The Borderline Which Separated You from Me: The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment

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“The Borderline Which Separated You From Me”: The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment

*Michael L. Perlin*

INTRODUCTION

Our local newspaper—like many newspapers in midsize cities—carries *Parade* magazine as a weekend supplement. *Parade* is a mix of fashion tips, inspirational stories, celebrity interviews, and diet suggestions, with one “real” article thrown into the mix. This past August, my eyes were caught by the headline on the cover story: *What Teenagers Say About* (drugs, sex, morality, etc.). As the father of two teenagers, it struck me that this might prove to be valuable reading.

The results were not surprising: only four percent were willing to tell interviewers that they ever tried drugs, sixty-one percent thought condoms should be available in schools, and nearly eighty percent said governmental dishonesty and corruption are widespread. But what interested me the most were the results on criminal law-related issues. Eighty-one percent support the death penalty (slightly higher than the seventy-five percent reported for adults); eighteen-three percent feel that teenage criminals should be punished as adults (more than the seventy percent figure reported for adults); over sixty percent fear danger from paroled prisoners and domestic terrorists (eighty-two percent of adults favor making it more difficult for defendants convicted of the most violent crimes to be paroled). And, and this is what particularly piqued my curiosity, ninety percent believe that the insanity plea is overused, a

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5. See Hales, *supra* note 1, at 5.
number almost identical to that found in a public opinion poll commissioned in the wake of the verdict in the Hinckley case, to which I will return.

This brought me up short a bit. Do teenagers think about the insanity plea? Do others? Have I ever heard a teenager discuss this? Is this on the teenage issues agenda?

Intuitively, I do not think this is a high ticket item in most teenage conversations, but have to assume that the numbers reflect something. Their parents' views? Their teachers' views? Or simply, part and parcel of an inchoate sense about the criminal justice system, excuse defenses, and the propriety of a system that appears to exculpate some defendants from guilt and responsibility in a series of high publicity, emotionally charged cases?

No matter which (if any) of these explanations is correct, my sense is that the numbers are significant. Significant because they reflect the fact that teenagers possess a kind of "ordinary common sense" about the use, overuse, and abuse of the insanity defense that mirrors attitudes of their parents and neighbors, of jurors, of legislators, and of judges.

In the fifteen years since John Hinckley shot President Reagan, the national debate over the insanity defense has been less a debate than a sound byte. The public response to Hinckley's successful use of the insanity defense resulted in intense scrutiny of the defense and the passage of the federal Insanity Defense Reform Act (IDRA). That Act statutorily overruled decisional law in virtually all federal circuits, replacing it with a more rigid version of the 1843 M'Naghten cognitive "right and wrong" test, and imposed restrictive procedural rules on the use of the insanity defense, placing the burden of proof on the defendant, mandating strict procedures in retention hearings, and sharply limiting the scope of expert testimony in insanity defense trials. The states quickly followed Congress's lead. Twelve states adopted the Guilty But Mentally Ill (GBMI) test, seven narrowed the substantive insanity test, sixteen shifted the

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7. I guess that mine do, but that's simply because they see my books and articles strewn all over our house.

8. I have never heard it mentioned during the hundreds of telephone conversations my children have had with their friends or during a like number of car pool rides.


12. See generally 3 Michael L. Perlin, Mental Disability Law: Civil and Criminal (1989), §
burden of proof, and twenty-five tightened release provisions in the cases of individuals found Not Guilty By Reason of Insanity (NGRI).  

Notwithstanding these changes, however, a familiar pattern has emerged. A defendant pleads not guilty by reason of insanity in a controversial case, and the fact of the plea is reported in the local newspapers. The public responds with letters to the editor decrying the plea. State legislators become involved, calling for the abolition, or, at least, the sharp curtailment, of the plea. A counterposition is rarely raised in the public discussion.

Then, the jury returns a verdict and the responses are predictable. If a jury says, "guilty," then that verdict is seen as a reflection of the fact that the system "works." If, on the other hand, the case is in that universe of less than one-tenth of one percent of all felony cases in which a jury returns an NGRI verdict, then that verdict is seen as a reflection of a breakdown of the entire criminal justice system. Earlier this fall, John Hinckley applied for a one-day-a-month conditional release from St. Elizabeth's Hospital. Public response was, as could be expected, totally negative: "No," "No, that's stupid," "No way no way no way.

I believe that the insanity defense has always been a symbol and a screen. It has always served as a litmus test for how we feel about a host of social, political, cultural and behavioral issues that far transcend the narrow questions of whether a specific defendant should be held responsible for what—on its surface—is a criminal act, or how responsibility should be legally calibrated, or of the sort of institution in which a successful insanity acquittee should be housed.

At its base, how we feel about the insanity defense illuminates how we feel about the relationships between mental health and the law, between mental health professionals and judges, between criminals and victims, between the media and the trial process, between the law-abiding and the law-flaunting. In short, our feelings about the insanity defense reflect our


feelings about borderlines, and it is this image that is central to this paper.

Insanity defense jurisprudence is based on a series of myths (legal myths, judicial system myths, and behavioral myths), and we cannot possibly understand the insanity defense unless we unpack these myths, lay them bare, and discuss their mythic nature.\footnote{See generally Perlin, supra note 6 (discussing the process of unpacking insanity myths).} We cannot understand the insanity defense unless we look at it through the cognitive psychology construct of “heuristics,” that is, the way that we seek to simplify information-processing tasks by privileging the vivid, negative, accessible anecdote, and by subordinating the factual, the logical, the statistical, the rational.\footnote{See Perlin, supra note 9, at 12-22.} Furthermore, we cannot understand the insanity defense unless we come to grips with the meretricious allure of a false “ordinary common sense” (OCS) that has long pervaded our jurisprudence in this area.\footnote{Id. at 23-38.}

The overarching question to explore is: Why do we feel the way we do about these people (insanity pleaders), and how does the answer to that question preordain our answers to almost all of the legal and behavioral questions that are posed in this area?\footnote{See Michael L. Perlin, The Jurisprudence of the Insanity Defense 383-92 (1994).} Even that answer does not help us much, unless we look at insanity defense developments through the twin filters of “sanism” (irrational prejudice based predominantly upon stereotype, myth, superstition and deindividuation)\footnote{Id. at 295, 385-86; see generally Michael L. Perlin, On “Sanism,” 46 SMU L. Rev. 373 (1992) (discussing the insidious effects of prejudice against people with disability).} and “pretextuality” (the ways that courts often accept testimonial dishonesty and engage in dishonest decisionmaking).\footnote{Perlin, supra note 18, at 395-96; see generally Michael L. Perlin, Pretexts and Mental Disability Law: The Case of Competency, 47 U. Miami L. Rev. 625 (1993) (discussing pretextuality in the mental disability law context).} and under the lens of therapeutic jurisprudence (a means of studying the law as a therapeutic agent, recognizing that substantive rules, legal procedures and lawyers’ roles may have either therapeutic or antitherapeutic consequences).\footnote{Perlin, supra note 19, at 417-19; see generally Michael L. Perlin, What Is Therapeutic Jurisprudence? 10 N.Y.L. Sch. J. Hum. Rts. 623 (1993) (discussing the impact of law on mentally disabled individuals).} Structural anthropology may also give us more insights as to why we feel the way we do, as well as why our society is discomforted whenever it appears that “sane” and “insane” may not be the same type of a set of concepts as are “cold” and “hot” or “black” and “white.”\footnote{Perlin, supra note 12, at 14 (discussing the problems caused by the possibility of more than one type of categorization).} And if we do not acknowledge our profound ambivalence about this discomfort, our efforts to understand the defense will fail:

The development of the insanity defense has tracked the tension between psychodynamics and punishment, and reflects our most profound ambivalence about both. On one hand, we are
especially punitive toward the mentally disabled, "the most despised and feared group in society"; on the other, we recognize that in some narrow and carefully circumscribed circumstances, exculpation is—and historically has been—proper and necessary. This ambivalence infects a host of criminal justice policy issues that involve mentally disabled criminal defendants beyond insanity defense decisionmaking: on issues of expert testimony, mental disability as a mitigating (or aggravating) factor at sentencing and in death penalty cases, and the creation of a "compromise" GBMI verdict.

The post-Hinckley debate revealed the fragility of our insanity defense policies, and demonstrated that there was simply not enough "tensile strength" in the criminal justice system to withstand the public's dysfunctionally heightened arousal that followed the jury verdict. In spite of doctrinal changes and judicial glosses, the public remains wed to the "wild beast" test of 1724, a reflection of how we truly feel about "those people." It should thus be no surprise that, when Congress chose to replace the ALI/Model Penal Code insanity test with a stricter version of M'Naghten, that decision was seen as a victory by insanity defense supporters.

These dissonances, tensions and ambivalences—again, rooted in medieval thought—continue to control the public's psyche. They reflect the extent of the gap between academic discourse and social values, and the "deeply rooted moral and religious tension" that surrounds responsibility decisionmaking. They lead to sanism, to pretextuality and to teleological decisionmaking. They seek confirmation in "ordinary common sense" and in the use of heuristic cognitive devices. Ours is a culture of punishment, a culture that grows out of our authoritarian spirit. Only when we acknowledge these psychic and physical realities—and the anthropology of insanity defense attitudes—can we expect to make sense of the underlying jurisprudence.24

All of this is but a start. We must dig deeper in an effort to determine why we feel the way we do, to determine what it is about our communal psyche that responds to insanity pleaders and the insanity defense the way we do, and why the symbol of the insanity defense retains its power in spite of the rarity with which it is used, the greater rarity of its success, and the high costs of pleading the defense (whether that plea be successful or unsuccessful). We must also explore why the judiciary—and especially the United States Supreme Court—can offer us "no direction home" in our efforts to bring coherence to this most incoherent area of law.25

My title for this paper comes, in part, from Bob Dylan's epic song, Idiot Wind, an angry, coruscating and brilliant polemic that indicted

American foreign policy in the post-Vietnam War period. Sang Dylan:

I been double-crossed now for the very last time and now
I'm finally free
I kissed goodbye the howling beast on the borderline which separated you from me.26

To a significant percentage of the American public, the insanity defense is a “howling beast” that has “double-crossed” efforts at the implementation of a sane (irony intended) criminal justice system. It is one from which many of us wish we were “finally free.” And, most importantly, it sits at the “borderline which separates you from me.” For I am convinced that, to a majority of the American public, the debate over the insanity defense is a debate over that “borderline.” We struggle with our ambivalence over that borderline, our need for that borderline, and our wish to deny that borderline. And until we understand that and come to grips with that, our efforts to understand the defense are doomed to failure.

In Part I, this paper briefly recounts the changes, both substantive and procedural, in the insanity defense that followed the verdict in the Hinckley case. Part II explores the way society feels about punishment and the way that society’s urge to punish “the factually guilty” drives all aspects of criminal justice policy, including specifically and especially the insanity defense. Part III considers the role of authoritarianism in the American fabric and the linkages between the authoritarian personality and insanity defense policy. Part IV examines structural anthropology in hopes of finding some answers, or, at least, in hopes of finding some illumination of some of the most important questions. It then looks at the myths that dominate insanity defense jurisprudence, considering specifically the “fear of faking” myth, perhaps the most compelling and dominating myth in all of criminal procedure. Part V briefly considers recent developments in Iowa, including press coverage of recent insanity defense cases, in an effort to determine how much Iowa is or is not like the rest of the nation. Part VI looks at the issue through the jurisprudential filters of sanism, pretextuality, and teleology in hopes of illuminating the underlying issues. Finally, Part VII directly confronts the Dylan lyric that serves as the epigrammatic piece of the paper’s title, and considers how society’s psychic need to reify the existence of that “borderline” dominates this area of jurisprudence.

I. THE HINCKLEY CASE AND BEYOND27

The acquittal of John W. Hinckley galvanized the American public in a way that led directly to the reversal of 150 years of study and understanding of the complexities of psychological behavior and the

27. This section is generally adapted from Perlin, Deconstructing the Myths, supra note 13, at 347-48.
relationship between mental illness and certain violent acts. The public's outrage over a jurisprudential system that could allow a defendant who shot an American president on national television to plead "not guilty" became a "river of fury" after the jury's verdict was announced.

Sensational and extreme trials such as Hinckley's consume the hearts and minds of the American public. They reflect society's basic dissatisfaction with the perceived incompatibility of the due process and crime control models of criminal law, and with the notion that psychiatric excuses can allow a guilty defendant to "beat a rap" and escape punishment. Such dissatisfaction leads to a predictable response, especially when the defendant, like Hinckley, is perceived as one not sufficiently "like us" to warrant empathy or sympathy. As Dr. Loren Roth suggests, when a "wrong verdict" is entered in a sensational trial, the American public may simply be nothing more than a "bad loser."

In retrospect, this firestorm should have been entirely predictable. To the public, the defense strategy, the trial and the subsequent verdict were vivid reifications of many of the most powerful insanity defense myths. An intelligent, albeit troubled, defendant plans a fiendish crime (not coincidentally, against one of the nation's most beloved and patriarchal political leaders), hires an expensive Washington, DC law firm, retains a panel of heavily-credentialed forensic mental health witnesses, and proceeds to successfully bamboozle a well-meaning (but evidently out of its depths) lay jury so as to avoid severe punishment. The public, to no one's surprise, reacted with swift outrage.

Members of Congress responded quickly to the public's outpouring of outrage, introducing twenty-six separate pieces of legislation designed to limit, modify, severely shrink or abolish the insanity defense. Statements by legislators introducing these bills and by Reagan Administration

28. See Perlin, supra note 6; Perlin, supra note 9.
32. See Lincoln Caplan, The Insanity Defense and the Trial of John W. Hinckley Jr. 101-02 (1984) (discussing the public reaction in the aftermath of Hinckley's acquittal); 3 Perlin, supra note 12, § 15.36, at 390-01 (same).
33. Perlin, supra note 29, at 860; Perlin, supra note 6, at 614.
spokespeople supporting them reflected the fears and superstitions that have traditionally animated the insanity debate, as well as the public's core ambivalence about mentally disabled criminal defendants.54

The Reagan Administration originally called loudly for the abolition of the insanity defense.55 However, in the face of a nearly-unified front presented by most of the relevant professional organizations and trade associations, it quietly dropped its call for abolition and supported the IDRA as a reform compromise.56 This quiet change in position ensured that the symbolic call for abolition would be the lasting public image.

The legislative debate was utterly predictable. State and federal legislators and federal prosecutors repeated discredited and outdated myths based on ancient superstitions, and then conceded that their actions were driven by myth, not reality. Their statements went unchallenged; the empirical evidence refuting them went unnoticed. Had a mid-19th century Member of Parliament stumbled into one of the legislative arenas during this debate, he would have felt, correctly, that nothing had changed in the 140 years that passed since the M'Naghten rules were articulated.

Congress responded directly and swiftly to public perceptions of a system run amok, a system that, purportedly, allowed uncountable numbers of dangerous defendants to escape punishment through the meretricious loophole of the insanity defense. Even though Congress clearly knew that this perception was a myth, it responded as it did in order to assuage these fears and persuade the voters that it was doing something by laudably enhancing public protection values. In short, it participated knowingly and openly in a massive legislative charade. The legislation ultimately enacted by Congress, legislation that closely comported with the public's moral feelings, returned the insanity defense to "status quo ante 1843: the year of . . . M'Naghten." All of this had the ultimate effect of returning to a test that compelled the law to "do its punitive worst," that had "the rigidity of an army cot and the flexibility of a Procrustean bed," that retained the flavor "of the celebrated concepts of Hale and Coke of the 17th century," and that was, simply, "bad psychiatry and bad law."37

34. See 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 (1987) (discussing public reactions to particularly well publicized insanity plea cases); Perlin, supra note 6, at 610-614.

35. See Perlin, supra note 29, at 860 n.9 (noting that the Reagan administration wished to retain the insanity plea only where the defendant lacked the sufficient mens rea of the charged offense due to mental incapacity).


II. THE ROLE OF PUNISHMENT

A reading of the voluminous testimony at these legislative hearings clarifies one point above nearly all others: Congress and the state legislatures—reflecting the public’s mood—were in a fiercely punitive mood, a mood stoked by outrage over the fact that Hinckley appeared to “get away with it.” Before considering the discrepancy between the public perception and reality, it is useful, indeed essential, to think about punishment and its role in the criminal justice system. It is also helpful to reflect on society’s frustration when an individual verdict, especially a verdict in a famous case, appears to thwart, or, better, to flaunt, society’s need to punish.

Punishment is a coercive, symbolic, judgmental, state-inflicted, condemnatory, normative, proportional deprivation that “has been the main device for enforcing laws ever since the mists of prehistory lifted.” At least five major aims of punishment have been identified by criminologists and philosophers: restraint, general deterrence, individual deterrence, rehabilitation, and desert. As recently as 1974, Professor Schulhofer noted that most American jurisdictions exclude retaliation from the legitimate goals of the criminal law, that legal theorists “[w]ere virtually unanimous in applauding the judgment,” and that the idea of

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38. This section is generally adapted from Perlin, supra note 9, at 49-69.
39. See id. at 16-28 nn.20-76 (citing sources).
punishment was giving way to the idea of treatment. Yet, the notion of desert has since regained prominence as the most important contemporary justification for and aim of punishment. The Supreme Court’s 1991 decision upholding a first offender’s sentence of life imprisonment without parole for a cocaine possession conviction specifically invokes retribution as one of the acceptable rationales for such a penalty.

Since this decision, increasingly punitive attitudes toward criminals have appeared throughout the criminal justice system. Although penal theories are known to be cyclical, the dominant trends in current social and criminal philosophy emphasize retribution and containment of the criminal, and society’s right to protection. The roots of this philosophical switch are complex, but public perceptions of rising crime rates and unpunished criminals are probably the major cause.

objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence . . . . “); Regina v. Sargent, 60 Crim. App. 74, 77 (Eng. C.A. 1974) (“The Old Testament concept of an eye for an eye and tooth for tooth no longer plays any part in our criminal law.”).

44. Devlin, supra note 42, at 75-76. Lord Devlin made it clear that he was not referring solely to cases involving mentally disabled prisoners:

No doubt there are still judges who think of psychiatrists as persons who invent long names for simple sins; and no doubt there are psychiatrists who think of the criminal calendar as a list of mental disorders with antiquated names, taken from the Ten Commandments. But both these extreme schools of thought are dying out. The idea of punishment is giving way—and here I am not concerned solely with mental abnormality—with the idea of treatment.

Id. (emphasis added).

45. See Perlin, supra note 19, at 53 n.198.

46. See Harmelin v. Michigan, 501 U.S. 957, 1003 (1991) (Kennedy, J., concurring in part & concurring in judgment) (“[T]he Michigan Legislature could with reason conclude that the threat posed to the individual and society by possession of this large an amount of cocaine [more than 650 grams]—in terms of violence, crime, and social displacement—is momentous enough to warrant the deterrence and retribution of a life sentence without parole.”).

47. I speak here primarily of public attitudes as reflected in changes in legislation and judicial opinions that appear to respond to opinion polls, popular surveys, and the like. See e.g., Anthony Doob & Julian Roberts, Social Psychology, Social Attitudes, and Attitudes Toward Sentencing, 16 Can. J. Behav. Sci. 269 (1984) (suggesting that public attitudes towards criminal sentences are negatively impacted by the insufficiency of material available in mass media reports on criminal cases); James Alan Fox et al., Death Penalty Opinion in the Post-Furman Years, 18 N.Y.U. Rev. L. & Soc. Change 499 (1990-91) (noting the increase in public support of the death penalty since the 1970s); Julian V. Roberts & Anthony N. Doob, Sentencing and Public Opinion: Taking False Shadows for True Substances, 27 Osgoode Hall L.J. 491 (1989) (noting the increase in the public’s interest in the sentencing process).


50. See generally Francis T. Cullen et al., Attribution, Salience, and Attitude Toward Criminal Sentencing, 12 Crim. Just. & Behav. 305 (1985) (noting the relationship between a person’s outlook on crime and his attitude towards punishment). Ours is not the first generation to
Punishment was originally needed to "remove the evil spirit thought
to cause an individual to transgress against society." It is a ritualistic
device conveying "moral condemnation," "inflicting humiliation," and
dramatizing evil through a public "degradation ceremony." As many
forms of crime were identified with sin, they were thus believed to
challenge "God and organized religion." Importantly, these opinions
have not entirely disappeared; recent research suggests that many people
rate all offenses, regardless of seriousness, as "equally morally wrong," and
"equate crime with sin."

Punishment ceremonies stimulate socialization through a process
which involves the internalization of normative social behavior rules. The
relinquishment of personal retaliation to the social institution involves
a mutual agreement whereby all parties suppress their own, personal
retaliative impulses by turning the problem of punishment over to the
sovereign. This avoids "the greater evil of mob violence." By

have come to this conclusion. See, e.g., Walter B. Miller, Ideology and Criminal Justice Policy: Some
Current Issues, 64 J. Crim. L. & Criminology 141, 141 (1973) ("Few generations have been free
from the conviction that the nation was in the throes of the crisis of our times," and such
perceptions have not always corresponded with judgments of later historians.");
Conditions, 1989 Duke L.J. 1357, 1360 (citing Harry Barnes, The Story of Punishment: A
Record of Man's Inhumanity to Man 59 (1930); David Dressier, Practice and Theory of
Probation and Parole 3 (2d ed. 1969)).
L. & Criminology 969, 1004 (1986) (quoting Gordon Hawkins, Punishment and Deterrence: The
Educative, Moralizing, and Habituation Effects, 1969 Wis. L. Rev. 550, 553-60); see also Hawkins,
supra, at 555 ("Punishment is a ritualistic device designed to influence by intimating
symbolically social disapproval and society's moral condemnation.").
(describing the use of sticks, pillory, branding iron, ducking stool, and scarlet letters).
54. Boldt, supra note 52 (quoting Garfinkel, Conditions of Successful Degradation Ceremonies,
61 Am. J. Soc. 420, 421-423 (1956)); see also Samuel J. Brakel, Presumption, Bias and
Incompetency in the Criminal Process, 1974 Wis. L. Rev. 1105, 1116 (describing the criminal trial
as a "morality play"); Brilliant, supra note 50, at 1361 (noting the role of degradation in
punishment theories).
55. On the biblical roots of the link between crime, punishment, and sin, see Lasky, The
(describing symbols of Adam and Eve and Cain and Abel and concluding, "Crime and
punishment are coeval in the history of the world, and it is difficult to say which had
priority").
56. Harry Elmer Barnes, The Repression of Crime 25 (1926). See also, David Rothman,
The Discovery of the Asylum: Social Order and Disorder in the New Republic 15 (1971)
(notifying that early American colonists equated crime with sin).
57. See, e.g., Steven Burkett & David Ward, A Note on Perceptual Deterrence, Religiously Based
Moral Condemnation, and Social Control, 31 Criminology, 119, 122 (1993), reporting on research
58. Boldt, supra note 52, at 1004-05 (quoting Garfinkel, supra note 54, at 421, and
Hawkins, supra note 52, at 557-60).
59. See Andrew S. Watson, A Critique of the Legal Approach to Crime and Correction, 23 Law &
60. Schulhofer, supra note 43, at 1511.
nurturing emotions of vengeance, the punishment of criminals "furthers social solidarity and protects against the terrifying anxiety that the forces of good might not triumph against the forces of evil after all." It does this through the context of a trial process that is a "moral parable [with] a religious meaning essential as a public exercise in which the prevailing moral ideals are dramatized and reaffirmed." Margaret Radin has thus speculated:

Maybe the death penalty symbolizes the arbitrary, alien power of government over life and death; the government as avenging God run amok; our relinquishment of social responsibility to the government to fix things for us by conveniently getting rid of some bad actors. Maybe by attacking this symbol we play a part in the struggle for a more humane political order.

Punishment thus is clearly a socially-sanctioned "safety valve" through which law-abiders express community condemnation of wrongdoers, especially the wrongdoers whom we fear the most. In this way, punishment is imbued with an important symbolic significance: more than mere disapproval, it expresses "a kind of vindictive resentment" as a "way of getting back at the criminal." When society identifies those who are criminals, it can "keep straight who is good and who is bad." This may be the reason that "the moment ... rehabilitative impulses emerge into expressions, the legal system is doomed to encounter contradiction,


64. See Schulhofer, supra note 43, at 1512 ("Even if popular resentment would not lead to mob violence, it can be argued that giving an outlet for this resentment will contribute to the psychological health of the community.").

65. "[V]engeance is exercised against those who offend custom, who transgress tradition, and who attack the constituted order of things and those who tend by their conduct to break down the structure of society." William A. White, Insanity and the Criminal Law 16 (1923).


confusion and frequent public criticism."

This symbolic function explains "why even those sophisticated persons who abjure resentment of criminals and look with small favor generally on the penal law are likely to demand that certain kinds of conduct be punished when or if the law lets them go by."70 Punishment furthers "the mythology of justice, [by] creating the illusion that the world is fair."71 As Professor Elyn Saks has astutely noted, "Society's perception that the person is being punished is perhaps the most important consideration" in assessing the role of punishment in the criminal justice system.72

The standards enforced by such punishment transcend the "rock-bottom prohibitions of the criminal law"; they include "the affirmative standards and ideals of the group with which we wish to identify."74 Punishment expresses to other members of the community "its self-image as a society" that places great value on the "preservation of designated interests."75 This expression is all the more pointed when the defendant is enough unlike other members of society that they neither empathize nor sympathize. As Professor Stanley Ingber has noted, "The criminal process is . . . a pageant which dramatizes the differences between 'we' and 'they' by portraying a symbolic encounter between the two."76

This reading, however, does not fully detail punishment's roots. Why do members of society have the feelings that make them need to express this vindictive resentment? Also, why does society choose to punish some offenders more harshly than others who commit like crimes?77 Why does

70. Watson, supra note 59, at 226.
71. Feinberg, supra note 68, at 102. See also 3 Joel Feinberg, Harm to Self: The Moral Limits of the Criminal Law (1986). It is precisely this attitude that surfaces in the charge that the insanity acquittee somehow "beats the rap." Herbert Morris has focused attention explicitly on the symbolism of punishment:

As a response to guilt, punishment must be seen, then, as freighted with rich symbolic significance, and in considering what might justify punishment we risk, I believe, incompleteness in our theories if we neglect this symbolic baggage.

72. Diamond, supra note 61, at 110.
75. Sendor, supra note 30, at 1428-29 n.298.
77. On the existence of a "community tolerance threshold" in insanity cases, see, e.g., Caryl E. Boehnert, Psychological and Demographic Factors Associated With Individuals Using the Insanity Defense, 13 J. Psychiatry & L. 9, 27-28 (1985) (noting that defendants committing crimes below the limits of this tolerance level were more readily acquitted by reason of insanity); Daniel W. Schwartz, The Proper Use of a Psychiatric Expert, in Scientific and Expert Evidence in Criminal Advocacy 97, 111 (Juris. G. Cederbaums & Selma Arnold eds., 1975) (observing that the success of insanity plea frequently hinges on defendant's "likeability"); David B. Wexler, An Offense-Victim Approach to Insanity Defense Reform, 26 Ariz. L. Rev. 17, 20-23
it so badly misperceive the empirical realities of criminal sentencing systems? And, finally, why are perceptions the most erroneous in cases involving mentally disabled criminal defendants?

To understand the matter at hand, the roots of the rejection of psychodynamic principles in criminal justice decisionmaking (as exemplified by society's attitudes toward the insanity defense plea), consider the explanation offered by J.C. Flugel:

In the first place, the criminal provides an outlet for our (moralized) aggression. In this respect he plays the same role as do our enemies in war and our political scapegoats in time of peace. In the second place, the criminal by his flouting of law and moral rule constitutes a temptation to the id; it is as though we said to ourselves, "if he does it, why should not we?" This stirring of criminal impulses within ourselves calls for an answering effort on the part of the super-ego, which can best achieve its object by showing that "crime doesn't pay." By punishing [the criminal] we are not only showing that he can't "get away with it" but holding him up as a terrifying example to our own tempted and rebellious selves. Thirdly, and closely connected with this . . . is the danger with which our whole notion of justice is threatened when we observe that a criminal goes unpunished. The primitive foundation of this notion . . . lies in an equilibrium of pleasures and pains, of indulgence and punishment. This equilibrium is disturbed, either if the moral rewards of good conduct are not forthcoming . . . or if the normal punishments of crime are absent or uncertain . . . It is to prevent disturbance of the latter kind that we insist that those who have broken the law shall be duly punished. Through their punishment the equilibrium is re-established; without it (so we

(1984) (stating that the public disproportionately tolerates the use of the insanity defense in cases where the victim is a nonstranger, and where the level of community outrage is thus comparatively lower). See, e.g., Daniel S. Bailis et al., Community Standards of Criminal Liability and the Insanity Defense, 19 Law & Hum. Behav. 425 (1995) (comparing lay standards of insanity to those standards incorporated in American legal codes); Norman Finkel, Culpability and Commonsense Justice: Lessons Learned Betwixt Murder and Madness, 10 Notre Dame J. L. Ethics & Pub. Pol'y 11 (1996) (noting that community sentiment plays a central if not dispositive role in cases where the issue is whether a punishment is cruel and unusual).

78. See, e.g., Doob & Roberts, supra note 47 (discussing community opinion regarding sentencing); Fox et al., supra note 47 (exploring factors which underlie recent trends in public support for the death penalty); Roberts & Doob, supra note 47 (investigating the assertion that members of the public are consistently more punitive than judges in sentencing).

79. See Henry Steadman, Beating a Rap? 17 (1979) (stating that there is an astonishing dearth of information about those who are found incompetent to stand trial); Henry Steadman & Joseph Cocozza, Selective Reporting and the Public's Misconception of the Critically Insane, 41 Pub. Opin. 523, 531 (1977-78) (presenting the results of a random sample of the general public, in which the public incorrectly identified such notorious defendants as Patty Hearst and Charles Manson as being criminally insane, and every person cited as being criminally insane by poll respondents was an individual who had been charged with murder, kidnapping, or bombing).
dimly feel) the whole psychological and social structure on which morality depends is imperiled.  

Another important purpose of punishment stems from the fact that society's sense of justice is disturbed if its members see another go unpunished for antisocial or asocial behavior. If society fails to punish, those who wish to violate the law may feel more free to do so, and those who are law-abiding may lose confidence in the legal system's ability to enforce the criminal law. The importance of punishing offenders is thus underscored: law-abiding society has its anti-aggression safety-valve; it projects its guilt, blame, shame, and fear, expresses its collective anger and hostility, and shows the criminal that, like other members of society,

80. Franz Alexander & Hugo Staub, The Criminal, the Judge, and the Public 215 (Gregory Zilboorg trans., 1931) ("[T]he louder man calls for the punishment of the lawbreaker, the less he has to fight against his own repressed impulses."); see, e.g., J.C. Flugel, Man, Morals and Society 169-70 (1961).


83. But see Mickenberg, supra note 34, at 960-61 n.66 (1987) (suggesting that "law and order" sentiments are a pretext, covering retributive personal antipathy toward criminals).

We are somehow not content to say that criminals should be punished because we hate them and want to hurt them. It has to be because others hate them and would, were it not for our prudence in providing them with this spectacle, stage a far worse one of their own. This kind of hypocrisy is endemic in arguments about the death penalty, but it does not seem to be empirically verified. Lynchings do not, as this theory would lead us to conclude, seem to increase in places that have abolished capital punishment.)


85. See J.C. Flugel, supra note 80, at 150; Sendor, supra note 30 at 1428 ("[Punishment] expresses the collective anger at issue in retribution."); see also Sendor, supra note 30, at 1428 n.208 ("Punishment is a form of communication to other people as well as to an offender.").
he cannot succumb to temptation, thereby preserving the notion of an
even-handed justice system. Although both the law-abiding and the
criminal know that only a small percentage of crimes result in arrests (let
alone punishment), society continues to retain this notion of a fair
criminal justice system; its schema of fairness is shaken when defendants
who have been arrested and who are on trial appear to evade punishment
for their criminal behavior.

In the context of the insanity defense, these principles seem to reflect
some cognitive dissonance or psychological reactance. If some mentally
ill individuals are deemed to not be criminally culpable, and if society
accepts the notion that some individuals will receive "special treatment"
from the law by reason of their mental disability, such exemptions can exist
only where those selected accurately reflect society's moral judgments that
such special treatment is warranted. This helps to explain why there is
increasing support for relaxing the legal protections available to the
mentally ill, by making them equally subject to the same draconian
penalties now generally in favor. It may also explain why so much of the
insanity defense debate is dominated by the fear of defendants faking so as
to "beat the rap." In reality, research shows that offenders often deny
mental illness and its symptomatology, even where recognition of the

86. See generally Joseph M. Livermore & Paul E. Meehl, The Virtues of M'Naghten, 51 Minn.
L. Rev. 789, 792 (1967) (discussing the societal need for moral condemnation through
retribution); see also J.M. Balkin, The Rhetoric of Responsibility, 76 Va. L. Rev. 197, 238 (1990)
(prosecutor implicitly suggested to jurors that, "if Hinckley had emotional problems, they
were largely his own fault"); Pillsbury, supra note 83, at 736 (penitentiary satisfied public's
emotional need for "tough and dramatic retaliation against criminals").

87. See, e.g., Steven Shavell, Criminal Law and the Optimal Use of Nonmonetary Sanctions as a

88. See Sharon Brehm & Jack Brehm, Psychological Reactance: A Theory of Freedom and
Control 30-31 (1981) ("Given that a person believes he or she has a specific freedom, any
force on the individual that makes it more difficult for him or her to exercise the freedom
constitutes a threat to it. Thus, any kind of attempted social influence . . . that work[s]
against exercising the freedom can be defined as threats."); see generally Michael L. Perlin,
Morality and Pretextuality, Psychiatry and the Law: Of "Ordinary Common Sense," Heuristic Reasoning,
effect of cognitive dissonance and psychological reactance on mental health reform
legislation). See generally, Perlin, supra note 20 (explaining the tendency of the legal system to
condone and encourage pretextuality and deceit).

89. See Lynnette S. Cobun, The Insanity Defense: Effects of an Abolition Unsupported by a Moral
treatment reflects society's moral judgment and is correctly implemented, the public will
perceive that the law is just and not easily circumvented.").

question of whether we are, in fact, "criminalizing" mental patients, see Arthur J. Lurigio &
Dan A. Lewis, The Criminal Mental Patient: A Descriptive Analysis and Suggestions for Future
Research, 14 Crim. Just. & Behav. 268, 283 (1987) (asserting that there is little empirical
evidence found to support the notion that the mentally ill are being unduly criminalized).

91. See, e.g., Linda S. Grossman & James L. Cavanaugh, Jr., Do Sex Offenders Minimize
Psychiatric Symptoms? 34 J. Forensic Sci. 881 (1989) (discussing findings that many sex
offenders experience and deny widespread psychiatric symptoms in addition to their sexual
existence of such symptoms might, literally, save their lives.92

Thus, in analyzing the decision of the legislature in Idaho (an isolated, highly religious state) to reduce the insanity defense to solely a consideration of mens rea,93 Geis and Meier found that Idaho residents strongly held the view that all human beings ought to take personal responsibility for their behavior.94 As a result the residents concluded that mentally disabled criminal defendants should not be able to avoid punitive consequences of criminal acts by reliance on either a "real or faked plea of insanity."95 This sentiment of the people of Idaho was subsequently endorsed by a member of the Louisiana Supreme Court.96

These attitudes also create a residual problem: empirical studies have shown, clearly and consistently, that a significant percentage of offenders suffer from mental illness,97 and that the act of incarceration may either
exacerbate underlying psychiatric conditions or precipitate mental illness in vulnerable individuals. To some extent, this percentage, which absorbs mental health and criminal justice resources "at an alarming pace," includes defendants unable to avail themselves of a nonresponsibility defense who are subsequently imprisoned. This "overlapping clientele" of individuals—often "twice-cursed" as "mad and bad"—will inevitably increase as judicial hostility toward the insanity defense and insanity defense pleaders increases, fueled by the punitive spirit that sparks the "negative pattern of fear and repression" that once again dominates penology. It is this spirit that best exemplifies our "culture of punishment."


100. On the implications of recent adoptions of the guilty but mentally ill verdict for this population, see 3 Perlin, supra note 12, § 15.09, at 307-13 (discussing the development of this defense in over a dozen jurisdictions).


103. Herschel A. Prins, Mad or Bad—Thoughts on the Equivocal Relationship Between Mental Disorder and Criminality, 3 Int'l J.L. & Psychiatry 421 (1980); see generally June Resnick German & Anne C. Singer, Punishing the Not Guilty: Hospitalization of Persons Found Not Guilty By Reason of Insanity, 29 Rutgers L. Rev. 1011, 1074 (1976) ("No group of patients has been more deprived of treatment, discriminated against, or mistreated than persons acquitted of crimes on grounds of insanity.").


Forensic patients are highly accessible targets for both medical and legal intervention. Like criminal defendants generally, individuals facing psychiatric assessment are typically dependent, dispossessed, powerless people . . . who are "put into order" . . . by a system over which they exercise little knowledge or control. They are the semi- or pre-institutionalized populations . . . who are immersed within the expanding web of welfare, justice, and mental health, and whose deviant careers repeatedly penetrate into this triadic system of supervision and constraint. At the frontier between law and medicine, forensic patients become the subjects of a control display in which parallel agencies mutually reinforce each other's capacity to promote order.

Id. at 233 (citations omitted).

105. The closest prior use I have found of this phrase is in Todd Clear, The Punishment Addiction: Twenty Years of Compulsivistic Punishment Lifestyle, in National Conference on Sentencing Advocacy 55, 56 (1989) ("Our culture suffers from a punishment addiction.").
III. AUTHORITARIANISM AND THE INSANITY DEFENSE

A. Introduction

The need for punishment is only part of the explanation of the discrepancy between public perception and the realities of the insanity defense. Indeed, the need for punishment is only part of society's psyche, its personality. A more complete understanding of the complexities of society's personality provides further explanation of the discrepancy.

1. Authoritarian Personality Theory

Sociologists, political scientists and psychologists have developed a theoretical construct to describe individuals who reflect an "authoritarian personality." Responding to the hypothesis that "the political, economic, and social convictions of an individual often form a broad and coherent pattern, as if bound together by a 'mentality' or 'spirit,' and that this pattern is an expression of deep-lying trends in his personality," T.W. Adorno and his colleagues first conceived of the authoritarian personality to characterize an individual whose behavior was marked by a bundle of personality traits:

dominance of subordinates; deference toward superiors; sensitivity to power relationships; need to perceive the world in a highly structured fashion; excessive use of stereotypes; and adherence to whatever values are conventional in one's setting.

An authoritarian personality-type is intolerant of ambiguity and is unadaptable in a rapidly changing social environment. It is a rigid, self-centered personality. 

106. This section is generally adapted from Perlin, supra note 19, at 369-75.
107. The classic work is Theodore Adorno et al., The Authoritarian Personality (W.W. Norton & Co. 1982) (1950). Authoritarian personality has generated the most widely used typology of political personality available. See generally Michael Lerner, A Bibliographical Note in Fred I. Greenstein, Personality & Politics: Problems of Evidence, Inference, and Conceptualization 154, 167-178 (1975) (discussing authoritarian studies). While it has been critiqued vigorously, see for example, Studies in the Scope and Method of "The Authoritarian Personality" (Richard Christie & Marie Jahoda eds., 1954) and M. Brewster Smith, Review of The Authoritarian Personality by T.W. Adorno, et al., 45 J. Abnormal & Soc. Psychol. 775 (1950) (book review), and while important methodological errors have been uncovered, see for example, Greenstein, supra, at 100-02, 114-16, authoritarian personality remains a valuable construct for explaining both the roots of political psychology and the significance of personality on political beliefs.
110. Later researchers have described two theories of authoritarian personalities: the "ego-defensive" theory (the authoritarian personality covers his feelings of personal weakness with a "facade of toughness," through a combination of the ego defenses of repression and reaction formation which leave his emotional capacities stunted), and the "cognitive" theory (the authoritarian personality's behavior patterns stem from the learning of a reality prevalent in one's individual subculture). Fred I. Greenstein, Personality and Political Socialization: The Theories of Authoritarian and Democratic Character, 361 Annals Am. Acad. Pol. & Soc. Sci. 81, 88-89 (1965). Research is compatible with both or either underlying theory. See id. at 89 n.24
made uncomfortable by disorder.\textsuperscript{111} In response to subtle and complex phenomenon, he imposes his own tight categories upon them, thus making “more than the usual use of stereotypes.”\textsuperscript{112} Perhaps more subtly, he is “preoccupied with virility,” tending toward “exaggerated assertion of strength and toughness,”\textsuperscript{113} and is frequently unable to be introspective.\textsuperscript{114} He demands obedience to rules and insists on conformity, and is willing to rely on coercion and punishment to enforce that obedience.\textsuperscript{115}

Authoritarians have difficulty in accepting impulses they consider deviant: “fear, weakness, sex and aggression,”\textsuperscript{116} and greater difficulty in expressing empathy.\textsuperscript{117} It is thus no surprise that authoritarians are particularly intolerant of psychodynamic explanations of human behavior, nor that a major study of attitudes about mental illness concluded that, “in a community climate characterized by an authoritarian social-political structure, we can expect to find authoritarian and socially restrictive attitudes toward the mentally ill.”\textsuperscript{118}

Authoritarian traits are frequently exhibited by individuals characterized as “rigid, racist, anti-Semitic, sexually repressed, [and] politically conservative . . . . who will accept the word of an authority figure over that of a lesser person.”\textsuperscript{119} Attitudes toward crime control, due process and legal punishment are also positively linked to authoritarianism,
and legal verdicts reflect juror authoritarianism in assessments of defendants' guilt.  

2. Authoritarianism and Public Opinion

One of the recurrent themes in insanity defense literature is the peculiar role of public opinion in shaping judicial policy. The Hinckley trial loosed a torrent of public criticism rarely equaled in contemporaneous trials:

Separate streams of public opinion—outrage over the courts’ perceived “softness on crime”; outrage over a jurisprudential system that could even allow a defendant who shot the President in cold blood (on national television) to plead “not guilty” (by any reason); outrage at a jurisprudential system that countenanced obfuscatory and confusing testimony by competing teams of psychiatrists as to the proper characterization of a defendant’s mental illness; in short, the outrage over the “abuse” of the insanity defense—became a river of fury after the NGRI verdict was announced.

In considering the impact of public opinion on the shaping of insanity defense jurisprudence, it is necessary to consider the impact on public opinion of two important forces: the media and governmental officials. Here, the record is definitive: the public’s distorted view of the insanity defense and its impacts is a direct result of misinformation disseminated by both media and official sources.

Researchers have demonstrated that the public grossly overestimates both the frequency and the success rate of the insanity defense plea. This overestimation is a product of the media publicity accorded to certain notorious criminal cases, virtually none of which involved defendants...
actually found NGRI. Although the extent to which mass media representations distorted the prevalence and symptomatology of mental illness was first articulated over thirty years ago by J.D. Nunnally, it was not until Steadman and Cocozza published their study in 1978 that the earlier media critique grew to encompass the criminally insane.

The Hinckley trial further exacerbated this distortion. The media’s interest in the defense helped to legitimatize long-standing movements to abolish or shrink the defense. In the trial’s wake, the National Commission on the Insanity Defense specified that the public’s perceptions were largely formed by “selective news reporting,” and patiently rebutted each of the myths that media miscoverage helped to perpetuate.

In addition, the nation’s political leaders perpetuate insanity defense myths by appealing to society’s “emotionality and impulsive change.” Officials of both the Nixon and Reagan Administrations regularly used the insanity defense as the whipping boy for a host of unrelated criminal justice and social problems. Using heuristic reasoning and appealing to alleged ordinary common sense, they painted a false picture of the insanity defense, its role in the criminal justice system, and its impact on public safety.

Shaped in significant part by these distortions, public opinion has a significant impact on insanity defense jurisprudence. Professor Susan Herman noted this phenomenon and argued that, while public opinion may be an appropriate determinant for some insanity defense decisionmaking, it is inappropriate for other aspects: if the public

123. In their classic study, Henry Steadman and Joseph Cocozza asked respondents to list criminally insane persons. Although 42% named at least one individual in response to this inquiry, none of the persons listed had actually been found NGRI. Steadman & Cocozza, supra note 77, at 528. On the gap between public perception and reality, see, Bailis et al., supra note 75, at 425-26; Karen E. Whitemore & James R.P. Ogloff, Factors That Influence Jury Decision Making: Disposition Instructions and Mental State at the Time of the Trial, 19 Law & Hum. Behav. 283, 284-45 (1995).


125. Steadman & Cocozza, supra note 79, at 532.

126. Peter Arenella, Reflections on Current Proposals to Abolish or Reform the Insanity Defense, 8 Am. J.L. & Med. 271, 272 (1992) (“By rekindling public hostility and media interest, the Hinckley verdict helped legitimize long-standing efforts at both the state and federal levels to abolish or reform the defense.”); see generally Eric Silver et al., Demythologizing Inaccurate Perceptions of the Insanity Defense, 18 Law & Hum. Behav. 63, 65 (1994) (discussing the media’s power to influence public perception of the insanity defense).


130. See Herman, supra note 121, at 398.
wished to abandon moral blameworthiness (and to substitute factual guilt, the actus reus, as an underpinning for criminal liability), then "the
defenders of the insanity defense would be in trouble."\textsuperscript{131}

Society's social ambivalence about the use of psychiatry as a tool of
social control is ironic. Where inaccurate predictions support lengthier
detentions, they are privileged; where they may lead to the earlier release
of an individual who has the potential of committing a subsequent violent
act, they are intolerable. The constant is the desire for a settled social
order. The uncertainty that would result from contrary use of psychiatric
expertise, expertise that might add "gray" tones to questions that could
otherwise be answered in black and white, is rejected because it is
dissonant with the authoritarian intolerance of ambiguity.\textsuperscript{132}

3. Authoritarianism and the Insanity Defense

Authoritarians hold harshly punitive attitudes toward those who do
not comply with the law,\textsuperscript{133} and "condemn, reject, and punish people
who violate conventional values."\textsuperscript{134} The insanity defense by its own terms
exculpates those who do not comply with criminal statutes, and, frequently,
this noncompliance is exhibited in non-conventional ways. It should not be
surprising that the authoritarians' distrust of difference is especially
marked in their dealing with insanity defense issues.

Research confirms the "enduring pattern of public animosity to the
insanity plea."\textsuperscript{135} Conviction proneness in death penalty cases is revealed
in many ways by an individual's attitudes toward the legitimacy of the
insanity defense,\textsuperscript{136} and toward the perception whether the defense is "a
loophole allowing too many guilty [people] to go free."\textsuperscript{137} Upon
reviewing the literature, Professor Ellsworth and her colleagues labeled the
finding that death penalty and insanity defense attitudes are related as a
"robust one."\textsuperscript{138} Perhaps research that reveals that a pro-death penalty

\textsuperscript{131} Id. at 397.

\textsuperscript{132} The opportunity to exercise authority influences some individuals to accept low-
paying jobs as "gatekeepers" in psychiatric emergency facilities. See Rosalyn Tolbert, Decision
Making in Psychiatric Emergencies: A Phenomenological Analysis of Gatekeeping, 17 J. Community

\textsuperscript{133} See Henderson, supra note 115, at 394 (stating that authoritarians demand compliance
with the law simply by virtue of its status as law).

\textsuperscript{134} Adorno et al., supra note 107, at 157 (defining authoritarian aggression).

\textsuperscript{135} Valerie P. Hans, An Analysis of Public Attitudes Toward the Insanity Defense, 24
Criminology 393, 394 (1986) (noting that although there is negativity toward the insanity plea,
little is known about the reason for such a reaction).

\textsuperscript{136} See Edward J. Bronson, On the Conviction Proneness and Representativeness of the Death-
Qualified Jury: An Empirical Study of Colorado Veniremen, 42 U. Colo. L. Rev. 1, 7 n.32 (1970); see
also Harry Kalven, Jr. & Hans Zeisel, The American Jury 330 (1966) (such response may reveal
willingness to violate the law to convict "bad men," lack of regard for a legitimate legal
defense, or an unsympathetic posture on the scope of moral or criminal responsibility).

\textsuperscript{137} Bronson, supra note 136, at 7.

\textsuperscript{138} See Phoebe C. Ellsworth et al., The Death-Qualified Jury and the Defense of Insanity, 8 Law
& Hum. Behav. 81, 83 (1984) (referring to surveys which found that people against capital
attitude is correlated with a high level of "resentment of outgroups" helps further explain this link; after all, what group is more of an "outgroup" than insanity defense pleaders?\textsuperscript{139}

This animosity toward outgroups is especially evident among jurors. Studies indicate jurors who favor the death penalty are much more likely to reject the insanity defense than jurors who oppose the death penalty.\textsuperscript{140} Nonetheless, other research reveals that

where the defense of insanity was based on a physical disease or defect, there was no difference between [the views of] death-qualified and excludable jurors. The distinction in the minds of the jurors is striking. In part it may reflect the public's generally greater hostility towards the mentally ill than towards people with other types of disease or handicap, including mental retardation,\textsuperscript{141} but, in part it probably also reflects a particular resentment against the idea of a purely mental problem as an excuse for unacceptable behavior. To a person who believes strongly in crime control, who believes that people must be made to pay for their irresponsible behavior, it must be particularly galling to see one form of irresponsibility excused by another. A physical disorder may be seen as external to the person, creating a sort of necessity or duress, but a purely mental disorder may be seen as simply another manifestation of a weak or corrupted character.\textsuperscript{142}

In simulated studies, mock jurors offer three primary reasons for rejecting insanity defenses: "mental illness is no excuse; [the defendant] might have fooled the psychiatrist; [the defendant] should have sought help for his problems."\textsuperscript{143} These findings are consistent with other

punishment were more likely to acquit by reason of insanity); see also People v. Williams, 558 N.E.2d 1258, 1268 (Ill. App. Ct. 1990) (rejecting defendant's argument based on the article by Ellsworth and her colleagues that excusing jurors opposed to the death penalty resulted in a jury "organized to convict [the defendant] because of its opposition to the insanity defense").


139. See Jonathan Kelley & John Braithwaite, Public Opinion and the Death Penalty in Australia, 7 Just. Q. 529, 530 (1990) ("The idea is that criminals are an outgroup . . . and that there is a general predisposition toward persecution of outgroups which includes support for capital punishment.").

140. See Ellsworth et al., supra note 138, at 83, 90, 92 (discussing the attitudinal differences among individuals when judging insane defendants).


142. Ellsworth et al., supra note 138, at 90; see also Lawrence T. White, The Mental Illness Defense in the Capital Penalty Hearing, 5 Behav. Sci. & L. 411, 417 (1987) (noting that an insanity defense is more likely to succeed when supported with "objective" evidence of psychopathology).

143. Lawrence T. White, Juror Decision Making in the Capital Penalty Trial: An Analysis of Crimes and Defense Strategies, 11 Law & Hum. Behav. 113, 125 (1987). Conversely, Professor White found that an insanity defense had a greater chance of success where defense counsel "could establish that (1) the defendant has not "fooled" the examining psychiatrist . . . and
research demonstrating that jurors with unfavorable attitudes toward psychiatry appear to have "a more basic approach to the relationship between crime and punishment." According to criminal defense attorney Norman Zalkind, insanity defense case jurors employ "almost a kind of quasi-religious view that you’re responsible for your acts."

There is a clear fit between the retribution-driven punitive response favored by authoritarians and their resentment of the insanity defense and general hostility toward psychiatry. This should not be surprising, given authoritarians’ propensity to endorse punishment as an end in itself; by its very nature, the insanity defense allows certain mentally impaired criminal defendants—frequently perceived as morally deviant—to escape punishment. Similarly, eighty-two percent of surveyed death penalty retentionists endorsed the proposition that a capital punishment advantage is that it “makes it impossible for convicted murderers to later go free on account of some legal technicality.” When we factor in additional research revealing that legislators who attribute crime to “free will” support capital punishment more strongly than do those who attribute it to social factors, another piece of the puzzle is filled in. Believers in free will are often precisely those who reject mental disability as a causal explanation

(2) the defendant had previously sought help for his illness. Id. at 125 n.11, for the raw data reported, see id. at 124.

In his study, White found that mock jurors identified a defendant’s mental illness both as a reason for giving a life sentence (e.g., thirteen respondents indicated “[d]efendant is mentally ill; cannot be held completely responsible for his actions”) and for choosing the death penalty (e.g., eight stated “mental illness is no excuse;” seven stated “defendant is not crazy; could have fooled psychiatrist;” and six stated that “[d]efendant did not seek help for his problems.”). Id. At 124 (referring to Tables 5-6).


146. See e.g., Ralph Brancale, More on McNaghten: A Psychiatrist’s View, 65 Dick. L. Rev. 277, 279 (1961) (“Let us not delude ourselves that we have accorded the defendant a fair consideration through due process of law and have weighed all the moral and psychologic issues involved. We are seeking the extermination of a dangerous person and we are seeking revenge.”); Vidmar & Miller, supra note 120, at 591.

147. See Vidmar & Miller, supra note 120, at 591.

148. See, e.g., Valerie P. Hans & Dan Slater, “Plain Crazy:” Lay Definitions of Legal Insanity, 7 Int’l J.L. & Psychiatry 105, 110 (1984) (public opinion polls have consistently shown a majority of Americans believe the insanity defense is a “loophole that allows too many guilty people to go free”); Jonas R. Rappeport, The Insanity Plea Scapegoating the Mentally Ill—Much Ado About Nothing? 24 S. Tex. L.J. 687, 690 (1983) (“The insanity plea offers an opportunity to soften some of the harshness of our criminal justice system . . . .”); White, supra note 141, at 124-26 (jurors who are primarily concerned with efficient crime control are likely to reject insanity plea, while those primarily concerned with due process are more likely to accept a plea).


for criminal behavior; this rejection may well stem from the same behavioral and cognitive sources as do the related death penalty attitudes.

It is clear that much public opinion about the insanity defense is imperfect and uninformed. Further, insanity defense attitudes, like death penalty attitudes, are laden with symbolism. They are "almost wholly abstract, ideological, and symbolic in nature, with essentially no personal relevance to the individual." These abstracted attitudes are expressed not only by lay people but by experts as well. Professors Homant and Kennedy have demonstrated that expert witnesses' previously articulated general attitudes toward the insanity defense would significantly govern their determination as to insanity in an individual hypothetical case.

The insanity defense is the authoritarian's worst-case disaster fantasy. It explicitly states that certain individuals can break the rules; what is worse, the rule breakers are definitionally deviant: they are individuals not "like us," outgroup members whose very essence appears to be a rejection of the conformity values most prized by the authoritarian personality. To the authoritarian, the insanity defense condones, indeed, rewards, the deviant for flaunting the law, and the defense refuses to force such an individual to take responsibility for his actions. The insanity defense thwarts the administration of punishment and does so with judicial sanction.

This perhaps helps explain why society adheres to insanity defense myths in spite of the overwhelming weight of contrary empirical evidence; psychologically, the dissonance that would be caused by acknowledging the mythic basis of insanity defense beliefs is more than the social psyche can bear. It may also explain why society adheres to the use of heuristic cognitive devices when evaluating information about the insanity defense, and why it refuses to concede that common sense may simply not be a sufficient explanation for the complex problems under discussion.

IV. ANTHROPOLOGY AND THE INSANITY DEFENSE

A. Introduction

Anthropologists study culture; they study the form and structure of culture; they study the content of culture; they study attitudes—social attitudes, cultural attitudes and political attitudes. And they study myths.

151. Ellsworth & Ross, supra note 149, at 164.
153. This section is generally adapted from Perlin, supra note 12, at 13-16.
155. See id. at 470.
156. See Douglas Mossman, Deinstitutionalisation, Homelessness, and the Myth of Psychiatric
The study of attitudes and myths is particularly relevant to this article. It is utterly impossible to understand the politics of insanity defense jurisprudence without understanding the social and cultural attitudes that drive legislative and judicial decisionmaking. It is also impossible to understand this phenomenon without understanding the social and cultural myths that drive the behavioral and empirical myths. What is as important as the existence and universality of insanity defense myths is the firmness of society’s belief in them as objective realities. Every civilization, according to Claude Lévi-Strauss, “tends to overestimate the objective orientation of its thought, and this tendency is never absent.” So it is with the insanity defense.

Just as “madness” has specific cultural meanings, just as psychiatric disease can be seen as a cultural and historical product of Western biomedicine, and just as cultural factors affect the course of major mental illness, attitudes toward the insanity defense have such meanings and affect the course of treatment (and the ultimate disposition) of the case of an insanity-pleading offender. Explanatory models of the insanity defense plea and pleaders have the same function as explanatory models of sickness. Both are “sets of generalizations which enable the thinker to produce information about particular sickness episodes and events.”

The importance of anthropology to the development of an understanding of the insanity defense becomes even clearer when the


157. The word “myth” is used in the same manner that many social anthropologists use it: “a sacred tale about past [or present] events which is used to justify social action in the present.” *Id.*


inquiry is narrowed to the school of structural anthropology. Structural anthropologists believe that all culture consists of sets of concepts that are in psychological tension with each other. For instance, it is impossible to make sense of black without realizing that it contrasts with white; it is impossible to understand citizenship without understanding that it contrasts with alienage. Consider how Richard Merelman characterizes this:

Such narratives appear in myths, rituals, popular culture, ceremonies or even institutionalized behavior in which exemplary persons (heroes, villains, etc.) . . . depict components of the sets themselves. In effect, such persons 'act out,' 'display,' or 'exercise' the culture. Building on these insights in a recent article, Douglas Mossman looks at the way society constructs mentally ill persons, specifically mentally ill homeless persons:

This . . . helps us appreciate how mentally ill persons . . . are ambiguous, perplexing, figures in the context of present day American political culture. American legal institutions ascribe to persons a high level of autonomy, personal responsibility and rationality. These qualities mirror the attributes—independence and the capacity for conscientious choice—through which mythologized individuals express their natural goodness amidst corrupting social influences. [Because of changes in involuntary civil commitment laws and state hospital funding, m]entally ill homeless persons are now free to reject society's norms, [and] to make unwise decisions about their life styles . . . [S]uch behavior . . reflects unconventional and therefore troubling choices. Mentally ill homeless persons thus represent a set of culturally contextual contradictions, because their behavior violates the set of structural oppositions that Americans use to organize their social perceptions. Think, in this context, about the insanity defense, about its roots, about society's attitudes. Think about how society structures good and evil, well and sick, lawful and unlawful, sane and insane. And think about the way that, on one hand, the existence of an insanity defense satisfies the need to express such tensions, but on the other hand creates a tension that may simply be "too much" for the legal system's "tensile strength."

B. The New Research

It is also useful to observe the myths that society uses to justify its juxtaposition of fact and emotion, and to consider the ways in which these myths fit into the structural anthropological model. In order to develop a better understanding of this fit, I have, over the past two years, conducted

163. Merelman, supra note 154, at 473.
164. Id. at 477.
165. Mossman, supra note 156, at 76.
a daily computer search for the words "insanity defense" in the NEWS library of the NEXIS database on the LEXIS system.

The database reveals few surprises. According to the news media, the allegedly "popular" insanity defense—that nothing more than a "legalistic slight of hand" and a "common feature of murder defenses"—is a reward to mentally disabled defendants for "staying sick," a "travesty," a "loophole," a "refuge," a "technicality," one of the "absurdities of state law," perhaps a "monstrous fraud." It is used—again, allegedly—in cases involving "mild disorders or a sudden disappointment or mounting frustrations... or a less-than-perfect childhood." It is reflected in "pseudoscience [that] can only obfuscate the issues," and is seen as responsible for "burying the traditional Judeo-Christian notion of moral responsibility under a tower of psychobabble." Other references to Christianity abound—a letter to the editor made this analogy:

Christ had the courage and felt a sense of outrage to drive the money changers from the temple. Will we have the fortitude to admonish the lawyers to back off and to stop getting killers acquitted, especially by the insanity defense? Society is simply overwhelmingly skeptical about the use of the insanity defense in virtually any case. "If everything is forgivable, then

167. Editorial, Insanity Defense on Trial, St. Louis Post-Dispatch, Feb. 23, 1995, at 6B.
173. Thomas Sowell, Insanity Defense Subverts Justice, St. Louis Post-Dispatch, Feb. 16, 1994, at 7B.
175. John Angelotta, Insanity Not a Scientific Term, Clev. Plain Dealer, Apr. 14, 1994, at 11B.
180. See Silver et al., supra note 126, at 64 (citing that studies indicate the public perceives the insanity defense as a "loophole"); see, e.g., Eve Zibart, The Medea Syndrome: Women Who Murder Their Young, Cosmopolitan, Aug. 1996, at 176.
everything is permissible,” reasoned a recent column in an Orlando newspaper. When it is pled, successful defendants are perceived either as spending a “short time” in mental hospitals (before being released to unsupervised freedom), or as being simply “set free,” or, most often, “getting away with it.” Defendants’ criminal responsibility is still being assessed by visual frames of reference: if he didn’t “seem frenzied” or appear insane, then “there’s no craziness here.” And of course, the Dan White “Twinkie defense” continues to be seen as some kind of norm in insanity cases.

Of course, the statistics belie the myths. All empirical analyses are consistent: the public at large and the legal profession (especially legislators) dramatically and grossly overestimate both the frequency and the success rate of the insanity plea, an error “undoubtedly . . . abetted” by media distortions. The most recent research reveals, for instance, that the insanity defense is used in only about one percent of all felony cases, and is successful just about one-quarter of the time. The use of the defense is not limited to murder cases; in one jurisdiction where the data has been closely studied, contrary to expectations, slightly less than one-third of the successful insanity pleas entered over an eight-year period were reached in cases involving a victim’s death. Further, individuals who plead insanity in murder cases are no more successful in being found

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183. See Roger Simon, Was Lorena Bobbitt’s Act ‘An Irresistible Impulse’?, Balt. Sun, Jan. 12, 1994, at 2A (explaining that a person found not guilty by reason of insanity is set free after being cured).
184. See, e.g., Dan Aucoin, On Trial: The Insanity Defense, Boston Globe, Mar. 24, 1996, at 17 (explaining that if defendant is found not guilty by reason of insanity, the defendant would be sent to a psychiatric facility rather than granted freedom); Lane Lambert, Local Public: He Got What He Deserved, Patriot Ledger (Quincy, MA), Mar. 19, 1996, at 7 (showing that if an insanity defense is successfully asserted, the defendant could spend the rest of his life in a mental hospital instead of the state prison);
185. See generally Graciela Sevilla, At Rapist’s Sanity Trial, Woman Recounts Attack; Assault Was ‘Methodical,” Victim Says, Wash. Post, Apr. 6, 1994, at B5 (quoting victim at a rapist’s sanity trial that her attacker “didn’t seem frenzied.”).
188. See Joseph H. Rodriguez et al., The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders, 14 Rutgers L.J. 397, 481 (1983).
189. See id. at 401; see also Lisa A. Callahan et al., The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study, 19 Bull. Am. Acad. Psychiatry & L. 331, 334 (1991) (finding that the insanity defense was raised in nearly one percent of all felony cases).
190. See Rodriguez et al., supra note 188, at 402.
NGRI than persons charged with other crimes.¹⁹¹

Thus, contrary to myth, there is a high risk to the defendant who pleads insanity and is unsuccessful. Defendants who asserted an insanity defense at trial, and who were ultimately found guilty of their charges, served significantly longer sentences than defendants tried on similar charges who did not assert the insanity defense. The same ratio is found when only homicide cases are considered.¹⁹² Furthermore, insanity acquittees are not quickly released from custody. A comprehensive study of California practice showed that only one percent of insanity acquittees were released following their NGRI verdict and that another four percent were placed on conditional release, the remaining ninety-five percent being hospitalized.¹⁹³ Additionally, they spend more time in custody—almost double the time—as do defendants convicted of the same offenses, and in California, those found NGRI of non-violent crimes were confined for periods over nine times as long.¹⁹⁴

Perhaps the oldest of the insanity defense myths is that criminal defendants who plead insanity are usually faking, a myth that has bedeviled American jurisprudence since the mid-nineteenth century. Of the 141 individuals found NGRI in one jurisdiction over an eight year period, there was no dispute that 115 were schizophrenic (including thirty-eight of the forty-six cases involving a victim’s death), and in only three cases was the diagnostician unwilling or unable to specify the nature of the patient’s mental illness.¹⁹⁵ And finally, it is a myth that most insanity defense trials feature “battles of the experts,” a myth reinforced by the circus-like atmosphere of the Hinckley trial. On the average, there is examiner agreement in eighty-eight percent of all insanity cases.¹⁹⁶

The “default drive” of prosecutors is simply to argue that the defendant was faking or malingering,¹⁹⁷ suggesting that insanity pleaders

¹⁹². See Rodriguez et al., supra note 188, at 401-02.
¹⁹⁴. See Rodriguez et al., supra note 188, at 403-04; see also Mark Pogrebin et al., Not Guilty By Reason of Insanity: A Research Note, 8 Int'l J.L. & Psychiatry 237, 240 (1986) (insanity acquittees do not spend fewer days in confinement via an NGRI plea than had they been convicted and sentenced); Steadman et al., supra note 193, at 58-61.
¹⁹⁶. See Jeffrey L. Rogers et al., Insanity Defenses: Contested or Conceded?, 141 Am. J. Psychiatry 885, 885-86 (1984); cf. Kenneth Fukunaga et al., Insanity Plea: Interexaminer Agreement and Concordance of Psychiatric Opinion and Court Verdict, 5 Law & Hum. Behav. 325, 325 (1981) (finding that there was unanimous agreement in 92% of the cases concerning the mental state of the defendant).
¹⁹⁷. See, e.g., Jeffrey Brainard, Accused Killer Avoids Another Trial, St. Petersburg Times, May 25, 1996, at 1 (describing prosecutors’ and some psychologists’ belief that defendant was attempting to malinger, or to fake illness); Jury Gets Duran Case, Tampa Trib., Apr. 4, 1995, at
be given "a little fake Oscar," or that defendants charged with outrageous crimes merely need find a psychiatrist willing to believe a "story of mental disorder in order to assure that they are sent 'home free.'" Criminal defense lawyers refer to their own insanity-pleading clients as "a monster, a Frankenstein."

Potential jurors are sometimes excused because they appear too eager to sit on insanity defense cases (and certainly not because of their desire to ente an NGRI verdict). When interviewed, families of crime victims regularly report that, in their opinions, insanity-pleading defendants are "fakers who aren't sick." Or that "everybody pleads that [defense]."

In one instance a spokesperson for the American Psychiatric Association misinformed the press as to the appropriate test for assessing the need for continuing confinement of insanity acquittees.

Politicians focus on abolition of the insanity defense as a panacea for urban crime problems, calling it "one of the absurdities of state law," providing a hiding place for criminals "to avoid responsibility." Legislative candidates point to insanity defense support as an indicia of an opponent being soft on crime, and others point to their opposition to

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204. Cameron McWhirter, 'What Do You Want To Do With Them?', Cin. Enquirer, Dec. 19, 1994, at A14 (quoting APA spokeswoman as saying that the problem after a defendant is declared insane is "when someone becomes cognizant of what they've done, what do you want [to] do with them?")


the insanity defense as part of campaign strategy.\textsuperscript{208} And these positions are regularly endorsed in newspaper editorials\textsuperscript{209} and letters to the editor.\textsuperscript{210} In the words of a thirteen-year-old—perhaps one polled by \textit{Parade} magazine?—writing about the O.J. trial to the \textit{Fresno Bee}.

Of course, if he did do it, there’s always the good old temporary insanity defense, a sure-fire way to bail out of just about any heinous crime, especially murder.\textsuperscript{211}

C. The Roots of the Myths

So, why do these myths persist? Why did the myths originally emerge? Why have they shown such remarkable longevity? Why do cases such as Hinckley’s have such a profound effect on the perpetuation of the myths? Why do they appear essential to the continued order of society? Why do they continue to capture a significant portion of the general public and the legal community? How do they reflect a “community consciousness”? Finally, why may their persistence doom any attempt to establish a rational insanity defense jurisprudence, no matter how much conflicting empirical data is revealed?\textsuperscript{212}

To answer these questions it is necessary to look at the myths’ roots. An examination of the literature and the caselaw reveals at least four reasons for the myths’ persistence:

1. The fear that defendants will “beat the rap” through fakery, a millennium-old fear which has its roots in a general disbelief in mental illness, and a deep-seeded distrust of manipulative criminal defense lawyers invested with the ability to dupe jurors into accepting spurious expert testimony.\textsuperscript{213}

2. The sense among the legal community and the general public that there is something different about mental illness and organic illness, so that, while certain physiological disabilities may be seen as legitimately exculpatory, emotional handicaps are
3. The demand that a defendant conform to popular images of extreme craziness in order to be legitimately insane, a demand with which Chief Justice Rehnquist and other members of the current Supreme Court appear entirely comfortable.\textsuperscript{215}

4. A fear that the soft, exculpatory sciences of psychiatry and psychology, claiming expertise in almost all areas of behavior, will somehow overwhelm the criminal justice system by thwarting the system's crime control component.

The following section addresses the most important of these reasons, the fear of faking, in greater detail.\textsuperscript{216}

D. Fear of Faking\textsuperscript{217}

Historically, society believed that insanity was too easily feigned, that psychiatrists were easily deceived by such simulation, and that the use of the defense was "an easy way to escape punishment."\textsuperscript{218} Because it could not be demonstrated conclusively that insanity had some "observable 'material' existence," charges of "counterfeit[ing]" insanity quickly arose.\textsuperscript{219} When Judge Darling characterized insanity in 1911 as "the last refuge of a hopeless defense,"\textsuperscript{220} the factual basis of his assertion went unchallenged. As recently as 1986, Justice Lavorato of the Iowa Supreme Court, dissenting from a decision upholding the constitutionality of placing the burden of proof on the defendant in an insanity case, pointed out, "Placing proof of insanity with the defense originated over a hundred years ago with judicial concerns that cunning defendants might pull one over snifing jurors."\textsuperscript{221}

This fear of successful deception, which has "permeated the American legal system for over a century,"\textsuperscript{222} was seen as significantly weakening the

\textsuperscript{214} See generally Kulynych, supra note 30 (discussing neuroimaging).

\textsuperscript{215} Perlin, supra note 19, at 233.

\textsuperscript{216} The other myths are discussed extensively in Perlin, supra note 19, at 247-62.

\textsuperscript{217} This section is generally adapted from id. at 256-47.

\textsuperscript{218} Diane B. Bartley, State v. Field: Wisconsin Focuses on Public Protection by Reviving Automatic Commitment Following a Successful Insanity Defense, 1986 Wis. L. Rev. 781, 784. For what is probably the first recorded example of feigned insanity, see H.H. Cohn, Some Psychiatric Phenomena in Ancient Law, in Psychiatry, L. & Ethics 59, 61 (A. Carmi et al. eds., 1986) (discussing David's decision to feign mental disorder so as to escape from King Saul, see 1 Samuel 21:13-16); see also Robert P. Brittain, The History of Legal Medicine: The Assizes of Jerusalem, 34 Medico-Legal J. 72, 72-73 (1966) (discussing the possibility of feigning illness to avoid trial in European feudal states and methods of detection).

\textsuperscript{219} Joel Peter Eigen, Historical Developments in Psychiatric Forensic Evidence: The British Experience, 6 Int'l J.L. & Psychiatry 425, 427 (1984). Thus, in 1681, Sir Robert Holbrun wrote, "[A] man may counterfeit himself to be mad, he may do it so cunningly as it cannot be discerned whether he be mad or no." Id. at 427-428 (quoting G.D. Collinson, A Treatise on the Law Concerning Idiots, Lunatics, and Other Persons "Non Compotes Mentis" (1812)).

\textsuperscript{220} Rex v. Thomas, 7 Cr. App. R. 36 (1911), discussed in Homer D. Crotty, The History of Insanity as a Defense to Crime in English Criminal Law, 12 Cal. L. Rev. 105, 119 n.87 (1924).

\textsuperscript{221} State v. James, 393 N.W.2d 465, 470 (Iowa 1986) (Lavorato, J., dissenting) (emphasis added).

\textsuperscript{222} Perlin, supra note 97, at 98; cf. Winiarz v. State, 752 P.2d 761, 763 (Nev. 1988)
The deterrent effect of the criminal law.\footnote{223} The fear holds some of this century's most respected jurists in its thrall.\footnote{224} The public's fear of feigned insanity defenses meshes with its fears of released insanity acquittees. If a defendant can successfully feign insanity, it is feared, he will likely be quickly released from confinement, thus both escaping his "justly deserved punishment" and endangering other potential victims in the community.\footnote{225} Even lawyers for insanity acquittees repeat these myths. In a press interview following a bench trial acquitting his client, defense counsel Jerome Ballarotto stated, "Everybody who knew [the defendant] knew something wasn't right about this . . . . Prosecutors generally scoff at this type of defense, but in this case, it was true."\footnote{226}

Yet this fear is unfounded.\footnote{227} There is virtually no evidence that feigned insanity has ever been a remotely significant problem of criminal procedure, even after more "liberal" substantive insanity tests were adopted. A survey of the case law reveals no more than a handful of cases in which a defendant free of mental disorder "bamboozled"\footnote{228} a court or jury into a spurious insanity acquittal.\footnote{229}

(deciding it was reversible error for psychiatric expert to testify defendant was "feigning" in homicide case where defendant pled mistake and misadventure as defenses). The alleged ease with which insanity can be feigned is also cited as a rationale for the tort law doctrine imposing tort liability on the "insane." See, e.g., Williams by Williams v. Kearbey by & through Kearbey, 775 P.2d 670, 672 (Kan. Ct. App. 1989) (citing Restatement (Second) of Torts § 895J, cmt. a (1977)).


\footnote{226. Booth, Trenton Firefighter Acquitted; Temporary Insanity Cited in 1991 Attack, The (Trenton, NJ) Times, March 17, 1993, at A19. The defendant, a fireman, had suffered organic brain damage after having been struck on the head by a rock eight months prior to the incident that gave rise to the criminal charges. Id.}

\footnote{227. See Elizabeth Goldstein, Asking the Impossible: The Negligence Liability of the Mentally Ill, 12 J. Contemp. Health L. & Pol'y 67, 75 (1995).}


\footnote{229. See People v. Lockett, 468 N.Y.S.2d 802 (N.Y. App. Div. 1983) (granting state's motion to vacate defendant's NORI plea on ground defendant defrauded court); People v. Schmidt,
Recent carefully-crafted empirical studies have clearly demonstrated that malingering among insanity defendants is, and traditionally has been, statistically low. Even where it is attempted, it is fairly easy to discover (if sophisticated diagnostic tools are used). Clinicians correctly classify ninety-two to ninety-five percent of all subjects as either faking or not faking, especially in cases where defendants are faking severe forms of mental illness. Some of these cases involve defendants who, although


Other anecdotal instances of feigned insanity are discussed in Sauer v. United States, 241 F.2d 640, 648 n.21 (9th Cir. 1957), aff'd by 354 U.S. 940 (1958) (case of Martin Leven, discussed in Wertham, The Show of Violence (1949)) and in Rudolph J. Gerber, The Insanity Defense Revisited, 1984 Ariz. St. L.J. 83, 117-118 (speculating that President Nixon's charges that the insanity defense had been subject to unconscionable abuse by defendants stemmed from his reading press accounts of the case of United States v. Trapnell, 495 F.2d 22 (2d Cir. 1974), cert. denied, 419 U.S. 851 (1974), where the court admitted evidence that Trapnell, while a patient at a hospital, had counseled a fellow patient, Padilla, about how to feign insanity). Padilla subsequently had charges against him dropped and attributed his success to Trapnell's teachings on the art of acting insane. Id. at 24. For the complete story of Garrett Trapnell, see Elliot Asinof, The Fox Is Crazy Too: The True Story of Garrett Trapnell, Adventurer, Skyjacker, Bank Robber, Con Man, Lover (1976).


For a recent and rare case reflecting this reality, see United States v. Denny-Shaffer, 2 F.3d 999, 1009 (10th Cir. 1993).


232. See David Schretlen & Hal Arkowitz, A Psychological Test Battery to Detect Prison Inmates Who Fake Insanity or Mental Retardation, 8 Behav. Sci. & L. 75, 75 (1990).

233. Recent evidence suggests that tests that are accurate at detecting malingering of severe forms of psychosis may be less accurate in detecting malingering of Post-Traumatic Stress Disorder (PTSD). See, e.g., Paul Lees-Haley, Malingering Post Traumatic Stress Disorder on the MMPI, 2 Forensic Rep. 89 (1989). On juror suspicion in PTSD cases in general, see Judd F.
feigning, are nonetheless severely mentally ill. And the mere act of pleading, say, multiple personality disorder syndrome is seen as malingering in se.

Reported cases also reveal that attempted feigning is a risky gambit, and defendants have very few incentives to mangle:

37 feigned attempts result in abandoned insanity defenses and/or convictions.

This, of course, should not be surprising. Almost two centuries ago, it was observed that feigning attempts would be “doomed to failure” because to “sustain the character of a paroxysm of active insanity would require a continuity of exertion beyond the power of the sane person.”


234. See, e.g., People v. Kurbegovic, 188 Cal. Rptr. 268, 282 (Cal. Ct. App. 1983) (finding that defendant "left a trail of evidence that he was not only competent but very capable of manipulating those around him ... "); Barton Gellman, Acting Skills Gain Defendant an Extended Run in Prison: Mental Illness "Charade" Doesn't Fool Court, Wash. Post, July 6, 1989, at C1 (discussing the case of Tyrone Robinson, in which data was consistent "both with psychosis and with desperate malingering") (quoting Dr. William D. Strathmann).


235. See Sarah K. Fields, Note, Multiple Personality Disorder and the Legal System, 46 Wash. U. J. Urb. & Contemp. L. 261, 284-85 (1994) (“Because [Multiple Personality Disorder] is so out of the ordinary and bizarre, when the defendant maintains that she is not guilty by reason of insanity because of [Multiple Personality Disorder], that suspicion [of malingering] is heightened.”).

236. See id. at 287-88.


For rare reversals in such cases, see Boggs v. State, 667 So. 2d 765 (Fla. 1996); State v. Sparks, 891 S.W.2d 607 (Tenn. 1995); State v. Jackson, 890 S.W.2d 436 (Tenn. 1994).

238. Eigen, supra note 219, at 428 (quoting John Haslam, Medical Jurisprudence as it Relates to Insanity According to the Laws of England 60 (Garland Publ., Inc. 1979) (1817)).

"Cases will doubtless arise where criminals will take shelter behind a professed belief that their crime was ordained by God, just as this defendant attempted to shelter himself behind that belief. We can safely leave such fabrications to the common sense of juries."

In reality, the empirical evidence is quite to the contrary: it is much more likely that seriously mentally disabled criminal defendants will feign sanity in an effort not to be seen as mentally ill, even where such evidence might serve as powerful mitigating evidence in death penalty cases. Thus, juveniles imprisoned on death row were quick to tell Dr. Dorothy Lewis and her associates, "I'm not crazy," or "I'm not a retard.

In spite of this track record, the public remains highly skeptical of the abilities of forensic psychiatrists to determine legal insanity and continues to insist that "people are getting away with murder and [that the insanity defense] is an easy defense to fake." Prosecutors have offered, as evidence of sanity, expert testimony that a defendant was "intelligent enough to feign insanity." Anti-insanity defense prosecutors suggest that only "a defendant who is faking insanity" can reasonably fear disclosure of his response to post-arrest Miranda warnings. Prosecutors characterize the defense as a "fake," and the ensuing convictions are affirmed.

Indeed, it may not even matter to some segment of the public whether an insanity defense is feigned or authentic; in either case, it is equally rejected. Even insanity defense supporters such as Prof. Richard

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240. See Lewis, Juveniles, supra note 92 (juveniles on death row "almost uniformly tried to hide evidence of cognitive deficits and psychotic symptoms"); Lewis, Inmates, supra note 92 (all but one of sample of death row inmates studies attempted to minimize rather than exaggerate their degree of psychiatric disorders); Taylor, Motives for Offending Among Violent and Psychotic Men, 147 Brit. J. Psychiatry 491, 496-97 (1985) (finding that in a sample of 211 prisoners studied, nonpsychotic men never claimed psychotic justification for their offenses but half the psychotic men claimed ordinary, nonpsychotic motives).

241. See, e.g., Dan Slater & Valerie Hans, Public Opinion of Forensic Psychiatry Following the Hinckley Verdict, 141 Am. J. Psychiatry 175, 177 (1984) (40% of those polled had "no confidence" in expert testimony in Hinckley trial; another 20% had only "slight" confidence); see generally Robert J. Homant & Daniel B. Kennedy, Judgment of Legal Insanity as a Function of Attitude Toward the Insanity Defense, 8 Int'l J.L. & Psychiatry 67, 79-80 (1986).


243. Compare Fulgham v. Ford, 850 F.2d 1529, 1534 (11th Cir. 1988), with Francois v. Henderson, 850 F.2d 251, 255 (5th Cir. 1988), a case involving an insanity acquittee's habeas corpus application for release, in which the state alleged that the defendant was "faking sanity." Expert testimony was unanimous that sanity could be feigned for only a few hours; "[n]o schizophrenic can feign sanity for years on end." Henderson, 850 F.2d at 235.


246. See State v. Perry, 610 So. 2d 746, 781 (La. 1992) (Cole, J., dissenting) ("Society has the right to protect itself from those who would commit murder and seek to avoid their
Bonnie recommend that "an exculpatory doctrine of insanity should be framed in a way that minimizes the risk of fabrication, abuse, and moral mistake." Dr. Isaac Ray, the father of American forensic psychiatry, discussed the impact of these misperceptions more than a century ago:

The supposed insurmountable difficulty of distinguishing between feigned and real insanity has conduced, probably more than all other causes together, to bind the legal profession to the most rigid construction and application of the common law relative to this disease, and is always put forward in objection to the more humane doctrines...

The judiciary is similarly subject to this myth. Courts are extraordinarily casual in their admission of both lay and expert testimony as to feigning. Thus, an expert’s testimony that a defendant might have been feigning “because he could be released from an institution in only a few months” if he were found NGRI was considered improper (albeit harmless error) only because there was no evidence in the case that the defendant had knowledge about the possibility of his potential release following such an insanity acquittal. Nowhere in the court’s brief opinion is there any indication as to how such testimony fits within psychiatric expertise as to mental states. Elsewhere, a conviction was affirmed based on expert testimony that “there is no blanket disturbance of reality just because a person is psychotic.”

In another case, testimony by a psychiatrist that an institutional chaplain had told him that he (the chaplain) felt the defendant “had tendencies to be a manipulative type of person,” was admissible since that issue was “clearly relevant to... whether... [the defendant] was a malingering.” Again, there is no discussion of why this is “clearly relevant” nor of the relationship that this testimony bears to the witness’s expertise. This is especially telling in light of contemporaneous scholarly research concluding that “unstructured interviews and projective
tests are the least effective ways to identify malingers.

Courts are pretextual and teleological in the way they construe malingering testimony. Where a defendant who committed a brutal murder gave himself up to police authorities, confessed and showed no remorse for the killing, the court found that this evidence "wholly refute[d]" expert testimony as to defendant's insanity, leading to the initial conclusion that the defendant "concocted" evidence of delusions, and to the broader holding that expert opinions are "especially entitled to little or no weight" when based upon a "feigned state of mind." Elsewhere, a court supported a finding that the defendant had "feigned incoherence" on evidence that his previous institutionalizations had made him "aware" of how to act during a psychological evaluation. In neither of these instances is there any social science basis offered by the court to support its conclusions.

Lurking beneath the surface of this myth is another truism: that the "'insanity dodge' has come into existence by popular concept as a symbol of sharp practice by unscrupulous attorneys and none too honest medical men." Thus, a comprehensive survey in the District of Columbia showed that court distrust of psychiatrists was "fully matched by distrust of defense counsel who appeared unorthodox in their approach to the insanity defense." The parallels to the perception of the role of lawyers in death penalty cases and in challenges to involuntary civil

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256. Id. at 475.


259. Richard Arens & Jackwell Susman, *Judges, Jury Charges and Insanity*, 12 How. L.J. 1, 5 (1966). Of 27 defense lawyers interviewed, "all but one expressed the view that [D.C.] District Court judges viewed the insanity defense with suspicion and at times hostility." Id. at 6; see also Ingo Keilitz, *Researching and Reforming the Insanity Defense*, 39 Rutgers L. Rev. 289, 315 (1987) ("[t]he promise of treatment may draw defense counsel to the MBG plea in cases in which an insanity defense is unlikely to succeed.").

commitment standards\textsuperscript{261} are remarkable.

Forensic psychiatrists testifying in criminal cases were similarly viewed as attempting to cloud our moral standards and to ignore the limits of community tolerance.\textsuperscript{262} From their first involvement in court proceedings, "alienists . . . have been perceived as a threat to public security and a fancy means for 'getting criminals off.'"\textsuperscript{263} Yet, as long as seventy-five years ago, William A. White responded to these charges: "[I]n my personal experience I have never known a criminal to escape conviction on the plea of 'insanity' where the evidence did not warrant such a verdict [except in jury nullification cases]."\textsuperscript{264} Although the story was greeted initially with some amusement, the fact that the New Mexico legislature passed legislation last year (subsequently vetoed by the state's governor) that would have required a mental health professional testifying during competency hearings to "wear a cone-shaped hat that is not less than two feet tall [, that's] surface . . . shall be imprinted with stars and lightning bolts,"\textsuperscript{265} suggests that little has changed over the past century.

Another reason that experts are viewed as unnecessary to the process is because the subject of their testimony appears to be within the lay individual's realm of ordinary common sense. The Seventh Circuit recently noted that, while psychologists and psychiatrists may sometimes demonstrate a "genuine expertise," their testimony is often "nothing more than fancy phrases for common sense."\textsuperscript{266} In a recent commentary in a


Indeed it seems there is a very comfortable ideological fit between being a forensic psychiatrist and being against capital punishment; being therapeutic rather than punitive; being against the prosecution and what was seen as the harsh status quo in criminal law. This ideological fit has begun to come apart in recent history, but during the days when David Bazelon and American psychiatry had their love affair, the fit was real. Those were the halcyon days when the concept of treatment and the concept of social justice were virtually indistinguishable.

\textsuperscript{264} White, supra note 65, at 3 (emphasis added).

\textsuperscript{265} Psychological Limits, Clev. Plain Dealer, Feb. 8, 1996, at 10E (quoting S. 459, 42nd Leg., 1st Sess. (N.M. 1995)).

\textsuperscript{266} United States v. Hall, 93 F.3d 1393, 1343 (7th Cir. 1996). But see People v. Strader, 663 N.E.2d 511, 516 (Ill. App. Ct. 1996) ("[T]his court is not prepared to say that the entire field of psychology is a matter of knowledge common to all.").
state bar journal, a Pennsylvania attorney put it this way:

An "expert witness" is generally defined as one possessing, with reference to a particular subject, knowledge not acquired by ordinary persons. But what facet of human behavior is foreign to the average judge or jury? Who hasn't felt rage, anger, loss, despair, self-pity, fear, and depression? Haven't we all been in the vise-like grip of an irresistible impulse only to be surprised when a little self-restraint caused it to loosen its grip?\(^6\)

In short, the fear of feigned insanity and the distrust of expert witnesses' ability to identify malingering behavior continue to dominate insanity defense jurisprudence. The empirical data suggesting that this problem is minimal continues to be trivialized, and judges, legislators and jurors continue to adhere to this most powerful of all myths.

V. THE INSANITY DEFENSE IN IOWA

Stories in the popular media about insanity defense cases from Iowa in the past few years similarly reflect traditional insanity defense myths. An editorial in the *Omaha World-Herald* about a series of Iowa and Nebraska cases charged that decisions that expanded the insanity defense were "dangerous" because they "encourage[d] people of weak character to call themselves victims to justify their irresponsible behavior."\(^{268}\) In an interview with the *Des Moines Register*,\(^{269}\) Drake Law University Law School Professor Robert Rigg characterized the defense in Iowa as "very, very unpopular," pointing out that a segment of the public believed it to be nothing more than "a song and dance a lawyer concocts to get the client off."\(^{270}\) A local sheriff referred to a defendant, who pleaded insanity after allegedly murdering another woman in order to obtain that woman's child, as "a very good thespian," who was "trying to fool" her jailers as she awaited trial.\(^{271}\) And, after a jury found a fourteen-year-old girl (tried as an adult) guilty of murdering her great aunt in spite of testimony that she was psychotic, the county attorney noted, "There was never any question whether she did it."\(^{272}\)

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269. Discussing a case in which a grandmother was found NGRI in the slaying of her eight month old grandson whom she believed to be the "Antichrist."
Although local lawyers describe the defense as “a tough defense to sell” and although local jurors are perceived as possessing “legendary” skepticism about a verdict seen as a way to “wiggle” out of a prison sentence, Iowa appears to be precisely in line with the majority of American jurisdictions in the way it constructs, views, contextualizes, and treats the defense: as a meretricious ploy that encourages irresponsible behavior on the part of defendants in the face of “factual” guilt.

VI. THE JUDICIARY’S ACCEPTANCE OF THE DISCREPANCY

While the previous sections provide explanations for the disparity between reality and society’s perception of the insanity defense, they do not indicate how the judiciary deals with the defense or the disparity. This section provides examples which indicate that the disparity between perception and reality also pervades the judiciary. It explains the judiciary’s acceptance of the disparity using several overlapping constructs. These constructs are drawn from cognitive psychology, from law, from sociology, from philosophy and from my own invention.

The first of these constructs is heuristics. Heuristics is a cognitive psychology construct that refers to the implicit thinking devices which individuals use to simplify complex, information-processing tasks. The use of heuristics leads to distorted and systematically erroneous decisions and causes decisionmakers to “ignore or misuse items of rationally useful information.” One single vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be made.

Through the availability heuristic, individuals judge the probability or frequency of an event based upon the ease with which they recall it, leading generally to demands for harsher punishment in all cases. Through the typification heuristic, people characterize a current experience via reference to past stereotypic behavior. Through the attribution heuristic, they interpret a wide variety of additional information to reinforce pre-existing stereotypes.
The second construct is ordinary common sense (OCS). The positions frequently taken by Chief Justice Rehnquist and Justice Thomas in criminal procedure cases best highlight the power of OCS as an unconscious animator of legal decisionmaking. Such positions frequently demonstrate a total lack of awareness of the underlying psychological issues and focus on such superficial issues as whether a putatively mentally disabled criminal defendant bears a "normal appearance." They frequently demonstrate a total lack of awareness of the underlying psychological issues and focus on such superficial issues as whether a putatively mentally disabled criminal defendant bears a "normal appearance."280

These are not the first jurists to exhibit this sort of closed-mindedness. Trial judges will typically say, "he [the defendant] doesn't look sick to me," or, even more revealingly, "he is as healthy as you or me." In short, advocates of OCS believe that simply by using their OCS, jurists can determine whether defendants conform to "popular images of 'craziness.'"281 If they do not the notion of a handicapping mental disability condition is flatly, and unthinkingly, rejected.282 Thus, OCS presumes two "self-evident" truths: "First, everyone knows how to assess an individual's behavior. Second, everyone knows when to blame someone for doing wrong."284

A third construct is sanism. Sanism is an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia and ethnic bigotry. It infects both jurisprudence and lawyering practices. Sanism is largely invisible, largely socially acceptable, and is based predominantly upon stereotype, myth, superstition and deindividualization.285

Judges, legislators, attorneys and laypersons all exhibit sanist traits and profess sanist attitudes. It is no surprise that jurors reflect and project the conventional morality of the community, and judicial decisions in all areas of civil and criminal mental disability law continue to reflect and perpetuate sanist stereotypes.286

280. See, e.g., State Farm Fire & Cas. Ltd. v. Wicka, 474 N.W.2d 324, 327 (Minn. 1991) (stating that both law and society are always more skeptical about a putatively mentally ill person who has a "normal appearance" or "doesn't look sick").
283. Id.
The concept of sanism must be considered concurrently with that of pretextuality. Sanist attitudes often lead to pretextual decisions. Fact-finders accept, either implicitly or explicitly, testimonial dishonesty and engage similarly in dishonest, frequently meretricious, decisionmaking, specifically where witnesses, especially expert witnesses, show a "high propensity to purposely distort their testimony in order to achieve desired ends." This is problematic for two reasons. First, the pretexts of the forensic mental health system are reflected both in the testimony of forensic experts and in the decisions of legislators and fact-finders. Second, experts frequently testify in accordance with their own self-referential concepts of morality and openly subvert statutory and caselaw criteria that impose rigorous behavioral standards as predicates for commitment or that articulate functional standards as prerequisites for an incompetency-to-stand-trial finding.

The final construct to consider is teleology. The legal system selectively, teleologically, either accepts or rejects social science evidence depending on whether or not the use of that data meets the system's a priori needs. In cases where fact-finders are hostile to social science teachings, such data often meets with tremendous judicial resistance, evidenced by the courts' expression of their skepticism about, suspicions of, and hostilities toward such evidence.

Courts are often threatened by the use of such data. Social science’s "complexities [may] shake the judge's confidence in imposed solutions." Courts' general dislike of social science is reflected in the self-articulated claims that judges are unable to understand the data and unable to apply it properly to a particular case. Thus, social science literature and studies that enable courts to meet predetermined sanist ends are often privileged while data that would require judges to question such ends are frequently rejected. Judges often select certain preferred data that adheres to their pre-existing social and political attitudes, and use heuristic reasoning in rationalizing such decisions. Social science data is used pretextually in such cases and is ignored in other cases to rationalize otherwise baseless judicial decisions.

288. See generally Perlin, supra note 21.
289. Id.
292. See, e.g., Perlin, supra note 275, at 986-93 (discussing decision in United States v. Charters, 863 F. 2d 302 (4th Cir. 1988) (en banc), cert. denied, 494 U.S. 1016 (1990) (limiting right of pretrial detainees to refuse medication)).
293. See Appelbaum, supra note 290, at 341.
So, how do these concepts “play out” in insanity defense cases? At the outset, consider that the insanity defense is a textbook example of the power of heuristic reasoning. Insanity defense defenders attempt to use statistics to rebut empirical myths; scientific studies to demonstrate that responsibility is a valid, externally verifiable term, and that certain insanity-pleading defendants are, simply, different; and principles of moral philosophy to prove that responsibility and causation questions are legitimate ones for moral and legal inquiry. On the other hand, the vivid anecdote or the self-affirming attribution overwhelm all attempts at rational discourse. Insanity defense decisionmaking is a uniquely fertile field in which the distortive vividness effect can operate, and in which the legal system’s poor mechanisms of coping with “systematic errors in intuitive judgment” made by heuristic “information processors” become especially troubling. The Hinckley case—perhaps the most vivid insanity defense trial in American legal history—is the perfect example. The discrepancy between society’s perception and the reality of the frequency of use of the insanity defense, its success rate, and the appropriateness of its success rate all reflect this effect.  

Reliance on OCS is one of the keys to an understanding of why and how insanity defense jurisprudence has developed. Not only is it prereflexive and self-evident, it is also susceptible to precisely the type of idiosyncratic, reactive decision making that has traditionally typified insanity defense legislation and litigation. Paradoxically, the insanity defense is necessary precisely because it rebuts “common-sense everyday inferences about the meaning of conduct.”

Empirical investigations corroborate the inappropriate application of OCS to insanity defense decisionmaking. Judges “unconsciously express public feelings . . . reflect[ing] community attitudes and biases because they are ‘close’ to the community.” Virtually no members of the public can actually articulate what the substantive insanity defense test is. The public is seriously misinformed about both the “extensiveness and consequences” of an insanity defense plea. And, the public explicitly and consistently rejects any such defense substantively broader than the "wild beast" test.

This OCS is consistent, even in that microhandful of cases in which defendants are acquitted by reason of insanity where it is questionable that they were actually insane. These cases fall into three categories: (1) certain

294. See also Perlin, supra note 6, (describing in greater detail the interactions of the aforementioned myths).
295. Sendor, supra note 30, at 1372.
296. Arens & Susman, supra note 259, at 34 n.43.
298. Hans, supra note 135.
women who commit infanticide,\textsuperscript{300} (2) on-duty law enforcement officials,\textsuperscript{301} and (3) a "we can feel sorry for you group" with whom jurors could empathize.\textsuperscript{302} Over a ten-year period, over two-thirds of all insanity acquitees in New York fell into such categories, "classes not necessarily predisposed to commit additional crimes."\textsuperscript{303} Lorena Bobbitt is a classic example of this subgroup, members of which have been referred to as "empathy outliers,"\textsuperscript{304} and "virtuous outlaws."\textsuperscript{305} But these cases, often simply nothing more than nullification verdicts,\textsuperscript{306} are simply reflections of society's imperfect OCS. Tony Mauro pointed out in a USA Today story soon after the Bobbitt verdict that, nearly simultaneously, a Virginia judge in the same courthouse rejected an insanity defense offered by a young black man charged with killing a state trooper, and sentenced him to death.\textsuperscript{307} Thus, it is not difficult to understand why the only stories in Iowa newspapers about successful insanity defenses were reports of a case of a grandmother killing her grandson (allegedly, the "Antichrist"),\textsuperscript{308} of a mother who killed her two young children,\textsuperscript{309} and of a woman who swerved her car (loaded with six family members) into the path of another vehicle in a failed mass suicide attempt.\textsuperscript{310} 

What about sanism? Insanity defense decisionmaking is often

\textsuperscript{300} For an important re-evaluation of this entire area of the law, see Michelle Oberman, Mothers Who Kill: Coming to Terms with Modern American Infanticide, 34 Am. Crim. L. Rev. 1 (1996).

\textsuperscript{301} The most prominent case in this category is Tornasney v. Gold, 420 N.Y.S.2d 192 (1979).


\textsuperscript{304} Perlin, supra note 19, at 193.

\textsuperscript{305} Dan M. Kahan & Martha C. Nussbaum, Two Concepts of Emotion in Criminal Law, 96 Colum. L. Rev. 264, 349-50.

\textsuperscript{306} See Perlin, supra note 6, at 704; Morning Edition: remarks of Prof. Peter Arenella, Transcript No. 1373-12 (NPR radio broadcast, June 22, 1994).


\textsuperscript{308} See O'Donnell, supra note 270.

\textsuperscript{309} See Psychotic Mother "Not Danger to Public," Des Moines Reg., July 24, 1993, at 21; see generally Santiago, supra note 274 (quoting Des Moines psychiatrist Michael Taylor as reporting that most of the successful insanity defenses in Iowa have involved infanticide cases). But see Wife Free, Man Plead For Justice, Des Moines Reg., July 26, 1994 (estranged husband of defendant criticizing her speedy release from custody, calling her "a menace to society").

\textsuperscript{310} See Gary Newman, Crash Driver Not Guilty By Reason of Insanity, Omaha World-Herald, Apr. 19, 1995, at 13SF. The defendant in that case had painted her house door red to signify that she was the devil, and "ate dirt in an attempt to choke to death." Id.
irrational. It rejects empiricism, science, psychology, and philosophy, and substitutes myth, stereotype, bias, and distortion. In short, insanity defense jurisprudence is the jurisprudence of sanism. Like the rest of the criminal trial process, the insanity defense process is riddled by sanist stereotypes and myths. For example:

- reliance on a fixed vision of popular, concrete, visual images of craziness;
- an obsessive fear of feigned mental states;
- a presumed absolute linkage between mental illness and dangerousness;
- sanctioning of the death penalty in the case of mentally retarded defendants some defendants who are "substantially mentally impaired," or defendants who have been found guilty but mentally ill (GBMI);
- the incessant confusion and conflation of substantive mental status tests, and
- the regularity of sanist appeals by prosecutors in insanity defense summations, arguing that insanity defenses are easily faked, that insanity acquittees are often immediately released, and that expert witnesses are readily duped. 31

Because of sanism, society blames mentally ill individuals for their own plight 312 and attributes deviant behavior to their character defects or "wayward free will." 313 In one astonishing case, a jury rejected the insanity defense in a case of a man who left his mother rotting in excrement on a vermin-ridden couch for six months, implicitly endorsing the state's closing arguments that the defendant was merely "lazy." 314 Sanism, in short, regularly and relentlessly infects the courts in the same ways that it infects the public discourse. It synthesizes all of the irrational thinking about the insanity defense, and helps create an environment in which groundless myths can shape the jurisprudence. As much as any other factor, it explains why we feel the way we do about "these people." Sanism also provides a basis for courts to engage in pretextual reasoning in deciding insanity defense cases.

Pretextual decisionmaking riddles the entire insanity defense decisionmaking process; it pervades decisions by forensic hospital administrators, police officers, expert witnesses and judges. Hospital decisionmaking is a good example. A National Institute of Mental Health Task Force convened in the wake of the Hinckley acquittal underscored

311. See Perlin, supra note 20, at 396.
this in its final report: "From the perspective of the Hospital, in controversial cases such as Hinckley, the U.S. Attorney's Office can be counted upon to oppose any conditional release recommendation."

As John Parry has explained, "hospitals have been pressured by public outrage to bend over backwards to make sure that no insanity acquittee is released too soon, even if such pressure is contrary to the intent and spirit of being found not guilty by reason of insanity."

Expert witnesses are often similarly pretextual. In one case, a testifying doctor conceded that he may have hedged in earlier testimony as to whether an insanity acquittee could be released "because he did not want to be criticized should [the defendant] be released and then commit a criminal act." Indeed, all aspects of the judicial decisionmaking process embody pretextuality. As discussed earlier, the fear that defendants will fake the insanity defense to escape punishment continues to paralyze the legal system in spite of an impressive array of empirical evidence that reveals (1) the minuscule number of such cases, (2) the ease with which trained clinicians are usually able to catch malingering in such cases, (3) the inverse greater likelihood that defendants, even at grave peril to their life, will be more likely to try to convince examiners that they're not crazy, (4) the high risk in pleading the insanity defense (leading to statistically significant greater prison terms meted out to unsuccessful insanity pleaders), and (5) that most successful insanity pleaders remain in maximum security facilities for a far greater length of time than they would have had they been convicted on the underlying criminal indictment. In short, pretextuality dominates insanity defense decisionmaking. The inability of judges to disregard public opinion and inquire into whether defendants have had fair trials is both the root and the cause of pretextuality in insanity defense jurisprudence.

Finally, little attention has been paid in general to the role of social science data in insanity defense decisionmaking. The law's suspicion of the psychological sciences is well documented. Furthermore, the issues before the courts in insanity defense cases raise such troubling issues for decisionmakers that the courts' inherent suspicion of the social sciences is enhanced.

This should not come as a surprise. Traditionally, social science has

318. On the relationship between these pretexts and racial bias in insanity defense decisionmaking, see generally, Villaverde, supra note 285.
played less of a role in the establishment of legal policy in areas "dominated by clear ideological division" or "political debate." The more that social science contradicts "sentiments essential to other legal institutions," the less likely it is to influence legal policy. Professor William Crowley, a professor of law at Montana Law School, and one of the architects of the bill abolishing the insanity defense in that state, responded to arguments based on empirical data by stating that he had "a deep and basic mistrust of statistics." And finally, consider what Judge Farmer of the Florida District Court of Appeal said recently, concurring in a decision that affirmed a defendant's conviction after the trial court excluded the defendant's proffered testimony on the unreliability of some witness identifications:

Acknowledging this is rather uncomfortable for me, for I am no blind partisan of the academic discipline concerned. Indeed, I should admit to a certain quarrel with the social "sciences" in general and psychology in particular. They are, it seems to me, founded on an almost indefensible premise: that one can fairly deduce some truths about an individual by what classes of human beings do in the aggregate. That seems to me so at odds with the human free will that any conclusions founded on the premise are intrinsically unreliable. By such methodology one might stumble into the truth about as often as 60 computers typing randomly for infinity might turn out all of the great literary works of western civilization.

Much of the incoherence of insanity defense jurisprudence can be explained by these phenomena. Stereotyped thinking leads to sanist behavior. Sanist decisions are rationalized by pretextuality on the part of judges, legislators and lawyers, and are buttressed by the teleological use of social science evidence and empirical data. This combination of sanism and pretextuality "fits" with traditional ways of thinking about (and acting toward) mentally disabled persons; it reifies centuries of myths and superstitions, and is consonant with both the way society uses heuristic cognitive devices as its *faux*, non-reflective "ordinary common sense," and with the nation's authoritarian spirit and its culture of punishment.

**CONCLUSION**

So why did ninety percent of American teenagers say that the insanity defense was overused? What is there about this area of the law that


323. See supra note 5 and accompanying text.
inspires such near unanimity of opinion from this universe, a universe that most likely has had no personal contact with the insanity defense system?

Structural anthropology teaches that society cannot articulate social constructs without simultaneously articulating the opposite. "Good" is meaningless without an understanding of the meaning of "evil." "Hot" is meaningless without an understanding of the meaning of "cold." And, of course, "sane" is meaningless without an understanding of the meaning of "insane."

But society's understanding of sanity and insanity is confounded by other factors that impede any true understanding of these terms. Society knows that this understanding is informed, (or, better, misinformed), by heuristics, by faux OCS, by sanism, and by pretextuality and teleology. Society knows all of this, yet it continues blithely and blindly along the same path it has followed for centuries. It is comfortable doing this for many reasons. Because it fits with the collective authoritarian personality, because it allows society to deny feelings of empathy toward criminal defendants with severe mental disabilities, because it comports well with the culture of punishment, and because, in structural anthropological terms, such defendants "fail to fit well into the set of structural oppositions that our culture gives us to organize our experience."

It is important to us—as individuals and as members of a larger community—to know that there is a "borderline" separating "you from me." Or, at the least, to believe that there is. On one hand, the insanity defense appears to establish such a borderline between those of us who are found to be criminally responsible for our acts and those of us who are not. But, on the other hand, a significant portion of society believes that the insanity defense actually blurs the borderline between good and evil, between "good guys" and "bad guys." As in the Dylan song, we feel "doublecrossed," because it appears that "these people" are "getting away with it." And we feel that way even though we know—rationally and objectively—that, in that minute statistically insignificant universe of cases in which defendants do succeed in contested insanity defense cases, these defendants are subsequently incarcerated in maximum security institutions for periods of time as long as or, in many cases, much longer than they would have spent in prison for the same offense.

324. Mossman, supra note 156, at 75.
325. For the most comprehensive study, see Steadman et al., supra note 193. For even more recent statistical and empirical research, see, e.g., Carmen Cirincione, Revisiting the Insanity Defense: Contested or Consensus? 24 Bull. Am. Acad. Psychiatry & L. 165 (1996); Carmen Cirincione et al., Rates of Insanity Acquittals and the Factors Associated with Successful Insanity Pleas, 23 Bull. Am. Acad. Psychiatry & L. 399 (1995); Silver et al., supra note 124. Some recent public press articles are beginning, albeit tardily, to recognize the extent to which public perceptions are erroneous. See id. at 69 (reporting on Newsweek's coverage of the Jeffrey Dahmer case); David Brown, Insanity Defense: Setting a Benchmark of Human Intellect and Will, Wash. Post, Jan. 27, 1992, at A3; Fox Butterfield, Dispute Over Insanity Defense Is Revived in Murder Trial, N.Y. Times, Mar. 4, 1996, at A10; MacQuarrie, supra note 143; Westfeldt, supra note 240; see also All Things Considered: Interviews with Ira Mickenberg (NPR radio broadcast, Feb.
We know this and we ignore it, because we do not care about this objective reality, a reality about which—following the publication of Henry Steadman's groundbreaking research—there can no longer be the shadow of a doubt. We do not care about it because this is simply an area too emotionally freighted for us to handle. Neither our legal system nor our individual psyches have the tensile strength required to accept the tensions and ambiguities inherent on a maturely functioning insanity defense system—one in which that "borderline" is inevitably so deeply blurred. Simply put, we cannot deal with the fact that insanity-pleading defendants may be more like us than not like us, and we thus develop elaborate mechanisms (legal and psychological) to distance ourselves from them and from that unacceptable reality.

So we accept an insanity defense system that is sanist, pretextual and teleological, a system that rests on the shaky underpinnings of heuristic reasoning and a false OCS. And this acceptance may ultimately doom to failure any attempt to reconstitute insanity defense policy, even when examined through the lens of therapeutic jurisprudence.

Why is this? I believe that our refusal to care about or think about the objective realities that I have been discussing, and our dogged, banal reliance on sanist myths and pretextual reasoning is made far easier by both phenomena that I discussed earlier: by our authoritarian spirit, and our culture of punishment. These phenomena allow us—encourage us—to wilfully blind ourselves to behavioral, scientific, cultural and empirical realities. They do this to preserve the illusion of a "borderline" between "you and me". The evanescence of this borderline becomes, in the end, the reason why, after centuries, our insanity defense jurisprudence continues to operate as it always has—out of consciousness.

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2, 1992).
326. See Steadman et al., supra note 193.