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Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence

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ARTICLE

UNPACKING THE MYTHS: THE SYMBOLISM MYTHOLOGY OF INSANITY DEFENSE JURISPRUDENCE*

*Michael L. Perlin***

The insanity defense has been the subject of great controversy. A review of the jurisprudential debate, infamous cases, judicial and legislative decision-making, media coverage, as well as public attitudes, when read in light of scientific and empirical research, reveals a gaping disparity between what we know and how we think about the mentally ill and the insanity defense. The Author argues that this disparity is the result of several operational myths about the mentally ill and the insanity defense. In this Article, the Author focuses on the role of psychia-

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* This is one in a series of five papers that I am preparing, dealing with the overall question of the psychodynamics of insanity defense jurisprudence. In the context of this Article, I refer to *Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning*, to be published in 67 NEB. L. REV. ___ (1990) [hereinafter Perlin, *Psychodynamics*]. In the near future, I anticipate writing four other works in this area: one, exploring the relationship between moral development psychology, philosophy and the insanity defense; the second exploring the relationship between mental illness, crime and our "culture of punishment"; the third exploring the relationship between authoritarian personality theory and the insanity defense; and the other exploring the impact of the post-Hinckley shrinkage of the insanity defense on the trial of novel cases.

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try, psychology, and mental illness in the law, specifically addressing how they are perceived and how they operate in the context of the insanity defense. He explores the nature of the myths, and exposes how they have been perpetuated. The Author attributes the longevity of the myths to the law's rejection of psychodynamic psychiatry and its principles. Instead of reflecting our current knowledge, jurisprudential literature and case law are guided by eighteenth century "wild beast" conceptions of the "insane." By exposing and dispelling the myths, the Author demonstrates the irrational development of insanity defense jurisprudence, and the need for a contemporary myth-free, reconsideration of the insanity defense.

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NOTWITHSTANDING CENTURIES OF jurisprudential evolution, the insanity defense doctrine remains incoherent. Most judges, legislators, scholars, mental health professionals, social policy makers, jurors, journalists, and the public at large would agree with this proposition. This consensus is consistent whether the observer is a retentionist, a modified retentionist, an expansionist, or an abolitionist.[1]

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1. *Compare* Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 806 (1985) [hereinafter Morse, *Excusing*] (retentionist) *and infra* text accompanying notes 298-315 *with* Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 195 (1983) [hereinafter Bonnie, *Moral Basis*] (modified retentionist who would retain the defense but limit its substantive reach) *and* Wexler, *An Offense-Victim Approach to Insanity Defense Reform*, 26 ARIZ. L. REV. 17 (1984) [hereinafter Wexler, *Offense-Victim*] (modified retentionist who would retain the defense but limit its application to cases involving certain victims) *with* United States v. Brawner, 471 F.2d 969, 1032 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part and dissenting in part) (expansionist)

Moreover, fixation on questions fundamentally irrelevant to the core jurisprudential inquiry of whom we shall exculpate, has resulted in doctrinal stagnation. Immobilized by this irresoluble debate, we continue to ignore even more fundamental questions, such as why we feel the way we do about the insane and why, in further structuring the insanity defense, we remain wilfully blind to new scientific and empirical realities.

Most of the plentiful literature in this area has attempted to synthesize the inconsistencies in insanity defense jurisprudence by viewing only one isolated aspect of the doctrine and then extrapolating a systemic theory based upon that partial observation.[2] Virtually none of this literature attempts to offer a coherent, integrated perspective on the multiple factors that form our insanity defense jurisprudence. This Article is one in a series of papers[3] in which I am attempting to do just that. Rather than proceed from an isolated segment of the insanity doctrine to generalizable theory, I will begin by viewing the whole of insanity defense jurisprudence and, in light of legal doctrine, empirical research, scientific discovery, moral philosophy, cognitive and moral psychology, sociology, communications theory and political science, explain why the doctrine has evolved as it has, and why we continue to respond to it as we do.

I begin with the proposition that we must view insanity defense jurisprudence in the context of the parallel development and growth of dynamic psychiatry and substantive legal doctrines.[4] Tensions between these fields emerged as a function of the legal system's persistent ambivalence about various models of mental health, mental health delivery systems and mental health practitioners.[5] Those tensions have historically been exacerbated in famous cases, such as the *Hinckley* insanity acquittal,[6] and by the development of a "culture of punishment," flowing from the medievalist conceptions of sin and evil that have traditionally animated

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and D. BAZELON, QUESTIONING AUTHORITY: JUSTICE AND CRIMINAL LAW 1-85 (1988) (expansionist) *with* Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514, 544 (1968) (appendix highlighting key arguments of several abolitionists).

2. *See generally infra* notes 180-330 and accompanying text (literature dealing with either empirical evidence, scientific evidence or moral philosophy but never combining these areas).

3. *See supra* note *.

4. *See infra* text accompanying notes 115-79.

5. *See infra* text accompanying notes 334-450.

6. United States v. Hinckley, 525 F. Supp. 1342 (D.D.C. 1981), *clarified* 529 F. Supp. 520 (D.D.C.), *aff'd* 617 F.2d 115 (D.D.C. 1982).

our beliefs in this area.[7] Thus, the post-*Hinckley* substantive and procedural shrinkage of the insanity defense may be viewed as an inevitable consequence of societal fear of and ambivalence toward dynamic psychiatry.

In this Article, I argue that our insanity defense jurisprudence has developed irrationally. At the surface, this incoherence manifests itself as a series of social myths about who pleads the defense, how often it is pled, its success rate, the type of cases in which it is invoked, and the ultimate disposition of those cases in which the plea is successful.[8] I then show how, in recent years, empirical and behavioral researchers have disproved each of these myths and that, nonetheless, these new discoveries have had absolutely no impact on the defense's development.[9] I also show that, while researchers have responded to suggestions that clinicians were biased and not knowledgeable about the evaluations they performed by developing sophisticated assessment tools that translate insanity concepts into quantifiable variables that appear to meet the traditional legal standard of "reasonable scientific certainty," these tools have had minimal impact on the law.[10] Similarly, while the development of "hard science" diagnostic tools, such as Computerized Axial Tomography (CAT), Magnetic Resonance Imaging (MRI), and Positron Emission Tomography (PET), have helped determine the presence of certain neurological illnesses, they have had little impact on the development of insanity defense jurisprudence.[11] In addition, while the increased growth of moral philosophy has enabled us to clarify what we mean by such ubiquitous terms as "responsibility," "causation," or "rationality," I argue that these developments also have had little impact on the basic debate.[12] Thus, the public continues to endorse a substantive test for insanity that approximates the "wild beast" test of 1724.[13]

Until we "unpack" the empirical and social myths that underlie our misconceptions about the insane and the insanity defense and hold us in a paralytic thrall, we cannot begin to move forward. Such an unpacking requires us to confront the legal sys-

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7. *See infra* text accompanying notes 115-33.
8. *See infra* text accompanying notes 211-45.
9. *See infra* text accompanying notes 180-330.
10. *See infra* text accompanying notes 246-56.
11. *See infra* text accompanying notes 257-97.
12. *See infra* text accompanying notes 298-315.
13. *See infra* notes 142, 179 & 476 and accompanying text.

tem's consistent rejection of psychodynamic principles notwithstanding its embrace of forensic testimony in individual cases. This rejection arises out of the law's profound ambivalences about psychiatry, psychiatric practitioners, and the psychiatric method.[14] We must acknowledge that our insanity defense jurisprudence reflects a dramatically low "community tolerance threshold" for certain kinds of deviant behavior.[15] Even in those few cases where, through the "ambivalence of empathy," certain defendants who do not strictly meet the responsibility standard are acquitted,[16] the failure to use psychodynamic principles is consistent.

I begin the process of unpacking the myths by focusing on a series of meta-myths that have developed around the empirical myths: myths animated by an omnipresent fear of feigning, by a community sense that mental illness is somehow different from other illnesses, by a public need for mentally disabled criminal defendants to conform to certain typical external manifestations of "craziness," and by a persistent belief that it is simply improper to exculpate most criminal defendants because of their mental illness.[17] Thus, after reviewing the way the *Hinckley* acquittal served as a rallying cry for the social forces I have just described, and after reviewing the role of symbol and myth in the legal structure in Part I,[18] I proceed to discuss the impact of "externalities" (empirical data, scientific evidence, and moral philosophy) on the development of the myths in question in Part II.[19] I then explore the way the legal system's rejection of psychodynamic principles "plays out" in an insanity defense context in Part III,[20] and the way that the meta-myths have contributed to the longevity of the empirical myths in Parts IV[21] and V.[22] I conclude[23] by suggesting that, until we begin, as a society, to confront the roots of these meta-myths, we will remain gridlocked and our jurisprudence will remain incoherent.

It is important to indicate at the outset what this paper is not

14. *See infra* text accompanying notes 334-415.
15. *See infra* text accompanying notes 491-501.
16. *See infra* text accompanying notes 477-90.
17. *See infra* text accompanying notes 502-627.
18. *See infra* text accompanying notes 38-108.
19. *See infra* text accompanying notes 180-330.
20. *See infra* text accompanying notes 331-501.
21. *See infra* text accompanying notes 502-44.
22. *See infra* text accompanying notes 545-627.
23. *See infra* text accompanying notes 628-34.

about. I am *not* advocating that a strict binary opposition exists between the hysterical panic that has reigned among "non-experts" in the aftermath of the *Hinckley* acquittal and the calm reason of "experts" familiar with the "scientific advancements." What I am suggesting is that the post-*Hinckley* panic has blinded us from inquiring into (1) the roots of the panic, (2) the social context of the "scientific advancements," and (3) the extent to which these "advances" can and should animate further jurisprudential developments in this area.

Moreover, this paper is *not* an attempt to choose a winner in the free will/determinism debate; it is not an attempt to create a new substantive standard under which responsibility for crime should be assessed; and it is not an attempt to remediate the never-ending role conflict between law and psychiatry. It is, rather, an effort to understand *why* we (the public, judges, legislators, scholars, empiricists, behavioralists, journalists, historians) feel the way we do about the insanity defense and insanity defendants, and to understand the psychodynamics of how insanity defense jurisprudence has developed (and will, most likely, continue to develop).[24]

In spite of the torrent of recent literature appearing to examine nearly every aspect of the insanity defense, important gaps remain. First, nearly all the authors tend to see the underlying issues as concerning solely scientific discoveries, of problems in moral philosophy, of misunderstood data, or of empirical discoveries.[25] Even those works that look at multiple factors are incomplete in that they generally fail to pay sufficient attention to the specific role of symbolism in the evolution of insanity defense jurisprudence.[26] In an effort to truly understand the significance of

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24. While there are other important contemporaneous jurisprudential "voices" — feminist, critical, and others — that *should* be relevant to this inquiry, I limit myself here primarily to the psychodynamic "voice." *Cf.* C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) (feminist voice). *See generally* Getman, *Voices*, 66 TEX. L. REV. 577 (1988) (discussing effects of "scholarly voice," "professional voice," and "human voice" in legal discourse); Note, *The Scientific Model in Law*, 75 GEO. L.J. 1968, 1988 n.102 (1987) [hereinafter Note, *Scientific Model*] (discussing G. ZUKAV, THE DANCING WU LI MASTERS: AN OVERVIEW OF THE NEW PHYSICS 82-87 (1979) (on "different branches of reality")).

25. *See generally infra* notes 180-330 and accompanying text (discussing the commentary within each of these disciplines).

26. *See, e.g.*, Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527 (1978) [hereinafter Morse, *Crazy Behavior*]; Morse, *Excusing*, *supra* note 1. Two important exceptions are Sendor, *Crimes as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74

recent developments, it is necessary to consider all of the factors simultaneously, and to ask how the underlying anthropological and sociological data — our religious, cultural and social beliefs — have shaped our thinking.[27] Only when these additional elements are "factored in" can we begin to understand one of the most perplexing, yet unasked questions in this area: if scholars agree, virtually unanimously, that the empirical myths that dominate legislative decision-making are, empirically mythic,[28] then why do these myths continue to enslave us?[29] Why do legislatures consistently ignore the reams of data showing the degree to which

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GEO. L.J. 1371 (1986), and Wexler, *Redefining the Insanity Problem*, 53 GEO. WASH. L. REV. 528 (1985) [hereinafter Wexler, *Insanity Problem*]; *see also* 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) [hereinafter Perlin, *Symbolic Values*] (discussing the importance of symbolism in Supreme Court's treatment of cases involving mentally disabled defendants); Rogers, *APA's Position on the Insanity Defense: Empiricism Versus Emotionalism*, 42 AM. PSYCHOLOGIST 840 (1987) [hereinafter Rogers, *APA's Position*] (considering empiricism versus emotionalism in formulating changes in the insanity defense).

27. In order to do this, I will consider the question through a series of cultural, religious and social myths (and the symbolic significance of these myths) that have historically animated insanity defense decision-making (and that are at the roots of the empirical myths which we have become increasingly familiar during the past decade).

In subsequent papers, I hope to explore (1) the importance of heuristic decision-making (especially attribution theory and the vividness effect), cognitive behavior theory, and what is characterized as "ordinary common sense" (OCS) in the shaping of the psychodynamics of insanity defense jurisprudence, *see* Perlin, *Psychodynamics*, *supra* note *, and (2) how, in our authoritarian culture, the peculiar interplays between mass media and practical politics, and the psychology of moral development, affect the moral bases of the insanity defense, and the way the defense is and is not consonant with the moral beliefs of the American public. *See supra* note *. Only through these explorations can we come to understand the importance of "imperfect" public opinion in the development of an insanity defense jurisprudence. *See, e.g.*, Tighe, *Francis Wharton and the Nineteenth Century Insanity Defense: The Origins of the Reform Tradition*, 27 AM. J. LEG. HIST. 223, 252 (1983) ("[T]here are a wide range of non-legal issues involved in the insanity defense. It is this perspective which is often lacking in contemporary discussions . . . ." (discussing F. WHARTON, A TREATISE ON MENTAL UNSOUNDNESS: EMBRACING A GENERAL VIEW OF PSYCHOLOGICAL LAW (1873))).

28. While I recognize the necessary social function of myths in our society, see, e.g., C. LÉVI-STRAUSS, STRUCTURAL ANTHROPOLOGY 232-41 (1963), I suggest that our societal perceptions as to how the insanity defense operates (*e.g.*, frequency of plea, success, disposition of cases, post-acquittal placements of "successful" pleaders) are empirically flawed, and that the "myths" that have developed regularly and persistently ignore the enormity of these misperceptions. *See infra* text and notes 218-45.

29. *E.g.*, English, *The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense*, 40 HASTINGS L.J. 1, 8 (1988) ("The strides in psychiatric understanding which have been realized in the century-and-a-half since *M'Naughten's* articulation seriously impugn the integrity of Congress' resurrection of a rigid cognitive test.").

our most deeply held beliefs about the insanity defense are, simply, wrong?[30] Only when these myths are "unpacked" can we begin to understand the remarkable symbolic power of insanity defense mythology.[31]

Second, there has been little attention paid to what may be the most significant issue of all: the *psychodynamics*[32] of why the

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30. These questions, I should stress, are unasked in the scholarly literature and in the political process. I discuss the significant reasons for this seemingly deliberate ignorance *infra* text accompanying notes 331-501.

31. *See, e.g.*, C.G. JUNG, *On Psychic Energy*, in 8 COLLECTED WORKS OF C.G. JUNG 38 (1959) (describing "how myths arise"). Adds Jung:

> We can see almost daily in our patients how mythical fantasies arise: they are not thought up, but present themselves as images or chains of ideas that force their way out of the unconscious, and when they are recounted they often have the character of connected episodes resembling mythical dramas.

Id.; *see also*, C.G. JUNG, *Archetypes of the Collective Unconscious*, in 9 COLLECTED WORKS OF C.G. JUNG, *supra*, at 1-7 [hereinafter C.G. Jung, *Archtypes*] (explains that myths are an expression of the "collective unconscious" and arise as an attempt to "assimilate all outer sense experiences to inner, psychic events").

For helpful overviews on the subject of myths, see M. ELIADE, MYTH AND REALITY (1963); C. LÉVI-STRAUSS, *supra* note 28; MYTH: A SYMPOSIUM (T. Sebeok ed. 1955); K. RUTHVEN, MYTH: THE CRITICAL IDIOM (1976); L. SCHNEIDERMAN, THE PSYCHOLOGY OF MYTH, FOLKLORE AND RELIGION (1981).

32. "Psychodynamic psychology is the theory of human behavior that posits unconscious variables and processes, especially psychological instincts, conflicts, anxieties and defenses, as the primary causes of behavior." Morse, *Failed Explanations and Criminal Responsibility: Experts and the Unconscious*, 68 VA. L. REV. 971, 985, 999-1043 (1982) [hereinafter Morse, *Failed Explanations*]. It encompasses all psychological systems and theories that emphasize processes of change and development, as well as those systems and theories that make motivation and drive central concepts. A. REIBER, PENGUIN DICTIONARY OF PSYCHOLOGY 38-39 (1985) (defining "psychodynamic"); S. WALROND-SKINER, DICTIONARY OF PSYCHOTHERAPY 275 (1986) ("[A]ll psychological theories which use the concept of inner drives and forces can be described as psychodynamics."); *see also* L. HINSIE & R. CAMPBELL, PSYCHIATRIC DICTIONARY 593 (4th ed. 1960) (Psychodynamics is "[t]he science of mental forces in action."); P. ROCHE, THE CRIMINAL MIND, 87-88 (1958) (describing the umbrella concept of psychodynamics); Watson, *Some Psychological Aspects of the Trial Judge's Decision-Making*, 39 MERCER L. REV. 937, 938 n.6 (1988) (" 'Psychodynamics' . . . encompasses biology, psychology, physiology, anthropology, and psychoanalysis in a unified set of concepts."). On the evolutionary basis of psychodynamics, see L. KOLB, MODERN CLINICAL PSYCHIATRY 6-7 (7th ed. 1968).

In arguing that we must consider the psychodynamics of the development of insanity defense jurisprudence, I am specifically side-stepping the debate between Professor Morse and Professors Bonnie and Slobogin, on the testimonial appropriateness of psychodynamic psychological explanations of criminal behavior. *See* Morse, *Failed Explanations*, *supra*, at 1043-83; Bonnie & Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, at 431-52 (1980). I agree in large part with Bonnie and Slobogin that it is morally and socially appropriate for the criminal law to both place significant weight on the defendant's psychological state and to accept some imprecision from forensic witnesses in testimony on such states. *Id.* Morse, though, to some extent, has appeared to have receded from some of his earlier positions.

public views the insanity defense as it does[33] and the significance of symbolism in all insanity defense decision-making.[34] In part, the debate over the insanity defense is a masquerade. It hides the true issues lurking beneath the surfaces of our consciousness: the sustained power of cultural myths, the power of heuristics, the meretriciousness of "ordinary common sense" as a tool in legal decision-making,[35] and the authoritarian roots of the American political character.[36] As Professor David Wexler has pointedly noted: "Ascertaining the 'real' problem or problems with the insanity defense is, of course, an empirical matter, and *careful empirical research relating to the roots of dissatisfaction with the defense has yet to be performed.*"[37] It is to these "roots of dissatisfaction" that I contend we must turn.

See Morse, *Excusing*, *supra* note 1, at 779-80 n.3 (acknowledging that his prior abolition position, Morse, *Crazy Behavior*, *supra* note 26, at 640-45, was "incorrect"). However, acceptance or rejection of a position on this question is not material to the thesis articulated in this Article: that until we understand what animates decision-makers — judges, juries, legislators, public-opinion shapers, and the public at large — in their insanity defense decision-making, much of the moral and philosophical debate, the new and urgent empirical data, and the more recent scientific discoveries will remain, unfortunately, largely irrelevant.

33. *Cf.* Wexler, *Offense-Victim*, *supra* note 1, at 20 (insanity defense should be retained except where its availability would likely be "viewed as going against the grain of community tolerance and the community sense of justice").

34.

> It is difficult to fathom how the criminal defense of insanity, which is used so infrequently, can engender the profusion of scholarly and popular literature that it has. The relative rarity of the defense, however, belies its symbolic role in our legal system and its great command of public attention.

I. KEILITZ & J. FULTON, THE INSANITY DEFENSE AND ITS ALTERNATIVES: A GUIDE FOR POLICYMAKERS vii (1984); *see also* Wexler, *Insanity Problem*, *supra* note 26, at 546 n.113 ("The insanity defense plays principally a symbolic and aesthetic function in the law."). One of the few cases explicitly discussing the symbolic significance of a successful insanity defense plea was United States v. Lyons, 739 F.2d 994 (5th Cir. 1984) (Rubin, J., dissenting).

35. *See infra* text accompanying notes 257-97.

36. *See* M. Perlin, The Psychodynamics of Insanity Defense Jurisprudence 9-10 (June 1990) (unpublished manuscript presented at the International Congress on Mental Health and the Law, Toronto, Canada).

37. Wexler, *Insanity Problem*, *supra* note 26, at 540 (emphasis added); *cf.* Hill, *The Psychological Realism of Thurman Arnold*, 22 U. CHI. L. REV. 377, 379 (1955) ("Social stability *depends* on the preservation of man's ignorance and false view of himself — his capacity to ignore the unconscious and unacknowledged parts of his personality, which play an unrecognized role in his actions." (emphasis added)).

I. SENSATIONALISM AND "TENSILE STRENGTH"

A. The *Hinckley* Case as Paradigm

Just as "[c]onstitutional law tends to define itself through reaction to great cases,"[38] insanity defense jurisprudence tends to define itself through reaction to scandalous, sensational, hysteria-creating, or outrageous cases.[39] The development of the insanity defense in the last century and a half has been marked by the idiosyncratic, episodic and distorted response of an angry public,[40] a frenzied media,[41] reactive legislatures,[42] and, ultimately, the courts to the use of the defense in such cases as the trials of

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38. Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873, 873 (1987).

39. This type of reactionary response to the *Hinckley* case has been described as the "vividness effect." Finer, *Should the Insanity Defense Be Abolished? An Introduction to the Debate*, 1 J.L. & HEALTH 113, 113 n.2 (1986-87) ("[T]he 'vividness effect' is the statistically undue prominence given to the characteristics of a regularly occuring phenomenon because of the concreteness and immediacy of the present example." (citing Rosenhan, *Psychological Realities and Judicial Policy*, 19 STAN. LAW. 10 (1984))).

40. *E.g.*, I. KEILITZ & J. FULTON, *supra* note 34, at 3 ("The June 21, 1982, verdict of 'not guilty by reason of insanity' in the Hinckley case ignited swift and vociferous public outrage." (footnote omitted)); *see* W. WINSLADE & J. ROSS, THE INSANITY PLEA 182 (1983); Dix, *Criminal Responsibility and Mental Impairment in American Criminal Law: Response to the Hinckley Acquittal in Historical Perspective*, in LAW AND MENTAL HEALTH: INTERNATIONAL PERSPECTIVES 1 (D. Weisstub ed. 1984); Shah, *Criminal Responsibility*, in W. CURRAN, A. MCGARRY & S. SHAH, FORENSIC PSYCHIATRY AND PSYCHOLOGY: PERSPECTIVES AND STANDARDS FOR INTERDISCIPLINARY PRACTICE 167, 199 (1986). *See generally* Moran, *Preface*, 477 ANNALS 9 (1985) ("The insanity defense is the most abused defense. No other defense has been so often denounced or so routinely criticized."); Rogers, *APA's Position*, *supra* note 26, at 840 ("Anglo-American history of the insanity defense is very much a chronicle of celebrated insanity cases in which the death of an important official at the hands of an apparently insane person stirred deep public indignation.").

41. For representative contemporaneous press accounts, see, Beach, *Picking Between Mad and Bad: The Hinckley Case Steps Up a Debate Over the Insanity Plea*, TIME, Oct. 12, 1981, at 68; *Is He Crazy About Her? A Plea of Insanity, A Cry For Love*, TIME, Oct. 12, 1981, at 30; Wright & Herron, *For Hinckley, the Epilogue Begins*, N.Y. Times, Aug. 30, 1981, § 4, at 2, col. 2.

42. On the response of legislatures to public opinion in responding to sensational insanity defense cases, see 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, 972-74 (1987). For a historical perspective, see Tighe, *supra* note 27, at 253 ("[T]he general pattern of a sporadic outburst of reform efforts stimulated by public outrage at a particularly sensational trial is not an adequate foundation for change.").

The impetus for the passage of the federal Insanity Defense Reform Act of 1984, 18 U.S.C. § 20 (1988) (recodified 18 U.S.C. § 17) "was undoubtedly the acquittal of John Hinckley, Jr., and the overwhelming public outrage at [his] exculpation." English, *supra* note 29, at 4-5 (footnote omitted).

Daniel M'Naghten[43] and John W. Hinckley, Jr.[44] Both cases involved an attack on an authority figure[45] and resulted in an acquittal which stunned the public, and offended its conscience.[46] If the insanity defense is "a normative standard applied to conflicting clusters of fact and opinion by a jury, . . . the traditional embodiment of community morality,"[47] cases such as Hinckley's are bound to create cognitive dissonance.[48] The insanity plea then sur-

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43. M'Naghten's Case, 8 Eng. Rep. 718 (1843). *See* Rollin, *Crime and Mental Disorder: Daniel McNaughton, a Case in Point*, 50 MEDICO-LEGAL J. 102, 102 (1982) ("Had the victim of Daniel McNaughton's murderous assault been a person of no importance, the event would have scarcely troubled the waters of medico-legal history.").

44. The pretrial rulings in the *Hinckley* case are reported in United States v. Hinckley, 525 F. Supp. 1342 (D.D.C. 1981), *clarified* 529 F. Supp. 520 (D.D.C.), *aff'd* 672 F.2d 115 (D.C. Cir. 1982). For subsequent developments, *see* United States v. Hinckley, 725 F. Supp. 616 (D.D.C. 1989); United States v. Hinckley, No. 81-0306 (D.D.C. Sept. 26, 1989) (LEXIS Genfed library, Dist file); United States v. Hinckley, 721 F. Supp. 323 (D.D.C. 1989). For a masterful literary account of the Hinckley trial, see L. CAPLAN, THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINCKLEY, JR. (1984).

45. Parallels between the *M'Naghten* and *Hinckley* cases are noted in R. ROGERS, CONDUCTING INSANITY EVALUATIONS (1986); English, *supra* note 29, at 4-8; Golding, Eaves & Kowaz, *The Assessment, Treatment and Community Outcome of Insanity Acquittees*, 12 INT'L J.L. & PSYCHIATRY 149 (1989); Golding & Roesch, *The Assessment of Criminal Responsibility: A Historical Approach to a Current Controversy*, in HANDBOOK OF FORENSIC PSYCHOLOGY 395, 411-13 (1987); Hermann & Sor, *Convicting or Confining? Alternative Directions in Insanity Law Reform: Guilty But Mentally Ill Versus New Rules for Release of Insanity Acquittees*, 1983 B.Y.U. L. REV. 449; Mickenberg, *supra* note 42, at 946-59; Perr, *The Hinckley Case, the Media and the Insanity Defense*, 28 J. FORENSIC SCI. 815 (1983); Sadoff, *Insanity: Evaluation of a Medicolegal Concept*, 9 TRANSACTIONS & STUD. C. PHYSICIANS PHILADELPHIA 237, 246 n.47 (1987).

46. Duncan, *Terminating the Guardianship: A New Role for State Courts*, 19 ST. MARY'S L.J. 809, 845-46, n.265 (1988).

47. Wales, *An Analysis of the Proposal to "Abolish" the Insanity Defense in S. 1: Squeezing a Lemon*, 124 U. PA. L. REV. 687, 698 n.66 (1976) (quoting *Hearings on S.1 and S. 1400 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess., at 6377 (1973)); *see also* T. GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS 157 (1986) ("[A] notorious insanity case is more than a [typical] case[;] . . . [it] become[s] the ground on which we test the basic foundations of criminal law itself . . . [and] serves a catalytic function, focusing our attention on moral issues that are far larger than the insanity defense itself.").

I discuss one aspect of community morality (the existence of a "community tolerance threshhold") extensively *infra* text accompanying notes 489-99. I discuss another aspect, the jurisprudential significance of "conventional morality," extensively in Perlin, *Psychodynamics*, *supra* note *.

48. *See* Spring, *The Insanity Issue in a Public Needs Perspective*, 4 DET. C.L. REV. 603, 610 (1979) ("The insanity defense is not working . . . because the public does not support the achieved results when consistently applied."). On the universality of public antipathy toward the insanity defense, see Mickenberg, *supra* note 42, at 965. *See generally* L. FESTINGER, THEORY OF COGNITIVE DISSONANCE (1957) (explaining how such dissonance arises); Abelson, *Modes of Resolution of Belief Dilemmas*, 3 CONFLICT RESOLUTION 343, 343 (1959) (dissonance arises on a belief level, which deals with "affective and

faces as the handy scapegoat for societal frustration.[49]

Cases such as Hinckley's are rare. When no sensational case is on the public's mind, insanity defense jurisprudence has developed as the outcome of a fairly uneasy *détente* between law and psychiatry (especially forensic psychiatry).[50] In this process, psychiatry has found its way into the law and applied deterministic principles in what we still insist is a free will-based judicial system.[51]

We acknowledge that "the law does not change with every advance of science,"[52] and accept that the frequently-cited concurrence of New Jersey Supreme Court Chief Justice Joseph Weintraub in *State v. Sikora*[53] still exemplifies the depths of the free

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cognitive processes," when psychological inconsistencies exist within the content of a belief system).

On the role of "ordinary common sense" (OCS) in the development of criminal procedure jurisprudence, see Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729 (1988).

49. *Cf.* Roth, *Preserve but Limit the Insanity Defense*, 58 PSYCHIATRIC Q. 91 (1986-87) (suggesting that the American public may simply be a "bad loser").

50. *See* F. A. WHITLOCK, CRIMINAL RESPONSIBILITY AND MENTAL ILLNESS 1 (1963) (the development of insanity defense jurisprudence has been complicated by the inherent differences in focus, method and goals of law and psychiatry); Sadoff, *Practical Ethical Problems of the Forensic Psychiatrist in Dealing With Attorneys*, 12 BULL. AM. ACAD. PSYCHIATRY & L. 243, 243 (1984) (forensic psychiatrists face several unique ethical dilemmas which arise from competing demands of the two disciplines).

This is not to suggest that absent the interposition of sensational cases, the relationship has been a static one. While law and psychiatry "treated each other with considerable respect" from the mid-nineteenth century to the late 1920's, Resnick, *Perceptions of Psychiatric Testimony: A Historical Perspective on the Hysterical Invective*, 14 BULL. AM. ACAD. PSYCHIATRY & L. 203, 205 (1986), more recent years have been marked by the "heat of reciprocal fault finding." *Id.*; *see also* Keedy, *Insanity and Criminal Responsibility*, 30 HARV. L. REV. 535 (1917) ("The feud between medical men and lawyers in all questions concerning the criminal liability of lunatics is of old standing") (quoting H. OPPENHEIMER, A TREATISE ON THE CRIMINAL RESPONSIBILITY OF LUNATICS, preface (1909)).

51. *See* Morrissette v. United States, 342 U.S. 246, 250 n.4 (1952) (quoting Pound, *Introduction*, in F. SAYRE, CASES ON CRIMINAL LAW (1924)) (" Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong.").

52. Gray, *The Insanity Defense: Historical Development and Contemporary Relevance*, 10 AM. CRIM. L. REV. 559, 559 (1972) (quoting State v. Pike, 49 N.H. 399, 438 (1869) (Doe, J., concurring)). Dr. Loren Roth has suggested: "The evolution of the insanity defense over the centuries cannot be viewed as a march of scientific progress, but instead as a barometer of public and jurisprudential thinking about justice." Roth, *supra* note 49, at 91.

53. 44 N.J. 453, 478-79, 210 A.2d 193, 207 (1965) (Weintraub, C.J., concurring):

> It seems clear to me that the psychiatric view expounded by [defendant's expert witness] is simply irreconcilable with the basic thesis of our criminal law, for while the law requires proof of an evil-meaning mind, this psychiatric thesis

will/determinism split. Yet, in the recent past, judges, legislators, and scholars appeared to have acknowledged, sometimes reluctantly,[54] that any modern system of criminal law must take into account the psychological and psychiatric discoveries and learning of the past century.[55] On the other hand, sensational trials such as

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> denies there is any such thing. To grant a role in our existing structure to the theme that the conscious is just the innocent puppet of a nonculpable unconscious is to make a mishmash of the criminal law, permitting — indeed requiring — each trier of the facts to choose between the automaton thesis and the law's existing concept of criminal responsibility. It would be absurd to decide criminal blameworthiness upon a psychiatric thesis which can find no basis for personal blame. So long as we adhere to criminal blameworthiness, *mens rea* must be sought and decided at the level of conscious behavior.

(footnote omitted); *see also Insanity as a Defense: Annual Judicial Conference, Second Judicial Circuit of the United States*, 37 F.R.D. 365, 369-75 (1964) [hereinafter *Insanity as a Defense*] (statement of Weintraub, C.J.).

54. A. GOLDSTEIN, THE INSANITY DEFENSE 93 (1967) ("It has long been apparent that judges, legislators, and lawyers have been reluctant to tamper with the insanity defense, perhaps because it relates to issues of great importance which they cannot quite understand.").

55. These acknowledgements came during a quarter-century period, lasting roughly from 1954, until the late 1970's. *See* Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954); GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, CRIMINAL RESPONSIBILITY AND PSYCHIATRIC EXPERT TESTIMONY: REPORT NO. 26 (May 1954) [hereinafter GAP REPORT]; REPORT OF ROYAL COMMISSION ON CAPITAL PUNISHMENT (1953) [hereinafter RCCP]. *See generally* D. BAZELON, *supra* note 1, at 39 (*Durham* was decided at a "time of ascendancy for our faith in science and technology").

Durham's author, Judge David Bazelon, has been lauded by many for his accomplishments, *see* Brennan, *Introduction*, 63 GEO. L.J. 2 (1974) ("[I]t is common ground that he [Bazelon] is among the outstanding judges of American judicial history"); Wald, *Disembodied Voices - An Appellate Judge's Response*, 66 TEX. L. REV. 623, 627 (1988) (characterizing Bazelon as one of "our greatest appellate judges"); Wales, *The Rise, the Fall, and the Resurrection of the Medical Model*, 63 GEO. L. J. 63, 87 (1974) (Judge Bazelon is credited with having "invited the world of mental health professionals and criminologists into his courtroom and . . . [having] extended his courtroom back into the world.").

This trend of acceptance was reflected in (1) the general adoption of the American Law Institute Model Penal Code insanity test, MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962), by the federal courts and many state courts, *see infra* note 163; (2) the extension of the civil rights "revolution" to the institutionalized mentally disabled, *see, e.g.*, Perlin, *State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier*? 20 LOY. L.A.L. REV. 1249, 1250-51 (1987); and (3) the publication of the third Diagnostic and Statistical Manual by the American Psychiatric Association, *see* DIAGNOSTIC AND STATISTICAL MANUAL (American Psych. Ass'n 3d ed. 1980) [hereinafter DSM-III]. These advances came at a moment when scientific developments in all aspects of psychiatry, psychology and neurology seemed to begin the process of illumination of some of the most intractable problems of deviant human behavior that have bedeviled lawyers, mental health professionals and philosophers for centuries.

It appeared that a "window" had opened which might accommodate a system in which the forensic psychiatrist might "teach others what [he had] . . . learned[;] . . . to share with the law, especially the judge and jury, the benefits of [his] experience and training." R. SADOFF, FORENSIC PSYCHIATRY: A PRACTICAL GUIDE FOR LAWYERS AND PSYCHI-

Hinckley's consume the hearts and minds of the American public.[56] They reflect our basic dissatisfaction with the perceived incompatibility of the due process and crime-control models of criminal law,[57] and with the notion of psychiatric excuses allowing a "guilty" defendant to "beat the rap" and escape punishment.[58] Our dissatisfaction led to a predictable response,[59] *especially* when a defendant — like Hinckley — is perceived as one "not sufficiently like us"[60] to warrant exculpation.[61] Post-*Hinckley* out-

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ATRISTS 55 (1975). What was required was for all the "participants in the system . . . [to] begin to work together meaningfully and openly if the 'shotgun wedding' between the professionals [were] to succeed." Perlin & Sadoff, *The Adversary System*, in VIOLENCE: PERSPECTIVES ON MURDER AND AGGRESSION 394, 403 (1978) (citation omitted); *see also* STATE OF NEW JERSEY INSANITY DEFENSE STUDY COMMISSION, FINAL REPORT 13-14 (1985) [hereinafter *Final Report*] ("The relationship between mental illness and criminal conduct is in serious need of on-going study."); National Center for State Courts, *Guidelines for Involuntary Civil Commitment*, 10 MENTAL & PHYS. DISABILITY L. REP. 409, 413-20 (1986).

Thus, in 1980, Professors Bonnie and Slobogin could write confidently that, "[t]he insanity defense is likely to remain intact." Bonnie & Slobogin, *supra* note 32, at 449. Even *after* the *Hinckley* acquittal, the ultimate impact of the verdict was often understated. *See* Perr, *supra* note 45, at 822 ("One can expect that relatively little will eventually occur as a direct result of the *Hinckley* case.").

56. *See* Perlin, *The Things We Do For Love: John Hinckley's Trial and the Future of the Insanity Defense in the Federal Courts* (Book Review), 30 N.Y.L. SCH. L. REV. 857, 857 (1985) [hereinafter Perlin, *Hinckley's Trial*] (review of L. CAPLAN, *supra* note 44).

57. One commentator has asserted that the insanity defense is constitutionally compelled as part of the requirement of "moral blameworthiness which is at the heart of our fundamental 'concept of ordered liberty' . . . and thereby guaranteed by the due process clause of the fourteenth amendment." Fentiman, *"Guilty But Mentally Ill": The Real Verdict Is Guilty*," 26 B.C.L. REV. 601, 603 (1985) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)); *see also, e.g.*, Miller, *Ideology and Criminal Justice Policy: Some Current Issues*, 64 J. CRIM. L. & CRIMINOLOGY 141, 143-46 (1973) (contrasting "crusading issues" and "general assumptions" of the political "left" and "right" on the criminal justice system); Viano, *Victim's Rights and the Constitution: Reflections on a Bicentennial*, 33 CRIME & DELINQ. 438, 441-42 (1987) (contrasting "politics of rights" and "politics of interests"). *See generally* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968) (noting what factors may limit the ability to penalize a criminal).

58. *See infra* text accompanying notes 609-27. *But cf.* Pogrebin, Regoli & Perry, *Not Guilty by Reason of Insanity: A Research Note*, 8 INT'L J.L. & PSYCHIATRY 237, 240 (1986) (studying disposition of not guilty by reason of insanity (NGRI) cases in Colorado, finding that "defendants who successfully raise the plea of NGRI do *not* beat the rap") (emphasis added). Moreover, the insanity defense is usually unsuccessful when asserted. *E.g.*, Rodriguez, LeWinn, & Perlin, *The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders*, 14 RUTGERS L.J. 397, 401 (1983).

59. *See* Mickenberg, *supra* note 42, at 963 ("Public opinion polls taken immediately after the [*Hinckley*] verdict indicate that as much as ninety percent of the population favored doing away with the insanity defense and punishing any defendant who committed a criminal act." (citing Farabee & Spearly, *The New Insanity Law in Texas: Reliable Testimony and Judicial Review of Release*, 24 S. TEX. L.J. 671, 671 (1983))).

60. Sendor, *supra* note 26, at 1396.

rage served as a catalyst for public denunciation,[62] which led to speedy legislative inquiry,[63] "reform" legislation,[64] and ultimately to a "shrinkage" of the insanity defense.[65]

The insanity defense thus exemplifies the "tensile strength" theory of the law:

> According to [Professor] Roberts, every legal principle can only hold a certain amount of emotional or political freight, and that amount is defined as its tensile strength. When a principle is pushed beyond its tensile strength by expansionist litigators or creative legislators, it will simply fall apart.[66]

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61. *See* H. WEIHOFEN, THE URGE TO PUNISH 19 (1956) [hereinafter WEIHOFEN, URGE] ("[T]he mentally ill are like the rest of us, only more so."); Burt, *Of Mad Dogs and Scientists: The Perils of the 'Criminal-Insane,'* 123 U. PA. L. REV. 258, 273 (1974) [hereinafter Burt, *Mad Dogs*] ("If we can hold fast to the conviction that our potential victims [in institutions for the 'criminally insane'] are much like us, even just like us 'but for the grace of God,' we diminish the likelihood that we will tolerate inflictions of the worst horrors on them."); Singer, *Abolition of the Insanity Defense: Madness and the Criminal Law*, 4 CARDOZO L. REV. 683, 683 (1983) ("Is mental 'health' so evanescent that any of us can slip away, or is there something really 'different' about those who are 'mad'?").

62. *See* T. GRISSO, *supra* note 47, at 157 (referring to the "catalytic function" of the insanity defense); English, *supra* note 29, at 5 (on the *Hinckley* acquittal's "profound catalytic effect on previously inchoate revisionist and abolitionist legislative agendas"); Mickenberg, *supra* note 42, at 946, 946 n.16; *see also* Fentiman, *supra* note 57, at 601 (quoting Zilboorg, *Misconceptions of Legal Insanity*, 9 AM. J. ORTHOPSYCHIATRY 540, 544 (1939)):

> [W]henever strong emotions are aroused by a dissension of opinion, it is a sign that some basic problem, some instinct-like emotion, more fundamental than the issue formally under discussion, has smuggled itself in to cloud the issue itself and to interfere with the calm and objective examination of fact.

; *cf.* State v. Strasburg, 60 Wash. 106, 131, 110 P. 1020, 1028 (1910) (Rudkin, C.J., concurring) ("[T]he remedy for acquittals *through maudlin sentiment or in response to popular clamor* must be sought by correcting false notions, and not by destroying the safeguards of private liberty." (emphasis added)).

63. Mickenberg, *supra* note 42, at 947-48 (discussing the "flood" of legislative proposals which followed in the wake of the *Hinckley* acquittal).

64. For a full survey, see Callahan, Mayer & Steadman, *Insanity Defense Reform in the United States — Post-Hinckley*, 11 MENTAL & PHYS. DISABILITY L. REP. 54 (1987) (cataloging the changes in insanity defense statutes in the three years before and after the 1982 Hinckley acquittal); *cf.* Wexler, *Insanity Problem*, *supra* note 26, at 529-30 (discussing the role of the *Hinckley* acquittal in shaping position papers of relevant professional associations articulating insanity defense standards).

65. The "shrinkage" of the insanity defense involves three components: restrictions on the limits of the substantive test (in this case, the elimination of the so-called "volitional" prong in the federal Act, *see* 18 U.S.C. § 20 (Supp. II 1984)); alterations in the procedural aspects of the insanity plea (in this case, both the shifting of the burden of proof to the defendant, and changing the quantum of evidence necessary to sustain a plea); and increased restrictions on insanity acquittees following their post-acquittal commitment to psychiatric institutions. *See infra* notes 172-77 and accompanying text.

66. Fentiman, *supra* note 57, at 611 n.63 (citing Lectures by Ernest Roberts on Environmental Law, Harvard Law School (Spring 1983)); *see* Roth, *supra* note 49, at 98

The pressures exerted against the insanity defense after *Hinckley* thus can be seen at having raised "arousal . . . to dysfunctionally high levels," which "preclude[d] innovative action because the limits of bounded rationality [were] exceeded."[67]

Judge David Bazelon's suggestion in 1976, that the bases of criminal non-responsibility be expanded, appears now to be little more than a quaint historical curiosity.[68] No notion of *expansion* is even ripe for speculation at this time; the questions before us all presume a shrunken insanity defense, with further shrinkage a distinct possibility.[69] This possibly becomes problematic in light of the explosion of scientific advances in the past decade,[70] in which researchers appear to have made important strides toward the understanding of the interplay between mental illness and criminogenic behavior,[71] and appear to have developed new models for

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("[R]esponsibility in the law is an elastic concept, like a giant balloon: Squeeze one facet, watch another expand!"); R. Christenson, From Hadfield to Hinckley: The Insanity Plea in Politically-Related Trials, 46 (paper delivered at the 1983 annual meeting of the Academy of Criminal Justice Sciences) (discussing "hydraulic pressure" of public opinion in political assassination cases).

67. Wexler, *Insanity Problem*, *supra* note 26, at 537 (quoting Weick, *Small Wins: Redefining the Scale of Social Problems*, 39 AM. PSYCHOLOGIST 40, 48 (1984)).

68. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 398 (1976) ("The real question, it seems to me, is how we can afford *not* to live up to our moral pretenses and *not* to excuse unfree choices or nonblameworthy acts."); *see also* D. BAZELON, *supra* note 1, at 29 (failures in the administration of the insanity defense are "caused not by too much compassion, but by too little — by a failure of our moral imagination, not an excess"). For another expansionist perspective, see, Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQUALITY 9, 87 (1985) ("[A]n offender who never had a realistic opportunity to absorb the majority culture's norms can scarcely be held accountable when he or she violates them.").

69. *Cf.* COLO. REV. STAT. § 16-8-103.6 (1988 Supp.) (defendant who pleads insanity waives claim of confidentiality as to any communication with examining mental health professional), *discussed in* 12 MENTAL & PHYS. DISABILITY L. REP. 200-01 (1988).

70. Professor English has pointedly noted the way Congress disregarded the "plethora of psychiatric advances" in the 150 years since *M'Naughton*. English, *supra* note 29, at 8. For a helpful, broad-based survey, see Deutsch, Platt & Senghaas, *Conditions Favoring Major Advances in Social Science*, 171 SCI. 450, 455 (1971) (finding that there were more major advances in psychology from 1900 to 1965 than in any other social science field). *See generally infra* text accompanying notes 256-96.

71. For a biologically based overview, *see* Jeffrey & White, *Law, Biological Psychiatry, and Diseases of the Brain*, in ATTACKS ON THE INSANITY DEFENSE: BIOLOGICAL PSYCHIATRY AND NEW PERSPECTIVES ON CRIMINAL BEHAVIOR 79 (C. Jeffrey ed. 1985). *See generally* Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors Upon Which Our Criminal Law Is Predicated*, 66 N.C.L. REV. 283, 294 (1987) (pointing out that "increasing evidence indicates that [the] behavior [of most people who kill without justification] frequently can be traced to . . . physical abnormalities"). For a discussion of the significance of these advances on insanity defense jurisprudence, see *infra* text accom-

understanding such behavior.[72] Thus, at precisely the same time that courts and legislatures have tightened the use of the insanity defense (procedurally and substantively), and have restricted the use of expert testimony in insanity defense trials,[73] behavioral scientists have begun to develop a body of empirical evidence as to what actually happens when a defendant pleads insanity,[74] and to articulate new explanations for why some mentally disabled individuals commit seemingly-inexplicable violent acts.[75]

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panying notes 257-97.

72. There has been significant growth in recent years in the development of assessment and research instruments, designed to determine the reliability and validity of determinations of competency to stand trial and of responsibility for criminal acts. *See, e.g.*, Golding, Roesch & Schreiber, *Assessment and Conceptualization of Competency to Stand Trial*, 8 LAW & HUM. BEHAV. 321 (1984) (providing preliminary data on the Interdisciplinary Fitness Interview, a structured interview for the assessment of competence); Rogers, Dolmetsch & Cavanaugh, *An Empirical Approach to Insanity Evaluations*, 37 J. CLINICAL PSYCHOLOGY 683, 684 (1981) (describing "the development of the Rogers Criminal Responsibility Assessment Scales (RCRAS)," and its use in insanity evaluations); 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) [hereinafter *R-CRAS Validation*]. See *infra* text accompanying notes 246-56 for a discussion of the impact of these empirical tools.

73. One of the most pointed debates in criminal law has centered over the degree to which mental health professionals should be relied upon for explanations of criminal behavior. *Compare* Morse, *Failed Explanations*, *supra* note 32 (rejecting psychodynamic approach to the adjudication and disposition of criminal cases) *with* Bonnie & Slobogin, *supra* note 32 (skeptically accepting role of mental health professionals in such matters).

74. For example, the questions being dealt with include: In what percentage of cases is the defense pled? How frequently is it successful? When it is successful? What is the ultimate disposition of the case? When it is unsuccessful? Is there any "penalty" for raising the defense? *See infra* text accompanying notes 218-45.

75. An example of this is the identification of new syndromes classified as mental disorder, such as post-traumatic stress disorder. For an early overview, see Warnes, *The Traumatic Syndrome*, 17 CANAD. PSYCHIATRIC A.J. 391 (1972); *see also* Daly, *Samuel Pepys and Post-Traumatic Stress Disorder*, 143 BRIT. J. PSYCHIATRY 64 (1983) (discussing traumatic stress effects of Great Fire of London of 1666). *But cf.* Strümpfer, *Fear and Affiliation During a Disaster*, 82 J. SOC. PSYCHOLOGY 263 (1972) (a study conducted to explore the relationships between threat, anxiety, and affiliation tendency following a natural disaster (*i.e.*, a monsoon which killed 8 people in Port Elizabeth, S. Afr.), serves to point out that many new "syndromes" may be little more that the application of new diagnostic labels to behavior which has been observed for centuries).

In the past decade, there has been an explosion of interest, research and study of groups such as battered spouses and Vietnam veterans — groups whose members frequently exhibit so-called "syndromic" behaviors. While there has been significant scholarship devoted to the individual substantive syndromes, there has been virtually no attention paid to the *legal* implications of their use in insanity defense cases. For a rare example, see McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 OR. L. REV. 19, 64-69 (1987). On the question of the public's negative view toward defendants asserting such syndromes in insanity defense cases, see Resnick, *supra* note 50, at 208:

In summary, the insanity defense landscape is now dominated by an important tension: the legal system's panic-driven response to a "wrong" verdict in a sensational case,[76] at a time when our understanding of why the underlying "crazy"[77] behavior takes place has begun to increase dramatically.[78] This series of papers[79] will explore this tension as well as the post-*Hinckley* insanity defense shrinkage, and its implications for mentally disabled criminal defendants.[80]

> Today, the public views the following diagnoses as unjustly "getting criminal off": dissociative reaction, the "Twinkie" defense, post-Vietnam stress disorder, temporal lobe epilepsy, premenstrual syndrome, and pathological gambling. The closer a defendant is to normality, the more public opinion is outraged by insanity acquittals. People are unwilling to excuse conduct that appears to have a rational criminal motive.

In addition, anthropologists and others are beginning to study cases involving non-Anglo-American defendants (such as Hmong tribesmen) in an effort to determine the extent to which determinations of criminal responsibility are, or should be, *culturally*-based. *See, e.g.*, Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293 (1986).

76. On the public's "selective misperceptions" as to "wrong" verdicts, see Steadman & Cocozza, *Selective Reporting and the Public's Misconceptions of the Criminally Insane*, 41 PUB. OPINION Q. 523 (1977-78). Judge Bazelon has thus noted that "even the most banal burglary is newsworthy if committed by someone with a psychiatric history." D. BAZELON, *supra* note 1, at 28.

77. *See, e.g.*, Morse, *Crazy Behavior*, *supra* note 26, at 654 (discussing "crazy behavior").

78. *See* Rogers, *Assessment of Criminal Responsibility: Empirical Advances and Unanswered Questions*, 15 J. PSYCHIATRY & L. 73, 73 (1987) [hereinafter Rogers, *Unanswered Questions*] (in spite of emotional and political responses to the *Hinckley* acquittal, significant empirical advances have been made in insanity evaluation, including efforts to standardize screening procedures and to operationalize legal standards). *See generally* 3 M. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL §§ 15.35-.42 (1989).

79. *See supra* note *. As will become clear, I am most comfortable with the position articulated by Judge Bazelon:

> [Insanity defense cases] mark the boundary of condemnable behavior, enabling us to unite the concepts of guilt and responsibility without violating our own consciences. By declaring a small number not responsible, we emphasize the responsibility of all others who commit crimes. By cultivating our understanding of these limits, we illuminate and strengthen the moral authority of the criminal law.

D. BAZELON, *supra* note 1, at 2.

80. The universe of "mentally disabled criminal defendants" is broader than simply those defendants who raise the issue of lack of responsibility in defense of a criminal charge (or the few additional cases in which courts or prosecutors seek to impose the defense over a defendant's objection, *see, e.g.*, State v. Khan, 175 N.J. Super. 72, 417 A.2d 585 (1980)). It also includes those defendants who are putatively incompetent to stand trial as well as those who raise mental state issues in related competency inquiries. *See* Perlin, *Are Courts Competent to Decide Questions of Competency? Stripping the Facade from* United States v. Charters, 38 KAN. L. REV. 957, 967 (1990) [hereinafter Perlin, *Facade*]. While the legal tests invoked in these cases are significantly different from those used in

B. The Insanity Defense as Symbol

At the outset, it is critical to consider the significance of symbolism in insanity defense jurisprudence.[81] As "a convenient symbolic target in [the] war of words [over the crisis in crime]"[82] and "a scapegoat for the failure of the entire criminal justice system,"[83] the insanity defense —like the death penalty[84] — has con-

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insanity cases, the way the public thinks *about* mentally disabled criminal defendants is a relevant factor in these cases as well. *See* Perlin, *Symbolic Values*, *supra* note 26, at 2.

81. "Symbol" is defined in the Jungian sense: "[T]he best possible expression for a complex fact not yet clearly apprehended by consciousness." 8 C.G. JUNG, *supra* note 31, at 75. The relationship between Jung's discussions of symbolism and the insanity defense is discussed in Perlin, *The Supreme Court, the Mentally Disabled Criminal Defendant, Psychiatric Testimony in Death Penalty Cases, and the Power of Symbolism: Dulling the* Ake *in* Barefoot's *Achilles Heel*, 3 N.Y.L. SCH. HUM. RTS. ANN. 91, 91 n.1 (1985) [hereinafter Perlin, *Barefoot's Ake*]; *see also* R. SMITH, TRIAL BY MEDICINE: INSANITY AND RESPONSIBILITY IN VICTORIAN TRIALS 3 (1981) ("Deciding between guilt and insanity has a symbolism transcending an individual's fate.").

For political overviews, see Edelman, *Law and Psychiatry as Political Symbolism*, 3 INT'L J.L. & PSYCHIATRY 235 (1980); Lasswell, *What Psychiatrists and Political Scientists Can Learn From One Another*, 1 PSYCHIATRY 33 (1938). For an anthropological analysis, see M. DOUGLAS, IMPLICIT MEANINGS: ESSAYS IN ANTHROPOLOGY (1975); Sendor, *supra* note 26, at 1397-1407.

82. Bazelon, *The Dilemma of Criminal Responsibility*, 72 KY. L.J. 263, 277 (1984) [hereinafter Bazelon, *Dilemma*]; *see also* Ellsworth, Bakaty, Cowan & Thompson, *The Death-Qualified Jury and the Defense of Insanity*, 8 LAW & HUM. BEHAV. 81, 81, 83 (1984) [hereinafter Ellsworth]:

> The idea that a person who has committed an atrocious crime can be acquitted on the grounds of insanity is disturbing to many people, and has been so since the time [of M'Naughton's case] . . . .
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> . . . .
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> . . . It may well be that people's mistrust of the insanity defense stems more from their attitudes toward criminals than it does from their attitudes toward the mentally ill . . . . Those who place a high value on crime control relative to due process tend . . . [to assume] that anyone who breaks the law should pay the price, regardless of mental state . . . .

83. Bazelon, *Dilemma*, *supra* note 82, at 263.

Professor Susan Herman has aptly characterized the insanity defense as "the acid test of our attitudes toward the insane and toward the criminal law itself." Herman, *The Insanity Defense in Fact and Fiction: On Norval Morris's Madness and the Criminal Law*, 1985 AM. B. FOUND. RES. J. 385.

84. Professor Welsh White discusses with approval the theory proposed by Professors Zimring and Hawkins that death penalty legislation enacted after Furman v. Georgia, 408 U.S. 238 (1972), can be best explained by the theory of "psychological reactance. 'The loss of freedom to legislate on the death penalty triggers a strong desire to reassert the legislative power to act.' " White, *Patterns in Capital Punishment*, 75 CALIF. L. REV. 2165, 2174 (1987) (quoting F. ZIMRING & G. HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 42 (1987)). Furthermore, "[t]he death penalty was precisely the type of politically charged, symbolic policy issue to which judicial invalidation has always provoked anger and resentment." *Id.* (quoting F. ZIMRING & G. HAWKINS, *supra*, at 45).

In an important recent article on the importance of symbolism in capital punishment

sistently reflected a "symbolic perspective" of citizens' basic values.[85] It symbolizes the gap between the aspirations of a theoretically positivist and objective common law legal system (in which behavior is allegedly animated by free will and is judged and assessed on a conscious level), and the reality of an indeterminate, subjective, psychosocial universe (in which behavior is determined by a host of biological, psychological, physiological, environmental and sociological factors, and is frequently driven by

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jurisprudence, Professor Barbara Ann Stolz has explained that there are two types of symbols with which we must be concerned: referential symbols (economical devices used for purposes of reference, such as speech, the flag, or a telegraph code) and condensation symbols ("highly condensed forms of substitutive behavior, requiring no check with reality"). Stolz, *Congress and Capital Punishment: An Exercise in Symbolic Politics*, 5 LAW & POL'Y REV. 157, 161 (1983) (discussing Sapir, *Symbolism*, in ENCYCLOPEDIA OF THE SOCIAL SCIENCES 492 (1934)). She draws on the work of Murray Edelman, who has argued that "every controversial or important political act serves in part as a condensation symbol by symbolizing a threat or reassurance. The meaning of these symbols is [to be] derived from the needs of those responding to the political acts." Stolz, *supra*, at 161 (discussing M. EDELMAN, THE SYMBOLIC USES OF POLITICS 7 (1964)). She goes on to add that "one of the functions of symbolization is to induce a feeling of well-being . . . . Thus, the symbolic reassurance generated by passage the of legislation may satisfy a group, although the content of the legislation is inconsistent with the group's interests." *Id.* (discussing M. EDELMAN, *supra*, at 38.). Stolz thus recommends that in order to truly understand the use of symbolism, we must "not only . . . understand how the public reacts to symbols, but [must also understand] how public officials perceive their audience, [how they] understand the relationship between symbolism and law, and [how they] manipulate symbols." Stolz, *supra*, at 162; *see* Tyler & Weber, *Support for the Death Penalty: Instrumental Response to Crime or Symbolic Attitude*? 17 LAW & SOC'Y REV. 21, 43 (1982).

85. This symbolic role is not new. *See, e.g.*, Platt & Diamond, *The Origins and Development of the 'Wild Beast' Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility*, 1 J. HIST. BEHAV. SCI. 355, 365 (1965) [hereinafter Platt & Diamond, *Wild Beast*] ("Underlying most of [the] descriptions and social movements concerning mental illness is the assumption that 'insanity' is the 'ultimate catastrophe' to befall a human being . . . [which stems] from the notion that the mentally ill are not really human beings . . . but have regressed to a state of 'animal appetency.' ").

Inevitably, the public misinterprets and over-exaggerates the effects of important, symbolic court decisions. *See, e.g.*, Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 169-70 (1985). On the mythology of Supreme Court decision-making, see, e.g., Casey, *The Supreme Court and Myth: An Empirical Investigation*, 8 LAW & SOC'Y REV. 385, 393 (1974). The Warren Court —which, ironically, never decided a substantive insanity defense case — has generally been the symbolic target of this enmity. *See* Saltzburg, *Foreward: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, 151-52 nn.1-10 (1980); Perlin, *Symbolic Values*, *supra* note 26, at 95-96. On the public's view of the Warren and Burger Courts' criminal procedure decision-making and the lower courts' responses to those views, see Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 793 (1970); Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185 (1983); Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436 (1980).

unconscious forces).[86] In such a landscape, insanity plea defendants are often little more than "bit players in a larger social struggle."[87] The defense is seen as "a crucial prop in a 'public morality play,' "[88] a "surrogate for resolution of the most profound issues in social and criminal justice,"[89] and as a symbol of "the distribution of value and power between the individual and society."[90] The dissonance caused by the operation of the insanity defense itself and the public's perception of how a criminal justice system should operate[91] must be considered in light of yet another layer of symbolism: the symbolic role of psychiatry in the determination of insanity defense cases.[92] In short, as Holmes pointed out sev-

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86. "Because there is no correspondence between the ideal constructions we project and the actual practices that go on in the world, we create legal rituals and popular symbols which keep us unconscious of the discrepancy between illusion and reality, and facilitate a rough adjustment to an imperfect world." Hill, *supra* note 37, at 379-80 (discussing Arnold, *Trial by Combat and the New Deal*, 47 HARV. L. REV. 913 (1934)). Thus, a legal definition of insanity is merely "a ritual by which juries are put in the proper frame of mind to decide a particular case." Arnold, *Law Enforcement — An Attempt at Social Dissection*, 42 YALE L.J. 1, 23 (1932) [hereinafter Arnold, *Law Enforcement*]. Even after a significant change in the substantive insanity defense (*e.g.*, from *M'Naghten* to *Durham*), "adult education . . . will not immediately replace a system of folklore." Roche, *Durham and the Problem of Communication*, 29 TEMP. L.Q. 264, 267 (1956) (citing Hill, *supra* note 37.).

87. Seidman, *supra* note 85, at 437.

88. Monahan, *Abolish the Insanity Defense? - Not Yet*, 26 RUTGERS L. REV. 719, 721 (1973).

89. Keilitz, *Researching and Reforming the Insanity Defense*, 39 RUTGERS L. REV. 289, 322 (1987).

90. R. SMITH, *supra* note 81, at 172.

91. The critical importance of this dissonance is examined in Wexler, *Offense-Victim*, *supra* note 1, at 20:

> [I]f either the philosophical justification, or the statutory formulation, or the administration of the insanity defense is *gravely disharmonious with the community sense of justice*, it is bad for the [mental health] profession, it is bad for the public attitude toward the criminal justice system, and, more to the point, it won't be carried out.

(emphasis added) (quoting Meehl, *The Insanity Defense*, MINN. PSYCHOLOGIST 11, Summer 1983).

92. *See, e.g.*, R. SMITH, *supra* note 81, at 3 ("The [*M'Naghten*] Rules symbolised and exacerbated an endemic conflict [between law and psychiatry].");
Dession, *Psychiatry and the Conditioning of Criminal Justice*, 47 YALE L.J. 319, 336 (1938) ("The psychiatrist, representing as he does in the popular mind a symbol of the more exacting new penal expectations and of current dissatisfaction, must take care lest he find himself unwittingly sponsoring a psychopathic culture pattern."); *id.* at 328 ("In a sense . . . what we have traditionally sought of criminal justice has been not so much actual as *symbolic performance*.") (emphasis added).

More recently, a student commentator has noted: "It is clear that the law needs the psychiatric language or code which is common to so many other disciplines. But such a code is merely symbolic of the greater need for the re-examination of the subjective aspects

enty years ago, "[w]e live by symbols, and what shall be symbolized by any image of the sight depends on the mind of him who sees it."[93]

Moreover, the purported abuse of the insanity defense symbolizes the alleged breakdown of law and order,[94] the thwarting of punishment[95] (a penalty expressing a "shared litany"[96] of "the community's condemnation"[97]), the failure of the crime control model,[98] and the ascendancy of a "liberal," exculpatory, excuse-ridden jurisprudence, all in the context of the trial of a mentally disabled criminal defendant caught in the "[p]andemonium between the 'mad' and the 'bad' "[99] in our punitive legal culture.[100] The successful use of the defense in the *Hinckley* case symbolizes, on a psychodynamic level, the thwarting of punishment[101] of the

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of the juridical act." Comment, *The Psychiatrist's Role in Determining Accountability for Crimes: The Public Anxiety and an Increasing Expertise*, 52 MARQ. L. REV. 380, 394 (1969) [hereinafter Comment, *Psychiatrist's Role*].

93. O.W. HOLMES, COLLECTED LEGAL PAPERS 270 (1920), *quoted in* Kurland, *The Religious Clauses and the Burger Court*, 34 CATH. U.L. REV. 1, 6 (1984).

94. *See* Seidman, *supra* note 85, at 442-43 n.35 ("As soon as a criminal trial becomes a symbolic confrontation over issues of social policy, the actual facts of the criminal episode assume secondary importance.").

95. *See* J. FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 98 (1970) ("Punishment, in short, has a *symbolic significance* largely missing from other kinds of penalties."(emphasis added)).

The insanity defense has traditionally been seen as "a kind of lynch-pin that holds together the broader system of responsibility-desert-punishment." Homant & Kennedy, *Judgment of Legal Insanity as a Function of Attitude Toward the Insanity Defense*, 8 INT'L J.L. & PSYCHIATRY 67, 78 (1986) [hereinafter Homant & Kennedy, *Judgment*].

96. *See* Morgan, *The "Scientific" Justification for Urine Drug Testing*, 36 KAN. L. REV. 638, 638 (1988) ("Litany is seldom questioned, nor is the speaker of litany often called upon to prove the truth of his statements . . . . Individuals rise to speak out of strong conviction, and congregational beliefs are strengthened in a confirmation of faith and shared attitudes.").

97. J. FEINBERG, *supra* note 95, at 98 ("[P]unishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority . . . or of those 'in whose name' the punishment is inflicted.").

98. *See* Ellsworth, *supra* note 82, at 92 ("a crime control ideology has underlain objections to the insanity defense at least since *M'Naghten*'s case.").

99. Benham v. Edwards, 501 F. Supp. 1050, 1076 (N.D. Ga. 1980), *aff'd* 678 F.2d 511 (5th Cir. 1982), *vacated sub nom.* Ledbetter v. Benham, 463 U.S. 1222 (1983).

100. *See* Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence*, 11 LAW & SOC'Y REV. 427, 447 (1977).

101. In her analysis of the "rhetorical phenomenon" that followed the *Hinckley* acquittal, Professor Barbara Sharf employed "symbolic convergence theory," see Bormann, *Fantasy and Rhetorical Vision: Ten Years Later*, 68 Q.J. SPEECH 288, 292 (1982), to explain the trial's ultimate significance:

[T]he societal order received a severe blow due to the attempted assassination

errant child who commits the perfect Oedipal crime[102] against the perfect father figure,[103] making the subsequent furor inevitable. As in the post-*M'Naghten* era, "[t]he insanity defence *symbolised* a loss of social control"[104] in the eyes of the public.[105]

> that endangered the life of the president . . . . The "not guilty by reason of insanity" verdict further emphasized the descent into chaos, for surely something or someone had to be held responsible for the damages. Since the obvious choice, Hinckley, was now ruled out, guilt had to be assigned elsewhere. Psychiatry became a perfect scapegoat. Through the formulation, propagation, and sharing of the alien, rhetorical vision "that clearly distinguish[ed] the 'we' of the [public] from the 'they' of the [psychiatrists,]" the public was able to feel cleansed and have a sense that the social order was restored.

Sharf, *Send in the Clowns: The Image of Psychiatry During the Hinckley Trial*, 36 J. COMM. 80, 91 (1986) (quoting Bormann, *Symbolic Convergence: Organizational Communication and Culture*, in COMMUNICATION AND ORGANIZATIONS: AN INTERPRETATIVE APPROACH 106 (1983)); *cf.* J. FEINBERG, *supra* note 95, at 100 ("[P]unishment generally expresses more than judgments of disapproval; it is also a symbolic way of getting back at the criminal, of expressing a kind of vindictive resentment . . . . [The criminal's] punishment bears the aspect of legitimatized vengefulness.").

102. *See infra* note 395 and accompanying text.

103. On the unique role of President Reagan as a mythic-figure, see, e.g., L. DEMAUSE, REAGAN'S AMERICA (1984).

104. R. SMITH, *supra* note 81, at 31. Smith contrasted this *symbolic* loss with the realities discovered by empirical studies showing that there was *no* increase in homicides in the aftermath of notorious insanity acquittals (such as *M'Naghten*'s). *Id.* at 30. For a discussion of empirical studies, see *id.*, at 29-31, 185 n.68, and Golding & Roesch, *supra* note 45, at 411-412 (discussing the research contained in Guy, *On Insanity and Crime; and On the Plea of Insanity in Criminal Cases*, 32 J. ROYAL STATISTICAL SOC. 159 (1869)).

Dr. Richard Rogers has criticized the public's response to the Hinckley verdict as reflecting the "tenuous logic," Rogers, *APA's Position*, *supra* note 26, at 840, that "if the verdict was wrong, then the standard was wrong." Rogers, *Unanswered Questions*, *supra* note 78, at 78.

105. The operation of the insanity defense also gives expression to other value-laden symbols. *See generally* Bonnie & Slobogin, *supra* note 32, at 448-49 (insanity defense operates to affirm symbolically social beliefs about free will); Ingber, *A Dialectic: The Fulfillment and Decrease of Passion in Criminal Law*, 28 RUTGERS L. REV. 861, 911 (1975) [hereinafter Ingber, *Dialectic*] (criminal process symbolizes the existence and enforcement of social norms); Seidman, *supra* note 85, at 501 (criminal defendants are treated as symbols and manipulated as part of the struggle for just punishment); Perlin, *Symbolic Values*, *supra* note 26, at 89-92 (the insanity defense is symbolic of the majority conscience when a penalty of death might be imposed); *id.* at 93-95 (the criminal trial process includes various religious and ritualistic symbols which must be examined to understand the process); Sherman, *Guilty But Mentally Ill: A Retreat From the Insanity Defense*, 7 AMER. J.L. & MED. 237, 256 (1981) ("the enactment of the [Guilty But Mentally Ill (GBMI)] statute symbolized a legislative response to the public's growing dissatisfaction with existing insanity laws."). On the GBMI verdict, see *supra* notes 166-67 and accompanying text.

As criminal justice scholars Robert Homant and Daniel Kennedy have pointed out, "insanity defense trials . . . will continue to play an important symbolic role. They will underline the fact that the motivations for criminal behavior are indeed important and that a principled and effective response to offenders requires an understanding of the individuals

Finally, the seemingly endless disposition phase of the insanity defense case simply does not "fit" with the extant criminal-trial-process symbolism.[106] The insanity defense process, unlike other criminal trials which generally end in a conviction or an acquittal, imposes indeterminacy on a system "unique in its ability to pit forces against each other in stark, primitively satisfying fashion and to produce clear-cut winners and losers."[107] As such, it is no surprise that this symbolic dissonance has given rise to some of the most pernicious empirical myths about the defense's use (and alleged misuse), nor that those myths have surfaced in those the rare cases in which the plea was successful.[108]

The growth and development of insanity defense jurisprudence must be read specifically against this symbolism. Only then can the mythology basic to the development of the insanity plea be realistically understood.

C. Historical Overview

Since the first emergence of the concept of individual responsibility,[109] the tension between a purportedly free-will based legal

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involved." Homant & Kennedy, *Subjective Factors in Clinicians' Judgments of Insanity: Comparison of a Hypothetical Case and an Actual Case*, 18 PROF. PSYCHOLOGY RES. & PRAC. 439, 445 (1987) [hereinafter Homant & Kennedy, *Subjective Factors*].

106. *See, e.g.*, Perlin & Sadoff, *Ethical Issues in the Representation of Individuals in the Commitment Process*, 45 LAW & CONTEMP. PROBS. 161, 166-67 (1982):

> Unlike a typical criminal trial in which a defendant is either found "guilty" or "not guilty," . . . a civil commitment matter does not fit into a discrete paradigm. This void causes ambivalence, as the lawyer may be incapable of perceiving the characteristics of a "victory" or a "loss."
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> . . . .
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> . . . [T]he dispositional phase of a commitment case is ambiguous and almost always open for modification (as a partial reflection of the frequent changes in mental conditions and symptomatology of many persons who are the subjects of commitment proceedings). This ambiguity is inconsistent with the concept of "finite resolution," a hallmark of legal decisionmaking.

(footnotes omitted).

107. Seidman, *supra* note 85, at 442; *see also*, Rodriguez, LeWinn & Perlin, *supra* note 58, at 403 (after eight years, 116 of 138 defendants in cases involving insanity defense acquittals in New Jersey were still under the trial court's jurisdiction and subject to its supervision, in accordance with the mandates of State v. Krol, 68 N.J. 236, 344 A.2d 289 (1975)).

108. The Supreme Court's decision in Jones v. United States, 463 U.S. 354 (1983), for example, accepts, honors and perpetuates these myths in a way that predictably refueled political fires. *See* Perlin, *Symbolic Values*, *supra* note 26, at 12-16.

109. Two classic relevant articles on *mens rea* are Levitt, *Extent and Function of the Doctrine of* Mens Rea, 17 ILL. L. REV. 578 (1923) (doctrine developed *via* the penitential books of the English Catholic church in the ninth century), and Sayre, Mens Rea, 45

system and a purportedly deterministically-driven scientific or psychodynamic system has been the critical obstacle to the development of a coherent insanity defense doctrine.[110] This tension has reflected several parallel lines of activity: (1) the development of psychiatry as a medical specialty; (2) the concomitant expansion of psychological knowledge and awareness (and the public's response to these developments); (3) the development of the substantive insanity defense, and (4) the simultaneous legal and medical critique of each test articulated.

While it has been commonly accepted that both substantive and procedural modifications in the insanity defense were roughly correlated to "advances" in medical science and psychology,[111] the *détente* between law and psychodynamics has been, and remains, unstable.[112] For every insanity defense "refinement" that paral-

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HARV. L. REV. 974 (1923) (concept developed in twelfth century).

110. *See* Ingber, *Dialectic*, *supra* note 105, at 895-96:

> While intellectually our society may accept the concept of determinism, our passion response is still based on the theory of free will. Free will and determinism are constructs on differing conceptual levels:
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> > Determinism refers to the complex of causal factors, hereditary and environmental, internal and external, past and present, conscious and unconscious, which combine to produce a certain resultant in a given individual . . . . Free will, on the other hand, is not on the same conceptual level . . . . It refers to a subjective psychological experience and to compare it to determinism is like comparing the enjoyment of flying to the law of gravity.
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> (quoting Knight, *Determinism, "Freedom," and Psychotherapy*, 9 PSYCHIATRY 251, 255 (1946)).

A Canadian psychiatrist, Brian Hoffman, has put the issue more tersely: "Medical and legal views of the mentally ill cannot be amalgamated." Hoffman, *Is Psychiatry Being Harmed by Involuntary Hospitalization and Treatment*? 137 CANAD. MED. A.J. 17, 19 (1987). *See generally* State v. Breakiron, 108 N.J. 591, 595, 532 A.2d 199, 201 (1987) ("Twelve centuries of debate have yet to resolve the law's attitude about the criminal mind"); Moore, *Mental Illness and Responsibility*, 39 BULL. MENNINGER CLINIC 308 (1975) (discussing theories of individual responsibility in the context of mental illness).

111. For example, greater comprehension of brain functioning and refutation of the "diseased brain" model, development of a psychodynamic model, "discovery" of the unconscious and recognition of Freudian principles, advances in classification and etiology of mental disorder, development of integrated personality theory, application of the psychoanalytic model to criminology, and discoveries in brain biochemistry. *See generally* Bonnie, *Moral Basis*, *supra* note 1, at 195 ("The historical evolution of the insanity defense has been influenced by the ebb and flow of informed opinion concerning scientific understanding of mental illness and its relation to criminal behavior.").

112. *See* H. WEIHOFEN, URGE, *supra* note 61, at 43 ("We lawyers . . . expect the psychiatrist to give us *exact* answers. Psychiatry is Science, and like everyone in our twentieth century civilization, we have tremendous faith in what the scientific method can do. We don't distinguish very carefully between the medical and the physical sciences."). On the indeterminacy of much of the physical sciences, *see infra* text accompanying notes 363-

leled greater comprehension of human behavior, there has been a concomitant regression as a result of a highly-publicized case bringing about an unpopular verdict.[113]

In order to fully appreciate the significance of these developments (and counter-developments), we must consider the following: the historical development of psychiatry and psychology, focusing particular attention on how these developments were consonant, dissonant or assonant with public perceptions of "craziness" and the treatment of the mentally disordered; the unique role of punishment in Anglo-American culture, and the way that responsibility defenses are seen as somehow "cheating" society of its right to vindication when the penal law is violated; the legal critique of these developments, leading to the uneasy relationship between law and forensic psychiatry; and each substantive development of the insanity defense, the critiques which emerged following each change in the law, and the specific role of the politically-charged trial, particularly *Hinckley*'s, in these developments.[114]

1. The Development of Psychiatry

The historical development of psychiatry and psychology must be seen in the context of public perceptions of "craziness" and the treatment of the mentally disordered.[115] This history

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113. While the parallels between the *M'Naghten* and *Hinckley* trials have been well-explored, see sources cited *supra* note 45, there has been surprisingly little written on the relationship between the *Hinckley* trial and the trial of Charles Guiteau, the assassin of President Garfield. *But see* Bulmash, *The Irony of the Insanity Defense: A Theory of Relativity*, 10 J. PSYCHIATRY & L. 205 (1982) (comparing the status of psychological theories of human behavior in the times of Guiteau and Hinckley). What is especially startling is the nearly identical significance in each trial — separated by nearly a full century — of the presence (or absence) of measurable and identifiable "brain disease." *Compare, e.g.*, L. CAPLAN, *supra* note 44, at 75-85 (on importance of testimony dealing with "objective medical evidence" in the *Hinckley* trial) *with* Zilboorg, *Legal Aspects of Psychiatry*, in ONE HUNDRED YEARS OF AMERICAN PSYCHIATRY 507, 557 (1944) (quoting a witness at the Guiteau trial: "In every case of insanity there is disease of the brain which may be discovered if the proper methods are made use of to discover it. I have never yet examined a case in which I did not discover marked disease of the brain").

114. To the extent that these developments relate to the central thesis of this article, I will explore them below. In a series of forthcoming works, see supra note *, I hope to examine each of these in greater depth.

115. The literature on this topic is, as would be expected, voluminous. *See, e.g.*, F. ALEXANDER & S. SELESNICK, THE HISTORY OF PSYCHIATRY (1966); W. BROMBERG, FROM SHAMAN TO PSYCHOTHERAPIST: A HISTORY OF THE TREATMENT OF MENTAL ILLNESS (1975 rev. ed.); THE HISTORY OF PSYCHOTHERAPY: FROM HEALING MAGIC TO ENCOUNTER (J.

reveals that mental illness was tied to notions of religion[116] and traditionally seen as God's punishment for sin,[117] and that until

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Ehrenwald ed. 1976) [hereinafter HISTORY OF PSYCHOTHERAPY]; W. OVERHOLSER, THE PSYCHIATRIST AND THE LAW (1953); G. ZILBOORG, A HISTORY OF MEDICAL PSYCHOLOGY (1941) [hereinafter G. ZILBOORG, MEDICAL PSYCHOLOGY]; Musto, *A Historical Perspective*, in PSYCHIATRIC ETHICS 13 (1981).

It is also necessary to consider the concomitant development of social history and the sociology of medicine in attempting to draw a full picture. *See, e.g.*, M. FOUCAULT, MADNESS & CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON (1963); G. ROSEN, MADNESS IN SOCIETY (1968); A. SCULL, MUSEUMS OF MADNESS (1979); R. SMITH, *supra* note 81, at 4-5.

The medical historian Roger Smith suggests further that "the history of the insanity defence is intimately tied up with questions of interest to historians of many persuasions," focusing on (1) the way the "public, emotive, symbolic and capital implications of murder trials . . . have created a . . . record of controversy over the medical definition of an individual's relation to society," and (2) "[h]ow it is possible to establish a social history of scientific thought in the face of still dominant positivist epistomologies of scientific knowledge." Smith, *Scientific Thought and the Boundary of Insanity and Criminal Responsibility*, 10 PSYCHOLOGICAL MED. 15, 15 (1980).

Furthermore, psychiatry can be seen as being "inextricably tied" to the values of the prevailing class and culture. Romanucci-Ross & Tancredi, *Psychiatry, The Law and Cultural Determinants of Behavior*, 9 INT'L J.L. & PSYCHIATRY 265, 291 (1986). "Forensic psychiatry is always accompanied by a set of cultural attitudes . . . [representing] an anthropology concerning the nature of man and the nature of culture . . . ." *Id.* at 265; *see also* L. ROMANUCCI-ROSS, D. MOERMAN & L. TANCREDI, THE ANTHROPOLOGY OF MEDICINE: FROM CULTURE TO METHOD 262 (1983) ("Because it is concerned with disorders of mood, thought, and behavior, psychiatry must eke out of the panorama of everyday life . . . disturbances . . . [which] involve an infusion of the symbols, imageries, and metaphors of the culture into the content of the specific patterns [of behavior].").

116. *See* M. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 64-65 (1984) (considering the basis of the insanity defense as an outgrowth of the rationale in support of the exculpation of children under the age of 7 (who "knoweth not of good and evil") and is itself an adaptation of the language of Genesis).

117. *See* J. BIGGS, THE GUILTY MIND 38-39 (1955); J. NEAMAN, SUGGESTION OF THE DEVIL: THE ORIGINS OF MADNESS 31 (Anchor ed. 1975); *see also* A. GOLDSTEIN, *supra* note 54, at 10 ("Many who did not accept the 'devil theory' saw the insane as marked by God for misfortune. As a result, the mad were as likely as the bad to be beaten, exorcised, or burned."); de Vito, *Some New Alternatives to the Insanity Defense*, 1 AM. J. FORENSIC PSYCHIATRY 38-39 (1980) (discussing the "sharply contrasting conceptualizations" of "mental illness" in the era from 100 B.C. to 100 A.D.); Fentiman, *supra* note 57, at 605-08, 651-52 ("The insanity defense had its genesis in a single, homogeneous, highly religious and moralistic society."); Swartz, *'Mental Disease': The Groundwork for Legal Analysis and Legislative Action*, 111 U. PA. L. REV. 389, 409 n.69 (1963) (quoting Menninger, *Community Attitudes Vis a Vis the Offender*, in ABA SECTION ON CRIMINAL LAW, PROCEEDINGS 83, 85 (1958)):

> 'The infestation or 'devil-possession' theory, this ontological conception of mental disease as a *thing* present or not present in the individual, is an erroneous medieval and pre-medieval concept which persists in the minds of many laymen, not a few lawyers, and even a few physicians in spite of all sorts of efforts to eliminate it.'

For fascinating accounts of popular stereotypes of madness, and the significance of the *appearance* of the insane, see S. GILMAN, SEEING THE INSANE 2-11 (1982); M. FOUCAULT,

the middle of the eighteenth-century, these religious attitudes exerted great influence on the treatment of the mentally ill.[118]

In reaction to medieval scholasticism and superstition,[119] Dr. Sigmund Freud developed psychoanalysis[120] which evolved, after a lengthy series of detours, into modern dynamic psychiatry.[121]

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supra note 115, at 15.

118. J. NEAMAN, *supra* note 117, at 55 ("The major difference . . . between the medieval and the modern response to insanity is that what the theologian of the Middle Ages called sin, we call sickness."); Halleck, *A Critique of Current Psychiatric Roles in the Legal Process*, 1966 WIS. L. REV. 379, 383 [hereinafter Halleck, *Critique*] ("In eras when mental illness was approached from a more theological standpoint, efforts were made to place the responsibility for sick behavior on external 'devils' such as incubi or succubi."); Musto, *supra* note 115, at 15-24; Platt & Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 CALIF. L. REV. 1227, 1231 (1966) [hereinafter Platt & Diamond, *Right and Wrong*] ("The social control of criminals and deviates during the medieval period was guided by the moral dogmata reflected in theological literature."); *see also* Loevinger, *Law and Science as Rival Systems*, 8 JURIMETRICS J. 63, 63 (1966):

> The origins of both law and science lie buried deep in primitive religion and superstition, and both were dominated by the priesthood until the emancipation of the intellectual revolution which was the real foundation of the scientific revolution, the industrial revolution, and the period of enlightenment and political emancipation that began in the 16th century.

As medical historian Gregory Zilboorg has noted, "[t]he psychological attitude toward the criminal, the hatred of the witch and the sorcerer as an emotion of 'fury and vengeance' proved much stronger determinants in civilized justice than did rational science." G. ZILBOORG, MEDICAL PSYCHOLOGY, *supra* note 115, at 243 (referring to the sixteenth century).

119. Loevinger, *supra* note 118, at 65-66 (modern science and law developed contemporaneously "as a reaction against and rejection of medieval scholasticism and superstition."). *See generally id.* at 65 ("Science as an organized discipline with recognized tactics and strategy involving rigorous modes of observation and experiment has been developed only since the early 17th century") (footnote omitted); Menninger, *Medicolegal Proposals of the American Psychiatric Association*, 19 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 367, 369 (1928-29) ("About 150 years ago . . . the scientific method began to be applied to the matter of human sickness.").

120. *See, e.g.*, F. ALEXANDER & H. STAUB, THE CRIMINAL, THE JUDGE, AND THE PUBLIC 22-23 (1956):

> Psychoanalysis was the first branch of human knowledge which undertook to investigate the psychology of the real individual, i.e., of the deeper motive powers of human actions. Psychoanalysis, therefore, claims a right to speak when the matter of the judging of the criminal is considered; it believes that it could, by means of its special methods, lead to a complete understanding of the criminal and his acts . . . . Real psychology . . . was uncovered by Freud.

See generally F. ALEXANDER, OUR AGE OF UNREASON: A STUDY OF THE IRRATIONAL FORCES IN SOCIAL LIFE (rev. ed. 1971) (discusses the post-Freudian trend toward recognition of the importance of psychological processes in all human behavior); PSYCHOANALYSIS, SCIENTIFIC METHOD AND PHILOSOPHY (S. Hook ed. 1959) (exploring the scientific status of psychoanalysis); R. WEST, CONSCIENCE AND SOCIETY (1942), in INTERNATIONAL LAW AND PSYCHOLOGY (1974) (psychological theory of law).

121. Dynamic psychiatry is "[t]he study of emotional processes, their origins and

While Freudianism has been sharply criticized in recent years for various reasons,[122] its impact on the judicial system and on western civilization was revolutionary.[123]

2. The Rejection of Psychodynamic Principles and the Role of Punishment

Psychodynamic principles appear to cut against the powerful forces of punishment in the criminal justice process. Such punishment has been seen for centuries as serving to express profound feelings of social disapproval and reprobation,[124] as well as being a corrective, educative and socializing deterrent that is necessary for the preservation of the public welfare.[125] Punishment may also be viewed as a "ritualistic device"[126] which conveys "moral condem-

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mental mechanisms, which seeks to analyze the active, energy-filled, and constantly changing factors in human behavior and motivation, and thus convey the concepts of progression or regression." BLAKISTON'S GOULD MEDICAL DICTIONARY 416 (4th ed. 1979). On the public's historic distrust of dynamic psychiatry, see V. BROME, FREUD AND HIS EARLY CIRCLE 31-38 (1968).

122. *See, e.g.*, State v. Schantz, 98 Ariz. 200, 210, 403 P.2d 521, 527-28 n.7 (1965), *cert. denied*, 382 U.S. 1015 (1966):

> "The best psychiatry is still more of an art than of science," writes a recognized expert . . . . [A] forthright investigator concludes that "no critically minded person practiced in scientific research or in disciplined speculation can accept psychoanalysis on the basis of the writings of Freud or of any of his followers. The presentation of facts is inadequate; the speculation is irresponsible; verifications are lacking; conclusions are hastily arrived at, and concepts are hypostatized." Finally, it is admitted that, with some exceptions, "there has been no real psychiatric insight into criminalistic behavior."

(quoting Hall, *Mental Disease and Criminal Responsibility*, 45 COLUM. L. REV. 677, 682 (1945)). *See generally* Morse, *Failed Explanations*, *supra* note 32 (arguing that psychodynamic questions are irrelevant to issues of criminal responsibility and punishment).

123. *See generally* Deutsch, Platt & Senghaas, *supra* note 70, at 451 (listing Freud's contributions among those that have played a central role in the advancement of the psychological sciences).

124. *See, e.g.*, Boldt, *Restitution, Criminal Law, and the Ideology of Individuality*, 77 J. CRIM. L. & CRIMINOLOGY 969, 1004 (1986) (discussing Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949 (1966)); DeGrazia, *Crime Without Punishment: A Psychiatric Conundrum*, 52 COLUM. L. REV. 746, 756 (1952) ("The retributive aspect of punishment has its roots deep in the psyche of man").

125. *See* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 312 (2d ed. 1960); Hawkins, *Punishment and Deterrence: The Educative, Moralizing and Habituative Effects*, 1969 WIS. L. REV. 550; Schmideberg, *The Promise of Psychiatry: Hopes and Disillusionment*, 57 NW. U.L. REV. 19, 27 (1962).

126. *See* Heinbecker, *Two Year's Experience Under Utah's Mens Rea Insanity Law*, 14 BULL. AM. ACAD. PSYCHIATRY & L. 185, 190 (1986) (The insanity defense serves a "ritual function whereby lawyers can move clients from the legal system to the mental health system."). On the way that attempts at abolition simply create additional, symbolic "paper" shifts of legal categories, see Steadman, Callaghan, Robbins & Morrisey, *Mainte-*

nation" upon wrongdoers, and which dramatizes such condemnation through a public "degradation ceremony."[127] The need to inflict punishment is heightened when the victim is either an elected political official or a law enforcement officer.[128]

Thus, punishment is clearly a socially sanctioned safety valve[129] through which we express community condemnation of wrongdoers, especially the wrongdoers whom we fear the most.[130] In this way, punishment takes on an important symbolic significance: more than mere disapproval, it represents "a kind of vindictive resentment" as a "way of getting back at the criminal."[131]

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nance of an Insanity Defense Under Montana's "Abolition" of the Insanity Defense, 146 AM. J. PSYCHIATRY 357 (1989) (finding that Montana's abolition of the insanity defense, has had the effect of increasing the number of cases in which defendants were found incompetent to stand trial).

On the symbolic importance of the law's ritual function in "keep[ing] peace with the public morality," see Kaplan, *Barriers to the Establishment of a Deterministic Criminal Law*, 46 KY. L.J. 103, 104 (1957) (discussing T. ARNOLD, THE SYMBOLS OF GOVERNMENT (1935)).

127. Boldt, *supra* note 124, at 1004 (quoting Hawkins, *supra* note 125, at 553-60, and Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOC. 420, 421-23 (1956)); *see also, e.g.*, Brakel, *"Presumption, Bias, and Incompetency in the Criminal Process*, 1974 WIS. L. REV. 1105, 1116 (1974) (criminal trial as "morality play"); Ingber, *Dialectic, supra* note 105, at 911 ("The criminal process is . . . a pageant which dramatizes the differences between 'we' and 'they' by portraying a symbolic encounter between the two.").

128. *See, e.g.*, N.Y. PENAL LAW § 125.27 (McKinney 1987), limiting murder in the first degree to cases where (1) the victim is a police official or a correctional facility employee, or (2) the defendant is serving a term of imprisonment of at least 15 years to life or is an escapee from a state correctional facility. Retribution and the protection of prison guards and the prison population have been explicitly articulated as the rationale for the passage of this statute. People v. Smith, 63 N.Y.2d 41, 77, 468 N.E.2d 879, 897, 479 N.Y.S.2d 706, 724 (1984), *cert. denied* 469 U.S. 1227 (1985).

129. *See* Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1512 (1974) ("Even if popular resentment would not lead to mob violence, it can be argued that giving an outlet for this resentment will contribute to the psychological health of the community."); Watson, *A Critique of the Legal Approach to Crime and Correction*, 23 LAW & CONTEMP. PROBS. 611, 611-12 (1958) ("[E]arly relinquishment of personal retaliation to the social institution of the law was a mutual agreement whereby all parties agreed to suppress their own retaliative impulses in exchange for similar suppression on the part of others, turning the function of punishment over to the sovereign.").

130. Davis, *Setting Penalties: What Does Rape Deserve?*, 3 LAW & PHIL. 61, 81 (1984).

131. J. FEINBERG, *supra* note 95, at 98-100; *see also* DeGrazia, *supra* note 124, at 764 ("To the public the criminal has always been the 'badman' and without him there is no 'badman.' Perhaps, as was suggested, they want their badman for a scapegoat; but perhaps, too, they want him so that they can keep straight who is good and who is bad.").

Thus, as Andrew Watson has noted, "the moment . . . rehabilitative impulses emerge into expressions, the legal system is doomed to encounter contradiction, confusion, and fre-

In contrast, psychodynamic principles have been characterized by their critics as reflecting a "peculiarly tolerant attitude toward criminal behavior"[132] and the urge to "replace the negative pattern of fear and repression which has dominated penology."[133]

3. The Legal Critique of Psychiatry

Once dynamic psychiatrists began to criticize the theological view of responsibility and their influence among criminal law theoreticians on such issues as punishment, rehabilitation, and responsibility began to increase,[134] battles based on professional rivalries frequently centered on the insanity defense, which came to symbolize "competition in the administration of deviance and between strategies of . . . control."[135]

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quent public criticism." Watson, *On the Preparation and Use of Psychiatric Expert Testimony: Some Suggestions in an Ongoing Controversy*, 6 BULL. AM. ACAD. PSYCHIATRY & L. 226, 226 (1978). *See generally* Tyler & Weber, *supra* note 84, at 26-27 (discussing punitiveness as a symbolic attitude).

132. Guttmacher, *The Psychiatric Approach to Crime and Correction*, 23 LAW & CONTEMP. PROBS. 633, 633 (1958) [hereinafter Guttmacher, *Psychiatric Approach*].

133. *Id.* at 642.

This should not imply that psychiatry speaks (or ever did speak) with a unified voice on this issue. First, it is historically clear that the debate over "moral insanity," *see infra* text accompanying notes 141-54, reflected a deep split in psychiatry's attitudes toward the mentally ill individual charged with crime. *See, e.g.*, Grissom, *True and False Experts*, 35 AM. J. INSAN. 1 (1878) (historical perspective on law-medicine relationship in the context of criminal insanity pleas). Second, the history of psychiatry in the twentieth century is not a history of a unified movement. Beyond the deep rift which exists between the "directive/organic" and "analytic/psychological" schools, *see, e.g.*, A. HOLLINGSHEAD & F. REDLICH, SOCIAL CLASS AND MENTAL ILLNESS (1958), even a cursory reading of recent decisions of the Supreme Court of the United States in this area will quickly illuminate the difference in positions between what Guttmacher might call "tolerators" and psychiatrists such as Dr. James Grigson, known colloquially as "Dr. Death." *See* Perlin, *Symbolic Values*, *supra* note 26, at 7 n.44 (citing cases); *see also* Dain & Carlson, *Moral Insanity in the United States*, 1835-1866, 117 AM. J. PSYCHIAT. 795, 797-79 (1960) (conflict in nineteenth century psychiatric positions on "moral insanity"). To some extent, the split identified by Dain and Carlson between somatically-oriented and psychologically-oriented psychiatrists, *see id.* at 797, tracks the division between organic and analytic mental health practitioners still present today. *See* A. HOLLINGSHEAD & F. REDLICH, *supra*; Kreitman, *Psychiatric Orientation: A Study of Attitudes Among Psychiatrists*, 108 J. MENTAL SCI. 317 (1962).

134. While the relationship between law and psychiatry has been a cyclical one, *see, e.g.*, J. ROBITSCHER, THE POWERS OF PSYCHIATRY (1980); A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION (1975), as a result of recent developments — including specifically the *Hinckley* acquittal — there is now "greater ferment" in the law/psychiatry relationship than at any time since the 1950's. Bonnie, *Morality, Equality, and Expertise: Renegotiating the Relationship Between Psychiatry and the Criminal Law*, 12 BULL. AM. ACAD. PSYCHIATRY & L. 5 (1984) [hereinafter Bonnie, *Morality*].

135. R. SMITH, *supra* note 81, at 169. *See generally* Comment, *Legal and Psychiat-*

Legal commentators viewed with suspicion what they perceived as an unseemly exculpatoriness — if not to say softness — inherent in modern psychiatry.[136] As Professor Jerome Hall has noted fairly bluntly, "because Anglo-American criminal law embodies and safeguards important values, it ought to be obvious that not all the discoveries of psychiatry are grounds for modification of the criminal law."[137] One important example of this attitude has always been the widespread concern that the insanity defense "does not protect the public."[138] Thus, it is suggested that retribution is the theory that probably "most sharply separates the psychoanalyst and the moralist."[139]

4. Substantive Doctrinal Developments

Prior to the mid-nineteenth century, the development of the insanity defense tracked both the prevailing scientific and popular concepts of mental illness, responsibility and blameworthiness.[140] Before *M'Naghten*, the substantive insanity defense went through

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ric Concepts and the Use of Psychiatric Evidence in Criminal Trials, 73 CALIF. L. REV. 411, 411-17 (1985) [hereinafter Comment, *Concepts*] (arguing that as long as psychiatry clarifies policy distinctions established by the law, the law will accept it, but if psychiatry begins to infringe on the laws ability to carry out its policies, the law will act to maintain its control).

136. *See, e.g.*, Guttmacher, *Psychiatric Approach*, *supra* note 132, at 633 ("The psychiatrist has a peculiarly tolerant attitude toward criminal behavior, which is born out of his recognition of the welter of antisocial impulses occurring in noncriminal individuals."); *see also infra* text accompanying notes 345-62.

137. Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L.J. 761, 761 (1956).

138. Carey, *Message to the Legislature, quoted in* R. CARTER, HISTORY OF THE INSANITY DEFENSE IN NEW YORK STATE 13 n.43 (1982).

139. Louisell & Diamond, *Law and Psychiatry:* Détente, Entente, *or Concomitance?* 50 CORNELL L.Q. 217, 223 (1965).

140. This has been a particularly fertile topic for legal and behavioral scholars and historians. *See, e.g.*, D. HERMANN, THE INSANITY DEFENSE (1983); R. SMITH, *supra* note 81, at 1-46; 1 N. WALKER, CRIME AND INSANITY IN ENGLAND (1973); Hermann & Sor, *supra* note 45; Moran, *The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield*, 19 LAW & SOC'Y REV. 487 (1985); Walker, *The Insanity Defense Before 1800*, 477 ANNALS 25 (1985).

On the question of responsibility in this context:

> The basis of responsibility is not [a] condition, but a process; a process of scientific study of the factors of criminality in the individual case, and of the balancing, by trained, experienced scientists, of the individual and social interests involved in each individual case, and with reference to the ideals of our day and age.

Glueck, *Ethics, Psychology and the Criminal Responsibility of the Insane*, 14 J. CRIM. L. & CRIMINOLOGY 208, 248 (1924).

three significant stages: the "good and evil" test,[141] the "wild beast" test,[142] and the "right and wrong" test.[143] Each of these tests reflected prevailing cultural and social myths, the triumph of superstition and demonology over enlightenment and reason, and the spurious use of science to justify the imposition of specific behavioral norms.

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141. The "good and evil" test apparently first appeared in a 1313 case involving the capacity of an infant under the age of seven, Platt & Diamond, *Right and Wrong*, *supra* note 118, at 1233 (discussing Y.B. 6-7 Edw. 2, pl. 135, *reprinted in* 24 SELDEN SOCIETY 109 (1909)). On the relationship between the insanity defense and the capacity of infants, see Walker, *supra* note 140, at 28-29.

The insane, like children, were incapable of "sin[ning] against [their] will" since man's freedom "is restrained in children, in fools, and in the witless who do not have reason whereby they can choose the good from the evil." Platt & Diamond, *Right and Wrong*, *supra* note 118, at 1233 (quoting Michel, AYENBIT OF INWYT, OR REMORSE OF CONSCIENCE 86 (Morris ed. 1866) (treatise written in 1340)). The operative assumption was that "the mental anguish and suffering of the insane is sufficient to account for any retributive feelings we might have towards them concerning their misdeeds." Golding, *Mental Health Professionals and the Courts: The Ethics of Expertise* (1989) (manuscript at 7). In short, to further punish the insane would create a sort of moral double jeopardy. Similarly, Professor Golding believes that "the key to understanding the level of emotionality surrounding [the insanity defense] can be found in the "deeply rooted moral and religious tension which surrounds the attribution of individual responsibility for 'good' and 'evil.'" *Id.*

142. In Rex v. Arnold, Y.B. 10 Geo. 1 (1724), *reprinted in* 16 A COMPLETE COLLECTION OF STATE TRIALS 695 (T. Howell ed. 1812), the defendant shot and wounded a British Lord in a homicide attempt. Judge Tracy instructed the jury that it should acquit by reason of insanity if it found the defendant to be a madman which he described as "a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than *a brute, or a wild beast*, such a one is never the object of punishment[.]" *Arnold* has been characterized by Dr. Jacques Quen as the "first of the historically significant" insanity defense trials, Quen, *Criminal Insanity: An Historical Perspective*, 2 BULL. AM. ACAD. PSYCHIATRY & L. 115, 117 (1973), *quoted in* Eule, *The Presumption of Insanity: Bursting the Bubble*, 25 UCLA L. REV. 637, 678 (1978).

The word "brute" appears to have been a mistranslation of Bracton's use of the Latin word *brutis*, Platt & Diamond, *Wild Beast*, *supra* note 85, at 360; *see also id.* at 365 n.61 (explaining source of error); Quen, *Isaac Ray and Charles Doe: Responsibility and Justice* in LAW AND THE MENTAL HEALTH PROFESSIONS: FRICTION AT THE INTERFACE 237 (1978) (brute as referring to farm animals such as "badgers, foxes, deer, and rabbits"). Thus, the emphasis was apparently meant to focus on a lack of *intellectual ability*, rather than the savage beast-like image the phrase calls to mind. Yet, the "wild beast" image of mental illness remained a powerful and long-lasting one, and the test stands as "a significant archetype." Platt & Diamond, *Wild Beast*, *supra* note 85, at 365; *see, e.g.*, Penry v. Lynaugh, 109 S. Ct. 2934, 2954 (1989) (citing "wild beast" test to define the level of idiocy that has historically barred punishment).

143. In Regina v. Oxford, 173 Eng. Rep. 941 (1840), Lord Denman charged the jury that it must determine whether the defendant, *"from the effect of a diseased mind,"* knew that the act was wrong, and that the question that must thus be answered was whether *"he was . . . unaware of the nature, character, and consequences of the act he was committing." Id., quoted in* D. HERMANN, *supra* note 140, at 33.

These opinions reflected the public's demand for an all-or-nothing test of insanity,[144] a conceptualization which has been peculiarly foreign to psychiatry since at least the middle of the nineteenth century.[145] Similarly, the demonological concept of mental illness retained its power centuries after the scientific study of human behavior supplanted this realm of theological dogma; yet, the perception of mental illness as a "separate and pernicious external agent" persists to this day.[146]

Virtually all the developments in insanity defense jurisprudence, from *M'Naghten*[147] to the American Law Institute's Model

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144. This demand did not die in the nineteenth century. *See, e.g.*, Holloway v. United States, 148 F.2d 665, 667 (D.C. Cir. 1945) *cert. denied* 334 U.S. 852 (1948) ("For the purposes of conviction there is no twilight zone between abnormality and insanity. An offender is wholly sane or wholly insane."); Johnson v. State, 292 Md. 405, 421, 439 A.2d 542, 552 (1982) ("For the purpose of guilt determination, an offender is either wholly sane or wholly insane."); J.C. GOODWIN, INSANITY AND THE CRIMINAL 253 (1924) ("Lawyers, regarding irresponsibility as a disorder of the intellect, demand that the boundary line between responsibility and irresponsibility, shall be clearly defined. Medical science, regarding irresponsibility as a disorder of the emotions, insists that no definable boundary line exists.").

145. *See, e.g.*, J. BUCKNILL, UNSOUNDNESS OF MIND IN RELATION TO CRIMINAL ACTS 2 (1856):

> Insanity is a condition of the human mind ranging from the slightest aberration from positive health to the wildest incoherence of mania, or the lowest degradations of cretinism. Insanity is a term applied to conditions measurable by all the degrees included between these widely separated poles, and to all the variations which are capable of being produced by partial or total affection of the many faculties into which the mind can be analyzed.

; see also C. MERCIER, CRIMINAL RESPONSIBILITY 103 (1926) ("Insanity is a disease or disorder . . . not of this or that organ, or tissue, or part of the body, as are the diseases, which come under the purview of the general physician or surgeon, but of the whole individual who is the subject of the disorder."); W. OVERHOLSER, *supra* note 115, at 45 (rejecting the notion "that there are no gradations or shadings"); Brancale, *More on* McNaughten*: A Psychiatrist's View*, 65 DICK. L. REV. 277, 278 (1961) ("[B]ecause of its rigidity," the *M'Naughten* rule was unable to accommodate the full range of "abnormal mental states."); Bromberg & Cleckley, *The Medico-Legal Dilemma: A Suggested Solution*, 42 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 729, 733 (1952) ("There is little or nothing in medical evidence to indicate that all degrees of disability short of demonstrable psychosis imply that the subject has unimpaired (normal) ability to evaluate moral and ethical issues and conduct himself properly thereby."); Diamond, *Criminal Responsibility of the Mentally Ill*, 14 STAN. L. REV. 59, 62 (1961) (there is no sharp division between those who are mentally ill and those who are not); Morse, *Treating Crazy People Less Specially*, 90 W. VA. L. REV. 353, 361 (1987) [hereinafter Morse, *Treating Crazy*] ("The capability for responsible behavior varies along a continuum").

146. S. HALLECK, PSYCHIATRY AND THE DILEMMAS OF CRIME: A STUDY OF CAUSES, PUNISHMENT AND TREATMENT 210 (1967) [hereinafter S. Halleck, PSYCHIATRY].

147.

> [T]he jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes,

Penal Code test[148] (with detours for the irresistible impulse test[149] and the now-abandoned *Durham* "product" experiment[150]), reflected the prevailing myths, superstition and demonology to which I have previously referred. Although the *M'Naghten* test was severely criticized for its rigidity, for concentrating inappropriately on the defendant's cognitive powers while ignoring "the affective and volitional components of behavior,"[151] and for its reliance on outmoded psychological theory,[152] it was considered "sacrosanct" by nearly all American courts for over a century,[153] in large part "because the courts regard[ed] it as the best criteria

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

M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843).

For detailed discussions of the case, see, *e.g.*, D. WEST & A. WALK, DANIEL MCNAUGHTON: HIS TRIAL AND THE AFTERMATH (1977); R. MORAN, KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL MCNAUGHTAN 18 (1981); Quen, *An Historical View of the M'Naghten Trial*, in 1 THE PSYCHOLOGICAL FOUNDATIONS OF CRIMINAL JUSTICE 90 (1978).

148. MODEL PENAL CODE § 4.01(1) (Proposed Official Draft 1962). "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." *Id.*

149. *See, e.g.*, Parsons v. State, 81 Ala. 577, 596, 2 So. 854, 866 (1866).

150. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), *overruled*, United States v. Brawner, 471 F.2d 969, 981 (D.C. Cir. 1972).

151. Hermann & Sor, *supra* note 45, at 515.

152. *Id.* at 512 n.60; *see* Lewinstein, *The Historical Development of Insanity as a Defense in Criminal Actions* (Part II), 14 J. FORENS. SCI. 469 (1969). *See generally*, J. HALL, *supra* note 125, at 487 ("[L]ong before . . . modern psychiatry, it was insisted that . . . 'the test of irresponsibility [should not be] whether the individual be conscious of right and wrong — not whether he had a knowledge of the consequences of his act — but whether he can properly control his actions!' " (quoting S. KNAGGS, UNSOUNDNESS OF MIND CONSIDERED IN RELATION TO THE QUESTION OF RESPONSIBILITY FOR CRIMINAL ACTS (1854))).

The rules reflected a theory of responsibility that was outmoded prior to its adoption, and bore little resemblance to what was known about the human mind, even at the time of their promulgation. *See* J. BIGGS, *supra* note 117, at 108. The rules were developed at a time when it was generally "believed that the mind was each person's link with God or the supernatural." Hovenkamp, *Insanity and Criminal Responsibility in Progressive America*, 57 N.D.L. REV. 541, 544 (1981). "[P]redicated on the notion that the human mind was dark and mysterious," *id.*, they rejected the principle at the core of modern psychology: that a human functions as a "unitary being," that is, that "reason, will [and] feeling" coalesce and are integrated. Hall, *supra* note 137, at 775.

153. Guttmacher, *The Quest for a Test of Criminal Responsibility*, 111 AM. J. PSYCHIATRY 428, 428 (1954) [hereinafter Guttmacher, *Quest*].

yet articulated for ascertaining criminal responsibility *which comports with the moral feelings of the community.*"[154]

Yet, when the *Durham* court made its decision to reject *M'Naghten* on the theory that the mind of man was a "functional unit,"[155] and that a far broader test would be appropriate,[156] the new test was criticized as a "non-rule" that provided "the jury with no standard by which to judge the evidence,"[157] misidentified the "moral issue of responsibility with the scientific issues of diagnosis and causation,"[158] and too heavily depended upon expertise, leading to the usurpation of jury decision-making by psychiatrists.[159] The inevitable dismantling of *Durham*[160] was completed in *United States v. Brawner*,[161] which discarded the "product"

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154. Sauer v. United States, 241 F.2d 640, 649 (9th Cir. 1957) (emphasis added), *overruled*, Wade v. United States, 426 F.2d 64, 73 (9th Cir. 1970). *See generally* Virgin Islands v. Fredericks, 578 F.2d 927, 936-37 (3d Cir. 1978) (Adams, C.J. dissenting) (characterizing the law of criminal responsibility as the "screen upon which the community has projected its visions of criminal justice").

155. A. GOLDSTEIN, *supra* note 54, at 82; *see also* Hovenkamp, *supra* note 152, at 544 (The *M'Naghten* rule was based on "the notion that the human mind was dark and mysterious. [It] had been invented at a time when people believed the mind was each persons link with God or the supernatural.").

156. *See* Durham v. United States, 214 F.2d 862, 870-71 (D.C. Cir. 1954) (discussing criticisms of *M'Naghten* test), *overruled*, United States v. Brawner, 471 F.2d 969, 981 (D.C. Cir. 1972). *Durham* thus held "that an accused [would not be] criminally responsible if his unlawful act was the product of mental disease or mental defect." *Id.* at 874-75.

157. A. GOLDSTEIN, *supra* note 54, at 84.

158. R. GERBER, THE INSANITY DEFENSE 47 (1984).

159. *See* P. ROCHE, *supra* note 32, at 250-51 (1958); Halleck, *Critique*, *supra* note 118, at 388, 389; Hermann & Sor, *supra* note 45, at 520; *cf.* Scher, *Expertise and the Post Hoc Judgment of Insanity or the Antegnostician and the Law*, 57 NW. U.L. REV. 4, 9 (1962):

> We, as psychiatrists, are babes in the woods regarding the human mind, human motivation, sanity, insanity, etc. It does us no good professionally, nor, in the long run, as people and as citizens, to expertize where we cannot know and do not know. Our profession already suffers under too much of a suggestion of charlatanism.

160. *See, e.g.*, D. BAZELON, *supra* note 1, at 32 ("Psychiatrists are not unprincipled, and the failure of *Durham* was not entirely their fault. Partisan lawyers wanted certain, not equivocal, answers; the legal process has trouble with ambiguity . . . . Finally, judges and juries often preferred to delegate weighty responsibilities to experts."); Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367, 373 (1955) (The *Durham* rule constituted "a legal principle beclouded by a central ambiguity, both unexplained and unsupported by its basic rationale."); *cf.* Frigillana v. United States, 307 F.2d 665, 668 (D.C. Cir. 1962) ("If our objective is to excuse all mentally or emotionally disturbed persons from criminal responsibility we should frankly and honestly say that and proceed accordingly, for that is precisely where our rule, as applied, is taking us.").

161. 471 F.2d 969 (D.C. Cir. 1972) (overruling *Durham* and adopting the American Law Institute-Model Penal Code test, see *supra* note 148).

test, but which added a *volitional* question to *M'Naghten*'s cognitive inquiry.[162] However, the assumption that its spreading adoption would thus augur the death of *M'Naghten* has proven to be inaccurate.[163]

Within a few years of *Brawner*, local outcry over the minute handful of cases involving insanity acquittees who were subsequently released from secure conditions of custody and then committed criminal acts[164] provided the impetus for the creation of a hybrid verdict to be known as "guilty but mentally ill (GMBI)."[165] This verdict would ostensibly "protect the public

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162. The volitional prong of the Model Penal Code test would relieve a criminal defendant from responsibility for his conduct if he lacked substantial capacity "to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01(1) (Proposed Official Draft 1962).

While the Model Penal Code test is "rooted in the *M'Naughten* standard," there are four significant differences. Hermann & Sor, *supra* note 45, at 522. First, its use of the word "substantial" was meant to respond to case law developments which had required "a showing of total impairment for exculpation from criminal responsibility." *Id.* Second, the substitution of the word "appreciate" for the word "know" showed that "a sane offender must be emotionally as well as intellectually aware of the significance of his conduct," A. GOLDSTEIN, *supra* note 54, at 87, and that "mere intellectual awareness that conduct is wrongful, when divorced from appreciation or understanding of the moral or legal import of behavior, can have little significance." United States v. Freeman, 357 F.2d 606, 623 (2d Cir. 1966). Third, by using broader language of mental impairment than had *M'Naughten*, the test "capture[d] both the cognitive and affective aspects of impaired mental understanding." Hermann & Sor, *supra* note 45, at 522. Fourth, its substitution in the final proposed official draft of the word "wrongfulness" for "criminality" reflected the position that the insanity defense dealt with "an impaired moral sense rather than an impaired sense of legal wrong." *Id.*; *see* MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962).

The test was subsequently adopted by over half of the states, Weiner, *Mental Disability and Criminal Law*, in S. BRAKEL, J. PARRY & B. WEINER, THE MENTAL DISABLED AND THE LAW 693, 712 (3d ed. 1985), and, in some form, by all but one of the federal circuits. *See* United States v. Lyons, 731 F.2d 243, 253 n.3 (5th Cir.) (Rubin & Williams, JJ., concurring in part and dissenting in part) *cert. denied*, 469 U.S. 930 (1984); Note, *The Proposed Federal Insanity Defense: Should the Quality of Mercy Suffer for the Sake of Safety*? 22 AM. CRIM. L. REV. 49, 55-56 nn.42, 46 (1984) (circuit-by-circuit listing). *But see Lyons*, 731 F.2d at 248 (eliminating requirement of substantial capacity to conform conduct to the requirements of law). *Cf.* Lyons v. United States, 739 F.2d 994 (5th Cir. 1984) (Rubin, J., dissenting) (supplementing *Lyons*, 731 F.2d at 250 (Rubin & Williams JJ., concurring in part and dissenting in part)).

163. This case law was legislatively overruled by the Insanity Defense Reform Act, passed as part of the Comprehensive Crime Control Act of 1984, 18 U.S.C. § 17 (1987), which is discussed *infra* notes 172-77 and accompanying text.

164. *See* Weiner, *supra* note 162, at 714 nn.263-64.

165. *See generally* Mickenberg, *supra* note 42 (arguing that a GBMI verdict preserves the traditional notions of criminal responsibility while rectifying the defects in the insanity defense). *But see* Fentiman, *supra* note 57 (pointing out constitutional infirmities with the GBMI verdict); Keilitz, *supra* note 89 (examining factors leading to adoption of GBMI laws).

from violence inflicted by persons with mental ailments who slipped through the cracks in the criminal justice system."[166]

This public anger culminated in the "river of fury" that was undammed in the wake of the *Hinckley* acquittal.[167] Within days "[t]he most 'celebrated' insanity trial in American history had instantly become the most 'outrageous' verdict."[168] Eighty-three percent of the respondents to a national overnight poll thought justice was not done.[169] There was little ambiguity in the results:

> Separate streams of public opinion — outrage over the courts' perceived "softness on crime"; . . . outrage over a jurispruden-

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166. People v. Seefeld, 95 Mich. App. 197, 199, 290 N.W.2d 123, 124 (Ct. App. 1980). The "slip through the cracks" metaphor is also used in Commonwealth v. Trill, 374 Pa. Super. 549, 575, 543 A.2d 1106, 1119, (Super Ct. 1988), *appeal denied* 522 Pa. 603, 562 A.2d 826 (1989).

While four states enacted GBMI statutes before the *Hinckley* verdict, the remainder did so in the immediate aftermath of *Hinckley*. Professor Weiner notes that, although the GBMI tide has ebbed, "it is likely to be revived in those states where a crime occurs which enrages the public when the defendant raises and/or succeeds with the insanity defense." *See* Weiner, *supra* note 162, at 714 n.264. In these jurisdictions, a GBMI verdict is appropriate — as an *alternative* to the Not Guilty by Reason of Insanity (NGRI) verdict —if the following were found by the trier of fact beyond a reasonable doubt: "(a) That the defendant is guilty of an offense[;] (b) That the defendant was mentally ill at the time of the commission of the offense[; and] (c) That the defendant was not legally insane at the time of the commission of the offense." Mich. Comp. Laws § 768.36(1) (1989).

The verdict has been the target of virtually-unanimous academic criticism. *See generally* Sherman, *supra* note 105, at 260 (advocating legislative rejection of GBMI "panacea"); Slobogin, *The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494 (1985) [hereinafter Slobogin, *GBMI*] (justifying the ABA's recommendation against adopting GBMI on the grounds that it falls to achieve its goals, it does not add anything meaningful to the criminal justice system, and is unnecessary even if it were to work).

In the most important work yet done supporting the verdict, Professor Mickenberg has suggested that it serves an "obvious and important function" in permitting "juries to make an unambiguous statement about the factual guilt, mental condition, and moral responsibility of a defendant," and "enhances public confidence in the criminal justice system in that it helps eliminate many of the conflicts between legal and medical experts in insanity cases." Mickenberg, *supra* note 42, at 988-89.

167. Perlin, *Hinckley's Trial*, *supra* note 56, at 859. *See generally Trill*, 374 Pa. Super at 578, 543 A.2d at 1120 ("To the general public, it appeared to be incomprehensible that a man who had carefully planned to fatally injure the President, and had made an attempt to carry through with this contemptuous act, could possibly escape penal retribution for his crime."); Wexler, *Insanity Problem*, *supra* note 26, at 529-30 (describing the targets of public outrage after the *Hinckley* decision).

168. Perlin, *Hinckley's Trial*, *supra* note 56, at 858-59.

169. L. CAPLAN, *supra* note 44, at 116. In another poll, 75 percent of those questioned stated that they did not favor exculpation for criminal acts based on insanity. Margulies, *The "Pandemonium Between the Mad and the Bad:" Procedures for the Commitment and Release of Insanity Acquittees After* Jones v. United States, 36 RUTGERS L. REV. 793, 794 n.3 (1984).

> tial system that could even allow a defendant who shot the President in cold blood (on national television) to plead "not guilty" (by *any* reason); outrage at a jurisprudential system that countenanced obfuscatory and confusing testimony by competing teams of psychiatrists as to the proper characterization of a defendant's mental illness; in short, outrage over the "abuse" of the insanity defense — became a river of fury after the [Not Guilty by Reason of Insanity (NGRI)] verdict was announced.[170]

Twenty-six different pieces of legislation were soon introduced into Congress to abolish or limit the insanity defense.[171] The bill that was ultimately enacted as the Insanity Defense Reform Act of 1984 (IDRA)[172] had the effect of "returning the insanity defense in federal jurisdictions to *status quo ante* 1843: the year of . . . *M'Naghten.*"[173] Fundamentally, the bill that was ultimately enacted changed the law in four material ways: 1) it shifted the burden of proof to defendants, by a quantum of clear and convincing evidence;[174] 2) it articulated, for the first time, a substantive insanity test, adopting a more *restrictive* version of

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170. Perlin, *Hinckley's Trial*, *supra* note 56, at 859 (footnotes omitted). On the "reignited public outcry about 'buying' mental health experts in order to escape criminal punishment," see G. MELTON, J. PETRILA, N. POYTHRESS & C. SLOBOGIN, PSYCHOLOGICAL EVALUATION FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 3 (1987) [hereinafter G. MELTON].

171. Perlin, *Hinckley's Trial*, *supra* note 56, at 860. On the role of the abolitionist movement in these developments, see *infra* text accompanying notes 316-30.

172. Pub. L. No. 91-190, 98 Stat. 1837 (1984).

173. Perlin, *Hinckley's Trial*, *supra* note 56, at 862; *see also* Mickenberg, *supra* note 42, at 954. The finally-enacted bill is criticized in English, *supra* note 29, at 46 ("[T]he Act has turned back the jurisprudential clocks to the unenlightened days of *M'Naghten.*"); R. Rogers & C. Ewing, *"Proscribing Ultimate Opinions": The Quick and Cosmetic Fix* 28 (Aug., 1988) (paper delivered at the 1988 annual meeting of the American Psychological Association) (effort to reform insanity defense nothing more than a "cosmetic suggestion, a shopworn restatement of concerns raised more than a century ago"); Note, *Due Process Concerns With Delayed Psychiatric Evaluations and the Insanity Defense: Time Is Of the Essence*, 64 B.U.L. REV. 861, 864 (1985) (noting constitutional questions raised by the Act); *cf.* Diamond, *From* M'Naghten *to* Currens *and Beyond*, 50 CALIF. L. REV. 189, 189 (1962) ("I shall start with the assumption . . . that M'Naghten is dead . . . and that the real issue is how long must the funeral services go on and how many decades must pass before the law ceases to mourn at its grave."); R. Sadoff, Insanity: Evolution of a Medicolegal Concept, (paper presented at College Night, The College of Physicians of Philadelphia, Sept. 10, 1986), manuscript at 20 ("The [1984 act] assumes the flavor of the celebrated concepts of Hale and Coke of the 17th century. . . .").

174. *See* The Comprehensive Crime Control Act of 1984, 18 U.S.C. § 17 (1988); HANDBOOK ON THE COMPREHENSIVE CRIME CONTROL ACT OF 1984 AND OTHER CRIMINAL STATUTES ENACTED BY THE 98TH CONGRESS 60-61 (1984) [hereinafter CRIME CONTROL HANDBOOK].

M'Naghten, thus discarding the ALI-Model Penal Code test previously in place in all federal circuits;[175] 3) it established strict procedures for the hospitalization and release of defendants found NGRI and incompetent to stand trial;[176] and 4) it severely limited the scope of expert testimony in insanity cases.[177]

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175. *See* 18 U.S.C. § 17(a) (1988). Under the new standard, the mental disease or defect must be "severe." This qualifier was added "to ensure that relatively minor disorders such as nonpsychotic behavior disorders or personality defects would not provide the basis for an insanity defense." CRIME CONTROL HANDBOOK, *supra* note 174, at 59. Also, the new standard eliminates the "volitional" portion of the ALI test as well. *Id.* This change was made to exclude from the scope of the test persons who retained the ability to appreciate the quality and wrongfulness of their acts (the *M'Naghten* standard), but who could not conform their conduct to the requirements of law (the ALI test). *Id. But 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) (reporting empirical evidence showing that this truncation "may systematically exclude . . . that class of psychotic patients [those with manic disorders] whose illness is clearest in symptomatology, most likely biologic in origin, most eminently treatable, and potentially most disruptive in penal detention."). The criticism of the volitional prong is persuasively and sharply criticized on both constitutional and social policy grounds in English, *supra* note 29, at 20-52.

Congress also rejected efforts aimed at the creation of a federal guilty but mentally ill verdict, *see Report of the Committee on the Judiciary, U.S. Senate, on S. 1672*, 98th Cong., 1st Sess. 228 n.27 (1983).

176. CRIME CONTROL HANDBOOK, *supra* note 174, at 62-66. The final report of the National Institute of Mental Health's Ad Hoc Forensic Advisory Panel's review of policies at St. Elizabeth's Hospital (the facility where John Hinckley is housed) makes explicit, in discussing the controversy that followed the proposal that Hinckley be given an unescorted holiday pass to visit his parents, the continuation and domination of symbolic values in Hinckley's post-acquittal institutionalization:

> Release or progressive relaxation of restrictions placed upon insanity acquittees reawakens public, even professional, uncertainties about forensic psychiatry and the viability of the insanity defense — whether it is fair or just . . . . Therapeutic passes are, of course, *symbolic* of a forensic hospital's legitimate mission to rehabilitate its patients, as well as provide the security necessary to protect the public.

Final Report of the National Institute of Mental Health (NIMH) Ad Hoc Forensic Advisory Panel, 12 MENTAL & PHYS. DISABILITY L. REP. 77, 81 (1988) [hereinafter *Ad Hoc Report*] (emphasis added) (citations omitted).

177. CRIME CONTROL HANDBOOK, *supra* note 174, at 61; *see* FED. R. EVID. 704:

> (a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
>
> (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

A commentator has stated squarely that this "amendment 'reflects a Congressional judgment that the law has been too favorable to criminal defendants in permitting them to fashion psychiatric defenses.'" Comment, *The Psychiatric Expert in the Criminal Trial:*

The states quickly followed the lead of the federal government in similarly reducing both the substantive and procedural components of the defense.[178] This reduction simply reflected legislative confirmation of a recent empirical survey that revealed that the "wild beast" conception of insanity remained "representative of most people's implicit theories of responsibility."[179]

II. THE IMPACT OF EXTERNALITIES

A. Do Externalities Matter?

As the preceding section points out, shifts in insanity defense jurisprudence are frequently animated by public negative reactions to "vivid" cases and public fear of "abuses" of the defense either by defendants who are "inappropriately" exculpated or by acquittees who are improperly (or prematurely) released from custody and commit additional criminal acts. There are several underpinnings for these sentiments: our retention of medievalist views of the relationship between sin and mental illness, the role of retributive punishment in our cultural fabric, and our ambivalent fear of psychodynamic explanations of "crazy behavior." Some judicial opinions[180] precisely underscore the way that our insanity defense jurisprudence mirrored the moral feelings of the community.[181]

One underlying constant throughout the centuries of insanity

Are Bifurcation and the Rules Concerning Opinion Testimony on Ultimate Issues Constitutionally Compatible? 70 MARQ. L. REV. 493, 512 (1987) (quoting S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 691 (4th ed. 1986).

178. In at least thirty-three states, the defense was reevaluated. Callahan, Mayer & Steadman, *supra* note 64, at 57. A dozen states adopted some version of the "guilty but mentally ill" verdict, Fentiman, *supra* note 57 at 603-04, seven jurisdictions narrowed the substantive insanity test, sixteen states altered the locus of the burden of proof in an insanity defense trial (in all but one instance shifting it to the defendant), and twenty-five tightened release procedures for those who had been found NGRI. Callahan, Mayer & Steadman, *supra* note 64, at 55 (Table 2).

Three states — Utah, Montana and Idaho — adopted legislation which purported to abolish the insanity defense, but which, in effect, retained a limited *mens rea* defense. *See* UTAH CODE ANN. § 76-2-305 (1986 Supp.), *discussed in* Heinbecker, *supra* note 126; IDAHO CODE § 18-207 (1986), *construed in* State v. Beam, 109 Idaho 616, 621, 710 P.2d 526, 531 (1985), and *discussed in* Geis & Meier, *Abolition of the Insanity Plea in Idaho: A Case Study*, 477 ANNALS 72, 74 (1985); MONT. CODE ANN. §§ 46-14-101 to -401 (1985), *upheld in* State v. Korell, 213 Mont. 316, 690 P.2d 992 (1984).

179. Roberts, Golding & Fincham, *Implicit Theories of Criminal Responsibility: Decision Making and the Insanity Defense*, 11 LAW & HUM. BEHAV. 207, 226 (1987).

180. *See, e.g.*, Saver v. United States, 241 F.2d 640 (9th Cir. 1957).

181. *Id.* at 649; *see supra* text accompanying note 154.

defense test formulation has been the intermittent calibration and recalibration of the degree to which *externalities* — empirical research, scientific advances, political confrontations, and teachings of moral philosophers — have had a significant impact on the actual structuring of the substantive legal formula for responsibility.[182] As a result of the tension created by this relationship (between law and externalities), insanity defense scholarship has been caught up in an elaborate game where scholars argue about what Kant would have said about the *Hinckley* case had he known of it,[183] or the significance of competing schools of psychological research,[184] or which responsibility constructs should be utilized.[185]

As I will subsequently demonstrate, it is futile to be terribly concerned with the question of which school of moral philosophy "wins" or which set of scientific data is soundest or which database of empirical evidence is most persuasive.[186] For the empiricist, the scientist and the moral philosopher all base their arguments on one important but unarticulated premise: that fact-finders are capable of being rational, fair and bias-free in their assessment of insanity defense cases, and it is only the absence of a missing link — the additional, irrefutable data as to NGRI demographics, the newest discovery in brain biology, the exact calibration of moral agency in the allocation of responsibility — that stands in the way of a coherent and well-functioning system. Yet, there is virtually no evidence that the addition of any (or all) of these extra factors really would make any such difference.

What is necessary is for us to shift the focus of the debate. We must begin by asking a different set of questions. How has the omnipresence of the externalities and our hyper-attentiveness to them helped to shape an insanity defense jurisprudence? Do the positions of moral philosophers really matter? Does the fact that

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182. I am unaware of any prior use of the word "externality" in this context. *Cf.* Smith, *The Technology of Transnational Environmental Externalities*, in PUBLIC GOODS AND PUBLIC POLICY 177 (1978) ("An externality is said to occur [in an economics context] when an economic entity's (consumer or firm) satisfaction or productive ability is influenced by factors whose levels are selected by other entities without concern or recognition of the effects to that party (or parties).").

183. *See, e.g., Symposium on Kantian Legal Theory*, 87 COLUM. L. REV. 419 (1987).

184. *See R-CRAS Validation*, *supra* note 72.

185. *Compare* Bonnie & Slobogin, *supra* note 32 (proposing the increased use of the psychodynamic approach in criminal cases) *with* Morse, *Failed Explanations*, *supra* note 32 (rejecting the psychodynamic approach to the adjudication of criminal cases).

186. See *infra* notes 298-330 and accompanying text.

virtually every belief held by the public about who pleads the insanity defense, how it is abused, what happens to defendants following an NGRI verdict, where such individuals are institutionalized (and for how long) are myths[187] — and that ordinary common sense is, to be blunt, dead wrong — actually matter? Does the fact that scientists appear to understand more about brain chemistry, physiology, neurology, and the effect of physical and psychological trauma on criminally irresponsible behavior matter?[188]

Because a resolution to these questions has not been attempted, one might wonder whether it is worthwhile expending time and effort to explore these issues without further empirical studies.[189] My sense is that it is worthwhile for several different reasons.[190] First, additional knowledge will aid in the process of demystifying the myths[191] which have largely controlled jurisprudential developments in this area. Second, if we can begin to understand and "work through" the underlying psychodynamic issues,[192] then, perhaps, we will be ready as a society to engage in a rational discourse about the future of the insanity defense.[193] Third, there remains the possibility that additional research will significantly "influence reform and public policy."[194] And fourth,

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187. *See infra* notes 218-45 and accompanying text.

188. Professor David Wexler, one lonely voice, has suggested a need for "careful empirical research relating to the roots of dissatisfaction with the [insanity] defense," while noting that such research "has yet to be performed." Wexler, *Insanity Problem*, *supra* note 26, at 540.

189. *See* Monahan, *supra* note 88, at 739; Sales & Hafemeister, *Empiricism and Legal Policy on the Insanity Defense*, in MENTAL HEALTH AND CRIMINAL JUSTICE, 253 (L. Teplin ed. 1984); *cf.* Keilitz, *supra* note 89, at 289-90 (The empirical approach to insanity defense operations and outcomes "is a healthy development which should be encouraged."). *See generally* Rogers, *APA's Position*, *supra* note 26, at 844-45 (suggesting research agenda based on recommendations made by the American Psychological Association); Steadman, *Empirical Research on the Insanity Defense*, 477 ANNALS 58 (1985) (suggesting "areas that could profit from research in the remaining 1980's and the 1990's"); Steadman, *Mental Health Law and the Criminal Offender: Research Directions for the 1990's*, 39 RUTGERS L. REV. 323, 337 (1987) [hereinafter Steadman, *Research Directions*] (making the same argument).

190. *See* M. Perlin, The Government's Effect on Patients' Lives: A Challenge to Scholars 7 (Aug. 1988) (paper delivered at the annual meeting of the American Psychological Association, Atlanta, Ga.) (setting forth same reasons for exploring impact of government on patients' lives).

191. *Id.* at 7-8.

192. *Id.* at 8.

193. *Id.*

194. Keilitz, *supra* note 89, at 290; *see also* Phillips, Wolf & Coons, *Psychiatry and the Criminal Justice System: Testing the Myths*, 145 AM. J. PSYCHIATRY 605, 609 (1988)

the more extensive our database, the more likely that we will not repeat past mistakes (or, if we do, we will have a better idea of why we are repeating them).[195] Only then will our insanity defense jurisprudence become a coherent one.[196]

A fundamental question that we must ask ourselves as a society is, if we now understand so much more about science, human behavior, and empiricism than we did at the time of, say, the *M'Naghten* verdict, why have we shrunken our insanity defense to the point where it not only approximates, but is even more restrictive than what was scientifically, empirically, and morally out of date 145 years ago?[197] The answer to this question may be the answer to the gridlock that has plagued insanity defense jurisprudence for seven centuries: that we as a society continue to be guided by our primordial feelings and unconsciously rebel against reasoned empiricism. The empirical evidence, scientific discoveries, competing philosophical interests, and new behavioral constructs simply do not "matter." In short, we must "unpack" the symbols that control insanity defense decision-making so that we can attempt to understand the meta-mythology that underlies the empirical myths that continue to animate insanity defense developments.

The powerful symbolic values that surround and, in some important ways, strangle, the development of an insanity defense jurisprudence have little, if anything, to do with empiricism, with science, or with philosophy. On the contrary, they reflect the influence of *psychodynamic* factors — unconscious decision-making, defense mechanisms, primitive needs, and basal instincts — in the creation of an insanity defense doctrine which, paradoxically, overtly rejects psychodynamic factors when offered as an explana-

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("Legislators, jurists, and mental health administrators need a realistic [empirical] overview before they can rationally devise and implement policies for the management of mentally ill offenders.").

195. *Cf.* G. SANTAYANA, THE LIFE OF REASON 284 (1905) ("Those who cannot remember the past are condemned to repeat it.").

196. One "real world" effect of the myths is an inappropriate limitation on the number of defendants that either choose to plead the insanity defense, or successfully maintain such a plea. While there remains a handful of cases in which jurors — through what I call "paradoxical sympathy," *see infra* text accompanying notes 477-90 — return questionable insanity verdicts (*i.e.*, insanity acquittals in cases where the defendant "should have" been found responsible), the construction of a more coherent insanity-defense jurisprudence would lead, by and large, to a greater number of successful pleas entered and verdicts returned. Of course, this may be precisely the reason *why* such a jurisprudence has not developed.

197. *See* English, *supra* note 29, at 8.

tion for what would otherwise be criminal behavior.

Rather than responding in a coherent manner to developments in our understanding of human behavior, we continue to allow our insanity defense jurisprudence to be guided by psychodynamic factors that are at the root of our discomfort with the insanity defense. Overtly, we search for knowledge and unifying principles that would help to order our jurisprudence. Covertly, we ignore the knowledge we obtain to maintain the viability of our primitive schemata of mankind, of good and evil, and of heaven and hell. Thus, our insanity defense jurisprudence, as well as our efforts to rationalize our understanding of it, develop as a function of our psychodynamic "outrage," our authoritarian personality styles, our atrophied state of moral development, and our rejection of "psychological man."[198]

The insanity defense is, to a significant majority of the American public, counter-intuitive. We are generally uncomfortable with the entire notion of "excuse" defenses; yet, the use of the other such defenses (duress, choice of evils, *etc.*), does not appear to imperil the operation of the criminal justice system (as the insanity defense appears to do).[199] This imperilment, of course, has nothing to do with the reality of empirical issues (*i.e.*, the frequency with which the defense is used, the type of cases in which it is used, the actual disposition of insanity defense cases, the rate of subsequent institutionalization of insanity acquittees),[200] with philosophical issues (*i.e.*, the way in which we choose to balance free will and determinism, assuming that these "emotionally freighted" constructs can be given meaningful content in this context),[201] or with scientific issues (*i.e.*, the way that scientific "advances" are translated into insanity defense doctrinal develop-

198. For a political critique the defense, see Simon, *Homo Psychologicus: Notes on a New Formalism*, 32 STAN. L. REV. 487 (1980).

199. *See* W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 5.3 (2d ed. 1986). For helpful recent overviews, see Dressler, *Justification and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155 (1987); Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses, and the Model Penal Code*, 19 RUTGERS L.J. 671 (1988); Fletcher, *Rights and Excuses*, 3 CRIM. JUST. ETHICS, Summer/Fall 1984, at 17. *Compare* English, *supra* note 29, at 41-42 (continued existence of the duress defense is a "strong paradigm" for perpetuating the insanity defense's volitional prong).

200. *See infra* text accompanying notes 218-45.

201. *See infra* text accompanying notes 298-315. The term "emotionally freighted" comes from Monahan, *supra* note 88, at 721.

ment).[202] More precisely, it seems that we, as a society, cannot accept the proposition that "psychological" determinants are a valid excuse from criminal responsibility.

Thus, I will look at the relevant externalities and will explore what I call the "mythology of insanity defense myths."[203] I will examine the empirical myths that have "frozen" insanity defense decision-makers and insanity defense decision-making,[204] and will then attempt to "unpack" these myths in an effort to determine the source of their power and longevity.[205] I will do this by suggesting a series of meta-myths that lie at the roots of the "insubstantial" empirical myths, and by demonstrating how these meta-myths are the true animators of insanity defense decision-making.[206]

After discussing one recent unreported case that appears to reflect virtually all of the issues under consideration,[207] I will explain why the myths have persisted, what values retention of the myths reinforce, how the public's view of mental illness, psychiatrists, and how our notion of the propriety of emotional excuses has shaped various constructs,[208] driving us back, before *M'Naghten*, to the time of Justice Tracy and the "wild beast" test, articulated in the 1724 case of *Rex v. Arnold*.[209]

This test — the "wild beast" standard — satisfies a significant portion of the American public including the average person on the street, legislators, the President and members of the judici-

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202. *See infra* text accompanying notes 257-97.

203. *See infra* text accompanying notes 502-13.

204. Prof. Stephen Morse rightfully characterizes many of these myths as "insubstantial." Morse, *Excusing*, *supra* note 1, at 795-801. Yet, this characterization misses an important reality: in spite of (or, perhaps, *because of*) the *banality* of these myths, they have set the limits of the insanity defense debate for centuries. Until we attempt to understand *why* that is, we will remain their prisoners. *See generally* Kaplan & Rinella, *Jurisprudence and the Appropriation of the Psychoanalytic: A Study in Ideology and Form*, 11 INT'L J.L. & PSYCHIATRY 215, 246 (1988) ("Human psychology has an intra-psychic structure that retains cultural attitudes long after such attitudes are dysfunctional for self or society").

205. *See infra* text accompanying notes 545-627.

206. *See infra* text accompanying notes 514-26.

207. *See infra* text accompanying notes 527-44.

208. *See infra* text accompanying notes 502-627.

209. Y.B. 10 Geo. 1 (1724) *reprinted in* A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 143 at 695; *see also* Roberts, Golding & Fincham, *supra* note 179, at 226 (positing that public uproar regarding Hinckley's insanity acquittal focused on his apparently sane preparation for the crime and ignored his less visible, hence less believable, mental infirmity).

ary (including the Chief Justice[210]). Only when we can understand why this is so, may we begin to deal rationally — and on a conscious level — with the issues underlying insanity defense jurisprudence.

B. The Significance of Empirical Evidence[211]

Recently, commentators have urged that "scholars and practitioners in law and mental health . . . look more often to social science research to determine the effect of the insanity defense."[212] When such research is examined, it becomes absolutely clear the extent to which a series of myths — utterly discredited by scholars and practitioners alike — dominate the insanity defense landscape. We must, therefore, examine why these myths have sprung up, why we continue to honor them, and why the revelations that they are myths has had absolutely no impact on insanity defense jurisprudence.[213]

The failure of courts and states to collect adequate statistical data "is testimony to the indifference of bureaucracy, societal

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210. *See infra* text accompanying notes 566-71, 598-602 & 625.

211. Commentators have agreed, at least until very recently, that there has been "an extreme dearth of empirical data relating to the [insanity defense] plea." Pasewark, *Insanity Plea: A Review of the Research Literature*, 9 J. PSYCHIATRY & L. 357, 357 (1981) [hereinafter Pasewark, *Insanity Plea*]. Even now, the minimal research that has been done has focused almost entirely on NGRI defendants, their socio-demographic characteristics, and their subsequent post-acquittal dispositions (including institutionalization and rearrest rates); virtually *no* attention has been paid to the clinical assessment of such defendants and the relevant trial processes, including attitudes of defense counsel, judges and prosecutors. Rogers, *APA's Position*, *supra* note 26, at 845. *But see infra* text accompanying notes 246-56 (exploring significance of structured clinical assessments such as the Schedule of Affective Disorders and Schizophrenia (SADS), and the Rogers Criminal Responsibility Assessment Scales (R-CRAS)).

212. Keilitz, *supra* note 89, at 291-92. Interestingly, Keilitz states and then rebuts a potential counterargument. He notes that opponents might say "that by its emphasis on outcome data, the empirical approach ignores the logic, intuition, and rational analysis of legal doctrine that is the center of debate on the insanity defense," *id.* at 292, but demurs, suggesting that his approach will "help rather than hinder understanding" because it enables others to "sidestep much of the dogma." *Id.*

While I agree completely with Keilitz that such an approach is important, my sense is that its most powerful opponents are *not* moral philosophers committed to the construction of a defense based upon "logic, intuition, and rational analysis," but are, rather, majoritarian, authoritarian, ordinary common sensicalists, who will continue to ignore the illogical and the irrational components of the developing jurisprudence. It is necessary to articulate the roots of this opposition to come to a meaningful understanding of the true issues in the debate.

213. *See, e.g.*, de Vito, *supra* note 117, at 40 (insanity defense myths are "firmly rooted in our cultural subconscious").

avoidance and neglect of the criminally insane. . . ."[214] Until we begin to understand why we are indifferent to something as emotionally-neutral as statistical data collection and retrieval, we will not make any meaningful progress toward understanding the true roots of insanity defense mythology.[215] What makes this indifference even more confounding is the concession that the empirical data belie the common wisdom that has dominated the insanity defense legislative discourse. For example, the House Report accompanying the House version of the Insanity Defense Reform Act explicitly acknowledged:

> Although abuses of the insanity defense are few and have an insignificant direct impact upon the criminal justice system, the Committee *nonetheless* concluded that the present defense and the procedures surrounding its use are in need of reform . . . .
>
> . . . .
>
> The insanity defense has an impact on the criminal justice system that goes beyond the actual cases involved. The use of the defense in highly publicized cases, *and the myths surrounding its use*, have undermined public faith in the criminal justice system.[216]

It is this concession — that Congress must act to assuage erroneous public sentiments (based on what all acknowledge to be myths)[217] — that is astounding, and to which serious attention must be paid.

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214. Roth, *supra* note 49, at 92.

215. Our failure becomes even more stark in light of the reality that, at the current time, "we are increasingly in a position to take advantage of empirical data to inform and modify our beliefs." Golding, Eaves & Kowaz, *supra* note 45, at 173. For an important critical analysis of the role of empiricism in the formation of legal policy, see Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984).

216. H.R. REP. NO. 577, 98th Cong., 1st Sess., 9-10 (1983) (emphases added); *cf.* Goldstein, *The Psychiatrist's Guide to Right and Wrong: Part IV: The Insanity Defense and the Ultimate Issue Rule*, 17 Bull. Am. Acad. Psychiatry & L. 269, 279 (1989) (while the limit of the amendment to the Federal Rules of Evidence, *see supra* note 177, is "scientifically unnecessary," narrower rule might be justified because of American Psychiatric Association's "concern about unfavorable psychiatric participation in controvertial insanity cases").

217. *Cf.* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 448 (1985) (discussing the implications of equal protection clause for local zoning ordinance seeking to bar congregate housing for the mentally retarded). The Court held that "private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.* at 448 (quoting Palmore v. Sidotti, 466 U.S. 429, 432-34 (1984)).

1. Empirical Data and Myths[218]

In the wake of the *Hinckley* verdict, commentators began to examine carefully the myths which had developed about the insanity defense, in an effort to determine "the extent to which this issue has been distorted in the public eye."[219] The empirical research revealed that at least half a dozen myths had arisen and been perpetuated, but that all were "unequivocally disproven by the facts."[220] The research showed that the insanity defense opens only a "small window of nonculpability,"[221] defendants found NGRI "do not beat the rap,"[222] and, perhaps most importantly, the "tenacity of these misbeliefs in the face of contrary data" is profound.[223]

Myth #1: *The insanity defense is overused.*

One team of commentators had the following to say about the empirical analyses:

> All empirical analyses, however, have been consistent: the public, legal profession and — specifically — legislators "dramatically" and "grossly" overestimate both the frequency and the success rate of the insanity plea. This error undoubtedly is abetted by the media's "bizarre depictions," "distortions," and "inaccur[acies]," in presenting information on mentally ill persons charged with crimes.[224]

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218. The text *infra* accompanying notes 219-45 is partially adapted from 3 M. PERLIN, *supra* note 78, § 15.37.

219. Rodriguez, LeWinn & Perlin, *supra* note 58, at 400 n.3; *see also, e.g.*, Steadman, *Research Directions*, *supra* note 189, at 330 ("Legal scholars and social scientists were at a loss to provide various state and federal legislative committees with meaningful data on the insanity defense immediately following the 1982 insanity acquittal of John Hinckley, Jr., ..."). *But see, Final Report*, *supra* note 55, at 7 (findings of state-level study commission showing rarity of insanity-defense plea and subsequent success); Rodriguez, LeWinn & Perlin, *supra* note 58, at 397 n.† (following receipt of testimony based on cited article empirically refuting insanity-defense myths, New Jersey State Senate Judiciary Committee rejected all efforts to abolish or modify insanity defense).

220. Perlin, *Whose Plea Is It Anyway? Insanity Defense Myths and Realities*, 79 PHILA. MED. 5, 6 (1983). For the most recent comprehensive overviews, see Keilitz, *supra* note 89; Steadman, *Research Directions*, *supra* note 189. Prior research is ably summarized in Shah, *supra* note 40, at 184-88.

221. Jeffrey, Pasewark & Bieber, *Insanity Plea: Predicting Not Guilty By Reason of Insanity Adjudications*, 16 BULL. AM. ACAD. PSYCHIATRY & L. 35, 39 (1988).

222. Pogrebin, Regoli & Perry, *supra* note 58, at 240.

223. Rogers, *APA's Position*, *supra* note 26, at 840; *see also* Jeffrey & Pasewark, *Altering Opinions About the Insanity Plea*, 11 J. PSYCHIATRY & L. 29 (1983).

224. Rodriguez, LeWinn & Perlin, *supra* note 58, at 401 (footnotes omitted) (for a complete listing of sources supporting this proposition, see *id.* at nn.21-28); *see also* Jeffrey

What is as startling as any other fact unearthed by empiricists is the realization that directors of forensic services in only ten of the 50 states could even provide researchers with baseline information regarding the frequency of the insanity plea and its success, and that officials in twenty states could provide no information whatsoever about the use of the plea.[225] In short, not only are the estimates as to the use of the plea mythic, but the small discrete universe of individuals who might logically be expected to represent the one group that could dispel the myth is as self-admittedly ignorant as the rest of us as to the myth's scope.

Myth #2: *The use of the insanity defense is limited to murder cases.*

In one jurisdiction where the data have been closely studied, slightly fewer than one third of the successful insanity pleas entered over an eight-year period were reached in cases involving a victim's death.[226] Further, individuals who plead insanity in mur-

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and Pasewark, *supra* note 223; Pasewark & Seidenzahl, *Opinions Concerning The Insanity Plea and Criminality Among Mental Patients*, 7 BULL. AM. ACAD. PSYCHIATRY & L. 199 (1979) (analyzing empirical data of attorneys and the public).

A more recent study has suggested that, while the insanity-plea incidence is fairly uniform in all jurisdictions, the plea's success rate is "quite variable." Pasewark & McGinley, *Insanity Plea: National Survey of Frequency and Success*, 13 J. PSYCHIATRY & L. 101, 101 (1985); *see also* Hans, *An Analysis of Public Attitudes Toward The Insanity Defense*, 24 CRIMINOLOGY 393 (1986) (comprehensive survey of attorneys); Rodriguez, LeWinn & Perlin, *supra* note 58, at 401 (in New Jersey in 1982, NGRI cases in which insanity pleas were successful represented only 1/20 of 1 percent of all cases handled by the Office of the Public Defender).

On the media's role in disseminating other —perhaps more dangerous — misinformation about the insanity defense process, see Mickenberg, *supra* note 42, at 946 n.14 ("The hostility of even supposedly neutral reporters toward the *Hinckley* verdict was palpable in press accounts of the trial."). On the significance of public misperceptions in this area generally, see Cavanaugh & Rogers, *Convergence of Mental Illness and Violence: Effect on Public Policy*, 12 PSYCHIATRIC ANNALS 537 (1982).

225. Pasewark & McGinley, *supra* note 224, at 106.

226. Rodriguez, LeWinn & Perlin, *supra* note 58, at 402. Among the other underlying charges were writing 'bad' checks, carrying an unloaded starter's pistol, and drug use. *Id.*; *see, e.g.*, Jones v. United States, 463 U.S. 354, 359 (1983) (insanity plea entered in case involving attempted petit larceny). For an earlier survey of the same jurisdiction, *see* Singer, *supra* note 61; *cf.* Golding, Eaves & Kowaz, *supra* note 45, at 161 (40 percent of the insanity pleas entered were reached in cases involving a victims death or attempted murder).

Not all recent surveys are entirely in accord. *Compare* Stokman & Heiber, *The Insanity Defense Reform Act in New York State, 1980-1983*, 7 INT'L J.L. & PSYCHIATRY 367, 375 (1984) (70 percent of new NGRIs acquitted of "violent crimes," including murder and assault) *with* Jeffrey, Pasewark & Bieber, *supra* note 221, at 36 (Colorado study revealed 19 percent of insanity pleaders charged with murder). *See generally* Bogenberger,

der cases are no more successful in being found NGRI than persons charged with other crimes.[227]

Myth #3: *There is no risk to the defendant who pleads insanity.*

Defendants who asserted an insanity defense at trial and who were ultimately found guilty of their charges served significantly longer sentences than defendants tried on similar charges who did not assert the insanity defense.[228] The same ratio is found when exclusively homicide cases are considered.[229]

Myth #4: *NGRI acquittees are quickly released from custody.*

Of all the individuals found NGRI over an eight-year period in one jurisdiction, only fifteen percent had been released from all

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Pasewark, Gudeman & Beiber, *Follow-Up of Insanity Acquittees in Hawaii*, 10 INT'L J.L. & PSYCHIATRY 283, 290-91 (1987) (discussing percentages of insanity pleaders that later committed crimes). Henry Steadman has called the strategy of "*cross jurisdictional research*" the most important research initiative "for informed policy making and legal scholarship" in the area. Steadman, *Research Directions*, *supra* note 189, at 328.

For a survey of those jurisdictions in which significant empirical data has been developed, see Boehnert, *Psychological and Demographic Factors Associated With Individuals Using the Insanity Defense*, 13 J. PSYCHIATRY & L. 9, 30 n.3 (1985); Petrila, *The Insanity Defense and Other Mental Health Dispositions in Missouri*, 5 INT'L J. L. & PSYCHIATRY 81 (1982); Rogers, Sack, Bloom & Hanson, *Women in Oregon's Insanity Defense System*, 11 J. PSYCHIATRY & L. 515 (1983).

227. *See* Steadman, Keitner, Braff & Arvanites, *Factors Associated With a Successful Insanity Plea*, 140 AM. J. PSYCHIATRY 401, 402-03 (1983); *See generally* Criss & Racine, *Impact of Change in the Legal Standard for Those Adjudicated Not Guilty By Reason of Insanity, 1975-1979*, 8 BULL. AM. ACAD. PSYCHIATRY & L. 261, 265-66 (1980) (presenting data indicating that the overall number of NGRI findings remained stable while the number in murder cases alone declined in the 1970's).

228. Rodriguez, LeWinn & Perlin, *supra* note 58, at 401-02. A possible explanation for this is offered in Perlin, *Symbolic Values*, *supra* note 26, at 98 ("They have made a 'play' for our unconscious, and have come up short"); *see also* Steadman, *Predicting Dangerousness Among the Mentally Ill: Art, Magic and Society*, 6 INT'L J.L. & PSYCHIATRY 381, 381 (1983) ("Testimony on the probability of future violent behavior is taken as authoritative and heavily influences the disposition and placements of tens of thousands of [mentally ill] each year."); *cf.* Braff, Arvanites & Steadman, *Detention Patterns of Successful and Unsuccessful Insanity Defendants*, 21 CRIMINOLOGY 439, 445 (1983) (unsuccessful NGRI pleaders are incarcerated for a longer time than individuals who never raise the plea). Interestingly, NGRI acquittees were found to commit less heinous offenses than defendants unsuccessful in their reliance on the defense or those evaluated for the defense who ultimately chose to enter into plea-bargain agreements. Boehnert, *supra* note 226, at 26.

229. Rodriguez, LeWinn & Perlin, *supra* note 58, at 402 n.32. For a recent initial inquiry into the personality characteristics of an individual who unsuccessfully raises the insanity defense, see Boehnert, *Typology of Men Unsuccessfully Raising the Insanity Defense*, 15 J. PSYCHIATRY & L. 417 (1987); Pasewark, Jeffrey & Bieber, *Differentiating Successful and Unsuccessful Insanity Plea Defendants in Colorado*, 15 J. PSYCHIATRY & L. 55 (1987).

restraints; thirty-five percent remained in institutional custody; and forty-seven percent were under partial court restraint following conditional release.[230] In the most recent research, Dr. Stephen Golding and his colleagues, in a study of all persons found NGRI in the Canadian province of British Columbia over a nine-year period, discovered that the average time spent in secure hospitalization or supervision was slightly over nine and one-half years.[231]

Myth #5: *NGRI acquittees spend much less time in custody than do defendants convicted of the same offenses.*

Contrary to this myth, NGRI acquittees actually spend almost *double* the amount of time that defendants convicted of similar charges spend in prison settings and often face a lifetime of post-release judicial oversight.[232]

Myth #6: *Criminal defendants who plead insanity are usually faking.*

This is perhaps the oldest of the insanity defense myths, and is one that has bedeviled American jurisprudence since the mid-nineteenth century.[233] Of one hundred forty-one individuals found NGRI in one jurisdiction over an eight year period, there was no dispute that one hundred fifteen were schizophrenic (including thirty-eight of the forty-six cases involving a victim's death), and in only three cases was the diagnostician unable to specify the nature of the patient's mental illness.[234]

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230. Rodriguez, LeWinn & Perlin, *supra* note 58, at 403. For an explanation of "conditional release" in this context, see 3 M. PERLIN, *supra* note 78, §§ 15.20-15.21.

231. Golding, Eaves & Kowaz, *supra* note 45, at 153 (interpreting this data, the authors posit one interpretation of this phenomenon as being indicative of "defendants receiv[ing]' maximum clinical benefit from psychotropic medication after an average of three months, . . . but were held an additional 120 months for social policy reasons.").

232. Rodriguez, LeWinn & Perlin, *supra* note 58, at 403-04; *see also* Pogrebin, Regoli, & Perry *supra* note 58, at 240 (insanity acquittees do not spend fewer days in confinement because of an NGRI plea than had they been convicted and sentenced).

233. *See* I. RAY, MEDICAL JURISPRUDENCE OF INSANITY § 247, at 243 (1962). *See generally* Perlin, *Symbolic Values*, *supra* note 26, at 81-83 (discussing support by a consistent majority of the Supreme Court for predictive psychiatric testimony in part to distinguish feigned from true mental illness).

234. Rodriguez, LeWinn & Perlin, *supra* note 58, at 404. For studies indicating that a large number of NGRI defendants have significant histories of prior hospitalizations, see Hawkins & Pasewark, *Characteristics of Persons Utilizing the Insanity Plea*, 53 PSYCHOLOGICAL REP. 191, 194 (1983) (citing studies). The recent British Columbia study — see text accompanying note 231 — revealed that 80 percent of all NGRI acquittees had "significant mental health histories including frequent hospitalizations." Golding, Eaves &

Looking at the same issue from a different perspective, Dr. Henry Steadman and his colleagues studied all defendants who pled NGRI in Erie County, New York, from 1970 to 1980 and found that the *only* statistically significant factor which consistently correlated positively with a clinical finding of insanity was a diagnosis of psychosis, and the "key" to a successful insanity defense was the forensic evaluation done by the county's mental health service.[235] This reflects another empirical truth: there is an unusually high degree of concordance between clinical evaluations of sanity and subsequent legal dispositions.[236]

The belief that insanity plea defendants are feigning mental illness is fueled by infrequent courtroom disagreements over diagnosis by experts. The public's false perception of the circus-like battle of the experts is one of the most telling reasons for the rejection of psychological principles by the legal system. A dramatic case such as the *Hinckley* trial reinforced the perception that insanity cases were characterized by battles of experts who "overwhelmed" the jury.[237] Such highly publicized professional dis-

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Kowaz, *supra* note 45, at 173.

Paradoxically, at least one recent empirical survey has concluded that a return to *M'Naghten* from the ALI test "may systematically exclude from a successful plea of insanity that class of psychotic patients whose illness is clearest in symptomatology, most likely biologic in origin, most eminently treatable, and potentially most disruptive in penal detention." Silver & Spodak, *supra* note 175, at 390.

235. Steadman, Keitner, Braff & Arvonites, *supra* note 227, at 401-04. "[I]n only 3 . . . of the 131 cases in which the forensic clinician found the defendant sane did the court acquit by reason of insanity." *Id.* at 402.

236. Boehnert, *supra* note 229, at 231 (over 80 percent concordance); Fukunaga, Pasewark, Hawkins & Gudeman, *Insanity Plea: Interexaminer Agreement in Concordance of Psychiatric Opinion and Court Verdict*, 5 LAW & HUM. BEHAV. 325, 327 (1981) [hereinafter Fukunaga] (93 percent concordance); Phillips, Woolf & Coons, *supra* note 194, at 609 (79 percent concordance); Rogers, Bloom & Manson, *Insanity Defense: Contested or Conceded?* 141 AM. J. PSYCHIATRY 885, 887 (1984) (more than 80 percent concordance of successful insanity defenses were stipulated to by the prosecution); Rogers, Cavanaugh, Seman & Harris, *Legal Outcome and Clinical Findings: A Study of Insanity Evaluations*, 12 BULL. AM. ACAD. PSYCHIATRY & L. 75, 80 (1984) [hereinafter *Legal Outcome*] (88 percent concordance). Dr. Rogers and his colleagues have thus concluded that "the legal outcome is closely related to the clinical evaluation and not unduly influenced by sociodemographic factors." *Legal Outcome*, *supra*, at 82; *cf.* Wexler, *Insanity Problem*, *supra* note 26, at 547 n.116:

> Because a large portion of insanity acquittals result from conceded rather than contested cases, it is interesting to speculate what effect abolition would have on prosecutorial plea-bargaining behavior . . . . It would [also] be interesting to explore this question empirically in the three jurisdictions . . . that have thus far abolished the insanity defense.

(citing Rogers, Bloom & Manson, *supra*, at 887).

237. Anchor, *Expert Witness Testimony in the John Hinckley Trial*, 6 AM. J. TRIAL

agreements engender judicial and public skepticism as to the ability of psychiatrists to come to reasoned and reasonable judgments in cases involving mentally disabled individuals charged with crime.[238]

The empirical reality is quite different. In Oregon, prosecutors agreed to insanity verdicts in eighty percent of all cases. In an Hawaii survey, there was diagnostic agreement on insanity in ninety-two percent of all cases.[239] Most importantly, these are not recent developments: over twenty-five years ago, a study of the impact of the *Durham* decision in Washington, D.C., found that between two-thirds and three-quarters of all insanity defense acquittals were uncontested.[240] In short, the empirical evidence refuting this myth has been available to judges, legislators and scholars since almost a decade prior to the adoption of the ALI-Model Penal Code test in *Brawner.*

Myth #7: *Criminal defense attorneys employ the insanity defense plea solely to "beat the rap."*

Attorneys representing mentally disabled defendants have been routinely criticized for "seeking refuge" in the insanity defense as a means of avoiding a deserved conviction.[241] The facts

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ADVOC. 153, 153 (1982); *see also* Rogers, Bloom & Manson, *supra* note 236, at 885 (referring to the "public's perception that the insanity defense is characterized by battles of experts").

238. *See* Note, *The Right to a Partisan Psychiatric Expert: Might Indigency Preclude Insanity?*, 61 N.Y.U. L. REV. 703, 721 & n.116 (1986) [hereinafter NYU Note] (arguing that the judiciary has been "highly skeptical of the psychiatrists upon whom it must rely" and citing sources). For a discussion of conflicts in the Hinckley testimony, see L. CAPLAN, *supra* note 44, at 66-84; Perlin, *Hinckley's Trial, supra* note 56, at 863-65 (the "battle of the experts" was one of the major threads of the Hinckley trial); NYU Note, *supra*, at 721 n.115. On the question of whether conflicting testimony is inherently confusing, see Note, *Punishing the Insane: Restriction of Expert Psychiatric Testimony by Federal Rule of Evidence 704(b)*, 40 U. FLA. L. REV. 541, 558-59 (1988).

239. Fukanaga, *supra* note 236, at 326; Rogers, Bloom & Manson, *supra* note 236, at 885.

240. Acheson, McDonald v. U.S.: *The* Durham *Rule Redefined*, 51 GEO. L.J. 580, 589 (1963).

241. *See, e.g.*, M. KAVANAGH, THE CRIMINAL AND HIS ALLIES 90 (1928) (charging that, because "skillful criminal lawyers" can turn insanity defense trials into emotional disputes, "in cases where insanity is presented as a defense, so many verdicts which outrage justice are returned"). *See generally* D. NISSMAN, BEATING THE INSANITY DEFENSE vii (1980) (reference book for prosecutors faced with an insanity defense "is necessary since the defense very often is a hoax, enabling the guilty defendant to be set free")

This position is articulated forcefully in Justice Morris's well-traveled concurrence in State v. Strasburg, 110 P. 1020, 1029, 60 Wash. 106, 133 (1910) (Morris, J., concurring):

> No defense has been so much abused and no feature of the administration

are quite different. First, the level of representation afforded to mentally disabled defendants is frequently substandard,[242] a fact noted pointedly a decade ago by the President's Commission on Mental Health's Task Force on Legal and Ethical Issues.[243] Second, the few studies that have been done paint an entirely different picture: lawyers may enter an insanity plea to obtain immediate mental health treatment of their client, as a plea-bargaining device to insure that their client ultimately receives mandatory mental health care, and to avoid malpractice litigation.[244] Third, the best available research suggests that jury biases exist relatively independent of lawyer functioning, and are generally "not

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> of our criminal law has so shocked the law-loving and the law-abiding citizen, as that of insanity, put forward not only as a shield to the poor unfortunate bereft of mind or reason, but more frequently as a cloak to hide the guilty for whose act astute and clever counsel can find neither excuse, justification, nor mitigating circumstances, either in law or fact.

Prosecutors also advance the proposition. *See, e.g.*, People v. Lundell 182 Ill. App. 3d 417, 538 N.E. 2d 186 (1989), *appeal denied*, 127 Ill. 2d 630, 545 N.E. 2d 122 (1989) (prosecutor charged accused of fabricating his insanity defense with the aid of his counsel).

242. *See* D. BAZELON, *supra* note 1, at 49 (criticizing counsel in insanity cases for failing to "dig beneath the experts' boilerplate"). *See generally* German & Singer, *Punishing the Not Guilty: Hospitalization of Persons Found Not Guilty By Reason of Insanity*, 29 RUTGERS L. REV. 1011, 1017-35 (1976) (discussing lack of procedural due process and equal protection safeguards afforded NGRI pleaders).

For recent cases assessing counsels' performance in such cases, see Dufour v. Mississippi, 479 U.S. 891, 892-94 (1987) (Marshall, J., dissenting) (denial of petition for *certiorari*) (failure to request appointment of psychiatrist to assist the defense in developing psychological evidence in a capital case, where such an appointment is crucial to the defendants ability to marshal his defense, may constitute ineffective counsel); Alvord v. Wainwright, 469 U.S. 956, 959 (1984) (Marshall, J., dissenting from denial of *certiorari*) (discussing counsel's total failure to pursue possible insanity defense); Laws v. Armontrout, 834 F.2d 1401 (8th Cir. 1987), *vacated en banc*, 863 F.2d 1377 (1988) (failure to present mitigating evidence relating to client's military service during vietnam war, when based upon informed and reasoned judgment and determined to be more strategically sound, was not considered to be ineffective counsel); Rivera v. Franzen, 794 F.2d 314 (7th Cir.) (failure to investigate the client's history of mental disorders, when no reason to know of the client's mental problems existed, was not violative of sixth amendment standard of competency), *cert. denied*, 479 U.S. 991 (1986).

243. *See, e.g., Mental Health and Human Rights: Report of the Task Panel on Legal and Ethical Issues*, 20 ARIZ. L. REV. 49, 62 (1978) (in provision of counsel to indigent criminal defendants, few states provide for "special problems endemic to representation . . . when there are questions . . . as to [the defendant's] responsibility for the criminal act in question").

244. Pasewark & Craig, *Insanity Plea: Defense Attorneys' Views*, 8 J. PSYCHIATRY & L. 413 (1980) *discussed in* Pasewark, *supra* note 211, at 392. Attorneys also entered the insanity plea as a plea-bargaining chip, as a device through which to gain time to allow community outrage to subside, and as a way of introducing relevant background and motivational information either to mitigate the verdict or the sentence. *Id.*

induced by attorneys."[245]

2. The Use of Assessment Tools

Since the first outpouring of literature focusing on the pervasive myths which infect the insanity defense system, behaviorists have continued to examine the data on insanity-defense pleaders in an effort to further illuminate the relevant issues.[246] For the first time, there has been a significant and meaningful focus upon the provision of standardized and empirically-based approaches to criminal responsibility,[247] through the use of such instruments as the Mental State at the Time of the Offense Screening Evaluation (MSO),[248] the Schedule of Affective Disorders and Schizophrenia (SADS),[249] the Research Diagnostic Criteria (RDC),[250] and the

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245. Tanford & Tanford, *Better Trials Through Science: A Defense of Psychologist-Lawyer Collaboration*, 66 N.C.L. REV. 741, 749-50 (1988) (written, in significant part, as a response to Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 N.C.L. REV. 481 (1987) (attorneys relying on psychologists for advice on courtroom techniques designed to induce extra-legal bases for decision-making and illogical evaluation of evidence by jurors, threatens the legitimacy of jury verdicts)); *see also*, Perlin, *After Hinckley: Old Myths, New Realities, and the Future of the Insanity Defense* in 5 DIRECTIONS IN PSYCHIATRY, Lesson 22, at 25, 28 (1985):

> Clearly, this data reflects the extent to which myths have permeated the debate [on] the insanity defense, and the extent to which much of the new legislation represents "an unnecessary and extreme reaction to a group of serious misconceptions." . . . What is clear is that "each and every one of the false premises" raised in support of abolition or evisceration of the defense is disproved by the evidence.

(quoting Rodriguez, LeWinn & Perlin, *supra* note 58, at 425, and Perlin & Sadoff, *supra* note 55, at 402).

246. *See, e.g.*, Keilitz, *A Model Process For Forensic Mental Health Screening and Evaluation*, 8 LAW & HUM. BEHAV. 355 (1984) (describing forensic screening and evaluation process used by decision-makers in the criminal justice system); T. Grisso, Clinical Assessments for Legally-Relevant Decision Research Directions, (paper presented at the International Congress of Law and Mental Health, Montreal, Canada, June 1988).

247. *See, e.g., R-CRAS Validation*, *supra* note 72; Reich & Wells, *Psychiatric Diagnosis and Competency to Stand Trial*, 26 COMPREHEN. PSYCHIATRY 421, 430 (1985); Rogers & Cavanaugh, *Differences in Psychological Variables Between Criminally Responsible and Insane Patients: A Preliminary Study*, 1 AM. J. FORENS. PSYCHIATRY 29 (1980).

248. Slobogin, Melton & Showalter, *The Feasibility of A Brief Evaluation of Mental State at the Time of the Offense*, 8 LAW & HUM. BEHAV. 305 (1984); *see* G. MELTON, *supra* note 170, at 147-56. Professors Roesch and Golding have applauded the development of the MSO — an *investigative* technique that standardizes how responsibility- evaluation interviews should be conducted — as a technique with "great promise." Golding & Roesch, *supra* note 45, at 419.

249. The SADS was developed to facilitate diagnosticians' ability to obtain accurate and reliable diagnoses. *See* Endicott & Spitzer, *A Diagnostic Interview: The Schedule of Affective Disorders and Schizophrenia*, 35 ARCHIVES GEN. PSYCHIATRY 837 (1978). An earlier study had revealed that an astounding 95 percent of diagnostic disagreements

Rogers Criminal Responsibility Assessment Scales (R-CRAS).[251] These instruments were designed to translate legal insanity concepts into quantifiable variables that would meet the standard of reasonable scientific certainty.[252] Both the SADS and the R-

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among psychiatrists could be accounted for by the use of different and unreliable interviewing techniques and diagnostic standards. *See* Rogers & Cavanaugh, *Application of the SADS Diagnostic Interview to Forensic Psychiatry*, 9 J. PSYCHIATRY & L. 329, 330 (1981) [hereinafter Rogers & Cavanaugh, *SADS*] (discussing Ward, *The Psychiatric Nomenclature* 7 ARCHIVES GEN. PSYCHIATRY 198 (1962)).

The SADS has been adapted successfully to forensic evaluations. *See* Rogers & Cavanaugh, *SADS*, *supra*, at 341. It has also been used preliminarily, with success, in criminal-responsibility assessments. *See* Rogers, Cavanaugh & Dolmetsch, *Schedule of Affective Disorders and Schizophrenia, A Diagnostic Interview in Evaluations of Insanity: An Exploratory Study*, 49 PSYCHOLOGY REP. 135 (1981); Rogers, Thatcher & Cavanaugh, *Use of the SADS Diagnostic Interview in Evaluating Legal Insanity*, 40 J. CLIN. PSYCHOLOGY 1537 (1984)); Rogers & Zimbarg, *Antisocial Backgrounds of Defendants Evaluated for Insanity: A Research Note*, 10 INT'L J. L. & PSYCHIATRY 75, 76 (1987).

250. *See generally* Spitzer, Endicott & Robins, *Research Diagnostic Criteria For Use in Psychiatric Research*, 35 ARCHIVES GEN. PSYCHIATRY 773, 773 (1978) (RDC provide "a consistent set of criteria for the description or selection of samples of subjects with functional psychiatric illness" to replace less precise diagnoses that rely on the diagnostician's concept of each disorder and standard descriptive glossaries).

251. *R-CRAS Validation*, *supra* note 72; *Legal Outcome*, *supra* note 236, at 77. The R-CRAS instrument measures patients on five scales: patient reliability, organicity, psychopathology, cognitive control, and behavioral control. *R-CRAS Validation*, *supra* note 72, at 68. *See generally* Rogers, *Unanswered Questions*, *supra* note 78, at 79-80 (important remaining unanswered questions include influence of extra-clinical factors, effects of new statutory proposals, and the "etiology of psychotically based criminal behavior").

For an assessment of the reliability and validity of an earlier, better-known instrument in this context, see Rogers & Cavanaugh, *Usefulness of the Rorschach: A Survey of Forensic Psychiatrists*, 11 J. PSYCHIATRY & L. 55 (1983) (forensic psychiatrists found to be "reasonably cautious and selective" in their use of Rorschach test, but also found to be unfamiliar with the existence of a variety of scoring and interpretation systems). For an evaluation of such a structured instrument in a *non*-forensic setting, see, *e.g.*, Kernberg, Goldstein, Carr, Hunt, Bauer & Blumenthal, *Diagnosing Borderline Personality: A Pilot Study Using Multiple Diagnostic Methods*, 169 J. NERVOUS & MENTAL DISORDERS 225 (1981) ("structural" interview contributes to the differential diagnosis of borderline personality organization).

252. *Cf.* G. MELTON, *supra* note 170, at 144-47 (recognizing the relationship between the lack of certainty in behavioral science methods and the relevance of behavioral science knowledge that governs the use of mental health professionals in legal proceedings).

These instruments also were created in response to research suggesting that some evaluating "clinicians may be both biased and unknowledgeable about the insanity evaluations they perform," Rogers, *APA's Position*, *supra* note 26, at 844-45, and that experts' subjective judgments about the justifications for the insanity defense substantially affected their evaluations of marginal cases. *Id.*, *cf.* Homant & Kennedy, *Judgment*, *supra* note 95 (the primary predictor of an expert witness' view of a particular case is the expert's attitude toward the insanity defense); Rogers & Turner, *Understanding of Insanity: A National Survey of Forensic Psychiatrists and Psychologists*, 7 HEALTH L. CAN. 71 (1987) (forensic psychiatrists and psychologists have insufficient knowledge and understanding of the current insanity standard); Smith & Graham, *Clinicians' Experience and the Determination*

CRAS have been validated for use in insanity determination studies.[253] The R-CRAS tellingly revealed that malingering was not associated with either severe psychopathology or expert opinion regarding sanity.[254]

Whether or not these instruments prove ultimately to be of significant global value in assessing responsibility,[255] they reflect

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of Criminal Responsibility 16 CRIM. JUST. & BEHAV. 473 (1989) (experienced psychologists found fewer defendants NGRI than did either graduate students in clinical psychology or undergraduate students). For an analysis of the MSE and R-CRAS, see T. GRISSO, *supra* note 47, at 172-87 (most mental health professionals who specialize in forensic assessments have insufficient knowledge and understanding of the current insanity standard).

The most recent research conducted by Dr. Rogers and his associates suggests that the chance assignments of a particular psychiatrist "may override all other considerations in determining a forensic patient's prognosis," and that "who conducts the evaluation is at least as important as who is evaluated in determining the prognosis and treatment recommendations of MDOs [mentally disordered offenders]." Rogers, Gillis, Dickens & Webster, *Treatment Recommendations for Disordered Offenders: More Than Roulette?*, 6 BEHAV. SCI. & L. 487, 494 (1988) (emphasis omitted).

253. *See, e.g., R-CRAS Validation, supra* note 72 (use of R-CRAS and Model Penal Code (MPC)); Rogers, *Unanswered Questions, supra* note 78 (use of R-CRAS under *M'Naghten* and GBMI); Rogers & Cavanaugh, *SADS, supra* note 249 (use of SADS in insanity evaluations); Rogers, Dolmetsch & Cavanaugh, *supra* note 72 (R-CRAS and MPC); Rogers, Seman & Wasyliw, *The R-CRAS and Legal Insanity: A Cross Validation Study*, 39 J. CLIN. PSYCHOLOGY 554 (1983) (R-CRAS and MPC); Rogers, Wasyliw & Cavanaugh, *Evaluating Insanity: A Study of Construct Validity*, 8 LAW & HUM. BEHAV. 293 (1984) (same). Professor Rogers suggests that accurate assessment tools may be of greater reliability in volitional than in cognitive determinations, Rogers, *Unanswered Questions, supra* note 78, at 78, and that arguments that volitional prong non-responsibility cannot be measured are "an intellectual charade played for the benefit of an uninformed public." *Id.*

254. Rogers, Dolmetsch & Cavanaugh, *supra* note 72, at 687.

255. While the SADS-generated RDC diagnosis has been found — in forensic evaluations — to provide a "systematic and highly reliable assessment based on a sophisticated psychiatric classification of mental disorders," Rogers & Zimbarg, *supra* note 249, at 79, and the RDC has been used to investigate the question of whether certain developmental antisocial symptoms may have a predictive value in determining whether such defendants warrant the diagnosis of antisocial personality disorder, Rogers & Cavanaugh, *SADS, supra* note 249, the R-CRAS has been criticized gently by Professors Roesch and Golding. They have pointed out that it may not appropriately clarify the association between organic disturbance and moral judgment or control capacities, and that its validity data uses "criterion contaminated groups," that is, groups characterized as sane or insane by the R-CRAS. See Golding & Roesch, *supra* note 45, at 419. They fear that the use of such instruments may "deflect attention away from the critical need to develop a better fundamental understanding of the behavioral, perceptual, cognitive, affective, and judgmental correlates of [mental disorders]." *Id.* at 417-418 (emphasis omitted); *see also*, G. MELTON, *supra* note 170, at 147:

> The weaknesses of the RCRAS include its misplaced emphasis on addressing ultimate-issue questions; its claims to quantify in areas of judgment that are actually logical and/or intuitive in nature; and the manual's claims to scientific rigor, which assures that RCRAS-based opinions have "reasonable medical and

an important development and concomitant reality: that psychologists and other behavioralists are developing new empirical tools to help us understand irrational behavior. These tools remain, however, virtually irrelevant both to the policy debate over the future of the insanity defense, and to the substantive and procedural contours of the defense itself. It is *this* reality that needs sober reflection.[256]

C. The Significance of Scientific Evidence

The elements of the empirical picture are thus fairly clear, although its contours remain opaque. Myths regarding the operation of the insanity defense system developed and became locked into place; commentators empirically rebutted these myths; other empiricists developed new data leading to a significant measure of clarity regarding certain elements of responsibility decision-making; scholars continue to call for additional empirical evidence to illuminate the underlying issues more coherently; yet, regardless of the wealth of new empirical data, public attitudes have not changed.

Virtually all of the data and instruments discussed, however, focus on the court process: what happens to insanity pleaders once they are arrested, tried and institutionalized and how forensic assessors come to their determinations of responsibility. None of this data touches on another critical aspect of insanity defense jurisprudence: the interplay — if any — between scientific discoveries and changes in the law. If the insanity defense is inevitably and inextricably intertwined with notions of mental disease, it would

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scientific certainty." The major risk involved in its use at this time is that clinicians or courts may, in light of the unsubstantiated claims in the manual, attribute undeserved scientific status to judgments that remain, ordinal ratings notwithstanding, logical and commonsensical in nature.

256. *Cf.* R. ROGERS, *supra* note 45, at 16 ("[T]he relevant question is whether the standardized measures represent a substantial improvement in the quality of forensic evaluations. The issue is not whether these measures represent a perfect synchronicity of any law professor's armchair interpretation of the legal standard.").

In the lengthy Congressional hearings held in the wake of the Hinckley acquittal, there was apparently only one witness whose testimony focused on the development and utility of any of these tools. See *Reform of the Federal Insanity Defense: Hearings on H.R. 1280 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 416 (1983) (statement of Stephen L. Golding, Ph. D.). Nothing in either the final committee report or the Insanity Defense Reform Act as enacted suggests that Congress paid any particular heed to Dr. Golding's recommendations. *Cf.* English, *supra* note 29, at 47-48 (decrying fact that Dr. Rogers' empirical research never "informed the Congressional debate").

stand to reason that as our knowledge about the etiology, epidemiology, pathology and physiology of mental diseases increases, our construct of responsibility would increasingly become more sophisticated. It seems that this would hold true, especially in light of the recent attention being paid by legal commentators to the scientific method and its implications for the law.[257] In fact, no such thing has happened.

Development of insanity defense jurisprudence has proceeded with extreme indifference to new scientific discoveries.[258] If anything, the retrenchment of the cognitive-only test (as reflected in the *M'Naghten* rules) may have reflected a conscious decision on the part of legal decision-makers to ignore the psychodynamic revolution and its aftermath. It may be helpful to consider these seemingly paradoxical developments in light of the various dominant models of mental illness[259] which have evolved in an effort to explain aberrant behavior:[260] the medical model,[261] the psychoanalytic model,[262] the behaviorist model[263] and the social model.[264] It

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257. *Cf.* Fuller, *Playing Without A Full Deck: Scientific Realism and the Cognitive Limits of Legal Theory*, 97 YALE L.J. 549, 549 (1988) ("[L]egal theorists have failed to come to grips with the central role that cognitive limitations play in legal reasoning."); Note, *Scientific Model*, *supra* note 24, at 1970-71 (Three elements generally found in the "scientific model of judicial lawmaking" are (1) an objective inquirer, (2) a process of hypothesis and empirical testing, and (3) a belief in some underlying coherent system that assures that the first two principles will produce accurate and reproducible answers.).

258. *Cf.* State v. Pike, 49 N.H. 399, 438 (1869) (Doe, J., concurring) ("The law does not change with every advance of science; nor does it maintain a fantastic consistency by adhering to medical mistakes which science has corrected."). For a recent important integration of law and the scientific method, see Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics*, 103 HARV. L. REV. 1 (1989).

259. *See generally* M. SIEGLER & H. OSMOND, MODELS OF MADNESS, MODELS OF MEDICINE (1976) (comparing and evaluating medical and other models' abilities to explain aberrant behavior); Wolfgang, *The Medical Model Versus the Just Deserts Model*, 16 BULL. AM. ACAD. PSYCHIATRY & L. 111 (1988) (exploring the roles played by the rehabilitation-oriented medical model and the retribution-oriented just deserts model in the development of modern penology).

260. In addition to the models listed in the text, see, M. SIEGLER & H. OSMOND, *supra* note 259, at 16-18 (discussing moral model, impaired model, psychedelic model, conspiratorial model, and family interaction model). *But see* Mechanic, *Explanations of Mental Illness*, 166 J. NERV. & MENTAL DIS. 381, 386 (1978) (arguing that theoretical models purporting to explain the manifestations of mental illness do not further our understanding and pointing out that the reason there are so many theories is because we know so little).

261. M. SIEGLER & H. OSMOND, *supra* note 259, at 23-27; Gerard, *The Usefulness of the Medical Model to the Legal System*, 39 RUTGERS L. REV. 377 (1987).

262. M. SIEGLER & H. OSMOND, *supra* note 259, at 43-52. The use of this model in criminal justice problem-solving is demonstrated in Schoenfeld, *Law and Unconscious Motivation*, 8 HOW. L.J. 15 (1962). On the question of the scientific basis of psychodynamic

might also be helpful to examine the basis of recent scientific "discoveries" in an effort to determine whether the choice of model, in fact, makes any difference[265] and whether such discoveries have had a significant impact on insanity defense jurisprudence.[266]

The medical model is a method of investigation which hypothesizes that aberrant behavioral manifestations are potentially symptomatic of underlying physical causes, and relies upon observation, classification and testing to isolate such causes, thus permitting syndrome-specific diagnosis, treatment and prognosis.[267] Professor Jules Gerard extols this as the appropriate model to be embraced by the legal system in insanity defense and civil commitment decision-making, and asserts that psychiatry's failure to describe illnesses in such a way that patients could be appropriately clinically diagnosed was "an inevitable by-product of the *dominance* in America of the psychoanalytic model."[268]

Nothing is more significant to Professor Gerard's position than the American Psychiatric Association's adoption of the DSM-III.[269] It is ironic, he stresses, that while critics of the

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theory, see Morse, *Failed Explanations*, *supra* note 32, at 994-1018.

263. *See*, M. SIEGLER & H. OSMOND, *supra* note 259, at 27-35. For a helpful discussion of this model in a non-insanity defense context, see Wexler, *Token and Taboo: Behavior Modification, Token Economies, and the Law*, 61 CALIF. L. REV. 81 (1973).

264. M. SIEGLER & H. OSMOND, *supra* note 259, at 52-58; *see also* Weiss & Bergen, *Social Supports and the Reduction of Psychiatric Disability*, 31 PSYCHIATRY 107 (1968) (hypotheses as to elements constituting supportive relationships which can serve as a foundation for future study).

265. *Cf.* Lazare, *Hidden Conceptual Models in Clinical Psychiatry*, 288 NEW ENG. J. MED. 345, 349-50 (1973) ("Whereas human beings are simultaneously biologic organisms, psychologic selves, behaving animals, and members of social systems, [psychiatry] lack[s] a comprehensive set of general "laws" [which includes the medical, psychologic, behavioral and social models.] Failing that, we must come to terms with the [fact that no] model offers a complete explanation . . . .").

266. The influence of *biological* factors on criminality is explored in S. HALLECK, PSYCHIATRY, *supra* note 146, at 11-22. *But see* Walters & White, *Crime, Popular Mythology, and Personal Responsibility*, FED. PROBATION, Mar. 1988, at 18, 25 ("[T]he source of crime involves choice, not genes, drugs and alcohol, psychological trauma, or poverty.").

267. Gerard, *supra* note 261, at 382-383.

268. *Id.* at 414. The psychoanalytic model, Professor Gerard charges, "viewed diagnosis as unnecessary." *Id.*

269. *Id.* at 415; *see* Spitzer & Endicott, *Medical and Mental Disorder: Proposed Definition and Criteria*, in CRITICAL ISSUES IN PSYCHIATRIC DIAGNOSIS 15 (1978); Spitzer, Williams & Skodol, *DSM-III: The Major Achievements and an Overview*, 137 AM. J. PSYCHIATRY 151 (1980). *See generally* 1 M. PERLIN, *supra* note 78, § 2.03 n.123 (citing sources).

Not all commentators are as sanguine about DSM-III. *See, e.g.*, Comment, *The Psychologist as Expert Witness: Science in the Courtroom?*, 38 MD. L. REV. 539, 578-582 (1979) [hereinafter Comment, *Psychologist*]. DSM-III has since been supplemented by a

mental health system were "essentially correct" in arguing that psychiatry's descriptions of illnesses were vague, overlapping and confusing, their criticism "reached its apogee" at the precise time that psychiatry was remediating the problem through elaborate diagnostic criteria, clinical descriptions and operational definitions of mental disorders in DSM-III.[270]

The medical model has become more significant in light of contemporary research regarding the hypothesized physiological bases of mental disorders and the use of "hard science" diagnostic tools such as CAT, MRI, and PET, to determine the presence of underlying physical causes.[271] Even Professor Stephen Morse has acknowledged that recent studies showing "real biological differences between normals and various types of disordered people" may someday reflect "valid differences."[272] While "[t]he impact of neuroscience on forensic medicine is still somewhat in its infancy,"[273] scientific papers about such developments are frequently written in an ebullient, promising tone.[274]

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new manual, DSM-III-R. *See* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (American Psychiatric Association 3d ed. rev. 1987) [hereinafter DSM-III-R]. *See generally* Cooper & Michels, *DSM-III-R: The View From Here and Abroad* (Book Review), 145 AM. J. PSYCHIATRY 1300, 1301 (1988) ("[T]he majority of the changes [in the DSM-III-R] improve the manual and provide both a better basis for current diagnosis and better opportunities for future research.") Kendell, Book Review, 145 AM. J. PSYCHIATRY 1301, 1302 (1988) ("there is no doubt that [the DSM-III-R] represents a substantial improvement over its distinguished predecessor, DSM-III.").

270. Gerard, *supra* note 261, at 414-415.

271. *See generally* Luchins, *Computed Tomography in Schizophrenia: Disparities in the Presence of Abnormalities*, 39 ARCHIVES GEN. PSYCHIATRY 859 (1982) (computed tomography studies reveal that some schizophrenics have enlarged ventricals and other evidence of brain atrophy); Garber, *Use of Magnetic Resonance Imaging in Psychiatry*, 145 AM. J. PSYCHIATRY 164 (1988) (magnetic resonance imaging studies have detected subtle morphological differences in schizophrenics and is useful in the study of neuropsychiatric disorders); Wong, Wagner, Tune, Dannals, Pearlson, Links, Tamminga, Broussolle, Ravert, Wilson, Toung, Malat, Williams, O'Tauma, Snyder, Kuhar & Gjedde, *Positron Emission Tomography Reveals Elevated D_2 Dopamine Receptors in Drug-Naive Schizophrenics*, 234 SCI. 1558 (1986); Sargent, *Updating on Brain Imaging*, 39 HOSP. & COMMUN. PSYCHIATRY 933 (1988) (PET studies reveal that brain D_2 dopamine receptor density is greater in patients with schizophrenia than in normal volunteers).

272. Morse, *Treating Crazy*, *supra* note 145, at 365-66, & n.25 (citations omitted). On the other hand, Morse argues that the presence of a "distinguishing biological variable . . . would have no necessary relevance for *legally or socially* distinguishing crazy people from normals." *Id.* at 366.

273. Cavanaugh & Rogers, *Forensic Psychiatry and the Neurosciences*, 5 BEHAV. SCI. & L. 221, 221 (1987).

274. *E.g.*, Swayze, Yates & Andreason, *Brain Imaging: Applications in Psychiatry*, 5 BEHAV. SCI. & L. 223, 224 (1987) ("[e]xciting new developments in a multiplicity of brain imaging techniques capable of studying not only structure but physiology have rekin-

Yet, the history of psychiatry as a means of altering the social order has been, to some extent, a history of failed promises.[275] In each of the past several generations, psychiatrists have developed new treatments, new tests, and new methods of diagnosis; inevitably, a counter-literature develops, criticizing the new developments.[276] While the criticism may be more pronounced as to therapeutic interventions which are found wanting (because of irreversible side effects, civil rights violations or invasions of personal autonomy),[277] criticism has also been made as to matters involving testing and diagnosis.[278]

Even though many of the new "discoveries" appear closer to "hard science" than did traditional psychoanalytic constructs, this

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dled psychiatric interest in brain science").

275. *E.g.*, Schmideberg, *supra* note 125, at 21 ("The popular picture painted by [psychiatry's] propagandists is sometimes totally unrealistic and irresponsible."); *cf.* Weisberg, *The 'Discovery' of Sexual Abuse: Experts' Role in Legal Policy Formation*, 18 U.C. DAVIS L. REV. 1, 18 (1984) (Since at least the 1930's, psychiatrists have consciously attempted to "increase the legitimacy and expand the influence of their fledgling science by the establishment of a new link between psychiatry and the law. . . . at a time when the public was increasingly aware of the promise of psychiatry."). For the reaction of one commentator to psychiatry as it has affect in law, see S. GLUECK, LAW AND PSYCHIATRY: COLD WAR OR ENTENTE CORDIALE? 171 (1962):

> Psychiatric research is following psychological, physiological and chemical paths. This is wise; for mental illness appears to be the outcome of chemistry at one end and culture at the other, and limitation of inquiry to psychological symptoms may mean that investigators are dealing more with the smoke than with the fire.

276. *Cf.* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 77 (1962) (clashes between theoretical paradigms is a necessary precondition to the advance of science). *See generally* G. GROB, MENTAL ILLNESS AND AMERICA SOCIETY, 1875-1940 (1983) (traces social efforts to deal with mental illness as both a medical and social problem by looking to the development of individual, institutional and governmental relationships); G. ROSEN, *supra* note 115 (historical overview of the place of mental illness in societies from the ancient world to the present and how it underlies the foreignness of the mentally ill in their own communities); A. SCULL, *supra* note 115 (discusses the evolution of english asylums for the mentally ill, as well as the dramatic changes which took place between the mid-eighteenth and mid-nineteenth centuries in the treatment of deviants).

277. *See, e.g.*, Kaimowitz v. Michigan Dep't of Mental Health, 2 Prison L. Rep. 433, 475 n.15 (Mich. Cir. Ct., Wayne Cty., 1973) ("The classical lobotomy of which thousands were performed in the 1940's and 1950's . . . was overused and caused [a general bleaching of the personality] to the persons who were subjected to it."); Note, Kaimowitz v. Department of Mental Health: *A Right to Be Free From Experimental Psychosurgery*, 54 B.U.L. REV. 301, 304 (1974) ("Intrusion into the brain for political purposes can be conceptualized as merely a more direct means of stifling dissent, and warnings have been issued labelling current interest in psychosurgery as a harbinger of ominous threats to individual liberty in the future.") (footnote omitted).

278. *See, e.g.*, Comment, *Psychologist*, *supra* note 269, at 565-77, 577-88 (on reliability of psychological tests and diagnoses, respectively).

does not suggest that there is no debate in the "hard sciences" over diagnostic matters.[279] Also, while the psychoanalytic model may not be an effective *diagnostic* model,[280] the criticisms leveled against it should not obscure the fact that studies have shown that — as a *treatment intervention* — psychotherapy's benefits have been found to be "on a par with other expensive and ambitious interventions, such as . . . medicine."[281]

Thus, whether Professor Gerard's assessment of the psychoanalytic model is correct or not may be largely irrelevant, regardless of whether it is viewed from the vantage point of empiric "reality," moral philosophy, the rules of evidence, legal theory, or science.[282] As a student commentator has recently observed, "the 'absolute' truth Cardozo found lacking in the law is not present in scientific theories either."[283] Like law, science is interpretive and contextual.[284] It is especially ironic that the "common denomina-

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279. Indeed, Professor Gerard explicitly concedes as much. *See* Gerard, *supra* note 261, at 417 n.144 (discussing cardiologic diagnoses and toxicologic analyses). *See generally* Note, *Scientific Model*, *supra* note 24, at 1986-88 (pointing out that requirement of certainty in law does not require rejection of the scientific model in light of recognition of the models limitations).

280. *See* Gerard, *supra* note 261, at 414; *cf.* Kaplan & Rinella, *supra* note 204, at 216 (discussing the reasons why psychoanalysis remains a "marginal tool for legal analysis").

281. M. SMITH, G. GLASS & T. MILLER, THE BENEFITS OF PSYCHOTHERAPY 183 (1980) (discussing the "near monotonous regularity" with which psychotherapy's efficacy has been demonstrated).

282. *See, e.g.*, Boorse, *On the Distinction Between Disease and Illness*, 5 J. PHIL. & PUB. AFF. 49, 67 (1975) ("[O]ne cannot expect to substitute psychiatry for moral debate, any more than moral evaluations can be substituted for psychiatric theory."); Note, *Scientific Model*, *supra* note 24, at 1971 ("Scientists themselves have questioned whether their own disciplines are capable of the kind of objectivity, strict empiricism, and theoretical coherence the traditional model describes.").

283. Note, *Scientific Model*, *supra* note 24, at 1980.

284. *Id.* at 1988. Over twenty years ago, Professor Harold Korn argued that attacks on the *M'Naghten* test were "misconceived," as *M'Naghten*, a legal standard, reflected "not a purely scientific" formulation, and was thus one that could not be "resolved solely by reference to the learning of psychiatry." Korn, *Law, Fact and Science in the Courts*, 66 COLUM. L. REV. 1080, 1094 (1966). *M'Naghten*, he explained, "explicitly authorize[d] [the jury] to make an inferential jump from psychiatric conceptions to the value-laden legal one." *Id.* at 1095; *see also id.* at 1101 ("[T]he normative and prescriptive attitudes of the legal system inject value and policy ingredients with which scientific learning is not concerned."); Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV: 827, 842-43 (1988) ("Scientific authority, on which nonscientists rely in forming their beliefs on scientific matters, is derivative from the genuine power and well-deserved prestige of scientific methodology; science works. Judicial authority is essentially political[.]"). This, of course, implies that psychiatric concepts are *not* "value-laden," an assumption that, today, nearly all would agree is erroneous.

tor between law and science . . . is a central emphasis on the critical method of hypothesis formulation and empirical testing."[285] For it is here that one of the great ironies of insanity defense jurisprudence glares at us: the results of empirical testing are ultimately irrelevant to legal decision-makers.[286] As I will demonstrate later,[287] even when we are made aware of the inaccuracy of the myths that form the underpinning of our jurisprudence, we continue to ignore overwhelming and virtually uncontradicted evidence, and to instead, adhere to the persistent myths. Just as we have demurred to uncontested empirical evidence, so do we demur, in large part, to "interpretive and contextual" scientific explanations of mentally disordered criminal behavior.[288]

While "science continue[s] to offer new insights and techniques applicable to the law and to all aspects of human understanding,"[289] it is not at all clear that society is prepared to accept these insights and expand its base of understanding. Perhaps we reject scientific explanations because we are terrified that they will tell us what we do not want to confront: that far more criminal defendants are "insane" or "not responsible" than we had thought.[290]

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285. Note, *Scientific Model, supra* note 24, at 1981. *See generally* C. HEMPEL, PHILOSOPHY OF NATURAL SCIENCE 2 (1966) ("[M]any of our findings concerning the methods and the rationale of scientific inquiry apply to the social as well as to the natural sciences.").

286. Professor Robinson's view is typical of those who find these results irrelevant.

> [F]or all practical purposes, the only time medicine and physiology figure centrally in the insanity defense is where a disease of the brain is suspected. The experts in this regard, however, are not psychiatrists but neurologists. Psychiatry is a "social science," which is to say it is not a science at all, and the same is true of psychology and sociology . . . . At most, they tote a loose collection of question-begging diagnoses that are not beyond dispute even within [a] small clinical population . . . .

D. ROBINSON, PSYCHOLOGY AND LAW: CAN JUSTICE SURVIVE THE SOCIAL SCIENCES? 61 (1980).

287. *See infra* text accompanying notes 502-26.

288. *See* Berk, *The Role of Subjectivity in Criminal Justice Classification and Prediction Methods*, 9 CRIM. JUST. ETHICS 35, 36-37, 44 (1988) (arguing that all statistical procedures "necessarily rest on subjective elements that can drastically affect the numbers produced," and "objectivity in all classification and forecasting schemes is multidimensional and a matter of degree," but quantitative methods still lead to the best results "we can currently produce," results that are "certainly better than conventional wisdom, bureaucratic convenience, seat-of-the-pants calculations or clinical judgments.").

289. Note, *Scientific Model, supra* note 24, at 2002.

290. For example, recent case study evidence has shown that brain abnormalities in violent mental patients may be far more frequent than has previously been reported. Tancredi & Volkow, *Neutral Substrates of Violent Behavior: Implications for Law and Pol-*

If the number of defendants found not responsible were to go beyond some abstract pressure point, new dilemmas for society would be created. The empirical reality is that few defendants plead insanity and fewer are successful. Yet, if we accept new scientific evidence (and integrate those findings into our jurisprudence), we would then have to deal with an insanity defense system which has a potentially significant impact on the judicial system and the criminal process. That might plausibly lead to new pressure to abolish the defense because its use would — for the first time in history — actually have an operational impact on the crime-control model of criminal law.[291]

An analogy may help. In assaying long-held assumptions that underlie criminal trial fact-finding, social-science research has created new factual issues by showing that statistically, white jurors have a disproportionate tendency to convict black defendants, and that indigent criminal defendants often do not have an adequate opportunity to prepare a defense or rebut the state's evidence in cases in which scientific evidence is crucial.[292] Rather than face the issues posed, we respond by rejecting the studies, and steadfastly adhere to the status quo.

In short, where science does appear to inform us of ways in which the criminal justice system is operating unfairly, we choose to reject the information rather than confront the underlying issues that are raised. To some extent, this may reflect a self-refer-

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icy, 11 INT'L J.L. & PSYCHIATRY 13, 48 (1988); Taylor & Gunn, *Violence and Psychosis: Risk of Violence Among Psychotic Men*, 288 BRIT. MED. J. 1945, 1948 (1984); *see* Weller & Weller, *Crime and Mental Illness*, 28 MED. SCI. & L. 38 (1988) (exploring relationship between deinstitutionalization of the mentally ill and rise in prison population).

Thus, Dr. Tancredi and Professor Volkow have pointed out that the traditional Western assumption that individuals generally possess free will and can control their decisions to engage in antisocial behavior may need to be reexamined, as "we may discover that a vast majority of individuals engaging in deviant behavior are influenced by factors and determinants which are clearly not within the powers of their individual free will." Tancredi & Volkow, *supra*, at 34 (emphasis added); *see also id.* at 31-32 (new scientific discoveries "give validity to" volitional prong of the Model Penal Code test).

291. *See supra* text accompanying notes 55-56. *See generally* S. BREHM & J. BREHM, PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL 79 (1981) (pressure in one area of freedom, *e.g.*, freedom to eliminate the insanity defense, will increase when freedom on another area, *e.g.*, freedom to exercise a crime-control model of criminal law, is limited (discussing the hydraulic principle (and not the insanity defense itself) articulated in R. WICKLUND, FREEDOM AND REACTANCE 86 (1974))).

292. Note, *Scientific Model*, *supra* note 24, at 1991. *But see* McCleskey v. Kemp, 481 U.S. 279 (1987) (rejecting statistics and results of social science survey offered to show systemic racial discrimination in Georgia prosecutors' decisions to seek death penalty, and in jurors' decisions to impose death sentences).

ential heuristic, *i.e.*, in order to retain our concepts of intentionality of the mind "as understood in scholastic medieval philosophy," we need to reject scientific reality.[293] Heuristically at least, we cannot accept the idea that because of "defects in the limbic area" or differences in "receptor systems of the brain," all of us do not react the same way to external stimuli.[294]

Scientific advance is clearly not without its internal dissonance.[295] Yet, even if we acknowledge both psychiatry's inherent and inevitable subjectivism and contextuality, as well as its history of failed promises as a means of controlling deviance, we must still confront one even more implacable problem: society's dogged heuristic adherence to its "common sense" conceptions of free will and behavior control, in the face of remarkable contrary evidence.[296] Until this paradox is confronted, the impact of scientific advance on our ability to craft new solutions to perennial dilemmas will be little more than illusory.[297]

D. The Significance of Moral Philosophy

No perspective is more ubiquitous in insanity defense literature than that of the moral philosopher. The insanity defense is, to be sure, a natural for philosophic debates, as it involves so many of the philosopher's "high cards": notions of free will, determinism, responsibility, rationality, community standards and ethical perspectives.[298] Without too much distortion, one can read the his-

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293. Tancredi & Volkow, *supra* note 290, at 34.

I use "heuristic" to refer to principles that are used in attempting to simplify complex information-processing tasks, but which lead to distorted and systematically erroneous decisions that decision-makers rely on to disregard useful information. Perlin, *Facade*, *supra* note 80, at 966 n.46 (citing Carroll & Payne, *The Psychology of the Parole Decision Process: A Joint Application of Attribution Theory and Information-Processing Psychology*, in COGNITION AND SOCIAL BEHAVIOR 13, 21 (J. Carroll & J. Payne eds. 1976).

294. *See* Tancredi & Volkow, *supra* note 290, at 34.

295. *See* T. KUHN, supra note 276, at 77, 110 (competing paradigmatic branches of a given science would give the impression of instability, but such competition is necessary for scientific advance, especially when anomalies, inconsistencies and insight shake the established scientific paradigm).

296. *See id.*

297. *See* McHenry, *The Judicial Evolution of Ohio's Insanity Defense*, 13 U. DAYTON L. REV. 49, 78 (1987) (speculating that Ohio's insanity test will probably remain static until the time that "all human behavior, emotions, and thoughts will be discernible from examining a string of DNA [deoxyribonucleic acid] on the end of a pin").

298. *See generally* D. BAZELON, *supra* note 1, at 25-26 (insanity defense "illuminates the complex moral judgments we make in finding guilty a person who commits a criminal act"); FREEDOM AND RESPONSIBILITY (H. Morris ed. 1962) (collection of philosophical, legal and psychological works which focus on the common question of moral free-

tory of the insanity defense debate as a history of philosophical positions.

Along with the evolution of philosophical positions has come an important development in the field of criminal law scholarship: the use of moral philosophy as a tool to analyze substantive criminal law doctrine.[299] As a result, scholars and academics began the "immense undertaking" of crafting and refining insanity defense doctrines in reliance on schools of philosophical thought.[300] From this body of work, the writings of Professors Stephen Morse[301] and Michael Moore[302] have emerged as the most important.[303]

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dom and responsibility); Morris, *The Decline of Guilt*, 99 ETHICS 62, 71-72 (1988) (discussing the insanity defense in the context of moral versus legal guilt).

299. *See, e.g.*, Arenella, *supra* note 85, at 214 (criticizing Herbert Packer, see H. PACKER, *supra* note 57, for "ignor[ing] the moral quality of substantive guilt"). On the American vision of custody as a moral act, see Willens, *Structure, Content and the Exigencies of War: American Prison Law After Twenty-Five Years, 1962-87*, 37 AM. U. L. REV. 41, 154 (1987).

300. *See, e.g.*, Ross, *Some Philosophical Considerations of the Legal-Psychiatric Debate of Criminal Responsibility*, 1 ISSUES IN CRIMINOLOGY 34, 35 (1965) ("[P]hilosophers from the Sophists to the Rationalists to the Existentialists . . . have concerned themselves with the question: 'What would happen . . . if men were held irresponsible for some or all of their actions?' ").

301. *See, e.g.*, Morse, *Treating Crazy*, *supra* note 145; Morse, *Excusing*, *supra* note 1; Morse, *Failed Explanations*, *supra* note 32; Morse, *Diminished Capacity: A Moral and Legal Conundrum*, 2 INT'L J.L. & PSYCHIATRY 271, 271 (1979); Morse, *Crazy Behavior*, *supra* note 26.

302. *See, e.g.*, M. MOORE, *supra* note 116, at 5; Moore, *Causation and the Excuses*, 73 CALIF. L. REV. 1091 (1985); Moore, *The Relevance of Philosophy to Law and Psychiatry*, 6 INT'L J.L. & PSYCHIATRY 177 (1983); Moore, *Responsibility and the Unconscious*, 53 S. CAL. L. REV. 1563 (1980); Moore, *Responsibility for Unconsciously Motivated Action*, 2 INT'L J.L. & PSYCHIATRY 323 (1979); Moore, *Mental Illness and Responsibility*, 39 BULL. MENNINGER CLIN. 308 (1975) [hereinafter Moore, *Responsibility*]. For a helpful (and generally laudatory) review of Moore's work, see Slobogin, *A Rational Approach to Responsibility* (Book Review), 83 MICH. L. REV. 820 (1985) (review of M. MOORE, *supra* note 116)).

303. In Moore's monumental work, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP, *supra* note 116, he explicitly articulates the importance of moral philosophy to the inquiries in question:

> I shall return to the ultimate theses of the book: first, that both lawyers and psychiatrists need to know more about the philosophy of science, the philosophy of mind, and the philosophy of law if either group is to get straight the relationship between the two disciplines; and second, that a rethinking of the relationship in terms of such knowledge should show that neither the legal nor the psychiatric theory of the person departs significantly from the ancient and commonsense [*sic*] idea that persons are beings who are sufficiently rational, "in charge" of their actions, and unified in their purposes, that they may justly be the subjects of praise and blame, justly the holders of rights and of responsibilities.

Id. at 5.

Both of them appear[304] to be comfortable with retentionist positions,[305] at least in cases involving the "extremely crazy."[306] That is, while Professor Moore acknowledges the role of the insanity defense as a "morality play," he also suggests that the only "appropriate" question to ask jurors is whether the accused is "so irrational as to be nonresponsible."[307] Professor Morse, on the other hand, suggests a new alternative formulation: "A defendant is not guilty by reason of insanity if, at the time of the offense, the defendant was so extremely crazy, and the craziness so substantially affected the criminal behavior that the defendant does not deserve to be punished."[308]

While these tests are, to be sure, narrow ones, they are certainly based on defensible moral constructs. More problematic are the real world assumptions underlying their positions which disregard the inherent irrationality in legal insanity defense decisionmaking and the inherent dissonance between the insanity defense and the peacekeeping function of the criminal law.

Professors Moore and Morse have also greatly influenced the work of others working in the area of moral philosophy and criminal responsibility. *See, e.g.*, Mitchell, *Culpable Mental Disorder and Criminal Liability*, 8 INT'L J.L. & PSYCHIATRY 273 (1986); Saunders, *Voluntary Acts and the Criminal Law: Justifying Culpability Based on the Existence of Volition*, 49 U. PITT. L. REV. 443, 475-76 n.130 (1988) (distinguishing his approach from Moore's).

This is not to denigrate the work of many other commentators in this area, specifically Professors Richard Bonnie and Christopher Slobogin. *See, e.g.*, Slobogin, *GBMI*, *supra* note 166; Bonnie, *Morality*, *supra* note 134; Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97 (1984) [hereinafter Slobogin, *Dangerousness*]; Bonnie, *Moral Basis*, *supra* note 1; Bonnie & Slobogin, *supra* note 32. However, a careful reading of their work reveals that they are both at least as concerned with empirical data and with the underlying evidential and doctrinal issues as with the "pure" issues of moral philosophy.

For a recent major contribution regarding the interrelationship of philosophy and law, see Sendor, *supra* note 26, at 1394-1401 (articulating an interpretative theory of the insanity defense).

304. *See supra* note 32 (recounting Morse's change of heart, from abolitionist to retentionist, on this issue).

305. Slobogin, *GBMI*, *supra* note 166, at 528 (Professor Moore's thesis "strongly affirms the role of the insanity defense as a necessary and integral aspect of criminal justice."); *see* Morse, *Excusing*, *supra* note 1, at 836 ("We should not abolish the insanity defense unless we truly believe that every perpetrator of a criminal act deserves to be punished, no matter how crazy.").

306. Morse, *Excusing*, *supra* note 1, at 820. On the use of the vernacular word "crazy," see generally Toulmin, *Introductory Note: The Multiple Aspects of Mental Health and Mental Disorder*, 2 J. MED. & PHIL. 191 (1977) (discussing the confusing "colloquial language" used for talking about the mentally disabled).

307. M. MOORE, *supra* note 116, at 244, 245.

308. Morse, *Excusing*, *supra* note 1, at 820; *see also id.* at 781 ("The basic precondition for desert in all contexts . . . is the actor's responsibility as a moral agent.").

Professor Moore expects that jurors, the primary representatives of the "shared moral sentiments of the community,"[309] will ultimately come to a moral decision as to a defendant's responsibility. Similarly, Professor Morse relies on fact-finder common sense and compassion to insure that the "extremely crazy" are found not responsible.[310] These seemingly unobjectionable views rest on a premise which may have less support than the authors appear to acknowledge: the expectation that fact-finders will be fair in determining criminal liability in cases involving mentally disabled criminal defendants. It is simply not clear what normative standards Professor Morse expects jurors will employ in coming to moral decisions as to who deserves to be punished. This lack of clarity is troubling, because the expectation articulated by both Professors Morse and Moore flies squarely in the face of the empirically-demonstrated *irrationality* of jurors acting as fact-finders in insanity defense decision-making.[311]

Also, Professor Morse suggests a defendant should be excused if his or her "irrationality is the product of [an] extreme mental disorder, over which, to the best of our knowledge, the person has little control."[312] This argument presupposes rational and cognitively-driven decision-making, a scenario that bears little resemblance to reality in the trial of insanity defense cases and which may be largely irrelevant to insanity defense decision-makers. To some extent, Professor Moore's formulation also begs the political question.[313] Thus, he quotes, with seeming endorsement, an observation from the Royal Commission on Capital Punishment's report: "However much you charge a jury as to the M'Naughten Rules or any other test, the question they would put to themselves when they retire is—'Is this man mad or not?' " [314] But, if this were so, then why the furor over *Hinckley* or other "wrong" verdicts in which something about the victim, or the surrounding social or political circumstances or the highly publicized nature of the case animates the public's post-verdict furor?[315]

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309. Moore, *Responsibility*, *supra* note 302, at 322.

310. *See, e.g.*, Morse, *Failed Explanations*, *supra* note 32, at 1081.

311. *See, e.g.*, Roberts, Golding & Fincham, *supra* note 179.

312. Morse, *Justice, Mercy, and Craziness* (Book Review), 36 STAN. L. REV. 1485, 1490 (1984) (reviewing N. MORRIS, MADNESS AND THE CRIMINAL LAW (1982)).

313. *See infra* text accompanying notes 316-25.

314. M. MOORE, *supra* note 116, at 245 (quoting RCCP, *supra* note 55, § 322).

315. *See* Wexler, *supra* note 26, at 541. *See generally id.* at 543 (discussing the American Bar Association's Criminal Justice Mental Health Standards Project use of the

E. The Abolitionist Movement

The movement to abolish the insanity defense in the United States dates back to the turn of the century.[316] Its contemporaneous revival can be traced to the Nixon Administration's unsuccessful attempts to transform the insanity defense[317] by limiting it to cases in which the defendant, by mental disease or defect, "lacked the state of mind required as an element of the offense charged."[318]

By its very nature, the *Hinckley* case was guaranteed to stoke the fires of the abolitionist movement.[319] After *Hinckley*, there

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phrase "moral mistake," referring to, in Wexler's view, a "substantial disharmony between the good faith judgment of a criminal jury and the public reaction to that judgment").

316. The New York State Bar Association issued a report recommending that the law "relegate to the realm of the obsolete the assumption that an insane man cannot commit crime." Rood, *Statutory Abolition of the Defense of Insanity in Criminal Cases*, 9 MICH. L. REV. 126, 126 (1911). Interestingly, Professor Rood — writing over 75 years ago — began his paper with an anecdote, focusing on the then-recent *In re Thaw*, 138 App. Div. 91, 122 N.Y.S. 970 (1910) "as a striking illustration of the disgraceful farce made of criminal trials by the allowance of the defense of insanity under the present practice.". Rood, *supra*, at 126. The specific impact of "anecdotal justice," i.e., formulating a jurisprudence from the heuristic of an isolated case, will be explored in depth in Perlin, *Psychodynamics*, *supra* note *.

317. *See* Perlin, *Hinckley's Trial*, *supra* note 56, at 860.

318. *See* Wales, *supra* note 47, at 687 (quoting S. 1, 94th Cong., 1st Sess. § 522 (1975)). A forerunner to section 522 had been proposed by a consultant to the National Commission on Reform of Federal Criminal Laws in 1970, but was rejected by the Commission. Wales, *supra*, at 688; *see* Hermann & Sor, *supra* note 45, at 539-540.

President Nixon had charged that this limitation was necessary so as to end the "unconscionable abuse" to which the defense had been subjected by unscrupulous defendants. *See* Perlin, *Overview of Rights in the Criminal Process*, in 3 LEGAL RIGHTS OF MENTALLY DISABLED PERSONS 1879, 1889 (P. Friedman ed. 1979) (quoting Mackenzie, *New Code Would Alter Rules on Insanity*, Wash. Post, Oct. 12, 1975, at C6, col. 1). On the possible roots of this charge, see, e.g., Gerard, *supra* note 261, at 410; Gerber, *The Insanity Defense Revisited*, 1984 ARIZ. ST. L.J. 83, 117-18 (discussing United States v. Trapnell, 495 F.2d 22 (2d Cir.), *cert. denied*, 419 U.S. 851 (1974)). On the lack of empirical data supporting President Nixon's allegations, see, e.g., Pasewark & Pasewark, *Insanity Revised: Once More Over the Cuckoo's Nest*, 6 J. PSYCHIATRY & L. 481 (1978).

319. Perhaps the most important — and persistent — criminal law scholar supporting abolition has been Norval Morris. *See, e.g.*, N. MORRIS, *supra* note 312, at 53-76; Morris, *supra* note 1, at 516. Professor Morris has asserted "that the defense of insanity is moribund and should in the decades ahead be interred." *Id.* at 516. He has characterized the defense as "anachronistic," "manifestly inefficient," *id.* at 518, and "a sop to our conscience, a comfort for our failure to address the difficult arena of psychopathology and crime . . .!" *Id.* at 519.

It seems ironic that Professor Morris utilizes myths about the insanity defense to advance his abolitionist arguments (e.g., that its rare use is limited to "sensational cases" or "particularly ornate homicide cases where the lawyers, the psychiatrists, and the community seem to enjoy their plunge into the moral debate" and that it is "not raised for minor crimes." Bonnie & Morris, *Debate: Should the Insanity Defense be Abolished?*, 1 J.L. &

was no question that in a controversial case, political pragmatism would override clinical needs.[320] Thus, the final report of the National Institute of Mental Health's Ad Hoc Forensic Advisory Panel, which was specifically selected to review the policies and procedures of the St. Elizabeth's Hospital Forensic Division (where Hinckley is housed), underscored the pragmatic issues afoot in such a case. "From the perspective of the Hospital," noted the Report, "*in controversial cases such as Hinckley*, the U.S. Attorney's Office *can be counted upon* to oppose *any* conditional release recommendation."[321] The bureaucratic issue is not one of moral philosophy, of treatment philosophy, or of clinical conditions: it is the *political* reality that the government will be sure to oppose release of a "controversial" patient.[322]

HEALTH 113, 118 (1986) (remarks of Professor Morris); *see also*, Wexler, *Insanity Problem*, *supra* note 26, at 543 (discussing Morris's near-exclusive concern with murder cases). Interestingly and revealingly, in a recent non-insanity defense article, Professor Morris carefully attempts to debunk myths as to racial and genetic criminal propensity as "balderdash." Morris, *Race and Crime: What Evidence Is There That Race Influences Results in the Criminal Justice System?*, 72 JUDICATURE 111, 111 (1985).

While I believe that I have shown that each of his mythic premises is incorrect, my sense is that a sub-text issue is far more important. If a careful, well-respected scholar such as Professor Norval Morris can continue to perpetuate such myths, we should not be surprised when we discover similar distortions on the part of legislatures, political figures or the mass media.

320. In his analysis of the operation of the insanity defense system in Missouri, John Petrila, former director of that state's Forensic Services Office, charged forensic administrators with portraying the defense as "the last refuge of sociopathic individuals who manipulate mental health-criminal justice systems in order to escape confinement in a penitentiary." Petrila, *supra* note 226, at 91; *see id.* at 91 n.36 ("Administrators find that this view is often held by staff charged with caring for forensic patients. The author has been assured on several occasions by staff that 'there isn't one of them (in the state's maximum security unit) that's really crazy.' ").

Thus, one critic has noted, " '[t]he disrepute into which the insanity defense appears to be falling has profound impact upon both the criminal justice system and the mental health system.' " Sherman, *supra* note 105, at 251 n.111 (quoting Prevost, *Foreward* in THE INSANITY DEFENSE IN NEW YORK, A REPORT TO GOVERNOR HUGH L. CAREY 1, 4 (1978) [hereinafter NY REPORT]). Where an insanity defense acquittal appears to reflect "official permissiveness," the public's faith in the judicial system may be further disturbed. Sherman, *supra* note 105, at 252 & n.113 (citing Steadman, Pasewark & Pantle, *The Use of the Insanity Defense* in NY REPORT, *supra*, at 37, 38-39). Such a loss of faith has profound implications for the system's "gatekeepers" who must enforce the system's values, and becomes explicitly more problematic in controversial cases, such as Hinckley's. *See* Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273, 279 (1968) (administrative difficulty argument no more makes out case for abolition of insanity defense than it does for jury abolition in cases involving defenses such as lack of intent or ignorance).

321. *Ad Hoc Report*, *supra* note 176, at 96 (emphasis added).

322. *But see* 18 U.S.C. § 4243(f) (1988) (mandating that, when the director of a facility housing a person hospitalized following an insanity acquittal determines that the

The underpinnings of much of the opposition to the insanity defense, then, should not mask the simple reality that the only significant influence in this country over the past forty years — either rejecting a liberal test or adopting a conservative test — has been from prosecutors, district attorneys and their legislative allies.[323] While the language and supporting arguments of scholars and theoreticians as diverse as Thomas Szasz, Norval Morris and Jay Goldstein have been cited to bolster their arguments,[324] there can be no doubt that insanity defense "law reform agendas"[325] have been animated by one and only one significant motivation: to lessen the number of criminal defendants who can avail themselves of a non-responsibility defense, and, simultaneously, to increase the number of convictions and insure longer and more punitive terms of imprisonment.

It is striking that there has been virtually no interest in the empirical data which would be relevant to the *mens rea* or abolition positions,[326] despite specific suggestions that the *mens rea* reduction in Montana, Idaho and Utah should provide an "ideal opportunity" for emulating the "laboratory" conditions envisioned by Justice Brandeis in *New State Ice Co. v. Liebmann*.[327] It is

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person has sufficiently recovered so that his outright or conditional release "would no longer create a substantial risk of bodily injury to another[,] . . . he shall promptly file a certificate to that effect with the [committing court]," at which time the court shall either order discharge or, upon motion by the government, schedule a release hearing).

323. *See generally* Allen, *Criminal Law and the Modern Consciousness: Some Observations on Blameworthiness*, 44 TENN. L. REV. 735, 752 (1977) (noting resistance of prosecutors and judges who were prosecutors to giving internal mental states expanded significance in substantive criminal law); Sherry, *The Politics of Law Reform*, 21 AM. J. COMPAR. L. 201, 211-17 (1973) (discussing efforts by prosecutors and legislatures to redefine the *M'Naghten* test).

324. *See Gray*, *supra* note 52, at 576.

325. *See* Keilitz, *supra* note 89, at 306 n.97 ("In a chapter on the workings of the U.S. Department of Justice, . . . the influential conservative Heritage Foundation called for the elimination of the insanity defense as a priority in the criminal justice field in 1985." (citing Strasser, *Reagan to Resubmit Meese Nomination*, NAT'L L.J., Dec. 24, 1984, at 3, col. 8)).

For a recent example from a purportedly philosophical perspective, see Delk, *The Insanity Defense: Free Will, Determinism, and the Legal Process*, 21 THE PROSECUTOR 29 (1988) (advocating imposing responsibility on the insane, as they possess free will).

326. *See, e.g.*, Keilitz, *supra* note 89, at 304-06 (decrying the conspicuous absence of empirical data).

327. 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("[A] single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); *see also* Brooks, *The Merits of Abolishing the Insanity Defense*, 477 ANNALS 125, 135 (1985) (recommending experimentation with an study of the *mens rea* alternative).

ironic that so little attention has been paid to the experiences in the *mens rea* states,[328] especially since there has been some evidence that there may be "more claims of mental disturbance" as a result of the new legislation, rather than fewer.[329] While Henry Steadman and his colleagues are now beginning to publish data about what actually happens when abolition is attempted,[330] there is no evidence to suggest that Steadman's research will have a significant impact on politically motivated abolitionist measures.

III. The Law and Psychodynamic Principles

The legal system's continuing and unremitting failure to take seriously either empirical or scientific data about the insanity defense reflects its ongoing and generalized rejection of psychodynamic principles as a means of explaining human behavior.[331] For the purposes of this Article, two aspects of this rejection must be examined: the roots of the legal system's profound ambivalence toward psychiatry and psychiatrists,[332] and the specific, obsessive fears that arise in response to any suggestion that psychodynamic principles can be of assistance to the law in its disposition of mentally disabled offenders.[333]

A. The General Rejection of Psychodynamic Principles

1. The Law's Ambivalence Toward Psychiatry

The law remains "paradoxically fascinated and repelled

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328. *But see* Geis & Meier, *supra* note 178, at 74 (evaluating the Idaho legislation in light of that state's "highly conservative" population "notably hostile to mental health concepts," and "wont to proclaim that the mental health movement was dominated by left-wingers"); *cf.* Steadman, Callaghan, Robbins & Morrisey, *supra* note 126 (discussing forces motivating similar legislation in Montana).

329. *E.g.*, Keilitz, *supra* note 89, at 305 (noting that in a year's time in Montana, five persons were found "not guilty by reason of lack of *mens rea*").

330. *See*, Steadman, Callaghan, Robbins & Morrisey, *supra* note 126.

331. *See* Comment, *Concepts*, *supra* note 135, at 428 ("[L]egal decisionmakers behave rather like scientists faced with disruption of an imperfect but functioning paradigm: they find ways to limit the defense and to preserve the ability of law to achieve its policy goals.").

332. *See infra* text accompanying notes 334-451.

333. *See infra* text accompanying notes 452-502. Rejection of psychodynamic principles reveals itself in at least four different ways: in the laws view of psychiatry as being soft, exculpatory and confusing, *see infra* text accompanying notes 345-62, as "unseeable" and "imprecise," *infra* text and accompanying notes 363-83, and psychiatrists as wizards or charlatans, *infra* text and accompanying notes 384-415; and through a specific rejection of psychodynamic principles, *infra* text and accompanying notes 451-501.

by"[334] and "overwhelmingly ambivalent"[335] about psychiatry's role in the adjudicative process.[336] This tragic ambivalence is reflected in judicial desires to have mental health experts testify as to future dangerousness,[337] an expertise which psychiatrists themselves freely acknowledge they do not have, and to have them "take the weight" on difficult decisions involving commitment or release, especially in the cases of individuals hospitalized following insanity acquittals.[338] At the same time psychiatry is characterized as "the ultimate wizardry"[339] and psychiatrists as "medicine m[e]n"[340] or "shamanistic wizards."[341] Ambivalence arises as a consequence of the conflict between the aid that the legal system desires from psychiatrists and its fear that, as a result of the acceptance of that aid, an unacceptable amount of power over legal decision-making will accrue to psychiatrists.[342]

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334. Perlin, *Symbolic Values*, *supra* note 26, at 87.

335. *Id.* at 86.

336. *See* Zilboorg, *supra* note 62, at 543 (ideological attitudes of law and psychiatry, while both motivated by "deepest and greatest altruistic feelings, appear in practice extremely antagonistic"; relationship between law and psychiatry marked by "mutual suspicion and even open hostility"). For a psychological analysis of *why* lawyers resist psychology, see P. REIWALD, SOCIETY AND ITS CRIMINALS 21-41 (T. James trans. 1950). *But see* M. MOORE, *supra* note 116, at 2 ("the legal and psychiatric views of minds and persons do not contradict one another"); Sadoff, *supra* note 45, at 240 ("Historically, medical writers and legal scholars influenced each other's thinking."); Smith, *Scientific Proof and Relations of Law and Medicine*, 10 U. CHI. L. REV. 243, 243 (1943) ("The anvil of the law has always resounded to the striking iron of science.").

337. *See, e.g.*, Barefoot v. Estelle, 463 U.S. 880 (1983); Perlin, *Symbolic Values*, *supra* note 26, at 7-12.

338. *See, e.g.*, Suarez, *A Critique of the Psychiatrist's Role as Expert Witness*, 12 J. FORENSIC SCI. 172 (1967) ("The law has attempted to unburden itself of some of its tasks and responsibilities by dumping them on the lap of psychiatry."); Wasyliw, Cavanaugh & Rogers, *Beyond the Scientific Limits of Expert Testimony*, 13 BULL. AM. ACAD. PSYCHIATRY & L. 147, 152 (1985) ("Public decisions are often so close to impossible that those charged with making them are more than anxious to pass their burdens to unwitting experts"), Bazelon, *Veils, Values and Social Responsibility*, 37 AM. PSYCHOLOGIST 115, 121 (1982).

339. Bazelon, *Psychiatrists and the Adversary Process*, SCI. AM., June 1974, at 18 [hereinafter Bazelon, *Psychiatrists*].

340. Gunn, *An English Psychiatrist Looks at Dangerousness*, 10 BULL. AM. ACAD. PSYCHIATRY & L. 143, 147 (1982).

341. Perlin, *Symbolic Values*, *supra* note 26, at 87.

On the question of the credibility of expert witnesses in insanity defense cases, see, e.g., Homant & Kennedy, *Judgment*, *supra* note 95. On the way that extraneous factors, such as forensic identification, affect psychiatric evaluations in a civil context, see, e.g., Zusman & Simon, *Differences in Repeated Psychiatric Examinations of Litigants to a Lawsuit*, 140 AM. J. PSYCHIATRY 1300 (1983).

342. *See* Freckleton, *Court Experts, Assessors, and the Public Interest*, 8 INT'L J.L. & PSYCHIATRY 161, 161-62 (1986); Comment, *Psychiatrist's Role*, *supra* note 92, at 385.

Thus, the ambivalence reflects "ambiguous . . . feelings in need of self-rationalization: unconscious feelings of awe, of fear, of revulsion, [and] of wonder",[343] and involves at least three distinct but interconnected elements: the view of psychiatry as "soft," exculpatory, and confusing; the view of psychiatry as an invisible and imprecise science; and the view of psychiatrists as "wizards" or charlatans. This ambivalence is also the result of a record of empirical psychiatric error in the areas of diagnosis, release decisions and dangerousness evaluations,(invariably focusing on the numerically insignificant "false negatives")[344] and a tableau of demeaning and circus-like "battles of the experts" in trials where psychiatric evidence is a critical issue.

i. Psychiatry as Soft, Exculpatory and Confusing

The legal critique of psychiatry as soft is based on the innate feeling that psychiatry is inappropriately lenient or unduly exculpatory, as reflected in psychiatrists' "peculiarly tolerant attitude[s] toward criminal behavior, which is born out of [a] recognition [that a] welter of antisocial impulses occur[] in noncriminal individuals."[345] The critics assert that psychiatry expands "the

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343. Perlin, *Barefoot's Ake*, *supra* note 81, at 168; *see also*, Roth, *supra* note 49, at 93 ("It is difficult to educate the public about psychiatry and the Insanity Defense within a climate of fear and violence, where conscious and unconscious associations inevitably intrude."). *See generally* Goldstein & Katz, *Abolish The Insanity Defense — Why Not?*, 72 YALE L.J. 853, 868-69 (1963) (discussing the public's ambivalence toward the " 'sick' reflected in conflicting wishes to exculpate and to blame"). At least one state court judge has recently acknowledged this discomfort. *See* Matter of Clements, 440 N.W.2d 133, 137 (Minn. Ct. App. 1989) (Irvine, J., dissenting), *review denied*, (June 21, 1989 (no published denial of review)) ("It is undisputed that for at least the last 10 years, [the defendant] has engaged in conduct that makes a normal person's skin crawl (exposing himself in public while masturbating). It is easy to lose one's objectivity while dealing with such a highly emotional situation.).

344. *See infra* note 441.

345. Guttmacher, *Psychiatric Approach*, *supra* note 132, at 633; *see also* M. GUTTMACHER, THE ROLE OF PSYCHIATRY IN LAW 95 (1968) (urging retention of the insanity defense because it "give[s] the criminal law a heart"); Halleck, *Critique*, *supra* note 118, at 395 ("The most important reason for psychiatric participation in the criminal trial is humanitarian zeal to temper the harshness of punishment."); *cf.* Penry v. Lynaugh, 109 S. Ct. 2934, 2968 (1989) (Scalia, J., concurring in part and dissenting in part):

> The Court today . . . [approves] a scheme that simply dumps before the jury all sympathetic factors bearing upon the defendant's background and character . . . . It is an unguided, emotional "moral response" that the Court demands be allowed—an outpouring of personal reaction to all the circumstances of a defendant's life and personality, an unfocused sympathy."

It is a serious mistake to infer from these statements that *all* psychiatrists (especially all forensic psychiatrists) endorse these sentiments. *See, e.g.*, J. ROBITSCHER, *supra* note

concept of illness . . . continually at the expense of the concept of moral failure,"[346] and interjects improper "rehabilitative impulses" which doom the legal system to "contradiction, confusion and frequent public criticism."[347] For this reason, "many people simply do not trust psychiatrists with anything so . . . serious as the determination of criminal responsibility".[348] Others insist on a defendant's "near total lack of comprehension" for the insanity standard to be met.[349] The suggestion by psychiatry that an illness diagnosed as less severe than "psychotic psychopathology" or a "dramatic intellectual disorientation"[350] might be exculpatory has traditionally been rejected by the law and by the general public as well.[351] For example, in 1986, when President Reagan warned that impending Democratic control of the Senate would have dire consequences on his efforts to appoint tough federal judges, he asserted that " '[w]e don't need a bunch of sociology majors on the bench . . . . [w]hat we need are strong judges . . . who do not hesitate to put criminals where they belong, behind bars.' "[352]

134, at 24 (discussing prosecution-minded psychiatrists); *supra* note 133 (discussion of Dr. Grigson).

346. Swartz, *supra* note 117, at 390 (quoting Wootton, *Sickness or Sin?*, 159 TWENTIETH CENTURY 433, 434 (1956)).

This position is far from new. *See* Werman, *True and False Experts: A Second Look*, 130 AM. J. PSYCHIATRY 1351, 1352 (1973) (discussing Grissom, *supra* note 133); Zilboorg, *supra* note 62, at 545 (legislative policies holding defendants criminally responsible for certain delusions and the rejection of attempts by psychiatrists to tell courts what they learned from evaluations of criminals originated in Saxony in the sixteenth century); *cf.* Willens, *supra* note 299, at 154 (American prison systems "adopt or inherit the pre-colonial view that custody is a moral act, part of the fight to the death between good and evil, between us and them").

347. Watson, *supra* note 131, at 226.

348. Comment, *Psychiatrist's Role*, *supra* note 92, at 385.

349. *See, e.g.*, Hans & Slater, *"Plain Crazy:" Lay Definitions of Legal Insanity*, 7 INT'L J.L. & PSYCHIATRY 105, 111 (1984).

350. Arens, Granfield & Susman, *Jurors, Jury Charges and Insanity*, 14 CATH. U.L. REV. 1, 9 (1965).

351. *See, e.g.*, A. GOLDSTEIN, *supra* note 54, at 42 ("[B]ehavior is not regarded by the public as reflecting serious mental disorder . . . [without] conditions . . . reminiscent of the major characteristics of psychosis: breakdown of intellect, serious loss of self-control, and markedly inappropriate behavior"); Morse, *supra* note 300, at 272 ("support and respect for the criminal law require that only these persons who are truly incapable of obeying the law should be singled out as not responsible."). If the expert does his "educative job" well, jurors will learn that "the psychotic is much less 'crazy' than the general public imagines him to be". A. GOLDSTEIN, *supra* note 54, at 26.

Goldstein's assessment does not go far enough. I think it can be fairly argued that members of the public have a major emotional investment in insuring that the psychotic be seen as "truly crazy" so as to distance themselves from such individuals.

352. Rowland, Songer & Carp, *Presidential Effects on Criminal Justice Policy in*

To some extent, the public's attitude mimics Justice Stewart's famous *dictum* in *Jacobellis v. Ohio*:[353] "I know it when I see it."[354] Beyond this, the law is convinced that psychiatrists are not better in finding "it" than are members of the lay public.[355] Chief Justice Rehnquist's allegedly common-sensical vision of severe mental disability is a near-perfect examplar of the public's views.[356]

Finally, the legal system, reflecting community custom and consciousness, is dissatisfied with psychiatry because it is perceived as too confusing,[357] both internally and externally. It appears confusing internally in that psychiatrists have never been able to agree on the meaning of such terms as responsibility, mental illness or dangerousness.[358] It appears confusing externally in that psychiatrists have never satisfactorily explained to us why mentally disabled individuals act as they do.[359] Thus, Dr. Stephen Golding has perceptively noted:

> [W]hen the expert is asked covertly to relieve us of the moral burden of deciding who is on which side of a fuzzy boundary marked by considerable tension and conflict, we displace our anxiety, our punitiveness, and perhaps our resentment about being held to the moral standard and the psychological tension it

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the Lower Federal Courts: The Reagan Judges, 22 LAW & SOC'Y REV. 191, 194 (1988).

353. 378 U.S. 184 (1964) (Stewart, J., concurring).

354. *Id.* at 197. Writing in an entirely different science-and-law context, Prof. Rhoden characterizes Justice Stewart's test used to determine obscenity as a combination of "common sense plus social values." *See* Rhoden, *Trimesters and Technology: Revamping* Roe v. Wade, 95 YALE L.J. 639, 691-92 (1986). Common sense tells each of us that we are all "equipped with . . . the analytical and judgmental faculties . . . need[ed] to understand the nature, meaning, and morality of a particular act." Sherwin, *supra* note 48, at 738.

355. *See infra* notes 415-50 and accompanying text.

356. *See infra* notes 566-71, 598-602 & 625 and accompanying text. *See generally* D. BAZELON, *supra* note 1, at 6 ("As H.L. Mencken once said, for every complex problem in our society, there is a solution that is simple, plausible — and wrong.").

357. *See* Swartz, *supra* note 117, at 392 n.16 (quoting Stengel, *Classification of Mental Disorders*, 21 BULL. WORLD HEALTH ORG. 601 (1959)). For an important alternative perspective, see Lawrence, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

358. *See, e.g.*, Quen, *Responsibility and Justice*, *supra* note 143, at 247:

> As for the "battle of experts," I confess that I've never been able to understand why, when psychiatrists disagree, it is proof positive that they don't know what they're talking about and it demeans the profession; while, when our Supreme Court decides the law of the land by a disagreement of 5-4, they are scholars dealing with profound, difficult, and complicated issues and one must respect their differences in judgment.

359. For a helpful overview, see Bonnie & Slobogin, *supra* note 32.

causes.[360]

Perhaps this reflects the reality that "mental disease is much too complex to 'make it simple and understandable to everyone just by inventing simple words or phrases to describe it.' "[361] Thus, while serving as a court of appeals judge, future Chief Justice Burger observed, "no rule of law can possibly be sound or workable which is dependent upon the terms of another discipline whose members are in profound disagreement about what those terms mean."[362]

ii. Psychiatry as "Unseeable" and "Imprecise"

The legal system rejects psychodynamic principles because, unlike the biological sciences, the subject matter of psychological sciences is not visible.[363] The imprecision of psychiatry and psychology is seen as a given: judges should not "harbor the illusion that psychiatry and psychology will ever become 'exact' . . . that is, precise, quantitative, experimentally verified, and with substantially unanimous agreement of all behavioral scientists as to obser-

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360. Golding, *supra* note 141, at 8; *see also* Rogers, *Unanswered Questions*, *supra* note 78, at 76 ("Both attorneys and psychiatrists attempted to disavow the *Hinckley* case, seeking their *own* exculpation through proposals for a more restrictive standard.").

361. Comment, *Psychiatrist's Role*, *supra* note 92, at 395 (quoting 112 CONG. REC. 2975 (1966) (remarks of Sen. Dodd)).

362. Blocker v. United States, 288 F.2d 853, 860 (D.C. Cir. 1961) (Burger, J., concurring); *cf.* Wertham, *Psychoauthoritarianism and the Law*, 22 U. CHI. L. REV. 336, 338 (1955):

> Judge Bazelon's legal openmindedness shows that lawyers are eager to receive concrete psychiatric information. If we have nothing to offer but psychological speculations and highhanded pronouncements, no progress is possible. Only if we overcome this psychoauthoritarianism will psychiatry find its proper place in the courtroom, and play, as it should, a strong but subordinate role.

363. Diamond & Louisell, *The Psychiatrist as an Expert Witness: Some Ruminations and Speculations*, 63 MICH. L. REV. 1335, 1340 (1965); Kuh, *The Insanity Defense — An Effort to Combine Law and Reason*, 110 U. PA. L. REV. 771, 791 (1962).

Speaking specifically of the development of psychodynamic theory, Professors Diamond and Louisell set out the dilemma facing the forensic witness:

> The investigator is able to have a first-hand acquaintance only with his own conscious mind — never with his own unconscious, and never directly with the conscious or unconscious minds of others. The investigator must therefore rely upon inferences made from derivatives: speech, non-verbal communication, actions, behavior. For example, a psychoanalyst never actually knows what his patient dreams. He knows only what the patient tells him about his dream, and there is reason to believe that the telling of a dream is much different from the dreaming process itself.

Diamond & Louisell, *supra*, at 1340-41.

vation and theory."[364]

This "invisibility" of the subject matter of psychological sciences is important for several reasons. It leads to a perceived inexactness in measurement and observation, an inexactness which is contrasted with the "exact" "hard" sciences.[365] This is especially troubling in the context of the "all or nothing" role of mental illness in determining responsibility questions.[366]

The invisibility of mental illness also leads to circumstances where the pivotal terminology and constructs may appear to be beyond the understanding of jurors who rely on ordinary common sense[367] in decision-making. The D.C. Circuit's decision in *United States v. Brawner*[368] to overrule *Durham*[369] and adopt the ALI-Model Penal Code insanity test, underscores how insanity tests "cannot be the result of scientific analysis or objective judgment," but instead, "must be based on the instinctive sense of justice of ordinary men".[370] This is because we know a lay juror "puts his own 'value' on the [defendant's] asocial behavior."[371]

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364. Diamond & Louisell, *supra* note 363, at 1342.

Dr. Jonas R. Rappeport, a leading forensic psychiatrist, stated, "there is no scientifically valid method for measuring 'substantial capacity' to appreciate criminality or conform behavior." Rappeport, *The Insanity Plea Scapegoating the Mentally Ill — Much Ado About Nothing*, 24 S. TEX. L.J. 687, 698 (1983) [hereinafter Rappeport, *Scapegoating*]. Rappeport asks elsewhere: "Are we embarrassed to let the public know that the state of our art is such that we do not know everything and that there are different schools and theories in psychiatry?" Rappeport, *Ethics and Forensic Psychiatry*, in PSYCHIATRIC ETHICS, *supra* note 115, at 255, 259; *see* Rappeport, *The Insanity Plea: Getting Away With Murder*? 32 MD. ST. MED. J. 202 (1983) [hereinafter Rappeport, *Getting Away with Murder*].

This observation has been used as a major weapon in the judicial attack on psychiatric testimony. *See, e.g.*, Suggs v. LaVallee, 570 F. 2d 1092, 1119 (2d Cir.) (Kaufman, C.J., concurring), *cert. denied*, 439 U.S. 915 (1978) ("[P]sychiatry is at best an inexact science, if, indeed, it is a science, lacking the coherent set of proven underlying values necessary for ultimate decisions on knowledge or competence.").

365. *See, e.g.*, Nesbitt v. Community Health of South Dade, Inc., 467 So. 2d 711, 717 (Fla. Dist. Ct. App. 1985) (Jorgenson, J., concurring in part and dissenting in part) (physicians' diagnoses can be readily verified whereas psychiatrists' cannot (quoting Almy, *Psychiatric Testimony: Controlling the 'Ultimate Wizardry' in Personal Injury Actions*, 19 FORUM 233, 243-44 (1984))).

366. *See, e.g.*, Robitscher & Haynes, *In Defense of the Insanity Defense*, 31 EMORY L.J. 9, 26-27 (1982).

367. Comment, *Psychiatrist's Role*, *supra* note 92, at 390 ("[t]he facts are that the jury . . . does not understand the code of the psychiatrist . . . and . . . applies its own reasoning to the case").

368. 471 F.2d 969 (D.C. Cir. 1972).

369. Durham v. United States, 214 F.2d 862, 874-75 (D.C. Cir. 1954).

370. *Browner*, 471 F.2d at 977 n.6.

371. Comment, *supra* note 92, at 390 (discussing R. SIMON, THE JURY AND THE

Further, the invisibility clarifies why neurological and biological testimony as to *brain* disease (as reflected in tests such as CAT scans) may be more readily accepted by jurors and courts in sensational[372] and unknown[373] trials alike. Such "hard" data may simply be more persuasive to lay jurors than "soft psychological explanations."[374]

This also gives credence to what is basically a fundamental view:[375] If we cannot see it, how can we be sure it exists, and if it does exist, how can we assess or measure it?[376] Here, psychiatric language serves a symbolic function: it reemphasizes to the judge and to the lay juror how idiosyncratic the expert's views truly are. This stands in stark contrast with the law's epistemological authoritarianism.[377] It is no surprise that an authoritarian system instinctively rejects the values of an "invisible" science.

The psychological sciences' concomitant imprecision and inexactitude stand in juxtaposition to the legal system's emphasis on certainty, an emphasis seen by some as "the primacy of the legal form in modern society."[378] Finally, even among mental health professionals, surveys seem to indicate that public attitudes are more favorable to the "strictly medical professions" than to those

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DEFENSE OF INSANITY (1967)).

372. *See* L. CAPLAN, *supra* note 44, at 69-85 (outlining expert testimony in the *Hinckley* trial including the court's initial refusal, and later permission, to allow discussion of CAT scan results as a method for diagnosing schizophrenia); Elliott, *An Introduction to Brain Syndromes*, 5 BEHAV. SCI. & L. 287, 305 (1987) ("Thus, a scan of the brain dome on would-be presidential assassin John Hinckley, showing enlarged ventricles, may have helped to persuade the jury that he indeed did have 'something wrong' with his brain.").

373. *See, e.g.*, Commonwealth v. Monico, 396 Mass. 793, 799-800, 488 N.E.2d 1168, 1172-73 (1986) (neurological testimony as to frontal lobe dysfunction sufficient basis for giving of insanity instructions).

374. Elliott, *supra* note 372, at 305.

There is an extra measure of ambivalence here: if Professor Rhoden is right when she asserts that "[t]he judicial process cannot become value-free and remain judicial," Rhoden, *supra* note 354, at 696, it is ironic that the more purportedly "pure" scientific testimony (e.g., CAT scans) *is* embraced by jurors precisely because it appears *to be* "value-free," while the "softer" and less visible psychodynamic testimony — embodying "values" just as the legal system embodies values — is to be rejected. *Id.* ("For while science seeks to be value free, law is the ultimate articulation of social values").

375. *See supra* text accompanying notes 353-54.

376. *Cf.* People v. Guzman, 47 Cal. App. 3d 380, 385, 121 Cal. Rptr. 69, 72 (1975) ("How far should the courts go in allowing so-called scientific testimony, such as that of polygraph operators, hypnotists, "truth drug" administrants, as well as purveyors of general psychological theories, to substitute for the common sense of the jury?")

377. Haney, *Psychology and Legal Change: On the Limits of a Factual Jurisprudence*, 4 LAW & HUM. BEHAV. 147, 159 n.23 (1980).

378. *Id.* at 165.

involving "psychologically designated roles."[379] This reflects the public's "common sense" feeling that scientists specializing in an imprecise, invisible branch of study are simply not as trustworthy as those dealing with objective data.

On the other hand, it is not at all clear that "the precision and finality often associated with the x-ray and microscope"[380] really are either precise or final. As Dr. Jonas Rappeport reminds us, "heart sounds may be interpreted differently by various physicians, and even the revered EKG may be interpreted differently,"[381] an observation amply borne out by the scientific literature.[382]

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379. McGuire & Borowy, *Attitudes Toward Mental Health Professionals*, 10 PROF. PSYCHOLOGY 74, 78 (1979); *see* Nunnally & Kittross, *Public Attitudes Toward Mental Health Professions*, 13 AM. PSYCHOLOGIST 589 (1958).

380. Sobeloff, *From* McNaghten *to* Durham *and Beyond*, in CRIME AND INSANITY 136, 142 (R. Nice ed. 1958).

381. Rappeport, *Scapegoating*, *supra* note 364, at 702.

382. *See, e.g.*, Goldberger & O'Konski, *Diagnostic Decision: Utility of the Routine Electrocardiagram Before Surgery and On General Hospital Admission*, 105 ANNALS INTERNAL MED. 552 (1986); Moorman, Hatky, Eddy, Wagner & the Duke Medical House Staff, *The Yield of the Routine Admission Electrocardiogram: A Study in the General Medical Service*, 103 ANNALS INTERNAL MED. 590 (1985); Patterson, Cashie, Galloway, McArthur, McWhinnie, *The Pre-Operative Electrocardiogram: an Assessment* 28 SCOT. MED. J. 116 (1983); Resnekov, *Task Force IV: Use of Electrocardiograms in Practice*, 41 AM. J. CARDIOLOGY 170 (1978).

Similarly, there is significant controversy in many other, seemingly more-tangible areas of medicine. *See, e.g.*, Blery, Chastang & Gaudy, *Critical Assessment of Routine Preoperative Investigations*, 1 EFF. HEALTH CARE 111 (1983). *See generally* Lasagna, *Consensus Among Experts: The Unholy Grail*, 19 PERSP. BIOLOGY & MED. 537, 538 (1976) (discussing the "extraordinary extent of disagreement about a number of therapeutic agents" among physicians).

The popular analysis rebutted by Rappeport is also to be found wanting by recent research explorations of the wide range of physical diseases that masquerade as psychiatric disorders, leading to the discovery that physiological disorders such as endocrine disturbances, neurologic diseases, a variety of tumors, tissue disorders, and electrolyte and fluid imbalances, epilepsy, cerebral tumor, head trauma, encephalitis, and cerebral arteriosclerosis may play an important part in creating disabling mental conditions. *See, e.g.*, Peterson & Martin, *Organic Disease Presenting as a Psychiatric Syndrome*, 54 POSTGRADUATE MED. 78 (1973); Hall, Popkin, Devaul, Faillace & Stickney, *Physical Illness Presenting as Psychiatric Disease*, 35 ARCH. GEN. PSYCHIATRY 1315 (1978); Hall, Gardner, Stickney, LeCann & Popkin, *Physical Illness Manifesting as Psychiatric Disease II: Analysis of a State Hospital Inpatient Population*, 37 ARCH. GEN. PSYCHIATRY 989 (1980) [hereinafter Hall, *Physical Illness II*]; Martin, *A Brief Review of Organic Diseases Masquerading as Functional Illness*, 34 HOSP. & COMMUNITY PSYCHIATRY 328, 329-32 (1983). For additional sources discussing physical disorders in psychological patients, see Hall, *Physical Illness II*, *supra*, at 995 nn.1-9.

iii. Psychiatrists as Wizards or Charlatans and the Need for Masks

Perhaps no attitude contributes as much to the legal system's ambivalence about psychiatry and psychiatrists as the attribution of shamanistic or wizard-like qualities to psychiatric practitioners.[383] We have historically invested psychiatrists with "the special powers of reading and healing minds, powers that are magical," calling upon them as the "medicine m[e]n" who have the ability to heal our anxiety and take away our fears.[384]

There is significant support for the argument that the origins of law "[lay] buried deep in primitive religion and superstition."[385] "When a king decided a dispute by a sentence, the judgment was assumed to be the result of direct [divine] inspiration."[386] Thus, legal constructs are metaphorically characterized as "magical tools for objectification which make persons and human emotions disappear", and as masks which serve to "objectify human conflict," as "tools for the enforcement of social policies," benefitting the legal system's peace-keeping functions.[387]

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383. *See* Bazelon, *Psychiatrists*, *supra* note 339, at 18 ("Psychiatry, I suppose is the ultimate wizardry. My experience has shown that in no case is it more difficult to elicit productive and reliable expert testimony than in cases that call on the knowledge and practice of psychiatry.").

384. Gunn, *supra* note 340, at 147. *See generally* F. ALEXANDER & S. SELESNICK, *supra* note 115 (traces the history of psychotherapy in magic, religion, and science); sources cited *supra* note 115.

Walter Bromberg traces this investiture to the use of magical aids by Bronze Age shamans. W. BROMBERG, *supra* note 115, at 2-3

385. Loevinger, *supra* note 118, at 63; *see also* Weyrauch, *Law as Mask — Legal Ritual and Relevance*, 66 CALIF. L. REV. 699, 716 (1978) [hereinafter Weyrauch, *Law as Mask*]:

> The idea that our legal system has magical and religious roots, and that there is an identity of functions between tribal masks and legal concepts and rules, is hard to accept because of our belief in the intrinsic rationality of modern law. But this idea is not very different from Holmes' observation that rules survive the forces that give rise to them . . . .

(citing O. HOLMES, THE COMMON LAW 5 (1881)).

386. Loevinger, *supra* note 118, at 63-64 (quoting H. MAINE, ANCIENT LAW 4 (3d Amer. ed. 1888)).

387. Weyrauch, *Law as Mask*, *supra* note 383, at 713-14 (discussing, in part, J. NOONAN, PERSONS AND MASKS OF THE LAW — CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS (1976)); *see also*, Weyrauch, *Taboo and Magic in Law* (Book Review), 23 STAN. L. REV. 782, 798 (1973) [hereinafter Weyrauch, *Taboo and Magic in Law*] (reviewing A. EHRENZWEIG, PSYCHOANALYTIC JURISPRUDENCE (1971)):

> Magic attempts to control the environment primarily by manipulative and mechanistic incantations of words. Spells are cast by the uttering of words in an exacting ritual, any deviation from which destroys the spell and may turn it

Simply put, "modern thought systems of our professions are not without ritual, magic, belief in incantations, and a certain amount of liturgy."[388]

It is also necessary to consider the concept that the legal system is a type of social mask. "[L]aw as a mask is an ancient device to invoke a higher authority in a dramatic ceremony, and to channel emotions and events into fixed styles of reasoning. . . ."[389] Masks are essential to the law's peace-keeping function.[390] They serve as a means of minimizing conflict and avoiding social confrontation.[391]

As a means of making the role of psychiatry in law more objective and channelling emotions toward constructive social ends, we invest the psychiatrist with shamanistic attributes. In the courtroom context, the psychiatrist interprets the inexplicable contours of irrational behavior for us, and in this role, dons the ceremonial mask of an archetypal shaman.[392] Yet, when the shaman's role as interpreter of irrationality clashes with the law's peace-keeping function by seemingly magical incantations leading to exculpation, the social need for vengeful punishment is left unsatisfied.

It should be no surprise that there is such dissonance between the peace-keeping function of law and the role of the insanity defense, especially given the historical link between insanity and demonology.[393] While the insanity defense lends credibility to the

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against the actor. In addition, magic establishes standards of "rationality," channels behavior, and permits prediction of the future . . . .

. . . .

. . . .The analogy of magic and magicians to law and lawyers appears to be appropriate.

388. Romanucci-Ross & Tancredi, *supra* note 115, at 265 (citing L. ROMANUCCI-ROSS, D. MOERMAN & L. TANCREDI, *supra* note 115, at 347-48).

On the continued role of magic in the civil commitment process, see Mestrović, *Magic and Psychiatric Commitment in India*, 9 INT'L J.L. & PSYCHIATRY 431 (1986).

389. Weyrauch, *Law as Mask*, *supra* note 383, at 725-26.

390. *Id.* at 718.

391. *Id.* at 718-19; *see* Ingber, *Procedure, Ceremony and Rhetoric: The Minimization of Ideological Conflict in Deviance Control*, 56 B.U.L. REV. 266, 269 (1976); Turnbull, *The Individual, Community and Society: Rights and Responsibilities From an Anthropological Perspective*, 41 WASH. & LEE L. REV. 77, 82 (1984).

392. C.G. JUNG, *Archtypes*, *supra* note 31, at 7-8.

393. *See, e.g.*, S. HALLECK, *Psychiatry*, *supra* note 146, at 210 (reviewing "demonological concept" of mental illness); Crotty, *The History of Insanity as a Defence to Crime in English Criminal Law*, 12 CALIF. L. REV. 105 (1924) ("The medieval notions that insanity was a visitation from the Almighty, or that the insane were possessed with demoniacal influences, were not confined to laymen alone, but were generally current among all

law when society disavows its need for vengeful punishment, it cannot satisfy this need when society demands that punishment be meted out.[394] Paradoxically, such societal demands for punishment seem most intense in cases of so-called "Oedipal crimes": crimes for which the fear of punishment is ineffective to restrain an offender once there is an overpowering urge to commit the act.[395] It is in the wake of such crimes that our fears of violence and irrationality resonate, catalyzing social forces to demand punishment. In such cases, society's desires for vengeance are highest, and the insanity defense's corrective function appears most dissonant. The facade we have constructed as a mask for the law then becomes less credible. Thus, from the perspective of law as mask, the insanity defense, as well as mental health professionals, become symbolic sacrificial tokens offered at the altar of public conscience.

As John Gunn has noted:

> Man seems to need to invest his physician with superior, almost superhuman powers . . . . The psychiatrist is after all the medicine man who heals anxiety, the man we call upon to take away our fears. This is partly why we give him legal powers to protect us from insane violent people . . . .
>
> It may be that man's inherent fear of irrationality is intimately mixed with an understandable fear of violence. If this be the case then it is a very short, although unwarranted, step to believe that all violence is a form of madness and alien.[396]

The psychiatrist's involvement in insanity defense cases is thus sought out to quell our fears of irrationality and violence.[397] In the rare case of a moral mistake,[398] in either a finding of non-

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classes"); Halleck, *supra* note 118, at 383 ("[I]n eras where mental illness was approached from a more theological standpoint, efforts were made to place responsibility for sick behavior on external 'devils' such as incubi or succubi.").

394. Weyrauch, *Taboo and Magic in Law*, *supra* note 387, at 791 (discussing A. EHRENZWEIG, *supra* note 387, at 230-41).

395. A. EHRENZWEIG, *supra* note 387, at 211-12, 220-21. "Oedipal crime" is meant to signify the severity of the crime and the emotional repulsion it causes. Weyrauch, *Taboo and Magic in Law*, *supra* note 387, at 790 n.26. Ehrenzweig's distinctions between pre- and post-Oedipal crimes are explored critically in Kaplan & Rinella, *supra* note 204, at 225-27.

396. Gunn, *supra* note 340, at 147.

On the continued role of magic and the civil commitment process, see Mestrovic, *Magic and Psychiatric Commitment in India*, 9 INT'L J.L. & PSYCHIATRY 431 (1986).

397. *E.g.*, Gunn, *supra* note 340, at 147.

398. *See, e.g.*, Bonnie, *Morality*, *supra* note 134, at 7.

responsibility[399] or a post-acquittal release decision,[400] the psychiatrist suffers as the system's scapegoat for his magical and exculpatory interpretation of a defendant's irrational acts.[401]

Thus, even though it is designed to serve a preservative function, the insanity defense also increases public skepticism of psychiatry because it is mystifying; because it is frequently contrary to "ordinary common sense;"[402] because it can be manipulated for ideological purposes;[403] because it appears that the testifying psychiatrist too often abandons the role of "healer" inappropriately becoming an advocate,[404] and because of its apparent all-inclusive-

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399. *See infra* text accompanying note 468.

400. *See infra* text accompanying notes 439-50 & 469.

401. *See* M. MOORE, *supra* note 116, at 244-45.

402. *See* Sherwin, *supra* note 48, at 738 (arguing that societal expectations about the blameworthiness of a criminal defendant are likely to be satisfied when common sense is used to establish the innocence or guilt of the defendant, but when ordinary common sense cannot be used, as is the case when an insanity defense is involved, the public perceives the system as somehow "awry"); *cf.* Kaplan, *The Mad and the Bad: An Inquiry Into the Disposition of the Criminally Insane*, 2 J. MED. & PHIL. 244, 254 (1977) ("The fact that contemporary medicine (psychiatry) and psychology have generated models of man which vary from the original simple dichotomy of responsibility/nonresponsbility articulated by the law creates an ideological tension with traditional legal notions concerning responsibility.").

403. *See* Kaplan, *supra* note 402, at 254 (discussing argument that American psychiatry supports "ideological repression under the name of science"); Rogers, *Ethical Dilemmas in Forensic Evaluations*, 5 BEHAV. SCI. & L. 149, 151 (1987) (distortion caused by "forensic identification," an unintentional process by which clinicians adopt theory or fact statement of attorneys with whom they have initial contact (discussing Zusman & Simon, *supra* note 340)); Wasyliw, Cavanaugh & Rogers, *supra* note 338, at 149 (discussing concern that expert testimony may reflect statements of personal or political beliefs "inappropriately disguised as expert testimony").

404. *See, e.g.*, Needell, *Psychiatric Expert Witnesses: Proposals for Change*, 6 AM. J.L. & MED. 425 (1980); Note, *Hearsay Bases of Psychiatric Opinion Testimony: A Critique of Federal Rule of Evidence 703*, 51 S. CAL. L. REV. 129, 137 (1977).

On the significance of an expert's legal attitudes in the formulation of his testimonial judgments, see Homant & Kennedy, *Subjective Factors*, *supra* note 105. On the related question of the ways in which a psychiatrist's personal feelings and emotions may color his testimony, see, e.g., Colbach, *American Forensic Psychiatry in the Eighties*, 29 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 99 (1985) (noting the potential for skewing results based on the characters of the psychiatrist); Heilbrun & McClaren, *Assessment of Competency for Execution? A Guide for Mental Health Professionals*, 16 BULL. AM. ACAD. PSYCHIATRY & L. 205, 207 (1988) ("It is hard for the clinician to avoid the sense of being the 'last hope' for keeping a condemned inmate from dying."); Schetky & Colbach, *Countertransference on the Witness Stand: A Flight From Self?*, 10 BULL. AM. ACAD. PSYCHIATRY & L. 115 (1982) (psychiatrists personal experiences and traits color their on stand testimony); K. Heilbrun & H. McClaren, *Assessment of Competency for Execution? Toward Resolutions of an Ethical Dilemma*, Paper presented at Annual Meeting of the Amer. Acad. of Psychiatry & Law, manuscript at 6 (Oct. 1987) ("[I]t is virtually impossible" for psychiatrists working with a death row population "to separate thoughts from

ness.[405] Psychiatrists thus appear to be engaged in the practice of "turf" annexation by claiming "expertise in almost all areas of human behavior."[406] For these reasons, the insanity defense has been traditionally seen as a part of the "complex of cultural forces that keep alive the moral lessons, and the myths, which are essential to the continued order of society,"[407] as "a crucial prop in a 'public morality play' ",[408] serving a "ritual function,"[409] or "as a screen upon which the community . . . project[s] its visions of criminal justice."[410]

However, when we fail to consciously acknowledge or attempt to come to grips with the unconscious depths of our fears of irrational and violent human behavior, we must struggle to accommodate our conscious repulsion of violence, with the moral element of the insanity defense facade. Just as the insanity defense plays a symbolic role, so too does public outrage at a *Hinckley*-type acquittal fill a similar symbolic need: the need to expiate ourselves because of the system's failure to mete out "appropriate" punishment.[411] Even some of the outraged state legislators who intro-

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feelings."). This coloring of testimony may be a result of "countertransference," which involves the effects of a therapist's unconscious needs and conflicts on his therapeutic understanding and/or technique. *See, e.g.*, R. CAMPBELL, PSYCHIATRIC DICTIONARY 167 (6th ed. 1989).

405. Weitzel, *Public Skepticism: Forensic Psychiatry's Albatross*, 5 BULL. AM. ACAD. PSYCHIATRY & L. 456, 462 (1977).

406. Wasyliw, Cavanaugh & Rogers, *supra* note 338, at 151 (discussing J. ROBITSCHER, *supra* note 134).

For recent research on the question of whether forensic psychiatric decision-making *is* truly different from that engaged in by other mental health professionals, lawyers, and lay persons, see Jackson, *Lay and Professional Perceptions of Dangerousness and Other Forensic Issues*, 30 CANAD. J. CRIMINOLOGY 215 (1988).

407. A. GOLDSTEIN, *supra* note 54, at 224.

408. Monahan, *supra* note 88, at 721.

409. Heinbecker, *supra* note 126, at 190.

410. Virgin Islands v. Fredericks, 578 F.2d 927, 937 (3d Cir. 1978) (Adams, J., dissenting).

411. *See* J. FEINBERG, *supra* note 95, at 100 ("[P]unishment generally expresses more than judgments of disapproval; it is also a symbolic way of getting back at the criminal, of expressing a kind of vindictive resentment . . . . [The criminal's] punishment bears the aspect of legitimatized vengefulness . . . ."); *see also* Arnold, *Law Enforcement*, *supra* note 86, at 10:

> [Courts] are engag[ed] in a public ceremonial in celebration of an ideal. For this purpose, the more deserving the accused is of punishment, the more striking is the exemplification of the emotional lesion. Thus the prestige of the government in enforcing laws is vindicated in one case while a ceremonial in memory of individual freedom from law enforcement is celebrated in another . . . .

Id.

duced post-*Hinckley* bills modeled after the federal Insanity Defense Reform Act acknowledged that this attempt served, at most, to fulfill a symbolic function in helping to create public confidence in the criminal justice system.[412]

Similarly, because trust (that is, the willingness of citizens to cooperate with governmental decisions and leaders) plays a key role in the authoritativeness and the legitimacy of government, and because empirical research seems to indicate that lack of such public support may lead to a willingness to disobey the law and engage in antisocial behavior, it is a high priority for governmental officials to minimize "the hostility that . . . unsatisfactory government decisions might engender."[413] As "the perception of unequal treatment . . . is the single most important source of popular dissatisfaction with the American legal system,"[414] it becomes almost essential for public authorities to take at least symbolic action to demonstrate to the public their symbolic outrage at a perceived "unfair" judicial decision. Assistant United States Attorney General Stephen Trott, speaking at the District of Columbia's Judicial Conference on the Insanity Defense, alluded to this type of governmental reaction in the insanity defense context:

> [W]e have a right as people to expect that the state will vindicate our individual rights as human beings and citizens and the state has an obligation to deliver a level of redress and protection that makes up for that renouncement of rights. And I think that's a good way to go, it's a government that's organized along the right lines. And whenever we see the government doing strange and bizarre things that fail to take into consideration in that balance our individual rights, I think we ought to be disturbed and that is partially what is at the bottom of all this insanity defense business.[415]

The social outrage that followed in the wake of the *Hinckley* acquittal thus threatened the continued use of masks in this con-

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412. *See, e.g.*, Kaufman, *Should Florida Follow the Federal Insanity Defense?*, 15 FLA. ST. U.L. REV. 793, 823 n.144 (1987) (quoting a sponsor of a series of Florida bills that would have codified *M'Naghten*, "Bureaucratically, there is not a felt need to make that change. I believe, though, that it would be a substantial value to the public in helping create confidence in the criminal justice system.").

413. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience*, 18 LAW & SOC'Y REV. 51, 52 (1984); *see* Wahlke, *Policy Demands and System Support: The Role of the Represented*, 1 BRIT. J. POL. SCI. 271 (1971).

414. Tyler, *supra* note 413, at 55 (quoting Sarat, *supra* note 100, at 434).

415. *Proceedings of the Forty-Sixth Judicial Conference of the District of Columbia Circuit*, 111 F.R.D. 91, 226 (1985) [hereinafter *D.C. Circuit Conference*].

text. The vividness of an on-camera assassination attempt of an enormously popular president followed by the seeming exculpation of his putative assassin *via* a retreat into obfuscatory, self-contradictory psychiatric jargon, served to threaten the uneasy homeostasis that traditionally has surrounded the use of the insanity defense in criminal trials. Only through a decisive and symbolic response of "reform" legislation could the masking function of psychiatry in law be maintained. Thus, our need to eviscerate the insanity defense so as to maintain the use of the mask reflects our underlying rejection of psychodynamic principles.

2. The Law's Ambivalence Toward the Psychiatric Method

i. The Reading of Empirical Data

The public's ambivalence about the use of psychiatry in the legal process and the legal system's concomitant rejection of psychodynamic principles in legal decison-making must also be considered in light of the legal system's "reading" of available empirical data.[416] By this reading, the legal system rejects psychiatric claims of expertise as to diagnosis and dangerousness issues, specifically in light of perceived "turf" imperialism by mental health professionals.[417]

Half a century ago, there was unbounded scholarly optimism about the role of psychiatry in the criminal justice process.[418] Psychiatry "appear[ed] to be popularly accepted both as the symbol of the desired new order and as the instrument for its attainment."[419] Benjamin Karpman expressed the visionary view

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416. Any apparent ambiguity between this section and Section II. B. I (Empirical Data and Myths), *supra* notes 218-45 and accompanying text, discussing the public's rejection of empirical evidence as to the actual operational impact of the insanity defense on the criminal justice system, is only illusory. In the earlier instance, we have consciously chosen to ignore data that focuses on the insanity pleader and the disposition of his case; here, we are paradoxically willing to examine data that focuses on the very different question of how much "expertise" an "expert" truly has. Any irreconcilable residue is best explained by our overarching use of heuristic decision-making as a means of dealing with this entire subject matter.

417. For a brief discussion of psychiatrists' habit of expanding their role and giving opinions which are "beyond their scientific domain," see Reich, *Psychiatric Diagnosis as an Ethical Problem*, in PSYCHIATRIC ETHICS, *supra* note 115, at 72-74.

418. *See* Dession, *supra* note 92. *See generally*, W. BROMBERG, THE USES OF PSYCHIATRY IN THE LAW: A CLINICAL VIEW OF FORENSIC PSYCHIATRY 47-53 (1979) (discussing the development of "a dynamic criminologic psychiatry that sought to understand crime as the result of unconscious and conscious pressures.").

419. Dession, *supra* note 92, at 329.

eloquently:

> I belong to the small group of psychiatrists who hold the thesis that criminality is *without exception* symptomatic of abnormal mental states and is an expression of them . . . . It is my task to present pertinent material demonstrating abnormal motivations behind the major types and kinds of criminality; to demonstrate that since these people are emotionally abnormal, they cannot be held legally responsible; and that psychiatric treatment, and not punishment, is the preferred and logical treatment of crime.[420]

Claims such as this "increased the ante" for psychiatry. As Henry Weihofen indicated a few years after the publication of Karpman's article, "We lawyers . . . expect the psychiatrist to give us *exact* answers. Psychiatry is Science, and like everyone in our twentieth century civilization, we have tremendous faith in what the scientific method can do."[421] It is not then surprising that psychiatric claims of expertise in the areas of diagnosis and predictions of dangerousness have been examined so closely, and have been, to a significant degree, found wanting.

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420. Karpman, *Criminality, Insanity, and the Law*, 39 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 584, 584-85 (1949) (emphasis added). Karpman also argued:

> We have to treat [criminals] as psychically sick people, which in every respect they are. It is no more reasonable to punish these individuals for a behavior over which they have no control than it is to punish an individual for breathing through his mouth because of enlarged adenoids, when a simple operation will remove the cause. There can be no question of responsibility when there is no evidence of conscious guilt; and there can be no question of guilt, if there is in the individual a strong psychic barrier that does not allow him to see it . . . .

Id. at 605.

At least one aspect of this view of psychiatry's role in the criminal justice system retains contemporary significance. *See* Heilbrun & McClaren, *supra* note 404, at 206 ("One could thus argue that there is an 'affirmative duty' for those who are well-trained, experienced in forensic assessment, aware of the limits of our knowledge, and determined to proceed within the boundaries imposed by ethical standards to *actively seek* an opportunity to participate" in assessing the competency of individuals for execution.). *See generally* Perry v. Lynaugh, 109 S. Ct. 2934 (1989) (discussing the potential mitigating effect of mental retardation and the constitutionality of executing mentally retarded convicts); Perlin, *Symbolic Values*, *supra* note 26, at 49-62 (discussing Ford v. Wainwright, 447 U.S. 399 (1986) (execution of the insane)).

421. H. WEIHOFEN, URGE, *supra* note 61, at 43; *see, e.g.*, Hall, *Psychiatric Criminology: Is It a Valid Marriage? The Legal View*, 16 BUFFALO L. REV. 349 (1966-67).

ii. Diagnosis

a. Issues of Classification

The law's ambivalence about the psychiatric method is also a product of the problems involved in diagnosing a person as mentally ill. Because "[t]here is no one acceptable definition of mental illness,"[422] and the validity and utility of standard psychiatric classifications have been questioned by critics representing the full spectrum of perspectives,[423] the history of classification systems in America reveals a constant pattern of conflicts.[424] The chair of the American Psychiatric Association Task Force that created the current classification system has pointed out that, while "this manual provides a classification of mental disorders, there is no satisfactory definition that specifies precise boundaries for the concept 'mental disorder.' "[425]

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422. Sadoff, *Basic Facts About Mental Illness*, in 1 LEGAL RIGHTS OF MENTALLY DISABLED PERSONS, *supra* note 318, at 165; *see also* Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 80 (1968):

> One need only glance at the diagnostic manual of the American Psychiatric Association to learn what an elastic concept mental illness is . . . . *Obviously the definition of mental illness is left largely to the user and is dependent upon the norms of adjustment that he employs.* Usually the use of the phrase "mental illness" effectively masks the actual norms being applied. And, because of the unavoidably ambiguous generalities in which the American Psychiatric Association describes its diagnostic categories, the diagnostician has the ability to shoehorn into the mentally diseased class almost any person he wishes, for whatever reason, to put there.

423. *See, e.g.*, A. BANDURA, PRINCIPLES OF BEHAVIOR MODIFICATION (1969) (behavioral critique); Kanfer & Saslow, *Behavioral Diagnosis*, in BEHAVIOR THERAPY: APPRAISAL AND STATUS 417 (C. Franks ed. 1968) (behavioral critique); J. ROBITSCHER, *supra* note 134, at 162-83 (political and social critique); T. SZASZ, THE MYTH OF MENTAL ILLNESS (1961) (psychiatric problems are not illnesses but are social conflicts over ways of achieving certain social values).

424. *See, e.g.*, Feighner, Robins, Guze, Woodruff, Winokur & Munoz, *Diagnostic Criteria For Use in Psychiatric Research*, 26 ARCHIVES GEN. PSYCHIATRY 57 (1972); Kramer, *The History of the Efforts to Agree on an International Classification of Mental Disorders*, in AMERICAN PSYCHIATRIC ASSOC. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (American Psych. Ass'n 2d ed. 1968) [hereinafter DSM-II]; Spitzer, *Introduction*, in DSM III, *supra* note 55, at 1; Spitzer & Endicott, *Medical and Mental Disorder: Proposed Definition and Criteria*, in CRITICAL ISSUES IN PSYCHIATRIC DIAGNOSIS 15 (1978); Spitzer, Forman & Nee, *DSM-3 Field Trials I: Initial Interrater Diagnostic Reliability*, 136 AM. J. PSYCHIATRY 815 (1979).

425. Spitzer, *supra* note 424, at 5. Spitzer adds that this observation is also true for such concepts as "physical disorder and mental and physical health." *Id.* at 5-6; *cf.* Livermore, Malmquist & Meehl, *supra* note 422, at 80 n.16 (contrasting categorizations of "emotionally unstable personality" in DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 36 (American Psychiatric Assoc. 1st ed. 1952) [hereinafter DSM I], and "hysterical personality" in DSM-II, *supra* note 424, at 43). This disorder is now known as

b. The Ambivalence of Diagnosis

The criminal justice system's dependence on psychiatry has been found diagnostically wanting for at least two reasons: the ambiguity of the diagnostic categories themselves[426] and the highly subjective application of the relevant diagnostic instruments (e.g., intelligence and personality tests, psychiatric observational interviews), which are often "subject to inconsistency and change . . . [and] suffer[] from bias."[427] As "diagnosis is a social act . . . . [which] takes place in a social context,"[428] and because the " 'facts' that the interviewer . . . perceive[s] can easily be distorted by his or her presuppositions, expectations, and sheer random errors,"[429] a significant divergence in psychiatric opinions is inevitable.[430] Thus, there have been suggestions "that experts limit

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"Histrionic personality disorder." *See* DSM-III, *supra* note 55, at 313 ("a Personality Disorder in which there are overly dramatic, reactive, and intensely expressed behavior and characteristic disturbances in interpersonal relationships"); *id.* at 379 (term "hysterical" [from DSM-II, *supra* note 424] dropped, in part, because of its many "irrelevant historical connotations").

In preparing the new manual, the Task Force focused on a variety of goals including "clinical usefulness for making treatment and management decisions in varied clinical settings" and "reliability of the diagnostic categories." DSM-III, *supra* note 55, at 2.

For a law professor's critique, see Morse, *Failed Explanations*, *supra* note 32, at 1049 (while DSM-III diagnostic categories are "far more precise" than those in DSM-II, "they are still not adequate proxies for legal craziness because they are not sufficiently precise to provide the fact finder with the necessary, full, textured account of how the defendant behaved").

DSM-III has already been supplanted by DSM-III-R. *See supra* note 269.

426. *E.g.*, NYU Note, *supra* note 238, at 719. *But see* Gerard, *supra* note 261, at 389 (discussing utility of DSM-III in this regard).

427. Reich, *supra* note 417, at 63 (footnote omitted); *see also id.* at 85 nn.8-12 (additional sources discussing the subjectivity of diagnosis); NYU Note, *supra* note 238, at 719 (judges and scholars find dependence on psychiatrists' troubling because "determining whether a defendant is insane involves the highly subjective application of several diagnostic instruments").

428. Reich, *supra* note 417, at 64.

429. United States v. Byers, 740 F.2d 1104, 1169 (D.C. Cir. 1984) (Bazelon, J., dissenting); *see also* Homant & Kennedy, *Judgment*, *supra* note 95, at 76 (relationship may exist between attitudinal bias and outcome in insanity assessments).

430. *See, e.g.*, Liston, Yager & Strauss, *Assessment of Psychotherapy Skills: The Problem of Interrater Agreement*, 138 AM. J. PSYCHIATRY 1069 (1981) (extent of agreement among thirteen experienced supervising psychotherapists evaluating interviews of six postgraduate residents "was uniformly low"). For an earlier view, see Spitzer & Fleiss, *A Re-analysis of the Reliability of Psychiatric Diagnosis*, 125 BRIT. J. PSYCHIATRY 341 (1974); *cf.* Silving, *Testing the Unconscious in Criminal Cases*, 69 HARV. L. REV. 683, 685 (1956) ("Nor is this 'scientific' method of testing held out as scientifically infallible. It is merely said to be more reliable than the *intuitive laymen's psychology* at present used in courtrooms, particularly the vague impression gained from the testimony of character witnesses.") (footnotes omitted) (emphasis added).

their testimony to explaining the psychodynamics of a defendant's behavior and avoid testifying on the ultimate issue of legal responsibility, which should be left to a value judgment of the jury."[431]

On the other hand, Dr. Walter Reich believes that the diagnostic process remains an attractive means of solving or avoiding complex problems, arguing that its "fetching beauty" is its capacity to instantly explain odd, troublesome or objectionable behavior.[432] This "quick fix" solution may be a meretricious one, however, since it encourages a diagnosis of illness "even in cases in which such illness does not exist, or is at best, only marginally present."[433] He adds that diagnosis may serve a reassuring function in that it encourages a shift of "the frame of the behaviour from the threatening personal or social arena to a safer medical one."[434]

Dr. Reich recognizes, by the same token, diagnosis can be seen as excluding and dehumanizing:

> When we want to do unto others as we would not have them do unto ourselves, we find some way of turning them into others. We usually do that by labelling them, by excluding them from our own group, and by dehumanizing them — by defining their status as less than ours and, therefore, less human.[435]

Through this characteristic, diagnosis allows the psychiatrist to "harden his heart" by seeing "the person as a patient, one whose pleas are not simple, soulful, human importunes but rather the routine and expected reactions of ill patients to the illnesses that have possessed them and to the treatments to which they have been subjected."[436]

According to this view, a diagnosis also has the capacity for "inevitable self-confirmation": once an individual is labelled as "crazy" or "weird," all his subsequent actions "can be attributed to, and dismissed as a result of, [such] epithets."[437] Finally, diag-

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431. Homant & Kennedy, *Subjective Factors in the Judgment of Insanity*, 14 CRIM. JUST. & BEHAV. 38, 58 (1987).

432. Reich, *supra* note 417, at 71.

433. *Id.* at 72.

434. *Id.* at 74.

435. *Id.* at 77. The roots of this impulse, Reich adds, are "primitive, powerful, and universal." *Id.*

436. *Id.* at 79.

437. *Id.* at 81. *See generally* Krieger & Levine, *Schizophrenic Behavior as a Function of Role Expectation*, 32 J. CLINICAL PSYCHOLOGY 463, 466 (1979) ("[W]hen the expected role [is] that of a normal person there [is] significantly less evidence of psychopathology than when the expected role [is] of a mental patient.").

nosis can be a weapon of discreditation and punishment, "the attribution of a person's views, politics, actions, or conclusions to a mind gone sick."[438]

c. Predictivity of Dangerousness[439]

The voluminous literature examining the ability of psychiatrists (or other mental health professionals) to predict dangerousness in the indeterminate future has been virtually unanimous:[440] "psychiatrists have absolutely no expertise in predicting dangerous behavior — indeed, they may be *less* accurate predictors than laymen — and . . . they usually err by overpredicting violence."[441] The American Psychiatric Association has thus informed the Supreme Court that two out of three predictions of long-term, future

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438. Reich, *supra* note 417, at 82.

439. This section is partially adapted from 1 M. PERLIN, *supra* note 78, § 2.15.

440. For an excellent overview, see Slobogin, *Dangerousness*, *supra* note 303, and for a more recent comprehensive survey, see Monahan, *Risk Assessment of Violence Among the Mentally Disordered: Generating Useful Knowledge*, 11 INT'L J.L. & PSYCHIATRY 249 (1989). New research directions are sketched out in T. Grisso, Conceptual Directions for Studying Dangerousness Judgments (June 1988) (paper presented at the 1988 International Congress of Law and Mental Health in Montreal Canada).

441. Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 734-35 (1974) (emphasis in original); *see also* Barefoot v. Estelle, 463 U.S. 880, 934-36 (1983) (Blackmun, J., dissenting) (examining the impact that overpredicting psychiatrists have on a jury); *id.* at 921-22 nn.2-4 (listing sources pointing to the unreliable nature of psychiatric predictions of dangerousness).

Errors in overpredicting violence are known as "false positives," *i.e.*, a person falsely predicted to be dangerous, as opposed to "false negatives," *i.e.*, a person falsely predicted to be not dangerous. *See, e.g.*, Wilkins, *The Case for Prediction*, in 3 CRIME & JUSTICE 375 (1971). False positives have generally been "seen as preferable" errors for medical predictors to make. *See, e.g.*, H. STEADMAN & J. COCOZZA, CAREERS OF THE CRIMINALLY INSANE 110 (1974). *But see, e.g.*, Von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFFALO L. REV. 717, 731 (1972) ("[W]e can afford little tolerance, indeed, of prediction methods that show a high yield of false positives.").

Ironically, researchers have suggested that the false negative rate is much lower than the false positive rate. *See, e.g.*, Wenk, Robison & Smith, *Can Violence Be Predicted?* 18 CRIME & DELINQ. 393, 394 (1972) ("The best prediction available today, for even the most refined set of offenders, is that any particular member of that set *will not* become violent."). *See generally* Petrunik, *The Politics of Dangerousness*, 5 INT'L J.L. & PSYCHIATRY 225, 244 (1982) (discussing heavy media focus on the problem of "false negatives [—] individuals diagnosed as insufficiently dangerous enough to confine (or as safe enough to release) who are later found to have committed serious acts of personal violence or nonconsensual sexual offences," in spite of research reports of a higher level of false positives.) (footnote omitted).

On the way courts err by making too many "false positives," see Boehnert, *Characteristics of Successful and Unsuccessful Insanity Pleas*, 13 LAW & HUM. BEHAV. 31, 38 (1989).

violence made by psychiatrists are wrong.[442] While there is some recent evidence of a modest counterassault,[443] the research and conclusions of Professor Monahan appear virtually impregnable:

> Outcome studies of clinical prediction with adult populations underscore the importance of past violence as a predictor of future violence, yet lead to the conclusion that *psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior over a several year period among institutionalized populations that had both committed violence in the past and were diagnosed as mentally ill.*[444]

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442. In *Barefoot*, the Supreme Court of the United States *rejected* the arguments made by the American Psychiatric Association based on this data, and ruled that, in the context of a penalty phase of a capital case, "it makes little sense, if any, to submit that psychiatrists, out of the entire universe of persons who might have an opinion on the issue, would know so little about the subject that they should not be permitted to testify." *Barefoot*, 463 U.S. at 896.

Justice Blackmun, however, presented the opposite viewpoint:

> The Court holds that psychiatric testimony about a defendant's future dangerousness is admissible, despite the fact that such testimony is wrong two times out of three . . . . [W]hen a person's life is at stake — no matter how heinous his offense — a requirement of greater reliability should prevail. In a capital case, the specious testimony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialist's words, equates with death itself.

Id. at 916 (Blackmun, J., dissenting).

For discussions of the courts opinion in *Barefoot*, see, Perlin, *Barefoot's Ake*, *supra* note 81, at 108-11; Perlin, *Symbolic Values*, *supra* note 26, at 7-12. Psychiatric aspects of *Barefoot* are placed in a cultural perspective in Romanucci-Ross & Tancredi, *supra* note 115, at 285-86. A recent article has concluded flatly, "[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).

443. *See, e.g.*, Haddad, *Predicting the Supreme Court's Response to the Criticisms of Psychiatric Predictions of Dangerousness in Civil Commitment Proceedings*, 64 NEB. L. REV. 215, 238-46 (1985) ("[R]ecent research does indicate that psychiatrists can provide useful and sufficiently reliable information to aid the trier-of-fact in determining the need for emergency and extended involuntary detention.") (footnote omitted). Recent research also indicates that *some* predictions may be accurate when based on the presence of certain social variables associated with dangerousness: sex, age, employment, prior history of violence and drug or alcohol abuse. *See, e.g.*, J. MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 89 (1981).

444. J. MONAHAN, *supra* note 443, at 60 (emphasis added). *But see* Cohen, Spodak, Silver & Williams, *Predicting Outcome of Insanity Acquittees Released to the Community*, 6 BEHAV. SCI. & L. 515 (1988) (model developed for forensic release decisions involving insanity acquittees found to accurately predict the likelihood of post-release arrest on 75 percent of subjects; variables considered included adjustment in hospital, clinical assessment by hospital staff, Global Assessment Scale score at release, patient's functioning prior to instant offense, presence of heroin addiction, and birth order). The Global Assessment Scale is an instrument used to measure the overall severity of psychiatric disturbance. *See, e.g.*, Endicott, Spitzer, Fleiss & Cohen, *The Global Assessment Scale*, 33 ARCH. GEN.

This inability to predict dangerousness contributes to the law's ambivalence toward the psychiatric method.

In their exhaustive study, Professors Ennis and Litwack reviewed the then-available empirical evidence of the validity of psychiatric diagnosis, of the predictivity of dangerousness, of the predictivity of the need for hospitalization and treatment, and of the predictivity of the effect of hospitalization and treatment, and concluded:

> [P]sychiatrists often disagree in their judgments and . . . even where they do agree those judgments — especially predictive judgments — are often wrong. In particular, psychiatric predictions that an individual is dangerous are usually wrong. Furthermore, perceptions of symptoms and behavior vary dramatically among examining psychiatrists and for some diagnostic categories there is little relationship between the symptoms and behavior perceived by the psychiatrist and the eventual diagnosis. For specific diagnostic categories, there is little evidence that the symptoms and behavior perceived by the psychiatrist were actually exhibited by the patient. . . . In short, diagnoses often convey more inaccurate than accurate information about patients.[445]

Their conclusion, based on research studies done by psychiatrists, psychologists and sociologists, that "training and experience do not enable psychiatrists adequately to predict dangerous behavior,"[446] has been supported warmly by the psychiatric establishment.[447] Yet, the public and the courts continue to invest psychia-

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PSYCHIATRY 766 (1976).

445. Ennis & Litwack, *supra* note 441, at 719. According to the authors, courts should limit psychiatric testimony to "descriptive statements and should exclude psychiatric diagnoses, judgments, and predictions." *Id.* at 696; *see also* Morse, *Crazy Behavior*, *supra* note 26, at 619 ("[Experts] should simply present descriptive data that would otherwise be unknown and hard, relevant probability data").

446. Ennis & Litwack, *supra* note 441, at 733. For an exhaustive and comprehensive study of the literature as to the full range of predictivity issues, see Cocozza and Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084 (1976). Cocozza and Steadman concluded that the data reviewed "would appear to represent clear and convincing evidence of the inability of psychiatrists or anyone else to predict dangerousness accurately." *Id.* at 1098-99.

447. Eminent forensic psychiatrist Robert L. Sadoff has said, "[W]e do not have treatment for dangerousness", and "the psychiatrist ha[s] no expertise in the prediction of dangerousness." Sadoff, *Dangerousness as a Criterion for Involuntary Commitment*, in THE SCHIZOPHRENIAS 191, 193-94 (F. Flach ed. 1988) (Directions in Psychiatry monograph series No. 4). In his influential monograph MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION, Alan Stone, the past president of the American Psychiatric Association, went even further: "It can be stated flatly . . . that neither objective actuarial tables nor

trists with "superior, almost superhuman powers" and continue to demand that psychiatrists "say whether a particular person is likely to act violently in the future."[448] Definitions of "dangerousness" are thus "based on the pressures . . . the general public and particular interest groups exert on policy-makers and prevalent ideologies of social control."[449] Similarly, "[j]urors, judges and [the lay public] are [all] influenced to believe in the subterfuge of 'dangerousness' (1) by their respect for science, (2) by the participation of doctors, and (3) by the slippery nature of clinical testimony."[450]

B. The Specific Rejection of Psychodynamic Principles: The Insanity Defense as Case Study

As seen earlier, the theory of psychodynamics has been rejected by the legal system for various reasons.[451] This rejection becomes obvious by analyzing the actual effect of the substantive facts of the insanity claim and the personality characteristics of

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psychiatric intuition, diagnosis, and psychological testing can claim predictive success when dealing with the traditional population of mental hospitals." A. STONE, *supra* note 134, at 33. The American Psychiatric Association has formally agreed with this position: "Neither psychiatrists nor anyone else have [sic] reliably demonstrated an ability to predict future violence or 'dangerousness.' Neither has any special psychiatric 'expertise' in this area been established." AMERICAN PSYCHIATRIC ASSOCIATION, CLINICAL ASPECTS OF THE VIOLENT INDIVIDUAL 28 (1974).

448. Gunn, *supra* note 340, at 147-48; *see* Beck, *Psychiatric Assessment of Potential Violence: A Reanalysis of the Problem*, in THE POTENTIALLY VIOLENT PATIENT AND THE TARASOFF DECISION IN PSYCHIATRIC PRACTICE 84, 90 (J. Beck ed. 1985). While Dr. Beck notes that "[s]ociety expects psychiatrists to predict potential major violence", *id.*, he adds, however, that "none of us knows whether we can predict violence or not, although most of us [in clinical practice] believe we can." *Id.* Professor Alan Stone's metaphor is helpful: "I once did some empirical research on humor. It turned out that of 280 students 280 thought they had a very good sense of humor. Similarly, it seems to me every psychiatrist thinks he/she has very good clinical judgment." Stone, *The Ethical Boundaries: A View From the Ivory Tower*, 12 BULL. AM. ACAD. PSYCHIATRY & L. 209, 213 (1984) (footnote omitted).

The demand on psychiatrists is especially "astounding" in light of the uncertainty of psychiatrists' ability to make such predictions. *E.g.*, Steadman, *Predicting Dangerousness*, in RAGE, HATE, ASSAULT AND OTHER FORMS OF VIOLENCE 67 (1976), *quoted in* Petrunik, *supra* note 441, at 235. Steadman argues:

> It is an astounding paradox to see the steady publication of research data over the past five to ten years showing the inabilities of predictors of dangerousness to make accurate estimations and simultaneously to observe state legislators and groups producing or recommending criminal and mental health codes and procedures which rely so heavily on the preventive concept . . . .

449. Petrunik, *supra* note 441, at 226.

450. Worrell, *Psychiatric Prediction of Dangerousness in Capital Sentencing: The Quest for Innocent Authority*, 5 BEHAV. SCI. & L. 433, 438 (1987).

451. *See supra* notes 334-450 and accompanying text.

the insanity defense pleader on the legal system's treatment of the particular insanity defense.

A century ago, Sir James Stephen wrote: "I think it highly desirable that criminals should be hated . . . ."[452] This attitude inspires the use of the criminal process to "dramatize the differences between 'we' and 'they' "[453] and thus demands that accused criminals "go through rituals which allow status degradation."[454] Punishment of criminals "furthers the mythology of justice, creating the illusion that the world is fair. By nurturing emotions of vengeance, it furthers social solidarity and protects against the terrifying anxiety that the forces of good might not triumph against the forces of evil after all."[455] The insanity defense partially controls retribution;[456] thus, it limits this degradation and restricts the expression of hatred. As a "moral judgment that mental illness is relevant to our determination of criminal culpability,"[457] it is a judgment that society frequently wishes to decline making so that the punishment of wrongdoers will continue to occur.[458]

1. The Ambivalence of Empathy

The public has difficulty empathizing with insane defendants,[459] especially when the legal definition of insane appears to be

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452. 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81-82 (1883).

453. Ingber, *Dialectic*, *supra* note 105, at 911.

454. *Id.* at 907 (citing Goldstein, *Police Discretion Not To Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 590 (1960)).

455. Diamond, *From* Durham *to* Brawner, *A Futile Journey*, 1973 WASH. U.L.Q. 109, 110. It has been suggested that the abolition of the insanity defense in Idaho may have been a response by the majority who control their emotions to the actions of those who do not:

> [T]here exist in all of us impulses toward wickedness that we suppress at some cost. As a reward for our suppression, we would like to make certain that those who have not forced themselves to repress their evil impulses suffer suitably for that lapse so we ourselves can be reassured that our sacrifice was not for nothing.

Geis & Meier, *supra* note 178, at 77.

456. Rappeport, *Scapegoating*, *supra* note 364, at 690.

457. Note, *The Insanity Defense: Effects of an Abolition Unsupported by a Moral Consensus*, 9 AM. J.L. & MED. 471, 495 (1984) [hereinafter *Insanity Defense* Note].

458. *See, e.g.*, People v. Wallace, 160 Mich. App. 1, 12, 408 N.W.2d 87, 92 (1987) ("We recognize that in a particularly brutal case where the defendant admits perpetrating the acts and raises the defense of insanity, the temptation will be great to place the insanity defense on trial along with the defendant.").

459. The presence of empathy is more likely in intrafamilial insanity homicides.

"a highly restrictive and legalistic definition of responsibility."[460] This lack of empathy expresses our societal frustration that the defense does not seem to serve its metaphysical purpose of distinguishing between those "we feel satisfied about torturing and those we are satisfied with treating."[461] Since the insanity defense is seen as the "lynch-pin that holds together the broader system of responsibility-desert-punishment"[462] of criminal law, we must reject the notion that insanity defense pleaders are "much like us, even just like us 'but for the grace of God'" in order to punish them for actions that they did not have the control to avoid.[463] Rejection of the insanity defense also may be an expression of "ancient convictions that society can . . . punish [an offender] because the punishment is a . . . collective purge or vengeance; a purge to rid society of the offender and thereby to protect it, and vengeance to show retribution on the transgressor, thereby to deter others and thus to protect society."[464]

The lack of empathy leads to irrational fears of the defense's overuse, the "soft" treatment of insanity acquitees, and the deviousness of counsel and expert witnesses in proffering the defense,[465] all symbolizing "society's frustrated vengeance."[466] This

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"The public is far less fearful of the intrafamilial killer and possesses greater empathy for insanity acquittees in domestic homicide cases than it does in cases involving strangers." Wexler, *Offense-Victim*, *supra* note 26, at 552. A British study has revealed that the victims of 70-75 percent of homicides committed by mentally disabled defendants were related to the assailants. *See* Parker, *The Victims of Mentally Disordered Female Offenders*, 125 BRIT. J. PSYCHIATRY 51 (1974). Perhaps because intrafamilial insanity homicides are more common, the jury can more easily empathize and acquit.

460. S. HALLECK, PSYCHIATRY, *supra* note 146, at 208.

461. Seney, *"When Empty Terrors Overawe" — Our Criminal Law Defenses*, 19 WAYNE L. REV. 947, 984 (1973).

462. Homant & Kennedy, *Judgment*, *supra* note 95, at 78.

463. Burt, *Mad Dogs*, *supra* note 61, at 273, 282; *cf.* State v. Hoyt, 21 Wis. 2d 284, 302, 128 N.W.2d 645, 654 (1962) (Wilke, J., concurring):

> [W]e must place ourselves empathetically in the actual situation in which the defendant was placed, a situation which may be relatively unique . . . . [To find provocation, t]he trier of fact must be able to say, "Although I would have acted differently, and I believe most persons would have acted differently, *I can understand why* this person gave way to the impulse to kill.

(emphasis added).

464. People v. Nash, 52 Cal. 2d 36, 49, 338 P.2d 416, 424 (1959).

465. These fears worked to restrict the use of the insanity defense. *E.g.*, Arafat & McCahery, *The Insanity Defense and the Juror*, 22 DRAKE L. REV. 538, 548 (1973) ("[T]he presence of an unfavorable attitude toward psychiatry was strongly associated with the decision against the use of the insanity plea."); *see* Arenella, *Reflections on Current Proposals to Abolish or Reform the Insanity Defense*, 8 AM. J.L. & MED. 271, 272 (1982) (recognizing public opposition to the insanity defense after *Hinckley* and suggesting re-

frustration may result in increased punitiveness by juries towards certain defendants "for not conforming to the stereotype [of sounding truly insane]."[467]

Both the frustration and the punitiveness are in sharpest focus in public attitudes towards defendants following insanity acquittals. It is then that the rare "false negative" — the individual predicted to be not dangerous who subsequently commits a violent act — enthralls the system. Repressive legislation limiting the insanity defense regularly follows disclosure of the public's worst fantasy: a violent crime committed by an insanity acquittee.[468] Yet, there is virtually no empirical basis for this pattern of legislation-in-response-to-horror-story. In 1983, for example, researchers could point to only one person acquitted by reason of insanity in New York state — ever — who subsequently killed someone after being released.[469]

The legal system's response to public pressure arising from "vindictive community attitudes . . . subverts the humane intention of the law."[470] This subversion is made easier because of "the law's active avoidance of any true, psychological understanding of

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forms to combat that opposition).

466. S. HALLECK, *Psychiatry*, *supra* note 146, at 250-51 (commitment of successful insanity pleaders often done to satisfy society's need to control offenders).

467. Schneider & Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN'S RTS. L. REP. 149, 160 (1978) (Jury may require a female defendant to react as they feel is appropriate for an insane person.).

468. Mickenberg, *supra* note 42, at 972 ("Virtually every legislature to have passed a law restricting the insanity plea within the last ten years has done so as a direct response to a highly publicized crime committed by a former NGRI mental patient."); *see* Fentiman, *supra* note 57 (GBMI verdicts are a constitutionally questionable response to public hysteria concerning insanity acquittees); *cf.* Fisher, Pierce & Appelbaum, *How Flexible Are Our Civil Commitment Statutes?* 39 HOSP. & COMMUNITY PSYCHIATRY 711 (1988) (more restrictive *civil* commitment legislation frequently follows on the heels of a violent act by an insanity acquittee). Such responses are sometimes precipitated by events outside the jurisdiction having virtually no likelihood of occurring within the jurisdiction in question. *See* Morgan, McCullaugh, Jenkins & White, *Guilty But Mentally Ill: The South Carolina Experience*, 16 BULL. AM. ACAD. PSYCHIATRY & L. 41, 42 (1988) (GBMI legislation in South Carolina partially inspired by *Hinckley* insanity acquittal notwithstanding fact that, in that state, insanity defense used successfully in no more than two out of 24,000 felony indictments per year).

469. *See* Steadman, Keitner, Braff & Arvanites, *supra* note 227, at 403; *see also* Bieber, Pasewark, Baslen & Steadman, *Predicting Criminal Recidivism of Insanity Acquittees*, 11 INT'L J.L & PSYCHIATRY 105, 106-08 (1988) (Only 16 of 132 acquittees adjudicated NGRI in New York state from 1971 to 1976 later arrested for crimes against persons, a category including homicide.); Bogenberger, Pasewark, Gudeman, & Bieber, *supra* note 226, at 291, Table 5 (of 362 arrests of insanity acquittees in Hawaii, four (1.1 percent) were for murder, manslaughter, or negligent homicide).

470. S. HALLECK, *Psychiatry*, *supra* note 146, at 251.

the defendants who come before the courts."[471] Where a defendant does not show "flagrant psychotic symptomatology,"[472] does not behave like a "wild beast,"[473] or where his behavior does not have apparent organic roots,[474] "pervasive judicial hostility" toward the use of the defense constantly surfaces.[475] Thus, a recent simulated study of nearly 200 college psychology students (a group that, presumably, would be more sensitive to the underlying issues than a random sample from the general public) revealed the following:

> [T]he only defendant who will likely be found universally insane is the *totally mad individual* who acts impulsively in response to a *glaring psychotic* process that is itself tied thematically to a criminal action. *Judge Tracy's "wild beast" conception of insanity is representative of most people's implicit theories of responsibility.* Even with respect to such a prototypically insane person, however, the concept of guilt still has appeal to the lay public, despite several hundred years of religiously toned jurisprudential logic that flatly opposes the morality of such attributions. . . . [I]t is clear . . . that the public on the whole does not trust the underlying logic nor the administration of the insanity defense.[476]

This requirement of clearly observable total "madness" is more than is legally required of one who pleads the insanity defense and is a result of the public's lack of empathy.

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471. Curran, *Expert Psychiatric Evidence of Personality Traits*, 103 U. PA. L. REV. 999 (1955) (citing G. ZILBOORG, THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT 14 (1954)) [hereinafter G. ZILBOORG, CRIMINAL ACT].

472. Arens & Susman, *Judges, Jury Charges and Insanity*, 12 HOW. L.J. 1, 2 (1966) (exploring juror attitudes toward insanity pleas at trial).

473. Greenwalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1899 n.6 (1984).

474. V. HANS & N. VIDMAR, JUDGING THE JURY, 131, 194-95 (1986) (discussing Ellsworth, *supra* note 82).

475. Arens & Susman, *supra* note 472, at 2.

476. Roberts, Golding & Fincham, *supra* note 179, at 226 (emphasis added); *see also* Finkel, *Maligning and Misconstruing Jurors' Insanity Verdicts: A Rebuttal*, 1 FORENSIC REP. 97 (1988) (verdicts of mock jurors using "wild beast" test not significantly different from verdicts of jurors using *M'Naghten* test); Miller, Stava & Miller, *The Insanity Defense for Sex Offenders: Jury Decisions After Repeal of Wisconsin's Sex Crimes Law*, 39 HOSP. & COMMUNITY PSYCHIATRY 186, 188 (1988) (Insanity defense decision-making was based upon considerations of defendants' "apparent need for treatment and the right of the public to protection but were not particularly influenced by legal definitions of insanity.").

2. The Paradox of Sympathy

This atavistic picture of societal conceptions of responsibility may be incomplete. Paradoxically, other research has revealed that there are certain groups to whom jurors have appeared to be inordinately (and, perhaps, even inappropriately) sympathetic in cases where insanity pleas are proffered.[477] When these cases are examined further, however, a unifying theme emerges: that insanity defense decision-making regularly and systemically is based on a host of social and psychological factors which have a common thread — the rejection of psychodynamic principles.[478]

A series of New York studies identified at least three groups of insanity acquittees who not only did not appear to be "insane" under the prevailing substantive test, but seemed to be the recipients of jury *sympathy*: (1) mothers committing infanticide; (2) law enforcement officials; and (3) a category labeled as the "[we]-can-feel-sorry-for-you people" — individuals with whom the jurors could empathize.[479] Over a ten year period, over two-thirds of all insanity acquittees in that jurisdiction fell into "categories of classes not necessarily predisposed to commit additional crimes."[480]

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477. *E.g.*, Spohn, Guhl, & Welch, *The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 CRIMINOLOGY 175 (1987) (pattern of discrimination shown in favor of female defendants and against black and Hispanic male defendants).

478. For recent research in this area, see ROGERS, *supra* note 78, at 9-10.

479. *E.g.*, Steadman, Pasewark & Pantle, *supra* note 320, at 57; *see also* Pasewark, Pantle & Steadman, *The Insanity Plea in New York State, 1965-1976*, 51 N.Y. ST. B.J. 186, 224 (1979) (of 39 female NGRI's in sample, 18 had been tried for infanticide; of 239 acquitees in sample, four were police officers; the third over-represented group was composed primarily of "previously respectable, middle class individuals"); Pasewark, *supra* note 211 (reviewing his earlier study in conjunction with other research studies done on the insanity plea). *But see* Dix, *supra* note 40, at 10 (questioning the methodology used in Dr. Pasewark's New York study); G. ZILBOORG, CRIMINAL ACT, *supra* note 471, at 102 (over thirty years ago, most of the inmates at the Broadmoor facility for the criminally insane in England had been committed following the murders of spouses or children). *See generally* Howard & Clark, *When Courts and Experts Disagree: Discordance Between Insanity Recommendations and Adjudications*, 9 LAW & HUM. BEHAV. 385, 394 (1985):

> [W]hen courts find defendants insane in spite of contrary expert opinion from state examiners, the discordance is not haphazard. The offenses are likely to be unusual ones, occupying neither the clearly rational nor clearly irrational ends of the spectrum. It is in the middle ground, where subjective judgment is most needed to determine whether the test of insanity has been met, that discordance occurs.

480. Sherman, *supra* note 105, at 261 (*e.g.*, class of individuals with no prior arrest record). On this point, Dr. Loren Roth suggests: "We forgive, if not condone, a patient's past behavior on the basis of psychological determinism, or at times on heuristic reasons."

Different rationales for making "special allowances" appear to be employed in the case of each subgroup.[481] Dr. Pasewark and his colleagues have inferred that we categorize women who murder their children as "insane" because "society seems unwilling to critically examine its belief in the concept of 'mother love,' "[482] and because institutionalized sexism, masquerading as "judicial chivalry," allows us to accept "certain cultural transgressions" more readily from women than from men.[483] As to police officers, some observers speculate that "society, investing the officer with the sacred trust of protecting society and providing him with weapons for that purpose, is highly reluctant to accept the fact that this trust might be violated."[484] Thus, we are willing to show this group "special leniency."[485]

The "feel-sorry-for-you" group included those individuals who least met the criminal stereotype: "previously respectable, middle class individuals with whom the courts and/or juries

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Roth, *supra* note 49, at 100.

481. Pasewark, Pantle & Steadman, *supra* note 479, at 224.

482. *Id.*

483. Stokman & Heiber, *supra* note 226, at 382 (quoting Steadman & Braff, *Defendants Not Guilty By Reason of Insanity*, in MENTALLY DISABLED OFFENDERS: PERSPECTIVES IN LAW AND PSYCHOLOGY 109 (1983)); *see also* Faulstich & Moore, *The Insanity Plea: A Study of Societal Reactions*, 8 LAW & PSYCHOLOGY REV. 129, 132 (1984) (in a simulated study, the insanity plea was viewed as more acceptable when the accused was female); *cf.* Corley, Cernkovich & Giordano, *Sex and the Likelihood of Sanction*, 80 J. CRIM. L. & CRIMINOLOGY 540, 541 (1989) (noting lesser penalties for women in virtually every criminal category); Ford, *The Role of Extralegal Factors in Verdicts*, 11 JUST. SYS. J. 16, 24 (1986) ("[P]erceptions of attractiveness are associated with leniency in jury verdicts, and unattractiveness associated with verdict severity."). *But see* Morris, *Sex and Sentencing*, 1988 CRIM. L. REV. 163, 170 (rejects "chivalry" hypothesis after noting little evidence of leniency); Packer, *Homicide and the Insanity Defense: A Comparison of Sane and Insane Murderers*, 5 BEHAV. SCI. & L. 25, 34 (1987) (rejecting "chivalrous" argument, and suggesting that juries are more sympathetic to insanity pleaders in cases where the victim is a family member); Rogers, Sack, Bloom & Hanson, *supra* note 226, at 530 (finding "consistent preferential treatment" of women pleading insanity in Oregon, but still reluctant to label this phenomenon "chivalrous" treatment absent further information).

On the related question of whether women are treated differently from men once institutionalized, see N. RAFTER, PARTIAL JUSTICE: WOMEN IN STATE PRISONS, 1800-1935 (1985) (comprehensive study of all types of women's prisons and the treatment of women within those prisons based on race, gender and social class); Barnett, *Book Review*, 12 LEGAL STUD. F. 102, 103 (1985) (reviewing N. RAFTER, *supra*).

484. Pasewark, Pantle & Steadman, *supra* note 479, at 224 (Perhaps, also, there is an additional reluctance "to place the officer in the prison lair of his former enemy, the felon."); Steadman, Pasewark & Pantle, *supra* note 320, at 69-70.

485. Sherman, *supra* note 105, at 261 (citing Pasewark, Pantle & Steadman, *supra* note 479, at 224).

[could] empathize,"[486] persons with no prior psychiatric record and no reported psychotic symptoms[487] whose crimes appear "reactive to an immediate stressful situation."[488] It has been suggested, without apparent contradiction, that in some cases in these categories, "[t]he puny efforts of some of the prosecutors . . . to combat their opponents' proof of the insanity defense greatly increased the chances of defendants to gain acquittal on that

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486. Pasewark, Pantle & Steadman, *supra* note 479, at 224 (emphasis added). One example of when this sympathy may occur is the case of "a professional male who was a compulsive gambler and had accumulated extensive gambling debts. Harassed by his debtors, threatened with harm and under severe stress, he committed robbery." *Id.* Recent empirical studies of non-insanity defense cases appear to bear this out. *See* Myers, *Social Background and the Sentencing Behavior of Judges*, 26 CRIMINOLOGY 649, 669 (1988) (older judges found to be more lenient to the "selected advantaged offenders, in particular, those who were white and older"); *cf.* Willis & Wells, *The Police and Child Abuse: An Analysis of Police Decisions to Report Illegal Behavior*, 26 CRIMINOLOGY 695, 711 (1988) (police more likely to report white families for child physical and sexual abuse, perhaps reflecting "negative stereotyping of the black life-style and behavior").

More recent studies have indicated that a higher degree of education (at least the completion of high school) is also frequently associated with a legal decision of nonresponsibility, leading to speculation that (1) triers of fact more readily identify and empathize with more educated individuals who are presumably more similar to themselves, (2) there are different implicit criteria for referring better educated individuals for sanity evaluations, or (3) more educated individuals are more articulate and thus better able to participate meaningfully in legal proceedings. Rogers, Seman & Stampley, *A Study of Socio-Demographic Characteristics of Individuals Evaluated for Insanity*, 28 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 3, 8 (1984).

On the paradoxical question as to whether bizareness of the criminal act itself is seen as indicative of insanity, see Stokman & Heiber, supra note 226, at 382.

487. Pasewark, *supra* note 211, at 375. *But see* Resnick, *supra* note 50, at 208 ("The closer a defendant is to normality, the more public opinion is outraged by insanity acquittals," explaining why syndrome diagnoses are seen as ploys to "get criminals off.").

The "feel-sorry-for-you" analysis may be in accord with the legal system's response. If the fact-finder empathizes with the defendant, feeling that they too would have broken down, then they are more comfortable acquitting. If, however, the factfinders feel that they would have been stronger and not broken down were they in the defendant's shoes, then they will reject the insanity defense. As the collective consciousness shifts, so does the perception of a defendant's breaking point. This analysis is consonant with the discovery by Stokman and Heiber that the percentage of insanity acquittees diagnosed as suffering from personality disorders decreased from eleven percent in 1971-76 to one 1 percent in 1980-83. Stokman & Heiber, *supra* note 226, at 374. The researchers speculated that the "current opinion regarding the insanity defense and the concepts of personality disorder as a mental disorder [thus] discourages the use of personality disorder as a primary diagnosis in insanity defenses." *Id.* at 375.

488. Steadman, Pasewark & Pantle, *supra* note 320, at 70. *But see* Faulstich & Moore, *supra* note 483, at 132 (contradictory findings, showing that simulated study sample was *more likely* to accept insanity defense where defendant had psychiatric history; authors offer potential explanation based on the increased amount of information given to jurors in real cases).

ground."[489] Such cases appear to reflect a sort of *prosecutorial* nullification: prosecutors, like other citizens, "feel sorry" for this tiny sub-group of insanity pleaders, and choose to allow such defendants to "evade" responsibility.

Illustratively, Morse discusses a tax evasion prosecution hypothetical as an example of what he characterizes as an illegitimate use of mental disorder as a defense. He posits a well-to-do middle-class businesswoman who, in defense of her intentional failure to file income tax returns, claims that she suffered from a stress-induced mental disorder, thus giving the IRS a "class-neutral ground" on which to pursue civil remedies in lieu of criminal ones.[490] While Professor Morse is undoubtedly right in that this solution allows society to avoid facing the troubling question of prosecutorial nullification, my sense is that the focus on the way claims of mental disorder may be used improperly to avoid culpability misses a more important point. Our choice to (perhaps "improperly") exculpate a very few is simply the flip side of our decision to (improperly) inculpate many, which is a societal decision based on our conceptions of good and evil, right and wrong, and reflected in a community sense of justice that remains frozen in medieval views of responsibility.

3. The "Community Tolerance Threshold"

Dr. Caryl Boehnert has suggested that individuals who commit crimes that fall below the "community tolerance threshold" (and thus would not trigger a concomitantly high level of community outrage) are more readily found not guilty by reason of insanity.[491] Professor David Wexler, in suggesting an "offense-victim approach" to the insanity defense debate, has similarly focused on the community tolerance threshold.[492] Accepting as his basic premise the need for the administration of the insanity defense to be harmonious with the "community sense of justice," Wexler has urged retention of the "morally-appropriate" defense "except in areas where its retention would likely enrage the com-

489. Ireland, *Insanity and the Unwritten Law*, 32 AM. J. LEGAL HIST. 157, 170 (1988).

490. *See* Morse, *Treating Crazy*, *supra* note 145, at 376.

491. *See* Boehnert, *supra* note 226, at 27-28.

492. *See* Wexler, *The "Offense-Victim" Insanity Limitation: A Rejoinder*, 27 ARIZ. L. REV. 335 (1985); Wexler, *Offense-Victim*, *supra* note 1.

munity sense of justice and protection."[493] Since he views public concern over the insanity defense's use as largely aimed at mentally disabled defendants who kill strangers (or, merely, non-relatives), he would disallow the defense in these instances "that may well exceed bounds of public tolerance."[494]

Such a reduction would also eliminate much of the concern about repeat offenses by insanity acquittees: research has revealed a recidivism rate ranging from zero to "very low" in the cases of defendants who are found NGRI in cases involving family murders.[495] This limitation is not a moral model but it arises from a pragmatic concern that, once a certain level of community intolerance is exceeded, legislatures will be forced to act rather than merely engage in abstract moral discourse.[496] Thus, while the public is "inured" to a thirty percent-plus recidivism rate among released felons, "*any* criminal recidivism by insanity acquittees offends the public's sense of justice."[497]

Certainly, the research literature bears out at least the last

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493. Wexler, *Offense-Victim*, *supra* note 1, at 20.

494. *Id.* at 21-22; *see also* Wexler, *Insanity Problem*, *supra* note 26, at 553 n.144 (citing M. Cleary, Not Guilty by Reason of Insanity, Paper presented at the Tenth International Congress on Law and Psychiatry 10 (June 14-17, 1984) (copy on file at George Washington Law Review)) (finding that insanity acquittals in murder cases occurred *only* where the victim was related to the offender, but still concluding that such acquittals are not confined solely to domestic situations); Parker, *supra* note 459, at 54 (Study of mentally disordered female offenders found insane showed that "a substantial proportion of the victims of murder, 70 percent, and manslaughter, 75 percent, were related to the assailants."); *cf.* Willis & Wells, *supra* note 486, at 710 ("[P]olice reaction is stronger if the race or class of the victim and offender is different (i.e., the degree of social intimacy is low).").

495. *E.g.*, Wexler, *Offense-Victim*, *supra* note 1, at 23; *see also* J. MONAHAN, *supra* note 443, at 96, 113-14 ("Spouse murders . . . have a very low recidivism rate since they have removed their source of motivation. Incest offenders may desist when their children grow up." Thus, where only one person is the target of potential violence, "the unavailability of those persons may preclude violent behavior.").

496. *E.g.*, Wexler, *Offense-Victim*, *supra* note 1, at 20; *see* Finkel, *supra* note 476, at 112 (in certain insanity cases, "jurors weigh the *victim's* actions and character along with the defendant's in their delicate calculus") (emphasis added); *supra* text accompanying note 66 (discussing Professor Fentiman's discussion of Professor Ernest Roberts' "tensile strength" metaphor, Fentiman, *supra* note 57, at 611 n.63); *see also* Sinclair, *The Use of Evolution Theory in Law*, 64 DET. C.L. REV. 451, 469-70 (1987) ("It would seem that social systems are capable of absorbing a considerable amount of stress before they precipitate a need for change. Legislatures seem to act only when such needs become, or appear to become, comparatively urgent.")

497. Roth, *supra* note 49, at 94 (emphasis added); *see also* Rappeport, *Scapegoating*, *supra* note 364, at 695 ("Despite recidivism rates of 35-65% reported by all prison systems, public is more incensed at the crimes of insanity acquittees than it is by those of ex-convicts.").

part of Wexler's premise: that we do have, as Boehnert suggested,[498] a community tolerance level which is triggered in NGRI cases. It is not as clear that the family member/stranger dichotomy is the only variable with which we must be concerned. For example, the most recent research shows that, "[a]lmost without exception," women and whites are still overrepresented significantly in virtually all categories of mentally disordered offenders being treated in inpatient psychiatric services.[499] While there are many possible explanations for this statistically significant disparity,[500] Dr. Boehnert's "community tolerance threshold" suggestion appears to provide the most likely answer.[501] It also provides for another means of exculpation that is at odds with psychodynamic principles.

IV. THE PERSISTENCE OF THE MYTHS

As I have previously discussed, one of the driving forces be-

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498. *See* Boehnert, *supra* note 226, at 27-28; *supra* note 491 and accompanying text.

499. Steadman, Rosenstein, MacAskill, & Marderscheid, *A Profile of Mentally Disordered Offenders Admitted to Inpatient Psychiatric Services in the United States*, 12 LAW & HUM. BEHAV. 91, 98 (1988); *see also* Packer, *supra* note 483, at 27-29 (in a 1987 study of 1980-83 sample 9.4 percent of evaluated males were found NGRI, compared to 23.3 percent of evaluated females; 4.7 percent of evaluated whites so found, compared to 2.6 percent of evaluated non-whites); *cf.* Morgan, McCullogh, Jenkins, & White, *supra* note 468, at 46 (whites and women overrepresented in GBMI sample as well).

500. *See, e.g.*, Steadman, Rosenstein, MacAskill & Marderscheid, *supra* note 499, at 98 ("Do attorneys differentially advise clients to raise these questions? Do county prosecutors differentially accept such pleas or requests? Do judges and/or juries respond differently to these determinations? Do clinicians differentially recommend clients for evaluation or formal determinations? Do these patterns reflect differences in the detection of pathology?")

Dr. Daniel Schwartz, a prominent forensic witness, has suggested that the success of an insanity plea frequently hinges on the defendant's "likeability." Schwartz, *The Proper Use of a Psychiatric Expert*, in SCIENTIFIC AND EXPERT EVIDENCE IN CRIMINAL ADVOCACY 97, 111 (1975):

> The only time that juries are likely to acquit a criminal by reason of insanity is when the defendant is a rather appealing person with whom the jurors can identify, a nice man who has been mistreated in some way . . . . If the jury likes him enough, it will acquit him, using the insanity defense to, so to speak, hand their hats on.

501. On the question of whether acceptance of the insanity defense in these cases may be little more than an example of jury nullification, an issue which has rarely been examined in the context of insanity cases, see *Insanity Defense* Note, *supra* note 457, at 492-93 (jury nullification may "incorporate evidence of mental illness"); cf. Packer, *supra* note 483, at 34 (discussing the case of a young defendant without mental disorder who killed extremely abusive and threatening father where the *judge* rendered insanity verdict "as a means of exculpating a defendant who did not appear to warrant imprisonment but who did not qualify for any other exculpating verdict").

hind the abolition movement has been the persistence of insanity defense mythology.[502] For example, it is taken as common wisdom that the insanity defense is an abused, over-pleaded and over-accepted loophole used as a last-gasp plea solely in grisly murder cases to thwart the death penalty;[503] that most successful pleaders are not truly mentally ill;[504] that most acquittals follow sharply contested "battles of the experts";[505] and that most successful pleaders are sent for short stays to civil hospitals. Each of these myths has been clearly, definitively, and empirically disproven,[506] yet they remain powerful, and show no sign of abating.[507] Even

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502. *See supra* text accompanying notes 316-30.

503. *See, e.g.*, Moore v. State, 525 So.2d 870, 871-73 (Fla. 1988); W. WHITE, INSANITY AND THE CRIMINAL LAW 3 (1923); Hans, *An Analysis of Public Attitudes Toward the Insanity Defense*, 24 CRIMINOLOGY 393, 407-08 (1986); Hans & Slater, *supra* note 348, at 105, 110; Perlin, *Barefoot's Ake*, *supra* note 81, at 95-97; Roberts, Golding & Fincham, *supra* note 179, at 211; Slater & Hans, *Public Opinion of Forensic Psychiatry Following the Hinckley Verdict*, 141 AM. J. PSYCHIATRY 675, 202 (1984).

Prior to the eighteenth century, 60 percent of all insanity pleas were entered in petty larceny cases. *E.g.*, Eigen, *Historical Developments in Psychiatric Forensic Evidence: The British Experience*, 6 INT'L J.L. & PSYCHIATRY 423, 426 (1984). Eigen further notes that "the jurisprudence of insanity appears to have arisen not out of sensationalistic murders or grotesque personal assaults, but from what were rather routine, 'garden variety' crimes." *Id.* Statistically, this pattern continues today. *See, e.g.*, Fentiman, *supra* note 57, at 648 n.281 (citing authorities demonstrating that non-violent crimes constitute the majority of charges that are answered by a plea of insanity in various states since the 1960's). Yet, the underlying assumption that the predicate acts are necessarily heinous crimes is accepted by even the most thoughtful and perceptive of scholars working in this area. *See, e.g.*, Morse, *Excusing*, *supra* note 1, at 832 (acknowledging that the perception that "insanity acquitees have almost always committed" serious acts is legitimate and must be dealt with). *But cf. id.* at 795-801 (discussing and dismissing other "insubstantial" insanity defense myths).

504. *E.g.*, Hans, *supra* note 503, at 408.

505. *E.g.*, United States v. Lyons, 739 F.2d 994, 995 (5th Cir. 1984) (Rubin, J., dissenting). Various authorities, though, demonstrate that this is patently untrue. *E.g. The Insanity Defense: Hearings Before the Comm. on the Judiciary of the U.S. Senate to Amend Title 18 to Limit the Insanity Defense*, 97th Cong., 2d Sess. 267, 268 (1982) [hereinafter *The Insanity Defense*] (remarks of Professor Bonnie stating that "[t]he highly visible insanity claim pitting the experts in courtroom battle, is the aberrational case"); S. HALLECK, THE MENTALLY DISORDERED OFFENDER 51-52 (1986) (noting that a battle of the experts is rare); Acheson, *supra* note 240, at 589 (even during the highwater mark of insanity acquittals in the years immediately following the *Durham* decision, between two-thirds and three-quarters of acquittals were uncontested bench trials following stipulations by both parties, reflecting unanimous medical opinion).

506. *E.g.*, United States v. Lyons, 739 F.2d 994, 995-99 (5th Cir. 1984) (Rubin, J., dissenting); *supra* text accompanying notes 218-45.

507. For a recent, politically driven articulation of this position, see Smith, *Limiting the Insanity Defense: A Rational Approach to Irrational Crimes*, 47 MO. L. REV. 605 (1982) (the author, former Attorney General William French Smith, expands on his testimony before the Committee on the Judiciary of the United States Senate concerning changes in the insanity defense). A recent study by two psychologists concluded that, *de-*

when the inaccuracies of public perceptions are demonstrated by contrary data, the public remains resistent to change.[508]

Thus, it is necessary to answer the following questions: Why did these myths originally emerge? Why have they shown such remarkable longevity? Why have cases such as *Hinckley* had such a profound effect on the perpetuation of the myths? Why do they continue to derive support from a significant portion of the general public and the legal community?[509] In what way do they reflect a "community consciousness"?[510] Finally, why might their persis-

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spite recent efforts to educate the public about insanity defense issues, "professionals and laymen continue to exhibit a lack of accurate understanding regarding the mechanics and use of the NGRI plea and its success rate." Faulstich & Moore, *supra* note 483, at 129 (citing D. Van Speybroeck, A Comparison of the Opinions of Professionals and Laypersons Toward the Insanity Plea and the Criminal Behavior of Mental Patients, (Dissertation Abstracts International, 8111615, 1980)); *see also D.C. Circuit Conference*, *supra* note 415, at 218, 223 (remarks of Judge Parker and Professor Aaronson concerning the public outcry for changes in the abolition of the insanity defense in response to the *Hinckley* case).

508. Jeffrey & Pasewark, *supra* note 223, at 33-35 (The authors' research showed that even after receiving information concerning the actual use and success of the defense, a substantial number of those questioned still believed that the defense was "overused" and "abused."); Rogers & Ewing, *Ultimate Opinion Proscriptions: A Cosmetic Fix and Plea for Empiricism*, 13 LAW & HUM. BEHAV. 357, 361 (1989) ("Research has consistently shown the inaccuracy of public perceptions [about the insanity defense] and the resistance of such perceptions to change in the face of contrary data." (citation omitted)). *See* United States v. Wright, 511 F.2d 1311, 1313 n.11 (D.C. Cir. 1975) (Despite Congressional charges of a "revolving door" policy regarding NGRI acquittees, between 1968 and 1975 "every defendant acquitted by reason of insanity was committed thereafter unless Saint Elizabeth's [Hospital] recommend[ed] release."); Kirschner, *Constitutional Standards for Release of the Civilly Committed and Not Guilty By Reason of Insanity*, 20 ARIZ. L. REV. 223, 276 (1978) (discussing legislative fear of public outcry when an infamous insanity acquittee is released).

509. The fact that the insanity defense "is in many ways the acid test of our attitudes toward the insane and toward the criminal law itself," Herman, *supra* note 83, at 385, certainly helps to explain the phenomenon.

510. *See supra* text accompanying notes 491-501 (discussing the "community tolerance level" idea: when something occurs that exceeds this level, the community seeks reform and reenlists the myths to aid in achieving reform).

In his article counseling rejection of expert testimony based upon psychodynamic psychology, Morse, *Failed Explanations*, *supra* note 32, at 1042, Professor Morse explains the appeal of dynamic theory to "lawyers, historians and literary critics":

> They are constantly interpreting language and behavior in order to make sense of them. If a psychodynamic theorist is asked to explain a human action, he or she will tell a story about a human life, explaining the behavior by reference to motives — sex, aggression — that we can all understand. It will be a human story about human beings, rather than an account that treats behavior as nothing more than mechanistic effects of biological, psychological, or sociological variables.

Id. at 991 & n.74. However, it may be precisely this *lack* of "mechanistic"-ness that engenders jury suspicion and insures that testimony based upon *psychological* motives will

tence doom any attempt to establish a rational insanity defense jurisprudence,[511] no matter how much conflicting empirical data is revealed?[512] To answer these questions, it is necessary to look to the roots of the myths.[513]

A. The Roots of the Myths[514]

The myths persist because of at least four underlying notions: (1) an irrational fear that defendants will "beat the rap"

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never truly fit within a jury's reflection of a community consciousness.

511. *See, e.g.*, Roberts, Golding & Fincham, *supra* note 179, at 208 ("Unfortunately, calls for [insanity-defense] reform [after *Hinckley*] did not stem from an increased understanding of the purpose and appropriate limits of the insanity defense, but, rather, arose from a sense of emotional outrage, a series of factual and attitudinal misconceptions, and a belief that insanity acquittals undermined the public's faith in the criminal justice system." (citations omitted)).

512. We have known for at least a half century that the empirical data refutes these myths. Guttmacher, *Quest*, *supra* note 153, at 428, 430 (discussing William White's studies showing insanity acquittees spent more time confined than those convicted in cases dealing with similar offenses). Attempts to present such data in order to improve the state of insanity defense jurisprudence continue. For a recent call to legislators to adopt a more "realistic overview" of the actual operation of the insanity defense, see Phillips, Wolf & Coons, *supra* note 194, at 609.

513. *See generally* Bidney, *Myth, Symbolism and Truth*, in MYTH: A SYMPOSIUM, *supra* note 31, at 3, 16 (myths symbolize "fundamental metaphysical and religious truth"). Bidney also notes that:

> [Myth] is beyond truth and falsity. The "truth" of a myth is a function of its pragmatic and dramatic effectiveness in moving men to act in accordance with typical, emotionally charged ideals. The effectiveness of myth depends in large part upon ignorance or unconsciousness of its actual motivation. That is why myth tends to recede before the advance of reason and self-conscious reflection.

Id. at 20-21.

For other discussions about the roots of myths, see B. MALINOWSKI, MAGIC, SCIENCE AND RELIGION AND OTHER ESSAYS, 74-89 (1948) (describing theories to explain the nature of myth); de Vito, *supra* note 117, at 30 (myths rooted in "cultural subconscious").

514. This analysis accepts as a given the judicial presumption of the defendant's sanity. *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68, 72-73 (1985) (noting that trial judge instructed jury that defendant "was to be presumed sane at the time of the crime unless *he* presented evidence sufficient to raise a reasonable doubt about his sanity at that time"); Mullaney v. Wilbur, 421 U.S. 684, 702-03 n. 31 (1975) (stating that the prosecution's burden of production and persuasion is sometimes aided by a presumption, *i.e.*, the sanity of the defendant (citing Davis v. United States, 160 U.S. 469 (1895))). While the vitality of this presumption was brilliantly rebutted in Eule, *supra* note 143, neither the courts nor the legislatures have appeared to heed Professor Eule's sound advice in the intervening decade. *Ake*, 470 U.S. 68; State v. Milian-Hernandez, 287 S.C. 183, 185, 336 S.E.2d 476, 477 (1985) ("There is a presumption that every criminal defendant is sane."). I will thus not repeat Professor Eule's arguments, but merely raise the point that the myths discussed here are all premised on this foundation myth — the presumption of sanity — and that the roots of that myth are equally shaky.

through fakery; a millennium-old fear[515] that has its roots in a general disbelief of mental illness[516] and a deep-seated distrust of manipulative criminal defense lawyers invested with the ability to "con" jurors into accepting spurious expert testimony;[517]

(2) a sense (among the legal community and the general public) that there is something different about mental illness, which distinguishes it from organic illness, so that, while certain *physiological* disabilities may be seen as legitimately exculpatory, "mere" emotional handicaps will not;[518]

(3) a demand that the defendant conform to popular images of extreme "craziness" in order to qualify as "insane," a demand with which Chief Justice Rehnquist and other members of the current Supreme Court appear entirely comfortable;[519] and

(4) a fear that the "soft," exculpatory sciences of psychiatry and psychology, which claim expertise in almost all areas of behavior,[520] will thwart the criminal justice system's crime-control component.[521]

The dissent in *Government of Virgin Islands v. Fredericks*[522] viewed the law of criminal responsibility "as a screen upon which

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515. *See* Resnick, *supra* note 50, at 206 (concern dates to the tenth century).

516. *See, e.g.*, United States v. Lyons, 739 F.2d 994, 998 (5th Cir. 1984) (Rubin, J., dissenting) ("[A] defendant pleading insanity typically faces both a judge and a jury who are skeptical about psychiatry in general and the insanity plea in particular." (footnote omitted)). *But see* Steadman, Keitner, Braff & Arvanites, *supra* note 227, at 402 (The one factor strongly associated statistically with an insanity defense acquittal was a pretrial forensic evaluation finding insanity. In only three of 131 cases studied (2 percent) where a forensic clinic found a defendant sane did the court acquit.).

517. *See infra* text accompanying notes 545-77.

For a more realistic appraisal of counsel's *inabilities* in this area, however, see, e.g., Miller v. State, 338 N.W.2d 673, 680 (S. Dak. 1983) (Henderson, J., dissenting) (criticizing defense counsel for failure to research and raise Vietnam Stress Syndrome defense).

518. *See infra* text accompanying notes 578-89.

519. *See infra* text accompanying notes 590-608.

There is, however, an important exception to this demand. We are willing to exculpate certain defendants who do not look "crazy" at all in those very limited and fact-specific cases where our sympathy, understanding or empathy outweighs our punitive, disbelieving and vengeful feelings. *See supra* text accompanying notes 451-501.

520. *E.g.*, Wasyliw, Cavanaugh & Rogers, *supra* note 338, at 151.

521. *See* H. PACKER, *supra* note 57, at 111 ("[I]f all we are concerned with is the prevention of crime, there is no utilitarian calculus clearly showing that excuses [including insanity] ought to be recognized."); *infra* text accompanying notes 609-27; *cf.* Fitzgerald & Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31 (1984) (A study of the attitutes of eligible jurors showed that "death-qualified" respondents were more concerned with crime control than due process.).

522. 578 F.2d 927 (3d Cir. 1978).

the community has projected its visions of criminal justice."[523] Similarly, eminent psychiatrist William A. White thought that the jury "projects its own feelings upon the accused,"[524] so that jury verdicts in insanity defense cases "represent the affective orientation of the herd towards the offender."[525] The underlying visions and feelings are seriously distorted, however, and it is necessary to explore the depths of these distortions if any attempt is to be made to develop a rational, coherent body of insanity law.[526]

B. A "Real-Life" Case

Because so much of our insanity defense jurisprudence is informed by sensational cases (such as *M'Naghten* or *Hinckley*), it is all too easy to lose sight of the way jurors respond in less celebrated trials. A recent journalistic account of one such case focuses our attention on some of the critical issues.[527]

Josee Trani McNally, a fifty-two-year-old, white, female, middle-class professional,[528] had suffered from "complex partial seizures,"[529] a form of epilepsy that renders its victims semi-conscious and may lead to irrational behavior, ever since she underwent brain surgery in 1980 to eradicate the *grand mal* epileptic convulsive seizures that she had suffered since she sustained head injuries in an auto accident at age seventeen.[530] Since 1982, she had been arrested on four occasions for shoplifting or petit larceny.[531] She had pled guilty to the first few charges,[532] but, after

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523. *Id.* at 937 (Adams, J., dissenting); *cf.* Spring, *supra* note 48, at 610 ("What we are witnessing [in insanity defense cases] is jury vigilantism, and the effects run deep because it occurs in the most celebrated of cases. It mocks the entire process of criminal justice and fuels a lack of confidence in the whole system.").

524. W. WHITE, *supra* note 503, at 91.

525. *Id.* at 205. Similarly, the Ninth Circuit found the longevity of the *M'Naghten* Rules to flow from their comporting closely with "the moral feelings of the community." Sauer v. United States, 241 F.2d 640, 649 (9th Cir.), *cert. denied*, 354 U.S. 940 (1957), *overruled on other grounds*, Wade v. United States, 426 F.2d 64, 73 (9th Cir. 1970).

526. *Cf.* United States v. Lyons, 739 F.2d 994, 1000 (5th Cir. 1984) (Rubin, J., dissenting) (discussing the need for judges to prevent the sort of "uninformed popular opinion" reflected in W. WINSLADE & J. ROSS, *supra* note 40, at 2-3, from forming "the basis for judicial decisionmaking").

527. *See* Abrams, *Confined for Crimes She Can't Remember*, Newsday, Mar. 4, 1989, at 2, col. 3 (Nassau ed.). I wish to thank Ron Musselwhite, one of my students, for bringing this case to my attention.

528. *See id.* at 10, col. 2.

529. *Id.*

530. *Id.* at 10, col. 102.

531. *Id.* at 10, col. 2.

532. *Id.*

her fourth arrest, she entered an insanity plea.[533] In her defense, she relied on the testimony of her treating psychologist[534] who stated that, while in the throes of a seizure, she could not control her behavior.[535]

The jury rejected her defense, and, following her conviction, she was placed on probation.[536] Later, she would be arrested twice more for shoplifting,[537] placed on house detention, and monitored *via* an electronic ankle-sensor during the few excursions permitted her.[538] Post-verdict interviews with the judge, the forensic expert and jurors revealed the following:

(1) The jurors "had never heard of this type of epilepsy, . . . and they could not understand how somebody could be in this state while looking and acting normal."[539]

(2) "If she had fallen to the floor in convulsions — then they would have believed."[540]

(3) One juror said, "there certainly was nothing wrong with the woman we saw."[541] He went on to say: "She dressed well, was obviously intelligent and answered questions very precisely. She seemed all there."[542]

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533. *Id.*

534. *Id.* at 10, col. 3. According to the press accounts, the prosecutor stressed that the psychologist did not have "medical credentials." *Id.* Beyond the scope of this paper is the question of the degree to which jurors demand testimony by *physicians* in insanity cases. *Compare* Perlin, *The Legal Status of The Psychologist in the Courtroom*, 5 J. PSYCHIATRY & L. 41, 45 (1977) (noting that non-medical witnesses often are viewed as "second-class" experts) *with* Yarmey & Popiel, *Judged Value of Medical Versus Psychological Expert Witnesses*, 11 INT'L J.L. & PSYCHIATRY 195, 201 (1988) (discussing study results which show that the distinction between professional backgrounds is not as "salient" as the individual witness's training and experience).

For recent conflicting views on the significance of professional background in satisfying the command of Ake v. Oklahoma, 470 U.S. 68 (1985), that an indigent criminal defendant who makes a threshold showing that insanity is likely to be a significant factor at trial is constitutionally entitled to a *psychiatrist's* assistance, compare Jones v. State, 189 Ga. App. 232, 236-37, 375 S.E.2d 648, 652 (1988) (defendant not entitled under *Ake*, to appointment of a *psychologist*), with Funk v. Commonwealth, 8 Va. App. 91, 91-93, 379 S.E.2d 371, 371-74 (1989) (court decision to appoint *clinical psychologist* satisfies *Ake*).

535. Abrams, *supra* note 525, at 2, col. 3.

536. *Id.* at 10, col. 4.

537. *Id.*

538. *Id.* at 2, col. 3.

539. *Id.* at 10, col. 3. (quoting the expert psychologist who testified at McNally's trial). According to a spokesperson from the Epilepsy Foundation, about 25 percent of the nation's two million epileptics suffer from complex partial seizures. *Id.* at 10, col. 1.

540. *Id.* at 10, col. 3 (quoting the expert).

541. *Id.*

542. *Id.*

(4) According to the judge, "[t]hat stuff about being unconscious while seeming conscious sounded like a lawyer's ploy," and "[t]he jury obviously didn't believe her defense — and, frankly, neither did I."[543]

Each of these arguments reflects an important and fixed vision of "crazy behavior," a vision with which McNally clearly did not conform. The defendant neither looked nor acted "insane"; her intelligence was not impaired; she demonstrated no outward physical manifestations of her disorder at the time of trial; and the entire defense seemed to be a "lawyer's ploy."[544] McNally's is a paradigmatic case that precisely reflects the little value placed on scientific research and empirical evidence by jurors and the persistence of the meta-myths that still dominate the insanity-defense landscape.

V. UNPACKING THE MYTHS

A. Fear of Faking

Historically, it was believed that insanity was too easily feigned, that psychiatrists were easily deceived by such simulation, and that the use of the defense has thus been "an easy way to escape punishment."[545] Because it could not be demonstrated conclusively that insanity had some "observable 'material' existence,"[546] charges of counterfeiting insanity arose.[547] When Judge

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543. *Id.* at 10, col. 4.

544. *Id.* While McNally obviously did not strike the jurors as a violent or dangerous personal threat, perhaps the fact that she was perceived as a recidivist offender (albeit for a minor charge) deprived her of the sympathy a defendant of her background could normally expect. *See supra* text accompanying notes 486-501 (Jurors usually exhibit sympathy toward defendants who fall into a "we-can-feel-sorry-for-you" category.).

545. Note, State v. Field*: Wisconsin Focuses on Public Protection by Reviving Automatic Commitment Following a Successful Insanity Defense*, 1986 WIS. L. REV. 781, 784; *see also* R. Smith, *supra* note 81, at 63 (Psychiatrists "were accused of being biased in favour of finding insanity and of being deceived by simulation."). *See generally* H. WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW 156 (1933) [hereinafter H. WEIHOFEN, DEFENSE] (discussing the legal tests, burdens of proof, pleading and procedure for the insanity defense). For what is probably the first recorded example of feigned insanity, see Cohn, *Some Psychiatric Phenomena in Ancient Law*, in PSYCHIATRY, LAW AND ETHICS 59, 61 (1986) (David's decision to feign mental disorder so as to escape from King Saul (citing *1 Samuel* 21:13-16)); *see also* Brittain, *The History of Legal Medicine: The Assizes of Jerusalem*, 34 MEDICO-LEGAL J. 72, 72 (1966) (feigned illness to avoid trial in 1100).

546. Eigen, *supra* note 503, at 427.

547. *Id.* Thus, in 1681, Sir Robert Holburn wrote that "a man may counterfeit himself to be mad he may do it so cunningly, as it cannot be discerned, whether he be mad or no." *Id.* at 428 (quoting 1 G. COLLINSON, A TREATISE ON THE LAW CONCERNING IDIOTS,

Darling characterized an "impulsive" insanity defense in 1911 as "the last refuge of a hopeless defence,"[548] the factual basis of his assertion went unchallenged. This fear of successful deception, which "permeated the American legal system for over a century,"[549] was believed to weaken significantly the deterrent effect of the criminal law.[550] The fear is one that has held some of this century's most respected jurists in its thrall,[551] regardless of the fact that it is *not* an axiom of criminal procedure that rights be "denied to all because of the fear that a few might abuse them."[552]

Yet there is virtually no evidence that feigned insanity has ever been a remotely significant problem of criminal procedure, even after more liberal substantive tests of insanity were adopted.[553] A survey of the case law reveals no more than a handful of cases in which a defendant free of mental disorder "bamboozled"[554] a court or jury into a spurious insanity acquittal.[555]

LUNATICS, AND OTHER PERSONS *Non Compotes Mentis* 490 (1812) (non-substantive errors in Eigen's quotation of G. Collinson have been corrected)).

548. Rex v. Thomas, 7 Crim. App. 36, 37 (1911), *discussed in* Crotty, *supra* note 393, at 119 n.87.

549. Perlin, *Symbolic Values*, *supra* note 26, at 98; *cf.* Fentiman, *supra* note 57, at 634 (prison inmates who make repeated requests for psychiatric or medical services are seen as malingering (quoting Weihofen, *Institutional Treatment of Persons Acquitted by Insanity*, 38 TEX. L. REV. 849, 861 (1960))). *But see* Winiarz v. State, 752 P.2d 761, 763 (Nev. 1988) (reversible error for psychiatric expert to testify defendant was "feigning" in homicide case where defendant pled mistake and misadventure as defenses).

550. Eule, *supra* note 142, at 649.

551. *E.g.*, Margulies, *supra* note 169, at 806-07 n.85 (citing Lynch v. Overholser, 369 U.S. 705, 715 (1962) (Harlan, J.) and United States v. Brown, 478 F.2d 606, 611 (D.C. Cir. 1973) (Leventhal, J.) (quoting *Lynch*)).

552. Bolton v. Harris, 395 F.2d 642, 649 n.35 (D.C. Cir. 1968), *discussed in* Note, *Commitment of Persons Acquitted By Reason of Insanity: The Example of the District of Columbia*," 74 COLUM. L. REV. 733, 749 (1974).

553. *See* Kuh, *supra* note 363, at 772; *id.* at 772 n.7 (citing sources).

554. United States v. Carter, 415 F. Supp. 15, 16 (D.D.C. 1975).

555. *See, e.g. Id.* (defendant found NGRI ordered released although he had falsified mental disorder in order to prevail on insanity defense); People v. Lockett, 121 Misc. 2d 549, 468 N.Y.S.2d 802 (Sup. Ct. 1983) (granting state's motion to vacate defendant's NGRI plea on ground defendant defrauded court); Mickenberg, *supra* note 42, at 981:

> Even the most vociferous opponents of the insanity defense are usually unable to cite actual cases of defendants who escaped justice by pretending to be mentally ill. United States Attorney Guiliani, when pressed on this point, cited the novel *Anatomy of a Murder* as a "perfect example of how you can manipulate and use the insanity defense." Needless to say, while *Anatomy of a Murder* is an excellent novel, it is still only fiction.

(footnote omitted).

The defendant was *unsuccessful* in his effort in State v. Simonson, 100 N.M. 297, 669

Contrary to the prevailing stereotype, malingering[556] among insanity defendants is statistically low[557] and is fairly easy to discover.[558] In fact, the empirical evidence shows that it is much

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P.2d 1092 (1983). *Lockett* and *Simonson* are discussed in Note, *Vietnam Stress Syndrome and the Criminal Defendant*, 19 LOY. L.A.L. REV. 473, 505-06 (1985). On feigning of posttraumatic stress disorder generally, see Fairbank, McCaffrey & Keane, *Psychometric Detection of Fabricated Symptoms of Posttraumatic Stress Disorder*, 142 AM. J. PSYCHIATRY 501, 501-03 (1985) (over 90 percent of subjects instructed to fabricate symptoms of disorder correctly classified through use of Minnesota Multiphasic Personality Inventory (MMPI) test).

For anecdotal instances of feigned insanity, see Sauer v. United States, 241 F.2d 640, 648 n.21 (9th Cir. 1957) (case of Martin Laven), *discussed in* F. WERTHAM, THE SHOW OF VIOLENCE 41-61 (1949); Gerber, *The Insanity Defense Revisited*, 1984 ARIZ. ST. L.J. 83, 117-18 (speculating that President Nixon's charges that the insanity defense had been subject to extraordinary abuse by defendants stemmed from his reading press accounts of United States v. Trapnell, 495 F.2d 22 (2d Cir.), *cert. denied*, 419 U.S. 851 (1974), that said the defendant boasted he could feign insanity).

556. *See generally* Eissler, *Malingering*, in PSYCHOANALYSIS AND CULTURE: ESSAYS IN HONOR OF GREZA ROHREIM 222, 223 (1951) (Malingering "is the persistent, planned simulation or dissimulation of symptoms for a gainful purpose"); Gorman, *Defining Malingering*, 27 J. FORENSIC SCI. 401, 401 (1982) ("Malingering is . . . the false and fraudulent simulation or exaggeration of . . . mental disease or defect.") (citations omitted); Howe, *Psychiatric Evaluation of Offenders Who Commit Crimes While Experiencing Dissociative States*, 8 LAW & HUM. BEHAV. 253, 256-59 (1984) (on identifying offenders with multiple personalities through distinguishing feigned from genuine amnesia of their crimes); Resnick, *The Detection of Malingered Mental Illness*, 2 BEHAV. SCI. & L. 21 (1984) (discussing clinical approaches to and strategies for identifying malingering); Ziskin, *Malingering of Psychological Diseases*, 2 BEHAV. SCI. & L. 39 (1984) (discussing different techniques of assessing malingering).

557. *See, e.g.*, Wettstein & Mulvey, *Disposition of Insanity Acquittees in Illinois*, 16 BULL. AM. ACAD. PSYCHIATRY & L. 11, 15 (1988) (one of 137 insanity acquittees seen as malingering); *Most Defendants Who Plead Insanity Are Not Malingering, Study Shows*, Psychiatric News, July 3, 1987, at 7, col. 1 (discussing study using MMPI examination to assess possible malingering). Recent studies in forensic settings reveal a range of 3.2 percent to 8 percent frequency of malingering. Rogers, *Feigned Mental Illness*, 26 PROF. PSYCHOLOGY 312 (1989) [hereinafter Rogers, *Feigned Mental Illness*] (Studies have found that the rate of malingering among those examined for insanity to range from 3.2 percent to 17.2 percent. Dr. Rogers concludes "that the majority of forensic patients ha[ve] no indicators of malingering.").

558. *See* Francois v. Henderson, 850 F.2d 231, 235 (5th Cir. 1988) (unanimous testimony that sanity could be feigned for only a few hours; "No schizophrenic can feign sanity for years on end."); Commonwealth v. Goulet, 402 Mass. 299, 305, 522 N.E. 2d 417, 421 (1988) (expert testified that defendant was "faking bad," where defendant's scores on MMPI indicated incompatible diagnoses and where, had defendant suffered from the illnesses indicated by her scores, "she would not have been able to take the test"); People v. Schmidt, 216 N.Y. 324, 340, 110 N.E. 945, 950 (1915) ("Cases will doubtless arise where criminals will take shelter behind a professed belief that their crime was ordained by God, just as this defendant attempted to shelter himself behind that belief. *We can safely leave such fabrications to the common sense of juries.")* (emphasis added); H. DAVIDSON, FORENSIC PSYCHIATRY 159-73 (1952) (pointing out the difficulty of malingering a mental deficiency and the nonconformity of symptoms in a malingered psychosis);

more likely that seriously mentally disabled criminal defendants will feign *sanity* in an effort to avoid being seen as mentally ill,[559] even where evidence of insanity might serve as powerful mitigating evidence in death penalty cases.[560] Thus, juveniles imprisoned

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Eigen, *supra* note 503, at 428 (attempts at feigning "doomed to failure because '[t]o sustain the character of a paroxysm of active insanity would require a continuity of exertion beyond the power of a sane person . . . .' " (quoting J. HASLAM, MEDICAL JURISPRUDENCE AS IT RELATES TO INSANITY ACCORDING TO THE LAWS OF ENGLAND 60 (1817))) (nonsubstantive errors in Eissler's quotation of J. Haslam have been corrected). *But see* Dietz, *Why the Experts Disagree: Variations in the Psychiatric Evaluation of Criminal Insanity*, 477 ANNALS 80, 92 (1985) ("To ask a murder defendant claiming hallucinations whether the voices encouraged the killing is to invite self-serving fabrications."); Faust, *Declarations Versus Investigations: The Case for the Special Reasoning Abilities and Capabilities of the Expert Witness in Psychology/Psychiatry*, 13 J. PSYCHIATRY & L. 33 (1985) (little evidence found to support clinical claims of expert capacity to detect malingering accurately).

For very recent research on the detection of malingering, see Cornell & Hawk, Clinical Presentation of Malingerers Diagnosed by Experienced Forensic Psychologists 13 LAW & HUM. BEHAV. 375, 377 (1989) (finding "consistent clinical features associated with the diagnosis of malingered patients"); Hawk & Cornell, *MMPI Profiles of Malingerers Diagnosed in Pretrial Forensic Evaluations*, 45 J. CLINICAL PSYCHOLOGY 673 (1989) (The MMPI is a useful tool in detecting malingering.); Walters, White & Greene, *Use of the MMPI to Identify Malingering and Exaggeration of Psychiatric Symptomatology in Male Prison Inmates*, 56 J. CONSULTING & CLINICAL PSYCHOLOGY 111 (1988) (same).

559. In the "pecking order" of prisoners, the mentally ill have always been plagued by an exceptionally low status. *See* P. ROCHE, *supra* note 29, at 165 (discussing the factual backdrop of Commonwealth v. Ballem, 386 Pa. 20, 123 A.2d 728, *cert. denied* 352 U.S. 932 (1956), and concluding that the defendant "ha[d] succeeded in feigning sanity"); Greene, *Assessment of Malingering and Defensiveness by Objective Personality Inventories*, in CLINICAL ASSESSMENT OF MALINGERING AND DECEPTION 123, 151-52 (R. Rogers ed. 1988) (20 percent of all psychiatric patients deny or minimize their psychopathology); Grossman & Cavanaugh, *Do Sex Offenders Minimize Psychiatric Symptoms?*, 34 J. FORENSIC SCI. 881 (1989) (Patients facing legal charges are less likely to admit to psychopathology than those not facing such charges.); Halleck, *The Criminal's Problem With Psychiatry*, in READINGS IN LAW AND PSYCHIATRY 51, 52 (1975) (Despite apparent advantages of hospital life, prisoners make strenuous efforts to return to prison by claiming that they only feigned insanity.); Lewis, Pincus, Feldman, Jackson & Bard, *Psychiatric and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838, 841 (1986) (all but one of sample of death row inmates studies attempted to *minimize* rather than exaggerate their degree of psychiatric disorders); Resnick, supra note 556, at 23 (discussing why "[d]issumulation, or denial of psychiatric symptoms, is not uncommon in persons who have committed crimes"); Taylor, *Motives for Offending Among Violent and Psychotic Men*, 147 BRIT. J. PSYCHIATRY 491, 496-97 (1985) (in sample of 203 prisoners studied, "nonpsychotic men never claimed psychotic justification for their offences, but half the psychotic men claimed ordinary nonpsychotic motives").

560. *See, e.g.*, Lewis, Pincus, Bard, Richardson, Prichep, Feldman & Yeager, *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584, 588 (1988) (Juveniles on death row "almost uniformly tried to hide evidence of cognitive deficits and psychotic symptoms.").

on death row were quick to tell Dr. Dorothy Lewis and her associates, "I'm not crazy," or "I'm not a retard."[561]

In spite of this track record, the public remains highly skeptical of the abilities of forensic psychiatrists to determine legal insanity.[562] Prosecutors have offered, as evidence of sanity, expert

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561. *Id.*

Dr. Isaac Ray, the father of American forensic psychiatry, discussed the impact of misperceptions about malingering on the legal definition of insanity:

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

I. RAY, *supra* note 233, § 247, at 243. On the problems with the assumptions about malingering, see Rogers, *Feigned Mental Illness*, *supra* note 556, at 313 (labeling "current model of malingering as puritanical," and concluding that it is "scientifically indefensible").

The issue of how jurors respond to fabricated defenses in general is discussed in State v. Eaton, 30 Wash. App. 288, 295, 633 P.2d 921, 925 (1981) (In a case involving a defendant who claimed an alcohol-induced black-out, the court noted that "[j]urors are quite aware that a criminal defendant may be motivated to fabricate a defense and are unlikely to be influenced unduly by an expert opinion that is shown to rest on questionable sources of information."); *see also* Singer, *On Classism and Dissonance in the Criminal Law: A Reply to Professor Meir Dan-Cohen*, 77 J. CRIM. L. & CRIMINOLOGY 69, 76 (1986) (discussing courts' fears of fabrication in cases involving prison inmates claiming duress in escape cases, *e.g.*, People v. Lovercamp, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974)).

562. *See, e.g.*, Abrams, *supra* note 527, at 2, col. 3 (jury rejection of Josee McNally's insanity defense); Homant & Kennedy, *Judgment*, *supra* note 95, at 79-80 (concluding that expert psychiatric testimony should be limited to the subjects of mental state and motivation, while the determination of legal sanity or insanity should be left to juries); Slater & Hans, *supra* note 503, at 676 (40 percent of those polled had "no confidence" in expert testimony in *Hinckley* trial; another 20 percent had only "slight" confidence); Benner, *Requiem for* Miranda: *The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U.L.Q. 59, 143 n.379 (1989) (reproducing newspaper editorial attached to state prosecutor's *certiorari* petition in Colorado v. Connelly, 479 U.S. 157 (1986)):

> You might well wonder how the [Colorado] Supreme Court can be sure Connelly lacked free will . . . . Silly you. The court knows because a psychiatrist says so, and the psychiatrist knows because Connelly says so . . . . Perhaps next time the Supreme Court should find an expert who will go the distance — someone who will contend that no confession is ever the product of free will . . . . Surely the court should find that notion appealing: It's simple but abstract, and it's a bold departure in legal theory. Best of all, though, it helps the guilty go free.

Indeed, it may not even matter to some segment of the public whether an insanity defense is feigned or authentic; in *either* case, it is equally rejected. *See* Geis & Meier, *supra* note 178, at 73 (Idaho residents hold the view that persons "should not be able to avoid punitive consequences of criminal acts by reliance on either a real or a faked plea of insanity."); *cf.* Ellsworth, supra note 82, at 90 (pro-death-penalty jurors more likely to see insanity defense as a "ruse").

testimony that a defendant was "intelligent enough to feign mental illness."[563] Anti-insanity-defense prosecutors suggest that "[o]nly a defendant who is faking insanity" can reasonably fear disclosure of his response to post-arrest *Miranda* warnings.[564] Even insanity defense supporters such as Professor Richard Bonnie recommend that "an exculpatory doctrine of insanity should be framed in a way that minimizes the risk of fabrication, abuse, and moral mistake."[565]

No one is more to blame for perpetuating this meta-myth than Chief Justice Rehnquist. He was the lone dissenter in *Ake v. Oklahoma*,[566] which held that an indigent defendant is constitutionally entitled to psychiatric assistance when he makes a preliminary showing that his sanity "is [likely] to be a significant factor at trial."[567] In his dissent, the then Associate Justice expressed fears of feigned insanity defenses,[568] "in the face of staggeringly-unanimous professional diagnosis and lay observation as to the profundity of Ake's mental illness."[569] Similarly, in *Ford v. Wainwright*,[570] which held that the eighth amendment prohibits the execution of an insane prisoner, he dissented, raising "the spectre [that] sane capitally-sentenced defendants [will seek] to 'cheat' death by raising spurious, multiple claims of insanity."[571]

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563. Fulghum v. Ford, 850 F.2d 1529, 1534 (11th Cir. 1988).

564. Daley & Fryklund, *The Insanity Defense and the "Testimony By Proxy" Problem*, 21 VAL. U.L. REV. 497, 521 (1987) (because if defendant were *actually* insane at the time of the arrest and crime, the manner of response would *support* an insanity claim, according to the authors, who are Illinois state attorneys); *cf.* Wainwright v. Greenfield, 474 U.S. 284, 295 (1986) (defendant's silence in response to *Miranda* warnings cannot be used to overcome his plea of insanity, because that would be fundamentally unfair), *discussed in* Perlin, *Symbolic Values*, *supra* note 26, at 28-33, 70.

565. Bonnie, *Morality*, *supra* note 134, at 15.

566. 470 U.S. 68 (1985).

567. *Id.* at 83, *discussed in* Perlin, *Symbolic Values*, *supra* note 26, at 18-22.

568. *Ake*, 470 U.S. at 90-91 (Rehnquist, J., dissenting) (discussing the lack of evidence establishing defendant's purported insanity).

569. Perlin, *Symbolic Values*, *supra* note 26, at 83. Ake's lawyer characterized his client to the court as "goofier than hell." *Id.* at 18 n.156 (quoting Brief for Petitioner at 10, Ake v. Oklahoma, 470 U.S. 68 (1985) (No. 83-5424) [hereinafter *Ake* Petitioner's Brief]). A consulting psychiatrist characterized Ake as "a psychotic [diagnosed as suffering from] paranoid schizophrenia — chronic, with exacerbation." *Id.* at 19 n.158 (quoting *Ake* Petitioner's Brief, *supra*, at 2-3).

570. 477 U.S. 399 (1986), *discussed in* Perlin, *Symbolic Values*, *supra* note 26, at 53-62.

571. Perlin, *Symbolic Values*, *supra* note 26, at 83. Specifically, Chief Justice Rehnquist is leery of the potential use of the claim as a stalling tactic:

> A claim of insanity may be made at any time before sentence and, once rejected, may be used again; a prisoner found sane two days before execution

Portrayals of the insanity defense as being more aptly characterized as the " 'insanity dodge' [have] come into existence by popular consent as a symbol of sharp practice by unscrupulous attorneys and none too honest medical men."[572] A comprehensive survey in the District of Columbia demonstrated the pervasiveness of this view, by showing that court "[d]istrust of psychiatrists and psychologists was fully matched by distrust of defense counsel who appeared unorthodox in their approach to the insanity defense."[573] The parallels to the perception of the role of lawyers in death penalty cases are remarkable.[574]

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might claim to have lost his sanity the next day, thus necessitating another judicial determination of his sanity and presumably another stay of his execution. *Ford*, 477 U.S. at 435 (Rehnquist, J., dissenting).

This scenario though, is unlikely. Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 STAN. L. REV. 765, 790 (1980) (Empirical evidence "undermines the forecast of a stampede of unmeritorious claims."). Picking up on this argument, a student commentator has suggested that, when such a prisoner raises "frivolous claims of insanity," he could thus be deemed to waive the right to a judicial inquiry into present sanity. *See* Note, Ford v. Wainwright: *The Eighth Amendment, Due Process and Insanity on Death Row*, 7 N. ILL. U.L. REV. 89, 110-11 (1986).

Chief Justice Rehnquist also joined in Justice Scalia's partial dissent in Penry v. Lynaugh, 109 S. Ct. 2934 (1989), which criticized the majority for encouraging "an unguided, emotional 'moral response' " on the part of jurors charged with assessing whether to impose the death penalty on mentally retarded defendants. *Id.* at 2968 (Scalia, J., dissenting in part).

572. W. WHITE, *supra* note 503, at 3; *see also* M. KAVANAGH, *supra* note 241, at 90 (discussing apparent ability of "skillful criminal lawyers" to use insanity defense to frustrate justice); H. WEIHOFEN, DEFENSE, *supra* note 545, at 8 ("The public believes an alarming number of criminals escape punishment by means of the 'insanity dodge,' and that they do so because shrewd lawyers, with the help of willing experts, can . . . delude the jury . . . ."); Comment, *The Use of Illegally Obtained Evidence to Rebut the Insanity Defense: A New Exception to the Exclusionary Rule?*, 74 J. CRIM. L. & CRIMINOLOGY 391, 402 (1983) (discussing society's view of the "insanity dodge" as a "windfall to the defendant"). *See generally* Flannery, *Meeting the Insanity Defense*, 51 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 309 (1960) (on the proper approach a prosecuting attorney should use when confronted by an apparently fraudulent defense of insanity).

573. Arens & Susman, *supra* note 472, at 5. Of 27 criminal defense lawyers interviewed, "all but one expressed the view that [District of Columbia] District Court judges viewed the insanity defense with suspicion and at times hostility." *Id.* at 6; *cf.* Keilitz, *supra* note 89, at 315 ("[T]he promise of treatment may draw defense counsel to the GBMI plea in cases in which an insanity defense is unlikely to succeed."); Abrams, *supra* note 527, at 10, col. 4 (insanity defense in *McNally* shoplifting case seen by judge as "lawyer's ploy"). *See generally* Rogers, *APA's Position*, *supra* note 26, at 845 (calling for more studies of legal professionals' attitudes toward and understanding of the insanity defense).

574. *See, e.g.*, Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1793 (1987) (rejecting the view attributed to Justice Rehnquist that the great number of reversals of death sentences is due to "shyster lawyers [who have been] so successful in tricking gullible federal and state judges.") *See generally* Worrell,

"Forensic psychiatrists testifying in criminal cases [have also been] viewed as attempting to cloud our moral standards and to ignore the limits of community tolerance."[575] From their first involvement in court proceedings, psychiatrists "have been perceived as a threat to public security and a fancy means for 'getting criminals off.' "[576] Yet, this fear of faking was dispelled as long as 65 years ago when William A. White responded: "[I]n my personal experience I have *never* known a criminal to escape conviction on the plea of 'insanity' where the evidence did not warrant such a verdict [except in jury nullification cases]."[577]

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supra note 450, at 441 (describing reliance on expert predictions of future dangerousness as a "subterfuge" to avoid difficult issues in imposition of death penalty).

575. Weitzel, *supra* note 405, at 459; *see also* Sharf, *supra* note 101 (arguing that forensic psychiatry was the public's "scapegoat" following its outrage at the *Hinckley* verdict of NGRI).

Religious intolerance and xenophobia have sometimes played a role in attacks against forensic psychiatrists. *See* C. ROSENBERG, THE TRIAL OF THE ASSASSIN GUITEAU: PSYCHIATRY AND LAW IN THE GILDED AGE 166, 186 (1968) (attorneys prosecuting President Garfield's assassin focused on portraying the defendant's psychiatric expert as an atheist); *id.* at 255 (A "prominent authority on legal medicine" described the defense expert as "a weak echo of a class of modern crazy German pagans, who are trying . . . to break down all the safeguards of our Christian civilization."); 1 N. WALKER, *supra* note 140, at 82 (quoting a crown prosecutor questioning a forensic witness in an 1801 trial thus: "Have you not been here before as a witness and a *Jew physician*, to give an account of a prisoner as a madman, to get him off upon the ground of insanity?" (emphasis added)).

576. Watson, *supra* note 131, at 226; *cf.* Stone, *The Ethical Boundaries of Forensic Psychiatry: A View From the Ivory Tower* 12 BULL. AM. ACAD. PSYCHIATRY & L. 209, 214 (1984).

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

But see J. ROBITSCHER, *supra* note 134, at 24, 262 (discussing pro-prosecution bias of many forensic psychiatrists, especially in cases involving little publicity or indigent defendants).

577. W. WHITE, *supra* note 503, at 3-4. On jury nullification in insanity defense cases, see generally Perlin, *Psychodynamics*, *supra* note *, at 74-85.

Skepticism surrounding the insanity defense may well have irrational roots. Dr. Sidney Shindell has suggested that "the public can be expected to be rational about those aspects of criminal procedure with which they have little anxiety" and that the public will "remain completely at the mercy of their emotions in dealing with the more 'extreme' forms of aberrant behavior." Shindell, *The Public and the Criminal: Observations on the Tail of the Curve*, 50 A.B.A. J. 545, 549 (1964); *see also* Howe, *supra* note 556, at 273 n.101 (discussing the beliefs jurors hold in face of the normal appearance of offenders with multiple personalities). Dr. Edmund Howe suggests:

B. Mental Illness is "Different"

The public's views about the insanity defense are fueled by the supposed invisibility of mental illness.[578] Generally, in the absence of either exceptionally persuasive or "objective" evidence, jurors reject the notion that an alleged mental disorder is severe enough to excuse criminal behavior.[579] Thus, like the "objective" evidence of insanity successfully used in nineteenth-century British trials,[580] the most persuasive testimony presented in the *Hinck-*

> Juries may have a greater psychological need to deny that multiple personality and other dissociative states exist than to deny that other mental illnesses exist. Persons with [dissociative states] appear identical to themselves and are therefore more threatening in two respects. First, persons close to them such as family members or neighbors could have such illnesses and they could not be aware of them. Second, if others who appear like them have these disorders, they too could perhaps acquire them.

Id.

578. *See supra* notes 363-83 and accompanying text.

579. *See* Arens, Granfield & Susman, *supra* note 350, at 9 ("[J]urors [are probably] predisposed to view an insanity defense as calling for nothing short of highly persuasive evidence of severe psychotic disorientation."); White, *The Mental Illness Defense in the Capital Penalty Hearing*, 5 BEHAV. SCI. & L. 411, 417 (1987) ("[J]urors probably are unaware of the interpretational problems involved" in neurological and psychological testing and thus place greater weight on brain scans and psychological test scores than on "traditional" psychological testimony.); Bonnie & Slobogin, *supra* note 32, at 434 n.14:

> Although the issue is not much discussed, the skeptics appear to be intuitively more confident about the precision of the inquiry when it concerns neuro physiological explanations for aberrant behavior rather than psychogenic ones. Thus, they might permit the defendant to offer evidence of epilepsy and trauma to negate the "voluntariness" (conscious direction) of his criminal act. These investigations, however, usually are every bit as speculative as those concerning functional mental disorder.

Furthermore, there exists a widespread tendency to limit what constitutes a mental disease for the purpose of invoking the insanity defense. *See, e.g.*, Gerard, *supra* note 261, at 409 ("[O]nly four DSM-III [*supra* note 55] disorders justify invoking the insanity defense: moderate or worse mental retardation; schizophrenia; the affective disorders (mania and depression); and brain syndromes that were not induced by the voluntary ingestion of some substance."); Halleck, *Critique*, *supra* note 118, at 382 n.8 (The public is convinced that the neurotic should be held responsible for his actions. "Whether or not free will actually exists, a belief in its existence and an assumption of personal responsibility on the part of all citizens seems to be essential to the survival of any society."); Roberts, Golding & Fincham, *supra* note 9, at 208 ("[C]ourts are willing only to say what mental disease is *not* — for example, it is not neurosis and usually not personality disorder." (citing People v. Uppole, 97 Ill. App. 3d 72, 422 N.E.2d 245 (1981))).

580. *See, e.g.*, Pantkratz, *Murder and Insanity: Nineteenth Century Perspectives from the "American Journal of Insanity,"* 28 INT'L J. OFFENDER THEORY & COMP. CRIMINOLOGY 37, 38-39 (1984) (discussing cases in which pulse rates, "peculiar odors," head measurements, and ophthalmoscopic measurements of brain congestion were used as evidence of insanity). *But see* Eigen, *supra* note 503, at 426 (late eighteenth-century medical testimony noteworthy for lack of "physicalist imagery").

ley trial consisted of abnormal CAT scans.[581]

Traditionally, the American psychiatric orientation with respect to the nature and cause of mental disorders was nearly exclusively "an anatomico-pathological one . . . the product of what Gruhle called 'brain mythology,' the expression of what Zilboorg has termed a 'psychiatry without psychology.' "[582] At the same time, however, psychiatric testimony about diagnosis has traditionally been criticized as being less accurate than that of other medical specialists. This criticism rests on the faulty assumption that other medical specialists "base their diagnoses upon provable objective facts,"[583] and are more likely to reflect unanimity on questions of diagnosis, prognosis and preferred treatment. "[T]he mind-brain problem . . . plagues all our endeavors to account for human actions . . . [and is particularly] important . . . to forensic psychiatry."[584]

Not surprisingly, therefore, one court recently stressed that the fact that the expert witnesses failed to testify "that appellant's dyssocial personality was caused by trauma *or other damage to his brain*,"[585] was a critical factor in its determination that a di-

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581. *See* White, *supra* note 579, at 417 ("[O]bservers of the John Hinckley trial seem to agree that the abnormal CAT scans of Hinckley's brain were highly instrumental in his acquittal."). *See generally* L. CAPLAN, *supra* note 44, at 79-85 (discussing the admissibility and subsequent presentation at trial of Hinckley's CAT scan).

582. Bunker, *American Psychiatric Literature During the Past One Hundred Years*, in ONE HUNDRED YEARS OF AMERICAN PSYCHIATRY 195, 207 (Amer. Psych. Ass'n. ed. 1944).

Dr. Walter Kempster, a prominent state psychiatric superintendent, testifying at the trial of President Garfield's assassin stated, " 'In every case of insanity there is disease of the brain which may be discovered if the proper methods are made use of to discover it. I have never yet examined a case in which I did not discover marked disease of the brain.' [sic]" Zilboorg, *supra* note 62, at 557 (quoting 38 AM. J. INSAN. 384 (1881-82) (no title for article in original)).

Earlier, in an 1839 treatise, John Shapland Stock recommended inquiry as to whether "any of those circumstances which are generally acknowledged to be the causes of [insanity] had occurred — as injuries of the head, mercurial preparations largely or injudiciously administered, attacks of paralysis, suppression of customary evacuations, &c." J. STOCK, A PRACTICAL TREATISE ON THE LAW OF NON COMPOTES MENTIS, OR PERSONS OF UNSOUND MIND 70-71 (1838). *See generally* R. SMITH, *supra* note 81, at 40-70 (tracing the history of the medical view of the insanity defense as a "physical disease").

583. NYU Note, *supra* note 238, at 718.

584. Stone, *supra* note 576, at 211.

585. Commonwealth v. Terry, 513 Pa. 381, 397 n.17, 521 A.2d 398, 406 n.17 (emphasis added) (citing, by way of contrast, Commonwealth v. Walzack, 468 Pa. 210, 360 A.2d 914 (1976), in which the defendant sought to introduce expert testimony concerning his lobotomy to support a defense of diminished capacity), *cert. denied*, 482 U.S. 920 (1987).

minished capacity defense was not established. Similarly, another court relied on the lack of "organic manifestations" to affirm a jury's rejection of a schizophrenic's insanity defense.[586]

The different treatment of mental illness is further demonstrated by the fact that while some physical diseases are difficult to prove, courts rarely display the hostility to testimony in cases involving such diseases that is frequently exhibited in insanity-defense trials.[587] The *Josee McNally* case serves to illustrate the operative bias at work in insanity defense cases. Even though her mental disorder was neurologically based (epilepsy), the testimony she offered was that of a psychologist who, according to the prosecutor, lacked medical credentials.[588] This, along with McNally's "normal" appearance contributed to the psychologist's inability to convince the jury that an illness was the cause of McNally's crim-

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586. United States v. Dube, 520 F.2d 250, 252 (1st Cir. 1975).

For cases in which an organically based defense was raised, see, e.g., Virgin Islands v. Smith, 278 F.2d 169 (3d Cir. 1960) (epilepsy); Clark v. State, 436 N.E.2d 779 (Ind. 1982) (epilepsy); State v. Parker, 416 So. 2d 545 (La. 1982) (hypoglycemia and/or intoxication); People v. Morton, 100 A.D.2d 637, 473 N.Y.S.2d 66 (1984) (hypoglycemia); State v. Werlein, 136 Wis. 2d 445, 401 N.W.2d 848 (Ct. App. 1987) (organic brain dysfunction); Regina v. Charlson, 1 All E.R. 859 (1955) (automatism arising from cerebral tumor); Regina v. Sibbles, 1959 CRIM. L. REV. 660 (automatism arising from case involving high blood pressure); Regina v. Kemp, 1 Q.B. 399 (1957) (arteriosclerosis causing lapse in reasoning ability) (distinguishing *Charlson*). For a discussion of organically based defenses generally, see S. HALLECK, *Psychiatry*, *supra* note 146, at 159-66 (on the role of organically caused syndromes as a causal factor of criminal behavior); Fox, *Physical Disorder, Consciousness, and Criminal Liability*, 63 COLUM. L. REV. 645 (1963) (comparing and contrasting automatism, or unconsciousness, defense).

587. *Cf.* Moran, *supra* note 40, at 9 ("When it comes to the insanity defense, however, the public appears to demand near perfection."); *id.* at 10:

> [W]hen two ballistics experts disagree as to whether the defendant's pistol fired the fatal bullets, the science of ballistics is not discredited. Again, the public understands the limits of scientific knowledge, that much of what is known in science is a matter of interpretation . . . . Yet, when two psychiatrists disagree as to whether a defendant's behavior was the product of a mental disease, or whether the defendant knew the difference between right and wrong, the profession of psychiatry is often discredited.

On the difference in attitudes towards psychiatric as opposed to other forms of forensic evidence, compare Rogers & Ewing, *supra* note 173, at 9 (jurors appear "mildly interested" in mental health expert testimony, but are not "thunderstruck" by it) with Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 OHIO ST. L.J. 671, 672 (1988) (25 percent of jurors surveyed indicated that, but for hard scientific evidence presented by prosecutors, "they would have changed their verdicts — from guilty to not guilty." (quoting Peterson, *The Uses and Effects of Forensic Science in the Adjudication of Felony Cases*, 32 J. FORENSIC SCI. 1730, 1748 (1987))).

588. Abrams, *supra* note 527, at 10, col. 3.

inal behavior.[589]

C. The Defendant Does Not "Look Crazy"

The public has demanded that a mentally ill defendant comport with its *visual* images of "craziness."[590] Thus, Josee McNally's insanity defense was unsuccessful, in large part because she appeared "normal" and "all there."[591] One study "revealed pervasive judicial hostility toward the insanity defense when that defense was not founded on flagrant psychotic symptomatology."[592] To the lay person (the juror *or* the judge), the temporarily delirious patient "leaping over chairs and taking the broomstick to hallucinatory monsters [still] looks more genuinely psychotic than a deeply disordered but calm and brittle-worded schizophrenic."[593] The lay public cannot simply use its intuitive

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589. *Id.*

590. The persistence of this phenomenon was noted over 40 years ago by Judge Thurman Arnold. *See* Holloway v. United States, 148 F.2d 665, 667 (D.C. Cir. 1945) (noting "the common belief that men who talk rationally are in most cases morally responsible for what they do" and approving the criminal law's tolerance of the belief's persistence), *discussed in* Hill, *supra* note 37, at 382-83.

591. Abrams, *supra* note 527, at 10, col. 3; *see also* Fulgham v. Ford, 850 F.2d 1529, 1532 (11th Cir.) (testimony by jail employee and deputy sheriff that defendant exhibited no "unusual" behavior), *cert. denied*, 109 S. Ct. 802 (1988); People v. Tylkowski, 171 Ill. App. 3d 93, 524 N.E.2d 1112, 1117 (1988) (lay witness testified "that there was nothing unusual about defendant's appearance in the days before the murder"; police officers and assistant state's attorney testified defendant "was neatly dressed and . . . seemed aware and mentally alert"); State v. Brantley, 514 So. 2d 747, 751 (La. App. 1987) (noting that witnesses did not portray unsuccessful insanity defendant as a "raving maniac" but as " 'outgoing,' " " 'very friendly,' " and a "nicely dressed 'person of means' "); Lind, *Cross-Examination of the Alienist*, 13 J. CRIM. L. & CRIMINOLOGY 228, 229 (1922) (setting out "typical" juror response in cases of conflicting expert testimony: "the man doesn't look very crazy to us, anyhow").

For an historical overview of the portrayal of madness in the Western world, see S. GILMAN, *supra* note 117; see also R. SMITH, *supra* note 81, at 90-96 (discussing the nineteenth-century British image of the "raving madman"); Eigen, *supra* note 503, at 429 (Haslam "discounted 'popular' images of bizarre behavior" derived from literary images." (citing J. HASLAM, *supra* note 558, at 11)).

592. Arens & Susman, *supra* note 472, at 2; *see also* Arens, Granfield & Susman, *supra* note 350, at 26 (study concluding that jurors' concepts of mental illness are "couched in terms of bizarre behavior manifestations," and that those perceptions are reinforced by typical jury instructions on insanity pleas).

593. Bromberg & Cleckley, *The Medico-Legal Dilemma: A Suggested Solution*, 42 J. CRIM. L. & CRIMINOLOGY 729, 738 (1952); *see* Abrams, *supra* note 527, at 10, col. 3; *see also* T. MAEDER, CRIME AND MADNESS 109 (1985) (Jurors "look for bizarre acts, sudden episodes, a defendant's genuine obliviousness to his own best concerns, and a pervasive inability to lead an ordinary life."); *cf.* State v. Van Horn, 528 So. 2d 529, 530 (Fla. Dist. Ct. App. 1988) (The state's lay rebuttal witnesses provided sufficient "probative perceptions of normalcy.").

"common sense" about whether an individual "looks crazy" (based on a combination of media images, religious iconographs and unconscious rationalizations[594]) to effectively determine who is or is not criminally responsible. In short, for the insanity defense to be successful, the defendant must appear to be "mad to the man on the street."[595]

Similarly, insanity claims are generally rejected when jurors find any significant measure of planning in the defendants' pre-crime actions.[596] That is, "[p]eople are unwilling to excuse conduct that appears to have a rational criminal motive. Evidence of the ability to plan and premeditate a crime flies in the face of the public's perception of mental disease."[597] The public expects a type of "impulse" action on the part of the defendant who pleads insanity.

Chief Justice Rehnquist's views reflect popular sentiment,[598] a sentiment also expressed in the *Josee McNally* case.[599] In *Wainwright v. Greeenfield*,[600] for example, which held that it violated

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594. *See* Baur, *Legal Responsibility and Mental Illness*, 57 NW. U.L. REV. 12 (1962) (discussing religious, moral and cultural roots of responsibility concepts).

595. A. STONE, *supra* note 134, at 219. To some extent, it may be necessary for a defendant to look this way in order to convince a forensic psychiatrist as well. *See* White, *supra* note 579, at 416-17 (psychiatrists more likely to recommend diminished capacity when defendant exhibits "bizarre behavior" (discussing Daniel, Beck, Herath, Schmitz & Menninger, *Factors Correlated With Psychiatric Recommendations of Incompetency and Insanity*, 12 J. PSYCHIATRY & L. 527 (1984))).

596. Roberts, Golding & Fincham, *supra* note 179, at 209-10.

597. Resnick, *supra* note 50, at 208; *see also* Golding & Roesch, *supra* note 45, at 400 (Planning will rule out exculpation in "strict interpretation" jurisdictions.).

M'Naghten reflects this misperception:

> [The *M'Naghten*] "Rules," to state it as simply as possible, labor under the illusion that a "criminotic" . . . is "crazy" in the *popular* sense of the word. The popular conception of mental disease envisages a raving maniac devoid of all reason. The *scientific* conception of psychosis is quite different: a person may appear to the layman quite rational and still harbor psychotic delusions which prompt his actions. Criminosis is not characterized by the ability or inability to distinguish between "right and wrong," but by a tendency to commit acts, punishable by the specific society, under the influence of an *unconscious defense mechanism.*

E. BERGLER & A. MEERLOO, JUSTICE AND INJUSTICE 118 (1963).

598. *See* Perlin, *Symbolic Values*, *supra* note 126, at 82 ("His concurrences-urging-limitations in *Estelle* and *Greenfield* reveal a vision of mental disability that virtually mirrors public perceptions . . . ." (discussing Wainwright v. Greenfield, 474 U.S. 284 (1986) and Estelle v. Smith, 451 U.S. 454 (1981))).

599. *See supra* text accompanying notes 540-44 (discussing jurors' skepticism of McNally's defense, based on her appearance).

600. 474 U.S. 284 (1986). For an overview of the Court's resolution of the *Miranda* issue in *Greenfield*, see Perlin, *Facade*, *supra* note 80, at 29-33 (manuscript).

the Due Process Clause to use the defendant's silence following the administration of *Miranda* warnings as evidence of his sanity, the then Associate Justice concurred in the result only. While agreeing that the prosecutor could not comment on the defendant's *silence*, Justice Rehnquist stated that the defendant's requests for counsel *were* admissible to prove sanity. He argued that a request for counsel "is a perfectly straightforward statement tending to show that an individual is able to understand his rights and is not *incoherent or obviously confused or unbalanced.*"[601] That is, Justice Rehnquist found the defendant's *external* appearance to be "highly relevant" to the question of his sanity.[602] Unlike the patient described by Drs. Bromberg and Cleckley as "leaping over chairs,"[603] the defendant in *Greenfield* did not, by lay concepts, "seem clearly and totally crazy."[604]

In a recent study, Professors Hans and Slater concluded that many individuals see the insanity defense as a "loophole" because of their "apparently common belief that the legal definition for insanity is [or should be] a lack of understanding of what one is doing."[605] Since Hinckley, "who even by his own account 'knew'

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601. *Greenfield*, 474 U.S. at 297 (Rehnquist, J., concurring) (emphasis added).

602. 474 U.S. at 297.

The judicial roots of the Chief Justice's vision may partially be traced to the writings of former Chief Justice Warren Burger, from the period when he was a circuit judge in the District of Columbia. These writings reflect former Chief Justice Judge Burger's sense of "normalcy":

> [The] presumption [of sanity] is grounded on the premise that the generality of mankind is made up of persons within the range of "normal," rational beings and can be said to be accountable or responsible for their conduct; this premise is rooted in centuries of experience, [and] has not been undermined by contemporary medical knowledge . . . .

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

603. *See supra* text accompanying note 591.

604. Morse, *Crazy Behavior*, *supra* note 26, at 654; *cf.* Rogers v. State, 514 N.E.2d 1259, 1261 (Ind. 1987) (affirming the rejection of an insanity plea, in part because of the testimony of the victim's girlfriend that, while the defendant at first acted "nervous" with a " 'weird' facial expression," she subsequently found his speech and actions " 'calmer' " and testified he did not act " 'crazy' "); State v. Clayton, 656 S.W.2d 344, 350 (Tenn. 1983) (reversing trial court's conviction based on police testimony that, upon apprehension, the defendant " 'was sitting with his head down' and 'looked okay,' " where defense presented "overwhelming, even staggering evidence" of a textbook example of paranoid schizophrenia (quoting trial judge's dissenting opinion)); Mestrovic, *Need for Treatment and New York's Revised Commitment Law: An Empirical Assessment*, 6 INT'L J.L. & PSYCHIATRY 75, 78 (1983) (In assessing admission to its facility, a public hospital's staff was "essentially concerned with [the] idea of 'normal craziness' that enables one to function versus 'more than normal craziness.' ").

605. Hans & Slater, *supra* note 349, at 111. Of 434 Delaware residents surveyed, only *one* "gave a reasonably good approximation" of the definition of legal insanity then

what he was doing," employed the insanity defense successfully, the defense appeared to those interviewed to be a loophole.[606] This modern lay definition is not unlike the "wild beast" test of the early eighteenth century[607] and its adherents include members of the judiciary. Thus, in an opinion rejecting the defendant's argument that his mental state should have served to reduce the degree of his homicide conviction, the Colorado Supreme Court focused on the lack of visible insanity and concluded: "[W]e find that here there was no evidence of the defendant suddenly going berserk . . ., no evidence of mental weakness . . ., no[r] evidence of *burst of passion with paleness, wild eyes and trembling* . . . ."[608] Despite a wealth of evidence showing that mentally ill defendants may not "look crazy," the vestiges of the "wild beast" standard remain active in our jurisprudence.

D. Mental Illness as an Improperly Exculpatory Excuse

Finally, the insanity defense myths are premised on a persistent meta-myth that has lost little of its power over the centuries: namely, that mental illness simply is not a valid excuse, and that the social engineering engaged in by mental health professionals inappropriately interferes with society's ability to punish appropriately those who have engaged in criminal acts.

The "indiscriminate and often irresponsible glorification of psychiatry" in past decades[609] may be the source of the public's present disenchantment with psychiatry.[610] Moreover, the sentiment of some psychiatrists, such as Dr. Manfred Guttmacher, that the insanity defense should be retained because "it gives the

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operative in that jurisdiction. *Id.* at 105-06.

606. *Id.* at 111; *see also* Roberts, Golding & Fincham, *supra* note 179, at 226 (Hinckley's acquittal caused uproar because his actions "may not have been striking or odd enough to cross the threshold levels of 'knowledge' impairment to be perceived by most lay persons as sufficiently mentally disordered to be exculpable.").

607. Hans & Slater, *supra* note 349, at 111 (noting the similarity); *cf.* Roberts, Golding & Fincham, *supra* note 179, at 226 (The " 'wild beast' conception of insanity is representative of most people's implicit theories of responsibility."); *cf.* Penry v. Lynaugh, 109 S. Ct. 2934 (1989) (discussed *supra* note 142).

608. Battalino v. People, 118 Colo. 587, 594-95, 199 P.2d 897, 901 (1948) (emphasis added).

609. Schmideberg, *supra* note 125, at 20.

610. *See* Weitzel, *supra* note 405, at 462 ("The skepticism we meet in the public forum seems to come from the *mystification* of the knowledge we possess about mental illness and the *all-inclusiveness* some of us claim as our own medical turf.").

criminal law a heart,"[611] has increased the utilitarian and retributive outcry against the insanity defense.[612] In short, the public cannot be satisfied with the insanity defense if it is left "with the inner sense that justice has [not] been done."[613]

The public's hostility to mental illness and the mentally disabled criminal offender arises from a complex combination of sources: an historically negative view of psychiatry (and, specifically, forensic psychiatry);[614] a negative stereotype of the mentally ill;[615] a tendency to link mental illness and criminality;[616] "the vagueness of the mental health concept and its imprecise relationship to criminal behavior";[617] and an awareness that psychiatrists

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611. M. GUTTMACHER, *supra* note 345, at 95; *cf.* S. HALLECK, *Psychiatry*, *supra* note 146, at 222 ("The most important reason for psychiatric participation in the criminal trial is a humanitarian zeal to temper the harshness of punishment.").

The view that psychiatrists are soft on criminals is, of course, distorted. *See, e.g.*, J. ROBITSCHER, *supra* note 134, at 33 ("To the lawyer, it seems important that civil rights be preserved; to the psychiatrist, who believes that his diagnosis or prognosis should be accepted without challenge, these rights seem less important." Hence, the determination of sanity should not be removed entirely from the jury.).

612. *See* Hans, *supra* note 503, at 407-09.

613. Davidson, *Criminal Responsibility: The Quest for a Formula*, in PSYCHIATRY AND THE LAW 61, 67 (1955).

614. *See generally* Hans & Slater, *supra* note 349 (discussing survey of attitudes towards the insanity defense, taken after the *Hinkley* verdict); Kargon, *Expert Testimony in Historical Perspective*, 10 LAW & HUM. BEHAV. 15 (1986) (analyzing the ethical and values issues facing the scientific expert in the courtroom, through a series of four cases studies spanning the 17th, 18th, 19th and 20th centuries); McGuire & Borowy, *supra* note 379 (study of undergraduates enrolled in introductory psychology course revealed that attitudes were more positive towards mental health professions identified with physical medicine than those identified with mental illness); Slater & Hans, *supra* note 503 (results and analysis of survey, taken shortly after the *Hinkley* trial, exploring Delaware residents' perceptions of insanity law).

615. *See* Roberts, Golding & Fincham, *supra* note 179, at 211 (noting that surveys show the public holds negative opinions of the mentally ill and criminally insane and views the insanity defense as a loophole).

616. *See* Slater & Hans, *supra* note 503, at 675; Steadman & Cocozza, *supra* note 76, at 525-29. These feelings have deep historical roots. *See* W. BROMBERG, *supra* note 115, at 220 ("Had not Lombroso shown that 'moral imbecility, epilepsy, and the born criminal belong to the same natural family'?"). They are exacerbated by frequent media linkages between crime and mental illness. *See* Hans & Slater, *supra* note 349, at 112 (speculating that television's distortion of the link between crime and mental illness "may affect views of the insanity defense and help shape people's definitions"). *See generally* Haney & Manzolati, *Television Criminology: Network Illusions of Criminal Justice Realities*, in READINGS ABOUT THE SOCIAL ANIMAL 125, 126-27 (E. Aronson ed. 3d ed. 1981) (arguing that television "seriously misrepresents the realities of the criminal justice system"); Slater & Elliott, *Television's Influence on Social Reality*, 68 Q.J. SPEECH 69 (1982) (statistical analysis of television's complex effect on the public's perception of criminal behavior).

617. MacBain, *The Insanity Defense: Conceptual Confusion and the Erosion of*

frequently are wrong in their predictions of future dangerous behavior.[618]

The case law reflects these views. Decisions such as *State v. Sikora*,[619] holding that "[c]riminal responsibility must be judged at the level of the conscious,"[620] were premised on the notion that "the psychodynamic theory of determinism was . . . too speculative"[621] a basis upon which to base a criminal-law system. This position, in turn, reflects a "fear [of] engag[ing] in a philosophic discussion of determinism and free will when the product could be the acquittal of one who in his conscious state was aware of the consequences and illegality of his conduct."[622]

More recently, in *Colorado v. Connelly*,[623] the Supreme Court held that serious mental disability was not a factor to consider in determining the validity of a *Miranda* waiver absent police misconduct.[624] Chief Justice Rehnquist stated unequivocally:

> *Miranda* protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment;

Fairness, 67 MARQ. L. REV. 1, 6 (1983).

618. *See* Menzies, Webster & Sepejak, *The Dimensions of Dangerousness: Evaluating the Accuracy of Psychometric Predictions of Violence Among Forensic Patients*, 9 LAW & HUM. BEHAV. 49, 67 (1985) (noting that "forensic assessments of dangerous behavior . . . will never approach perfect accuracy," yet counselling against "wholesale repridiation of the dangerousness issue," because "[v]iolence *does* play a substantial role in shaping public attitudes and legal policy, the fear of violence has expanded in North American society, and the predictive components of decision making are not easily exorcised from the medicolegal system.") (citations omitted). *See generally* Poythress & Stock, *Competency to Stand Trial: A Historical Review and Some New Data*, 8 J. PSYCHIATRY & L. 131 (1980) (arguing that although the public generally doubts the reliability and credibility of psychiatric evaluations of criminal defendants, their reliability is, in fact, improving).

619. 44 N.J. 453, 210 A.2d 193 (1965).

620. *Id.* at 470, 210 A.2d at 202.

621. Lewin, *Psychiatric Evidence in Criminal Cases for Purposes Other Than the Defense of Insanity*, 26 SYRACUSE L. REV. 1051, 1065 n.60 (1975); *see also* State v. Lucas, 30 N.J. 37, 85, 152 A.2d 50, 76 (1959) (Weintraub, C.J., concurring) (criticizing psychiatric doctrines applied to law as being too vague).

622. Lewin, *supra* note 621, at 1096. *See generally* M. MOORE, *supra* note 116, at 140, 141 (discussing how the "discovery of the unconscious" has "apparently contradictory implications" for the law); Sendor, *supra* note 26, at 1406 n.142 (discussing "the traditional debate between lawyers and psychiatrists over free will and determinism").

623. 479 U.S. 157 (1987).

624. *Id.* at 163-69. *See generally* Benner, *supra* note 562, at 143-47, 162-63 (criticizing *Connelly*'s lowered standard for determining the validity of waivers); Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231, 244 (1988) (*Connelly* is "undoubtedly" the court's most significant confession case in the last two terms.); Perlin, Colorado v. Connelly: *Farewell to Free Will?*, 14 SEARCH & SEIZURE L. REP. 121 (1987) (criticizing *Connelly*).

> it goes no further than that. Respondent's perception of coercion flowing from the "voice of God," however important or significant such a perception may be in other disciplines, is a matter to which the United States Constitution does not speak.[625]

Connelly is clearly of the same vein as *Sikora*; it reflects a dogged adherence to a vision of criminal law and procedure in which decision-making considers only the conscious level of behavior. This may simply be because, as Professor Lewin suggested, "the state of the science has not advanced to the stage where general agreement has been reached on the nature of the unconscious, the role it plays on the conscious and the means by which to test and identify it."[626] On the other hand, it may also disguise the unscientific belief that adherence to the notion of unconscious (unseeable, unverifiable) motivations is "soft" and threatens to subvert completely the crime-control purpose of the criminal justice system.[627]

CONCLUSION

Our insanity-defense jurisprudence remains the prisoner of medievalist concepts of sin and punishment, and of rigid constructs of "good and evil" and "right and wrong." Because these concepts hold us so firmly in their grasp, we reject evidence that counsels us to reexamine our beliefs. We thoughtlessly repeat disproven myths and adhere to them, in spite of ample empirical and scientific refutation.

We adhere to these myths because they enable us to retain our allegiance to an underlying social vision that rejects psychodynamic thinking and the importance of psychodynamic motivation to human behavior. Cases such as *Hinckley*'s create "heightened arousal,"[628] causing us to retreat more deeply into our eighteenth-century visions of crime and mental illness. Because of the "hydraulic pressure"[629] of these visions, our jurisprudence does not

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625. *Connelly*, 479 U.S. at 170-71; *see also id.* at 169 (rejecting state court analysis for "importing into this area of constitutional law notions of 'free will' that have no place there").

626. Lewin, *supra* note 621, at 1096.

627. *Cf.* H. PACKER, *supra* note 57, at 131-35 (Whereas a crime-prevention view of the criminal justice system does not justify the insanity defense, a moral-condemnation model does, by taking account of the common assumption that mental illness impairs volitional capacity and hence destroys culpability.).

628. Wexler, *Insanity Problem*, *supra* note 26, at 538.

629. R. Christenson, *supra* note 66, at 46.

have the "tensile strength"[630] necessary to withstand the type of vivid imagery raised by such cases.

When the underlying myths are unpacked, they reveal yet another set of fundamental meta-myths that serve as the true structural basis for the existing jurisprudence. These myths remain powerful whether the decision-maker is a state legislature,[631] the Chief Justice of the Supreme Court[632] or a Long Island juror.[633] By adhering to these meta-myths, jurors can invoke a type of "conventional community morality," punishing the defendant whose "crazy" behavior is truly threatening to our "core beliefs."[634] Until we acknowledge the staying power and the universality of these myths, we are doomed to a jurisprudence that will proceed on the same blind path that we have followed for the past two hundred fifty years: one developed out of consciousness.

630. Fentiman, *supra* note 57, at 611 n.63.

631. *See supra* text accompanying notes 316-30.

632. *See supra* text accompanying notes 566-71, 598-602 & 625.

633. *See supra* text accompanying notes 527-44 (on the Josee McNally trial).

634. Ingber, *Ideological Boundaries of Criminal Responsibility* (Book Review), 27 UCLA L. REV. 816, 826-27 (1980) (reviewing H. FINGARETTE & A. HASSE, MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY (1979).