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# Psychodynamics and the Insanity Defense: Ordinary Common Sense and Heuristic Reasoning

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# Psychodynamics and the Insanity Defense: “Ordinary Common Sense” and Heuristic Reasoning

## TABLE OF CONTENTS

I. Introduction .....	4
II. Psychodynamics and the Insanity Defense: Piercing the Veil of Consciousness .....	7
A. Introduction .....	7
B. The Significance of Wrong Verdicts .....	8
C. The Behavioral Roots of Insanity Defense Decisionmaking: The Power of Heuristic Reasoning .	12
1. The Insanity Defense and Human Inference .....	20
D. Ordinary Common Sense (OCS): The Unconsciousness of Legal Decisionmaking .....	22
1. Introduction .....	22
2. OCS and the Insanity Defense .....	29
3. Jurisprudential Approaches to Explaining Deviance .....	29
4. Conventional Morality .....	31
5. OCS and Judicial “Cognitive Dissonance” .....	33

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This is one of a series of five papers that the author is preparing dealing with the overall question of the psychodynamics of insanity defense jurisprudence. In the context of this article, the author refers extensively to these other articles: Hinckley’s Other Victims: The Implications of a Shrunk Insanity Defense for the Trial of Novel Cases; Mental Illness, Crime, and the Culture of Punishment; Authoritarianism, The Mystique of Ronald Reagan, and the Future of the Insanity Defense; and Moral Development Psychology and Insanity Defense Policy: Moral Judgments and Immoral Jurisprudence. Copies of these works in preparation may be obtained directly from the author.

6. A Twilight Zone: OCS and Individual Jury Verdicts.....	36
III. OCS and Heuristic Reasoning in Action: Two Case Studies.....	39
A. Introduction .....	39
B. Jury Research.....	39
1. Jury Nullification .....	40
2. Jury Research and Psychodynamic Conclusions...	46
C. Social Science Research .....	53
1. The Role of Social Science Data.....	53
2. Social Science and the Insanity Defense.....	54
3. Toward a Jurisprudence of Social Science?.....	56
4. The Psychodynamics of Judicial Suspicion .....	59
D. The Psychodynamics of Judicial Attitudes.....	61
1. Justices' Signals .....	62
2. Judicial Philosophies .....	67
IV. Conclusion.....	69

## I. INTRODUCTION

Our insanity defense jurisprudence is the prisoner of a combination of empirical myths and social meta-myths.<sup>1</sup> Born of a medievalist, fundamentalist religious vision of the roots of mental illness and the relationships between mental illness, crime, and punishment,<sup>2</sup> the myths continue to dominate the landscape in spite of impressive and ample scientific and behavioral evidence to the contrary.<sup>3</sup>

A further prisoner of the powerful symbols at play in any criminal trial where lack of responsibility is raised as a defense,<sup>4</sup> the legal sys-

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1. See Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599 (1989-90). By meta-myths, I refer to myths that have developed *about* and *around* the empirical myths. See *id.* at 603-07, 713-31. See *infra* text following note 10. For a parallel explanation, see V. FOLEY, AN INTRODUCTION TO FAMILY THERAPY 74-75 (1974)(explaining metacommunication theory).
  2. See M. Perlin, *Mental Illness, Crime, and the Culture of Punishment* (unpublished paper in progress). See generally J. BIGGS, *THE GUILTY MIND* (1955); A. GOLDSTEIN, *THE INSANITY DEFENSE* (1967); J. NEAMAN, *SUGGESTION OF THE DEVIL: THE ORIGINS OF MADNESS* (1975).
  3. See, e.g., Crowe, *Genetic Studies of Antisocial Personality and Related Disorders*, in *CRITICAL ISSUES IN PSYCHIATRIC DISORDERS* 193 (R. Spitzer & D. Klein eds. 1978); Garber, Weilburg, Buonanno, Manschreck & New, *Use of Magnetic Resonance Imaging in Psychiatry*, 145 AM. J. PSYCHIATRY 164 (1988); Rogers, Seman & Clark, *Assessment of Criminal Responsibility: Initial Validation of the R-CRAS with the M'Naghten and GBMI Standards*, 9 INT'L J. L. & PSYCHIATRY 67 (1986); R. Rogers, *Assessment of Criminal Responsibility: Empirical Advances and Unanswered Questions* (paper presented at national conference of the American Psychological Association, August 1985).
  4. See, e.g., Herman, *The Insanity Defense in Fact and Fiction: On Norval Morris's*

tem rejects the psychodynamic view of human motivation and behavior<sup>5</sup> and remains intensely suspicious of concepts of mental health and mental disability, of mental health professionals, and of the ability of such professionals to assess or ameliorate mental disability.<sup>6</sup> As a result, the legal system remains most comfortable with an all-or-nothing view of mental illness<sup>7</sup> and a substantive test for criminal responsibility that most closely resembles the so-called "wild beast" test of 1724.<sup>8</sup> It is no wonder that in the aftermath of the *Hinckley* acquittal, Congress adopted a substantive insanity defense responsibility test that established a more restrictive version of the 1843 *M'Naghten* right and wrong test.<sup>9</sup>

We retain our allegiance to the underlying meta-myths that buttress the discredited but still powerful empirical myths about the insanity defense. Some of those myths include misconceptions about the defense's overuse, its use only in the most heinous of cases, its relative success rate, and the length and conditions of custodial confinement of

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*Madness and the Criminal Law*, 1985 AM. B. FOUND. RES. J. 385; Keilitz, *Researching and Reforming the Insanity Defense*, 39 RUTGERS L. REV. 289 (1987); Monahan, *Abolish the Insanity Defense — Not Yet*, 26 RUTGERS L. REV. 719 (1973).

5. For the paradigmatic case, see *State v. Sikora*, 44 N.J. 453, 210 A.2d 193 (1965), in particular *id.* at 463, 210 A.2d at 204 (1965) (Weintraub, C.J., concurring).
6. See, e.g., Perlin, *The Supreme Court, the Mentally Disabled Criminal Defendant, and Symbolic Values: Random Decisions, Hidden Rationales, or "Doctrinal Abyss"?* 29 ARIZ. L. REV. 1 (1987); Roth, *Preserve But Limit the Insanity Defense*, 58 PSYCHIATRY Q. 91 (1986-87).
7. See, e.g., *Holloway v. United States*, 148 F.2d 665, 667 (D.C. Cir. 1945) ("An offender is wholly sane or wholly insane"); *Johnson v. State*, 292 Md. 405, 439 A.2d 542, 552 (1982) ("For the purposes of guilt determination, an offender is either wholly sane or wholly insane"). On the practical problems raised by this either/or construct, see N. FINKEL, *INSANITY ON TRIAL* 145-46 (1988) (discussing self-perceived dilemma of *Hinckley* jurors).
8. *Rex v. Arnold*, 16 How. St. Tr. 695 (1724), in 16 T.B. HOWELL, *A COMPLETE COLLECTION OF STATE TRIALS* 695 (1812) (insanity acquittal proper where A "is totally deprived of his understanding and memory, and doth not know what he is doing, no more than a brute, or a wild beast, such a one is never the object of punishment"); Roberts, Golding & Fincham, *Implicit Theories of Criminal Responsibility Decision Making and the Insanity Defense*, 11 LAW & HUM. BEHAV. 207 (1987). Although the emphasis in *Arnold* was probably meant to focus on lack of intellectual ability (as opposed to the violent "ravenous" image it now evokes, see Ray, *Criminal Law of Insanity*, 28 AM. JURIST 253, 257 (1985)), the image remains a profound one, and the test has stood as "a significant archetype in the history of law and medicine." Platt & Diamond, *The Origins and Development of the "Wild Beast" Concept of Mental Illness and Its Relations to Theories of Criminal Responsibility*, 1 J. HIST. BEHAV. SCI. 355, 365 (1965). Compare Penry v. Lynaugh, 109 S. Ct. 2934, 2954 (1989) (citing *Arnold* in discussion of common law ban on persons who had a "total lack of reason or understanding").
9. See Perlin, *supra* note 1, at 638-40 (discussing 18 U.S.C. § 20 (1988) and the impact of the *Hinckley* trial on its adoption). Cf. *M'Naghten's Case*, 10 Clark & Fin. 200 (1843). See generally 3 M. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* §§ 15.35-15.42 (1989).

those few defendants who are able to successfully use the defense. The meta-myths are four-fold:<sup>10</sup> (1) the defense is regularly, easily, and successfully feigned (a dissimulation purportedly eagerly abetted by unscrupulous defense lawyers and disreputable forensic witnesses); (2) unlike physiological illness, mental illness is invisible and this invisibility renders the diagnosis, prognosis, and treatment of mental illness less objective than the parallel techniques employed in other medical specialties; (3) if a criminal defendant does not comport with popular visual images of "craziness" which are based upon distorted media depictions, religious iconography, and unconscious rationalizations, judges or jurors will not be satisfied that the pertinent substantive responsibility standard is met; and (4) mental illness is not an appropriately exculpatory legal excuse because it demands an evaluation of behavior beyond that which is readily perceivable at a conscious level. The longevity of the empirical myths cannot be placed in proper perspective as long as we wilfully turn a blind eye to the existence of these social myths.

In this article, I recast the question: Why do these myths persist in spite of the best scientific, behavioral, and social science research to the contrary? In formulating an answer, I turn first to what I characterize as the behavioral roots of insanity defense decisionmaking. In Part II, I carefully examine two topics: 1) the way reasoning devices that help shape our daily behavior, known as simplifying heuristics, lead to distorted and systematically erroneous decisions when applied to legal problems<sup>11</sup> and 2) the meaning of "ordinary common sense" (OCS) in jurisprudential developments.<sup>12</sup> I suggest that until we come to grips with the power that these processes have over us we cannot begin to understand why the insanity defense myths have persisted, what values retention of the myths reinforce, why these myths become even more powerful in a case such as *Hinckley* where the victim was an archetypal patriarch, and why these myths continue to hold our legal system in thrall.<sup>13</sup>

In Part III, two important bodies of recently-burgeoning research about jury behavior and social science evidence are examined to illu-

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10. See, e.g., Jeffrey, Pasewark & Bieber, *Insanity Plea: Predicting Not Guilty By Reason of Insanity Adjudications*, 16 BULL. AM. ACAD. PSYCHIATRY & L. 35 (1988); Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777 (1985); Pogrebin, Regoli & Perry, *Not Guilty By Reason of Insanity: A Research Note*, 8 INT'L J. L. & PSYCHIATRY 237 (1986); Rodriguez, LeWinn & Perlin, *The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders*, 14 RUTGERS L.J. 397 (1983). The meta-myths are discussed extensively in Perlin, *supra* note 1, at 713-31.

11. See *infra* text accompanying notes 46-90, focusing on such principles as the "vividness" effect and attribution theory.

12. See *infra* text accompanying notes 91-133.

13. See *infra* text accompanying notes 134-85.

minate the extent to which jurors actually apply the controlling law in insanity defense cases, the extent to which jury nullification occurs,<sup>14</sup> and the remarkable ambivalence with which courts treat social science evidence, and how such evidence frequently appears to be admitted only when it conforms with a judge's "ordinary common sense."<sup>15</sup> I then draw on these bodies of research in an effort to "read" the signals given by judges, mostly United States Supreme Court justices, in relevant cases and to determine whether their views are anything more than a reflection of what philosophers and jurisprudence scholars have come to call "conventional morality."<sup>16</sup> Here, I give special attention to the positions taken by Chief Justice Rehnquist.<sup>17</sup>

In Part IV, I conclude that the results of these bodies of research make sense only when viewed as the by-product of the sort of pre-reflective thought embodied by OCS and heuristic reasoning devices. These devices are largely unknown to lawyers and other legal decisionmakers, but remain enormously important factors that shape our insanity defense jurisprudence, especially when reflected in a case such as the *Hinckley* acquittal. Until we acknowledge their existence, their pervasiveness, and their domination of our thought and reasoning processes, we will not be able to formulate a reflective and integrated jurisprudence of the insanity defense.

## II. PSYCHODYNAMICS AND THE INSANITY DEFENSE: PIERCING THE VEIL OF CONSCIOUSNESS

### A. Introduction

It is not enough to merely assert that insanity defense mythology is persistent and impervious to scientific developments, philosophical reasoning, and empirical discoveries. We must inquire into the unique roots of the implacability of public opinion in this area of the law. Many of these myths have their roots in theology, in medieval superstition, in concepts of "masks" and "magic."<sup>18</sup> It is necessary to explore beyond these fairly rudimentary drives and motivations if we are to ferret out the true meaning of why our insanity defense jurisprudence has developed the way it has.

Our further attention must be focused on at least three sets of additional phenomena: 1) the singular way in which "wrong verdicts" bring immediate calls for the abolition of the insanity defense in a way that "wrong" verdicts based on self-defense, alibi, or mistake do not inspire public outcries for the abolition of those defenses; 2) the use of

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14. See *infra* text accompanying notes 186-253.

15. See *infra* text accompanying notes 254-96.

16. See *infra* text accompanying notes 297-349.

17. See *infra* text accompanying notes 297-306, 325-34.

18. See Perlin, *supra* note 1, at 673-88.

heuristic thinking and behavior theory as an explanation for such decisionmaking; and 3) the role of "ordinary common sense" in decisionmaking.<sup>19</sup>

### B. The Significance of "Wrong" Verdicts

Over 80 years ago in a railroad case, Justice Holmes wrote that "great cases like hard cases make bad law" because of "some accident of immediate, overwhelming interest which appeals to feelings and distorts the judgment."<sup>20</sup> According to Holmes, these "immediate interests" exercise a kind of "hydraulic pressure which makes what previously was clear seem doubtful and before which even well settled principles of law will bend."<sup>21</sup>

So it is with insanity defense cases. The call for abolition of the insanity defense followed quickly the "strafing of the cuckoo's nest"<sup>22</sup> in the *Hinckley* case.<sup>23</sup> In responding to the "hydraulic pressure" of

19. In M. Perlin, *Authoritarianism, The Mystique of Ronald Reagan, and the Future of the Insanity Defense; and Moral Development Psychology and Insanity Defense Policy: Moral Judgments and Immoral Jurisprudence* (unpublished papers in progress), I discuss the unique psychodynamic importance of the attack by John Hinckley on Ronald Reagan, the perfect "father figure." Then, I consider the moral bases of insanity decisionmaking by focusing on (1) the importance of the authoritarian personality style, (2) the roles of politics, the media, and public opinion, (3) the unique and important parallels between insanity defense and death penalty decisionmaking, and (4) the impact of moral psychology on such decisionmaking.

20. *Northern Sec. Co. v. United States*, 193 U.S. 197, 400 (1904). See also P. DEVLIN, *TRIAL BY JURY* 124 (1966):

Hard cases make bad law; the jury is sometimes too frightened of the hard case and the judge of the bad law. This is the eternal conflict between law in the abstract and the justice of the case — how to do what is best in the individual case and yet preserve the rule. It is out of this dialect that the just verdict comes.

*Cf.* Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987)(constitutional law tends to define itself through reaction to "great cases").

21. *Northern Sec. Co. v. United States*, 193 U.S. 197, 400-01 (1904). See Morse, *supra* note 10, at 779 ("Unpopular or even 'wrong' verdicts occur in all areas of law, however, and should not spur intemperate attempts to change fundamentally just laws"). But see Shah, *Criminal Responsibility*, in *FORENSIC PSYCHIATRY AND PSYCHOLOGY: PERSPECTIVES AND STANDARDS FOR INTERDISCIPLINARY PRACTICE* 167, 200 (W. Curran, A. McGarry & S. Shah eds. 1986):

There is also reason for concern that the shocking cases tend to have a very disproportionate influence in shaping public policies and related practices. Notorious cases seem in many instances to function like the proverbial tails that tend to wag and influence policies [that affect] the much larger (albeit less visible) class of people.

22. English, *The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense*, 40 HASTINGS L.J. 1, 10 (1988).

23. See Perlin, *supra* note 1, at 637-40. For a superb literary account of the Hinckley trial, see L. CAPLAN, *THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINCKLEY, JR.* (1984).

public opinion<sup>24</sup> and by "overreacting to a single astonishing incident,"<sup>25</sup> it replicated<sup>26</sup> similar calls which have followed almost every unpopular insanity verdict since the *M'Naghten* trial.<sup>27</sup> These calls reflected a tenuous logic: "if the verdict was wrong, then the standard [must have been] wrong."<sup>28</sup>

While the "bad case" phenomenon has been noted,<sup>29</sup> there appears

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24. See R. Christiansen, *From Hadfield to Hinckley: The Insanity Plea in Politically-Related Trials* 46 (paper delivered at the annual meeting of the Academy of Criminal Justice Sciences, March, 22, 1983).
  25. Kaufman, *Should Florida Follow the Federal Insanity Defense?* 15 FLA. ST. U.L. REV. 793, 836 (1987). See also Herman, *supra* note 4, at 393 ("In the wake of such traumatic events [as political assassination and assassination attempts], public opinion cannot be measured reliably. Comment on the insanity defense now is not likely to be a reaction to the insanity defense in general but rather to its operation in the exceptional case of John Hinckley").
  26. Cf. Tighe, *Francis Wharton and the Nineteenth Century Insanity Defense: The Origins of a Reform Tradition*, 27 AM. J. LEGAL HIST. 223 (1983) (Hinckley acquitted "rejuvenated" insanity defense reform movement).
  27. See R. MORAN, *KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL MCNAUGHTAN* 191-95 (1981). R. Rogers & C. Ewing, *Proscribing Ultimate Opinions: The Quick and Cosmetic Fix*, (paper delivered at national conference of the American Psychological Association convention, August 1988), speculating that, if the *Hinckley* jury rejected Hinckley's insanity defense, that decision would have probably resulted in a public affirmation of our court system and its experts in the pursuit of justice. See also Rogers & Ewing, *Ultimate Opinion Proscriptions: A Cosmetic Fix and a Plea For Empiricism*, 13 LAW & HUM. BEHAV. 357 (1989). Links between the *Hinckley* and *M'Naghten* verdicts are explored helpfully in N. FINKEL, *supra* note 7, at ix-xii; R. ROGERS, *CONDUCTING INSANITY EVALUATIONS* (1986); English, *supra* note 22, at 6.
  28. Rogers, *The American Psychological Association's Position on the Insanity Defense: Empiricism Versus Emotionalism*, 42 AM. PSYCHOLOGIST 840 (1987). See N. FINKEL, *supra* note 7, at xii (in the aftermath of the *Hinckley* verdict, "we have reinvented the *M'Naghten* wheel"). Cf. Tanford & Tanford, *Better Trials Through Science: A Defense of Psychologist-Lawyer Collaboration*, 66 N.C.L. REV. 741, 765 (1988) ("social acceptance of a verdict does not automatically follow from verdict accuracy").
- Verdicts and post-acquittal release decisions in individual insanity defense cases where either the verdict or the post-acquittal release were perceived as "outrageous" have led speedily to the consideration and adoption of the "guilty but mentally ill" (GBMI) verdict in many jurisdictions. See Fentiman, *"Guilty But Mentally Ill" The Real Verdict is "Guilty,"* 26 B.C.L. REV. 601, 617-18 (1985); Hermann & Sor, *Convicting or Confining? Alternative Directions in Insanity Law Reform: Guilty But Mentally Ill Versus New Rules for Release of Insanity Acquitees*, 1983 B.Y.U. L. REV. 449, 543-83; Mickenberg, *A Pleasant Surprise: The Guilty But Mentally Ill Verdict Has Both Succeeded On Its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense*, 55 U. CIN. L. REV. 943, 972-77 (1987); Perlin, *supra* note 1, at 640 n.178. See generally Keilitz, *supra* note 4, at 308; McGraw, Farthing-Capowich & Keilitz, *The 'Guilty But Mentally Ill' Plea and Verdict: Current State of the Knowledge*, 38 VILL. L. REV. 117 (1985).
29. See, e.g., Gerard, *The Usefulness of the Medical Model to the Legal System*, 39 RUTGERS L. REV. 377, 410 (1987) (discussing the case of Garrett Trapnell who allegedly feigned insanity successfully on six occasions and society's negative reac-



to be little discussion in the literature of the *uniqueness* of this ultimate "throw-the-baby-out-with-the-bath-water" response.<sup>30</sup> It is accepted, almost as a given, that an unpopular verdict will lead to abolition cries. Yet, unpopular verdicts based on other excusing criminal law defenses do not lead to similar reform suggestions,<sup>31</sup> notwithstanding the common law's deeply rooted hostility toward all such excuse defenses.<sup>32</sup>

There have been few recent criminal cases that have polarized major metropolitan areas in the same way as did the Bernhard Goetz trial.<sup>33</sup> The specific legal question was a fairly narrow one that has provoked criminal law scholars for centuries: the standard to be used in assessing whether a defendant's use of deadly force was justified under the circumstances.<sup>34</sup> However, the combination of the New York City subway location for the shooting and the contrasting socio-economic status of the white, middle-class defendant and the black, inner-city victims led to an emotionally-charged, publicity-driven trial.<sup>35</sup> That trial, already "part of the folklore of American law,"<sup>36</sup> resulted in a verdict that was seen by a significant number of observ-

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tion to such cases). On the heuristic significance of the Trapnell case in animating President Nixon's attempt to abolish the insanity defense, see Perlin, *supra* note 1, at 670 n.318 (discussing Gerber, *The Insanity Defense Revisited*, 1984 ARIZ. ST. L.J. 83, 117-18).

30. *But see, e.g.*, Steadman, *Empirical Research on the Insanity Defense*, 477 ANNALS 58, 69 (1985)(intent of New York state insanity defense "reforms" "was to increase the certainty of avoiding another Adam Berwid, who, while on a weekend hospital leave, murdered his wife while her last words were recorded on NYC's emergency '911' telephone number").
31. *See, e.g.*, Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273, 279 (1968). This does not suggest that the public does not become regularly enraged about individual jury acquittals or its perceptions of the overall rate of jury acquittals. While these may lead to outcries against the perceived incompetence of jurors or the deficiencies inherent in the jury system, the attacks are rarely, if ever, focused on a specific substantive defense. *See, e.g.*, V. HANS & N. VIDMAR, *JUDGING THE JURY* 133 (1986)(discussing J. BALDWIN & M. MCCONVILLE, *JURY TRIALS* (1979)).
32. Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1295 (1974).
33. *People v. Goetz*, 68 N.Y.2d 96, 497 N.E.2d 41, 506 N.Y.S.2d 18 (1986). *See, e.g.*, L. RUBIN, *QUIET RAGE: BERNIE GOETZ IN A TIME OF MADNESS* (1986); Heller, *A Professor Watches the Law Come to Life*, CHRONICLE HIGHER EDUC., June 24, 1987, at 3 (discussing George Fletcher's observations of the Goetz trial); Fletcher, *Goetz on Trial*, 39 N.Y. REV. BOOKS, April 23, 1987, at 22 (reviewing L. RUBIN, *supra*).
34. *See, e.g.*, W. LAFAYE & A. SCOTT, *CRIMINAL LAW* §§ 3.7(g), 5.7(c)(2d ed. 1986).
35. *See generally* Comment, *Bernard Goetz, A "Reasonable Man": A Look At New York's Justification Defense*, 53 BROOKLYN L. REV. 1149 (1988); Note, *The Proper Standard for Self-Defense in New York: Should People v. Goetz Be Viewed As Judicial Legislation or Judicial Restraint?* 39 SYRACUSE L. REV. 845 (1988).
36. Heller, *supra* note 33, at 3 (quoting Fletcher, *supra* note 33, at 22). *See also* Rosenfeld, *Afterthoughts on the Goetz Case*, N.Y.L.J., Aug. 11, 1987, at 2 (editorial).

ers as outrageous.<sup>37</sup>

Self-defense is a defense that, by all anecdotal and observational accounts, is used frequently in criminal courts, as it was in the Goetz case.<sup>38</sup> Yet, following Goetz's trial, there were no cries for the abolition of the self-defense defense.<sup>39</sup> Similarly, auto manufacturer John DeLorean was acquitted of narcotics and conspiracy charges based on his successful use of the entrapment defense. However, no bills have been introduced into Congress to eliminate entrapment as a criminal law defense.<sup>40</sup>

What is it about the insanity defense which animates the public's response? Why does the sensational case appear to have such a disproportionate impact on the development of jurisprudence?<sup>41</sup> To some extent, the insanity defense is different.<sup>42</sup> It involves unconscious motivations and inevitably involves profound issues such as free will,

37. See, e.g., *Goetz Verdict Will Endanger Young Black Males, Leaders Say*, 72 JET, July 6, 1987, at 18; Rosenfeld, *supra* note 36, at 2.

38. This, of course, contrasts with the low number of insanity defense pleas. See Rodriguez, LeWinn & Perlin, *supra* note 10, at 401 (in 1982, not guilty by reason of insanity pleas entered in 50 of 32,500 felony cases handled by New Jersey's Office of the Public Defender; plea succeeded in fifteen of 50 cases, or 1/20 of 1 per cent of all felonies).

39. Of course, many observers strongly supported Goetz. See, e.g., Carter, *When Victims Happen To Be Black*, 97 YALE L.J. 420, 422-24 (1988) (emphasis in original) (Stories like Goetz's become true "because the popular culture demands their truth." Goetz becomes a folk-hero, and the central message of the hero-worshippers is clear: "We know that what he did was right").

On how the Goetz debate served as an indirect way of talking about race, see Chase, *In the Jungle of Cities*, 84 MICH. L. REV. 737, 739-40 n.11 (discussing "socio-economic and sexual-psychological fear of blacks" as "undercurrent" of law-and-order politics"). Cf. Mickenberg, *supra* note 28, at 962:

If criminal responsibility must attach to all who commit a bad act regardless of issues of free will, then not just insanity but all other defenses should be abolished. Thus, the individual who injures another in self-defense should be as guilty of assault as the crazy person who injures another because of his mental illness.

40. The DeLorean case is discussed in Comment, *Entrapment, DeLorean and the Undercover Operation: A Constitutional Connection*, 18 J. MARSHALL L. REV. 365 (1985). For recent developments on the use of expert psychological testimony as to a defendant's susceptibility to entrapment, compare *United States v. Newman*, 849 F.2d 156 (5th Cir. 1988) (Insanity Defense Reform Act does not preclude expert testimony on such susceptibility) with *United States v. Prickett*, 790 F.2d 35 (6th Cir. 1986) (reliance upon insanity precluded raising entrapment defense).

41. *But cf.* Smith, *Scientific Thought and the Boundaries of Insanity and Criminal Responsibility*, 10 PSYCHOLOGICAL MED. 15 (1980) (emphasis in original) (warning that insanity defense jurisprudence did not solely develop from "sensational" cases).

42. Researchers have suggested that *criminal justice attitudes* may be formed in ways that separate them from other attitudes because of the public's lack of a clear idea as to how the criminal justice system actually operates. See Doob & Roberts, *Social Psychology, Social Attitudes, and Attitudes Toward Sentencing*, 16 CAN. J. BEHAV. SCI. 269, 270 (1984). The public's specific misperceptions about

responsibility, and blame. It incorporates religious ideology, medieval superstition, and anthropological roots, and the defense draws on rich myths in a way that insures that "symbolic values" remain necessarily paramount.<sup>43</sup> It is *these* factors, many of which are not frequently present in cases involving the use of other criminal defenses, that leads to a gross distortion of the sensational case.<sup>44</sup> To try to make sense of this, it is necessary to examine cognitive behavior decision theory and recent social cognition research in an effort to learn why we respond to these phenomena the way we do.<sup>45</sup>

### C. The Behavioral Roots of Insanity Defense Decisionmaking: The Power of Heuristic Reasoning<sup>46</sup>

Behaviorists are aware of the power of what Dr. David Rosenhan has characterized as the "distortions of vivid information." As part of this phenomenon, "concrete and vivid information" about a specific case "overwhelms" the abstract data upon which rational choices

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the operation of the insanity defense within the criminal justice system are even more distorted. See Perlin, *supra* note 1, at 646-55.

43. See, e.g., Perlin, *supra* note 1, at 607 n.31 (Jungian views of myths as projections from the unconscious). See generally Perlin, *supra* note 6.

44. See Tanford & Tanford, *supra* note 28, at 763 (footnotes omitted):

Trials do not function solely as searches for truth, games, or any other single purpose. . . . [T]he adversarial process by which results are reached is just as important as the accuracy of those results. For one thing, trials serve a symbolic, or legitimating, function. It is essential that both the present and future disputants perceive that the decision making process is a fair one; otherwise, disputes may be settled in the streets rather than in the courts. The adversarial structure reassures litigants that they will be fully heard before anyone deprives them of liberty or property. Beyond that, some scholars argue that the process must not only be perceived as fair, but must in fact be fair. The adversary structure fills this need by allowing the decision maker to remain neutral and avoid the natural human tendency to jump quickly to conclusions through heuristic reasoning.

*But see* Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257, 267 n.24, 275-76 (1987) (discussing cultural relativism and provocation defense in the context of *State v. Williams*, 4 Wash. App. 908, 484 P.2d 1167 (1971)).

45. See COGNITION AND SOCIAL BEHAVIOR (J. Carroll & J. Payne eds. 1976); Saks & Kidd, *Human Information Processing and Adjudication: Trial By Heuristics*, 15 LAW & SOC'Y REV. 123, 125 (1980-81).
46. For a comprehensive one volume survey of the issues discussed in this section, see JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (P. Slovic & A. Tversky eds. 1982) [hereinafter JUDGMENT UNDER UNCERTAINTY]. For helpful overviews of related areas, see S. BREHM & J. BREHM, PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL (1981); COGNITION AND SOCIAL BEHAVIOR, *supra* note 45; R. NISBETT & L. ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980); C. SHERIF, M. SHERIF & R. NEBERGALL, ATTITUDE AND ATTITUDE CHANGE: THE SOCIAL JUDGMENT-INVOLVEMENT APPROACH (1965); Edwards & von Winterfeldt, *Cognitive Illusions and Their Implications for the Law*, 59 S. CAL. L. REV. 225 (1986).

are often made.<sup>47</sup> Thus, "the more vivid and concrete is better remembered, over recitals of fact and logic."<sup>48</sup> Studies have shown further that the "vividness effect" is actively present in judicial proceedings<sup>49</sup> and in our perceptions of judicial proceedings.<sup>50</sup>

This distortion results in "trial by heuristics,"<sup>51</sup> the use of problem-

47. Rosenhan, *Psychological Realities and Judicial Policies*, 10 STAN. LAW. 10, 13-14 (1984). Professor Joel Finer has explicitly recognized the impact of the "vividness effect" on the post-Hinckley debate. Finer, *Should the Insanity Defense Be Abolished? An Introduction to the Debate*, 1 J. HEALTH & L. 113 (1986-87). See also D. BAZELON, QUESTIONING AUTHORITY: JUSTICE AND CRIMINAL LAW 28 (1988) ("Run-of-the-mill muggings by street [gangs] are too common for the front pages, but even the most banal burglary is newsworthy if committed by someone with a psychiatric history").

48. Ford, *The Role of Extralegal Factors in Jury Verdicts*, 1 JUST. SYS. J. 16, 23 (1986). See also Bank & Poythress, THE ELEMENTS OF PERSUASION IN EXPERT TESTIMONY, 10 J. PSYCHIATRY & L. 173 (1982). On the psychological tendency to employ the defense mechanism of avoidance following a vivid, stressful incident, see Horowitz, Wilner & Alvarez, *Impact of Event Scale: A Measure of Subjective Stress*, 41 PSYCHOSOMATIC MED. 209 (1979).

For contrasting research inquiries about the "vividness" effect, compare Taylor & Thompson, *Stalking the Elusive "Vividness" Effect*, 89 PSYCHOLOGICAL REV. 155 (1982) (finding little support in the experimental literature for the hypothesis that vividly presented information is more persuasive than information presented in a non-vivid manner) with Shedler & Manis, *Can the Availability Heuristic Explain Vividness Effects?* 51 J. PERSONALITY & SOC. PSYCHOLOGY 26 (1986) (vividness positively affected recall of material and subsequent judgments, but availability was not found to be a critical factor in mediating the impact of vividly presented information).

49. See, e.g., Bell & Loftus, *Vivid Persuasion in the Courtroom*, 49 J. PERSONALITY ASSESSMENT 659, 663 (1985) (vivid information at trial may "garner more attention, recruit more attention from memory, cause people to spend more time in thought, be more available in memory, be perceived as having a more credible source, and have a greater affective impact"); Doob & Roberts, *supra* note 42, at 279 (in one study, subjects presented with information about a single welfare recipient generalized data to all recipients even when told the particular exemplar was highly atypical of the population at large).

50. See, e.g., Alschuler, *"Close Enough For Government Work": The Exclusionary Rule After Leon*, 1984 SUP. CT. REV. 309, 347-48 (fear that application of exclusionary rule might potentially free "next year's Son of Sam" will overwhelm empirically-based arguments in support of rule); Diamond & Stalans, *The Myth of Judicial Leniency on Sentencing*, 7 BEHAV. SCI. & L. 73, 87-88 (1989) (vividness of media stories about particularly violent criminal offenses has a "disproportionate impact" on public perceptions about crime); Nisbett, Borgider, Crandall & Reed, *Popular Induction: Information Is Not Necessarily Informative*, in JUDGMENT UNDER UNCERTAINTY, *supra* note 46, at 101, 113 (comparing "influenceability" by abstract and concrete information) [hereinafter *Popular Induction*]; Slovic, Fischhoff & Lichtenstein, *Facts Versus Fears: Understanding Perceived Risk*, in JUDGMENT UNDER UNCERTAINTY, *supra* note 46, at 463, 468 (impact of biased newspaper coverage on perceived risks in cases of various disaster scenarios).

51. Saks & Kidd, *supra* note 45. See generally Tanford & Tanford, *supra* note 28, at 748-49; Tversky, *Features of Similarity*, 84 PSYCHOLOGICAL REV. 327 (1977); Tversky & Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY, *supra* note 46, at 3; Walker & Monahan, *Social*

solving methods to keep "the information-processing demands of a task within the bounds of [individuals'] limited cognitive capacity."<sup>52</sup> Through the use of social cognitive research and behavior decision theory,<sup>53</sup> I will examine how the use of such principles which appear to guide the simplification of complex information-processing tasks — "simplifying heuristics" — actually lead to distorted and systematically erroneous decisions<sup>54</sup> and lead decisionmakers to ignore or mis-

*Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 576-78 (1987). On the impact of heuristics on individual psychiatric decisionmaking, see Bagby, *The Indigenous Paraprofessional and Involuntary Civil Commitment: A Return to Community Values*, 25 CAN. PSYCHOLOGY 167, 172 (1984) (psychiatric judgment is often "inextricably woven with social class bias"); Jackson, *Psychiatric Decision-Making for the Courts: Judges, Psychiatrists, Lay People?* 9 INT'L J. L. & PSYCHIATRY 507 (1986) (psychiatric decisionmakers may be as susceptible to heuristic bias as lay persons). On heuristics in a political perspective, see Quattrone & Tversky, *Contrasting Rational and Psychological Analyses of Political Choice*, 82 AM. POL. SCI. REV. 719 (1988). The value and significance of Tversky and Kahneman's research is trivialized in Carlson, *Philosophy in Bankruptcy*, 85 MICH. L. REV. 1341, 1368-69 (1987).

52. Carroll & Payne, *The Psychology of the Parole Decision Process: A Joint Application of Attribution Theory and Information Processing Psychology*, in COGNITION AND SOCIAL BEHAVIOR, *supra* note 45, at 13, 21.
53. Saks & Kidd, *supra* note 45, at 125. For a full elaboration, see, e.g., Kahneman & Tversky, *On the Psychology of Prediction*, 80 PSYCHOLOGICAL REV. 237 (1973); Tversky, *Features of Similarity*, 84 PSYCHOLOGICAL REV. 327 (1977); Tversky & Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOLOGY 207 (1973) [hereinafter *Availability*]; Tversky & Kahneman, *Belief in the Law of Small Numbers*, in JUDGMENT UNDER UNCERTAINTY, *supra* note 46, at 23 [hereinafter *Law of Small Numbers*]; Tversky & Kahneman, *supra* note 51. See generally Tanford & Tanford, *supra* note 28, at 749-52.

Saks and Kidd wrote primarily in response to Tribe, *Trial By Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1393 (1971). Tribe had asserted that the costs of attempting to integrate mathematics into the fact-finding process outweighed the benefits. He also believed that keeping a trial elemental and intuitive would best preserve both the symbolism and humanness of the trial process, and thus, best serve the courts and society. Tribe stated:

That some mistaken verdicts are inevitably returned even by jurors who regard themselves as "certain" is of course true but is irrelevant; such unavoidable errors are in no sense *intended*, and the fact that they must occur if trials are to be conducted at all need not undermine the effort, through the symbols of trial procedure, to express society's fundamental commitment to the protection of the defendant's rights as a person, as an end in himself.

*Id.* at 1374 (emphasis in original; footnote omitted).

Compare *State v. Joon Kyu Kim*, 398 N.W.2d 544, 551-52 (Minn. 1987) (Kelley, J., dissenting) (Saks and Kidd have "successfully challenged" Tribe's conclusions); G. MELTON, J. PETRILA, N. POYTHRESS & C. SLOBOGIN, *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 11 (1987) (positions of Saks and Kidd are more persuasive) [hereinafter *HANDBOOK*]. See also Walker & Monahan, *supra* note 51, at 576-77 n.52.

54. Saks & Kidd, *supra* note 45, at 132. See also Edwards & von Winterfeldt, *supra*

use rationally useful information.<sup>55</sup>

These principles include the following:

*Representativeness*: We erroneously view a random sample drawn from a population as highly representative of that population, *i.e.*, similar in all essential characteristics;<sup>56</sup>

*Insensitivity to sample size*: We intuitively reject the statistical reality that larger samples are more likely to approximate the characteristics of the population from which it is drawn;<sup>57</sup>

*Illusion of validity*: We tend to make intuitive predictions by selecting an outcome most similar to a pre-existing stereotype and express extreme confidence in such predictions, even where we are given scanty, outdated, or unreliable information about an unknown;<sup>58</sup>

*Availability*: We tend to judge the probability or frequency of an event based on the ease with which we can recall occurrences of the

note 46, at 227 (discussing elements of cognitive illusions); Klahr, *The Social Psychologist as Troll*, in COGNITION AND SOCIAL BEHAVIOR, *supra* note 45, at 243, 245.

55. Carroll & Payne, *supra* note 52, at 21. On the role of heuristics in legal decision-making in the area of the right of pretrial detainees to refuse psychotropic medication, see Perlin, *Are Courts Competent to Decide Questions of Competency? Stripping the Facade from United States v. Charters*, 38 U. KAN. L. REV. 957 (1990). On the role of heuristics in the public's conception of the relationship between deinstitutionalization and homelessness, see Perlin, *Competency, Deinstitutionalization and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. (1990)(in press)[hereinafter *Competency*].
56. Dangerous behavior is overpredicted by psychiatrists and clinical psychologists because of inappropriate reliance on the representative heuristic where a person facing involuntary civil commitment is compared to the stereotype of a dangerous person. Saks & Kidd, *supra* note 45, at 133 (discussing Kahneman & Tversky, *Subjective Probability: A Judgment of Representativeness*, 3 COGNITIVE PSYCHOLOGY 430 (1972)); Perlin, *supra* note 1, at 693-96. See also *Law of Small Numbers*, *supra* note 53, at 23. Compare Fisher, Pierce & Appelbaum, *How Flexible Are Our Civil Commitment Statutes?* 39 HOSP. & COMMUNITY PSYCHIATRY 711 (1988)(more restrictive civil commitment legislation also frequently follows a random violent act by an insanity acquittee). Because the rare false negative receives such extensive negative publicity, we overattribute representativeness to that category. See Edwards & von Winterfeldt, *supra* note 46, at 237, (discussing Kahneman & Tversky, *supra* note 53). See generally Kozol, Boucher & Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 CRIME & DELINQ. 371 (1972).
57. See Edwards & von Winterfeldt, *supra* note 46, at 235 (discussing *Law of Small Numbers*, *supra* note 53); Saks & Kidd, *supra* note 45, at 134 ("this fundamental notion of statistics is evidently not part of people's repertoire of intuitions"). Like the "illusion of validity" discussed *infra* text accompanying note 58, this heuristic may be viewed as a subcategory of representativeness.
58. Saks & Kidd, *supra* note 45, at 135. Moreover, we frequently fill in the gaps in our evidence base with information consistent with our preconceived notions of what evidence should support our belief, a phenomenon also known as "filling." See D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* 45 (1977). See generally Snyder, Tanke & Berscheid, *Social Perception and Interpersonal Behavior: On the Self-Fulfilling Nature of Social Stereotypes*, 35 J. PERSONALITY & SOC. PSYCHOLOGY 656, 657 (1977).

event;<sup>59</sup>

*Illusory correlation:* We erroneously report correlations between two classes of events that are not really correlated, are correlated to a lesser extent than is reported, or really are correlated in an opposite direction;<sup>60</sup>

*Adjustment and anchoring:* Our adjustments or revisions of initial estimates frequently depend heavily on initial values;<sup>61</sup>

*Overconfidence in judgments:* We tend to overestimate how much we already know and underestimate how much we have recently learned;<sup>62</sup>

59. Saks & Kidd, *supra* note 45, at 137 (citing Tversky & Kahneman, *supra* note 51). See also *Availability*, *supra* note 53, at 163; Slovic, Fischhoff & Lichtenstein, *Cognitive Processes and Societal Risk Taking*, in *COGNITION AND SOCIAL BEHAVIOR*, *supra* note 45, at 165.

Extensive publicity about some atrocious crime greatly enhances lay assessment of how probable the event is. Edwards & Von Winterfeldt, *supra* note 46, at 248. However, as the most salient experiences are the ones which are the most bizarre and extreme, they are precisely the "poorest instances on which to construct decision making policies." Saks & Kidd, *supra* note 45, at 139.

As a correlative of this phenomenon, Saks and Kidd also report studies confirming that experts reporting scientific and/or statistical data are likely to have less of an impact on factfinders than a person who reports a case study, relates a compelling personal experience, or offers anecdotal evidence. Such anecdotal evidence is viewed as "more concrete, vivid and emotion-arousing", and thus, more easily understood. *Id.* at 137 (citing Nisbett & Temoshok, *Is There an "External" Cognitive Style?* 33 *J. PERSONALITY & SOC. PSYCHOLOGY* 36 (1976)). See also Kelley, *The Process of Causal Attribution*, 28 *AM. PSYCHOLOGIST* 107, 122 (1973) ("the preference for simple rather than complex causal explanations not only is characteristic of children but also . . . persists into adulthood"); *HANDBOOK supra* note 53, at 10-12 (discussing courts' preference for idiographic or case-centered testimony). On the impact of the "personality-centered communication," see Rosenthal, *The Concept of the Paramessage in Persuasive Communication*, 58 *Q. J. SPEECH* 15, 20-23 (1972). It is not coincidental that political commentators have credited much of the personal popularity of President Reagan — Hinckley's victim — to his ability to capitalize on this sort of heuristic, "anecdotal evidence." See M. Perlin, *supra* note 19.

For more information, see Van Zandt, *Commonsense Reasoning, Social Change and the Law*, 81 *Nw. U.L. REV.* 894, 917 n.120 (1987) (anecdotal evidence, such as oral stories, tales, and myths, plays a major role in people's understanding of their society; individuals routinely accept as highly probative evidence that would otherwise constitute hearsay), and *infra* text accompanying notes 134-43. For an experimental investigation into the positive relationship between recall and persuasion, see Insko, Lind & LaTour, *Persuasion, Recall, and Thoughts*, 7 *REPRESENTATIVE RES. SOC. PSYCHOLOGY* 66 (1976).

60. Saks & Kidd, *supra* note 45, at 139 (citing, Chapman & Chapman, *Genesis of Popular But Erroneous Psychodiagnostic Observations*, 74 *J. ABNORMAL PSYCHOLOGY* 193 (1967)).

61. The phenomenon that differing initial values lead to differing final estimates is known as "anchoring." Saks & Kidd, *supra* note 45, at 140-41.

62. Saks & Kidd, *supra* note 45, at 143. For example, lawyers are found to be significantly overconfident in predicting their chances of winning a hypothetical case. See Loftus & Wagenaar, *Lawyers' Predictions of Success*, 28 *JURIMETRICS J.* 437

*Under-incorporation of statistical information:* Contrary to the common belief that statistical reliance results in the production of unduly persuasive data, we do not process probabilistic information well, and as a result, unduly ignore statistical information;<sup>63</sup> and

*The myth of particularistic proofs:* We misassume that case-specific, anecdotal information is qualitatively different from base-rate, statistical information.<sup>64</sup>

When recognized and ultimately understood, these heuristic reasoning devices can shed new light on the hidden issues underlying insanity defense decisionmaking.<sup>65</sup> To take one example, the simplifying heuristic of attribution theory<sup>66</sup> teaches that, once a person adopts

(1988). See generally Oskamp, *Overconfidence in Case-Study Judgments*, in JUDGMENT UNDER UNCERTAINTY, *supra* note 46, at 287. Further, very difficult judgments produce the most overconfidence. Edwards & von Winterfeldt, *supra* note 46, at 239 (citing Pitz, *Subjective Probability Distribution for Imperfectly Known Quantities*, in KNOWLEDGE AND COGNITION (L. Gregg ed. 1974)).

63. Saks & Kidd, *supra* note 45, at 148-49 (responding to Tribe, *supra* note 53, at 1334, 1376).

64. Saks & Kidd, *supra* note 45, at 151; Tribe, *supra* note 53, at 1330 n.2 ("all factual evidence is ultimately "statistical""). See also J. MONAHAN & L. WALKER, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS 248-49 (on impacts of probabilistic versus particularistic evidence); Walker & Monahan, *supra* note 51, at 576 (aggregate "statistical" information is likely to be highly undervalued by lay decisionmakers).

65. One example of the availability heuristic in a collateral area should be illustrative. When asked about whether a sentencing judge was too lenient in an individual case, 80% of all respondents who had read a newspaper account of the case agreed while only 14.8% of those who had read a court transcript came to the same conclusion. Diamond & Stalans, *supra* note 50, at 88 (citing Doob & Roberts, *supra* note 42). See also Harris & Harvey, *Attribution Theory: From Phenomenal Causality to the Intuitive Social Scientist and Beyond*, in THE PSYCHOLOGY OF ORDINARY SOCIAL BEHAVIOR 57 (C. Antaki ed. 1981). Harris and Harvey stated:

[T]he use of the availability heuristic can account for frequently seen types of attributional bias. . . . [I]f one had to judge the chances of a discharged mental patient being dangerous, one might only access dramatic memories of particular discharged patients (e.g., memories of their violent behaviour) presumably because such memories are more available. If so, then one would judge a particular patient as having a greatly inflated chance of being dangerous, ignoring data which suggest, in general, that discharged mental patients are most likely to be docile and non-violent.

*Id.* at 83.

66. See, e.g., Burger, *Motivational Biases in the Attribution of Responsibility for an Accident: A Meta-Analysis of the Defensive-Attribution Hypothesis*, 90 PSYCHOLOGICAL BULL. 496 (1981); Kelley, *supra* note 59; *Popular Induction*, *supra* note 50. For a consideration of attribution theory in the context of prison inmates' explanations about the causes of their criminality, see Saulnier & Perlman, *Inmates' Attributions: Their Antecedents and Effects on Coping*, 8 CRIM. JUST. & BEHAV. 159 (1981). Cf. Shotter, *Telling and Reporting: Prospective and Retrospective Uses of Self-Ascriptions*, in Harris & Harvey, *supra* note 65, at 157 (criticizing attribution theory from a humanistic perspective).



a stereotype, a wide variety of information will be seen by that individual to reinforce that stereotype. Such information may include events that could equally support the opposite interpretation,<sup>67</sup> that process is sometimes characterized as dispositional consistency.<sup>68</sup>

In short, a stereotype functions as a self-fulfilling prophecy. Once formed, beliefs about oneself, others, or relationships can even survive and persevere in light of "the total discrediting of the evidence that first gave rise to such beliefs."<sup>69</sup> Thus, the biased assimilation processes may include a propensity to remember the strengths of confirming evidence, but not the weaknesses of disconfirming evidence. Further, the process may cause a person to "judge confirming evidence as relevant and reliable but disconfirming evidence as irrelevant and unreliable, and to accept confirming evidence at face value while scrutinizing disconfirming evidence hypercritically."<sup>70</sup>

Evidence shows that belief polarization will increase, rather than decrease or remain unchanged, when mixed or inconclusive findings

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67. Snyder, Tanke & Berscheid *supra* note 58, at 657. See generally Russell, *The Causal Dimension Scale: A Measure of How Individuals Perceive Causes*, 42 J. PERSONALITY & SOC. PSYCHOLOGY 1137 (1982); Zadny & Gerard, *Attributed Intentions and Informational Selectivity*, 10 J. EXPERIMENTAL SOC. PSYCHOLOGY 34 (1974). There is also a "well-documented tendency for people to seek information that confirms rather than disconfirms their beliefs." Doob & Roberts, *supra* note 42, at 279 (citing Snyder & Swann, *Hypothesis-Testing Processes in Social Interaction*, 36 J. PERSONALITY & SOC. PSYCHOLOGY 1202 (1978)).
68. Fiske, *Attention and Weight in Person Perception: The Impact of Negative and Extreme Behaviors*, 38 J. PERSONALITY & SOC. PSYCHOLOGY 889 (1980). See also Ross & Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, in JUDGMENT UNDER UNCERTAINTY, *supra* note 46, at 129 (attribution theory deals with "naive psychology").
69. Lord, Ross & Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOLOGY 2098, 2108 (1979). See also Dohrenwend & Chin-Shong, *Social Status and Attitudes Toward Psychological Disorder: The Problem of Tolerance of Deviance*, 32 AM. SOC. REV. 417, 431-33 (1967); Ross & Anderson, *supra* note 68, at 144-45; Ross, Lepper & Hubbard, *Perserverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm*, 32 J. PERSONALITY & SOC. PSYCHOLOGY 880 (1975); Snyder, Tanke & Berscheid *supra* note 58, at 663. There is also substantial evidence that simplifying devices may lead to systematic errors in perception and action. See Van Zandt, *supra* note 61, at 918 n.125 (citing various sources). These principles control, whether the topic is law, psychology, or baseball. Thus, in a recent essay reviewing a book about Joe DiMaggio's 1941 fifty-six game hitting streak, Stephen Jay Gould relies on heuristic theories to demonstrate that statistically DiMaggio's one-season streak is "the greatest factual achievement in the history of baseball." Gould, *The Streak of Streaks*, N.Y. Rev. Books, Aug. 18, 1988, at 8. Yet, well-known sports odds-maker Danny Sheridan continues to quote significantly longer odds (100 to 1 as opposed to 75 to 1) on the longevity and unbeatability of Hank Aaron's career record of 755 home runs. *Pursuing Baseball's Elusive Records*, USA Today, Sept. 30, 1988, at 7C.
70. Lord, Ross & Lepper, *supra* note 69, at 2099.

are assimilated by proponents of opposite viewpoints. This polarization hypothesis stems from the assumption that data relevant to a belief are not processed impartially.<sup>71</sup> The hypothesis posits that people who hold strong opinions on complex social issues would be likely to examine relevant empirical evidence in a biased manner.<sup>72</sup> As a corollary, those individuals would irrationally exaggerate a person's causal responsibility for an event while underestimating other causal factors that are logically involved in the event's occurrence.<sup>73</sup>

Public perceptions of a system "burdened by citizen demands and assailed by unprecedented attempts to use the courts as a vehicle for social engineering"<sup>74</sup> have been found to be based upon a handful of worst case studies or an anecdotal "parade of horrors."<sup>75</sup> We respond to social policies in terms of the images they evoke or in conformity with views expressed by leaders we respect.<sup>76</sup> The evidence brought to bear in the formulation of such policies is apt to be "incomplete, biased, and of marginal probative value — typically, no more than a couple of vivid, concrete, but dubiously representative instances or cases."<sup>77</sup> In the same vein, individuals tend to generalize from spe-

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71. *Id.* See also Edwards & von Winterfeldt *supra* note 46, at 233 ("People integrate two items of information only if both seem to them equally relevant. Otherwise, high relevance information renders low information irrelevant. One item of information is more relevant than another if it somehow pertains to it more specifically").
  72. White, *Juror Decision Making in the Capital Penalty Trial: An Analysis of Crimes and Defense Strategies*, 11 LAW & HUM. BEHAV. 113, 127 (1987)(citing Lord, Ross & Lepper, *supra* note 69). See also Ross & Anderson, *supra* note 68, at 149-50 (discussing "confirmation bias").
  73. Landy & Aronson, *The Influence of the Character of the Criminal and His Victim on the Decisions of Simulated Jurors*, 5 J. EXPERIMENTAL SOC. PSYCHOLOGY 141, 141 (1969). Our reasoning is also distorted by the "hindsight illusion" through which we "consistently exaggerate what could have been anticipated in foresight," a phenomenon characterized as "a probabilistic version of 'I told you so.'" Edwards & von Winterfeldt, *supra* note 46, at 243 (quoting, in part, Fischhoff, *For Those Condemned To Study the Past: Reflections on Historical Judgments*, NEW DIRECTIONS FOR METHODOLOGY OF SOCIAL AND BEHAVIORAL SCIENCE: FALLIBLE JUDGMENT IN BEHAVIORAL RESEARCH (R. Shweder & D. Fiske eds. 1980)). See also Slovic, Fischhoff & Lichtenstein, *supra* note 59, at 172.
  74. Cavanagh & Sarat, *Thinking About Courts: Toward And Beyond A Jurisprudence of Judicial Competence*, 14 LAW & SOC'Y REV. 371, 371 (1980). Commentaries referred to include Barton, *Beyond the Legal Explosion*, 27 STAN. L. REV. 567 (1975); Glazer, *Towards an Imperial Judiciary*, 41 PUB. INTEREST 104 (1975); Manning, *Hyperlexis: Our National Disease*, 71 NW. U.L. REV. 767 (1977).
  75. Cavanagh & Sarat, *supra* note 74, at 373, 396. See Edwards & von Winterfeldt, *supra* note 46, at 241 (even intelligence analysts "overestimate the probabilities of occurrence of dire events"); V. HANS & N. VIDMAR, *supra* note 31, at 133.
  76. Lord, Ross & Lepper, *supra* note 69, at 2098. See Perlin, *supra* note 1, at 618-23 (on impact of symbolism on insanity defense jurisprudence).
  77. Lord, Ross & Lepper, *supra* note 69, at 2098. Congress's "fixating" on the Hinckley case clearly reflects this "vividness" effect. See English, *supra* note 22, at 37 n.211. On the role of this sort of "horror story" in the legislative reduction of

cific cases to the population from which such cases were drawn and tend to remember and recall negative and extreme behaviors more easily than positive, more moderate behaviors.<sup>78</sup> Thus, heuristics and biases shed significant light on our perceptions of the insanity defense when we consider the extent to which we are inclined to select information from relevant cases that tend to support our pre-existing views of the insanity defense.

### 1. *The Insanity Defense and Human Inference*

Public perceptions of the insanity defense comprise a prime exhibit in the case against the soundness of human cognition and inference. Heuristics and biases influence public perceptions, combining to produce invidious scenarios which doggedly resist rational correction.<sup>79</sup>

For example, insanity defense defenders attempt to use statistics to rebut empirical myths about how often the defense is used; scientific studies to demonstrate that "responsibility" is a valid, externally verifiable term, and that certain insanity-pleading defendants are simply different from "normal" defendants; and principles of moral philosophy to "prove" that responsibility and causation questions are legitimate ones for moral and legal inquiry.<sup>80</sup> In contrast, President Reagan, who was the victim of an insanity-pleader, was able to stir public opinion against the defense, in large part, because he used a case-specific style that relied on concrete, vivid and emotion-arousing anecdotes. Such a technique is instinctively more accessible to the fact-finder than relying on "boring" empirical studies, and philosophical debates.<sup>81</sup> It is no surprise that counterdemands by empiricists

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Idaho's insanity defense, see Geis & Meier, *Abolition of the Insanity Plea in Idaho*, 477 ANNALS 72, 74-75 (1985).

78. Diamond & Stalans, *supra* note 50, at 87; Fiske, *supra* note 68, at 890-91, 904, points out that (1) individuals who are statistically rare, rare in context, or "visually highlighted . . . all have been shown to attract [disproportionate] attention," (2) impressions are most influenced "by their extreme terms," and (3) individuals "read" negative cues as more important than positive ones, in part, because they "stand out by virtue of being rare."
79. Mental health clinicians do not escape blame either. See C. WEBSTER, R. MENZIES & M. JACKSON, CLINICAL ASSESSMENTS BEFORE TRIAL 121 (1982) ("rules of psychiatric decision-making are not substantially divergent from the canons and heuristics of everyday life"); Jackson, *The Clinical Assessment and Prediction of Violent Behavior: Toward a Scientific Analysis*, 16 CRIM. JUST. & BEHAV. 114, 115-18 (1989); Jackson, *supra* note 51, at 519 ("in clinical practice, a knowledge of how heuristics and biases work to affect judgment may be every bit as important as clinical acumen *per se*").
80. See Perlin, *supra* note 1, at 640-73. These efforts have had negligible effects on insanity defense jurisprudential developments. See *id.* at 713-31.
81. See Saks & Kidd, *supra* note 45, at 137. In a radio broadcast commentary recapping the Reagan Presidency, Jim Angle characterized Reagan by his "ability to ignore any fact contrary to his views." *All Things Considered* (National Public Radio Broadcast, Jan. 20, 1989).

that change be based on scientific evidence rather than emotionalism receive scant attention.<sup>82</sup>

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.<sup>83</sup> The chasm between perception and reality on the question of the frequency of use of the insanity defense, its success rate, and the appropriateness of its success rate reflect these effects.<sup>84</sup>

There appears to be some connection between these heuristic fallacies and reliance on OCS.<sup>85</sup> In his dissent from the Fifth Circuit's decision abandoning the control component of the Model Penal Code's substantive test,<sup>86</sup> Judge Alvin Rubin astutely focused on one aspect of the majority's decisionmaking process:

Judges are not, and should not be, immune to popular outrage over this nation's crime rate. Like everyone else, judges watch television, read newspapers and magazines, listen to gossip and are sometimes themselves victims. They receive the message trenchantly described in a recent book criticizing the insanity defense: "Perhaps the bottom line of all these complaints is that *guilty people go free* — guilty people who do not have to accept judgment or responsibility for what they have done and are not held accountable for their actions. . . . These are not cases in which the defendant is *alleged* to have committed a crime. *Everyone knows he did it.*" Although understandable as an expression of uninformed popular opinion, such a viewpoint ought not to serve as the basis for judicial decisionmaking; for it misapprehends the very meaning of guilt.<sup>87</sup>

82. Rogers, *supra* note 28, at 840. See also Alschuler, *supra* note 50, at 347-48.

83. Saks & Kidd, *supra* note 45, at 145. The members of the National Institute of Mental Health Forensic Advisory Panel implicitly recognized the importance of anecdotal notoriety in the shaping of an insanity defense jurisprudence: "From the perspective of [St. Elizabeth's] Hospital, in *controversial* cases such as Hinckley, the U.S. Attorney's office can be counted upon to oppose *any* conditional release recommendation." *Final Report of the National Institute of Mental Health (NIMH) Ad Hoc Forensic Advisory Panel*, 12 MENTAL & PHYSICAL DISABILITY L. REP. 77, 96 (1988)(emphasis added)[hereinafter *Ad Hoc Report*]. See also M. Perlin, *supra* note 19.

84. See also N. Finkel, *De Facto Departures From Insanity Instructions: Toward the Remaking of Criminal Law 20* (1988)(unpublished manuscript)(mock jurors "keep shifting their relevant and determinative constructs from case to case").

85. This is made explicit in Kelley, *supra* note 59, at 108 ("it is precisely common sense with which attribution theory is concerned"). See generally Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729 (1988).

86. *United States v. Lyons*, 731 F.2d 243 (5th Cir. 1984). *Lyons* preceded the adoption of the Insanity Defense Reform Act of 1984 (IDRA). See 18 U.S.C. § 17 (1989).

87. *United States v. Lyons*, 739 F.2d 994, 999-1000 (5th Cir. 1984)(Rubin, J., dissenting)(emphasis in original; footnote and citation omitted). See English, *supra* note 22, at 4 (the post-*Hinckley* abolitionist movement was the result of "reflexive, rather than reasoned, legislative action"). See also Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Story Telling*, 87 MICH. L. REV. 543, 595 (1988)("Can common sense make sense of interpretive principles, deriving, say,

The Justice Department's position on post-*Hinckley* insanity defense reform illuminated the issue:

[H]ow do we get a hook into this person so that he or she isn't going to go out and do this again to me, to any of my friends. . . . If you are so disturbed mentally that it manifests itself in . . . assassinations . . . , society has a right to put a hook in you . . . until I think it's demonstrated beyond a shadow of a doubt that you are no longer that type of danger to the community. . . .

The people really don't care if he couldn't help himself. They want to know what do you do to protect me.<sup>88</sup>

This type of decisionmaking mimics what is characterized as "implicit personality theory," an untested, unconfirmed collection of ideas that people rely on to explain or predict others.<sup>89</sup> Thus, if OCS is a "prereflective attitude" exemplified by the attitude of "What I know is 'self-evident'; it is 'what everybody knows,'" <sup>90</sup> the use of the heuristic bias becomes even more pernicious in insanity defense decisionmaking.

#### D. "Ordinary Common Sense" (OCS): The Unconsciousness of Legal Decisionmaking

##### 1. Introduction

Ordinary common sense (OCS) can be a powerful unconscious ani-

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from a constitutional text, which trump our 'natural' inclination to blame the factually guilty?"). On the important difference between *factual* guilt and *moral* guilt, see Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 197-98 (1983); Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436 (1980).

88. *Proceedings of the Forty-Sixth Judicial Conference of the District of Columbia Circuit*, 111 F.R.D. 91, 227 (1985)(remarks of Assistant U.S. Attorney General Stephen Trott). See generally Nisbett, Borgida, Crandall & Reed, *Popular Induction: Information Is Not Necessarily Informative*, in COGNITION AND SOCIAL BEHAVIOR, *supra* note 45, at 113, 128 (in assessing impact of "sheer number of instances" as against "instances of some emotional interest," researchers have found that "emotional instance has in every case carried the day").

Heuristic decisionmaking in involuntary civil commitment law is described in Bagby & Atkinson, *The Effects of Legislative Reform on Civil Commitment Admission Rates: A Critical Analysis*, 6 BEHAV. SCI. & L. 45, 46 (1988)("publicly salient events such as a heinous murder of an innocent victim at the hands of a discharged mentally ill patient, or community intolerance of deviance, may have the effect of increasing the rate of commitments"), and Fisher, Pierce & Appelbaum, *supra* note 56, at 712.

89. Saks & Kidd, *supra* note 45, at 135 n.15 (citing Bruner & Tagiuri, *The Perception of People*, in HANDBOOK OF SOCIAL PSYCHOLOGY (G. Lindzey ed. 1954)).
90. Sherwin, *supra* note 85, at 737. See also Sherwin, *supra* note 87, at 595 (common sense probably would not surrender concrete evidentiary truth to abstract constitutional principles). For a paradigmatic judicial characterization in a collateral area, see *State v. Vaughan*, 268 S.C. 119, 126, 232 S.E.2d 328, 331 (1977)("effect of drunkenness on the mind and on men's actions . . . is a fact known to everyone").

mator of legal decision making.<sup>91</sup> Often judges' decisions reflect a total lack of awareness of the underlying psychological issues involved in a particular case. Rather, judges often focus on such superficial issues as whether a putatively mentally-disabled defendant has a "normal appearance."<sup>92</sup>

Typically,<sup>93</sup> trial judges will say, the defendant "doesn't look sick to me," or, even more revealingly, "the defendant is as healthy as you

91. See, e.g., Grigsby v. Mabry, 569 F. Supp. 1273, 1332 (E.D. Ark. 1983), *aff'd* 758 F.2d 226 (8th Cir. 1985), *rev'd sub nom.* Lockhart v. McCree, 476 U.S. 162 (1986), relying on, *inter alia*, Berry, *Death-qualification and the "Fireside Induction,"* 5 U. ARK. LITTLE ROCK L.J. 1 (1982), to define "fireside induction" as "those common sense, empirical generalizations about human behavior which derive from introspection, anecdotal evidence, and culturally transmitted beliefs."

92. Perlin, *supra* note 6, at 83-84 n.811. See generally Perlin, *supra* note 1, at 713-31. Rehnquist's opinions reflect the "meta-myths" of "fear of feigning." See Ford v. Wainwright, 477 U.S. 399, 431 (1986) (Rehnquist, J., dissenting). For stereotypical visions of mental disability informed primarily by surface views of defendants' external appearance, see Wainwright v. Greenfield, 474 U.S. 284, 297 (1986) (Rehnquist, J., concurring); Ake v. Oklahoma, 470 U.S. 68, 87, 91 (1985) (Rehnquist, J., dissenting). The opinions also reflect the view that mental illness is an improperly exculpatory excuse. See Colorado v. Connelly, 479 U.S. 157, 163-71 (1986). On the meaning of "meta-myths," see *supra* text following note 10.

In a recent revealing speech, the Chief Justice discussed the impact of public opinion on judicial decisionmaking:

Somewhere "out there" — beyond the walls of the courthouse — run currents and tides of public opinion which lap at the courthouse door. . . .

[I]f these tides of public opinion are sufficiently great and sufficiently sustained, they will very likely have an effect upon the decision of some of the cases decided within the courthouse. This is not a case of judges "knuckling under" to public opinion, and cravenly abandoning their oaths of office. Judges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs.

Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 768 (1986) (emphasis added). The degree to which Rehnquist's views mirror public consensus on "craziness," the appearance of normality, and criminal nonresponsibility as an exculpatory condition is probably not coincidental.

93. On the role of ego defenses in behavior, see Bibring, Dwyer, Huntington & Valenstein, *Glossary of Defenses*, in J. KATZ, J. GOLDSTEIN & A. DERSHOWITZ, *PSYCHOANALYSIS, PSYCHIATRY AND LAW* 155 (1967). Justice Rehnquist is not immune to this way of thinking. For an analysis of the "fallacies of logic" that pervade Justice Rehnquist's decisionmaking, see McClurg, *Logical Fallacies and the Supreme Court: A Critical Examination of Justice Rehnquist's Decisions in Criminal Procedure Cases*, 59 U. COLO. L. REV. 741, 837 n.460 (1988). "Courts regularly and routinely make assumptions about how and why people behave in certain ways. . . ." Haney, *Psychology and Legal Change: On the Limits of a Factual Jurisprudence*, 4 LAW & HUM. BEHAV. 147, 154 (1980). For a rare example of a judicial opinion "unpacking" the mythology that serves as the building blocks of "ordinary common sense," see United States v. Lyons, 739 F.2d 994, 999-1000 (5th Cir. 1984) (Rubin, J., dissenting), discussed *supra* notes 86-87. On the Courts' failure to "unpack" such myths in a collateral area (involvement of the judiciary in refusal of treatment decisionmaking), see Perlin, *supra* note 55, at 979-93.

or me."<sup>94</sup> In short, where defendants do not conform to "popular images of 'craziness,'" <sup>95</sup> the notion of a handicapping mental disability is flatly and unthinkingly rejected.<sup>96</sup> Similarly, the "slippery slope" conflation of mental illness and dangerousness is blindly accepted.<sup>97</sup> These views<sup>98</sup> reflect the power of OCS.<sup>99</sup>

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94. Perlin, *Psychiatric Testimony in a Criminal Setting*, 3 BULL. AM. ACAD. PSYCHIATRY & L. 143, 147 (1975).
95. Lasswell, *Foreward*, to R. ARENS, *THE INSANITY DEFENSE* at xi (1974). For an empirical evaluation of how defendants who conform to popular notions of "craziness" are differentially treated by prosecutors and by courts, see Hochstedler, *Twice-Cursed? The Mentally Disordered Criminal Defendant*, 14 CRIM. JUST. & BEHAV. 251, 260 (1987)(mentally disabled defendants were prosecuted in significantly different ways from the general population; courts commonly subjected mentally disabled defendants to court-ordered treatment and were reluctant to release previously hospitalized defendants on their own recognizance; prosecutors showed "selective leniency," issuing charges less frequently to the formerly-hospitalized, but more frequently to defendants with histories of chronic health problems)(emphasis added).
96. R. ARENS, *supra* note 95, at 77-79, graphically reproduces transcripts of two competency hearings conducted by the same judge on the same day in which the judge merely asks the defendant the date, the names of the President and the Vice-President, and the Washington Senators' standing in the American League. The motion of the defendant who answered the questions correctly was denied, while the defendant who knew only the President's name was ordered held for psychiatric evaluation. *Id.* at 78-79. See generally Perlin, *supra* note 6, at 83-84 n.811.
97. See *Jones v. United States*, 463 U.S. 354, 365 n.14 (1983). Compare Schmidt, *Supreme Court Decision Making on Insanity Acquittes Does Not Depend on Research Conducted By The Behavioral Science Community: Jones v. United States*, 12 J. PSYCHIATRY & L. 507, 512 (1984)(empirical evidence does not support the common sense of the majority in *Jones* as much as it supports the responding speculation of the dissent).
98. See, e.g., Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 805-09 (1970)(discussing Supreme Court's implicit use of OCS in deciding the leading confession-coercion case of *Brown v. Mississippi*, 297 U.S. 278 (1936)). Such judgments are not limited to cases involving mentally disabled defendants. Complaining that not enough systematic attention has been focused upon the influence of political, racial, moral, and idiosyncratic factors in judicial decisionmaking, Professor Randall Kennedy has noted Chief Justice Burger's sympathy and "admiration" for the "law-abiding" and 'self-sufficient' " Amish people, as reflected in his opinion in *Wisconsin v. Yoder*, 406 U.S. 205, 212-13 (1972). Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1417 n.141 (1988). On the role of "ordinary common sense" in the jurisprudence of law and economics, see Gjerdingen, *The Coase Theorem and the Psychology of Common-Law Thought*, 56 S. CAL. L. REV. 711, 741-48 (1983).
99. Sherwin, *supra* note 85, at 737. One important example of such thinking is reflected in courts' persistent adherence to patterns of jury instructions in spite of overwhelming social science evidence as to the jurors' confusion. See *infra* text accompanying notes 238-42. Professors Steele and Thornburg state that, since judges and lawyers understand the instructions, they believe that jurors probably understand them as well. Steele & Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C.L. REV. 77, 99 (1988). In criminal procedure,

Empirical investigations similarly corroborate the inappropriate application of OCS to insanity defense decisionmaking.<sup>100</sup> Studies demonstrate that judges "unconsciously express public feelings . . . reflect[ing] the community's attitudes and biases because they are 'close' to the community."<sup>101</sup> Others show that virtually no members of the public can actually articulate what the substantive insanity defense test is.<sup>102</sup> Still others illustrate that the public is seriously misinformed about both the "extensiveness and consequences" of an insanity defense plea<sup>103</sup> and that the public explicitly and consistently rejects any such defense substantively broader than the "wild beast" test.<sup>104</sup> These realities may lead into yet one more trap. While judges and attorneys are accustomed to weighing and interpreting several factors at once, the conflict that arises from the attorney's fear that a jury will reject, or will be less impressed by, explanations that require complex analysis and a lengthy explanation may lead to important distortions of forensic testimony.<sup>105</sup>

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OCS presupposes two self-evident truths: 1) everyone knows how to assess an individual's behavior, and 2) everyone knows when to blame someone for doing wrong. Sherwin, *supra* note 85, at 738. *See also* Doob & Roberts, *supra* note 42, at 275 (the public appears simply to accept the information they have as adequate in assessing perceived leniency of criminal sentences). *Cf.* Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 671-72 (1981) ("dominant legal thought is nothing but some more or less plausible common-wisdom banalities, superficialities, and generalities").

100. *See, e.g.*, Finkel, Shaw, Bercaw & Koch, *Insanity Defenses: From the Jurors' Perspective*, 9 LAW & PSYCHOLOGY REV. 77, 92 (1985) (characterizing the layman's perspective toward the insanity defense as reflecting "intuitive, common sense"). *Cf.* State v. Van Horn, 528 So. 2d 529, 530 (Fla. Dist. Ct. App. 1988) (rebuttal lay witness provided jury with "probative perceptions of normalcy").
101. Arens & Susman, *Judges, Jury Charges, and Insanity*, 13 HOW. L.J. 1, 34 n.43 (1966). The caselaw reflects each of these traps. *See, e.g.*, Regina v. Turner, 1 Q.B. 834, 841 (1975) ("Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life"). Professor Finkel's research suggests that expert witnesses reinforce this sense of conventional morality. N. FINKEL, *supra* note 7, at 349.
102. Of 434 Delaware residents surveyed, only one gave a "reasonably good approximation" of the insanity test then operative in that jurisdiction. Hans & Slater, "Plain Crazy": *Lay Definitions of Legal Insanity*, 7 INT'L J. L. & PSYCHIATRY, 105-06 (1984).
103. Hans, *An Analysis of Public Attitudes Toward the Insanity Defense*, 24 CRIMINOLOGY 393, 411 (1986).
104. Roberts, Golding & Fincham, *supra* note 8, at 226. *Cf.* Washington v. United States, 390 F.2d 444, 445 (D.C. Cir. 1967) (In the 1700's, jurors and witnesses "knew a wild beast when they saw one").
105. Anderten, Staulcup & Grisso, *On Being Ethical in Legal Places*, 11 PROF. PSYCHOLOGY 764 (1980). "Thus, the psychologist might be led into this more simplistic manner of reasoning that scientifically and ethically misrepresents the complexity of most psychological conclusions and potentially distorts the results." *Id.* at 769.



Whatever its general value is in legal decisionmaking,<sup>106</sup> OCS is an incomplete and imperfect tool by which to assess criminality. Anthropologists have shown that the content and style of expression of common sense varies markedly from one place to another.<sup>107</sup> The truth claims to which OCS gives rise are complex and conflicting, and stem from diverse situational factors, such as geography, culture, class, education, familial background, religion, and current events.<sup>108</sup> Furthermore, OCS cannot answer such important questions as how a reasoned argument could hope to dissuade a jury or judge that is committed to a contrary view of human nature.<sup>109</sup>

The dominance of OCS is reflected in the Supreme Court's opinion in *Coy v. Iowa*.<sup>110</sup> In *Coy*, the Court held that placing a screen between a child sexual assault victim and a defendant violated the defendant's sixth amendment right to confront his accuser. In *Coy*, Justice Scalia<sup>111</sup> first precedentially<sup>112</sup> invoked the literary and cultural underpinnings of OCS by citing to the Bible and to Shakespeare,<sup>113</sup> and then explained his use of references to and quotations from antiquity as part of his effort to convey "that there is something deep in human nature that regards face-to-face confrontation . . . as

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106. See, e.g., Fraher, *Adjudicative Facts, Non-Evidentiary Facts, and Permissible Jury Background Information*, 62 IND. L.J. 333, 342-43 (1987) ("The constant refrain in treatises, case law, and statutes alike, refers to unanimity of belief, common knowledge, knowledge shared by the community, a common fund of knowledge, data notoriously accepted by all, information generally known, facts beyond reasonable dispute, or information whose accuracy cannot reasonably be questioned"). See also Tanford & Tanford, *supra* note 28, at 777-78 (psychological research debunking OCS myths about use of jury challenges).
107. Sherwin, *supra* note 85, at 738 n.7. See generally C. LÉVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* (1965). For a historical reading suggesting that insanity defense decisionmaking flowed from "the prevailing Protestant religious morality," see Dain & Carlson, *Moral Insanity in the United States, 1835-1866*, 117 AM. J. PSYCHIATRY 785, 787 (1960). Cf. N. WALKER, *CRIME AND INSANITY IN ENGLAND* 82 (1973) (prosecutor's characterization of defense forensic expert witness as a "Jew physician" in 1801 trial).
108. *Id.* at 829. On the way different ethnic and socioeconomic groups perceive and define deviance, see Dohrenwend & Chin-Song, *supra* note 69. See also Gusfield, *On Legislating Morals: The Symbolic Process of Designating Deviance*, 56 CALIF. L. REV. 54, 55-56 (1968) ("To assume a common culture or a normative consensus in American society, as in most modern societies, is to ignore the deep and divisive role of class, ethnic, religious, status, and regional culture conflicts which often produce widely opposing definitions of goodness, truth, and moral virtue").
109. Sherwin, *supra* note 85, at 755.
110. 108 S. Ct. 2798 (1988).
111. Scalia's opinion was for an "odd bedfellows" majority of himself, Justices Brennan, White, Marshall, Stevens, and O'Connor.
112. Directly after citing to these sources and others, Scalia added: "We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Coy v. Iowa*, 108 S. Ct. 2798, 2800 (1988) (emphasis added).
113. *Id.* (citing *Acts* 25:16, and W. Shakespeare, *Richard II*, act 1, sc. 1).

essential to a fair trial.”<sup>114</sup>

To ultimately buttress his conclusion that this condition persists, Scalia quoted at length from remarks made by former President Eisenhower on the role played by face-to-face confrontation in the code of social justice in his home town of Abilene, Kansas:

[I]t was necessary to “[m]eet anyone face to face with whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry. . . . In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow.”<sup>115</sup>

As a result of “these human feelings of what is necessary for fairness,”<sup>116</sup> the right to confrontation “contributes to the establishment of a system in which the perception as well as the reality of fairness prevails.”<sup>117</sup>

In a dissenting opinion, Justice Blackmun, joined by Chief Justice Rehnquist, specifically criticized the majority’s opinion because of the reliance on “literature, anecdote, and dicta.”<sup>118</sup> Demurring to the assertion that “there is something deep in human nature” that considers confrontation critical,<sup>119</sup> Blackmun relied instead on Wigmore’s treatise that expressed a contrary view on how essential confrontation is to a fair trial. Blackmun concluded: “I find Dean Wigmore’s statement infinitely more persuasive than President Eisenhower’s recollection of Kansas justice . . . or the words Shakespeare placed in the mouth of his Richard II concerning the best means of ascertaining the truth.”<sup>120</sup>

The right to confront accusers in a juvenile sexual assault case is an issue that would be expected to raise powerful unconscious feelings in jurors and judges.<sup>121</sup> Where powerful OCS exists, it unfortunately can become a mechanism to establish constitutional policy. As in *Coy*, Jus-

114. *Coy v. Iowa*, 108 S. Ct. 2798, 2801 (1988)(quoting, in part, *Pointer v. Texas*, 380 U.S. 400, 404 (1965)).

115. *Id.* at 2801 (1988)(quoting Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381 (1959)). Scalia followed with this observation: “The phrase exists, ‘Look me in the eye and say that.’” *Id.*

116. *Id.* at 2801.

117. *Id.* at 2802 (quoting *Lee v. Illinois*, 476 U.S. 530, 540 (1986)).

118. *Id.* at 2805-06 (1988)(Blackmun, J., dissenting). The Chief Justice apparently failed to see the irony in this critique of Scalia’s opinion. Cf. *Wainwright v. Greenfield*, 474 U.S. 284, 297 (1986)(Rehnquist, J., concurring)(relying on an OCS-ical “reading” of external manifestations of mental illness in determining whether a request for counsel following administration of *Miranda* warnings was probative of sanity, and noting that the defendant was not “incoherent or obviously confused or unbalanced”).

119. *Coy v. Iowa*, 108 S. Ct. 2798, 2807 (1988).

120. *Id.* at 2807.

121. The defendant had been charged with sexually assaulting two 13 year old girls while they were camped out in the back yard of an adjoining home. See *id.* at 2799.

tice Scalia's view of human nature based on the archetypal historical stories of the Bible and Shakespeare, and on President Eisenhower's *fin de siecle* notions of justice become the foundation of future constitutional law.<sup>122</sup> Scalia neither considers the meretricious power of OCS in the formulation of this policy, nor acknowledges the "diverse situational factors" that inform our individualized concepts of OCS.<sup>123</sup>

Contemporaneous psychologists and researchers are no strangers to this issue. In a study of the beliefs of one hundred psychologists about depression and antidepressive behavior, consensus as to the truth of certain assertions ranged from total to near-complete disagreement. This prompted the study's director to conclude that far greater study was needed in exploring "the paradoxically unknown territory of 'what everybody knows' about depression."<sup>124</sup> Similarly, the terrain of what "everybody knows" about insanity is perilously uncharted.<sup>125</sup> However, courts and legislatures regularly base decisions upon perceptions about OCS and mental illness. OCS should not be applied to insanity defense law jurisprudence, where human behavior is very often *opposite* to what OCS would suggest.<sup>126</sup> The reliance on such propositions by legal decisionmakers is risky at best and probably reflects a refusal to acknowledge the bases and applicability of psychodynamic principles to the questions at hand.<sup>127</sup>

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122. This view is only tepidly replied to in Justice Blackmun's dissent. On the other hand, Blackmun noted that Wigmore had discussed the passage from Shakespeare's *Richard II* used by Scalia in his majority opinion, and that, according to Wigmore, the view of confrontation there expressed reflected an "earlier conception" that had merged with the principle of cross-examination by the time the Bill of Rights was ratified. *Coy v. Iowa*, 108 S. Ct. 2798, 2807 n.3 (1988) (Blackmun, J., dissenting).
123. Sherwin, *supra* note 85, at 755. See also *supra* text accompanying notes 107-09. The question remains open as to whether judges truly comprehend the reasons that animate their decisionmaking. See Konecni & Ebbesen, *External Validity of Research in Legal Psychology*, 3 LAW & HUM. BEHAV. 39 (1979), discussed in J. MONAHAN & L. WALKER, *supra* note 64, at 158 (great discrepancy found between reasons judges gave for sentencing decisions and factors that actually seemed to determine sentences).
124. Rippere, *Commonsense Beliefs About Depression and Antidepressive Behaviour: A Study of Social Consensus*, 15 BEHAV. RES. & THERAPY 465, 467 (1977). See also Rippere, *What's the Thing To Do When You're Feeling Depressed? — A Pilot Study*, 15 BEHAV. RES. & THERAPY 185 (1977).
125. See Rogers, Turner, Helfield & Dickens, *Forensic Psychiatrists and Psychologists' Understanding of Insanity: Misguided Expertise?* 33 CAN. J. PSYCHIATRY 671 (1988) (88 percent of experienced forensic psychiatrists had erroneous beliefs about the proper legal standard).
126. See Bromberg & Cleckley, *The Medico-Legal Dilemma: A Suggested Solution*, 42 J. CRIM. L., CRIMINOLOGY & POL. SCI. 729, 738 (1952) (to the lay person, the temporarily delirious patient "leaping over chairs and taking the broom-stick to hallucinatory monsters" still looks more genuinely psychotic than does "a deeply disturbed" but calm schizophrenic). See generally Sherwin, *supra* note 85.
127. See, e.g., GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, CRIMINAL RESPONSIBILITY AND PSYCHIATRIC TESTIMONY, REP. NO. 26 (1954) [hereinafter GAP REPORT

## 2. OCS and the Insanity Defense

I propose that this reliance on OCS is one of the keys to an understanding of why and how our insanity defense jurisprudence has developed. Not only is it "prereflexive" and "self-evident,"<sup>128</sup> it is susceptible to precisely the type of idiosyncratic, reactive decisionmaking that has traditionally typified insanity defense legislation and litigation.<sup>129</sup> It also ignores our rich, cultural, heterogenic fabric<sup>130</sup> that makes futile any attempt to establish a unitary level of OCS to govern decisionmaking in an area where we have traditionally been willing to base substantive criminal law doctrine on medieval conceptions of sin, redemption, and religiosity. Paradoxically, the insanity defense is necessary precisely because it rebuts everyday inferences about the meaning of conduct.<sup>131</sup> In the words of the Group for Advancement of Psychiatry: "The problem involves more than common sense."<sup>132</sup>

Extensive reliance on OCS infects all players in the drama. Careful research studies have thus found that judges, attorneys, legislators, and mental health professionals all inappropriately employ irrelevant, stereotypical negative information in coming to conclusions on the related question of a mentally disabled criminal defendant's dangerousness.<sup>133</sup> In short, unwitting reliance on OCS is a hidden animator of criminal justice decisionmaking, whether the decisionmaker is a judge, a juror, a legislator, or an expert witness. Because insanity defense judgments are shrouded in myth, weighed down by symbol, and arise frequently from unconscious and unarticulated motivations, it is especially important that we acknowledge OCS's power if we are to truly understand the operation of the defense.

## 3. Jurisprudential Approaches to Explaining Deviance

The process of "coming to grips with the world" known as "typifi-

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(even the M'Naghten rules accept the fact that not all individuals are accountable; the problem involves more than common sense).

128. Sherwin, *supra* note 85, at 737. Cf. Sendor, *Crime as Communication: An Interpretative Theory of the Insanity Defense and the Mental Elements of Crime*, 74 GEO. L.J. 1371, 1406 n.142 (1986) (citing sources rejecting suggestions that responsibility be assessed in light of "intrapsychic forces" and "neurochemical reactions").
129. See *Jones v. United States*, 463 U.S. 354, 365 n.14 (1983); Perlin, *supra* note 1, at 636-40.
130. See Gusfield, *supra* note 108, at 55-56.
131. Sendor, *supra* note 128, at 1372.
132. GAP REPORT, *supra* note 127, at 1. See D. BAZELON, *supra* note 47, at 6 (for every complex problem in our society, there is a solution that is simple but wrong.)
133. Jackson, *supra* note 79, at 125-26. See also Kahneman & Tversky, *supra* note 56, reprinted in JUDGMENT UNDER UNCERTAINTY, *supra* note 46, at 34-35 (sophisticated psychologists equally susceptible to representativeness heuristic); Tversky & Kahneman, *supra* note 51, at 18 (those with extensive training in statistics similarly inappropriately rely on heuristics in making probability assessments).

cation"<sup>134</sup> helps illuminate the way we think about deviance. Typification involves characterizing a current experience as one which is familiar to the individual.<sup>135</sup> For example, we learn to understand deviance by viewing and classifying the types of deviance that we see every day.<sup>136</sup> When pressed to explain the fact of deviation, the layman may redirect the question by talking about the *type of person* the deviant is thought to be: brutal, immature, irresponsible, vicious, inconsiderate, or degenerate.<sup>137</sup> To some extent, this is all a self-fulfilling prophecy; as long as we have faith in our stereotypes, we continue to treat others in ways that elicit from them behaviors that support those stereotypes.<sup>138</sup>

We also seek to vindicate our OCS ideas so that they will be accurate for all foreseeable practical purposes.<sup>139</sup> This type of thought processing leads to the "attribution" heuristic:<sup>140</sup> where new experiences do not fit neatly into our pre-existing data-base, we will engage in complex elaborations prior to relinquishing our theories. Consequently, simple rational argumentation will be unavailing to change

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134. Van Zandt, *supra* note 59, at 913 (citing Cicourel, *Interpretive Procedures and Normative Rules in the Negotiation of Status and Role*, in *COGNITIVE SOCIOLOGY* 11, 35 (1972)).

135. Van Zandt, *supra* note 59, at 914. Van Zandt's illustration exemplified typification of the mentally disabled:

[I]f I am approached on a public street by an individual who appears disheveled and who is babbling incomprehensible sentences, I am likely to categorize that experience as one involving a mentally disturbed person whose condition is explainable by the presence of mental "disease." I may not know precisely what "disease" he has or what his long-term prognosis might be. It is sufficient for my practical purposes that I am able to understand this experience in that way, predict from that understanding this person's short-term behavior, and adjust my behavior accordingly. Although this process of typification is more noticeable in unusual situations, it is essential to everyday life. Routine and habit are the stuff that makes the world turn; without them, we would be forced to start from scratch on each occasion.

*Id.* (footnotes omitted).

For works stressing the way that police authorities rely on commonsense understanding to categorize juvenile delinquency and skid row behavior and to determine the appropriate response, see *id.* at 914 n.106.

136. *Id.* at 915 n.109 (citing A. SCHULTZ, *THE PHENOMENOLOGY OF THE SOCIAL WORLD* 77, 80-82 (G. Walsh & F. Lehnert, trans. 1972)). See also *id.* at 915 n.112 (citing Cohen, *Introduction*, to *IMAGES OF DEVIANCE* at 9, 10 (S. Cohen ed. 1971)).

137. *Id.* at 915 n.112 (citing Cohen, *supra* note 136). This process of typification similarly affects juror decisionmaking: the construction of the jurors' "story" depends significantly on jurors' OCS understanding of the way people behave in a given situation. *Id.* at 916 n.115 (citing Pennington & Hastie, *Evidence Evaluation in Complex Decision Making*, 51 *J. PERSONALITY & SOC. PSYCHOLOGY* 242, 247 (1986)).

138. *Id.* at 926 n.158 (quoting Snyder, *When Belief Creates Reality*, 18 *ADVANCES EXPERIMENTAL SOC. PSYCHOLOGY* 247, 296 (1984)).

139. *Id.* at 917-18.

140. See *supra* text accompanying notes 66-67.

them.<sup>141</sup>

These OCS formulations differ radically from theories constructed by philosophers and scientists. Philosophical and scientific theories generally seek a broader perspective and search for a high degree of systematic consistency. Scientists and philosophers will generally base their views on a more complete information set than that employed by individuals facing practical problems. In contrast, the layman's orientation toward particular issues will often "trump" concerns for consistency.<sup>142</sup>

Legal rules thus operate against a background of commonsense understanding about the world that constitutes the formative context as a stock of knowledge. There are four main strands of the relationship between law and OCS: (1) legal rules may be formulations derived from the decisionmaker's common sense theories of the world; (2) a lawmaker may choose a rule based on his or her estimation of the consistency of that rule with his or her world view; (3) most legal rules remain uncontested because society either agrees with the governing principles or is indifferent to them, but where rules do deviate from OCS, they fail to be supported; and (4) in spite of the general consensus between OCS and legal rule-making, the coercive force of law is still important for two reasons: (a) to deter faulty judgments about the proper course of action, and (b) to provide resources for the negotiation of practical problems.<sup>143</sup>

#### 4. *Conventional Morality*

In considering the relationship between the standards of judicial lawmaking and "dominant, conventional morality,"<sup>144</sup> there are two distinct dimensions to OCS: 1) the OCS employed by courts in deciding the legal status of a particular practice, *e.g.*, the decriminalization of homosexuality or abortion, and 2) the OCS used in cases where there is less doubt as to legal status, but where public morality must "give moral content to the standards by which the practice is legally

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141. Van Zandt, *supra* note 59, at 918, 921-22. See generally D. HEISE, UNDERSTANDING EVENTS 8 (1979); Snyder, *supra* note 138, at 248.

142. Van Zandt, *supra* note 59, at 919-20. For a striking example of the way OCS "trumps" social science, see Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 121 (1988) (discussing *McCleskey v. Kemp*, 418 U.S. 279 (1987)).

143. Van Zandt, *supra* note 59, at 933-36. A legislator's evaluation of the potential effectiveness of a new sanction will thus be based in large part on his or her own understanding of what motivates individual behavior. *Id.* at 934.

144. Sadurski, *Conventional Morality and Judicial Standards*, 73 VA. L. REV. 339, 341 (1987). The idea of a "community tolerance threshold" in insanity defense cases is explored in Perlin, *supra* note 1, at 704-06. See also Boehnert, *Psychological and Demographic Factors Associated With Individuals Using the Insanity Defense*, 13 J. PSYCHIATRY & L. 227-28 (1985).

assessed," *i.e.*, a community must decide whether a particular publication is obscene.<sup>145</sup>

It is the first grouping — where there are “yes-or-no” divisions of public opinion and where no “general average of community thinking and feeling” can be discerned in “hotly disputed situations” — which poses the more difficult questions when examined through an OCS filter. Search for consensus is made all the more difficult where many members of the community express no view on the underlying subject matter, others hold views that are “clearly mutually inconsistent,” and yet others express one set of attitudes in considering concrete policies and another incongruent set while responding more abstractly.<sup>146</sup>

Faced with this muddy landscape, judges’ ascertainment of a conventional morality occupy a broad range of positions between two extremes: the representation of their *own* moral standards as community morality, and radical skepticism as to the possibility of stating what the conventional morality is.<sup>147</sup> Located on a continuum between these end points are the seemingly-intermediate positions articulated in *Furman v. Georgia*<sup>148</sup> by Justice Marshall who rejected results of public opinion polls based on responses of people not “fully informed” as to the death penalty’s purposes,<sup>149</sup> and by Justice Bren-

145. Sadurski, *supra* note 144, at 351-54. For a broader exposition of Sadurski’s jurisprudential views, see Sadurski, *The Right, the Good, and the Jurisprude*, 7 LAW & PHIL. 35 (1988).
146. Sadurski, *supra* note 144, at 355-58. See L. FREE & H. CANTRIL, *The Political Beliefs of Americans: A Study of Public Opinion* 36-37 (1968); B. HENNESSY, PUBLIC OPINION 345 (1965).
147. Sadurski, *supra* note 144, at 360. The paradigm expression of the first position is the famous “I-know-it-when-I-see-it” definition of obscenity in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964)(Stewart, J., concurring). The second position might be characterized as “I can’t fathom how others see it.” See *id.* at 361 (quoting and discussing *In re Lolita*, 1961 N.Z.L.R. 542, 549 (C.A.)(Gresson, P., dissenting)).
148. 408 U.S. 238 (1972). See generally M. Perlin, *supra* note 19. Sadurski, *supra* note 144, at 362-66, rejects both Marshall’s and Brennan’s positions as well.
149. *Furman v. Georgia*, 408 U.S. 238, 361 (1972)(Marshall, J., concurring). This may be characterized as the “they’d know it if they *really* saw it” argument. See Sadurski, *supra* note 144, at 363-64 (characterizing as “pretextual” Marshall’s subsequent dissent in *Gregg v. Georgia*, 428 U.S. 153, 232 (1976), that, if Americans “were better informed, they would consider [the death penalty] shocking, unjust, and unacceptable”). But see Doob & Roberts, *supra* note 42, at 277 (Because the public’s attitudes toward judicial sentencing are shaped not by reality that takes place in courts but by mass media, policy makers should not interpret the public’s apparent desire for harsher penalties at face value; rather, they should understand this “widespread perception of leniency is founded upon incomplete and frequently inaccurate news accounts.”); Vidmar & Dittenhoffer, *Informed Public Opinion and Death Penalty Attitudes*, 23 CAN. J. CRIMINOLOGY 43, 52 (1981)(“on the whole, if the public were informed, opinion polls would show more people opposed to capital punishment than favor it”). On the heuristic biases inherent in news accounts of disasters, see Slovic, Fischhoff & Lichtenstein, *supra* note 50.

nan who relied on "actual social practice and public opinion" to support his argument.<sup>150</sup>

Both the Brennan and Marshall positions reveal the basic dilemma facing a judge who wants to appeal to conventional morality to condemn the death penalty in a morally pluralistic society. Either the conventional morality must be characterized as a mere proxy for the judge's personal opinions, or it will fail to support the argument because an important segment of the public directly opposes the judge's views. To resolve this dilemma, courts have developed "laundering devices" as a means by which to "filter the actual, divergent moral opinions of the community through the sieve of rationality."<sup>151</sup> The resulting judicial decisions are, and should be seen as, part of a broader process of societal decisionmaking about morally controversial matters. In this process, judges make their own substantive choices, the responsibility for which they should not abdicate.<sup>152</sup>

##### 5. OCS and Judicial "Cognitive Dissonance"

A great amount of cognitive dissonance<sup>153</sup> exists between OCS and what we now know<sup>154</sup> about mental illness, about the interplay between mental illness and criminal behavior, and about the disposition of cases in which defendants both successfully and unsuccessfully plead the insanity defense. At virtually all intellectual costs, we will strain to fit new experiences into our preexisting theories of the world.<sup>155</sup> Thus, almost autonomically, we reject much of the rich empirical insanity defense database that has developed in the past decade,

150. *Furman v. Georgia*, 408 U.S. 238, 295-300 (Brennan, J., concurring). Sadurski, *supra* note 144, at 364, criticizes Brennan for his nonchalant use of data, characterizing it as a "half empty, but not half full" type of argument. *Id.* at 365.

151. Sadurski, *supra* note 144, at 364, 366. Sadurski examines the methodology of constitutional theorists such as Harry Wellington and Michael Perry, and finds these wanting, concluding that neither theorist can withstand confrontation of "moral diversity in a community." *Id.* at 377. See also Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689 (1976); Perry, *Substantive Due Process Revisited: Reflections On (and Beyond) Recent Cases*, 71 NW. U. L. REV. 417 (1976)[hereinafter *Due Process Revisited*]; Sadurski, *supra* note 144, at 367-73 (discussing Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486 (1982)); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973). While Wellington, like Justice Marshall, gives great deference to community standards, his selectivity in determining which standard will count "make[s] the actually shared moral views and ideals largely irrelevant." Sadurski, *supra* note 144, at 369.

152. Sadurski, *supra* note 144, at 397.

153. See Van Zandt, *supra* note 59, at 920 n.133 (discussing L. FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957)).

154. Cf. Sherwin, *supra* note 85, at 737.

155. Van Zandt, *supra* note 59, at 918. See also, M. Perlin, *supra* note 19; Vidmar, *Retributive and Utilitarian Motives and Other Correlates of Canadian Attitudes*



simply because it does not fit our picture of the world.<sup>156</sup> This is especially pernicious where so much of our OCS insanity defense "data" is anecdotal and heuristic.<sup>157</sup> Consequently, where insanity defense decisionmaking is so animated by the vividness effect, our view of reality will inevitably be distorted.<sup>158</sup>

Yet, the conflict between the insanity defense and conventional community morality leads to other jurisprudential dissonances. Because the insanity defense appears to fly in the face of society's informed OCS, it is received with the same sort of hostility that greeted civil rights laws in the South twenty-five years ago; it is seen as "the [coercive] imposition of an alien ideology by one [social] group on another."<sup>159</sup> While many of the scholars and philosophers who write about the insanity defense note this hostility, few see the hostility as the inevitable outgrowth of the tension between the seemingly coercive legal rules and the public's OCS.<sup>160</sup>

Majoritarian legal theory raises the troubling question of whose community standards are at play. For example, one commentator rejects the argument that the Supreme Court can recognize its own standards as a proxy for community standards, but seems to cautiously endorse in part the position that courts should be guided "by the attitudes of our ethical leaders."<sup>161</sup> However, he finds this latter position

*Toward the Death Penalty*, 15 CAN. PSYCHOLOGY 337 (1974); Vidmar & Dittenhofer, *supra* note 149. See generally *All Things Considered*, *supra* note 81.

Empirical research supports the thesis that attribution theory is applied to clinical judgments in attempts to perceive the dangerousness and treatability of offenders. See Jackson, *supra* note 79; Quincey & Cyr, *Perceived Dangerousness and Treatability of Offenders: The Effects of Internal Versus External Attributions of Crime Causality*, 1 J. INTERPERSONAL VIOLENCE 458 (1986).

156. Van Zandt, *supra* note 59, at 916 n.115 (citing Pennington & Hastie, *supra* note 137). See, e.g., Russell, *The Causal Dimension Scale: A Measure of How Individuals Perceive Causes*, 42 J. PERSONALITY & SOC. PSYCHOLOGY 1137 (1982).

157. See *supra* Part II C. Cf. Van Zandt, *supra* note 59, at 895 nn.7, 9 (citing R. UNGER, SOCIAL THEORY 83 (1987))("Any complete story about nature and society lacks the compelling character of the most compelling local narratives").

158. See Rosenhan, *supra* note 47. Compare, e.g., Hall, *Science, Common Sense, and Criminal Law Reform*, 49 IOWA L. REV. 1044, 1051 (1964)(insanity defense decisionmaking depends mostly on "ordinary experience").

159. Van Zandt, *supra* note 59, at 938. On the link between society's attitudes toward the mentally disabled and toward racial, religious, and sexual minorities, see Fleming, *Shrinks vs. Shysters: The Latest Battle for Control of the Mentally Ill*, 6 LAW & HUM. BEHAV. 355, 356 (1982). The link between racism and "sanism" (irrational prejudices toward the mentally disabled) is explored in *Competency*, *supra* note 55.

160. See Rodgers & Hanson, *The Rule of Law and Legal Efficacy: Private Values Versus General Standards*, 27 W. POL. Q. 387, 393 (1974)("the individual's attachment to a general standard seems to be a symbolic orientation that has little or no relation to specific legal disputes").

161. Sadurski, *supra* note 144, at 372-73 (discussing *Due Process Revisited*, *supra* note 151, at 730 n.195, and *Repouille v. United States*, 165 F.2d 152, 154 (2d Cir.

is still ultimately wanting because of the apparent indeterminacy of conventional morality, suggesting that such indeterminacy can easily be demonstrated by a comparison of the public positions of Jesse Jackson, Jerry Falwell, and John Rawls.<sup>162</sup>

Yet, assuming that the indeterminacy question can be answered, are judges and other lawmakers in a position to either calculate or reflect the attitudes of our ethical leaders?<sup>163</sup> Certainly, some of the accumulated data on insanity defense jurisprudence suggests that many judges are able to articulate such ethical leadership on this issue.<sup>164</sup> It is probably not coincidental that judicial OCS and public OCS appear to be in substantial harmony on this issue. The role of OCS in insanity defense jurisprudence can best be illustrated by the following:

A political philosopher (or, for our purposes, a judge) must do more than register actual moral opinions, but at the same time he must stop short of stipulating his own views from "outside." How deeply is he allowed to dive in order to ascertain these "deeper" understandings, in order to reconcile the competing requirements of consistency in a moral system and of respect for actual people who hold divergent views? Will they still recognize these "deeper" opinions and understandings as their own?<sup>165</sup>

We frequently refuse to "go deeper" when we unconsciously fear what we may learn at a deeper level of exploration.<sup>166</sup> A court's embrace of OCS serves as an effective brake so as to prohibit the judge from "diving" into his or her own unconscious so as to reconcile the competing requirements of consistency in a moral system. How ironic it is that the paradigmatic OCS insanity defense opinions<sup>167</sup> con-

1947)(Frank, J., dissenting)). Sadurski also appears to substantially approve of Ronald Dworkin's criteria for a moral position in which one's reactions would pass through an analytical test that would remove his or her prejudices, irrational emotions, and rationalizations. Sadurski, *supra* note 144, at 369-70 (discussing R. DWORKIN, TAKING RIGHTS SERIOUSLY 248-53 (1977)).

162. Sadurski, *supra* note 144, at 373. *See also* Rodgers and Hanson, *supra* note 160, at 393 ("[W]hat we have found is that the individual's attachment to a general standard seems to be a symbolic orientation that has little or no relation to specific legal disputes").
163. *See infra* note 248. This may be nothing more than a complicated way of asking whether judges are at a sufficiently advanced stage of moral development to be able to sort out their OCS from that of society. *See* M. Perlin, *supra* note 19 (discussing works of Lawrence Kohlberg, Jean Piaget, and Carol Gilligan).
164. Judge Bazelon of the D.C. Circuit Court of Appeals is the clearest example of a judge who has exerted such leadership. *See, e.g.*, Wald, *Disembodies Voices: An Appellate Judge's Response*, 66 TEX. L. REV. 623, 627 (1988)(characterizing Bazelon as one of our "greatest appellate judges").
165. Sadurski, *supra* note 144, at 388.
166. Repression of the unconscious is briefly explained in J. KATZ, J. GOLDSTEIN & A. DERSHOWITZ, *supra* note 93, at 85-87.
167. *See State v. Sikora*, 44 N.J. 453, 210 A.2d 193 (1965); *id.* at 473-74, 210 A.2d at 204 (Weintraub, C.J., concurring). *See also State v. Lucas*, 30 N.J. 37, 83-84, 152 A.2d 50, 74 (1959)(Weintraub, C.J., concurring); Perlin, *supra* note 1, at 729-30.

sciously articulate a position that refuses to "go deeper" and explore the psychodynamic roots of unconscious motivations. Such willful blindness,<sup>168</sup> however, which is utterly reflective of the public's uninformed and distorted OCS, has served to shape insanity defense jurisprudence.

#### 6. *A Twilight Zone: OCS and Individual Jury Verdicts*

The public is disinterested in most legal rules;<sup>169</sup> however, when a legal rule deviates from common sense understandings, it fails to gain support.<sup>170</sup> The *Hinckley* verdict is the perfect example of insanity defense decisionmaking, reflecting such deviation from OCS. Within this "twilight zone," a significant consensus breaks down, and public outrage at the apparent dissonance between the law and OCS is greatest.<sup>171</sup> When the public is confronted with the defense's use and its apparent occasional role of exculpation of some whom we feel ought to be punished, the defense's putative costs become apparent.

One commentator has suggested that insanity defense jurisprudence is subject to the law of "tensile strength" — that is, that when a legal principle "is pushed beyond its tensile strength . . . , it will simply fall apart."<sup>172</sup> Justice Holmes's "hydraulic pressure" theory — that judgment-distorting "immediate interests" can exercise a dynamic force "before which even well settled principles of law will bend"<sup>173</sup> — similarly reflects the dissonance caused by a *Hinckley*-type verdict.<sup>174</sup>

Recent empirical work by Professor Norman Finkel illuminates this point.<sup>175</sup> OCS has been demonstrated to be very powerful in insanity decisionmaking in individual cases. Since the "wild beast" test, insanity developments have reflected jurors' own intuitive, common-sense understanding of what is sane and what is insane. This common sense understanding has been consistently overlooked in the long run-

168. See Finer, *Gates, Leon, and the Compromise of Adjudicative Fairness (Part II): Of Aggressive Majoritarianism, Willful Deafness, and the New Exception to the Exclusionary Rule*, 34 CLEV. ST. L. REV. 199, 205 (1986) (criticizing the current Supreme Court for its intentional refusal to listen to party against whom it is ruling in criminal procedure cases).

169. Van Zandt, *supra* note 59, at 935. See also Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 747 (1988).

170. Van Zandt, *supra* note 59, at 936 & n.199. Obvious examples suggested by Van Zandt include the death penalty, abortion, and the prohibition on marijuana use.

171. As I discuss in other papers, it is precisely within this "twilight zone" that personality factors become so important in the establishment of an insanity defense jurisprudence. See M. Perlin, *supra* note 19.

172. Fentiman, *supra* note 28, at 611 n.63.

173. Northern Sec. Co. v. United States, 193 U.S. 197, 400-01 (1904). See also R. Christiansen, *supra* note 24, at 46.

174. See generally Rodgers & Hanson, *supra* note 160, at 393.

175. For his most recent and comprehensive work, see N. FINKEL, *supra* note 7.

ning scholarly and judicial debate that has surrounded insanity.<sup>176</sup> In empirical studies, the choice of a substantive test or the articulation of any test at all has made little difference in mock jurors' determinations. Evidence has shown that jurors interpret instructions to fit their common sense, intuitive understanding of insanity.<sup>177</sup> However, the fact that the wording of tests makes little difference does not support the inference that juror decisionmaking is random. Rather, jurors contextualize or frame specific cases differently, jurors construe cases differently, and differences in case disposition are frequently a reflection of an underlying problem of perspective, *i.e.*, a disagreement in seeing or construing. The insanity construct may result in some verdicts that raise questions about where the defendant might wind up after the verdict. Additionally, concerns for the defendant and victim come into play. As part of their OCS approach, some jurors may weigh the victim's actions and character along with the defendant's plea of insanity.<sup>178</sup> A leading behavior scholar has articulated the complexity of the determination:

"[I]nsanity," as jurors understand and construe it, is a multidimensional, complex construct, or, in the vernacular of the construct theorists, is a *superordinate* construct. The *essence* of insanity is not the same thing as any of its correlated attributes, which may or may not be manifest in a particular defendant. Thus, a person can be judged "insane" whether or not [he or she is] manifesting clear or distorted perception[s], clear or distorted thinking, or control or lack of control of [his or her] actions; the latter three — perception, thinking, and volitional control — are attributes, lower level constructs — and not the essence of insanity. Furthermore . . . a sound and coherent insanity test — one that specifies the essence of insanity, and accords with our legal, psychological, and commonsense notions of insanity — has not yet been developed, but certainly ought to be developed.<sup>179</sup>

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176. Finkel, *Malingering and Misconstruing Jurors' Insanity Verdicts: A Rebuttal*, 1 FORENSIC REP. 97, 100 (1988)(legal test that does not adequately capture the essence of insanity as understood by the ordinary juror invites disregarding or reconstruing); Finkel & Handel, *How Jurors Construe Insanity*, 13 LAW & HUM. BEHAV. 41 (1989).
177. Finkel, *supra* note 176, at 106-07. *See generally* N. FINKEL, *supra* note 7, at 157-76 (summarizing research).
178. Finkel, *supra* note 176, at 109-11. *See also* N. FINKEL, *supra* note 7, at 178 ("the law's constructs fail to match well with the relevant and determinative constructs of jurors"). On the general question of the role of the victim as a "stimulus of the action for which the defendant seeks exculpation," see Horowitz, *Justification and Excuse in the Program of the Criminal Law*, 49 LAW & CONTEMP. PROBS. 109, 125 (1986); Landy & Aronson, *supra* note 73; Wexler, *An Offense-Victim Approach to Insanity Defense Reform*, 26 ARIZ. L. REV. 17, 20-21 (1984).
179. Finkel, *supra* note 176, at 120-21 (manuscript at 29-30)(emphasis in original). The test cases used by Finkel included defendants who were (1) epileptic, (2) chronic alcoholics, (3) paranoid-schizophrenic, and (4) suffering from a traumatic stress-induced disorder (a battered spouse case). *Id.* at 109. While jurors who find a defendant NGRI may construe the case as "fitting" into an "insane person" image, those who find him guilty may construe it as "fitting" into a "normal criminal" image. *Id.* at 112.

This same commentator applauded jurors' use of OCS as a "necessary addition to the mix," and calls for a new test that "harmonizes legal, psychological, and common-sense perspectives."<sup>180</sup> Recognizing that the common-sense perspective of jurors "remains a minor chord at best" in the shaping of insanity defense law,<sup>181</sup> he points out that "commonsensical"-sounding insanity defense reformulations such as those suggested by Stephen Morse and Michael Moore<sup>182</sup> "still lack a sound *empirical* base."<sup>183</sup>

Yet, he also points out and appears somewhat disquieted by the fact that jurors tend to shift their determinative constructs from case to case. This creates another problem. Any new empirically-derived common law insanity test might meet the same fate as other legal tests. It might work well for one case but not the next; what we want is an insanity test that works *from* case to case.

On reexamination, at least two hidden variable factors appear to significantly animate juror decisionmaking: 1) the readiness of jurors to use a third alternative verdict — Guilty But Mentally Ill (GBMI) — when the verdict options are graded rather than dichotomous, and 2) the presence of a "time/action" variable, *i.e.*, some jurors assess a defendant's culpability at other times, as well as at the moment of the criminal act.<sup>184</sup> Juror use of these variables is neither inexplicable nor eccentric. Instead, it reflects an additional common sense cluster of variables that would make a test upon which it is based likely to harmonize with existing legal and psychological tenets rather than nullify them.<sup>185</sup> Such juror processes highlight the dominance of OCS in insanity defense decisionmaking and underscore its further importance to our inquiry.

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180. N. Finkel, *De Jure and De Facto Insanity Tests* 20 (paper delivered at the national conference of the American Psychological Association, August 1988).

181. N. Finkel, *supra* note 84, at 10. The relationships between jury behavior, OCS and heuristic reasoning are discussed *infra* Part III B 2.

182. See Perlin, *supra* note 1, at 666-70 (discussing impact of moral philosophy on insanity defense jurisprudence). See also M. MOORE, *LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP* (1984); Morse, *supra* note 10.

183. N. Finkel, *supra* note 84, at 13 (emphasis in original).

184. *Id.* at 20-25. In an epilepsy case, based on *People v. Grant*, 71 Ill. 2d 551, 377 N.E.2d 4 (1978), a significant number of mock jurors focused on a time prior to the criminal act, when the defendant, without consulting her doctor, chose to stop taking her medication and then chose to go to a party where she had an alcoholic drink. These decisions were evaluated by the mock jurors as having significant effects on the defendant's capacity, mental condition, and actions at the moment of the act. N. Finkel, *supra* note 84, at 24. See also Finkel & Handel, *supra* note 176, at 49-51. There is support for this position in other studies as well. See, *e.g.*, White, *supra* note 72, at 125 n.11 (key variables in attempts to establish insanity defense is whether defendant had previously sought help for his illness).

185. N. Finkel, *supra* note 84, at 25-26.

### III. OCS AND HEURISTIC REASONING IN ACTION: TWO CASE STUDIES

#### A. Introduction

There has been virtually no legal scholarship devoted to the primary focus of this article: the impact of OCS and the use of heuristic reasoning devices in the development of insanity defense jurisprudence. To illuminate these issues, it may be helpful to consider how the underlying psychodynamic themes have been explored in other collateral substantive areas.<sup>186</sup> An examination of both the fields of jury research and social science data research will reveal the applicability of these interpretative devices and will help determine the extent to which use of these devices by insanity defense decisionmakers helps explain researchers' conclusions. When reading this research, it is necessary to keep in mind the influence of the underlying empirical and social myths that have dominated these fields.

#### B. Jury Research

A significant amount of effort has already been expended on questions involving the unique role of juries in insanity defense cases in making normative interpretations of the defendant's conduct.<sup>187</sup> Do jurors understand the technical language of substantive insanity defense tests, or do they merely attempt to "do justice" by applying their own "test"? Do jurors attempt to apply the law to the facts in such cases (as they presumably do in alibi, self-defense, and identification cases), or does their decisionmaking rest on an entirely different set of variables? To what extent are jurors' "crime control" or "due process" orientations significant in their determination of insanity defense cases? If jurors do, in fact, misapply the relevant law, are we, as a society, terribly upset about this development? To what extent has the obscurity and mystification that has traditionally enveloped the jury decision process contributed to the underlying confusion?<sup>188</sup>

While the research is neither complete nor unanimous, certain conclusions may be reached. While jurors are generally hostile to the in-

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186. The meaning of "psychodynamics" in this context is explored carefully in Perlin, *supra* note 1, at 607 n.32.

187. Sendor, *supra* note 128, at 1403. Sendor states:

[T]he jury's interpretation is informed, guided, and limited by the official definition of the alleged crime established by legislation or common law, the indictment or other charging document, evidence, rules of evidence, jury instructions, and attorneys' arguments. The important point here, however, is that the criminal law regards the jury's interpretation as the authoritative interpretation of the relevant meaning of a defendant's conduct. It is for the jury to interpret the defendant's behavior to determine whether he showed disrespect.

*Id.* at 1402-03.

188. See *supra* text accompanying notes 175-85.

sanity defense,<sup>189</sup> they are receptive to it in those rare instances when they can empathize with the defendant. For instance, mothers accused of killing their small children, police officers, and individuals about whom jurors can say "there but for the grace of God go I" are disproportionately acquitted by reason of insanity.<sup>190</sup> These cases of seemingly-paradoxical sympathy may reflect the reality that some insanity defense jury verdicts should more appropriately be read as a version of jury nullification.

### 1. *Jury Nullification*

Jury nullification is a jury's unreviewable power to acquit in disregard of the applicable law.<sup>191</sup> In those jurisdictions where courts accept its legitimacy,<sup>192</sup> the nullification power leaves the jury with the responsibility of deciding whether special factors present in the particular case compel the conclusion that the defendant's conduct was not blameworthy.<sup>193</sup> Jury nullification is especially likely to occur when the substantive law fails to incorporate strong moral impulses such as those traditionally encompassed by the insanity defense.<sup>194</sup>

The very essence of the jury's function in its role as spokesman for the community conscience in determining blameworthiness is vindicated by jury nullification, and our understanding of community val-

189. See, e.g., Hans & Slater, *supra* note 102.

190. See Perlman, *supra* note 1, at 701-04.

191. See, e.g., Hornig v. District of Columbia, 254 U.S. 135, 138 (1920)(jury has "power to bring in a verdict in the teeth of both law and fact"). See also sources cited in Note, *The Insanity Defense: Effects of an Abolition Unsupported By a Moral Consensus*, 9 AM. J. L. & MED. 471, 492 n.108, 493 n.111 (1984). See generally *United States v. Moylan*, 417 F.2d 1002, 1005-06 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 910 (1970)(prosecution for interference with operation of Selective Service System). For the most recent empirical research, see Horowitz, *Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making*, 12 LAW & HUM. BEHAV. 439 (1988).

192. See Arenella, *supra* note 87, at 215 ("Indeed, juries may nullify the law because their function extends beyond simply applying legal norms to the facts. They may negate the substantive criminal law's clear application to a particular defendant in cases in which they believe applying the legal standard would be unjust"). But see Note, *Chance, Freedom, and Criminal Liability*, 87 COLUM. L. REV. 125, 132 (1987)("unprincipled deference to community sensibilities is rarely a satisfying solution to apparent conceptual incoherences"). The fear of jury nullification may have been the reason for the exception to the equal grading made for capital crimes and first degree felonies in the Model Penal Code. *Id.* at 131 n.34.

For sharply-conflicting views, see *Sparf & Hansen v. United States*, 156 U.S. 51 (1893); *State v. Ragland*, 105 N.J. 189, 213-22, 519 A.2d 1361, 1374-78 (Handler, J., concurring in part & dissenting in part).

193. *United States v. Dougherty*, 473 F.2d 1113, 1140 n.5 (D.C. Cir. 1972)(Bazelon, J., dissenting)(in a Vietnam War protest case defendants entered offices of Dow Chemical without permission and spilled containers of blood).

194. Note, *supra* note 191, at 492.

ues and standards of blameworthiness is informed.<sup>195</sup> Under this theory, the use of the nullification device mirrors all jury decision-making as a reflection of the morality of the community and the standards of behavior it espouses.<sup>196</sup>

While nullification is usually discussed in what are popularly considered "political cases,"<sup>197</sup> it has clearly been a historic element in insanity defense decisionmaking, as well.<sup>198</sup> In discussing juror responses to an infanticide case, Justice Cardozo stated, "No jury would be likely to find a defendant responsible in such a case, *whatever a*

195. *United States v. Dougherty*, 473 F.2d 1113, 1142 (D.C. Cir. 1972) (Bazelon, J., dissenting). See, e.g., W. WHITE, *INSANITY AND THE CRIMINAL LAW* 91 (1923) (Da Capo Press ed. 1981) ("the community, through the medium of its selected agent, the jury . . . projects its own feelings upon the accused, so that from this point of view responsibility stands for something which exist in the minds of the jury rather than in that of the defendant"); Eule, *The Presumption of Sanity: Bursting the Bubble*, 25 UCLA L. REV. 637, 661 (1978) ("the jury often resolves the question of sanity with reference to its own understanding of community concepts of blameworthiness"). See also *Williams v. Florida*, 399 U.S. 78, 100 (1970) ("the essential feature of a jury obviously lies in . . . community participation and shared responsibility that results from the group's determination of guilt or innocence"); *State v. Ingenito*, 87 N.J. 204, 211-12, 432 A.2d 912, 916 (1981) (The responsibility of the jury with respect to factual findings and ultimate guilt or innocence is "so pronounced and preeminent that we accept inconsistent verdicts that accrue to the benefit of a defendant." The jury may return a verdict of innocence even in the face of "overwhelming evidence of guilt." The jury "serves in criminal prosecutions as the "conscience of the community and the embodiment of the common sense and feelings reflective of society as a whole").
196. Singer, *The Resurgence of Mens Rea: I — Provocation, Emotional Disturbance, and the Model Penal Code*, 27 B.C.L. REV. 243, 322 (1986) (characterizing this as "common sensical 'rough justice,' not highly sophisticated"). See *supra* Part II D. Other values inherent in jury nullification are discussed in Gobert, *In Search of the Impartial Jury*, 79 J. CRIM. L. & CRIMINOLOGY 269, 300-02 (1988).
197. See, e.g., *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972). On the role of jury nullification in the Bernhard Goetz trial, see *supra* text accompanying notes 34-39. See also Johnson, *Jury's Power Comes Into Play In Goetz Trial*, N.Y. Times, Apr. 5, 1987, at 6, col. 4. There is some evidence that suggests that juries convict at a higher rate in draft evasion cases when a war was popular than after it lost popular support. See Horowitz, *supra* note 191, at 441 (discussing Levine, *The Legislative Role of Juries*, 1984 AM. BAR FOUND. RES. J. 605). The unique role of the insanity defense in political trials is explored in M. Perlin, *supra* note 19. See also R. MORAN, *supra* note 27, at 139 (Judge Bazelon's position provides a jurisprudential basis for the creation of a "political defense" for crime).
198. The insanity defense was comfortably accepted by juries in cases of defendants who did not exhibit florid psychiatric symptomatology where jurors were especially sympathetic to the circumstances of the underlying crime. See Comment, *Recognition of the Honor Defense Under the Insanity Plea*, 43 YALE L.J. 809, 813 (1934) (use of insanity defense where husband finds wife *en flagrante delict* generally accepted by jurors, but criticized for its potential "to confuse an already distorted legal concept"). More recent research suggests, however, that there was compelling evidence of insanity in many of the so-called honor defense cases. See Ireland, *Insanity and the Unwritten Law*, 32 AM. J. LEGAL HIST. 157, 172 (1988).



*Judge might tell them.*"<sup>199</sup> Similarly, William A. White told of insanity acquittals in cases involving the murder of the man who seduced a defendant's daughter and of a man who broke his long-term promise to marry his mistress by whom he had fathered several children; in both instances, "the written law offend[ed] the public conscience, or the public standard of justice," and the jury disregarded it "out of its collective sense of justice."<sup>200</sup>

While this has not been the subject of abundant scholarship,<sup>201</sup> several commentators have focused upon nullification as a "swing factor" in the debate on the substantive limits of the insanity defense. It has been suggested that the jury's potential use of the device in marginal cases counsels in support of the abandonment of the American Law Institute's Model Penal Code use of a volitional prong.<sup>202</sup> As there is

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199. *People v. Schmidt*, 216 N.Y. 324, 328, 110 N.E. 945, 949 (1915)(emphasis added). Professor Horowitz's research demonstrates that, when judges tell jurors that a nullification verdict is permissible, information affects criminal trial verdicts, with jurors moving "in the direction of mercy." Horowitz, *supra* note 191, at 450. On juror response to infanticide pleas in general, see Steadman & Braff, *Defendants Not Guilty By Reason of Insanity*, in *MENTALLY DISABLED OFFENDERS: PERSPECTIVES IN LAW AND PSYCHOLOGY* 109 (J. Monahan & H. Steadman eds. 1983). On the role of "judicial chivalry" in such cases, see Perlin, *supra* note 1, at 702 n.483.
200. W. WHITE, *supra* note 195, at 100-01. White had never known a criminal to escape conviction on the plea of insanity where the evidence did not warrant such a verdict except in such nullification cases. *Id.* at 3.
201. See Glantz, *Withholding and Withdrawing Treatment: The Role of the Criminal Law*, 15 *LAW, MED. & HEALTH CARE* 231, 232-34 (1987)(juries acquitted defendant on insanity grounds in six of nineteen reported "mercy killing" cases); Packer, *Homicide and the Insanity Defense: A Comparison of Sane and Insane Murderers*, 5 *BEHAV. SCI. & L.* 25, 34 (1987)(defendant killed "extremely abusive father"; judge entered NGRI verdict because defendant "did not qualify for any other exculpatory verdict"). See also Kadish & Kadish, *The Institutionalization of Conflict: Jury Acquittals*, in *LAW, JUSTICE AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES* 308, 316 (J. Tapp & F. Levine eds. 1977)(where jurors "appear to depart from the law and instructions," they may be invoking their power of "legitimated interposition"). *But see* A. GOLDSTEIN, *supra* note 2, at 62-63; Gobert, *supra* note 196, at 304 (nullification allows the jury to express its view of the moral blameworthiness of the defendant).
202. Bonnie, *Morality, Equality, and Expertise: Renegotiating the Relationship Between Psychiatry and Law*, 12 *BULL. AM. ACAD. PSYCHIATRY & L.* 5, 17 (1984). However, there is now significant empirical doubt as to the accuracy of the ABA's position that "'morally correct' results are likely to be achieved more often under a narrow test which does not include a volitional criterion." Keilitz, *supra* note 4, at 297 (quoting ABA Standing Committee on Association Standards for Criminal Justice, Proposed Criminal Justice Mental Health Standards 329 (1984), and noting that the ABA's position may have been based on nothing more than "unverified observations of psychiatrists"). See Silver & Spodak, *Dissection of the Prongs of ALI: Retrospective Assessment of Criminal Responsibility by the Psychiatric Staff of the Clifton T. Perkins Hospital Center*, 11 *BULL. AM. ACAD. PSYCHIATRY & L.* 383, 390 (1983)(contemporaneous empirical research has shown some evidence that this truncation of the insanity defense may systematically ex-

allegedly no objectifiable basis for such an inquiry, volitional insanity defense litigation degenerates into individualized moral guesses. If the factfinder is otherwise sympathetic to the defendant, the possibility arises that the claim will be accepted in morally inappropriate cases, thus raising the discernible risk of "moral mistake at the margins."<sup>203</sup>

Yet, this view further acknowledges that, in the case of legally unrecognized claims of situational excuse, *e.g.*, the interfamilial murder or the mercy killing, the insanity defense functions as a "safety valve," in other words, an instrument for nullification. Such aberrational cases may illustrate an inevitable feature of any legal system. To the extent a law "pinches too tightly," some safety valve will be found to nullify that law.<sup>204</sup>

One of the defense's most implacable opponents, Dr. Abraham Halpern, former president of the American Academy of Psychiatry and Law, has similarly drawn on the nullification doctrine to support the creation of a "justly acquitted" doctrine to "uncloset the conscience of the jury."<sup>205</sup> He posits that a defendant should not be held criminally responsible if, "in the circumstances surrounding his unlawful act, his

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clude patients with manic disorders whose illness is clearest in symptomatology, most likely biological in origin, most eminently treatable, and potentially most disruptive in penal detention).

203. Bonnie, *supra* note 202, at 17. *But see* Rogers, *Assessment of Criminal Responsibility: Empirical Advances and Unanswered Questions*, 15 J. PSYCHIATRY & L. 73, 78 (1987)(characterizing this position, on basis of available empirical evidence, as "an intellectual charade played for the benefit of an uninformed public"). Elsewhere, Dr. Rogers has concluded that, when clinical assessment tools are used appropriately, their reliability might be greater in volitional than in cognitive determinations. R. Rogers, *supra* note 3, at 7. *See also* English, *supra* note 22, at 11 (on Congress's selective reading of the available scientific evidence so as to allow it to conclude that psychiatrists were unable to understand such discriminations).

It must be emphasized that Bonnie's position is not a unanimous one on this point. *See, e.g.*, Silver & Spodak, *supra* note 202, at 390; English, *supra* note 22, at 40-41 (supporting Silver and Spodak's findings).

204. Bonnie, *supra* note 202, at 18.

205. Halpern, *Uncloseting the Conscience of the Jury — A Justly Acquitted Doctrine*, 52 PSYCHIATRY Q. 144, 154-55 (1980). Such a doctrine differs from the "justly responsible" test suggested in the *United States v. Brawner*, 471 F.2d 969, 1031, 1034 (D.C. Cir. 1972)(Bazelon, J. concurring). Under the "justly responsible" test, "a defendant is not responsible if at the time of his unlawful conduct his mental or emotional processes or behavior controls were impaired to such an extent that he cannot be held responsible for his act." *Id.* at 1032. Halpern explains that the "justly responsible" doctrine would require proof of some sort of "mental disease or defect" or "impairment of mental processes with its inescapable medical implications." Halpern, *supra*, at 152. Further, a narrow construction of "at the time of the act or conduct" would confine the analysis of the mental state of the defendant to an unrealistically brief time frame. *Id.* Finally, automatic confinement would still follow on the heels of the alternative approach. *Id.* at 153.

For earlier alternatives of the "justly responsible" test, see *id.* at 148-50 (dis-

mental or emotional processes or behavioral controls were functioning in such a manner that he should be justly acquitted."<sup>206</sup>

Such a doctrine that refers to the functioning of mental processes without a showing of "disease" eschews the notion of a mental state at the precise time of the act and allows the factfinder to take into account the entire gamut of relevant factors that influenced the defendant. This doctrine would allow the expert witness to "really talk 'unfettered by arbitrary legal formulae', and would allow the jury 'to confront the causes of criminal conduct in a way that might teach us all something about human behavior.'"<sup>207</sup>

While these analyses are provocative and illuminating,<sup>208</sup> some fairly serious underlying substantive issues remain.<sup>209</sup> Jurors' tendencies to ignore medical evidence and legal tests may equally demonstrate the sort of freakish inconsistency that led to the Supreme Court's decision in *Furman v. Georgia*.<sup>210</sup> In *Furman*, the Court decided that the administration of the death penalty constituted cruel and unusual punishment and that it might reflect nothing more than "jury vigilantism."<sup>211</sup> The suggestion that jurors must simply determine whether the discrepancy between the defendant's mental capacity and that of a "normal" individual is sufficient to negate

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cussing the Report of the Royal Commission on Capital Punishment (1953) and MODEL PENAL CODE § 4.01, alternative (a) to § 4.01(1)(Tent. Draft No. 4 1955)).

206. Halpern, *supra* note 205, at 147, 154-55.

207. *Id.* at 153-55 (quoting, in part, United States v. Brawner, 471 F.2d 969, 1034 (D.C. Cir. 1972)(Bazelon, J., concurring), and Douglas, *The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists*, 41 IOWA L. REV. 485, 489 (1956)). Halpern, *supra* note 205, at 155, qualifies this by limiting its application to "at least some cases of ordinarily law-abiding and honest persons." But see Bonnie, *supra* note 202, at 18 (expressing some concern over this formulation, cautioning that a principle of situational excuse must be structured "to frame the moral inquiry without opening the door to wholesale individualization of the standards of criminal liability"). Empirical mock jury research shows no significant differences between jurors given some legal instructions and those given no specific instructions at all. Finkel & Handel, *Jurors and Insanity: Do Test Instructions Instruct?* 1 FORENSIC REP. 65, 75 (1988).

208. As a retentionist, I find Dr. Halpern's formulation especially appealing, but only as an alternative to a "standard" insanity defense in what Professor Bonnie calls "situational excuse cases," not as a replacement.

209. See also Note, *supra* note 191, at 493 (since nullification provides no vehicle for the introduction of expert testimony, the jury may not recognize defendant's incapacity, and the jury may be unaware of its prerogative to acquit). Cf. State v. Ragland, 105 N.J. 189, 213-22, 519 A.2d 1361, 1374-78 (1986)(Handler, J., concurring in part & dissenting in part).

210. 408 U.S. 238, 306, 310 (1972)(Stewart, J., concurring)(the eighth and fourteenth amendments cannot allow the infliction of a sentence of death under legal systems that permit this unique penalty to be wantonly imposed).

211. Spring, *The Insanity Defense in a Public Needs Perspective*, 4 DET. C.L. REV. 603, 610 (1979).

responsibility<sup>212</sup> similarly ignores the dangers of arbitrary and discriminatory judgments inherent in decisional discretion.<sup>213</sup>

In addition, critics may lose sight of an important underlying psychodynamic issue that bears repeating: in its role as "conscience of the community," jurors will continue to make judgments based on their ordinary common sense vision of rough justice<sup>214</sup> as to who ought to be punished.<sup>215</sup> Insanity defense jurisprudence has developed in large part in response to outrageous verdicts that shock the community's conscience — the post-*Hinckley* shrinkage and the public's endorsement of the "wild beast" test.<sup>216</sup> Nullification becomes an issue only in that minute handful of cases where the jury's empathy lies with the defendant because of the defendant's persona,<sup>217</sup> his or her role as social "victim," or because of special circumstances surrounding the offense, *i.e.*, the defendant's concern for a dying relative in perpetrating a mercy killing. In such cases, we "trust" jurors to "do the right

212. See generally H. FINGARETTE & A. HASSE, *MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY* (1979).

213. Ingber, *Ideological Boundaries of Criminal Responsibility*, 27 UCLA L. REV. 816, 831 (1980) (reviewing H. FINGARETTE & A. HASSE, *supra* note 212). Ingber states:

All [the authors] suggest is that the jury make a common sense determination of whether the defendant, from a practical lay viewpoint, had the ability to take the law into account before acting. This standard provides no criteria for evaluation, no limits or direction to aid in avoidance of the abuses of discretion. At most it constitutes an after-the-fact rationalization for judgments already reached. The jury is allowed to focus on the lowest level of generality — that of the specific actor — and the process is consequently subject to the vicissitudes inherent in the emotionality and drama of a trial. The vagaries of common sense determinations are made apparent by the virtual impossibility of conceiving a situation in which a jury's determination of rationality would be overturned on appeal.

Jurors have thus been granted the opportunity (or burdened with the responsibility) of making an unstructured moral inquiry. Not only may such an inquiry be perceived as inadequately general and thus illegitimate, but it may also be insensitive to the subtleties of the juror's role.

*Id.* at 832.

Compare Hassett, *Absolutism in Causation*, 38 SYRACUSE L. REV. 683, 714 (1987) (expressing approval of the MODEL PENAL CODE § 2.03(2)(b)(1972) attempt to put the issue of causation "squarely to the jury's sense of justice").

214. Singer, *supra* note 196, at 322.

215. Eule, *supra* note 195, at 661.

216. See Perlin, *supra* note 1, at 640; Roberts, Golding & Fincham, *supra* note 8, at 226. See *supra* text accompanying note 9.

217. For recent important research into the personal factors that affect death penalty jurors, see Geimer & Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 40-41, 51-52 (1988) (32% of all actual death penalty jurors interviewed saw the defendant's demeanor as an operative factor in their determination as to whether to recommend life imprisonment or death; where defendants appeared unimpressive, passive, unremorseful, or emotionless, death sentences were returned).

thing."<sup>218</sup>

Ironically, if it were not for the ultra-rigid limitations on the substantive test that have grown out of fear of "wrong verdicts,"<sup>219</sup> the entire nullification debate would probably never have arisen in this context. It is only because the insanity defense has been "over-shrunk" in response to the jury's articulation of an OCS-based community conscience that nullification needs be employed as a compensatory device in those rare cases where the community's conscience rebels at a guilty verdict.<sup>220</sup> Until we understand why this is and why the community's conscience is as it is, reliance on nullification will simply be a temporal palliative.

## 2. *Jury Research and Psychodynamic Conclusions*

Lawyers have always accepted as a given the mysticism inherent in the jury system and how little we really know about what goes on in actual jury deliberations.<sup>221</sup> Discussing the impact of this mystification on the trial in insanity defense cases, several commentators concluded:

We simultaneously deify and degrade jurors. We entrust them with the awesome responsibility of deciding a defendant's guilt or innocence. We attribute to them the superhuman quality of being able to ignore their own backgrounds and biases and to approach the trial *tabula rasa*. We pretend they are able to disregard all statements made at trial that the judge tells them to dis-

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218. *Cf. Pea v. United States*, 397 F.2d 627, 640 (D.C. Cir. 1967) (Burger, J., dissenting on rehearing) ("This case is but another manifestation in this court of a tendency . . . to follow the Jerome Frank . . . school of thought which profoundly mistrusts juries, and prefers fact finding by one judge whose conclusions can more readily be upset by appellate judges.") (footnote and citation omitted).

Given the jury's role as a "buffer against government oppression," the need for accuracy in criminal verdicts must be "balanced by the jury's role as the link between contemporary community values and the penal system." Note, *In Search of Madness in the Sixth Amendment*, 15 COLUM. HUM. RTS. L. REV. 131, 140, 152 (1983). *But see* Gobert, *supra* note 196, at 305 ("Nor can the principles [animating jury nullification] simplistically be equated with community values. Community values may be the irrational product of majoritarian prejudices and bigotry"). *See generally* Perlin, *State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier?* 20 LOY. L.A.L. REV. 1249, 1253 (1987) (on ways that Supreme Court decisions involving the mentally disabled reinforce majoritarian values).

219. *See Bonnie*, *supra* note 202, at 17 (concern for "moral mistakes" inherent in potential volitional prong acquittals).

220. *Cf. A. GOLDSTEIN*, *supra* note 2, at 90 (problem with finding a substantive formula that keeps the responsibility exemption closely attuned to what the public can accept).

221. *See, e.g., Tanford & Tanford*, *supra* note 28, at 759-71 (on jury behavior). Leading scholars in the area concede that the scientific study of groups such as juries "is in its infancy." R. Hastie, *Theoretical Maps of the Road to Consensus in Small Groups 2* (unpublished manuscript). On the legal system's need for "masks," *see Perlin*, *supra* note 1, at 682-88.

regard. We assume that they are able to understand and apply the most complex legal formulae — ones that philosophers and lawyers have debated for centuries. Nevertheless, we camouflage jurors' importance to the criminal trial, telling them they are merely factfinders and that the judge will decide the defendant's disposition. . . .

Is society served by its continued tolerance of the mystique surrounding real juror deliberations. We think not. Efforts to investigate these obscure rites should be encouraged and expanded.<sup>222</sup>

This notion of "camouflage" is an important one for our purposes. So much of our insanity defense jurisprudence serves as a camouflage for hidden feelings, drives, and desires that are certainly present in juror decisionmaking. Our shrouding juror deliberations with such a mystique simply keeps us one step further away from understanding the psychodynamic processes at work in insanity defense cases.

Until very recently, there has been little serious interest in whether the choice of a substantive defense test makes an actual empirical difference.<sup>223</sup> Common wisdom had been that the test employed really does not matter in "real life."<sup>224</sup> Generally, an artful expert witness can shape his or her testimony to fit any test,<sup>225</sup> especially where the defendant is "clearly psychotic."<sup>226</sup>

Recent jury research helps illuminate some of these intuitive conclusions.<sup>227</sup> This research shows that jurors who are given no instructions decide cases similarly to jurors who are instructed on the law, and, when such mock jurors are given varied instructions, no one specific text instruction produces discriminably different verdicts than

222. Morris, Bozzetti, Rusk & Read, *Whither Thou Goest? An Inquiry Into Jurors' Perceptions of the Consequences of a Successful Insanity Defense*, 14 SAN DIEGO L. REV. 1058, 1078 (1977).

223. On what else makes a difference, see J. ROBITSCHER, PURSUIT OF AGREEMENT: PSYCHIATRY AND THE LAW 66 (1966)(economic factors, the tensions prevailing in society, and the understanding in society of psychiatric concepts, are influential in determining the particular insanity test).

224. See generally A. GOLDSTEIN, *supra* note 2; Gray, *The Insanity Defense: Historical Development and Contemporary Relevance*, 10 AM. CRIM. L. REV. 559, 572-73 (1972). But see R. SIMON, THE JURY AND THE DEFENSE OF INSANITY 72 (1967)(in incest trials, experimental jurors deliberating under *M'Naghten* were significantly less likely to enter NGRI verdicts than those instructed under the "product test" of *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), or those who received no specific test instructions).

225. As previously discussed, there is some evidence that limiting the ALI test might, paradoxically, increase psychiatric participation in criminal trials. Silver & Spodak, *supra* note 202, at 389.

226. Bromberg & Cleckley, *supra* note 126, at 731.

227. A new "generation" of empirical inquiry into jurors' perspectives on the insanity defense is now resulting in data on the jurors' "intuitive understanding of mental disease, responsibility, culpability, punishment and treatment prior to deliberating with fellow jurors." See, e.g., N. FINKEL, *supra* note 7; Finkel & Handel, *supra* note 176; Finkel & Handel, *supra* note 207. On the connection between attribution theory and jury behavior, see N. FINKEL, *supra* note 7, at 168.

any other.<sup>228</sup> These findings remain constant even where the Insanity Defense Reform Act (IDRA), a *reduced* version of *M'Naghten* is added as an alternative. Generally, test instructions have not produced significantly different verdict patterns.<sup>229</sup>

Notwithstanding this fairly clear empirical picture,<sup>230</sup> the choice of an insanity test remains important for other normative and instrumental reasons. The process by which the insanity defense has shrunk reflects widespread public and judicial dissatisfaction with the defense. Thus, it is likely that the narrower "reform" tests help create an atmosphere in which insanity defenses will be contemplated even more rarely in the future. In addition, as the substance of the new federal IDRA is even narrower than the *M'Naghten* test, it is likely that jury instructions on the IDRA will be even narrower.<sup>231</sup> This is especially important given the new interest in novel "syndrome" cases.<sup>232</sup> These syndrome cases have all the elements that are prototypic of the sort that appeared to animate the cries for reform:<sup>233</sup> non-

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228. Finkel & Handel, *supra* note 207, at 75 (The authors note: "this outcome is not what judges, jurists, psychological experts, and legislators had in mind."). Accord Pasewark, Randolph & Bieber, *Insanity Plea: Statutory Language and Trial Proceedings*, 12 J. PSYCHIATRY & L. 399 (1984)(no difference found regarding rate and success of insanity plea or disposition of insanity acquittal cases in jurisdiction which employed *M'Naghten*, the Model Penal Code rule with a bifurcated trial, and the Model Penal Code rule with a single-phase trial sequentially over six year period). See also N. FINKEL, *supra* note 7, at 160.

Finkel's findings have been consistently found regardless of whether jurors are given the "wild beast" test or *M'Naghten*; the "wild beast" test or *M'Naghten*-plus-irresistible impulse; or the "wild beast" test, *M'Naghten*, ALL, or *Durham*. N. FINKEL, *supra* note 7, at 59-60; Finkel & Handel, *supra* note 176, at 43-44. On the other hand, when jurors are offered the "diminished responsibility" alternative, that verdict choice is used selectively, discriminately, and appropriately. See N. Finkel & K. Duff, *The Insanity Defense: Giving Jurors a Third Option* (1988)(unpublished manuscript).

229. N. FINKEL, *supra* note 7, at 177; Finkel, *The Insanity Defense Reform Act of 1984: Much Ado About Nothing*, 7 BEHAV. SCI. & L. 403 (1989).

230. Professor Finkel emphatically does not draw nihilistic conclusions from this data. His interpretation that jurors' intuitive, common sense understanding of what is sane and what is insane is finally determinative. Finkel, *supra* note 176, at 100.

231. IDRA limits the insanity defense to those with "severe" mental disorders. 18 U.S.C. § 20 (1988). In Finkel's sample using the IDRA test, the phrase "severe mental disease or defect" was not further defined. Finkel, *supra* note 229, at 407. Were this phrase to be given greater content, it might be hypothesized that there would be some statistically significant variation.

232. See M. Perlin, *Hinckley's Other Victims: The Implications of a Shrunk Insanity Defense for the Trial of Novel Cases* (unpublished paper in progress). One of the rare judicial mentions of heuristics in the insanity defense literature occurs in *United States v. Torniero*, 735 F.2d 725, 733 (2d Cir. 1984)(quoting with approval, *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681 (1983)("Persons with antisocial personality disorders (such as compulsive gambling) should, at least for heuristic reasons, be held accountable for their behavior").

233. See Resnick, *Perceptions of Psychiatric Testimony: A Historical Perspective on*

"crazy" looking defendants,<sup>234</sup> the presence of "planful" behavior, the potential presence of "political" issues, and suspicious, "soft" expert testimony.<sup>235</sup>

There is also some evidence in cases involving idiosyncratic physiological expert testimony that suggests that the choice of test has traditionally made a difference.<sup>236</sup> Finally, a few available more recent "real life" empirical studies do seem to indicate that the choice of test may be more significant than has been traditionally believed.<sup>237</sup>

On the other hand, it appears fairly clear that jurors exhibit a startlingly low comprehension of the court's charge,<sup>238</sup> especially in in-

*the Hysterical Invective*, 14 BULL. AM. ACAD. PSYCHIATRY & L. 203, 208 (1986). See also Note, *The Syndrome Syndrome: Problems Concerning the Admissibility of Expert Testimony on Psychological Profiles*, 37 U. FLA. L. REV. 1035, 1045-46 (1985) (discussing impact of judges' "personal perceptions regarding the substance of syndromes" on determination of admissibility of expert testimony). Several courts that have allowed the introduction of testimony on "battered spouse syndrome" explicitly noted that such testimony was "counterintuitive" to jurors' senses of OCS. See, e.g., *State v. Hodges*, 239 Kan. 63, 716 P.2d 563 (1986); *State v. Ciskie*, 110 Wash. 2d 263, 273-74, 751 P.2d 1165, 1171 (1988). See also Perlin, *Taking Syndromes Seriously: State v. Ciskie, "Ordinary Common Sense" and the Limits of Expert Testimony*, 14 NEWSLETTER AM. ACAD. PSYCHIATRY & L. 48 (1989).

234. See Perlin, *supra* note 1, at 724-27.

235. Golding & Roesch, *The Assessment of Criminal Responsibility: A Historical Approach to a Current Controversy*, in HANDBOOK OF FORENSIC PSYCHOLOGY 395, 400 (I. Weiner & A. Hess eds. 1987). Suspicion in such cases is not new. See J. HASLAM, JURISPRUDENCE AS IT RELATES TO INSANITY ACCORDING TO THE LAWS OF ENGLAND 4 (1817) (psychiatrist should not "palm on the court the trash of medical hypothesis as the apology for crime").

236. See Note, *Epilepsy and the Alternatives for a Criminal Defense*, 27 CASE W. RES. L. REV. 771, 790 (1977). Accord Klofas & Yandrasits, "Guilty But Mentally Ill" and the Jury Trial: A Case Study, 24 CRIM. L. BULL. 424, 441 (1988) (when asked to predict what would have happened to the defendant if GBMI were not a verdict option, all of the jurors believed that he would have been found guilty). Cf. Finkel & Handel, *supra* note 176, at 49-51 (in a mock case involving epilepsy defense, jurors focused primarily on "nonculpable acts" (72.4%), "could not control impulses and actions" (48.1%), and "no evil motive" (45.5%), as factors supporting their verdict choices). N. Finkel, *supra* note 84, at 24 (in assessing culpability of insanity defendant in epilepsy case, a significant number of jurors focused upon an earlier time, when the defendant on her own, without consulting her doctor, chose to stop taking her medication and chose to go to a party where she had an alcoholic drink").

237. See Keilitz, *supra* note 4, at 298-303 (reviewing five studies on the effects of statutory changes on the success of the insanity defense). See also Steadman, *supra* note 30, at 68-69 (changes in NGRI release standards appeared to have "major ramifications" in New York).

238. Arens, Granfield & Susman, *Jurors, Jury Charges, and Insanity*, 14 CATH. U.L. REV. 1, 25 (1965). See generally Steele & Thornburg, *supra* note 99, at 83-87; Tanford & Tanford, *supra* note 28, at 749. Some of the blame for jurors' lack of comprehension can be laid at the feet of the trial judges who, in one post-Durham District of Columbia study, improperly avoided the "product" language demanded by that case, and whose charges, instead "still reflected an overwhelming



sanity defense cases.<sup>239</sup> In reporting their study of the responses of 229 college psychology and sociology students (a sample which, intuitively, is better educated than any typical jury cross-section)<sup>240</sup> to mock jury instructions, researchers found that in 75% of the deliberations, only one-third of the jurors could recall the judge's charge with "significant accuracy." In addition, comprehension was not significantly increased regardless of the quality of the jury. Most shockingly, the jurors deliberated under the operative presumption of the defendant's guilt.<sup>241</sup> Unless jurors clearly understand judicial charges, they cannot return verdicts that give effect to the legislative formulations of a substantive insanity defense test.<sup>242</sup>

Hidden beneath the surface in these studies is a crucial psychodynamic issue: the significance of those underlying psychological and personality traits of jurors that animate their decisionmaking. As jurors have significantly different ethnic, economic class, and educational backgrounds than do medical and academic experts,<sup>243</sup> they

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number of symbols suggestive of the cognitive [*M'Naghten*] formulation." Arens & Susman, *supra* note 101, at 33.

239. See Eule, *supra* note 195, at 661 n.121 (jury studies consistently reveal that the accuracy rate in recalling an insanity formulation is the lowest of any material heard during the trial).
240. See, e.g., Field & Barnett, *Simulated Jury Trials: Students vs. 'Real' People as Jurors*, 104 J. SOC. PSYCHOLOGY 287-93 (1978)(students more lenient in setting sentences for defendants in mock trials). On the problems raised by what is colloquially called "college sophomore research," see Kramer & Kerr, *Laboratory Simulation and Bias in the Study of Juror Behavior*, 13 LAW & HUM. BEHAV. 89 (1989); Tanford & Tanford, *supra* note 28, at 754. *But see* Jackson *supra* note 79, at 118 (even lawyers — who as a group are better educated than either an actual true jury or a college sophomore sample — are prone to show the same heuristic biases as lay people in making similar judgments based on the same information).
241. Arens, Granfield & Susman, *supra* note 238, at 22-26. *See also* Arens & Susman, *supra* note 101, at 17 (jury instructions are needlessly wordy and fail to communicate the notion of the acceptability of non-psychotic mental illnesses as a valid basis for insanity acquittals in "clear and compelling language").
242. Strawn & Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478, 483 (1976). *See also* Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1359 (1979)(if jurors do not properly understand the laws that they are required to use in reaching their verdicts, it is possible that many verdicts are reached either without regard to the law or by using improper law); Elwork, Sales & Alfini, *Juridic Decisions: In Ignorance of the Law or in Light of It?* 1 LAW & HUM. BEHAV. 163, 178 (1977)(unless the situation is corrected, juries will continue to reach decisions arbitrarily, and countless litigants will be denied their constitutional right to a fair trial); Steele & Thornburg, *supra* note 99, at 99 (studies show juror comprehension of pattern instructions "to be so low as to be dysfunctional"). *See generally* V. HANS & N. VIDMAR, *supra* note 31, at 193-94.
243. On the impact of presumption instructions on juror deliberation in insanity cases, see Note, *The Improper Use of Presumptions in Recent Criminal Law Adjudication*, 38 STAN. L. REV. 423, 450 (1986), which concludes that the "authority" with which the presumption instruction is communicated can sufficiently reorient the jurors' decisionmaking processes in a way that "seriously challenges the jury's

may be less tolerant of and more impassioned by deviance.<sup>244</sup> Such fear of jurors' expected "excessive responses to deviant behavior" has led scholars to fear virtually unlimited jury discretion and to caution against the "facade of jury neutrality."<sup>245</sup>

There is some case law support for this position in other criminal procedure areas. In *Jackson v. Denno*,<sup>246</sup> a voluntariness of confession case, the Supreme Court found that a jury may be "ill-suited to do justice to a defendant's full constitutional entitlement."<sup>247</sup> This conclusion reflects due process "trumping" OCS.<sup>248</sup> More recent

obligation to act as the 'conscience of the community' and to draw upon ordinary common sense in making its decisions."

Other studies have demonstrated that jurors' pre-existing beliefs regarding racial and gender characteristics affected their determinations of guilt and innocence most strongly in cases where evidence was equivocal. See Fraher, *supra* note 106, at 339 (discussing Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. EXPERIMENTAL SOC. PSYCHOLOGY 133 (1979)). On jurors' responses to novel scientific evidence, see Note, *The Frye Doctrine and Relevancy Approach Controversy: An Empirical Evaluation*, 74 GEO. L.J. 1769, 1783-85 (1986)[hereinafter Note, *Frye Doctrine*](discussing the interplay between heuristic reasoning devices and juror response to expert testimony in cases where jurors feel well informed).

244. Ingber, *supra* note 213, at 835 & n.109 (relying on T. ADORNO, E. FRENKEL-BRUNSWIK, D. LEVINSON & R. SANFORD, *THE AUTHORITARIAN PERSONALITY* (1950), the epochal study of American anti-Semitism in the 1940's). See generally M. Perlin, *supra* note 19.

245. Ingber, *supra* note 213, at 836 & n.110. For Ingber's views on the critical issue of the role of crime in animating jurors' "passionate" response to deviance, see *id.* at 842-48. On the significance of jurors' views on the attractiveness of the victim and the character of the criminal as a determinant in their decisionmaking, see Landy & Aronson, *supra* note 73.

On the impact of jurors' perceptions of expert testimony, see Tanton, *Jury Preconceptions and Their Effect on Expert Testimony*, 24 J. FORENSIC SCI. 681, 690 (1979)(most jurors "have a remarkably precise, albeit inaccurate, visual preconception of the forensic scientist in the courtroom"). See also Rosenthal, *Nature of Jury Response to the Expert Witness*, 28 J. FORENSIC SCI. 528 (1983)(jurors can be swayed by secondary information related by witnesses themselves by the peripheral aspects of the message and by the general environment of the courtroom). See generally Saks & Wissler, *Legal and Psychological Bases of Expert Testimony: Surveys of the Law of Jurors*, 2 BEHAV. SCI. & L. 435 (1984); Note, *Frye Doctrine*, *supra* note 243.

246. 378 U.S. 368 (1964).

247. Sherwin, *supra* note 85, at 763. The database that helped support this conclusion included *Blackburn v. Alabama*, 361 U.S. 199, 200-03 (1960)(mentally disabled defendant interrogated for at least eight hours of sustained questioning; jury had accepted confession as not coerced) and *Brown v. Mississippi*, 297 U.S. 278, 281-83 (1936)(detailing whipping and torture of defendant; jury had accepted confession as not coerced).

248. While Sherwin, *supra* note 85, at 764, questions the basis for assuming that a court has superior expertise to a jury in determining the voluntariness of a putatively-coerced confession, this skepticism must be evaluated on two additional levels. First, it is necessary to consider the field of moral psychology, which may yield some very specific potential answers regarding the question of whether

Supreme Court decisions show significant backsliding from this position.<sup>249</sup> However, the *Jackson* court's concern is still important. There are certain due process values that are not intuitively endorsed by lay persons on an OCS basis, a reality exacerbated by the frequent employment of heuristics in the way we weigh such cases.<sup>250</sup>

Other empirical research corroborates these concerns. Jurors more concerned with crime control values are more likely to reject insanity pleas, while those who take due process concerns more seriously are more likely to return a Not Guilty by Reason of Insanity (NGRI) verdict.<sup>251</sup> Conviction proneness may also be revealed by an individual's attitude toward the legitimacy of the insanity defense.<sup>252</sup> These findings may help explain why female jurors appear to respond more favorably to mental disability defenses, as some evidence indicates that women may be more concerned with due process and men with controlling crime.<sup>253</sup>

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judges are, or at least are expected to be, at a higher stage of "moral development". See M. Perlin, *supra* note 19. Cf. Monaghan, *supra* note 169, at 749 & n.153 (discussing the idea that certain "elite groups," including judges, are the reasoning class.). See generally J. ELY, DEMOCRACY AND DISTRUST 59 n.\*\* (1980).

Second, an objective consideration of the factual underpinnings of early confession cases reflects the accuracy of the *Jackson* Court's position. Thus, at the time of *Brown v. Mississippi*, 297 U.S. 278, 281 (1936), the fact that police officers brutalized indigent black defendants might have been (under OCS principles) perfectly appropriate to white Mississippi jurors, but not to a majority of Supreme Court justices who have a different set of intuitions, based on their different ethnic, class, and educational backgrounds. Ingber, *supra* note 213, at 835.

249. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987), discussed *infra* Part III C 3. See generally Woolhandler, *supra* note 142, at 121 (court ignores social science data that appears to "trump" OCS).

250. See, e.g., Alschuler, *supra* note 50, at 347-48.

251. Ellsworth, Bukaty, Cowan & Thompson, *The Death Qualified Jury and the Defense of the Insanity*, 8 LAW & HUM. BEHAV. 81 (1984).

252. 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). In response to the statement, "The plea of insanity is a loophole allowing too many guilty men to go free," responses broke down in the following manner as to the respondents' conviction proneness (CP) and innocent proneness (IP) on death penalty attitudes:

	CP	IP
Strongly favor	82	8
Favor	238	42
Oppose	147	45
Strongly oppose	40	26

*Id.* at 8 n.34. See also White, *supra* note 72, at 125 (death-qualified subjects more likely to see insanity defense as "a ruse and an impediment" to conviction).

253. White, *The Mental Illness Defense in the Capital Penalty Hearing*, 5 BEHAV. SCI. & L. 411, 418 (1987). But see Ford, *supra* note 48, at 17-18 (discussing studies finding women more conviction-prone than men). Compare Faulstich, *Effects Upon Social Perceptions of the Insanity Plea*, 55 PSYCHOLOGICAL REP. 183

To summarize, a wide variety of research on jury behavior reveals the pervasive use of both OCS and heuristic reasoning in all aspects of insanity defense decisionmaking in the typical cases and the rare nullification cases alike. Until we are willing to unshroud the jury's articulation of its view of the community's conscience and to carefully identify the cognitive potholes into which heuristic thinking frequently leads jurors in their decisionmaking, we will continue to fruitlessly grind our wheels over the precise terminology of substantive insanity defense tests, as we remain blind to the underlying psychological motivations that truly matter in insanity defense cases.

### C. Social Science Research

The past few years have seen an important resurgence of interest in the impact of social science research on legal decisionmaking.<sup>254</sup> Scholars have begun to reexamine the proper role of social science data in the judicial process. Judicial opinions of enormous significance have turned on the degree to which such data could appropriately be absorbed. While few of these new academic developments have focused on the issues of concern here,<sup>255</sup> other empiricists have begun to investigate aspects of insanity defense decisionmaking that may shed additional light on how resolution of the underlying psychodynamic questions are distorted by OCS and heuristic decisionmaking.

#### 1. *The Role of Social Science Data*

The Supreme Court's relationship with social science data can be traced to Justice Marshall's opinion in *Gibbons v. Ogden*. Marshall asserted that "all America understands and has traditionally under-

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(1984)(female jurors more likely to find defendant not responsible, but only where evidence of psychiatric history available). In considering the results of another simulated study, Professor Finkel and his colleagues stressed the importance of the lay perspective of "intuitive, common sense understanding of insanity, responsibility, culpability, punishment, and treatment." Finkel, Shaw, Bercaw & Koch, *supra* note 100, at 92. See also N. FINKEL, *supra* note 7, at 164-67. See generally French, *Boundary Maintenance and Capital Punishment: A Sociological Perspective*, 5 BEHAV. SCI. & L. 423 (1987); White, *supra* note 72.

254. See, e.g., Kerr, *Social Science and the U.S. Supreme Court*, in THE IMPACT OF SOCIAL PSYCHOLOGY ON PROCEDURAL JUSTICE 56 (M. Kaplan ed. 1986); Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986); Walker & Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CALIF. L. REV. 877 (1988); Tremper, *Sanguinity and Disillusionment Where Law Meets Social Science*, 11 LAW & HUM. BEHAV. 267 n.1 (1987). See generally D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977).

255. On the use of social science data to determine commonly-accepted meanings of responsibility, see Sanders & Hamilton, *Is There a 'Common Law' of Responsibility? The Effect of Demographic Variables on Judgments of Wrongdoing*, 11 LAW & HUM. BEHAV. 277 (1987).

stood the word *commerce* to comprehend navigation." However, he cited no data and demanded on faith acceptance of his expertise on the state of public opinion and his ability to measure the public's views.<sup>256</sup> While Louis Brandeis's brief in *Muller v. Oregon* is generally seen as the Court's initial confrontation with social science data,<sup>257</sup> *Gibbons* is the true forerunner. Since Marshall's time, progress in utilization of social science data by the Supreme Court has not kept pace, even remotely, with the progress in social science skills for gathering and interpreting such data.<sup>258</sup>

## 2. *Social Science and the Insanity Defense*

While scholars have recently considered critically the impact of social science data on child custody decisionmaking and its use in death penalty cases,<sup>259</sup> in general, little attention has been paid to the specific methodological problems afoot in insanity defense decisionmak-

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256. 22 U.S. (9 Wheat.) 1, 190 (1824). See Rosenblum, *Affinity and Tension in Relationships Between Social Science and Law*, 33 ST. LOUIS U.L.J. 1, 1-2 n.1 (1988)[hereinafter Rosenblum, *Affinity and Tension*]; Rosenblum, *A Place for Social Science Along the Judiciary's Constitutional Law Frontier*, 66 NW. U.L. REV. 455, 456-457 (1971)[hereinafter Rosenblum, *A Place for Social Science*].

257. 208 U.S. 412 (1908). See also Colquitt, *Judicial Use of Social Science Evidence at Trial*, 30 ARIZ. L. REV. 51, 53 (1988). See generally Collins & Friesen, *Looking Back on Muller v. Oregon*, 69 A.B.A. J. 294 (1983).

258. Rosenblum, *A Place for Social Science*, *supra* note 256, at 457, 479 (calling for the application of social science to judicial decisionmaking "when the courts themselves formulate or invoke propositions or norms conditioned upon knowledge within the competence of the social sciences"). Cf. Loewinger, *Law and Science and Rival Systems*, 8 JURIMETRICS J. 63 (1966)(conflict reflects the law's hostility toward science as a rival system which would replace the legal, dialectic method). But see Rosenblum, *Affinity and Tension*, *supra* note 256, at 3 (quoting Cottrell, *The Interrelationships of Law and Social Science*, in LAW AND THE SOCIAL ROLE OF SCIENCE 106, 109 (H. Jones ed. 1966)("By and large, the towering ignorance and indifference on the part of most lawyers concerning the social sciences and their potentialities is matched only by the abysmal illiteracy and irresponsible neglect on the part of most so-called social scientists concerning the legal system").

On the possible roots of the conflict between courts and social scientists, see Dorin, *Two Different Worlds: Criminologists, Justices and Racial Discrimination in the Imposition of Capital Punishment in Rape Cases*, 72 J. CRIM. L. & CRIMINOLOGY 1667 (1981); Note, *Social Science Statistics in the Courtroom: The Debate Resurfaces in McCleskey v. Kemp*, 62 NOTRE DAME L. REV. 688, 708 (1987). See also Bazelon, *Veils, Values and Social Responsibility*, 37 AM. PSYCHOLOGIST 115, 117 (1982). For a full exploration of all issues, see Tanford & Tanford, *supra* note 28.

259. See Appelbaum, *The Empirical Jurisprudence of the United States Supreme Court*, 13 AM. J. L. & MED. 335, 341 (1987)(critiquing *McCleskey v. Kemp*, 481 U.S. 279 (1987) and *Barefoot v. Estelle*, 463 U.S. 880 (1983), and charging that the Supreme Court acts with "blatant wrongheadedness" in dealing with empirical data in such cases). See also Davis, *"There is a Book Out . . ."* *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987). See generally M. Perlin, *supra* note 19.

ing.<sup>260</sup> The law's suspicion of the psychological sciences is well documented.<sup>261</sup> Furthermore, the issues before the courts in insanity defense cases raise such troubling psychodynamic issues for decisionmakers that the courts' inherent suspicion of the social sciences will be further heightened.<sup>262</sup> Likewise, the history of behavioral scientists' suspicion of "restrictive legalisms" is well known.<sup>263</sup>

Historically, one of the earliest criticisms of the law's willful indifference to the question of the application of psychology, was destroyed by Dean Wigmore in a responsive article that argued that psychology had nothing to offer the law.<sup>264</sup> Because decisions as to sanity clearly do contain social judgments,<sup>265</sup> legal decisionmakers have been overtly reluctant to cede decisionmaking autonomy in this area to social scientists.<sup>266</sup> Although social scientists have now begun to examine the

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260. A related exception is the literature that has developed in the wake of the Supreme Court's decision in *Barefoot v. Estelle*, 463 U.S. 880 (1983), on the ability of psychiatrists to accurately predict future dangerousness. *See, e.g.*, Appelbaum, *Death, the Expert Witness and the Dangers of Going Barefoot*, 34 HOSP. & COMMUNITY PSYCHIATRY 1003 (1983); Appelbaum, *supra* note 259; Appelbaum, *The Supreme Court Looks at Psychiatry*, 141 AM. J. PSYCHIATRY 827 (1984); Geimer, *Death At Any Cost: A Critique of the Supreme Court's Recent Retreat From Its Death Penalty Standards*, 12 FLA. ST. U.L. REV. 737 (1985); Perlin, *supra* note 6, at 64-66. On the question of the burden of proof at post-insanity acquittal commitment and review hearings, see *Jones v. United States*, 463 U.S. 354 (1983), discussed in Perlin, *supra* note 6, at 66-68 nn.657-65.

261. *See, e.g.*, Tanford & Tanford, *supra* note 28, at 742-46.

262. Sperlich has noted that opposition to the use of social science in the recent past has explicitly masked political agendas. *See, e.g.*, Sperlich, *Social Science Evidence and the Courts: Reaching Beyond the Adversary Process*, 63 JUDICATURE 280, 282 n.9 (1980) (noting that Senator Moynihan's opposition to such use was grounded on his unhappiness with restrictions on public funding of public education and that Amitai Etzioni's opposition was based on his fear that such use would increase jury acquittals).

263. *See generally* Bazelon, *supra* note 258, at 118-19.

264. *See* Wigmore, *The Psychology of Testimony*, 3 U. ILL. L. REV. 399 (1909) (responding to H. MUENSTENBERG, ON THE WITNESS STAND (1908)). *See also* H. CAIRNS, LAW AND THE SOCIAL SCIENCES 169 (1935); Tanford & Tanford, *supra* note 28, at 744 n.8.

265. Wesson, *Historical Truth, Narrative Truth, and Expert Testimony*, 60 WASH. L. REV. 331, 333 (1985). *See also* Bazelon, *supra* note 258, at 116 (legal and policy questions are "multidimensional" because they involve "scientific, moral, and social judgments").

266. Judge David Bazelon has written revealingly of his "passionate ambivalence" about the behavioral sciences, an ambivalence reflected in his desire to "open the courthouse doors" to psychologists and other mental health experts but to "never hand over the keys." Bazelon, *supra* note 258, at 115. On the question of the jurisprudential implications of what non-scientists can contribute to the scientific community, see Bazelon, *Coping With Technology Through the Legal Process*, 62 CORNELL L. REV. 817 (1977). *See also* Wales, *The Rise, the Fall, and the Resurrection of the Medical Model*, 63 GEO. L.J. 87 (1974) (Judge Bazelon "invited the

ways in which insanity judgments are reached,<sup>267</sup> there still has been little attention paid to the way courts look at social science research in insanity defense cases.<sup>268</sup>

### 3. *Toward a Jurisprudence of Social Science?*

Some scholars have looked more carefully at the underlying issues in an effort to create a jurisprudence of social science.<sup>269</sup> In the most important work to date, Professors Monahan and Walker have outlined a series of specific proposals for obtaining, evaluating, and establishing in court the findings of empirical, social science research.<sup>270</sup>

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world of mental health professionals and criminologists into his courtroom" to "extend his courtroom back into the world").

Bazelon's "passionate ambivalence" is discussed in N. FINKEL, *supra* note 7, at 38-39. In order to understand the depths of Judge Bazelon's ambivalence, it is necessary to consider the history of the tension in the relationship between social science and the law. See Rosenblum, *Affinity and Tension*, *supra* note 256 at 1. ("Nonperceptions, misperceptions, and dissonance between law and social science are anything but new in the annals of professional relationships").

267. See, e.g., Homant & Kennedy, *Definitions of Mental Illness as a Factor in Expert Witnesses: Judgments of Insanity*, 31 CORRECTIVE & SOC. PSYCHOLOGY J. BEHAV. TECH. METHODS & THERAPIES 125 (1985)(some support found for proposition that one's definition of mental illness correlates with professional background and ideology and is predictive of attitude toward insanity defense in general); Homant & Kennedy, *Determinants in Expert Witnesses' Opinions in Insanity Defense Cases*, in COURTS AND CRIMINAL JUSTICE: EMERGING ISSUES 57 (S. Talerico ed. 1985)(significantly high correlation found between experts' attitudes toward insanity defense in general and judgment of insanity in specific hypothetical case); Homant & Kennedy, *Subjective Factors in the Judgment of Insanity*, 14 CRIM. JUST. & BEHAV. 38 (1987)(favorable expert opinion of insanity defense claim correlated positively with psychiatrist's having liberal ideology). See also Homant & Kennedy, *Subjective Factors in Clinicians' Judgments of Insanity: Comparison of a Hypothetical Case and an Actual Case*, 18 PROF. PSYCHOLOGY: RES. & PRAC. 439 (1987). The universality of the conclusions that can be drawn from Homant and Kennedy's research is gently questioned in Rogers & Ewing, *supra* note 27, at 369.
268. On juror perceptions of expert testimony, see Saks & Wissler, *supra* note 245. But see Keilitz, *supra* note 4, at 291-92 (scholars and practitioners in law and mental health should look more often to social science research to determine the effect of the insanity defense).
269. For an earlier and important view, see Katz, *The Unmasking of Dishonest Pretensions: Toward an Interpretation of the Role of Social Science in Constitutional Litigation*, 6 AM. SOCIOLOGIST 54, 57-58 (1971)(Social scientists subject the arguments for proposed legislation to rigorous analyses in order to identify any logical or structural weaknesses, factual limitations, erroneous assumptions, or faulty methodologies).
270. J. MONAHAN & L. WALKER, *supra* note 64; Monahan & Walker, *supra* note 254; Walker & Monahan, *supra* note 51. See, e.g., *United States v. Hessling*, 845 F.2d 617, 620, 621 n.1 (6th Cir. 1988)(citing Monahan & Walker, *supra* note 254, for the proposition that social science research findings can provide an "invaluable frame of reference" conveyable to a jury).

Both Monahan and Walker are law professors at the University of Virginia. Walker is a lawyer, and Monahan is a psychologist.

Noting that all nine members of the Burger Court had either authored or joined in opinions using social science to establish or criticize a rule of law,<sup>271</sup> they suggest that social science be treated as a source of authority rather than as a source of facts and that social science research be treated the same way that courts would treat common law legal precedents.<sup>272</sup>

Under their recommended schemata, parties should present empirical research in briefs rather than through expert testimony, and courts should begin to locate social science studies through judges' own research. Scientific research studies should then be evaluated along dimensions analogous to those used to evaluate case precedent. Courts should "place confidence" in scientific research to the extent that the research has survived critical review by the relevant scientific community, has employed valid research methods, is generalizable to the case at issue, and is supported by a body of other research.<sup>273</sup> If these guidelines had been employed with any rigor in recent Supreme Court cases, much of the research relied upon by the Court would be easily dismissed.<sup>274</sup> The ability to comprehend properly conducted re-

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271. Monahan & Walker, *supra* note 254, at 477-78 n.2. Cf. Haney, *supra* note 93, at 150 ("Many decisions of the Warren court indicated a new openness to social science data, suggesting that social scientists would be taken seriously now in a way that previously they had not been.").

272. Monahan & Walker, *supra* note 254, at 488. Cf. Bazelon, *supra* note 266, at 821 n.19.

273. Monahan & Walker, *supra* note 254, at 495, 499-508.

274. On this point, the authors focus specifically on cases involving numerical composition of juries. See *id.* at 510 n.117 (discussing *Williams v. Florida*, 399 U.S. 78, 101 (1970), a case in which the Court said there was no discernible difference between six and twelve member juries). See also Saks, *Ignorance of Science Is No Excuse*, TRIAL, Nov.-Dec. 1974, at 18 (Court's empirical scholarship "would not win a passing grade in a high school psychology test"); Zeisel & Diamond, "Convincing Empirical Evidence" on the Six Member Jury, 41 U. CHI. L. REV. 281, 292 (1974) (studies' flaws are "not complex and surely not beyond the reach of modest expertise"). See generally Baldwin & McConville, *Criminal Juries*, in 2 CRIME AND JUSTICE: AN ANNUAL REVIEW OF THE RESEARCH 269 (N. Morris & M. Tonry eds. 1980) (all empirical research on non-unanimous and smaller-than-twelve juries is flawed by severe methodological limitations; but "faulty interpretation of research" is an even more important problem).

Criticisms of the Supreme Court's reluctance to accept certain statistical data has since resurfaced following its decision in *McCleskey v. Kemp*, 418 U.S. 279 (1987) (rejecting statistics and results of a social science survey—the "Baldus Study"—offered to show systemic racial discrimination in Georgia prosecutors' decision to seek death penalty and in state's juries' decisions to sentence defendant to death based on victim's race). See, e.g., Amsterdam, *Race and the Death Penalty*, 7 CRIM. JUST. ETHICS 2 (1988) ("the basic principles that give value to our lives [that] are in the keeping of the law . . . have been sold down the river"); Kennedy, *supra* note 98, at 1389 (majority "repressed the truth and validated racially oppressive official conduct"); *The Supreme Court, 1986 Term — Leading Cases*, 101 HARV. L. REV. 119, 158 (1987) (McCleskey is "logically unsound, morally reprehensible, and legally unsupportable"); Note, *McCleskey v. Kemp: Com-*



search studies should be well within the grasp of lawyers and judges. After all, "anyone who can comprehend the Federal Tort Claims Act can learn what standard deviation and statistical significance means."<sup>275</sup>

According to Monahan and Walker, general conclusions from social science research can be used to determine factual issues in a specific case through the device of "social frameworks." After the court evaluates the applicable research, it is to be communicated to the jury by instruction in the same manner as the court explains the pertinent case law and statutes.<sup>276</sup> The court's instructions should involve four components: (1) the factual determination that is being framed or placed in context for the jury by the research; (2) the variables in the research that bear upon the determination the jury is to make; (3) the form of the relationship that exists between the identified factors; and (4) the magnitude of the relationship that is to be addressed in the empirical framework.<sup>277</sup> Such a new methodology would be efficient and inexpensive and would be specifically helpful where the relevant empirical research provides uncommon and otherwise unavailable insights into factual issues at trial. Here, "knowledge of certain topics . . . appears not to be common among lay factfinders, and what passes for knowledge in other areas may be bogus."<sup>278</sup>

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*ing Full Circle: A Return to Arbitrary Sentencing Patterns in Capital Punishment Cases*, 56 UMKC L. REV. 387 (1988).

The Court's hostility in *McCleskey* may have been presaged by Justice Powell's concurrence in *Ballew v. Georgia*, 435 U.S. 223, 246 (1978)(anything smaller than a six person jury would be unconstitutional in state criminal trial)(wisdom and the necessity of relying on statistical studies is questionable). *But see* Kerr, *supra* note 254, at 61 (applauding Blackmun's "extensive and sophisticated use" of social science research in majority opinion). Some of the problems with the *McCleskey* position are similarly presaged in Ellsworth & Ross, *Public Opinion and Judicial Decisionmaking: An Example From Research in Capital Punishment*, in CAPITAL PUNISHMENT IN THE UNITED STATES 152, 166 (H. Bedau & C. Pierce eds. 1976)(problems of "critical evaluation"). *See also* Harris v. Pulley, 852 F.2d 1546 (9th Cir. 1988)(statistical study suggesting that application of California's death penalty statute results in discriminatory imposition of death sentences upon defendants convicted of murdering whites and among young males does not provide basis for finding statute violates equal protection clause or prohibition against cruel and unusual punishment).

275. Monahan & Walker, *supra* note 254, at 511 n.119. *See generally* Lochner, *Some Limits on the Application of Social Science Research in the Legal Process*, 5 LAW & SOC. ORD. 815 (1973). On why courts are distrustful of statistical evidence, see Note, *supra* note 258, at 705-08. For an empirical evaluation of how such evidence is interpreted, see Thompson & Schumann, *Interpretation of Statistical Evidence in Criminal Trials: The Prosecutor's Fallacy and the Defense Attorney's Fallacy*, 11 LAW & HUM. BEHAV. 167 (1987).
276. Walker & Monahan, *supra* note 51, at 570, 585, 592.
277. *Id.* at 595. *See generally* Walker & Monahan, *supra* note 254 (explaining how the authors would construe scientific methodology as legal precedent).
278. Walker & Monahan, *supra* note 51, at 579-84. The examples given by the authors

The insanity defense myths are *precisely* this type of "bogus," "common" knowledge upon which our jurisprudence is based. Based upon OCS and such heuristic reasoning devices as the vividness effect and availability, they reflect views of crime and mental illness based on fundamentalist and medieval religiosity, scholasticism, superstition, and the alleged relationships between mental illness and "sin."<sup>279</sup> They assume a fixed-world data base of human behavior, and an all-or-nothing view of mental illness and criminal responsibility. Until we seriously consider the value of a methodology of the sort outlined by Monahan and Walker, we will continue to remain imprisoned by these distorted views.

#### 4. *The Psychodynamics of Judicial Suspicion*

Courts remain profoundly suspicious of much social science evidence.<sup>280</sup> The roots of this suspicion most likely stem from multiple causes. Like the judicial process, social science is normative and value-driven.<sup>281</sup> Further, judges' pre-existing social values and views taint their perceptions of the probative value of social science data.<sup>282</sup> Judges may view social science as a competitor for the judge's historical role as society's "primary intellectual broker."<sup>283</sup> In addition, we fear that social science may introduce complexities that shake the judge's confidence in imposed solutions.<sup>284</sup>

Courts respond negatively to social science data even to the extent

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focus upon research into factors affecting the accuracy of eyewitness testimony and the battered woman's syndrome.

279. See Perlin, *supra* note 1, at 625-28; M. Perlin, *supra* note 2.

280. See generally *McCleskey v. Kemp*, 481 U.S. 279 (1987). For an earlier view in an insanity defense case, see *People v. Nash*, 52 Cal. 2d 36, 338 P.2d 416, 424 (1959) ("There is danger in judicial changes of long-established rules of law when such changes proceed from a court's assumption that it can recognize what has become a fact of social science"). Not even the most eminent of scholars are immune from statistics-bashing. See Tribe, *supra* note 53, at 1329 ("Yesterday's practice of numerology has given way to today's theory of probability, currently the *sine qua non* of rational analysis"). Tribe is responded to carefully in Saks & Kidd, *supra* note 45. See also *supra* Part II C.

281. See Woolhandler, *supra* note 142, at 119 (discussing G. MYRDAL, *AN AMERICAN DILEMMA* 92 (1944)). See also Berk, *The Role of Subjectivity in Criminal Justice Classification and Prediction Methods*, 7 CRIM. JUST. ETH. 35 (1988). Compare Bazelon, *supra* note 258, at 120-21.

282. Woolhandler, *supra* note 142, at 120. See also *id.* at 118 n.47 (statistical showing in *McCleskey* was "outweighed by majoritarian preferences for retribution and assumed deterrence, and the need for discretion in the administering of the criminal justice system").

283. Kerr, *supra* note 254, at 71 (citing P. ROSEN, *THE SUPREME COURT AND SOCIAL SCIENCE* (1972)).

284. Woolhandler, *supra* note 142, at 125 n.84 (quoting D. HOROWITZ, *supra* note 254, at 284). Social science is thus relied upon by advocates in their efforts to persuade the court only as a "last resort." Kerr, *supra* note 254, at 66 (citing Haney, *supra* note 93).

of suggesting there is something faintly supernatural or fictive at its basis<sup>285</sup> because such evidence is often dissonant with the judges' own OCS.<sup>286</sup> Just as Chief Justice Rehnquist has delineated his vision of "abnormal" mental behavior in *Wainwright v. Greenfield*<sup>287</sup> and *Ake v. Oklahoma*,<sup>288</sup> and as he has trivialized scientific discourse on jury bias cases,<sup>289</sup> other judges debase social science research and data.<sup>290</sup> When the Court in *Jones v. United States* rejected petitioner's argument that available research "fail[ed] to support the predictive value of prior dangerous acts," the Court did so by simply responding: "We do not agree with the suggestion that Congress' power to legislate in this area depends on the research conducted by the psychiatric community."<sup>291</sup> In response to the further argument that it was unreasonable for Congress to determine that an insanity acquittal "supports an inference of continuing mental illness," it merely concluded without citation or reference: "It comports with *common sense* to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need of treatment."<sup>292</sup>

Cases such as *Jones* may simply reveal that the Supreme Court's use of social science data is only teleological.<sup>293</sup> Several scholars have argued that individual justices employ an outcome-determinative approach, uncritically accepting social science data bolstering opinions when they are in the majority, but debunking it when they are in the

285. *Ballew v. Georgia*, 435 U.S. 223, 246 (1978) (Powell, J., concurring) (criticizing reliance on "numerology" of statistical studies).

286. Sherwin, *supra* note 85, at 737. *See, e.g.*, Geimer & Amsterdam, *supra* note 217, at 4 (courts demonstrate a "marked aversion to information about how due process works in practice in contrast to theory . . . because the operational evidence continues to contradict the rosy future the court predicted for capital [punishment] schemes").

287. 474 U.S. 284 (1986). *See* Perlin, *supra* note 1, at 725-26.

288. 470 U.S. 68 (1985). *See* Perlin, *supra* note 1, at 718.

289. *See, e.g.*, *Lockhart v. McCree*, 476 U.S. 160, 166-68 (1986) ("death qualification" of jury does not violate constitutional right to impartial trial). *See also* Kerr, *supra* note 254, at 63 (Rehnquist relied on social science less frequently than any other justices in study sample); Tanford & Tanford, *supra* note 28, at 774 n.224 (Rehnquist's opinion was "an excellent example of how lay persons tend to reject scientific knowledge in favor of folklore and traditional ignorance").

290. The same attitude infects the lower courts as well. *See* Kennedy, *supra* note 98, at 1400 n.45 (discussing remand trial court opinion in *McCleskey v. Kemp*, No. C87-1517A at 12 (N.D. Ga. Dec. 23, 1987), where the court stated that racial disparities found in the Baldus study were produced by arbitrarily structured "rinky-dink" regressions that accounted for only a few variables. "They prove nothing other than the truth of the adage that anything may be proved by statistics").

291. 463 U.S. 354, 364-65 n.13 (1983).

292. *Id.* at 366 (emphasis added). *Jones* had been charged with attempted petit larceny (shoplifting). *Id.* at 359.

293. *See* Appelbaum, *supra* note 259, at 341 (discussing Perlin, *supra* note 6, at 71).

minority.<sup>294</sup> To an important extent, heuristic reasoning may help explain this behavior. Attribution theory teaches when the import of a body of data is contrary to a justice's otherwise-articulated or deeply-held views the tendency to discount such data must at times be difficult to resist.<sup>295</sup> Thus, members of the court bypass substantial bodies of data and substitute bits of inconclusive data that reflect their own findings of substantiality.<sup>296</sup> Until the heuristic roots of the justices' positions are acknowledged, it is unlikely that recommendations such as those suggested by Monahan and Walker will have a significant impact on how courts evaluate social science data.

#### D. The Psychodynamics of Judicial Attitudes

Any investigation of insanity defense jurisprudence from the perspective of psychodynamic factors must include an examination of the peculiar psychodynamics involved in judicial decisionmaking. Judges are not impervious to the non-reflective, heuristic, irrational thought processes that are emblematic of the public's attitudes towards the insanity defense.<sup>297</sup> Further attention must be paid to two overlapping questions: (1) what signals are judges, in particular Supreme Court Justices, currently giving in this area; and (2) why are they responding in this manner?<sup>298</sup>

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294. Kerr, *supra* note 254, at 58 (quoting P. ROSEN, *supra* note 283, at 90) (when courts wish to uphold social welfare measures, they generally accept the validity of facts contained in "Brandeis briefs," but whenever they choose to reject such legislation, courts find extralegal data unconvincing).

295. Appelbaum, *supra* note 259, at 347.

296. Rosenblum, *Affinity and Tension*, *supra* note 256, at 15.

297. For a view of the type of unconscious factors that may animate appellate court decisionmaking, see Amsterdam, *supra* note 98, at 792. On judicial behavior in this context, see Note, *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89 (1985). *But see* Myers, *Social Background and the Sentencing Behavior of Judges*, 26 CRIMINOLOGY 649, 668 (1988) (judicial background has little direct bearing on sentencing outcomes; its effect is more "subtle and indirect, discernible only after considering social background in conjunction with the offender's attributes and behaviors").

In responding to the suggestion that psychoanalytic discourse could be profitably used "as a hermeneutic to disclose the individual offender to himself and the judge," Kaplan and Rinella stated that such a stance assumes a judge is "capable of sympathy, psychological subtlety, and self-awareness. It further assumes a policy where prejudice of race or class does not distort the administration of criminal justice." Kaplan & Rinella, *Jurisprudence and the Appropriation of the Psychoanalytic: A Study in Ideology and Form*, 11 INT'L J. L. & PSYCHIATRY 215, 227 (1988).

298. For an analysis of the importance of justices' deeply held beliefs about where constitutional decision-making power should be located, see Kahn, *The Intersection of Policy and Rights Principles on the Burger Court: Towards a Social Science of Jurisprudence*, 11 LEGAL STUD. F. 5 (1987).

### 1. Justices' Signals

Chief Justice Rehnquist's opinions in cases involving mentally disabled criminal defendants reflect a fixed, unidimensional vision of the sort of externalities which must be present if such disability is to be an exculpatory defense.<sup>299</sup> His views are similar to those expressed by Justices Black and Harlan in their *Pate v. Robinson* dissent.<sup>300</sup> They incorporate a kind of "ordinary common sense-icality" and reject the notion that a defendant who does not conform to the notion of a madman who jumps over chairs in the courtroom,<sup>301</sup> who is not a "raving maniac," or who is not a "complete imbecile,"<sup>302</sup> can avail himself of the insanity defense.<sup>303</sup>

While there is a robust literature both by and about Justice Rehnquist on the chief justice's philosophy, scant attention has been paid to the issues discussed in this article.<sup>304</sup> One irony should be fairly clear. While Rehnquist is severe in his extrajudicial writings about judges who inappropriately elevate their own personal moral judgments to the level of law,<sup>305</sup> he falls into precisely this trap in his opinions; his decisions concerning mentally disabled criminal defendants are informed by his own view of OCS.<sup>306</sup>

Much has been written about how this court is aggressively majoritarian (or at least "nonminoritarian"), seeing the Constitution "through the eyes of mainline America," via means that are "insensi-

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299. See *supra* Part III C. See also Perlin, *supra* note 1, at 718-30 (discussing Rehnquist's opinions in cases involving mentally disabled criminal defendants). Cf. Quen, *Anglo-American Criminal Insanity: A Historical Perspective*, 2 BULL. AM. ACAD. PSYCHIATRY & L. 115, 120 (1974).
300. 383 U.S. 375 (1966). In *Robinson*, the Supreme Court found that criminal incompetency-to-stand-trial proceedings were governed by the due process clause. In the dissent, Justices Harlan and Black focused on the defendant's "behavior in the courtroom as evidencing competency." *Id.* at 387, 390. See also *Lynch v. Overholser*, 369 U.S. 705, 715 (1962) (discouraging false pleas of insanity).
301. Bromberg & Cleckley, *supra* note 126.
302. *Jones v. State*, 289 So. 2d 725, 729 (Fla. 1974).
303. See Quen, *supra* note 299.
304. See, e.g., Denvir, *Justice Rehnquist and Constitutional Interpretation*, 34 HASTINGS L.J. 1011, 1032, 1040 (1987) (arguing that Rehnquist's conception of the "majoritarian system of government" can best be understood by the construct of an "individualism/paternalism model"). For a more detailed discussion of Rehnquist's opinions, see Perlin, *supra* note 6.
305. See, e.g., Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 704 (1976).
306. This contradiction has been noted in the context of other subject matter areas. See Riggs & Proffitt, *The Judicial Philosophy of Justice Rehnquist*, 16 AKRON L. REV. 555, 565 (1983); Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 332 (1976) (in *Hamling v. United States*, 418 U.S. 87 (1974), Rehnquist "sacrificed reasoned analysis to his determination that the [defendant's] conviction for mailing obscene and manifestly distasteful materials be affirmed"). However, commentators have been virtually silent as it applies to this population. See generally Sherwin, *supra* note 85.

tive, or at least unempathetic, to those most in need of its protection."<sup>307</sup> This majoritarianism<sup>308</sup> is reflected in the Court's disposition of cases arising in a variety of fact settings, including civil actions seeking to reform institutions for the mentally disabled and criminal appeals dealing with burdens of proof in commitment and release hearings following insanity defense acquittals.<sup>309</sup>

Such aggressive majoritarianism is marked by a "willful deafness," a "*willful refusal to listen* to the contentions of the party [the Court] is ruling against."<sup>310</sup> In a telling description of the Court's deafness in search and seizure litigation, Professor Finer uses a psychodynamic metaphor to make his point:

To listen is to maintain a state of relatively open-minded, alert, intellectually active receptivity toward all non-frivolous contentions. While justices cannot be expected to hear with the value neutrality once expected of psychoanalysts, they can with effort approach the "evenly suspended attention" Freud recommended to psychoanalysts "in the face of all that one hears. . . ."

On the contrary, judges can approach a hearing (and read a brief) as something more than a formality, or worse, an inconvenience on the path to *ultimate conscious or subconscious imposition of their psychological, social, economic or moral preconceptions. . . .*

It is active listening that is a prerequisite to just judging.<sup>311</sup>

To what extent, if at all, do members of the current Court engage in such "active listening," and to what extent do they merely impose their preexisting psychological preconceptions?<sup>312</sup> While a full-scale psychoanalytic interpretation of the justices is far beyond the scope of this article, those justices who sat on the Burger Court<sup>313</sup> have emitted certain signals in cases involving mentally disabled criminal defend-

307. Stone, *O.T. 1983 and the Era of Aggressive Majoritarianism: A Court in Transition*, 19 GA. L. REV. 15, 19, 22 (1984).

308. See Perlin, *supra* note 218, at 1258 (discussing the majoritarian implications of *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984), which considered the eleventh amendment jurisdictional limitation on actions brought in federal court against state officials based on state law).

309. *E.g.*, *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984). See also *Jones v. United States*, 463 U.S. 354 (1983), discussed *supra* at text accompanying notes 97 & 291. Cf. *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981)(no private cause of action under Developmentally Disabled Assistance Act, 42 U.S.C. §§ 6000-6081 (1988)).

310. Finer, *supra* note 168, at 205 (emphasis in original). See also Appelbaum, *supra* note 259, at 345 (explaining Court's decision in *McCleskey* as function of its fear that if it accepted the arguments as to racial disparities in death penalty imposition, "future studies might show other 'unexplained discrepancies' in sentencing patterns that might require restructuring the entire sentencing process").

311. Finer, *supra* note 168, at 205-06 (emphasis added). "Active listening" is discussed extensively in D. BINDER & S. PRICE, *supra* note 58, at 25-37.

312. See, e.g., Watson, *Some Psychological Aspects of the Trial Judge's Decision-Making*, 39 MERCER L. REV. 937, 945 (1988)(how the judge perceives attorneys' arguments and measures them against his values will influence how he decides and how he feels about his decision).

313. Justice Kennedy is currently completing his first full term on the court. While

ants which partially reveal their "fit" in a "willful deafness" model.<sup>314</sup>

Four justices — Brennan, Marshall and Blackmun consistently, and Stevens generally — have articulated positions that are sympathetic to the plight of the mentally disabled criminal defendant. They are suspicious of overblown claims of psychiatric expertise, especially in matters dealing with the predictability of dangerousness; they appear willing to engage in "active listening" in cases involving the mentally disabled. Exemplars of this willingness include Justice Blackmun's dissent in *Barefoot v. Estelle*,<sup>315</sup> Justice Brennan's dissent

Justice Scalia has already participated in two terms' decisions, that experience has generated an insufficient data base to include him fairly in this section.

But see *supra* text accompanying notes 110-22, discussing the OCS-implications of Justice Scalia's opinion in *Coy v. Iowa*, 108 S. Ct. 2798 (1988). However, Justice Scalia's early dissent in *Booth v. Maryland*, 482 U.S. 496 (1987), in which the Court held that the introduction of a "Victim Impact Statement" at the sentencing phase of a capital case violated the eighth amendment may have revealed his future directions in cases involving mentally disabled criminal defendants:

Many citizens have found one-sided and hence unjust the criminal trial in which a parade of witnesses comes forth to testify to the pressures of beyond normal human experience that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced — which (and *not* moral guilt alone) is one of the reasons society deems his act worthy of the prescribed penalty. Perhaps these sentiments do not sufficiently temper justice with mercy, but there is a question to be decided through the democratic processes of a free people, and not by the decree of this Court. There is nothing in the Constitution that dictates the answer, no more in the field of capital punishment than elsewhere.

*Id.* at 520 (Scalia, J., dissenting)(emphasis in original). See also *Penry v. Lynaugh*, 109 S. Ct. 2934, 2968 (1989)(Scalia, J., concurring in part & dissenting in part)(majority's view expanding admissibility of mental retardation as mitigating evidence on question of defendant's moral culpability reflects "an unguided, emotional 'moral response' . . . an unfocused sympathy"), discussed in 3 M. PERLIN, *supra* note 9, at 83-84, at 617.10 (1990 pocket part).

314. Much of the material *infra* accompanying notes 315-36 is adapted from Perlin, *supra* note 6, at 81-83. See also Rosenberg, *Activism Without Equality*, in *THE BURGER YEARS* 125, 139 (H. Schwartz ed. 1987)(discussing Burger Court's track record in cases involving mentally disabled *civil* litigants, concluding that while it is by no means clear that the Burger Court chose to overtly "target" the mentally disabled, the attitudes of a majority of the justices reveal, an "insistence on judicial passivity [which] left the legitimate and urgent claims of mentally disabled people at the mercy of those who prefer them to be out of sight and out of mind").

Justices' views are also reflected in related decisions. Compare Justice White's opinion in *Traynor v. Turnage*, 485 U.S. 535 (1988)(§ 504 of Rehabilitation Act of 1973 not violated by Veterans' Administration's characterization of alcoholism as "willful misconduct" for purposes of 38 U.S.C. § 1662(a)(1)), with Justice Blackmun's opinion in *Traynor*. *Id.* at 1382-83.

315. 463 U.S. 880 (1983)(psychiatric testimony in punishment phase of capital case as to future dangerousness permissible even where witness never personally examined defendant). See *id.* at 916 (Blackmun, J., dissenting)(such testimony is baseless).

in *Jones v. United States*,<sup>316</sup> Justice Marshall's majority opinion in *Ake v. Oklahoma*,<sup>317</sup> and Justice Stevens' dissent in *Allen v. Illinois*.<sup>318</sup>

The other five justices who have typically made up the majority in cases where the claims of a mentally disabled defendant were rejected such as in *Allen*, *Jones*, and *Barefoot*, have not approached the cases so uniformly. The faith expressed by Justice White in *Barefoot* in the jury's ability to separate the "wheat from the chaff"<sup>319</sup> enabled him to sanction the admission of expert testimony as to future dangerousness in a capital case in spite of overwhelming professional agreement that in a "best-case analysis" the types of psychiatric predictions relied upon by the state would be wrong two out of three times.<sup>320</sup>

Justice Powell showed his willingness to expand earlier opinions sanctioning fewer safeguards for certain populations<sup>321</sup> in competence-to-be-executed decisions in *Ford v. Wainwright*<sup>322</sup> and commitment and release hearings for insanity acquittees in *Jones v. United States*.<sup>323</sup> Justice O'Connor has expressed fear that the court's decision in *Ford* will inspire other defendants to feign insanity in last-ditch

316. 463 U.S. 354 (1983). See also *id.* at 371 (Brennan, J., dissenting)(fact of insanity acquittal not constitutionally valid substitute for due process protections); *Penry v. Lynaugh*, 109 S. Ct. 2934, 2961 (1989)(Brennan, J., concurring in part and dissenting in part)(impairment of mentally retarded offender's reasoning abilities and moral development limits culpability so as to preclude imposition of death penalty).
317. 470 U.S. 68 (1985)(indigent criminal defendant who makes *ex parte* threshold showing has right to expert assistance in presenting insanity defense).
318. 478 U.S. 364 (1986)(privilege against self-incrimination inapplicable in sex offenders' proceedings). See *id.* at 375 (Stevens, J., dissenting)(procedures should be deemed criminal in nature, and fifth amendment should apply).
319. *Barefoot v. Estelle*, 463 U.S. 880, 901 n.7 (1983).
320. *Id.* at 920 (Blackmun, J., dissenting). In relying on J. MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* 47-49 (1981), the state's expert witness at *Barefoot's* habeas hearing had conceded that Monahan was the "leading thinker" at work in this area today. *Barefoot v. Estelle*, 463 U.S. 880, 899-900 n.7 (1983). A recent article asserts: "[W]e have yet to find a single word of praise for, or in defense of, *Barefoot* in the literature of either science or law." Risinger, Denbeaux & Saks, *Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting Identification "Expertise"*, 137 U. PA. L. REV. 731, 780, n.215 (1989).
321. *E.g.*, *Vitek v. Jones*, 445 U.S. 480, 497 (1980)(Powell, J., concurring)(scope of prison inmates' right to assistance at transfer-to-mental-hospital hearing); *Parham v. J.R.*, 442 U.S. 584 (1979)(juveniles).
322. 477 U.S. 399 (1986)(eighth amendment prohibits execution of insane prisoner). See *id.* at 418, 426 (Powell, J., concurring)(the ordinary adversarial process that includes live testimony, cross-examination, and oral argument by counsel may not necessarily be the best means of arriving at appropriate judgments regarding a defendant's sanity).
323. See, *e.g.*, *Jones v. United States*, 463 U.S. 354, 363-64 (1983)(defendant's concession of having committed a criminal act (shoplifting) provides "concrete evidence" as to his dangerousness that is generally as persuasive as predictions about dangerousness regularly made in civil commitment proceedings).



efforts to cheat death.<sup>324</sup>

Perfectly mirroring the community's OCS,<sup>325</sup> former Chief Justice Burger remained overwhelmingly ambivalent and offered a wide range of positions. After he authored *Estelle v. Smith*,<sup>326</sup> which expanded *Miranda* and raised the issue of psychiatric expertise in dangerousness predictivity problems, he concurred in *Ake* to limit its application to capital cases and was the sole member of the court to join in Justice Rehnquist's *Ford* dissent.<sup>327</sup>

Chief Justice Rehnquist's implacability and his crystallized positions are clear. His concurring opinions urging limitations in *Estelle* and *Wainwright v. Greenfield*<sup>328</sup> reveal a vision of mental disability that virtually mirror public perceptions. In *Greenfield*, Rehnquist focused explicitly on the fact that when the defendant was given his *Miranda* warnings, he was not "incoherent or obviously confused or unbalanced."<sup>329</sup> In other words, the defendant was not "crazy" because he did not "look" crazy.<sup>330</sup> As the lone dissenter in *Ake*, Rehnquist expressed concerns of feigning<sup>331</sup> in the face of staggeringly unanimous professional diagnosis and lay observation as to the profundity of *Ake's* mental illness.<sup>332</sup> In his *Ford* dissent, in addition to rejecting the argument that the eighth amendment applied to the

324. See *Ford v. Wainwright*, 477 U.S. 399, 429 (O'Connor, J., concurring in part & dissenting in part)(potential for false claims "obviously enormous").

In her opinion in *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989), Justice O'Connor supported her position that mental retardation *per se* should not serve as a complete bar on capital punishment by noting that the insanity defense serves to protect the severely retarded from conviction and punishment. *Id.* at 2954. This assertion ignores the inadequate assistance of counsel frequently present in insanity defense cases. See, e.g., *Alvord v. Wainwright*, 469 U.S. 956, 957-63 (1984)(Marshall, J., dissenting from denial of *certiorari*), discussed in 3 M. PERLIN, *supra* note 9, at 352-53, at § 15.23.

325. See *Morse*, *supra* note 10, at 795 (discussing the "ambivalence with which society views crazy criminals"). But see Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 901 n.210 (1979)("[]law does not simply mirror societal expectations and attitudes; it prescribes the standards and obligations that individuals in society must accept").

326. 451 U.S. 454 (1981)(constitutionally impermissible for witness appointed by court to determine defendant's competency to testify on state's behalf at penalty phase as to defendant's likely future dangerousness).

327. *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985)(Burger, C.J., concurring); *Ford v. Wainwright*, 477 U.S. 399, 431 (1986)(Rehnquist, J., dissenting). See *infra* text accompanying note 335.

328. 474 U.S. 284 (1986).

329. *Id.* at 297 (Rehnquist, J., concurring).

330. See Perlin, *supra* note 1, at 724-27. Similar reasoning is reflected in the trial testimony of *State v. Clayton*, 656 S.W.2d 344, 350-51 (Tenn. 1983)(against an array of overwhelming evidence of defendant's insanity, "jurors chose to accept testimony of police officers who characterized defendant as 'look[ing] okay to me' and as 'show[ing] remorse' in that 'he got kind of teary-eyed'").

331. *Ake v. Oklahoma*, 470 U.S. 68, 90-91 (1985)(Rehnquist, J., dissenting).

332. For a full discussion of the facts of *Ake*, see Perlin, *supra* note 6, at 18-22. For the

execution of the insane, he again raised the specter of sane capitally-sentenced defendants who sought to cheat death by raising spurious, multiple claims of insanity.<sup>333</sup> In *Colorado v. Connelly*, a case ruling that absent police coercion, severe mental disability was not a relevant issue in construing the voluntariness of a *Miranda* waiver, Rehnquist criticized a lower court for "importing into this area of constitutional law notions of 'free will' that have no place there."<sup>334</sup>

## 2. Judicial Philosophies

Why do the justices respond in this manner? Are the mentally handicapped a specific judicial target?<sup>335</sup> What impels the justices' decisions? On one level, the justices' methodologies may be seen as a reflection of a philosophy that demands that all judicial decisionmaking take place on a rational, conscious level.<sup>336</sup> Such a philosophy is seen most notably in the opinions of Warren Burger (as developed during his years on the District of Columbia Court of Appeals) and of the New Jersey Supreme Court when Joseph Weintraub was its Chief Justice.

Both Burger and Weintraub expressed "ordinary commonsense"<sup>337</sup> visions of criminal defendants as "normal, rational human beings" who can and should be held accountable or responsible for their be-

most recent scholarship on malingering, see Symposium, *Malingering and Deception: An Update*, 8 BEHAV. SCI. & L. 1-102 (1990).

333. *Ford v. Wainwright*, 477 U.S. 399, 435 (1986)(Rehnquist, J., dissenting).

334. 479 U.S. 157, 169 (emphasis added). See generally Benner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U.L.Q. 59 (1989); Perlin, *Colorado v. Connelly: Farewell to Free Will?* 14 SEARCH & SEIZURE L. REP. 121 (1987); Perlin, *supra* note 1, at 729-30.

335. See Rosenberg, *supra* note 314, at 139 (although one might want to accuse the Court of being insensitive, "handicapped people are obviously not the Court's target"). Rosenberg analyzed only the court's civil docket, which included cases such as *Youngberg v. Romeo*, 457 U.S. 307 (1982)(right to treatment of institutionalized mentally handicapped); *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981); *Addington v. Texas*, 441 U.S. 418 (1979)(burden of proof at civil commitment hearing). It is unclear if Rosenberg would have exempted the court from being callous if his analysis had been expanded to cases involving mentally disabled criminal defendants.

336. See, e.g., *State v. Andrews*, 187 Kan. 458, 469, 357 P.2d 739, 747 (1960):

It may be noted, that Freudian psychiatrists tend to discount the existence of the capacity in the individual to exercise his free will. Perhaps, it should be noted also that there are other schools of psychiatry besides the Freudian. It is not for the lawyer to decide between these schools. We can only wish all of these learned men success in their quest for knowledge in a new field. But, the law has always insisted upon an exercise of the will.

337. See Sherwin, *supra* note 85, at 749-56. But see Grano, *supra* note 325, at 890 ("a relativistic approach, based on introspective moral judgments, is not what we should expect in constitutional analysis by the Supreme Court").

havior.<sup>338</sup> This premise<sup>339</sup> is one rooted in centuries of experience and which has not been undermined by contemporary medical knowledge.<sup>340</sup> To discard it would require adoption of a psychiatric model whose inevitable thrust would be to "discard all concepts of insanity as a *defense* . . . and to deal with all transgressors as unfortunate mortals."<sup>341</sup> According to Justice Francis's famous dictum in *State v. Sikora*, criminal responsibility "must be judged at the level of the conscious."<sup>342</sup> This rejection of psychodynamics and a psychodynamic means of decisionmaking<sup>343</sup> permeates recent Supreme Court decisionmaking and reflects what the Rehnquist years will most likely bring.<sup>344</sup>

As discussed earlier, there is a profound judicial tradition endorsing a draconian, Old Testament rule of punishment in criminal cases. While we no longer adhere to the words of a turn-of-the-century decision of a West Virginia appellate judge that the "morality of our laws is the morality of the Mosaic interpretation of the Ten Commandments, modified only as to the degree and kind of punishment inflicted,"<sup>345</sup> the animating principles behind a "just deserts" theory of punishment are fairly similar.

Justice Rehnquist may be expressing no more than a view com-

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338. See, e.g., *Keys v. United States*, 346 F.2d 824, 826 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 869 (1965).

339. See Haney, *supra* note 93, at 172 (characterizing such beliefs as a "legal fiction").

340. Eule, *supra* note 195, at 695-96.

341. *State v. Lucas*, 30 N.J. 37, 84, 152 A.2d 50, 75 (1959)(Weintraub, C.J., concurring)(emphasis in original). See also *Blocker v. United States*, 288 F.2d 853, 865 (D.C. Cir. 1961)(Burger, J., concurring)("While philosophers, theologians, scientists and lawyers have debated for centuries whether such a thing as 'free will' really exists," we really have no choice in the matter. We must proceed, until a firm alternative is available, on "the scientifically unprovable assumption that human beings make choices in the regulation of their conduct").

The "vividness" heuristic, discussed *supra* text accompanying notes 47-50, also informs Burger's jurisprudence. In *In re Rosenfield*, 157 F. Supp. 18 (D.D.C. 1957), over the course of a weekend, forensic hospital officials indicated that, contrary to prior practice, "psychopathic personality" would be classified as a "mental disease." *Rosenfield's* impact on subsequent insanity developments is highlighted in *United States v. Brawner*, 471 F.2d 969, 977-78 (D.C. Cir. 1972)(adopting ALI test), *overruling* *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954)("product" test).

342. 44 N.J. 453, 470, 210 A.2d 193, 202 (1965).

343. See *supra* note 218 (discussing Justice (then-Judge) Burger's opinion dissenting on rehearing in *Pea v. United States*, 397 F.2d 627, 638, 640 (D.C. Cir. 1967)).

344. Cf. Haney, *supra* note 93, at 193 ("Like the rest of us, judges, legislators and lawyers are 'naive psychologists' who often use imperfect and inadequate information to make attributions about people and behavior"). *Id.* at 193 n.95 (criticizing the Supreme Court's "disturbing endorsement of naive psychologizing by trial judges" in sentencing decisions such as *United States v. Grayson*, 438 U.S. 41 (1978)).

345. *Moore v. Strickling*, 33 S.E. 274, 278 (W. Va. 1899).

porting with "conventional morality"<sup>346</sup> — the public perceives notorious insanity defense defendants to be engaged in "morally distasteful" behavior.<sup>347</sup> In such cases, judges appear to endorse the implicit existence of a "community tolerance threshold"<sup>348</sup> where the community, through the jury, "projects its own feelings upon the accused," and where the jury "fairly well reflects the state of the public mind."<sup>349</sup>

#### IV. CONCLUSION

The results of the relevant jury research data and the status of social science evidence in the courts can be explained when they are viewed through the filters of ordinary common sense and heuristic reasoning. Social science data is trivialized where it does not "fit" into prereflective OCS thought, and its importance is minimized through reliance on heuristics. Just as acceptance of the Baldus study in *McCleskey v. Kemp* might have required "restructuring the entire sentencing process,"<sup>350</sup> so might acceptance of rational and coherent social science frameworks<sup>351</sup> require courts to abandon their adherence to both the empirical myths and social meta-myths that continue to inform our insanity defense jurisprudence. Cases such as *Jones v. United States* reflect the way that OCS will continue to "trump" social science. Pertinent jury research demonstrates the power of heuristic fallacies to insanity decisionmakers. The opinions of Supreme Court justices reflect the same reasoning errors and the same unconscious reification of OCS principles.

These influences were exaggerated even more in the wake of the *Hinckley* acquittal. In such a case, it is more likely that the public will refuse to believe that the assassination attempt could truly have been

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346. See Sadurski, *supra* note 144, at 351-56.

347. Note, *Still Newer Equal Protection: Impermissible Purpose Review in the 1984 Term*, 53 U. CHI. L. REV. 1454, 1477 (1986). See, e.g., Steadman & Coccozza, *Selective Reporting and the Public's Misconceptions of the Criminally Insane*, 41 PUB. OPIN. Q. 523 (1977-78)(public inaccurately assumed that defendants such as Charles Manson and David Berkowitz ("Son of Sam") had pled the insanity defense).

348. Boehnert, *supra* note 144, at 228. Professor Boehnert uses this phrase to describe jurors' implicit decisionmaking processes in insanity defense cases. For a debate over the significance of such a level of community tolerance, see Hall, *The Insanity Defense: Thumbs Down to Wexler's "Offense-Victim" Limitation*, 27 ARIZ. L. REV. 329 (1985); Wexler, *supra* note 178; Wexler, *The "Offense-Victim" Insanity Limitation: A Rejoinder*, 27 ARIZ. L. REV. 335 (1985). See also Perlin, *supra* note 1, at 704-06.

349. W. WHITE, *supra* note 194, at 91, 188.

350. Appelbaum, *supra* note 259, at 345.

351. See Walker & Monahan, *supra* note 51, at 578-98; Walker & Monahan, *supra* note 254.

the result of mental illness.<sup>352</sup> The intense amount of publicity such cases receive in the news media brings with it an inevitably distorting and heuristic effect,<sup>353</sup> creating a distinctive kind of hydraulic pressure based on outraged public opinion.<sup>354</sup>

The sentiments of fear, revulsion, skepticism, and anger that regularly follow insanity acquittals will be heightened where the putative victim is a public figure. Society's deep-seeded and rarely-articulated ambivalence about punishment, its projection of unacceptable hostile impulses onto an insanity-pleading defendant and its unconscious fears of its own impulses<sup>355</sup> exaggerates its response to a "political" case in which OCS and heuristic devices dominate and the likelihood of reasoned discourse is lessened. Because trials involving public figures are inherently "hard cases,"<sup>356</sup> there may be an extra level of distortion. Juries may be too frightened of the hard case, and the judge may be too frightened of the bad law that is bound to result. These fears reflect eternal conflict between law in the abstract and the justice of the case.<sup>357</sup>

When the power of OCS and the pervasiveness of heuristic reasoning devices are considered and understood, the reasons for the post-*Hinckley* insanity defense shrinkage become clear.<sup>358</sup> In the context of a case involving a defendant about whom "everybody [was] morally convinced [that he was] conscious and aware of what he did,"<sup>359</sup> we erroneously attribute representativeness to the most vivid case that provides us with the most available anecdotes upon which we superimpose an illusion of validity. It is no wonder that, in the light of our employment of these powerful simplifying devices, our insanity defense remains in gridlock. Until we come to terms with the power and dominance of OCS and heuristics and acknowledge their existence and their omnipresence, our efforts to formulate a reflective, integrated, and rational jurisprudence of the insanity defense will remain doomed.

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352. Diamond, *Isaac Ray and the Trial of Daniel M'Naghten*, 112 AM. J. PSYCHIATRY 651, 655 (1956).

353. See Slovic, Fischhoff & Lichtenstein, *supra* note 50.

354. R. Christiansen, *supra* note 24, at 46.

355. See, e.g., Schoenfeld, *Law and Unconscious Motivation*, 8 HOW. L.J. 15, 17 (1962) (it is not surprising that apprehension and punishment of criminals helps direct the "unconscious aggressive tendencies" of policemen and prison officials into "socially useful channels").

356. Cf. Sunstein, *supra* note 20 (constitutional law defines itself through reaction to "great cases").

357. P. DEVLIN, *supra* note 20, at 124.

358. See Perlin, *supra* note 1, at 636-40.

359. See R. MORAN, *supra* note 27, at 21.