"Deceived Me into Thinking/I Had Something to Protect": A Therapeutic Jurisprudence Analysis of When Multiple Experts Are Necessary in Cases in which Fact-Finders Rely on Heuristic Reasoning and "Ordinary Common Sense"

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Abstract:

There is a stunning disconnect between the false "ordinary common sense" of fact-finders (both jurors and judges) and the valid and reliable scientific evidence that *should* inform decisions on the full range of questions that are raised in cases involving the forensic mental health systems – predictions of future dangerousness, competency and insanity determinations, sentencing mitigation in death penalty cases, and sexually violent predator commitments. Abetted by the misuse of heuristic reasoning (the vividness effect, confirmatory bias, and more), decisionmakers in such case frequently "get it wrong" in ways that poison the criminal justice system. If we were to adopt this proposal – to provide *two* experts in cases in which such inaccuracy is likely, one to explain to the fact-finders why their "common sense" is fatally flawed, and one to provide an evaluation of the defendant in the context of the specific question before the court – then, and only then, would therapeutic jurisprudence principles be vindicated.

Introduction

The public – and for the purposes of this paper, this includes judges as well as jurors along with those whose knowledge base flows from TV news and Internet websites – is dead wrong about everything it thinks it knows about the full range of topics that matter so much in the criminal justice system: the accuracy of predictions of future dangerousness, the salient issues in competency and insanity determinations, the disposition of cases involving defendants who plead insanity (both those who are successful and those who are not), the potentially mitigating factors that are frequently raised in sentencing phase of death penalty cases and the meaning of "intellectual disability" in such cases, and the accuracy of predictions involving those who are subject to sexually violent predator commitments.[1] These "dead wrong" views flow from the unthinking use of heuristic thinking devices (including, but certainly not limited to, the vividness effect and confirmatory bias) and the similarly unthinking use of false "ordinary common

[1] I have written about these frequently in the past, and I continue to do so. See e.g., MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE (1994) (PERLIN, INSANITY DEFENSE); MICHAEL L. PERLIN, THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL, (2000) (PERLIN, HIDDEN PREJUDICE); MICHAEL L. PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES (2013); MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, SHAMING THE CONSTITUTION: THE DETRIMENTAL RESULTS OF SEXUAL VIOLENT PREDATOR LEGISLATION (2017).

sense."[2] The effect of all of these is the same – judicial decisionmakers, "knowing" they are right, fall prey to a full range of biases that cause them to believe everything that is false and disbelieve everything that is true. In this paper, I suggest an approach to remediate these gross cognitive errors.

Those of us who do the research, who read the research, and who study the research know that our assumptions are wrong, and we have known this for years. Consider the example of the Supreme Court's 1983 decision in *Barefoot v. Estelle,*[3] countenancing testimony on future dangerousness in a death penalty case in which

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[2] See e.g, Michael L. Perlin, *Morality and Pretextuality, Psychiatry and Law: Of Ordinary Common Sense, Heuristic Reasoning, and Cognitive Dissonance*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 131 (1991) (Perlin, *Morality*); Michael L. Perlin, *Psychodynamics and the Insanity Defense: Ordinary Common Sense and Heuristic Reasoning*, 69 NEB. L. REV. 3 (1990) (Perlin, *Psychodynamics)*. By way of example, for the impact of these factors on death penalty cases involving defendants with serious mental disabilities, see Michael L. Perlin, Talia Roitberg Harmon & Sarah Chatt, *"A World of Steel-Eyed Death": An Empirical Evaluation of the Failure of the* Strickland *Standard to Ensure Adequate Counsel to Defendants with Mental Disabilities Facing the Death Penalty*, -- U. MICH. J. L. REF. – (2019) (forthcoming).

[3] 463 U.S. 880 (1983) See generally, MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, §§ 17.2-1 to 17-2.2, at 17-3 to 17-15 (3d ed. 2018); Michael L. Perlin, *The Supreme Court, the Mentally Disabled Criminal Defendant, Psychiatric Testimony in Death Penalty Cases, and the Power of Symbolism: Dulling the* Ake *in* Barefoot's *Achilles Heel*, 3 N.Y. L. SCH. HUMAN RTS. ANN. 91 (1985)

the witness had never personally examined or evaluated the defendant.[4] One of the lynch-pins of the *Barefoot* decision was Justice White's conclusion that, as a result of vigorous cross-examination, "the jury will ... be able to separate the wheat from the chaff."[5] The *Barefoot* decision led three researchers to write, some six years later, "[W]e have yet to find a single word of praise for, or in defense of *Barefoot,* in the literature of either science or law."[6] Thirty years after that article was written,

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[4] *Barefoot,* 463 U.S. at 896. Compare *id.* at 926 (Blackmun, J., dissenting) (cautioning that the "major danger of scientific evidence is its potential to mislead the jury" and that "an aura of scientific infallibility may shroud the evidence and thus lead the jury to accept it without critical scrutiny"), as discussed in Michael L. Perlin, *"Your Corrupt Ways Had Finally Made You Blind": Prosecutorial Misconduct and the Use of "Ethnic Adjustments" in Death Penalty Cases of Defendants with Intellectual Disabilities,* 65 AM. U. L. REV. 1437, 1452 n. 81 (2016).

[5] *Barefoot,* 463 U.S. at 899 n. 7. Compare *id.* at 926 (Blackmun, J., dissenting): "The major danger of scientific evidence is its potential to mislead the jury; an aura of scientific infallibility may shroud the evidence and thus lead the jury to accept it without critical scrutiny."

One commentator has characterized this as a "cavalier attitude toward indiscriminate acceptance of scientifically unreliable testimony." See Cathleen C. Herasimchuk, *A Practical Guide to the Admissibility of Novel Expert Evidence in Criminal Trials Under Federal Rule 702,* 22 ST. MARY'S L.J. 181, 201 (1990).

[6] D. Michael Risinger, Mark P. Denbeaux & Michael J. Saks, *Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting Identification "Expertis*e," 137 U. PA. L. REV. 731, 780 n. 215 (1989).

such a single word can still not be found.[7] And *Barefoot* continues to be perceived as good law, and continues to be regularly cited in published, appellate cases.[8]

But, again, it is not just matters involving predictions of dangerousness that we get dead wrong. Our "ordinary common sense" is flawed—deeply, fatally flawed – as it relates to all of the issues that I noted above, and, if we continue to litigate these cases as we currently do, I see no reason to expect any significant "improvement" (meaning that, in an alternative universe I wish for, fact-finders would take seriously the valid and reliable evidence that has been developed for decades, and would acknowledge that their embrace of the vividness and

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[7] Paul Appelbaum's analysis of the Supreme Court's decisions in *Barefoot* "persuasively demonstrates that the Court's use of heuristic devices leads it to misinterpret some significant empirical data, to disparage other data, and to ignore yet other data." Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625, 668 (1993), referring to Paul S. Appelbaum, *The Empirical Jurisprudence of the United States Supreme Court,* 13 AM. J. L. & MED. 335 341 (1988).

For more recent critical articles about B*arefoot, see e.g.,* James Acker, *Snake Oil with a Bite: The Lethal Veneer of Science and Texas's Death Penalty,* 81 ALB. L. REV. 751, 763-69 (2017-18); Mayra Reyes*, Danger! The Defendant Is "Disturbed." Risks of Using Psychiatric Assessments to Predict Future Dangerousness*, 17 CONN. PUB. INT. L.J. 141, 162-63 (2017); Jaymes Fairfax-Columbo & David DeMatteo, *Reducing the Dangers of Future Dangerousness Testimony: Applying the Federal Rules of Evidence to Capital Sentencing*, 25 WM. & MARY BILL RTS. J. 1047, 1056-61 (2017).

[8] E.g, *Ex Parte* Wood, 2018 WL 6076407, *2 (Tex. Ct. Crim. App. 2018); *In re* Detention of Parsons, 189 Wash. App. 1031, 2015 WL 4756464, *6 (Wash. Ct. App. 2015).

availability heuristics taints all their judgments).[9] Certainly, there is no question that, when valid research is dissonant with jurors' (and judges') "ordinary common sense" on these positions, then that "ordinary common sense" prevails--an "ordinary common sense" that is often wrong --and the research is ignored.[10] As one of the leading casebooks on evidence tells us, "What the witness sees or hears is fitted into and made sense of by means of pre-existing ideas."[11]

In this context, we also need to think about what is regularly called "folk psychology" – **"**the prescientific, commonsense conceptual framework that all normally socialized humans deploy in order to comprehend, predict, explain, and manipulate the behavior of humans."[12] There has been extensive scholarship about

[9] See *infra* text accompanying notes 65 & 68.

[10] Michael L. Perlin, *"I've Got My Mind Made Up": How Judicial Teleology in Cases Involving Biologically Based Evidence Violates Therapeutic Jurisprudence,* 24 CARD. J. EQUAL RTS. & SOC'L JUST. 81, 88 (2018). On false "ordinary common sense," see *infra* text accompanying notes 71-75.

[11] JACK WEINSTEIN ET AL, CASES AND MATERIALS ON EVIDENCE 245 (8th ed. 1988).

[12] Paul M. Churchland, *Folk Psychology,* in PAUL M. CHURCHLAND & PATRICIA S. CHURCHLAND, ON THE CONTRARY: CRITICAL ESSAYS 1987-1997 3, 3 (1998), as quoted in Robert Birmingham, *Folk Psychology and Legal Understanding*, 32 CONN. L. REV. 1715, 1716 (2000).

this phenomenon in related areas, [13] much of it focusing on the rules of evidence. By way of example, "excited utterances" are commonly viewed as exceptions to the hearsay rules, an exception that relies on folk psychology to tell us that "a person is unlikely to fabricate lies (which presumably takes some deliberate reflection) while his mind is preoccupied with the stress of an exciting event."[14] Or, in the words of Professor Melissa Hamilton, "Drawing on a `folk psychology of evidence,' this naïve belief that people are wholly incapable of spontaneously lying under emotional distress is farcical."[15] As Professors Robert Beatty and Mark Fondacaro have noted, in a context close to what I am discussing here, "a folk psychology [referring to

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[13] For an overview, see Stephen J. Morse, *Determinism and the Death of Folk Psychology: Two Challenges to Responsibility from Neuroscience*, 9 MINN. J.L. SCI. & TECH. 1, 4 (2008) (criminal law is based on "folk psychology" which views humans as rational beings).

[14] United States v. Joy, 192 F.3d 761, 767 (7th Cir 1999). Importantly, his premise has been specifically rejected in a subsequent case, concluding, "[a]s with much of the folk psychology of evidence, it is difficult to take this rationale entirely seriously." United Stats v. Boyce, 742 F. 3d 792, 796 (7th Cir. 2014).

See Steven Baiker-McKee, *The Excited Utterance Paradox,* 41 SEATTLE U. L. REV. 111, 111 (2017) (doctrine "based on nothing more than John Henry Wigmore's personal belief").

[15] Melissa Hamilton, *The Reliability of Assault Victims' Immediate Accounts: Evidence from Trauma Studies,* 26 STAN. L. & POL'Y REV. 269, 278 (2015).

"ordinary common sense"] approach to something like *mens rea* is guaranteed to be wrong some of the time and costly much of the time".[16]

In this paper, I suggest that our current "take" on a full range of issues relevant to forensic cases is similarly "farcical," and wrong *most* of the time, and suggest a new approach. In cases involving forensic testimony of this sort – testimony that is especially difficult for jurors to process because it flies in the face of "what they know," and is contrary to the media's incessant mis-characterizations of the issues in question[17]– the defendant should be entitled to *two* experts: *one* who has done an evaluation and testifies as to whether the defendant in question is, variously, likely to be dangerous in the future, likely to reoffend sexually, not responsible for the underlying *actus reus,* etc., and *one* (a different one) who explains to the jury (and not insignificantly, the judge) *why* fact-finders regularly make these fatal errors in such cases.[18]

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[16] Robert A. Beattey & Mark Fondacaro, *The Misjudgment of Criminal Responsibility*, 36 BEHAV. SCI. & L. 457, xxx (2018).

[17] See, e.g., PERLIN, THE INSANITY DEFENSE, *supra* note 1, at 172 ("Media depictions rely on stereotypes and distort images of mental illness ...."); see also, Heather Ellis Cucolo & Michael L. Perlin, *"They're Planting Stories in the Press": The Impact of Media Distortions on Sex Offender Law and Policy,* 3 U. DENV. CRIM. L. REV. 185 (2013).

[18] In some jurisdictions, there *are* rights to multiple experts to evaluate competency, see e.g., State v. Israel, 577 P.2d 631 (Wash. App. 1978), but these experts are statutorily tasked with answering the same question: whether the defendant in the case in question is competent to stand trial.

I. Supreme Court caselaw

Supreme Court caselaw is of marginal help. While *Ake v. Oklahoma,*[19] a case in which an indigent defendant sought funding for an expert witness, concluded that a "criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense,"[20] a more recent case on right to experts made clear that "*Ake* does not give the defense the right to interview

[19] 470 U.S. 68 (1985).

Ake had been charged with two counts of murder and two counts of shooting with intent to kill. *Id.* at 70-71. Prior to trial, he was institutionalized to determine his competency to stand trial, in accord with a recommendation rendered by a court-appointed psychiatrist who characterized Ake as "frankly delusional" and a "probable paranoid schizophrenic." *Id.* at 71. That Ake had serious mental problems cannot be seriously disputed: in a remarkable colloquy with the judge, trial counsel had characterized the defendant as "goofier than hell." See Brief of Petitioner, Ake v. Oklahoma, 470 U.S. 68 (1985), at 10, *quoting* J.A. 27. Before trial, defense counsel had notified the court that he would raise the insanity defense, and asked the trial judge to either arrange for a psychiatric examination of the defendant so as to evaluate his responsibility at the time of the offense, or to make funds available (in light of the defendant's indigency) to allow him to arrange for his own evaluation. *Id.* at 5, , *quoting* J.A. 20 This request was denied. *Ake,* 470 U.S. at 72.

[20] *Id.* at 77. On the need for such assistance to be independent, see Alexandra Marimucci, *Achieving* Ake: *Defendants Deserve the Constitutional Right to Independent Mental Health Professionals,* 79 U. PITT. L. REV. 729 (2018).

By statute in at least one state, **if** an expert has been appointed to assist the defense, the defense may produce other expert evidence on the same matters, but any additional experts must be paid by the defense. See ALA. EVIDENCE CODE § 733.

potential experts, to seek out an expert who offers a favorable preliminary diagnosis, *or to hire more than one expert*."[21] This is in line with earlier state court

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[21] McWilliams v. Dunn, 137 S. Ct. 1790, 1803 (2017).

While awaiting sentence on a conviction for capital murder, McWilliams' counsel asked for neurological and neuropsychological testing. *Id.* at 1795-96. The court agreed, and McWilliams was examined by a doctor who filed a report two days before the judicial sentencing hearing. *Id.* at 1796. He concluded that McWilliams was likely exaggerating his symptoms, but nonetheless appeared to have some "genuine" neuropsychological problems. *Id.*

Just prior to the hearing, counsel also received updated records from the commission's evaluation, as well as previously-subpoenaed mental health records from the Alabama Department of Corrections. *Id.* At the hearing, defense counsel requested a continuance in order to evaluate all the new material, and also asked for the assistance of someone with expertise in psychological matters to review the findings. *Id.* at 1796-97. The trial court denied defense counsel's requests. At the conclusion of the hearing, the court sentenced McWilliams to death. *Id.* at 1797–98.

See also e.g., Glass v. Blackburn, 791 F.2d 1165, 1168–69 (5th Cir.1986) (suggesting that *Ake* does not require that more than one expert be provided). Other post-*Ake* cases have considered aspects of this question in a variety of ways. See e.g., Schiro v. Clark, 754 F. Supp. 646, 658 (N.D. Ind. 1990), *aff'd*, 963 F.2d 962 (7th Cir. 1992) (*Ake* satisfied by appointment of two experts who evaluated defendant on questions of competency and sanity); Rychtarik v. State, 334 Ark. 492, 976 S.W.2d 374 (1998) (defendant not entitled to additional psychiatric evaluation to determine his competency to waive rights); Castro v. Ward, 138 F.3d 810 (10th Cir.), *cert. denied*, 525 U.S. 971 (1998) (denial of funds for additional mental health expert did not violate due process); State v. Arter, 2016 Ariz. App. Unpub. LEXIS 1583 (Dec. 20, 2016) (trial court did not abuse its discretion by denying the motion for additional funds for a second mental evaluation); Lewis v. Commonwealth, 42 S.W.3d 605 (Ky. 2001) (no prejudice from court's failure to appoint additional experts when

decisions that have held that the "defendant had no right to the appointment of multiple experts."[22]

I believe that this unthinking line of cases is, in large part, responsible for the current state of affairs in which credible expert evidence is often ignored, succumbing to heuristic reasoning and false "ordinary common sense" in ways that are infused with sanism and pretextuality.[23] I hope that this paper will encourage fact-finders to rethink the current state of affairs.[24]

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person appointed was expert on syndrome which was defendant's defense). See generally, PERLIN & CUCOLO, *supra* note 3, § 15-4.3, at 15-70 n. 559 (collecting cases).

[22] E.g., State v. Seaberry, 388 S.E.2d 184 (N.C. 1990). On the other hand, there are pre-*Ake* state cases finding the right to experts to flow from the state constitutional right to effective counsel, a right that *might* extend to multiple experts, although not for the reasons urged in this paper. See e.g., Coronevsky v. Superior Court, 204 Cal.Rptr. 165, 167 (1984) (right to an expert when necessary to respond to the prosecution's expert witnesses or to establish an affirmative defense, as an aspect of "ancillary defense services"), as construed in People v. Stuckey, 96 Cal.Rptr.3d 477, 491 (App. 2009).

[23] On sanism and pretextuality in general, see Michael L. Perlin, *"Half-Wracked Prejudice Leaped Forth": Sanism, Pretextuality, and Why and How Mental Disability Law Developed as It Did*, 10 J. CONTEMP. LEG. ISS. 3 (1999). *See infra* text accompanying notes 56-63.

[24] For an earlier article suggesting additional expert testimony in the confessions context to inform judges and juries about police interrogations, false confessions, and personal and situational risk factors, see Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. IN PUB. INTEREST 33, 58 (2004), as discussed in Tamar R. Birckhead, *The Age of the Child: Interrogating Juveniles*

II. The public's attitudes

We know, by way of examples, that the public is wrong – dead wrong –about what it believes about sex offender cases. As I have written with my frequent co-author-colleague Professor Heather Ellis Cucolo:

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after Roper v. Simmons, 65 WASH. & LEE L. REV. 385, 446 n. 238 (2008). This has been noted by at least one state Supreme Court justice. See State v. Lawrence, 920 A.2d 236, 273 (Conn. 2007) (Katz, J., dissenting):

> These studies [referring to that of Kassin and Gudjonsson, among others] demonstrate that jurors are unable to detect false confessions because of the commonsense expectation of self-serving behavior in others and the accompanying disinclination to believe that a person would falsely confess.

Similarly, Professor Kassin and another colleague have argued that special experts -- to testify about memory and perception -- may be needed in cases involving eyewitness testimony, see SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 84-86 (1988), a topic about which courts have differed significantly (compare State v. Henderson, 27 A. 3d 872 (N.J. 2011) (allowing for the introduction into evidence of expert testimony on eyewitness identification testimony in general), to United States v. Thevis, 665 F. 2d 626, 641 (5th Cir. 1982) , *cert.* den., 459 U.S. 825 (1982) (the jury can adequately weigh questions involving witness's perceptions and memory "through common-sense evaluation")).

Lawyers must be trained in the sanist and pretextual myths that lead fact finders to make gross misassumptions about persons who are subject to the SVPA process (*e.g.*, that "no treatment works"; that "they all recidivate";[25] that the stranger-in-the-parking-lot scenario is the most common fact pattern), in the ways that heuristic reasoning dominates fact-finders' thought process (including, not limited to, the vividness heuristic), and in the ways that fact-finders' false "ordinary common sense" leads them to make fatally

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[25] On the issue of what is perceived as the ubiquity of recidivism, see Heather Ellis Cucolo & Michael L. Perlin, *"The Strings in the Books Ain't Pulled and Persuaded": How the Use of Improper Statistics and Unverified Data Corrupts the Judicial Process in Sex Offender Cases,* 69 CASE W. RES. L. REV. 637, 651-52 (2019), discussing how, in the case of McKune v. Lile, 536 U.S. 24 (2002), the Supreme Court, relying on one prior source – a source based on a non-peer reviewed study of *one* therapy group (led by the source's author) -- cited an 80 percent rate of re-offense for untreated offenders as a basis underlying the justification to restrict the rights and liberties of individuals convicted of sexual offense, an "unsupported assertion of someone without research expertise who made his living selling such counseling programs to prisons," Cucolo & Perlin, *supra,* at 652, quoting Ira Mark Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495, 499 (2015).

On the Supreme Court's misuse of social science in general, see William Blake, *"Don't Confuse Me with the Facts": The Use and Misuse of Social Science on the U.S. Supreme Court,* -- MD. L. REV. – (2019) (forthcoming), accessible at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3383067, and see *id.*, at 3 (characterizing the relationship between social science and judicial behavior as "polarizing").

erroneous assumptions as a result of pre-reflective thinking, and observations based disproportionately on visual cues and clues ("he looks creepy").[26]

Similarly, the public is equally dead wrong about what it believes about the use if the insanity defense: that it is a plea without risk, often used, almost always successful, and that it leads to a minimal stay in a "Club Fed" type facility.[27] Consider some of the myths – myths that have been disproved unequivocally by all the valid and reliable evidence[28] – to which jurors adhere:

Myth #1: The insanity defense is overused.

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

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

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

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[26] See Heather Ellis Cucolo & Michael L. Perlin, *Promoting Dignity and Preventing Shame and Humiliation by Improving the Quality and Education of Attorneys in Sexually Violent Predator (SVP) Civil Commitment Cases,* 28 FLA. J. L. & PUB. POL'Y 291, 325-26 (2017) (footnotes omitted).

[27] See e.g., Michael L. Perlin, *"His Brain Has Been Mismanaged with Great Skill": How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?* 42 AKRON L. REV. 885, 901 (2009).

[28] See e.g., Michael L. Perlin, *The Insanity Defense: Nine Myths That Will Not Go Away*, in THE INSANITY DEFENSE: MULTIDISCIPLINARY VIEWS ON ITS HISTORY, TRENDS, AND CONTROVERSIES 1 (Prof. Mark D. White, ed. 2017).

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

Myth #6: Criminal defendants who plead insanity are usually faking.[29]

Again, we know that each of these are demonstrably wrong, and that we have known that they are wrong for decades;[30] these myths are "firmly rooted in our cultural subconscious,"[31] and despite decades of scholarly articles refuting them,[32]

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[29] *Id.*

[30] See PERLIN, INSANITY DEFENSE, *supra* note 1, at 229-62 (citing valid and reliable evidence disproving each of these myths).

[31] R. de Vito*, Some New Alternatives to the Insanity Defense*, 1 AM. J. FORENSIC PSYCHIATRY 38, 40 (1980).

[32] *See e.g,,* Russell D. Covey, *Criminal Madness: Cultural Iconography and Insanity*, 61 STAN. L. REV. 1375 (2009).

I have been writing about this for over 35 years, and I continue to do so. See e.g., Joseph H. Rodriguez, Laura M. LeWinn & Michael L. Perlin, *The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders*, 14 RUTGERS L.J. 397 (1983); Michael L. Perlin, *Whose Plea Is It Anyway? Insanity Defense Myths and Realities*, 79 PHILA. MED. 5 (1983); Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599 (1989-90) (Perlin, *Unpacking the* Myths); Perlin, *Psychodynamics, zupra* note 2; PERLIN, INSANITY DEFENSE, *supra* note 1; Michael L. Perlin, *Myths, Realities, and the Political World: The Anthropology of Insanity Defense Attitudes*, 24 BULL. AM. ACAD. PSYCHIATRY & L. 5 (1996); Michael L. Perlin, *"The Borderline Which Separated You from Me" : The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment,* 82 IOWA L. REV. 1375 (1997) (Perlin, *Borderline*); Michael L. Perlin, *The Insanity Defense: Deconstructing the Myths and Reconstructing the Jurisprudence,* in LAW, MENTAL HEALTH AND MENTAL DISORDER 341 (Bruce Sales & Daniel. Shuman eds. 1996); Michael L. Perlin, *"She Breaks Just Like a Little Girl":*

they remain so rooted. We were cautioned about this over 180 years ago, when Isaac Ray wrote, in the context of insanity defense cases, "the jury is seldom a proper tribunal for distinguishing the true from the false, and fixing on each its rightful value."[33] Yet, we continue to adhere to them, and prosecutors continue to regularly perpetuate these myths in jury closings with no sanctions forthcoming.[34]

Neonaticide, the Insanity Defense, and the Irrelevance of "Ordinary Common Sense," 10 WM. & MARY J. WOMEN & L. 1 (2003) (Perlin, *Neonaticide*); Perlin, *supra* note 14; Michael L. Perlin, *"Too Stubborn To Ever Be Governed By Enforced Insanity": Some Therapeutic Jurisprudence Dilemmas in the Representation of Criminal Defendants in Incompetency and Insanity Cases,* 33 INT'L J. L. & PSYCHIATRY 475 (2010); Michael L. Perlin, *"God Said to Abraham/Kill Me a Son": Why the Insanity Defense and the Incompetency Status Are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence,* 54 AM. CRIM. L. REV. 477 (2017) (Perlin, *God Said*); Perlin, *supra* note 27; Perlin, *supra* note 28.

[33] Catherine Struve, *Doctors, the Adversary System, and Procedural Reform in Medical Liability Litigation*, 72 FORDHAM L. REV. 943, 959 (2004) (citing ISAAC RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY 59 (1838)).

[34] Compare e.g., Commonwealth v. Dalton, 794 S.E. 2d 485 (N.C. 2016) (prosecutor's statements during closing argument, exaggerating the likelihood of defendant's release if found guilty by reason of insanity, constituted prejudicial error), to State v. Moody, 94 P. 3d 1119 (Ariz. 2004) (prosecutor's improper closing argument appealing to jurors' fears that verdict of not guilty by reason of insanity would result in defendant's release did not require reversal of capital murder conviction).

Another example to consider. Since the Supreme Court decided *Atkins v. Virginia* in 2002,[35] it has returned to the question presented there – on the executability of one with intellectual disabilities – on the merits on four occasions.[36] In *Hall v. Florida,* it rejected the use of a "bright line" IQ score of seventy as a cut-off point for intellectual disability for the purposes of determining whether one is eligible to be executed.[37] But, notwithstanding the *Hall* decision, the state of Texas, by way of example, continued to adhere to its utterly-discredited decision of *Ex parte Briseño,*[38] which created a standard -- based on the fictional character of Lenny, in Steinbeck's novel *Of Mice and Men*[39] -- for determining whether a

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[35] 536 U.S. 304 (2002) (execution of a person with mental retardation [as it was then characterized] is cruel and unusual punishment).

[36]Hall v. Florida, 134 S. Ct. 1986 (2014), Brumfield v. Cain, 135 S. Ct. 2269 (2015), Moore v. Texas, 137 S. Ct. 1039 (2017), Moore v. Texas, 139 S. Ct. 666 (2019).

[37] *Hall*, 134 S. Ct. at 2001. Soon after its decision in *Hall,* the Court returned to this issue in *Brumfield,* holding, that a state postconviction court's determination that prisoner's IQ score of 75 demonstrated that he could not possess subaverage intelligence reflected an unreasonable determination of the facts. 135 S. Ct. at 2281. *Brumfield* also held that a defendant needs "only to raise a 'reasonable doubt' as to his intellectual disability to be entitled to an evidentiary hearing." *Id*

[38] 135 S.W.3d 1 (Tex. Crim. App. 2004).

[39] *Id.* at 6 ("Most Texas citizens might agree that Steinbeck's Lennie should, by virtue of his lack of reasoning ability and adaptive skills, be exempt"), citing in a footnote to *Of Mice and Men.* See, for a provocative discussion of this issue, Mia-Carré B. Long, *Of Mice and Men, Fairy Tales, and Legends: A Reactionary Ethical Proposal to Storytelling and the* Briseño *Factors,* 26 GEO. J. LEGAL ETHICS 859 (2013).

particular defendant possesses significant adaptive deficits, a standard criticized by a commentator, accurately, creating "an unconstitutional risk of executing mentally deficient persons" notwithstanding the *Hall* decision.[40]

Three years after *Hall*, in its first *Moore* decision, the Supreme Court struck down Texas's schemata for determining if a defendant were sufficiently intellectually disabled so that execution would violate the Eighth Amendment,[41] sending the case back to state court for further review utilizing a test based on more current medical standards.[42] But, notwithstanding this decision, and notwithstanding the fact that the *prosecutor* in the *Moore* case requested the defendant's sentence be changed to life in prison, the Texas Court of Criminal Appeals again rejected this plea, ruling that Moore was not intellectually disabled under either standard. The Supreme Court granted *certiorari* again, and once more

[40] Hensleigh Crowell, *The Writing Is on the Wall: How the* Briseno *Factors Create an Unacceptable Risk of Executing Persons with Intellectual Disability,* 94 Tex. L. Rev. 743, 744 (2016). See also, on this point, Perlin, *supra* note 4, at 1450 n.67.

[41] *Moore,* 137 S. Ct at 1044. See e.g., Alexander H. Updegrove, Michael S. Vaughn & Rolando V. del Carmen, *Intellectual Disability in Capital Cases: Adjusting State Statutes after* Moore v. Texas, 32 Notre DAME J.L. ETHICS & PUB. POL'Y 527 (2018) ; Austin Holler, Moore *v. Texas and the Ongoing National Consensus Struggle Between the Eighth Amendment, the Death Penalty, and the Definition of Intellectual Disability*, 50 LOY. U. CHI. L.J. 415 (2018).

[42] *Moore*, 137 S. Ct. at 1052-53.

held that the Texas court was in error in determining that Moore was not intellectually disabled.[43]

This area of the law is further contaminated by the corrupt use by some prosecutors of retaining witnesses who use "ethnic adjustments" in death penalty cases--artificially adding points to the IQ scores of minority death penalty defendants--so as to make such defendants, who would otherwise have been protected by the A*tkins* line of cases, subject to capital punishment.[44] To be able to do this, an additional expert will inevitably be needed.[45] Although at least one psychologist who has testified in this manner has been sanctioned by a state

[43] *Moore*, 139 S. Ct. at 672. See generally, Perlin, Harmon & Chatt, *supra* note 2, manuscript at 75-76; PERLIN & CUCULO, *supra* note 3, § § 17-4.2.5, at 17-xx to 17-xy (3d ed. 2019) (in press).

The most recent decision in *Moore* has since been cited favorably in one other case. See Commonwealth v. Cox, --- A.3d ----2019 WL 1338435, *4 n. 8 (Pa. 2019). Compare Carr v. Mississippi, --- So.3d ----2019 WL 2384142 (2019). (finding that the defendant was not intellectually disabled did not constitute clear error).

[44] See. Perlin, *supra* note 4, at 1439-40 ; Robert M. Sanger, *IQ, Intelligence Tests, "Ethnic Adjustments" and* Atkins, 65 AM. U. L. REV. 87 (2015).

[45] See Sanger, *supra* note 44, at 123 (noting there are no peer reviewed studies supporting these adjustments)

licensing board,[46] it is clear that many others have testified in the same corrupt way.[47]

In writing about this specific issue previously, I called on defense counsel to "call their own witnesses ... to expose the testimony's fraudulence to the court and its jurors."[48] Here, I drew on the example of the case of the Colorado death penalty case of Frank Orona, in which Drs. Paul Appelbaum and Henry Steadman[49] testified on behalf of the defendant and concluded that the testimony of Dr. James Grigson was "unethical,"[50] and that there was "no empirical evidence" to support his

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[46] Tex. State Bd. of Examiners of Psychologists v. Denkowski, 520-09-2882 (Tex. State Office of Admin. Hrgs. 2009)., Denkowski entered into a Settlement Agreement with the Texas State Board of Examiners of Psychologists, in which his license was "reprimanded." See Ex parte, Hunter, 2016 WL 4793152, *1 (Tex. Ct. Crim. App. 2016).

[47] See e.g., Ex Parte Smith, 213 So.3d 313 (Ala. 2010) (discussing testimony of Dr. McLaren). Ex Parte Rodriguez, 164 S.W.3d 400 (Tex. Crim. App. 2005) (discussing testimony of Dr. Sherman) (Cochran, J., concurring).

[48] Perlin, *supra* note 4, at 1458-59.

[49] Drs. Appelbaum and Steadman are two of the most eminent experts in the world on these issues.

[50] See Perlin, *supra* note 4, at 1440, discussing "the scandalous story of Dr. James Grigson--known morbidly as "Dr. Death"--who regularly testified fraudulently on behalf of the state at the penalty phase of death penalty cases, *even after he lost his license to practice psychiatry,* using, in virtually every case, `junk science' as the basis of his opinions."

conclusions), resulting in a hung jury at the penalty phase.[51] This, though, will be impossible if, per *Ake*, counsel representing indigent defendants is limited to one expert.

III. Jurisprudential filters

In considering this array of cases and myths – spanning sex offender law, insanity defense law, and death penalty law (some, but not all, of the categories that trouble me)[52] -- it is necessary to also consider those jurisprudential filters that

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[51] See Matt C. Zaitchik, *Burying Dr. Death,* BOS. PHOENIX, Dec. 21, 1990, § 1, at 3, discussed in this context in Perlin, *supra* note 4, at 1448 n. 56.

There is no mention of Dr. Grigson's testimony, nor of Drs..Steadman's or Appelbaum's testimony, in the reported decision in the O*rona* case. See People v. Orona, 907 P.2d 659 (Colo. Ct. App. 1995), *disapproved of on other grounds, in* People v. Harlan, 8 P 3d 448 (Colo 2000), *overruled on other grounds, in* People v. Miller, 113 P.3d 743 (Colo. 2006).

[52] Consider also matters related to incompetency to stand trial. One trial judge responding to a National Center for State Courts survey indicated that defendants who were incompetent to stand trial could have understood and communicated with counsel and the court "if they had only wanted." Perlin, *supra* note 7, at 671, citing Ingo Keilitz & J. Rudy Martin, *Criminal Defendants with Trial Disabilities: The Theory and Practice of Competency Assistance* 90 (unpublished manuscript, on file with the author), cited, in this context, in Michael L. Perlin & Keri K. Gould, *Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines*, 22 AM. J. CRIM. L. 431, 454 (1995) (quoting Keri A. Gould et al., *Criminal Defendants With Trial Disabilities: The Theory and Practice of Competency Assistance* 90 (1993) (unpublished manuscript)).

have "poisoned and corrupted" all of mental disability law,[53] and have "malignantly distort[ed] both the legislative and judicial processes"?[54] I will define them each briefly:[55]

A. Sanism

Sanism dominates the entire representational process in cases involving individuals with mental disabilities,[56] and it reflects what civil rights lawyer Florynce Kennedy has characterized as the "pathology of oppression."[57] It is an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) racism, sexism, homophobia, and ethnic bigotry.

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[53] *See* Michael L. Perlin & Meredith R. Schriver, *"You Might Have Drugs at Your Command": Reconsidering the Forced Drugging of Incompetent Pre-trial Detainees from the Perspectives of International Human Rights and Income Inequality,* 8 ALBANY GOV'T L. REV. 381, 395 (2015).

[54] *See, e.g.,* Michael L. Perlin, *Simplify You, Classify You: Stigma, Stereotypes and Civil Rights in Disability Classification Systems,* 25 GA. ST. U. L. REV. 607 (2009).

[55] The following section is partially adapted from Perlin, Harmon & Chatt, *supra* note 2, manuscript at 36-38.

[56] Michael L. Perlin & Alison J. Lynch, *"Mr. Bad Example": Why Lawyers Need to Embrace Therapeutic Jurisprudence to Root out Sanism in the Representation of Persons with Mental Disabilities*, 16 WYO. L. REV. 299, 300 (2016).

[57] Morton Birnbaum, *The Right to Treatment: Some Comments on its Development,* in MEDICAL, MORAL AND LEGAL ISSUES IN HEALTH CARE 97, 107 (Frank Ayd ed., 1974) (quoting Kennedy).

Sanism "infects both our jurisprudence and our lawyering practices" and is largely invisible and largely socially acceptable, "based predominantly upon stereotype, myth, superstition, and deindividualization,"[58] in unconscious response to events both in everyday life and in the legal process.[59] Sanism is especially pernicious in institutional settings, and its power in jails and prisons is particularly vicious.[60] Its "corrosive effects have warped all aspects of the criminal process."[61]

B. Pretextuality

Pretextuality describes the ways in which courts accept testimonial dishonesty--especially by expert witnesses--and engage similarly in dishonest (and frequently meretricious) decision-making, a phenomenon that is especially poisonous where courts accept witness testimony that shows a "high propensity to purposely distort their testimony in order to achieve desired ends."[62] It "breeds

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[58] *See, e.g.,* Michael L. Perlin, *"Everybody Is Making Love/Or Else Expecting Rain": Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia,* 83 U. WASH. L. REV. 481, 486 (2008).

[59] Michael L. Perlin & Heather Ellis Cucolo, *"Tolling for the Aching Ones Whose Wounds Cannot Be Nursed": The Marginalization of Racial Minorities and Women in Institutional Mental Disability Law,* 20 J. GENDER, RACE & JUSTICE 431, 451-52 (2017).

[60] See Perlin, *God Said*, supra note 32, at 510.

[61] Perlin & Schriver, *supra* note 53, at 384.

[62]See Perlin, *Morality, supra* note 2, at, 133; Perlin & Cucolo, *supra* note 59, at 452.

cynicism and disrespect for the law, demeans participants, and reinforces shoddy lawyering, blasé judging, and, at times, perjurious and/or corrupt testifying."[63]

C. Heuristics

Heuristics refers to a cognitive psychology construct that describes the implicit thinking devices that individuals use to simplify complex, information-processing tasks. The use of such heuristics frequently leads to distorted and systematically erroneous decisions, and it leads decision-makers to ignore or misuse items of rationally useful information.[64] By example, the vividness heuristic teaches us that "One single vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be made."[65] Similarly, "confirmation bias" informs us that "we focus on information that confirms our preconceptions,"[66] the "hindsight bias" causes people "to hold decisionmakers

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[63] Michael L. Perlin, *"And My Best Friend, My Doctor, Won't Even Say What It Is I've Got": The Role and Significance of Counsel in Right to Refuse Treatment Cases,* 42 SAN DIEGO L. REV. 735, 750-51 (2005). On how courts "employ pretextuality as a "cover" for sanist-driven decisionmaking," see Perlin, *supra* note 23, at 30.

[64] *See, e.g.,* Cucolo & Perlin, *supra* note 17, at 212. On how *judges* are particularly vulnerable to the use of heuristics., see Harold J. Bursztajn et al, *Kumho for Clinicians in the Courtroom*, 24 MED. MALPRACTICE L. & STRATEGY, No. 2 (Nov. 2006), at 1,6 (author of this paper a co-author of the Bursztajn paper).

[65] *See*. Perlin, *Borderline, supra* note 32, at 1417

[66] Perlin, *Mind Made Up, supra* note 10, at 87. Through this heuristic, people tend to favor "information that confirms their theory over disconfirming information." Alafair S. Burke,

legally liable for outcomes that they could not have predicted," [67] and the "availability heuristic" leads us to judge the probability or frequency of an event based upon the ease with which we recall it.[68] The "meretricious allure of simplifying cognitive devices"[69] "blinds us to 'gray areas' of human behavior."[70]

D. *"Ordinary Common Sense"*

"Ordinary common sense' (OCS) is a 'powerful unconscious animator of legal decision making.' It is a psychological construct that reflects the level of the disparity between perception and reality that regularly pervades the judiciary in deciding cases involving individuals with mental disabilities. OCS is self-referential and non-reflective: 'I see it that way, therefore everyone sees it that way; I see it

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Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science, 47 WM. & MARY L. REV. 1587, 1594 (2006).

[67] Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight,* 65 U. Chi. L. Rev. 571, 588 (1998). See also, Amanda Beltrani et al, *Is Hindsight Really 20/20? The Impact of Outcome Information on the Decision-Making Process,* 17 INT'L J. FORENS. MENTAL HEALTH 285 (2018), finding that outcome knowledge can bias an expert's decision-making process as well.

[68] Cucolo & Perlin, *supra* note 17, at 242, citing, inter alia, Jeffrey Rachlinski, *Selling Heuristics*, 64 ALA. L. REV. 389, 399-400 (2012).

[69] Perlin & Gould, *supra* note 52, at 446.

[70] Perlin, *Neonaticide,* supra note 32, at 6; see also Perlin & Cucolo, *supra* note 59, at 452.

that way, therefore that's the way it is.'"[71] Importantly, it is supported by "our reliance on a series of heuristics-cognitive-simplifying devices that distort our abilities to rationally consider information."[72]

Consider how jurors perceive insanity defendants. Whether or not a defendant "drools" has acquired totemic significance in these sorts of cases. In the trial of Andrew Goldstein for the murder of Kendra Webdale (after whom New York's outpatient commitment statute, "Kendra's Law," was named), jurors, who initially rejected Goldstein's insanity defense, "reported crediting testimony that Goldstein did not froth at the mouth or drool, and considered his lack of drooling significant to their responsibility determination."[73] The fact that most persons with severe mental illness do not comport with popular culture's depictions of "crazy

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[71] Michael L. Perlin & Naomi Weinstein, "*Said I, 'But You Have No Choice'": Why a Lawyer Must Ethically Honor a Client's Decision About Mental Health Treatment Even If It Is Not What S/he Would Have Chosen,* 15 CARDOZO PUB. L. POL'Y & ETHICS J. 73, 87-88 (2016).

[72] Michael L. Perlin, *A Law of Healing,* 68 U. CIN. L. REV. 407, 421-23 (2000).

[73] *See* Amanda Pustilnik*, Prisons of the Mind: Social Value and Economic Inefficiency in the Criminal Justice Response to Mental Illness*, 96 J. CRIM. L. & CRIMINOLOGY 217, 248 (2005), as discussed in Michael L. Perlin, "*Merchants and Thieves, Hungry for Power": Prosecutorial Misconduct and Passive Judicial Complicity in Death Penalty Trials of Defendants with Mental Disabilities*, 73 WASH. & LEE L. REV. 1501, 1532 n. 132 (2016).

people"[74] increases the likelihood of teleological decision-making via the use of false OCS.[75]

Again, I believe it is impossible to understand the textures of what I am discussing here without a consideration of these poisoning and corrupting factors. The "vividness" heuristic – a TV "action news" story that a juror saw about a defendant with a mental disability (a story that may or may not be true) – blocks the juror's mind to actually *listening* to what the expert has to say. The juror's non-reflective and false "ordinary common sense" ("this isn't what a truly crazy person would do") stops him from taking the expert seriously. And these cognitive errors are abetted by the sanist and pretextual stereotypes that are used regularly in our

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[74] *See e.g.*, Perlin, *Unpacking the Myths, supra* note 32, at724 : "To the lay person (the juror or the judge), the temporarily delirious patient 'leaping over chairs and taking the broomstick to hallucinatory monsters' [still] looks more genuinely psychotic than a deeply disordered but calm and brittle-worded schizophrenic," citing Walter Bromberg & Harvey Cleckley, *The Medico-Legal Dilemma: A Suggested Solution*, 42 J. CRIM. L. & CRIMINOLOGY 729, 738 (1952).

[75] As I noted in an earlier article:

> When the defendant fails to exhibit any stereotypical behaviors (such as drooling, giggling, smiling with a vacant appearance, rocking), jury members may think that the mental retardation defense is untrue or unwarranted.

Michael L. Perlin, *"Life Is in Mirrors, Death Disappears": Giving Life to* Atkins, 33 N. MEX. L. REV. 315, 335 (2003), citing Denis Keyes et al., *Mitigating Mental Retardation in Capital Cases: Finding the "Invisible" Defendant*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 529, 536 (1998).

treatment of persons with mental disabilities, especially in the criminal trial process.[76]

IV. The need for an additional expert

A *second* expert, though, could best address these stereotypes, these cognitive errors, these biases.[77] S/he could explain the roots of this disordered thought (on the part of the fact-finders), demonstrate to jurors how sanist pretexts dominate their thought processes, and illuminate why reliance on heuristics and false "ordinary common sense" is inappropriate in these cases, as they "distort our abilities to rationally consider information."[78] This is especially important, given findings that,

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[76] See e.g., Perlin, *Neonaticide, supra* note 32, at 9 (discussing the stereotype of persons with mental illness as evil);

[77]Dr. David Shapiro has speculated that this might, in itself, be a new area of forensic specialization. See email from Dr. Shapiro to author, Wed., May 8, 2019. Indeed, the American Psychology Association's Specialty Guidelines for Forensic Psychology, section 2.05, states:

> Forensic practitioners seek to provide opinions and testimony that are sufficiently based upon adequate scientific foundation, and reliable and valid principles and methods that have been applied appropriately to the facts of the case.

As I conceive of the role of the "second expert," such individuals would do precisely this.

[78] Perlin, *supra* note 54, at 622. On how these stereotypes are conflated with stereotypes of race, gender and ethnicity, see Perlin & Cucolo, *supra* note 59; Michael L. Perlin, *On "Sanism,"* 46 SMU L. REV. 373, 390 (1992).

when an expert's message is "difficult to comprehend or is complex, individuals rely on cognitive shortcuts or heuristics to evaluate the value of the communication."[79] This is especially important in cases where fact-finders rely on pre-existing (yet false) beliefs.[80] Given the reality that "*doctors* do not always `strictly adhere to

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[79] Daniel A. Krauss & Bruce D. Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing,* 7 PSYCHOL. PUB. POL'Y & L. 267, 273 (2001).

[80] See e.g., Jonathan M. Warren, *Hidden in Plain View: Juries and the Implicit Credibility Given to Police Testimony*, 11 DEPAUL J. FOR SOC. JUST. 1, 18 (2018) ("Expert testimony would be especially useful where jurors have preexisting, incorrect beliefs on certain subjects," discussing witness identification testimony). See also, Kayla A. Burd & Valerie P. Hans, *Reasoned Verdicts: Oversold?* 51 CORNELL INT'L L.J. 319, 357 (2018) ("Jurors may distort incoming information to match a preexisting belief"). Judges' decisions may be similarly contaminated. See e.g., Masua Sagiv, *Cultural Bias in Judicial Decision Making,* 35 B.C. J.L. & SOC. JUST. 229, 240 n. 53 (2015), discussing judges' preexisting beliefs about homosexual parenting, citing Donna Hitchens & Barbara Price, *Trial Strategy in Lesbian Mother Custody Cases: The Use of Expert Testimony,* 9 GOLDEN GATE U. L. REV. 451, 451 (1978).

diagnostic criteria' leaving `their clinical judgment ... affected by heuristics and biases,'"[81] this becomes even more important.[82]

Also, as we begin to learn more about the ambiguities inherent in what is called the "G2i [group-to-individual] problem"(the dilemma of applying group data

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[81]Katie Manworren, *The FAA's Mental Health Standards: Are They Reasonable?* 83 J. AIR L. & COM. 391, 409 (2018), quoting, in part, Eva Charlotte Merten et al., *Overdiagnosis of Mental Disorders in Children and Adolescents (in Developed Countries)*, CHILD & ADOLESCENT PSYCHIATRY & MENTAL HEALTH 1, 2 (Jan. 17, 2017), accessible at https://capmh.biomedcentral.com/articles/10.1186/s13034-016-0140-5 [perma.cc/U4WZ-GB8B] (emphasis added).

We have known about how unconscious bias can infect forensic testimony for over 65 years. See Note, *Psychiatric Assistance in the Determination of Testamentary Capacity*, 66 HARV. L. REV. 1116, 1121 (1953). This bias persists today. See Sara Gordon, *Crossing the Line:* Daubert*, Dual Roles, and the Admissibility of Forensic Mental Health Testimony*, 37 CARDOZO L. REV. 1345, 1381 (2016): "Given the impact that unconscious bias can have on decision making, many mental health professionals believe that true objectivity among forensic mental health experts is an unrealistic expectation."

[82] Compare Busby v. State, 990 S.W.2d 263, 271 (Tex. Crim. App. 1999) (if expert is appointed and defendant requests a different or additional expert, only proof that the trial court erred in finding the appointed expert sufficient will show *Ake* error; question was whether appointed mental health experts were also able to testify as drug abuse experts).

to individual instances) in the context of expert psychiatric testimony,[83] such testimony becomes even more essential.[84] In an important G2i paper, Professors David Faigman, John Monahan and Christopher Slobogin focus on four considerations that must be considered in the making of admissibility decisions about scientific evidence: (1) Relevance or "Fit"; (2) Helpfulness; (3) Reliability and Validity; and (4) Unfair Prejudice.[85] Certainly the fear of prejudice here is a real one.[86]

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[83] See e.g., Carl E. Fisher; David L. Faigman & Paul S. Appelbaum, *Toward a Jurisprudence of Psychiatric Evidence: Examining the Challenges of Reasoning from Group Data in Psychiatry to Individual Decisions in the Law*, 69 U. MIAMI L. REV. 685 (2015).

[84] Fisher and his colleagues explain:

> Whereas psychiatrists assess individual patients for purposes of making individual treatment decisions, courts are interested in assessing the psychological characteristics of individuals to aid legal decisionmakers in dispensing fair and just outcomes pursuant to applicable law. For psychiatric testimony to aid in this process, psychiatric experts must apply to individual defendants or litigants data that are derived from the study of groups in a valid manner, and judges must understand the predicates for the appropriate use of such data. We suspect that often neither of these *desiderata* are met when psychiatric testimony is introduced. *Id*. at 689-90.

[85] David L. Faigman, John Monahan & Christopher Slobogin, *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81 U. CHI. L. REV. 417, 440 (2014).

[86] See *id.* at 472:

> When diagnostic testimony is at issue, the prejudice inquiry is a crucial tool for ensuring that expert testimony aids the adjudication process. This inquiry requires close attention to whether the testimony rests on a valid empirical framework that

Think again also about the holding in *Ake v. Oklahoma*[87] that a criminal trial is "fundamentally unfair" unless a defendant has access to "the raw materials integral to the building of an effective defense."[88] Importantly, the *Ake* court also stressed that, "through this process of investigation, interpretation and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the medical condition of the defendant at the time of the offense."[89] I believe that, without the sort of extra witness I urge here, it is impossible for the fact finer to actually make a "sensible and educated determination" about the case in question.

Subsequently, in *McWilliams v. Dunn,*[90] the Court built on its *Ake* holding to explain that the defendant had the right to an expert to "translate these data

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permits extrapolation to an individual case, as well as the extent to which the testimony departs from the diagnostic skills the expert is known to possess (as a result of proficiency testing or some other measure of validity).

Ironically, the Supreme Court *has* noted the significant "potential of mental-disease evidence to mislead." Clark v. Arizona, 548 US 735, 774 (2006). It is ironic that the Court wrote this in *Clark,* "a decision that spawned some of the most caustic commentary in decades responding to a Court decision in this area of law and policy." PERLIN & CUCOLO, *supra* note 3, § 14-1.2.8, at 14-47. Also, on this point, *Clark* relied on Greenwood v. United States, 350 U.S. 366 (1966), paying no attention to the changes in scientific research *and* in evidentiary rules (as to admissibility of expert testimony) in the intervening half-century since the *Greenwood* decision. *Id* at 14-59.

[87] 470 U.S. 68 (1985).

[88] *Id.* at 77.

[89] *Id.* at 80.

[90] 137 S. Ct. 1790 (2017).

[medical records, other doctors' reports] into a legal strategy."[91] Importantly, here the Court noted that such an expert could have appropriately explained that the defendant's "purported malingering was not necessarily inconsistent with mental illness."[92] It is counter-intuitive to the OCS of many –including many judges[93] -- but the reality is that there are multiple cases that involve defendants who,

[91] *Id.* at 1800.

[92] *Id.*

[93] See e.g., Michael L. Perlin, "*Everything's a Little Upside Down, As a Matter of Fact the Wheels Have Stopped": The Fraudulence of the Incompetency Evaluation Process*, 4 HOUS. J. HEALTH L. & POL'Y 239, 250 (2004) ("[C]ourts resolutely adhere to the conviction that defendants regularly malinger"). On how courts "continue to focus, *in some cases almost obsessively*, on testimony that raises the specter of malingering," see. Perlin, *supra* note 7, at 679, and *id.*, n.287 (citing cases).

although feigning, are nonetheless severely mentally ill,[94] an observation that must be read hand-in-glove with the reality that the "fear of faking" is significantly

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[94] Perlin, *Borderline, supra* note 32, at 1410-11. On how "people with real mental illness malinger," see Christopher Slobogin, *A Defense of the Integrationist Test as a Replacement for the Special Defense of Insanity*, 42 TEX. TECH L. REV. 523, 539 (2009). Again, counter-intuitively to those who rely on false OCS, a significant number of insanity defendants *minimize* their level of mental illness. See Linda S. Grossman & Orest E. Wasyliw, *A Psychometric Study of Stereotypes: Assessment of Malingering in a Criminal Forensic Group*, 52 J. PERSONAL. ASSESSMENT 549, 555 (1988) (22-39% of all insanity defendants studied showed evidence of minimizing their psychopathology); John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency,* 103 MICH. L. REV. 939, 982 (2005) (defendants may also "malinger well" when they are sick, often because they wish to avoid the stigma of mental illness). The additional expert could explain this – again dissonant with OCS – to the fact-finders.

See also, Perlin, *supra* note 32, at 1412, quoting in part, Dorothy Lewis et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States,* 145 AM. J. PSYCHIATRY 584, 588 (1988) (stating that death row juveniles "almost uniformly tried to hide evidence of cognitive deficits and psychotic symptoms"); and in Dorothy Otnow Lewis et al., *Psychiatric and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838, 841 (1986) (stating that all but one of a sample of death row inmates studied attempted to minimize rather than exaggerate their degree of psychiatric disorders);:

> In reality, the empirical evidence is quite to the contrary: it is much more likely that seriously mentally disabled criminal defendants will feign sanity in an effort not to be seen as mentally ill, even where such evidence might serve as powerful mitigating evidence in death penalty cases. Thus, juveniles imprisoned on death row

exaggerated.[95] A hidden issue here is how clinicians may overdiagnose malingering in black defendants.[96] An additional expert is critical to explain all of this, again, counter-intuitive valid and reliable empirical data.

The "additional" expert can also educate jurors about the pervasiveness of sanism, and he or she can explain why sanism may be driving their decision-making.[97] This sanism "distort[s] our abilities to consider information rationally,"[98]

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were quick to tell Dr. Dorothy Lewis and her associates, "I'm not crazy," or "I'm not a retard."

[95] On "the consensus of scholars that the public's fears of fakery are exaggerated," see Dora Klein, *Memoir as Witness to Mental Illness,* 43 LAW & PSYCHOL. REV. 133, 147 (2018-2019); see generally, Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post*-Clark *Era*, 18 U. FLA. J. OF L. & PUB. POL'Y 7, 12-13 (2007). See Perlin, *Borderline*, *supra* note 32, at 1390 ("So much of the insanity defense debate is dominated by the fear of defendants faking so as to `beat the rap'"). On how "the `default drive' of prosecutors is simply to argue that the defendant was faking or malingering," see *id.*, at 1397, and sources cited at *id.* n. 197.

[96] Dewey G. Cornell & Gary L. Hawk, *Clinical Presentation of Malingerers Diagnosed by Experienced Forensic Psychologists,* 13 LAW & HUM. BEHAV. 375, 382 (1989).

[97] Perlin, *God Said, supra* note 32, at 517; Perlin & Lynch, *supra* note 56, at 319-20.

[98] Michael L. Perlin, *"Wisdom Is Thrown into Jail": Using Therapeutic Jurisprudence to Remediate the Criminalization of Persons with Mental Illness,* 17 MICH. ST. U.J. MED. & L. 343, 365 n.127 (2013).

and it is fatuous to think that jurors --or judges[99] -- will be able to figure this out on their own.

There is more (although this is focused more on the behavior of judges than on the behavior of jurors). There is no longer any question of the disparity in decision making in cases that focus on the rule in *Daubert* cases:[100] in such cases, the prosecutor's position is sustained (either in support of questioned expertise or in opposition to it) vastly more often than is that of defense counsel's.[101] This cannot be the result of random chance, and it is likely that Professor Susan Rozelle's blunt

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[99] See Perlin, *supra* note 23, at 14 (footnotes omitted):

> Judges are not immune from sanism. "[E]mbedded in the cultural presuppositions that engulf us all," judges express discomfort with social science (or any other system that may appear to challenge law's hegemony over society) and skepticism about new thinking; this discomfort and skepticism allows them to take deeper refuge in heuristic thinking and flawed, non-reflective "ordinary common sense," both of which continue the myths and stereotypes of sanism.

[100] Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579, 586-591 (1993) (crafting a five-factor test for admissibility of evidence in federal trials).

[101] Perlin, *supra* note 27 at 906-07, and *id.*, n. 139, citing D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?,* 64 ALB. L. REV. 99, 105-08 (2000). In sixty-seven cases of challenged government expertise, the prosecution prevailed in sixty-one of these. *Id.* at 105. Out of fifty-four complaints by criminal defendants that their expertise was improperly excluded, the defendant lost in forty-four of these. *Id.* at 106.

assessment – "The game of scientific evidence looks fixed"[102] – is, sadly, accurate. The "additional" expert can best explain this sort of teleological behavior to the court,[103] teleology that has been noticed in at least one state Supreme Court opinion.[104]

Daubert was supplemented by the Supreme Court some six years later in the case of *Kumho Tire Co. Ltd. v. Carmichael,*[105] so as to apply to *clinical* testimony as well as *scientific* testimony, mandating that an expert, "whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." [106] But, as Professor Michael Saks pointed out nearly twenty years ago, "One can never underestimate the ingenuity of judges in finding ways to evade rules that tell them to do something that would lead to a result contrary to the one

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[102] Susan Rozelle, Daubert, *Schmaubert*: *Criminal Defendants and the Short End of the Science Stick,* 43 TULSA L. REV. 597, 598 (2007). For another thoughtful analysis of Professor Risinger's findings, see Deirdre Dwyer, (*Why) Are Civil and Criminal Expert Evidence Different*?, 43 TULSA L. REV. 381, 382-84 (2007).

[103] Perlin, *supra* note 10, at 82.

[104] See Edmonds v. State, 955 So.2d 787 (Miss. 2007) (Diaz, P.J., specially concurring): "This case presents a disheartening example of the double standard applied to expert testimony in criminal cases."

[105] 526 U.S. 137 (1999).

[106] *Id.* at 152.

suggested by their intuitions."[107] It is precisely those "intuitions" (often, again, a false "ordinary common sense") that concern me so.[108]

A recent example. In 2018, the North Carolina Court of Appeals rejected testimony by a forensic psychologist on the "fight or flight" doctrine as such testimony would not have assisted the jury in a voluntary manslaughter case.[109] There, Dr. Amy James – whose testimony was excluded – had testified that scientific research about this phenomenon has been going on for ninety years and that there were "hundreds of studies" in the area.[110] The court reasoned that the witness's testimony "as an expert witness does not provide insight beyond the conclusions that jurors *can readily draw from their own ordinary experiences in their own lives*."[111] In short, the Court rejected testimony based on reams of valid

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[107] Michael J. Saks, *Banishing Ipse Dixit: The Impact of* Kumho Tire *on Forensic Identification Science,* 57 WASH. & LEE L. REV. 879, 880 (2000).

[108] See also, Bursztajn et al, *supra* note 64. On how *Kumho* has "paved the way for inconsistency," see Robert J. Goodwin, *The Hidden Significance of* Kumho Tire Co. v. Carmichael*: A Compass for Problems of Definition and Procedure Created by* Daubert V. Merrell Dow Pharmaceuticals, Inc., 52 BAYLOR L. REV. 603, 637 (2000).

[109] State v. Thomas, 814 S. 2d 835 (N.C. Ct. App. 2018) (defendant had claimed self-defense).

[110] *Id.* at 840. See generally, WALTER B. CANNON, BODILY CHANGES IN PAIN, HUNGER, FEAR AND RAGE: AN ACCOUNT OF RECENT RESEARCHES INTO THE FUNCTION OF EMOTIONAL EXCITEMENT (1915).

[111] *Thomas,* 814 S.E. 2d at 841 (emphasis added). For a comprehensive discussion of the physiology of the "fight or flight" response, see Baiker-McKee*, supra* note 14, at 133-35,

and reliable research (research that may have yielded findings dissonant with jurors' false "ordinary common sense," likely a substitution for the *judges'* own "ordinary common sense"[112]

Some thirty years ago, Professors David Wexler and Robert Schopp urged the admission of expert testimony (and the promulgation of specific *jury instructions)* as "debiasing mechanisms" that would, optimally, counter the use of the hindsight bias in mental health malpractice litigation.[113] Although the initial version of this article[114] has been cited extensively in the legal literature,[115] to the best of my

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citing, inter alia, KEVIN T. PATTON & GARY A. THIBODEAU, ANATOMY AND PHYSIOLOGY 512-16 (9th ed. 2015), and GEORGE S. EVERLY JR. & JEFFREY M. LATING, A CLINICAL GUIDE TO THE TREATMENT OF THE HUMAN STRESS RESPONSE 33-34 (3d ed. 2013).

[112] See *supra* text accompanying note 71:

> OCS is self-referential and non-reflective: 'I see it that way, therefore everyone sees it that way; I see it that way, therefore that's the way it is.'"

[113] David B. Wexler & Robert Schopp, *How and When to Correct for Juror Hindsight Bias in Mental Health Law Malpractice Litigation: Some Preliminary Observations,* in ESSAYS IN THERAPEUTIC JURISPRUDENCE 135, 141 (David B. Wexler & Bruce J. Winick eds. 1991). See *supra* note 67.

[114] See 7 BEHAV. SCI. & L. 485, 496 (1989).

[115] A recent Westlaw search reveals 37 citations. A companion article by Wexler and Schopp on hindsight bias -- Robert F. Schopp & David B. Wexler, *Shooting Yourself in the Foot with Due Care: Psychotherapists and Crystallized Standards of Tort Liability,* J. PSYCHIATRY & L. 163, 165 (Summer 1989) -- was cited once in caselaw. See Higgins v. Salt

knowledge, this specific recommendation has not been adopted by any court. I hope this article rekindles interest in that proposal.

A fascinating parallel change in criminal practice has recently been suggested by Professor Bruce Green, who argues that there should be two criminal defense lawyers. According to Professor Green:

> This Article's proposed *disruptive innovation* is that indigent defendants be assigned two lawyers--each of whom would have primary responsibility for different functions. The "settlement lawyer" would take the lead outside judicial proceedings, undertaking responsibility for the counseling and negotiating roles. The "trial lawyer" would be the principal advocate. These roles correspond to the different but interconnected processes--plea bargaining and trial--by which most criminal prosecutions in the United States are resolved.[116]

Professor Green identifies eight reasons why his recommendation makes sense: that it would lessen the likelihood that lawyers will encourage their clients to plead guilty without conducting a full investigation; that it would enhance accountability; that it would address the problem of the isolated and insular defense

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Lake County, 855 P.2d 231 (1993), *overruled*, *Scott v. Universal Sales Inc.,* 356 P.3d 1172 (Utah 2015).

[116] Bruce Green, *The Right to Two Criminal Defense Lawyers,* 69 MERCER L. REV. 675, 676 (2018).

lawyer; that it would promote client trust; that it would obviate some of the limitations currently imposed on defense counsel; that it would enable each lawyer to truly focus on her specific role; that it may lead to improvements in procedural law and practice, and that it might expand the pool of lawyers interested in pursuing a career in criminal defense law.[117] He concludes that, "perhaps one day, new thinking may lead to changes that realistically can be implemented to "disrupt" the indigent defense process for the better."[118]

Although the issues that Professor Green explores in his paper are not the same as the ones I am describing here, I believe that the innovation he recommends come from the same spirit that the one I suggest here does – to help reconceptualize the criminal trial in ways that are more sound and fairer to the defendant.

V. Therapeutic jurisprudence

I further believe that these reforms are required by the principles of therapeutic jurisprudence.[119] Therapeutic jurisprudence recognizes that, as a

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[117] *Id.* at 683-90.

[118] *Id.* at 696.

[119] This section is largely adapted from Perlin, *supra* note 10, at 93-95; see also, Michael L. Perlin & Alison J. Lynch, *"In the Wasteland of Your Mind": Criminology, Scientific Discoveries and the Criminal Process*, 4 VA. J. CRIM. L. 304 (2016) . Further, it distills the work of the author over the past 25 years, beginning with Michael L. Perlin, *What Is Therapeutic Jurisprudence?* 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993) (Perlin, *What Is). See generally,* Michael L. Perlin, *"Have You Seen Dignity?": The Story of the Development of*

therapeutic agent, the law can have therapeutic or anti-therapeutic consequences.[120] It asks whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.[121] Professor David Wexler clearly identifies how the inherent tension inherent in this inquiry must be resolved: "the law's use of "mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns."[122] Therapeutic jurisprudence "look[s] at law as it actually impacts

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Therapeutic Jurisprudence, 27 U.N.Z. LAW REV. 1135 (2017); Michael L. Perlin, *"Changing of the Guards": David Wexler, Therapeutic Jurisprudence, and the Transformation of Legal Scholarship,* 63 INT'L J. L. & PSYCHIATRY 3 (2019).

[120] Michael L. Perlin, Deborah A. Dorfman & Naomi M. Weinstein, *"On Desolation Row": The Blurring of the Borders between Civil and Criminal Mental Disability Law, and What It Means for All of Us,* 24 TEX. J. ON CIV. LIBS. & CIV. RTS. 59, 103 (2018).

[121]. Perlin, *supra* note 62, at 751. In my first article about therapeutic jurisprudence, I predicted that "therapeutic jurisprudence will also restructure the contours of forensic testimony as well as the contours of the relationship between fact-finders and expert witnesses." Perlin, *What Is, supra* note 119, at 635.

[122] David B. Wexler*, Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993).

people's lives,"[123] and it supports "an ethic of care."[124] It attempts to bring about healing and wellness,[125] and to value psychological health.[126]

I have written elsewhere about how TJ can redeem a heuristics-driven jurisprudence,[127] and have talked about how the TJ filter "can be used to shine light on the presence of sanism and pretextuality and the false use of OCS" in considerations of sex offender law and many other areas of forensic mental disability law.[128] Recently, I concluded that judges often "decide cases teleologically, taking refuge-- perhaps unconsciously--in time-worn heuristics that appeal to their

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[123] Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing With Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009).

[124] Perlin, *supra* note 10, at 94, quoting, in part, Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605-07 (2006).

[125] *Id.,* citing Bruce Winick, *A Therapeutic Jurisprudence Model for Civil Commitment, in* INVOLUNTARY DETENTION AND THERAPEUTIC JURISPRUDENCE: INTERNATIONAL PERSPECTIVE ON CIVIL COMMITMENT 23, 26 (Kate Diesfeld & Ian Freckelton eds., 2003).

[126] *Id.*

[127] See Michael L. Perlin, *"They Keep It All Hid": The Ghettoization of Mental Disability Law and Its Implications for Legal Education,* 54 ST. LOUIS U. L. J. 857, 876 (2010).

[128] Michael L. Perlin & John Douard, *"Equality, I Spoke That Word/As If a Wedding Vow": Mental Disability Law and How We Treat Marginalized Persons,* 53 N.Y.L. SCH. L. REV. 9, 20 (2008-09). See also, Michael L. Perlin, Alison J. Lynch & Valerie R. McClain, **"***Some Things are Too Hot to Touch": Competency, the Right to Sexual Autonomy, and the Roles of Lawyers and Expert Witnesses,* 35 TOURO L. REV. 405, 410 (2019) ("TJ is the vehicle through which we can best understand the pernicious power of OCS").

own distorted 'ordinary common sense.'"[129] I believe that the reform I suggest in this paper might be a way to help end -- or at least, limit – these distortions.[130]

At the least, if the additional expert can explain cogently to jurors *why* they take refuge in groundless stereotypes, closing their eyes to valid and reliable research,[131] it is more likely that there will be at least a modest "uptick" in verdicts based on the actual evidence and not on bias and stereotype. As I have discussed

[129] Perlin, *supra* note 10, at 103.

[130] Professor Amy Ronner relies on TJ principles in urging the admission of testimony to "inform the judge of the psychological effect of interrogation on a youthful offender and apprised him or her of the empirical studies showing that juveniles tend to misunderstand and waive their *Miranda* rights." Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence,* Miranda *and Juveniles,* 71 U. CIN. L. REV. 89, 113 (2002).

[131] On this specific issue in neonaticide,cases, see Perlin, *Neonaticide, supra* note 32, at 29:

> While mental disability law jurisprudence and insanity defense jurisprudence are incoherent, neonaticide jurisprudence is especially incoherent. We take refuge in a sanism-drenched, false and distorted OCS, and we use this to inherently rationalize self-contradictory and pretextual social policies and legal decisions. We do this blindly and with little consideration for the implications of what we do.

here and elsewhere, so much of this bias is unconscious.[132] Of course, unconscious bias permeates other areas of judicial decision-making as well,[133] but it remains so much more *hidden* here,[134] making the need for the additional expert even more urgent.

In an earlier paper – dealing with jurors' attitude towards neuroimaging testimony – I concluded that, "If an indigent criminal defendant is refused access to an independent expert in an area where juror OCS may lead to uncritical

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[132] We are beginning to look at unconscious bias in related areas of mental disability law. By way of example, on how unconscious bias leads clinicians to overpredict future dangerousness in cases involving African-American individuals subject to involuntary civil commitment, *see* Perlin & Cucolo, *supra* note 59, at 438 n. 49, citing Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders,* 28 LAW. & HUMAN BEHAVIOR 483, 499-501 (2004); James Hicks, *Ethnicity, Race, and Forensic Psychiatry: Are We Color-Blind?* 32 J. AM. ACAD. PSYCHIATRY & LAW 21, 23 (2004). See also, Gordon, supra note 81, at 1378 n. 198, quoting Adam J. Goldyne, *Minimizing the Influence of Unconscious Bias in Evaluations: A Practical Guide*, 35 J. AM. ACAD. PSYCHIATRY & L. 60, 60 (2007) ("Emotions such as anger, pity, guilt, affection, resentment, disdain, humiliation, and others may give rise to unconscious motivations that conflict with the motivation to be objective.").

[133] See e.g., Perlin & Weinstein, *supra* note 71, at 82:

> Decision-making in mental disability law cases is inspired by (and reflects) the same kinds of irrational, unconscious, bias-driven stereotypes and prejudices that are exhibited in racist, sexist, homophobic, and religiously and ethnically bigoted decision-making.

[134] See generally, PERLIN, HIDDEN PREJUDICE, *supra* note 1. Not insignificantly, I believe the biases also remain hidden in the legal academy. See Perlin, *supra* note 126, at 876.

acceptance of neuroimaging testimony (because of its visual appeal and its apparent lack of falsifiability), the fairness of the entire trial remains, to me, in question."[135] I believe that this same variable – the fairness of the trial – comes into play in all of the areas of forensic mental health law/criminal procedure that I am discussing in this paper.

It is inconsistent with fact-finders' "ordinary common sense" that an authentically mentally ill person might still appear to be malingering; as I noted previously, the *McWilliams* court understood this, and saw the need for an expert to explain this to a jury.[136] What I am urging in this paper is totally consistent with this aspect of *McWilliams.*

With my colleague, Professor Heather Ellis Cucolo, I have previously argued, in the context of sexually violent predator cases, that "lawyers need to be able to understand, contextualize and effectively cross-examine experts on specific actuarial tests; recognition of when an expert witness is needed; and the overwhelming potential for bias (making the ideal of a fair trial even more difficult to accomplish)," and that these requirements "demand... a TJ approach to

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[135] Michael L. Perlin, *"And I See Through Your Brain": Access to Experts, Competency to Consent, and the Impact of Antipsychotic Medications in Neuroimaging Cases in the Criminal Trial Process,* 2009 STANFORD TECHNOL. L. J. 1, * 46 (footnote omitted).

[136] See *supra* text accompanying notes 90-95...

representation."[137] What I am urging here goes beyond the examination and the cross-examination of the expert retained or assigned to evaluate the individual

[137] Cucolo & Perlin, *supra* note 25, at 322. See also, Heather Ellis Cucolo & Michael L. Perlin, *"Far from the Turbulent Space": Considering the Adequacy of Counsel in the Representation of Individuals Accused of Being Sexually Violent Predators,* 18 U. PA. J. L. & SOC. CHANGE 125, 167 (2015):

> [the] variables that make SVPA litigation *different*--the need for lawyers to be able to understand, contextualize and effectively cross-examine experts on specific actuarial tests; the need for lawyers to recognize when an expert witness is needed to rebut the state's position, and the need for lawyers to understand the potential extent of jury bias (making the ideal of a fair trial even more difficult to accomplish)--all demand a TJ approach to representation and to litigation.

In most jurisdictions, SVPA determinations are bench trials, but there are also states in which juries are empaneled. See e.g., People v. Burroughs, 6 Cal. App. 5th 378, 2016 WL 7048701 (2d Dist. 2016); *In re* Care and Treatment of Sporn, 215 P.3d 615 (2009); State v. Rosado, 889 N.Y.S.2d 369 (Sup. Ct. 2009). In at least one state, courts have ruled specifically that there is no right to a jury trial in such matters. See *In re* Commitment of R.S., 773 A. 2d 72 (N.J. App. Div. 2001).

before the court;[138] rather, I urge the *addition* of an expert to better explain and contextualize to the fact-finder, basically, what is going on in the entire enterprise, and *why* the fact-finders' data-base is likely to be deeply poisoned.[139]

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[138] Recall that, in Barefoot v. Estelle*,* 463 U.S. 880, 899 n. 7 (1983), Justice White relied on vigorous cross-examination to allow jurors to "separate the wheat from the chaff" in matter of expert testimony. On why cross-examination cannot be relied on "singularly" in such situations, see Jordan Dickson, Daubert *Won't Do: Why Expert Testimony Regarding Future Dangerousness Requires a New Rule of Evidence,* 107 GEO. L.J. 481, 490 (2019). On how decisions such as *Barefoot* – relying on cross-examination as the palliative here -- improperly "valorize the adversary process," see Jerry H. Elmer, *Scientific and Expert Testimony after* Daubert, 42 R.I.B.J. 13, 13 (Nov. 1993). For a comprehensive empirical analysis that "call[s] into question the Supreme Court's confidence in *Barefoot," see* Shari Seidman Diamond et al, *Juror Reactions to Attorneys at Trial,* 87 J. CRIM. L. & CRIMINOLOGY 17, 40 (1996).

[139] Faith in counsel's abilities in such cases is sadly misplaced. See generally, Perlin, Harmon & Chatt, *supra* note 2, manuscript at 82-83:

> The data demonstrates, beyond doubt, that the *Strickland* test has failed miserably as an aspirational bulwark, and that, due to inadequate counsel, defendants with serious mental disabilities continue to have death sentences upheld and, in some cases, be executed. To say that *Strickland* ultimately protects defendants is the ultimate pretext.

This is even more urgent in SVPA cases in jurisdictions in which there is no right to counsel (based on the pretext that such matters are civil, not criminal).[140] In a recent article with Professor Cucolo, I stressed that we must discuss that right "in combination with the quality of counsel and her resources and knowledge in this area of the law."[141] Given the level of *inadequacy* of counsel in criminal cases involving defendant with mental disabilities in general,[142] it is – to put it plainly – preposterous to assume that *un*counseled defendants can do the sort of adequate cross-examination Justice White presumed in *Barefoot.*[143]

VI. Conclusion

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[140] See Cucolo & Perlin, *supra* note 137, at 132, and s*ee, e.g.*, Ramsey v. Runion, No. 2:11cv396, 2012 WL 3883378, at *5 (E.D. Va. Sept. 5, 2012) (stating "there is no federally cognizable right to effective assistance of counsel in a civil commitment proceeding").

[141] Cucolo & Perlin, *supra* note 137 at 137.

[142] See Perlin, Harmon & Chatt, *supra* note 2.

[143] See Perlin, *supra* note 3, at 111, citing, in part, Paul Appelbaum, *The Supreme Court Looks at Psychiatry,* 141 AM. J. PSYCHIATRY. 827, 831 (1984):

> *Barefoot* appears to be indefensible on evidentiary grounds, on constitutional grounds and on common sense grounds. It flies in the face of virtually all of the relevant scientific literature. It is inconsistent with the development of evidence law doctrine, and it makes a mockery of earlier Supreme Court decisions cautioning that *extra* reliability is needed in capital cases. In the words of Dr. Paul Appelbaum, it is an example of "tortuous [reasoning] in the extreme," reflecting "factual inconsistency in the service of a transcendent ideological goal.

This proposal will also make it less likely that "junk science" will further contaminate the legal process.[144] As a colleague and I wrote recently, "Scientific discovery moves faster than the law, and it is critical to make sure that the legal system is given an opportunity to catch up, rather than risk allowing `junk science' to influence how a defendant is treated."[145] I believe this proposal also "fits" well with the recommendations recently made by Professor Aliza Kaplan and attorney Janis Puracal who proposed "a specialized role of forensic resource counsel."[146] Significantly, in discussing why cross-examination alone cannot be a panacea, the authors underscore: "Attorneys could be better trained to recognize evidence that is

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[144] On Dr. Grigson's use – see *supra* note 50 – of "`junk science' as the basis of his opinions," see Perlin, *supra* note 4, at 1440.

[145] Perlin & Lynch, *supra* note 56, at 312.

[146] Aliza B. Kaplan & Janis C. Puracal, *It's Not a Match: Why the Law Can't Let Go of Junk Science*, 81 ALB. L. REV. 895, 938 (2017). Such counsel would "help to facilitate conversation by:

- assembling commissions to review forensics in the state;
- proposing and appearing as *amicus* in hearings before special masters to explore advances in forensic methodologies and necessary changes in the law;
- collaborating with forensic resource counsel, lawyers, and experts in other states to find independent scientists who can further the research and assist with facilitated conversations for prosecutors, defense counsel, and judges;
- offering *amicus* briefing to educate trial and appellate judges; and
- offering seminar trainings for prosecutors, defense counsel, and the judiciary."

scientific in nature *and offer rebuttal experts*, rather than relying exclusively on cross-examination."[147]

My paper title includes a lyric of Bob Dylan's, from the final verse of his anthemic song *My Back Pages*. This is the verse in its entirety:

> Yes, my guard stood hard when abstract threats too noble to neglect
> Deceived me into thinking I had something to protect
> Good and bad, I define these terms quite clear, no doubt, somehow
> Ah, but I was so much older then I'm younger than that now.[148]

Our reliance on heuristics and false ordinary common sense does deceive us into thinking we have "something" (society) to protect (from "them," criminal defendants with mental disabilities). The threats to the integrity of the judicial

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[147] *Id.* at 935 (emphasis added).

[148] See https://www.bobdylan.com/songs/my-back-pages/. I have drawn on this song several times before, including once from this verse. See Michael L. Perlin, *"Good and Bad, I Defined These Terms, Quite Clear No Doubt Somehow": Neuroimaging and Competency to be Executed after* Panetti, 28 BEHAV. SCI. & L. 671 (2010). I find it incredulous that there may be a reader of this paper who does not know this song, but, if so, go to 3:39 of https://www.youtube.com/watch?v=rGEIMCWob3U, to hear George Harrison sing this verse (in the best cover, ever, of a Bob Dylan song, from Dylan's 30th Anniversary Concert, October 1992).

system and the criminal process are far from "abstract." They are real. I believe that it is only through the reform I suggest here that this situation can be ameliorated.