceed to Shakespeare’s *Hamlet* and the insanity defense he offers for the murder of Polonius. Here I focus on the ways in which the insanity defense allows the offender fully to repudiate the wrongdoing while asserting an innocent “real” self. Further, I discuss the ways in which the insanity defense allows the offender to stand in solidarity with the victim, indeed sometimes even as a collateral victim of the wrongdoing, and to cast blame onto the illness for the offence.
THE INSANITY DEFENSE AS DEMEANING

Before we begin our analysis of these texts, it will be helpful to give some greater theoretical and legal depth to the debate about whether insanity is a demeaning defense. To do so we can gain much by giving our attention to a debate between Gardner and Macklem on the one hand and. Mackay and Mitchell on the other.6 In 2001, Gardner and Macklem published an article in the *Criminal Law Review* entitled “Compassion without Respect? Nice Fallacies in *R. v. Smith.*” The article was critical of the House of Lords decision interpreting section 3 of the English *Homicide Act, 1957* in a way that watered down the objective element in the provocation defense: the requirement that the provocation must be such that a reasonable person would have lost self-control under the circumstances. In *Smith,* the court held that evidence of mental illness that might not be sufficient to ground a diminished responsibility defense under section 2 of the Act was nevertheless admissible and relevant under section 3 in relation to provocation inasmuch as the presence of mental illness (in Smith’s case, clinical depression) could properly be seen by the jury as cause for lowering the standard of self-control to which the defendant should be held. In other words, a clinically depressed person might reasonably be expected to lose self-control in reaction to a lesser provocation than someone who was in perfect mental health. It should be open to the jury, in the House of Lords view, to correspondingly adjust the standard of self-control demanded by section 3 to take into account the lesser capacity of the mentally ill person for self-control.

The concern to preserve the integrity of the defense of provocation as a true excuse in their understanding of the term is at the core of Garder and Macklem’s objections (2001, pp. 631–634). An excuse is a responsible denial of culpability and not a plea of the absence of responsibility. In “The Gist of Excuses,” first published in 1998, Gardner writes:

> By making excuses people are . . . asserting their responsibility. . . . For being responsible in this sense – being responsible for our actions – is none other than being in that condition in which our actions are amenable, in principle, to justification and excuse. Justifications and excuses are available only to those whose actions have intelligible rational explanations, i.e. whose actions properly reflect reasons for action that they took themselves to have, and this is the basic condition of our responsibility for our actions (pp. 131–132).

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Defendants pleading provocation are asking the court to view their anger, not their actions, as reasonable given the provocation. They are giving us a rationally intelligible account of why they did what they did, and they are asking us to conclude that other reasonable people might well have done the same. Gardner and Macklem (2001) write:

> Defendants also have an interest in being accorded their status as fully-fledged human beings, i.e. as creatures whose lives are rationally intelligible even when they go off the rails, and who can therefore give a rationally intelligible account of how they came to do so (p. 627).

The defense of provocation with an objective standard maintains the defendant’s integrity as a responsible individual offering a rationally intelligible excuse. Once that objective standard is eliminated and replaced with a standard that shifts to take account of the mental disorder, the defendant who actually receives a provocation that would have deprived a reasonable person of self-control no longer has a hope of receiving, under section 3 of the Act, a verdict that acknowledges the justice of that excuse. Again, to quote Gardner and Macklem (2001):

> Pleas like diminished responsibility and insanity are different in this respect from excuses. They are reserved for those who are not quite among us, who cannot quite provide an intelligible account of themselves, and whose susceptibility to the full range of human judgment is therefore in doubt. Nobody should wish this status on themselves. And all else being equal, it is inhumane to wish it upon other people (p. 627).

The defendants who did not want to plead diminished responsibility because they wanted to maintain their standing as responsible individuals no longer have that option if the provocation defense is collapsed into a variant of the diminished responsibility defense.

Describing the motives of the defendant who prefers a provocation defense to a diminished responsibility defense, Gardner and Macklem (2001) write, “They wish, as we said before, to be treated as fully responsible human beings who can explain themselves intelligibly and offer regular justifications and excuses for their actions” (p. 630).

The House of Lords decision deprives some defendants of the “opportunity to engage self-respectingly with the law” (Gardner & Macklem, 2004). In the construction of its conceptual categories, the law should not impose costs in self-respect to the defendant by nudging the defendant away from a standard—such as provocation—that is anchored in rationality and reasonableness into a standard of diminished responsibility that excludes the defendant from the community of responsible agents.
In an article entitled “Provoking Diminished Responsibility: Two Pleas Merging into One?” (2003) Mackay and Mitchell counter Gardner and Macklem and defend the House of Lords in Smith. They go on to suggest that the two defenses—diminished responsibility and provocation—should be merged into one defense drawn on the lines of “extreme emotional disturbance” that would reduce murder to manslaughter for those who kill when suffering from severe emotional upset from either external factors or mental illness or a combination of both (Mackay & Mitchell, 2003, p. 758). According to Mackay and Mitchell, both provocation and diminished responsibility are essentially concessions to “losing it,” both make concessions to a loss of rationality, and therefore the two could, more coherently and inclusively, be boiled down into one defense (pp. 756–758).

Mackay and Mitchell take exception to Gardner and Macklem’s view that self-respecting defendants would rather not plead diminished responsibility. MacKay and Mitchell (2003) write:

In essence what Gardner and Macklem are telling us is that a diminished responsibility verdict, like insanity, is one to which stigma is attached. This not only perpetuates an unfortunate attitude towards the mentally disordered but also relegates the interest in avoiding a murder conviction as being less important than what is referred to as a defendant’s ‘interest in being accorded their status as fully-fledged human beings’” (p. 757 [footnotes omitted]). They state further, “Small wonder that defendants are reluctant to plead insanity when we encounter the kind of stigma which is being promulgated here” (Mackay & Mitchell, 2003, p. 757).

Gardner and Macklem pull no punches in their response. On the charge that they are stigmatizing mental illness, they write: “. . . we did not rely on the fact that stigma is attached to a diminished responsibility verdict. We claimed that stigma should be attached to it” (2004, p. 216, emphasis in original). They quite straightforwardly defend the view that it is indeed demeaning for a defendant to plead lack of responsibility on the grounds of mental illness. Having said that, however, Gardner and Macklem do not want to suggest that a person suffering from mental illness ought not to put forward the defense. Rather, they want to highlight the cost in self-respect of claiming that one is not responsible, that one is “not quite among” those of us who are able to give responsible accounts of our actions. So although they take the view that the defense is demeaning and carries a stigma, they also maintain that position is not disrespectful of the mentally ill. Rather, they maintain that their position acknowledges the debilitating tragedy of mental illness. Mental illness really does prevent people from living “distinctively human” lives. Gardner and Macklem (2004) write:
Mentally ill people have often been persecuted, neglected, patronized, and treated as objects of mirth. Their woes have often been compounded by quack treatments, pointless incarcerations, and brutal ‘care’ regimes. They have often fallen victim to bizarre superstitions and prejudices. But one should not conclude from the fact that mentally ill people have been on the receiving end of so much baseness and stupidity that their mental illness should be regarded with equanimity. Mental illness is not like homosexuality or left-handedness, unobjectionable traits that do not need any remedy, despite what some once thought. Mental illness really is a kind of illness and illnesses by definition call for treatments and cures (p. 217).

No one defends mental illness as a good thing. Everyone—including the mentally ill—wish that mental illness did not exist. Compelling though this argument is, it leaves some concerns unanswered. Criminal proceedings constitute a realm of relative stigma. Simply to be a defendant in a criminal case is deeply discrediting. What Gardner and Macklem are arguing, however, is that there are more- and less-stigmatizing ways of getting off the hook. They argue that defenses grounded in mental illness are and should be more stigmatizing than those that affirm the responsibility of the agent but not his or her culpability. Here again, their position is “a denial of responsibility is, all else being equal, the least appetizing of all defences for a self-respecting person to offer” (Reply to Critics, 2007, p. 274).

However, the lingering problem with this answer is that if we buy the theory of the insanity defense that mentally ill persons are not responsible for their conduct, that defense really ought to be seen as completely morally exonerating and thus should eliminate the stigma attached to the criminal conduct. None of that entails viewing mental illness with equanimity in the way we now view homosexuality or left-handedness. We can view mental illness as a terrible thing. We can still go along with Adam Smith in holding that of all the calamities of men, loss of reason is the most pitiable—and at the same time say that it is morally wrong to evaluate it negatively in a moral sense: that is, to view persons as morally discredited because of their mental illness. If mentally ill offenders really are not responsible and therefore not culpable, why should not the defense be the most attractive rather than the least?

Keeping the moves in this debate in mind, let us turn now to look at some texts that support the Gardner and Macklem view that the insanity defense is demeaning for the accused inasmuch as it concedes that the offender is “not quite among us,” that as a mentally ill person he or she is not a “fully-fledged human being” insofar as he or she cannot give a rational account of his or her actions. And for this, let us turn first to Miguel de Cervantes’s *Don Quixote* (2009, originally published in 1604).
Rationality, Delusion, and the Exclusion from a Fully Human Life: Don Quixote’s Deathbed

Cervantes’s *Don Quixote De La Mancha* is arguably the most sustained study of delusional psychosis in all of literature. Of course, it is written in the comic register and springs from a sensibility around insanity quite different from our own—one that we might say with Foucault was a better time when madness could hold its head up and be included as part of society or, if we follow Nietzsche, we might say was astonishingly cheerful in its indifference to and even delight in cruelty. Despite the huge cultural gap between renaissance Spain and twenty-first-century North America, there are aspects of Cervantes’s observations on madness that both foreshadow and cast light on present-day discourse about insanity and responsibility.

Don Quixote “presents with” the symptoms of schizophrenia. He is delusional, he hallucinates, his perceptions are not grounded in reality, his thoughts are disordered, and others (most notably Sancho Panza) try to help realign his perceptions by confronting him with the evidence: The windmills are not monsters. the inn is not a castle, the wineskins are not giants, and the barber’s basin not Mambrino’s helmet. None of this evidence can shake his delusions. Everything is assimilated to conform to his inner orientation; his belief in himself as a knight-errant and the world as the domain of enchantment.

The idea that an insane offender is not liable to be punished under the criminal law is stated surprisingly often in this text. Early on, in Chapter III of Book I, Don Quixote has gone to an inn that he takes to be a castle. The innkeeper, whom Don Quixote thinks is the castellan, is amused by Don Quixote’s lunacy and hopeful that he might make money out of him. The innkeeper goes along with Don Quixote’s delusions and promises to dub him a knight. He garners interest in Don Quixote among the townsfolk by informing them of his fantastic form of madness. As a result, many people come to watch Don Quixote standing on guard of the rusty armor that belonged to his great-grandfather which he has placed on a trough for safekeeping. A man of the inn enters the yard and moves Don Quixote’s armor so as to water his horses at the trough. Don Quixote reels at what he takes to be the man’s aggression and begins to attack him in self-defense and defense of his armor: “... he lifted his lance with both hands and with it smote such a blow on the carrier’s head that he stretched him on the ground” (Cervantes, p. 31). Soon another man comes to water his mules as well; taking him to be an imminent threat, Don Quixote:

without uttering a word or imploring aid from anyone, once more dropped his buckler and once more lifted his lance, and without actually
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breaking the second carrier's head into pieces, made more than three of it, for he laid it open in four (p. 31).  

In horror the spectators now begin to throw rocks at Don Quixote in the hopes of putting an end to his rampage. However, the landlord intervenes. Cervantes writes, “The landlord shouted to them to leave him alone, for he had already told them that he was mad, and as a madman he would not be accountable even if he killed them all” (p. 31). Another translation renders this as “he would get off scot free” (Penguin Classics, 1950). The idea that, as a delusional actor, Don Quixote is not responsible for his wrongdoing is stated with remarkably modern clarity. People must manage Don Quixote, must work around his delusions because his illness puts him beyond the realm of accountability.

In *Madness and Civilization: A History of Insanity in the Age of Reason*, Michel Foucault outlines a regression in attitudes about mental illness from the renaissance into the enlightenment (1988, originally published 1965). Once respectable, insanity becomes stigmatized. The insane go from being integrated members of community to being confined in asylums. Foucault’s preference for a respectful, even reverential, attitude toward mental illness is apparent throughout his work. He takes Shakespeare and Cervantes to mark the tail end of the age in which the insane could hold their heads high and be counted as valuable members of society. Foucault’s discussion of Cervantes’s *Don Quixote* is perhaps the cornerstone of his claim that the literature of the early seventeenth century gives us an attitude toward madness as respectable—as a valuation of unreason, imagination, and the absurd.

What this interpretation requires, and what Foucault gives us, is an ironic reading of the ending of *Don Quixote*. One that does not take at face value Don Quixote’s own despair at having spent so much of his life in a delusional state. Of course, it may be impossible to read *Don Quixote* with too much irony. Cervantes is constantly playing with meaning and satire, but one misses something important about the pathos of the book’s ending if one does not take seriously and without irony, Don Quixote’s sadness and sense of humiliation on his deathbed. Don Quixote’s delusions of himself as a knight errant are lifted at the same time as he becomes mortally ill with a fever. He regrets his delusional life. He is humiliated by having been trapped in psychosis for so long and is profoundly embarrassed by the realization that others have been humoring him. Don Quixote states:

I was mad, now I am in my senses; I was Don Quixote of La Mancha, I am now, as I said, Alonso Quixano the Good; and may my repentance

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7 It would be very interesting at some point to analyze the similarities in the logic of the insanity defense and the defense of mistake of fact. It is often the case that we engage with the moral assumptions behind a mentally ill offender's deluded understanding of reality and, to some degree, the insanity defense, I think, hinges on the estimation that the offender would have been acting justifiably if his or her delusions were true.
and sincerity restore me to the esteem you used to have for me (2009, p. 60).

He wants to redeem himself by making the connection between his former and present sane selves and by reconnecting with others as a rational agent. He wants to make amends. To Sancho Panza: “Forgive me, my friend, that I led thee to seem as mad as myself” (p. 608).

Our delight in or respect for his madness and its wonderful connections to the imagination does not take away from our genuine pain at his humiliation. Though Don Quixote is humiliated on every page of the book, it is only in this final humiliation when he becomes a rational observer of his past insane life and views it with profound regret that we actually enter into real sympathetic pain with him. Until this point, he is an object of our mirth. Once he becomes aware that his perception of reality was in error and that his actions were, therefore, not a product of his autonomous self, we feel genuine compassion for him. His realization that his hyper-vigilance about his dignity as a knight errant was delusional is a serious indignity for him. He has been in error about reality, and everyone has known it except for him. People have gone along with him in a patronizing way.

In Cervantes's *Don Quixote*, we can see remarkably clear pictures of both the kind of unfair stigmatization of madness that McKay and Mitchell decry and the essentially demeaning nature of insanity to which Gardner and Macklem draw our attention. Don Quixote is treated with astounding cruelty. He is made an object of ridicule and trickery by almost everyone he meets. As Neitzsche says:

> Today we read *Don Quixote* with a bitter taste in our mouths, almost with a feeling of torment, and would thus seem very strange and incomprehensible to its author and his contemporaries: they read it with the clearest conscience in the world as the most cheerful of books, they laugh themselves almost to death over it (*On the Geneology of Morals*, Essay II, Ch. 6, pp. 66–67).

For the most part in Cervantes, there is no pity for the madman. Of course, today we see ourselves as having a vastly more enlightened view of madness. Although graphic portrayals of murder and dismemberment are the standard fare of twenty-first-century entertainment, we would see a novel that made the delusions of a schizophrenic the object of comedy intolerably barbaric.8 The insane have left the comedic genre and are now confined

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8 One exception to this is perhaps the film *Lars and the Real Girl* (Kimmel & Gillespie 2007), which depicts a delusional young man who sees his life-size inflatable doll as a real person. Although the film is a comedy, when the community joins in to support Lars's delusions, they do so with kindness and a real desire to help him transcend his illness. When others go along with Don Quixote's delusions, they do so only either to manage him or to lead him into further ridiculous acts to humiliate him.
to drama, thriller, and horror. However, in Cervantes, alongside this primitive cruel portrayal of insanity, we have also at the end of the book a very sensitive portrayal of what is lost in a human life marred by mental illness.

Even as everyone else is trying to restore his life by restoring his madness, Don Quixote rejects their offers as patronizing: Sancho Panza says,

Come, don’t be lazy, but get up from your bed and let us take to the fields in shepherd’s trim as we agreed. Perhaps behind some bush we shall find the lady Dulcinia disenchanted, as fine as fine can be. If it be that you are dying of vexation at having been vanquished, lay the blame on me, and say you were overthrown because I had girted Rocinante badly (p. 608).

This display of friendship, evidenced by Sancho’s desire to revive Don Quixote’s by affirming and restoring his madness, is touching. We feel Don Quixote’s rejection of it as tragic but necessary to the redemption of his self-respect. He now goes on to carry out the business of a sane man; through confession and making a will. He accepts his past with resignation but with a vivid sadness over his loss, in part, of a fully human life.

Don Quixote views his own madness as demeaning. It lowers his dignity and status in his own eyes. Certainly it has lowered him in the eyes of others. However, his deathbed efforts to restore his own dignity are both poignant and successful in part at least because he does not deny responsibility on the grounds of his insanity. He asks forgiveness from an assumption of responsibility. He repudiates his actions without denying that they are his. So the text takes the position that to be mad is in itself demeaning. However, by inference, it also seems to take the position that the dignity of the madman is restored by a sane self who, like a parent taking responsibility for the wrongdoing of a wayward adult child, takes a responsibility that perhaps does not belong to him.

Cervantes’s text highlights the pain of recognizing that one has been trapped in delusion and the indignity involved in that pain. It also grapples with the very understandable impulse of insane persons to try to redeem themselves by taking responsibility. In this text, however, the indignities of insanity have not yet been compounded by the arrogance of science. Here, mental illness, though it is recognized as a condition vitiating responsibility, is still a category constructed by lay judgments about the capacity for reason

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9 See Bernard Williams’s discussion of Agamemnon in *Shame and Necessity* (2008) and my discussion of Agamemnon infra. Williams argues that Agamemnon does not deny responsibility. I am not a philologist or a classicist so I have no opinion on the point, but clearly some translations—like that of David Konstan—support the reading that Agamemnon denies responsibility. Others, like the one Williams points to, support Williams’s reading that Agamemnon is not “disassociating himself from the action; he is, so to speak, dissociating the action from himself” (p. 54).

10 Of course, Don Quixote commits numerous assaults in the course of his adventures, and people are often afraid that he is going to commit murder.
and appreciation of reality. Let us now shift to a more modern text that orients us toward the way in which the medicalization of mental disorder has created new grounds of stigma for mental illness, new ways in which autonomy and self-respect are undermined by mental illness.

“That piece of beef whose specialty is surgery has gone mad on mental diseases.” Dostoyevsky, mental illness, and professional zeal

In Fyodor Dostoyevsky’s *Crime and Punishment* (2005, originally published in 1866), Raskolnikov murders two women with an axe in the course of a robbery. He has planned the robbery and the first murder of the old woman pawnbroker for weeks in advance. He has a narcissistic, pseudo-philosophical justification for the killing. None of his reasons for murdering the women count as either justifications or excuses under law, nor could they be given any moral weight in his favor. After the murder, Raskolnikov becomes ill. He is physically weak, intensely nervous, hypersensitive, and temperamental. People begin to speculate about his condition and also to suspect that he is the murderer.

Early on in Raskolnikov’s decline into nervous illness, we are introduced to a character, Zozzimov, a physician enamored of the emerging discipline of psychiatry and its promise of scientific dominion over the minds of others. Madness is Zozzimov’s “favourite subject.” Long before the trial has begun, Zozzimov is trying to gather data to support his insanity hypothesis on Raskolnikov. Consider the following passage uttered by the character of Razumihin, Raskolnikov’s friend, who is the grounding voice of reason in the novel:

“Do you know what Zossimov whispered to me when we were coming out?” Razumihin blurted out, as soon as they were in the street. “I won’t tell you everything, brother, because they are such fools. Zossimov told me to talk freely to you on the way and get you to talk freely to me, and afterwards I am to tell him about it, for he’s got a notion in his head that you are... mad or close on it. Only fancy! In the first place, you’ve three times the brains he has; in the second, if you are not mad, you needn’t care a hang that he has got such a wild idea; and thirdly, that piece of beef whose specialty is surgery has gone mad on mental diseases, and what’s brought him to this conclusion about you was your conversation to-day with Zametov” (2005, p. 173).

The passage ridicules the arrogance of the doctor for imagining himself an expert on mental illness and for his meddlesomeness for trying to trick

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11 The ellipsis is in the original.
Raskolnikov into exposing himself. The passage also makes a number of points about why mental illness itself is demeaning given its new medicalization. The first has to do with the implication of inferior self-understanding. Raskolnikov is smarter than the doctor. By judging him mad, Zozzimov presumes to know and understand more than Raskolnikov does about himself. By diagnosing Raskolnikov in this way, Zozzimov claims a fundamental epistemic advantage. He claim an expertise about Raskolnikov’s inner life to which Raskolnikov does not have access.

Regardless of whether this move entails a claim of superior intelligence, it does entail a claim of superior knowledge and understanding of precisely that which each individual presumptively knows most. Consider John Stuart Mill’s classical liberal formulation of the idea: “with respect to his own feelings and circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by anyone else” (On Liberty and Other Essays, 2010, originally published in 1859). The judgment of mental illness usurps the individual as the superior authority on his own feelings and circumstances. To be properly the subject of such a judgment is to be lower in dignity and status. It is to be excluded from the rest of humanity who are presumed to know most about themselves.

So first, by calling Raskolnikov mad, Zozzimov claims epistemic power over him, but the passage points to something more. Were Raskolnikov mad, Zozzimov and his colleagues would potentially have coercive power over him. The murder aside, Zozzimov’s judgment that Raskolnikov is crazy is more than an opinion; it is a threat. If other professionals agreed with that, they could lock him up regardless of whether he was guilty of any crime. Judging another to be insane was (and still is) a way into the exercise of coercive control. Razumihin tries to minimize the threat. He reassures Raskolnikov that if he is not crazy, they cannot do anything to him. So Razumihin presumes Raskolnikov can protect himself by proving his own sanity, but it is Raskolnikov’s vulnerability in the face of a medical diagnosis of mental illness to which Razumihin draws our attention.

The threat of being taken to an asylum or hospital, of being subjected against one’s will to a care regime (brutal or otherwise), is part of what makes mental illness itself, certainly under nineteenth century conditions, and even today, a lowering in status or dignity. Of course, today people cannot be committed on grounds of mental illness alone. It must be shown

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12 The voice here is that of Razumihin, who is really the voice of reason and decency throughout the book. For the most part, the text asks our judgments to keep pace with those of Razumihin, and he seems to be the voice of the author.
13 Foucault provides a marvelous explanation and analysis of the rise of confinement as the response to mental illness. See Madness and Civilization, 1998, beginning at p. 38.
14 Razumihin is assuming Raskolnikov is innocent throughout this discussion.
also that they are a danger to themselves or others. Nevertheless, mental illness potentially entails coming under the authority and control of the medical profession in a far-reaching way: a way that does not depend upon a judgment of guilt for past action.

Let us turn now to the distinct question of how Dostoyevsky portrays not the stigma of mental illness itself but the extent to which the defense of insanity is potentially demeaning to the accused. Ultimately Raskolnikov confesses, and the trial ensues. Dostoyevsky writes:

There had been little difficulty about his trial. The criminal adhered exactly, firmly, and clearly to his statement. He did not confuse nor misrepresent the facts, nor soften them in his own interest, nor omit the smallest detail (*Crime and Punishment*, 2005, p. 453).

The lawyers and judges and medical witnesses converged on one conclusion: temporary insanity. Dostoyevsky writes:

They immediately drew the deduction that the crime could only have been committed through temporary mental derangement, through homicidal mania, without object or the pursuit of gain. This fell in with the most recent fashionable theory of temporary insanity, so often applied in our days in criminal cases (p. 454).

And later:

To the intense annoyance of those who maintained this opinion, the criminal scarcely attempted to defend himself. To the decisive question as to what motive impelled him to the murder and the robbery, he answered very clearly with the coarsest frankness that the cause was his miserable position, his poverty and helplessness, and his desire to provide for his first steps in life by the help of the three thousand roubles he had reckoned on finding (p. 454).

There is something redeeming about Raskolnikov’s refusal to dissemble about his mental state no matter how beneficial it would be for him to do so. There is integrity in his stance. He does not collude with the doctors who want to paint him as sick. In a sense, Raskolnikov has his cake and eats it, too. He gives a responsible account of the reasons for his actions. This assumption of responsibility ought to mean the death penalty, but psychiatry intervenes to save him from the consequences of his heroic authenticity. This intervention makes Raskolnikov’s greater redemption through Christianity possible.

Dostoyevsky portrays the professional designation of madness as arbitrary if not completely false. In this portrayal, Dostoyevsky foreshadows the twentieth century critique of mental illness articulated by Thomas Szasz.
Szasz states that psychiatric diagnoses rely on pseudo-scientific categories that are, at bottom, “judgments of disdain” (The Myths of Mental Illness, 2010). In Raskolnikov’s trial, madness lies in the professional judgment of doctors who have complete power over, and personal professional investments in, particular understandings of the category. Judgments about mental illness are subject to the forces of professional ego and ambition. The category of mental illness is not scientifically verifiable and is subject to trends and politics.

Raskolnikov is benefited and yet demeaned when he is classified as insane. He escapes the death penalty and is sent to Siberia for 8 years of penal servitude. In the court’s finding of temporary insanity, we see the zeal of phony expertise and personal investment in professional theories. The actors in the criminal justice system clearly have their own professional agendas in wanting to cast Raskolnikov’s actions in terms of mental derangement. They are frustrated by Raskolnikov’s honesty, by his unwillingness to play ball, and his failure to feed them the right lines.

The success of the insanity defense, despite Raskolnikov’s refusal to go along with it, points to one of the ways in which the defense itself is demeaning. The accused does not speak for himself. It is the professionals who explain the accused’s conduct. On the subject of his own inner state, Raskolnikov’s voice becomes annoying and irrelevant, while the professional voices are authoritative. In any trial where the defense is based on mental illness, the primary witness for the defense will be the psychiatrist and not the accused. Defense counsels will often avoid putting their client on the stand to avoid the very sort of candid admission that Raskolnikov gave the court. Better to have the controlled testimony of the psychiatrist than the potentially damning testimony of the accused. This aspect of the insanity defense itself reveals why Gardner in particular sees the defense as demeaning. For Gardner (1998), defenses are responsible denials of culpability rather than denials of responsibility. Gardner understands the process of offering defenses to be a distinctly human endeavor of trying to explain one’s actions and give reasons for them. If a defense entails the substitution of professional voices for one’s own, one has already opted out of that distinctly human endeavor. What Raskolnikov’s trial points to is the way that the insanity defense takes the power of explanation away from the accused and gives it to experts.

Although Dostoyevsky seems to ask the reader to be mistrustful of the professional expertise behind the verdict of temporary insanity, he also seems to endorse the possibility for redemption that the commuting of the death penalty brings. With the help of the good-hearted and pious prostitute Sonia, who comes with him to Siberia, Raskolnikov is able to move toward a kind of spiritual growth that seems also to involve accountability and repentance.
THE INSANITY DEFENSE AND THE REDEEMING REPUDIATION OF WRONGDOING

Having examined two texts that reveal some of the reasons why the insanity defense is demeaning, let us now try to look at the problem from the other angle. Though there is some stigma involved in pleading one’s lack of responsibility due to mental illness, it is clear, nonetheless, that the complete moral exoneration involved in a judgment of not guilty by reason of insanity might nevertheless have its benefits as a defense. That is, the defense might actually deflect stigma rather than attracting it. Let us consider situations in which a defense of insanity, though not removing all stigma, at least involves less stigma relative to that which will attach if they are in any way responsible for their conduct. Let us consider when, if ever, an insanity defense, though possibly demeaning, might be the least demeaning defense or explanation for one’s conduct. Before proceeding to our two texts here (Homer’s *Iliad* and Shakespeare’s *Hamlet*), let us consider a brief thought experiment that perhaps shows why insanity might be appealing to an accused.

A Preliminary Thought Experiment: Insanity as the Most Appetizing Defense for a Self-Respecting Person

Is it really true that a denial of responsibility is the least appetizing of defenses for a self-respecting person? Is it not possible that there might be actions so morally abhorrent to a self-respecting person that they would actually prefer to be able to truthfully say, “I was not responsible due to mental illness” than to have to take responsibility even by way of exonerating justification or excuse? Imagine an experiment in which all you know is that you have assaulted your child, causing bodily harm. You are told that you must now choose between four parallel universes. Each universe represents a different defense. In each universe, you are going to get completely “off the hook” in the sense that there will be no state-inflicted consequences for your action.

In the first universe, your defense is self-defense. Your child viciously attacked you, and your counter-assault constituted reasonable force necessary to protect you from death. In the second universe, your defense is duress. An evil tyrant credibly demanded that you assault your child or face...
the torture chamber. You complied. In the third, your defense is mistake of fact; you thought the person you were assaulting was a burglar when in fact it was your child returning home from a party late at night. In the fourth universe, your defense is insanity. You assaulted your child because were delusional and believed that because you were protecting him from evil spirits that were trying to take possession of his soul. Which do you chose?

On some understandings of self-respect, the insanity defense may not be the least appetizing. Your self-respect might be completely bound up with a self-understanding profoundly inconsistent with the other defenses. If, for example, you see your love for your child as the cornerstone of your life and the foundation of your self-respect, taking responsibility for the assault even by way of offering a justification or excuse might be prohibitively dissonant for you. The duress defense in particular might be more distasteful than an insanity defense for persons whose self-respect is grounded in their concern for their children. Some might well have more contempt for a hypothetical self who would avoid pain by inflicting it on his or her child than they would for a hypothetical self who, as a result of mental illness, had no control at all over what he or she was doing. Duress concedes cowardice. Insanity admits no vice at all.

Self-defense is usually the most appetizing defense for the self-respecting person, as to use reasonable force in defending oneself actually is the morally right thing to do. However, we can still imagine parents whose self-respect would be devastated by confronting their own (perfectly reasonable) decision to resort to return violence to protect themselves against their child.

Mistake of fact concedes stupidity. Some might well be horrified at their own failure to distinguish between an intruder and their own child. In these cases, a person might well prefer an insanity defense to the alternatives.

What the thought experiment highlights is that in calling insanity the least appetizing defense for the self-respecting person, Gardner and Macklem assume an understanding of self-respect grounded in rationality. This point is made clearer by in Gardner’s seminal essay, “The Mark of Responsibility”, wherein he says this:

As rational beings we cannot but aim at excellence in rationality. The only way we have to question that aim—by asking “What reason do I have to excel at rationality?” already concedes the aim by demanding that the cause for rationality be made rationally. And of course at that point rationality makes its own case: what else could we have reason to do, or think, or feel but whatever reason would have us do, or think, or feel? So as rational beings—beings who are able to follow reasons—we cannot but want to follow reasons: to excel in rationality. One implication of this among many is that as rational beings we cannot but want our lives
to have made rational sense, to add up to a story not only of what but of *why*. We cannot but want there to have been adequate reasons why we did what we did (or thought or felt) what we did (or thought or felt (in *Offences and Defences*, 2007, p. 178 [footnotes omitted].

For Gardner, self-respect is bound up with that distinctively human desire to excel in rationality, but self-respect can be grounded in other human values as well. Morality, for example, can be a foundation of self-respect distinct from rationality. We do not want only rationally adequate reasons for doing what we do; we want morally adequate reasons as well. Defenses to criminal charges such as self-defense, duress, and mistake of fact identify reasons for action that are both rational and morally legitimating. However, there are certainly many who can give excellent rational explanations for why they commit criminal offences that have no morally exonerating force at all. A person may kill to inherit under a will or to uphold a reputation as a tough gang member dealing punitively with someone who has reneged on a drug deal. Reasons for action, even when they provide a coherent and responsible story of why the person did what they did, may not contribute anything to the moral or legal defensibility of those actions. The person who wants to excel in rationality alone may be satisfied with an explanation for murder. In the words of Dostoyevsky’s Raskolnikov:

I resolved to gain possession of the old woman’s money and to use it for my first years without worrying my mother, to keep myself at the university and for a little while after leaving it—and to do this all on a broad, thorough scale, so as to build up a completely new career and enter upon a new life of independence (*Crime and Punishment*, 2005, p. 357).

Rationally adequate, certainly, but equally morally bankrupt.

For those whose self-respect is grounded more in morality than rationality, a rational explanation for their actions will not be sufficient if it does not also provide a moral justification. A person might well prefer a defense that gives complete moral exonerations by excluding responsibility to one that concedes a moral failing without questioning responsibility. One might want to avoid at all costs the loss in self-respect involved in the cowardice that is conceded by duress, the stupidity conceded by mistake of fact, the wrath that is conceded by provocation, or even the failure of non-violence that is conceded by self-defense. A soul such as Gandhi, a man of epic self-respect, if faced with a world in which he had undeniably killed another, might well have preferred the world in which that had taken place because of a complete supplanting of his will to another. Of course, Gandhi with his supererogatory ideas about agency would undoubtedly insist on taking responsibility no matter what and would view himself as culpable even if
his violence were the product of mental illness. However, he still might prefer a world in which that violence was delusional to one in which it was cowardly, rash, or stupid.

Agamemnon and the Benefits of Blaming Zeus

Honor can also compete with rationality for preeminence as a foundation for self-respect. When honor comes first, a claim that one acted in a fit of madness may be preferable to any admission that one acted responsibly and wrongly. We can see this in the ancients who conceived of madness, [atê] as a kind of divine mischief-making by the gods. In Homer’s *Iliad*, Agamemnon himself eventually pleads such a defense to the charge of wrongfully depriving Achilles of his prize girl, Briseis. Agamemnon says, “I am not responsible, but rather Zeus and Fate and the Fury that strolls through the air, who cast this violent madness upon my wits in the assembly, on that day when I myself took away Achilles’ prize” (Konstan, p. 62). And later, “Since I was mad and Zeus stole my wits away, I wish to please [Achilles] once more and give him numberless gifts” (p. 62). Agamemnon admits liability to pay compensation, as he needs to win Achilles back into the battle and, to do so, must appease him. What he does not admit, however, is moral responsibility for the wrongdoing to Achilles. Of course, we suspect the claim is disingenuous because Agamemnon certainly appeared to be exercising his own rational will when he decided to take Briseis from Achilles. His action was rationally motivated by his desire to keep sufficient booty for himself after being forced to return his own prize girl to her father, the priest Chryses, for a ransom. However, once Agamemnon is losing to the Trojans and is desperate for Achilles to return to battle on the side of the Achaeans, Agamemnon can no longer afford the haughty stance he took in relation to Achilles.

A denial of responsibility here allows him to save face where it matters most. There may be some loss of face in loss of reason, but it is nothing in comparison to the loss of face in conceding that he had been responsibly wrong at the outset. The only way he can repudiate his action is by disclaiming responsibility for it and casting the blame elsewhere. At the time he took her, Agamemnon felt absolutely entitled to Achilles’ prize girl. His sense of superiority over Achilles legitimated his taking of Briseis, but now he is humiliated in relation to Achilles. He needs him badly in the battle against the Trojans, and he knows he is going to have to eat crow to get him. However, willing though he is to call his actions wrong, he is not willing to own the whole rational analysis that responsibility would entail. He

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18 The Greek word being translated as “responsibility” is [*aitios*].
is not willing to say that he genuinely made a mistake about his status relative to Achilles. Agamemnon is not willing to concede a real, responsible error in overestimating his own supremacy and self-sufficiency and underestimating Achilles’ entitlement to glory and indispensability in battle. Denying responsibility allows Agamemnon to repudiate the action while being vague and noncommittal on a host of moral details for which responsibility would require an explanation.

Further, the insanity defense for Agamemnon here preserves self-respect not just because it allows him to say, “It was not me” but because it allows him to assert a return of their “real” trustworthy, unblemished self. Agamemnon speaks now from the real self, unfettered by the mischief of the gods. In our criminal defendant’s case, he or she can claim a hope for recovery from mental illness. Some, like Agamemnon, can utter the insanity defense in the voice of the real and sane self—“I was mentally ill then—but I am all right now.”

Denials of responsibility, therefore, succeed in having a completely exculpatory effect where other defenses do not. The defense of provocation leaves a blot on the moral life of the defendant: the vice of having given in to rage, howsoever reasonable. The defense of duress leaves the stain of cowardice, howsoever excusable. True, no one would ever wish mental illness on themselves or others they cared for, but this does not mean that it would never be the case that, confronted with one’s own wrongful conduct, one might not wish for an explanation of it that negated one’s responsibility. Again, in wishing for the availability of the defense, one need not wish for permanent and debilitating mental illness. Like Agamemnon, who denies responsibility on behalf of his past self in the voice of his present “real” responsible self, unfettered by the intervention of the gods, the defendant may plead insanity on behalf of the past violent self from the voice of the sane, rehabilitated self. Mental illness, too, can come and go, if not at the whim of the gods, through the intervention of treatment.

One thing that is striking about the example of Agamemnon’s defense is that the loss of reason itself seems to carry no stigma at all. This may be as a result of vastly different understandings the Greeks held of the idea of mental illness and the irrationality it entailed. Agamemnon, it seems, did not see any stigma in having been robbed of his reason by Zeus. This is perfectly consistent with seeing such fits of madness as terrible things—things you would never wish on yourself or anyone you loved. Though being robbed of one’s reason by the gods is something to be evaluated negatively, it is not something that reflects negatively on the person in a moral way. They are not responsible for it. There could be, of course, many reasons why the ancients would not have viewed such madness as deeply discrediting to the insane. Being Zeus’ target in the mortal realm might indeed have

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had some caché. It would show that one was in an immediate relationship with the gods, even if only as the plaything of their mischief. Supernatural forces really could credibly take the blame for things, leaving human agents untouched by stigma. Again to turn to Nietzsche, in the Greek formulation of madness, the gods themselves could be blamed for human action: “In this way the gods served in those days to justify man to a certain extent even in his wickedness, they served as the originators of evil—in those days they took upon themselves, not the punishment but, what is nobler, the guilt” (*Genealogy of Morals* at essay II, p. 94).

Unlike the divinely inflicted madness of ancient times, mental illness today is not a temporary deprivation of the wits that comes and goes at the whim of another who bears responsibility. We assume that it is not going to go away unless something is done about it. The mentally ill person needs to be acted upon and managed by others—and in particular by professionals. Whether he or she gets well or does not is seen as depending on the particular mix of the degrees of the intractability of the illness, the efficacy of psychotropic drugs, the skill of the treating professionals, and the diligence of his or her cooperation with them. The cure is a matter of judgment and effort on all sides. Unless something responsible and effective is done to and by the individual, the healthy self will not resurface. In today’s understandings of insanity, the self is compromised in a much more thoroughgoing way. There is no fully healthy self ready and waiting to spring back to robust well-being. Nevertheless, we can still gain insight from this Greek example into how the insanity defense might remain attractive for an accused person. Even today, such a defense allows the offender to repudiate the action in a comprehensive way—to stake out a space of allegiance with the victim wherein the offender takes sides against him- or herself and his or her deluded action. It permits offenders to distance themselves from actions they cannot deny. In this, the offender may rehabilitate self-respect by again speaking in the voice of the rational self who condemns the conduct driven by mental illness.

Hamlet: The Offender as Victim

Shakespeare’s *Hamlet*, written between 1599 and 1601, picks up the same theme and perhaps extends it even further. Hamlet stabs Polonius in the mistaken belief that he is his uncle Claudius, who murdered Hamlet’s father. Laertes, Polonius’s son comes to take revenge but, as the two men begin the joust that will prove fatal to them both, Hamlet tries to reconcile with Laretes by pleading a kind of insanity defense in Polonius’s killing. He speaks to his victim’s son:

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20 It is ironic, therefore, that the World Health Organization has published a study showing living in a developed country as a negative indicator for recovery from mental illness. See Robert Whitaker, *Mad in America*. Cambridge, MA: Perseus Publishing, 2005, p. 227).
Give me your pardon, sir: I've done you wrong;
But pardon't, as you are a gentleman.
This presence knows,
And you must needs have heard, how I am punish'd
With sore distraction... . .
Was't Hamlet wrong'd Laertes? Never Hamlet:
If Hamlet from himself be ta'en away,
And when he's not himself does wrong Laertes,
Then Hamlet does it not, Hamlet denies it.
Who does it, then? His madness: if't be so,
Hamlet is of the faction that is wrong'd;
His madness is poor Hamlet's enemy (Shakespeare, Hamlet Act V, Scene ii).

Hamlet both accepts and refuses responsibility. He acknowledges his own wrongdoing. So much is implicit in his request for Laretes's pardon, but from there he passes the blame onto his madness externalized and personified. He posits his own insanity as a second hostile self, an alien force, an enemy that has the power to harm not just others but himself also. Hamlet does not deny the murder, though he does deny responsibility for it. He repudiates it by attributing the act to an alter ego more dangerous to Hamlet even than to others. Hamlet implies that Polonius's death was not a product of his true will. And in a move as arrogant as it is touching, Hamlet asks Laertes to include him within the circle of victims: those wronged by the slaying of Polonius. He asks for Laertes's compassion because he is a victim of that madness that has usurped control of that body that both his mad and sane self share. He also asks Laretes to pity the mental disorder itself and to view that suffering as independent retribution for the murder: “I am punish'd with sore distraction” (Shakespeare, Hamlet Act V, Scene ii, 215).

Hamlet posits himself as the victim of his own madness along with Polonius the deceased, his son, Laertes, and his daughter, Ophelia. Before we dismiss this move as too exaggerated to be effective in dispelling the stigma of an insanity defense, consider the following parallel to the psychiatric analysis of the case of Vince Li. Vince Li and Tom Mclean both boarded a greyhound bus travelling across the Canadian prairies. They happened to sit next to each other near the back. Without warning or explanation, Li stabbed and decapitated Mclean, ate his eyeballs and part of his heart, and pocketed Mclean’s nose, tongue, and one of his ears. Less than a year later, on the basis of a statement of facts agreed to by both the Crown prosecutor and defense counsel, Li was found not criminally responsible. Following the psychiatric evidence, the court agreed that Li passed the legal test for insanity. Li would not go to prison but would be held in a psychiatric hospital. Further, Li would be entitled each year to a hearing before a review board to determine whether he had recovered from his mental illness and was fit to
be released into the community. One of Vince Li’s psychiatrists, Dr. Yaren, speaking optimistically about Li’s chances for recovery, said this:

He is, as I’ve come to know him, a decent person. He is as much a victim of this horrendous illness . . . as Mr. McLean was a victim. Don’t hate the person. Hate the illness” (Mike McIntyre, “Accused killer acted ‘to save himself,’ Li was tormented but can recover, psychiatrist says”, Winnipeg Free Press, April 3, 2009).

The similarity to Hamlet’s reasoning is astonishing. It is the illness that victimizes both the slayer and slain. No agent—not even a god—can be blamed. Perhaps there is also the suggestion that the killer, inasmuch as he becomes the object of hatred, suffers an additional wrong not endured by the primary victim of the offence. He becomes a wrongdoer against his true will. Against the decency of his own character, the illness makes him into a monster. At least the deceased and his kin remain innocent in their suffering. Yaren and Hamlet both wager that the argument is persuasive even as it risks the appearance of minimizing the deceased’s loss of life by relegating it to the same status as the loss of sanity, even as it risks enraging the true victims of the offence by striking the pose of solidarity with them. However, the reason they take the risk is because the argument is potentially very effective in bringing about the fundamental shift required in coming to see the offender as deserving of compassion rather than contempt. If the offence really is so profoundly the enemy of the offender, is he not to be pitied more than condemned?

Yet, in this excerpt from Hamlet, we also see how the seeds of skepticism about the insanity defense come to be sown. Though we do not know for sure whether Vince Li’s “it wasn’t really me” argument is bogus, we do know that the “Hamlet does it not” stance is bogus. Hamlet is not insane. And his real defense, if he has one at all, is a kind of amalgam of accident and mistake of fact. He thought the man behind the curtain was Claudius: someone whom, on the terms of the play, Hamlet had the right if not the duty to kill. It was not insanity but a perfectly reasonable belief that his own father’s murderer was behind the curtain through which he plunged his sword with deliberate and murderous intent. We also know that Hamlet was not especially repentant when he discovered his mistake: “Thou wretched, rash, intruding fool, farewell! I took thee for thy better” (Act IV scene iv). At the time of the killing, Hamlet takes a mere three lines to lament and dismiss Polonius’s death before getting back to the more important business of reprimanding his mother.

Hamlet is feigning madness, and he is doing so because telling the truth will get him killed. Claudius, the King of Denmark and Hamlet’s intended victim, is present in this scene, already poised to kill Hamlet, as the prince offers his insanity defense to Laertes. Nevertheless, Hamlet really
does repudiate the action. He truly did not intend to kill Polonius. The insanity defense helps him to save face, by helping him reassert a self-respecting moral position that condemns his own actions without engaging the need for real remorse or contrition. His alleged non-responsibility for the killing makes repentance in relation to it incoherent even as he firmly repudiates the act. This underlines both the potential attractiveness of the defense and the potential for skepticism about its legitimacy.

CONCLUSION: ETHICS AND AWARENESS OF OFFENDERS’ SELF-RESPECT INTEREST

Offenders have a dignity interest in the way they frame their defense. The ideal defense is one that is both morally exonerating and true. However, actors in the criminal justice system have a key role to play in assisting accused persons in framing their response to criminal charges. Often the first impetus for an insanity defense comes from defense counsel whose interactions with the accused raise questions about the accused’s mental health. Prosecutors also sometimes have to make decisions about whether to attempt to lead evidence of mental disorder. And, of course, ultimately judges must assess evidence and decide on the parameters of the insanity defense.

In making these kinds of decisions, counsel and judges ought to bear in mind the dignity interests of the accused, though from the forgoing we can see that it is never straightforwardly obvious as to whether an insanity defense will increase or lessen the stigma attaching to the accused. Whether it will be felt by the accused as more or less demeaning, actors in the system should be sensitive to offenders’ experience of the moral ramifications of the choice to run an insanity defense. This will vary for each offender and will likely be significantly affected by their cultural and social background and their own attitude toward mental illness. Defense counsel, especially in situations where no other defense seems to present itself, are often tempted to try to mount an insanity defense where the accused’s mental health appears to be in question. However, counsel should not gainsay the possibility of emotional damage that might be inflicted by the defense. In the case of minor offenses in particular, it is sometimes clear that, like Don Quixote, offenders have more to gain by taking responsibility that may not in truth be theirs than by avoiding a conviction through a mental illness–based defense. Like Raskolnikov, an offender may be harmed by the criminal process that deposes him as the ultimate authority on his own inner state: a process that replaces his own self-understanding with expert testimony and medicalized accounts of his conduct.

Conversely, it may also be the case that many offenders find the defense attractive for precisely the same reasons Agamemnon and Hamlet did. The
defense allows an offender to radically repudiate the action while at the same time acknowledging that the offence did take place. Because the defense allows the offender to present a kind of separate “real” self who laments the offence along with the victim, the defense may deflect stigma rather than attracting it. Here, however, actors in the system must consider the possibility that the insanity defense is attractive to an accused precisely because, as with Agamemnon and Hamlet, the actual explanation for the offense is no defense at all.

REFERENCES


