



1-1-2007

Is Tyler Durden Insane?

J.C. Oleson

Follow this and additional works at: <https://commons.und.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Oleson, J.C. (2007) "Is Tyler Durden Insane?," *North Dakota Law Review*: Vol. 83 : No. 2 , Article 5.
Available at: <https://commons.und.edu/ndlr/vol83/iss2/5>

This Article is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact zeineb.yousif@library.und.edu.

IS TYLER DURDEN INSANE?

J.C. OLESON*

I. INTRODUCTION: WELCOME TO FIGHT CLUB

Literature is peppered with heroes who are opposed not by external enemies but by splintered aspects of their own imaginations. Dostoevsky's Ivan Karamazov curses the devil conjured by his own fevered brain;¹ Shakespeare's good Prince Hamlet is hounded by a ghost that might be a bona fide supernatural apparition or that might be the product of filial guilt;² and of course, the monstrous Mr. Hyde is none other than the shadowy aspect of Stevenson's Henry Jekyll.³ More recently, the same theme has been effectively used in motion pictures. In *Jacob's Ladder*, a Vietnam veteran struggles against a conspiracy of "demons" produced by his own mind;⁴ in *Identity*, an individual with multiple personality disorder pits one fractionated personality against the others;⁵ and in the based-on-a-true story *A Beautiful Mind*, the dizzying intellect of Nobel Laureate John Nash turns against itself in a Kafkaesque sequence of schizophrenic hallucination.⁶

One of the most exciting films to make use of this device, however, is David Fincher's *Fight Club*,⁷ the movie adaptation of Chuck Palahniuk's

*Chief Counsel, Criminal Law Policy Staff, Administrative Office of the United States Courts; J.D., School of Law, University of California, Berkeley (Boalt Hall), 2001; Ph.D., University of Cambridge, 1998; M. Phil., University of Cambridge, 1995; B.A., Saint Mary's College of California, 1994. The views contained in this article are the author's own, and do not necessarily reflect the position of the Administrative Office of the United States Courts, the Judicial Conference of the United States, or any other individuals within the federal judiciary. I owe an enormous debt of gratitude to the staff of the *North Dakota Law Review* (particularly Kara Gansmann, Madeleine E. Moise Cassetta, Andrea Odegaard, and Mark Western) for their insightful comments and for permitting the manuscript to go forward while a complementary piece ("*Drown the World: Imperfect Necessity and Total Cultural Revolution*") was being published in *Unbound: Harvard Journal of the Legal Left*. Conversely, I would like to thank the staff of *Unbound* (particularly Nate Ela, Lauren Coyle, and Zina Miller) for permitting this article to go forward in the *North Dakota Law Review*. Of course, for all this, I blame Chuck Palahniuk, David Fincher, Meriko and Russell Borogove, Keith Garner, and Will Rountree.

1. FYODOR DOSTOEVSKY, *THE BROTHERS KARAMAZOV: A NOVEL IN FOUR PARTS WITH EPILOGUE* (Farrar et al. eds., Richard Pevear & Larissa Volokhonsky trans., 2002).

2. WILLIAM SHAKESPEARE, *HAMLET* (Washington Square Press 2003).

3. ROBERT LOUIS STEVENSON, *DR. JEKYLL AND MR. HYDE* (Bantam Classics ed., 1982).

4. *JACOB'S LADDER* (Carolco Pictures Inc. 1990).

5. *IDENTITY* (Columbia Pictures 2003).

6. *A BEAUTIFUL MIND* (Universal Pictures 2001).

7. *FIGHT CLUB* (Fox Pictures 1999).

1996 debut novel of the same name.⁸ For good reason, *Fight Club* has been a popular work,⁹ the object of rhapsodic praise and searing condemnation by critics,¹⁰ and the subject of considerable attention by scholars.¹¹ *Fight Club* touches upon numerous provocative themes: addiction to self-help groups,¹² the economics of deciding whether the risk of lawsuit warrants a

8. CHUCK PALAHNIUK, *FIGHT CLUB* (Hyperion Books 1996).

9. See Jesse Kavadlo, *The Fiction of Self-Destruction: Chuck Palahniuk, Closet Moralist*, STIRRINGS STILL, Fall/Winter 2005, at 3, 4 (noting more than 300,000 copies of *Fight Club* have been sold).

10. See Robert Bennett, *The Death of Sisyphus: Existentialist Literature and the Cultural Logic of Chuck Palahniuk's Fight Club*, STIRRINGS STILL, Fall/Winter 2005, at 65, 66 (noting the film was praised as "stunning, mordantly funny, [and] formally dazzling" and hailed by *Total Film* as the "Greatest Film of Our Lifetime" while critics lambasted it as "intensely misogynistic" and as threatening to revive Nazism).

11. *Id.* See generally Kevin Alexander Boon, *Men and Nostalgia for Violence: Culture and Culpability in Chuck Palahniuk's Fight Club*, 11 J. MEN'S STUDIES 267 (2003); Robert Alan Brookey & Robert Westerfelhaus, *Hiding Homoeroticism in Plain View: The Fight Club DVD as Digital Closet*, 19 CRITICAL STUDIES IN MEDIA COMMUN 21 (2002); J. Michael Clark, *Faludi, Fight Club, and Phallic Masculinity: Exploring the Emasculating Economics of Patriarchy*, 11 J. MEN'S STUDIES 65 (2002); Suzanne Clark, *Fight Club: Historicizing the Rhetoric of Masculinity, Violence, and Sentimentality*, 21 J. COMPOSITION THEORY 411 (2001); James Craine & Stuart C. Aitken, *Street Fighting: Placing the Crisis of Masculinity in David Fincher's Fight Club*, 59 GEOJOURNAL 289 (2004); Christopher Deacey, *Integration and Rebirth Through Confrontation: Fight Club and American Beauty as Contemporary Religious Parables*, 17 J. CONTEMPORARY RELIGION 61 (2002); Krister Friday, 'A Generation of Men Without History': *Fight Club, Masculinity, and the Historical Symptom*, 31 POSTMODERN CULTURE (2003), available at <http://muse.jhu.edu/journals/pmc/v013/13.3friday.html>; Henry A. Giroux, *Private Satisfactions and Public Disorders: Fight Club, Patriarchy, and the Politics of Masculine Violence*, 21 J. COMPOSITION THEORY 1 (2001); Kavadlo, *supra* note 9, at 3-4; Paul Kennett, *Fight Club and the Dangers of Oedipal Obsession*, STIRRINGS STILL, Fall/Winter 2005, at 48; Terry Lee, *Virtual Violence in Fight Club: This Is What Transformation of Masculine Ego Feels Like*, 25 J. AM. & COMP. CULTURES 418 (2002); Peter Mathews, *Diagnosing Chuck Palahniuk's Fight Club*, STIRRINGS STILL, Fall/Winter 2005, at 81; Andrew Hock Soon Ng, *Muscular Existentialism in Chuck Palahniuk's Fight Club*, STIRRINGS STILL, Fall/Winter 2005, at 116; Paulo Palladino & Teresa Young, *Fight Club and the World Trade Center: On Metaphor, Scale and the Spatio-Temporal (Dis)location of Violence*, 7 J. FOR CULTURAL RESEARCH 195 (2003); Thomas Peele, *Fight Club's Queer Representations*, 21 J. COMPOSITION THEORY 862 (2001); Mark Pettus, *Terminal Simulation: 'Revolution' in Chuck Palahniuk's Fight Club*, 6 HUNGARIAN J. ENGLISH & AM. STUDIES 111 (2000); Jeffrey A. Sartain, "Even the Mona Lisa's Falling Apart": *The Cultural Assimilation of Scientific Epistemologies in Palahniuk's Fiction*, STIRRINGS STILL, Fall/Winter 2005, at 25; Alex Tuss, *Masculine Identity and Success: A Critical Analysis of Patricia Highsmith's The Talented Mr. Ripley and Chuck Palahniuk's Fight Club*, 12 J. MEN'S STUDIES 93 (2004).

12. See Carina Chocano, *We Think, Therefore We Diagnose*, Salon.com, May 30, 2001, <http://archive.salon.com/mwt/feature/2001/05/30/syndromes/index.html> (noting four in ten Americans attend support groups, and suggesting the fascination with therapy is "a movement that began with a fringe mid-nineteenth century health craze and became a national obsession with compulsions and an addiction to self-help"). The idea that individuals might become addicted to treatment is not mere hyperbole; the medical literature contains several articles on surgical addiction. E.g., L. Chertok, *Mania Operativa: Surgical Addiction*, 3 PSYCHIATRY MED. 105-18 (1972); M. R. Wright, *Surgical Addiction. A Complication of Modern Surgery?*, 112 ARCHIVES OF OTOLARYNGOLOGY—HEAD AND NECK SURGERY 870-72 (1986).

corporation's recall of a defective product,¹³ various forms of "culture jamming" as an expression of resistance to the dominant consumer culture,¹⁴ and consensual fighting as a legitimate form of self-discovery.¹⁵

13. Most law students are familiar with Learned Hand's formulation of negligence: $B < PL$, where B is the burden of taking a precaution; P is the probability of harm occurring if no precautions are taken; and, L is the loss or injury that could arise if precautions are not taken. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). Failure to invest amount B constitutes prima facie negligence. *Id.* A similar algebra is employed in *Fight Club*. The protagonist, an automotive recall coordinator, explains:

Take the number of vehicles in the field, (A), and multiply it by the probable rate of failure, (B), then multiply the result by the average out-of-court settlement, (C). A times B times C equals X . If X is less than the cost of a recall, we don't do one.

Jim Uhls, *The Final Screenplay*, Part I, available at http://www.geocities.com/weekend_game/final_scr1.htm#top (last visited Sept. 25, 2006). This is not a fictional approach to business. Rather, the analysis cited in *Fight Club* is probably derived from the *Ford Pinto* case. In *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, (1981), a jury awarded over \$2.5 million in compensatory damages and \$125 million in punitive damages to Richard Grimshaw for injuries sustained from an accident involving a 1972 Ford Pinto with a fuel tank design defect. *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 771 (1981). Ford had the ability to correct the Pinto design (which would have decreased the risk of a Pinto "igniting" after a rear-end collision) but determined it was more cost-effective to pay for deaths and injuries associated with the design defect. *Id.* at 777. The *Ford Pinto* case has become an iconic example of the tension between economics and ethics. See generally DOUGLAS BIRSCH & JOHN H. FIELDER, *THE FORD PINTO CASE: A STUDY IN APPLIED ETHICS, BUSINESS, AND TECHNOLOGY* (1994); Mark Dowie, *Pinto Madness*, MOTHER JONES, Sept./Oct. 1977, <http://www.motherjones.com/news/feature/1977/09/dowie.html>. But see Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1066-67 (1991) (suggesting actual deaths associated with the Pinto have been much lower than predicted, and that the "smoking gun" memo at the center of the litigation was not actually about the Pinto, but about American cars in general).

Of course, it is possible that Palahniuk's recall coordinator was not referring to the Pinto case at all. History has a way of repeating, and similar litigation reached the California courts in 1999. In *Anderson v. General Motors*, a Los Angeles jury awarded a \$4.9 billion dollar verdict against General Motors for adopting a purely economic approach to public safety, determining that it was more efficient to litigate "fuel fed fire related fatalities" than to make design changes to reduce the risk of gas tank explosions. *Anderson v. General Motors*, No. BC116926 (L. A. Super. Ct 1999). The *Anderson* jury awarded a dizzying \$4.9 billion dollars in damages: \$107 million in compensatory damages, and a whopping \$4.8 billion in punitive damages. Darlene R. Wong, *Stigma: A More Efficient Alternative to Fines in Detering Corporate Misconduct*, 3 CAL. CRIM. L. REV. 3, ¶ 67, n.134 (2000), available at <http://www.boalt.org/bjcl/v3/v3wong.pdf>.

14. See KALLE LASN, *CULTURE JAM: HOW TO REVERSE AMERICA'S SUICIDAL CONSUMER BINGE—AND WHY WE MUST passim* (1999) (identifying pathological aspects of modern consumer culture); NAOMI KLEIN, *NO LOGO* 279-310 (2001) (describing forms of culture jamming); Mark Dery, *Culture Jamming: Hacking, Slashing, and Sniping in the Empire of Signs*, <http://www.levity.com/markdery/culturjam.html> (last visited Sept. 21, 2006) (outlining the theory of culture jamming). But see JOSEPH HEATH & ANDREW POTTER, *NATION OF REBELS: WHY COUNTERCULTURE BECAME CONSUMER CULTURE* 137-38 (2005) (suggesting political usurpation of consumerism does not quell consumerism, but perpetuates it and condones criminal behavior as a legitimate form of dissent). For a good discussion of the tension between the values of culture jamming and the enforceability of copyright rights, see Giselle Fahimian, *How the IP Guerrillas Won: @™ark, Adbusters, Negativland, and the Bullying Back of Creative Freedom and Social Commentary*, 2004 STAN. TECH. L. REV. 1, ¶ 15-19.

15. The events in *Fight Club* were based upon author Chuck Palahniuk's real-life experiences. See Edward Guthmann, *A Writer Fights the Odds*, SAN FRANCISCO CHRONICLE, Oct. 13, 1999, at E1 ("I went through a few years when I did nothing but fight . . . I fought anybody—it's amazing how fast people in a bar can find a reason to fight each other. I fought

Fight Club is the story of a white-collar drone (played by Ed Norton) who suffers from a contemporary malaise of the soul. In Norton, this quiet desperation manifests as insomnia. The insomnia is incapacitating. Like most Americans, Norton initially tries to correct his problem with drugs.¹⁶ But when he asks for narcotic sedatives, the physician refuses his request, and tells him that if he wants to see *real* pain, he should visit a support

people at work, I fought a dishwasher at a restaurant.”). Palahniuk characterizes fighting as a means of bonding.

It’s amazing how much fun [fighting] is, really seductive. I don’t know if I should be saying this stuff because it makes me sound not very politically correct. But I can see why the cowboys would hang all over each other getting drunk after they slugged it out in a bar. It comes from sharing that really intense experience.

Id.; see also Sam Jemielity, Chuck Palahniuk: The Playboy Conversation, available at, <http://www.playboy.com/arts-entertainment/dotcomversation/palahniuk/> (last visited August 18, 2006) (describing being beaten up on a camping trip as the genesis of *Fight Club*). Although Palahniuk sees the fun in fighting, he claims that organized fight clubs do not really exist. See Chuck Palahniuk, *I Made Most of It Up, Honest*, L.A. TIMES, Sept. 12, 1999, at Weekend 8 (“There’s no secret society of clubs where guys bash each other and gripe about their empty lives, their hollow careers, their absent fathers. Fight clubs are make-believe. You can’t go there. I made them up.”). But Chuck Palahniuk doth protest too much: clandestine fighting clubs *do* exist. See, e.g., Athan Bezaitis, *At a Secret S F. Fight Club, an Amateur with a Primal Urge to Test His Mettle Finds Himself in a Basement Ring with No Room to Run*, S.F. CHRONICLE, Jan. 19, 2004, at D1 (describing an underground fight club in San Francisco); Andrew Gumbel, *Blood Runs at Mormon Campus Fight Club*, THE INDEPENDENT (London), May 21, 2000, at 25 (describing the formation of a Mormon fight club in Provo, Utah); Christine Jackman, *Rise of Brutal Fight Clubs has Anti-Violence Activists on Ropes*, SUNDAY MAIL, Dec. 5, 1999, at 49 (describing the increasing popularity and subsequent banning of ultimate no-rules fighting, the only sport “in which there was a good possibility competitors could actually be killed before the audience’s eye”); Michael McCarthy, *Illegal, Violent Teen Fight Clubs Face Police Crackdown*, USA TODAY, Aug. 1, 2006, at A1-2 (describing prosecution of individuals who organized and filmed the pugilistic activities of juvenile fight clubs); Yvonne Ridley & Sophie Goodchild, *Bare-Knuckle Is All the Rage*, THE INDEPENDENT (London), Sept. 19, 1999, at 3:

There is plenty of blood. It will be pouring from a fighter’s ears and probably from his groin where he has been bitten by his opponent. He will have soaked his hands in vinegar but his fists will end up shredded to ribbons. The impact of one man’s bare fist on another is equivalent to the force of a 4lb lump hammer travelling at 20 miles an hour. The effect can be devastating, even after an average bout lasting a few minutes. There are no official rounds; instead the loser is the one whose injuries are so bad he can no longer stand up.

Id. (spelling in original). A more-extreme version of fight clubs has emerged: sluggin’. In sluggin’ matches, participants duct tape a pillow around a baseball bat, and then fight in one-on-one matches. See *American Idiots*, MAXIM, Apr. 2006; see also Sluggin’ 4 Life, www.sluggin4life.com (last visited May 27, 2006) (identifying enumerated rules of sluggin’ a la *Fight Club*).

16. Americans consume a tremendous volume of pharmaceuticals. See GREG CRITSER, GENERATION RX: HOW PRESCRIPTION DRUGS ARE ALTERING AMERICAN LIVES, MINDS, AND BODIES 2 (2005). In 1993, the average American was taking seven different prescription drugs. *Id.* By 2000, the number had increased to eleven, and by 2004, the number had increased to twelve. *Id.* See also generally JOHN ABRAMSON, OVERDOSED AMERICA: THE BROKEN PROMISE OF AMERICAN MEDICINE xii (2004) (describing increasing overmedication of Americans); RAY MOYNIHAN & ALAN CASSELS, SELLING SICKNESS: HOW THE WORLD’S BIGGEST PHARMACEUTICAL COMPANIES ARE TURNING US ALL INTO PATIENTS (2005) (describing practice of redefining problems as diseases, and offering prescription medication to “cure” them).

group for men who have had their testicles removed. Norton does exactly that. He goes to the meeting, and discovers that curiously, after sobbing with abandon, he is able to sleep. “Babies don’t sleep this well,” he boasts.¹⁷ Very quickly, Norton becomes dependent on the group. He *needs* the meetings in order to sleep. He becomes addicted, to this and to other self-help groups. But when Marla Singer (played by Helena Bonham Carter) begins to attend his groups, Norton once again loses the ability to sleep. The presence of a fellow “tourist” in his meetings robs him of the catharsis he so desperately needs.

It is at this precarious moment that Norton meets the character known as Tyler Durden (played by Brad Pitt). Seated next to each other on an airplane, Norton and Pitt enjoy an immediate rapport, and they exchange business cards. And when, after landing, Norton discovers that his apartment has inexplicably exploded in a ball of fire, leaving him without a place to stay, he calls. They talk over several pitchers of beer. Norton laments the designer clothing and the IKEA furniture that he lost in the explosion, but Pitt shrugs it off. Like a modern Thoreau,¹⁸ he hints that Norton might actually be happier this way. “The things you own wind up owning you,” he cautions.¹⁹ Pitt invites Norton to stay in his squalid house, but before they go, he asks Norton to indulge him in one small request. Standing in an empty parking lot, Pitt says, “I want you to hit me as hard as you can.”²⁰ Norton resists, asking *why* in the world Pitt would want that. “Why? I don’t know why. I don’t know. Never been in a fight, you?”²¹ Norton tells him that no, he hasn’t, but that this is a *good* thing. Pitt, however, rejects that conventional mode of thinking. “How much can you know about yourself if you’ve never been in a fight?”²² Still, Norton continues to resist the idea, saying that it’s crazy. “So go crazy,” Pitt jeers. “Let ‘er rip.”²³

Finally, Norton acquiesces, and punches Pitt in the ear with an anemic roundhouse. Pitt starts to laugh, but returns the favor, punching Norton in

17. Uhls, *supra* note 13, at Part 1.

18. *See generally* HENRY DAVID THOREAU, *THE ANNOTATED WALDEN* (P. Van Doren Stern ed., 1970) (1854) (suggesting people would be happier if they simplified their existences).

19. *See id.* at 172 (noting that the farmer who, through sacrifice, obtains a house may come to learn that “he may not be the richer but the poorer for it, and it be the house that has got him”). Of course, critics have noted the irony of mega-star Brad Pitt preaching against the seductions of materialism. *See, e.g.*, Andrew O’Hehir, *Fight Club*, SALON, *available at* http://dir.salon.com/ent/review/1999/10/15/fight_club/index.html?sid=350202 (last visited Sept. 25, 2006) (“[T]here’s something more than a little ludicrous about sitting in a theater while Brad Pitt preaches at you about the emptiness of materialism.”).

20. Uhls, *supra* note 13, at Part 1.

21. *Id.*

22. *Id.*

23. *Id.*

the stomach. Pitt punches him *hard*. Norton doubles over, gasping, “That really hurts,” but when he recovers from the blow, he’s smiling.²⁴ “Hit me again,” Norton pleads. But Pitt shakes his head and says, “No, *you* hit *me*.”²⁵ And so fight club is born.²⁶

Fighting is a way of feeling something genuine in a world where real experiences are rare.²⁷ In a world of veneers, fight club promises something solid and authentic—authentic pain—and men from all walks of life seek it out hungrily: stockbrokers and muscle-men, waiters and supply clerks, priests and platinum pretty boys. Fight club is based on the rule of law,²⁸ and all men are equal before the law. Fight club is fundamentally

24. *Id.*

25. *Id.*

26. Although voluntary, participation in a clandestine fight club is often criminal. *See, e.g.,* McCarthy, *supra* note 15, at A1-A2 (outlining prosecution of individuals associated with real-life fight clubs). Fight clubs are illegal because “courts in the United States, England, and Canada have consistently maintained that one cannot consent to any activity which could cause serious bodily injury or death.” Cheryl Hanna, *Sex is Not a Sport: Consent and Violence in Criminal Law*, 42 B. C. L. REV. 239, 242 (2001).

The consent defense is an exception to this general rule where public policy deems it worthy to protect a socially desirable activity. For example, a consent defense is available for a patient of cosmetic surgery or willing participants in a football game or a boxing fight. “*On the other hand, assault involving aberrant behavior or conduct with no apparent social utility is often held to be criminal without regard to the consent of the victim if the force used has as its probable result bodily injury.*”

Monica Pa, *Beyond the Pleasure Principle: The Criminalization of Consensual Sadoomasochistic Sex*, 11 TEX. J. WOMEN & L. 51, 64 (quoting Note, *Assault and Battery—Consent of Masochist to Beating By Sadist Is No Defense To Prosecution For Aggravated Assault*, 81 HARV. L. REV. 1339, 1339 (1968) (italics added)).

27. *See* V. VALE & ANDREA JUNO, MODERN PRIMITIVES 5 (1989). The authors explain:

Increasingly, the necessity to prove to the self the authenticity of unique, thoroughly private sensation becomes a threshold more difficult to surmount. Today, something as basic as sex itself is inextricably intertwined with a flood of alien images and cues implanted from media programming and advertising. But one thing remains fairly certain: *pain* is a uniquely personal experience; it remains loaded with tangible shock value.

Id. (italics in original). In many ways, fight club resembles a classic rite of passage. *See, e.g.,* A. VAN GENNEP, THE RITES OF PASSAGE *passim* (1960) (describing characteristics of rites of passage); R. GOULD, *Masculinity and Mutilation in a Primitive Society*, 4 MED. OPINION AND REV. 59 (1968) (same). In particular, as a semi-public exchange of pain involving inflictors, victims (initiates), and audience members, fight club neatly fits the model outlined by Bilmes and Howard. *See* J. BILMES & A. HOWARD, *Pain as Cultural Drama*, 5 ANTHROPOLOGY & HUMANISM Q. 10 (1980) (suggesting rites of passage are constructed cultural dramas involving inflictors, initiates, and audience members).

28. There are eight rules that govern fight club. The first two rules are intended to regulate the metastatic growth of the club:

The first rule of fight club is—you don’t talk about fight club. The second rule of fight club is—you *don’t* talk about fight club. The third rule of fight club is—when someone says “stop” or goes limp, the fight is over. Fourth rule is—only two guys to a fight. Fifth rule—one fight at a time. Sixth rule—no shirts, no shoes. Seventh rule—fights go on as long as they have to. And the eighth and final rule—if this is your first night at fight club, you *have* to fight.

egalitarian: the clothes you wear and the car you drive are meaningless in the thick of a fight. As Norton's voiceover sagely observes, "Who you were in fight club is not who you were in the rest of the world."²⁹

Interestingly, fight club is not about winning or losing. It is not a gladiator fight. The goal is not to defeat your opponent, but rather—by beating someone up, and by being beaten up—the goal is about tapping into something primal—about finding out something real.³⁰ It is a radical form of therapy, an extreme support group. During one basement fight, Norton compares the experience of fight club to religious beatitude. "The hysterical shouting was in tongues, like at a Pentecostal church. Afterwards, we all felt saved."³¹

Eventually, however, even the catharsis of fight club is insufficient, and more daring experiences are required to tap into the primal truths of blood and bone. In an attempt to help Norton "hit bottom," the point at which real freedom is attained because everything is lost,³² Pitt wets Norton's hand and sprinkles it with lye. As the searing chemical burn begins to blister and smoke, Pitt offers to help neutralize the reaction, but only if Norton "gives up." He has to *know*, not fear, that someday he is going to die.³³

Uhls, *supra* note 13, at Part 2. The rules of fight club—especially those first two—have become iconic. Even *The Onion* featured a spoof article entitled "*The First Rule Of The Quilting Society Is You Don't Talk About The Quilting Society*," available at: <http://www.theonion.com/content/node/33408> (June 7, 2000).

29. Uhls, *supra* note 13, at Part 2. In light of the fact that Pitt and Norton are split personalities inhabiting one body, a fact revealed only later in the film, the observation appears to be foreshadowing.

30. Of course, violence is involved in the process, and sometimes this violence is quite graphic. In fact, the violence depicted in *Fight Club* was graphic enough that British censors cut two scenes of excessively sadistic violence. See Fiachra Gibbons, *Out For the Count: Film Censors Cut Fight Club*, THE GUARDIAN, Nov. 9, 1999, at 11, available at http://www.guardian.co.uk/uk_news/story/0,,253748,00.html.

31. Uhls, *supra* note 13, at Part 2.

32. Pitt's proclamation that "[i]t's only after we lost everything that we are free to do anything" may be an expression of the view that "freedom is really synonymous with lack." Bennett, *supra* note 10, at 71. It may be another way of expressing Kris Kristofferson's cynical observation that "freedom's just another word for nothing left to lose." KRIS KRISTOFFERSON, ME AND BOBBY MCGEE (Sony 1971). But the sentiment may also have its roots in Hassan-i-Sabbah's (possibly apocryphal) crypto-anarchistic pronouncement that "nothing is true—everything is permitted." See, e.g., WILLIAM S. BURROUGHS, CITIES OF THE RED NIGHT 158 (Henry Holt & Co., 1981) (ascribing the phrase to Hassan-i-Sabbah as his final words). But see Brian D. Hodges, Nothing is True, Everything is Permitted, <http://www.disinfo.com/archive/pages/article/id1562/pg1/> (last visited Sept. 6, 2001) (refuting the veracity of the claim that these words were uttered by Hassan-i-Sabbah, much less on his death bed).

33. This idea permeates existentialist psychology and can be traced to the writings of Martin Heidegger. Only when the individual can shake off the "untroubled indifference" of death that is associated with inauthentic being (a state that Heidegger called the "they-self"), is the individual free to embrace the anxiety associated with one's own finitude and enjoy an "impassioned freedom towards death." MARTIN HEIDEGGER, BEING AND TIME 299, 311 (Harper 1962) (1927).

The underground movement of fight club eventually emerges from the basement, mutating and manifesting as an army of conspirators that calls itself “project mayhem.”³⁴ The members of project mayhem have no names (at least not while they live) and are devoted to the undermining of consumer culture.³⁵ Pitt calls them space monkeys—test subjects willing to sacrifice themselves for the greater good—like monkeys that were shot into space before men dared edge beyond the stratosphere. The principal weapon in the arsenal of the space monkeys is something known as “culture jamming.”³⁶

In a montage sequence, the viewer learns that the space monkeys have used a high-powered magnet to erase videotapes in a Blockbuster, fed bread to the flock of pigeons above a BMW dealership in order to coat the new cars below in guano, and doctored a billboard to helpfully proclaim, “Did you know you can use recycled motor oil to fertilize your lawn?”³⁷ The film also hints that the nameless operatives of project mayhem were responsible for an excrement catapult, the shaving of monkeys,³⁸ and the widespread adulteration of restaurant food.³⁹ As the tasks of project

34. Some critics believe that *Fight Club* satirized project mayhem in the same way it satirized the “IKEA world” of modern consumer culture. See Kavadlo, *supra* note 9, at 13 (“In their brutality and futility, Tyler’s followers, the nameless and faceless Space Monkeys, blur the lines between rebellion and conformity with the zeal of conversion, discarding tie-wearing, Starbucks-sipping, and IKEA-shopping by becoming mantra-repeating black shirts.”); Mathews, *supra* note 11, at 82 (“Tyler Durden does not speak directly for Palahniuk any more than Heathcliff is the mouthpiece of Emily Brontë.”).

35. Members of project mayhem are also guided by the rule of law. See *supra* note 28 and accompanying text. The rules of project mayhem, however, are slightly different from the rules of fight club. The rules of project mayhem are: (1) You don’t ask questions; (2) You don’t ask questions; (3) No excuses; (4) No lies; and, (5) You have to trust Tyler. See Pahlaniuk, *supra* note 8, at 119, 122, 125 (outlining the rules of project mayhem).

36. See *supra* note 14 and accompanying text (identifying sources on culture jamming).

37. Uhls, *supra* note 13, at Part 3; see also Jack Napier & John Thomas, *Billboard Liberation Front, The Art and Science of Billboard Improvement*, <http://www.billboardliberation.com/guidebook.html> (last visited Nov. 20, 2007) (describing theory and practice of billboard hacking).

38. See Hakim Bey, *Poetic Terrorism*, <http://www.sniggle.net/Manifesti/poeticTerrorism.php> (last visited Nov. 4, 2007) (“In Kampala, Uganda, an unknown poetic terrorist was shooting Gorillas with tranquilizer darts, then dressing them up as clowns while they were unconscious.”).

39. Social critiques of the food service industry have been part of the American literary diet for decades. See, e.g., UPTON SINCLAIR, *THE JUNGLE passim* (Sharp Press 2003) (1905) (criticizing the meatpacking industry); ERIC SCHLOSSER, *FAST FOOD NATION passim* (2002) (criticizing proliferation of the fast food industry). But there is an even darker side to the American food service industry. The intentional introduction of adulterants to food is not limited to fiction. See, e.g., Cabbie Caught Sprinkling Dried Feces on Food, <http://www.thedenverchannel.com/print/5189706/detail.html> (last visited Nov. 4, 2007) (describing use of a cheese grater to sprinkle feces onto bakery goods); J.W. Brown, *Ex-cook Gets 45 Days for Tainting Officer’s Burger*, PHOENIX GAZETTE, Nov. 14, 1991, at B2 (describing intentional adulteration of a hamburger by adding mucus to it); Ami Chen Mills, *Serves You Right*, <http://www.metroactive.com/papers/metro/03.14.96/waitprsn-9611.html> (“You can spit into food. If it’s in salad dressing or soup, they can’t see it. Or you can put chocolate Ex-Lax in desserts. You know what works good? Visine. If you drink Visine it makes you shit for days.”) (last visited Nov. 4, 2007).

mayhem become more ambitious, the associated stakes—and the risks inherent in these projects—escalate.

Thus, when the space monkeys rappel from the roof of an office building—painting a massive green smiley face on the facade, lighting fires in two offices so that the eyes blaze merrily—the police commissioner convenes a rigorous investigation. When project mayhem attempts to kill two birds with one stone in “operation latte thunder”—blowing up a piece of corporate art while simultaneously trashing a franchise coffee bar—one of the fatigue-clad space monkeys is shot and killed by the police while fleeing the scene of the crime.⁴⁰

And thus, as the project mayhem nears the completion of its magnum opus—destroying the headquarters of several major credit card companies and the TRW building, thereby eliminating the debt record and setting people free—Norton decides that he has had enough and attempts to stop Pitt and the space monkeys. He goes to the police in a bid to end the conspiracy,⁴¹ but all of the police are in on the plan. Eventually, Norton is forced to confront Pitt directly. The film is reduced to a familiar trope: the courage of a moderate protagonist, pitted against the fanaticism of the extremist.

This, however, is more complicated than it seems. Because at the heart of *Fight Club* lies a secret: indeed it is the same twist that Robert Louis Stevenson used so effectively in *Dr. Jekyll and Mr. Hyde*.⁴² Norton and Pitt are the same person. Pitt is not really a glib anarchist dressed in thrift-store chic who just happened to sit next to Norton on a flight; he is not a person at all, but an alter ego: a separate personality, a discrete consciousness that inhabits Norton’s body. Only the carefully-constructed story and the well-made film were able to conceal this from the viewer (just distortion and rationalization concealed it from Norton). But once the film reveals that Pitt and Norton are actually the same person, it prompts a difficult question: Which one *is* Tyler Durden? Would the real Tyler Durden please stand up?

40. Kennett suggests that this is the transformative moment for Norton’s character. “At the moment where he realizes that Project Mayhem is not just a story of revolution, not just an ideal masculine therapeutic space, but rather a physical organization that actually harms people, the Narrator becomes horrified and feels the weight of his personal responsibility.” Kennett, *supra* note 11, at 59.

41. Unfortunately for Norton, it is exceedingly difficult to legally abandon a criminal conspiracy. Because the crime of conspiracy is complete as soon as the conspirators agree to commit a criminal act, or—in some jurisdictions—as soon as an overt act is committed in furtherance of a criminal objective, even Norton’s confession does not undo his involvement in the conspiracy. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 490 (4th ed. 2006). It may, however, limit his liability for the subsequent crimes committed by the members of project mayhem. *See id.*

42. *See* STEVENSON, *supra* note 3, *passim*.

Yes, we know Tyler Durden is the father of fight club. Yes, we know Tyler Durden is the mastermind of project mayhem. And yes, we know that in the film universe of *Fight Club*, Tyler Durden is venerated as a mythic hero, even as a god: “In Tyler we trust.”⁴³ Indeed, there is no doubt that *Fight Club* is Tyler’s movie. But which of the protagonists—Norton (the sympathetic narrator who, curiously, never is identified by name)⁴⁴ or Pitt (the charming anti-capitalist who assembles an army of space monkeys)—is actually Tyler Durden?

Part II of this article attempts to answer that question, to determine which of the characters is the host and which is the alter ego.⁴⁵ Part III attempts to operationalize the legal term “insanity” and to apply it to the circumstances of both Norton and Pitt. This part of the article concludes that both Norton and Pitt, understood as separate individuals, suffer from cognitive defects that would probably qualify them as insane: Norton because he lacks understanding of *what* he has done, and Pitt because he lacks understanding of the *wrongfulness* of what he has done.⁴⁶ Part IV focuses upon the kernel at the core of Pitt’s insanity and asks if it is insane to reject consumer culture by violent means. While the insanity of Tyler Durden is fictional, it is not without at least one real-life analogue. The case of convicted Unabomber Theodore John Kaczynski is not unlike like the case of Pitt-as-Durden. While Kaczynski was not judged “insane,” his ultimate sentence was founded upon a claim of mental illness, which in turn was rooted in Kaczynski’s rejection of social conventions and consumer norms.⁴⁷

43. Uhls, *supra* note 13, at Part 3. There is other evidence to support the interpretation of fight club as a church and Tyler Durden as a god. See, e.g., Sartain, *supra* note 11, at 38 (quoting Norton’s character as praying, “May I never be complete. May I never be content. May I never be perfect. Deliver me, Tyler, from being perfect and complete.”); Mathews, *supra* note 11, at 91-92 (recounting the same prayer, describing Tyler’s aspirations as “messianic,” and characterizing fight club as “the new religion without religion”); Ng, *supra* note 11, at 127 (linking fight club to a church, Tyler to godhood, and the other members as missionaries).

44. Bennett links the nameless narrator to the unnamed narrator of *Notes from the Underground*. See Bennett, *supra* note 10, at 68 (contrasting the pathological nameless narrator of *Fight Club* with the malignant antihero of Dostoevsky’s book). But many *Fight Club* enthusiasts refer to Norton’s nameless character as “Jack.” They do so because the character reads a magazine story written in the first person about a man’s internal organs (e.g., “I am Jack’s medulla oblongata”). These articles are based upon a real series of “I am Joe’s” articles that were published in *Reader’s Digest*. See, e.g., J.D. Ratcliff, *I am Joe’s Heart*, 90 *READER’S DIGEST* 59 (1967). Later in the movie, Norton’s character invokes cynical variations upon this theme, quipping lines like, “I am Jack’s cold sweat,” “I am Jack’s complete lack of surprise,” and “I am Jack’s smirking revenge.” Norton’s personification of his organs and mental states may be a reference to the depersonalization underlying his multiple personality disorder.

45. See *infra* Part II.

46. See *infra* Part III.

47. See *infra* Part IV.

II. WHO IS TYLER DURDEN?

People are always asking me if I know Tyler Durden.

—Ed Norton, *Fight Club*⁴⁸

Who is Tyler Durden? Tyler is the antihero of *Fight Club*, a primitivist, a nihilist, and an anti-capitalist. He is a Puck, a Loki, a modern incarnation of the Trickster figure. But there are two actors in *Fight Club* who, at one time or another, are called Tyler Durden. Which one—the character played by Brad Pitt or the character played by Ed Norton—is really Tyler Durden?⁴⁹

An individual viewing *Fight Club* for the first time will almost certainly identify Brad Pitt as Tyler Durden. Indeed, in one scene, Ed Norton's voiceover begins the sentence, "And this is how I met—" a sentence that Brad Pitt then completes, as if introducing himself, "Tyler Durden."⁵⁰ Given such obvious cues, it seems abundantly clear that Brad Pitt is Tyler Durden. Norton's voiceovers, saying things like, "How I came to live with Tyler is: airlines have this policy about vibrating luggage,"⁵¹ or "Let me tell you a little bit about Tyler Durden,"⁵² while the onscreen images show Brad Pitt further emphasize that when Norton says Tyler, he is referring to Pitt's character. All of these obvious cues, however, are actually misdirection, ingeniously employed by the filmmakers to conceal the fact that Brad Pitt and Ed Norton are split personalities inhabiting one body. Ascertaining the real identity of Tyler Durden is difficult.

Tyler Durden's identity finally begins to unravel in one scene, late in the movie. Norton's character has been traveling from town to town, following a trail of flight coupons, looking for Pitt (who has mysteriously vanished). When Norton walks into a bar and encounters a bartender wearing a halo device, one of those metal braces used in spinal injuries, he knows that he is close to a fight club.

The barman greets him. "Welcome back, sir. How have you been?"⁵³

"Do you know me?" Norton asks.⁵⁴

48. Uhls, *supra* note 13, at Part 1.

49. Ng notes that treating Norton and Pitt as separate beings elides the important motif of the double. Ng, *supra* note 11, at 117 n.17. This is an important point. Because of the way courts deal with multiple personality, however, there is utility in treating the personalities as separate entities and in asking which one is the real Tyler Durden.

50. Uhls, *supra* note 13, at Part 1.

51. *Id.*

52. *Id.*

53. *Id.* at Part 4.

54. *Id.*

“Is this a test, sir?” asks the barman.⁵⁵

“No, this is not a test.” answers Norton.⁵⁶

“You were in here last Thursday.” replies the barman.⁵⁷

“Thursday?” asks Norton.⁵⁸

“You were standing exactly where you are now, asking how good our security is. It’s tight as a drum, sir.” says the barman.⁵⁹

Norton senses something is amiss. He asks, “Who do you think I am?”⁶⁰

“Are you sure this isn’t a test?” the barman asks Norton again.⁶¹

“No, this is not a test.” Norton replies.⁶²

“You’re Mr. Durden. You’re the one who gave me *this*[.]” says the barman.⁶³

He holds up his hand and displays an angry pink scar—the same kind of unmistakably singular scar that Pitt gave to Norton by sprinkling lye on the back of his hand.⁶⁴

Norton’s voiceover ominously warns, “*Please return your seatbacks to their full and upright and locked position.*”⁶⁵ Norton’s character rushes to a telephone and calls Marla Singer. Knowing that it was Tyler who had sex with Marla—and not him—Norton asks her if they’ve ever had sex.

“Marla, it’s me. Have we ever done it?”⁶⁶

“Done what?” asks Marla.⁶⁷

“Have we ever had sex?” replies Norton.⁶⁸

“What kind of stupid question is that?” asks Marla.⁶⁹

“Is it stupid because the answer’s ‘yes’ or because the answer’s ‘no’?” replies Norton.⁷⁰

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*; see *supra* text accompanying notes 32-33 (describing Pitt’s intentional scarring of Norton’s hand in an attempt to help him “hit bottom”).

65. Uhls, *supra* note 13, at Part 4. The air travel reference may connote a daydream in which Norton fantasizes about a mid-air collision. “*Life insurance pays off triple if you die on a business trip.*” *Id.* Interestingly, Norton meets Pitt for the first time immediately after waking from this reverie.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

Marla asks, “Is this a trick?”⁷¹

“No, Marla, I need to know —”⁷²

Marla interrupts him, “— You mean, you want to know if we were just having sex or making love?”⁷³

“We did make love.” Norton remarks.⁷⁴

“Is that what you’re calling it?” inquires Marla.⁷⁵

“Just answer the question, Marla, please. Did we do it or not?”⁷⁶

She says, “You fuck me, then snub me. You love me, you hate me. You show me your sensitive side, then you turn into a total asshole. Is that a pretty accurate description of our relationship, Tyler?”⁷⁷

Norton’s voiceover ominously warns, “*We have just lost cabin pressure.*”⁷⁸ A moment later Norton asks her, “What did you just call me? Say my name!”⁷⁹

Marla responds, “Tyler Durden, Tyler Durden, you fucking freak, what’s going on?”⁸⁰

Here, Marla asks an astute question: What *is* going on? Which of the characters in this movie—Pitt or Norton—is the real Tyler Durden? For most of the movie, Norton (as well as the audience, seeing the story through his eyes) believed that Pitt was Tyler, and at one point Norton explicitly says, “I’m *not* Tyler Durden!”⁸¹ But Norton is a quintessentially unreliable narrator.⁸² Norton also says that he *is* Tyler Durden,⁸³ and there is other compelling evidence to suggest that Norton *is* Tyler. After all, Marla identifies Norton as Tyler Durden; so did the halo-wearing barman.

When the barman calls Norton “sir,” it is not because he thinks that Norton is the co-creator of fight club and therefore entitled to an appropriate modicum of respect. It is because the barman recognizes Tyler Durden,

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*; see *supra* note 65 and accompanying text (associating the air travel reference to Norton’s first meeting with Pitt).

79. *Id.*

80. *Id.*

81. *Id.*

82. See WAYNE C. BOOTH, *THE RHETORIC OF FICTION* 158-59 (Univ. of Chi. Press 1961) (coining the term and describing the concept of the unreliable narrator, a literary device in which the credibility of the narrator is compromised due to psychological instability, bias, ignorance, or intentional deception of the audience).

83. Uhls, *supra* note 13, at Part 4.

the individual who single-handedly invented fight club and who, through project mayhem, is going to liberate the world from modernity. When Marla calls him Tyler, it is not the mild-mannered Norton that she recognizes in this body, but the jubilantly anarchistic Pitt. In a scene that takes place in a metropolitan police station, the film explores in greater detail the idea that third parties may not know which of the two radically different personalities might be in active possession of the body.

After Norton goes to the police, asking them to arrest him as the leader of a terrorist organization, the three detectives in the interrogation room (all members of fight club) tell him that they admire him. They tell Norton that he is a brave man to order this, a genius. What did he order?

“You said if anyone ever interferes [with] Project Mayhem, even you, we gotta get his balls,” explains one of the detectives.⁸⁴

Norton, knowing the detectives do not know about his split personality, tries to bluff his way through the situation: “You’re making a *big* mistake, fellas!”⁸⁵

“You said you’d say that,” replies one of the detectives.⁸⁶

“I’m *not* Tyler Durden!” Norton cries.⁸⁷

“You told us you’d say that too,” answers one of the other detectives.⁸⁸

Norton changes tactics. He lowers his voice and tries to sound authoritative. “Okay, I’m Tyler Durden . . . listen to me. I’m giving you a direct order. We are aborting the mission right now.”⁸⁹

“You said you would *definitely* say that.” remarks a detective.⁹⁰

What the detectives recognize as “Tyler Durden,” though, is Norton’s body—not Tyler’s personality. In the final sequences of the film, the objective lens of a security camera depicts a fight between Pitt and Norton.⁹¹ It shows only one thrashing body subjecting itself to impossible abuse. Interestingly, that body belongs to Norton.

Who, then, is Tyler Durden? Were Marla Singer and the convalescing barman mistaken when they called Norton “Tyler Durden?” Yes and no. At the beginning of *Fight Club*, Norton is negative, passive, and unhappy, governed by the force of *yin*. To adapt, he invents a new identity (Tyler

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. See Kavadlo, *supra* note 9, at 5 (“Two sides to a split personality, the narrator and Tyler turn their acts of sadomasochism into masochism alone.”).

Durden) that is active, dynamic, and masculine, governed by the force of *yang*.⁹² Pitt explains:

You were looking for a way to change your life. You could not do this on your own. All the ways you wished you could be . . . that's me! I look like you wanna look, I fuck like you wanna fuck, I'm smart, capable and most importantly, I'm free in all the ways that you are not. . . . People do it every day. They talk to themselves. They see themselves as they like to be. They don't have the courage you have, to just run with it. . . . Naturally you're still wrestling with it . . . sometimes you're still you. . . . Other times you imagine yourself watching me. . . . Little by little, you're just letting yourself become . . . Tyler Durden!⁹³

Pitt is correct: Norton *is* becoming Tyler Durden throughout the story's arc. Admittedly, Tyler Durden was already there, dormant, in Norton during *Fight Club*'s first scenes. A vigilant viewer can even see him, in a subliminal flash of film,⁹⁴ at the hospital where Norton has gone to seek medication for insomnia. As the movie continues, however, Norton becomes increasingly Tylerized.⁹⁵

By the final scenes of *Fight Club*, it is Norton who is active, dynamic, and masculine. It is Norton who takes extraordinary steps and acts heroically. It is Norton who gets into a fist fight with Pitt, the teleporting champion of fight club, to prevent the destruction of several buildings. It is Norton who fires a gun at Pitt, putting passion before reason, sinking a bullet into the back of a van that is loaded to the gills with nitroglycerine. It

92. Norton is the yin—passive, dark, feminine, sad, downward-seeking, and corresponds to the night; Pitt is the yang—active, light, masculine, happy, upward-seeking and corresponds to the day. The yang is also associated with the element of fire, which is appropriate for Pitt, who blew up Norton's condominium with homemade dynamite and who eventually blows up the headquarters of the credit card corporations and the TRW building. Uhls, *supra* note 13, at Part 4. Sartain uses another dualistic metaphor to explain Pitt and Norton: entropy. He characterizes Pitt's character as "a very highly entropic state, chaotic and anarchistic" while Norton's character "represents a very low entropic state, highly ordered and rigid." Sartain, *supra* note 11, at 34. He also notes that in contemporary American society, highly entropic individuals are regarded as subversive and evil. *Id.*

93. Uhls, *supra* note 13, at Part 4.

94. Brad Pitt's foreshadowing appearance in a single-frame flash is an allusion to another theme in *Fight Club*: the splicing of single frames of pornography into family films. Chuck Palahniuk claims that, like the origins of fight club itself, the idea of splicing frames of pornography into mainstream films is based upon real experiences. Chuck Palahniuk, *Monkey Think, Monkey Do*, GEAR, Dec. 2001, at 110, available at <http://downsupremacy.blogspot.com/2005/12/monkey-think-monkey-do-by-chuck.html> (Dec. 11, 2005).

95. The widespread appeal of fight club and project mayhem among disenchanting young males suggests that there may actually be a bit of Tyler Durden in many of us. See *supra* notes 15 and 34 and accompanying text (describing the proliferation of real life fight clubs and the emergence of a real-life project mayhem).

is Norton who puts a gun into his own mouth to liberate himself from Pitt. It is Norton who pulls the trigger, thereby ablating that unwanted part of his brain and banishing Pitt.

Which one, then, Brad Pitt or Ed Norton, is Tyler Durden? The naïve viewer of *Fight Club* believes that Brad Pitt's character is Tyler Durden. But really, Pitt is merely a figment from Norton's imagination,⁹⁶ a conjured repository for all of the deviant and countercultural thoughts and feelings that Norton had repressed. Pitt's anarchism,⁹⁷ his anti-capitalism,⁹⁸ his primitivism,⁹⁹ and his nihilism¹⁰⁰ were all there, awaiting expression, in Norton. Because he was incapable of acting on these views himself, he needed a vehicle of expression.¹⁰¹ He needed Pitt. But Norton eventually assimilates the good qualities in Pitt's character (e.g., valuing people over things,¹⁰² rejecting fear,¹⁰³ and recognizing that each person can change history¹⁰⁴) and rejects the bad (e.g., callousness for the feelings of others,¹⁰⁵ cynicism about the value of the individual¹⁰⁶). In so doing, he is able to make the symbolic gesture that makes him whole and sets him free,

96. See Uhls, *supra* note 13, at Part 4 (quoting Norton as saying, "Jesus, you're a voice in my head"). *But see id.* (quoting Pitt as responding, "You're a voice in mine!").

97. *See id.* (describing a scene in which Pitt tells Norton, "You're missing the point. [Fight club] does not belong to us. We are not special.").

98. *See id.* ("You are not your job . . . you are not how much money you have in the bank . . . not the car you drive . . . not the contents of your wallet. You are not your fucking khakis.").

99. *See infra* note 341 and accompanying text (describing Pitt's anarcho-primitivist vision).

100. See Uhls, *supra* note 13, at Part 2 ("Fuck damnation, man. Fuck redemption. We are God's unwanted children. *So be it!*").

101. *See supra* text accompanying note 93.

102. See Uhls, *supra* note 17, at Part 1 (condemning a society in which would-be hunter-gatherers are reduced to being consumers). "We're consumers. We're by-products of a lifestyle obsession. Murder, crime, poverty—these things don't concern me. What concerns me is celebrity magazines, television with five hundred channels, some guy's name on my underwear." *Id.*

103. *See id.* ("He had a plan. And it started to make sense in Tyler [sic] sort of way. No fear. No distractions.").

104. *See* Palahniuk, *supra* note 8, at 12 (describing the destruction of the debt record by a small group of committed individuals).

Tyler said the goal of Project Mayhem had nothing to do with other people. Tyler didn't care if other people got hurt or not. The goal was to teach each man in the project that he had the power to control history. We, each of us, can take control of the world.

Id. at 122.

105. See Uhls, *supra* note 13, at Part 4 (describing Pitt's glib comment about the death of a member of project mayhem—"If you wanna make an omelet you've gotta break some eggs"); *see also supra* note 104 and accompanying text (describing disinterest in the injury of other people).

106. See Uhls, *supra* note 17, at Part 3 ("Listen up, maggots. You are not special. You are not a beautiful or unique snowflake. We are the same decaying organic matter organic as everyone else.").

exorcising Pitt with a bullet.¹⁰⁷ With that shot, Norton's character really does become Tyler Durden.

In Part III, the unified personalities are referred to as Tyler Durden, while the host personality is identified as Norton and the alter personality as Pitt. The titular questions are: Is Tyler Durden insane? And does our answer to that question change if we adopt different legal approaches?

III. IS TYLER DURDEN "INSANE"?

Insane in the membrane

Insane in the brain!

Insane in the membrane

Insane in the brain!

Insane in the membrane

Plenty insane.

—Cypress Hill, *Insane in the Brain*¹⁰⁸

Insanity is a difficult abstraction to appreciate. Like a prism across which sunlight is broken into the visible spectrum, the careful study of the insanity defense reveals many of our assumptions about criminal law and responsibility. In *The Limits of the Criminal Sanction*, Packer observed that

[t]here is no more hotly controverted issue in the criminal law than the question of whether, and, if so, to what extent and according to what criteria, individuals whose conduct would otherwise be criminal should be exculpated on the ground that they were suffering from mental disease or defect when they acted as they did.¹⁰⁹

Part III.A will briefly outline the history of the insanity defense and identify some of the more influential tests of insanity. Part III.B will describe the difficulty of applying cognitive tests of insanity to cases

107. Bennett has a similar interpretation. He writes:

As with most of the issues that surround subjectivity in this novel the answer to "who pulls the trigger" is "both of them!" The shot banishes Tyler [Pitt] as fantasy construct; a murder performed by the Narrator [Norton]. At the same time, the hand that holds the gun is also Tyler's hand. Since Tyler disappears with the shot, his "murder" of the Narrator can be considered as a suicide in a symbolic dimension.

Bennett, *supra* note 10, at 60.

108. CYPRESS HILL, *Insane in the Brain*, on BLACK SUNDAY (Sony Records 1993).

109. HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 131 (1968). Dressler identifies reasons insanity is controversial: first, in egregious cases, the defense highlights the tension between society's desire to punish wrongdoers and its sense that treatment—not punishment—is warranted; second, the conceptual intermingling of psychiatric and legal concepts creates ample opportunity for disagreement and confusion. DRESSLER, *supra* note 41, at 386-89.

involving dissociative disorders such as multiple personality disorder. Finally, Part III.C will attempt to apply the M’Naghten test of insanity to the character of Tyler Durden.

A. A BRIEF HISTORY OF INSANITY

Psychologist Hermann Ebbinghaus once observed that “[p]sychology has a long past, but only a short history.”¹¹⁰ The same could be said of the insanity defense. In many ways, the insanity defense seems to be a product of modern psychology. The highly influential M’Naghten test was not created until 1843,¹¹¹ and the current federal insanity statute was not enacted until 1984,¹¹² yet the concept of insanity has roots that extend at least as far back as the epics of Homer¹¹³ and the philosophy of Aristotle.¹¹⁴ Aristotle suggested that deliberate actions may be worthy of praise and blame, but that involuntary actions are not.¹¹⁵ Thus, it follows, that if some individuals are so mentally impaired that their actions are not deliberate, they should not be held legally responsible for their actions.¹¹⁶ This belief was incorporated into the criminal law of ancient Rome. The person who was *non compos mentis* (having no power or possession of mind) or the *furiosus* (the person who resembled a raving beast) were totally lacking in discretion,¹¹⁷ and thus no guiltier of a crime than the child who is too young to know good from evil,¹¹⁸ the wild animal,¹¹⁹ or an inanimate object.¹²⁰ Milhizier explains:

110. HERMANN EBBINGHAUS, *ABRISS DER PSYCHOLOGIE* 3 (1909) (1843).

111. *See* M’Naghten’s Case, (1843) 8 Eng. Rep. 718 (H.L.).

112. 18 U.S.C. § 17(a) (2006).

113. *See* DANIEL N. ROBINSON, *WILD BEASTS & IDLE HUMOURS* 8 (1996) (citing the *Iliad* as providing one of the earliest examples of an insanity defense).

114. *See* DONALD T. LUNDE, *MURDER AND MADNESS* 110 (1976) (“Aristotle . . . concluded that because [free will] is lacking in animals, young children, and madmen, they ought not to be held morally responsible for their behavior.”).

115. *See* Aristotle, *Nicomachean Ethics*, in *THE BASIC WORKS OF ARISTOTLE* 964 (Richard McKeon ed., W. D. Ross trans., 1941) (“[V]irtue is concerned with passions and actions, and on voluntary passions and actions praise and blame are bestowed, on those that are involuntary pardon, and sometimes also pity. . . .”). *Id.* at 1109b.

116. *Id.*

117. *See* DANIEL N. ROBINSON, *PSYCHOLOGY AND LAW: CAN JUSTICE SURVIVE THE SOCIAL SCIENCES?* 86 (1980) (describing these terms).

118. In ancient Rome, the age of discretion (when it was assumed that the child could tell good from evil) was seven. 1 NIGEL WALKER, *CRIME AND INSANITY IN ENGLAND: THE HISTORICAL PERSPECTIVE* 28 (1968). For a good review of the relationship between age and responsibility, see generally Gerry Maher, *Age and Criminal Responsibility*, 2 *OHIO STATE J. CRIM. L.* 493 (2005).

119. *See* *Holloway v. United States*, 148 F.2d 665, 666-67 (D.C. Cir. 1945) (“To punish a man who lacks the power to reason is as undignified and unworthy as punishing an inanimate object or an animal. A man who cannot reason cannot be subject to blame. Our collective conscience does not allow punishment where it cannot impose blame.”). Nonetheless, throughout

Insanity was recognized as a complete criminal defense under Roman law. An insane person was treated as an ox or other beast for the purpose of tort and criminal liability, in that he could not be held responsible for his conduct in any fashion, but his keeper could be liable in tort for failing to restrain the insane man.¹²¹

In many systems of law, there is an intimate relationship between cognition and criminal culpability. For example, in American jurisprudence, the law treats the first-degree murderer far more severely than the second-degree murderer (who is, in turn, treated more severely than the individual guilty of manslaughter, although all have unlawfully taken the life of another human being).¹²² Those who, perceiving more, commit crimes are punished more severely, while those who suffer defects of reason are punished less severely. For example, the law will not permit the execution of the insane or the mentally retarded.¹²³ There are, of course, some crimes that take no notice of the offender's mental state, and do not differentiate between the deliberate crime and the accident, but strict liability offenses are uncommon and disfavored in the law.¹²⁴ Strict liability crimes are the exception. The rule, as all first-year law students know, is that most crimes require a *mens rea*—an evil or guilty mind—as well as an *actus reus*—a criminal act. Without a sufficiently culpable *mens rea*, an individual has not committed a crime, even if she has performed the

history, a number of animals have been tried and executed by ecclesiastical and secular courts. See, e.g., Jen Girgen, *The Historical and Contemporary Prosecution and Punishment of Animals*, 9 ANIMAL L. 97, 99 (2003) (describing trials and executions of animals); Paul Schiff Berman, Note, *Rats, Pigs, and Statues on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects*, 69 N.Y.U. L. REV. 288, 290 (1994) (same).

120. Moore has suggested that rationality and self-control are essential attributes of personhood, and that those who lack such attributes—like the insane—are “no more the proper subjects of moral evaluation than are young infants, animals, or even stones.” Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1137 (1985).

121. Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 ST. JOHN'S L. REV. 725, 764 (2004). Furthermore, it was believed by some Roman commentators that the insane should not be punished, as they already had been punished sufficiently by their madness. See, e.g., ANTHONY CLARE, *PSYCHIATRY IN DISSENT* 354 (1980) (quoting the maxim *furiosus satis ipso furore punitur*, which translates to the mad man is sufficiently punished by his madness); NORMAN J. FINKEL, *INSANITY ON TRIAL* 7 (1988) (“[T]he Roman recommendation for leniency was based on the idea that madness itself was punishment enough. If one's illness was one's retribution, then it follows that any further punishment would be inhumane.”).

122. See DRESSLER, *supra* note 41, at 546-47, 555-56 (outlining law of homicide).

123. See *Ford v. Wainwright*, 477 U.S. 399, 400 (1986) (prohibiting execution of the insane); *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (prohibiting execution of the mentally retarded).

124. See *United States v. United States Gypsum Co.*, 438 U.S. 422, 437-38 (1978) (noting offenses that do not contain a *mens rea* element have a generally disfavored status in the law).

criminal act.¹²⁵ Knowledge, and the choice that knowledge affords, lies at the heart of criminal culpability.

Even early English jurisprudence distinguished between conduct that was knowing and voluntary and conduct that was not. In the tenth century, King Æthelred's laws read, "[a]nd if it happens that a man commits a misdeed involuntarily, or unintentionally, the case is different from that of one who offends of his own free will, voluntarily and intentionally."¹²⁶ Æthelred's successor, Cnut, was even more explicit, decreeing that "we must make due allowance and carefully distinguish between age and youth, wealth and poverty, freemen and slaves, the sound and the sick."¹²⁷ This distinction between the sound and the sick became an essential fixture of Anglo/American criminal law. Elkins writes, "[s]ince the time of Henry III (1216-1272), insanity consistently has been viewed as a mitigating or exculpating factor exempting the accused from criminal punishment."¹²⁸ Elkins goes on to note:

In the time of Henry III, the insane were regularly pardoned after conviction. Edward I (1272-1307) introduced the use of a special verdict declaring the accused to be insane, which led to a pardon. During the reign of Edward II (1307-1327), insanity began to be recognized as a defense, and by the time of Edward III (1327-1377), it had become a complete defense to a criminal charge.¹²⁹

Over time, a common law prohibition emerged against punishing those who lacked sufficient cognitive abilities to make responsible decisions. The prohibition encompassed young children,¹³⁰ idiots,¹³¹ and lunatics.¹³²

125. See DRESSLER, *supra* note 41, at 125 ("Actus non facit reum nisi mens sit rea, or 'an act does not make [a person] guilty, unless the mind be guilty,'" expresses the modern principle that a crime contains not only an actus reus, but also a mens rea.). Lord Bracton, the greatest jurist of the thirteenth century, suggested something very similar, writing that "a crime is not committed unless the will to harm be present." WALKER, *supra* note 118, at 26.

126. WALKER, *supra* note 118, at 16.

127. *Id.* at 16-17.

128. Brian E. Elkins, *Idaho's Repeal of the Insanity Defense: What Are We Trying to Prove?* 31 IDAHO L. REV. 151, 161 (1994).

129. *Id.* (citations omitted).

130. Children who had not reached the age of discretion were not held responsible for their crimes because it was believed they did not have the faculties to distinguish good from evil. The exculpatory influence of youth played a role in Roman jurisprudence. Walker, *supra* note 118, at 28. It also played a role in early English jurisprudence. *Id.* at 16-17. It continues to influence modern criminal law, as well. The Constitution bars the execution of the insane and the mentally retarded. See *supra* text accompanying note 123. Similarly, the Eighth and Fourteenth Amendments bar the execution of those who were under the age of eighteen when they committed their offenses. *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

131. What historically was called idiocy would today be called mental retardation or mental disability. The American Psychiatric Association defines mental retardation thusly:

Blackstone accordingly wrote that “idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities; no, not even for treason itself.”¹³³ This prohibition was the common law precursor of the insanity defense.

Yet how was the prohibition against punishing the insane applied in practice? How mad must a madman be in order to be excused for his crimes? What standards were adopted? Eight influential tests of insanity are described below: the “wild beast” test; the “child of fourteen” test; the insane delusion test; the irresistible impulse test; the M’Naghten test; the Durham test; the American Law Institute test; and, the modern statutory test.

1. *The “Wild Beast” Test*

Lord Bracton, the pre-eminent jurist of the thirteenth century, articulated one of the early tests of insanity: the “wild beast” test.¹³⁴ In the

The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.

AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 49 (4th ed. text rev. 2000). There are four degrees of severity of mental retardation: mild (IQ level from 50-55 to approximately 70), moderate (IQ level from 35-40 to 50-55), severe (IQ level from 20-25 to 35-40), and profound (IQ level below 20-25). *Id.* at 42. One of the great jurists of the seventeenth century, Sir Edward Coke, distinguished two types of idiocy on the basis of severity. What he called *fatuitas* was the equivalent of severe or profound retardation, whereas *stultitia* was less severe but still subnormal intelligence. FINKEL, *supra* note 121, at 9. Even this lesser condition was severe enough to impair distinguishing good from evil, and therefore to excuse. *Id.* Mild retardation is sufficient to bar execution in modern capital cases. *Atkins v. Virginia*, 536 U.S. 304, 320-21 (2002).

132. The punishment of lunatics—those who suffered from mental illness—was problematic. Unlike young children, who were presumed not to know the difference between good and evil, and idiots, whose mental defects were stable and permanent, the mental disabilities of some lunatics waxed and waned. The great English jurists Bracton, Coke, and Hale all distinguished between permanent dementia and temporary lunacy. FINKEL, *supra* note 121, at 9.

133. WILLIAM BLACKSTONE, 4 COMMENTARIES *24; *see also* 1 W. HAWKINS, PLEAS OF THE CROWN 1-2 (7th ed. 1795) (“[T]hose who are under a natural disability of distinguishing between good and evil, as . . . ideots, and lunaticks are not punishable by any criminal prosecution whatsoever.”).

134. Bracton wrote that the insane “are not very different from animals who lack understanding (*ratio*).” WALKER, *supra* note 118, at 28. Walker goes on to explain that in this context, the term “ratio” could imply either the understanding of the nature of one’s act or the knowledge of its wrongfulness, and notes that it was recognized that madmen might lack either. *Id.* These two readings of ratio correspond neatly to the two prongs of the M’Naghten test. *See infra* text accompanying note 165 (articulating the M’Naghten test).

1724 case, *Rex v. Arnold*,¹³⁵ Justice Tracy drew heavily upon the work of Bracton, writing:

[G]uilt arises from the mind, and the wicked will and intention of the man. If a man be deprived of his reason, and consequently of his intention, he cannot be guilty: and if that be the case, though he had actually killed Lord Onslow, he is exempted from punishment: punishment is intended for example, and to deter other persons from wicked designs; but the punishment of a madman, a person that hath no design, can have no example. This is on one side. On the other side we must be very cautious; it is not every frantic and idle humour of a man that will exempt him from justice, and the punishment of the law. . . . [I]t must be a man that is *totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute or a wild beast*, such a one is never the object of punishment.¹³⁶

2. The “Child of Fourteen” Test

While it is likely true that offenders who engage in behavior that is utterly beyond the pale (e.g., acting like a beast) are more likely to be found insane than those who retain vestiges of normalcy,¹³⁷ many mentally ill offenders are not entirely disabled.¹³⁸ Thus, another insanity test was created by one of Britain’s most celebrated jurists, Sir Matthew Hale, Lord Chief Justice of England, who—in an attempt to address the difficult matter of “partial insanity” (i.e., conditions in which the reason is partially impaired, such as in cases of depression (melancholia), but in which the afflicted individual is not totally stripped of his reason)—suggested that the standard should be the mental ability of a child of fourteen:¹³⁹

135. 16 How. St. Tr. 695 (1724).

136. WALKER, *supra* note 118, at 56 (emphasis added). Under this standard, Arnold was found convicted, sentenced to be executed, and spared only through the intercession of his victim. See ROBINSON, *supra* note 113, at 134.

137. See Alec Samuels, *Mental Illness and Criminal Liability*, 15 MED. SCI. & LAW 198, 199-200 (1975) (suggesting the further removed the defendant’s behavior is from normal behavior, the more he appears mentally ill).

138. See *United States v. Freeman*, 357 F.2d 606, 618 (D.C. Cir. 1966) (“Our mental institutions, as any qualified psychiatrist will attest, are filled with people who to some extent can differentiate between right and wrong”).

139. See generally MATTHEW HALE, *THE PLEAS OF THE CROWN*, 29-30 (Robert H. Small ed. 1847) (1670) (recognizing that there are individuals whose reason is partially, but not totally, impaired). The “child of fourteen” test ingeniously established a meaningful standard of insanity by comparing it against another category of exculpated offenders: children who have not reached the age of discretion. Walker, *supra* note 118, at 28. While the age at which it was assumed a child could tell good from evil was seven in ancient Rome, the age of discretion was twelve in

There is a partial insanity of mind . . .; some persons that have a competent use of reason in respect of some subjects, are yet under a particular dementia in respect of some particular discourses, subjects or applications; or else it is partial in respect of degrees; and this is the condition of very many, especially melancholy persons . . . The best measure that I can think of is this; such a person as laboring under melancholy tempers hath yet ordinarily as great an understanding, as ordinarily a child of fourteen hath, is such a person as may be guilty of treason or felony. . . .¹⁴⁰

Hale's mental jurisprudence, including the "child of fourteen" test, was enormously influential. A voracious reader and student of seventeenth century scientific reasoning, Hale's treatise on law and insanity "is the seventeenth century's canonical work."¹⁴¹ His approach to insanity dominated English legal reasoning from the time he wrote *Historia Placitorum Coronae* [*The History of the Pleas of the Crown*] in about 1670 until the test was supplanted by a new test of insanity: the insane delusion test.

3. *The Insane Delusion Test*

In the 1800 case of James Hadfield,¹⁴² the defendant entered a theatre and fired a pistol at King George III, for which he was charged with high treason. The case did not initially appear to be a case of insanity. When interrogated, Hadfield seemed quite rational. He knew what he was doing, had deliberately planned his offense, understood the nature and quality of his actions, and knew that murder and treason were wrong.¹⁴³ A verdict of insanity seemed unlikely. Fortunately, Hadfield was defended by Thomas Erskine, a brilliant barrister who made effective legal use of Hadfield's delusions¹⁴⁴ and previous injuries,¹⁴⁵ and who successfully challenged the

Bracton's era. *Id.* "If the partially insane individual had enough understanding (equivalent to the child at the discretionary age of 12 or 14), then he was guilty." FINKEL, *supra* note 121, at 10.

140. *Id.* at 38.

141. ROBINSON, *supra* note 113, at 122.

142. *Rex v. Hadfield*, 27 How. St. Tr. 1281 (1800).

143. *See* FINKEL, *supra* note 121, at 14 (describing circumstances of Hadfield's trial).

144. Hadfield suffered from fascinating delusions. FINKEL, *supra* note 121, at 14. He believed that the second coming of Jesus Christ was imminent, and that Christ's reappearance would result in the salvation of humanity, but that in order to precipitate the coming of Christ, Hadfield must be sacrificed. *Id.* He could not, however, kill himself. *Id.* His solution was to make an assassination attempt on George III's life, ensuring martyrdom. *Id.*; *see also* ROBINSON, *supra* note 113, at 148 (describing Hadfield's delusions); Jodie English, *The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense*, 40 HASTINGS L.J. 1, 15 (1988) (same). Hadfield's beliefs are not entirely unlike the beliefs of Unabomber Theodore Kaczynski who believed that his actions were necessary to save humanity from the evils of modernity. *See infra* note 424 and accompanying text.

prevailing wild beast test. Erskine argued that the total incapacity required by the wild beast test did not actually exist, and claimed that the real essence of madness was different. In madness, “reason is not driven from her seat, but distraction sits down upon it along with her, holds her, trembling upon it, and frightens her from her propriety.”¹⁴⁶ With the prosecution’s agreement, the court interrupted the proceedings to suggest to the jury that since Hadfield was unequivocally insane, an acquittal was in order.¹⁴⁷ The jury agreed, and by substituting a more-subtle insane delusion test for the wild beast test in force, found the failed martyr James Hadfield not guilty by reason of insanity.¹⁴⁸ In *Hadfield*, Erskine had managed to carve out the first qualification in the legal standard of total insanity.¹⁴⁹

4. *The Irresistible Impulse Test*

Forty years later, building on the foundation of *Hadfield*, in the case of *Regina v. Oxford*,¹⁵⁰ an “irresistible impulse” test of insanity was articulated. In *Regina*, Edward Oxford had attempted to assassinate Queen Victoria with a pistol. Oxford, however, could not explain why he fired at the queen. He bore no ill will toward Victoria, and indeed considered the sovereign to be “a very nice lady.”¹⁵¹ Eigen writes of such cases, “No attempt was made to elude detection, no motive lay behind the outrageous acts. Why would someone act so obviously against his own interests, and for no reason? The culprit appeared to be an autonomous, pernicious will: . . . ‘I cannot help myself, it is stronger than me.’”¹⁵² Based on a theory of irresistible impulses occasioned by what testifying medical

145. Hadfield had sustained serious head injuries in battle against the French six years before the crime. WALKER, *supra* note 118, at 76. One of these sword injuries had penetrated Hadfield’s skull, allowing Erskine to invite the jury to inspect the membrane of the brain itself. *Id.* An officer from Hadfield’s regiment testified that before the injuries he had been an excellent soldier, but that afterwards he was incoherent, with symptoms of derangement. *Id.*

146. WALKER, *supra* note 118, at 77.

147. English, *supra* note 144, at 15.

148. To prevent Hadfield from being turned loose into the community, Parliament quickly enacted the *Insane Offenders Bill* (1800) to take into custody those who had been acquitted on grounds of insanity. See FINKEL, *supra* note 121, at 16. Hadfield was committed to Bethlem. *Id.* Finkel notes that a verdict of innocent by reason of insanity would henceforth result in a different outcome than a typical not guilty verdict. *Id.* Whereas the individual found not guilty could walk, free, from the courtroom, the individual found innocent by reason of insanity would nonetheless be detained. *Id.*

149. Joel Peter Eigen, *Lesion of the Will: Medical Resolve and Criminal Responsibility in Victorian Insanity Trials*, 33 LAW & SOC’Y REV. 425, 428 (1999).

150. (1840) 173 Eng. Rep. 941 (H.L.).

151. Eigen, *supra* note 149, at 435.

152. *Id.*

experts called “moral insanity,”¹⁵³ Edward Oxford was acquitted and committed to Bethlem. While there are different formulations, the irresistible impulse test essentially states that a defendant is insane if, at the time of the offense, he lacked the will to control his actions and acted from an irresistible and uncontrollable impulse.¹⁵⁴ This test has been sharply criticized. For example, the American Psychiatric Association has snarkily observed that “[t]he line between an irresistible impulse and an impulse not resisted is probably no sharper than between twilight and dusk.”¹⁵⁵

5. *The M’Naghten Test*

Many commentators agree that the most influential test for insanity is the so-called M’Naghten rule.¹⁵⁶ The rule is derived from the oft-described M’Naghten’s Case of 1843,¹⁵⁷ in which a Scot, Daniel M’Naghten,

153. *Id.* One scholar has recently identified the concept of moral insanity as the starting point of scientific criminology. Nicole Rafter, *The Unrepentant Horse-Slasher: Moral Insanity and the Origins of Criminological Thought*, 42 CRIMINOLOGY 979, 999 (2004).

154. See DRESSLER, *supra* note 41, at 378 (providing formulations of the irresistible impulse test).

155. *Am. Psychiatric Ass’n, Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681, 685 (1983); see also Jodie English, *The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense*, 40 HASTINGS L.J. 1, 40 n.224 (1988) (contrasting the phrase with a passage from Melville’s Billy Budd).

156. The correct spelling of M’Naghten’s name is a matter of considerable dispute. See Cynthia G. Hawkins-Leon, *The Literature as Law: The History of the Insanity Plea and a Fictional Application Within the Law & Literature Canon*, 72 TEMP. L. REV. 381, 390 n.43 (1999). She writes:

It should be noted that, throughout history, the defendant’s name has been variously spelled (namely, “M’Naughten”) and the case variously cited (namely, “10 Cl. & Fin. 210”). The author has chosen what she believes is the correct spelling of the defendant’s name and the correct citation. Justice Frankfurter was also of this opinion: “to what extent is a lunatic’s spelling even of his own name to be deemed as authority?”

Id. (citing OF LAW AND LIFE & OTHER THINGS THAT MATTER: PAPERS AND ADDRESSES OF FELIX FRANKFURTER 1956-1963 3 (Philip B. Kurland ed., 1964)); Robert E. Mensel, *Right Feeling and Knowing Right: Insanity in Testators and Criminals in Nineteenth Century American Law*, 58 OKLA. L. REV. 397, 411 n.79 (2005) (“There have been many different spellings of M’Naghten’s name.”). There is, however, widespread agreement that the M’Naghten case is one of the most important cases (if not the single most important case) in the formulation of the insanity defense. See, e.g., RONALD BLACKBURN, *THE PSYCHOLOGY OF CRIMINAL CONDUCT* 256 (1993) (“Of major significance in [establishing a firm legal precedent] . . . was the trial of Daniel McNaughtan at the Old Bailey in 1843.”); LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 143 (1993) (“The most important legal definition of insanity was the so-called right-or-wrong test. It was formulated by an English court in 1843. The test is often called the McNaughten test. . . .”) (italics omitted); CLIVE HOLLIN, *PSYCHOLOGY AND CRIME* 123-24 (1989) (“While the status of the mentally disordered offender has a long history in English law, the famous case of Daniel M’Naghten in 1843 is generally seen as the beginning of contemporary legislation.”) (citations omitted).

157. M’Naghten’s Case, (1843) 8 Eng. Rep. 718 (H.L.). The secondary literature on the M’Naghten Case is immense. One monograph, however, is particularly useful: RICHARD MORAN, *KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL MCNAUGHTAN* (1981).

believing that the Prime Minister of England, Robert Peel, was persecuting him,¹⁵⁸ attempted to assassinate Peel, but M’Naghten did not know what Peel looked like, and inadvertently shot Peel’s private secretary, Edward Drummond by mistake.¹⁵⁹

At trial, M’Naghten was defended ably by four barristers and nine medical experts; his principal attorney, Cockburn, rivaled Erskine in masterful advocacy. Arguing (as Erskine had in the *Hadfield* case) that the prisoner’s insanity strips his power of self-control, and arguing that partial insanity can “lead to a partial or total aberration of the moral sense,” Cockburn (like Erskine) attempted to persuade the judges in the case to accept a test of insanity that was not formally recognized by the law.¹⁶⁰ He succeeded. After the last medical expert had testified, Justice Tindal stopped the trial and asked the Solicitor General if he planned to refute the medical testimony offered by the defense. The Solicitor General declined, and withdrew the Crown’s case against M’Naghten.¹⁶¹ “Justice Tindal virtually gave [the jury] a directed verdict. ‘If you find the prisoner not guilty . . . on the ground of insanity . . . proper care will be taken of him.’”¹⁶² Predictably, like James Hadfield, Daniel M’Naghten was acquitted on grounds of insanity and committed to Bethlem. The verdict,

158. M’Naghten made only one public statement, in which he explained his reasons for his crime:

The Tories in my native city have compelled me to do this. They follow, persecute me wherever I go, and have entirely destroyed my peace of mind. They followed me to France, into Scotland, and all over England. In fact, they follow me wherever I go. I cannot sleep nor get no rest from them in consequence of the course they pursue towards me. I believe they have driven me into a consumption. I am sure I shall never be the man I was. I used to have good health and strength but I have not now. They have accused me of crimes of which I am not guilty, they do everything in their power to harass and persecute me; in fact, they wish to murder me. It can be proved by evidence. That’s all I have to say.

MORAN, *supra* note 157, at 10. The statement has been regarded as evidence of M’Naghten’s delusions. There was, however, unexplained evidence (such as a deposit receipt for £750, an extraordinary sum of money for a woodturner) that supported M’Naghten’s claims. Moran suggests that M’Naghten’s crime may have been a political act of self-defense. *See id.* at 40 (“It may well be that the only real delusion M’Naghten ever suffered from was the delusion that he had shot the prime minister.”); *see also* FINKEL, *supra* note 121, at 17-18 (describing the political climate of the era and suggesting that, in light of these facts, M’Naghten’s statement seems less delusional). The notion of murder as political self-defense bears some likeness to the “imperfect necessity” defense considered in the Kaczynski case. *See infra* note 411 and accompanying text.

159. There are, of course, compelling similarities between M’Naghten’s killing of Drummond and John Hinckley’s 1981 wounding of Press Secretary James Brady during the attempted assassination of President Reagan. *See* Jennifer S. Bard, *Re-Arranging Deck Chairs on the Titanic: Why the Incarceration of Individuals with Serious Mental Health Illness Violates Public Health, Ethical, and Constitutional Principles and Therefore Cannot Be Made Right By Piecemeal Changes to the Insanity Defense*, 5 HOUS. J. HEALTH L. & POL’Y 1, 31 n.134 (2005).

160. WALKER, *supra* note 118, at 94.

161. FINKEL, *supra* note 121, at 20.

162. MORAN, *supra* note 157, at 108.

however, incensed Queen Victoria (who had, herself, been the object of several attempted assaults by individuals of unsound mind).¹⁶³ Victoria's ire may help explain why the House of Lords took the unusual step of demanding clarifications from all fifteen Justices in the case.¹⁶⁴ Their answers collectively yielded the now-famous M'Naghten test:

To establish a defence on the ground of insanity it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or he did know it, that he did not know he was doing what was wrong.¹⁶⁵

The M'Naghten test has been enormously influential. It was widely adopted throughout the United States,¹⁶⁶ and became rapidly the generally accepted standard.¹⁶⁷ The M'Naghten test, however, has been criticized on several grounds. First, the test is entirely cognitive in nature, focusing on what the defendant *knows*, and ignores mental illnesses that impair volition.¹⁶⁸ Second, the test does not recognize degrees of incapacity. The defendant must *wholly* lack awareness.¹⁶⁹ Third, the test does not define its key terms, allowing different courts to apply alternatively narrow or broad readings to the words "know," "nature," and "wrong."¹⁷⁰

163. See HERSCHEL PRINS, DANGEROUS BEHAVIOUR, THE LAW, AND MENTAL DISORDER 15 (1986) (describing Queen Victoria's interest in the case).

164. FINKEL, *supra* note 121, at 21.

165. *Id.* Moran notes that not one of the Lords "was tactless enough to point out that if the judges' answers represented the law M'Naghten should have been convicted." MORAN, *supra* note 157, at 102.

166. See Bard, *supra* note 159, at 33.

167. DRESSLER, *supra* note 41, at 375.

168. Impairments of volition and self-control were central to the trial of Edward Oxford. See *supra* text accompanying notes 150-155 (describing the irresistible impulse test).

169. In some ways, M'Naghten requires mental illness that would render the defendant a *furiosus*. See *supra* text accompanying note 117. The partial insanity envisioned by Hale would not be sufficient to trigger a M'Naghten acquittal. See *supra* text accompanying note 139.

170. The question of whether the word "wrong" in the right-and-wrong prong of the test refers to legal or moral wrongdoing has interesting consequences. English courts have clarified the ambiguity by holding that it refers to awareness that an act is legally wrong. *R. v. Windle*, [1952] 2 QB 826. American jurisdictions are divided on this point, however. See *People v. Serravo*, 823 P.2d 128, 130 (Colo. 1992) (describing split over interpretation of the term). It is an issue with real implications. Dressler cites a hypothetical of a defendant who believes that God has ordered her to kill a victim. While she knows that murder violates secular law, she also believes it is morally right to kill the victim. DRESSLER, *supra* note 41, at 319-20. His hypothetical anticipates the offenses of Tyler Durden and Theodore Kaczynski. See *infra* Part IV.

6. *The Durham Test*

In the 1954 case of *Durham v. United States*,¹⁷¹ Judge David Bazelon first articulated the Durham test—sometimes called the product test.¹⁷² *Durham* involved a defendant, Monte Durham, who had suffered from intermittent symptoms, occasionally enjoying periods of lucidity between bouts of mental illness. Similar to the judges in the trials of Hadfield, Oxford, and M’Naghten, Judge Bazelon considered the medical science of his time, and then took another incremental step away from the *furiosus* requirement of the wild beast test.¹⁷³ Rejecting the existing test for insanity (M’Naghten plus irresistible impulse), he articulated a new test that asked whether the crime was the product of a mental disease or defect. Bazelon explained:

If you the jury believe beyond a reasonable doubt that the accused was not suffering from a diseased or defective mental condition at the time he committed the criminal act charged, you may find him guilty. If you believe he was suffering from a diseased or defective mental condition when he committed the act, but believe beyond a reasonable doubt that the act was not the product of such mental abnormality, you may find him guilty. Unless you believe beyond a reasonable doubt either that he was not suffering from a diseased or defective mental condition, or that the act was not the product of such abnormality, you must find the accused not guilty by reason of insanity.¹⁷⁴

The expansive Durham test shifted away from the rigid cognitive focus of M’Naghten, and also excused emotional and volitional disabilities.¹⁷⁵

171. 214 F.2d 862 (1954), *overruled by* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972).

172. See, e.g., FINKEL, *supra* note 121, at 35 (equating the Durham test and the product test).

173. ROBINSON, *supra* note 113, at 201-02.

174. *Durham*, 214 F.2d at 875. Unlike the M’Naghten test, which excused only those who suffered a “defect of reason, from disease of the mind,” the Durham test explicitly encompasses those who suffer from mental defect as well as those who suffer from mental disease. In this respect, the Durham test re-established the common law exculpation of “idiots” and “lunatics.” See BLACKSTONE, *supra* note 133, at 24.

175. The test even allowed for the exculpation of psychopaths. While the psychopath is considered ill by clinicians, the pathology impairs the psychopath’s capacity for empathy, not his reasoning or cognitive abilities, implying that they are sane under exclusively-cognitive tests of insanity. See HERVEY CLECKLEY, *THE MASK OF SANITY*, 337-38 (5th ed. 1976) (describing sixteen characteristics of the psychopath, including *inter alia*, absence of delusions and other signs of irrational thinking, lack of remorse or shame, pathological egocentricity and incapacity to love); Robert D. Hare, *A Research Scale for the Assessment of Psychopathy in Criminal Populations*, 1 PERSONALITY & INDIVIDUAL DIFFERENCES 111, 115 (1980) (providing a checklist of twenty-two items). Prins summarizes the core features of psychopathy as “*lack of real affect, an inability to relate feelings to the words with which they are expressed, and the chaos and destruction that the*

Bazelon believed the new test would permit a more meaningful dialogue to occur between the realms of the new psychology and the law,¹⁷⁶ but critics of the Durham test claimed that it left all of the essential decision making to psychiatrists.¹⁷⁷ Because medical experts made the determination of what did and did not qualify as “mental disease or defect,” and because some doctors blurred the line between fact and opinion, offering testimony about the “ultimate issue” (i.e., whether a given condition produced the defendant’s crime and therefore whether the defendant was responsible), doctors—not judges or jurors—essentially determined whether the defendant should be acquitted by reason of insanity.¹⁷⁸ In 1972, the Durham court abandoned the rule and in its place adopted a version of the test promulgated by the American Law Institute.¹⁷⁹

7. *The American Law Institute Test*

As part of its Model Penal Code,¹⁸⁰ the American Law Institute (ALI) drew from several of the antecedent tests of insanity in formulating a new standard in 1962. The ALI test provides:

essential psychopath leaves behind.” PRINS, *supra* note 163, at 155. The terms “psychopathy” and “sociopathy,” while still expressive, have been replaced with “anti-social personality disorder.” See AM. PSYCHIATRIC ASS’N, *supra* note 131, at 701-02.

176. See FINKEL, *supra* note 121, at 37-38 (describing Bazelon’s hopes for premising the test on new psychological principles). Unfortunately, in some ways, psychiatry and law are professions that—to paraphrase George Bernard Shaw—are divided by a common language. See CHRISTOPHER E. DAVIES, *DIVIDED BY A COMMON LANGUAGE: A GUIDE TO BRITISH AND AMERICAN ENGLISH* viii (2005) (attributing the phrase “England and America are two countries divided by a common language” to George Bernard Shaw). While psychiatry is focused on the well-being of the client, and while criminal law is focused on the culpability of the defendant, both professions are keenly interested in mental states, capacities, and behavior. Such similar interests, with such diverging goals, sometimes create friction. Indeed, at least one commentator has referred to the “war between lawyers and psychiatrists.” KARL MENNINGER, *THE CRIME OF PUNISHMENT* 90 (1966).

177. See, e.g., Ronald Leifer, *The Psychiatrist and Tests of Criminal Responsibility*, 19 AM. PSYCHOLOG. 825 (1964).

[A]lthough one of the purposes of the Durham Decision is to insure that the moral decision is made by the jury rather than the expert, the facts on which the decision is to be based are so technical that the jury must hear the psychiatrist’s conclusion as to whether the act was a product of mental disease or not, which is equivalent to an opinion about responsibility.

Id. at 828.

178. See *id.*

179. DRESSLER, *supra* note 41, at 372.

180. The Buffalo Criminal Law Review has printed three issues dedicated to aspects of the Model Penal Code, and many of its articles provide a useful overview of the Code. See, e.g., George P. Fletcher, *Dogmas of the Model Penal Code*, 2 BUFFALO CRIM. L. REV. 3 *passim* (1998) (critiquing the Code); Paul H. Robinson, *In Defense of the Model Penal Code: A Reply to Professor Fletcher*, 2 BUFFALO CRIM. L. REV. 25 *passim* (1998) (defending the principles of the Code).

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.¹⁸¹

The ALI test employs elements of the M’Naghten and irreversible impulse tests, but combines these and uses new terms to express the concepts. Like the M’Naghten test, the ALI standard applies to those who suffer from mental disease, but unlike M’Naghten, the ALI test explicitly applies to those who suffer from mental defect.¹⁸² Like the M’Naghten, the ALI standard contains two prongs. Unlike M’Naghten, however, only one of the prongs (“appreciate”) is cognitive; the other (“conform”) is volitional.¹⁸³ Finkel explains:

The term “appreciate,” which implies emotional as well as intellectual understanding, has been substituted for the narrower and much criticized M’Naghten term “to know.” The phrase “criminality of his conduct,” clearly implies a breach of law, whereas M’Naghten’s “wrong” was ambiguous as to whether it meant “legal” or “moral” wrong. With the phrase “he lacks substantial capacity,” the ALI advocated sought to clarify what had been troubling to many long before M’Naghten: they hoped that references to “total insanity” . . . would be eliminated.¹⁸⁴

While in most aspects the ALI test is far more expansive than the M’Naghten test, the ALI standard is similarly restrictive in at least one way: it does exclude psychopaths from the protections afforded to others by a successful insanity defense.¹⁸⁵ Although psychopathy is well established in

181. MODEL PENAL CODE § 4.01(1) (2006).

182. *See supra* note 174 and accompanying text (noting that, similar to the ALI test, the antecedent Durham test re-established the common law exculpation of “idiots” and “lunatics”).

183. The volitional prong of the ALI test uses the phrase “lacks substantial capacity . . . to conform his conduct to the requirements of law” and thereby avoids any mention of “irresistible impulse.” *See supra* text accompanying note 155 (criticizing the irresistible impulse standard).

184. FINKEL, *supra* note 121, at 39.

185. MODEL PENAL CODE § 4.01(2) (2006) (“[T]he terms ‘mental disease or defect’ do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.”). Curiously, individuals whose abnormality manifests in antisocial and criminal conduct *may* be civilly committed against their will and incarcerated (above and beyond any punishment they may have received for their crimes) if there is a finding of (1) dangerousness to oneself or others, (2) proof of some mental illness or abnormality [including personality disorders such as antisocial personality disorder], and (3) proof of serious difficulty in controlling behavior. *Kansas v. Crane*, 534 U.S. 407, 410-11 (2002) (citing and clarifying *Kansas v. Hendricks*, 521 U.S. 346 (1997)). It seems curious that psychopathy should be sufficiently crippling that it would permit involuntary civil commitment under the law but not sufficiently “sick” to warrant the use of the insanity defense.

the psychiatric literature,¹⁸⁶ the notion of excusing those who (1) knew what they did, (2) knew that it was wrong, and (3) could have controlled their behavior but who offended anyway, strains the credibility of the public and the law. And so by reining in the Durham test's excessive reliance upon psychiatric expertise, and by excluding psychopaths, the ALI test found widespread acceptance. The ALI test was adopted by most federal courts,¹⁸⁷ and embraced by several American legislatures.¹⁸⁸ In 1981, however, John Hinckley, Jr. attempted to assassinate President Ronald Reagan, a crime for which he was found not guilty by reason of insanity.¹⁸⁹

The reaction to the Hinckley verdict was searing: the public challenged the legitimacy of the defense¹⁹⁰ and in the wake of the case, several jurisdictions sought to reform the insanity defense.¹⁹¹ Legislatures restricted it,¹⁹² shifted the burden of proof to the defendant,¹⁹³ established an alternative verdict ("guilty but mentally ill"),¹⁹⁴ and altogether abolished it.¹⁹⁵ Vowing to remedy "a glaring deficiency in our federal criminal justice

186. Prins traces the origins of psychopathy back to Pinel's conception of *manie sans délire* and suggests that the same phenomenon has subsequently been labeled "moral insanity," (for a discussion of moral insanity, see *supra* note 153 and accompanying text), "moral imbecility," "psychopathic inferiority," "neurotic character," "psychopathy," "sociopathy," and "anti-social personality disorder." PRINS, *supra* note 163, at 146. More recent research suggests a neurological basis for antisocial personality. See, e.g., Adrian Raine et al., *Hippocampal Structural Asymmetry in Unsuccessful Psychopaths*, 55 *BIOLOGICAL PSYCHIATRY* 185 (2004) (suggesting that an asymmetrical hippocampus may relate to the impulsiveness and lack of affect associated with psychopathy).

187. See Judith A. Morse & Gregory K. Thoreson, Comment, *Criminal Law—United States v. Lyons: Abolishing the Volitional Prong of the Insanity Defense*, 60 *NOTRE DAME L. REV.* 177, 181 (1984) (reporting that all but one of the federal circuits have adopted the ALI test).

188. See DRESSLER, *supra* note 41, at 317 (noting the ALI test was adopted by approximately half of the states).

189. See generally RICHARD J. BONNIE ET AL., *A CASE STUDY IN THE INSANITY DEFENSE: THE TRIAL OF JOHN HINCKLEY, JR.* 1-2 (2d ed. 2000) (tracing the Hinckley trial).

190. See, e.g., Bard, *supra* note 159, at 34 (citing public outrage); Valerie P. Hans, *An Analysis of Public Attitudes Toward the Insanity Defense*, 24 *CRIMINOLOGY* 393 (1986) (same); Ira Mickenberg, *A Pleasant Surprise: The Guilty but Mentally Ill Verdict has Both Succeeded in its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense*, 55 *U. CIN. L. REV.* 943, 946-47 (describing widespread public outrage following the trial: "ninety percent of the population favored doing away with the insanity defense").

191. See Carolyn Alexander, *Oregon's Psychiatric Security Review Board: Trouble in Paradise*, 22 *LAW & PSYCHOL. REV.* 1, 6 (1998) ("Eighty percent of the reforms in the insanity defense between 1978 and 1990 occurred shortly after Hinckley's acquittal.").

192. See Bard, *supra* note 159, at 35 (describing changes to procedures in wake of dissatisfaction with Hinckley's acquittal).

193. See Hawkins-Leon, *supra* note 156, at 402 ("By 1990, thirty-six states and the District of Columbia had switched the burden of proof to the defendant.").

194. See *id.* at 404 ("Another approach taken by the states has been to adopt the guilty but mentally ill ("GBMI") verdict. Thirteen states have adopted this additional verdict.").

195. See *id.* at 405 ("Due to the confusion and oftentimes political backlash associated with the insanity defense in any form, the states of Arizona, Idaho, Montana, and Utah have abolished insanity as a separate defense.").

system—the abuse of the insanity defense,”¹⁹⁶ Congress passed the Insanity Defense Reform Act of 1984,¹⁹⁷ creating a new and restrictive standard for the federal courts.

8. *The Modern Statutory Test (Ghosts of M’Naghten)*

With the passage of the Insanity Defense Reform Act of 1984, Congress banished the ALI test from the federal courts and replaced it with a new standard.¹⁹⁸ The new statutory test is different from (and stricter than) the ALI test in several ways. First, under this approach, insanity is an affirmative defense: the burden of proof rests with the defendant.¹⁹⁹ Second, the defendant must prove (A) that he suffered from a severe mental disease or defect when he committed the crime, *and* (B) that his mental disease or defect prevented him from appreciating the nature and quality or wrongfulness of his conduct.²⁰⁰ Third, both prongs of the test must be proved by clear and convincing evidence.²⁰¹ Any other proof of mental disease or defect does not constitute a defense.²⁰²

By requiring severe mental disease or defect, the test excludes conditions that might have exculpated under the ALI’s “substantial capacity” standard, and approaches the *furiosus* standard required under the wild beast test.²⁰³ “[C]ognitive incapacity must be total.”²⁰⁴ By eliminating the volitional prong of the ALI test, the statute established an insanity test that bears a striking resemblance to the purely cognitive M’Naghten standard.²⁰⁵ In enacting the Insanity Defense Reform Act, Congress proved that there is indeed truth in Santayana’s famous maxim—“Those who cannot remember

196. 130 CONG. REC. H381, 13 (daily ed. Feb. 2, 1983) (statement of Rep. Gekas).

197. 18 U.S.C. § 17, Pub. L. No. 98-473, 98 Stat. 1837.

198. *See* 18 U.S.C. § 17(a) (2000).

199. *Id.*

200. *Id.*

201. *See id.* § 17(b).

202. *See id.* § 17(a).

203. *See supra* text accompanying note 1366 (describing the wild beast test).

204. DRESSLER, *supra* note 41, at 324 (2nd ed. 1995).

205. *See United States v. Fishman*, 743 F. Supp. 713, 720 (N.D. Cal. 1990).

By this legislation, Congress essentially adopted the venerable *M’Naghten* rule, grounded in cognitive defect concepts, to establish the legal insanity defense for federal criminal law. At the same time, by purposeful exclusion, Congress rejected the various formulations of defects of volition which had been stated in other definitions of legal insanity.

Id. at 720. The federal rule does, however, use the ALI test term “appreciate” in lieu of the M’Naghten term “know.” 18 U.S.C. § 17(a).

the past are condemned to repeat it”²⁰⁶—and effectively erased 141 years of mental illness jurisprudence.²⁰⁷

B. SQUARE PEGS IN ROUND HOLES: FITTING MULTIPLE PERSONALITY DISORDER INTO EXISTING INSANITY TESTS

Conceptions of insanity have evolved over time, reflecting the zeitgeist of their eras.²⁰⁸ Yet, regardless of the standard in place at any given time, certain assumptions about criminal responsibility and the mind have informed these tests. One assumption deeply ensconced in the criminal law is that each person has one—and only one—personality. In cases of multiple personality disorder (MPD),²⁰⁹ the law is woefully ill-equipped to respond.²¹⁰

206. GEORGE SANTAYANA, 1 *THE LIFE OF REASON* (1905-06) *quoted in* JOHN BARTLETT, *FAMILIAR QUOTATIONS* 703 (15th ed. 1980).

207. The statutory test, like the M’Naghten test before it, reflects a nineteenth century understanding of psychiatry, yet these tests are the most commonly applied. A 2002 study by the American Academy of Psychiatry and the Law indicated “that 25 states use the M’Naghten Test, 17 states use the ALI/MPC Test, 4 states have abolished the insanity defense, 3 states utilize the IIT, and 1 state uses the Durham Test.” Deborah Giorgi-Guarneri et al, *AAPL Practice Guideline for Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense*, 30 J. AM. ACAD. PSYCHIATRY & L. S3, S3-S9 (Supp. 2002).

208. See Julie E. Grachek, Note, *The Insanity Defense in the Twenty-First Century: How Recent United States Supreme Court Case Law Can Improve the System*, 81 IND. L.J. 1479, 1482-85 (2005) (describing the “modern” M’Naghten test, the “liberal era” of irresistible impulse, Durham, and ALI, and the “neoconservative era” of the modern statutory test and abolition).

209. The DSM-IV-TR uses the diagnostic label “dissociative identity disorder” instead of MPD. See AM. PSYCHIATRIC ASS’N, *supra* note 131, at 526. The essential features of the disorder are: the presence of two or more distinct identities or personality state that recurrently take control of behavior, as well as an inability to recall important personal information, beyond ordinary forgetfulness and not caused by substance use or a general medical condition. *Id.* Hindley summarizes the etiological literature:

MPD is a brutal phenomenon which shatters an integrated self. It is a creative strategy to cope with and survive heinous childhood trauma and it represents “the struggle of the self to maintain its integrity in the face of severe violation.” The main component of MPD is dissociation, “an unconscious defense mechanism in which a group of mental activities splits off” from the main stream of consciousness and functions as a separate unit.” Unlike in other dissociative diseases, dissociation in MPD is so severe that the individual actually creates alter personalities who exchange exclusive control over the individual’s actions. This exchange from one personality to another is called “switching,” and is generally uncontrollable. All multiples have at least one alter personality who serves as a “host,” defined as the “the one who has executive control of the body the greatest amount of time during a given time.” The host is generally not the original personality; the original personality is typically characterized as having been “put to sleep.”

Mark E. Hindley, Note, *United States v. Denny-Shaffer and Multiple Personality Disorder: “Who Stole the Cookie from the Cookie Jar?”*, 1994 UTAH L. REV. 961, 963-64. MPD is an extraordinarily controversial diagnosis. “There can be no clinical entity more open to skepticism in both clinical and legal context; the very notion of multiple individuals inhabiting one body violates our sense of person and smacks of the crudest sort of demonology.” Alfred P. French & Bryan R. Shechmeister, *The Multiple Personality Syndrome and Criminal Defense*, 11 BULL. AM. ACAD. PSYCHIATRY & L. 17, 17 (1983). Despite critics who explain MPD through malingering,

Hindley describes the following:

Consider, for example, “Multiple,” an individual suffering from MPD. Multiple has two alter personalities, Abe and Bob. Presently, Abe controls Multiple the greatest percentage of time and is clearly the “host” personality. Abe is well-mannered and well-liked by friends and family. He is also gentle and controls his temperament. Bob, however, is the antithesis of Abe. He is aggressive, mean-spirited, and abusive. Bob knows that Abe exists and dislikes him intensely. Conversely, Abe does not know about Bob, and cannot control Bob. Abe notices, however, that he often experiences blackouts, and reawakens in peculiar circumstances.

One night, Bob gets into a bar fight. Consistent with his personality, Bob pulls a knife and kills his opponent. Because Bob does not cover his tracks well, the police easily solve the crime. When the police make an arrest, however, it is Abe who they take into custody. Abe denies killing anyone although the evidence clearly establishes that the police arrested the right individual. Under hypnosis, Bob manifests himself and proudly admits to the murder. Bob states that he committed the crime mostly to “get back” at Abe for being a “goody-goody.”²¹¹

Hindley could be describing the characters in *Fight Club*. In some respects, Norton is much like Abe. He is sensitive and thoughtful, a successful young professional.²¹² And in some respects, Pitt is much like Bob. He is everything that Norton cannot be²¹³—aggressive, glib, and uncomfortably comfortable with the use of violence as a means to an end. But

susceptibility to a therapist’s suggestion, or self-hypnosis, there is strong support for the existence of clinical MPD. See Sabra McDonald Owens, *The Multiple Personality Disorder (MPD) Defense*, 8 MD. J. CONTEMP. L. ISSUES 237, 252 (1997) (“According to current scientific research, different personalities may speak different languages, be different-handed, respond differently to medications, and score differently on psychological tests.”). Moreover, the rate of MPD diagnosis is increasing exponentially. See Ralph Slovenko, *The Multiple Personality: A Challenge to Legal Concepts*, 17 J. PSYCHIATRY & L. 681, 686 (1989) (noting increase from 200 to 6000 cases between 1980 and 1989).

210. See Jennifer Radden, *Am I My Alter’s Keeper? Multiple Personality Disorder and Responsibility*, 10 S. CAL. INTERDIS. L.J. 253, 260 (2001) (suggesting traditional definitions of criminal insanity were developed to address conditions such as schizophrenia and are “singularly unfit for multiples”).

211. Hindley, *supra* note 209, at 961.

212. See Uhls, *supra* note 13, at Part 1 (“Home was a condo on the fifteenth floor of a filing cabinet for widows and young professionals.”).

213. See *supra* text accompanying note 93 (describing Pitt as embodying all the traits that Norton could not).

how should the law deal with Abe and Bob? How should it deal with Norton and Pitt?

Just as our conventional insanity tests flounder when applied to psychopaths (individuals whose cognitive structures remain intact, but whose capacities for empathy are compromised),²¹⁴ so too the insanity tests fail to fit those who appear to be cognitively intact, but contain more than one personality. It may seem like a straightforward matter to punish those who knew what they were doing, knew that it was wrong, and could have controlled their impulses,²¹⁵ but what should be done with the individual who was Jekyll (an alter) at the time of the crime and is Hyde (a host personality) at the time of arrest and trial? How can the law punish “a personality”? An alter, after all, is a phantom, no more substantial than Ryles’ ghost in the machine.²¹⁶ Like the abstract corporation, an alter provides the law with “no soul to damn, no body to kick.”²¹⁷

Courts struggle in deciding questions of sanity in MPD cases, and often abdicate these decisions to mental health experts without explicitly identifying the rule by which a multiple defendant is found guilty or not guilty.²¹⁸ The courts that have attempted to articulate their reasoning fall into three main groups, separated by their approaches to deciding questions of sanity in MPD cases: the unified approach, the alter approach, and the host approach.²¹⁹

Under the unified approach, courts reason that crimes are committed by a *person* (not a personality), and only one person is on trial.²²⁰ This may

214. See *supra* note 175 and accompanying text (describing symptoms of psychopathy).

215. See *supra* Part III.A.4-5 (describing M’Naghten and irresistible impulse tests).

216. See GILBERT RYLES, *THE CONCEPT OF MIND* 22 (1949) (describing belief in mind-body separation as the “myth of the ghost in the machine”).

217. The quote is attributed to Edward, the first Baron Thurlow (1731-1806) and has been used in the title of an article about corporate responsibility. See John C. Coffee, Jr., “*No Soul to Damn: No Body to Kick*”: *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981). In a more recent article, however, two authors suggest that Coffee’s quote may be erroneous:

Coffee quotes a suspect wording: “Did you ever expect a corporation to have a conscience, when it has no soul to be damned and no body to be kicked?” A source nearer to his time indicates that Thurlow said: “Corporations have neither bodies to be punished, nor souls to be condemned, they therefore do as they like.”

Gilbert Geis & Joseph F. C. DiMento, *Empirical Evidence and the Legal Doctrine of Corporate Criminal Liability*, 29 AM. J. CRIM. L. 341, 342 n.3 (2002) (citations omitted).

218. See Elyn R. Saks, *Multiple Personality Disorder and Criminal Responsibility*, 10 S. CAL. INTERDISC. L.J. 185, 187-88 (2001).

219. See Owens, *supra* note 209, at 244-57 (describing the three approaches); Juliette K. Orr, Comment, *Multiple Personality Disorder and the Criminal Court: A New Approach*, 28 SW. U. L. REV. 651, 655-59 (1999) (same).

220. See, e.g., *State v. Woodard*, 404 S.E.2d 6 (N.C. Ct. App. 1991) (adopting this approach); Owens, *supra* note 209, at 252-55 (describing unified approach and citing cases in which it has been employed).

seem like a parsimonious approach, eliminating problematic questions, such as “who—in a multiple—has MPD?”²²¹ and permitting courts to follow established procedures for determining criminal culpability, but treating MPD defendants as a *person* ignores the heart of their disorders: the fissure that divides their discrete identities. In practice, this approach is tantamount to legal rejection of MPD, effectively precluding any viable claim of insanity. Courts that adopt this approach do not consider separately the mental state of the host and alter personalities, and therefore treat as irrelevant the presence of MPD symptoms.²²²

Under the alter approach, courts focus upon the mental state of the alter at the time of the offense.²²³ If the alter was insane at the time of the offense, then the defendant is found insane. Conversely, if the offending alter is found to be sane and guilty, then the defendant is found guilty, whether or not the host personality had any actual awareness of the crime.²²⁴ The alter approach is the prevailing test employed by modern courts,²²⁵ but sometimes results in the punishment of an innocent actor: holding the host personality responsible for crimes that she did not commit, could not control, or did not even know had occurred.²²⁶

221. See Robert F. Schopp, *Multiple Personality Disorder, Accountable Agency, and Criminal Acts*, 10 S. CAL. INTERDIS. L.J. 297, 304 (2001) (asking which personality suffers from MPD).

222. See *State v. Woodard*, 404 S.E.2d 6, 10 (N.C. Ct. App. 1991) (finding no error because “[t]here was only one person accused of rape”).

223. See Owens, *supra* note 209, at 247-52 (describing alter approach and citing cases in which it has been employed).

224. See, e.g., *State v. Grimsley*, 444 N.E.2d 1071, 1075 (Ohio Ct. App. 1982) (involving a woman who claimed that she, Robin, was not guilty of driving under the influence of alcohol because she was unaware of what her alter, Jennifer, was doing):

The evidence failed to establish the fact that Jennifer was unconscious or acting involuntarily. There was only one person driving the car and only one person accused of drunken driving. It is immaterial whether she was in one state of consciousness or another, so long as in the personality then controlling her behavior, she was conscious and her actions were a product of their own volition.

Id. at 1075.

225. See Owens, *supra* note 209, at 247 (reporting this approach is used sixty-seven percent of the time in state decisions).

226. The issue of punishing innocent actors has received an extraordinary amount of attention in the legal MPD literature. See, e.g., ELYN SAKS & STEPHEN H. BEHNKE, *JEKYLL ON TRIAL: MULTIPLE PERSONALITY DISORDER AND CRIMINAL LAW passim* (1997) (describing difficulties of imposing criminal rules on those with MPD); Edward W. Mitchell, *Culpability for Inducing Mental States: The Insanity Defense of Dr. Jekyll*, 32 J. AM. ACAD. PSYCHOL. & L. 63, 67 (2004) (suggesting because he was responsible for creating his own incapacitating condition, Dr. Jekyll could be held liable for the crimes of Mr. Hyde); Saks, *supra* note 218, at 191-94 (suggesting innocent alters are punished when they are imprisoned along with guilty personalities); Radden, *supra* note 210, at 265 (suggesting innocent alters are not punished, but “burdened,” in the way children of prisoners are burdened).

Under the host approach, courts focus upon the host personality.²²⁷ If the host personality is not responsible for the offense, the defendant is not responsible. In *United States v. Denny-Shaffer*,²²⁸ the Tenth Circuit rejected the prevailing state test of finding a MPD defendant insane so long as the offending alter was insane at the time of the offense.²²⁹ Instead, the *Denny-Shaffer* court focused on the awareness of the host. The court held that

where the evidence would permit a jury to find that a defendant suffers from MPD and that the host personality was unaware of the criminal conduct at issue and did not participate in or plan that conduct, the jury may also find that the “defendant” satisfied [18 U.S.C. §] 17’s requirements and thus return a verdict of “not guilty only by reason of insanity.”²³⁰

Each of the above approaches has been used by American courts to adjudicate criminal responsibility in MPD cases.²³¹ But application of these varied approaches might result in wildly different outcomes. Consider how criminal responsibility would be established in the fictitious case of *State v. Tyler Durden*.

C. THE INSANITY OF TYLER DURDEN

Let us suppose that after the final frame of the movie, *Fight Club*, Tyler Durden (the now-incorporated personalities of Norton and Pitt)²³² is arrested on a host of charges: masterminding an underground boxing club, organizing a conspiracy responsible for widespread acts of vandalism and other property crimes, adulterating restaurant food, stealing biohazardous materials from a liposuction clinic, burying the body of Robert Paulson (a member of project mayhem, shot by the police during Operation Latte Thunder), production of large quantities of nitroglycerin, the destruction of

227. See Owens, *supra* note 209, at 255-57 (describing host approach and citing *United States v. Denny-Shaffer*).

228. 2 F.3d 999 (10th Cir. 1993).

229. *Denny-Schaffer*, 2 F.3d at 1017-18 (outlining state precedent).

230. *Id.* at 1017 n.18.

231. See generally Owens, *supra* note 209 (describing application of the three approaches); Orr, *supra* note 219 (same).

232. Norton exorcises Pitt by putting a gun into his mouth and squeezing the trigger. FIGHT CLUB, *supra* note 7. While this puts a bloody hole through Norton’s cheek, it blows off the back of Pitt’s skull, causing Pitt to fall and fade from view. *Id.* Sartain writes:

When Jack [Norton] realizes that he is going to live through his self-inflicted wound, he seems to take on a presence that he had lacked earlier. He orders the flunkies of Project Mayhem with cool confidence, and assures Marla that ‘everything’s going to be fine.’ He seems to have unified his soul, which was previously driven into the diametric opposition of Tyler [Pitt] and Jack [Norton].

Sartain, *supra* note 11, at 43 n.5.

a condominium unit, and organizing the destruction of several major credit card companies and the TRW building. Let us suppose that Durden claims—and is supported by uncontested psychiatric evidence—that before shooting a gun into his mouth and reconciling the two personalities within himself, he suffered from MPD. How might a court evaluate his claim of “not guilty by reason of insanity?”²³³

In this section, each of the three approaches described above will be adopted, and the result a court might reach will be examined. First, the unified approach will be considered, then the host approach, and finally the most commonly applied approach: the alter approach.

1. *The Unified Approach (Tyler Durden)*

A court employing the unified approach such as that adopted in *State v. Badger*,²³⁴ *State v. Woodard*,²³⁵ and *State v. Halcomb*,²³⁶ might acknowledge the antagonistic but complementary personalities represented by Norton and Pitt, but would not recognize them as separate legal persons.²³⁷ A court using the unified approach might say that it was irrelevant whether the alter “Pitt” or the host “Norton” committed the offenses,²³⁸ since—physically speaking—there was only one person who founded fight club and established project mayhem. It is that *person* whose sanity must be evaluated.

If the court were one of the many jurisdictions that utilize the M’Naghten test,²³⁹ it would be exceedingly difficult for Durden to prevail on an insanity defense. Durden can probably demonstrate that he was labouring under a defect of reason from disease of the mind. Marla Singer

233. In practice, insanity cases are quite uncommon. See Hawkins-Leon, *supra* note 156, at 406-07 (noting use of the insanity plea is rare in criminal trials, appearing in less than one percent of all felony trials). Furthermore, even when the defense is raised, insanity pleas tend not to result in acquittal. See *id.* at 409 (reporting about seventy-four percent of insanity pleas fail).

234. *State v. Badger*, 551 A.2d 207, 293-94 (N.J. Super. Ct. Law Div. 1988).

235. *State v. Woodard*, 404 S.E.2d 6, 10 (N.C. Ct. App. 1991).

236. *State v. Halcomb*, 510 N.W.2d 344, 350-51 (Neb. Ct. App. 1993).

237. Owens, *supra* note 209, at 252.

238. That Norton enthusiastically participated in the fight club conspiracy and acquiesced in some of the offenses committed by project mayhem suggest the unified-approach court may be correct in stating that it is irrelevant whether the crimes were committed by Pitt or Norton. Even if Pitt and Norton were separate people, under the doctrine of Pinkerton liability, Norton is responsible for the crimes committed in furtherance of the conspiracy. See *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946) (outlining the rule that a party to a conspiracy is liable for all crimes of his co-conspirators as long as the acts fall within the scope of the conspiracy and are foreseeable consequences of the conspiracy).

239. See *supra* text accompanying note 165 (outlining the M’Naghten test); see also *supra* note 207 and accompanying text (noting twenty-five states employ M’Naghten).

will testify that he suffered from MPD.²⁴⁰ Durden probably satisfies that part of the M’Naghten test. Yet, because the prosecutor can introduce clips from *Fight Club*, demonstrating that the alter Pitt knew the nature and quality of his acts,²⁴¹ and because the prosecutor can use these clips to show that the host Norton knew his actions were morally and legally wrong,²⁴² it is highly unlikely that Tyler Durden would be able to establish a successful defense of insanity.

Although the fractionated Tyler Durden did not appreciate the nature and quality of some of his actions, such as when he got into a parking lot fist-fight with himself or when (while controlled by Pitt) he unknowingly blew up his condo, because the alter Pitt *did* know the nature and quality of those actions, the unified approach to MPD will not exculpate him. If Durden was evaluated under the federal insanity statute,²⁴³ requiring clear and compelling evidence that his mental disease or defect prevented him from appreciating the nature and quality or wrongfulness of his conduct,²⁴⁴ it probably would be even more difficult to prevail under a unified approach.

2. *The Host Approach (Norton)*

If Tyler Durden were tried in a court that utilizes the host approach (treating as equivalents the host personality and the defendant), such as the court in *Denny-Shaffer*, he might be able to prevail in a claim of insanity. In such a court, the question would be whether Norton (the host personality)

240. See Uhls, *supra* note 13, at Part 4 (quoting Marla as telling Norton, “You have very serious emotional problems. Deep seated problems for which you should seek professional help.”).

241. See *id.* For example, Norton describes Pitt’s penchant for “splicing single frames of pornography into family films” and Pitt’s status as “the guerrilla terrorist of the food service industry” who “farted on meringue,” “sneezed on braised endive,” and otherwise modified “creme of mushroom soup.” *Id.* Once realizing that he and Pitt were the same person, Norton also acknowledges the nature of his acts when he turns himself into the police, confessing to the desk sergeant, “I’m the leader of a terrorist organization responsible for numerous acts of vandalism and assault all over the city.” *Id.*

242. Norton knows that fight club is illegal. When Commissioner Jacobs convenes a rigorous investigation, members of project mayhem (including Pitt and Norton) assault the Commissioner and threaten to cut off his testicles.

We’ll send one [of your testicles] to the New York Times and one to the Los Angeles Times. Press release style. Look. The people you’re after are the people you depend on. We cook your meals, we haul your trash, we connect your calls, we drive your ambulances. We guard you while you sleep. Do not fuck with us.

Id. Similarly, Norton knows that the effort to reset the debt record by blowing up the TRW building and credit card headquarters is both criminal and morally wrong. *Id.* Accordingly, Norton describes himself as “the leader of a terrorist organization” and tries to stop his alter Pitt, insisting, “I’m stopping this” and “I can’t let this happen.” *Id.*

243. 18 U.S.C. § 17(a) (2006).

244. See *generally* Part III.A.8.

was insane at the time of the offense. Again, it would be a fairly straightforward matter to demonstrate that he was labouring under a defect of reason from disease of the mind.²⁴⁵ But unlike the unified approach, where Durden is held responsible for the awareness and conduct of both Norton (the host) and Pitt (the alter),²⁴⁶ in a host-approach court, the determination of insanity is made based on the host's mental state. Thus, if appearing in a jurisdiction that applies the M'Naghten test, defendant Durden would need to prove clearly that at the time of the act, Norton did not know the nature and quality of his actions or know that what he was doing was wrong.

Because Norton (the host) did not know the nature and quality of many of his acts, believing them instead to be the actions of his alter, Pitt, the defendant Durden might be able to prevail in raising an insanity defense. Certainly, Norton's attempt to stop Pitt's destruction of the credit card buildings suggests that the host personality did not participate in the criminal objectives of his alter, and his self-inflicted gunshot wound demonstrates how desperate the host personality was to stop and neutralize his alter.

While the host personality should bear responsibility for some of his conduct (e.g., participation in the clandestine fight club, "accompanying" Pitt in a nighttime fat-gathering raid of a liposuction clinic, and "helping" Pitt to threaten the convenience store clerk Raymond K. Hessel with murder in order to teach him the value of life),²⁴⁷ the overwhelming bulk of his offenses were committed by a personality that the host thought was someone else. Even under the exacting standards of the M'Naghten test,²⁴⁸ Tyler Durden might be found not guilty by reason of insanity.

3. *The Alter Approach (Pitt)*

Most jurisdictions do not use the unified or host approach. Rather, most courts confronted with MPD issues in criminal matters utilize the alter approach.²⁴⁹ Under this approach, the defendant is found insane only if the alter that was in control at the time of the offense is insane. If the alter is

245. See *supra* text accompanying note 240 (discussing Durden's possibility of demonstrating that he was acting under a defect of reason).

246. See *supra* Part III.C.1.

247. Norton may also bear vicarious responsibility under conspiracy doctrine. See *supra* note 238 and accompanying text.

248. See *supra* note 169 and accompanying text (noting M'Naghten requires total cognitive impairment).

249. See *supra* text accompanying note 225.

culpable under the jurisdiction's standards, the defendant is guilty.²⁵⁰ This, then, leads to the question of whether the alter Pitt is insane.

Again, assuming strong and uncontroverted testimony that establishes clinical MPD,²⁵¹ Tyler Durden will be able to satisfy the first part of the M'Naghten test, demonstrating that he was labouring under a defect of reason from disease of the mind. The trickier part will be satisfying one of the two remaining prongs, either proving that the alter Pitt did not know the nature and quality of his actions or proving that he did not know they were wrong. The first approach is doomed. While the host personality, Norton, was unaware of the actions taking place during his interstitial fugues, the alter, Pitt, used these opportunities to make bathtubs of nitroglycerin, blow up a high-rise condominium, and to mastermind the simultaneous destruction of eleven corporate headquarters with roughly 4400 gallons of nitroglycerin.²⁵² The alter Pitt knows perfectly well the nature and quality of his actions, but does he know their wrongfulness? While there is no evidence in *Fight Club* to suggest that Pitt does not know the illegality of his actions, there is evidence suggesting that Pitt does not view his behavior as morally wrong. Indeed, there is evidence suggesting that he believes his behavior is right, necessary, and redemptive.²⁵³

Pitt does not blow up the corporate buildings out of greed or malice; his act of destruction is meant to be liberating. He destroys the buildings (and the debt record they contain) because he is furious with an anemic society founded upon consumption and hunger. At one point, Pitt laments:

I see all this potential—God damn it, an entire generation pumping gas and waiting tables; they're slaves with white collars. Advertisements have them chasing cars and clothes, working jobs we hate so we can buy shit they don't need. We are the middle

250. Owens, *supra* note 209, at 247.

251. See *supra* note 240 and accompanying text.

252. See Uhls, *supra* note 13, at Part 4 (“You are now firing with a gun at your imaginary friend, near *four hundred* gallons of *nitroglycerin!*” and “You know there are ten other bombs in ten other buildings.”). Four thousand four hundred gallons of nitroglycerin would do enormous damage. One U.S. gallon = 3.79 liters, and one liter of nitroglycerin weighs 1.13 kilogram, so 4400 gallons of nitroglycerin would weigh 18,843.88 kilograms (45,550.76 pounds). Research suggests that nitroglycerin is approximately 1.5 times as powerful as TNT. Michael B. Dillon, et al., *The NARAC Emergency Response Guide to Initial Airborne Hazard Estimates* 8 (March 18, 2004), at https://narac.llnl.gov/uploads/Dillion2004_NARACEmergencyResponseGuide_202990_xchnw.pdf (indicating that, pound for pound, nitroglycerin is 1.49x as powerful as TNT). Thus, 4400 gallons of nitroglycerin would have the force of about 27.82 tons of TNT.

253. When Norton tries to persuade Pitt to call off the detonation, Pitt says, “The buildings are empty. Security and maintenance are all our people. We’re not killing anyone, man, we’re setting them *free!*” Uhls, *supra* note 13, at Part 4. Later, Pitt boasts to Norton about the ultimate objective behind the bombs. “Out these windows, we will view the collapse of financial history. One step closer to economic equilibrium.” *Id.*

children of history, man. No purpose or place. We have no great war, nor great depression. Our great war is a spiritual war. Our great depression is our lives. We've all been raised by television to believe that one day we'll all be millionaires and movie gods and rock stars—but we *won't*. And we're learning slowly that fact. And we're very, *very* pissed off.²⁵⁴

Similar to the Hindu god Lord Shiva,²⁵⁵ Pitt is a destroyer, razing existence so that something new—something better—can be fashioned from the ashes of the old.²⁵⁶ Pitt—like Shiva—is an embodiment of masculine creative energy.²⁵⁷ The alter Pitt knows that the laws of men prohibit blowing up buildings, but he also knows that there are higher laws than the laws of men.²⁵⁸ In order to save men from themselves, liberating them from their “lives of quiet desperation,”²⁵⁹ he rejects secular laws and embraces a higher law.²⁶⁰

254. *Id.*

255. See DAVID FONTANA, *THE SECRET LANGUAGE OF SYMBOLS* 208-09, 225, 227 (1994) (describing Shiva). Kavadlo has also noted the destroyer-creator aspect at work in *Fight Club*, writing that reading Palahniuk is like having your eyes rubbed raw with broken glass, but that “after you wipe the pulp from your eyes, you realize something. That the world is not broken. Somehow, the world feels more together than before you started. This is what it feels like to read Chuck Palahniuk. Broken, but something disturbing and beautiful recreated in its place.” Kavadlo, *supra* note 11, at 9.

256. See SALMAN RUSHDIE, *THE SATANIC VERSES* 3 (“To be born again . . . first you have to die.”).

257. FONTANA, *supra* note 255, at 125; see also *supra* note 92 (describing Pitt as an embodiment of the masculine, active *yang* force).

258. Those who believe in natural law maintain that there is an essential link between law and morality. According to natural law theory, “[m]oral validity is a logical necessary condition for legal validity.” JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW* 11 (Westview Press, rev. ed. 1990). But those who choose to ignore secular laws of men can simply appeal to the higher laws of God. Vonnegut neatly summarized the relationship of divine law and secular legislation:

I will tell you my dim memories of what he [Thomas Aquinas] said about the hierarchy of laws on this planet, which was flat at that time. The highest law, he said, was divine law, God's law. Beneath that was natural law, which I suppose would include thunderstorms and our right to shield our children from poisonous ideas, and so on. And the lowest law was human law. Let me clarify this scheme by comparing its parts to playing cards. Enemies of the Bill of Rights do the same sort of thing all the time, so why shouldn't we? Divine law, then, is an ace. Natural law is a king. The Bill of Rights is a lousy queen.

KURT VONNEGUT, *PALM SUNDAY* 10 (1981).

259. THOREAU, *supra* note 18, at 150 (“The mass of men lead lives of quiet desperation.”).

260. According to at least one developmental psychologist, Pitt's rejection of law-and-order thinking (and embracing of a universal principle that places human dignity above property rights) shows sophisticated moral reasoning. See generally LAWRENCE KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT* (1981) (proposing a hierarchy of moral development). Owens writes that alters sometimes speak different languages, exhibit different handedness, or score differently on psychological tests. Owens, *supra* note 209, at 252-53. In this case, the alter Pitt may score

Is the alter Pitt insane when he blows up the corporate buildings? In many ways, Pitt's thinking resembles that of James Hadfield, who—because he believed he had to die in order to save the world, yet could not commit suicide—fired a shot at King George III.²⁶¹ The alter Pitt is not suicidal like James Hadfield, but he does believe (as Hadfield did) that his actions will save the world.

Like Hadfield,²⁶² Pitt's character appears to be rational. In *Fight Club*, Pitt rants,²⁶³ but he does not rave. He does not foam at the mouth. And while his denigration of consumer culture may not be a common way of looking at the world, it does possess an internal logic. After all, viewed dispassionately, it does seem perverse to live in a dystopian world where people work jobs they despise to purchase things they do not need,²⁶⁴ where the pain of living is so acute that people drug themselves into numbness,²⁶⁵ and where the accumulation of wealth is more important than human life.²⁶⁶ Rejecting such a world and embracing a world of actualized lives does make sense, “*in a Tyler sort of way.*”²⁶⁷

Hadfield was acquitted by reason of insanity,²⁶⁸ but proving that Pitt was insane would be more difficult. Indeed, no court employing the alter approach has ever found a defendant not guilty by reason of insanity.²⁶⁹ Pitt knew the nature and quality of his acts, and he knew that they were illegal. Accordingly, if Tyler Durden pleads insanity in a jurisdiction that has construed the ambiguous M’Naghten prong “he did not know he was doing what was wrong” to mean did not know the *legal* wrongfulness of his actions,²⁷⁰ his insanity plea will fail. The only way that Tyler Durden might succeed in winning an insanity plea is if the jurisdiction has construed the term, “he did not know he was doing what was wrong,” to denote the *moral*

higher than the host Norton on Kohlberg's moral development scale. Norton appears to exhibit conventional law-and-order thinking, but Pitt exhibits post-conventional morality.

261. *See supra* Part III.A.3 (describing the insane delusion test of insanity).

262. *Supra* text accompanying note 142.

263. *See supra* text accompanying note 255 (quoting one of Pitt's diatribes).

264. *See supra* text accompanying notes 19 and 255 (warning our possessions can enslave us).

265. *See supra* note 16 and accompanying text (describing American consumption of pharmaceuticals).

266. *See supra* note 13 and accompanying text (describing Ford and GM design cases).

267. *See Uhls, supra* note 13, at Part 3 (quoting Norton).

268. *Supra* text accompanying note 148.

269. Owens, *supra* note 209, at 247.

270. England has adopted this approach. *See R. v. Windle*, [1952] 2 QB 826. American jurisdictions that so construe the M’Naghten prong include Kansas, Iowa, and Tennessee. *People v. Serravo*, 823 P.2d 128, 135 (Colo. 1992).

wrongfulness of his actions.²⁷¹ Even then, the test is not whether Pitt thought his actions were moral; rather, the test is whether Pitt believed that *society* would view his actions as morally proper.²⁷² Under the letter of the law, it would be difficult for Durden to demonstrate that Americans share his antipathies and support his objectives.

Still, if represented by a talented lawyer, Tyler Durden might be able to prevail in an insanity plea, although he cannot satisfy the existing legal criteria. Mackay notes:

[T]here seems to have been little attempt made to distinguish between lack of knowledge of legal wrong, which is what the Rules have been judicially interpreted to require, and unawareness of moral wrong. Indeed, the general impression gained from reading the documentation in these cases was that the wrongness issue was being treated in a liberal fashion by all concerned.²⁷³

Such behavior is not a strictly modern phenomenon: several of the existing insanity tests (e.g., insane delusion,²⁷⁴ irresistible impulse,²⁷⁵ M’Naghten,²⁷⁶ and Durham²⁷⁷) were established when iconoclastic courts reached beyond the letter of existing law to ensure a just result. Although the Hinckley case triggered massive insanity reforms,²⁷⁸ the actual number of people exculpated because of their mental states did not change much at all.²⁷⁹ Appelbaum suggests that laws come and go, but that (empirically speaking) the technical specifics do not matter. Instead, courts make determinations of sanity by exercising common sense:

271. Jurisdictions that so construe the M’Naghten prong include New York, Arizona, California, and Colorado. *Serravo*, 823 P.2d at 137.

272. *See, e.g.*, *People v. Stress*, 252 Cal.Rptr. 913, 923 (Ct. App. 1988).

273. R. D. Mackay, *Fact and Fiction About the Insanity Defense*, 1990 CRIM. L. REV. 247, 251. The suggestion is echoed by Edward Griew. He states that “it is well known that psychiatrists, lawyers and judges have, between them, benignly contrived to bring within [the law] some kinds of cases that it might find difficulty in accommodating if diagnosis and statutory interpretation were both rigorously conducted.” Edward Griew, *The Future of Diminished Responsibility*, 1988 CRIM. L. REV. 75, 79.

274. *See* Part III.A.3

275. *See* Part III.A.4

276. *See* Part III.A.5

277. *See* Part III.A.6

278. *See* Part III.A.8

279. *See* PAUL S. APPELBAUM, *ALMOST A REVOLUTION: MENTAL HEALTH LAW AND THE LIMITS OF CHANGE* 191-93 (1994).

[C]ommentators have often observed that notorious defendants . . . no matter how crazy, are almost always found guilty. Conversely, for crimes below a certain threshold of heinousness, the perception that defendants either do not warrant punishment or deserve to be treated for their disorders may lead to findings of insanity, regardless of the legal parameters in effect.

Id. at 193.

[P]sychologist Norman Finkel provided subjects (usually college students) with vignettes of insanity defence cases. Participants were asked to reach decisions regarding the appropriate verdict—not guilty, guilty, or NGRI [not guilty by reason of insanity]—and the tests they were asked to apply were varied systematically. Among the insanity tests Finkel compared were the “wild beast” test; McNaughtan; McNaughtan combined with an irresistible impulse test; the ALI standard; the new federal insanity test; and a more complex decisionmaking framework called the “disability of mind” approach. Although participants routinely distinguished among the cases they reviewed, judging some to be more worthy of NGRI verdicts than others, their willingness to find a defendant not guilty by reason of insanity was not at all affected by the standard they were instructed to use. Even more startling, subjects given the same cases without any instructions as to which test to apply did not differ in their verdicts from the other groups.²⁸⁰

Ultimately, then, the likelihood of Tyler Durden succeeding in an insanity plea may depend less upon the jurisdiction’s written standards than upon his lawyer’s ability to persuade a court that Durden was sufficiently impaired that he should not be held responsible for his actions. A good advocate would, like Hadfield’s lawyer, Thomas Erskine, emphasize his client’s noble qualities,²⁸¹ would perhaps argue against narrow readings of the prevailing insanity tests,²⁸² and also may appeal to lay conceptions of craziness.²⁸³ Durden’s lawyer might underscore the madness of his client’s thinking, suggesting that anyone who would resort to acts of violence in order to reject consumer culture *must* be insane. It is an interesting claim, but is it a persuasive one? Part IV of the article explores this question, considering the primitivist beliefs of Tyler Durden in Part IV.A, considering the practice of culture jamming in Part IV.B, and considering a real-world analogue—the case of Unabomber Theodore Kaczynski—in Part IV.C.

280. *Id.* at 191.

281. Erskine elicited sympathy for James Hadfield by explaining the self-sacrificing nature of Hadfield’s delusions. *See supra* note 144 and accompanying text. Erskine also allowed the jury to view Hadfield’s head injuries. *See supra* note 145 and accompanying text. Durden’s lawyer might make use of similar tactics, emphasizing his client’s attempts to liberate from an existence of consumption and slavery. *See infra* note 407 and accompanying text. He might also permit a jury to examine the wound where Tyler Durden shot himself in the mouth.

282. *See supra* text accompanying notes 274-278.

283. *See supra* text accompanying note 280 (describing common-sense decision making).

IV. IS IT INSANE TO REJECT CONSUMER CULTURE BY VIOLENT MEANS?

*Great abundance is heaped up as the result of brutalizing labor,
but a miserable life is the result.*

—Epicurus²⁸⁴

A. THE WORLD OF TYLER DURDEN

In *Fight Club*, Tyler Durden (the convergent personalities of Pitt and Norton) founds a clandestine boxing club, organizes a conspiracy that commits widespread acts of vandalism and property crimes (“homework assignments”), adulterates restaurant food, steals human fat from a liposuction clinic, conceals the body of a co-conspirator shot by police during a terrorist operation, produces about four thousand gallons of nitroglycerin, blows up a condominium unit, and demolishes ten credit card headquarters and the TRW building.²⁸⁵ He is a *busy* fellow. As Norton sagely observes, “Even a hummingbird couldn’t catch Tyler at work.”²⁸⁶ But *why* does Durden do these things? What is it that he hopes to destroy? What is it that he aspires to create?

Durden stands against a world of insipid consumerism.²⁸⁷ He stands against the hoarding of wealth, and the squandering of existence. He stands against a world where the social milieu does not provide us with the contact we require as human beings,²⁸⁸ and stands against a world where people shop to make themselves happy, but inadvertently make themselves depressed instead.²⁸⁹ He stands against a world where people possess grand

284. Thinkonline!, Daily Deistic and Progressive Thoughts, <http://www.deism.com/thinksam10.htm> (last visited Nov. 5, 2007) (quoting Epicurus).

285. FIGHT CLUB, *supra* note 7 (depicting these frenetic activities); Uhls, *supra* note 13, at Part 1.

286. Uhl, *supra* note 13, at Part 1 (quoting Norton).

287. See Eric Anderson Reece, *Epicurus at the Food Court*, HUMANIST, Jan.-Feb. 2004, at 3, available at http://www.findarticles.com/p/articles/mi_m1374/is_1_64/ai_111979623 (“Americans comprise 5 percent of the world’s population yet consume nearly 25 percent of its resources.”).

288. See Uhls, *supra* note 13, at Part 1 (describing “home” as a condo on the fifteenth floor of a filing cabinet for widows and young professionals); Robert Wright, *The Evolution of Despair*, TIME, Aug. 28, 1995, available at <http://www.time.com/time/magazine/article/0,9171,983355-6,00.html> (suggesting society does not afford the human contact that we, as organisms, require). Unnatural industrial-urban society was labeled “*Gesellschaft*” by the sociologist Ferdinand Tönnies. It represents one main approach to social grouping, based upon instrumental goals, while “*Gemeinschaft*,” a village-like community of individuals based upon family and neighborhood bonds, represents the other. See FERDINAND TÖNNIES, COMMUNITY AND SOCIETY: GEMEINSCHAFT UND GESELLSCHAFT *passim* (C. P. Loomis trans., 1957) (1887). Durden’s goal is to destroy the world of *Gesellschaft* and to replace it with a *Gemeinschaft* world.

289. Ben Summerskill, *Shopping Can Make You Depressed*, THE GUARDIAN, May 6, 2001, http://observer.guardian.co.uk/uk_news/story/0,,486677,00.html.

houses and vast estates, but have no sense of who they are.²⁹⁰ Like Wilson's outsider, Tyler Durden is the man who sees too deep, and too much.²⁹¹ Like Camus's rebel,²⁹² he is the man who says no and rejects the world he has been handed. Tyler defies our world, and vows to undo it.

Like others of the X generation,²⁹³ Tyler Durden was born into a precariously balanced world that feared and trembled in the cold-war shadow of the bomb.²⁹⁴ Like others of the nuclear generation, he may have believed—may have *known*—that the world was doomed, and might have asked, “Why build roads and bridges meant to last a century?”²⁹⁵ Why care about the future, when there *is* no future? Tyler Durden was born in a dangerous time, and his institutions gave him little cause for hope.

A child of divorced parents,²⁹⁶ Durden grew up in a nation where community was dying.²⁹⁷ He grew up watching the idealists of the 1960s

290. See Reece, *supra* note 287.

According to my mall's directory of stores, forty-three sell clothes, ten sell shoes, ten sell jewelry, twelve are dedicated to “beauty,” and then there is the food court. A handful of “specialty stores” sell electronics, compact disks, books, and greeting cards. If we imagine the mall itself as the body politic lying sprawled in a field of asphalt, we would have to conclude that what makes the millennial American happy is to be judged solely by outward appearance. If we are honest with ourselves, we have to admit that the happiness of contemporary Americans—especially young Americans—is largely defined by the need for others' approval.

Id. at 4.

291. See COLIN WILSON, *THE OUTSIDER* 9 (new ed. 2001) (quoting Barbusse).

292. See ALBERT CAMUS, *THE REBEL* 13 (Anthony Bower trans., 1956) (“What is a rebel? A man who says no. . . . He means, for example, that ‘this has been going on too long,’ ‘up to this point yes, beyond it no,’ ‘you are going too far.’ . . . In other words, his no affirms the existence of a borderline.”).

293. See DOUGLAS COUPLAND, *GENERATION X: TALES FOR AN ACCELERATED CULTURE passim* (1991) (describing three fictitious lives of Generation X members). Generation X includes those born between about 1968 and 1979. U.S. CENSUS BUREAU, *GENERATION X SPEAKS OUT ON CIVIC ENGAGEMENT AND THE DECENNIAL CENSUS: AN ETHNOGRAPHIC APPROACH* at v (2003), available at <http://www.census.gov/pred/www/rpts/Generation%20X%20Final%20Report.pdf>.

294. See ALLAN M. WINKLER, *THE COLD WAR: A HISTORY IN DOCUMENTS* 71 (2003) (“During the 1950s and 1960s, the United States found itself involved in cold war confrontations around the world. . . . Throughout these decades, the cold war dominated all phases of American life. Nuclear weapons were a constant source of anxiety. . . .”).

295. JAMES GLEICK, *GENIUS* 3 (1992) (quoting Richard Feynman).

296. See Uhls, *supra* note 13, at Part 4 (describing Norton's father as a man who periodically went from town to town, starting new families, “setting up franchises”).

297. See John Zerzan, *Seize the Day*, <http://www.johnzerzan.net/articles/seize-the-day.html> (last visited Jan. 14, 2007) (“As much as we yearn for community, it is all but dead.”). Zerzan's requiem is based in real research. Social scientists report that our social networks are shrinking. See Miller McPherson et al., *Social Isolation in America: Changes in Core Discussion Networks over Two Decades*, 71 *AM. SOCIOLOGICAL REV.* 353, 371 (2006) (“The number of people who have someone to talk to about matters that are important to them has declined dramatically, and the number of alternative discussion partners has shrunk.”). In 1985, the most common response from Americans was that they had three confidants; in 2004, the most common answer is that they have *none*. *Id.* at 353. Many of us have substituted the friends on *Friends* for real companionship.

and the activists of the 1970s sell out and become the rapacious “greed is good” capitalists of the 1980s.²⁹⁸ This older generation made fortunes, but were unhappy and miserable nonetheless.²⁹⁹ As children, Tyler’s generation was flooded with television images of assassinations, protests, and riots. Accordingly, as young adults, they associated politics with the scandals of Watergate,³⁰⁰ ABSCAM,³⁰¹ and Iran-Contra.³⁰² But they knew corruption was not limited to the nation’s capitol. Although Reagan-era economics arguably did not “trickle-down,” corruption *did*. Tyler’s generation saw the Catholic Church linked to widespread sex abuse,³⁰³ and associated police departments with Serpico,³⁰⁴ Rodney King,³⁰⁵ and the Los

and know *Seinfeld’s* neighbors better than we know our own. Fromm presciently wrote, “Alienation as we find it in modern society is almost total: it pervades the relationship of man to his work, to the things he consumes to the state, to his fellow man, and to himself.” ERICH FROMM, *THE SANE SOCIETY* 114 (1965).

298. The catch phrase comes from the film, *Wall Street*. WALL STREET (Twentieth Century Fox 1987) (“Greed, for lack of a better word, is good.”). The phrase has its roots in reality, however. During a 1985 commencement address at UC Berkeley, arbitrager (and insider-trader), Ivan Boesky, told the graduates, “Greed is all right. . . . I want you to know that. I think greed is healthy. You can be greedy and still feel good about yourself.” JAMES COLEMAN, *THE CRIMINAL ELITE* 87 (5th ed. 2002) (quoting Ivan Boesky).

299. See TOM WOLFE, *THE BONFIRE OF THE VANITIES passim* (1987) (satirizing the status-obsessed culture of New York City in the 1980s).

300. See, e.g., *United States v. Nixon*, 418 U.S. 683, 707 (1974) (holding the Supreme Court makes ultimate decisions in constitutional controversies and that no person, not even the president, is completely above the law); MICHAEL SCHUDSON, *WATERGATE IN AMERICAN MEMORY: HOW WE REMEMBER, FORGET, AND RECONSTRUCT THE PAST* 3 (1992) (describing the Watergate scandal and its impact on American culture); Faye Jones, *Bibliography, Twenty-Five Years After Watergate: A Selective Bibliography*, 51 HASTINGS L.J. 793 *passim* (2000) (reviewing response to scandal); Nixon White House Phone Calls, <http://www.c-span.org/executive/presidential/nixon.asp> (providing audio of Watergate tapes); Watergate Chronology, <http://www.washingtonpost.com/wp-srv/onpolitics/watergate/chronology.htm> (detailing key events in Watergate scandal).

301. See, e.g., *Congress Feels the Sting*, U.S. NEWS & WORLD REPORT, Feb. 18, 1980, at 19 (describing FBI bribery sting of members of Congress); *Abscam’s Toll*, TIME, Aug. 24, 1981, at 20, available at <http://www.time.com/time/magazine/article/0,9171,949365,00.html> (describing penalties associated with bribery and conspiracy convictions).

302. See, e.g., PETER KORNBLUH & MALCOLM BYRNE, *THE IRAN-CONTRA SCANDAL: THE DECLASSIFIED HISTORY* xxi (1993) (providing 100 primary sources involved in the scandal); LAWRENCE E. WALSH, *FIREWALL: THE IRAN-CONTRA CONSPIRACY AND COVER-UP* xv (1998) (describing events from the prosecutor’s perspective).

303. See, e.g., Beth Wilbourn, Note, *Suffer the Children: Catholic Church Liability for the Sexual Abuse Acts of Priests*, 15 REV. LITIG. 251, 251-52 (1996) (reporting between 1983 and 1992, the Vatican Embassy had documented more than 400 allegations of sexually abusive priests).

304. See PETER MAAS, *SERPICO passim* (1973) (describing rampant police corruption among the New York Police Department).

305. See *Koon v. United States*, 518 U.S. 81, 85 (1996) (considering application of sentencing guidelines in convictions of police officers in Rodney King beating); Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 524-34 (1994) (reviewing events of the *United States v. Koon* trial); Abraham L. Davis, *The Rodney King Incident: Isolated Occurrence or a Continuation of a Brutal Past?* 10 HARV. BLACKLETTER J. 67, 67 (1993) (“What happened to [Rodney King] was

Angeles Police Department's Ramparts Division.³⁰⁶ Neither the nuclear family, nor the marketplace, nor the government, nor the church afforded his generation any real hope.

Tyler Durden's generation came of age while AIDS was emerging;³⁰⁷ they accepted "mcjobs" because the baby boomers had usurped all the careers;³⁰⁸ and they grew up in an America that was increasingly dominated by shopping malls filled with franchise chains and corporate fast-food outlets.³⁰⁹ His generation, perhaps for the first time in American history, could not realistically expect to possess the quality of life that their parents' generation had enjoyed.³¹⁰ His generation saw the war in Vietnam yield to the war on drugs,³¹¹ and saw the prison population soar.³¹²

not an isolated occurrence, but merely one example of what has happened to Blacks persistently before and after this incident.").

306. See, e.g., David W. Burcham & Catherine L. Fisk, *Symposium, The Rampart Scandal: Policing the Criminal Justice System*, 34 LOY. L.A. L. REV. 537, 537-38 (2001) (providing overview of scandal); Lou Cannon, *One Bad Cop*, N.Y. TIMES MAGAZINE, Oct. 1, 2000 (recounting corrupt activities of Rafael Perez and other Ramparts substation officers).

307. See RANDY SHILTS, *AND THE BAND PLAYED ON passim* (1987) (tracing the early history of AIDS epidemic). The spread of AIDS has changed society in ways that could not be imagined twenty years ago. For example, there is now a body of sociological literature focusing on "bug chasers," individuals who intentionally seek to become infected with the HIV virus. E.g., Richard Tewksbury, "[Click here for HIV](#)": *An Analysis of Internet-Based Bug Chasers and Bug Givers*, 27 DEVIANT BEHAVIOR 379 (2006).

308. See Merriam-Webster: 'McJob' is Here to Stay, CNN.com, Nov. 11, 2003, <http://www.cnn.com/2003/SHOWBIZ/books/11/11/offbeat.mcjob.ap/> (defining term as "a low-paying job that requires little skill and provides little opportunity for advancement").

309. There are more than 47,000 shopping malls in America, and more than 10,000 of them were constructed since 1990. See U.S. Census Bureau, *Facts for Features*, http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/005870.html (Dec. 19, 2005). Reece suggests that the mall, more than any other social sphere, has debased the ideal of freedom. Reece, *supra* note 287, at 4. In shopping malls, freedom is exercised by shopping in the same hundred or so stores that populate every mall in America. According to Reece, "[T]he mall isn't a realm of public speech but of quiet consumption." *Id.* "The American dream has become a dream of accumulation." *Id.* Reece also laments the state of the food courts, writing, "Alas, the food court. Try to imagine what a U.S. city street looked like before it was lined with the fast food industry's gaudy, intrusive signs and vapid architecture. This landscape is so artificial, redundant, and lacking in character that we simply become immune to it." *Id.* But as Schlosser notes, the fast-fooding of the American people extends well beyond the mall. See ERIC SCHLOSSER, *FAST FOOD NATION* 3 (2002).

In 1970, Americans spent about \$6 billion on fast food; in 2001, they spent more than \$110 billion. Americans now spend more money on fast food than on higher education, personal computers, computer software, or new cars. They spend more on fast food than on movies, books, magazines, newspapers, videos, and recorded music—combined.

Id. at 3.

310. See, e.g., American Society of Newspaper Editors, *Busting Myths About Generation X*, <http://www.asne.org/index.cfm?ID=767> (last visited Nov. 5, 2007) ("Xers cannot take for granted that they'll be any better off tomorrow than they are today. They cannot even assume that they will do any better than their parents did.").

311. See J.C. Oleson, *The Punitive Coma*, 90 CALIF. L. REV. 829, 831 n.3 (2002) (tracing history of the war on drugs from Nixon in 1971 to Reagan in 1982 to Bush in 1989).

Tyler Durden's generation was another beat generation.³¹³ As the norms of the liberal 1960s and 1970s clashed against the conservative values of the 1980s and 1990s, anomie prevailed. Against the normlessness of an anomic state, Tyler's generation grew up in a world of uncertain values and shifting expectations. The titillation of sex was everywhere, on television and movies and billboards and music, but real sex was deadly.³¹⁴ Pornography, which had been a largely underground phenomenon for his parents' generation, became a multi-billion dollar industry during Durden's young adulthood. In 1996, Americans spent more than \$8 billion on hardcore videos, peep shows, live sex acts, adult cable programming, sexual vices, computer porn, and sex magazines—an amount much larger than Hollywood's domestic box office receipts and larger than all the revenues generated by rock and country music recordings. Americans now spend more money at strip clubs than at Broadway, off-Broadway, regional, and nonprofit theaters; at the opera, the ballet, and jazz and classical music performances—combined.³¹⁵

Drugs were another source of uncertain expectations for Durden's generation. The 1960s and 1970s had been marked by liberal use of marijuana and a move toward decriminalization.³¹⁶ During the 1980s and 1990s, however, America experienced a “drug ‘panic,’”³¹⁷ and assumed an increasingly punitive attitude toward illicit drug use.³¹⁸ Curiously, though,

312. See, e.g., *id.* at 833-36 (2002) (describing explosive growth of U.S. prisons).

To put the . . . incarcerated population into perspective, try to imagine constructing a giant prison. If you erected a razor wire fence around both North and South Dakota and counted every living man, woman, and child within that perimeter . . . as prisoners, it still would not equal the current jail and prison population. One could then erect a second razor wire fence around the entire state of Wyoming . . . and still it would not total the current incarcerated population.

Id. at 835, n.24 (figures omitted).

313. See STEVEN WATSON, *THE BIRTH OF THE BEAT GENERATION: VISIONARIES, REBELS, AND HIPSTERS, 1944-1960 passim* (1995) (tracing the development of the “Beat Generation”).

314. See WILLIAM STRAUSS & NEIL HOWE, *13TH GEN: ABORT, RETRY, IGNORE, FAIL?* 149 (1993) (“Forty years ago, young adults associated sex with procreation; twenty years ago with free love; today, with self-destruction.”).

315. Eric Schlosser, *The Business of Pornography*, U.S. NEWS & WORLD REPORT, Feb. 10, 1997, at 42.

316. See Erich Goode & Nachman Ben-Yehuda, *The American Drug Panic of the 1980s*, in *MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE* 205, 205 (Erich Goode & Nachman Ben-Yehuda eds., 1994) (“The 1970s represented something of a high water mark in both the use and the public acceptance and tolerance of illegal drugs.”).

317. *Id.* (citation omitted).

318. *Id.* Of course, the American public is deeply schizophrenic on the subject of drugs. While it demonizes illicit drugs, it venerates legal pharmaceuticals as “magic bullets” and miracle cures, even if these drugs have the same effects on the user. See Joshua Wolf Shenk, *America's Altered States*, HARPER'S MAGAZINE, May 1, 1999, at 38, available at <http://www.shenk.net/alterd.htm> (last visited Sept. 20, 2006).

marijuana usage did not dramatically change,³¹⁹ and public support for legalization surpassed levels reported during the 1960s and 1970s.³²⁰ Even the definition of life became unclear during Durden's lifetime, leading to ferocious legal battles over abortion³²¹ and euthanasia.³²² Acting in combination, the sense of atomic futility, the consistent failings of social institutions, the anomic uncertainties, and the rapacious materialism are overwhelming.

In a world where the very air is filled with anxiety, malaise, and despair, some members of Tyler Durden's generation sank into a state of anesthetized apathy;³²³ others embraced consumer culture with the pathological zeal of converts, buying their own gas-guzzling SUVs and their own suburban McMansions.³²⁴ They consumed greedily, hungry for meaning but finding only food upon which to gorge. They grew fat, both spiritually and physically.³²⁵ And they persisted in believing that readily-available goods would make them happy, even though research suggests that the truism is not true. Instead of making us happier, shopping may actually be responsible for the depression of consumers.³²⁶

319. See JASON ZIEDENBERG & JASON COLBURN, JUSTICE POLICY INST., EFFICACY AND IMPACT: THE CRIMINAL JUSTICE RESPONSE TO MARIJUANA POLICY IN THE UNITED STATES 6 (2005), available at http://www.justicepolicy.org/images/upload/05-08_REP_EfficacyandImpact_AC-DP.pdf (citing 1988-2003 data from the National Household Survey on Drug Abuse).

320. See Sourcebook of Criminal Justice Statistics Online, <http://www.albany.edu/sourcebook/pdf/t2672005.pdf> (last visited Nov. 9, 2007) (reporting in 1969, twelve percent of respondents supported legalizing the use of marijuana, and reporting support for this view increased to sixteen percent by 1973, twenty-five percent in 1980, twenty-five percent in 1995, and thirty-six percent in 2005).

321. *E.g.*, *Roe v. Wade*, 410 U.S. 113, 116 (1973).

322. *E.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 705 (1997); *Vacco v. Quill*, 521 U.S. 793, 796 (1997).

323. See STRAUSS & HOWE, *supra* note 314, at 126. ("[They] get scolded for having no civic spirit; for feeling no stake in the nation's past crusades or future ideals; for seldom bothering to read the newspapers, learn about public affairs, discuss big issues, or vote for candidates; for just *not caring*."). The dispiritedness of the X generation is not merely stereotyping; it is all too real. "Youth depression rates rose from 2 percent in the sixties to almost 25 percent today, according to Ronald Kessler of Harvard Medical School. Suicide among kids has soared 400 percent since 1950." Joshua Wolf Shenk, *Guns and Roses*, THE NATION, Jun. 14, 1999, at 23.

324. See STRAUSS & HOWE, *supra* note 314, at 114 ("We trust ourselves, and money—period. . . . A lot of this money fixation can be attributed to this generation's premature affluence and its poor economic prospects down the road. . . . [They] trust hard green because their earliest life experiences taught them that you can't trust anything else.").

325. See GREG CRITSER, FATLAND: HOW AMERICANS BECAME THE FATTEST PEOPLE IN THE WORLD *passim* (2003) (describing skyrocketing rates of obesity in the United States); Eileen Salinsky & Wakina Scott, NATIONAL HEALTH POLICY FORUM, OBESITY IN AMERICA: A GROWING THREAT 2-3 (2003), available at http://www.nhpf.org/pdfs_bp/BP_Obesity_7-03.pdf (noting a nearly seventy-five percent increase in obese persons between 1991 and 2001).

326. See Summerskill, *supra* note 289 (reporting a link between shopping and depression).

Indeed, just living in America increases the likelihood of suffering from depression and other psychological disorders,³²⁷ and research suggests that each generation of the twentieth century suffers significantly more than the last.³²⁸ Since World War II, the American rate of depression has doubled.³²⁹ Consumption is our new religion, even if it dehumanizes us, even if it makes us fat, even if it makes us wish that we were dead.

But some fought back against the tide of malaise.³³⁰ Instead of just taking life as it came, they questioned the status quo, asked *how* they should live,³³¹ and asked if what they were living was *life*.³³² These individuals, eyes wide open, saw that the American lifestyle was poisonous, making its citizens sick, unhappy and defeated. They understood that “cultural toxins have now reached dangerously high levels, helping to explain the high school shootings, the skyrocketing use of legal and illegal psychoactive drugs, our growing problems with obesity and psychosomatic illness, rage in public places, and the general sense of cynicism and hopelessness that is enveloping our culture.”³³³ These members of Durden’s generation sought to create personalized meaning, and even amid the horrific malaise of everyday life, found value in authentic lives.³³⁴ Like Durden, they rejected “the shit job, fucking condo world, watching sitcoms,”³³⁵ and they explored

327. See William A. Vega et al., *Lifetime Prevalence of DSM-III-R Psychiatric Disorders Among Urban and Rural Mexican Americans in California*, 55 ARCHIVES OF GENERAL PSYCHIATRY 771, 776 (1999) (finding the longer Mexican immigrants lived in the United States, the greater their likelihood of experiencing psychological problems). Perhaps it was accelerated American culture that caused Tyler Durden’s mental illness. Ng suggests that Tyler Durden’s MPD is a “mode of resistance against the process of symbolic emasculation initiated by postmodern culture.” Ng, *supra* note 11, at 134.

328. See Myrna Weissman et al., *The Changing Rate of Major Depression*, 268 J. AM. MEDICAL ASS’N 3098, 3100 (1992).

329. *Id.*

330. Paul Fussell outlines a strategy for opting out of a materialist, class-stratified society, suggesting that with courage and imagination people can break out of the socio-economic hierarchy and live as “X” people. PAUL FUSSELL, CLASS 179-87 (1983).

331. See WILSON, *supra* note 291, at 66 (“The man who is interested to know how he should live instead of merely taking life as it comes, is automatically an Outsider.”).

332. See THOREAU, *supra* note 18, at 222 (“I went to the woods because I wished to live deliberately, to front only the essential facts of life, and see if I could not learn what it had to teach, and not, when I came to die, discover that I had not lived. I did not wish to live what was not life, living is so dear. . .”).

333. Kalle Lasn & Richard DeGrandpre, *Toxic Culture USA*, Jul.-Aug. 2001, <http://www.adbusters.org/metaps/psycho/prozacspotlight/toxicculturetour/index.htm>.

334. This is a decidedly existentialist approach to life. See Ng, *supra* note 11, at 116 (“*Fight Club* neatly packages existentialism for the scarcely uninitiated in both its thematic concerns and adequate doses of rather ‘hip’ phrases that smack profoundly of the philosophy.”).

335. Uhls, *supra* note 13, at Part 4 (quoting Pitt).

new possibilities.³³⁶ A few affirmatively pushed back against the tsunami of brands and labels and advertising,³³⁷ struggling against a world in which psychopathic corporations have usurped the role of nation states.³³⁸ But good intentions and half-measures are not enough for Tyler Durden. Not content with small-scale culture jamming,³³⁹ *Fight Club*'s Tyler Durden seeks to do something decisive. So he blows up eleven buildings in his bid to end modern civilization.

Tyler Durden seeks to destroy the consumer society, but is more than a nihilist. Mathews suggests that Durden hopes to raze the existing landscape—to tear away the old structures of the world—and starting with a *tabula rasa*, to build a new Garden of Eden.³⁴⁰ At one point, sounding like a benevolent father figure, Pitt describes his vision of this new world to Norton:

In the world I see—you're stalking elk through the damp canyon forests around the ruins of Rockefeller Center. You will wear leather clothes that last you the rest of your life. You will climb the wrist-thick kudzu vines that wrap the Sears Tower. You will see tiny figures pounding corn and laying-strips of venison on the empty car pool lane of the ruins of a superhighway.³⁴¹

Pitt's utopia is nothing novel. Development critics have been arguing for something analogous for decades: Jacques Ellul wrote *The*

336. Poets and philosophers tend to address these themes better than do lawyers. Rilke wrote beautifully of the tragedy of those who cleave to the status quo, and the nobility of those who seek out new possibilities:

[I]f we think of this existence of the individual as a larger or smaller room, it appears evident that most people learn to know only a corner of their room, a place by the window, a strip of floor on which they walk up and down. Thus they have a certain security. . . . We, however, are not prisoners. No traps or snares are set about us, and there is nothing which should intimidate or worry us. . . . We have no reason to mistrust our world, for it is not against us. Has it terrors, they are *our* terrors; has it abysses, those abysses belong to us; are dangers at hand, we must try to love them.

RAINER MARIA RILKE, LETTERS TO A YOUNG POET 68-69 (M.D. Herter Norton trans., rev. ed. 1954) (1929).

337. See KLEIN, *supra* note 14, at 37 (describing the flipping point at which buses and taxicabs no longer bore advertisements, but *became* advertisements—"Now buses, streetcars and taxis, with the help of digital imaging and large pieces of adhesive vinyl, have become ads on wheels, shepherding passengers around in giant chocolate bars and gum wrappers, just as Hilfiger and Polo turned clothing into wearable brand billboards."). She describes a whole town that has been privatized and branded. *Id.* at 38.

338. See THE CORPORATION (Big Picture Media Corp. 2003) (recounting characteristics of the psychopath, and noting that all of these characteristics are readily apparent in corporate entities).

339. See Part IV.B for discussion of culture jamming.

340. Mathews, *supra* note 11, at 96.

341. Uhls, *supra* note 13, at Part 4 (quoting Pitt).

Technological Society in 1964;³⁴² Alvin Toffler published *Future Shock* in 1970;³⁴³ and Daniel Quinn published *Ishmael* in 1992.³⁴⁴ Since the 1990s, John Zerzan has argued that modern (agricultural and industrial) society is inherently oppressive and discriminatory, and has advocated a shift to a harmonious way of life based on Paleolithic hunter-gatherers.³⁴⁵ Derrick Jensen has claimed that industrial society is unsustainable, based upon the exploitation of natural resources and indigenous peoples; he has urged people to consider how to deal with a society that will not voluntarily stop destroying the environment, eliminating indigenous cultures, exploiting the poor, and killing resisters.³⁴⁶ This general approach has been called primitivism, or anarcho-primitivism. On standard accounts, anarchism rejects states as both undesirable and unnecessary and proposes in their place a variety of alternative forms of collective existence. Anarcho-primitivism pushes the envelope by rejecting civilization entirely, and proposes in its place some sort of primitive or feral community, most popularly some sort of hunter-gatherer society.³⁴⁷ That is the world Pitt seeks—a *Gemeinschaft* world of anarcho-primitivists where people value life because they play an active role in sustaining it.³⁴⁸

Ultimately, Durden wants to nudge people into a state of wakefulness,³⁴⁹ or into the awareness of freedom that Kierkegaard called “dread.”³⁵⁰ By rejecting the crutch of technology, and by immersing people in hunter-gatherer conditions that better match the circumstances under

342. JACQUES ELLUL, *THE TECHNOLOGICAL SOCIETY* 71 (John Wilkinson, trans., Alfred A. Knopf, Inc. 1964) (1954) (suggesting technological society creates an artificial system that subordinates the natural world). Ellul’s book was influential in shaping the views of the Unabomber. See *infra* text accompanying note 453.

343. ALVIN TOFFLER, *FUTURE SHOCK* (Bantam Books, Inc. 1970) (describing accelerating pace of the world as we move from a hunter-gatherer lifestyle to agriculture to industrialization to a super-industrial society).

344. DANIEL QUINN, *ISHMAEL* 69 (1992) (contrasting a world of “takers,” who view the world as here for them, against “leavers,” who view themselves as here for the world).

345. See, e.g., JOHN ZERZAN, *FUTURE PRIMITIVE AND OTHER ESSAYS passim* (1994). The websites www.primitivism.com and www.insurgentdesire.org.uk contain more than a score of Zerzan’s essays.

346. See DERRICK JENSEN, *ENDGAME passim* (2006).

347. Dan Savia, *John Zerkan, Ed. Against Civilization*, 17 *Utopian Studies* 285 (2006) (book review).

348. See *supra* note 288 and accompanying text.

349. See THOREAU, *supra* note 18, at 212.

The millions are awake enough for physical labor; but only one in a million is awake enough for effective intellectual exertion, only one in a hundred millions to a poetic or divine life. To be awake is to be alive. I have never yet met a man who was quite awake.

Id.

350. See Bennett, *supra* note 10, at 3 (equating Norton’s quest for experience—for both himself and others—as akin to Kierkegaard’s state of dread).

which we evolved, Tyler Durden hopes to lend real meaning to lives that the consumer culture has stripped of meaning.

Even in a world where everyday life has been marketed and commoditized, where one's identity is defined by the brands one buys,³⁵¹ there are still ways to rebel. Tyler Durden's fiery destruction of eleven buildings is but one stop on a sliding scale of culture-jamming that ranges from subtle, passive gestures all the way up to homicide.

B. CULTURE JAMMING

In many ways, culture jamming is a subjective gloss applied to unlawful conduct. When a jammer switches the voice boxes in hundreds of talking Barbie and G.I. Joe dolls,³⁵² he might claim that he was helping people see through gender stereotypes; the affected toy store, however, might claim it was an intentional tort. When a jammer samples and modifies another musician's work, she might claim that she created new music, using *bricolage*; the original musician, however, might claim it was copyright infringement.³⁵³ When a jammer modifies a billboard, changing the words "It's the Cheese" into "It's the Greed (What Feeds All Those Start Ups)",³⁵⁴ he might claim that he is transforming California's iconic cheese logo into a social critique, drawing consumer attention to a social ill. The police officer who catches him, however, might insist that it was vandalism. But the objective of the culture jammer is different from that of the copyright-infringing merchant or the vandalizing graffiti artist. The jammer does not seek profit or turf. The jammer wants to make you think.³⁵⁵ In *Fight Club*, many of the project mayhem homework assignments were culture jams.³⁵⁶ Bennett writes:

351. See KLEIN, *supra* note 14, at 8 (describing brand targeting of youth).

352. Fahimian, *supra* note 14, at 8. This jam was the work of ®™ark (pronounced "art mark").

353. See *id.* (describing threatened lawsuits over the release of *Deconstructing Beck*).

354. California Department of Corrections, <http://www.geocities.com/billboardcorrections/> (last visited Nov. 23, 2007).

355. See *supra* text accompanying note 349. One jammer explains the theory of culture jamming:

Pranks should never be thought of as menial, or light, or pejorative, even. . . . Because pranks are confrontational; pranks are creative; pranks are in that realm of transgressive art; a creative response to ludicrous situations that people find themselves in, in society, faced with illegitimate authority, illogical explanations, and mind-sets that are very, very unhealthy. A good prankster, basically through a creative act, breaks through all of that, and questions that and makes other people participate in that questioning.

Sniggle Theory, <http://www.sniggle.net/theory.php> (last visited Sept. 21, 2006).

356. It is not entirely surprising that culture jamming should find its way into Palahniuk's work. He is a member of the Cacophony Society, a "randomly gathered network of individuals

Far from being simply acts of masculine bravado or even a revolutionary assault on capitalism, the nasty tricks played by Jack and Tyler—from the splicing of pornography into family films and guerrilla waiting to the fighting, soap making, and terrorist mayhem—are perhaps better understood within this existentialist tradition as attempts to reclaim . . . human beings’ “burden of freedom” in a world that has succumbed to the easy IKEA comforts of Danish modernist furniture.³⁵⁷

Culture jamming, the usurpation of mass media to produce negative commentary about itself, has been defined by Eco as “semiological guerrilla warfare”³⁵⁸ and by Klein as “the practice of parodying advertisements and hijacking billboards in order to drastically alter their messages.”³⁵⁹ Culture jamming, however, actually includes more than advertisements and billboards, encompassing a wide swath of behaviors. Dery writes:

An elastic category, culture jamming accommodates a multitude of subcultural practices. Outlaw computer hacking *with the intent of exposing institutional or corporate wrongdoing* is one example; “slashing,” or textual poaching, is another. . . . Transmission jamming; pirate TV and radio broadcasting; and camcorder countersurveillance (in which low-cost consumer technologies are used by DIY muckrakers to document police brutality or governmental corruption) are potential *modus operandi* for the culture jammer. So, too, is media activism such as the cheery immolation of a mound of television sets in front of CBS’s Manhattan offices—part of a protest against media bias staged by FAIR (Fairness and Accuracy In Reporting) during the Gulf War—and “media-wrenching” such as ACT UP’s disruption of *The MacNeill/Lehrer Newshour* in protest of infrequent AIDS coverage. A somewhat more conventional strain of culture jamming is media-watch projects such as Paper Tiger Television, an independent production collective that produces segments critiquing the information industry; Deep Dish TV, a grassroots satellite network that distributes free-thinking programming to public access cable channels nationwide; and Not Channel Zero, a collective of young

united in the pursuit of experiences beyond the pale of mainstream society through subversion, pranks, art, fringe explorations and meaningless madness.” The Cacophony Society, <http://cacophony.org> (last visited Sept. 25, 2006).

357. Bennett, *supra* note 10, at 3.

358. See UMBERTO ECO, *Towards a Semiological Guerrilla Warfare*, in TRAVELS IN HYPERREALITY 135-44 (1986).

359. KLEIN, *supra* note 14, at 280.

African-American “camcorder activists” whose motto is “The Revolution, Televised.” And then there is academy hacking—cultural studies, conducted outside university walls, by insurgent intellectuals.³⁶⁰

It may be useful to think about culture jamming as existing across a spectrum, ranging from passive conduct,³⁶¹ through behavior that is creative (without damaging the property of others),³⁶² through behavior that is creative and provocative (but damages the property of others),³⁶³ to the outer periphery: destructive behavior that verges on terrorism.

Near this outer limit lies Durden’s demolition of eleven corporate headquarters. His behavior did not exhibit the creativity typically associated with culture jamming, but it achieved a monumental primitivist goal. It is unclear whether Durden cared that the explosions could kill people,³⁶⁴ but many activists *do* distinguish acts of political violence that target property from those that target people.³⁶⁵ This distinction, however, is not as clear as some pretend.³⁶⁶ Destroying property is—like imposing a criminal fine or winning a civil judgment—a form of (latent) violence. The difficult question, then, is whether a culture jammer is justified in injuring and killing other people in order to realize an anti-corporate objective. Even Mahatma Gandhi and Henry David Thoreau—society’s poster boys of

360. Dery, *supra* note 14.

361. Examples include participating in *Adbusters’* “Buy Nothing Day” or “TV Turnoff Week.” See Fahimian, *supra* note 14, at 8 (describing *Adbusters’* campaigns). Various forms of nonviolent civil disobedience are regularly employed by jammers, including this imaginative one:

The ritual consists of interested humans arriving at a predetermined Wal-Mart at 12 noon on the first Sunday of every month and proceeding to push empty shopping carts slowly and silently through the aisles. Eventually, all of the participants locate one another and form a single-file chain of anti-shoppers which weaves, wanders, and whirls throughout the different departments of the store for about an hour. Overall, it is a soothing and fun experience for the actors, and perhaps a memorable spectacle for shoppers. It is a collective reclamation of space that is otherwise only used for buying and selling. It is a symbolic display of the will to resist the capitalist ideology. And, it is a living, breathing, moving, evolving sculpture.

Commerce Jamming, <http://www.sniggle.net/commerce.php> (last visited Sept. 25, 2006).

362. The spoof advertisements featured in *Adbusters* magazine and the music of Negativland are good examples of non-destructive, creative jamming. Many people are familiar with “7 O’Clock News/Silent Night” by Simon and Garfunkel. Layering narrative from the evening news upon a traditional Christmas song, the combination results in a powerful political statement. See Simon & Garfunkel, *7 O’Clock News/Silent Night*, on PARSLEY, SAGE, ROSEMARY AND THYME (Sony 1966).

363. Billboard modification is one example of creative jamming that damages property. See *supra* text accompanying note 354.

364. See *supra* note 104 and accompanying text (describing Pitt’s callousness).

365. See Andrew Calabrese, *Virtual Nonviolence? Civil Disobedience and Political Violence in the Information Age*, 6 INFO 326, 335 (2004) (suggesting there is a fundamental difference between throwing a rock through a window and throwing a rock at a person).

366. *Id.* (citing examples of tree spiking and construction site monkeywrenching).

nonviolent civil disobedience—did not condemn violence in all situations.³⁶⁷ Perhaps acts of violence—even lethal violence—are justified if they can save thousands (or millions) of people from suffering.³⁶⁸ While we do not customarily think of letter bombs as a medium for culture jamming, it is precisely this difficult question—whether a culture jammer is justified in injuring and killing other people in order to realize an anti-corporate objective—which the case of Theodore Kaczynski forces us to confront.

C. THEODORE KACZYNSKI

On January 22, 1998, “Unabomber” Theodore John Kaczynski pleaded guilty to thirteen federal bombing offenses and acknowledged responsibility for sixteen bombings that took place between May 1978 and April 1995.³⁶⁹ The Kaczynski case is relevant both because Kaczynski—like the fictional Tyler Durden—engaged in serious criminal conduct in order to save the world from itself, and because his case—referred to as the “non-trial of the century”³⁷⁰—reveals a great deal about the murky relationship between the medical concept of mental illness and the legal concept of insanity.

The facts of the Kaczynski case are straightforward and sad. Kaczynski, a precocious but introverted young man,³⁷¹ started at Harvard

367. See JOAN V. BONDURANT, CONQUEST OF VIOLENCE: THE GANDHIAN PHILOSOPHY OF CONFLICT 28 (1988) (“Gandhi guarded against attracting to his *satyagraha* movement those who feared to take up arms or felt themselves incapable of resistance. ‘I do believe,’ he wrote, ‘that where there is only a choice between cowardice and violence, I would advise violence.’”); Henry David Thoreau, A Plea for Captain John Brown (1859), available at <http://www.vcu.edu/engweb/transcendentalism/authors/thoreau/johnbrown.html> (last visited Sept. 21, 2006) (“I do not wish to kill nor to be killed, but I can foresee circumstances in which both these things would be by me unavoidable.”).

368. Act utilitarians and rights theorists disagree about whether it is permissible to kill an innocent person in order to save the lives of many. See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 28-29 (1974); JAMES RACHELS, THE ELEMENTS OF MORAL PHILOSOPHY 100-01 (1986); H. J. McCloskey, *A Non-Utilitarian Approach to Punishment*, in CONTEMPORARY UTILITARIANISM 248 (Michael D. Bayles ed., 1968). The utilitarian approach to social harms underlies the principle of necessity. See, e.g., Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 CRIM. L. & CRIMINOLOGY 289, 291-96 (1974) (outlining defense). Of course, it is extraordinarily difficult to establish necessity in a case of politically motivated crime. See Michael D. Schwartz, *The Use and Abuse of the Necessity Defense in Criminal Cases: In Politically Motivated Cases the Defense Will Invariably Be Denied*, 20 LOS ANGELES LAW. 24, 27, 28 (1997) (suggesting if “legal” alternatives to politically motivated illegal acts exist, the necessity defense will fail).

369. J.C. Oleson, “*Evil the Natural Way*”: *The Chimerical Utopias of Henry David Thoreau and Theodore John Kaczynski*, 8 CONTEMP. JUST. REV. 211, 218 (2005).

370. Michael Mello, *The Non-Trial of the Century: Representations of the Unabomber*, 24 VT. L. REV. 417, 417 (2000).

371. See ALSTON CHASE, HARVARD AND THE UNABOMBER: THE EDUCATION OF AN AMERICAN TERRORIST 156-79 (2003).

University at the age of sixteen.³⁷² After graduating at twenty, he attended graduate school, studying mathematics at the University of Michigan, where his Ph.D. dissertation won the departmental prize for the year.³⁷³ Upon graduation, he accepted a position as an assistant professor of mathematics at the University of California, Berkeley, but soon resigned, telling his father that he did not wish to teach engineers how to build bombs.³⁷⁴ Kaczynski moved to Lincoln, Montana, where, upon a 1.4 acre plot of land that he had purchased with his brother, he constructed a ten by twelve foot cabin, reminiscent of that constructed by Thoreau.³⁷⁵ During the years he spent in isolation, Kaczynski's reclusiveness curdled into misanthropy.³⁷⁶ He suffered from frustration and an unslakable thirst for revenge.³⁷⁷ His diaries indicate that he vandalized the property of noisy neighbors,³⁷⁸ set booby-traps in the woods,³⁷⁹ and fired a rifle at a helicopter.³⁸⁰ In the fall of 1977, Kaczynski wrote in his diary, "I think that perhaps I could now kill someone."³⁸¹ "Several months later, he planted his first bomb—an explosive device that he left in a parking lot at the University of Illinois, Chicago Circle campus."³⁸² During his seventeen year campaign of terror, sixteen of Kaczynski's hand-crafted bombs would kill three people and injure another twenty-three.³⁸³ It was only after Kaczynski's brother recognized some of the ideas and phrases from the Unabomber manifesto,³⁸⁴ *Industrial Society and Its Future*,³⁸⁵ and after he led the FBI to his brother, Theodore, that the

372. *See id.* at 181.

373. *Id.* at 301.

374. George Anastaplo, *Lawyers, First Principles, and Contemporary Challenges: Explorations*, 19 N. ILL. U. L. REV. 353, 481 (1999).

375. *See* ROBERT GRAYSMITH, UNABOMBER: A DESIRE TO KILL 21-26 (1997).

376. *See* Mello, *supra* note 370, at 484 (describing acts of vandalism and violence).

377. J.C. Oleson, *Book Review of Harvard and the Unabomber: The Education of an American Terrorist*, 5 WESTERN CRIMINOLOGY REV. 70, 72 (2004), available at <http://wcr.sonoma.edu/v5n1/oleson.pdf> (last visited Sept. 22, 2006).

378. CHASE, *supra* note 371, at 338.

379. *Id.*

380. *Id.* at 339.

381. *Id.* at 342.

382. Oleson, *supra* note 377, at 72.

383. *Id.* at 70.

384. *See* CHASE, *supra* note 371, at 109-14 (describing David Kaczynski's agonized decision to contact the FBI).

385. *Industrial Society and Its Future* was published in the September 19, 1995 edition of the *New York Times* and the *Washington Post*. Kaczynski, writing as the terrorist group, FC, had agreed to stop sending bombs if a major newspaper would publish its 35,000-word article. *See* CHASE, *supra* note 375, at 83-87; Statement by New York Times and Washington Post. *Washington Post*, Sept. 19, 1995, A07, available at: <http://www.washingtonpost.com/wp-srv/national/longterm/unabomber/manifesto.pubs.htm>. The manifesto has been published commercially by Jolly Roger Press. *See* FC, THE UNABOMBER MANIFESTO: INDUSTRIAL SOCIETY & ITS FUTURE (1995). The full text of the manifesto is also available on a number of

government was able to conclude the biggest manhunt in U.S. history.³⁸⁶ Theodore John Kaczynski was arrested on April 3, 1996,³⁸⁷ and indicted by a grand jury in June of 1996.³⁸⁸ He pled guilty on January 22, 1998,³⁸⁹ and on May 4, 1998, was sentenced to four consecutive life terms plus thirty years.³⁹⁰ In February 2001, the Ninth Circuit denied Kaczynski's appeal,³⁹¹ and in March 2002, the United States Supreme Court did the same.³⁹²

While the Kaczynski case involved many legal proceedings, there was never a trial. The chronology of the case has been recounted in detail elsewhere,³⁹³ but it is worth noting that, at its root, the Kaczynski case was about *power*, and who—client or counsel—wields that power when defending a capital case.³⁹⁴ Here, Kaczynski's real adversaries were not the death-penalty-seeking prosecutors, but his own lawyers, who sought to present a mental-health defense over their client's protests.³⁹⁵ Luban summarizes Kaczynski's struggle for control:

Kaczynski's lawyers, both of them first-rate federal public defenders, decided to put on a mental defense. The problem was that they could not get Kaczynski to go along. He didn't even want to be interviewed by a psychiatrist. He had his own theory of how he would win acquittal. His lawyers would move to exclude all the evidence seized from his cabin because the search was illegal, and without that evidence the government had no case.

Of course, the chance that the court would exclude the evidence was approximately zero—a mathematician like Kaczynski would

web sites. See, e.g., *Industrial Society and Its Future*, http://www.time.com/time/reports/unabomber/manifesto_toc.html (last visited Nov. 23, 2007).

386. Oleson, *supra* note 369, at 212.

387. CHASE, *supra* note 371, at 376.

388. Joel S. Newman, *Doctors, Lawyers, and the Unabomber*, 60 MONT. L. REV. 67, 72 (1999).

389. CHASE, *supra* note 371, at 376.

390. *Id.*

391. *United States v. Kaczynski*, 239 F.3d 1108, 1119 (2001).

392. *Kaczynski v. United States*, 535 U.S. 933, 933 (2002).

393. See generally MICHAEL MELLO, *THE UNITED STATES OF AMERICA VERSUS THEODORE JOHN KACZYNSKI: ETHICS, POWER, AND THE INVENTION OF THE UNABOMBER* (1999) (providing a detailed analysis of the *Kaczynski* case); Mello, *supra* note 370, 495-502 (describing legal proceedings in the *Kaczynski* case); Newman, *supra* note 388 (same).

394. See generally J.C. Oleson, *Swilling Hemlock: The Legal Ethics of Defending a Client Who Wishes to Volunteer for Execution*, 63 WASH. & LEE L. REV. 147, 154-68 (2006) (describing struggle between abolitionist defenders and their death-row clients who wish to terminate their appeals).

395. See William Finnegan, *Defending the Unabomber*, NEW YORKER, Mar. 16, 1998, at 55 ("His own lawyers, talented idealists intent on saving his life, were striving mightily to label him mentally ill. The prosecutors, meanwhile, intent on having him executed, were ready to accept him as the dead-serious dissident and violent anarchist that his writings said he was.").

say that the chance was “epsilon”—and Kaczynski’s optimism about the strategy was a product of legal naïveté, if not mental disturbance.³⁹⁶

His lawyers knew that mental disturbance was going to be the strongest argument for saving Kaczynski’s life.³⁹⁷ The physical evidence was overwhelming—a search of Kaczynski’s cabin had produced the typewriter used to type all identifiable Unabomber correspondence since 1982, a carbon copy of the manifesto (the original had been mailed to *The New York Times*), documents including the names and occupations of Unabomber victims, binders memorializing Kaczynski’s bomb-making experiments, and a fully functional improvised explosive device resembling other Unabomber devices.³⁹⁸ No one disputed that Kaczynski had built and sent the bombs.³⁹⁹ Thus, it was obvious to Kaczynski’s lawyers that psychiatric evidence was the best defense, even if Kaczynski refused to accept it.

His lawyers reassured him that the psychiatric evidence would be used only at the penalty stage if he was convicted, not at the guilt stage, and Kaczynski, convinced that the case would never get to the penalty stage because he would be acquitted, relented, and spoke to the psychiatrist. Apparently, his lawyers also reassured him that the main reason they wanted him to speak with a psychiatrist was to gather evidence to refute media assertions that he was demented. But then they double-crossed him. At the last minute, they announced that at the guilt phase they would undertake the mental defense—the only one that might save his life. Stunned and helpless, Kaczynski demanded to represent himself rather than let his lawyers put on the mental defense.⁴⁰⁰

At first, the judge tentatively granted Kaczynski’s request, conditioning it upon a *Faretta* hearing to determine his competence.⁴⁰¹ On January 20, 1998, after Kaczynski had been subjected to a marathon psychiatric

396. David Luban, *Lawyers as Upholders of Human Dignity (When They Aren’t Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 827 (2005).

397. See MELLO, *supra* note 393, at 45 (“[T]heir strongest argument to save their client’s life would be a mental defect defense.”).

398. See GRAYSMITH, *supra* note 375, at 475-81 (inventorying evidence recovered from Kaczynski’s cabin).

399. See David S. Jackson, *A Better Defense for the Unabomber?*, available at http://www.time.com/time/reports/unabomber/980127_jackson.html (last visited Sept. 25, 2006) (quoting attorney Tony Serra, the lawyer with whom Kaczynski had hoped to replace his lawyers, as saying, “[Kaczynski] is a man who, if he did it, and I think all sides are conceding that.”).

400. Luban, *supra* note 396, at 828.

401. Newman, *supra* note 388, at 77-78.

evaluation,⁴⁰² both prosecution and defense agreed that Kaczynski was competent to stand trial,⁴⁰³ and on January 21, both sides agreed that Kaczynski was competent to represent himself.⁴⁰⁴ But on January 22, Judge Burrell rejected Kaczynski's request to represent himself, stating that it was not timely.⁴⁰⁵ Unwilling to endure the mental-illness defense his attorneys had prepared (describing him as a paranoid schizophrenic), Kaczynski agreed to a plea bargain in less than an hour.⁴⁰⁶

The most astonishing part of the plea agreement is not that Kaczynski was denied the opportunity to raise an ideologically-based "imperfect necessity" defense,⁴⁰⁷ nor that he was forced into accepting a mental illness defense abhorrent to him.⁴⁰⁸ The remarkable part of Kaczynski's mental health defense was the foundation upon which mental illness was diagnosed.⁴⁰⁹ Some of the mental health professionals who diagnosed Kaczynski never actually met him; others based their diagnoses upon his aversion to psychiatrists,⁴¹⁰ upon interviews of citizens of Lincoln,⁴¹¹ or upon his writings.⁴¹² Even Dr. Sally Johnson, the court-appointed

402. MELLO, *supra* note 393, at 91 (describing Dr. Sally Johnson's evaluation as including twenty-two hours of questioning, review of the transcripts, and examination of material provided by prosecutors and defense attorneys).

403. *Id.* at 93.

404. *Id.* at 107.

405. *Id.* at 117.

406. *Id.* at 121.

407. Defense lawyer Tony Serra had offered to represent Kaczynski with an "imperfect necessity" defense. Serra had successfully employed the defense when he defended the distribution of clean hypodermic needles in Redwood City to halt the spread of AIDS. Serra explains imperfect necessity as a situation in which "you have a bonafide belief that you have to commit a crime in order to avoid a greater harm, but the belief ultimately from the main societal perspective is unreasonable. That's why it's imperfect. . . . It usually results in a lowered culpability but not a complete exoneration." Jackson, *supra* note 399.

408. MELLO, *supra* note 393, at 121 (suggesting Kaczynski pled guilty not because he feared the death penalty, but because it was the only way he could prevent his lawyers from portraying him as crazy).

409. Thomas S. Szasz, author of *The Myth of Mental Illness*, excoriated those who would medicalize crime and deviance. THOMAS S. SZASZ, *LAW, LIBERTY, AND PSYCHIATRY* 108 (1963). "Instead of recognizing the deviant as an individual different from those who judge him, but nevertheless worthy of their respect, he is first discredited as a self-responsible human being, and then subjected to humiliating punishment defined and disguised as treatment." *Id.* Theologian C.S. Lewis had the same reservation. See C.S. Lewis, *The Humanitarian Theory of Punishment*, in *CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS, AND JUSTIFICATIONS* 194-95, 197-98 (Rudolph J. Gerber & Patrick D. McAnany eds., 1972) (insisting that defendants, as human beings, enjoy the right to be held accountable and punished for one's actions).

410. MELLO, *supra* note 393, at 28 ("Kaczynski's very contempt for psychiatry is itself viewed as evidence of mental illness.").

411. See CourtTV.com, Psychological Evaluation of Theodore Kaczynski, <http://www.court tv.com/trials/unabomber/documents/psychological.html> (last visited Sept. 22, 2006) [hereinafter Psychological Evaluation] (citing diagnoses of Dr. Resnick and Dr. Dietz, based in part upon interviews with residents of Lincoln).

412. *Id.*

psychiatrist who interviewed Kaczynski for twenty-two marathon hours over five days, based her diagnosis in part upon Kaczynski's autobiography, diaries (spanning thirty-eight years), and written correspondence.⁴¹³ His symptoms included the "delusion" that technology controls people and the "delusion" that his parents' psychological abuse compromised his ability to relate to women.⁴¹⁴ But as Finnegan notes, "there is no credible evidence that he hears voices, has hallucinations, or is 'out of touch with reality'—unless reality is defined as having conventional social and political views."⁴¹⁵ Mello summarizes the evidence:

The central facts of Kaczynski's illness as it was diagnosed by the psychiatrists retained by his court-appointed defense counsel were (1) his antitechnology politics and (2) the crimes themselves. In short, because Kaczynski hated technology enough to kill and chose to live reclusively in one of the most physically beautiful places in America, he must be out of his mind.⁴¹⁶

After considering the way the judge and the lawyers treated Kaczynski, and Kaczynski's demeanor during the proceedings, Mello wonders if "Theodore Kaczynski wasn't a paranoid schizophrenic after all. The evidence certainly doesn't come close to proving that he is a paranoid schizophrenic or otherwise mentally ill in a way that matters in a court of law."⁴¹⁷ Mello concludes that "he is not crazy[,] . . . not in any way that matters to the law."⁴¹⁸ Thus, despite the lofty pronouncements from the psychiatrists and despite the medicalizing jargon of the *DSM-IV*, it is not at all clear that Kaczynski's belief system was the product of pathology, and

413. *Id.* (finding Kaczynski legally competent but provisionally diagnosing him with "Schizophrenia, Paranoid Type, Episodic with Interepisode Residual Symptoms).

414. *Id.* Mello challenges the notion that Kaczynski suffered from delusions, writing:

If you think Kaczynski is a paranoid schizophrenic, I have a question for you: What are his delusions? The hallmark of paranoid schizophrenia is a delusional architecture: What are Kaczynski's delusions? That the Industrial Revolution has been a mixed blessing? Hardly a delusion. That technology is chipping away at our freedoms and privacy? Hardly a delusion. That committing murder—and threatening to commit more—was the only way to force the New York Times and Washington Post into publishing, in full and unedited, the 35,000-word Unabomber Manifesto? Hardly a delusion. That the powers that be in our culture would define the Unabomber as a pathetic lunatic? Hardly a delusion. That a simple, self-sufficient life, in one of the most physically beautiful places in America, is preferable to the rat-race of academia? Hardly a delusion.

Mello, *supra* note 370, at 472.

415. Finnegan, *supra* note 395, at 61.

416. MELLO, *supra* note 393, at 25.

417. *Id.* at 36-37.

418. *Id.*

not philosophy. What *is* clear, though, is that the same anti-technology beliefs underlying Kaczynski's diagnosis also explain his crimes.

Unlike most cases, where society is left guessing why the criminal committed a crime, Kaczynski has provided the public with a cogent explanation for his crimes. In his manifesto,⁴¹⁹ *Industrial Society and Its Future*, Kaczynski explains in meticulous detail his reasons for mailing bombs. He killed three people and injured twenty-three more in a bid to save the world from the dehumanizing effects of technology.⁴²⁰

Industrial Society and Its Future is a difficult text,⁴²¹ ignored by most and misunderstood by many,⁴²² but it bears careful study. The manifesto is difficult neither because it employs particularly novel or innovative concepts,⁴²³ nor because it relies upon technical language.⁴²⁴ Rather, "the essay eludes the grasp of most readers because it struggles to convey such expansive and nuanced ideas with such pedestrian language."⁴²⁵

The manifesto suggests that modern Americans are slaves, and that our technology has enslaved us.⁴²⁶ The manifesto argues that the Industrial Revolution accelerated the pace of life, enslaved people to technology, and created a dismal social landscape of anomie and apathy.⁴²⁷ This is because, argues the manifesto, human beings have a biological need for a "power

419. Kaczynski never acknowledged writing the manifesto, but there is reason to believe that Kaczynski is its author. See Oleson, *supra* note 369, at 218 (citing content analysis and linguistic matches).

420. *Id.* at 222. Kaczynski's objective resembles that of James Hadfield. See *supra* note 144 and accompanying text. Like Hadfield, Kaczynski sought to save the world. Like Hadfield, he was willing to die to do so. Of course, Hadfield affirmatively sought the death penalty while Kaczynski simply viewed his death as a means of drawing additional attention to the anti-technology themes that justified his crimes:

I am not a selfless idealist and I am not attracted to martyrdom. If I could get out of prison and go back to the mountains, I certainly would do so. But if there is no hope that I will ever be released then my life is of no value to me, so I have no hesitation about sacrificing it.

Mello, *supra* note 370, at 465 (quoting Kaczynski). Kaczynski's view echoes that of another denounced as both mad and criminal: Joan of Arc. "You promised me my life; but you lied. You think that life is nothing but not being stone dead." GEORGE BERNARD SHAW, SAINT JOAN: MAJOR BARBARA: ANDROCLES AND THE LION 150 (1952).

421. Oleson, *supra* note 369, at 218.

422. See James B. Comey, *Address, Fighting Terrorism and Preserving Civil Liberties*, 40 U. RICH. L. REV. 403, 406 (2006) (referring to the manifesto as "wacko"); Finnegan, *supra* note 395, at 61 (quoting James Q. Wilson as saying, "If it is the work of a madman, then the writings of many political philosophers—Jean Jacques Rousseau, Tom Paine, Karl Marx—are scarcely more sane.").

423. Oleson, *supra* note 370, at 219.

424. *Id.*

425. *Id.*

426. *Id.* at 220.

427. *Id.* at 219.

process.”⁴²⁸ To satisfy this need, people must have goals, must exert effort to attain them, and must have a reasonable chance of attaining them.⁴²⁹ In modern society, though, virtually no effort is needed to satisfy biological needs, and people are left psychologically hungry, seeking other mechanisms to satisfy their need for power.⁴³⁰ Accordingly, people focus on wealth or status,⁴³¹ or immerse themselves in work, or identify with groups or organizations.⁴³² These *surrogate* activities, however, cannot satisfy the need for the power process in a meaningful way.⁴³³ “To find *real* fulfillment, people must be able to satisfy their biological needs as individuals. . . . Deprived of autonomy and meaningful goals, [the manifesto concludes,] we have surrendered our freedom.”⁴³⁴

The manifesto states that “technology is fundamentally incompatible with freedom.”⁴³⁵ It also suggests that our appetite for technology is more compelling than our love of freedom.⁴³⁶ Modern humans have become *addicted* to technology.⁴³⁷ Therefore, society employs subtle forms of coercion to socialize behaviors that support the sustainability of technological society.⁴³⁸ The manifesto alludes to dystopian works, comparing America to an Orwellian society of surveillance,⁴³⁹ and comparing our growing use of mood-altering drugs to Huxley’s brave new world of soma.⁴⁴⁰

Because technology is fundamentally incompatible with freedom, and because freedom is indispensable to authentic happiness, the manifesto advocates for the revolutionary overthrow of technology.⁴⁴¹ Such a revolution is not political in nature.⁴⁴² It is a revolution greater than a political revolution, and premised upon the wholesale rejection of technology and our modern approach to living.⁴⁴³ Unlike some primitivists, however, the manifesto does not advance a Paleolithic ideal;⁴⁴⁴ rather, it extols the virtues

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.* at 219-20.

434. *Id.* at 220.

435. *Id.*

436. *Id.*

437. *Id.*

438. *Id.*

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.*

443. *Id.*

444. *See supra* text accompanying note 345 (describing primitivist ideals).

of the nineteenth century American frontier.⁴⁴⁵ The manifesto is clear: It will take a bona fide revolution, executed on an international scale to effectively undo the evils of technology.⁴⁴⁶ The manifesto notes that an “ideology . . . must be FOR something as well as AGAINST something.”⁴⁴⁷ Accordingly, the manifesto suggests that nature —*wild* nature—is a perfect counter-ideal to technology.⁴⁴⁸

Some commentators have expressed disappointment in the work, criticizing it for not saying anything new or important. Sale, for example, has dismissed *Industrial Society and Its Future* as unoriginal and convoluted,⁴⁴⁹ and said that the Unabomber is nothing special, standing “in a long line of anti-technology critics where I myself have stood.”⁴⁵⁰ Snow said it resembled Al Gore’s *Earth in the Balance*.⁴⁵¹ Chase concurred, suggesting that—except for its call to violence—the manifesto’s message is ordinary and unoriginal,⁴⁵² saying the same thing as Jacques Ellul.⁴⁵³ Some, however, view the manifesto as profoundly revolutionary, challenging not only the American status quo but also rejecting the beliefs of those radicals who persist in believing that meaningful change can be effectuated through conventional political channels.⁴⁵⁴ Lydia Eccles writes:

The Manifesto blasphemed everything that knits together the worldview of not only the mainstream, but also that of many reformers and radical critics. Many are able to say that Orwell’s vision threatens. But they think that to become alert to this danger is to solve the problem. They remain caught up in what Jacques Ellul has called “the illusion of politics”—the belief that in a

445. Oleson, *supra* note 370, at 221.

446. *Id.*

447. *Id.*

448. *Id.*

449. Kirkpatrick Sale, *Is There Method in His Madness?*, THE NATION, Sept. 25, 1995, at 305.

450. *Id.*

451. See AL GORE, EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT *passim* (1992) (suggesting loss of biodiversity, depletion of the ozone layer, and global warming require immediate and coordinated action).

452. CHASE, *supra* note 371, at 89.

453. See ELLUL, *supra* note 342, at *passim* (describing *The Technological Society*).

454. Like Kaczynski, Thoreau quit society to escape materialism and was keenly aware of the difficulties involved in changing society through conventional mechanisms. In *Civil Disobedience*, he advocated immediate transgression. THOREAU, *supra* note 18, at 462. “Unjust laws exist: shall we be content to obey them or shall we endeavor to amend them, and obey them until we have succeeded, or shall we transgress them at once?” *Id.* It is not clear whether Thoreau would have condoned Kaczynski’s bombing campaign. Oleson, *supra* note 369, at 224. Thoreau advocated non-violent disobedience, but could imagine circumstances under which violence—even killing—would be unavoidable. See *supra* text accompanying note 367.

democracy we actually shape our future through the political process. Many of the Unabomber's anti-mythical ideas are unthinkable to us, more so than the use of violence. Given the right rationale, our society is willing to kill not only guilty people, but innocent ones as well, and then call it collateral damage. The Unabomber questioned our faith in politics itself, and challenges concepts of self, freedom and happiness. He is a heretic at the deepest level.⁴⁵⁵

Industrial Society and Its Future and the ideals for which it stands is a difficult, radical work. Its author, Theodore Kaczynski, has documented a worldview, drafted a constitution, and declared a call to arms. Furthermore, Kaczynski acted with the courage of his convictions, lived unassisted in the wilds of Montana, and used his formidable intellect to maim and destroy other human beings.

Thus, Kaczynski resembles the character of Tyler Durden in at least three respects. First, Kaczynski, like Durden, was a primitivist who sought to prevent society's blind march into technological enslavement, pointing the way toward a *Gemeinschaft* utopia.⁴⁵⁶ Second, Kaczynski, like Durden, had two aspects or characters. One version of the Unabomber is that of a monster, "cold as a lizard and ambitious as Lucifer."⁴⁵⁷ The other version of the Unabomber is that of a messiah.⁴⁵⁸ Kaczynski did not suffer from MPD, but just as there were two conflicting selves that comprised Tyler Durden,⁴⁵⁹ so there were two Kaczynskis:

One of them, the Kaczynski described in the government's sentencing memorandum, is a modern "Underground Man," a grubby misanthrope who acted not out of ideology but out of revenge. . . . This is the Kaczynski denounced as a madman, as a paranoid schizophrenic and who, in attacking technology and scientists who pursue abstract and meaningless goals, was attacking those parts of his own alienated identity that he had come to despise. If *this* is the Kaczynski who distributed letter bombs to university campuses, then his acts are merely crimes, and reprehensible ones at that. But there is another Kaczynski. This

455. MELLO, *supra* note 393, at 41 (quoting Eccles). A variation on this quote is cited in Mello's article. See Mello, *supra* note 370, at 475-76.

456. See *supra* text accompanying note 288 (describing Durden's goal of establishing a *Gemeinschaft* world).

457. Mello, *supra* note 370, at 435 (quoting Sam Houston).

458. Tony Serra said that Kaczynski "did it not through some kind of loathsome hatred. He did it ultimately to save humanity from self-destruction." Jackson, *supra* note 399.

459. See *supra* note 107 and accompanying text.

Kaczynski is the philosophical author of *Industrial Society and Its Future*, Harvard educated, a former Berkeley mathematic professor who turned his back on the academy and went to the woods. . . . This Kaczynski is a man who did not send bombs because he was vengeful but because he had *hope*; he believed that his acts of violence were *necessary* evils, catalysts to trigger the revolution that would set people free. This is the Kaczynski who . . . acted with violence because it was necessary to achieve a better world.⁴⁶⁰

Third, Kaczynski, like Durden, is sane.⁴⁶¹ Kaczynski is a keenly intelligent man, a genius.⁴⁶² He knew that his actions were criminal. Like, Durden, he knew that, far from being lauded by members of the general public, his crimes would be condemned as immoral.⁴⁶³ He would satisfy neither the M’Naghten test,⁴⁶⁴ nor the federal test for insanity.⁴⁶⁵ And Kaczynski preferred it this way: He did not want to be discounted as a “sickie.”⁴⁶⁶ He believed that he was right; he believed that his bombs were necessary to “save” society.⁴⁶⁷ Kaczynski believed that by sacrificing a few of America’s technological elites and waging a one-man war against

460. Oleson, *supra* note 369, at 224-25 (citations omitted).

461. Under the M’Naghten test of insanity and the oft-employed alter approach to MPD, Durden is legally sane. *See supra* Part III.C (analyzing sanity of Tyler Durden). Similarly, Kaczynski was legally sane. *See supra* notes 404-419 and accompanying text (establishing Kaczynski as competent and sane). Kaczynski may have suffered from psychological disorders such as depression, but these were not crippling enough to render him insane. *See Oleson, supra* note 395, at 170-78 (describing problem of volunteering death row defendants who medically suffer from severe depression yet are legally sane).

462. Chase reports Kaczynski’s childhood IQ as 167. CHASE, *supra* note 372, at 163. Johnson’s assessment placed it at 136. Psychological Evaluation, *supra* note 411. Whether 136 or 167, such an IQ qualifies as borderline-genius. *See* DEAN KEITH SIMONTON, GREATNESS 219 (1994) (describing 132 as “borderline genius”). Only one person in 122 possesses an IQ of 136, and only one in 250,000 has an IQ of 167. IQ Comparison Site, IQ Percentile and Rarity Chart, <http://members.shaw.ca/delajara/IQtable.html> (last visited Nov. 6, 2007). This suggests that Kaczynski’s IQ is as different from average (IQ = 100) as that of someone with mild or moderate mental retardation. *See supra* note 130 and accompanying text. Since the law treats those with mental retardation differently than those with normal cognitive abilities, perhaps individuals with marked intellectual gifts should be treated differently as well, either exculpated for their difference or punished more severely, for having known better. *See Ford v. Wainwright*, 477 U.S. 399, 400 (1986) (prohibiting execution of the insane); *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (prohibiting execution of the mentally retarded).

463. *See Dressler, supra* note 41, at 319-20 (describing Dressler’s hypothetical case). Without the benefit of history, it can be difficult to know who to laud and who to condemn. Many of our greatest reformers and many of our greatest tyrants were “criminals” who violated the laws of their societies.

464. *See supra* note 165 and accompanying text (quoting M’Naghten test).

465. *See supra* text accompanying note 200 (discussing 18 U.S.C. § 17(a)).

466. Mello, *supra* note 370, at 452 (“In his diary, Kaczynski wrote of his fear that his bombing campaign against technology would be dismissed as the work of a ‘sickie.’”).

467. *See supra* note 458 and accompanying text.

modernity, he could draw attention to the costs of development and thereby slow the march toward spiritual Armageddon.⁴⁶⁸

V. CONCLUSION: TAPPING OUT

Fight Club's Tyler Durden, the MPD protagonist represented by Brad Pitt and Ed Norton, used four thousand gallons of nitroglycerin to blow up eleven high-rise buildings and with them, the modern consumer's debt record. Durden destroyed the debt record because he sought to regress humanity to the Paleolithic era,⁴⁶⁹ and to liberate us from a consumer *Gesellschaft*⁴⁷⁰ where we "work jobs we hate so we can buy shit we don't need."⁴⁷¹ He tried to free us from a society in which people shop compulsively, shop desperately, trying to fill the void in their souls.⁴⁷² He tried to liberate us from a world in which humanity has been enslaved by technology,⁴⁷³ in which we are losing our souls, bit by bit.⁴⁷⁴ Like Unabomber Theodore Kaczynski,⁴⁷⁵ Durden engaged in spectacular acts of

468. Kaczynski did not believe that the manifesto would, itself, save humanity from technology. But he believed that by killing people, he could draw attention to a socio-political screed that would otherwise be ignored. *See Industrial Society and Its Future, supra* note 385.

If we had never done anything violent and had submitted the present writings to a publisher, they probably would not have been accepted. If they had been accepted and published, they probably would not have attracted many readers, because it's more fun to watch the entertainment put out by the media than to read a sober essay. . . . *In order to get our message before the public with some chance of making a lasting impression, we've had to kill people.*

Id. (italics added). This belief was not delusional, but quite correct. The *New York Times* and *Washington Post* do not customarily offer full pages to their op-ed authors, but afforded Kaczynski seven full pages. *See supra* note 385 and accompanying text. *See Mello, supra* note 370, at 462 ("The Unabomber's killings were the only reason his manifesto was published; were it not for the bombings, the Post and the Times wouldn't have given Kaczynski space for a 500-word op-ed piece setting forth his critique of technology—much less seven full pages of newspaper.").

469. *See supra* text accompanying note 345 (describing goal of re-establishing hunter-gatherer lifestyle).

470. *See supra* note 288 and accompanying text (describing Tonnies' concepts of *gesellschaft* and *gemeinschaft*).

471. Uhls, *supra* note 13, at Part 3.

472. *See supra* note 289 and accompanying text. Kaczynski would suggest that consumers purchase unnecessary goods as a surrogate for the power process. Oleson, *supra* note 369, at 219-20.

473. *See Oleson, supra* note 369, at 220.

474. Richard Powers, *Losing Our Souls, Bit by Bit*, N.Y. TIMES, July 15, 1998, at A19.

475. Durden and Kaczynski used comparable methods to achieve equivalent objectives. One web site even analogizes the movie *Fight Club* to the *Cliff's Notes* version of *Industrial Society and Its Future*:

[I]f you don't have the energy to read the Manifesto's 232 paragraphs of diatribe, you can get a nicely re-packaged version of its basic tenets in the movie *Fight Club*. The Manifesto's description of modern problems and their probable causes is uncannily convincing, its prediction of a dystopian future quite realistic, and call for action worrisomely compelling.

violence to arrest society's slide into a dystopian future clouded with fear,⁴⁷⁶ hopelessness,⁴⁷⁷ and malaise.⁴⁷⁸ Is that insane?⁴⁷⁹

Until he put a bullet through his face, Durden suffered from dissociative identity disorder.⁴⁸⁰ But MPD is a *medical* diagnosis, while identifying someone as sane or insane is a *legal* judgment.⁴⁸¹ Depending on which test for insanity is used,⁴⁸² and depending on which legal approach to MPD is employed,⁴⁸³ different outcomes are possible. Under the prevailing standards, the M'Naghten test and the alter approach to MPD,⁴⁸⁴ Durden would not be found insane. The alter Pitt knew the nature and quality of his acts, and knew that they were wrong in the eyes of the public.⁴⁸⁵ Nonetheless, research suggests that written tests of insanity do not determine the outcomes in sanity hearings,⁴⁸⁶ and Durden might be exculpated for his offenses because his lifestyle and his beliefs appear alien and incomprehensible to most of the consumer society.⁴⁸⁷

If tried, Tyler Durden—a James Hadfield⁴⁸⁸ for the millennium—would be found not guilty by reason of insanity.⁴⁸⁹ A benign collusion between defense and prosecution, judge and jury, would shepherd him out of the justice system and into the mental health system.⁴⁹⁰ This in spite of

Chris Wenham, *The Unabomber Antifesto*, Mar. 12, 2002, <http://www.disenchanted.com/dis/humanity/unabomber.html>.

476. See Winkler, *supra* note 294, at 71.

477. See Lasn & DeGrandpre, *supra* note 333.

478. See Strauss & Howe, *supra* note 323, at 126.

479. Some would argue that what is *insane* is to ignore these problems, knowing full well that people will not voluntarily undergo a transformation to a sane and sustainable way of living. See JENSEN, *supra* note 346, at 3 (noting that when he asks audiences if our culture will undergo a voluntary transformation to a sane and sustainable way of living, “[t]he answers range from emphatic nos to laughter”).

480. See *supra* note 209 and accompanying text (describing MPD).

481. Oleson, *supra* note 394, at 169.

482. See *supra* Part III.A (outlining tests of insanity).

483. See *supra* text accompanying note 219 (outlining three approaches to MPD).

484. See *supra* Part III.C.3 (evaluating Durden's insanity under the M'Naghten test and the alter approach to MPD).

485. See *supra* text accompanying note 252 (establishing Pitt's awareness).

486. See *supra* text accompanying notes 273-280 (suggesting written standards do not determine outcomes).

487. See Samuels, *supra* note 137, at 199-200 (arguing that the more bizarre the defendant's behavior, the more likely a mental illness defense).

488. See *supra* Part IV.A.3 (reviewing Hadfield's case).

489. See *supra* Part IV.C.3 (suggesting that a talented lawyer might be able to win an insanity acquittal for Durden).

490. Of course, moving from the sphere of punishment (where sentences are determinate or semi-determinate) to the sphere of treatment (where treatment goes on as long as necessary, regardless of the underlying offense) can mean that insane offenders are incapacitated much longer than their sane counterparts. See, e.g., Joseph Goldstein & Jay Katz, *Abolish the Insanity*

what the letter of the law required,⁴⁹¹ and in spite of what Durden wanted.⁴⁹² Tyler Durden would receive psychiatric treatment—not punishment—because, like Hadfield, his messianic objectives had been laudable.⁴⁹³ Because, as a man who had literally been at war with himself, he had already been sufficiently punished by his madness.⁴⁹⁴ But the main reason that he would be found not guilty by reason of insanity is because society could not bear to confront the justification behind Durden’s crime.⁴⁹⁵ It is not ready. Society needed to believe that Kaczynski was a “mad bomber”⁴⁹⁶ because the alternative—a Harvard-educated genius who peered into the inner workings of modernity and was so horrified by it that he could maim and kill other people, and to keep doing it for seventeen

“*Defense*”—*Why Not?* 72 YALE L.J. 853, 868 (1963) (noting that insanity is “a device for triggering indeterminate restraint”).

491. *Supra* note 273 and accompanying text.

492. It happens. For example, using the threat of a mental health defense, Kaczynski’s lawyers coerced him into accepting a plea he did not want. *See supra* text accompanying notes 400-406 (describing negotiation of plea).

493. *See supra* note 144 and accompanying text (describing Hadfield’s salvation-based delusions).

494. *See* CLARE, *supra* note 121 (quoting Roman maxim).

495. The word justification may not be correct. In an oft-cited passage, Hart explains the classic distinction drawn between justification and excuse:

In the case of “justification” what is done is regarded as something which the law does not condemn, or even welcomes. But where killing . . . is excused, criminal responsibility is excluded on a different footing. What has been done is something which is deplored, but the psychological state of the agent when he did it exemplified one or more of a variety of conditions which are held to rule out the public condemnation and punishment of individuals. This is a requirement of fairness or of justice to individuals.

H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 13-14 (1968). The insane are excused from criminal responsibility, because we understand and forgive their conduct, but they are not justified in their conduct, because we do not view their conduct as good. Tyler Durden—suffering from MPD and believing that his crime was necessary to liberate society from enslavement—stands upon two shores, with one foot on the banks of necessity (justification) and the other on the banks of insanity (excuse). Of course, today the distinction is largely academic. *See* Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher’s Thinking and Rethinking*, 32 UCLA L. REV. 61, 65-66 (1984). Still, there may be value in classifying a hybrid defense such as imperfect necessity. *See supra* note 407 and accompanying text (describing “imperfect necessity”).

496. The media seized upon the motif of the mad bomber. On April 15, 1996, Kaczynski made the cover of both *Time* and *U.S. News & World Report* magazines, his bedraggled picture pasted under the sprawling, bold headlines that read “Twisted Genius” and “Odyssey of a Mad Genius.” Mello writes:

I think the media and the public decided Theodore Kaczynski was crazy the moment they saw that first photo of him right after his arrest—dirty, disheveled, matted hair, scraggly beard. In that photo, he looked crazy, and that’s all it took to transform the near Luddite Unabomber into the mad hermit. All Kaczynski’s family and lawyers needed to do was build on that first snapshot of him, to reinforce the notion that, because Kaczynski looked crazy when he was arrested, he must be crazy.

Mello, *supra* note 370, at 447.

years—was unimaginable.⁴⁹⁷ We cannot bear to believe that our world is that pathological, that sick.⁴⁹⁸ Ours is the best of all possible worlds.⁴⁹⁹

497. *See id.* at 472-73.

The crimes become less threatening if we believe that only a madman is capable of them. There is something comforting in the idea that the Unabomber was a mad bomber. What else could have made him do it? Consider an alternative explanation: Theodore Kaczynski was a perfectly sane, albeit eccentric, highly-educated white man who, nearly two decades ago, decided to devote his life to designing and crafting deadly mailbombs; he went about his lethal task with scientific precision and exceptional premeditation. He wasn't a mad bomber; he was a chillingly sane bomber. The sane bomber, it seems to me, is a far scarier image than the mad bomber.

Id.

498. *But see* Vega et al., *supra* note 327 (suggesting that our culture is pathological).

499. *See* VOLTAIRE, *CANDIDE* (John Butt, trans., 1950) (satirizing Leibniz's observation that this is *le meilleur des mondes possibles*, the best of all possible worlds).