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**CULPABILITY AND COMMONSENSE JUSTICE:
LESSONS LEARNED BETWIXT MURDER
AND MADNESS**

NORMAN J. FINKEL*

I. INTRODUCTION

Three criminal law domains — accessory felony-murder, insanity, and manslaughter — serve as the grounds for contrasting two perspectives on “culpability” — that of “black-letter law” and “commonsense justice.” Of the two, black-letter law is clearer, for it has been codified in statutes, clarified in rulings, pronounced in dicta, and patterned in jury instructions. Less clear is “commonsense justice”: as used here, that term signifies those fundamental views that ordinary citizens hold about what is fair and just, what is blameworthy, and what is not.¹ In regard to commonsense justice’s positions, those must be gleaned empirically, from objective indicia.

The reader, either a novice or seasoned veteran, might pose an immediate question: Why bother with “commonsense justice,” if black-letter law is *the one and only law* pertinent to a case at bar? Put another way, why not simply rule “commonsense justice” irrelevant and out of bounds? Some answers must be offered.

The first answer is a realist’s response: the irrelevant ruling simply will not hold, as commonsense justice refuses to stay out of bounds. As archival findings suggest² and experimental results show,³ jurors bring their perspectives on culpability to the jury box, and when those views conflict with the law’s position,

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1. See NORMAN J. FINKEL, *COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW* (1995).

2. See, e.g., THOMAS A. GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800* (1985); VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* (1986).

3. See, e.g., Irwin A. Horowitz, *The Effect of Jury Nullification Instruction on Verdicts and Jury Functioning in Criminal Trials*, 9 *LAW & HUM. BEHAV.* 25 (1985);

jury nullification,⁴ reconstruing of instructions,⁵ and the intrusion of "extralegal" factors⁶ may result. This first, pragmatic point warns that ignoring this perspective courts a jury decision making process and a verdict outcome that black-letter law may never have intended.

The second point cuts more deeply, striking at foundational matters. When Sophocles staged *Antigone*,⁷ and when Shakespeare did *Measure for Measure*⁸ two thousand years later, both

Irwin A. Horowitz, *Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making*, 12 LAW & HUM. BEHAV. 439 (1988).

4. Irwin A. Horowitz & Thomas E. Willging, *Changing Views of Jury Power: The Nullification Debate, 1787-1988*, 15 LAW & HUM. BEHAV. 165 (1991). "Jury nullification" is the term given to the phenomenon whereby jurors bring in a "not guilty" verdict despite the prosecution's proving all elements of the charge; thus, the jury nullifies the conviction. Nullifications have been suspected, and even argued for within the trial, in the Colonial trial of John Peter Zenger (1735), the Quaker trial of William Penn and William Mead (1670), and the Interregnum trial of John Lilburne (1649), an opponent of Cromwell. See Green, *supra* note 2; Hans & Vidmar, *supra* note 2.

5. GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL (1988) (discussing how "intent to commit murder," the malice aforethought," was reconstrued by the jury in a way that moved those terms from the legal definition toward a motivational and commonsense meaning); see also Norman J. Finkel et al., *Competency, and Other Constructs, in Right to Die Cases*, 11 BEHAVIORAL SCI. & L. 135 (1993); Norman J. Finkel et al., *Right to Die, Euthanasia, and Community Sentiment: Crossing the Public/Private Boundary*, 17 LAW & HUM. BEHAV. 487 (1993) (in these two articles, mock jurors reconstrue legal terms such as "malice" and "murder," and reconstrue medical/legal terms, such as "terminal," "irreversible," and "pain," in ways that doctors and courts typically do not consider, but ordinary people do).

6. HARRY H. KALVEN, JR. & HANS H. ZEISEL, THE AMERICAN JURY (1971); Christy A. Visher, *Juror Decision Making: The Importance of Evidence*, 11 LAW & HUM. BEHAV. 1 (1987). "Extra-legal" factors are those that should not be relevant to weighing the guilt or innocence of the defendant; these are factors not sanctioned by the court, and a judge may warn against the intrusion of such in instructions to the jury. Deciding guilt on the basis of race, gender, income, attractiveness, etc., would clearly involve impermissible extra-legal factors. But other extra-legal factors, such as the "justice notions" of ordinary citizens, whether they think the law is silly or too punitive or whether they think the case is frivolous, are less clearly out of bounds.

7. Sophocles, *Antigone*, in 1 GREEK TRAGEDIES (David Grene & Richmond Lattimore eds., 1991); see also Daniel N. Robinson, *A Critical Study of Natural Law Theory: Contemporary Essays*, 45 REV. METAPHYSICS 363 (1991). Antigone sought to bury her slain brother, but the king, her "uncle" Creon, had issued a decree forbidding the burial. The law made it a crime, but Antigone deliberately broke the law. Her appeal, so to speak, was to "the gods' unwritten and unfailing laws," a higher law; given that this play has had a more than two-thousand year run, Antigone's "nullification pitch" must have struck a sympathetic chord in audiences.

8. See WILLIAM SHAKESPEARE, MEASURE FOR MEASURE (Brian Gibbons ed., 1991). In this play involving law, justice, and extremes, Vienna has gone to seed

dramatists, legal “outsiders” to be sure, played out the dangers for law and society when laws failed to accord with the deeper sense of justice. Some “insiders” have delivered that message as well: judges,⁹ justices,¹⁰ commentators,¹¹ and researchers¹² have all noted that the law, for it to be respected and obeyed, must be grounded closely to the common ground. Unlike point one, where the danger is that a “wrongful verdict” might result, or where the jury decision making process may be confounded and flawed, point two goes beyond a particular case to the danger for law itself.

The third point notes that there are places where the law not only does not silence commonsense justice, but summons it to speak. The obvious place is in death penalty adjudication, where the jury — the “conscience of the community” — typically renders the life or death decision.¹³ Far from out of bounds, community sentiment is front and center, as it legitimates this final act. Though less visible than a jury’s decision, “community sentiment” plays a central if not dispositive role in Eighth

under the permissive rules of Duke Vincentio, with debauchery and corruption rampant. The Duke deliberately departs and appoints Angelo as his replacement, who wields the law in strict and authoritarian ways, where measure for measure — the unyielding letter of the law — leads not to justice. Shakespeare argues, through this play, for law working best when it is tempered by a humane and expansive spirit; put in current terms, for the intrusion of certain “extra-legal” factors.

9. *E.g.*, DAVID L. BAZELON, *QUESTIONING AUTHORITY: JUSTICE AND CRIMINAL LAW* (1988).

10. *E.g.*, OLIVER W. HOLMES, JR., *THE COMMON LAW* (1881); *see also* *Georgia v. McCollum*, 112 S. Ct. 2348, 2354 (1992). Justice Blackmun, writing for the Court, states, “Public confidence in the integrity of the criminal justice system is essential for preserving community peace in trials involving race-related crimes.” To allow exclusion of groups from the jury “could only undermine the very foundation of our system of justice — our citizens’ confidence in it.” *But see* Justice Scalia’s short, but stinging, dissent, *id.* at 2364. *See also* *Planned Parenthood of S.E. Pa. v. Casey*, 112 S. Ct. 2791, 2799 (1992). Here, the Court again talks about the country’s loss of confidence in the Judiciary. But in Justice Scalia’s dissent, he writes, “I cannot agree with, indeed I am appalled by, the Court’s suggestion that the decision whether to stand by an erroneous constitutional decision must be stongly influenced — *against* overruling, no less — by the substantial and continuing public opposition the decision has generated.” *Id.* at 2883 (emphasis added).

11. *E.g.*, RONALD DWORKIN, *LAW’S EMPIRE* (1986); MICHAEL L. PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE*, (1994); ROSCOE POUND, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607 (1907).

12. *E.g.*, TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

13. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 241 (1972).

Amendment cases,¹⁴ where the issue is whether a punishment is "cruel and unusual."¹⁵ When black-letter law admits community sentiment to adjudicate these punishing dilemmas, it also admits that "law" alone does not preempt the legal discourse. Thus, whether avowed or unconscious,¹⁶ invited or not, this common-sense perspective is in mind, and in court.

In this article, the common ground is brought to light not by divination, or even opinion poll responses to general questions, but by giving "mock jurors" specific cases with specific fact patterns, where key variables are manipulated. From experimental methods, cause and effect relationships between culpability variables and jurors' verdict and sentencing decisions can be found.¹⁷ From these relationships, the outline of the jurors' perspective emerges. And when jurors' reasons¹⁸ for their decisions are analyzed — the *why* they do what they do — an even richer picture emerges.

14. *E.g.*, *Solem v. Helm*, 463 U.S. 277 (1983); *Rummel v. Estelle*, 445 U.S. 263 (1980); *Trop v. Dulles*, 356 U.S. 86 (1958); *Weems v. United States*, 217 U.S. 349 (1910).

15. This is not the only area of law, of course, where community sentiment weighs heavily. In obscenity law, for example, the community's standards play a significant part in the judgment, although gauging that standard has been done in almost cavalier, rather than empirical, fashion. Judges and prosecutors, through some *direct knowing* or divination, have claimed that they knew what those standards were. *See* Daniel Linz et al., *Discrepancies between the Legal Code and Community Standards for Sex and Violence: An Empirical Challenge to Traditional Assumptions in Obscenity Law*, 29 LAW & SOC'Y REV. 127 (1995). In Fourth Amendment cases involving search and seizure and reasonable expectations of privacy, the community's reasonable expectations come into play. *See* Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society"*, 42 DUKE L.J. 727 (1993).

16. HOLMES, *supra* note 10, at 1 (stating that "intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed").

17. *See* Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL., PUB. POL'Y, & L. 193, 204 (1995) (stating that "[t]he best type of research is a true experiment").

18. I have argued that reasons must be fathomed as well as verdicts, to complete the picture: not just *what* jurors do, but *why* they do what they do. *See, e.g.*, Norman J. Finkel, *Capital Felony-Murder, Objective Indicia, and Community Sentiment*, 32 ARIZ. L. REV. 819 (1990); Norman J. Finkel, *De Facto Departures From Insanity Instructions: Toward the Remaking of Common Law*, 14 LAW & HUM. BEHAV. 105 (1990). Such an approach moves the methodology from the strict experiment, to something broader, which now includes more narrative and discursive analyses. *E.g.*, ROM HARRÉ & GRANT GILLET, *THE DISCURSIVE MIND* (1994).

This article tells the story of those findings, a story that is consistent across domains, and can be summarized this way: citizens see greater nuance and gradations to culpability, and make finer distinctions, than black-letter law either sees or sanctions. In addition, jurors' culpability judgments emerge from a highly contextualized, psychological matrix, where the law's matrix turns out to be simplistic, by comparison. Further, those traditional elements — *mens rea*, *mens*, and intention — loom large and are judged more subjectively, rather than objectively, or by doctrinal rules. However, while jurors bend in the subjective direction in judging culpability, they do not go as far as the law's unrestrained plunge into subjectivity,¹⁹ as in the Model Penal Code's concept of "extreme emotional disturbance."²⁰ Thus, objective anchors to reality remain important to jurors, even if they are being jettisoned by black-letter law. Looking across domains, these commonsense distinctions align quite closely with venerated legal principles and reliable psychological findings, even when the law strays from those principles and ignores those facts.

It is no accident that I pick accessory felony-murder, insanity, and manslaughter as the three criminal law domains under scrutiny. Each has been rife with controversy, with tensions of the past remaining alive today. There remains, for each domain, a suspicion that the law may be out of tune with community sentiment.²¹ And another reason for picking these three relates to culpability: these domains represent distinct positions along a culpability continuum. If we take the verdicts of guilty of accessory felony-murder, guilty of manslaughter, and not guilty by reason of insanity, two of these verdicts would fall at the extremes, while the other occupies a midpoint on the continuum.

Black-letter law's position, while clear, is far from cogent. The doctrine that sustains accessory felony-murder has been called "a living fossil"²² — yet it still leaves the Supreme Court divided, while exposing some to the death penalty who do not have the level of culpability that is traditionally required. In insanity jurisprudence, where each new "wrongful" verdict seems to trigger judges and legislators to "change the test," this strategy

19. See Richard Singer, *The Resurgence of Mens Rea: I — Prococation, Emotional Disturbance, and the Model Penal Code*, 27 B.C. L. REV. 243 (1986).

20. MODEL PENAL CODE § 210.3(1)(b) (Proposed Official Draft 1962) [hereinafter MPC].

21. See *supra* note 18 (suspicions regarding insanity, and felony-murder, being out of tune); see Singer, *supra* note 19 (regarding manslaughter).

22. *Tison v. Arizona*, 481 U.S. 137, 159 (1987) (Brennan, J., dissenting).

finds the law chasing the tail of symptoms,²³ travelling in circles,²⁴ and making law in the absence of evidence.²⁵ And in the curious history of manslaughter, where objective rules and an "average man" exemplar were first fashioned, the law then did a subjective flip-flop, plunging into the dark interior where culpability is now tied to an outmoded mental entity. If the law finds itself lost in a labyrinth, then perhaps commonsense justice, with its views on culpability, can show the way out.

In Part II, at one extreme on a culpability continuum, accessory felony-murder is examined. Here, a guilty verdict signifies great culpability, as such defendants may receive the death penalty.²⁶ Yet, despite the highest level of culpability that attaches, the traditional assessment of intent (*mens rea*) becomes muted and moot, as doctrinal rules dictate outcomes. The "intent" to kill matters not, as the felony-murder doctrine dictates that if one intended to commit the underlying felony and a death occurred during the commission of a felony, then one is guilty of murder. By the accessorial liability doctrine, accessories are judged equally guilty with the triggerman, and with each other, as these now fungible defendants get equal punishment.

Jurors are left with an unenviable two-choice option: finding such defendants Not Guilty, or Guilty of Felony-Murder,²⁷ even though premeditation and deliberation are absent. Though jurors see culpability distinctions among perpetrators, the law permits no gradations. The law's "equalism" is problematic not only for jurors, but for the law, as it seems to fly in the face of individual and proportional justice — where each defendant's culpability is assessed according to that defendant's blameworthiness.

In Part III, we move to the other end on the culpability continuum, insanity. An NGRI verdict is a finding of nonculpability,

23. BAZELON, *supra* note 9.

24. NORMAN J. FINKEL, *INSANITY ON TRIAL* (1988).

25. PERLIN, *supra* note 11; Norman J. Finkel & Solomon M. Fulero, *Insanity: Making Law in the Absence of Evidence*, 11 INT'L J. MED. & L. 383 (1992).

26. In *Enmund v. Florida*, 458 U.S. 782 (1982), there were 32 states and jurisdictions where the death penalty could follow felony-murder depending upon the level of participation, the level of culpability, or who dies (e.g., police officer) during the death. In *Tison*, 481 U.S. 137, there were 34 jurisdictions.

27. One can argue that a lesser offense charge can be given. But can jurors select such an option without nullifying the instructions? If jurors follow the conclusive presumption that if the defendant intended to commit the underlying felony, and if a death occurred during the commission of that felony, then the logic, "if A, and if B, then guilty of felony-murder," must follow, like a syllogistic conclusion. Only by defying the instructions, or reconstruing them, can a third option result.

and it exculpates. Linking the extremes of felony-murder and insanity is the fact that the law presents jurors with an "all-or-none" choice in insanity cases as well.²⁸ While the two choices have remained constant for nearly three centuries, the test definition of insanity has repeatedly changed, as it did again after *United States v. Hinckley*.²⁹ Yet the empirics will show that while jurors discriminate, the test instructions neither yield discriminable verdicts, nor get jurors to think along different construct dimensions; thus changing the test has been much ado about nothing. Empirics also show that jurors' *constructs* of insanity are powerfully determinative of verdict, and these constructs reveal greater shadings to culpability, in type and degree, than those embedded in the legally sanctioned tests. Thus the law's two-choice format misfits jurors' judgments of culpability. This is more than black-letter law and commonsense justice out of tune, for the argument also asserts that law is in conflict with itself.

In Part IV, I summarize some recent work in the area of manslaughter, where the law has recognized mitigation for centuries. Here, jurors have a lesser offense category betwixt murder and not guilty to register an in-between culpable judgment. Experimental findings will show that the commonsense justice perspective is highly nuanced, revealing a "psychological theory" — of provocation, passion, thinking, control, and cooling off time, and how they interrelate — that is more complex and more in line with psychological findings than the law's theory. This commonsense theory is more ideographic and subjective than the objective law and its prototypical "average person" exemplar; it is also more objectively grounded and demanding than the MPC's "extreme emotional disturbance."

In Part V, I conclude that the consistency belongs to commonsense justice, and not the law. When we sum across the areas, commonsense justice reveals some reliable principles about culpability. These principles are neither nonsensical nor superficial: to the contrary, they are *grounded* in moral and psychological concerns about culpability, and they invoke *enduring* principles of justice that the law's path has strayed from. Understanding the path of commonsense justice offers at least two rewards: it may bring the law closer to its citizens, and it may bring the law back to its most enduring principles.

28. For a seventeenth century exception, see SIR GEORGE MACKENZIE, *THE LAWS AND CUSTOMS OF SCOTLAND IN MATTERS CRIMINAL* (1678).

29. 525 F. Supp. 1342 (D.D.C. 1981); Insanity Defense Reform Act (IDRA), Pub. L. No. 98-473, §§ 401-02, 20, 98 Stat. 1837, 2057 (1984).

II. ACCESSORY FELONY-MURDER, OR MURDER MOST FOUL

The people of Denmark, including the Prince, thought it was an accident: a serpent stung the sleeping King, making his "sleep" permanent. But when his father's Ghost tells Hamlet that it was a "foul and most unnatural murder,"³⁰ Hamlet is caught by surprise. Now consider D's surprise.

D enters a liquor store with a loaded (or unloaded) gun, intending to commit a robbery,³¹ but something goes wrong; the storekeeper, at the sight of the gun, has a heart attack and dies.³² D, as if stung by a serpent, is charged with first degree murder, called felony-murder. "But this most foul, strange, and unnatural"³³ murder gets only stranger.

Now consider these variations where the storekeeper again dies: D's loaded gun accidentally discharges; the storekeeper grabs at D's gun and the gun discharges; the storekeeper grabs his own gun and shoots himself as he tries to fire at the fleeing D; or a police officer, arriving at the scene, accidentally shoots the storekeeper while aiming at D. While these diverse but by no means exhaustive variations go off in improbable directions, the "bottom line" remains constant and certain: the crime is always felony-murder. In *Hamlet*, a supposed accident is revealed as premeditated murder, by a snake of a different sort. Here, in felony-murder, where there is no premeditation but an unintended death, there is nonetheless murder.

A. *The Law's Conflict . . . with Itself*

Such cases become "murder" through the felony-murder rule, which holds that if in the course of certain felonies³⁴ a death occurs, even an unintended death, then the crime is felony-murder. But where is the *mens rea* for murder? We know

30. WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK*, act 1, sc. 5, lines 25-26.

31. Norman J. Finkel & Kevin B. Duff, *Felony-Murder and Community Sentiment: Testing the Supreme Court's Assertions*, 15 L. & HUM. BEHAV. 405, 405 (1991).

32. Something akin to this hypothetical occurs in *People v. Stamp*, 82 Cal. Rptr. 598 (Cal. Ct. App. 1969).

33. SHAKESPEARE, *supra* note 30, at line 28.

34. Finkel, *Capital Felony Murder, Objective Indicia, and Community Sentiment*, *supra* note 18, at 820 n.10 (many states limit felony-murder to certain enumerated felonies, typically the violent felonies); MPC, *supra* note 20, § 210.2(1)(b) (the MPC, for example, states that "the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping, or felonious escape," are the enumerated felonies).

that D intended to rob the liquor store, but he did not intend to murder. How do we convict for murder without the intent? Three answers have been put forth.³⁵ The least satisfactory answer claims that *mens rea* is unnecessary for felony-murder, as the crime is simply a strict liability offense. But as Professor Hart notes, strict liability offenses are “generally viewed with great odium,”³⁶ since they sever “the required connection between culpability and criminal liability.”³⁷ Thus, this strict liability answer bypasses culpability altogether, creating an expedient that seems to fly in the face of fairness principles.³⁸

The other two justifications for felony-murder deal with intent, either by transferring or constructing it.³⁹ In the “transferred intent” view — which has been criticized as having “no proper place in criminal law”⁴⁰ — the mental state required for the underlying felony (e.g., robbery) substitutes for the mental state required for the homicide. But there are differences between *intent to kill* and *intent to rob*, as they diverge in legal, conceptual, and pragmatic ways. If, by this transfer, “intent” is finessed and becomes a given, and we couple this with an uncontroverted death, then guilt on the felony-murder charge is beyond reproof.

Under the third view of “constructive malice,”⁴¹ we presume the malice for the homicide from the mental state required for the commission of the underlying felony. This is an elastic, “one size fits all” notion, where a generic malice is stretched to cover all particulars. But the stretch doesn’t work: the malice to commit a robbery, or even a generic malice, whatever that is, may be quite removed from the intent to commit murder.

The felony-murder rule — supported by unsupportable justifications that either deny, finesse, or elasticize intent — ends up manufacturing murder. Once alleged, its proof is almost as certain as gravity, for the scales of justice flop toward “guilty” without culpability ever being weighed. The crime then leads to a punishment that may be disproportionate to the offense, and

35. Finkel, *Capital Felony Murder, Objective Indicia, and Community Sentiment*, *supra* note 18, at 820 n.9.

36. H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 20 (1984).

37. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 303 (1978).

38. *See* *People v. Washington*, 402 P.2d 130, 134 (Cal. 1965) (The court noted criticism that this rule “erodes the relation between criminal liability and moral culpability.”).

39. Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 *CORNELL L. REV.* 446, 454 (1985).

40. ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 921 (1982).

41. Roth & Sundby, *supra* note 39.

may therefore be cruel and unusual under the Eighth Amendment. One empirical question is: Does this crime and punishment fit with commonsense justice's notions?

Let us compound the basic felony-murder scenario by giving our triggerman D some accessories, all of whom are in on the robbery attempt: C will be the "sidekick," who enters the liquor store with D, but who does not fire a gun; B will be the "lookout," stationed outside the liquor store to warn his fellow conspirators if danger approaches; and A will be the "getaway driver," sitting behind the wheel across the street. We know that when the storekeeper dies, D's crime escalates from armed robbery to felony-murder. Now, through the accessorial liability rule, involving another transfer, the triggerman's culpability is transferred *undiminished* to all the accessories. Thus, A, B, and C face felony-murder charges as well.

Am I my brother's keeper? The biblical answer to Cain was "yes." The legal answer, to brothers-in-crime A, B, and C is "yes, and then some." In the eyes of the law, these brothers-in-crime become fungible clones. The union of accessorial liability and felony-murder rules produces "equalist" justice: all become equally guilty. Yet this equalist outcome seems to fly in the face of individualized and proportional justice, where each defendant's actions and intentions are weighed separately, and where punishment is graded proportionately to the blameworthiness of each defendant.

We reach a second empirical question: Is equalist justice and punishment disproportionate, and thus cruel and unusual, as judged by commonsense justice? A part of that question was taken up when this "curious doctrine" came before the Supreme Court in *Tison v. Arizona*.⁴² In Justice Brennan's oxymoronic phrase, this "living fossil"⁴³ not only still lives, but it would sharply divide the Court.

B. *The Law and Psychology at Odds*

Though Justices may be at odds and the law may be in conflict, academic psychology's predictions are quite consistent. "Attribution theorists" have long studied how people make judgments of responsibility and blameworthiness. Fritz Heider, an early attributional theorist, held that "it is an important principle of common-sense psychology, as it is of scientific theory in general, that man grasps reality, and can predict and control it, by referring transient and variable behavior and events to relatively

42. 481 U.S. 137, 159 (1987) (Brennan, J., dissenting).

43. *Id.*

unchanging underlying conditions, the so-called dispositional properties of his world."⁴⁴ "Personal traits," someone's attitudes, beliefs, or personality, can be viewed as dispositions, and a specific disposition can be whether someone is a responsible actor. Ross and Fletcher, reviewing Heider's theory, state that in deciding if someone is responsible or not we more likely infer responsibility to that person "from intentional actions."⁴⁵ We infer intentionality when an actor appears (1) goal directed, (2) appears to be the originator of the action, rather than a passive recipient, and (3) appears to strive to achieve intended effects.

Extending Heider's theory to the felony-murder triggerman, we would predict that this triggerman would not be seen as blameworthy as the premeditated murderer, since the homicide is neither intended nor sought. Heider's theory would also predict that the accomplices would be viewed as even less blameworthy, since they neither originated the deadly action nor exerted in that deadly direction.⁴⁶

Jones and Davis proposed another attribution theory, which they called the correspondent inference theory.⁴⁷ The theory's name derives from the finding that perceivers sometimes infer another's dispositions directly from the other's actions: if we see a person acting mean toward another, we may infer that this is a mean person, or if we see a kindly act, we may infer a kindly person; thus there may be a "correspondence" between behavior and inferred disposition. Using this theory, the predictions of difference between the felony-murder triggerman and the premeditated murderer would be even greater than those derived from Heider's theory, for Jones and Davis maintain that dispositional attributions are made *only* on the basis of intentional behaviors; thus, the unintended death in the prototypical felony-murder situation should not lead to strong condemnation. Moreover, an act is perceived as intentional when the perceiver believes the actor knew the behavior would produce the deadly consequences, and believes the actor had control over the conse-

44. FRITZ HEIDER, *THE PSYCHOLOGY OF INTERPERSONAL RELATIONS* 79 (1958).

45. MICHAEL ROSS & GARTH J.O. FLETCHER, *Attribution and Social Perception*, in *HANDBOOK OF SOCIAL PSYCHOLOGY* 73, 74 (Gardner Lindzey & Elliot Aronson eds., 1985).

46. Norman J. Finkel & Stephanie F. Smith, *Principals and Accessories in Capital Felony-Murder: The Proportionality Principle Reigns Supreme*, 27 L. & SOC'Y REV. 129 (1993) (In two experiments, we tested, and confirmed, these extensions of Heider's theory; see HEIDER, *supra* note 44).

47. E.E. Jones & K.E. Davis, *From Acts to Dispositions: The Attribution Process in Person Perception*, in 2 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* (Leonard Berkowitz ed., 1965).

quences. But while *knowing* and *controlling* the deadly outcome fit the typical premeditated murderer, they do not fit the felony-murderer. This predicted difference should be even greater in the accessory felony-murder cases, where the accessories often claim that they did not know that killings would occur, and, since they were not at the scene of the deaths, they could not exert any control over the outcome.

Accessory felony-murder law asks jurors to find all participants equally guilty of murder. Psychological theory tells us that this is not how people are likely to judge such situations. Before we turn to the evidence, we must first turn to the Supreme Court's evidence, as it was gauged in *Enmund v. Florida*⁴⁸ and *Tison v. Arizona*.⁴⁹

C. *Two Cases, Two Rulings, and Too Many Doubts*

In *Enmund*, Earl Enmund was the getaway driver, sitting in a car when Sampson and Jeanette Armstrong attempted to rob a farm house and killed Thomas and Eunice Kersey. Enmund was charged with felony-murder, as the accessorial liability rule under Florida jurisprudence made Enmund equally culpable to the triggermen, and he was found guilty of felony-murder and given the death sentence.⁵⁰

In the *Tison* case, the Tison brothers, Ricky and Raymond, participated in breaking their father, Gary Tison, and his cellmate, Randy Greenawald, out of Arizona State Prison, without a shot being fired. Two days later, with a flat tire and no spare, their father instructed them to flag down a passing motorist in order to steal a car. The Lyons family stopped and was taken into the desert at gunpoint. John Lyons asked the Tisons to leave his family there with some water, and Gary Tison sent his sons to get some water. As the sons were returning, they heard shots. All four members of the Lyons family were killed. Ricky and Raymond were found guilty of felony-murder, armed robbery, kidnapping, and theft of an auto, and for the former, they were sentenced to death as accessory felony-murderers.⁵¹

In *Enmund* and *Tison* an Eighth Amendment challenge was raised. Was the death penalty disproportionate, and hence cruel and unusual punishment for accessory felony-murder? Given the Court's commitment to use objective indicia to the maximum

48. 458 U.S. 782 (1982).

49. 481 U.S. 137 (1987).

50. *Enmund*, 458 U.S. at 782.

51. *Tison*, 481 U.S. at 137.

extent possible,⁵² the Court acted much like social scientists — the Justices analyzed the indicia⁵³ in order to reach a judgment about where community sentiment stood.

In summing up its analysis, the *Enmund* majority concluded that the current judgments weighed heavily “on the side of rejecting capital punishment for the crime at issue.”⁵⁴ Specifically, the Court found that of the thirty-six state and federal jurisdictions that presently authorize the death penalty, “only eight jurisdictions authorize imposition of the death penalty to be imposed solely for participation in a robbery in which another robber takes a life.”⁵⁵

From the conclusions, it would seem that the empirics provided an open and shut case. Moreover, the Court connected the empirics to the inadequate *mens rea*, noting that unlike Florida’s felony-murder statute, eight other states “make knowing, intentional, purposeful, or premeditated killing an element of capital murder.”⁵⁶

The minority reached the opposite conclusion, holding that “the Court’s peculiar statutory analysis cannot withstand closer scrutiny.”⁵⁷ Whereas the *Enmund* majority found that in only 15% (8/52)⁵⁸ of the jurisdictions could the death penalty be imposed, the *Enmund* minority figure was 44% (23/52). Both sides asked different questions and made different assumptions; both did bad social science. A more defensible social science analysis puts the percentage range at 15%-to-37% of the jurisdictions allowing for the death sentence in *Enmund*-like situations, far less than a majority.⁵⁹

What the Court did with jury decisions data was even more suspect. Those data were fatally flawed because the Court had only numerators — the number of cases where a death sentence was given — but lacked the denominators — the number of such cases brought to trial. This lack, which would stop the social scientist, did not deter the *Enmund* majority.

52. *Coker v. Georgia*, 433 U.S. 584 (1977).

53. *Id.* (The two sanctioned indicia were the inter-jurisdictional legislative enactments data, and jury decisions data).

54. *Enmund*, 458 U.S. at 793. The 5-vote majority consisted of Justices White, Brennan, Marshall, Blackmun, and Stevens; the 4-vote minority consisted of Justices O’Connor, Powell, Rehnquist, and Burger, C.J.

55. *Id.* at 789.

56. *Id.* at 790.

57. *Id.* at 823 (O’Connor, J., dissenting).

58. The denominator, 52, consists of the 50 states plus the District of Columbia, plus the U.S. Code.

59. Finkel, *Capital Felony-Murder, Objective Indicia, and Community Sentiment*, *supra* note 18, at 833.

Tison was different, but no different. In this 5-to-4 decision going the other way, the majority held that the death penalty for *Tison*-like defendants was constitutional, and cited empirical evidence which "powerfully suggests that our society does *not* reject the death penalty as grossly excessive under these circumstances."⁶⁰ Why do *Enmund* and *Tison* differ? To the *Tison* majority, the *Tison* brothers fell into a different and intermediate class than did *Enmund*. The majority put forth two distinctions, one based on participation and the other based on culpability: the *Tison* brothers were "more major" participants in the crime than the getaway driver *Enmund*; and the *Tison* brothers had, or may have had, a more culpable mental state than *Enmund*, one that could be characterized as showing "reckless indifference to human life."⁶¹

The *Tison* minority challenged the majority's distinctions, believing that the *Tison* brothers' level of participation was indiscriminable from *Enmund*'s, and that the "[c]reation of a new category of culpability is not enough to distinguish this case from *Enmund*."⁶² Both majority and minority social science analyses remain riddled with error. From a more objective analysis,⁶³ the *Tison* range of states that might support the death penalty turns out to be 13%-to-44%, not all that different from the *Enmund* range of 15%-to-37%; these ranges are still shy of majority (50%), and certainly shy of the *Tison* majority's claim of a *powerful* percentage. The *Tison* Court cited the exact same jury decisions data as in *Enmund*, with the same flaw present again — the Court had only the numerators, but not the needed denominators to make meaningful comparisons. Going a step further, however, the *Tison* majority acknowledged the weakness of the data, unlike the *Enmund* Court, but the majority in *Enmund* doubted "whether it is possible to gather such information";⁶⁴ while now admitting that the data were inadequate to sustain any conclusion, the majority did not back off its own unwarranted and illegitimate conclusion.

This is where social scientists doing social science and Supreme Court Justices doing "social science" part company: where the latter authoritatively pronounced a strong conclusion

60. *Tison v. Arizona*, 481 U.S. 137, 154 (1987). The majority consisted of Justices O'Connor, Powell, Scalia, White, and Rehnquist, C.J.; the minority, of Justices Brennan, Blackmun, Marshall, and Stevens.

61. *Id.* at 151.

62. *Id.* at 168 (Brennan, J., dissenting).

63. Finkel, *Capital Felony-Murder, Objective Indicia, and Community Sentiment*, *supra* note 18, at 840-41.

64. *Enmund v. Florida*, 481 U.S. 782, 796 (1982).

from inadequate data, the former would fall silent, in all likelihood, rather than be stripped bare by peer review judges in the publish or perish court. But on the issue of "community sentiment," the only conclusion that we can safely rest on, at this point, is this: when the sound and fury of *Enmund* and *Tison* were stilled, we still do not know where community sentiment stands.

D. *Sounder Substance to Community Sentiment*

To reach sounder substance, a number of experiments were run to test some of the "hypotheses" that are discernible from *Enmund* and *Tison*. One hypothesis advanced was that Enmund and the Tison brothers were different "types" of felony-murder accessories, with the latter being more major and more culpable. Would mock jurors, for example, "see" the distinction, and, more importantly, would that distinction translate into harsher verdicts and a higher percentage of death sentences for the latter? There are also questions that involve the felony-murder triggerman vs. all types of accessories: Would we find "equal justice" — where the guilt and punishment for the former are transferred undiminished onto the latter — or would we find that mock jurors make judgments of culpability individually, and proportionately — and do not find accessories to be fungible with the triggermen?

Only an experiment allows us to control and manipulate variables in such a "clean" way. Doing a study of the *Enmund* and *Tison* cases runs into a myriad of confounding differences: for example, along with the hypothesized "different type of accessory" difference, Earl Enmund and Ricky and Raymond Tison were different in age, the number and types of crimes they were charged with, the number of deaths that resulted, whether a child was killed or not, and the degree of pretrial publicity surrounding each case, and many more "defendant" and "case" variable differences; moreover, they were tried in different states, by different juries, under differing statutes and instructions, and sentenced differently. With all of these factors presenting possible sources of variation, reaching a sound conclusion about which factors are dispositive is impossible — unless we can control the variation. Hence we turn to the first experiment.

In the first experiment,⁶⁵ four defendants, a getaway driver A, a lookout B, a sidekick C, and a triggerman D, plan to rob a

65. See Finkel & Duff, *supra* note 31.

liquor store. Mock jurors⁶⁶ received one of four cases where *how the storekeeper dies* was manipulated (the *case variable*). In HEART, the storekeeper dies of a heart attack at the sight of the gun. In STRUGGLE,⁶⁷ the elderly clerk grabs at the gun in D's hand, and, in the ensuing struggle, the gun discharges and the bullet strikes and kills the clerk, suggesting, perhaps, more culpability for defendant D. In HEINOUS, after the elderly clerk grabs at the gun, D pulls away, smashes the gun into the face of the elderly clerk again and again, and fires six shots in rapid succession into the clerk who dies from the wounds. By manipulating case, we ask, Does the heinousness of the death matter, and does it matter for just the triggerman, or for all accessories as well? Case four, called PREMED, is a control: just when defendants C and D get the money from the storekeeper and C says "let's go," D says "no, I've been waiting to nail this old guy for two years, and I'm not leaving any witness around"; with that, D opens fire, as C stands by, and the clerk, hit with six bullets, subsequently dies. In this case, where D is charged with premeditated, first degree murder, A, B, and C, are charged with felony-murder.

There were two verdict measures for each defendant: guilty or not guilty on the armed robbery charge, and guilty, not guilty, or guilty to a lesser charge on the felony-murder (or first degree murder, for D, in PREMED) charge. Would either complete nullifications⁶⁸ (e.g., a not guilty verdict), or partial nullifications (e.g., a lesser offense verdict) occur, and for whom, and under what conditions? Since nullifications can occur for differing reasons, i.e., because the crime is judged unjust, and because the penalty appears too severe, two conditions were created to help discriminate. Half the subjects got the case under the *capital* condition, where the State was seeking the death penalty for all the

66. There were over two hundred mock jurors, both students and adults, the latter included to increase the representativeness of the sample. To further increase the generalizability of this sample, all subjects answered *voir dire* questions in order to achieve a "death qualified" (DQ) subsample. DQs, as they are called, can be viewed as a remainder — what is left over when you eliminate those jurors who, because of their attitudes toward the death penalty, would either (1) always vote for the death penalty (called ADPs — Automatic Death Penalty types), (2) never vote for the death penalty (called *Witherspoon* excludables), (3) be unwilling to follow the law (*nullifiers*), or (4) be substantially impaired in making their decision (*Witt* excludables). In our sample, 73.1% were death qualified (DQs), a percentage that corresponds to national figures. A last word on subjects: in this experiment and the ones to follow, there were no significant verdict or sentencing differences between students and adults.

67. This case condition was originally designated as ACCIDENT, but STRUGGLE seems more apt.

68. See *supra* note 4.

defendants, and the other half got the case under the *noncapital* condition. If the nullifications are roughly equal in the *capital* and *noncapital* conditions, then it is not the death penalty causing the nullifications, but something about the crime or equalism. But if nullifications greatly increase in the *capital* condition, the death penalty is the obvious suspect.

Starting with verdicts, we find agreement on the underlying felony, armed robbery. For example, guilty verdicts for defendants C and D were 98% and 99%. If subjects are following the felony-murder rule, then the guilty percentage on the felony-murder charge should be about the same. But that does not result. Looking at the guilty percentages across cases, defendant A is found guilty 2% of the time, B 15%, C 48%, and D 77%. These percentages show sizable drops from the robbery percentages, and these drops occur in capital and noncapital conditions. The not guilty verdicts reveal the complete nullification picture: defendant A is found not guilty 89% of the time, B 40%, C 15%, and D only 2%. Not only do we see a nullification effect, but that effect reveals proportional rather than equalist judgments of culpability.

Two other notes. When the death gets more heinous (going from HEART to STRUGGLE to HEINOUS to PREMED), D's guilty percentage on the felony- or first degree murder charge increases (from 63% to 79% to 88% to 92%). However, the guilty percentages stay roughly the same for the three accessories. Thus, while subjects make harsher judgments of the triggerman, they do not transfer those judgments to the accessories. Commonsense judgments of the principal and the accessories remain distinct, whereas in the law, through accessorial liability, they are linked. The second note is that the D's guilty percentage across the felony-murder cases is 77%, whereas it reaches 92% when D is a premeditated murderer. Thus, we see *two bright lines*: first, and brightest, subjects clearly differentiate the triggerman from accessories, and make individual and separate determinations of guilt; and second, we see indications that subjects differentiate the premeditated from the felony-murder triggerman.

The number of death sentences and two "death rate" percentages (D/N and D/FM)⁶⁹ were calculated for each defendant

69. D, the numerator, is the number of death sentences given. N, the denominator, is the number of DQ subjects in the capital condition who rendered a judgment for that defendant in that case. Since the non-DQ subjects have substantial qualms against the death penalty and would be eliminated from a capital jury, the DQs are the appropriate sample; in addition, only capital condition DQs have both the inclination and the opportunity to

by case. For the D/N percentage, we see a sizable difference between the premeditated murder triggerman (64.3%) and the felony-murder triggermen (16.5%), with the former getting the death sentence approximately four times more frequently than the latter. Second, focusing only on the felony-murder triggerman, we see an increase in the death sentence rate as the cases progress from HEART (4.3%) to STRUGGLE (12%) to HEINOUS (29%), indicating an increasingly harsh judgment of D's culpability; however, this increasingly harsh judgment does not transfer to A, B, and C, whose death rates are much lower and fairly constant across the cases. And third, when we compare the death rates for A (0%), B (1.9%), and C (5.6%) to the felony-murder triggerman D (16.5%), we clearly see that subjects are judging the defendants individually and proportionately, and not administering equalist punishment. Thus, a rejection of equalism in favor of proportional judgments results, as does the two bright line distinctions between the principal and the accessories, and between the premeditated and felony-murder triggerman.

These effects were not only large and powerful, they were demonstrable in different ways. For example, we presented these cases to subjects under what we called "the ninth Justice" paradigm. Here we told the subjects that defendants A, B, C, and D had been sentenced to death and were appealing their death sentence as cruel and unusual punishment. They were further told that the other justices were divided 4-4 on whether to let stand or reverse and remand the death sentence. They were given two lists of reasons — one for reversing and remanding, one for letting stand the death sentence — and quotations taken from Supreme Court cases. Subjects then had to make a let stand or reverse and remand decision, and give their reasons. The "reverse and remand" percentages for the four defendants were 97% (A), 83% (B), 69% (C), and 53% (D) across all cases. Only in case HEINOUS, and only for D, was the let stand percentage (68%) greater than reverse and remand.

One problem in generalizing these results to *Tison* is that the *Tison* majority could claim that our hypothetical accessories, A, B, and C, were less culpable and not the more major participants that the majority claimed for the *Tison* brothers. Hence,

give the death sentence *at the beginning of the case*. For the second percentage, D/FM, the denominator, FM, is the number of DQ subjects in the capital condition who rendered a guilty verdict on the felony-murder (or first degree murder) charge. This FM denominator represents those subjects who have the inclination and the opportunity *at the sentencing phase* to give the death sentence, since only a guilty verdict can lead to the death sentence.

we ran a second experiment⁷⁰ where we “upped” the culpability and participation level of both B and C: both carry loaded guns now; and the sidekick points his loaded gun at the storekeeper, and fires recklessly over the head of the storekeeper when the latter hesitates in opening the cash register. We tested six different cases, even two cases where a police officer dies, which did not obtain in *Tison*.

The results were much the same. While all subjects found all defendants guilty on the underlying felony, sizable and proportional nullifications occur on the felony-murder charge: the not guilty percentages were 56% (A), 42% (B), 20% (C), and 5% (D). The death sentence rates also show the proportional effect: 0% (A), 1% (B), 8% (C), and 18% (D). And the death sentence rate for the premeditated murderer was 94%, which was about 5 times what it was for the felony-murder triggerman.

In subsequent experiments,⁷¹ we used the *Tison* case directly. We created a new *Tison* brother who was even more reckless, culpable, major, and on the scene of the death. We had subjects try defendants separately, or in trials with multiple defendants. But however we varied the cases, defendants, and trial conditions, the basic results recurred. The death sentence rates for our three accessories were always low, varying between 0% and 10%, and 5-to-7 times lower than the *Tison* triggerman.

We also repeated our “ninth Justice” paradigm, where subjects had to make a let stand or reverse and remand decision for each defendant. Two things were different: subjects were getting the actual *Tison* case, and they were given no list of reasons, but had to write out their own reasons for deciding as they did. The let stand decisions were similar to previous experiments: the let stand percentages were 10% (A), 15% (B), 26% (C), and 83% (D). The reasons for their decisions were illuminating. Those who said “let stand” cited that (1) the defendant could have prevented the death but did not; (2) intended to kill; and (3) was a major participant and had a past criminal record. These reasons fit the *Tison* triggerman far more closely than the accessories, and stress *intent* and *control*, those factors that attribution theorists labelled as central in reaching culpability judgments. Those who said “reverse and remand” cited the fact that the defendant (1) was a minor participant and could not control; (2) did not have a criminal record; and (3) did not intend to kill. These reasons fit the accessories far more than the triggerman, and highlight the absence of *intent* and *control*.

70. See Finkel & Duff, *supra* note 31.

71. See Finkel & Smith, *supra* note 46.

Finally, in an experiment that sought to test whether the proportionality principle or equalist justice would rule at early developmental ages, kindergarten, second and third graders, and fifth graders were given two felony-murder-like scenarios, and asked to make culpability and punishment judgments.⁷² As not to frighten the youngsters with death but to maintain a parallel to felony-murder, a "crime" is plotted and "something worse" then happens. In one of our two cases, the "stolen math test" scenario, the ringleader plots to steal the math test from the copy room while the teacher is at lunch, and he gets several accomplices to go along, but unbeknownst to the accomplices the ringleader also steals money from the teacher's purse. In our second case, the "trespass" scenario, the ringleader persuades his accomplices to trespass, and a fight occurs where a boy is injured by the ringleader. In both cases, there is an agreement to do something they know is wrong, and then something worse happens. The three accomplices (Al, Bill, and Frank), along with the ringleader (John), differ in their degree of participation, and they were designed to create a similar array to the felony-murder experiments, roughly paralleling the getaway driver, lookout, sidekick, and triggerman. Even at the kindergarten level, subjects clearly discriminate the principal from the accessories: 53% judge Al and Bill as having "low" culpability, while 35% judge Frank as having "medium," and 60% judge John as having "high" culpability. These culpability distinctions translated into punishment distinctions, which were categorized into four levels: no punishment, loss of privileges, physical punishment, and a combination of loss of privileges and physical punishment. For the kindergarteners, the dominant punishment for Al, Bill, and even Frank, was "no punishment," but John gets far more severe punishment.

By the second and third grades, the proportionality principle is most evident in their culpability and punishment judgments, with the spread among the accessories being much like what we found for adults. For example, under the "high" culpability ratings, 100% of fifth graders give this rating to John, 92% for Frank, 12% for Bill, and 0% for Al. Similarly, at the top level punishment category, we find 62% for John, 44% for Frank, 12% for Bill, and 0% for Al.

72. Norman J. Finkel et al., *Equal or Proportional Justice?: Children's Judgments of Accessory Liability*, Paper presented at the American Psychological Association's Annual Convention (August 22, 1993) (on file with author).

E. *Proportionality Reigns Supreme*

Felony-murder, spawned from error and contrivance, manufactures murder for principals and accessories alike. It may be murder most foul or monstrous, an anachronistic remnant or a legal fiction, but this living fossil lives, divides the Court, and continues to produce death sentences. It creates a most curious way of assessing and assigning guilt, one that appears to detach criminal liability from individual culpability, and one that appears quite detached and foreign from how ordinary people make such judgments.

The Supreme Court has had to gauge "community sentiment" from the objective indicia. The *Tison* Court, with its flawed reading, held to equalism, upheld the death penalty for *Tison*-like defendants, and claimed that community sentiment supported this conclusion when reckless indifference and more major participation by an accessory were shown. The Court's empirical claim is undermined by our experimental results across a wide number of cases and conditions. Community sentiment strongly opposed the death penalty for felony-murder accessories. Community sentiment rejected accessorial liability that creates an equalist outcome. Community sentiment differentiates felony-murderers from premeditative murderers. And overwhelmingly, community sentiment favors proportional justice, based on each person's actions and intentions, and that sentiment is evident in the youngest subjects we tested. *Commonsense justice* seems to be saying, in loud, clear, and consistent tones, "that the law is wrong, and ought to change."

The suggested direction of change, as read from the community's verdicts and sentences, is not toward anarchy, but toward proportionality and coherence. For example, none of the defendants walks from the courtroom free; they are punished, but not for murder. The community does lay the death at the doorstep of the principal, and is willing to exact a tougher punishment on him, but not so much that he is indiscriminable from the premeditated murderer; there is a difference in *intent*, here. And *intent* clearly matters to the community. The overall lesson seems to be: that when intent is ignored or manufactured, reducing culpability to an either/or choice that doesn't fit with commonsense justice, then murder most foul results, and nullifications lie in wait.

III. INSANITY'S MADDENING CHANGES, MUCH ADO. . .

Change has been the constant in the insanity defense equation. When a great case (e.g., M'Naghten, Hinckley) produced a

so-called “wrongful” verdict — typically a “not guilty by reason of insanity” (NGRI) — the press for a new test boiled and brewed, as legal and psychological arguments, and myths, fears, and politics, commingled in the stew. The jurors’ perspective, when given any thought at all, was charitably denounced as soft-headed, misguided, or willfully anarchic,⁷³ yet these “dysfunctional” jurors continued to declare such defendants “insane.” Nonetheless, the “change the test” *process* remained maddingly and schizophrenically split: legal notions and *commonsense justice* seldom made contact.

Though legislators, monarchs, judges, and justices have often ignored the jurors’ perspective, the *law* cannot ignore the jurors for long: insanity tests eventually make contact with the jurors’ reality, when the new test meets the new case — before the next jury. Yet even before that happens, a *prediction* is implied. To illustrate, critics claimed that the wild beast test⁷⁴ was off base in focusing on memories and perceptions, and too demanding in its insistence on total deprivation. M’Naghten shifted the focus from memories and perceptions to cognition, and reduced total deprivation to “pockets of madness” — delusions.⁷⁵ From these changes, M’Naghten should produce more

73. Norman J. Finkel, *Maligning and Misconstruing Jurors’ Insanity Verdicts: A Rebuttal*, 1 FORENSIC REP. 65 (1988).

74. Rex v. Arnold, 16 Howell’s St. Trials 695, 764-65 (1724) (in Mr. Justice Tracy’s summary, he noted that “it is not every kind of frantic humour, or something unaccountable in a man’s actions, that points him out to be such a madman as is to be exempted from punishment: it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute or a wild beast . . .”).

This test, with its accent on memories and perceptions, was the test under which James Hadfield was tried in 1800, for attempting to kill King George III. *Hadfield*, 27 Howell’s St. Trials 1281 (1800). Hadfield’s counsel, Erskine, skillfully mocked this test: “If a TOTAL deprivation of memory was intended by these great lawyers to be taken in the *literal* sense of the words: — if it was meant, that, to protect a man from punishment, he must be in such a state of prostrated intellect, as not to know his name, nor his condition, nor his relation towards others — that if a husband, he should not know he was married; or, if a father, could not remember that he had children; nor know the road to his house, nore his property in it — then no such madness ever existed in the world.” *Id.* at 1312.

75. McNaughtan’s Case, 8 Eng. Rep. 718 (1843). There are at least twelve different spellings of McNaughtan, with “M’Naghten” being the most common. Daniel M’Naghten may have spelled his own name differently, on occasion, thereby adding to the confusion; see RICHARD MORAN, KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL McNAUGHTAN (1981).

After M’Naghten’s acquittal on grounds of insanity, particularly as he did not meet the “wild beast test,” the House of Lords took the unusual step of summoning all 15 Justices to demand clarification of the law. Within their

NGRI verdicts than the wild beast test. M'Naghten plus the irresistible impulse test⁷⁶ should produce more NGRI verdicts than M'Naghten alone. Durham's "product rule" test,⁷⁷ which critics believed opened the insanity door wider than ever, should produce more NGRI verdicts than all of its predecessors. The ALI test, with cognitive and volitional prongs,⁷⁸ should produce fewer

reply, we find the "M'Naghten rules." The two rules were (1) To establish a defense on the ground of insanity it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or he did know it, that he did not know he was doing what was wrong; (2) Where a person labors under partial delusions only and is not in other respects insane, and commits an offense in consequence thereof, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real"; see *United States v. Currens*, 290 F.2d 751, n.15 (3d Cir. 1961).

76. *Parsons v. State*, 2 So. 854 (Ala. 1887). This test adds a volitional prong, noting that if a person lacks freedom of will, then his power to choose right from wrong, or to even govern his mind, is undermined. In England, some influential judges, most notably Sir James Fitzjames Stephens, were pushing for this addition, and back in the 1800 Hadfield trial, Erskine spoke of "motives irresistible," this prong was not formerly added in English law; rather, some judges smuggled the concept in under an elasticized interpretation of *McNaughtan*; see FINKEL, *supra* note 24.

The central controversy with a volitional test is the twilight vs. dusk controversy: How do we tell impulses that cannot be resisted from those the defendant simply failed to resist? *Id.*

77. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954). In Judge Bazelon's opinion:

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

Id. at 875.

The critics of this test noted that key terms, such as "mental disease" and "product," were not defined; in this void, mental health experts were likely to have too much influence, it was claimed, usurping the jurors' function; see, e.g., ABRAHAM S. GOLDSTEIN, *THE INSANITY DEFENSE* (1967).

78. The American Law Institute made its recommendations on the matter of insanity one year after *Durham*, and a number of states, including the District of Columbia, eventually adopted the test. It was a two pronged test, where "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 of his conduct or to conform his conduct to the requirements of law." MPC, *supra* note 20, § 4.01.

Critics noted that the first prong was a semantic reworking of M'Naghten's cognitive, right from wrong test, and the second prong was the problematic volitional test. See, e.g., FINKEL, *supra* note 24, at 39.

NGRI verdicts than Durham but more than M'Naghten alone. And for the new Insanity Defense Reform Act (IDRA) test, since it eliminates the volitional prong,⁷⁹ less NGRI verdicts than ALI should result. But the empirical question is: Do tests work in practice as their supporters predict?

A. *While Tests Fail to Discriminate, the Jurors Do*

Professor Rita James Simon presented a disguised version of the Monty Durham case to multiple juries. The case involved a man caught breaking into a house in broad daylight, who stole less than \$50.00 worth of goods (e.g., a cheap cigarette lighter, cuff links). Now the sharp-eyed psychology or law student, unfamiliar with the case, might wonder why this is an "insanity" case. The answer is found in the way Monty Durham was caught by the police: he was found in the middle of the living room, crouched like a duck, with a newspaper over his head! What Simon varied was the test instructions. Some juries got the M'Naghten test, while others got the Durham test, but no significant verdict differences resulted. She found that jurors did not ignore the test, but *reconstructed* the instructions in a "cognitive" direction.⁸⁰ In early work,⁸¹ I expanded on Simon's methodology in two directions — by increasing the number of cases and the number of tests. Subjects rendered verdicts in five cases,⁸² and were assigned to one of six different insanity test instructions: the wild beast test, M'Naghten, M'Naghten plus the irresistible impulse addition, Durham, the ALI test, and a proposed new test called the Disability of Mind test.⁸³ Whereas Simon found no differ-

79. Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, §§ 401-02, 98 Stat. 2057 (1984). This Act followed two years of Senate and House Hearings on the insanity matter in the wake of *United States v. Hinckley*, 525 F. Supp. 1342 (D.D.C. 1981). Congress decided that the substantive problem with the ALI test, which Hinckley was tried and found NGRI under, was the volitional prong, so an amputation of the prong was performed. For criticisms of the process and the outcome, see, e.g., PERLIN, *supra* note 11; Finkel & Fulero, *supra* note 25.

80. Rita M. James, *Jurors' Assessment of Criminal Responsibility*, 7 SOC. PROBS. 58 (1969); see also RITA JAMES SIMON, *THE JURY AND THE DEFENSE OF INSANITY* (1967), Rita M. James, *Status and Competence of Jurors*, 64 AMER. J. SOC. 563 (1959).

81. See Norman J. Finkel et al., *Insanity Defenses: From the Jurors' Perspective*, 9 LAW & PSYCHOL. REV. 77 (1985).

82. Increasing the number of cases increases the generalizability of the findings, and protects against the possibility, in a one-case experiment, that the experimenter has inadvertently chosen an outlier case.

83. HERBERT FINGARETTE & ANN F. HASSE, *MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY* (1979). In the "disability of mind" (DOM) test, partial culpability, as well as culpability for bringing about the disability of mind, are

ences between two tests, we found no significant differences overall among six tests. In still another experiment, Finkel⁸⁴ gave one group of subjects the new IDRA test; a second group had the two pronged ALI test, and a third group had a *mens rea* update of the old wild beast test. Again, no significant verdict differences among the tests were found. These findings are not only sobering, but strongly suggest that Congress's attempt to limit the insanity defense⁸⁵ through its IDRA progeny had failed. When taken together with the prior findings, IDRA joins a long line of test failures.

If no test works any differently than any other, what would happen if subjects were given "no test" at all? This was the question Finkel and Handel⁸⁶ examined, as they told subjects to use their "own best lights" to decide these cases. Specifically, subjects were told that they had to make a decision (a verdict — NGRI or Guilty), but that we were giving them no insanity test instruction; rather, just using their own judgment, they were to decide. We found no significant verdict differences between the "no instruction" condition versus the various "insanity test instructions" conditions.⁸⁷ Given these findings, an obvious question is: Why do tests fail to produce discriminably different verdicts, and fail to produce differences from "no test" at all?

The familiar refrain is to blame the jurors — they don't listen to the instructions, they ignore them, they can't comprehend them — the refrain goes on. The only problem with this refrain is that it is out of tune with the empirics. In Simon's work, jurors did not ignore or willfully disregard instructions. In Finkel's work,⁸⁸ subjects consistently made *case-by-case* discriminations. Moreover, if jurors had biased or bizarre views regarding insanity — views that should have been set loose under a "no test" condi-

assessed; thus this test, unlike the sanctioned tests, is not an either-or, NGRI or guilty judgment.

84. Norman J. Finkel, *The Insanity Defense Reform Act of 1984: Much Ado About Nothing*, 8 BEHAVIORAL SCI. AND THE LAW 403 (1989).

85. Limiting the Insanity Defense: Hearings on S. 818, S. 1106, S. 1558, S. 2669 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 97th Cong., 2nd Sess. (1982).

86. Norman J. Finkel & Sharon F. Handel, *Jurors and Insanity: Do Test Instructions Instruct?* 1 FORENSIC REP. 65 (1988); Norman J. Finkel & Sharon F. Handel, *How Jurors Construe "Insanity,"* 13 LAW & HUM. BEHAV. 41 (1989).

87. This finding recurred in several experiments, with students and adults, where subjects who used their "own best lights" reached similar verdicts with those who used the wild beast test, M'Naghten, M'Naghten plus the irresistible impulse addition, Durham, ALI, and IDRA. See, e.g., Finkel, *supra* note 75.

88. Finkel et al., *supra* note 72; Finkel, *supra* note 73.

tion — we do not see it, for their verdicts closely fall where test instruction verdicts land. The empirics also show that jurors discriminate among defendants on items relating to culpability, such as how responsible the defendant was for her act and how much mitigation was warranted for her mental condition. And finally, subjects discriminated on an item the law does not take into account in insanity cases — the defendant's culpability for bringing about her mental deterioration.⁸⁹ This "culpable negligence" factor, germane to their assessment of the moral blameworthiness, is not part of the legal instructions.

B. *Commonsense Insanity*

There may be a convergence between empirical findings and what a few jurisprudes have advocated — that legal insanity ought to rest on the commonsense perspective. These "common sense" advocates have argued that medicalized definitions of "mental illness" and "insanity" leave these terms outside ordinary thinking, removing insanity from its proper moral context. One such proponent, Professor Michael Moore,⁹⁰ puts it this way:

If the issue is a moral one then the legal definition of the phrase should embody those moral principles that underlie the intuitive judgment that mentally ill human beings are not responsible.

. . . . What is thus needed is an analysis of that popular moral notion What have people meant by mental illness such that, both on and off juries, they have for centuries excused the otherwise wrongful acts of mentally ill persons?⁹¹

Professor Stephen Morse⁹² makes a similar point. He rejects "pseudomedicalizations" and criticizes those legal and semantic debates that create a "distinction without a difference."⁹³ What

89. For example, subjects who find the epileptic defendant guilty acknowledge that at the moment of the act she was going into seizure and unconscious when the gun went off; they do not hold her responsible for that. What they hold her responsible for is for going off her seizure medication two days earlier without consulting her doctor; it is this "negligence" or "recklessness" that they weigh, and find blameworthy.

90. MICHAEL S. MOORE, *LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP* (1984).

91. *Id.* at 244.

92. Reform of the Federal Insanity Defense: Hearings before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 98th Cong., 1st Sess. 331 (1983) (statement and additional remarks of Stephen J. Morse); see also Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 779, 780 (1985).

93. Morse, *supra* note 92, at 390.

Morse suggests is "the craziness test": "A defendant is not guilty by reason of insanity if at the time of the offense the defendant was extremely crazy and the craziness affected the criminal behavior."⁹⁴ Morse's supposition "is that ordinary citizens are invoking such a craziness test,"⁹⁵ so the law ought to follow the path laid by the community.

Fingarette and Hasse⁹⁶ also believe that traditional legal tests wrongly focus on "symptoms" and fail to identify the essence of insanity, which involves *mens*. This *mens* factor is the "capacity for rational conduct,"⁹⁷ for in the absence of such a capacity, we have a person who is not "response-able"; this "is central to what we wish to express when we speak of someone as 'out of his mind,' 'out of touch with reality,' 'mentally incompetent,' 'crazy,' or 'mad.'"⁹⁸

Judge Bazelon also writes critically of this symptom focus, stating that "[t]he fundamental objection to the right-wrong test, however, is not that criminal irresponsibility is made to rest upon an inadequate, invalid or indeterminable symptom or manifestation, but that it is made to rest upon *any* particular symptom."⁹⁹ Bazelon proposed the "justly responsible" test: jurors would be instructed that a defendant is not responsible "if at the time of his unlawful conduct his mental or emotional processes or behavior controls were impaired to such an extent that he cannot justly be held responsible."¹⁰⁰ The implication of the "justly responsible" test is that it "candidly informs the jury that it is their function to apply the moral standards of the community."¹⁰¹

These "common sense" advocates decry the medicalized, legalized, and jargonized notions of "mental illness," and the grounding of insanity on symptoms. Such trends move insanity from where it ought to be — a proper moral judgment, resting on the moral principles that underlie ordinary people's understanding of sane and insane. But however commonsensical these "commonsense" notions sound, they still lack a sound empirical base. What is missing, and what is still needed, as Moore pointed out, is an *analysis* of what people mean by "sane" and "insane,"

94. *Id.*

95. Finkel, *De Facto*, *supra* note 18, at 110.

96. *Supra* note 83, at 218.

97. *Id.*

98. *Id.*

99. Bazelon, *supra* note 9, at 45.

100. *Id.* at 50-51.

101. *Id.* at 51.

such that they continue to excuse the otherwise wrongful acts of some insanity defendants as morally just.¹⁰²

If people have, invoke, and use *intuitive concepts* of “sane” and “insane” to decide insanity cases, we need a way to get them to identify and explain their constructs, and we need to ask the question in a way that doesn’t cause them to merely parrot back the specific insanity test language. Thus, we can best get at the intuitive constructs under a “no test” condition. In Finkel and Handel’s work,¹⁰³ where no test instruction was given, subjects were asked to write out the factors they found most relevant and determinative in reaching their verdict, and to explain their reasons.¹⁰⁴

Turning to the results, the first point to note is that subjects invoke a number of relevant and determinative constructs per case, 2.5 on the average. This indicates complex construing, rather than simplistic construing; in fact, since most legal tests identify only one (e.g., IDRA) or two constructs (e.g., ALI), the “simplism” would seem to be in *the legal test*, not in the subjects’ minds. Second, subjects rendering a NGRI verdict and subjects rendering a guilty verdict do not construe the case along identical construct dimensions, but along orthogonal lines. Thus, it is not a simple, polar-opposite type of construing, where guilty subjects see “clear thinking” while NGRI subjects see “distorted thinking.” And third, subjects change their relevant and deter-

102. Finkel, *De Facto*, *supra* note 18, at 110.

103. Goldstein, *supra* note 77.

104. These reasons were categorized by independent raters using a seven-construct schema that proved reliable. One end of the construct dimension reflects the “insane” (NGRI) judgment, whereas the other reflects the “sane” (guilty) judgment. The seven dimensions were: (1) incapacity/capacity to make responsible choices; (2) impaired/unimpaired awareness and perceptions; (3) distorted/clear thinking; (4) could not control/could control impulses and actions; (5) nonculpable/culpable actions; (6) no evil motive/evil motive; and (7) others at fault/others not at fault. Some of these dimensions reflect the traditional symptom focus: for example, construct (2), impaired awareness and perception, is the wild beast construct; (3) distorted thinking, reflects the cognitive focus of M’Naghten and IDRA; (4) impulse control reflects the irresistible impulse addition and volitional prong of ALI. Unrelated to specific symptoms is construct (1), the incapacity dimension, which reflects a deeper essence to insanity. Construct (5), the culpable actions dimension, reflects negligence or recklessness before the moment of the act, such as going off medication, or starting to drink while on medication, or dropping out of therapy against medical advice. Construct (6) judges the motivation for the act, and whether the motive was evil or not, and construct (7) cites whether others are at fault (contributory blame) or not.

minative constructs from case to case, and this is particularly so for the “symptomatic” constructs.¹⁰⁵

These results are good news/bad news. The good news is that jurors do make fine discriminations; the bad news is that complex, orthogonal, and changing constructs do not appear to yield consistency. However, there were two construct dimensions that did achieve a number of first rankings as either an NGRI or guilty factor across cases: the capacity/incapacity construct, and the culpable/nonculpable construct. These results were replicated in another experiment,¹⁰⁶ where the capacity and culpable constructs were again salient across cases; moreover, because in this second experiment legal tests were given, it was found that those tests failed to either suppress or channel the subjects’ intuitive constructs along designated *de jure* lines. Put another way, the subjects’ intuitive constructs of “sane” and “insane” remained resistant to black-letter law’s guidelines, yet powerfully determinative of verdict.

From this empirical work, citizens seem to diverge from black-letter law in two ways. First, they invoke a deeper meaning to insanity than mere *symptoms*, a meaning closer to the moral question of whether the actor is responsible or not. The commonsense construct denotes greater depth and nuance than the law’s constructs. But we also discover, through the construct of *culpable actions*, a divergence of *type* rather than just degree of culpability. It will shortly be argued that *commonsense justice* is not manufacturing a type of culpability that isn’t there, but rather that black-letter law has long ignored this type of culpability when it comes to insanity.

Professor Robinson notes that criminal law’s treatment of “causing the conditions of one’s own defense” is “inadequate,” “frequently irrational, and is a poor approximation of our collective sense of justice.”¹⁰⁷ This doctrinal confusion creates confusion for the jurors when they see two separate and distinct actions and intentions requiring independent culpability judgments — but find only one type of culpability on the verdict

105. The cognitive construct (distorted/clear thinking), the volitional construct (could not control/could control impulses and actions), and the awareness construct (impaired/unimpaired awareness and perception), which are quite relevant in the historic legal tests, did not turn out to be relevant across cases.

106. Finkel, *supra* note 75.

107. Paul H. Robinson, *Causing the Conditions of One’s Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, 2 (1985).

form. As Fletcher notes,¹⁰⁸ criminal law tends to conflate different types of causation, and doctrinal confusion results.

C. *Shades of Culpability*

Not only do people see different types of culpability, but they see shadings. If people see "grey" but insanity is defined as a "black-or-white," then jurors have another problem: they must fit "grey" into one of two categories, neither of which matches their judgment. However, giving jurors a third option, be it diminished responsibility or Guilty But Mentally Ill (GBMI), arouses fears. The American Psychiatric Association's fearful claim is typical, predicting that jurors will use this third option as an "easy way out," avoiding "the difficult moral issues inherent in adjudicating guilt or innocence . . . settling conveniently on guilty but mentally ill."¹⁰⁹ Even though the empirical evidence shows that jurors make complex moral judgments — more complex than the law's insanity distinctions — the charges of simplism and avoidance arise once more.¹¹⁰

Data from Michigan, the state that first introduced GBMI, provide few insights into what jurors do, since over 90% of Michigan's insanity trials were bench trials, before a judge and not a jury.¹¹¹ In an empirical test of GBMI, Roberts et al. created a hypothetical case of a defendant who kills a mailman. They manipulated "mental disorder" of the defendant, creating four mental disorder conditions: the defendant either had an antisocial personality disorder, a schizotypal personality disorder, paranoid schizophrenia with delusions unrelated to the crime, or paranoid schizophrenia with delusions related to the crime. They also manipulated "bizarreness" of the crime, either bizarre (i.e., defendant cut the heart out) or nonbizarre, and they manipulated "planfulness," whether the crime showed planfulness or not. But the basic question concerned the verdict pattern, and what would happen when subjects had the GBMI option.¹¹²

They found that 66.7% of the verdicts across their four mental disorder conditions turned out to be GBMI, and concluded that most "subjects preferred to utilize the GBMI option as a compromise verdict even in the face of very severe mental

108. Fletcher, *supra* note 37, at 589.

109. AMERICAN PSYCHIATRIC ASSOCIATION, STATEMENT ON THE INSANITY DEFENSE 9 (1982).

110. See *supra* notes 73-89 and accompanying text.

111. Caton F. Roberts et al., *Implicit Theories of Criminal Responsibility: Decision Making and the Insanity Defense*, 11 LAW & HUM. BEHAV. 207, 211 (1987).

112. *Id.* at 212-14.

illness."¹¹³ They reached that conclusion, however, despite the fact that their subjects "who decided GBMI were more confident . . . of their decisions than either subjects who decided NGRI . . . or Guilty."¹¹⁴

From Roberts et al.'s results, it appears as if the critics of jurors and the third option may have been right. Yet there are reasons to suspect that Roberts et al.'s method may have inflated the use of the third option.¹¹⁵ In Finkel and Duff's work,¹¹⁶ order was counter-balanced, as one group got the three-choice schema first, then the two-choice, while a second group got the reverse order. Moreover, the two verdict renderings were separated by a week's time. The third option here was called "diminished responsibility" (DR), and subjects were given no legal definition of DR, but merely told that guilt and punishment are lessened because of the defendant's mental condition. By not giving a legal definition which might constrain its use, we maximized the likelihood of overuse, if subjects had a penchant for using this as an easy out, as was alleged.

Across their four cases, Finkel and Duff found that the DR verdicts accounted for 41% of all verdicts, a far cry from Roberts et al.'s 66.7% figure, and one that does not immediately suggest overuse. Second, the DR verdicts came from both the guilty and NGRI verdicts, which contradicts the critics' predictions that subjects would use this verdict to convict those who should be exculpated (i.e., the NGRIs). Though DR use across cases was 41%, there were significant differences in its use *by case*, evidence that jurors used that verdict *selectively*, not indiscriminantly. Finally, not one subject (0%) used the DR verdict for all four cases, again indicating selectivity.

The ratings of these defendants show that subjects who render a DR verdict "see" the defendant differently than those

113. *Id.* at 226.

114. *Id.* at 218.

115. In their methodology, subjects rendered a verdict in the traditional two-choice schema, with NGRI and Guilty being the two choices. But almost immediately thereafter, the researchers then gave the third choice option, and asked subjects to render another verdict for the same case, now having a three-choice schema featuring NGRI, Guilty, and GBMI. This second verdict rendering, following on the heels of the first, may have created the impression (i.e., a demand characteristic) that subjects were expected to use the new, third category. Moreover, since they did not balance "order" by having half the subjects do the three-choice schema first and then the two-choice schema, we cannot be sure that an order effect or a demand characteristic was not operating — which might have inflated the results.

116. Norman J. Finkel & Kevin B. Duff, *The Insanity Defense: Giving Jurors a Third Option*, 2 FORENSIC REP., 235 (1989).

who render either a guilty or NGRI verdict. If subjects are using the DR verdict appropriately, we would expect their ratings to fall between guilty and NGRI, and they consistently do. If the DR verdict is a "true" in-between verdict rather than a compromise, then we should see further evidence of this in the determinative constructs subjects invoke. If DR reflects some culpability, but less than guilty, and some mitigation, but less than NGRI's exculpation, then the DR subjects should be invoking a mixture of NGRI and guilty constructs. And they do.

These results were replicated in another experiment¹¹⁷ which featured a comparison of the DR option (with no legal test definition) and the GBMI option, where Michigan's legal wording was provided. There were no significant differences in terms of verdicts, ratings, and constructs cited between the DR and GBMI schemas, as usage (DR = 40.2%, GBMI = 33.9%) was moderate overall, and selective and discriminative by case.

In these experiments, the subjects' *constructs* are more determinative of verdict than particular insanity tests and other variables considered, and these constructs are not merely an artifact of making a verdict.¹¹⁸ Constructs are real, and they remain determinative. When researchers looked at the subjects' constructs in regard to the GBMI verdict, they found that subjects use the GBMI verdict "to signify diminished blame and punishment."¹¹⁹ Thus, while GBMI was supposed to be a "functionally guilty" verdict, subjects do use it as a mitigating midground category, reflecting diminished responsibility.

D. *When an Insanity Test Tracks Commonsense Judgments*

Given that subjects see different types of culpability, and different degrees of culpability — what has been referred to as "relative culpability"¹²⁰ — a new insanity test was developed by Finkel¹²¹ that incorporates these culpability distinctions and shadings. Finkel's test asks mock jurors to make a series of sequential decisions (judgments), involving: (1) whether the defendant's behavior caused the harm (the behavioral decision); (2) whether the defendant suffered from a disability of mind at

117. Norman J. Finkel, *The Insanity Defense: A Comparison of Verdict Schemas*, 15 LAW & HUM. BEHAV. 533 (1991).

118. Caton F. Roberts et al., *Verdict Selection Processes in Insanity Cases: Juror Construals and the Effects of Guilty But Mentally Ill Instructions*, 17 LAW & HUM. BEHAV., 261, 271 (1993).

119. *Id.* at 273.

120. Norman J. Finkel & Christopher Slobogin, *Insanity, Justification, and Culpability: Toward a Unifying Schema*, 19 LAW & HUM. BEHAV. 447 (1995).

121. FINKEL, *supra* note 24, at 293-98.

the moment of the act (the *mens* decision), and, further, whether it was partial or total; (3) whether the defendant was culpable to some degree for bringing about the disability of mind (the culpability decision), and, further, to what degree (partial or total); and (4) a traditional *mens rea* decision, if (2) and (3) are answered "no"; these sequential decisions ultimately lead to a verdict.¹²²

This new test was compared against a traditional two-choice test (IDRA), and the two three-choice tests (GBMI and DR) in a subsequent experiment, where we found that the fewest NGRI verdicts resulted when Finkel's schema was used, and that reduction was significant. But more than merely reducing a verdict, Finkel's schema more tightly tracked subjects' ratings and determinative constructs of the defendant, significantly more so than any other schema.¹²³ We know that subjects in the two- and three-choice conditions are making similar culpability judgments and invoking the same constructs as subjects in the sequential verdict condition, but the subjects in the two- and three-choice conditions do not have all the categories they need to register their discriminations. Thus, they must squeeze and conflate into one category. When you do so, you may get the appearance of a "wrongful" verdict.

Finkel's "relative culpability" schema was empirically tested in another experiment, this time against the two most widely used traditional exculpatory tests — the ALI¹²⁴ and IDRA¹²⁵

122. *Id.* One begins with a *behavioral decision* of did the defendant's behavior cause the harm that is a criminal offense by law. If a subject answers "no," then a not guilty verdict follows. If they answer "yes," then they go to the *mens decision*, where they answer whether the defendant, at the moment of the act, was suffering from a disability of mind, and did that disability of mind play a significant role in the defendant's criminal behavior. If subjects say "no," then they go to the *mens rea decision* to consider traditional intent questions, that may lead to a verdict of guilty, guilty to a lesser offense, or a verdict of not guilty. But if the subject says "yes" to the *mens* question, then they decide if the disability of mind at the moment of the act was partial or total. Then they go on to consider the *culpability decision* as to whether the defendant was culpable to some degree for bringing about her disability of mind. If they find culpability, they must further decide if she is partially or totally culpable. With this sequence of decisions, specific verdicts follow. In this schema, for someone to be found NGRI, they would have to have a total disability of mind and also be not culpable for bringing it about.

123. Put in terms of variance, this schema reduces more error variance and better predicts verdicts than any other schema. As subjects are naturally making different types of culpability judgments, and are naturally making shading discriminations, this schema gives them the vehicle for registering those discriminations.

124. See *supra* note 78 and accompanying text.

125. See *supra* note 79 and accompanying text.

tests. Finkel's schema was also tested against a "quasi-subjective justification" (QSJ) test that extends the subjectivizing point of view of the Model Penal Code,¹²⁶ and seeks to situate "insanity" with other defensive doctrines, such as self-defense, provocation, and duress. The results of this second experiment were clear and consistent with the first experiment. Only Finkel's test significantly reduced insanity verdicts across the seven different case vignettes used, resulting in less than half the percentage of NGRI verdicts than ALI, IDRA, and QSJ. Moreover, the result was obtained with college student subjects and law school student subjects.¹²⁷ In addition, when we subtly manipulated the case vignettes by adding a phrase that indicated that defendants were culpable (a *with culpability* condition) for bringing about their mental disorder (e.g., they drank, refused to take medication, went off medication without doctor's consent, refused treatment) — a manipulation that should have increased the guilty verdict percentage over the condition that did not have the culpability phrase (the *without culpability* condition) — only Finkel's schema registered increased guilt, whereas ALI, IDRA, and QSJ did not.¹²⁸

Further refining these results, we gave the *with* and *without culpability* variations to two law school student samples, under a "no test" condition. Overall, under "no test," their verdicts more closely resembled the verdicts under Finkel's schema, than under ALI, IDRA, and QSJ. Moreover, the subjects under the *with culpability* phrase registered that fact, and it resulted in significantly more guilty verdicts. These findings again suggest that Finkel's test does track culpability distinctions that people quite naturally see and weigh, and it gives them the schema to register them. Finally, we tested whether liberalizing the manslaughter definition, using the MPC language, would capture more "guilty" verdicts and reduce NGRI verdicts more simply than Finkel's schema. While the MPC language slightly reduced NGRI verdicts, it did not produce the dramatic and significant change that Finkel's test did.¹²⁹

All of these experiments, with adults, college students, and law school students, focus on different facets of the common-sense perspective on insanity, and how it relates to or departs from black-letter law's perspective, as embedded in traditional legal tests. The implications of these findings are pragmatic and

126. MODEL PENAL CODE, *supra* note 20, at § 4.01.

127. Finkel & Slobogin, *supra* note 120 (there were three experiments reported here).

128. *Id.*

129. *Id.*

practical, but they also bear on the conceptual and theoretical. If the law seeks to eliminate "wrongful" verdicts and to set the maddening matter of insanity right, it cannot ignore the jurors' perspective for long; yet, in the long history of changing the insanity test, that is precisely what has occurred, for the legal history is notable for the absence of that commonsense perspective.

In the absence of the commonsense perspective, we see test after test failing to cure the ills it was created to correct. In showing no significant difference in verdicts from its predecessor, the new test turns out to be much ado about nothing. When these new tests incorporate substantive standards out of the ether of legal or psychological theory — standards that make little contact with the jurors' intuitive constructs of sane and insane — we repeatedly find that these new legal constructs fail to instruct.¹³⁰

Maligning the jurors turns out to be the wrong answer. The evidence is overwhelming that jurors' constructs are complex, and that they make fine-grained discriminations. When the jurors' constructs of "sane" and "insane" are elucidated, they turn out to be deep: they go beneath the superficial symptoms of insanity, the shallow cornerstones of so many legal tests, to an essence that lies in the capacity to make responsible choices. They also consider and weigh a dimension akin to negligence or recklessness, which has been notably absent or conflated in insanity law: culpability for bringing about one's disability of mind.

Professor George Dix concluded that "the law, if it is to maintain the community's respect, must grade its condemnation according to the moral turpitude of the offender as the community evaluates it."¹³¹ The community does grade moral turpitude, and when an insanity schema is created from commonsense distinctions, fewer NGRI verdicts, tighter variance, and a more faithful tracking of culpability judgments results. When the law's path is constructed from legalisms unchecked by realism, *commonsense justice* does not follow. If the law followed the path of *commonsense justice*, that path leads neither into darkness nor madness, but back to familiar legal terrain.¹³² On this ground, intelligible and defensible culpability distinctions provide a moral footing for this maddening matter of insanity. The law can do worse. And it has.

130. Finkel & Fulero, *supra* note 25, at 257-58.

131. George E. Dix, *Psychological Abnormality as a Factor in Grading Criminal Liability: Diminished Capacity, Diminished Responsibility, and the Like*, 62 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 313, 332 (1971).

132. FINKEL, *supra* note 1, at 337.

IV. WHERE MANSLAUGHTER RULES, COMMONSENSE REIGNS

In mitigating the crime and the punishment, the law treats manslaughter differently than either felony-murder, where punishment is at full strength, or insanity, where the punishment is nil. The law's mitigating rationale is found amidst the concepts of provocation, emotion, time, reason, and action, and how they are woven into an *implicit* theory of human nature. This theory — which is at least as much a psychological theory as it is a legal theory — drives manslaughter jurisprudence. From the very same concepts and strands, ordinary people — who may come to sit on juries and who do not necessarily grant the law hegemony here — have their own implicit theories of how provocations, passions, reason, time, and action interweave, and why punishment ought to be mitigated under certain conditions. In evaluating the law's theory, we need to see if it comports with or departs from commonsense views.

A. *Common Law Manslaughter 'Rules'*

One rule abstracted from case law was that "mere words" were not sufficient provocation to mitigate the crime to manslaughter.¹³³ But this rule did not hold for all juries,¹³⁴ or even all courts.¹³⁵ Apart from exceptions which seemed to bend the "mere words" rule; the rule would soon undergo mutation and division, whereby "insults," regarded as insufficient, were split off from "informational" words, which might be sufficient. An illustration is *Royley*,¹³⁶ where a boy ran to his father and informed him that he had just been beaten by the victim. After running one mile, the father found the boy who beat his son and killed him with a cudgel. The court found that it was manslaughter because the killing was "upon a sudden" — which brings *time* into the equation as well as *type and degree of provocation*. But this opinion is problematic for both *provocation* and *time*. First, the

133. Singer, *supra* note 19, at 253.

134. See *Watts v. Byrnes*, Noy 171, 74 Eng. Rep. 1129 (K.B.). In this sixteenth century case, where the victim gave the defendant a wry face, and the defendant then stabbed the victim from behind, the jury first brought in a manslaughter verdict; the judge then imprisoned the jury and directed them to return a murder verdict, which they eventually did.

135. See also *Williams, Jones*, W. 432, 82 Eng. Rep. 227 (K.B.). In this case, two strangers met, and one insulted the defendant's Welsh heritage, whereupon the defendant threw a hammer at him; the hammer missed the intended victim but hit and killed a bystander. Here was an insult, plain and simple, mere words leading to deadly violence, but the court held the defendant guilty only of manslaughter.

136. *Royley's Case*, 2 Cro. Jac. 296, 79 Eng. Rep. 254 (1666).

informational words that fired the father off seem to be a small flame igniting an over-heated response: the father involved himself and his cudgel in a dispute between two boys. Second, on the *time* matter, the “upon the sudden occasion” proved no such thing: even if Royley was a world-class miler, he certainly needed minutes to cover the one mile, minutes in which reason could regain dominion over affect. *Time* and *provocation*, which physicists, psychologists, and ordinary citizens are apt to treat as relative and subjective, are herein treated as objective by the law. But even if we grant the law its objective perspective, the informational-words rule, and the rule about *time*, were about to conflict with another of its objective rules, this one regarding adultery.

In flagrante delicto cases are prototypes for most people of what constitutes “crimes of passion.”¹³⁷ “No ‘rule’ of adequate provocation was more firmly entrenched, even by the end of the eighteenth century, than that which proclaimed that a spouse (a husband, of course) who found his wife in bed with a lover, and killed one or both of them, was entitled to a reduction to manslaughter.”¹³⁸ Yet this well-established “rule” had qualifiers: *only* adultery could be adequate provocation, and just a suspicion of adultery was insufficient. Still, even with qualifiers, the rule was already bent in *Maddy’s Case*.¹³⁹

Maddy did not catch the act with his eyes, but with his ears, hearing informational words about an adulterous act. It cannot be just a *seeing* versus *hearing* distinction, for *Royley’s Case* contravenes. If Royley and Maddy both saw the provocative act, then manslaughter’s mitigation is granted; but when Royley hears of the beating and Maddy hears of the adultery, only Maddy loses. Along these lines, one can infer that if a blind man hears the unmistakable sounds of his wife’s *flagrante*, and kills, he would lose, where a seeing husband would not. If “blind justice” fails the blind husband, this division between informational words — beatings or adultery — fails to add up.

Of all the rules abstracted by commentators to define the parameters of manslaughter, the rule regarding *time* — killing

137. See e.g., *Regina v. Smith*, 4 Fost & F 1066 (1866), 176 Eng. Rep. 910; *State v. John*, 30 N.C. (8 Ired.) 330 (1848); *Paulin v. State*, 21 Tex. Crim. 436, 1 S.W. 453 (1886); *Maher v. People*, 10 Mich. 212 (1863). I have cited not the typical *flagrante* cases, where the spouse catches the other spouse in the act with the lover, for those cites would no doubt fill volumes, and return us to the dawn of time, which is slightly beyond the scope of this paper. More interesting, I submit, are the atypical *flagrante* cases, like those cited above, where the defendant hears of the infidelity, but does not catch the act with his own eyes.

138. Singer, *supra* note 19, at 256.

139. *Maddy’s Case*, 1 Vent. 158, 86 Eng. Rep. 108 (1672).

“upon a sudden,” in the heat of passion — seems almost axiomatic, yet no less problematic than other rules. The logic of this rule rests on considering the alternative: if the killing was not upon a sudden, but occurred after a cooling off period, it was then assumed that the actor’s blood and passions had cooled, his reason had been restored to its full apprehending and inhibiting strength, and full culpability and punishment should follow.

It was also assumed that the question of how much time must pass for cooling to occur was an *objective* question, one to be decided by the court rather than by the jury.¹⁴⁰ The assumption that “time” (1) inevitably cools passion, and (2) can be objectively determined by the courts, leaves two sorts of defendants in the murderous cold — “brooders” and “rekindlers.” Consider literature’s consummate brooder, Hamlet, who starts and stops, hems and haws, and finally, in Act V, does the deed he was given to do in Act I. Now consider *State v. Gounagias*.¹⁴¹ As Singer summarizes the case,

[t]he defendant, a Greek immigrant, had purposely killed the deceased. He sought to introduce evidence that he had been sodomized by the deceased and that for the next three weeks, the defendant’s friends, who had learned about the incident from the deceased, taunted him. The Washington Supreme Court held that this evidence had been properly excluded from the trial because, while the defendant might in fact have killed in passion, it was not “of a sudden.”¹⁴²

The Court offers an even more curious psychological “theory” to justify this decision.

This theory of the cumulative effect of reminders of former wrongs . . . is contrary to the idea of sudden anger as understood in the doctrine of mitigation. In the nature of the thing, *sudden* anger cannot be cumulative. A provocation which does not cause instant resentment, but which is only resented after being thought upon and brooded over, is not a provocation sufficient in law to reduce intentional killing from murder to manslaughter . . .¹⁴³

This proposition seems inconsistent with what we know from psychology, and with what common sense tells us about ordinary relationships. Adults who have suffered abuse in childhood, be it physical and/or sexual, may strongly react in the “heat of pas-

140. Singer, *supra* note 19, at 276.

141. 88 Wash. 304, 153 P. 9 (1915).

142. Singer, *supra* note 19, at 279.

143. *State v. Gounagias*, 88 Wash. 304, 153 P. 9, 14 (1915).

sion" in adulthood; others, traumatized by war, rape, and many other human and natural disasters, may suffer rekindling, flashbacks, and post-traumatic stress disorder (PTSD), which can feature sudden, passionate, even violent reactions to stimuli that normally do not evoke such responses. "Normal" individuals who have no diagnostic label often react long after the provocation has faded.

Brooders and rekindlers come together in that some new spark, be it internal or external, ignites an old flame. A legal theory that denies what seems fundamental about human nature risks losing support. The law seems to be embracing a stimulus-response simplism — a view that provocations always produce intense anger on the spot, and then they "die," becoming insufficient to trigger intense anger that is not premeditated revenge. For the Washington Court to tell Gounagias that the sodomy he suffered was over and done with, and that the subsequent taunts were insufficient by themselves, and, finally, that the sodomy and the taunts *do not go together or connect in any way* — seems preposterous. Such a legalism artificially keeps connected events in rigidly separate compartments; this compartmentalization, which would be clinically diagnostic to psychologists, will be rejected by laymen, who are imprisoned by no such legal reasoning.

As Professor Singer puts it:

[A] system which precludes evidence of words which actually enraged the defendant to the point of loss of self-control, which precludes evidence of his victim's adultery unless the defendant saw the physical act itself, . . . and which views the question of cooling off as one of law rather than of fact has, for all practical purposes, relegated the defendant to the sidelines. The issue of his culpability has, thus, been transformed into one to be measured by rules, rather than by his actual mental state.¹⁴⁴

The "final objectification" — the "quintessential 'rule' of objectivity — [is] the 'reasonable' or 'ordinary' man."¹⁴⁵ Yet this average man standard may ill-fit the likes of Gounagias. The ordinary person faced with taunts may not kill, but then the ordinary person has not been sodomized three weeks earlier. When individual variability is left out of the legal equation with only the mythical exemplar being considered, then the actual defendant becomes "persona non grata" at his own trial.¹⁴⁶ This is what happened to a young man, a Britisher named Bedder, who

144. Singer, *supra* note 19, at 280.

145. *Id.*

146. *Id.* at 262.

sought out a prostitute on the hope (to put it crudely) that he would get "screwed." His hope was not realized in the brothel, for his impotence was his undoing, but he got more than he bargained for in court. In *Bedder v. Director of Public Prosecutions*,¹⁴⁷ the "ordinary person" exemplar held in the end, rather than a standard more subjectivized and tailored to the impotent Bedder; thus, when the objective law was rendered, the law, like the defendant, was impotent.

Bedder, a seventeen-year-old, was told by a doctor that he was impotent; nonetheless, he hired a prostitute in a desperate hope that he might be able to perform. When he could not, the prostitute taunted and ridiculed Bedder, and he killed her in a rage. But in the instructions to the jury, instructions the House of Lords affirmed, Bedder's impotence was declared irrelevant, and the jury was told not to consider this fact. As Professor George Fletcher notes, we "can hardly say that the jury passed judgment on Mr. Bedder if they did not consider the most significant facts that influenced his loss of control."¹⁴⁸ "In effect, this meant that the legal issue to be decided by the jury was whether a reasonably *potent* man would have been incensed to the point of killing by taunts regarding his impotence. The question, of course, was silly"¹⁴⁹

B. *The Law Takes a Subjective Plunge*

The *Bedder* decision was promptly attacked, and three years later, via the Homicide Act of 1957, a subjective turn was taken, as the jury was now to consider everything done and said. In the United States, the Model Penal Code introduced "extreme mental or emotional disturbance," which was to be judged "from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."¹⁵⁰ This turns the question into a subjective inquiry. The objective reign had ended, and the law's subjective about-face put it on a path closer to commonsense justice. This may be an instance of Roscoe Pound's prediction, that when there is a "divergence between the standard of the common law and the standard of the public, it goes without saying that the latter will prevail in the end."¹⁵¹

In making a subjective veer, the Model Penal Code drafters not only shifted toward the direction common sense justice had

147. 1 W.L.R. 1119 (1954).

148. Fletcher, *supra* note 37, at 248.

149. Singer, *supra* note 19, at 289.

150. MPC, *supra* note 20.

151. Pound, *supra* note 11, at 615.

been taking all along, but went even further. In its "extreme mental or emotional disturbance" (EED) concept, the Code ended up severing all ties to objective reality. The problem with the EED standard is illustrated in two Connecticut cases, *State v. Zdanis*¹⁵² and *State v. Elliott*,¹⁵³ both of which dealt with "brooders" who killed victims without a provocative act by the victim. The appellate court in *Zdanis* made it clear that "virtually any reaction to any stimulus may be considered in an EED jurisdiction,"¹⁵⁴ and the appellate court in *Elliott* went even further:

The defense [of EED] does not require a provoking or triggering event; or that the homicidal act occur immediately after the cause or causes of the defendant's extreme emotional disturbance A homicide influenced by an extreme emotional disturbance is not one which is necessarily committed in the "hot blood" stage, but rather one that was brought about by a significant mental trauma that caused the defendant to brood for a long period of time and then react violently, seemingly without provocation.¹⁵⁵

The appellate courts' dicta is good news for the brooder, but bad news for the law. This EED construal reflects a naive and outdated subjectivity, where mental entities float about in the mind. In this sort of subjective law, as in this sort of mind, there exists a disembodied and disconnected EED, severed from its nexus to provocation on the front end, untied to control and action on the back end, yet producing mayhem, murder, and manslaughter in its wake. And if we are prepared to grant this EED alien such autonomy, it will surely claim mitigation as its due.

The MPC drafters, mindful that the objective rules for manslaughter had failed, turned, correctly it would seem, toward the subjective. This turn held the promise of greater alignment with commonsense justice and held out greater hope for doctrinal consistency. But while the direction was appropriate, the chosen path may not have been. This exclusively subjective path — a solipsistic slide into extreme emotional disturbance that deadends in a dark mind — remains problematic. Throwing the issue to jurors under these conditions may produce commonsensical rough justice despite the vagaries, or it might promote vague and disparate verdicts.

152. 182 Conn. 388, 391-97, 438 A.2d 696, 698-701 (1980).

153. 177 Conn. 1, 411 A.2d 3 (1979).

154. Singer, *supra* note 19, at 295 (regarding *State v. Zdanis*).

155. *Id.* at 295; *State v. Elliott*, *supra* note 134, at 7-8, 411 A.2d at 8.

C. *The Community's Subjectivity, with Objective Anchors*

In an experimental format, mock jurors confront the murder versus manslaughter question in two benchmark cases: *Bedder*¹⁵⁶ and *Gounagias*.¹⁵⁷ Certain case variables were manipulated to see the effects on verdicts, sentences, and subjects' reasons for their decisions. The general questions were these: How would varying the type and degree of provocation, the type of emotion engendered, the history of the actor, the context of the act, and the cooling-off time, affect verdicts and sentences in these brooder and rekindler scenarios? And would the subjects' commonsense reasons for their verdicts match, or depart from, the legal rules regarding manslaughter?

Subjects¹⁵⁸ were given two cases, variants of *Bedder* and *Gounagias*, called *State v. Bedder* and *New Mexico v. Cooper*, in random order. In *Bedder*, the variables of *context*, *provocation*, and *emotion* were manipulated. For *context*, one variation closest to the actual *Bedder* case reveals that the seventeen-year-old Bedder was told by several doctors that he was impotent, with the cause being physical and not correctable; in the second variation, the subjects were told that Bedder could not perform the sexual act with the prostitute, but they were not told of the impotence factor.

The second variable involved *provocation*, and there were two levels: the prostitute laughs and taunts Bedder, or she slaps Bedder in addition to laughing and taunting. The final variable was the *type of emotion* that Bedder claimed and displayed: in one variation, Bedder became *enraged* when the prostitute either taunted or slapped him, and after he repeatedly stabbed her and then fled, another customer and prostitute testify that they saw Mr. Bedder looking *enraged*; in the second version, Bedder claimed that he became *frightened* when the prostitute started taunting or slapping, and when he fled, the others testify that he looked *scared*. The question here is: Will subjects be more sympathetic to the emotion of fear as opposed to anger, and will fear lead to more manslaughter verdicts?

In the *Cooper* case, though there were eight conditions, the size of the defendant and victim is held constant: Cooper is a 37-year-old man, who stands 5'3" and weighs 118 pounds, while the 30-year-old Santiago stands 6'4" and weighs 265 pounds. The first condition parallels the *Gounagias* fact pattern, where Santiago sodomizes Cooper one night, and Cooper leaves the restau-

156. *Supra* note 147.

157. *Supra* note 141.

158. There were 95 college students serving as subjects.

rant angry and humiliated. For the next three weeks, Santiago repeatedly taunts Cooper, who finally picks up a knife and stabs Santiago to death following the last taunt. While this version represents a rekindling case, it is called "frequent rekindling," since the taunts occur often. A second version tests the effect of only one rekindling (taunting) episode. The third version tests brooding versus rekindling: here, Cooper returns to the restaurant after three weeks, but Santiago makes no taunts, yet Cooper picks up the knife and stabs Santiago. If the brooder case is perceived more like a premeditated murder than a rekindling case, we would expect harsher verdicts and stiffer sentences.

The essential feature of either rekindling or brooding is that time has passed between the provocation (e.g., the sodomy) and the killing, time for the blood to cool and malice aforethought to form. In the next two conditions, we manipulated *time* by expanding or shrinking it. In condition four, Cooper returns to the restaurant six months later to pick up his last check, Santiago taunts him, and then Cooper kills; the time interval has now expanded to six months. In the fifth condition "time" shrinks to zero: this becomes a heat of passion case, where Cooper kills immediately after being sodomized, and this serves as a control group for the rekindling and brooding cases.

There is still another control group which leaves in the taunt but takes out the sodomy: here, in the sixth condition, Cooper is not sodomized but kills after Santiago makes certain taunting comments which Cooper alleges brought back hurtful memories from his past. This condition should yield the fewest manslaughter verdicts, if the sodomy is indeed the crucial provocation. If the sodomy is irrelevant, as the *Gounagias* court claimed, then the verdicts and sentences in this case should look like the rekindling case, as both defendants kill immediately after a taunt.

The last two conditions push *context* even further. In both cases, the defense presents historical evidence that Cooper was raised by a physically abusive father; thus when the sodomy occurs Cooper's slate and psyche are not blank, but already sensitized, like Bedder was sensitized by his impotence. Now we will see if jurors widen context still further to include evidence from the distant past. In condition seven, there is history of physical abuse, then the sodomy, then the rekindling taunt three weeks later, and then the killing. In condition eight, there is history of abuse, sodomy, and a brooder who sees the victim three weeks later, and kills.

The results reveal that *Bedder* produces significantly more second degree murder verdicts and fewer manslaughter verdicts than *Cooper*. Approximately two-thirds of the verdicts in *Bedder*

were second degree murder, whereas slightly more than half the verdicts were voluntary manslaughter in *Cooper*. In *Bedder*, neither context (impotence versus no impotence), nor provocation (laugh versus slap), nor emotion (fear versus anger) produce a significant effect on verdict. In contrast, the *Cooper* case reveals a number of significant differences. First, in what was not obvious to the *Gounagias* court but was to these mock jurors, the sodomy makes a difference: when there is no sodomy but only a taunt, the voluntary manslaughter verdicts are the lowest; when the sodomy occurs and Cooper kills in the heat of passion, voluntary manslaughter verdicts dramatically rise; and when the killing occurs three weeks after the sodomy, following frequent rekindling episodes or a single episode, manslaughter verdicts remain high. A second significant difference is between brooding and rekindling cases, with brooders being judged more harshly: the rekindling cases average approximately 70% manslaughter verdicts, whereas brooding cases average about 40%.

There are also surprising nonsignificant differences. For one, *time* does not seem to matter. For example, there is no significant difference between the immediate killing in the heat of passion and the rekindling case where the killing occurs three weeks later; in addition, there is no significant difference between the three week and the six month rekindling cases. Hence, "cooling off time," an issue so central for the courts, seems moot for these mock jurors. Finally, the background *context* was not significant. Thus, while sodomy is a central contextual factor, the jurors limit the contextual field and give little weight to distant past history.

"Verdict" is not the only measure of a defendant's "culpability:" it is quite possible for two defendants to get the same verdict, yet jurors judge one of them more blameworthy when it comes to sentencing. Mock jurors had the option of sentencing defendants to jail time — from "no time" up to "life imprisonment."¹⁵⁹ The sentences for the *Bedder* case reveal significant differences for *provocation* and *emotion*. Sentences were lower when the provocation was a slap rather than a taunt, and sentences were lower when the emotion was fear rather than anger.

The *context* effect turns out to be not significant; in fact, sentences were higher in the impotence than in the no impotence condition. Some jurors invoked the concepts of negli-

159. Our decision was not to restrain jurors' predilections by providing sentencing ranges for the verdicts, so a more open sentencing format was used; while this may yield sentences lower and higher than what a judge might give using guidelines, what we get here is "community sentiment" unfettered.

gence or recklessness in their reasons: they argued that Bedder knew he was impotent and chose to put himself in a situation where failure and provocation were all but inevitable; for this, he bears additional culpability.

For *Cooper*, there was a large significant effect among the eight conditions. Planned comparisons revealed that the one condition where there was no sodomy received much higher sentences than all of the sodomy cases. The brooder cases received significantly higher sentences than either the rekindling cases or the heat of passion case. There was no significant difference between the heat of passion condition and the rekindling cases. As with verdict results, "time" does not seem to matter in terms of sentences, as there were no significant differences among six month rekindling, three week rekindling, and the immediate, heat of passion killing. And again, distant context had no effect on sentences.

The mock jurors' reasons for their decisions were categorized and analyzed, with three clusters emerging. The first cluster is called "intent versus emotion." This cluster represents the essence of the legal debate. If emotion is great, it negates malice aforethought, and if emotion is not great enough, intent to kill may be present. In cluster two, provocation, threat, and control cluster together, and is called "control." Jurors seem to be judging the degree of provocation, the sort of threat that might pose, and the degree of control the defendant had. These factors seem to be an admixture of objective and subjective factors: control seems more subjective, requiring an inference into what is not observable, while provocation and threat can be viewed either subjectively or objectively. Finally, the third cluster is called the "subjective reasonable person." Here, the context factor, as in Bedder's impotence and Cooper's sodomy, plays a dominant part. Context affects and subjectivizes "time," as rekindling makes the past present, and subjectivizes the objective reasonable person, for jurors see the drama through the subjective eyes of the defendant, who did not premeditate. Thus, while objective and subjective factors mix in differing ways, there is a decidedly subjective caste, particularly so for the voluntary manslaughter verdict jurors.

Mock jurors do not restrict their constructs and discriminations solely to the legally designated dimensions. In *Bedder*, the legal fight was over whether jurors should hear about his impotence. Our mock jurors who heard of his impotence were no more inclined toward manslaughter than those who did not; yet these jurors brought into play contributory negligence or recklessness.

In *Bedder*, while there was confirmation that a slap is adequate provocation but a taunt is not, there was clear evidence that jurors weigh the *particular* emotion — fear or anger — in their sentencing decisions. This suggests that people are more sympathetic to “scared” than “enraged,” and further suggests that it is not just the *heat* of passion, but *type of passion*, that determines verdict.

In *Cooper*, we have a number of disparities between what the *Gounagias* court said and did, and with what mock jurors did and said. First, where *Gounagias* was found guilty of second degree murder, *Cooper*, in the rekindling case, gets manslaughter 85% of the time. Beyond the sizable verdict difference is the reason for the difference: mock jurors weigh the context of the sodomy heavily, where the *Gounagias* court gave it no weight at all. In doing so, mock jurors thus extend “time” beyond the legal “moment of the act.” In a psychological sense, jurors shrink “time,” as the poet penned, such that “time past” now becomes “time present.” Yet, their “shrinking” of time was neither unrestrained nor indiscriminant, for where they included the sodomy they did not use the distant history of abuse to mitigate further. Thus, “relevant context” is bounded, and does not extend, in some fearful infinite regress, into ancient acts that wash all sins away.

In bringing the sodomy into the context, a strong subjective caste results. We cannot say, as we might of a rose, that “a taunt is a taunt is a taunt.” The provocation is subjective, determined in part by the contextual history of the defendant, which then affects attributions about how much emotion he is feeling, his sense of threat, and his degree of control. *Case facts* are important, yet the jurors’ *constructions* are even more dispositive of verdict. Facts, the objective ground, are construed and translated into a subjective story, where psychological attributions and interconnections are made. This is illustrated in the different attributions made for the brooder and rekindler. For the brooder, because there is not even a taunt at the moment of the deadly act, mock jurors are more likely to construe premeditation or malice aforethought. In contrast, the rekindler reacts to something in the external world — what the victim does or says. Mock jurors understand that external, objective, and “real” taunts can awaken sleeping passions, and their verdicts and reasons reveal greater sympathy and mitigation for the rekindler than the brooder.

V. CONCLUSIONS

A. *Context*

Across the venues of accessory felony-murder, insanity, and manslaughter, the paths of black-letter law and *commonsense justice* diverge regarding culpability, sometimes rather sharply. One reason for divergence is *context*. At times, citizens frame cases in ways that yield a different set of relevant factors and a different overall "picture" than the law's construction. An easy generalization, albeit an over-generalization, is this: the commonsense context is typically *wider* than the law's.

This wider view is taken in regard to current context, where jurors weigh more factors than the law's sanctioned elements in cases of accessory felony-murder, insanity, and manslaughter. This wider view extends backward and forward in time, thereby giving a different historical context to the drama at bar. Where the law seems to freeze the frame at the moment of the act, and then zooms in on a specific set of determinative variables, the commonsense context, like a motion picture, conveys actions before, during, and even after the moment of the act.

"Freezing the frame" may produce high resolution, when it comes to still pictures, but it can produce absurdity when it comes to justice, as the failed "manslaughter" cases of *Bedder*¹⁶⁰ and *Gounagias*¹⁶¹ illustrate. Had Gounagias picked up a weapon immediately and killed his sodomizer, this heat of passion and "of a sudden" reaction surely would have resulted in manslaughter; but by waiting, by brooding, by letting time pass, the legal moment of the act passes into the future, as the sodomy fades into the legally irrelevant past. Now, after three weeks of taunts by the deceased and his friends, Gounagias picks up a weapon and kills. If the killing defines the relevant "moment of the act," then the provocation is no longer the sodomy but the taunts; yet taunts *per se*, by an objective rule that deems "mere words" insufficient as a provocation, will not mitigate the crime to manslaughter.¹⁶² In a narrow context that begins with a taunt and ends with a death — the most important "fact" — the sodomy — is not even in play.

In the law's frozen moment, high-resolution portrayal, events occur *in time*, rather than *in mind*: in *time*, events begin, end, and then they are no more; in *mind*, subjective events have a mental and emotional half-life that may linger long after the

160. *Bedder v. Director of Pub. Prosecutions*, 1 W.L.R. 1119 (1954).

161. *State v. Gounagias*, 88 Wash. 304, 153 P. 9 (1915).

162. Singer, *supra* note 19.

objective event has gone. If jurors are instructed to take *in time* view, and they follow that instruction, can it be said that they really pass judgment on Gounagias?

To commonsense justice, the sodomy may be in play because some view it as *the* provocation, despite what the law says, and despite the fact that it occurred weeks earlier; in this view, *time* is more relative, subjective, and psychological, rather than fixed and immutable, but it also represents a jury nullification, as jurors would be rejecting the legal conditions for judging manslaughter. In a second way that the sodomy can be in play, there is no nullification *per se*, rather, the sodomy is seen as part of the *relevant* context, giving meaning to the current provocation of taunts. In this view, jurors may reason that the deceased and his friends were not taunting "the ordinary person" who had not been sodomized; they were taunting Gounagias, who had been. This view personalizes and subjectivizes the actor and the action.

To treat taunts *a-contextually* and *objectively* is to take the subjective and psychological out of the human judgment, and to take the person of Gounagias out of the picture. This would yield a stimulus-response simplism which reduces stimuli to objective and invariate properties, which in turn produce responses that fit the preordained category of manslaughter, or not. Where *Gounagias* omits a relevant *act* from the context, *Bedder* omits a relevant *personal fact*, his impotence. This element of *Bedder's* personal history may well be relevant to how *Bedder* reacts to "mere word" taunts. In a legal view that circumscribes context to the moment of the act, the past may not matter; in such a stimulus-response matrix, the history and context may be omitted. But to *commonsense justice*, this less-than-human way of judging human actions, intentions, and culpability is rejected.

When black-letter law arbitrarily foreshortens context, it creates a restricted causal or culpability matrix as well. In dramatic terms, the law's context is limited to the climax and denouement, that place on Freitag's Triangle¹⁶³ where the deadly resolu-

163. JOHN BARTH, *LOST IN THE FUNHOUSE* 91 (1969). "Freitag's Triangle," probably named by a literary rather than literal type, is not actually a triangle, for this schemata often is pictured with four lines, or three lines that do not touch and close at three points. Beginning with a horizontal line, this represents the opening or exposition of the story. Then the line slopes up, indicating the development of plot, characters, and dramatic action, and this "rising action" line continues up to the dramatic high point, where the climax occurs. Then the line plunges downward, at a sharp slope, as the climax is resolved in the denouement. Using this diagram, the "crime" and moment of the act occur at the high point, and the court case that resolves the drama occurs during the denouement.

tion of the conflict occurs. Within the dramatic analogue, the law omits the exposition, the beginnings of the conflict, the rise in the action, and how complication occurs in the development of the conflict leading to the climax. By contrast, *commonsense justice* typically widens the context to embrace the full-blown drama. People want to know what happened before the act, and to understand the actions, motives, and emotions that pushed the drama to this point. In short, they want to know *the story*, and, in that regard, a fuller context is essential.

Widening the context does run risks. For one, neatly drawn distinctions between criminal law and civil law may blur. Yet, as Kalven and Zeisel¹⁶⁴ noted some time ago, jurors do not fully embrace this distinction, and often view the culpability context as embracing both victim and defendant. This is particularly so when victim and defendant know one another, as in a heat of passion situation, where jurors are likely to be weighing the actions and intentions of both parties. So if the victim's provocations were flagrant, yet short of sticks and stones, jurors may mitigate the defendant's culpability, even if it does not precisely fit the manslaughter rules.

From the law's perspective, jurors' parsing culpability among participants is not what the law asks; to do so might bring extralegal and impermissible factors into play. That may be true from the legal context, but from the commonsense view, this is a social drama, and to extract one of the parties from the social web and then isolate the analysis on this individual's actions and intentions exclusively, seems contrived. Much may be lost in such a translation.

Black-letter law might well argue, as Holmes¹⁶⁵ did, that its business is not God's business: instead of judging all, it only judges *the one* who allegedly broke the law. When jurors stray from the sole function of judging the individual to parsing and apportioning blame, justice will suffer. If the law artificially isolates on a person, an act, and a finite period of time, it does so in order to make a "cleaner" culpability judgment. But if the claim is that a wider context produces a "messy" and less distinct culpability judgment, some lessons from insanity contravene this claim.

In insanity, *commonsense justice* widens the law's context to consider a second type of culpability — for bringing about the mental disorder. While adding complexity, this type of culpability is consistent with the law in other venues, where causing the

164. KALVEN & ZEISEL, *supra* note 6.

165. HOLMES, *supra* note 10.

conditions of one's own defense is properly weighed. It is also consistent with attributions of responsibility in social judgments. Thus, it might be said that *commonsense justice* brings into the context not an extralegal factor, but a legal one that has been overlooked or conflated in the law's narrowness.

B. *Subjectivity and Idiography*

If *context* defines the contours of the field and the factors in play, then *perspective* concerns the point of view we take when regarding those factors. The outsider versus insider, or objectivity versus subjectivity, dilemma continues to bedevil legal theory.¹⁶⁶ Where black-letter has been divided, *commonsense justice* consistently seems to take a more subjective perspective.

In *The Common Law*,¹⁶⁷ Holmes sought to situate the law in the objective sphere: law works, he said, "within the sphere of the senses"¹⁶⁸ and remains "wholly indifferent to the internal phenomena of conscience." The subjective realm that so captivates novelists is of no concern to the law, says Holmes; subtext is for the literary, not the legal, as "the standards of the law are external standards."¹⁶⁹

In trying to make his objective jurisprudence work, Holmes denudes terms like "malice" of motive and feeling, leaving a dry cognition that certain consequences will follow. By invoking the "reasonable man" exemplar, Holmes avoids a subjective inquiry into what this defendant knew, for it is enough to know that the prototype would have known. Holmes noted that the law makes no "attempt to see men as God sees them."¹⁷⁰ Whether God would approve or not of Holmes' creation, we cannot say; but what we can say is that ordinary citizens do not see men as Holmes saw them. His *tour de force* falls flat, as *commonsense justice* rejects such extreme objectivism.

In creating a story of what happened and why, jurors seem quite comfortable in "dropping into" the shoes of the defendant and looking at the events subjectively. More than just comfort, the subjective view seems necessary to make an adjudication. For jurors to construct a story that makes sense, that story must explicate the motive and intentions of the actor; here, jurors plunge

166. FLETCHER, *supra* note 37, § 3.1.2; while a page cite is given, this objective versus subjective theme and dilemma runs throughout this important work.

167. HOLMES, *supra* note 10, at 43.

168. *Id.* at 110.

169. *Id.*

170. *Id.* at 108.

into the subjective waters rather than remaining on dry land, with prototypic answers.

More than just subjectivity, there is idiography: jurors look at each defendant's culpability, rather than treating culpability *en masse*. This preference is most clear in cases where the accessorial liability and felony-murder rules conjoin, where these rules yield equalist culpability. Yet over and over again, subjects reject these objective rules, and evaluate each defendant's intentions and actions. Where black-letter law sees felons as fungible — jurors see them as individuals, with their own levels of culpability, which requires an idiographic assessment, despite the law's directions.

For *commonsense justice*, "intent" is the cornerstone of culpability, far more than objective acts or rules. Unlike Holmes' deconstructionist, constructionist, and minimalist treatment of intent, *commonsense justice* not only gives intent centrality, but dresses it with layers of emotion, motive, and meaning that leave intent far removed from the denuded, skeletal remains of Holmes' objective prototype. When the law erects formal rules, restricts the view to the objective, or props up a prototype to answer the question, the law runs counter to the jurors' powerful and prevailing subjectivity and idiography. "Intent" — when it is neither denuded in a Holmesian way nor formally pulled from a hat in the legal legerdemain called felony-murder — is subjective.

"Subjectivity" often arouses a countervailing fear — anarchy. Will jurors lose their way amidst the subjective and, more importantly, will the law lose its way? We have some evidence on this, at least for the specific areas of insanity, accessory felony-murder, and manslaughter. If jurors yielded entirely to the subjective, then insanity cases where delusional beliefs trigger the act would have a high acquittal rate; yet we know that NGRI acquittals are rare. In accessory felony-murder cases, accessories are routinely found guilty, but not for murder. And in manslaughter, where brooder versus rekindler differences were found, jurors seem to demand that provocations occur *in reality*, and not just in the mind. Jurors, then, are not yielding entirely to the subjective.

The subjective element, *mens rea*, turns out to have more nuance for citizens than for the black-letter law. When jurors see more shades to *mens rea* than the law either sees or sanctions, these distinctions with a difference can create a verdict problem. A dramatic example of shades to *mens rea* is in accessory felony-murder, where jurors see nuance just where the law asks them not to. When subjects are asked to determine *mens rea*, they do so *for each defendant* — by considering all that was done, against

what might have been done. Rejecting formulaic determinations of *mens rea*, subjects balk at transferring the intent from one crime to another, and outright rebel at transferring the intent from one defendant to another. Determining intent is individualized, and thus the law's biblical foray into making felons their brother's keepers and equal-time cellmates, is rejected.

But what happens when jurors find some culpability, but not the specific intent for the offense charged, and there is no lesser included offense? In short, what if jurors are confronted with an all-or-nothing situation? Insanity has been just such an all-or-nothing situation for over two hundred years. And while the law presents jurors with this black-or-white picture, empirical evidence shows that subjects see shadings. "Diminished responsibility" is one shade that falls between "completely culpable" and "not culpable at all." Another shading involves culpability for bringing about one's mental condition, which subjects recognize but the law does not. When the law's verdict categories conflate two distinct culpability judgments people make, or conflate gray into either black or white, the verdict may appear wrongful. Yet that is far different from concluding that the jurors arrived at the wrong verdict.

The problem of too few categories cuts across a wide swath of criminal law.¹⁷¹ In manslaughter, we see the same problem again, even though manslaughter itself can be viewed as an in-between culpability verdict. But when manslaughter is bound tightly to the provocation and a response that must be "of a sudden," then brooders and rekindlers are not only out in the cold, but entrapped by a murder conviction. But being bumped up to murder may not fit this defendant's *mens rea*; if jurors can see a difference between the murderer's *mens rea* and this defendant's, then the problem of too few categories arises again. Ignore the difference and follow the law, reconstrue the categories to create some *de facto* fit, or nullify, seem to be the unenviable choices.

171. In self-defense law, for example, where the area of "mistaken or putative self-defense" remains a theoretical backwater, we see that a defendant who makes a mistake can be in very deep water. If we require a defendant pleading self-defense to meet an objective set of prerequisites, then a defendant's mistaken belief that there existed a serious threat when there was none may doom the defense. But a consequence is that jurors are then asked to regard the defendant as a murderer; since there was no objective threat, hence no "provocation," manslaughter is not a likely fit. But neither is the crime of second or first degree murder likely to fit the case of mistaken self-defense. What do jurors do with such a defendant when the verdict categories do not fit?

C. *Proportionality*

Mens rea and culpability are measured, and the measure for measure turns out to be *proportionality*. The verdict and sentencing evidence suggest that people must be invoking some sort of *blameworthiness* scale when a task, like judging guilt or setting a sentence, calls for it. Moreover, the evidence suggests that these individualized blameworthiness scales must comport rather closely, since verdicts and sentences, while not uniform, do align to a significant degree. We see the principle of proportionality being invoked when jurors try to find a mitigating verdict, attempting to match a verdict to the blameworthiness they perceive. In insanity or diminished responsibility cases, subjects try to find the right equation for this defendant, invoking a contextual scale on which they will situate this defendant below the more culpable and above the less culpable.

The potency of *proportionality* can be seen most dramatically in situations where the law tries to forbid it, as in accessory felony-murder where the law asks jurors to treat the principal and all accessories equally; in capital cases, that might mean death sentences for all. Yet time and again subjects cast aside equalism in favor of proportional treatment of defendants. This is not just an adult phenomenon, for in experimental work with children on felony-murder-like scenarios we see how deeply and early proportionality reigns.

If a punishment does appear to violate the Eighth Amendment's prohibition, the Supreme Court may strike it down. But we have seen that *commonsense justice*, working through the jurors who are the conscience of the community, can exercise their judgments on crime and punishment, on *mens rea* and culpability, and what proportionately fits; and where the law's path and the community's path part company, *commonsense justice* can express its own check and balance, through a variety of nullifications, to register its corrective.

While *commonsense justice* does not command the "truth," it nonetheless demands respect: not because it is anarchy waiting to happen, but because it invokes just those sacred precepts of justice embedded in *mens rea* and proportionality. Rooted in a legal history far older than our Constitution, the jury, the conscience of the community, speaks: it decides guilt, and sometimes the life-or-death fate of a defendant. Jurors may not have the right to decide the law in most states, though they certainly have the power to nullify in all states. That power has been endorsed and condemned, seen as justice and as anarchy, but in

the end jury discretion remains an established and affirmed fixture within the law.

When put under an “experimental” microscope across a number of legal venues, the context and perspective that jurors take seem solid, substantial, and sound. Its moral groundings are rooted in *mens rea* and the principle of proportionality, roots that have clutched at our law for centuries. Citizens apprehend a depth to *mens rea*, but also perceive its nuances, and when they see distinctions worth making rather than ignoring, they will try to register these distinctions . . . somehow. They also make proportional distinctions among types of crimes and criminals, and attempt to fit punishment to blameworthiness. *Mens rea* and proportionality already constitute a well-worn path within black-letter law. In calling the law to listen to the community’s sentiment and to see its path, this is not a call to the law to heed unprincipled sentiment or follow some dead end; rather, it is a call to hear what the law may have forgotten or lost sight of — the deeper roots of justice.