

# Morality and Pretextuality, Psychiatry and Law: Of "Ordinary Common Sense," Heuristic Reasoning, and Cognitive Dissonance

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The thesis of this paper is that we will not make significant progress in understanding the tensions between the legal and mental health systems until we look carefully at a series of dissonances that affect both systems. We must consider the way that the law frequently condones pretextuality as a way of dealing with troubling or cognitively dissonant information, and the way that mental health professionals encourage a self-referential concept of morality as a way of subverting legal doctrines with which they disagree. These dissonances must be considered contextually in connection with the ways that courts generally read social science data and the ways that jurors and legislators employ such cognitive devices as "ordinary common sense" and heuristic reasoning in their judgments of cases involving mental disability questions. To ameliorate the current dilemma, we must redefine institutional and professional roles, reconsider the way we privilege expertise, recalibrate our allocation of "moral jurisdiction" over these matters, and consciously confront the way our simplifying thinking mechanisms distort the underlying social and political issues.

The law prides itself on its fairness and its inherent sense of rationality.<sup>1</sup> The

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legal trial process presupposes an ascertainable "truth" as a basis for testimony,<sup>2</sup> and severe sanctions are imposed for the commission of perjury.<sup>3</sup> Psychiatry and psychology, in turn, reject notions of a unitary concept of "reason," pointing out that the range of human behavior is infinite, and that unconscious variables and processes, conflicts, anxieties and defenses—the *irrational*—are frequently the primary causes of behavior.<sup>4</sup> The mental health professions also counsel practitioners not to impose their sense of "morality"

on patients or clients,<sup>5</sup> nor to employ their authority as a defense in dealing with such clients.<sup>6</sup>

At the point that these two systems intersect, something strange happens. Perhaps because of the "substantial gulf between scientific and legal discourse,"<sup>7</sup> perhaps because of the different training received by mental health professionals (MHPs) and lawyers,<sup>8</sup> perhaps because of the public's radically differing perceptions of the substance of law and the mental health professions,<sup>9</sup> those who are involved in both professional arenas must consider the way that these internal and inherent differences create tensions that have a measurable effect on what happens when these cultures collide, especially in the forensic mental disability system.

I propose to look at this collision from several vantage points that, to the best of my knowledge, have not been seriously explored: from the perspectives of the way that law—the system extolling "truth" as a highest virtue—adopts *pretextuality* as a means of dealing with information or situations that it finds troubling or dissonant, and the way that the mental health professions—the systems that counsel against attributions of "morality" in interpersonal dealings—impose a self-referential concept of *morality* in dealing with legal interactions. I will argue that, if we are to understand *why* the historic relationship<sup>10</sup> between the law and the mental health professions is seen as a rocky one, characterized variously as an uneasy detente, a shotgun marriage, or a *marriage de convenance*,<sup>11</sup> it is necessary to consider

the question through these two filters of pretextuality and morality.

Let me suggest several overlapping premises. First, much of what lawyers say about forensic testimony is pretextual.<sup>12</sup> Second, much of what forensic mental health professionals who frequently wear the hat of expert witness say about individual cases is similarly pretextual, ostensibly for reasons of "morality."<sup>13</sup> Third, much of the way judges interpret forensic testimony is teleological.<sup>14</sup> Fourth, much of the way that jurors feel about all of this is highlighted by overwhelming ambivalence.<sup>15</sup> Fifth, much of what legislators try to do in this area appears to be overwhelmingly futile.<sup>16</sup> Sixth, very few of the rest of the public cares very much about all of this almost all of the time, but do care intensely about all of it in the case of the rare "moral mistake," especially when it involves one of the rare but dreaded "false positives."<sup>17</sup>

I further propose to show that (1) little of any of this can be coherently explained without refuge to such cognitive psychology constructs as heuristic reasoning, psychological reactance, and cognitive dissonance;<sup>18</sup> (2) the relationship between the mutually symbiotic systems of law and forensic mental health is an increasingly more fragile one, and, as the Hinckley acquittal demonstrated, one vivid, outrageous case can wipe out the results of years of study, collection of empirical data, and reflective inquiry into any aspect of the mental health system<sup>19</sup>; and (3) most of what is written—in both law and the mental health professions—utterly ignores both

of my major premises as well as these two propositions.<sup>20</sup> My hope in writing this paper is that both lawyers and mental health professionals will come to recognize that, even if the pursuit of agreement<sup>21</sup> appears to be beyond us, we can at least acknowledge that there are bridges to be built.

### **Pretextuality of Law**

To label the law as pretextual might sound a bit presumptuous or nihilistic, but I do not mean to be either.<sup>22</sup> What I am suggesting is this: there is a dramatic tension between those areas in which courts accept (either implicitly or explicitly) dishonesty in certain subject-matter areas and those where they erect insurmountable barriers to guard against what they perceive as feigning, malin-gering, or other misuse of the legal system.<sup>23</sup>

Several varying examples should illustrate the phenomenon. Regularly, in search and seizure suppression motion hearings,<sup>24</sup> courts wink at police testimony that suggests that the defendant, after “gesturing furtively,” dropped a glassine envelope containing a powdery substance in plain view of the officer, and then subsequently and spontaneously blurted out, “That heroin is mine.” This testimony is clearly pretextual,<sup>25</sup> as are statements by legislators that their rationale for a “moment of silence” bill had nothing to do with school prayer, and was merely to insure that students had time for “private contemplation and introspection.”<sup>26</sup> Again,

courts accept this uncritically and at face value.

Elsewhere, studies confirm that the mandated provision of free counsel to indigents facing imprisonment upon conviction is frequently subverted by both economic and political factors well known to, but ignored by, those responsible for such provision of counsel,<sup>27</sup> again with little perceptible impact on actual practice.<sup>28</sup> In yet another sort of example, even though the District of Columbia Code contains a provision that patients can invoke seeking either periodic review of their commitment or an independent psychiatric evaluation, evidence developed in a recent case revealed that, in the 22 years since passage of the relevant law, not a single patient had exercised his rights to this statutory review.<sup>29</sup> Finally, a recent opinion by Justice Scalia on the “lawyers’ question” of what weight is to be given to congressional debate in determining a statute’s meaning—in which he characterized interpretative rules that assume a common understanding on the part of each congressperson as to the meaning of the enacted legislation as a “benign fiction”<sup>30</sup>—suggests that the Supreme Court is, in some areas, willing to concede the pretextuality of some level of legal decisionmaking.

An even more troubling example is the Supreme Court’s decision in *McCleskey v. Kemp*,<sup>31</sup> rejecting the use of statistical evidence offered to show systemic racial discrimination in Georgia prosecutors’ decisions to seek the death penalty, and in jurors’ decisions to impose the death sentence based upon the

victim's race.<sup>32</sup> Following *McCleskey*, in order to prevail, the defendant must show "that the decisionmakers in *his* case acted with discriminatory purpose,"<sup>33</sup> a standard that, presumably, intelligent Georgia prosecutors will be able to avoid.

Contrast this *acceptance* of pretextuality, on the other hand, with the court's well-documented "fear of faking" in response to any argument seeking expanded admissibility of testimony as to mental disability in a variety of criminal procedure settings,<sup>34</sup> as evidenced in Chief Justice Rehnquist's regular invocation of "parade of horrors" arguments in such cases.<sup>35</sup> Similarly consider courts' "ordinary common sensical" (OCS) beliefs<sup>36</sup> in popular myths that have arisen as to such issues as "the litigation explosion,"<sup>37</sup> the frequent use of exaggerated testimony in personal injury cases,<sup>38</sup> or the insubstantiality of most prisoner *pro se* writs.<sup>39</sup> The fact that former Attorney General William French Smith could tell Congress that the insanity defense "allows *so many persons* to commit crimes of violence"<sup>40</sup> at the same time as one of his top aides candidly conceded that the number of such cases "is really probably statistically insignificant"<sup>41</sup> speaks for itself.<sup>42</sup>

This paradox reflects two deeper issues: the cognitive dissonance<sup>43</sup> that is caused when legal decisions violate social norms, and our refusal to acknowledge the extent of this dissonance. Courts apparently allow (perhaps encourage) pretextuality so as to mediate the (perceived) draconian impact of imposed-from-above constitutional deci-

sions (or, in the case of the U.S. Supreme Court, decisions such as *Miranda v. Arizona*<sup>44</sup> or *Mapp v. Ohio*<sup>45</sup> that it is institutionally unwilling to overrule),<sup>46</sup> at the same time that they fantasize about *feared* pretextuality in cases where anecdotal myths prevail or where unconscious values predominant.

This tension should help to explain some of the discomfort courts feel with forensic testimony in mental health cases (both civil and criminal). Decisions such as *O'Connor v. Donaldson*<sup>47</sup> (setting out a constitutional right to liberty), *Jackson v. Indiana*<sup>48</sup> (applying the due process clause to incompetency to stand trial commitments) and the line of cases following *Lessard v. Schmidt*<sup>49</sup> (applying procedural due process to all aspects of the involuntary civil commitment system) have never been popular with trial judges or with court administrators for a variety of instrumental, functional, normative, and philosophical reasons.<sup>50</sup> Notwithstanding the staggeringly unanimous data base of empirical evidence to the contrary,<sup>51</sup> trial judges continue to see the insanity defense as a wily lawyer's ploy, in which "soft," "bleeding heart" expert witnesses dupe gullible jurors into returning inappropriately exculpatory verdicts.<sup>52</sup> As one result, the legal system winks broadly at testimony that talismanically finds "dangerousness" (based on behavior that, in reality, shows either a need for treatment or an ability to provide optimal care for oneself)<sup>53</sup> or that denies nonresponsibility in criminal *and* civil cases where defendant's acts reflect textbook levels of mental disorder and pathology.<sup>54</sup>

In some instances, courts' reasoning appears phantasmic. In one recent case, turning on whether a defendant had the requisite specific intent to attempt a bank robbery, a federal district court refused to allow a county jail psychiatrist to testify that he had been prescribing antipsychotic medications for the defendant for a particular purpose and for a period of time, reasoning that such testimony "might be interfering with the treatment of [other] prisoners in jails because [other] prisoners might ask for more drugs to create the impression they need more drugs."<sup>55</sup> Nowhere in any opinion in the case does it appear that there was ever *any* evidence introduced that spoke remotely to this issue; yet, the Ninth Circuit affirmed this decision as "not manifestly erroneous," offering no explanation for its finding.<sup>56</sup>

### **"Morality" of Mental Health Professionals**

It is now necessary to consider the specific reading of "morality" engaged in by certain forensic mental health professionals.<sup>57</sup> We should begin by reflecting upon Bernard Diamond's<sup>58</sup> concern that, because of a witness's unconscious identification with one "side" of a legal battle or more conscious identification with his own value system or ideological leanings, his "secret hope for victory for his own opinion [may lead to] innumerable subtle distortions and biases in his testimony that spring from this wish to triumph."

Research by Homant and Kennedy<sup>59</sup> similarly seems to show that experts'

opinions of insanity defense claims are positively correlated with the witness's underlying political ideology. Ben Bursten has argued further that *any* decision as to whether behavior is a product of mental illness is *not* a matter of scientific expertise, "but a matter of social policy."<sup>60</sup> We similarly cannot blind ourselves to the possibility that, in a whole variety of fact-settings, social bias frequently "infects and hides behind scientific judgments."<sup>61</sup> Other studies seem to confirm the influence of ideology on evaluators' assessments of civil psychic trauma cases.<sup>62</sup> These positions and findings must be weighed against the backdrop of other research that demonstrates that an overwhelming percentage of all experienced forensic MHPs have significantly mistaken beliefs about the substantive insanity defense standard actually employed in their jurisdiction.<sup>63</sup>

Thus, when involuntary civil commitment criteria were significantly tightened in the 1970s,<sup>64</sup> it should not be surprising that some—but not all<sup>65</sup>—MHPs responded fairly negatively to these developments, frequently seen as "turf invasions."<sup>66</sup> In a series of papers, Dr. Paul Chodoff, a prominent psychiatrist, suggested that experts go along with legal standards "as long as they are. . .not tyrannical,"<sup>67</sup> that they neither "acced[e] too readily to current trends" nor "succumb to prevailing fashion when they are convinced that it is not always in the best interests of [their] patients,"<sup>68</sup> and that, in spite of legislative or judicial standards mandating a dangerousness finding as the *sine qua non* of involuntary hospitalization, a

"wise and benevolent paternalism" will lead to the "moral judgment" that they are obligated to seek such hospitalization for a patient "incapable of voluntarily accepting help."<sup>69</sup> And Dr. H. Richard Lamb<sup>70</sup>—organized psychiatry's most visible critic of deinstitutionalization—has assailed courts for interpreting civil commitment laws too "literally."

Similarly, Dr. William McCormick<sup>71</sup> has quoted an anonymous (but allegedly knowledgeable) medical colleague who reported, following the 1978 amendments to the Ontario Mental Health Act, "Doctors will continue to certify those *whom they really believe* should be certified. They will merely learn a new language." Although there has been some empirical work responding to these philosophical positions and examples of anecdotal evidence,<sup>72</sup> it can in no way diminish the arguments' power.

This notion that there is a "higher morality" to which forensic MHPs owe some sort of higher duty<sup>73</sup> is, empirically, an extraordinarily important one, and one that requires far greater attention on the part of all those concerned about the underlying issues.<sup>74</sup> Although some researchers and scholars have taken seriously the importance of this call in their reading of the effects of "legislative reform" on psychiatric hospital admissions rates,<sup>75</sup> the whole question is strangely underdiscussed. Michael Saks<sup>76</sup> recent reference to such witnesses as "imperial experts" who install themselves as "temporary monarch[s]" by replacing a "societal preference expressed through the law and legal process with [their] own preferences"

should force us to more seriously confront the dimensions of this issue. Although the sort of arrogation to which he refers is certainly not limited to forensic witnesses,<sup>77</sup> and it is clear that such an attitude would not flourish if it were not tacitly endorsed by both jurors and litigators,<sup>78</sup> it is a problem that forensic MHPs (and lawyers working with such forensic experts) must carefully confront.

### The Teleology of Courts

Putting aside the important question of the dissonance of *interests* between courts and MHPs (the former ostensibly mostly focusing on community safety and the latter on psychological functioning).<sup>79</sup> I now want to consider the basic teleology of the courts.<sup>80</sup> Notwithstanding the careful series of proposals crafted by Professors Monahan and Walker<sup>81</sup> in their attempts to create a jurisprudence of social science, we must begin with the givens that, first, judges are suspicious of the psychological sciences<sup>82</sup> and hostile to the use of social science in the legal process<sup>83</sup> and, second, their track record in this area has, generally, been "dreadful."<sup>84</sup>

Perhaps courts see social science as a "threat,"<sup>85</sup> perhaps it is feared that social science's "complexities...shake the judge's confidence in imposed solutions,"<sup>86</sup> and perhaps judges' lack of clarity about the underlying issues "permits [social science data] to be used as a kind of *deus ex machina* whose sudden appearance produces the desired result."<sup>87</sup> Thus, although the Supreme Court re-

jected the carefully controlled “Baldus study” (examining over 2,000 death penalty cases involving 230 statistical variables) in the *McCleskey* race discrimination case, it was willing, in an obscure-to-the-lay-public jurisdiction case—that turned on whether a certain manufacturer’s product (a tire tube valve) was likely to have entered the “stream of commerce” in California—to accept uncritically a report, by an adverse party’s lawyer, as to the results of his personal examination of the inventory of one motorcycle shop revealing that a substantial percentage of tire tubes included valves produced by the manufacturer in question.<sup>88</sup>

These attitudes lead to a debasement of social science research and data (even to the extent of suggesting that there is something faintly supernatural or fictive at its base), leading further to a trivialization of scientific discourse, and leading finally to the teleological use of such data.<sup>89</sup> Scholars have thus suggested that justices of the U.S. Supreme Court employ an outcome-determinative approach, “uncritically” accepting social science data bolstering opinions when they are in the majority, but “debunk[ing]” it when they are in the minority.<sup>90</sup>

The individual judging process in mental disability cases is also, of course, highly dependent on heuristic reasoning processes.<sup>91</sup> The vivid and concrete case regularly “overwhelms the abstract data. . . upon which rational choices are often made.”<sup>92</sup> and studies consistently confirm that the “vividness” effect is actively present both in judicial

proceedings<sup>93</sup> and, perhaps just as importantly, in our *perceptions* of judicial proceedings.<sup>94</sup> Thus, just as when subjects are presented with information about one welfare recipient will they generalize that data to *all* recipients, even when told that the particular exemplar was “highly atypical of the public at large,”<sup>95</sup> so will the judge say—either aloud or *sotto voce*—“The last time I let one of these guys go at the release hearing, he held up the 7-11 store down the street from my brother-in-law’s, and I haven’t stopped hearing about it since. Petition denied.”<sup>96</sup>

Of course, the courts are overwhelmingly ambivalent about expert testimony in the first place.<sup>97</sup> On one hand, judges frantically desire experts to testify as to future dangerousness<sup>98</sup> (notwithstanding the experts’ plea that they frequently do not have that expertise)<sup>99</sup> and to “take the weight” on difficult release-or-commit decisions.<sup>100</sup> On the other, they characterize psychiatry as “the ultimate wizardry” and psychiatrists as “medicine m[e]n” or “shamanistic wizards.”<sup>101</sup> More simply, as Alan Stone<sup>102</sup> has suggested, “the more they hate us, the more they need us.” When the artificially demanded “exact answer” is not available,<sup>103</sup> *especially* in an area where the ends of the law and the ends of mental health professionals do not coincide,<sup>104</sup> yet one additional layer of dissonance is added to the system.

### The Ambivalence of Juries<sup>105</sup>

Jurors remain overwhelmingly ambivalent about concepts of mental health,

mental disability as an animating explanation for behavior (especially when the behavior is socially deviant and/or criminal), and about the reception of expert mental health testimony.<sup>106</sup> This behavior mirrors public attitudes: at the same time that we show the need to “invest [psychiatrists] with superior, almost supernatural powers,”<sup>107</sup> we remain contemptuous of mental health principles because they appear contrary to our notions of OCS.<sup>108</sup> Although courts routinely talk about the expert’s mystic infallibility” or “aura of near infallibility,”<sup>109</sup> it is likely that—because of the perception that such evidence is “soft”<sup>110</sup>—jurors are “mildly interested” in but not “thunderstuck” by such testimony.<sup>111</sup>

What we must remember here is that jurors, as the conscience of the community, will continue to make heuristic judgments based on their ordinary common sensical vision of “rough justice”<sup>112</sup> as to who “ought to be punished.”<sup>113</sup> And when the substantive law fails to incorporate their “strong moral impulses,”<sup>114</sup> they may either enter what is called a nullification verdict<sup>115</sup> (and acquit) or, what is far more likely, simply ignore the controlling legal principles (and convict).<sup>116</sup>

A recent example of the latter is illustrative. In *Moore v. State*,<sup>117</sup> a “particularly gruesome” murder case in which an insanity defense was raised, a juror candidly answered *voir dire* questions by stating that he thought (1) the insanity defense was “overused,” (2) that he couldn’t “let somebody off” just because he was insane, and (3) his preexisting

views on the insanity defense would “probably” prevent him from following the court’s instructions.”<sup>118</sup> Notwithstanding this candid testimony, the trial judge refused to excuse the juror for cause. Although the ensuing conviction was reversed by the Florida Supreme Court,<sup>119</sup> there is little encouragement in the course of the opinion to suggest the unlikelihood of such a situation recurring. Cases such as this one remind us that the pretexts, morality and teleology of law, mental health professions, and the courts must, in the appropriate cases, be viewed through the filter of the jury’s OCS as well.

### The Futility of Legislative Reform

This conclusion leads us to consider the role of the legislature: is it realistic to look to legislative reform as a means of ameliorating these situations? To answer this question, we must look more narrowly at the issue of the development of involuntary civil commitment law.

Although the 1970s were marked by a significant tightening of involuntary civil commitment standards<sup>120</sup> (a trend that has been subsequently reversed as the “pendulum” has begun to swing in the direction of rebroadened criteria),<sup>121</sup> there is little evidence to suggest that mental health professionals rigorously adhered to the stricter legislative guidelines.<sup>122</sup> Empirical evidence reveals, rather, that they more likely simply substituted older, lack-of-insight based legislation in spite of the new laws to the contrary.<sup>123</sup>

Here, Drs. Bagby and Atkinson<sup>124</sup>



have speculated that such professionals exhibit “psychological reactance” in resisting legislative attempts to reduce their prerogative.<sup>125</sup> Because of this resistance—frequently grounded in a misguided sense of “moral obligation”<sup>126</sup>—restrictive laws are ignored and some psychiatrists continue to commit those “whom they believe should be committed.”<sup>127</sup> Similarly, it has been suggested that broad statutory criteria “invite [medical witnesses] to implement hidden agendas about treating the mentally ill and protecting society.”<sup>128</sup> Phrased differently, this phenomenon reflects “cognitive dissonance”—the tendency of individuals to reinterpret information or experience that conflicts with their internally accepted or publicly stated beliefs in order to avoid the unpleasant state that such inconsistencies produce.<sup>129</sup> Just as we can observe *judicial* cognitive dissonance at play in insanity defense cases (between judges’ OCS and what we now understand about mental illness, its impact on criminal behavior, and the empirical disposition of insanity defense cases),<sup>130</sup> so we can observe *professional* cognitive dissonance here.

In other words, in some instances where mental health reform legislation does not meet the paternalistic needs of MHPs, the statutes are simply subverted.<sup>131</sup> Bagby and his colleagues<sup>132</sup> suggest that the “relative disregard of mental health law” has a long local history, and that this problem raises “serious questions about the feasibility of legislating the practice of mental health professionals.” Although I am not so pessimistic, I suggest that these data are

enormously important and deserve far wider dissemination among all policy makers in this area than it has received.

### The Rest of the World

The outside world rarely shows any interest in or recognition of this whole bundle of issues until it is faced with the statistically rare case of the false negative. Judge Bazelon<sup>133</sup> has thus questioned why “run-of-the-mill muggings by street toughs are too common for the front pages, but even the most banal burglary is newsworthy if committed by someone with a psychiatric history.” Just as the vividness of media stories about particularly violent criminal offenses has a “disproportionate impact” on public perceptions about crime,<sup>134</sup> so does this publicity lead us to overattribute representativeness to the type of act in question or to the idiosyncratic personality characteristics of the actor.<sup>135</sup>

Thus, public agitation and concomitant legislative “correction” is driven by heuristic reasoning.<sup>136</sup> A vivid, “outrageous” case that shows the public “what happens” when someone “falls through the cracks” animates legislative reform to ensure that such errors not be replicated.<sup>137</sup> In the state of Washington, after an individual who had been denied admission to a state hospital murdered two elderly neighbors (leading to a significant—and controversial—broadening of civil commitment standards),<sup>138</sup> commitments from the vicinage in question rose 100% even *prior* to the effective date of legislative reform.<sup>139</sup>

Two other separate and seemingly un-

related points offer further illumination. There is now some significant evidence that street police officers—in many instances, the *true* “institutional gatekeepers”—employ their OCS-ical concept of mental illness (manifested as “disrespect, recalcitrance and moral defect”) and shape *their* police reports through “dramatic communications” so as to “magnify the subjective madness and dangerousness of their subjects,” and insure their admission into forensic psychiatric hospitals.<sup>140</sup> Finally, at least one prominent forensic psychiatrist has recently written that, even though the recent amendments to the Federal Rules of Evidence barring “ultimate opinion” testimony<sup>141</sup> were “scientifically” unnecessary, the new rule might still be justified because of the American Psychiatric Association’s “concern about the unfavorable public attitude towards psychiatric participation in controversial insanity cases.”<sup>142</sup>

When added to the dominance of the heuristic legislative style, these two additional reports have additional importance. First, they show that much of the data upon which we base our assumptions, findings, and recommendations are governed by a cadre of individuals with absolutely no scientific or scholarly grounding upon which to base their actions, but whose OCS is driven by a discrete and important “moral” system (perhaps not so much unlike the moral psychiatrists Dr. Chodoff spoke of).<sup>143</sup> Second, they show the power of symbolism in forensic developments: notwithstanding behavioral or empirical merit, it is seen as essential—as a public rela-

tions ploy—to the American Psychiatric Association that it endorse a rule of little scientific value so as to ward off political and social criticism. Perhaps it is this final piece of data that helps clarify the extent of the dilemma we face.

## Conclusion

We cannot coherently explain any of the developments in question without considering the impact of heuristic reasoning, the power of psychological reactance and cognitive dissonance, and the dominance of OCS. We also need to pay further heed to reports that heuristic biases infect clinicians’ reports as well.<sup>144</sup> Also, we can never underestimate the role of what Professor Ernest Roberts<sup>145</sup> has, in another context, characterized as “tensile strength”:

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

If the parallel law of hydraulic pressure<sup>146</sup> raises arousal to “dysfunctionally high levels,” there is the danger that innovation will be precluded because the “limits of bounded rationality are exceeded.”<sup>147</sup> I think it is necessary for us to consider whether the law/forensic mental health systems has yet reached this pressure point, and, if it has, whether it is in danger of becoming dysfunctional.<sup>148</sup>

What, then, can we do? For a start, we need to start thinking about rebuilding some of our professional infrastructures, a rebuilding that will require all to

redefine institutional and professional roles, to reconsider the way that we privilege expertise, rethink the importance of moral preferences, recalibrate the way that the legal and behavioral communities share responsibility and blame as well as "moral jurisdiction" over these matters, and to consciously confront the way that we employ "common sense" in this arena and the way that our cognitive simplifying devices distort the underlying social and political issues. If we can do this, and if we can acknowledge the way we act pretextually, decide cases telologically, think heuristically, and superimpose improper systems of morality, we stand a chance of beginning to, finally, pursue agreement<sup>149</sup> between our two systems.

#### References

1. See e.g., R. Dworkin: *Law's Empire* 243, 405-7 (1986); Weinrib: *Legal formalism: on the immanent rationality of law*, 97 *Yale L J* 949, 954 n. 14 (1988), citing T. Aquinas: *Treatise on Law*, in *Summa Theologic I-II* QQ 90-105, reprinted in *On Law, Morality, and Politics* 11-83 (W. Baumgarth & R. Regan, eds. 1988).
2. See e.g., for recent formulations, *State v. Stevens*, 115 N.J. 289, 558 A. 2d 833, 840 (1989), and *Pena v. State*, 780 P. 2d 316, 334 (Wyo. 1989), both citing: Note, *Other crimes evidence at trial*, 70 *Yale L J* 763, 770-1 (1961); *State ex rel. Okla. Bar Ass'n v. Lloyd*, 787 P.2d 855, 859 (Okla. 1990); *Slaughter v. Commonwealth*, 744 S.W.2d 407, 414 (Ky. 1987); for a psychoanalytic view, see A. Ehrenzweig: *Psychoanalytic Jurisprudence* 277-81 (1971).
3. See e.g., N.Y. Penal Law, §§ 210.15 and 70.00(2)(d) (McKinney 1987) (up to seven years); N.J. Stat. Ann. §2C: 28-1, 43-6 (West 1982 & Supp. 1990) (three to five years); Fla. Stat. Ann. §§837.02 & 775.082-.083 (West 1976) (up to five years and \$5,000 fine).
4. See generally, O. Will: *Process, Psychotherapy and Schizophrenia* (1961), reprinted in J. Katz, J. Goldstein, A. Dershowitz: *Psychoanalysis, Psychiatry and Law* 680-4 (1967); see also, M. Moore: *Law and Psychiatry: Rethinking the Relationship* 142 (1984).
5. See e.g., A. Benjamin: *The Helping Interview* 140-3 (1969); R. Langs: *The Technique of Psychoanalytic Psychotherapy* 294-7 (2d ed. 1976); C. Rogers: *Counseling and Psychotherapy: Newer Concepts in Practice* 327 (1942); F. Perls, R. Hefferline, P. Goodman: *Gestalt Therapy* 510-1 (2d ed. 1973); R. Balsam, A. Balsam: *The Book of Family Therapy, Becoming a Psychotherapist: A Clinical Primer* 108-11 (1974).
6. A. Benjamin, *supra* note 5, at 92-5.
7. Green: *The law-science interface in public policy decisionmaking*, 51 *Ohio St L J* 375-405 (1990).
8. Some psychiatrists see this difference as critical in explaining what they perceive as differences in the perspectives of the two professions. See e.g., Lamb: *Involuntary treatment for the homeless mentally ill*, 4 *Notre Dame J L Ethics Pub Pol'y* 169, 276 (1989) (discussing Szasz, Goffman, and Laing as intellectually animating sources for "many attorneys"); M. Peszke: *Involuntary Treatment of the Mentally Ill* 133-6 (1975) (law students' interest in law and psychiatry comes from students' desires "to learn how to punch holes and to show the psychiatrist up in court").
9. See e.g., Cohen: *The evolutionary relationship between psychiatry and law*, in A. Carmi, S. Schneider, A. Hefez: *Psychiatry, Law and Ethics* 69 (1986); Bentley: *The infant and the dream: psychology and the law*, in D. Farrington, K. Hawkins, S. Lloyd-Bostock, eds., *Psychology, Law and Legal Processes* 35 (1979).
10. See J. Neaman, *Suggestion of the Devil: The Origins of Madness*, 67-110, (1975) (relationship dates back to Roman law and Justinian codes).
11. See J. Robitscher, *Pursuit of Agreement: Psychiatry and the Law* 12 (1966), citing F. Whitlock, *Criminal Responsibility and Mental Illness* (1963). See generally, 1 M. Perlin, *Mental Disability Law: Civil and Criminal* §1.01 (1989), at 2 n.2. Compare Perlin and Sadoff, *The Adversary System*, in S. Kutash et al. *Violence: Perspectives on Murder and Aggression* 394 (1978) ("the intersection of law and mental health stands at a significant focal point in the development of human behavior, at a point where motives, intents, and drives can and must be examined in the contexts of rights, obligations, duties, and the social order").
12. See *infra* text accompanying notes 22-56.
13. See *infra* text accompanying notes 57-78.
14. See *infra* text accompanying notes 79-104.
15. See *infra* text accompanying notes 105-19.
16. See *infra* text accompanying notes 120-32.
17. See *infra* text accompanying notes 133-42.

- On "false positives," see generally, Ennis, Litwack: Psychiatry and the presumption of expertise: flipping coins in the courtroom, 62 Calif L Rev 693, 734-5 (1974). On the way that courts err by making too many "false negative" judgments (being more conservative than is clinically necessary), see Boehnert: Characteristics of successful and unsuccessful insanity pleas, 13 Law Hum Behav 31, 38 (1989). On "moral mistakes," see Bonnie: Morality, equality, and expertise: Renegotiating the relationship between psychiatry and law, 12 Bull Am Acad Psychiatry Law 5, 17 (1984).
18. See Perlin: Psychodynamics and the insanity defense: 'ordinary common sense' and heuristic reasoning, 69 Neb L Rev 3-70 (1990).
  19. See generally, Perlin: Unpacking the myths: the symbolism mythology of insanity defense jurisprudence, 40 Case W Res L Rev 599 (1989-90); compare Rapoport: Editorial: Is forensic psychiatry ethical? 12 Bull Am Acad Psychiatry Law 205-7 (1984) (society's response to the Hinckley acquittal "placed the blame on the insanity plea and the psychiatrists"). It is necessary to acknowledge that there are at least two universes worthy of consideration in this context: the case such as Hinckley's that captures the attention of the whole nation, and the vivid case that may be unknown nationally but in which local interest is so heavy that its disposition may overwhelm a statewide legal system. See, e.g., Fischer, Pierce, Appelbaum: How flexible are our civil commitment statutes? 39 Hosp Community Psychiatry 711 (1978) (commitment rates in one Washington county increased 100% following murder by mentally disabled individual who had been denied voluntary admission to psychiatric hospital).
  20. But see D. Wexler: Therapeutic Jurisprudence: The Law as a Therapeutic Agent (1990) (critically investigating the impact of legal rules on the functioning of the mental health system); compare Gutheil, Burstajn, Kaplan, Brodsky: Participation in competency assessment and treatment decisions: the role of a psychiatrist-attorney team, 11 Ment Phys Disabil L Rep 446, 449 (1987) (discussing "critogenesis"—the "intrinsic risks of legal intervention" in medical decision making).
  21. See generally, J. Robitscher, *supra* note 11.
  22. It may also be confusing. Dr. Robert L. Sadoff has suggested that I need to deconstruct the phrase to assess the difference between pre-text (i.e., attitudes precede written decisions), and pretext (i.e., a legal fiction). Prof. Richard Sherwin has asked whether it may also mean "not yet ready for text." As with most deconstructive readings—see e.g., Balkin: Deconstructive practice and legal theory, 96 Yale L J 743 (1987)—I am willing to grant that all these interpretations are equally plausible. On the other hand, the law pays dogged lip service to the principle that "mere pretext" must be ferreted out in the legal decision making process. A WESTLAW® search conducted on November 24, 1990, revealed 474 state cases and 1,301 federal cases in which the phrase "mere pretext" has appeared. See e.g., *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 752 (1988) (antitrust); *City of Pleasant Grove v. United States*, 479 U.S. 462, 470 (1987) (voting rights act); *Barefoot v. Estelle*, 463 U.S. 880, 888 (1983) (1983) (death penalty); *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 676-7 n. 12 (1983) (pregnancy discrimination). Other aspects of *Barefoot* are discussed *infra* text accompanying notes 98-9.
  23. On the related question of the judicial reading of "laws that are applicable and constitutional but uncommonly silly," see Smith: Why should courts obey the law? 77 Geo L J 113, 125-6 (1988).
  24. See *Mapp v. Ohio*, 367 U.S. 643 (1961) (illegally seized evidence is inadmissible in criminal prosecutions under the Fourth and Fourteenth Amendments).
  25. See Alschuler: "Close enough for government work": the exclusionary rule after *Leon*, 1984 Sup Ct Rev 309, 349 n. 117, citing, *inter alia*, Cohen: Police perjury: an interview with Martin Garbus, 8 Crim L Bull 363, 365 (1972) (defense counsel who appeared in about 150 drug cases over a 13-year period "had no doubt that the police had 'shaped' their testimony in every case") (emphasis added); Sevilla: The exclusionary rule and police perjury, 11 San Diego L Rev 839 (1974); Grano: A dilemma for defense counsel: *Spinelli-Harris* search warrants and the possibility of police perjury, 1971 U Ill L F 405, 408-9. See also *United States v. Leon*, 468 U.S. 897, 950-1 (1983) (Brennan, J. dissenting), citing *Nardulli*: The societal cost of the exclusionary rule: an empirical assessment, 1983 Am B Found Res J 585, 596 (only 0.6% of all suppression motions successful); Report of the Comptroller General of the U.S., *Impact of the Exclusionary Rule and Federal Criminal Prosecutions* 8, 10 (1979) (0.7% success rate). On the related topic of pretextual arrests, see e.g., *Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *New York v. Class*, 475 U.S. 106 (1986). The issue is discussed in *Maclin*, *Seeing the constitution from the backseat of a police squad car*, 70 B U L Rev 543-4 (1990) (review of H. R. Uviller, *Tempered Zeal* (1988)), and in Note, Crim-

- inal law—pretextual arrests and alternatives to the objective test, 12 West N Engl L Rev 105 (1990).
26. May v. Cooperman, 780 F.2d 240, 241 (3d Cir. 1985), appeal dismissed sub. nom. Karcher v. May, 484 U.S. 721 (1987).
27. Worden, Worden: Local politics and the provision of indigent defense counsel, 11 L Pol'y 401 (1989). Provision of counsel is mandated in *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Argersinger v. Hamlin*, 407 U.S. 25 (1972).
28. See generally, Conference, *Gideon v. Wainwright* Revisited: What Does the Right to Counsel Guarantee Today? 10 Pace L Rev 327 (1990), and especially id. at 341 (the legal system functions as if *Gideon* had never been decided") (remarks of Prof. Burt Neuborne), and id. at p. 333 (trial of death penalty cases provide example of "*Gideon* betrayed") (remarks of Prof. Michael Mushlin). See also id. at 343–78 (remarks of Prof. Yale Kamisar), and at 387–406 (remarks of Paula Deutsch et al).
29. Streicher v. Prescott, 663 F. Supp. 335, 343 (D.D.C. 1987). This sort of pretext is not limited to mental health cases. Compare *Fuentes v. Shevin*, 407 U.S. 67, 85 n. 14 (1972) (notwithstanding presence of recovery provision in state prejudgment replevin statute, not a single defendant in a sample of 442 cases studied invoked that procedure). The nonavilers in *Streicher* and in *Fuentes*, of course, were indigent, and generally without access to the judicial system.
30. *Green v. Bock Laundry Mach. Co.*, 109 S. Ct. 1981, 1984–85 (1989); see generally, Costello: Average voting members and other "benign fictions"; the relative reliability of committee reports, floor debates, and other sources of legislative history, 1990 Duke L J 39. In its most recent term, the Supreme Court has acknowledged its use of "legal fictions" on at least three occasions involving different areas of the law; see *Cruzan v. Director, Missouri Dept. of Health*, 110 S. Ct. 2841 (1990) (right to die); *United States v. Dalm*, 110 S. Ct. 1361 (1990) (gift tax refund recoupment process); *Carden v. Arkoma Associates*, 110 S. Ct. 1015 (1990) (determining partnership residency in diversity jurisdiction case).
31. *McCleskey v. Kemp*, 481 U.S. 279 (1987).
32. Id. at 313. On the empirical contribution of social science to the Supreme Court's criminal procedure jurisprudence, see Acker: Social science in Supreme Court criminal cases and briefs: the actual and potential contribution of social scientists as *amici curiae*, 14 L Hum Behav 25 (1990); Acker: Thirty years of social science in Supreme Court criminal cases, 12 L Pol'y 1 (1990); see also Tremper: Organized psychology's efforts to influence judicial policy-making, 42 Am Psychologist 496 (1987). On the role of social science in the type of inquiry regularly pursued in such litigation, see Rossow, Rossow: Student initiated religious activity: constitutional argument or psychological inquiry, 19 J L Educ 207 (1990).
33. *McCleskey*, 481 U.S. at 292 (emphasis was included in text).
34. Perlin, *supra* note 19, at 713–21. On malingering, see e.g., Rogers, Delmetsch, Cavanaugh: Assessment and conceptualization of competency to stand trial, 9 L Hum Behav 321 (1984); Rogers, Delmetsch, Cavanaugh: An empirical approach to insanity evaluations, 37 J Clin Psychol 683 (1981). For more recent work, see Rogers, Gillis, Bagby: The SIRS as a measure of malingering: a validation study with a correctional sample, 8 Behav Sci L 85 (1990); Rogers, Bagby, Rector: Diagnostic legitimacy of factitious disorder with psychological symptoms, 146 Am J Psychiatry 312 (1989); R. Rogers: Models of feigned mental illness (manuscript); R. Rogers et al: Standardized assessment of malingering: validation of the structured interview of reported symptoms (manuscript).
35. See e.g., *Ford v. Wainwright*, 477 U.S. 399, 431 (1986) (Rehnquist, J., dissenting); see generally, Perlin, *supra* note 19, at 725–26.
36. Sherwin: Dialects and dominance: a study of rhetorical fields in the law of confessions, 136 U Pa L Rev 729 (1988).
37. Compare Barton: Behind the legal explosion, 27 Stan L Rev 567 (1975), and Manning: Hyperlexis: our national disease, 71 NW U L Rev 767 (1977) (setting out myths), to Galanter: Reading the landscape of disputes: What we know (and think we know) about our allegedly contentious and litigious society, 31 (UCLA L Rev 4, 38–9 (1983), and Felstiner, Abel, Sarat: The emergence and transformation of disputes: naming, blaming, claiming, . . . 15 L Soc'y Rev 631 (1981) (setting out reality). On the specific question of frequency of tort litigation in the mental health context, see Bonnie: Professional liability and the quality of mental health care, 16 L Med Health Care 229 (1988); M. Perlin: Power imbalances in the therapeutic and forensic relationship (paper presented at the University of Pennsylvania Department of Psychiatry Conference on Law and Ethics, November 1990), manuscript at 25–8.
38. Compare Kaplan: Courtroom indignities, Cal Lawyer (Aug. 1985), 72; Lees-Haley, Personal injury malingering, For the Defense (Feb. 1986), 28 (myths), to J. Fleming: The American Tort Process 140–5 (1988); Kramer: The Harvard Study, an analysis, NYLJ (Mar. 7, 1990), at 1; Gellis: Legisla-

- tive reforms of governmental tort liability: overreacting to minimal evidence, 21 Rutgers L J 375 (1990) (reality).
39. Compare Brakel: Prison reform litigation: has the revolution gone too far? 49 Correction Today 160 (1987) (myths), to Thomas: The "reality" of prisoner litigation: repackaging the data, 15 N Eng J Crim Civ Confinement 41, 42-4 (1989) (reality).
  40. Mickenberg: A pleasant surprise: the guilty but mentally ill verdict has succeeded on its own right and successfully preserved the traditional role of the insanity defense, 55 U Cin L Rev 943, 980 (1987), quoting Roberts: High U.S. officials express outrage, asking for new law on insanity plea, NY Times, (June 23, 1981), at B6, col. 1. See also, Keilitz: Researching and reforming the insanity call for abolition of the insanity defense, 39 Rutgers L Rev 289, 306 n. 97 (1987) (discussing Heritage Foundation's call for abolition of the insanity defense as a "priority in the criminal justice field in 1987"). Compare Smith: Limiting the insanity defense: a rational approach to irrational crime, 47 Mo L Rev 605, 610 (1982) (insanity defense invoked "for the purpose of avoiding punishment"), with Perlin, supra note 19, at 651 (insanity acquittees spend almost double the amount of time incarcerated in maximum security settings that defendants convicted of similar crimes spend in prison settings).
  41. Proceedings of the Forty-Sixth Judicial Conference of the District of Columbia Circuit, 111 F.R.D. 91, 225 (1985) (remarks of Stephen Trott, Assistant Attorney General).
  42. See generally Perlin, supra note 19, at 640-6.
  43. See infra text accompanying notes 129-30.
  44. *Miranda v. Arizona*, 384 U.S. 436 (1966).
  45. *Mapp v. Ohio*, 367 U.S. 643 (1961).
  46. See e.g., *Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, C. J., concurring) ("The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures: I would neither overrule *Miranda*, disparage it, nor extend it, at this late date").
  47. *O'Connor v. Donaldson*, 422 U.S. 563 (1975).
  48. *Jackson v. Indiana*, 406 U.S. 715 (1972).
  49. *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972) (subsequent citations omitted); see generally, 1 M. Perlin, supra note 11, at §§2.09, 2.11.
  50. The author was, for eight years, Director of the Division of Mental Health Advocacy in the New Jersey Department of the Public Advocate, and a member of that state's Supreme Court Committee on Civil Commitments. The thought in question was expressed on literally dozens of occasions by both judges and administrative personnel.
  51. Perlin, supra note 19, at 648-55.
  52. Id. at 653-55.
  53. For a flavor of the individual cases, see 1 M. Perlin, supra note 11, at §3.45.
  54. See e.g., *Francois v. Henderson*, 850 F. 2d 231 (5th Cir. 1988), and cases discussed in Perlin, supra note 19, at 713-31; *Breunig v. Amer. Family Insurance*, 45 Wis. 2d 536, 173 N.W. 2d 619 (1970).
  55. *United States v. Still*, 857 F. 2d 671, 672 (9th Cir. 1988).
  56. Id.
  57. On the many hats worn by the testifying mental health professional expert witness, see Smith: Mental health expert witnesses: of science and crystal balls, 7 Behav Sci L 145, 151-7 (1989) (teacher, priest, wizard, magician, decision maker, scapegoat, advocate, adviser, and smokescreen); see also, Wasyliw, Cavanaugh, Rogers: Beyond the scientific limits of expert testimony, 13 Bull Am Acad Psychiatry Law 147, 153-6 (1985).
  58. Diamond, The fallacy of the impartial expert, 3 Arch Crim Psychodynam 221, 222 (1959), as quoted in Goldstein: Hiring the hired guns: lawyers and their psychiatric experts, 11 Leg Stud Forum 41 (1987). On the potential role of psychiatric bias in the penalty phase of capital punishment trials, see *Smith v. Estelle*, 602 F. 2d 694, 708 (5th Cir. 1979), aff'd 451 U.S. 454, 471 (1981). On the way that the problem of "dual allegiances" can affect governmentally employed psychiatrists, see *United States v. Byers*, 740 F. 2d 1104, 1138, 1152-3 (1984) (Bazelon, S. J., dissenting); see generally, M. Perlin, supra note 37, manuscript at 11-2, discussing, inter alia, Shestack: Psychiatry and the dilemmas of dual loyalties, 60 ABA J 1521 (1974); Halleck: The ethical dilemmas of forensic psychiatry: a utilitarian approach, 12 Bull Am Acad Psychiatry Law 279 (1984).
  59. See e.g., Homant, Kennedy: Judgment of legal insanity as a function of attitude toward the insanity defense, 8 Int'l J L Psychiatry 67 (1986); Homant, Kennedy: Subjective factors in the judgment of insanity, 14 Crim Just Behav 38 (1987); Homant, Kennedy: Definitions of mental illness as a factor in expert witnesses: judgments of insanity, 31 Corrective and Soc'l Psych J Behavior Tech Methods and Ther 125 (1985). The universality of the conclusions that can be drawn from this research is gently questioned in Rogers, Ewing: Ultimate opinion proscriptions: a cosmetic fix and a plea for empiricism, 13 Law Hum Behav 357, 369 (1989); see also, Rogers, Bagby, Crouch, Cutler: Effects of ultimate opinions on juror

- perceptions of insanity, 13 *Int'l J L Psychiatry* 225 (1990).
60. B. Bursten: Beyond Psychiatric Expertise 167 (1984).
61. Davis: Law, science, and history: reflections upon in the best interests of the child, 86 *Mich L Rev* 1096, 1107 (1988), citing S. Gould: The Mismeasure of Man 21-2 (1981) (book review of J. Goldstein, A. Solnit, S. Goldstein: In the Best Interests of The Child (1986)).
62. Zusman, Simon: Differences in repeated psychiatric examinations of litigants to a lawsuit, 140 *Am J Psychiatry* 1300, 1302-4 (1983) (interview setting, training, orientation, and identification with one side all helped shape forensic evaluations). On the influence of such variables as "physical attractiveness, interpersonal adeptness, and social likeability" on the related question of degree of punitiveness exhibited toward defendants in sentencing decisions, see Rogers: Ethical dilemmas in forensic evaluations, 5 *Behav Sci L* 149, 152 (1987), discussing findings reported in M. Saks, R. Hastie, *Social Psychology in Court* (1978).
63. Rogers et al: Forensic psychiatrists' and psychologists' understanding of insanity: Misguided expertise, 33 *Can J Psychiatry* 691 (1988).
64. See 1 M. Perlin, *supra* note 11, at §§2.09-2.11.
65. Recent research shows that, in one carefully controlled study, clinicians did conform to the controlling involuntary civil commitment law. See Lidz et al.: The consistency of clinicians and the use of legal standards, 146 *Am J Psychiatry* 176 (1989).
66. See Reich: Psychiatric diagnosis as an ethical problem, in S. Bloch, P. Chodoff, eds.: *Psychiatric Ethics* 72 (1981).
67. Chodoff: The case for involuntary hospitalization of the mentally ill, 133 *Am J Psychiatry* 496, 501 (1976).
68. McGarry, Chodoff: The ethics of involuntary hospitalization, in Bloch & Chodoff, eds., *supra* note 66, at 203, 211, 212.
69. Chodoff, Involuntary hospitalization of the mentally ill as a moral issue, 141 *Am J Psychiatry* 384, 388 (1984).
70. Lamb, *supra* note 8, at 277. On the impact of these attitudes in the development of our social policies involving homeless mentally ill individuals, see generally, Perlin: Competency, deinstitutionalization, and homelessness: a story of marginalization, 28 *Hous L Rev* 63 (1991).
71. McCormick: Involuntary commitment in Ontario: some barriers to the provision of proper care, 124 *Can Med Ass'n J* 715, 717 (1981).
72. See Kahle, Sales, Nagel: On unicorns blocking commitment law reform, 6 *J Psychiatry* L 89 (1978), as cited in Hiday: Sociology of mental health law, 67 *Sociol Soc Res* 111, 120-1 (1983).
73. It would appear as if this position almost attempts to suggest the appropriateness of a duress or necessity doctrine to be employed in such cases. In standard tort law, such a defense typically applies when one commits what would otherwise be tortious behavior to save another's life in the face of a violent storm or other "act of God." See e.g., *Ploof v. Putnam*, 81 *Vt.* 471, 71 *A.* 188 (1908); *Vincent v. Lake Erie Transportation*, 109 *Minn.* 456, 124 *N.W.* 221 (1910). This situation is fairly far removed from the more parallel use of the necessity defense in criminal cases where one acts to avoid a perceived political or social harm. See e.g., *State v. Warshow*, 138 *Vt.* 22, 410 *A.* 2d 1000 (1979) (protest at nuclear power plant); *Sigma Reproductive Health Center v. State*, 297 *Md.* 660, 467 *A.* 2d 483 (1983) (abortion clinic trespass case). Perhaps a closer tort law analogy can be found in the false imprisonment, religious deprogramming cases. See e.g., *Peterson v. Sorlien*, 299 *N.W.* 2d 123 (Minn. 1980).
74. Legal scholars are beginning to critically investigate the question of how seriously (if at all) legal rules impair the functioning of the mental health system. See e.g., Schopp, Wexler: Shooting yourself in the foot with due care, 17 *J Psychiatry L* 163 (1989); D. Wexler, *supra* note 20. For a recent review of the relevant literature, see D. Wexler: Putting mental health into mental health law: therapeutic jurisprudence (paper delivered at the National Symposium on Justice and Mental Health System Interactions, November 1990), manuscript at nn. 40-64; Winick: Competency to consent to treatment: the distinction between assent and objection, 28 *Hous L Rev* 15 (1991).
75. See e.g., Bagby: The effects of legislative reform on admission rates to psychiatric units of general hospitals, 10 *Int'l J L Psychiatry* 383 (1987). As to what Dr. Richard Rogers and his associates refer to as an "arrogation of power," see Rogers et al., *supra* note 63, at 694.
76. Saks: Expert witnesses, nonexpert witnesses, and nonwitness experts, 14 *L Hum Behav* 291, 294 (1990), and *id.* n. 2.
77. Compare *Matter of Eaton*, 48 *Wash. App.* 806, 740 *P.* 2d 907, 911-2 (1987) (rejecting argument of state social service department that only it, and not the court, is in the best position to make juvenile institutional placement decisions).
78. See Saks, *supra* note 76, at 299 (reporting on an interview with a state prosecutor who said that he preferred using local forensic science experts rather than experts from the

- FBI's crime laboratory, because "it was harder to get the FBI experts to say what you want them to").
79. See Rogers, Webster: Assessing treatability in mentally disordered offenders. 13 *L Hum Behav* 19, 21 (1989).
  80. Of this basic teleology, I now have no doubts. See Perlin, *supra* note 18, at 53–61.
  81. See e.g., Monahan, Walker: Social authority: obtaining, evaluating, and establishing social science in law. 134 *U Pa L Rev* 477 (1986); Walker, Monahan: Social facts: scientific methodology as legal precedent, 76 *Calif L Rev* 877 (1988). For an earlier optimistic view, see Levine, Howe: The penetration of social science into legal culture, 7 *L Pol'y* 173 (1985).
  82. See Tanford & Tanford, Better trials through science: a defense of psychologist-lawyer collaboration, 66 *N C L Rev* 741, 742–6 (1988).
  83. See e.g., *Ballew v. Georgia*, 435 U.S. 223, 246 (1978) (Powell, J., concurring) (smaller than six-person jury unconstitutional in state criminal trials) (challenging the "wisdom—as well as the necessity—of . . . heavy reliance on *numerology* derived from statistical studies") (emphasis added).
  84. Sperlich: Trial by jury: it may have a future, in *Supreme Court Review* 191, 208 (P. Kurland & G. Casper, eds., 1978); Grofman: The slippery slope: jury size and jury verdict requirements—legal and social science approaches, 2 *L Pol'y Q* 285, 300 (1980). See also Suggs: The use of psychological research by the judiciary, 3 *L Hum Behav* 135, 147 (1979) (courts have failed to develop methods to insure validity of research used in opinions).
  85. Kerr: Social science and the U.S. Supreme Court, in *The Impact of Social Psychology on Procedural Justice* 56, 71 (M. Kaplan, ed., 1986). Compare Tremper, *supra* note 32; Melton: Bringing psychology to the legal system: opportunities, obstacles, and efficacy, 42 *Am Psychologist* 488 (1987), and sources cited *supra* notes 32 & 84, and *infra* note 90.
  86. Woolhandler, Rethinking the judicial reception of legislative facts, 41 *Vand L Rev* 111, 125 n. 84 (1988), quoting D. Horowitz: *The Courts and Social Policy* 284 (1977).
  87. Rubin: The practice and discourse of legal scholarship, 86 *Mich L Rev* 1835, 1989 (1988).
  88. Compare *McCleskey v. Kemp*, 481 U.S. 279, 286–9 (1987), to *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 107 (1987). While the evidence in question was not the critical factor in shaping the court's opinion in *Asahi*, nothing in the opinion even hints at the methodological problems raised by the court's acceptance of this characterization of the evidence by counsel.
  89. See *Ballew*, 435 U.S. at 246, discussed *supra* note 83; Appelbaum: The empirical jurisprudence of the United States Supreme Court, 13 *Am J L Med* 335, 341 (1987); Perlin. The Supreme Court, the mentally disabled criminal defendant, and symbolic values: random decisions, hidden rationales, or "doctrinal abyss"? 29 *Ariz L Rev* 1, 71 (1987).
  90. Kerr, *supra* note 85, at 58. See generally, Melton: Developmental psychology and the law: the state of the art, 22 *J Fam L* 445 (1983–4); Hafemeister, Melton: The impact of social science research on the judiciary, in *Reforming the Law: Impact of Child Development Research* 27 (G. Melton, ed., 1987) (Reforming); Melton: Judicial notice of "facts" about child development, in *Reforming*, *supra*, at 232; Weithorn: Professional responsibility in the dissemination of psychological research in legal contexts, in *Reforming*, *supra*, at 256; Loh: The evidence and trial procedure: the law, social policy and psychological research, in *The Psychology of Evidence and Trial Procedure* 13 (S. Kassin, C. Wrightsman, eds., 1985) (Trial); Sperlich: The evidence on evidence: science and law in conflict and cooperation, in *Trial*, *supra* at 325; Sarat: Judicial capacity: courts, court reform, and the limit of the judicial process. *The Analysis of Judicial Reform* 31 (P. DuBois, ed., 1982) (Analysis), and Haney: Data and decisions: judicial reform and the use of social science, in *Analysis*, *supra* at 43; Tremper, *supra* note 32.
  91. For these purposes, "heuristics" refers to principles that individuals use to simplify complex information-processing tasks, leading to distorted and systematically erroneous decisions. Carroll, Payne: The psychology of the parole decision process: a joint application of attribution theory and information-processing psychology, in *Cognition and Social Behavior* 13, 21 (J. Carroll, J. Payne, eds., 1976). For a comprehensive, one-volume survey of pertinent issues, see D. Kahneman, P. Slovic, A. Tversky: *Judgment under Uncertainty: Heuristics and Biases* (1982); see also R. Nisbett, L. Ross: *Human Inference: Strategies and Shortcomings of Social Judgment* (1980); see generally, Saks, Kidd: Human information processing and adjudication: trial by heuristics, 15 *Law Soc'y Rev* 123 (1980–1) I consider other mental disability law issues from this perspective in Perlin, *supra* notes 18 (insanity defense) & 70 (homelessness), and Perlin: Are courts competent to decide competency questions? Stripping the facade from *United States v. Charters*, 38



- U Kan L Rev 957 (1990) (refusal of medication).
92. Rosenhan: Psychological realities and judicial profiles, 10 Stan Law 10, 13-14 (1984).
93. See e.g., Bell, Loftus: Vivid persuasion in the courtroom, 49 J Personality Assessment 659, 663 (1985); Doob, Roberts: Social psychology, social attitudes, and attitudes toward sentencing, 16 Can J Behav Sci 269, 279 (1984).
94. See e.g., Diamond, Stalans: The myth of judicial leniency on sentencing, 7 Behav Sci L 73, 87-8 (1989). Legal scholars are tardily turning to the importance of heuristics as a means of explaining behavior in a variety of political and social settings. See e.g., Fitts: Can ignorance be bliss? Imperfect information as a positive influence on political institutions, 88 Mich L Rev 917, 945 n. 93 (1990).
95. Hamill, Wilson, Nisbett, Insensitivity to sample bias: generalizing from atypical cases, 39 J Personal Soc'l Psychol 578 (1980).
96. See Perlin, supra note 91, at 999 (discussing courts' discomfort in deciding cases involving mentally disabled criminal defendants), and see id. at 999-1000 n. 267, quoting O'Connor v. Ortega, 480 U.S. 709, 734 n. 3 (1987) (Blackmun, J., dissenting) (quoting B. Cardozo, The Nature of the Judicial Process 167 (1921)): "[J]udges are never free from the feelings of the time or those emerging from their own personal lives. . . . Deep below consciousness are . . . the likes and dislikes, the predilections and the prejudices, the complex of insights and emotions, and habits and convictions, which make the man, whether he be litigant or judge."
97. See Perlin, supra note 18, at 61-69; Perlin, supra note 19, at 673-96.
98. See Barefoot v. Estelle, 463 U.S. 880 (1983).
99. See id. at 916 (Blackmun, J., dissenting), relying on J. Monahan, The Clinical Prediction of Violent Behavior 47-9 (1981). Compare Thomas v. State, 259 Ga. 202, 378 S.E. 2d 686, 687 (1989) (refusing, on the grounds of "irrelevancy and questionable scientific reliability," to allow defense forensic expert psychologist to testify where expert had stated that psychologists could not "predict future behavior").
100. See e.g., Wasylw, Cavanaugh, Rogers, supra note 57, at 152; Suarez: A critique of the psychiatrist's role as expert witness, 12 J Forensic Sci 172 (1967). Compare Barefoot, 463 U.S. at 922 (Blackmun, J., dissenting), citing, *inter alia*, J. Monahan, supra note 99, at 13, 22-5, 86 (psychiatrists may overpredict dangerousness because of their fear of being perceived as responsible for the erroneous release of a violent individual). On the way that judges serve as society's scapegoats, see Farago: Intractable cases: the role of uncertainty in the concept of law, 55 NYU L Rev 195, 238-39 (1980).
101. See Perlin, supra note 19, at 682-88; Gunn: An English psychiatrist looks at dangerousness, 10 Bull Am Acad Psychiatry Law 143, 147 (1982).
102. Stone: The ethical boundaries of forensic psychiatry: a view from the ivory tower, 12 Bull Am Acad Psychiatry Law 209 (1984); see also Rappeport, supra note 19, at 205.
103. See H. Weihofen: The Urge to Punish 43 (1956); Perlin, supra note 19, at 628-30.
104. See Weinstock, Ethical concerns expressed by forensic psychiatrists, 31 J Forensic Sci 596, 600 (1986). Compare Appelbaum: The Supreme Court looks at psychiatry, 141 Am J Psychiatry 827, 834 (1984) (Supreme Court is willing to "mold its image of psychiatry in whatever way is useful in fulfilling its goals").
105. For a recent, massive scholarly undertaking weighing issues of jury competence, see Symposium, Empirical research and the issue of jury competence, 52 L Contemp Probs 1-310 (Autumn 1989).
106. See generally, Perlin, supra note 18, at 39-53.
107. Gunn, supra note 101, at 147.
108. See generally, Sherwin, supra note 36. See also Kaplan, The mad and the bad: an inquiry into the disposition of the criminally insane, 2 J Med Phil 244, 254 (1977).
109. See Albers, Pasewark, Meyer: Involuntary hospitalization and psychiatric testimony: the fallibility of the doctrine of immaculate perception, 6 Cap U L Rev 11, 31 (1976); United States v. Addison, 498 F. 2d 741, 744 (D.C. Cir, 1974); United States v. Alexander, 526 F. 2d 161, 168 (8th Cir, 1975); see generally, Barefoot, 463 U.S. at 926-27 n. 8 (Blackmun, J., dissenting).
110. See Perlin, supra note 19, at 675-78, 721-24.
111. R. Rogers, C. Ewing: Proscribing "ultimate opinions": the quick and cosmetic fix. manuscript at 9; see also, Rogers, Ewing, supra note 59, at 362 (undue influence claim underestimates jurors' abilities to evaluate expert testimony critically and exaggerates persuasive powers of expert witnesses). See also, Rogers, Bagby, Crouch, Cutler, supra note 59, at 230 (ultimate opinions do not appear to have a "pronounced effect" on juror perceptions of insanity). On the way jurors respond to secondary content emanating from expert witnesses, see Rosenthal: Nature of jury response to the expert witness, 28 J Forens Sci 528 (1983) (characterizing such content as a "paramessage").
112. Singer: The resurgence of *mens rea*: I. Provocation, emotional disturbance, and the model penal code, 27 B C L Rev 243, 322

- (1986); Eule: The presumption of sanity: bursting the bubble, 25 *UCLA L Rev* 637, 661 (1978); see also, Rogers, Bagby, Crouch, Cutler, *supra* note 59, at 225-7.
113. On the application of this doctrine to a related question, see generally, Wexler, Schopp: How and when to correct for juror hindsight bias in mental health malpractice litigation: some preliminary observations, 7 *Behav Sci L* 485 (1989); Casper, Benedict, Perry: Juror decision making, attitudes, and the hindsight bias, 13 *L Hum Behav* 291 (1989); Bursztajn et al.: "Magical thinking," suicide, and malpractice litigation, 16 *Bull Am Acad Psychiatry Law* 369 (1988).
  114. Note. The insanity defense: effects of an abolition unsupported by a moral consensus, 9 *Am J Med* 471, 492 (1984).
  115. See Perlin: *supra* note 18, at 40-6. For the most recent explication of jury nullification principles, see Weinberg-Brodth: Jury nullification and jury-control principles, 65 *NYU L Rev* 825 (1990).
  116. See Fentiman: "Guilty but mentally ill": the real verdict is guilty, 26 *B C L Rev* 601, 638 (1985) (discussing judicial recognition of difficulty jurors have in entering insanity verdict in case where underlying act "particularly heinous") and *id.* at n. 213 (discussing *Beck v. Alabama*, 447 U.S. 625, 627 (1980)) ("Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them").
  117. *Moore v. State*, 525 So. 2d 870 (Fla. 1988).
  118. *Id.* at 871-2.
  119. *Id.* at 872-3.
  120. See 1 M. Perlin, *supra* note 11, at §§2.09-2.11, 37, manuscript at 21-2.
  121. See Perlin, *supra* note 1 M. Perlin, *supra* note 11, §1.04, at 24 n. 134.
  122. Bagby, Atkinson: The effects of legislative reform on civil commitment admission rates: a critical analysis, 6 *Behav Sci L* 45, 57 (1988), citing Hiday, *supra* note 72; Page: New civil commitment legislation: the relevance of commitment criteria, 25 *Can J Psychiatry* 646 (1980); Page: Civil commitment: operational definition of new criterion, 26 *Can J Psychiatry* 419 (1981) (Page: Operational definition); Page, Firth: Civil commitment practices in 1977: troubled semantics and/or troubled psychiatry, 24 *Can J Psychiatry* 329 (1979); Page, Yates: Civil commitment and the danger mandate, 18 *Can J Psychiatry* 267 (1973). The differences between Page's and Bagby's positions are considered in Bagby. The deprofessionalization of civil commitment, 29 *Can Psychol* 234 (1988). But see McCready, Merskey: On the recording of mental illness for civil commitment, 27 *Can J Psychiatry* 140 (1982) (sample studied revealed adherence to statutory guidelines).
  123. Page: Operational definition, *supra* note 122, at 420.
  124. See S. Brehm, J. Brehm: Psychological Reactance: A Theory of Freedom and Control 30-1 (1981) ("Given that a person believes he or she has a specific freedom, any force on the individual that makes it more difficult for him or her to exercise the freedom constitutes a threat to it. Thus, any kind of attempted social influence . . . that work[s] against exercising the freedom can be defined as threats"); see Perlin, *supra* note 19, at 610-1 n. 48, 665 n. 291; see also, D. Wexler: Health care compliance principles nad the insanity acquittee conditional release process, 27 *Crim L Bull* 18 (1991) (discussing application of psychological reactance principles in cases where hospitals seek conditional release for insanity acquitees).
  125. Bagby, Atkinson, *supra* note 122, at 58.
  126. See *supra* text accompanying notes 57-78.
  127. Bagby, Atkinson, *supra* note 122, discussing Chodoff, *supra* notes 67 and 69. On the way such paternalistic interpretations of civil commitment laws may be harmful to patients, see Wexler: Grave disability and family therapy: the therapeutic potential of civil libertarian commitment codes, 9 *Int'l J L Psychiatry* 39, 56 (1986).
  128. Kaufman: "Crazy" until proven innocent: civil commitment of the mentally ill homeless, 19 *Colum Hum Rts L Rev* 333, 362 (1988). See generally Bagby et al: Effects of mental health legislative reform in Ontario, 28 *Can Psychol* 21 (1987) (serious questions raised about the ability of lawmakers to legislate the practices of mental health professionals); Martin, Cheung: Civil commitment trends in Ontario: the effect of legislation on clinical practice, 30 *Canad J Psychiatry* 259 (1985) (mental health legislation had little effect on local commitment practice). Although Peters and his colleagues have reported significant changes in Florida's admissions and census following legislative change, see Peters et al: The effects of statutory change on the civil commitment of the mentally ill, 11 *L Hum Behav* 73 (1987). Bagby & Atkinson suggest that such initial postreform changes are not predictive of subsequent commitment rates. Bagby, Atkinson, *supra* note 122, at 56-7.
  129. Winick, *supra* note 74, at 46-51, and *id.* at n. 103 (citing sources); see generally, G. Lefrancois: *Psychology* 518 (2d ed. 1983); L. Festinger: *A Theory of Cognitive Dissonance* (1957); Festinger, Carlsmith: Cognitive consequences of fixed compliance, 58 *J Abnorm Soc Psychol* 203 (1959).
  130. Perlin, *supra* note 18, at 61-9.
  131. Bagby, Atkinson, *supra* note 122, at 59.

132. Bagby et al., *supra* note 128, at 28, and see Martin, Cheung, *supra* note 128, at 263.
133. D. Bazelon: Questioning Authority: Justice and Criminal Law 28 (1988).
134. Diamond, Stalans, *supra* note 94, at 87-8.
135. Edwards, von Winterfeldt: Cognitive illusions and their implications for the law, 59 S Cal L Rev 225, 237 (1986), discussing Kahneman, Tversky: On the psychology of prediction, 80 Psychol Rev 237 (1973).
136. On the impact of the availability heuristic on clinicians' perceptions of the likelihood of their being sued, see Bonnie, *supra* note 37, at 233; see also Perlin, *supra* note 91, at 989 n. 211 (discussing Stanley Brodsky's suggestion that disproportionate reactions by mental health professionals responding to their fears of being sued have reached phobic proportions, see Brodsky: Fear of litigation in mental health professionals, 15 Crim Just Behav 492, 497 (1988)).
137. See Fischer, Pierce, Appelbaum, *supra* note 19.
138. Compare Durham, LaFond: The empirical consequences and policy implications of broadening the statutory criteria for civil commitment, 3 Yale L Pol'y Rev 395 (1985), to Stone: Broadening the statutory criteria for civil commitment: A reply to Durham and LaFond, 5 Yale L Pol'y Rev 412 (1987), Durham, LaFond: "Thank you, Dr. Stone": a response to Dr. Alan Stone and some further thoughts on the wisdom of broadening the criteria for involuntary therapeutic commitment of the mentally ill, 40 Rutgers L Rev 865 (1988), and Durham, LaFond: A search for the missing premise of involuntary therapeutic commitment: effective treatment of the mentally ill, 40 Rutgers L Rev 303 (1988); see Perlin, *supra* note 70, at 128-30 nn. 385-92.
139. Fischer, Pierce, Appelbaum, *supra* note 19, at 712.
140. Menzies: Psychiatrists in blue: police apprehension of mental disorder and dangerousness, 25 Criminology 429, 446 (1987); see also, B. Bursten, *supra* note 60, at 95 (arresting officer has far more impact on whether mentally disabled criminal suspect is treated as "mad" or "bad" than does the entire insanity defense system); compare Petrla: The insanity defense and other mental health dispositions in Missouri, 5 Int'l J L Psychiatry 81, 91 n. 36 (1982) (reporting on forensic staff's attitudes toward forensic patients, employing OCS so as to deny the presence of mental disability). On the other hand, police officers are frequently called to testify as lay witnesses to rebut expert testimony that a defendant was insane or incompetent to voluntarily confess. For a prototypic case, see *State v. Clayton*, 656 S.W. 2d 344 (Tenn. 1983). On the law enforcement perspective on these issues, see Gillig, Dumaine, Stammer, Hillard, Grubb: What do police officers really want from the mental health system, 41 Hosp Community Psychiatry 663 (1990).
141. See Perlin, *supra* note 19, at 639-40 n. 177.
142. Goldstein: The psychiatrist's guide to right and wrong, Part IV: the insanity defense and the ultimate issue rule, 17 Bull Am Acad Psychiatry Law 269, 179 (1989); see also, *United States v. Torniero*, 735 F. 2d 725, 733 (2d Cir. 1984), cert. den. 469 U.S. 1110 (1985), quoting American Psychiatric Association Statement on the Insanity Defense, 140 Am J Psychiatry 681 (1983) (recommending that insanity defense not apply to defendants with antisocial personality disorder "for heuristic reasons"). Compare Mickenberg, *supra* note 40, at 988-90, 995-6 ("guilty but mentally ill" verdict should be welcomed because it may restore public confidence in the criminal justice system).
143. See e.g., Lamb: Deinstitutionalization and the homeless mentally ill, 35 Hosp Community Psychiatry 899, 943 (1984) (society "morally disapproves of persons who 'give in' to their dependency needs"); compare *supra* text accompanying note 70 (quoting Lamb, *supra* note 8, at 277, assailing judiciary's alleged too-literal interpretation of civil commitment statutes).
144. See Jackson: The clinical assessment and prediction of violent behavior: toward a scientific analysis, 16 Crim Just Behav 114, 115-8 (1989); Jackson: Psychiatric decisionmaking for the courts: judges, psychiatrists, lay people? 9 Int'l J L Psychiatry 507, 519 (1986).
145. Fentiman, *supra* note 116, at 611 n. 63 (quoting Prof. Ernest Roberts), discussed in Perlin, *supra* note 19, at 614-5. For a similar explanation, see Sinclair: The use of evolution theory in law, 64 U Det L Rev 451, 469-70 (1987). Compare Steadman et al.: Maintenance of an insanity defense under Montana's "abolition" of the insanity defense, 146 Am J Psychiatry 357 (1989) (after Montana replaced its insanity defense with a more restrictive mens rea substitute, while insanity acquittals declined, dismissals based on incompetency to stand trial findings increased substantially).
145. See *Northern Securities Co. v. United States*, 193 U.S. 197, 400-01 (1904) (Holmes, J.).
147. Wexler: Redefining the insanity problem, 53 Geo Wash L Rev 528, 537 (1985), quoting Weick: Small wins: redefining the scale of social problems, 39 Am Psychologist 40, 48 (1984).
148. But see, I. Keilitz: Rethinking justice and mental health interactions: a systems approach (manuscript prepared for the Na-

tional Symposium on Justice and Mental Health Interactions, November 1990, Arlington, VA, sponsored by the National Center for State Courts) (understanding and improvement of interactions of justice and mental health systems will be enhanced if policymakers, social scientists, administra-

tors, and others concerned with mental health pay greater attention to structural aspects of justice and mental health systems and to interorganizational relations of their components).

149. See J. Robitscher, *supra* note 11.