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Achilles Fuming, Odysseus Stewing, and Hamlet Brooding: On the Story of the Murder/ Manslaughter Distinction

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Norman J. Finkel*

Achilles Fuming, Odysseus Stewing, and Hamlet Brooding: On the Story of the Murder/Manslaughter Distinction

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I. INTRODUCTION

Homer's heroes of the *Illiad*¹ and the *Odyssey*,² Achilles and Odysseus, rage with murderous passions to certain provocations. In the literary world, their actions make for epical stories, as their heroism has been sung for centuries, by the Muse. But when such stories are set in a legal world where heroes become defendants, these "heat of passion" cases fall between murder and manslaughter, and doubt remains about the verdict. In the case of Achilles, his wrath is with King Agamemnon, for taking his spoil of war, the concubine Briseis;³ in the case of Odysseus, his anger is with the suitors, who woo his wife while eating him out of house and home.⁴ When these heroes predictably erupt, the goddess of wisdom reacts with unpredictable contrariness: in the volatile Achilles case, Athena swoops down from Olympus and stays his hand,⁵ whereas, for the more labile Odysseus, she goads him to "clean house," by reaping murder and mayhem.⁶

Whether the gods are crazy, or whether Homer's "criminal law" is tragically flawed or just primitive in development, are matters quite beyond the scope of this Article. In this Article, I set the sights lower—on the law—where expectations are, if anything, more Olympian. Unlike the literary realm where we eagerly suspend disbelief and grant licence to heroes, gods, and authors for a good story, in the law we expect Justice to be evenhanded and principled, guided by rule rather than whim.

Law and literature may have a misunderstood relation,⁷ but the latter will be used in Part II to foreshadow the complexities and contradictions that have plagued the murder vs. manslaughter distinction for centuries. The "cases" of Achilles fuming, Odysseus stewing, and Hamlet brooding are our literary exemplars and defendants. But in adjudicating their cases, troubling legal questions arise which are not *solely* legal questions, I submit. My central thesis is that "man-

1. HOMER, *THE ILLIAD* (Alston H. Chase, et. al, eds., Little Brown and Company 1950).

2. HOMER, *THE ODYSSEY* (E.U. Rieu ed., Penguin Classics 1946).

3. HOMER, *supra* note 1, Book I.

4. HOMER, *supra* note 2, Books XIII-XXIV.

5. HOMER, *supra* note 1, at 38. "While he was debating this in heart and mind and was drawing from the sheath his mighty sword, Athena came from heaven. . . . She stood behind the son of Peleus and grasped his yellow hair, appearing to him alone . . . 'to check your fury.'" *Id.*

6. HOMER, *supra* note 2, at 342. After the revenge has been completed, Penelope recognizes, but only the half of it, that "it must be one of the immortal gods that has killed the young lords, provoked, no doubt, by their galling insolence and wicked ways."

7. RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988).

slaughter" is fundamentally a *psychological* theory of human nature. This psychological theory involves a complex story of how *provocations* (their type and intensity) relate to *emotions* (the heat of passion, and the type of passions); how these provocations and emotions affect *thinking, intention, and reason*; and how provocations, emotions, and reason relate to our capacity to *control* the actions they seem to impel, and if we even make *choices*, as we normally understand that term, under such conditions.

Yet even this thesis is oversimplified. Manslaughter is also a theory of how *time, situational context, and the history* of the actor relate to whether the blood cools or the emotions roil. Do provocations and the passions they promote occur once, and then fade in time, as the linear law of "time's arrow"⁸ would seem to have it? Or do events cycle in our mind,⁹ such that the one unrepeatable moment of the act is brought back again? When "time" moves from the fixed, objective, and external into the subjective mind, relative views of cause and effect,¹⁰ and culpability, become possible, as in the poet's construction¹¹ of "time past" becoming "time present," such that yesterday's provocations and passions are here today, afresh. These possibilities suggest radically different ways of construing time, provocation, passion, memory, motive, action—and hence manslaughter.

The law has evolved its own complex *psychological* theory, which becomes a moral and legal theory of whether acts that arise under such circumstances should be punished fully, as in murder, or excused,¹² or mitigated, as in manslaughter. Yet, the murder/man-

8. STEPHEN J. GOULD, *TIME'S ARROW, TIME'S CYCLE: MYTH AND METAPHOR IN THE DISCOVERY OF GEOLOGICAL TIME* (1987).

9. *Id.*

10. ALAN LIGHTMAN, *EINSTEIN'S DREAMS: A NOVEL* (1993).

11. GROVER SMITH, *T.S. ELIOT'S POETRY AND PLAYS* (1950)(while "time" is a central theme in many of Eliot's works, *Burnt Norton* is the source of these phrases).

12. See HOMER, *supra* note 2, at 363. While the law does not typically contemplate manslaughter as an excusing condition, we see that Zeus and Athena let Odysseus off the hook completely at the end of the *Odyssey*. As Zeus says to Athena: "My child, why come to me with such questions? Was it not your own idea that Odysseus should return and avenge himself on his enemies? Act as you please, though this is what I think most suitable myself. Since the admirable Odysseus has had his revenge on the Suitors, let them make a treaty of peace to establish him as king in perpetuity, with an act of oblivion, on our part, for the slaughter of their sons and brothers. Let the mutual goodwill of the old days be restored, and let peace and plenty prevail." *Id.*

Though the statuesque imagery of Justice being blind remains courtly and current, modern law seldom dispenses "an act of oblivion, on our part." Since we do "see," to limited degree, the extreme response of excusing is not the likely outcome in a less Olympian court. Thus, today's Odysseus is likely "doing time." But even the ancient Odysseus might have been punished had the jury been citizens rather than gods, for the concept of a disrupted harmony needing to be reestablished was deeply embedded in the classical world, and Odysseus surely disrupted that harmony. And had he been tried in Aristotle's time, in that high

slaughter distinction, despite centuries of common law cases and legislative statutes, remains indistinct and problematic, I submit. The root cause of the law's problem is its underlying "psychological theory" of manslaughter—where "provocations," "emotions," "thinking," "control," "time," and "context" interplay—but do not play well.

In Part III, we see how this "theory" grew over time, as one objective rule after another was added to the theoretical mix, and where inconsistencies among the rules were muted or ignored. As a result, there grew a Hydra-like theory that was not just complex, but contradictory: like its mythological cousins the Chimera and the Gorgons,¹³ this Hydra featured disparate parts and only one eye to see the whole. Yet, when the "objective law" began to recognize contradictions in its theory and variability in case law outcomes, it tried to stave off the subjective, psychological, and inevitable—by trotting out the "ordinary man" exemplar. Instead of Perseus, who might have slain the beast and started anew, the "ordinary man" turned out to be a conjurer, for he would spare the beast by making the problems of subjectivity, human variability, and even the defendant disappear from the courtroom. The law, thus reduced to formal objective rules and a caricature—had lost touch with the *psychological* human drama that it was supposed to address.

The law had a complex theory that lacked internal consistency, and a theory that promoted objectivity, but could not eliminate subjectivity. Pursuing the theme of objectivity vs. subjectivity, we turn in Part IV to the discipline of Psychology, which has studied matters relating to provocations, emotions, thinking, control, and actions. This selective review brings some *empirical* findings and conceptual understandings to the table, and advances another thesis: that the "objective law" grew far more from speculative notions than from empirical substance. As a result, we find the Law's psychological theory to be out of tune with Psychology's psychological theory. But we also find, in this brief review, academic psychology facing its own "objective vs. subjective" debate, and the direction it seems to be taking.

In Parts V and VI, continuing with the theme of objectivity vs. subjectivity, we move to the heart of this Article—commonsense psychology. The thesis here is that not only is the Law's theory of manslaughter at odds with itself, and at odds with academic Psychology's theory—but that the Hydra-headed beast does not fit with jurors' commonsense psychology. In these Parts, two bench mark cases are systematically varied in two different experiments in order to determine what relevant factors determine verdicts (murder vs. manslaughter), and what reasons (objective vs. subjective) mock jurors

court known as the Araeopagus for murder, appeals to emotion and psychologically mitigating factors would have counted for very little.

13. THOMAS BULFINCH, BULFINCH'S MYTHOLOGY 120, 127 (1979).

give for their verdicts. The results are clear and consistent—but they do not accord with the objective rules of manslaughter. Far from using objective rules or simple heuristics, ordinary citizens use a complex calculus in determining culpability, a calculus weighted in the subjective, psychological direction, but one that does not lose objectivity entirely.

In Part VII, with the Law clearly turning from objectivity toward subjectivity in the *Model Penal Code* ("MPC"),¹⁴ this new "subjective" turn is scrutinized. The MPC's "extreme mental or emotional disturbance" (EED) standard—in some ways more subjective and disconnected from the psychological matrix than academic or commonsense psychology, produces confusion in case law and incoherence in theory. The law's new "subjectivity," while clearly bending if not bowing toward psychology, still fails to accord with the evidence from academic and commonsense psychology. More importantly, for the law, is that this new subjectivity may be out of tune with some of the law's most enduring precepts.

In Part VIII, some conclusions are put forth. It may be, as Professor Richard Singer has concluded, that less law turns out to be more law.¹⁵ An even better bet is that more empirical, commonsense psychology will produce better law, for it will ground the law in something firmer, though that soil will necessarily have a distinctly psychological and subjective pH. This is neither the default option nor the lesser offense option, but a renovating virtue, I submit. For when the law either loses touch with the *psychological human drama*, gets it wrong, or relegates the subjective to the sidelines—and replaces it with formal rules and cardboard caricatures—jurors will nullify or reconstrue. In such a legal world, the modern courtroom dramas of today's Achilles, Odysseus, and Hamlet become humanless affairs, yielding a law not worthy of commonsense respect. If Homer or Shakespeare had erred in that direction, this story would be over now.

14. MODEL PENAL CODE § 210.3(1)(b)(Proposed Official Draft 1962).

15. Richard Singer, *The Resurgence of Mens Rea: I—Provocation, Emotional Disturbance, and the Model Penal Code*, 27 B.C. L. Rev. 243, 322 (1986). Singer writes:

Almost a century ago, the Kentucky Supreme Court urged that lower courts should not try to define the term "adequate provocation," but should simply leave the term to the jury without further guidelines. A similar solution to the manslaughter issue now would eradicate the interminable difficulties which four centuries of inconsistency, inaccuracy, and formalism have generated. This approach may seem simplistic. But after four centuries of recognizing that some distinction must be made among killers, while struggling with a verbal formula to capture that distinction, it may, perhaps, be true that here, as in many other areas, less really is more.

II. THREE LITERARY EXEMPLARS

To use the literary, we must first take a few liberties with Homer. First, we must imagine what would have happened had Athena not stayed Achilles' hand. We need not wonder long, for Homer's portrayal lets us know that the death of King Agamemnon would surely have followed. The next liberty is to imagine both Achilles and Odysseus as heroes-turned-defendants, now facing murder charges in a modern court, where both claim that it was not murder, but manslaughter.

If we play out the manslaughter claims of Achilles and Odysseus, staying faithful to Homer's facts, Achilles would appear to have the stronger claim. He killed "upon a sudden," in the "heat of passion," with red-hot emotions rising so fast that reason seemed unable to restrain them; after all, the goddess had to fly down and yank him by the hair, as he seemed quite beyond the point of bringing himself up short. Then there is the intent factor: while Achilles held Agamemnon in contempt,¹⁶ there is no textual evidence that Achilles planned or premeditated his killing. This lack of intent would seem to doom the "murder story" that the prosecution must present and prove. From these facts, the defense's manslaughter claim looks likely to fly.

But if Achilles' case has an Achilles heel (and it may have several), it would concern *provocation*. Was King Agamemnon's taking of Achilles' spoil of war "adequate provocation" to ignite a murderous act? The law might think not. It certainly was neither an "assault" nor a "battery," as we ordinarily understand those terms. Moreover, the text makes it clear that this provocation had a "history" to it, and that Achilles had a significant part in bringing it about: we learn that Agamemnon was pressured by his fellow Greeks to give up his concubine, Chryseis, to appease Apollo, and that Achilles led that effort. Viewed in this context, Agamemnon's act looks more like tit for tat, coupled, perhaps, with the customary and accepted practice of kingly prerogative. What we do not see are sticks and stones or swords and spears—for the only thing Agamemnon hurls are words.

A second weakness to Achilles' manslaughter claim is that while the act appeared "upon a sudden," it was not without thought. As Homer writes, "and anger arose in Peleus' son. His heart within his shaggy breast pondered two courses—whether, drawing his sharp sword from his thigh, he should disperse the others and slay the son of Atreus, or should quell his wrath and curb his spirit."¹⁷ If Achilles can conduct such an internal debate, pondering two very different courses, then there is *prima facie* evidence that reason, control, and

16. HOMER, *supra* note 1, at 7. Achilles calls Agamemnon "[g]reedy one, clothed in shamelessness" and "dog-face."

17. *Id.* at 8.

choice are operating. To choose the death course invites an attribution of malice aforethought; to *choose at all* invites the attribution that there is a *chooser* exercising control, and not simply emotions heating past the boiling point. If we ask the mythical, "objective reasonable person" to decide the case, Achilles' claim, which was flying high a moment ago, might now crash and burn. But if we ask jurors to decide the case—jurors who might not follow objective standards—the verdict is in doubt.

By contrast to the red-hot Achilles, Odysseus looks more the cold-blooded killer. At the level of thinking, he plans and premeditates. At the level of emotion, his anger does not appear "of a sudden" or in "heat of passion," but is seemingly controlled and in the service of his intent. And his intent is to efficiently massacre all the suitors.

When we move from his intent and his emotions back to the provocation, there are further problems. The fact that the suitors courted his wife Penelope, while he was missing for the last ten years, is not a crime. After all, Penelope's parents were urging her to remarry, believing their daughter to be a widow; furthermore, she herself was skillfully manipulating the suitors: in short, she was neither the innocent nor the put-upon victim, but an active player in the courting game. As for the provocation of being eaten out of house and home, that "crime" is also no crime; it may reflect bad manners, but that is not a killing offense.

If Odysseus' manslaughter claim does not fall on grounds of *intent* (which he has), or *emotion* (which he lacks), or *provocation* (which seems inadequate), it is likely to fall because of *time*. He had ample time between the provocations and the killing deed for the hot blood to cool. In Odysseus' defense, he might claim that the slights were not single but cumulative episodes: in this view, individual provocations which would not reach manslaughter's threshold, well might reach if provocations build; extending that notion, one might then argue that the blood never cooled, for each additional provocation inflames anew. But such a cumulative view of provocations shifts the focus from the objective to the subjective, a perspectival shift that the law would be unwilling to make for centuries. Thus, from an objective perspective on *cooling time* and *provocation*, Odysseus' claims appear to come up short. Yet, if the matter was set before jurors, they might find that subjective perspective compelling, despite what the law says. Though his claim may be substantially weaker than Achilles' on objective dimensions, its failure before a jury is not guaranteed.

The third manslaughter claimant is literature's consummate brooder, Hamlet, a man who, for all his "to be or not to be" talk, cannot

do the deed he was commanded to do.¹⁸ His father's ghost sets him to "[r]evenge his foul and most unnatural murder."¹⁹ Hamlet asks for the name of the murderer so "that I, with wings as swift . . . may sweep to my revenge."²⁰ The name is given, the storyline is set, and then the audience waits . . . and waits, as Hamlet's wings never get off the ground. Rather, he broods. As he does so, time passes, the provocation recedes, and the blood cools. As a result, his eventual manslaughter claim will fail one objective rule after another. These rules, as we shall soon see, are not kind to brooders, nor to the brooder's kin, the "rekindler."

In a rekindling case, someone has suffered the type of provocation that would warrant manslaughter, had the person killed on the spot; however, the rekindler kills some time later, when a small provocation occurs which would not warrant manslaughter, but which does ignite the rekindler to kill. Hamlet the brooder may have been Hamlet the rekindler, at the end.

In the last act, Hamlet and Laertes are both wounded with the poisoned rapier, only Hamlet does not know he is a dead man.²¹ The Queen falls and dies, her last words being "the drink! I am poison'd."²² Now Hamlet gets more words, this time from the dying Laertes, who reveals: "Hamlet, thou art slain The treacherous instrument is in thy hand, unbated and evenom'd. . . . Thy mother's poison'd [T]he King's to blame."²³ On the basis of these "mere words," the truth of which is uncertain, Hamlet strikes: "Then, venom, to thy work."²⁴ While this act appears "of a sudden," arising from "heat of passion," the provocation *at the moment of the act* is the words of a third party. The King simply sits on his throne, presenting no visible danger. Still, if we take Laertes' dying declaration as the truth, as Hamlet surely did, then informational words, if subjectively construed, may be the equivalent of a dagger to the heart, and enough for a jury to find for manslaughter. On the other hand, when viewed more objectively, they are only words that may fail to reach the level of adequate provocation.

Here is where rekindling comes into play. These words may trigger the old words of his father's Ghost, igniting a heat of passion much greater than Laertes' words alone. Yet a law that restricts our analysis to the moment of the act may eliminate Act I's flame from Act V's passion, and prevent old provocations from inflaming with the new.

18. WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK* (George L. Kittridge, ed., 1939).

19. *Id.* at act 1, sc. 5.

20. *Id.*

21. *Id.* at act 5, sc. 2.

22. *Id.*

23. *Id.*

24. *Id.*

In Hamlet's final scene, Shakespeare leaves us with an ambiguous stage direction which might doom Hamlet's manslaughter claim—if understood in this uncommon way. What if Hamlet's rapier thrust only wounded the King, and was not the death blow? The staging direction, following “venom, to thy work” says, “[Hurts the King],”²⁵ and the King says, “I am but hurt.”²⁶ Although almost all productions of *Hamlet* see the rapier thrust as the death blow, and thus the King and Hamlet are dead men waiting to happen, the non-lethal interpretation leads to a different possibility . . . and verdict. Now, when Hamlet forces the King to “drink off this potion,”²⁷ it is the drink that kills. This act and the inferred intention look like a deliberate act of murder. To a jury “that are but mutes or audience to this act,”²⁸ they may see “revenge”—the deed he was given to do—but for which the law, unlike the theatre, does not sanction. Focusing on the drink rather than the thrust, the jurors may find malice aforethought, and murder rather than manslaughter.

The murder/manslaughter distinction remains indistinct. At this point, verdict outcomes for these three literary exemplars must be placed on hold, for the actions of these heroes, and of the ghosts and gods that dally above and about, leave too many nuances in the air, and too many questions in doubt. In search of answers, we turn back from the literary to the law—where objective rules and a psychological theory of manslaughter were evolving.

III. ON THE OBJECTIVE RULES OF MANSLAUGHTER

Lord Coke, who authored one of the first murder vs. manslaughter distinctions, held that in manslaughter, both the act and the intent are distinguishable from murder.²⁹ The *objective act*, says Coke, occurs “upon a sudden,” from chance medley situations, while the actor's *subjective intent*, unlike murder, does not involve malice aforethought.³⁰ In Coke's view, act and intent become definitionally fused, for the nature of the act fixes the intent: in a chance medley killing, there is “no time for the defendant to establish hatred or ill will toward the deceased,”³¹ and thus “a killing done upon chance medley is by definition not done with malice.”³² If we view Hamlet's rapier

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. SIR EDWARD COKE, *INSTITUTES* (1628).

30. *Id.* at 55.

31. Singer, *supra* note 15, at 252.

32. *Id.* at 251.

thrust at the King in Act V, Scene ii as a chance medley situation, then Hamlet's crime could not be murder by Coke's analysis.³³

But something is rotten here. First, Coke assumes that malice cannot arise when deadly action occurs suddenly. But this is an empirical question, and not a tautological truism. Coke's assumption can be overturned by the likes of Achilles, who, with wrath on the rise, nonetheless contemplates which of two courses to take. Perhaps there are many people who, despite fast-rising emotions, still form an intent to kill in that brief interval between provocation and action.

A second objection concerns "upon a sudden"—a phrase that suggests that these acts arise *ex nihilo*, or out of chaos, or from spontaneous medley combustion. However, on closer examination, some of these acts may be long on history and rich in context. For example, when Achilles reaches for his sword and Hamlet thrusts the rapier, these "sudden" acts arise in a context where the defendants knew the victims, had previous interactions with them, and no doubt had feelings about the victim long before the deadly action took place. Neither Achilles nor Hamlet starts with an emotional blank slate before the "upon a sudden" act; if that be the case, then new provocations can reopen old wounds, producing much greater passion than the current provocation would suggest. But more important than excess passion is the possibility that the non-blank slate contains murderous *thoughts* as well. Lord Coke, who may have been in the audience of the original production of Shakespeare's *Hamlet*, does not seem to allow for the possibility that Hamlet had his murderous thoughts at the ready, and was just waiting to do the premeditated deed when he seized upon the apparent chance-medley moment; this would be an instance where a murderer, with malice aforethought, uses the appearance of "upon a sudden" to literally get away with murder.

Coke's distinction was inchoate, a rudimentary beginning that left much out. He did not use the phrase most identified with manslaughter, "heat of passion," and he failed to explore the notion of "provocation," and what provocations would be adequate. The objective rules of manslaughter that evolved over the next three centuries would fill in what Coke left blank. While those rules would be abstracted from common law cases, they would owe their firmness more to the treatise writers than the cases. As Professor Singer claims, even when case law revealed numerous contradictions and exceptions, the treatise

33. This analysis may be simplistic. For example, if Hamlet had malice prepense, and then learns that the King has poisoned the wine, this fact may be just the excuse he was looking for to now stage his "preemptive strike" against someone clearly out to kill him. In this analysis, murder might be the appropriate verdict. Yet such an analysis takes us beyond the psychological state of the actor, for we must now consider the real intent, or plausibly assumed intent, of the victim.

writers argued that these rules were clear, thereby "articulating the law as they thought it should be, not as it was."³⁴

A. Mere Words vs. Informational Words

In the law of what "should be," one objective rule that has been firmly in place for centuries is that "mere words" (including insults, taunts, and wry faces) are insufficient as a provocation: As the adage goes, while sticks and stones will warrant manslaughter, names will not. Yet cracks in the wall separating words from deeds soon developed, with an early exception involving "informational words." In *John Royley's Case*,³⁵ a father is informed by his son that the victim beat the son. The father does not see the beating, but only hears the telling. According to Singer, "[t]he father then ran three-quarters of a mile, found the man who beat his son, and killed him. The court, upon a special verdict of the jury, was unanimously of the opinion that 'it was but manslaughter,' because the killing was 'upon that sudden occasion.'"³⁶

The *Royley Case* is even more troubling, because Singer's summary³⁷ omits some key facts—facts that worsen Royley's manslaughter case. The actual case summary states that "[a] man's son having been beat by another boy, the father goes a mile to find him, and there, in revenge of his son's quarrel, strikes the boy with a little cudgel . . ."³⁸ So it is a *boy*, not a man, or even a young man. Moreover, the "beating" that was administered to the young William Royley by the other boy, John Derman, was described this way: "the said John Derman beating him so as his nose bled, he thereupon went to his father, telling and complaining to him of that battery . . ."³⁹ These new facts change the nature of the provocation, and change the picture of defendant Royley's response. In the new picture, Royley intervenes in a fight between two boys, where the injury to his son was a nose bleed; second, he intervenes with a cudgel, a weapon disproportionate to the original provocation; and third, there is still the matter of the time interval.

The *Royley* court broke new and troubling ground, even as the court seemed to deny so by singing the old "upon a sudden" refrain. Still, even if we begin our analysis at the sudden and deadly end, there is no "of a sudden." Royley ran three-quarters of a mile before killing the victim, and even if he was a world-class miler, four minutes or more have got to pass after he hears the provocation and before he

34. Singer, *supra* note 15, at 258 (footnote omitted).

35. Cro. Jac. 296, 79 Eng. Rep. 254 (England 1666).

36. Singer, *supra* note 15, at 255 (footnote omitted).

37. *Id.*

38. John Royley's Case, Cro. Jac. 296, 296, 79 Eng. Rep. 254, 254 (England 1666).

39. *Id.* at 296, 79 Eng. Rep. at 254.

kills. In Lord Coke's terms, this is not a chance medley act where swiftness prevents malice aforethought from forming or the blood from cooling. Royley has at least four minutes, probably ten, amidst the huffing and puffing, to either cool the blood or form the malice.

If our analysis moves to the front end provocation, there is another problem for the strictly objective approach. Since Royley did not see but only heard of the beating, it is possible that his son embellished, exaggerated, or even falsified the tale; perhaps the son said a "man" did this to me; thus, it is possible that Royley's "information" was misinformation or disinformation—objectively false—though Royley subjectively believed it to be true. If the "metaphysical truth" does not matter, but only what Royley believed, then this so-called "objective" rule is nothing of the sort, for we now land in the subjective psyche of Royley and every defendant in the dock who hears information.

Where the objective vs. subjective line blurred in *Royley*, the court seemed to handle the dilemma and restore clarity by invoking a version of the objective reasonable man test: if the reasonable man would likely believe the son, then the provocation was so. Put another way, if the subjective view is endorsed by enough reasonable people, then it is objective enough, as the absolute truth of the provocation need not trouble us. But if reasonable people divide, such that there is no consensus, then a consensus test will fail to extract us from the objective vs. subjective morass. But Royley, who arrives on the scene, now has his own eyes to aid him, and he sees that the assailant is a boy. Yet this fact does not seem material in the court's ruling.

The subjective implications of *Royley* do not stop there. Once the court sanctions aural as well as ocular provocations, it is acknowledging, wittingly or not, that informational words can be translated into passion-evoking pictures, and that this sort of provocation can be just as potent, powerful, and adequate as seeing the beating. But stimuli do not translate; a person translates. While one man might get enraged, another might not. And even a man who is enraged might cease to be enraged when he finds that the one who gave the nose bleed turns out to be a boy. It is not so much the provocative stimulus, be it words or sights, but the defendant's unique emotional make up that determines the heat of the passion—and this is both subjective and variable. But the *Royley* court would not move the law of provocations from objective reality into the psychological makeup of the defendant; such a subjective step was a long way off. Rather, *Royley* remained the case that added a new "objective" rule, putting a few erstwhile murderers into the manslaughter column, saved by a few informational words.

What *Royley* grants—the reductive effect from murder to manslaughter on the basis of certain informational words—Justice Park,

in *Regina v. Fisher*,⁴⁰ tried to remove. In this 1837 case, a fifteen-year-old is sodomized by a man named Randall, and the next day, the father of the boy, seeks out Randall and first beats him with a short stick, then draws a table knife and stabs him to death. In Justice Park's finding for murder, he cites 'the cooling' factor first, rather than 'the not seeing' factor, which makes this an insufficient provocation. First, "[w]hether the blood had time to cool or not, is rather a question of law,"⁴¹ rather than a matter for the jury to decide; and the Justice seemed to indicate that Fisher's day-late run indicated an intent to "inflict vengeance on the offender."⁴² And second, in mentioning that the father "only heard of what had been done from others," the seeing factor remains relevant, leading Justice Park to conclude that "there is not sufficient provocation to reduce this offence even to manslaughter."⁴³

If you do not distinguish *Royley* from *Fisher* on the basis of *cooling off time*—where *Royley* took off immediately while *Fisher* waited until the next day—then the cases are similar, though their verdicts contradict. Justice Park's assertion that hearing of the sodomy is inadequate provocation is inconsistent with the *Royley* Court's determination that hearing of a beating was adequate. This "inadequate provocation" conclusion is likely to be inconsistent with what citizens say as well.⁴⁴ Moreover, Justice Park's ruling ignored the testimony of two witnesses, who stated "that the prisoner appeared to be in a great passion."⁴⁵ Thus, despite the more provocative facts and the eyewitness testimony in this case, which suggest that *Fisher* had a stronger manslaughter claim than *Royley*, Park's "murder" conclusion seems out of tune with both the facts and the existing law. That it was also out of tune with community sentiment can be inferred from the jury's apparent nullification of Justice Park's instruction that hearing of the sodomy was insufficient provocation; the jury brought in a verdict of manslaughter and a recommendation of mercy.

B. Adultery

"Informational word" cases, once we ignore exceptions like *Fisher*, reveal that "adequate provocations" need not be sticks and stones, or

40. 8 Car. & P. 182, 173 Eng. Rep. 452 (England 1837).

41. *Id.* at 186, 173 Eng. Rep. at 454.

42. *Id.* at 186, 173 Eng. Rep. at 454.

43. *Id.* at 186, 173 Eng. Rep. at 454.

44. Though I have done no empirical investigation of this question, I have little doubt about how the results would turn out if I asked 100 fathers this question: "Which is worse, your son being sodomized by a man or your son getting a bloody nose from another boy?"

45. *Regina v. Fisher*, 8 Car. & P. 182, 182, 173 Eng. Rep. 452, 452 (England 1837).

assaults and batteries. The next new objective rule, a breach of a different sort, involved adultery. As Singer writes:

[n]o 'rule' of adequate provocation was more firmly entrenched, even by the end of the eighteenth century, than that which proclaimed that a spouse (a husband, of course) who found his wife in bed with a lover, and killed one or both of them, was entitled to a reduction to manslaughter.⁴⁶

The caveats to the rule were that it had to be adultery, and that mere suspicion of adultery was not sufficient.

Why adultery—of all the possible provocations that were not physical assaults or batteries—enjoyed this special exempt status from murder is a matter beyond the scope of this Article. What is clear is that the “rule” runs into contradiction, particularly alongside the informational words exception. Whereas the adultery rule demands ocular evidence—seeing the adultery with one’s own eyes⁴⁷—the informational words rule allows an exception for aural evidence. Furthermore, the adultery rule eliminates “mere suspicion,” whereas Royley, in the informational words case, reacts to a suspicion of a beating.

So what happens if the defendant does not see the adultery, but only hears about it? In the 1848 North Carolina case of *State v. John*,⁴⁸ and the 1866 British case of *Regina v. Smith*,⁴⁹ knowledge of adultery of a non-ocular sort was at issue. In *John*, the “defendant sought to introduce evidence that his wife and the victim had been having an affair for some period of time. The court excluded the evidence on the grounds that the defendant had to find the two in bed:

Hale, Foster, East and Russell all agree in stating that, to extenuate the offense, the husband must find the deceased in the very act of adultery. . . . A belief—nay a knowledge . . . that the deceased had been carrying on an adulterous intercourse with his wife, cannot change the character of the homicide.⁵⁰

Where Royley succeeds, John loses. Yet in terms of the aural vs. ocular distinction, *John* is indistinguishable from *Royley*, for John hears about the adultery as Royley hears about the beating. In *Royley*, the ears were good enough, but not so, in *John*. If the beating and the adultery are adequate provocations if seen, why does “hearing of a beating” retain its potency as an “adequate provocation” while “hearing of adultery” becomes “inadequate?” In creating a special mitigating category for adultery, but in limiting its band width to the visi-

46. Singer, *supra* note 15, at 256.

47. Under such a rule, a blind husband, hearing the sounds of his wife’s adultery and his cuckoldry, who then kills, may not get the manslaughter reduction that would go to a visually intact husband who sees and kills. Thus, when love is literally blind, there may be an added penalty.

48. 30 N.C. (8 Ired.) 330 (1848).

49. 4 Post. & F. 1066, 176 Eng. Rep. 910 (England 1866).

50. Singer, *supra* note 15, at 273 (footnote omitted).

ble spectrum, an inconsistency develops between some adultery and informational word cases.

In *Regina v. Smith*,⁵¹ William Smith killed his wife after she "violently abused him, taunting him with her preference for Langley,"⁵² a man with whom she had lived in adultery, but who was now dead. Beyond taunting and using foul language, she may have "spat in her husband's face," although in the next sentence the record indicates that whether she "actually spat on, or only at him, did not appear."⁵³ Though the Justices divided, the ruling in *Smith*, finding him guilty of manslaughter, seemed to suggest that "words spoken" could aggravate the provocation, as could being spat upon. The *Smith* court's ruling either (a) overturns the "mere words" rule, (b) creates a new objective rule, or (c) abandons the objective approach for the subjective. If the court is now sanctioning "taunts" as "sufficient provocation," then it is reversing one of the oldest rules which held that mere words, taunts, names, and wry faces were not sufficient. More likely, the court was carving out a new objective rule—categorizing certain kinds of taunts—cuckolding taunts that strike at his manhood, plus spat, whether the spittle lands or not—as amounting to assaults (and battery)—which would be sufficiently provocative. Looked at objectively, this ruling merely expands the universe of what is "reasonable" provocation to the reasonable person, and thus it does no more than what Royley's informational words did: it added a new category to the list of sufficient provocations for the manslaughter reduction.

A less likely interpretation is that the *Smith* court was subjectivizing provocations. Where most forms of "assault" and all "batteries" were understood to involve a physical touching, now, in a subjective interpretation, the wife's taunts and spat are felt by Smith as literal slaps. So much for "names will never harm me," once names reify in either Smith's mind or the court's eye. But to the objectivist, figurative and literal are not equal save in someone's psyche, and that is not a road the objectivist wants to travel. If law is to be grounded on terra firma rather than the infirm psyche that varies from one individual to the next, we must not subjectively distort external reality, or conflate it with some internal reality.

Yet just this sort of subjectivity and conflation seems evident in *Maher v. People*,⁵⁴ where the defendant was charged with "an assault with intent to kill and murder one Patrick Hunt."⁵⁵ Had Maher killed Hunt, this would have been a murder vs. manslaughter situation, though the case was discussed in such terms. William Maher acted

51. 4 Fost. & F. 1066, 1066, 176 Eng. Rep. 910, 910 (England 1866).

52. *Id.* at 1066, 176 Eng. Rep. at 910.

53. *Id.* at 1066, 176 Eng. Rep. at 910.

54. 10 Mich. 212 (1862).

55. *Id.* at 215.

under the belief that Hunt was having an adulterous relationship with Maher's wife. Maher had two pieces of evidence: first, on the morning of the assault, he saw his wife and Hunt going into the woods together and coming out an hour later, just before he followed Hunt into a saloon and fired; second, before entering the saloon, a friend informed Maher that his wife had had sexual intercourse with Hunt the day before in the woods.

The first piece of evidence was visual but short-sighted, as Maher failed to see the act. The second piece is informational; someone else caught the act, but the defendant only got a report. Given the adultery rule, mere information or inference does not add up to witnessing the *flagrante*. That may be the law, yet Judge Christiancy speculated on how a jury would have heard such evidence, and he believed that they would have put two and two together and found "sufficient evidence of provocation."⁵⁶ This seems to acknowledge that the formal rules were out of tune with what "men of fair average mind and disposition"⁵⁷ would construe.

Maher also makes an interesting subjective point. Judge Christiancy notes that provocation itself "must depend upon the nature of man and the laws of the human mind."⁵⁸ Illustrating this point, he wrote:

The passion excited by a blow received in a sudden quarrel, though perhaps equally violent for the moment, would be likely much sooner to subside than if aroused by a rape committed upon a sister or a daughter, or the discovery of an adulterous intercourse with wife; and no two cases of the latter kind would be likely to be identical in all their circumstances of provocation.⁵⁹

In the evolution of manslaughter's objective rules, we find problematic exceptions with each new objective rule. Moreover, we find that new rules are often inconsistent with old rules, producing contradiction rather than consistency. And finally, there is the spectre of subjectivity, the press to take the defendant's point of view, which declares "objectivity" to be the wrong approach. All of these problems recur as we turn from heating, to the "cooling off" rule.

C. Cooling Off

The "cooling off" rule is at least as old as Coke's original pronouncements. As Singer writes, "if killing in 'heat of passion' or 'upon a sudden' is manslaughter, then, almost tautologically, killing in 'cool blood,' and not suddenly, is not manslaughter."⁶⁰ As old as the rule was, it went unmentioned in *Royley*, where the father raced three-

56. *Id.* at 225.

57. *Id.* at 220.

58. *Id.* at 222.

59. *Id.*

60. Singer, *supra* note 15, at 275.

quarters of a mile to kill the boy who allegedly beat his son, thus having time, either during or after his sprint, for the blood to cool; rather, the *Royley* court considered this an "upon a sudden" case. But in *Regina v. Fisher*, where the father sets out after the victim the morning after the victim allegedly sodomized his son, the court finds that Fisher's blood had time to cool. With the *Royley* and *Fisher* cases as anchors, the mathematically inclined jurist finds the "objective blood-cooling time" to be longer than Royley's 10 minute sprint, but shorter than Fisher's day-late run. However, when we add the 1886 case of *Pauline v. State*⁶¹ to the mix, a case where the adultery rule and the informational words rule are conveniently ignored, the cooling off time not only dilates, but disappears entirely. The initial facts were these. Lewis Pauline gets a letter on January 5th informing him that his wife is having an adulterous relationship with the victim, whom he kills on February 7th. The court held that too much time had passed between the provocation and the murder, as a matter of law. Said another way, the blood had long cooled, even as the *Maher* court acknowledged that some provocations, like adultery, might not cool quickly for every cuckold. But on rehearing, the *Pauline* court learns that the letter had actually been dated February 5th, not January 5th. This new corrected fact made all the difference to the court, for it now "establishes the killing on the first meeting after appellant had been informed of the adultery of the appellant's wife with the deceased."⁶²

Whether Pauline gets the letter on January 5 or February 5, or even February 7, the words remain, for all time, merely informational words; he has no ocular evidence. Having already dealt with the problematic nature of provocations, let us grant the court's dubious view that this February 5 letter is sufficient provocation, and turn directly to the implications for *time*.

Pauline kills two days later, which is one day later than Fisher, who was already a day late. *Pauline* thus pushes the cooling-off time back. More importantly, *Pauline* makes *time* moot: by the court's logic, if Pauline killed 5 days later, or 50 days later, it would not matter, so long as this was Pauline's first meeting with the victim.

The psychology of Coke's rule about provocation, passion, and cooling-off time was simple: if an adequate provocation arouses murderous passions, those passions will cool with time. Yet, in *Pauline*, there is no drop in the two day interval between receiving the provocative letter and the lethal act; moreover, given the court's reading, there would be no drop if the interval was 5 days or 50. This, in effect, makes the rule about "cooling-off time" not about *time* at all.

61. 1 S.W. 453 (Tex. 1886).

62. *Id.* at 464.

In a second interpretation of the court's psychology, rather than staying red hot for two days *without cooling*, Pauline becomes a "rekindler": here, his temperature drops with time, but flairs red hot again with seeing the victim. This rekindling interpretation involves a legally insufficient provocation (*i.e.*, seeing the victim) evoking the two-day-old sufficient (?) provocation (*i.e.*, news of adultery). While this hypothesis may be more plausible than the non-cooling one, validating the hypothesis requires a plunge into Pauline's subjectivity, a course many courts were refusing to set. But in eschewing subjectivity for objectivity, the *Pauline* court runs aground, as the rule about provocation collides with the rule about cooling-off time. The court can say that non-ocular news of adultery is sufficient provocation, but to hold that a killing two days later is still manslaughter, ignores time, while holding heat constant. To squeeze out of the dilemma by claiming that the cooling clock does not begin to run until the defendant sees the victim is absurd. What if Pauline first sees the victim two years later?

Had the *Pauline* court openly taken the subjective route, it would have meant granting the proposition that new and minor provocations could re-ignite the old; this would make rules about *time*, "upon a sudden," and adequate provocation irrelevant. Whereas the objective road leads to frequent collisions among rules, the subjective, rekindling road leads, perhaps, to incendiary, for no rule is left standing. It may be that the *Pauline* court was granting an exception for the rekindler, albeit masking it in objective language of "sufficient" provocation, once the illicit connection was discovered. But as Professor Gobert recognized, this exception would "virtually abrogate the cooling-off period requirement."⁶³ And Singer, taking the court's conclusion to its logical end, finds that "the doctrine seriously challenges every aspect of the objectification of provocation."⁶⁴

Where *Pauline* apparently grants the exemption to a rekindler, *State v. Gounagias*⁶⁵ does not. In *State v. Gounagias*, defendant:

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

[t]his theory of the cumulative effect of reminders of former wrongs . . . is contrary to the idea of sudden anger as understood in the doctrine of mitigation. In the nature of the thing, *sudden* anger cannot be cumulative. A provocation which does not cause instant resentment, but which is only resented after being thought upon and brooded over, is not a provocation suf-

63. James Gobert, *Victim Precipitation*, 77 COLUM. L. REV. 511, 534 n.119 (1977).

64. Singer, *supra* note 15, at 277 (footnote omitted).

65. 153 P. 9 (Wash. 1915).

ficient in law to reduce intentional killing from murder to manslaughter
⁶⁶

The *Gounagias* court, beneath its legalities, announces a psychological theory that dooms the brooder and the rekindler. To this court, strong provocations like sodomy, if not acted upon immediately, fade into history and irrelevancy, such that only the current context matters. In such an analysis, a new and weak provocation, like a taunt, cannot produce the sudden, red-hot passion for mitigation. As for the nexus between present and past anger, the court severs it: the old anger fades and cools, so there is no cumulative storehouse waiting for a last taunt to ignite.

Gounagias may be more consistent with the legal history of "cooling-off time" than *Pauline*, but its "psychology" appears wrong from beginning to end. In failing to acknowledge that some people seethe rather than cool, or in failing to acknowledge that some people rehash old hurts such that the past is present—the law may be putting itself further from both psychological findings and from the jury's commonsense psychology.

The law can neither divorce itself from academic nor commonsense psychology for long; nor can the law immure itself behind *stare decisis*. Such defenses will and must crumble, for the subject of manslaughter is inherently psychological. The objective legal rules do reflect psychological theories of human nature. These theories relate: (a) the type and the degree of provocation to passions; (b) the heat of passion to one's thinking (malice aforethought), acting, and the ability to control; (c) the time to emotionally cool-off; (d) whether old hurts become history or stay current; and (e) whether new provocations are sufficient to re-ignite old passions.

I suggest that the objective legal theory—embodied in the rules as a whole—was out of tune with the growing psychological literature and understandings of human nature: this is a law vs. psychology conflict. In addition, I suggest that the theories embodied in the individual rules were inconsistent with one another: this is a law vs. law conflict. But I further suggest that these rules were getting out of tune with the commonsense psychology as represented by the jurors: this is a law vs. commonsense justice⁶⁷ conflict. This latter conflict may be inferred from the long running debate about whether cooling-off time was a matter to be decided by the court or the jury.

As Professor Singer notes, "[a]ll the seventeenth and eighteenth century cases appear to agree not only that the question of whether the defendant has cooled off is objective, but, also that it is a question to be decided by the court, rather than by the jury."⁶⁸ In the next two

66. Singer, *supra* note 15, at 279.

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

68. Singer, *supra* note 15, at 276.

centuries, courts would divide, as some would throw the question to the jury to decide.⁶⁹ But casting it as a "law vs. fact" question obscures the issue, for the barefaced question is factual and psychological: *When* has enough time passed after the provocation for the defendant's blood to have cooled? The judges in *Royley*, *Fisher*, and *Pauline* picked different cooling-off times, and their picks were grounded more in their own hunches about human psychology than in *stare decisis*.

The "law vs. fact" issue was a red herring. The claim that it was a "legal" matter rather than "factual" served to maintain the illusion of objectivity, thereby masking judicial subjectivity. More importantly, it prevented the encroachment of juror subjectivity, which might lead to widespread variability, and no "rule" at all. Judges' subjectivity, then, under the guise of "objective" decision making or deciding a "matter of law," forestalls the subjectivizing push that would give the jurors' psychology freer rein to reign.

Suppressing jurors' subjectivity seemed to be the latent motive, but suppression did not seem to be working, as rules were colliding, while more issues were finding their way to the jurors. The objectivist was fighting a rearguard action, delaying the subjective advance, but still far from surrender. In fact, the objectivist's most potent weapon was about to take the field, bearing a most pedestrian name—the "ordinary man." This man, despite his moniker, turns out to be an extraordinary conjurer, for he has the power to make individuality, variability, and subjectivity—as well as defendants—simply disappear.

D. The 'Ordinary Man' Who Reinforces the Rules

He is not even "the reasonable man," for "as Glandville [sic] Williams so rightly observed a century later, the reasonable man never kills."⁷⁰ But less turns out to be more in the matter of manslaughter. At trial, the ordinary man not only takes center stage, he will fill the spotlight, eclipsing the very defendant we are asked to judge.

Consider the following questions: "How would the ordinary man react to the provocations faced by the defendant?" "Would the ordinary man react with murderous heat of passion?" "Would the ordinary man have malice aforethought?" "Would the ordinary man's blood have cooled?" If answers to these questions can answer the matter at bar, then the defendant is indeed peripheral at his own trial, for his actual mental state and culpability need not be measured.⁷¹

69. *Regina v. Kirkham*, 8 Car. & P. 115, 173 Eng. Rep. 422 (England 1837); *Regina v. Albis*, 9 Crim. App. 158 (1913).

70. Singer, *supra* note 15, at 280 n.193; Flanville Williams, *Provocation and the Reasonable Man*, 1954 CRM. L. REV. 740.

71. Singer, *supra* note 15, at 280.

These questions, the objectivist says, are to be answered by the exemplar—average in all ways—save for the fact that there is no average man!

In the 1863 Michigan case of *Maher v. People*,⁷² the case usually credited with introducing the ordinary man concept, the worry was voiced that manslaughter's mitigation might go to the wrong people. If all it took were heated passions, then "by habitual and long continued indulgence of evil passions, a bad man might acquire a claim to mitigation which would not be available to better men."⁷³ A similar concern was expressed in *Jacobs v. Commonwealth*, a Pennsylvania case, where the court noted "[that a] phlegmatic man may be moved to anger as well as the most nervous. The only difference is that it requires more to affect the one than the other Why then, should it not excuse crime in the one as well as in the other."⁷⁴ The "ordinary man" levels the playing field and removes individual differences (e.g., low threshold, hot temper, bad character) that might lead to disparate verdicts. The price for evening the playing field, though, is steep.

A major test for the ordinary man standard occurred in 1954, in *Director of Public Prosecutions v. Bedder*,⁷⁵ for the seventeen-year-old Bedder, the defendant in the case, was not an ordinary man himself: doctors told Bedder that he was impotent. "[N]evertheless [Bedder] hired a prostitute with the tenuous hope of being able to perform. When he was unable to perform, the prostitute ridiculed the defendant. He slew her in what was undeniably true rage."⁷⁶ At trial, the judge held that Bedder's impotence was irrelevant, and the jury was instructed not to consider or weigh that fact. On appeal, Bedder claimed that his impotence produced his sensitivity, and that when the prostitute taunted and hit him "in a fracas about his inability to perform the negotiated sexual act,"⁷⁷ he reacted to the provocation not as an ordinary man might, but as a highly sensitive man would. The House of Lords, however, rejected Bedder's claim, and affirmed the trial court's ruling.

Once we extract Bedder and substitute the ordinary man, the story falls apart. If we ask why would the ordinary man be with a prostitute, there may be a number of reasons, but impotence would not likely be high on the list. Yet impotence drives Bedder's actions. Similarly, the ordinary man would not likely respond with rage to either a taunt or a slap about his impotence, if in fact the ordinary potent man performed in an ordinary, potent way. To the ordinary man, the pros-

72. 10 Mich. 212 (1862).

73. *Id.* at 220.

74. *Jacobs v. Commonwealth*, 15 A. 465, 466 (1888).

75. 1 W.L.R. 1119 (England 1954).

76. Singer, *supra* note 15, at 289.

77. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 248 (1978).

titute's provocation is a non sequitur, much ado about nothing; but to the impotent Bedder, it is a below-the-belt blow.

Bedder did not claim that his rage was proportionate to an adequate provocation. His claim was that his peculiar, individual makeup led him to rage at the provocation. This claim stresses uniqueness, not ordinariness, and he asks to be judged on the former. This is the claim that the *Maher* and *Jacobs* courts' feared; but fearful or not, claimants such as Bedder hold that they cannot be judged fairly without widening the ordinary to embrace the extraordinary.

When Homer invokes the goddess to sing "of the wrath of Peleus' son Achilles," the reader is alerted that Achilles is different, and that other Achaeans might not react in the same way as Achilles did to Agamemnon's provocation. The same might be said of Odysseus with the suitors and Hamlet with the King, as history, context, and individual sensitivities all come into play when the provocations occur. In the alleged adultery cases of *State v. John*,⁷⁸ *Pauline v. State*,⁷⁹ and *Maher v. People*,⁸⁰ these defendants were asking to be judged by the average cuckold standard. In *Regina v. Smith*⁸¹ and *People v. Berry*,⁸² two adultery and taunting cases, defendants were asking for a cuckold/tauntee standard. In *People v. Washington*,⁸³ the defendant, who had been acting as a servient homosexual with the victim, asked that he be judged by "an average homosexual" or a female standard. In *Gounagias*,⁸⁴ the defendant asked for a sodomized man standard, while *Bedder*⁸⁵ asked for an impotent young man standard. All of these defendants were asking for standards applicable to their circumstances.

Granting a sensitivity, however, does not automatically guarantee a manslaughter verdict. A legal analysis might grant sensitivity on the front end—where provocations are seen, heard, felt, interpreted, and emotionally reacted to—and still hold that the defendant should have controlled his rage, on the back end. Fletcher makes this point when he writes:

It may be that the accused should have controlled himself whether he was impotent or not, yet this is a fact that should have been decided by the jury with full appreciation of all the pressures bearing on the event. One can hardly say that the jury passed judgment on Mr. Bedder if they did not even consider the most significant facts that influenced his loss of control.⁸⁶

78. See *State v. John*, 30 N.C. (8 Ired.) 330 (1848).

79. See *Pauline v. State*, 1 S.W. 453 (Tex. 1886).

80. See *Maher v. People*, 10 Mich. 212 (1863).

81. See *Regina v. Smith*, 4 Fost. & F. 1066, 176 Eng. Rep. 910 (England 1866).

82. 556 P.2d 777 (Cal. 1976).

83. 130 Cal. Rptr. 96 (Ct. App. 1976).

84. See *State v. Gounagias*, 153 P. 9 (Wash. 1915).

85. See *Director of Public Prosecutions v. Bedder*, 1 W.L.R. 1119 (England 1954).

86. FLETCHER, *supra* note 77, at 248.

The *Bedder* decision produced outrage, and within three years Parliament passed The Homicide Act of 1957,⁸⁷ an Act that represents an end to objectivity's reign. It took a decided turn toward the subjective, where "the jury shall take into account everything both done and said. . . ."⁸⁸ In the United States, the *Model Penal Code* of 1962 would bring subjectivity to the fore, with its language of "extreme mental or emotional disturbance."⁸⁹ The Code explicitly states that the reasonableness of an explanation or excuse "shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."⁹⁰

This new approach represents more than subjectivity's triumph over objectivity: it is, in essence, the adoption of an idiographic approach over the general. In idiography, the unique character of the individual is of prime concern, and in that sort of analysis, subjectivity oftentimes dominates. But if idiography is the new direction for the law, then an underlying tension and contradiction must be recognized. The law has long been concerned with "the law"—finding general rules that courts can apply across cases. Idiography seems to abandon such hope. In the dire view, idiography becomes *carte blanche* permission to let juries do whatever they want in a given case, if there are no general rules that apply across cases. But the dire view of idiography is not the last word on the matter. Whether psychology, and a law, can be founded on idiography will be examined later on.

Parliament and the MPC drafters no doubt believed that the idiographic course was the way to go. But on what basis did they believe so? Perhaps they believed that idiography was more consistent with academic psychology's understandings of human nature, though we find little evidence that legislators and drafters were combing the empirical literature and weighing psychological findings. Perhaps they believed that idiography was more consistent with ordinary commonsense psychology, as represented by jurors; but again, there is little evidence that lawmakers examined any studies, or even commissioned any, to find out what jurors believe. Thus, given the radical changes in the law, we do not know if these idiographic and subjective changes, or the objective rules that preceded them, are consistent with how either academic psychology or ordinary citizens construe such matters.

In Part IV we take up academic psychology's "psychological theory," and in Part V commonsense justice's notions of manslaughter. Though moving from legal and conceptual arguments to a more empir-

87. 5 & 6 Eliz. 2, Ch. 11, pt. I, § 3 (England).

88. Singer, *supra* note 15, at 289 n.230 (citing Homicide Act, 1957, 5 & 6 Eliz. 2, pt. I, ch. 11, § 3 (England)).

89. MODEL PENAL CODE § 210.3(1)(b) (Proposed Official Draft 1962).

90. *Id.*

ical and earthier ground, the theoretical question is still at the fore: Is the Law's "psychological theory" of manslaughter consistent with either Psychology's "psychological theory," or with Commonsense Justice's notions, on the murder vs. manslaughter distinction?

IV. ACADEMIC PSYCHOLOGY TELLS A STORY

To claim that modern academic psychology has a theory of manslaughter is clearly false. What it does have is a rich history of facts and theories relating to the central elements that comprise manslaughter. But even here, our "history" needs to be extended into a deeper time, as Professor Daniel Robinson⁹¹ reminds the apostles of modern psychology: the ancient Greeks gave us not only our name "psychology," composed of "psyche" and "logos," but notions of "thymos," strong emotional urges, and "menos," the resentful anger lodged in Achilles' chest, as well. And where Homer's treatment of the murder vs. manslaughter distinction in Odysseus' case appears primitive if not offhand, Aristotle's views on such culpability distinctions reveal sophistication and modernity.⁹²

Our story, though, moves to the modernists, on three selective fronts. The first might be called "the front end" problem. One implicit theory embedded in the law of manslaughter involves the effects of provocation on the emotions, cognitions, and actions—and whether impairments so regularly result that mitigation seems the humane response to espouse. Psychologists have long studied "stressors" and "traumas," and the findings reveal a curious parallel to the law's objectivity vs. subjectivity debate.

The second front can be called "the back end" problem, where the law's implicit theory links the effects of emotions on self-control and subsequent action. Can red-hot emotions, for example, cause murderous actions to result that either bypass the controlling reason entirely—like reflex actions, automatisms, or some unconscious striking out—or, by their heat, weaken reason's ability to govern and rein in the resulting actions? Whether affect (emotions) or cognition (reason) is primary has been debated in the psychological literature.

After the front end and back end reviews, a third front is examined. How ordinary citizens, who will sit on juries and function as the conscience of the community, view these matters. What is their

91. See, e.g., DANIEL N. ROBINSON, *AN INTELLECTUAL HISTORY OF PSYCHOLOGY* (1987); DANIEL N. ROBINSON, *ARISTOTLE'S PSYCHOLOGY* (1989).

92. ARISTOTLE, *NICOMACHEAN ETHICS* bk. 5, Ch. 8 (Martin Ostwald trans., 1st ed. 1962). Aristotle distinguishes four levels of acts and responsibilities: the accidental, where the injury occurs through misadventure; injury that results from a mistake, but does not imply vice; injury that results from an act of injustice, where there is knowledge but not deliberation; and injury that results from choice, where the actor is an unjust and vicious man.

psychological theory of murder vs. manslaughter, of provocations, emotions, reason, and control? And when they face the murder vs. manslaughter distinction in real cases, with different fact patterns—what will they do, and why will they do what they do? There is now a rich empirical literature on this as well. But first, the front end problem and psychology's story of stress and traumas and psychological impairments.

A. On the Front End: The Stress-Illness Relationship

The father of modern "stress theory," Hans Selye,⁹³ long ago documented a relationship between stress and illness. Since then, the term has been accepted and incorporated into Diagnostic and Statistical Manuals of Mental Disorder, where "stressors" have been categorized⁹⁴ on their own "Psychosocial" Axis (Axis IV). In addition, stressors have been quantified⁹⁵ and correlated with a host of outcome measures in more than two decades worth of research, and this robust literature tells us that when stressors accumulate and the quantified stress level is high, we often see a greater likelihood of physical (*e.g.*, ulcer, heart attack) and/or psychological (*e.g.*, anxiety, depression, suicide) illnesses. In short, a *cumulative effect* of stress increases the likelihood of illness. As this finding is now well accepted, it is a customary and routine practice for clinicians to inquire about the stressors a prospective patient may have experienced in the last six months, the last year, or the lifetime.

But where psychological research findings support and open "the time window" to the cumulative effect of stresses, the *Gounagias* court closed the time window and rejected the "theory of the cumulative effect of reminders of former wrongs."⁹⁶ The *Gounagias* court held, in effect, that there were two provocations, at two discrete points in time; one counted (*e.g.*, the taunt), but it was insufficient, while the other (*e.g.*, the sodomy) did not count, because too much time elapsed; and there was no cumulative effect. The research from academic psychology points to a cumulative effect, such that the effects of stressors do not end at some arbitrary and discrete moment of time.

Though research yields consistent findings, there is an oddity: while a correlation exists between stress and illness, the correlations

93. HANS SELYE, *THE STRESS OF LIFE* (1956).

94. AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS*, (3rd ed., revised)(DSM-III-R)(1987). Axis IV categorizes the severity of psychosocial stressors that an individual experiences in the last year on a 1-to-6 scale, from "none" to "catastrophic."

95. Thomas H. Holmes & Richard H. Rahe, *The Social Readjustment Ratings Scale*, 11 J. OF PSYCHOSOMATIC RES. 213 (1967)(This scale quantifies various life event stressors, such as "death of spouse," which earns 100 points, on the top end of the scale, down to "minor violations of the law," which earns 11 points.).

96. *State v. Gounagias*, 153 P. 9, 14 (Wash. 1915).

turn out to be much lower than many researchers and clinicians expected ($R = .20-.30$); and when we square these modest-to-low correlations to get the more important measure of variance (R^2), we find that the correlation accounts for only a small proportion of the illness variance ($R^2 = 4\%-9\%$). Why these perplexingly low correlations? The main reason, I suggest, is that in doing such scientific, objective, quantifiable research, we have left out the individual person entirely. We no longer have an individual embedded in a unique social situation; the idiographic has been replaced by a prototypic, much like the defendant being left out when the ordinary man exemplar is invoked.

To explicate, take the life event "death of a spouse." On the Social Readjustment Ratings Scale, the most used measure of stress in the research literature, every person who lost his or her spouse to death in the last year gets 100 points. But such a "rule" treats every person like every other person, like the mythical average person. The "rule" eliminates individual variability from this most individual trauma: under this "fact pattern," all people, like all defendants, are the same. But if we imagine a room with 100 men and women who recently lost their spouses, we might well hear stories that run from "devastation" to "relief"—highly variable reactions. The point, here, is that the only way we can meaningfully give points to a life event is to first find out how *this* person is subjectively experiencing the event. This demands idiography.

When psychologists attempt to generalize that which is idiographic, they may make the same sort of mistake as do the objectifiers of the law. The consequence is losing variability, individuality, and meaning, and ending up with deceptively low correlations that relate more to a mythical exemplar than any particular person. By establishing the "average person," we end up describing *no person*. When we switch from an objective to a subjective point of view, we see that it is not the same event for each person who loses a spouse, save in the most trivial sense of a label. The import is clear for provocations: we can only determine if this event is a provocation, and how much it provokes this defendant, by conducting some sort of idiographic and subjective inquiry.

In the legal arena, to objectivize the inquiry by hoisting up the "ordinary person" exemplar eliminates the individual from the assessment and makes moot the moral inquiry into this defendant's blameworthiness. Furthermore, it eliminates from consideration the context, which provides the backdrop and ground for a full assessment. For whether the one taunted was impotent, or had been sodomized, or had never laid eyes on the taunter, or never had been touched, is surely relevant to the question of provocation.

There is yet another lesson to learn from the stress-illness literature. On the Social Readjustment Ratings Scale, where "death of a

spouse" earns top prize of 100 points, 11 points attach to "minor violation of the law" at the bottom of the scale. But for one person, a minor violation of the law may be greater than even death of a spouse. Let us use "making obscene telephone calls" as the minor violation of the law. If the person making such calls turns out to be a highly visible, successful figure, and the event and his picture are splashed across television and newspaper headlines throughout the country, and that the disgrace is profound, with friends and colleagues calling for your resignation . . . well this traumatic life event, beginning with a so-called minor event worth but 11 points, may be, in subjective reality, the most major event in this person's life.

Based on the mythical average person, this interval scale holds that one type of provocation is worth 11 points while another is worth 100 points; in this sort of objective analysis, *provocation per se* designates the points. Yet such a scale may not hold for a particular individual, because it is the *person* who designates the points, and who may order personal stressors in substantially different ways. Thus, trying to objectively designate, differentiate, and quantify which events are adequate provocations from those that are not, is bound to fail for just the same reasons the objective law fails: because individuals who react in singular ways to stressors and provocations are relegated to the sidelines, replaced by a mythical exemplar.

B. On the Back End: The Primacy of Affect or Cognition?

The "back end" question focuses on self-control, and here, academic psychology is much more divided than on the front end. On one side of the debate is Robert Zajonc,⁹⁷ who has argued for the primacy of affect, claiming that emotion and cognition can be independent. Zajonc believes that there are separate systems in the brain for handling emotion and cognition, and thus it is possible for affect to "precede cognition in a behavioral chain"⁹⁸ or "be generated without a prior cognitive process."⁹⁹ Zajonc's position would be most compatible with heat of passion cases, for if affect can precede cognition and trip off the behavioral chain that leads to a killing—before cognition can enter the chain and restrain the actor—then the actor can hardly be said to be fully culpable for what could not stop.

Zajonc's position, when pushed to the limit, is even more compatible with exculpation than with mitigation. Maybe Zeus and Athena had it right, in the end, for if Odysseus could not stop his emotional chain from running its deadly course, then exculpation might have

97. Robert B. Zajonc, *On the Primacy of Affect*, 39 AM. PSYCHOLOGIST 117 (1984).

98. *Id.* at 117.

99. *Id.*

been warranted. If, as Zajonc wrote in another paper,¹⁰⁰ “preferences need no inferences,” then emotions can lead to action *outside* the cognitive process, and presumably outside the actor’s ability to insert reason and restrain the process. If such emotional preferences are irresistible—as a train without brakes—how can we blame, even to a mitigating degree, if the train crashes?

The foremost critic of Zajonc’s position is Richard Lazarus,¹⁰¹ who has argued over the years for the primacy of cognition. As Lazarus writes:

I have taken the strongest position possible, and the most controversial, on the causal role of cognition in emotion, namely, that it is both a necessary and sufficient condition. *Sufficient* means that thoughts are capable of producing emotions; *necessary* means that emotions cannot occur without some kind of thought. Many writers who accept comfortably the idea that cognition is sufficient reject that it is necessary.¹⁰²

If, as Lazarus claims, some form of cognition is always present with the emotion, then an exculpatory claim—“I wasn’t aware and couldn’t control”—must fail. Lazarus’ view, though, can support a mitigation claim, for he is not saying that the cognitive appraisal that occurs in emotion is necessarily complete or accurate; rather, only that cognition is there, be it in minimalist form, or even in the form of “unconscious appraising.”¹⁰³

On the other side, Zajonc finds that Lazarus is inserting cognition into emotion *by definition*, when the issue is empirical. Moreover, says Zajonc, if you define the most fleeting, even unconscious registrations as instances of “cognitive appraisal,” we move from the realm of science to that which “cannot be observed, verified, or documented.”¹⁰⁴

In this Zajonc vs. Lazarus debate, we see that the two define “cognition” quite differently. For Lazarus, “cognition” does not map onto “reason” neatly, as his “cognition” has forms, shadings, and subtleties that the legal discourse omits. On the affect side, Zajonc sharply differentiates affect from cognition, as he argues that affect: (a) becomes conscious before cognition; (b) is more important than cognition in many areas of human behavior; (c) seems uncontrollable and inescapable; (d) does not require prior cognitive processing; and (e) seems irrevocable by subsequent cognition. But this sharp differentiation

100. Robert B. Zajonc, *Feeling and Thinking: Preferences Need No Inferences*, 35 AM. PSYCHOLOGIST 151 (1980).

101. Richard S. Lazarus, *On the Primacy of Cognition*, 39 AM. PSYCHOLOGIST 124 (1984).

102. Richard S. Lazarus, *Cognition and Motivation in Emotion*, 46 AM. PSYCHOLOGIST 352, 353 (1991).

103. *Id.* at 361.

104. Zajonc, *supra* note 97, at 117.

falls apart on further analysis, as Parrott and Sabini¹⁰⁵ demonstrate. They show that “[c]ognition that is unconscious and automatic can . . . be effortless and uncontrollable [and] be irrevocable by deliberate thought.”¹⁰⁶ Moreover, in reanalyzing Zajonc’s cases where he finds affect to have primacy, Parrott and Sabini find that “there is no compelling reason to conclude that affect is independent from cognition”¹⁰⁷ in such cases.

“Emotion vs. cognition,” then, began as a weighty academic debate set in extremes: two independent and dichotomous psychic variables, like two heavyweights, vie for the crown. But based on further analysis and research, the debate itself now seems extreme, and simplistic. As Rom Harre and Grant Gillett note, “some 20 years ago it was realized that there was an ineliminable cognitive element in the psychology of the human emotions.”¹⁰⁸ The debate, then, has been narrowing, due in part to more sophisticated research findings which suggest an interdependence, rather than an independence, of affect and cognitive systems.

With more practical implications for the legal question, these findings seem to show the presence of cognition in emotions such as anger, envy, and jealousy, to name but a few emotions that might operate during a “heat of passion” situation. Moreover, recent neuropsychological findings of “centrifugal anatomical wiring suggests that emotion and sensation cannot be independent from cognition.”¹⁰⁹ Parrott and Schulkin advance a functional or evolutionary perspective, noting that emotions must serve an adaptive function: if emotions prepare the organism for action, if they steer action toward satisfaction of a need, then this could not occur without cognitive appraisal; thus, the emotional process must involve “interpretation, memory, anticipation, and problem-solving.”¹¹⁰

Arguing against the simplistic, independence view of emotion and cognition, Parrott and Schulkin write,

[T]o consider emotions to be passions (as opposed to reason) is to make two assumptions, both problematic. One is that all emotions are irrational, which

105. W. Gerrod Parrott & John Sabini, *On the “Emotional” Qualities of Certain Types of Cognition: A Reply to Arguments for the Independence of Cognition and Affect*, 13 *COGNITIVE THERAPY & RES.* 49 (1989).

106. *Id.*

107. *Id.* at 58.

108. ROM HARRE & GRANT GILLETT, *THE DISCURSIVE MIND* 145 (1994).

109. W. Gerrod Parrott & Jay Schulkin, *Neuropsychology and the Cognitive Nature of the Emotions*, 7 *COGNITION & EMOTION* 43, 43 (1993). *See also* Joseph E. LeDoux, *Cognitive-Emotional Interactions in the Brain*, 3 *COGNITION & EMOTION* 267 (1989) (stating that emotion and cognition are mediated by separate but interacting systems of the brain); W. Gerrod Parrott & Jay Schulkin, *What Sort of System Could an Affective System Be? A Reply to LeDoux*, 7 *COGNITION & EMOTION* 65 (1993) (arguing that emotion and sensation are not independent of cognition).

110. Parrott & Schulkin, *Neuropsychology*, *supra* note 109, at 48.

flies in the face of experience and, if true, would be highly inconsistent with evolutionary and functional accounts. The other assumption is that the term "cognition" can be equated with rationality, which is surely not what is meant by this admittedly ambiguous term in contemporary psychology.¹¹¹

If the cognitivists have the better of the argument, and if Zajonc's claims for affect preceding cognition and acting independently of cognition are not supported by the data in general—then the cognitivists would counter a defendant's claim "that my passions were so aroused that I *could not think or control* my actions." The counter claim would be that the evidence suggests that some form of cognition (thinking) does accompany passions, and that the evidence further suggests that strong passions do not necessarily obliterate either thinking or the possibility of control. Thus, any simplistic rule of thumb—such as "if strong passions then no control"—would be baseless.

There is another way academic psychology contributes to the debate. Psychologists have been studying how ordinary people understand and use emotional terms. Professor James R. Averill,¹¹² in his study of anger and the law, takes the view that emotions "are primarily social constructions."¹¹³ If we can only judge an emotion such as anger "by reference to social norms and standards,"¹¹⁴ rather than by "individual psychology,"¹¹⁵ then in judging the meaning and strength of emotions and resultant actions, the jury "may be more 'expert' than most psychologists and psychiatrists,"¹¹⁶ as they share those social standards. In his "partial list" of normative rules relating to anger, Averill lists the social rule that "an angry person should not be held completely responsible for his or her behavior."¹¹⁷ This *type of empirical fact* involves what most people *believe* about murderous passions, manslaughter, and mitigation—that they share a belief that "anger mitigates." But this sort of empirical fact does not establish the truth of the proposition; rather, it tells us that the "anger mitigates" belief is common sense assumption, informing, but not disposing, of the question.

Parrott has looked at the thoughts that occur when people are impulsively angry, and from his work another common sense assumption—about why mitigation rather than exculpation—can be extracted.¹¹⁸ Parrott writes:

111. *Id.* at 50.

112. JAMES R. AVERILL, *ANGER AND AGGRESSION: AN ESSAY ON EMOTION* (1982).

113. *Id.* at 115.

114. *Id.*

115. *Id.* at 116.

116. *Id.* at 115.

117. *Id.* at 325.

118. Keith Oatley, *On the Scientific Study of Angry Organisms*, in VI PERSPECTIVES ON ANGER AND EMOTION: ADVANCES IN SOCIAL COGNITION 167-77 (Robert S. Wyer & Thomas K. Srull eds., 1993).

When people are impulsively angry, they just as impulsively think in ways consistent with being angry. When they cease to believe that they have a right to be angry, they stop being angry. So what is remarkable about impulsive anger is not that it can spring into being without *any* beliefs that one has been wronged, but that it can spring into being based on such *flimsy* beliefs that one has been wronged.¹¹⁹

If people believe that there are *flimsy* beliefs, but not full-blown delusional beliefs, this may well be the discriminating reason for mitigating but not exculpating.

Turning from anger to the emotion of envy, Parrott and colleagues demonstrate that the components of malign envy—hostile and depressive feelings—are associated with subjective and objective *injustice and inferiority beliefs*.¹²⁰ As the researchers conclude, “envy, especially in its typically hostile form, may need to be understood as resulting in part from a subjective, yet robust, sense of injustice.”¹²¹

From this back end look at affect and cognition, passion and reason, we see dichotomies closing, with independence turning into interdependence, even into an “ineliminable mix.”¹²² In this mix, there are beliefs about emotions, thoughts, and control which are grounded in subjectivity and objectivity. One such belief, a common sense assumption, is that manslaughter ought to be mitigated, a belief that accords with the law’s assumption; this accord was not always so, but the law’s subjective about-face in the second half of the twentieth century puts the Law’s path closer to the one laid by *commonsense justice*, even if commonsense justice findings are not consciously driving the change. The Law’s subjective “conversion,” and its convergence toward commonsense psychology, may be another example of Roscoe Pound’s prediction: that when there is a “divergence between the standard of the common law and the standard of the public, it goes without saying that the latter will prevail in the end.”¹²³

C. The Story

On this third and final front, the academic psychology germinates a story. In their seminal work, *Reconstructing Reality in the Courtroom*, Lance Bennett and Martha Feldman propose that jurors transform evidence into stories.¹²⁴ Why a story? First, a story is a handy

119. *Id.* at 171.

120. Richard H. Smith et al., *Subjective Injustice and Inferiority as Predictors of Hostile and Depressive Feelings in Envy*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 705, 705 (1994).

121. *Id.*

122. HARRE & GILLET, *supra* note 108.

123. Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607, 615 (1907).

124. W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* (1981).

analytic device for filtering large amounts of information. Second, a story functions as a *framework* for organizing, situating, and relating facts—the evidence as it unfolds through testimony. It is not only jurors who construct stories, but the prosecution and defense as well. Take the prosecution's opening statement, which is a story of what happened and why; it serves, among other things, as a map and reminder of where the prosecution's case is going, even as testimony may be presented in confusing, fragmented, or disjointed ways.

As Bennett and Feldman put it:

If trials make sense to untrained participants, there must be some implicit framework of social judgment that people bring into the courtroom from everyday life. Such a framework would have to be shared by citizen participants and legal professionals alike. Even lawyers and judges who receive formal legal training must rely on some commonsense means of presenting legal issues and cases in ways that make sense to jurors, witnesses, defendants, and spectators.

Our search for the underlying basis of justice and judgment in American trials has produced an interesting conclusion: the criminal trial is organized around storytelling.¹²⁵

Having given two reasons for a story, Bennett and Feldman propose a third and deeper reason. They note that “[i]n isolation . . . behaviors or actions are ambiguous.”¹²⁶ In *Hamlet*, for example, the Queen's drinking from the poisoned wine glass is an ambiguous act: Is it to be construed as murder, manslaughter, suicide, accident, or mistake? It is only when we set the act within a social context that meaning emerges. As the authors state, “[m]uch of the meaning and, therefore, the interest and importance of social activity depends on who does it, for what reasons, through what means, in what context, and with what sort of prologue and denouement.”¹²⁷ Social context and social activity are essential, and “[s]tories are everyday communication devices that create interpretive contexts for social action.”¹²⁸

How is a story constructed, and what elements go into the story? Bennett and Feldman say that first we “locate the central action in a story,”¹²⁹ which, staying with *Hamlet*, would be the deaths of the King, Queen, and Laertes. The interpreter must next “construct inferences about the relationships among the surrounding elements in the story that impinge on the central action.”¹³⁰ This construction of a social frame includes the scene, the act, the alleged agent, the agency, and the purpose.¹³¹ It will provide background (prologue), tell who did it, and by what means, and for what reasons, and in what context.

125. *Id.* at 3.

126. *Id.* at 7.

127. *Id.*

128. *Id.*

129. *Id.* at 41.

130. *Id.*

131. *Id.* at 62.

Does the story work? Bennett and Feldman tell us that the story is tested in essentially two ways. The first way involves the issue of internal consistency. It asks, does the story hang together as a plausible and unequivocal account of what happened? Do the elements of the story cohere or contradict? Or, could it have happened this way? But any number of stories might be told that make good stories and appear internally consistent, though the tale may be false, even if well-told. Thus the second way a story is tested involves its match with reality. The question here is, "Is the story valid?"

Reality, then, provides a check and constraint on the storyteller, as the storyteller does not "have complete freedom to create reality."¹³² Of the two criteria, validity and internal consistency, Bennett and Feldman give the far greater weight to consistency. They state:

On the one hand, courtroom stories must be built on definitions of the material evidence that comes from the incident in question. In this sense "the facts" do exercise some constraint over the possible stories that can emerge in a case. However, this constraint is considerably less binding than the conventional mythology of justice shared by most legal professionals and ordinary citizens would indicate. Each fact introduced in evidence is subject to a whole range of definition and placement tactics, the selection of which affects the contextual relations between the fact and all the other evidence that has been defined in story form In the final analysis, it is less the role played by evidence in the natural event than the degree to which the evidence can be redefined and relocated within stories and about the event that determines the outcome of a case.¹³³

1. *The Story of the Story*

The dominant epistemological position in psychology, at least in the first half of this century, has been logical positivism-empiricism. Although this position took some earlier salvos, the shelling started in earnest with Thomas Kuhn's influential work, *The Structure of Scientific Revolutions*,¹³⁴ as philosophers of science¹³⁵ began taking dead aim and scoring direct hits. Over the last few decades, "the drubbing that logical empiricism . . . received from philosophers of science"¹³⁶ took its toll and produced the predicted effect—new perspectives were spawned. Currently, psychology remains an epistemological battleground, with a retreating-but-not-yet-dead empiricism challenged by social constructionism and scientific realism. And it is out of the last

132. *Id.* at 65.

133. *Id.* at 143-44.

134. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

135. See, e.g., P.K. FEYERABEND, *AGAINST METHOD* (1976); WILLARD VAN ORMAN QUINE, *WORD AND OBJECT* (1960); STEPHEN TOULMIN, *THE PHILOSOPHY OF SCIENCE* (1960).

136. W. Gerrod Parrott, *Rhetoric for Realism in Psychology*, 2 *THEORY & PSYCHOL.* 159, 159 (1992).

two "isms," constructionism¹³⁷ and realism,¹³⁸ that we find the underpinnings of the story, the story of the story.

Rom Harre,¹³⁹ writing about the ontology of the science of psychology, puts forth the assumption "that there are at most two human realities . . . [the one that] comprehends our biological nature . . . [and the other that] comprehends our social nature as elements of a network of symbolically mediated interactions."¹⁴⁰ Harre sees social reality arising from conversational exchanges, out of language and discourse. Psychological phenomena as remembering, learning, "emotional talk," norms, and imperatives arise from the conversational world. From this view, story construction (and our thinking in story-like fashion), far from being a mere device, lies much closer to the essence of what it means to be a social being. Our norms, imperatives, and moral rules may take the form of "*representations sociales*."¹⁴¹

Psychologists have been taking a new look at stories in such diverse areas as thinking, memory, moral development, social psychology, and psychotherapy. For example, Jerome Bruner¹⁴² has proposed that there are two distinctly different modes of thought, *propositional thinking* and *narrative thinking*, and each provides "distinctive ways of ordering experience, of constructing reality." Where propositional thinking is logical, abstract, context-independent, theoretical, and formal, narrative thinking is concrete, interpersonal, situational, and descriptive of reality. If jurors think along narrative rather than propositional lines—a sensible assumption given that a case is about particulars—then stories may be the jurors' *natural mode* of both understanding the case and communicating their understandings to one another.

Paul Vitz, citing the work of social psychologist Theodore Sarbin, sees the story as a "general metaphor for understanding human conduct. . . . The story or narrative model allows psychology to make contact with the historical context of individuals and with the insights into human social behavior found in stories, drama, literature, and history."¹⁴³ While "metaphor" would seem to imply a device for con-

137. See, e.g., PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (1985); Kenneth J. Gergen, *The Social Constructionist Movement in Modern Psychology*, 40 *AM. PSYCHOLOGIST* 266 (1985).

138. See, e.g., ROM HARRE, *VARIETIES OF REALISM* (1986); John D. Greenwood, *Realism, Empiricism and Social Constructionism: Psychological Theory and the Social Dimensions of Mind and Action*, 2 *THEORY & PSYCHOL.* 131 (1992).

139. Rom Harre, *Metaphysics and Methodology: Some Prescriptions for Social Psychological Research*, 19 *EUR. J. SOC. PSYCHOL.* 439 (1992).

140. *Id.* at 440.

141. *Id.* at 451.

142. JEROME BRUNER, *ACTUAL MINDS, POSSIBLE WORLDS* (1986).

143. Paul C. Vitz, *The Use of Stories in Moral Development: New Psychological Reasons for an Old Education Method*, 45 *AM. PSYCHOLOGIST* 709, 711 (1990).

ceptualizing about people, Sarbin sees the story as more fundamental: the story is not just something scientists make up, it is what people use to interpret their own lives—as a story. As Sarbin puts it, “Our plannings, our rememberings, even our loving and hating, are guided by narrative plots.”¹⁴⁴

Finally, George Howard,¹⁴⁵ writing about psychotherapy, asks, “Have you noticed that therapy usually begins with an invitation to the client to tell his or her story?” From this “constructive” view, “life” becomes “the stories we live by,” “psychopathology” becomes “stories gone mad,” and “psychotherapy” becomes “exercises in story repair.”

Cutting across various psychological topics is the ubiquity of stories, and strong evidence that jurors create and use stories. Whether storytelling is bred in the bone or born of a culture whose commerce is stories, that nature vs. nurture question is beyond the scope of this inquiry. What is of concern is the realism vs. relativity question. For whether a story is “true,” or merely an interesting “story,” does bear on issues of justice and fairness in general, and on the specific question of whether the “murder” or “manslaughter” story is not only the “best fit,” but the real story. But “real” and “stories” may be an odd and irreconcilable couple, and some social constructionists espouse a relativism that claims that truth is unobtainable, for there are only stories, and more stories. While Homer and Shakespeare are treasured as storytellers, the same is not likely to be said of jurors, for upon them we place a different burden, and a solemn oath: we demand more than *a* story, however cleverly woven; we ask that they give us *the true* story—even as we know that that transcends the jurors’ perceptive capacities.

2. *Story Ingredients*

What are the raw ingredients that give the juror’s story its substance? The obvious ingredient, which the law hopes is the only ingredient, is the *evidence* brought out at trial. But jurors also use *extralegal factors*¹⁴⁶ in reaching their decisions. One such factor, present long before the trial commences, is their *prior knowledge*. This factor, at a minimum, simply acknowledges that the jurors’ slates have already been writ upon long before the first word of testimony is uttered. Their prior knowledge often includes specific representations

144. THEODORE R. SARBIN, *NARRATIVE PSYCHOLOGY: THE STORIED NATURE OF HUMAN CONDUCT* 11 (Theodore R. Sarbin ed., 1986).

145. George S. Howard, *Cultural Tales: A Narrative Approach to Thinking, Cross-Cultural Psychology, and Psychotherapy*, 46 *AM. PSYCHOLOGIST* 187, 194 (1991).

146. Christy A. Visher, *Juror Decision Making: The Importance of Evidence*, 11 *L. & HUM. BEHAV.* 1 (1987).

of crimes and criminals.¹⁴⁷ These representations may take the form of a *general* composite: a stereotype of the typical murderer, or the typical manslaughter case. And while these prototypes may be powerfully determinative of jurors' verdicts, they are likely to be distorted caricatures, off the mark of the typical and representative manslaughter or murder defendant.

The most likely source of prototypical distortion is the mass media. As Professor Valerie Hans notes, "[b]ecause a relatively small proportion of the public has direct experience with the justice system, public knowledge and views of law and the legal system are largely dependent on media representations."¹⁴⁸ The media in all its forms saturate us with information and images relating to crime and criminals. But this saturation "does not reflect reality," as "violent and sensational crimes . . . dominate media coverage of both fictional and factual crime."¹⁴⁹ The media's portrayal accents the extreme and the extraordinary, rather than the representative. In this sense, the media actively construct a "crime reality" which is a more violent one than the real one. So when jurors enter the jury box, so do prior knowledge and prototypes, accurate or not. Particularly salient may be recent cases in the news, relevant to the murder vs. manslaughter case at bar. Jurors may use the "availability heuristic,"¹⁵⁰ recalling the recent, sensational, and "biased" case last heard in the news: "biased" because what is most recent is not necessarily representative.

Another source of bias in the prior knowledge jurors bring with them comes from interpersonal and personal accounts of crimes. These accounts, according to Loretta Stalans, tend to be more typical of actual crime scenarios than media portrayals, and may act as a countervailing weight to the media's atypical portrayals.¹⁵¹ Yet, in Vicki Smith's empirical work, she found little evidence of realism in subjects' portrayals of crimes.¹⁵² For instance, when she asked subjects to write down all the attributes they could think of in connection with certain crimes, murder being one of them, the typical features they listed were significantly discrepant from the defining criteria that were specified by law. For example, subjects used *murder* as any intentional killing, but many intentional killings are manslaughter.

147. Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. PERSONALITY & SOC. PSYCHOL. 857 (1991).

148. Valerie P. Hans, *Law and the Media: An Overview and Introduction*, 14 L. & HUM. BEHAV. 399, 399 (1990).

149. *Id.*

150. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974).

151. Loretta J. Stalans, *Citizens' Crime Stereotypes, Biased Recall, and Punishment Preferences in Abstract Cases: The Educative Role of Interpersonal Sources*, 17 L. & HUM. BEHAV. 451 (1993).

152. Smith, *supra* note 147, at 867.

3. *Story Construction*

The most elaborated and well-researched model of story construction is Nancy Pennington and Reid Hastie's "Story Model" of juror decision making.¹⁵³ These researchers propose, as did Bennett and Feldman, that jurors construct narrative story structures to organize and interpret evidence, and this process is *explanation-based*: jurors seek to explain the facts by inferring causal and intentional links among particular facts.¹⁵⁴ In this constructive process, case-specific information acquired during the trial, knowledge about events similar in content to those that are the topic of dispute, and generic expectations about what makes a complete story are combined. This results in one or more *interpretations* "that have a narrative story form."¹⁵⁵ If, as Pennington and Hastie believe, the jurors' task is *fundamentally interpretative*, then idiography not only enters, but must enter.

With story construction being both subjective and interpretative, we arrive once again at the relativist's and novelist's position that the same set of facts can spawn more than one story. Yet Pennington and Hastie state that "one story will usually be viewed as more acceptable than the others."¹⁵⁶ On what grounds is one story selected as *the story*?

Pennington and Hastie cite a number of principles; *coverage, coherence, uniqueness, completeness, and plausibility*.¹⁵⁷ Of these principles *coverage, consistency, completeness, and, to some extent, uniqueness*, all refer to what Bennett and Feldman called "internal consistency," or what the novelist means, when asking, "Is it a good yarn?" But where is validity? That comes in through *plausibility*, though even this "objective" term may be highly culturally relative. Like Bennett and Feldman, Pennington and Hastie give greater weight to internal consistency over external validity: it is the subjective note that is stressed, the objective note, less so.¹⁵⁸ Where Pennington and Hastie go beyond Bennett and Feldman is by empirically

153. Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. PERSONALITY & SOC. PSYCHOL., 189 (1992). See REID HASTIE ET AL., *INSIDE THE JURY* (1983); Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. PERSONALITY & SOC. PSYCHOL. 242.

154. BENNETT & FELDMAN, *supra* note 124.

155. Pennington & Hastie, *Explaining the Evidence*, *supra* note 153, at 190.

156. *Id.*

157. *Id.*

158. *But see* JOHN SABINI & MAURY SILVER, *MORALITIES OF EVERYDAY LIFE* 183-220 (1982). These authors point out the confusion over "objectivity" and "subjectivity." They argue for a distinction between an evaluation and a reaction. When an art critic gives an evaluation of a painting—"it is not a major work"—this is not a purely subjective evaluation, but more objective; on the other hand, a novice's reaction—"I don't like it"—is subjective. When two baseball fans disagree over the question of whether player X is "a great player," they disagree over their con-

demonstrating that the story model provides a better fit with jury decision making than other models, be they legal or mathematical models of integrating and weighing information and reaching culpability decisions.

From the front end of how provocations are construed psychologically, to the back end of how emotions and cognitions effect actions and control, "idiography" and "subjectivity" have been centrally situated in the psyche and in academic psychology. Now, with jurors and the stories they weave, the process is replete with construing, constructing and interpreting. Objectivity and facts play a part, but the smaller part. The jurors' idiographic approach—where subjective subtext, sentiments, and prototypes abound—is unleashed to shape the facts into a psychological and subjective narrative of what happened—a story. Hamlet said, "The play's the thing wherein I'll catch the conscience of the king";¹⁵⁹ and for jurors, in their role as conscience of the community, it is the story which comes dispositively into play, to weigh the blameworthiness of this defendant and prince.

V. AN EXPERIMENTAL LOOK AT TWO BENCH MARK CASES

From research findings about what jurors do and construe, "stories" were the general finding, "idiography" was the leaning, and "subjectivity" was the shading.¹⁶⁰ But general findings may not apply in a particular case, and it is in the particulars where we find the richest stories. In the experiments that follow, jurors will confront a specific defendant with specific case facts; some of those case facts will be manipulated (*i.e.*, the independent variables), and their verdict (*i.e.*, murder vs. manslaughter) and reasons for their verdicts are the dependent variables. In this experimental way, their construals of the case, the factors they find relevant and determinative, and whether they take an objective or subjective perspective, should emerge in sharpest focus.

Two of the bench mark cases that were formative in the evolution of manslaughter law—the cases of *Bedder*¹⁶¹ and *Gounagias*¹⁶²—along with variations, will be manipulated to test a number of manslaughter-related issues. Our first question is: How will varying the type and degree of provocation, type of emotion, history and context, time and cooling-off, and brooder and rekindler scenarios effect mock jurors' verdicts? More specifically, which variables will produce more manslaughter verdicts, and which will yield more murder verdicts? In

clusions, but they agree about the relative evaluative dimensions. Thus, what first seems to be a purely subjective judgment is not.

159. SHAKESPEARE, *supra* note 18, at act 2, sc. 2.

160. See *supra* notes 124-59 and accompanying text.

161. Director of Public Prosecutions v. Bedder, 1 W.L.R. 1119 (England 1959).

162. State v. Gounagias, 153 P. 9 (Wash. 1915).

using the experimental method, which takes us beyond the correlational and suggestive, cause and effect relationships become clearer.

The second general question brings in discursive, narrative, and categorical analyses, for we are not only interested in verdicts—which tell us what respondents do under certain fact patterns—but their *reasons* for their verdicts—which tell us *why* they do what they do. We ask respondents' for their reasons for both their verdict and sentencing decisions, and we ask them to identify those factors that they find relevant and determinative. The second question, then, is: Will these commonsense reasons match, or depart from, the objective, legal rules regarding manslaughter?

A. Research Design

In the first experiment, 95 college students were given two cases, in random order, and were asked to make verdict and sentencing decisions and provide reasons for their decisions. The two cases were variants of *Bedder* and *Gounagias*, called *State v. Bedder* and *New Mexico v. Cooper*.

In *Bedder*, the State is bringing a second degree murder charge against Mr. Bedder, while Bedder claims that it was only manslaughter. Three variables were manipulated—*context*, *provocation*, and *emotion*. For the variable *context*, there were two variations: one variation, closest to the actual *Bedder* case, reveals that the seventeen-year-old Bedder was told by several doctors that he was impotent, with the cause being physical and not correctable; in the second variation, the subjects are told that Bedder could not perform the sexual act with the prostitute, as in the first variation, but they are not told of the impotence factor. Thus, in terms of *context*, subjects get either the impotence or no impotence variation. The question here is: Will the contextual history of impotence produce more manslaughter verdicts and lighter sentences?

The second variable involves *provocation*, and there are two levels: in one variation, the prostitute laughs and taunts Bedder, and in the second variation she slaps Bedder in addition to laughing and taunting. This represents the taunts vs. assault and battery distinction. The question here is: Will the increased provocation increase the percentage of manslaughter verdicts?

The final variable is the *type of emotion* that Bedder claims and displays. In one variation, it is said that Bedder became *enraged* when the prostitute either taunted or slapped him, and after he repeatedly stabbed her and ran out of the room, another customer and prostitute testify that they saw Mr. Bedder looking *enraged*. In the second version, Bedder claims that he became *frightened* when the prostitute started taunting or slapping, and in this version, when he runs out, the other customer and prostitute testify that he looked

scared. The question here is: Will subjects be more sympathetic to the emotion of fear as opposed to Achilles-like anger, and will fear lead to more manslaughter verdicts? Thus, for the *Bedder* case, we have a factorial design with eight different scenarios (2 context x 2 provocation x 2 emotion).

In the *Cooper* case, the vignette lets the mock jurors know that the State has brought a murder charge against Mr. Cooper, alleging that Cooper stabbed his co-worker Mr. Santiago to death with malice aforethought. The death took place in a Sante Fe restaurant where both men were employed. Cooper admits that he stabbed Mr. Santiago but claims that the act was provoked and justified as a result of unusual and mitigating circumstances. While there are eight different conditions, the size of the two men is held constant: Cooper is a 37-year-old man who stands 5'3" and weighs 118 pounds, while the 30-year-old Santiago stands 6'4" and weighs 265 pounds.

Our first condition parallels the *Gounagias* fact pattern, where Santiago sodomizes Cooper one night, and Cooper leaves the restaurant angry and humiliated. For the next three weeks, Santiago repeatedly taunts Cooper, who finally picks up a knife and stabs Santiago to death following the last taunt. While this version represents a rekindling case, we call it "frequent rekindling" (FR), since the taunts occur often. This version features a sodomy (S) followed by frequent rekindling (FR) and a death occurring three weeks (3W) later, and is designated as S-FR-3W. In a second version, we test the effect of only one rekindling episode (RE), instead of frequent rekindling. Here, Cooper returns to the restaurant three weeks later to pick up his final paycheck and Santiago taunts him; Cooper then kills. This second version (S-RE-3W), when compared to the first, tests whether frequent rekindling will reduce the harshest verdicts and lower sentences more so than will a single rekindling episode. The third version tests brooding vs. rekindling cases: here, Cooper returns to the restaurant after three weeks, sees Santiago, who makes no taunts, yet Cooper picks up the knife and stabs Santiago (S-BR-3W). If the brooder case is perceived more like a premeditated murder than a rekindling case, we would expect harsher verdicts and stiffer sentences here.

The essential feature of either rekindling or brooding cases is that time has passed between the provocation (e.g., the sodomy) and the killing, and that time may allow for blood to cool or for malice aforethought to form. In the next two conditions, we manipulated *time* by expanding it, or shrinking it. In condition four (S-RE-6M), Cooper returns to the restaurant six months (6M) later to pick up his last check, and Santiago taunts him, and then Cooper kills. This condition is identical to condition two (S-RE-3W), except that the time interval has now expanded to six months. The question here is: Because of the

added time, will more jurors see this as murder done in cold blood rather than manslaughter? In the fifth condition "time" shrinks to zero: this becomes a heat of passion (HP) case, where Cooper kills immediately (IM) after being sodomized (S-HP-IM), and this condition serves as a control group for the rekindling and brooding cases.

There is still another control group which leaves in the taunt (TN) but takes out the sodomy (NS-TN-IM): here, in the sixth condition, Cooper is not sodomized but kills Santiago after the latter makes certain taunting comments which Cooper alleges brought back hurtful memories from his past. This condition should yield the fewest manslaughter verdicts, if the sodomy is indeed the crucial provocation. If the sodomy is irrelevant, as the *Gounagias* court claimed, then the verdicts and sentences in NS-TN-IM should look like S-RE-3W, as both defendants kill immediately after a taunt.

The last two conditions push the variable *context* even further. In both cases, the defense presents historical evidence that Cooper was raised by a physically abusive father; thus when the sodomy occurs Cooper's slate and psyche are not blank, but already sensitized, like Bedder was sensitized by his impotence. In the simple heat of passion case, the sodomy is the provocation, and there is no context to speak of; in the rekindling or brooding cases, the taunt or the sight of the victim is the provocation, the sodomy becomes a contextual element, and we will see if mock jurors use the sodomy fact as part of the provocation matrix. Now, we will see if jurors widen and extend context still further to include evidence from the distant past. In condition seven (H-S-RE-3W), there is history (H) of physical abuse, sodomy, the rekindling taunt three weeks later, and the killing. In condition eight (H-S-BR-3W), there is history of abuse, sodomy, and the brooder who sees the victim three weeks later, and kills.

The focus of this work is the murder vs. manslaughter distinction, and while the *Bedder* and *Cooper* cases frame the issue that way, it is possible that jurors will see other alternatives. For example, even though the State does not bring a first degree murder charge, some jurors might see premeditation and a first degree murder verdict possibility—particularly when Cooper broods or kills after six months. Some mock jurors might see involuntary manslaughter in one of the *Bedder* conditions. And it is possible that some might excuse Cooper or Bedder on grounds of either self-defense or insanity. As we are interested in how ordinary people frame and construe such cases, we widened the verdict options beyond what a judge might give in such cases: the mock jurors have seven verdict options, along with legal definitions, for: guilty of (a) first degree murder, (b) second degree murder, (c) voluntary manslaughter, (d) involuntary manslaughter, or not guilty by reason of (e) self-defense, (f) insanity, or (g) a straight "not guilty."

Table 1.
Voluntary Manslaughter (VM) and Second Degree Murder (SM) Verdicts for the Bedder and Cooper Cases, by Conditions

Case	Condition	Verdict			
		VM		SM	
		n	%	n	%
<i>Bedder</i>		30	32	65	68
<i>Cooper</i>		51	54	44	46
<i>Bedder</i>	Context-Impotence	13	30	31	70
	Context-No Impotence	17	33	34	67
	Provocation-Laugh	15	32	32	68
	Provocation-Slap	15	31	33	69
	Emotion-Anger	14	29	34	71
	Emotion-Fear	16	34	31	66
<i>Cooper</i>	No Sodomy (NS-TN-IM)	1	9	10	91
	Rekindler (S-FR-3W)	5	45	6	55
	Rekindler (S-RE-3W)	11	85	2	15
	Brooder (S-BR-3W)	3	25	9	75
	Time (S-RE-6M)	9	75	3	25
	Heat of Passion (S-HP-IM)	9	64	5	36
	History (H-S-RE-3W)	9	75	3	25
	History (H-S-BR-3W)	4	40	6	60

B. Results and Discussion

There is no significant order effect (*i.e.*, which case comes first in the booklet) and no significant gender effect, but there is a significant case effect: the *Bedder* case produces significantly more second degree murder verdicts and fewer manslaughter verdicts than the *Cooper* case. The *Cooper* case also produces greater variability in verdicts, with 20% of the verdicts falling outside the second degree murder and voluntary manslaughter categories, whereas only 1% fell outside the two main categories for *Bedder*. To simplify the analysis, the few first degree murder verdicts were combined with second degree murder, and the few involuntary manslaughter and insanity verdicts were combined with voluntary manslaughter. Table 1 presents the verdict results. Approximately two-thirds of the verdicts in *Bedder* are second degree murder, whereas slightly more than half the verdicts are voluntary manslaughter in the *Cooper* case. Now looking at the particular variables in the *Bedder* case, a log-linear analysis reveals that

neither context (impotence vs. no impotence), nor provocation (laugh vs. slap), nor emotion (fear vs. anger) produce a significant effect on verdict.

In contrast, the *Cooper* case reveals a number of significant differences. First, in what was not obvious to the *Gounagias* court but is to these mock jurors, the sodomy makes a difference: when there is no sodomy but only a taunt, the voluntary manslaughter verdicts are the lowest, at 9%; when the sodomy occurs and Cooper kills in the heat of passion, voluntary manslaughter verdicts rise to 64%; and when the killing occurs three weeks after the sodomy, following frequent rekindling episodes or a single episode, manslaughter verdicts are 45% and 85%, respectively. A second significant difference occurs between brooding and rekindling cases, with brooders being judged more harshly: the rekindling cases average approximately 70% manslaughter verdicts, whereas brooding cases average about 40%.

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

"Verdict" is not the only measure of a defendant's "blameworthiness." It is quite possible for verdicts to mask true differences, as when two defendants get the same verdict, yet jurors judge them differently. To get a fuller picture, we also examined "sentencing decisions" as a second dependent measure. Mock jurors had the option of sentencing defendants to jail time—from "no time" up to "life imprisonment." Our decision was not to restrain jurors' predilections by providing sentencing ranges for the verdicts, so a more open sentencing format was used; while this may yield sentences lower and higher than what a judge might give using guidelines, what we get here is "community sentiment" unfettered. The sentences for the *Bedder* and *Cooper* cases, by conditions, are presented in Table 2.

An ANOVA shows significant main effects in the *Bedder* case for *provocation* and *emotion*. Sentences are lower when the provocation is a slap rather than a taunt, and sentences are lower when the emotion is fear rather than anger. There is also a significant *provocation* x *emotion* interaction effect: the presence of fear with just a taunt produces equally low sentences to fear with a slap; but when the emotion changes to anger, the taunt condition is the most severely punished, more than anger and slap.

Table 2
Sentences (in months) for Bedder and Cooper, by Condition

Case	Condition	Prison Sentence	
<i>Bedder</i>	Context-Impotence	183.8	
	-No Impotence	151.2	
	Provocation-Laugh	195.2	
	-Slap	139.8	
	Emotion-Anger	222.5	
	-Fear	112.5	
	Provocation x Emotion Interaction		
	Laugh-Anger	277.8	
	Laugh-Fear	112.6	
	Slap-Anger	167.3	
	Slap-Fear	112.4	
	<i>Cooper</i>	No Sodomy (NS-TN-IM)	286.4
		Rekindler (S-FR-3W)	80.2
Rekindler (S-RE-3W)		66.0	
Brooder (S-BR-3W)		142.0	
Time (S-RE-6M)		80.0	
Heat of Passion (S-HP-IM)		97.7	
History (H-S-RE-3W)		57.5	
History (H-S-BR-3W)		164.4	

The *context* effect turns out to be not significant; in fact, sentences are higher in the impotence than in the no impotence condition. Some jurors invoke the idea of negligence or recklessness in their reasons: they argue that Bedder knew he was impotent and chose to put himself in a situation where failure and provocation were all but inevitable; like the drinker who chooses to drive, Bedder bears additional culpability, in this analysis, for the outcome.

For the *Cooper* case, there is a large significant effect among the eight conditions. Planned comparisons revealed the following significant differences. The one condition where there was no sodomy (NS-TN-IM) receives significantly higher sentences than all of the sodomy cases. The brooder cases receive significantly higher sentences than either the rekindling cases or the heat of passion case. There are interesting nonsignificant findings as well. There is no significant difference between the heat of passion condition and the rekindling cases. Furthermore, "time" does not seem to matter, again, as there are no significant differences among six month rekindling (S-RE-6M), three week rekindling (S-RE-3W), and the immediate, heat of passion

killing (S-HP-IM). As with verdicts, distant context has little effect on sentencing.

Up to this point, mock jurors' objective judgments of verdict and sentence have been aggregated and analyzed, creating, in effect, the "average VM juror" or the "average SM juror" judgment. This sort of "mythic average juror" composite is open to the same sort of criticism I levelled earlier—that no such "average juror" exists. But more troubling than that is the possibility that verdicts and sentences do not tell us the *why* of the story. To get at the why, and to bring the idiographic into the method, the mock jurors' reasons for their verdicts were examined.

These reasons were categorized using a nine construct schema that proved reliable. The constructs were the following: first degree murder *mens rea* (C1); second degree murder *mens rea* (C2); objective reasonable person standard (C3); emotion/passion (C4); provocation (C5); context (C6); time (C7); threat (C8); and control (C9). These constructs were coded as either 0 or 1, with 0 being at the manslaughter end, while 1 is at the murder end. For example, where the absence of premeditation is mentioned by the jurors giving manslaughter, this construct is coded as 0, and when the presence of premeditation is mentioned by the jurors giving second degree murder, it is coded at 1; if the juror mentions neither, it is not scored. Table 3 presents the number of citings for each construct, and the construct's rank as a manslaughter (VM) construct, as a second degree murder (SM) construct, and overall.

Table 3
Frequency (n) and Ranking (R) of the Constructs, for
Manslaughter (VM) and Murder (SM) Verdicts, and Overall

Constructs	VM		SM		Overall	
	n	R	n	R	n	R
C1 First Degree <i>mens rea</i>	58	2	10	7	68	6
C2 Second Degree <i>mens rea</i>	55	3	65	1	120	2
C3 Standard	49	6	35	6	84	5
C4 Emotion/Passion	66	1	63	2	129	1
C5 Provocation	45	7	54	5	99	4
C6 Context	54	4	7	8	61	7
C7 Time	42	8	6	9	48	9
C8 Threat	1	9	57	4	58	8
C9 Control	52	5	58	3	110	3

Some constructs seem central to mock jurors who reach either a VM or SM verdict. For example, the emotion/passion (C4) construct ranks first as a VM construct and second as an SM construct; while relevant for both groups, the VM jurors see high levels of emotion/passion operating, whereas the SM jurors see insufficient emotion. In a similar vein, both VM and SM subjects cite the malice aforethought factor (C2), but see it as either absent or present. Other constructs are used differently by the two groups. For example, context (C6) is quite relevant to VM jurors, but almost irrelevant to the SM jurors. In reverse, threat (C8), which is seen as insufficient by SM jurors, plays a prominent role for them, but not so for the VM jurors. Two initial conclusions emerge: (1) VM and SM jurors are construing the case through some different constructs, which each group finds relevant to their verdict; and (2) when they are invoking the same constructs, they construe the defendant at different ends of the construct continuum.

A stepwise regression was run to see which constructs predict the verdict (see Table 4). A seven variable model emerges ($R^2 = 68.3$, F

Table 4
Stepwise Regression Results for Construct Variables that Predict Verdict

Construct	Partial R^2	Model R^2	F	P
C4 Emotion/Passion	.2398	.2398	59.3	.0001
C8 Threat	.2305	.4703	81.4	.0001
C7 Time	.0592	.5296	23.4	.0001
C5 Provocation	.0938	.6234	46.1	.0001
C2 Second <i>mens rea</i>	.0266	.6500	14.0	.0002
C9 Control	.0265	.6765	15.0	.0001
C6 Context	.0060	.6825	3.4	.0655

Note—The overall R^2 of this 7 Variable Model = 68.25, and the overall F [7,182] = 55.89, $p < .0001$.

[7,182] = 55.9, $p < .0001$), with two variables—C1 and C3—dropped from the model because they did not predict. The most predictive variable is emotion (C4), which is subjectively inferred rather than determined through objective assessment. The variable threat (C8) is the second most predictive variable, and here the SM jurors view this more objectively, whereas VM jurors view it subjectively. Other predictive variables, like time (C7), provocation (C5), control (C9), and context (C6), are construed more subjectively by the VM verdict jurors and more objectively by the SM jurors.

To this point, we have been viewing constructs individually, as if they are independent of one another. But they are not: these constructs are correlated, in differing degrees. To get a broader view by seeing which constructs cluster together, a cluster analysis was run. Three clusters emerge, and account for .6261 percent of the variance (see Table 5). The first cluster, containing two variables (C2 and C4), may be called "intent vs. emotion, or reason vs. passion." Not only do

Table 5
Results from an Oblique Principal Component Cluster Analysis

Cluster Variables Explained	Proportion of Name	Cluster
1 C2 Second <i>mens rea</i> C4 Emotion/Passion	.6362	"Intent v. Emotion" "Reason v. Passion"
2 C5 Provocation C8 Threat C9 Control	.6613	"Control"
3 C1 First <i>mens rea</i> C3 Standard C6 Context C7 Time	.5945	"Subjective Reasonable Person"

Note—The total proportion of the variation explained = .626

we have the two most frequently cited constructs together here, but this cluster seems to represent the essence of the legal debate. If emotion is great, it negates malice aforethought, and if emotion is not great enough, intent to kill may be present. So here, jurors are balancing the emotion factor against the intent factor. In cluster two, provocation, threat, and control (C5, C8, and C9) cluster together, and we call this "control." Jurors seem to be judging the degree of provocation, the sort of threat that might pose, and the degree of control the defendant had. These factors seem to be an admixture of objective and subjective factors. Control seems more subjective, requiring an inference into what is not observable, while provocation and threat can be viewed either subjectively or objectively. Finally, the third cluster involves four variables (C1, C3, C6, and C7), and it is called the "subjective reasonable person." Here, the context factor, as in *Bedder's impotence* and *Cooper's sodomy*, plays a dominant part. Context affects and subjectivizes "time," as rekindling makes the past present. Context also subjectivizes the objective reasonable person, for we must see the drama through the subjective eyes of the defendant, who

did not premeditate. Thus, while objective and subjective factors mix, and mix in differing ways, there is a decidedly subjective caste, particularly so for the VM verdict jurors.

Finally, we ran a canonical discriminant analysis, which shows the degree to which different constructs predict either a VM or SM verdict (see Table 6). The model was significant ($F [9,180] = 43.3, p < .0001$), in that constructs, weighted either positively or negatively, do discrimi-

Table 6
Results from a Canonical Discriminant Analysis

<i>Construct</i>	R^2	F	$.p$	Raw Canonical Coefficient
C1 First <i>mens rea</i>	.03	6.3	.01	-0.047
C2 Second <i>mens rea</i>	.16	29.2	.0001	-0.797
C3 Standard	.00	.02	.8997	-0.197
C4 Emotion/Passion	.32	59.3	.0001	-1.160
C5 Provocation	.02	4.0	.046	-1.088
C6 Context	.07	12.5	.0005	0.563
C7 Time	.17	32.2	.0001	1.813
C8 Threat	.20	37.9	.0001	2.697
C9 Control	.06	12.1	.0006	-0.954
Class Means on Canonical Variables				
Verdict				CAN 1
Voluntary Manslaughter (0)				1.698
Second Degree Murder (1)				-1.262

nantly predict the VM or SM verdicts. As one might intuitively predict, the higher the provocation, the higher the emotion, the higher the threat, and the lower the intent to kill, the greater the likelihood of a VM verdict; the converse would lead to a SM verdict.

Mock jurors do discriminate, but they do not restrict their constructs and discriminations solely to the legally designated dimensions. Take the *Bedder* case. The legal fight was over whether jurors should hear about his impotence, and, if they did, whether that contextual factor would then subjectivize the provocation and magnify his emotion to a point where jurors would believe that manslaughter was the appropriate verdict. Our mock jurors who heard of his impotence, however, were no more inclined toward a VM verdict than those who did not, and they were not inclined to reduce his sentence either. Why not? It seems that these mock jurors widened the contextual field to consider contributory negligence or recklessness—placing yourself in a situation you should know increases the danger.

In *Bedder*, in the sentencing data, there is confirmation of the long held legal view that a slap is an adequate provocation, but a taunt is not—at least not when a taunt concerns sexual performance. We also see that jurors weigh the *particular* emotion—fear or anger—differently, in their sentencing decisions: a one word change from “anger” to “fear” produced a significant reduction in the sentences handed out. This suggests that people are more sympathetic to “scared” than “enraged,” and further suggests that it may not be just the *heat* of passion, but *type of passion*, that will determine verdict.

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

In bringing the sodomy into the context, a strong subjective caste to their analysis results, for the very taunts that would not be enough for *Bedder*, and would not be enough for the non-sodomized *Cooper*, now become more than adequate for the sodomized *Cooper*. Thus, we cannot say, as we might of a rose, that “a taunt is a taunt is a taunt.” The provocation is subjective, determined in part by the contextual history of the defendant, which then affects attributions about how much emotion he is feeling, his sense of threat, and his degree of control.

Construing the case and making attributions about the defendant are both relevant and determinative of verdict. While case *facts* are important and do produce verdict discriminations among various conditions, the jurors’ *constructions* are even more discriminating and dispositive of verdict. Facts, the objective ground, are extracted, construed, and translated into a subjective story, where psychological attributions and interconnections are made.

One finding is that mock jurors make different attributions about the brooder than the rekindler. For the brooder, because there is not even a taunt at the moment of the deadly act, mock jurors are more likely to construe premeditation or malice aforethought. For example, had Laertes not said a single provocative word to Hamlet about sword,

poison, and King, and had Hamlet let his rapier do its work anyway, then Hamlet would fit the brooder profile, and jurors, by this work, would be less than kind. In contrast to the brooder who seems to be reacting to some inner stimulus, the rekindler reacts to something in the external world, what the victim does or says, or, in the Hamlet example, the provocative words of Laertes. Mock jurors seem to understand how external, objective, and hence "real" taunts and provocations can awaken sleeping passions; beyond simply understanding this, their verdicts and reasons reveal greater sympathy and mitigation for the rekindler than for the brooder.

VI. A SECOND EXPERIMENT—REFINING, EXTENDING, AND REPLICATING

A. Research Design

No one experiment can answer all questions, and even if it answers many, it often raises new questions to consider. Here, both leftover and new questions remain. Thus, to refine, extend, and replicate these first findings, and to pursue some vexing questions that remain, a second experiment was conducted.

Though we learned that mock jurors engage in complex construing of the case, we were surprised at the large verdict differences between our versions of the *Bedder* and *Gounagias* cases; specifically, we were surprised that the impotence factor in *Bedder* accounted for little. The finding that we did not anticipate—the jurors would construe contributory negligence or recklessness—*Bedder* putting himself at risk—may have been the reason.

But this may not have been the reason, or the entire reason. There is another suspect that emerges from the comments of a few respondents, who pointed to the fact that *Bedder* stabbed the prostitute *repeatedly*. When we designed the original case, we put in "repeated stabbings" to create the sense of "heat of passion;" however, a few respondents construed "repeated stabbings" in a more malevolent, murderous way, suggesting that *Bedder* may have even intended to kill; that construal would tilt the case toward murder. If many respondents were construing the case that way, even without commenting on it, this could clearly account for why the murder verdicts were so numerous.

To test this, we changed the *Bedder* case such that now, *Bedder* stabs the prostitute once, and runs out like before. As we found that the specific type of emotion—anger or fear—did not make a difference, we only used "anger" this time, and where witnesses testify that when *Bedder* ran out he looked enraged. Now, having an angry defendant who stabs the victim once, we again manipulate the context factor (impotence vs. no impotence) and the provocation factor (laugh vs. slap).

We also made some simplifications in our *Cooper* case, to refine, extend, and replicate the findings most germane to manslaughter. We eliminated the cases conveying historical abuse, which had no effect, and the long time delay (6 months), which had no effect, and the non-sodomy case, which was a control condition. What remains are four conditions: a heat of passion case, where the killing occurs right after the sodomy; a frequent rekindling case, which most closely matches the actual *Gounagias* fact pattern, where taunts occur for three weeks; a rekindling case, where the taunt occurs after a three week interval; and a brooding condition, where there is no taunt but a killing after a three week interval.

We also made some simplifications regarding verdict options. Since the vast majority of verdicts were either second degree murder or voluntary manslaughter in the first experiment, we left those options, plus "other," and did away with first degree murder, involuntary manslaughter, not guilty by reason of self-defense, not guilty by reason of insanity, and not guilty. Respondents again had to state reasons for their verdict and sentencing decisions.

Our new variable in this second experiment involves *instruction*. In the first experiment, all respondents received detailed "Instructions to the Jury" covering duty to follow instructions, presumption of innocence, burden of proof, and reasonable doubt. They also received specific instructions defining each verdict and its key terms (*e.g.*, malice aforethought, provocation). Had we only been interested in generalizing to a trial situation, we would have left the realistic instructions as is; however, here we are interested in the intuitive, commonsense *constructions* of murder and manslaughter that mock jurors are likely to possess, and which may be muted by instructions given by the judge. To test this possibility, half the mock jurors get detailed instructions as in the first experiment for general issues (*i.e.*, presumption of innocence) and the specific charges (*i.e.*, second degree murder and manslaughter). The other half received a "no instruction" instruction, which read as follows:

To reach a verdict, you need to know the specific legal definitions of second degree murder and voluntary manslaughter, along with some general matters. At this point in a trial, the judge would give the jurors instructions. But in this experiment, we are not giving you such instructions; rather, we want you to exercise your common sense and common understanding of these charges, and make your decision as you see it.

To summarize, mock jurors were assigned to either the instruction or no instruction condition. Then, they received one of the four Bedder cases and one of the four Cooper cases, in random order. There were 110 mock jurors in experiment II.

B. Results and Discussion

First, there is no significant order effect on verdict, so it does not matter whether the *Bedder* or *Cooper* case comes first or second in the booklet. And, as before, there is no gender effect, in that the verdicts of men and women respondents, regarding these male defendants, do not significantly differ. Moving to the independent variables, there is no significant *instruction* effect: respondents who get detailed instructions from the judge, and those who do not, reach essentially the same verdicts. Given this finding, we may infer that the judicial instructions used in the first experiment did not suppress, distort, or channel jurors' initial and unfettered verdicts—for the direct comparison here shows no difference.

Significant differences occur on the *case* variable ($X^2 [1, N=110] = 14.3, p < .001$), as they had in experiment I: across the varying conditions, 65% of the *Bedder* verdicts are second degree murder (SM), but only 40% of all the *Cooper* verdicts are SM. Once again, the *Cooper* case in general evokes more manslaughter verdicts, and the case difference widens when we examine particular conditions.

Turning to the *Bedder* case, the 65% SM verdict finding, which was almost identical to the first experiment results, suggests that our change of the case (from multiple stabbings to one stab) had no effect. Said another way, mock jurors were not being harsh on *Bedder* because they construed multiple stabbings as a sign of malice or premeditation, for changing the fact pattern that might give rise to that construction did not change verdicts.

The analysis of the specific variables of *impotence* (impotence vs. no impotence) and *provocation* (laugh vs. slap), and their interaction effect, reveals a significant finding only for *provocation*. When the victim only laughs and taunts, 80% register a SM verdict, but when the provocation gets physical, with a slap, the verdicts divide nearly equally between SM (51%) and VM (49%). Again, as in experiment I, the old legal dividing line between words and deeds, taunts and assaults, seems to be endorsed by ordinary citizens.

The *impotence* factor did not reduce SM verdicts; if anything, there is a greater percentage of SM verdicts (70% vs. 60%) when *Bedder* is impotent than when not, though this difference fails to reach significance. It may further suggest what was advanced from the first experiment: that the notion of contributory negligence may be operating, for *Bedder* knows he is impotent, yet puts himself in a high risk situation. The interaction effect, though not significant, lends further support, albeit tentative: for in the impotent/slap condition, 59% find this *Bedder* guilty of SM, but in the nonimpotent/slap condition only 43% find him guilty of SM. Why the difference?

The nonimpotent man, suddenly slapped, may react in the "heat of passion." But if "heat" (*i.e.*, the intensity of the emotion) was the criti-

cal variable, we would expect that the impotent man's emotions are likely to be even hotter than his nonimpotent counterpart, and that the impotent man would get more mitigating mileage; yet he gets less. Thus the determinative factor cannot be a "hotness difference." The answer to why jurors react more coldly (*i.e.*, fewer VM verdicts) to the "higher heat" (*i.e.*, impotence) condition may involve *thoughts and choices*, more than emotions. When the impotent man who has chosen to put himself at risk feels the slap, this may well arouse anger, but it may also awaken his ill-considered choice: angers may roil, but the toil may come from choosing unwisely. Had Athena let Achilles decide on his two choices, and let him act on his choice, neither the Muse nor the Bard might sing his tale, had he chosen murder. This sort of choice, I suggest, may be what mock jurors find more culpable.

Turning to the *Cooper* case, there is a large significant difference among the four conditions ($X^2 [3, N=110] = 27.9, p < .0001$). For the brooder condition, only 26% gave a VM verdict; for the rekindler and frequent rekindler conditions, the VM percentages jump to 57% and 61% respectively; and for the heat of passion condition, where the killing occurs immediately after the sodomy, 96% register a VM verdict. The pre-planned comparisons reveal that there is a significant difference between the immediate condition and all three conditions where a killing occurred three weeks later; a significant effect between the brooder and the rekindling conditions; and no significant effect between the rekindling and frequent rekindling conditions.

In experiment I, where we had eight conditions and tested many variables, we found, overall, that *time* did not matter. In this experiment, where half the conditions were pared away, *time* matters. The basic heat of passion condition produces almost 100% VM verdicts, but when time intrudes between sodomy and death, where temperature may drop or malice may grow in the interval, VM verdicts drop to approximately 60% in the rekindling conditions. While there is clearly a drop, it must be noted, still, that two-thirds of the verdicts are manslaughter verdicts. But when there is no external, visible, objective provocation, as in the brooder condition, the VM drop is great, such that now three-quarters of the mock jurors are giving SM verdicts.

Here we see *time* interacting with *provocation*. In the heat of passion condition (when time is zero), the provocation is the sodomy. In the rekindler and frequent rekindler cases (when time is three weeks), the provocation is not just the taunt: for if it was just the taunt, we should see VM verdicts as low as Bedder's under the taunt condition; but we do not, as VM verdicts for Cooper under rekindling are much higher. Thus mock jurors must be incorporating the sodomy along with the taunts as the provocation. In the brooder condition, there is no taunt, just the past sodomy, plus whatever Cooper is brooding about in his mind. The sodomy, however, must play some part in the

provocation picture for mock jurors, otherwise the SM verdicts would approach 100%; as 26% give a VM verdict, this verdict must be based on something, and that something is the sodomy, in all likelihood. But with the rekindling taunt absent—an objective act that not only rekindles but reconnects the nexus between present and past—the brooder is at a disadvantage, and he pays for it with more SM verdicts.

The mock jurors' reasons for their verdict decisions were again analyzed, using stepwise regression, canonical discriminant analysis, and cluster analysis procedures, and the results were quite consistent with the first experiment. To briefly summarize, mock jurors who give VM or SM verdicts construe the case through some similar and some dissimilar constructs, and canonical analysis shows which factors predict to which verdict, with these results being quite consistent with those of the first experiment. As to clusters, there is again the cluster that deals with the factors of *mens rea* (malice) and emotion/passion, coupled with an objective or subjective reasonable person interpreting both factors; there is another cluster that deals with *context*, and how this affects threat and possible control; and there is a third cluster where the correlated variables of provocation and time interact.

C. Simple Heuristics vs. Complex Calculus

One after another, across a 300 year period, the objective rules for manslaughter erupted. As the treatise writers told the tale, one might think these rules, like puzzle parts precisely fitting, created one unified theory, a seamless web of coherence. But beneath this fiction, legal evolution was marked by upheaval, clashes, and contradictions—where individual rules and individual exceptions collided. With conundrums muted, the objective law presented a set of rules, which, when properly applied to case facts, would yield consistent verdicts comporting with our notions of culpability. That was the hope and the prediction, and both were dashed.

Subjective dangers lurked around the rules like Scylla and Charybdis, and ran many common law cases aground in twisted endings. Without a wily pilot like Odysseus, the objective ordinary man exemplar would be called to the scene to set the matter right. This ordinary man would eschew subjective waters for more solid dry land. In doing so, the exemplar eliminated untidy variability, including the defendant.

A "rule" is a simple heuristic, when we pare it to its essence. Whether the rule is about a taunt or a slap, seeing an adulterous act or hearing it, or acting on the spot or waiting a day or two—the rule tells us how to decide, in almost simplistic yes/no terms. However, when we look at how ordinary citizens decide such cases, we see no simple heuristics—but a complex calculus—grounded in psychology, subjectivity, and narrative. In this storied world, variables interact in

messy ways, and even at the level of a single variable, it is neither simple nor entirely objective. "Provocations" do not label themselves as "manslaughter worthy" or not; we do. And whether a provocation is judged worthy depends on whether it is viewed idiographically or generally, subjectively or objectively, and on how such variables as context, time, threat, emotion, thinking, and control are construed.

In this complex story, ordinary citizens see the past as alive in the present, under certain conditions. When they see past provocations as alive today, they understand that this past context colors what the defendant sees and feels and thinks in the present moment. This psychological view makes "objective time" less relevant. A man sodomized in the past and taunted in the present, fearing future taunts and, perhaps, even another attack—lives in the present psychological moment where past, present, and future are one. When discrete designations of time (past, present, and future) collapse, context expands, becoming more rich and relevant to commonsense justice. The commonsense construal of context also reveals some commonsense boundaries on time: while a sodomy that is three weeks or six months old is deemed relevant, distant acts of abuse in childhood are deemed irrelevant. This finding tells us two things: first, commonsense justice defines a different boundary than the law; and second, it is not an open-ended, anything goes, indiscriminate matter, for commonsense justice does set boundaries.

Commonsense justice creates an idiographic story, more so than the law. And idiographic stories pull the viewer into the psychological and subjective, more so, certainly, than general, objective tales, where defendants are fungible, or replaceable by an exemplar. Yet objectivity is not abandoned: provocations and taunts need objective grounding, for when the stimulus is only in the brooder's head, and not in the objective environment as it is for the rekindler, the brooder fares poorly.

The objective law and commonsense justice turn out to be far apart in major ways. The three hundred year reign of objectivity was at end, as the law would take a dramatic turn, seemingly in the direction of commonsense justice. The new law, marked by the *Model Penal Code*, would bring subjectivity back into the law. But in swinging the other way, the question remains: Had the law gone too far into the subjective?

VII. THE MPC: SUBJECTIVITY ADRIFT

The MPC represents a radical and subjective veer. More by coincidence than mindfulness, the MPC shifts toward the direction academic psychology was taking; and more by mindfulness than coincidence, the MPC shifts toward the direction commonsense psychology had been taking all along. In an intuitive, subjective, and

penumbral way, the MPC recognizes that the actor who commits manslaughter and the actor who commits murder are not on the same footing. At this point, though, the MPC drafters' faith and footing rests infirmly on a subjective feeling. For when objective rules, doctrinal rationales, and *stare decisis* no longer provide grounding, and when hard evidence and empirics neither inform nor channel-mark the course, it will be the MPC's version of subjectivity itself—disconnected and adrift—which must steer alone.

Through codes, laws, and rules we try to define and differentiate a subject matter clearly. Like the intent of a realist or impressionist painter, one test for the Code is whether it brings subtle details or illuminating light to the shadowy penumbra of manslaughter law. The Code's subjective definition of manslaughter is:

a homicide which would otherwise be murder [is manslaughter when it] is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.¹⁶³

This definition unmistakably tilts to the subjective—both in the viewpoint it takes, and the new language of “extreme mental or emotional disturbance.” Yet, there may be a hint of equivocation in the terms “reasonable explanation” and “reasonableness”: though “reasonable explanation” sounds like something the objective, ordinary man might expect, “reasonableness” then becomes subjective in the next sentence. In other parts of the Code, though, a “quasi-subjective”¹⁶⁴ approach, where an objective remnant still clings and attaches to a subjective cloth, is evident. For example, with the doctrines of self-defense and duress, and in the area of justification, the objective remnants of “necessary,” “proportionate,” and “balancing of the harm prevented against the harm caused” are tied to the essentially subjective definition.

But when “provocation” alone fills the frame, there is nothing “quasi,” queasy, or objective in the picture. Crowning its subjectivity, the Code “sweeps away the rigid rules that limited provocation to certain defined circumstances . . . [and submits] that question to the jury.”¹⁶⁵ “The Code thus jettisoned all of the objective language and tests of the past 150 years—adequate provocation, ‘cooling off,’ ‘reasonable man . . .’¹⁶⁶

Though the MPC drafters placed the crown on subjectivity, jurisdictions, like rebellious dukes, were not in agreement when it came to the Code's adoption. As Singer states, “the history of adoption of the

163. MODEL PENAL CODE § 210.3(1)(b) (Proposed Official Draft 1962).

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

165. MODEL PENAL CODE, § 210.3(1)(b) (Proposed Official Draft 1962).

166. Singer, *supra* note 15, at 292.

Model Penal Code's EED [extreme mental or emotional disturbance] language is mixed. Although it has won favor in some jurisdictions, it has been directly rejected by others, and severely modified in still others.¹⁶⁷

More than mere adoption was the problem of interpreting and applying the EED standard. To illustrate, two Connecticut cases, *State v. Zdanis*¹⁶⁸ and *State v. Elliot*¹⁶⁹ both dealt with "brooders" who killed victims without a provocative act by the victim; nothing external or objective for the ordinary man or juror to cite as the explicable reason or provocation. The appellate court in *Zdanis* made it clear that "virtually any reaction to any stimulus may be considered in an EED jurisdiction,"¹⁷⁰ and the appellate court in *Elliot* went even further:

[T]he defense [of EED] does not require a provoking or triggering event; or that the homicidal act occur immediately after the cause or causes of the defendant's extreme emotional disturbance. . . . A homicide influenced by an extreme emotional disturbance is not one which is necessarily committed in the "hot blood" stage, but rather one that was brought about by a significant mental trauma that caused the defendant to brood for a long period of time and then react violently, seemingly without provocation.¹⁷¹

The appellate courts' dicta is good news for the brooder. He gets a much sweeter deal under this EED construal than under the objective law. And he gets a more lenient verdict under EED than the mock jurors give him. For both mock jurors and the objective law insist on some minimal, objective, external connection between a taunt and a killing for a manslaughter verdict, whereas EED severs the nexus between provocation and the EED that leads to a killing. But what is good news for the brooder turns out to be bad news for the law. For the new song seems to be, "anything goes."

Looked at psychologically, this EED construal is naive, faulty, and just plain bad subjectivity. It is a return to the old, rejected psychology where structures and mental entities float about in the mind, with each entity having a will and mind of its own. In this sort of subjective law, as in this sort of mind, there exists a disembodied and disconnected EED, severed from its nexus to provocation on the front end, untied to control and action on the back end, yet producing mayhem, murder, and manslaughter in its wake. And if we are prepared to grant this EED alien such autonomy, it will surely claim mitigation as its due.

The contrast with academic psychology's *The Discursive Mind* could not be greater. The subjectivity that Professors Rom Harre and

167. *Id.* at 294.

168. 438 A.2d 696 (Conn. 1980).

169. 411 A.2d 3 (Conn. 1979).

170. Singer, *supra* note 15, at 295 (regarding *State v. Zdanis*).

171. *Id.*; *State v. Elliot*, 411 A.2d 3, 8 (Conn. 1979).

Grant Gillett espouse is dynamic, "embedded in historical, political, cultural, social and interpersonal contexts. It is not definable in isolation."¹⁷² In sharp contrast is the law's subjectivity, where EED stands in isolation, a mental entity not interrelated to, or embedded in, any context, save subjectivity itself. Like some alien entity in a sci-fi movie, EED erupts without cause—decontextually—and what is worse—it erupts without good reason.

Yet the law needs reasons to mitigate, as do mock jurors. Mock jurors find a reason in the objective taunts for the rekindler, but not for the brooder. But as EED severs the contextual nexus, it provides no mitigating reason in context. Instead, EED turns inward—to attributions, speculations, and rationalizations of a specious and subjective sort—offering a "psychology" that varies from primitive to "pop." Thus the law's psychology is indeed different from what academic psychology is proposing. The EED standard is no standard at all, for it is without definition or grounding. In resting on bad psychology, in clearing away all remnants of objectivity, and in proffering an "anything goes" standard, the law bungee jumps into subjectivity, without a cord, plunging further than academic psychology or commonsense justice finds prudent. The outcome is likely to be a crash landing, a Rorschach-like splattering, and bad law.

There is other evidence that EED is going down the wrong road. As Singer notes through a variety of case law decisions, EED has been linked with "imperfect self-defense," insanity, and diminished capacity and diminished responsibility notions; EED has been unlinked to responsibility, moral blameworthiness, proportional punishment; and EED has promoted "the mounting use of psychiatric testimony in these cases."¹⁷³ Why this is the wrong road can be illustrated through insanity law.

"Insanity" law is instructive here, for rules and law, on the one hand, and mental entities and subjectivity, on the other, come together. From the "wild beast" test of 1723 to the Insanity Defense Reform Act of 1984, insanity law has travelled inward, trying to parse the defendant's psyche into appropriate and offending entities—responsible or nonresponsible cognitions, and/or resistible or irresistible impulses—to find the guiding, discriminative rule. Each new rule was touted in its time as the answer. But setting this maddening matter of insanity right, like slaying the Hydra without Hercules, proved difficult, and it was the rules, rather than the beast that bit the dust. But in this process, new rules continued to spring full blown from erroneous assumptions; "ordinary common sense" turned out to be bizarre if not floridly delusional; and simplistic heuristics and outright

172. HARRE & GILLETT, *supra* note 108, at 25.

173. Singer, *supra* note 15, at 298.

myths reigned, as Professor Michael Perlin¹⁷⁴ has persuasively argued. And what the rules have *not* arisen from, is empirical evidence: for when such tests are put to the empirical test, they fail to produce discriminatively different verdicts, and they fail to square with the jurors' commonsense constructs.¹⁷⁵

The MPC drafters, mindful that the objective rules for manslaughter had failed, turned, correctly, it would seem, toward the subjective. This turn held the promise of greater alignment with commonsense justice, and held out greater hope for doctrinal consistency. But while the direction was appropriate, the chosen path was not. This new, exclusively subjective path—a solipsistic slide into extreme emotional disturbance—was already antiquated; it deadened in a dark mind of hallucinatory projections and psychological entities, but which emitted no light and, finally, no lasting rules.

VIII. CONCLUSION OF THE STORY

As Singer reflects, common sense just seems to understand “that persons in extreme situations normally do not ‘intend’ very much of anything; they merely wish to end the stressful situation.”¹⁷⁶ If the actor did not intend anything, but struck out in blind distress, we know that this is different from murder. Even if the actor did intend to strike under provocation, our common sense tells us that the actor likely did not contemplate the consequences of his act in the way the murderer does. Manslaughter is different from murder; the law knows this, and commonsense justice knows this. But on what is our knowledge grounded?

If it is airy notions—like “it just feels right”—or legal lexical litanies—like “extreme emotional disturbance”—our prayers for understanding will not be answered. Watery metaphors of emotional currents beneath the surface do no better for either subjectivity or the

174. See, e.g., Michael L. Perlin, *Psychodynamics and the Insanity Defense: “Ordinary Common Sense” and Heuristic Reasoning*, 69 NEB. L. REV. 3 (1990); Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599 (1990); Michael L. Perlin, *The Supreme Court, the Mentally Disabled Criminal Defendant, and Symbolic Values: Random Decisions, Hidden Rationales, or “Doctrinal Abyss?”*, 29 ARIZ. L. REV. 1 (1987).

175. See, e.g., NORMAN J. FINKEL, *INSANITY ON TRIAL* (1988); Norman J. Finkel & Sharon F. Handel, *How Jurors Construe “Insanity,”* 13 L. & HUM. BEHAV. 41 (1989); Norman J. Finkel & Solomon M. Fulero, *Insanity: Making Law in the Absence of Evidence*, 11 INT’L J. OF MED. & L. 383 (1992); Norman J. Finkel, *The Insanity Defense: A Comparison of Verdict Schemas*, 15 L. & HUM. BEHAV. 533; Norman J. Finkel, *The Insanity Defense Reform Act of 1984: Much Ado About Nothing*, 7 BEHAVIORAL SCI. & L. 403 (1989).

176. Singer, *supra* note 15, at 310.

law, for their Sirens' songs leave us adrift or plunge us into an endless night sea journey.

Subjectivity and stories, however, are promising turns. But not any subjectivity will do. The subjectivity must have substance, and, as the mock jurors' verdicts reveal, must have some anchor in consensual reality. The brooder vs. rekindler difference turns on the fact that the brooder's subjectivity remains untied to any provocation in reality, whereas the rekindler's is clearly tied to an objective taunt. And not any story will do. A story must be coherent and plausible. In this regard, the stories of academic psychology and commonsense justice are way ahead of those used by the framers of the law.

At the conclusion of their book *The Discursive Mind*, Professors Harre and Gillett state: "We need to see mental life as a dynamic activity, engaged in by people, who are located in a range of interacting discourses and at certain positions in those discourses and who, from the possibilities they make available, attempt to fashion relatively integrated and coherent subjectivities for themselves."¹⁷⁷

At the conclusion of his paper, Professor Richard Singer turns to "common sensical 'rough justice,'" and offers an approach that he admits "may seem simplistic."¹⁷⁸ He states: "But after four centuries of recognizing that some distinction must be made among killers, while struggling with a verbal formula to capture that distinction, it may, perhaps, be true that here, as in many other areas, less really is more."¹⁷⁹

I believe Singer has it right, but only in part. The common sensical "rough justice" he recommends in the end—where jurors use their subjective sentiments to decide the murder vs. manslaughter question—seems to be offered out of four centuries of weariness: it becomes "the default" option, because the objective rules option that the law so long invested in, went broke. Singer is right that jurors' subjectivity and rough justice will produce better justice than objective rules and ethereal exemplars. The empirical evidence¹⁸⁰ that was presented confirms that: mock jurors' verdicts and reasons reveal more sophisticated distinctions, and tell a more coherent story, than that produced by the objective rules or the sort of disconnected subjectivity as espoused in the MPC.

But where Singer's recommendation emerges after he surveys four centuries of failure, Harre and Gillett's recommendation emerges from empirical and conceptual investigations into subjectivity itself. Such scrutiny brings subjectivity into the light, revealing narrative, discourse, and stories, and a rich contextual web of interconnections.

177. HARRE & GILLETT, *supra* note 108, at 180.

178. Singer, *supra* note 15, at 322.

179. *Id.*

180. See *supra* Parts V and VI (detailing empirical results).

This "subjectivity" is far more interesting, enlightening, and connected than what the MPC put forth.

My own conclusions, I believe, come from even more firm and fertile ground. They are empirically derived from specific cases and fact patterns, where nuances were manipulated and tested, and where commonsense justice could speak through verdicts and the reasons for the verdicts to the murder vs. manslaughter distinction. And this voice tells a sophisticated idiographic and subjective story. In the main, it is a story rich in history, context, subtext, and interconnections, yet a story with objectivity as well. For facts and external provocations play a key role: this is why brooders fair more poorly in the court of commonsense justice than they do in Connecticut courts under EED and MPC, when judged by appellate judges. What the judges and the current MPC/EED standard lack, the mock jurors apparently have: a complex calculus that fashions coherent psychological stories. These stories neither crash into objective rules that litter the road, nor fly off into deep space, nor plunge into fathomless subjectivity.

The "manslaughter story" that emerges is not one story, but many, for many defendants get that verdict even though provocations (their type and degree), emotions (their type and degree), cooling time, context, and history all differ. This is not "ruleless," but merely complex. We see in this complexity, for example, that manslaughter is not just "a crime of passion," as it has been advertised for so long, but a partial failure of reason. Reason may falter *before* the front end action even begins, because the actor makes a bad choice to put himself and others at risk. Reason may falter on the front end, in the way provocations are perceived and construed, or it may falter on the back end, where reason's flimsiness may justify the anger and the act, rather than controlling its occurrence.

Mitigation appears appropriate when these complex conditions are satisfied, for it reflects the culpability gradations people discern. This is more than good policy; it is good principle—the principle of proportionality.

The law has tried to reify those abstract gradations with objective rules—rules that have failed. By abandoning objective rules, the law's new subjectivity (its EED standard) created an old monster—a disembodied and disconnected psychic entity, without form or coherence, sweeping through courtrooms with expert witnesses sniffing for the scent. The law can do better.

The concluding remarks return to "stories," and the stories of Achilles fuming, Odysseus stewing, and Hamlet brooding, as their verdicts in a modern court were in doubt, and put on hold. If Law is logic,

which it is not,¹⁸¹ a syllogistic conclusion would follow; if judges were as Holmesian as Sherlock, rather than Oliver Wendell, an elementary and dispositive solution would end the story; but nothing that passes for *the* "truth" will be offered. Neither stories nor cases end that way. Literary exemplars, like legal exemplars, should serve rather than rule. This story serves to remind us, lest we forget, that the murder vs. manslaughter story—be it murder "most foul, strange, and unnatural,"¹⁸² or a slaughter where wrathful swords, avenging arrows, poison-tipped rapiers, and red-hot passions combine—is not formulaic. It is an idiographic story about a real person, with a unique history and psychological makeup, who is not fungible with another person or prototype. Try switching Achilles and Hamlet into the other's story, and I suggest that the brooding Hamlet never leaves the tent, and, with wrathful Achilles as Hamlet, *Hamlet* ends in Act I. There is no story to sing of here.

Yet the story of the story is *a* story, I submit. In this story I tell various points of view—literary, legal, psychological, and common sensical—brought together, with lines, arguments, and empirics converging. Because it is a story rather than a proof, divergence is still possible; others might take the same data and construct other stories. Some might argue that the MPC trusts in the good judgment of jurors, and the results from my mock jurors reinforces the MPC's faith that less law may yield more law. That, though, is a different story than the one I tell, and the mock jurors tell. That mock jurors "get it right" *despite* lack of guidance from the MPC—is credit to the jurors, not the MPC; that jurors invoke certain rules within a ruleless EED redounds not to the EED, but to the jurors. When we fathom the story that mock jurors tell, it is a story that has more substance to its subjectivity than MPC and EED. It is a substance that is grounded in empirics, common sense, and a rich psychological context. It yields the better story, I submit. And if the law would more faithfully track that story, it would yield better law.

181. RONALD DWORIN, *LAW'S EMPIRE* (1986).

182. SHAKESPEARE, *supra* note 18, act 1, sc. 5.