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### Understanding Buffalo's Economic Development (review essay)

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## BOOK REVIEWS

### Understanding Buffalo's Economic Development\*

THOMAS E. HEADRICK† & JOHN HENRY SCHLEGEL‡‡

POWER FAILURE: POLITICS, PATRONAGE, AND THE ECONOMIC FUTURE OF BUFFALO, NEW YORK. By Diana Dillaway. *Amherst, New York: Prometheus Books, 2006. Pp. 1, 266. \$24.00 (hardcover).*

Case studies can often illuminate difficult topics. Economic development, really the economic resuscitation of aging urban cities, qualifies as a difficult topic. Expert opinion here ranges from imprecations to keep the infrastructure in good shape, the streets clean and safe, and wait for businesses and jobs to come, all the way to similarly fervent directions to rely on full bore, glossy magazines and lavishly funded sales pitches to complete strangers. Littered in the area are asserted axioms about community involvement and governmental role, as well as about the importance of housing stock, public facilities, demography, and the right kinds of jobs.

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The limited number of available case studies about economic development primarily describe successes—Boston's Market Area, New York's Battery Park, Baltimore's Inner Harbor, Pittsburgh's Triangle, Seattle's Pioneer Square. The implicit message of such studies is "follow me." Case studies of failures, unfortunately few in number, are potentially at least as instructive, especially because the public audience for the literature on economic development likely consists of areas with not a lot of spare change or special economic attractions. Diana Dillaway has produced such a case study of failure, appropriately called *Power Failure*.<sup>1</sup> Unfortunately, part of the lesson it teaches is that a good case study needs to understand, in detail, the underlying economic costs and benefits of allegedly failed initiatives, to get the facts straight, and to understand the political (in the broadest sense) forces well enough to recognize the limits of the possible. And then there are the difficulties that derive from an author's academic and professional orientation—in this case, planning. However, before we address these problems let us first carefully summarize Ms. Dillaway's story.

The story starts with a brief recounting of Buffalo's economic history. The city started as an entrepôt, a place for trading and trans-shipment of goods, as a result of being the place where the Erie Canal met that great inland waterway known as the Great Lakes. First, goods moved between lake freighters and canal boats; later, between lake freighters and railroad cars. After electric power from Niagara Falls reached Buffalo, the city quickly diversified its economy into milling the Midwestern grain that moved through Buffalo and expanded its existing iron works and related manufacturing facilities into steel mills and their related manufacturing facilities. Such expansion meant that by the early part of the Twentieth Century, the city was the second largest railhead after Chicago and the second largest grain port after Minneapolis.

Two world wars hid the fact that Buffalo's economy was, nevertheless, only superficially healthy. In 1900 the city was the eighth largest in the United States; by 1910 it

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1. DIANA DILLAWAY, *POWER FAILURE: POLITICS, PATRONAGE, AND THE ECONOMIC FUTURE OF BUFFALO, NEW YORK* (2006).

was tenth; by 1920, eleventh; and by 1930, thirteenth. The city was growing, but Detroit, Los Angeles, Pittsburgh, Milwaukee, and San Francisco were growing faster. Ms. Dillaway identifies five factors that caused this decline: (1) shifts in transportation patterns; (2) the failure of steel companies to invest in the newest technology in the face of global over capacity after World War II; (3) the disappearance of locally owned and operated businesses; (4) a militant, effective union movement; and (5) a highly fractured leadership, both public (as a result of a fragmented governmental structure) and private.

Next, Ms. Dillaway expands upon this last factor in Buffalo's decline: the state of Buffalo's leadership in the Fifties. First, she focuses on three differing groups of individuals who held power: the traditional WASP elite, an alliance headed by two bankers and the Buffalo Evening News' publisher, tied together in a social and Protestant religious network; the Irish, Italian, and Polish ethnic communities that were held together by the Catholic Church and the Democratic Party's ethnic spoils system; and an economic grouping dominated by bankers and lawyers that only sometimes enlisted the talents of manufacturers. The first two were deeply wed to the status quo, but not, therefore, to each other, as can be shown by the editorial competition between the Buffalo News and the Buffalo Courier-Express, a more working class, ethnic neighborhood-focused paper. Similarly, the bankers were not monolithic, as indicated by the hostile competition between the two largest banks. Nor was even the business community unified, as shown by a rivalry between the city's Chamber of Commerce and the much smaller Greater Buffalo Development Foundation, which seems to have been formed because of dissatisfaction with the inability of the larger, and so more unwieldy, Chamber to address development issues. Buffalo's was not a monolithic elite.

With the economic and social structure of the city established, Ms. Dillaway starts her presentation of Buffalo's visible decline in the Sixties. Here she notes the efforts at slum clearance, especially along the waterfront southwest of downtown and in an African-American neighborhood east of downtown and several successful building projects in downtown—a new mall and four bank buildings—and one failed project—a convention center sited to help revitalize an old hotel that, perhaps duplicitously,

was turned into office space. She also details the growth of African-American political power exemplified by the creation of a self-help organization called BUILD. However, most of the discussion is focused on what Ms. Dillaway asserts are three projects that might have "slowed or reversed the city's economic decline,"<sup>2</sup>—a football stadium located near downtown, a University campus located on the downtown waterfront, and a rapid transit system designed to link downtown and the suburbs. The first two were built in suburban locations and are seen as examples of issues where the various city elites could not agree on what to do, in part because some feared change to their cozy domination of Buffalo's social and economic spheres. The third took forever to complete and never actually linked the city to even one suburb; it well deserves the label of a "shaggy dog story."

Ms. Dillaway's discussion of the Seventies is aptly called "Crisis," for it is during these years that the area's heavy manufacturing economy largely crumbled and Buffalo came close to declaring bankruptcy. In 1971, Bethlehem Steel cut its workforce in half; by the early Eighties its plant was all but closed and Republic Steel's facilities were completely closed. Six of the city's thirteen railroads declared bankruptcy. Houdaille Industries, National Gypsum, Carborundum, and Western Electric moved their plants elsewhere. All tolled, about ninety factories were closed and thirty thousand manufacturing jobs, lost. Thus, manufacturing employment declined by 16.3% while finance, insurance, and real estate employment grew by 28.8% as banking and other services became a more prominent part of the economy. Overall, employment in the region grew by a paltry 1.3%.

Closed plants and bankrupt railroads do not pay taxes, and so, by the middle of the decade, Buffalo was on the brink of bankruptcy, saved only by creative finance followed by significant infusions of state and federal funds. Not much economic development took place during these years, although an apparently good plan for such was put forth by the Greater Buffalo Development Foundation only to be ignored amidst predictable business infighting. The convention center was opened, but it lacked the hotel rooms

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2. *Id.* at 97.

necessary to support it. The project to build a rapid transit network diddled along. Attempts to build business leadership quickly collapsed as the two existing business organizations continued feuding. This feud was stoked by their fight over control of the newly formed the Erie County Industrial Development Agency, an entity that was designed to lure industry into the region with low-cost financing and tax breaks, but was so feeble that it could neither entice nor force the Town of Amherst to join it. With business in disarray, organized labor, having suffered massive job losses, was in no mood to cooperate and refused to do so. Amidst all of this chaos and destruction, the Democratic machine was turned out of City Hall by a renegade Democrat, elected as an Independent, who built and maintained his own political organization, based in Irish neighborhoods, with a patronage network separate from that of the Democratic Party. He pointedly shunned a growing African-American community that, like the city itself, saw its organizations fail as the economy lowered all boats.

Ms. Dillaway begins her discussion of the Eighties by recognizing that, at this time, new leaders appeared in the city. Foremost was the then still new mayor who served for sixteen years and somewhat surprisingly built a good relationship with the business community. He used non-profit government corporations to control and spend federal funds without the Common Council's political involvement, infuriating the Council and especially its African-American members. New faces also appeared in the business community. An informal organization of bankers, lawyers, and businessmen called the "Group of 18" that, for a change, included the president of the University at Buffalo, was born out of frustration with the endless fighting between the two major business organizations and quickly superseded both. When the business community could be convinced to speak, it now could speak with one voice and did so when attempting to retain jobs when area businesses threatened to move. So too could the newspapers, as the Buffalo Evening News, under new ownership, absorbed the Courier-Express and then moderated its editorial policy a bit.

With fewer people at the table, several projects were completed: two hotels, two office buildings, and a baseball stadium. Even organized labor participated by providing

mortgage money for one of the hotels. And work was begun on the development of a medical campus near downtown combining a large hospital, a state funded cancer research hospital, a medical research organization, and UB's Medical School. At long last the rapid transit system was finished; no one would say that it was completed, as a lack of funds caused by the endless delays in settling on a plan meant that it never reached its intended terminus at the UB campus in Amherst.

There were, however, some dropped balls, as usual. Plans for waterfront development, bruited about for over twenty years, were haggled over, but only barely begun. The only tangible markers of these efforts were the construction of some high-end residences. And despite the Council's best efforts, the neighborhoods, especially African-American ones, and the Buffalo Public Schools suffered from a lack of attention. Flight to the suburbs continued, as did heavy dependence on state and federal subsidies, about which Ms. Dillaway, quoting the noted urbanist Jane Jacobs, comments, "[H]eavy and unremitting subsidies are transactions of decline, and once adopted, the need for them grows greater with time, and the wherewithal for supplying them grows less."<sup>3</sup>

Ms. Dillaway barely discusses the Nineties which saw the return of the Democratic Party, largely stripped of its former organization, to power in City Hall, not that this change altered the now traditionally hostile relations between the Mayor and the Common Council. Still, business groups merged into the Buffalo Niagara Partnership and increasing hints of multi-county regional cooperation appeared. Neither seemed to lead to anything. New plans were announced for South Buffalo, for downtown, and for the waterfront, but never implemented. Indeed, the only significant development project was the work of a major bank in supporting a single Buffalo elementary school with amazing results. In a replay of dozens of similar disputes over the preceding forty years, a "rancorous debate" over an expanded Peace Bridge to Canada "became a fight without reason, filled with the

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3. *Id.* at 187 (quoting JANE JACOBS, *CITIES AND THE WEALTH OF NATIONS: PRINCIPLES OF ECONOMIC LIFE* 193-94 (1984)).

symbolism of power and control.”<sup>4</sup> And then the city collapsed into effective bankruptcy for a second time, this time aided by a state imposed control board, proving Jane Jacobs right. “Failure” was there for all to see. Whether it was a failure of the “Power” possessed by the banker and lawyer elite that Ms. Dillaway asserts is the heir to the WASP elite of the Fifties, is another matter entirely.

In her introduction, Ms. Dillaway states that she sees her story about economic development in Buffalo as “a study of form (the structure of power), function (the process of planning), and outcomes (initiatives).”<sup>5</sup> This is an odd list. First, unless the structure of power is coextensive with the economy of a location, something important is missing from the analysis—that economy. Second, “initiatives” are not the outcomes of “planning,” though one hopes that they follow the planning. Rather, outcomes are best seen as the actual achievements in terms of economic development, whether the result of planning or not, for among the questions to be asked in any story of economic development is the degree to which planning influenced actual outcomes. It is always possible that a planning exercise could misunderstand the economic conditions in a location, as well as the structure of power there, and so that plans, however sensible on their own terms, however inclusive of all parties’ interests, however formally exemplary as an instantiation of the tenets of modern planning theory, could yield nothing. So, let us next look at questions about the accuracy of Ms. Dillaway’s assessments of economy and of power. After all, since the book’s thesis is built around a claimed “Power Failure,” a reader’s initial question ought to be, “Whose power failed, how, and why?” The answer may vary in the three decades she focuses on.

Ms. Dillaway claims that in the Sixties, the traditional WASP elite either failed to support or actively blocked major projects critical to Buffalo’s future. The projects were a football stadium for downtown, a university campus on the downtown waterfront, and a rapid transit system to link downtown and the suburbs. And she argues that had these projects been completed, Buffalo’s future would have been brighter, that it could have escaped its crisis in the

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4. *Id.* at 204.

5. *Id.* at 20.

Seventies. Is this likely to be true? When one looks at each of these projects, it is hard to conclude that they were as important as Ms. Dillaway claims, or that these Sixties elites played as significant a role in the decisions as she claims, or that these decisions were in fact wrong on the merits or so critical to Buffalo's future.

A downtown football stadium would have consumed substantial real estate for its footprint and, more importantly, for parking. Other uses probably would have generated more city revenue. Such a stadium is used ten times a year (two exhibitions, eight regular season games, and possibly one or two more playoff games). For the remaining 97% of the year, it is empty. It is hard to argue that such a limited-use facility is a critical generator of economic activity. It is far better to have a baseball stadium (seventy to seventy-five games) or hockey arena (forty to fifty games), than a football stadium. Of course, all three properly located together would limit redundant parking and improve the economies of scale, but the football stadium is the least important of the trio.

Dual purpose (baseball/football) stadiums were all the rage in the Sixties. Cincinnati, Pittsburgh, Oakland, San Francisco, Houston, Minneapolis, and Seattle come to mind. Most of these localities have abandoned the concept and invested heavily in new facilities since then. Even in retrospect, Buffalo's rejection of a downtown football stadium does not seem inherently wrong.

The development of a SUNY/Buffalo (the pre-existing University of Buffalo, newly merged into the State University in 1962) campus on the downtown waterfront, for which Dillaway argues, was never a realistic prospect.<sup>6</sup> Her account ignores or misstates the critical facts. When the issue of where to locate the expanded University was under consideration, essentially in 1963 and 1964, two sites were seriously considered: expansion of the existing campus onto the Grover Cleveland Golf Course at Main and Bailey and into the surrounding neighborhoods along Main Street, or purchase of a larger site in the near suburbs. Amherst

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6. The following discussion of the location of the SUNY/Buffalo campus is a condensation of the discussion of the topic in WILLIAM R. GREINER & THOMAS E. HEADRICK, WITH W.J. SNYDER, *LOCATION, LOCATION, LOCATION: A SPATIAL HISTORY OF THE UNIVERSITY OF/AT BUFFALO* (forthcoming 2007).

was the logical location because of proximity to and ease of movement from the existing campus and because the University already owned 246 acres in the area. Contrary to Ms. Dillaway's account, the University came to that ownership initially as a way to obtain Grover Cleveland Park in the Fifties. Already needing space for expansion, it offered the City \$500,000 for the park. The City set the price at \$1 million. The University then bought the private Audubon Course in Amherst for about \$500,000, hoping to swap it for Grover Cleveland. However, before the swap could be negotiated, the Town of Amherst, flush with state subsidies, took the Audubon Course for public recreation purposes. The hope of getting the City to make Grover Cleveland available by swapping land having disappeared, UB used the proceeds from Amherst's action to purchase land adjacent to the Audubon Course.

When the State, with its eminent domain powers, entered the picture in 1962, Grover Cleveland came back into the University's thinking. Most of the UB campus leadership and faculty groups favored expanding the UB campus at Main and Bailey and holding the Amherst land for peripheral campus activities, such as research facilities, married student housing, and athletics. But the State University administration feared that an expanded UB campus at that location would not accommodate the long-term growth of the University and would create tensions with the City and local residents over Grover Cleveland and expansion into the surrounding neighborhoods. Thus, the SUNY Trustees chose the Amherst site in 1964, while keeping the existing campus for the Medical and other Health Science Schools.

All State University and UB records leading up to the decision to locate the campus in Amherst are devoid of any mention of the Waterfront site, except one—the Moore Report commissioned by the State University Construction Fund—a state entity separate from the State University and often at loggerheads with it over SUNY campus siting and construction issues. Moore had no substantial contact either with UB or SUNY officials in preparing his report. Not surprisingly, State University officials gave the Moore Report little attention because it came late in the process (February of 1964), came from a suspect source (the Construction Fund), and was rather superficial in its

approach, totally ignoring how the University might function in any of the six locations it surveyed.

Then, how did the possibility of a Waterfront University ever rise to the level of public consciousness that Ms. Dillaway describes? Pretty much the way she recounts. Two years later, a group of Buffalo citizens found out about Moore's listing of the Waterfront among the possible sites, stimulated some newspaper coverage, part of the endless competition between the city's newspapers, and thus created public pressure on the Governor during an election year. The pressure resulted in a study to be completed after the election by a process tilted toward the much larger Amherst site, which by that time had been substantially acquired by SUNY. The result was obvious.

The history of UB's development shows that the Waterfront site was never a possibility. Moreover, a careful examination of the site would reveal that it was too small, faced serious delays involving federal Urban Renewal and Corps of Engineers approvals, and entailed the substantial dislocation that would accompany the relocation of perhaps 16,000 residents. And even then, its size would have constrained further development, and so would have been a disaster for the growth of the University as a leading institution for the state and nation. It is also clear that the decision rested with the State University officials in Albany who were not inclined to listen to Buffalo people, whether they were UB leaders and faculty, social-economic elites, or Johnny-come-lately Buffalo politicians, if their advice contravened the long-term SUNY plans for UB.

In Ms. Dillaway's view, the Waterfront University would have revitalized downtown commerce, increased demand for entertainment, hotels, and health services, and diversified the city's economic base away from manufacturing. The WASP elite, she argues, feared the intrusion of progressive faculty and radical students into the mix of Buffalo politics. All of this is doubtful. First of all, the largest Waterfront site was 423 acres, roughly one-third the size of UB's current campuses. It would have provided little or no space for dormitories. Most students would have commuted from their homes or apartments spread throughout the region. Their demand for retail and other services downtown would have been minimal. Faculty and staff, moreover, would have been most likely to locate where their children would get a good education. The

Buffalo Public Schools would have been low on that list, and its private schools beyond most faculty member's means. As for political impact, Amherst politics have scarcely been radicalized by the 4,000+ faculty and staff and over 25,000 students who work and study there. Thus, on the facts and projected beneficial impact of a Waterfront University, Ms. Dillaway is just plain wrong.

The third project hampered or blocked by the WASP elite was the rapid transit link or links to the suburbs. According to Ms. Dillaway, such a system would have brought suburbanites who had fled the city back downtown and revived its economy with an enclosed mega-shopping mall, costing \$26 million in public funds. That was unlikely for two reasons beyond the cost. First, Buffalo is an easy car travel town. From many suburban locations, downtown is at most a thirty-minute drive. Rapid transit would not cut the time or ease of traveling to downtown. It would help those without cars, but they then lived in Buffalo, not the suburbs, and still do. For them, a good bus system is more important than a single channel rapid transit line. Second, such retail businesses as might be expected to grow followed people to suburban housing (the City of Buffalo was completely built out by the Fifties) where there was ample land for diversified shopping malls, strip commercial, and free parking. No downtown retail development, even one served by a network of rapid transit lines, could have competed with the convenience of suburban retail.

Perhaps the WASP elite had enough influence to block these three developments in the Sixties. But the plain truth is that even if they had not, it would not have made the difference for Buffalo that Ms. Dillaway claims. So much for those years.<sup>7</sup>

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7. Objections to the tone of this section (and the following ones) for undue pessimism and unwarranted optimism have been offered by two friends, Sara Faherty and Fred Konefsky, respectively. We doubt that we are unduly pessimistic; the City elite's record with respect to the political economy of development has been, and continues to be, terrible. It cannot even identify economic development opportunities accurately, as evidenced by the fact that all three of the projects from the Sixties that are still bruited about today were of a mostly symbolic, rather than of any economic, value. Less elite groups have not done much better at separating symbolic from economic value. Symbols count, but inexpensive, quickly realized symbols probably count most.

As for unwarranted optimism, we tend to believe that some things other than the ones identified in the City elite's collective memory might have been

Power shifted in the Seventies because the issues shifted. The issues became how to reverse or slow the decline in manufacturing, how to best use government funds, and how to develop and attract new businesses. As part of the change, labor unions, politicians, and bankers acquired power. According to Ms. Dillaway, they used it poorly. Little was accomplished. Her explanation is that they had access to good studies, sensible ideas, and adequate plans, but they failed to act in a concerted fashion. But should that have been expected? We think not, because for each of the main players, doing so would have required a major transformation.

Business organizations would have had to agree to shelve their turf wars. Labor unions would have had to cooperate with management and give back some hard-won benefits from the past. The City's Democratic Party, built on ethnic neighborhood patronage, would have had to give more prominence to the African-Americans and their leadership than the Italians, Poles, and Irish would have been willing to cede. White ethnics were moving to the suburbs, but those that stayed were not inclined to share a smaller pie with the proportionately growing African-American population. Such accommodations take more than a decade. As a result, an African-American leader could, and did, win the Democratic nomination for mayor, but the white ethnic Democrats rallied behind a white Irish Democrat/Independent who ran against his party and won, and won again and again and again.

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done, not so much to moderate the destruction of the area's economy, but to accelerate a bit any potential recovery. For example, if reconceived, at least one of the Sixties projects—the subway—might have been of modest economic value. Indeed, reconceived it still would be. Ignoring the fact that federal monies were available only for subways, a wise person in the early Sixties might have recognized that eventually the suburbs were going to dwarf the City economically. Though that recognition would have been a blow to the City elite's ego then (and probably now), that wise person might have used the large pot of money that went into the subway to reorganize the area's transit system to link city residents to suburban office/light industrial parks and to develop circumferential routes that linked such suburban locations to each other. Designed to meet peak—early morning and late afternoon—ridership generously, such reorganization might have had modestly positive environmental impact as well. If the willingness to offer this idea suggests unwarranted optimism, then we are guilty here too.

The bankers were surely willing to support efforts by the state and county to attract new businesses, but the funds for such an endeavor had to be managed by a government agency, which basically had to start from scratch in a difficult environment. New businesses needed or wanted lower taxes, but the declining tax base encouraged raising rates to shore up declining revenues. New businesses needed labor with more skills than were had by the workers displaced by declining manufacturing, as well as lower interest rates, which the banks facing growing inflation could not provide. In these years the deck was pretty well stacked against these efforts at trying to rebuild the local economy.

Maybe some foresighted politicians, bankers, and other business and labor leaders could have come together and allocated the declining local and heavily-monitored outside resources to the long-term advantage of the Buffalo region. But how would such leadership emerge from the past framework of labor-management relations and from political organizations, both built on quid pro quo exchanges? How could local priorities be implemented with the strings attached to the state and federal handouts? Ms. Dillaway does not explain how these things might have taken place. Planning alone is not likely to have made it happen. So much for the Seventies.

Ms. Dillaway characterizes the Eighties as “new leaders, old structure.”<sup>8</sup> It’s a fair assessment. The old WASP elite was replaced by a new group of bankers, lawyers, and UB’s President—many coming to Buffalo from elsewhere. They came together as the “Group of 18.” They were supported by the new ownership of the Buffalo Evening News—an absentee with imported, resident management. The newspaper’s ownership had chased its competitor into closing down and, thus, became the single voice on public issues. The Mayor had solidified his power and excluded dissonant voices from decision-making. But as Ms. Dillaway makes clear, both of those loci of power were too indecisive to be able to move forward on a broad agenda.

Next, Ms. Dillaway bemoans the over-representation of lawyers and bankers and the relative absence of manufacturers and other business owners among these new

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8. DILLAWAY, *supra* note 1, at 158.

leaders. But bankers and lawyers have the greatest interest in attracting new businesses and, thus, new clients. Manufacturers and other businesses had their hands full in a tough economy and certainly did not want to attract more local competition. On the issue of broader representation, which Ms. Dillaway urges, she is right in noting that Ethnic/Catholic leaders and African-American leaders were not included in this self-selected group. Both, however, retained some power to block or frustrate any new initiatives.

So, again, the question remains: What were the alternatives that might have led to better results? How would a more inclusive power structure emerge in the setting constructed by the past? Consider the Buffalo waterfront. Because it was once the Niagara Frontier Port Authority, created in the Fifties to revitalize the Port of Buffalo, the Niagara Frontier Transportation Authority controlled much of the waterfront. Since it had to bankroll public transit in the Buffalo area, including the subway, a colossal money loser despite its significant ridership, it was unwilling to yield control of any of that land, the development of which it, rightly or not, saw as providing income to support the transit system. The City had little to offer for the project, except a forum where neighborhood racial and ethnic politics could be played out while shadowboxing over other issues, that and zoning approval. Possible funding sources have their own, not necessarily compatible, agendas. Potential developers just want to make money and, to the extent that they are going to rely on private lenders, will be held to rather stiff tests of marketability. With cross currents such as these, it is hardly a surprise that the project did not move forward despite endless planning followed by photo-ops and glossy brochures.

Why might a case study such as this one misunderstand and misestimate the forces on the ground, as it were? After all, Ms. Dillaway's work in interviewing participants or even onlookers to the events that she chronicles is exemplary and her archival research significant. In no sense has this book been tossed off. To us it seems that one reason is disciplinary. Ms. Dillaway is a planner. She speaks as if a properly researched, well-documented plan will convince any and all parties in the game, and so almost execute itself. All right-thinking people

will agree. But such plans usually ignore entrenched interests, personalities and egos, and past conflicts with their attendant scores to be settled, that together really shape what happens. A good plan starts from that reality base and tries to construct a path to a new power structure, new goals, and new methods of implementation by creating new perceptions of self-interest and by logrolling and trading. But a good plan also needs new money, and although Ms. Dillaway lists the new money coming into Buffalo, she does not take account of the money that disappeared. It is altogether likely that the bottom line was a loss, that the pie grew smaller, given the slow growth, the out-migration from the region, the ravages of inflation, and unemployment over the period from 1965 to 1990.

Equally distinctive is the presence of an odd confusion that some species of planners make. *Power Failure* is a book about an economy in decline and so about economic development. Yet, only two narrowly conceived economic development projects are mentioned—the Thruway Industrial Park on abandoned railroad property and the Buffalo-Niagara Medical Campus. Instead, the book highlights endless disputes over public facilities envisioned as bringing collateral economic benefits: the football stadium, the UB campus, the light-rail, the waterfront, the Peace Bridge. This conflation of public works with economic development, an understandably necessary bastardization of cost/benefit analysis in a capitalist country, is common among planners. The roads, water and sewer lines, and street lighting, as well as the educational resources—schools and labor skills—that support private investment in the retention or expansion of economic activity are slighted, as if the lack of plausible photo-ops for the players in the game means that such things are unimportant to economic (or even neighborhood) development. Instead, public facilities are highlighted. This is a planner's blindness.

And then there is the matter of inclusion. As part of their notion of the self-executing plan, one that because of its quality all will buy into, planners today emphasize inclusiveness. So, near the end of her book, Ms. Dillaway observes, "In order for economic development to work, Buffalo's political and economic leadership must incorporate minority leaders into the heart of the regional

planning process.”<sup>9</sup> And again, “This, then, is Buffalo’s challenge: to identify and implement a common ground of leadership that serves Buffalo and the region well.”<sup>10</sup> Such was not always the case. Arguably the most effective planner and implementer in New York State history was the still much reviled Robert Moses, who consulted no one, never built without his own monetary base, and reported only occasionally to the Governor. To separate planning from execution is a planner’s mistake, as can be seen from Ms. Dillaway’s recurrent pleas to increase the number of people at the table.<sup>11</sup> Yet, this book recounts a truly fractionated set of power relations in which a very large number of people had vetoes, explicit or by virtue of simple non-cooperation, over development projects. Increasing the number of participants with veto power is a recipe for a thin, pork-filled stew, small projects that threaten no one, modestly improve neighborhood amenities, and do little or nothing for the economy as a whole. It is just possible that Buffalo’s power failure is that it has had too much of this kind of planning.

However, merely to speak of “Buffalo” in this singular, isolated sense is to identify a still larger problem with this book than the professional identity of its author. Ms. Dillaway fails to recognize, much less to answer the question, “What is Buffalo?” This is a common failure among Buffaloes, and Ms. Dillaway, a member of one of Buffalo’s most prominent families, is properly seen as a native. At times, her Buffalo is a city hemmed in by uncooperative suburbs. At other times, it is an economic region, stretching across two counties and possibly into Canada. Ms. Dillaway seems caught up for the most part in Buffalo as the city. But as an economy, it is the region that matters. Bethlehem Steel left Lackawanna, not Buffalo. GM is in Tonawanda, and its troubled offshoot, Delphi, in Lockport. Ford is in Blasdell. Ms. Dillaway gives scant attention to the role, accomplishments, and failures of Erie County government in advancing the region’s economy and no attention to the towns and their economic development efforts. She bemoans the stadium in Orchard Park and the

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9. *Id.* at 215.

10. *Id.* at 217-18.

11. *See id.* at 85-88, 97-99, 108-10, 140-42.

University in Amherst, but both have prospered. Despite all the movement of NFL franchises, the Bills are still in Buffalo. The University has far exceeded the size and the strength and reputation it might have achieved had it been located on the Waterfront. This is Ms. Dillaway's greatest failing. She by-passed or ignored her real subject, the real Buffalo, not the one whose boundaries were drawn over a century and a half ago. It's not that the real Buffalo hasn't had or doesn't now have problems, but a more complete picture would have been more accurate and less contrived. It might have provided a better basis for understanding the region's past and so for moving on.



# Mind Over Morality

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MINDS ON TRIAL. By Charles Patrick Ewing & Joseph T. McCann. *Oxford University Press*, 2006. Pp. x, 292. \$35.00 (hardcover).

## INTRODUCTION

Law is often an abstraction. As any astute lawyer knows, much time can be spent reading statutes and regulations, familiarizing oneself with the voluminous procedures that dictate how law is practiced. Many law students and attorneys alike succumb to boredom during the prolix of law review articles permeating much legal scholarship these days. This is unfortunate, since law has the propensity to engage the mind and tells us much about how and why our world operates as it does. But law, unlike science, operates as it does not because of some self-sustaining force outside of human dictates, but solely because of them. To put it a different way, law is the study of human rules whereas science depends upon material independent of human agency. Thus, to study law is really to study how social institutions decide and effectuate normative rules with an aim towards some social utopia. An ordered society is, indeed, the implicit goal of law whereas order is antithetical to the linear progression of the natural world.<sup>1</sup> In this vein, law and science do not just diverge; they are on entirely different paths from the beginning.

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1. See, e.g., Rudolf Clausius, *On Several Convenient Forms of the Fundamental Equations of the Mechanical Theory of Heat*, in MECHANICAL THEORY OF HEAT 354, 365 (T. Archer Hirst ed., n.d.) (“The entropy of the universe tends to a maximum.”).

Perhaps it is these different paths that explain why legal questions regarding the mind are so contested while so interesting. Studying law can inform us somewhat about why people behave as they do. The work in law and economics has demonstrated that people are motivated by incentives<sup>2</sup> (and laws can be powerful incentives). Others have shown how people judge risks irrationally<sup>3</sup> and policy formulated by public perception of these risks is unwise at best and downright foolish at worst.<sup>4</sup> These contributions are noteworthy and have greatly expanded our understanding of the nexus between law, policy, and the human element. But such studies often leave us hungry for more. While the law may be objective, its relation to each person is subjective. It is here, the meeting of the law and the mind, where the rubber meets the road.

And what road are we on? It is a dark one within the deep crevasses of the mind. Whereas the law is clear (do not kill others, for example) it tells us nothing about why people do so anyway. Exploring the mind of the lawbreaker tells us about the motive, the drive, the circumstances behind the singular point in time when law X is broken with repercussions surely to follow. In this sense, understanding the mind of the lawbreaker tells us more of the story about the law in addition to the psychological make-up of the offender. Conventional notions about law follow a predictable path: laws are enacted, they remain quietly on the books until something bad happens, and then the whirlwind of legal action overwhelms all involved. Yet exploring the mind of the lawbreaker helps us understand how the law fails to deter illegal conduct, and in this regard, is impotent as a social control mechanism. Such failures seem increasingly to lead lawmakers to focus more

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2. See, e.g., GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

3. See, e.g., Jeffery J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, in *BEHAVIORAL LAW AND ECONOMICS* 95 (Cass R. Sunstein ed., 2000).

4. See, e.g., W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 *J. LEGAL STUD.* 107 (2001).

on the punishment for lawbreakers rather than on crafting effective laws themselves.<sup>5</sup>

Of course, whether lawmakers should even be concerned with compliance is perhaps irrelevant when we are talking about *malum in se* crimes; even if lots of people kill that should not mean that homicide statutes are wrong. Yet lawmaking seems increasingly concerned with activities outside of obviously morally reprehensible crimes. The canon of *mala prohibita* is hefty and growing each day.<sup>6</sup> With these crimes, the moral authority of law requiring compliance simply out of a sort of *ipse dixit* seems less convincing. Since law is inherently normative, and hence a moral authority, the legal system loses legitimacy when that authority is out of step with moral conscience of popular wisdom. It, thus makes sense to understand the psychology and sociology of legal systems to gain an appreciation of how people interact and react with the seemingly passionless legal code.

There are many books on the topic of law and psychology: some provide overviews of the field,<sup>7</sup> others discuss important research findings,<sup>8</sup> but few provide an effective, upfront experience of the personas behind the headlines. In short, *Minds on Trial*<sup>9</sup> is a good and important book and falls in the last category. It deserves much praise for venturing into the opaque world of the disturbed mind. Popular wisdom often holds motives as overly simplistic. The common explanation for the crimes of folks like Andrea Yates or Jeffery Dahmer is that she was crazy and he was evil. Such accountings may contain a grain of truth, but are uninformative and ultimately

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5. For a good discussion on the emphasis on punishment, see JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003).

6. See Markus D. Dubber, *The Historical Analysis of Criminal Codes*, 18 L. & HIST. REV. 433, 434-35 (2000).

7. See, e.g., 11 HANDBOOK OF PSYCHOLOGY: FORENSIC PSYCHOLOGY (Alan M. Goldstein ed., 2003).

8. For a good overview of jury and eyewitness findings, see *PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE* (Neil Brewer & Kipling D. Williams eds., 2005). For a great review of research on psychopathy, see *HANDBOOK OF PSYCHOPATHY* (Christopher J. Patrick ed., 2006).

9. CHARLES PATRICK EWING & JOSEPH T. MCCANN, *MINDS ON TRIAL: GREAT CASES IN LAW AND PSYCHOLOGY* (2006).

unsatisfying. To appreciate the minds of people like Yates or Dahmer means craving deep answers to questions of motive beyond greed or the other usual suspects. While trial lawyers seek understandings of motive to prosecute or defend gradations of civil or criminal codes, forensic psychologists want to understand the complex human conditions behind the madness of Yates and the wickedness of Dahmer. Ewing and McCann present twenty seminal cases covering a large breadth of criminal and civil cases, providing a good primer of the psychological investigation of troubled minds.

The balance of this essay is organized as follows. Part I summarizes the book and discusses its major themes. It reviews the cases presented in *Minds on Trial* and examines the interface of law and science in our culture. It discusses how the influence of the behavioral sciences in our modern culture begets the expert and the controversy that inevitably flows from having such experts. The power that psychological science has exerted through expert testimony is examined by reference to the vast panoply of issues upon which experts feel qualified to opine. The effect on our social and legal systems is explored in light of cultural dependence on science to answer difficult questions of the human condition. The enduring skepticism of expert testimony is reviewed with an eye on the fundamental differences between law and science as the basis for our dissatisfaction with experts. Part II briefly discusses the conflict between law and science by examining the recent Supreme Court case of *Clark v. Arizona*.<sup>10</sup> Part III discusses the implications of *Clark*, psychology, and science as a moral authority.

## I. TRIALS OF THE MIND

Forensic psychology is popular these days. From students who desire to become federal agents to the numerous television programs that populate the airwaves, forensics is alive and well. Of course, the reality of forensic psychology is hardly as glamorous as many would like to believe. The training is long and arduous, the pay irregular, and recognition, if any, fleeting. So why on earth would

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10. 126 S. Ct. 2709 (2006).

anyone commit a life's work to such a pursuit? *Minds on Trial* provides an answer in its approach to the broad field that has become forensic psychology by focusing on individual cases and its fascinating detailing of the facts behind the headlines. What is special about *Minds on Trial* is its ability to tell the stories about the people behind the cases in an upfront and personal manner. There are many articles and books which explain legal doctrine or present the usual run down of facts from high-profile cases. The idea that cases undeniably involve humans—whether they are prosecutors, victims, or the perpetrator—is often lost in conventional scholarship. Likewise, popular Hollywood depictions are predictable by presenting crazed villains as one-dimensional monsters. But reality is, like so many things in life, far more complex. The people of focus in *Minds on Trial* are just like everyone else. They put their proverbial pants on one leg at a time, struggle with life's challenges, and, unfortunately, make some very bad choices. As co-author Ewing is fond of saying, he has never met a forensic patient he didn't like. This is so, I think, because as a psychologist, one inevitably gets the life-story behind the accused criminal, the angry family court litigant, and the troubled delinquent. Such stories are invariably complicated and often sad. Many people have endured horrendous hardships and it becomes evident doing this line of work that most people are well intentioned at the least, but are overcome by their choices, circumstances, and poor judgment. But as the saying goes, good intentions are not enough in this life.

#### A. Cases and Conjecture

The cases presented in *Minds on Trial* speak volumes about how our legal system has a love/hate relationship with behavioral science experts. An easy way to conceptualize this relationship is that the legal system, like all of us, seeks answers from psychologists when people engage in bizarre or heinous behavior. Yet, since ultimately such explanations will be predicated, in large measure, by examining a person's history, such explanations rarely suggest simple condemnation. Life histories are complicated and remind us how we are more fortunate than the people

we condemn.<sup>11</sup> Explanations often will include descriptions of child abuse or neglect, drug abuse, and other life tragedies which appear to many as “excusing away”<sup>12</sup> culpability. And, of course, in many respects, these expert opinions do exactly that since our legal system operates largely on a culpability paradigm. Many of the cases in *Minds on Trial* are well-known; others were well-known during their time. This status derives not just from the notorious crimes or celebrity figures of the cases themselves, but because experts were at the forefront of the cases.

*Minds on Trial* begins with what is considered the first instance of criminal profiling in modern psychology. The case of George Metesky<sup>13</sup> appears straightforward today: a disturbed man terrorized an American city with home-made bombs and was apprehended with the aid of a criminal profile. It is perhaps fitting that Metesky is the first case presented given the public’s fascination with criminal profiling. Ewing and McCann demonstrate how this technique is more about applying known psychological facts to the case at hand than relying on gut assumptions as popular media portrayals often depict. With careful inferences, psychologists can help construct a profile because they understand better than most others the tragic reality of madness. Such constructions, however, are like all things in science insofar as they are based upon probabilities and not certainties. Metesky was an unusual and troubled man and his crimes bore witness to this fact.

Likewise, Lee Harvey Oswald,<sup>14</sup> the next case presented in *Minds on Trial*, was also troubled—and that troubled mind had been forming for quite some time with feelings of anger and inferiority. Ewing and McCann paint a picture of a man disturbed from his early childhood. In reading about

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11. As St. Augustine elegantly put it, “love the sinner, hate the sin.” ST. AURELIUS AUGUSTINE, 2 CITY OF GOD 32 (R.V.G. Tasker ed., John Healey trans., J. M. Dent & Sons 1962) (1945).

12. See, e.g., ALAN M. DERSHOWITZ, THE ABUSE EXCUSE: AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY (1994); JAMES Q. WILSON, MORAL JUDGMENT: DOES THE ABUSE EXCUSE THREATEN OUR LEGAL SYSTEM? (1997).

13. EWING & MCCANN, *supra* note 9, at 7.

14. *Id.* at 19.

Oswald's aggressive antisocial personality, one cannot help but wonder whether things would have been different had his father been present in his life. We have grown accustomed these days to a deluge of stories about "antisocial" men who neglect their children and degrade women. Yet we hear much less about the disappearance of the father-figure from family life and the thirst many young men have for good role models.<sup>15</sup> The legacy of social change of the 1960s brought many good changes and many bad ones as well. The continued decline of marriage and actively-involved fathers is surely one of them.<sup>16</sup>

The Patty Hearst<sup>17</sup> case presented in *Minds on Trial* also takes the reader back to the era of social change of the 1960s and 1970s. Hearst, who was kidnapped and became an active participant in several serious crimes, was prosecuted for those crimes upon her capture. The Hearst case is a perplexing one because it is counterintuitive to most who hear about it. A woman identifies with her captors, participates in their crime spree, and then claims a psychological defense. As Ewing and McCann demonstrate, however, the take-home message of the Hearst case is the calculated tactic by the defense to pursue a duress claim instead of an insanity one presumably in the hopes that the jury would better receive it. Such tactics were undermined, nonetheless, by an expert whose own published works directly contradicted his testimony and, in all likelihood, a jury with deep suspicions of someone who crossed from passive victim to active participant. In this case, experts seem to deserve their reputation as "hired guns."

Other cases covered in *Minds on Trial*, conversely, demonstrate how common intuitions about the mind can be

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15. One way of measuring this decrease is by examining the percentage of premarital births. The largest upswing of such births occurred between 1979 and 1984. See AMARA BACHU, U.S. CENSUS BUREAU, TRENDS IN MARITAL STATUS OF U.S. WOMEN AT FIRST BIRTH: 1930 TO 1994 (1998), <http://www.census.gov/population/www/documentation/twps0020/twps0020.html>; see also DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM (1996).

16. For example, the divorce rate nearly doubled between 1960 and 1972. See ARTHUR J. NORTON & LOUISA F. MILLER, U.S. CENSUS BUREAU, NO. P23-180, MARRIAGE, DIVORCE, AND REMARRIAGE IN THE 1990'S (1992) (reporting divorce rates from 1921 to 1989).

17. EWING & MCCANN, *supra* note 9, at 31.

wrong and have devastating effects. Perhaps the most promising research in law and psychology has centered on the problems inherent in confessions<sup>18</sup> and eyewitness testimony.<sup>19</sup> The case of the Guildford Four,<sup>20</sup> who were incarcerated for years based entirely on false confessions relating to the tragic bombings at two pubs in Guildford, England, is emblematic of the grave miscarriage of justice that occurs during unbridled police interrogations. Likewise, John Demjanjuk,<sup>21</sup> wrongly accused of being “Ivan the Terrible” and inflicting death and torture to thousands of Jews during World War II based mostly on decades old eyewitness memories, is fervently proffered as confirmation that conventional notions of probative evidence are often wrong. Again, though, psychological experts have both contributed and assailed conventional notions of probative evidence. In the case of Gary Ramona,<sup>22</sup> accused of child sex abuse by the recovered memories of his daughter, Holly, it becomes clear how psychology was used as a tool of harm. As bad as the recovered memory movement was—and it was truly bad—it was practiced by a few and, in time, psychological science, not the law, corrected the practice by demonstrating that children are highly suggestive during interviews and recovered memories during psychotherapy have little merit.<sup>23</sup>

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18. See Gary L. Wells, Amina Memon & Steven D. Penrod, *Eyewitness Evidence: Improving Its Probative Value*, 7 PSYCHOL. SCI. PUB. INT. 45 (2006).

19. See Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33 (2004).

20. EWING & McCANN, *supra* note 9, at 45.

21. *Id.* at 115.

22. *Id.* at 165.

23. For a good review of recovered memories, see Elizabeth F. Loftus & Deborah Davis, *Recovered Memories*, 2 ANN. REV. CLINICAL PSYCHOL. 469 (2006). While most professional mental health associations have denounced recovered memories, see, e.g., AMERICAN PSYCHIATRIC ASS'N, POSITION STATEMENT ON THERAPIES FOCUSED ON MEMORIES OF CHILDHOOD PHYSICAL AND SEXUAL ABUSE (2000), [http://www.psych.org/psych\\_pract/therapymemoryofchildabuse81300.cfm](http://www.psych.org/psych_pract/therapymemoryofchildabuse81300.cfm), it is worth noting that the American Psychology-Law Society recently gave a prestigious award to former Attorney General Janet Reno. Reno has been criticized for her aggressive prosecution of sexual abuse cases during her tenure as Florida's Attorney General which relied heavily upon recovered memories

Many of the other cases in *Minds on Trial* such as the Dan White case,<sup>24</sup> Woody Allen's bitter custody battle with Mia Farrow,<sup>25</sup> and Mike Tyson's return to professional boxing are engaging and important because the facts were often blurred or ignored by the sensationalism surrounding them during their time in the limelight. Ewing and McCann do a commendable job of laying out the facts and the difficulties each case presented for the behavioral experts who overcame many ambiguities to arrive at their conclusions. As mentioned at the outset of this Book Review, the strength of *Minds on Trial* is its frank and open discussion of the cases in retrospect. Hindsight, of course, is supposedly twenty-twenty, and reviewing these cases reminds us of the vitriolic and judgmental attitude so pervasive at the time these cases were decided. People rightly have strong feelings about sex and violence, but the issues are rarely as simple as many would believe. Precedents established without dispassionate analysis invariably lead to bad outcomes.

Since behavioral experts seem at the center of bad events that enter the legal system, it is of no surprise that they are often condemned.<sup>26</sup> As the tragic cases of Colin Ferguson and Ralph Tortorici<sup>27</sup> demonstrate, however, the law must sleep in the bed it makes. Ferguson was clearly crazy,<sup>28</sup> as was Tortorici.<sup>29</sup> Both were convicted despite

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and other pseudo-psychology methods. See *The Child Terror* (PBS Frontline Television Broadcast Oct. 27, 1998) for an overview of the controversy.

24. EWING & MCCANN, *supra* note 9, at 69. Dan White was convicted of the homicides of San Francisco Mayor George Moscone and Supervisor Harvey Milk. White claimed a diminished capacity due to depression induced partly by his consumption of junk food. The defense is infamously known as the "Twinkie defense," though authors Ewing and McCann explain how this description is often exaggerated.

25. *Id.* at 205.

26. See MARGARET A. HAGEN, *WHORES OF THE COURT: THE FRAUD OF PSYCHIATRIC TESTIMONY AND THE RAPE OF AMERICAN JUSTICE* (1997) for a typical diatribe.

27. EWING & MCCANN, *supra* note 9, at 177, 191.

28. Ewing and McCann make the case that Ferguson (who represented himself *pro se*) was likely competent to stand trial as the court so ruled. I disagree, and, like many critics, think he was clearly incompetent. While arguably Ferguson employed some lawyerly tactics and presented a coherent closing argument, the totality of facts strongly suggest that he did not have a

serious questions about their competency during trial and abundant evidence that each suffered from schizophrenia. Cases like *Ferguson* directly flow from the fallout of cases like *Faretta v. California*.<sup>30</sup> In *Faretta*, the Supreme Court held there was a constitutional right to defend oneself. As Justice Blackmun warned in his dissent, however, the Court was creating a constitutional right to be a fool. Consequently, when a marginally competent defendant makes a *Faretta* motion, the trial court is placed in an impossible position. If the judge denies the motion and a reviewing court finds the defendant competent, the error is reversible per se; granting the motion risks allowing the trial to become a farce. Since judges hate reversal, *Ferguson* is the outcome. *Tortorici*<sup>31</sup> is more ominous. Briefly put, the court of appeals held no abuse of discretion occurred when the trial court held *Tortorici* was competent, despite a report from the prosecutor's psychiatric expert stating otherwise. This stands in stark contrast to the Supreme Court's holding in *Drope v. Missouri*<sup>32</sup> that a "bona fide" doubt of competency ignored by the court violates due process. Thus, *Tortorici* suggests that constitutional rights are not as entrenched as we would like to think.

While the law may be less firm than popular wisdom suggests, the notion of evil is solidly ingrained in our culture and legal traditions.<sup>33</sup> Malice and depraved heart have long histories in the criminal code because they signal the worst crimes that necessarily involve intentionality

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rational appreciation of the trial process, as set forth in *Dusky v. United States*, 362 U.S. 402 (1960).

29. *Tortorici* was, in my estimation, one of the worst cases in New York criminal procedure in the past twenty-five years. See Judge Smith's dissent for a thoughtful analysis, *People v. Tortorici*, 92 N.Y.2d 757, cert. denied, 120 S. Ct. 94 (1999) (Smith, J., dissenting) and *A Crime of Insanity* (PBS Frontline Television Broadcast Oct. 17, 2002) for a riveting profile of this sad case.

30. 422 U.S. 806 (1975).

31. 92 N.Y.2d at 767-68.

32. 420 U.S. 162 (1975).

33. For a review of the conflict between psychological research and legal norms, see NORMAN J. FINKEL & W. GERROD PARROTT, *EMOTIONS AND CULPABILITY: HOW THE LAW IS AT ODDS WITH PSYCHOLOGY, JURORS, AND ITSELF* (2006). Cf. Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 OHIO ST. J. CRIM. L. 397 (2006) (discussing the conceptual and empirical limits of psychological findings on culpability).

imbued with wickedness. The sadistic Cameron Hooker,<sup>34</sup> who enslaved an innocent woman for his mere pleasure, and the infamous cannibal, Jeffery Dahmer,<sup>35</sup> strike at the heart of our fears about the worst of humanity. Yet this is also where psychological science flourishes, as the psychological construct of psychopathy has shown real promise in elucidating the mental phenomena behind behaviors most would call evil.<sup>36</sup> Nonetheless, the lure of scientific explanations about evil should not displace normative judgments since such explanations fail to fully explain such a pervasive and intangible human condition. Evil behavior is extensive and multifaceted, and consequently, experts who claim people like Dahmer suffered from a cancer of the mind are surely on shaky ground.<sup>37</sup> The law rejects such claims because our culture views it as entirely incompatible with its ontological construction of free will and culpability. Our culture rejects it because it knows the end result of such deductions means that very few people, if any, would be responsible for their behaviors. Evil behavior, albeit not on the order of Dahmer's, arises from the many, not the few. In this sense, cultural cognition is a powerful force indeed<sup>38</sup> and, perhaps, represents a collective common sense.

Culture is also an important and determining component in social institutions. The law is an extension of our culture and studying cases helps us understand that very fact. Whether it is the case of subliminal messages in the Judas Priest case,<sup>39</sup> the botched psychological autopsy of Mate Hartwig from the U.S.S. Iowa,<sup>40</sup> the utter tragedy of Andrea Yates,<sup>41</sup> the death penalty sentence of the alleged

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34. EWING & MCCANN, *supra* note 9, at 81.

35. *Id.* at 141.

36. See HANDBOOK OF PSYCHOPATHY, *supra* note 8.

37. Dr. Fred Berlin claimed that Jeffery Dahmer suffered from a "love sickness" and that his sexual proclivities and violence were indicative of a "cancer of the mind." See Maureen O'Donnell, *4 Experts Call Dahmer Sane; 3 Disagree*, CHI.-SUN TIMES, Feb. 14, 1992, at 10.

38. See generally Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149 (2006).

39. EWING & MCCANN, *supra* note 9, at 103.

40. *Id.* at 129.

41. *Id.* at 229.

mentally retarded Daryl Atkins,<sup>42</sup> or the controversial sex change of Michael Kantaras,<sup>43</sup> law imitates life insofar as these cases are notorious not just because behavioral experts were injected into the mix, but because such cases turned vexing cultural controversies into formal adversarial forums with a decision only favorable to one side at the end. Thus, these cases became, in essence, prominent political spectacles with each side claiming that their position was the only true one worth siding with in the end. It was not just the finality of judgment that attracted public attention, but the litigant's drawing upon the force of law to decree such positions as true and correct that enticed us all. This is the attraction of law; in the end someone is a winner with the appearance of permanent imprimatur of our legal institutions and government. Moreover, law is unique because, unlike science or the humanities, it can back up its decrees with force.<sup>44</sup> Thus, law indeed attracts controversy; but power begets politics, and science and politics rarely mix well. As the cases in *Minds on Trial* show, the interplay of law and science is profoundly interesting and risky as well.

### B. *A Change of Mind*

A psychologist must like people to be effective at his job. Unlike the radiologist who peers into the brain via an MRI looking for lesions, the psychologist seeks an understanding of the metaphysical mind behind the behavior. Such investigations are invariably descriptive; behind each killer, sex offender, and psychopath lies a story. It is these life stories that keep many psychologists engaged in their work despite the uncertain future of the discipline.<sup>45</sup> Even with

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42. *Id.* at 217. It is worth noting that it is not entirely clear that Atkins is mentally retarded. See Adam Liptak, *Rising IQ Imperils Killer Once Considered Mentally Retarded*, S. F. CHRON., Feb. 6, 2005, at A9.

43. EWING & McCANN, *supra* note 9, at 241.

44. See MAX WEBER, *POLITICS AS A VOCATION* (1918).

45. I may be in the minority here, but I see an uncertain future because health insurance coverage for clinical psychology (the majority of psychological work) is poor and stagnant, other disciplines are providing psychotherapy at a cheaper rate, and the various psychological professional organizations seem more vested in various extraneous political causes than on promoting the livelihood of their members.

all of the psychological tests, the new science of brain imaging, and genetic analyses, the “meat” which sustains us lies with intensely trying to understand what motivates someone to kill another, confess to a crime she did not commit, or join in the criminal enterprise of her kidnappers. Whether it is the bizarre world of George Metesky,<sup>46</sup> the intense anger of Prosenjit Poddar,<sup>47</sup> or the psychotic mind of Ralph Tortorici,<sup>48</sup> the heart of the forensic practice is gathering a robust appreciation of what events led up to that point in time where a person crosses from mere citizen to a focus of the law’s energy. In this vein, forensic psychology is the same as it was during its infancy; yet as *Minds on Trial* demonstrates the field has grown substantially over the years, mainly due to the extent of issues mental health experts feel qualified to investigate. This fact parallels perhaps the growth of our laws in general, with a growing armatarium of criminal offenses and maze of regulations borne by the belief that better living can be engineered by legal institutions or institutions ruled by law at their forefront.

While current scholarship is replete with studies about faulty memories, false confessions, and problematic eyewitness testimony, those important discoveries are hardly new. Hugo Munsterberg, the father of applied psychology, wrote about those very issues<sup>49</sup> before the influential sociological jurisprudence of Pound.<sup>50</sup> What is odd and tells us much about the human condition is how enduring popular beliefs overvalue the accuracy of memories and confessions despite longstanding scientific evidence to the contrary. What is new is how authoritative mental health professionals have become in a relatively

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46. EWING & MCCANN, *supra* note 9, at 7.

47. *Id.* at 57.

48. *Id.* at 91.

49. See HUGO MUNSTERBERG, ON THE WITNESS STAND (1908).

50. Pound was prescient about the controversy that would envelop applications of the social sciences to law when he said “there will be much experimenting and some fumbling and much dissatisfaction.” Roscoe Pound, *Criminal Justice in the American City—A Summary*, in CRIMINAL JUSTICE IN CLEVELAND 559, 588 (Roscoe Pound & Felix Frankfurter eds., 1922).

short period of time.<sup>51</sup> As the cases in *Minds on Trial* show, within the past fifty years or so, the courts have entertained cases of subliminal messages within music, psychological autopsies, mental retardation's impact on the death penalty, parental alienation, and numerous "syndrome" defenses. Each of these cases is covered in *Minds on Trial* and one cannot but notice the expert at the forefront of each.

Indeed, the courts and our society rely on experts. But this reliance is less about arriving at consensus than on assuring consensus never occurs. Modern media represents this well as journalism has devolved into an inevitable clash of experts who often fall along political partisan lines. Each puts forth his claim, eagerly trashes his opponent's conclusions, and rarely acknowledges that the truth may contain variations of both sides. Instead of striving for truth, our contemporary experts seem more invested in winning—a legacy of the legal and political system. It is not just how our experts conduct themselves but what they feel free to comment upon that brings us to our current condition. In our world, where moral condemnation remains steadfast without the commitments of religion, a moral authority remains necessary to justify the force of our condemnation. Sigmund Freud's legacy has not been the id, ego, and superego, but rather his enduring contribution (or stain, depending on your view) is the popular acceptance of mental health experts as the first source consulted for life's problems.<sup>52</sup> Gone are the days of self-reliance and conquering one's own demons. Instead, we have a culture rife with mental disorders and studies purporting large

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51. I discuss this in more detail elsewhere. See Steven K. Erickson, *The Myth of Mental Disorder: Transsubstantive Behavior and Taxometric Psychiatry* (Yale Univ. Sch. of Med., Dep't of Psychiatry Working Paper Series, 2006), available at <http://ssrn.com/abstract=942122>.

52. Fuller Torrey presents a striking indictment about Freud's permutations in American culture. E. FULLER TORREY, *FREUDIAN FRAUD: THE MALIGNANT EFFECT OF FREUD'S THEORY ON AMERICAN THOUGHT AND CULTURE* (1992). What is often forgotten about Freudian thought was its reliance on its theoretical formulations of humanity and mental illness. That is, Freudian thinking was primarily a conceptual idea with little empirical support for its assumptions. Thus, it was antithetical to the tenets of the scientific method while claiming to be, at least somewhat, based on science. See generally Erickson, *supra* note 51.

numbers of people “addicted”<sup>53</sup> to sun tanning<sup>54</sup> or the internet.<sup>55</sup> Others are supposedly afflicted with Intermittent Explosive Disorder with millions of precious federal research dollars spent ascertaining its supposed prevalence.<sup>56</sup>

Even a cursory examination of the diverse cases presented in *Minds on Trial* leaves one with the impression that psychological constructs have become powerful forces in our society and law. This is a relatively new phenomenon and its effect is profound. In a short fifty years, we have grown accustomed to claims of Battered Women’s Syndrome,<sup>57</sup> a plethora of diminished capacity defenses,<sup>58</sup> and the general claim of biological propensities overtaking free will.<sup>59</sup> While many of these legal defenses may deserve attention, they represent a fundamental shift in how we construe questions of individual responsibility and moral accountability. American criminal law has always considered mens rea an important component of a just legal

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53. For an overview of the problems associated with concept of addiction, see Stephen J. Morse, *Addiction, Genetics, and Criminal Responsibility*, 69 LAW & CONTEMP. PROBS. 165 (2006). Like Morse, I think lay people and experts alike misunderstand the concept of addiction as applied to legal agents.

54. See Molly M. Warthan, Tatsuo Uchida & Richard F. Wagner, *UV Light Tanning as a Type of Substance-Related Disorder*, 141 ARCHIVES DERMATOLOGY 963 (2005).

55. See Kimberly S. Young, *Internet Addiction: The Emergence of a New Clinical Disorder*, 1 CYBER PSYCHOL. & BEHAV. 237 (1996).

56. See Ronald Kessler et al., *The Prevalence and Correlates of DSM-IV Intermittent Explosive Disorder in the National Comorbidity Survey Replication*, 63 ARCHIVES GEN. PSYCHIATRY 669 (2006).

57. The seminal work in this area, of course, was done by co-author Ewing himself. See CHARLES PATRICK EWING, *BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION* (1987).

58. California was the first state in the U.S. to adopt the diminished capacity defense, beginning with *People v. Wells*, 202 P.2d 53 (Cal. 1949), and *People v. Gorshen*, 336 P.2d 492 (Cal. 1959).

59. There has been much scholarship on this idea. See, e.g., Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269 (2002); Matthew Jones, *Overcoming the Myth of Free Will in Criminal Law: The True Impact of the Genetic Revolution*, 52 DUKE L.J. 1031 (2003). But see Stephen J. Morse, *Inevitable Mens Rea*, 27 HARV. J. L. & PUB. POL’Y 51, 62 (2003) (arguing that mens rea is required because only it can give meaning to purposeful movements).

system,<sup>60</sup> but the unperceivable line which divides excuse from culpability has inched further away from the latter for quite some time.<sup>61</sup> This movement is not so much due to popular will, but by the influence of modern psychology. What is interesting here is not so much that more crimes are excused—in fact, I doubt that they are—but the types of behaviors deemed worthy of psychological defenses has steadily increased.

One may conclude that this is a good thing. Science is exponential; our knowledge as psychological scientists grows every day. Indeed, there have been many fascinating discoveries in the scientific world about the brain and mind. But, as mentioned in the beginning of this Book Review, law and science are different creatures. Imagine the world of facts in a scientific world entering a funnel.<sup>62</sup> The job of science can be understood as taking in the outside world and funneling down observations into theories which become scientific laws. If a fact does not fit through the funnel, then the law does not hold true for that fact. With law, however, it is the inverse; laws are created and distributed to the world. Thus, one obeys the criminal code not because its dictates are shown to be true, but because they are declared true. Perhaps this explains why arguments about the failures of deterrence never gain much popular traction; people believe that criminal laws should deter because they believe in the propriety of the criminal code as a deterrent unto itself.

When the roads of law and science meet, it can be difficult to make sense of the interaction. But explanations of the metaphysical mind are even more troublesome. Why

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60. A good review of the development of mens rea in criminal law is provided in NORMAN J. FINKEL, *INSANITY ON TRIAL* 1-20 (1988). Of note is the role of ecclesiastical law in this development which built on Judeo-Christian notions placing intentions (i.e., mental states) at the forefront of moral culpability issues.

61. There are convincing arguments, however, that this trend has reversed itself considerably within the last twenty-five years. See WHITMAN, *supra* note 5. Indeed, our current culture appears punitive-driven; nonetheless, our society continues to accept an increasing array of material explanations for behavior in lieu of moral accountability. The expanding plethora of "addictions" is a testament to this fact.

62. This analogy was derived from William J. Stuntz's excellent article, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 782-83 (2006).

would a mother drown her five children?<sup>63</sup> The law turns to behavioral experts for the answer. The expert examines the defendant and may determine that, indeed, she has a serious mental illness which impaired her thinking during the commission of the crime. But the question the law really is interested in is not why she killed, but should it hold her accountable on par with non-mentally ill defendants. Here the expert is on difficult ground because this is not a scientific question; the expert must rely on judgment and experience in answering questions of moral capacity and the like. In so doing, the psychologist has quietly assumed vestments placed upon him or her by a society infatuated with Dr. Phil and increasingly uncomfortable with displays of the crèche. Given this nearly impossible task, behavioral experts do their best and are often assailed for their conclusions.

The dissatisfaction many hold towards the expert belies the discontent. We desire much from our science—cures for disease, knowledge about the universe, reasons for physical phenomena—but in describing the human condition, science will always fall short. The reductionism of the scientific method cannot account for the pleasure one has at seeing a sunset, becoming a parent, or accomplishing a goal. But our society has placed its bets, and science has become a cataphatism of truth. Popular doctrine thus holds that science must be able to provide answers for addiction, sexual deviance, and poor parenting if the discipline only worked harder on those questions. The notion that the “answer” to these questions is “out there” provides tremendous temptation for experts who enjoy their anointed posts in the legal system. When the proffered behavioral explanations are in conflict, politically undesirable, or in some way unsatisfying, condemning the experts becomes easy. Thus, a psychotic mother who kills her five children and gives *some* indication that she knew her actions were illegal, and perhaps morally wrong,<sup>64</sup> is

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63. *Woman Not Guilty in Retrial in the Deaths of Her 5 Children*, N.Y. TIMES, July 27, 2006, at A20.

64. See, e.g., Letter from Dr. Park Dietz, Clinical Professor of Psychiatry and Biobehavioral Sci., UCLA Sch. of Med., to Joseph S. Owmbly & Kaylynn Williford, Harris County Assistant Dist. Attorneys (Feb. 25, 2002), [http://parkdietzassociates.com/files/Report\\_of\\_Dr.\\_Park\\_Dietz\\_re.\\_Andrea\\_Yates\\_2002.pdf](http://parkdietzassociates.com/files/Report_of_Dr._Park_Dietz_re._Andrea_Yates_2002.pdf) (claiming that Yates was sane at the time of the murders).

easily condemned by our political criminal justice system<sup>65</sup> and considered deserving of punishment. This is accomplished irrespective of science's claim of schizophrenia's devastating and enduring impairment on cognition,<sup>66</sup> because casting suspicion on the expert who proffers such an explanation creates an easy scapegoat to difficult questions of disposition and satisfies our collective anger towards the law-breaker.

## II. INSANITY AND MORALITY

In reading *Minds on Trial* and this Book Review, it is abundantly clear that behavioral science experts have endured their share of criticism. A simple (and overly simplistic, albeit popular) way of thinking about this fact holds such experts willing to excuse any behavior simply because such excuses give experts power within our legal system. More cynically, one may say experts are willing to sell their testimony and psychological defenses are fundamentally a ruse. Seeing the world in such dichotomous constructions is efficient but hardly accurate. Psychological explanations of legally relevant conduct are controversial because they seek reasons for the conduct outside of normative structures. That is, while the law wants to know if someone acted with a malicious heart, it grows impatient with any elucidation of what malice means to the human condition. Moreover, while our legal system suggests a desire to understand the crazy behavior of its litigants, it is invested mostly with the ultimate issue of guilt. Explanations seem to detract from the ultimate issue because they suggest a complicated world not amenable with swift, severe, and certain punishment.<sup>67</sup>

As a consequence, a discernable movement has been afoot seeking to limit behavioral science explanations

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65. See generally William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

66. See Terry E. Goldberg, Anthony S. David & James M. Gold, *Neurocognitive Deficits in Schizophrenia*, in SCHIZOPHRENIA 168 (Steven R. Hirsch & Daniel R. Weinberger eds., 2003).

67. The classical hypothesis of criminal deterrence suggests punishment must have these elements. See Jeremy Bentham, *Principles of the Civil Code: Principles of Penal Law*, in 1 THE WORKS OF JEREMY BENTHAM 365-580 (John Bowring ed., 1962).

within our legal system. Many point to the acquittal of John Hinckley, Jr. as the impetus,<sup>68</sup> but the contentious relationship between behavioral experts and the legal system dates back further than the Hinckley case.<sup>69</sup> While many cases within our legal system involve behavioral science experts, none draw more fire from critics than insanity claims. Insanity, like the modern American criminal code itself, operates almost entirely on the moral proposition of blameworthiness. Blackstone famously held that where there was a defect of understanding there was no choice because the offender had no will to guide her conduct.<sup>70</sup> As the moral code that is our criminal law progressed, gradations of culpability joined the canon under the notions of fairness and justice.<sup>71</sup> Thus, diminished capacity results in manslaughter because the facts and circumstances surrounding the crime suggest less moral condemnation than murder. *Mens rea* matters because it directly speaks to intent and moral blame.

Despite this rich tradition in our criminal law, *mens rea* and insanity seem under attack. Of course, these elements of our criminal law have always drawn the ire of many because they can never be known with certainty. From its inception in criminal law, claims of experts excusing away the guilty based on assessments of *mens rea* have routinely been decried as undermining our criminal justice system.<sup>72</sup> In our modern era of DNA evidence, *mens rea* and insanity evidence appears even less reliable as it lags behind the other advances of science. Yet behavior is difficult; it is not comprised of merely four molecules.<sup>73</sup> The history of *mens rea* is one born out of a desire for a more just criminal justice system, but attacked from its birth because ascertaining the mental state of an offender *requires* faith

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68. See HENRY J. STEADMAN ET AL., *BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM* (1993).

69. See, e.g., Judson F. Falknor & David T. Steffen, *Evidence of Character: From the "Crucible of the Community" to the "Couch of the Psychiatrist,"* 102 U. PA. L. REV. 980 (1954).

70. WILLIAM BLACKSTONE, 4 COMMENTARIES \*20-33.

71. See FINKEL, *supra* note 60, at 5-7.

72. See FINKEL & PARROTT, *supra* note 33, at 18-20.

73. DNA is composed of only four amino acids. See JAMES D. WATSON & ANDREW BERRY, *DNA: THE SECRET OF LIFE* (2003).

that such states can be empirically known. Faith is a requisite because the mind is elusive in our material world. Scientists can measure mental phenomena as they manifest themselves in the world; ascertaining moral culpability moves the examination into the normative realm which is in construct flux. This section explores the dynamic relationship between criminal law and behavioral science by examining the Supreme Court's recent insanity decision and its focus on moral capacity as the measure of culpability.

### A. Clark and the Mental State

Last year, the United States Supreme Court decided the case of *Clark v. Arizona*.<sup>74</sup> Announced at the end of its term, *Clark* was overshadowed by *Hamdan v. Rumsfeld*,<sup>75</sup> decided on that same summer day. The issue before the Court was set forth at the beginning of the opinion by Justice Souter:

The case presents two questions: whether due process prohibits Arizona's use of an insanity test stated solely in terms of the capacity to tell whether an act charged as a crime was right or wrong; and whether Arizona violates due process in restricting consideration of defense evidence of mental illness and incapacity to its bearing on a claim of insanity, thus eliminating its significance directly on the issue of the mental element of the crime charged (known in legal shorthand as the *mens rea*, or guilty mind). We hold that there is no violation of due process in either instance.<sup>76</sup>

The facts of the crime were mostly undisputed. Clark was charged with the murder of a police officer, there was no question that Clark did shoot the officer, and there was circumstantial evidence that Clark knew the victim was a police officer at the time of the shooting. The tragedy unfolded as such:

In the early morning hours, a Flagstaff police officer responded in uniform to complaints that a pickup truck with loud music

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74. 126 S. Ct. 2709 (2006).

75. 126 S. Ct. 2749 (2006).

76. *Clark*, 126 S. Ct. at 2716.

blaring was circling a residential block. When he located the truck, the officer turned on the emergency lights and siren of his marked patrol car, which prompted petitioner Eric Clark, the truck's driver (then 17), to pull over. Officer Moritz got out of the patrol car and told Clark to stay where he was. Less than a minute later, Clark shot the officer, who died shortly after but not before calling the police dispatcher for help. Clark fled on foot but was arrested later that day with gunpowder residue on his hands; the gun that killed the officer was found nearby, stuffed into a knit cap.<sup>77</sup>

There was little doubt that Clark was mentally ill. The evidence underscored the severity of his schizophrenia:

As to his insanity, then, Clark presented testimony from classmates, school officials, and his family describing his increasingly bizarre behavior over the year before the shooting. Witnesses testified, for example, that paranoid delusions led Clark to rig a fishing line with beads and wind chimes at home to alert him to intrusion by invaders, and to keep a bird in his automobile to warn of airborne poison. There was lay and expert testimony that Clark thought Flagstaff was populated with "aliens" (some impersonating government agents), the "aliens" were trying to kill him, and bullets were the only way to stop them.<sup>78</sup>

Clark pled insanity under Arizona's Guilty But Insane statute. As expected, there was disagreement among the mental health experts as to whether Clark was legally insane at the time of the killing. Arizona's formulation was barebones: "A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong."<sup>79</sup>

At trial, the court ruled that Clark could not rely on his evidence of insanity to dispute his mens rea under the recent case of *State v. Mott*,<sup>80</sup> which had affirmed Arizona's statute forbidding psychiatric evidence to negate specific intent. Clark was convicted during a bench trial at which the court concluded that despite Clark's severe mental

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77. *Id.*

78. *Id.* at 2717.

79. ARIZ. REV. STAT. ANN. § 13-502(A) (2001).

80. 931 P.2d 1046 (Ariz. 1997), *cert. denied*, 520 U.S. 1234 (1997).

illness, it "did not . . . distort his perception of reality so severely that he did not know his actions were wrong."<sup>81</sup> Clark appealed his conviction and after being affirmed by the Arizona Supreme Court, the United States Supreme Court granted certiorari.

Arizona's insanity statute was noteworthy for one particular reason. Prior to 1993, the statute was typical of many jurisdictions which had simply codified the *M'Naghten* rule.<sup>82</sup> In 1993, Arizona dispensed with the cognition prong, leaving what the Court described as the "moral capacity" test as the sole issue. Thus, in Arizona a person could only be found insane if he can prove that during the commission of the crime in question he was so mentally ill that he could not tell right from wrong.<sup>83</sup> The court's opinion left no doubt about its skepticism of mental health experts:

Evidence of mental disease, then, can easily mislead; it is very easy to slide from evidence that an individual with a professionally recognized mental disease is very different, into doubting that he has the capacity to form *mens rea*, whereas that doubt may not be justified. And . . . in . . . cases . . . in which the categorization is doubtful or the category of mental disease is itself subject to controversy, the risks are even greater that opinions about mental disease may confuse a jury into thinking the opinions show more than they do. Because allowing mental-disease evidence on *mens rea* can thus easily mislead, it is not unreasonable to address that tendency by confining consideration of this kind of evidence to insanity, on which a defendant may be assigned the burden of persuasion.<sup>84</sup>

At the same time, the Court held that Arizona's *Mott* rule did not violate due process despite reading *Mott* as "to confine to the insanity defense any consideration of characteristic behavior associated with mental disease."<sup>85</sup> In sum, Clark was allowed only to provide mental health

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81. *Clark*, 126 S. Ct. at 2718.

82. *M'Naghten's Case*, 8 Eng. Rep. 718 (1843), reprinted in *CRIMINAL LAW: THEORY AND PROCESS* 1038-40 (Joseph Goldstein, Alan M. Dershowitz & Richard D. Schwartz eds., 1974).

83. See 1993 Ariz. Sess. Laws, ch. 256, §§ 2-3.

84. *Clark*, 126 S.Ct. at 2735.

85. *Id.* at 2627.

expert testimony as to whether he had moral capacity during the alleged crime; any further expert testimony regarding his mental illness was disallowed.

As one noted scholar has pointed out, *Clark* raised two potentially significant issues on appeal: whether there was a constitutionally mandated minimum definition of criminal sanity and whether the Constitution mandated allowance of exculpatory evidence (in terms of mens rea).<sup>86</sup> To the first, the Court held that the numerous state variations argued against a minimum formulation and that Arizona's elimination of the cognitive prong did not offend principles of justice so rooted in the traditions and conscience to be ranked as fundamental. Without clarifying whether insanity claims themselves occupy a fundamental rung of the constitutional ladder, the court went through a torturous analysis suggesting that, in fact, the cognitive prong of *M'Naghten* had merely been subsumed under the moral prong of Arizona's amended statute. Thus, mistakes of law and fact by the mentally ill offender had simply been merged, as one commentator has suggested.<sup>87</sup> Such suggestions, of course, ignore the reasons for the amendment itself. The reality was that Arizona amended its insanity statute for the same reasons most states and Congress had done within the past twenty years. The perception that insanity claims are frequently based upon junk science<sup>88</sup> that often lead to unjust results was the motivating force. Of course, such amendments have not prevented behavioral experts from opining on insanity claims. When it comes to defendants who appear crazy, the legal system does what the popular media and everyday Americans do: they ask the behavioral expert for explanations and their opinions.

What is curious about the transformed *M'Naghten* standard is its shift towards what the Supreme Court termed the "moral capacity" question.<sup>89</sup> Since moral capacity is not a construct of science, but rather, a

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86. See Peter Weston, *The Supreme Court's Bout with Insanity: Clark v. Arizona*, 4 OHIO ST. J. CRIM. L. 143, 145 (2006).

87. *Id.* at 152-56.

88. Cf. Ronald J. Allen, *Clark v. Arizona: Much (Confused) Ado About Nothing*, 4 OHIO ST. J. CRIM. L. 135 (2006).

89. *Clark*, 126 S.Ct. at 2719.

convention of law, the newly designed *M'Naghten* standard has less to do with psychology and much more to do with normative judgments. Questions about whether someone was so afflicted with mental illness as to not know whether their actions were wrong can be thought of two ways. Either the defendant knew the conduct per se was illegal, and hence, wrong; or despite such illnesses a defendant *should* know that such behavior is wrong. The former leads to easy conclusions of guilt since even most disturbed minds have a rudimentary understanding that killing is wrong. The latter, of course, is not a question but an imperative and is reflective of the prevailing skepticism of affirmative defenses. Either way, the amended statute looks less concerned with the affects of mental illness upon culpability than with securing convictions by removing psychological context from the equation. If there were any doubts about *Clark's* removal of such contours of psychological explanation, they were put to rest in the Court's discussion of the *Mott* rule and its exclusion of mitigating mens rea evidence.

The *Mott* rule was clear in its aim: the exclusion of behavioral expert testimony short of insanity is a complete bar. In *Clark*, the Supreme Court held that *Mott* did not present an issue under *Chambers v. Mississippi*,<sup>90</sup> regarding presentation of defense evidence. In so doing, the Court signaled its agreement with Arizona, essentially redefining intent to include psychotic-driven intention similar to alcohol-induced automatism under *Montana v. Egelhoff*.<sup>91</sup> States are generally free to construct their criminal codes as they see fit, yet *Clark* and *Egelhoff* are far from similar in most respects. In *Egelhoff*, the Court upheld Montana's exclusion of voluntary intoxication as an aspect for consideration in determining the existence of a mental state which is an element of a criminal offense.<sup>92</sup> The defendant in that case, James Allen Egelhoff, shot two men in the head while intoxicated and riding as a passenger in the backseat of one of the victim's automobiles. Such prohibitions seem convincing because even the most addicted alcoholic freely chooses to begin down the path of

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90. 410 U. S. 284 (1973).

91. 518 U.S. 37 (1996).

92. *Id.* at 49-51.

alcoholism and, moreover, there is little scientific evidence that alcohol intoxication can produce automatic behaviors. Yet extending the principles of *Egelhoff* to the facts of *Clark* is a stretch. No one chooses to be afflicted with schizophrenia and it is well known in science that the psychosis of schizophrenia can *profoundly* impair sensation, perception, and judgment.<sup>93</sup>

What *Mott* really accomplished in *Clark*, however, was not to exclude an expert from claiming that Eric Clark's schizophrenia prevented him from understanding right from wrong. Instead, *Mott* fundamentally altered the manner in which an expert could explain his behavior. As the Court in *Clark* duly noted in rebutting Justice Kennedy's dissent, Clark was prohibited from presenting evidence that explained how schizophrenia impaired people in general.<sup>94</sup> Clark was free to present behavioral expert testimony about Clark himself, but drawing any abstractions between Clark's behavior and those typically seen in schizophrenia could be excluded. This exclusion is a powerful one for a number of reasons. First, since there remains no laboratory test that can definitively prove the existence of schizophrenia, the diagnosis is made chiefly by comparing the behaviors of the patient in question with categories of behaviors indicative of the disease. By disallowing any comparison, the gateway suggesting the expert is fabricating the diagnosis is more easily opened. Since scientists cannot say chemical X was present in Clark's blood and such chemical is known to lead to behavior Y, the expert must rely on framing the reported behavior with behavioral traits known as indicative of mental illness. Lots of people believe strange things, but when the belief comprises hidden microphones imbedded within the body, plots by government officials to kill the afflicted person, and hallucinations so persistent as to lead someone to abandon most of their daily activities, the description is one of mental illness. Second, the prohibition removes any meaningful discussion linking the disease and the behavior in question. The behaviors of Clark were not random; they were, in fact, typical of florid psychosis and extreme paranoia. The expert's power in explaining the

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93. See Goldberg et al., *supra* note 66.

94. See *Clark*, 126 S.Ct. at 2732-37.

behaviors of someone like Clark comes from his or her ability to take bizarre, seemingly random behavior and make sense of it by noting its similarity to that of others afflicted with psychosis. Psychosis has a structure within its madness: hallucinations are impairments of sensory processing, delusions signal illogical thought, and inattentiveness is an outward manifestation of a damaged cognition.<sup>95</sup> Third, the *Mott* rule and its discussion in *Clark* demonstrate how differently we treat mental illnesses from physical ones. One is hard-pressed to imagine these exclusions used with cancer, diabetes, or other ailments. Of course, those illnesses would hardly be used in a criminal affirmative defense and behavioral illnesses are different from physical ones in many respects. Moreover, criminal law is chiefly concerned with behavior and it should be no surprise that mental illnesses are given careful scrutiny. But the Court's rhetoric in discussing *Mott*, its willingness to permit Arizona to limit discussion of mental illness outside of saying that Clark had one, along with its cynicism towards psychological concepts represents a surgical removal of psychological science from the sanity issue. Thus, the much discussed "moral capacity" of *Clark* is a concurrence towards popular conceptions of insanity as rampant with abuse while leaving the expert firmly entrenched. To put it differently, *Clark* moves insanity further away from the grasp of a defendant's hands in our retributive times while preserving the appearance that such defendants can proffer scientific experts. *Clark* undermines science while bantering its shortcomings.

### B. *Being Mindful in the Wake of Clark*

The cases presented in *Minds on Trial* all have one thing in common: each was intensely followed during its time and many people detested the behavioral experts employed in those cases. It is easy to assail such experts because, unlike oncologists or astrophysicists, everyone has a mind and most people think they are experts in understanding it. The idea that someone would confess to a crime he did not commit or that eyewitness testimony is often unreliable smacks of incredulity. Such propositions

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95. See BENJAMIN J. SADOCK & VIRGINIA A. SADOCK, SYNOPSIS OF PSYCHIATRY: BEHAVIORAL SCIENCES/CLINICAL PSYCHIATRY 280-87, 471-504 (2003).

seem so at odds with our experiences and social constructions of reality. When scientists claim that the theory of quantum physics may be wrong after all,<sup>96</sup> most people just assume such claims are on account of our better understanding of the universe. When those claims are about recovered memories of abuse or the link between sexual abuse and psychological adjustment, the world of science has entered hallowed ground and often takes a lashing.<sup>97</sup> Such outcomes have much ado with law, our culture, and science itself.

Cases like the well-known *Ferguson* trial<sup>98</sup> and the current *Panetti*<sup>99</sup> case before the Court often leave the lay public with feelings of anger and bewilderment; anger because defendants charged with horrendous crimes claim after conviction that their mental state prevented a fair trial and bewilderment because the courts entertain such claims. In *Panetti*, the defendant shot and killed his in-laws in front of his estranged wife and young child. Scott Panetti had a long history of severe mental illness, but nonetheless was deemed competent to stand trial and represent himself. During the course of the trial, Panetti tried to subpoena Jesus Christ, Pope John Paul, and former President John F. Kennedy. Panetti was convicted and sentenced to death. The issue on appeal is whether Panetti can be put to death under the Supreme Court's *Wainwright*<sup>100</sup> precedent. Although Panetti has a factual understanding of the death sentence, his understanding is mired in his psychotic delusions. From a legal perspective, competency is an ambiguous doctrine; as a scientific matter, Panetti is clearly crazy. The outcome of *Panetti* will likely please some and anger others.

Likewise, cases like *Clark* have aftermaths as well. Experts are derided for their junk science, but cases like

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96. See, e.g., PETER WOIT, NOT EVEN WRONG: THE FAILURE OF STRING THEORY AND THE SEARCH FOR UNITY IN PHYSICAL LAW (2006).

97. See, e.g., Scott O. Lilienfeld, *When Worlds Collide: Social Science, Politics, and the Rind et al. (1998): Child Sexual Abuse Meta-Analysis*, 57 AM. PSYCHOLOGIST 176 (2002).

98. *People v. Ferguson*, 248 A.D.2d 725 (N.Y. 1998).

99. *Panetti v. Dretke*, 448 F.3d 815 (5th Cir. 2006), cert. granted *Panetti v. Quarterman*, 127 S.Ct. 852 (2007).

100. *Wainwright v. Ford*, 467 U.S. 1220 (1984).

*Clark* and laws like Arizona's new insanity statute pull experts away from their science. In an effort to sharpen (or limit) the focus of sanity questions, courts and legislatures have sought to move the question from the expert's hand to one of common parlance. Moral capacity seems straightforward, but behavioral experts are not experts on moral questions. Their expertise lies in identifying and explaining how mental illnesses such as schizophrenia affect the lives of people like Eric Clark. These explanations should include the abundance of solid, scientific evidence demonstrating how schizophrenia impairs cognition. Understanding this fact helps us make sense of how someone like Clark could know murder to be illegal in the abstract sense but not grasp or appreciate how his psychotic actions were wrong when he shot Officer Moritz. Yet the law seems to desire a return to the old days of pre-biological behavioral science when psychiatrists and psychologists proffered opinions based solely upon unproven theoretical paradigms of personality and psychosexual development. Such opinions may or may not be easier to discount, but they surely do not serve the interests of justice.

Yet law is not alone in this indictment. There is much to be displeased about with psychological and psychiatric science. The number of diagnosable mental disorders has ballooned from about one hundred disorders in 1952 to almost three hundred today.<sup>101</sup> From "caffeine intoxication"<sup>102</sup> to numerous sexual paraphilias,<sup>103</sup> professional mental health treads on thin ice when it claims its science is unblemished by political or other motives. If *Clark* encourages behavioral experts to testify about moral questions, the profession is surely to oblige since our culture happily welcomes psychological explanations to moral questions. These explanations invariably weaken personal choice and increasingly value biological determinism but leave us unsatisfied—just as popular accounts of insanity do—because they can never provide robust answers to moral questions. The human condition is

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101. See Erickson, *supra* note 51.

102. See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: TEXT REVISION 232-34 (4th ed. 2000) [hereinafter DSM-IV-TR].

103. See *id.* at 566-76.

a synthesis of psychological, moral, and cultural conditions (at the least) and we should resist the draw to invoke one to explain the other when gratifying explanations are not forthcoming. Yet, our culture increasingly desires the opposite.

Culture is a peculiar thing; we feel powerless against it and yet most desire to shape it. Our popular culture is infected with misguided notions of mental illness and mental health, and it is to our detriment. Whether it is the belief in futile concept of self-esteem,<sup>104</sup> addiction to food,<sup>105</sup> or conviction that immoral conduct signifies a sick brain,<sup>106</sup> we have become complacent with accepting expert judgments in place of common sense. Irrespective of what an institution or individual donned with the robes of expertise or authority tell us, we are not bound by our genes nor predestined by our biological drives. Culture is powerful and ours is progressively one which seeks answers narrowly through the prism of science. As science fills the void of authority, bad outcomes are inevitable. Accordingly, we get cases like *Foucha v. Louisiana*<sup>107</sup> and *United States v. Jackson*<sup>108</sup> that both cite the psychiatric concept of Antisocial Personality Disorder<sup>109</sup> as the chief reason for involuntary commitment and the reason why involuntary commitment based upon it is unconstitutional. The draw of moral authority is powerful and corrupts our science. It becomes worse when we separate scientific experts from

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104. See Roy F. Baumeister et al., *Does High Self-Esteem Cause Better Performance, Interpersonal Success, Happiness, or Healthier Lifestyles?*, 4 PSYCHOL. SCI. PUB. INT. 1 (2003).

105. For an overview of the problems associated with concept of addiction, see Morse, *supra* note 53.

106. A common example of this thinking is with pedophilia. See Richard Green, *Is Pedophilia a Mental Disorder?*, 31 ARCHIVES SEXUAL BEHAV. 467 (2002).

107. 504 U.S. 71 (1992) (holding that further commitment was unconstitutional because such commitment was sought for Foucha's antisocial personality).

108. 19 F.3d 1003, 1007 (5th Cir. 1994) (upholding the district court's finding of dangerousness, "because the evidence shows that his current dangerousness stems from an antisocial personality rather than schizophrenia and that he can be held legally only if his violent behavior is 'due to a present mental disease or defect'").

109. See DSM-IV-TR, *supra* note 102, at 701-06.

science, as *Clark* does, because all that remains is arbitrary judgment thinly veiled under the guise of objectivity.

The mind in our modern culture has become the moral force. We have eagerly accepted the notion of bad behavior as almost exclusively a byproduct of an abnormal mind or even the dysfunctional brain. Many scoff at the idea of any moral authority whatsoever and yet reel when behavioral experts proffer opinions exculpating bad behavior. Indeed, it seems we want blame and an amoral society simultaneously; culpability without absolute judgments about what behaviors are right or wrong. And, of course, we cannot have such a system unless we are willing to have one endemic with abuse and built on a precarious social structure. Behavior is more than the mind put into action. Psychological science is a good thing; it helps us understand the mind. Experts are necessary and good as well; they help explain complex mental phenomena. But ultimately, it is us who decide where to draw the lines between normative and empirical matters. We should resist the temptation to erase that line because our arrogance leads us to believe science can provide a value-free world. The law cannot help itself; it will give us more *Panetti*, *Ferguson*, and *Jackson* cases if we allow it.

### CONCLUSION

*Minds on Trial* is a first-rate book. It should be celebrated for its gripping stories and thoughtful analysis of cases that tried the patience and soul of the American legal system. In a legal system geared towards reaching outcomes and a culture obsessed with efficiency, *Minds on Trial* reminds us that behind the headlines are stories of people deserving to be told. Whether that story is the insane Yates or wicked Dahmer, truth really is more interesting than fiction. Psychological science can tell us much about why people behave and those explanations can and should impact our laws and policy.

The impact, however, must get the order right. Science informs us; it should never dictate. It may well be true that competency abilities of juveniles are less sophisticated than

adults,<sup>110</sup> but deciding what to do with that information is not the purview of science. Science cannot prove law right or wrong. What should determine these final questions is the empire of law—and in the final analysis, our moral judgments. Nonetheless, law should not ignore the findings of science. While the old adage says that change brings more of the same, our understanding of behavior is not stagnant and neither should constitutional criminal justice. Debating how our legal system should evolve with scientific findings is a necessary discussion we should have—but the first point is that it should evolve in the first place. As science is surely to advance proofs about our human condition, law cannot ignore the inherent moral claims of such evidence.

But as law and science must respect each other, the ultimate burden falls on us. We like material explanations for mental phenomenon because they seem to provide answers to difficult questions every person is intimately associated with. There are few people who have not pondered about the inexorable truth of the mind. Our individual experiences are uniquely our own, yet we have a primitive bond with our fellow men and women because we know, they too, have minds. Bridging the individual and collective experience is difficult, especially when some people engage in appalling or crazy behavior. Material answers that invoke determinism or parochial ones which provide simple condemnation are appealing but fall short of our individual and collective responsibility to construct a just legal system. That responsibility is a heavy burden for each of us to endure, but good outcomes in this world are built upon hard work. We can begin this work by thoughtfully reading good books like *Minds on Trial*, while remembering that the rights guaranteed in our criminal justice system come with responsibilities.<sup>111</sup> Ensuring a just criminal justice system is surely one of those responsibilities. Such a system needs our careful attention to the mind behind the indispensable moral agent.

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110. See Thomas Grisso et al., *Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2004).

111. For a historical analysis of the link between legal rights and responsibilities, see William J. Stuntz, *When Rights Are Wrong*, 62 FIRST THINGS 14 (1996), [http://www.firstthings.com/article.php?id\\_article=3854](http://www.firstthings.com/article.php?id_article=3854).

