Commonsense Justice, Culpability, and Punishment

Norman J. Finkel

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlr

Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol28/iss3/4

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
COMMONSENSE JUSTICE, CULPABILITY, AND PUNISHMENT

Norman J. Finkel*

I. INTRODUCTION

In Finkel's Commonsense Justice, his title's defining term is differentiated from black-letter law this way:

There are two types of "law." There is the type we are most familiar with, namely "black-letter law," the "law on the books." This is the law that legislators enact, the law that was set down by the Founding Fathers in the Constitution, the law that evolves through common-law cases and through appeals decisions. It is the law that law school students study, judges interpret, and jurisprudes analyze. But there is another law—although "law" may be too lofty or lowly a term to describe it: I call it "commonsense justice," and it reflects what ordinary people think is just and fair. It is embedded in the intuitive notions jurors bring with them to the jury box when judging both a defendant and the law. It is what ordinary people think the law ought to be.

These commonsense notions are at once legal, moral, and psychological. They provide the citizen on the street and the juror in the jury box with a theory of why people think, feel, and behave as they do, and why the law should find some defendants guilty and punishable and others not. Black-letter law also has its theories of human nature, culpability, and punishment. But there is mounting and persuasive evidence that the "law on the books" may be at odds with commonsense justice in many areas. 2

The title of this Article links commonsense justice ("CSJ") first to culpability, and then to punishment. In Part III, the connections to culpa-
bility are made manifest through a variety of examples which illustrate but some of the disparities between black-letter law and CSJ. We see differences in the way each frames the case, delimits the determinant factors of culpability, and weights those factors. Moreover, we see different types of culpability being assessed (i.e., for the act, and for bringing about their mental condition), and gradations rather than dichotomies assigned to culpability.

Without such a fine-grained empirical analysis, it could appear that CSJ’s culpability judgments are fusing, confounding, and confusing, that which ought to be kept clear and distinct, a negative judgment that has been voiced repeatedly by the jury’s harshest critics within the law, and these voices seem to be reaching crescendo today. Adding to these negatives and multiplying the problem are the criticisms from those in the press, politics, and populace, for we hear not only the critical “last judgment” refrains, but now they are delivered with righteous certainty, particularly when CSJ’s verdicts appear wrongful to “those in the know.” While there is no denying that wrongful verdicts do occur in the aggregate of cases adjudicated, there is a formidable if not transcendent problem in determining that a “wrongful” verdict occurred in a particular case.

While CSJ’s culpability analysis does not march lockstep to black-letter law’s tune, the analysis in this Article supports a far more positive view of CSJ: that the “fusing, confounding, and confusing” picture reveals an underlying sense and sophistication. Furthermore, the analysis reveals that if the charge of simplism is to be laid anywhere, it is most aptly placed at Law’s doorstep.

In Part IV, the connections between CSJ and punishment are drawn, and these findings show disparities between the sentences black-letter law and CSJ mete out. These CSJ punishment disparities not only track their culpability disparities, but they generally grow wider, as years in prison can reveal differences where the verdicts are the same. Adding to this, the analysis of the reasons proffered for the sentences reveal greater sophistication for CSJ than the Law, at times. Moreover,


4. Since God seldom answers a subpoena duces tecum to give us the omniscient answer, earthly pronouncements, despite righteous tones, fall short.
we see evidence that the Law's neat and tidy split—between culpability and punishment—may not be adhered to by CSJ. Thus, at the end, after digging beneath the "fused, confounded, and confusing" surface, we end up unearthing time-honored treasures—principles such as proportionality and mitigation—which are consistent with the Law's principles.

In the concluding Part V, the nuances, meanings, and import of these findings are developed in the light of the ongoing interaction and relationship between CSJ and the Law. The case for heeding rather than dismissing CSJ is argued, and the empirical findings provide a strong factual basis for the argument. But the argument does not rest solely (or even most importantly) on the view that sociological jurisprudence makes for better law; rather, the Law's normative foundations are acknowledged, and these, in my opinion, remain too solid and essential to be overturned solely by the sheer volume of woolly empirics; empirics which may themselves be shorn by the next set of experiments. Rather, the view put forth here is more earthy and enriching, resting on a simple root premise: that laws are made by human beings, about the thoughts, feelings, and actions of other human beings. This root premise sends off far-reaching shots, for if this premise is so, then the Law must hold some psychological theory or theories about actors (be they defendants, witnesses, attorneys, judges, or justices) and their acts. Put another way, the Law must have its own commonsense notions, its own "commonsense psychology," and its behavioral assumptions about laws, legal systems, and legal processes. The argument, then, is not about replacing black-letter law with CSJ, but about CSJ informing Law, perfecting Law, and solidifying Law's institutional legitimacy.

5. See Oliver Wendell Holmes, Jr., The Common Law 1 (Sheldon M. Novick ed., Dover Publications 1991) (1881). Holmes began his seminal work by finding the life of the law not in logic, but in experience:

The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

Id.


8. See George P. Fletcher, A Crime of Self-Defense: Bernhard Goetz and the Law on Trial 154 (1988). Fletcher writes about juries using their power "not to defeat the law, but to perfect the law, to realize the law's inherent values." Id.

However, before proceeding down this Article's title track, we must address and answer, in Part II, a preliminary question which may derail this associative train long before its substantive destination is reached. The preliminary question is this: If black-letter law is the law—the one and only law—then why bother with CSJ at all?

We can put the question in the form of three objections to CSJ, each raised by a different black-letter law advocate. The first advocate, in a peremptory swipe, clears the field of CSJ findings, arguing that they have no relevance whatsoever for the law. The second advocate, less extreme, willingly stipulates that CSJ findings do reveal disparities, yet argues that those empirics are moot in the Law's largely normative world. And the third advocate, despite recognizing that at times the Law's world turns decidedly empirical (as in Eighth Amendment "cruel and unusual" punishment cases), nonetheless regards social science findings as misplaced foundlings, mistakenly dumped on the Supreme Court's doorstep in amici briefs. To illustrate the latter, Justice Scalia disparagingly labeled such findings as "socioscientific" and "ethicoscientific," which find no home, he argued, among the sanctioned objective indicia of jury decisions or legislative enactments data.

The battle must be fought, then, on the field of the Eighth Amendment; and in that struggle socioscientific, ethicoscientific, or even purely scientific evidence is not an available weapon. The punishment is either "cruel and unusual" (i.e., society has set its face against it) or it is not. The audience for these arguments, in other words, is not this Court but the citizenry of the United States. It is they, not we, who must be persuaded.

If CSJ findings are dismissed as irrelevant across the entire adjudicative front, as the first advocate would have it, or dismissed as irrelevant in cases of normative decision-making, as the second advocate would have it, or dismissed as immaterial when the Court is committed to an em-

10. See infra notes 32-52 and accompanying text.
11. See infra notes 53-62 and accompanying text.
12. See infra notes 63-79 and accompanying text.
14. Id.
pirical assessment of community sentiment, as the third advocate maintains, then our preliminary question takes on an added urgency.

If these above advocates have their way, Law's adjudicative train will pull out of the station leaving CSJ behind. In Part II, three reasons are offered for why this course is error-bound, and why its destination cannot be reached. The first reason, which is systemic, begins with the recognition that juries (and hence CSJ) remain a legal fixture; for the jury system is bred into the legal bone, so to speak. Said another way, CSJ is already on the train. To either ignore these sanctioned passengers or pretend that their views do not count—when we cede to them a "final say" in culpability and life or death punishment questions—denies reality and ups the odds of derailment (e.g., jurors nullifying, failing to comprehend, or reconstruing the law in ways that the Law did not intend). The second reason, which is consequential, involves the Law's own credibility and authority, its institutional legitimacy, and its compelling interest in seeing that its decisions are obeyed rather than defied. And the third reason, which is limited but constitutionally mandated, involves the Law's expressed mission in certain Eighth Amendment cases, of an accurate and objective reading of the community's views. Together, these reasons involve not only CSJ's potential to negatively impact the law, but its potential for positively enhancing the law.

II. WHY HEED COMONSENSE JUSTICE?

As long as the Law's adjudicative process still involves "the lengthy constitutional heritage of the jury," CSJ will always be aboard the train—not as a stowaway, not as a standby, but with a sanctioned seat. Despite this heritage, there are some reformers who have urged the removal of these ordinary citizens in favor of more elitist alternatives. Reformist arguments, however, and the evidence cited to bolster them, remain suspect, being contravened by sounder data, from sounder methods, along with sounder and more defensible arguments.

15. See infra notes 16-79 and accompanying text.
17. See id.
18. See id. at 250, 256.
19. See id. at 242, 249-56; see also Neil Vidmar, Medical Malpractice and the American Jury: Confronting the Myths about Jury Incompetence, Deep Pockets, and Outrageous Damage Awards x (1995) ("[M]edical [malpractice] negligence juries ... perform
Although calls to eliminate CSJ from the criminal law side have been fewer, those calls periodically do come, particularly when verdicts in certain high profile cases appear to be indefensible, wrongheaded, and wrong—at least to the talking heads, pundits, and armchair jurors who are watching Court TV and making those judgments. But the place of the jury on the criminal law side is firmer, with buttressing evidence coming from death penalty adjudication, where the law wants jurors—the “conscience of the community”—to have the final say, albeit along guided discretionary lines.

Putting civil and criminal law together, the composite forecast yields a safe bet: Given the jury’s historical, constitutional, and current community sentiment support, and given the absence of sound, substantive data for the greater effectiveness of alternatives, the jury will be traveling with the law for a long time to come.21 Thus, ruling CSJ out of bounds simply will not work, as CSJ refuses, by its de jure or de facto presence, to stay out of bounds.22

If this is the case, then a psychological stop and search of jurors is worth doing to further understand what jurors bring with them to trial, and to the assessment of tasks that are put to them. This would involve an analysis of citizens’ prototypes of crimes and criminals, their notions of fairness, justice, culpability, and reasonable doubt, and their proportional sense of justice, for all of these may vary slightly—to significantly from black-letter law’s positions.23 Along with these, jurors may also be

their functions reasonably well.

21. See Shuman & Champagne, supra note 16, at 250-51, 253-56 (opining that the constitutional history and empirical examination of the jury system evidences the adequacy and propriety of its continued use).
22. See Finkel, supra note 20, at 57, 59, 62 (arguing that the scope of CSJ is wider than that of the black-letter law).
23. See, e.g., PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 201-02, 204 (1995); Finkel, Prototypes that are
influenced by heuristics,\textsuperscript{24} ignorance and prejudice,\textsuperscript{25} myths,\textsuperscript{26} accessibility biases,\textsuperscript{27} and pretrial publicity.\textsuperscript{28} Such factors—some normal, some not, some wholesome, some not—can never be screened out entirely during \textit{voir dire}, such that the sitting jurors are far from the mythical blank slates for which some might wish.\textsuperscript{29} This being the case, it would not be surprising if extralegal factors intruded into culpability and pun-
ishment decisions,30 and not surprising if jurors reconstrued jury instructions and their key terms so as to nullify on some occasions.31

A. Jury Nullification, Comprehension, and Reconstrual of Instructions

Archival findings suggest that jury nullification has been, and continues to be, part of our jurisprudence,32 although other findings from empirical studies33 and experiments34 suggest that nullifications may not be nearly as frequent as many critics of juries suggest. But in the current climate, where allegations of jury nullification seem to be on the rise, and popular press and scholarly commentary on the topic has intensified, the question has taken on added heat and urgency.35 And why not? If nullifications are happening, and more are on the upswing, then Law’s worst nightmare—anarchy—may be at the gates.36

Whether juries should have the right to nullify has been long-debated in scholarly literature, with courts consistently ruling that jurors do not have such a right.37 In realpolitik, however, all agree that juries have the power to nullify, and therein lies the threat.38 If juries use that power and become wildcat operations,39 or all-too-readily toss aside...
their sworn oath to follow the law at a lawless whim, then black-letter law's worst nightmare is made manifest. Yet, what is also made manifest is my first point—that black-letter law can ill-afford to ignore CSJ.

My second point begins with the very term, jury nullification, which masks significant differences among types, blur wing important type distinctions that ought to be kept clear. For example, some juries may nullify because they believe that the law is a bad law, substantively flawed or out of sync with today's values; other juries may nullify because the procedures at trial seem blatantly unfair, amounting to a railroad ing or kangaroo court; while still other juries may nullify on both substantive and procedural grounds. If juries bring in a not guilty verdict, despite the fact that the prosecution has proved all elements of the charge beyond a reasonable doubt, then we can categorize these various types as "total nullifications," the traditional way of portraying nullification. But there is another variant, "partial nullification," where the jury brings in a lesser verdict (i.e., where guilt is mitigated but not eliminated) yet where this lesser verdict does not fit the facts as proved by the prosecution. Perhaps juries see that the legal verdict does not match the defendant's act, intent, and culpability, or see that the punishment does not fit the crime. Without parsing nullification into its types and variants, we cannot understand why jurors are nullifying (if

40. Other researchers do not find this easy discarding of the law in favor of nullification. See Finkel, supra note 1, at 331; Finkel, Prototypes that are Common, supra note 3, at 466-67; Norman J. Finkel, Commonsense Justice and Jury Instructions: Instructive and Reciprocating Connections, Psychol. Pub. Pol'y & L. (forthcoming 2000); Horowitz & Willging, supra note 32, at 174; Horowitz, Judicial Instructions, supra note 34, at 450.

41. See Keith E. Niedermeier et al., Informing Jurors of Their Nullification Power: A Route to a Just Verdict or Judicial Chaos?, 23 LAW & HUM. BEHAV. 331, 348 (1999). In an experiment that tried to create the law's worst nightmare, the researchers found, in four studies that examined juror biases predicated on defendant status, remorse, gender, national origin, penalty severity, and extenuating circumstances, that undisciplined and biased juror judgments were not amplified by nullification instructions, providing little evidence that this invited chaos. See id.

42. See Finkel, supra note 1, at 32-33; Finkel, Prototypes that are Common, supra note 3, at 463.

43. For alleged historical examples of each, see Finkel, supra note 1, at 23-40; see also Green, supra note 32, at 35-64 (describing jury nullification in 14th century England); Valerie P. Hans & Neil Vidmar, Judging the Jury 149-63 (1986) (discussing historical examples of jury nullification).

44. See David P. Bryden & Sonja Lengnick, Rape in the Criminal Justice System, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1256 (1997) (discussing total nullification in the context of rape where the parties knew each other and no aggregating factors were present).

they are). Thus, the Law remains like a statue, blind to CSJ's instructive message.

My third point moves from jury nullification to the jury's comprehension and reconstrual of instructions. This move requires a few steps. First, when most speak about jury nullification, they mean that the jurors, all six or twelve of them, are willfully disregarding the facts, the law, and their oath. But what is the likelihood of that? From social psychological findings regarding conformity and compliance, as opposed to rebelling and pulling the entire group to rebel, that literature predicts that rebelling or defying one's duty would be rare rather than extensive. Second, for the claim of nullification to be sustained, we face that transcendent problem again, of assuming that we know the right and true verdict in order to conclude that the jury's verdict is wrongful. Yet, the assumption rests on the most airy notions—our hunches, speculations, or shared delusions. We can do a bit better in mock jury simulations, for here we can set up the case in such a way that a guilty verdict ought to result; yet even here there are other possibilities to consider.

For one, did the jury get the verdict option they wanted? The nullification claim presupposes that the jury had the correct choice, but chose willfully and wrongly to ignore it. That may not be so. Second, reasonable doubt is a legitimate and sanctioned area for jurors to exercise their discretion, and its definitions not only vary but can be construed differently, such that a leniency bias or a conviction bias may show. And finally, the jury instructions per se may be poorly written, or poorly comprehended, such that the key terms can be construed or re-construed in ways the law did not intend. While many critics of jurors

46. See Finkel, supra note 20, at 11-12.
47. See, e.g., Stanley Milgram, Obedience to Authority 4-6 (1974); Fathali M. Moghaddam, Social Psychology: Exploring Universals Across Cultures 126-27, 239-42 (1998) (discussing a cross-cultural analysis that shows, despite the rhetoric and prototypical portrayal of America's "rugged individualism," we are, as a people, no more non-conformist than many other societies); Solomon E. Asch, Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority, 70 Psychol. Monographs 1 (1956).
49. See Finkel & Sales, Old Roots, supra note 3, at 231.
50. See id.
have highlighted nullification as the problem, the comprehension and reconstrual of the instructions problem is likely to be the bigger bugbear. Yet, for the Law to read the instructive message, it must come to understand the reasons that lie within the message, and not merely condemn those that send the message.

B. Institutional Legitimacy

Sophocles' *Antigone* and Shakespeare's *Measure for Measure*, separated by some two thousand years, both take up the theme of what is likely to happen to the institutional legitimacy of Law, and to the very government that backs it, when the law is perceived to be at odds with a deeper sense of justice. This is far from just a long running literary theme. During this past decade, Supreme Court Justices have been divided over decisions that have cited to the community sentiment position as a reason or justification for the Court’s own decision.

On one side, Justice Scalia has argued for judicial decision-making that is independent of community sentiment and societal harmony concerns. Other justices have taken the other side, believing that those factors ought to be considered for the law to be adhered to, as well as to maintain the Court’s institutional legitimacy. But this characterization is simplistic, for ironically it has been Justice Scalia who has frequently acknowledged the limitations of Supreme Court Justices, who, unlike members of the first and second branches of government, are unelected, and Justice Scalia has delivered his chastisements when Justices act as Platonic Guardians, as a “committee of philosopher-kings,” not appre-

52. *See Phoebe C. Ellsworth, Jury Reform at the End of the Century: Real Agreement, Real Changes, 32 U. Mich. J.L. Reform 213, 220 (1999) (noting that individual prosecutors and judges assert that there is a jury nullification problem).*

53. *Sophocles, Antigone, in II THE COMPLETE GREEK TRAGEDIES 159 (David Grene & Richmond Lattimore eds., 1959). Antigone sought to bury her slain brother, but the King issued a decree forbidding the burial. The law made it a crime, but Antigone deliberately broke the law, and her appeal was to “the gods’ unwritten and unfailing laws,” a higher law. See id. at 174.*

54. *WILLIAM SHAKESPEARE, MEASURE FOR MEASURE (Brian Gibbons ed., 1991) (1623). In this play, Vienna has gone to seed under the permissive rules of Duke Vincentio, with debauchery and corruption rampant. The Duke deliberately departs, and appoints Angelo as his replacement, who wields the law in strict ways, where measure for measure—the unyielding letter of the law—leads not to justice. See id.*


ciating that ""those institutions which the Constitution is supposed to limit' include the Court itself." 57

An activist Court, which makes, rather than interprets, law, runs the risk of losing institutional legitimacy, for it is in danger of exceeding its constitutional authority. 58 Like a tower erected that leans out too far from its foundational base, it may topple. But Justice Blackmun, writing in Georgia v. McCollum, 59 stated that "[p]ublic confidence in the integrity of the criminal justice system is essential for preserving community peace in trials involving race-related crimes," 60 and that allowing exclusion of groups from the jury "'could only undermine ... confidence in it.'" 61 In Justice Blackmun's view, one foundational base for Law rests upon community sentiment, and to erect law unmindful of that base may yield a Tower of Babel, which may topple out of disrespect. In quite different ways, and from different points of view, Justices Scalia and Blackmun are clearly concerned with the institutional legitimacy of the Court. 62

C. When the Court is Committed to Doing a Social Science Analysis

Whereas the nullification, comprehension, and reconstrual of instruction problems may be denied or minimized as but minor flies in the Law's ointment, and whereas the institutional legitimacy problem may be dismissed as no problem at all, it is harder to deny or dismiss CSJ when it is the central subject of the Court's scrutiny, as in Eighth Amendment cases. When the Supreme Court in Weems v. United States 63 held the Eighth Amendment's "cruel and unusual" clause must evolve because it "may acquire [wider] meaning as public opinion becomes enlightened by a humane justice," 64 the path was set toward some assessment of the community sentiment. In Trop v. Dulles, 65 the Court

58. See Maureen Straub Kordesh, "I Will Build My House With Sticks": The Splintering of Property Interests Under the Fifth Amendment May be Hazardous to Private Property, 20 HARV. ENVTL. L. REV. 397, 460 (1996).
60. Id. at 49.
63. 217 U.S. 349 (1910).
64. Id. at 378.
again made it clear that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," and thereby committed the Justices to the role of social scientists, for it is they who must gauge where community sentiment now lies.

But committing Supreme Court Justices to the role of social scientists and committing the Court to a social science task is one thing; specifying how to do it, and how to do it well, is quite another. On the latter points, problematic questions remain. First, there are a number of methodology questions that a social scientist would ask: How does the Court gather such data? What measures (i.e., objective indicia) do they anoint as yardsticks and which do they shun? Is there proper and thoroughgoing consideration given to the limitations of the methods selected? Are the chosen measures comprehensive and valid, broad enough, deep enough, and fine-tuned enough to gauge the very subject matter under question? Then when the task is done, and all is said and done, there remains another question: Can the Court's social science analysis survive social science scrutiny?

When social scientists examine the Supreme Court's performance in recidivist cases, accessory felony-murder death penalty cases, and juvenile death penalty cases, we see bitter and close divisions. However, divisions alone need not be problematic, particularly if the data are equivocal. Yet that is not what we find. Rather, there are repeated and

---

66. Id. at 101.
67. Two objective indicia that appear over and over again are legislative enactment data and jury decision data. See Norman J. Finkel, Prestidigitation, Statistical Magic, and Supreme Court Numerology in Juvenile Death Penalty Cases, 1 PSYCHOL. PUB. POL'Y & L. 612, 614, 620 (1995) [hereinafter Finkel, Prestidigitation].
70. See, e.g., Tison v. Arizona, 481 U.S. 137 (1987) (upholding as constitutional under the Eighth Amendment the accessorial liability rule, which imposes capital punishment on an accessory to felony-murder); Enmund v. Florida, 458 U.S. 782 (1982) (holding the imposition of the death penalty on accessories to felony-murder to be inconsistent with the Eighth Amendment).
71. See, e.g., Stanford v. Kentucky, 492 U.S. 361 (1989) (upholding as constitutional trying minors who commit felonies as adults and sentencing them to death); Thompson v. Oklahoma, 487 U.S. 815 (1988) (holding that the execution of a minor who was tried as an adult was cruel and unusual punishment).
72. See Finkel, Capital Felony-Murder, supra note 68, at 888; Finkel, Prestidigitation, su-
heated disagreements involving which gauges ought to count, with some
gauges being ruled out of bounds arbitrarily, capriciously, and indefen-
sibly, while others are included on political grounds, rather than grounds
of validity. Furthermore, the majority and dissent readings from those
limited gauges reveal unsupportable assumptions, blatant errors, im-
permissible inferences, and flawed conclusions. Moreover, when the
social scientist takes on the same task, but uses more fine-grained and
controlled measures, the readings of CSJ are significantly disparate.
Finally, in the wake of Daubert v. Merrell Dow Pharmaceuticals, Inc. and
Kumho Tire Co. v. Carmichael, and in light of the Court’s concern
about junk science, the Supreme Court’s social science analysis in
these death penalty cases takes on the appearance of a food fight, where
Justices hammer one another in footnotes hurling accusations of presti-
digation, statistical magic, and numerology. In the end, the Supreme
Court’s social science analysis does not withstand social science scrut-
niny.

Given that Eighth Amendment death penalty cases involve the
detail decision, and where the Court delivers a let stand or remand deci-
sion, the stakes alone would push for stricter scrutiny over the process
of gauging CSJ. And lastly, if there is any area where social scientists
could legitimately assist in this social science task, it is here.

73. See Finkel, Prestidigitation, supra note 67, at 613; Norman J. Finkel & Stefanie F.
Smith, Principals and Accessories in Capital Felony-Murder: The Proportionality Principle
and Accessories].

74. See generally Finkel, Prestidigitation, supra note 67, at 615-18 (discussing the conflicting
majority and dissenting opinions of the Supreme Court Justices and questioning the possible
subjective and personal consciences of the Justices).

75. See, e.g., Norman J. Finkel, Socioscientific Evidence and Supreme Court Numerology:
When Justices Attempt Social Science, 11 BEHAV. SCI. & L. 76 (1993); Norman J. Finkel &
Kevin B. Duff, Felony-Murder and Community Sentiment: Testing the Supreme Court’s Asser-
tions, 15 LAW & HUM. BEHAV. 405, 420-21, 427 (1991) [hereinafter Finkel & Duff, Testing the
Supreme Court’s Assertions]; Finkel & Smith, Principals and Accessories, supra note 73, at 135,
143-44; Norman J. Finkel et al., Killing Kids: The Juvenile Death Penalty and Community Senti-
ment, 12 BEHAV. SCI. & L. 5, 8, 19 (1994) [hereinafter Finkel et al., Juvenile Death Penalty];
Norman J. Finkel et al., Recidivism, Proportionality, and Individualized Punishment, 39 AM.
BEHAV. SCI. 474, 481-82 (1996) [hereinafter Finkel et al., Recidivism, Proportionality].

76. 509 U.S. 579 (1993) (determining the standard for admitting expert scientific testimony
as that which is generally accepted among the scientific community as relevant and reliable).

77. 526 U.S. 137 (1999) (expanding Daubert’s relevant and reliable standard to all expert
testimony).

78. See Finkel, Prestidigitation, supra note 67, at 638-39.

III. COMMONSENSE JUSTICE AND CULPABILITY

A. Sailing a Subjective Course, With an Objective Ballast

In Professor Fletcher's work, he states that criminal law has long been divided on the question of whether objectivity (the objective act, *actus reus*) or subjectivity (the subjective intent, *mens rea*) should be its dominant basis for judging culpability, though he notes that this conflict is typically "camouflaged by... legal maxims that create an image of unity in criminal theory." One legal maxim that he refers to is that "proof of both *actus reus* and *mens rea* is required." But does this conjoining euphemism unite the divide and make the division moot, or does it mask a weighty substantive division beneath the pap of simplicity, leaving the divide open? Texts on criminal law suggest that the division has not healed, much less receded into history, for these texts typically feature real or hypothetical examples of "impossible act" cases, where, for example, a defendant's intent to kill is clear, but where "no criminal act" occurs and no harm results. If the conjoining euphemism is the arbiter, then these cases should necessarily lead to a not guilty verdict under black-letter law.

But such a not guilty result is not the case for CSJ. In one experiment, participants received five impossible act cases and had to render a verdict on the charge of attempted murder, and had to give their

---

81. *Id.* at 119.
82. *Id.*
83. *Id.; see, e.g., Joshua Dressler, Understanding Criminal Law 368-376 (2d ed. 1995) (discussing the defense of impossibility and mentioning several examples).*
84. For one example, take a man who attempts to kill his wife, drives her to a secluded spot, puts a gun to her head, and fires, only then realizing that he forgot the bullets. Does firing an unloaded pistol constitute "attempted murder"? *Cf. id.* at 368-69 (discussing other impossible act involving attempted murder).
86. *See id.* at 597-98. The cases were called "Tree stump," "Dead body," "No bullets," "Sugar cubes," and "Effigy." *See id.* In *Tree stump*, a man takes aim and fires a rifle at what he thinks is a person, only to find out that he perceived wrongly, hitting a tree stump. *See id.* at 597. In *Dead body*, a person tries to kill a neighbor by firing shots through a window at the neighbor while the latter apparently slept in bed, only we learn that the neighbor had died earlier in his sleep. *See id.* at 598. In *No bullets*, a husband attempts to kill his wife by shooting her but forgets to put bullets into the gun. *See id.* at 598. In *Sugar cubes*, a wife tries to kill her husband by dropping arsenic-laced sugar cubes in his morning tea, only she mistakenly drops ordinary sugar cubes in. *See id.* at 598. And in *Effigy*, someone tries to kill another by sticking pins in an effigy doll. *See id.* at 597-98.
reasons for their decision. In four of the five cases, a guilty verdict is the more frequent one, and in three of those four cases, it is rendered almost all the time. Moreover, in those three cases (Dead body, No bullets, and Sugar cubes), the reasons participants’ offered overwhelmingly stressed subjectivity—the clear intent to kill. They saw these cases as involving fortuity (Dead body) or defendant stupidity (No bullets and Sugar cubes), and their position was that these defendants should not profit from fortuity or their mistakes when their intent (premeditation) was to take a life.

If we stop at just this result, we see a clear and wide disparity between black-letter law’s and CSJ’s culpability analysis. Yet CSJ’s almost exclusive reliance on subjectivity—seeming to begin and end its analysis with intent alone—might bolster those critics who claim that jurors are prone to plunge into subjectivity, ignoring objectivity entirely. However, this criticism can be rebutted by the results from the other two impossible act cases (Tree stump, Effigy), and by looking at mistaken act cases.

First, in Tree stump, where the verdicts roughly divide, although this defendant also makes a mistake (a mistake in perception), participants cite the objective factor that no actual danger exists to any person. Had that defendant realized his mistake before his attempt, no person was in immediate danger. To the contrary, had the defendants in No bullets and Sugar cubes realized their mistakes before their attempts, and then loaded the pistol or dropped the arsenic-laced sugar cubes, a death would surely have resulted; and had fortuity not intervened in Dead body, such that the sleeping victim was still alive, a

87. See id. at 598. In the five cases, the guilty verdicts percentages for Effigy, Tree stump, Dead body, No bullets, and Sugar cubes were 17%, 53%, 91%, 100%, and 100%, respectively, which were far removed from the 0% predicted by black-letter law’s conjoining euphemism. See id. at 599-600.
88. See id. at 599.
89. See id.
90. See id. at 660.
91. See Finkel, supra note 20, at 15-16; see also Finkel & Sales, Old Roots, supra note 3, at 227 (comparing and contrasting black-letter law with CSJ).
92. See Norman J. Finkel & Jennifer L. Groscup, When Mistakes Happen: Commonsense Rules of Culpability, 3 PSYCHOL. PUB. POL’Y & L. 65, 119-22 (1997) [hereinafter Finkel & Groscup, When Mistakes Happen]; see also Finkel, supra note 20, at 60 (stating that CSJ “seems to take a more subjective perspective”).
93. See Finkel et al., supra note 85, at 599.
94. See id. at 600.
95. See id.
96. See id.
death would have resulted as well. Objectivity also plays the determinative role in Effigy, for while there is again a mistake being made by the defendant, according to our participants, they see this as a mistake in causal reasoning, where there is no sufficient cause: objectively, they do not see sticking pins in a doll as a credible, realistic attempted murder.

We then went on to mistake cases proper. We began with a self-defense case, where the objective facts and the defendant's fears from those facts led him to believe that he was facing a loaded gun and immediate death, whereupon he fires his gun and kills the assailant, and then claims self-defense. For this beginning case, 63% of the participants find him not guilty by reason of self-defense. But then we created four variations of this case, all involving a mistake (be it in perception, reasoning, or judgment), where the mistakes go from reasonable to dubious to unreasonable to delusional. Our reasoning was this: If subjectivity is the be all and end all of ordinary citizens' culpability analyses, then the only thing that should matter is what the defendant believed at the moment he acted, regardless of its grounding (or lack of) in objective reality. But this is not what we found. As the "reasonableness" of the mistake begins to wane, guilty verdicts dramatically rise, reaching 96% and 100% in unreasonable and delusional variations.

Our findings are supported by a policy capturing experiment by Erich Greene and John Darley, who tested seventeen scenarios which featured a planned murder that succeeded, a number of attempted murders that failed for a variety of reasons (e.g., fortuity, incompetence, outside interference), and versions where deaths resulted by accident or other factors. This complex and sophisticated design allowed the researchers to parse and evaluate necessary and sufficient causes, CSJ's use of those causes in comparison to the Model Penal Code's position, and how CSJ and the law evaluate causality when there was an apparent

97. See id.
98. See id. at 601.
99. See id.
100. See id. at 603.
101. See id. at 605.
102. See id. at 603-04.
103. See id. at 604.
104. See id. at 605.
106. See id. at 433, 449-51.
break in the chain.\textsuperscript{107} They found, as we did, that "actions that are normally sufficient to bring about the criminal result deserve higher punishments than mere attempts,"\textsuperscript{108} and they conclude that the Model Penal Code's position, and a code conforming to the community's phenomenological standards, would differ.\textsuperscript{109} Moreover, citizens view liability "in a strikingly continuous manner," where the notion of "contributions" (in their theory of causation), captures something more than "necessity" does in a legal analysis.\textsuperscript{110} Although Greene and Darley note that this lay theory of causation "is not easy to specify," they conclude that "it has components of sturdy rationality."\textsuperscript{111}

When taken together, the more consistent interpretation of these findings is that CSJ starts with subjectivity, but it does not lose its way or plunge headlong into dark subjective waters, for it balances subjectivity with objectivity in sensible ways. Moreover, CSJ makes more distinctions and sees more shading than legal dichotomies provide. And finally, the CSJ theories of causation and culpability appear rational, and highly nuanced.

B. A Culpability Story of Complexities and Interactions . . .

In another experiment, we began by opening the mistake net wide, picking twelve different mistake cases, with four variants per case.\textsuperscript{112} In our low harm (\textit{de minimus}) cases, the intent of the defendant ("D") was the participants' starting and main point for their eventual culpability

\hspace{1cm} \textsuperscript{107} See id. at 445-48.
\hspace{1cm} \textsuperscript{108} Id. at 445.
\hspace{1cm} \textsuperscript{109} See id. at 446.
\hspace{1cm} Thus, in a code that conformed to community standards, actions that were either necessary or sufficient to bring about a prohibited harm would be criminalized as that harm, rather than as an attempt. This would differ from the stance of the current Model Penal Code, which criminalizes a sufficient case as only attempt; the factual cause standard would be importantly altered.
\hspace{1cm} Id.
\hspace{1cm} \textsuperscript{110} See id.
\hspace{1cm} \textsuperscript{111} Id. at 447.
\hspace{1cm} \textsuperscript{112} See Finkel & Groscup, \textit{When Mistakes Happen}, supra note 92, at 68.
\hspace{1cm} We sample mistake cases that remain in the ordinary interpersonal or social arena and those that end up in the legal arena. We sample cases that involve serious harms, mid-level harms, and those involving small or even trivial harms (i.e., \textit{de minimus} cases). We sample cases where the actor's intent ranges from the most blameworthy premeditation, to reckless disregard, to negligence, to even lower. . . . We test different type[s] of mistakes (i.e., mistake of fact and mistake of law), and within the mistake of fact realm, types of mistakes, and how reasonable the mistake was.
\hspace{1cm} Id.
judgments. But D's culpable intent was mitigated, generally, by D's mistake (in variations where a mistake occurs), and the degree of mitigation varied widely by "how believable or reasonable the mistake [was] and [by] whether reasonable effort was made (short of negligence) despite the mistake."114

Still more complexities emerged: further mitigation was granted to D when the other person ("O") (e.g., the victim) was found at fault, thus, O's contributory negligence lowers D's culpability.115 We also found a large difference between mistake of fact and mistake of law cases (the former were judged more sympathetically), and between mistake of law and willfully disregarding the law (the latter were judged much more harshly).116 In the willfully disregarding variations, participants were harsh with D, even when they personally believed that the Law was a poor or archaic one; thus, no easy nullifications resulted.117 In the mistake of fact variations, mitigating benefits occurred only when the D's claim seemed reasonable and defensible.118 Finally, and perhaps surprisingly, the variable of harm was not a significant factor in most of these cases.119

This complex pattern continued at the mid-level harm cases, with a few additional complexities.120 Again, harm was not the major factor in their culpability analyses; rather, it remained intent.121 We also tested a case which breaks the causal chain. It was called Bartender, where the latter served an underage patron who then got into an auto accident (where there was no mild or severe injury to another), and the bartender was the defendant.122 When participants see the causal chain broken—by the actions of the underage one—they mitigate.123 If the bartender willfully disregards the law (i.e., knows the patron is underage but serves anyway), the participants get much harsher.124 If the bartender makes a reasonable attempt to check the patron's identification but is fooled by a
phony identification, they mitigate, as a reasonable attempt has been made.\textsuperscript{125}

At the highest level of harm, intent is again primary.\textsuperscript{126} But here, at the upper reaches, where a defendant intends to kill, for example, his mistakes do not mitigate his culpability, "even when his mistake produces less harm, no harm, or creates an impossible act situation. Here, then, is the limiting condition of mitigation for mistake of fact situations. Said another way, once you premeditate, you do not benefit through mitigation for your mistakes."\textsuperscript{127} Yet we still find that the O's culpability will interact with D's intent, lowering D's culpability.\textsuperscript{128} In general, CSJ's culpability judgments are finely graded and attuned to a complex array of interacting factors, a finding that is replicated in other empirical work.\textsuperscript{129}

\textbf{C. Where Simple Objective Rules Do Not Hold: CSJ's Manslaughter Story}

In the twentieth century, black-letter law's position on manslaughter has swung dramatically from its centuries-old roots in objectivity—to subjectivity—the latter being most evident in the Model Penal Code's \textit{extreme emotional disturbance} ("EED") test.\textsuperscript{130} But if we begin with Lord Coke's early formulation of manslaughter\textsuperscript{131} and follow its common-law evolution over the next two centuries, we see the accretion of objective rules, creating not only a Hydra-headed beast, but one where the parts were eventually bumping into one another in inconsistent and contradictory ways.

The law's objective theory is, I submit,

fundamentally a \textit{psychological} theory of human nature. [It has to be.]

This psychological theory involves a complex story of how \textit{provocations} (their type and intensity) relate to \textit{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 presentation is oversimplified, for the law’s psychological theory goes deeper still: it also involves time (whether provocations occur in objective time, and then fade and are no more; or whether they linger, fester, and reactivate in psychological, subjective time), situational context, and the history of the actor, as these factors must necessarily be considered when we theorize about blood cooling or emotions roiling. This objective black-letter law theory turns out to be contradicted at many points by academic psychology’s facts and theories relating to provocations, emotions, thinking, and control, and contradicted by how CSJ decides such cases. In short, we again see CSJ considering and weighing a greater set of factors, and using a complex calculus to do so, rather than resorting to simple rules of thumb. Some provocations will mitigate, some will not, but the list is neither fixed nor veridical with the Law’s designations. Some provocations produce emotions that are sympathetically regarded, while others produce emotions that are regarded critically. Time in the psychological sense assumes far greater importance than events occurring in objective time; thus, brooding and rekindling cases get greater mitigation than the law would allow. But when D puts himself in a dangerous situation—and should have known this (i.e., another type of culpability)—then little mitigation will result. But if O is at fault, this will mitigate D’s culpability.  

133. Id. at 744.
134. See id.
135. See id. at 745. We tested two landmark cases, one British, Director of Public Prosecutions v. Bedder, 1 W.L.R. 1119 (England 1959), and one American, State v. Gounagais, 153 P. 9 (Wash. 1915), by creating multiple versions of each, manipulating such variables as provocation and type of provocation, type of emotion felt, time (between provocation and act), brooding vs. rekindling vs. frequent rekindling, and historical background of the actor. See Finkel, supra note 132, at 779-81.
137. See Finkel, supra note 132, at 781, 784; Finkel, supra note 20, at 53-54.
138. See Finkel, supra note 132, at 785, 789.
139. See Finkel & Groscup, When Mistakes Happen, supra note 92, at 89-90.
CSJ's culpability analysis of manslaughter, like in other areas, again mixes subjective and objective factors. When we look at black-letter law's swing to the subjective (in the EED) and compare it to what CSJ does, CSJ regards the EED position as far too generous and indiscriminate. The EED's psychological theory mitigates far more than CSJ, because it fails to consider all the factors CSJ takes account of, as well as the interaction of those factors.

D. Widening Culpability, and Proportionately Grading It

There are research findings from other criminal law arenas that support the above points. We can see the subjective vantage point being taken in cases where a battered woman kills and pleads self-defense and where mock jurors subjectively reconstrue key prerequisites of that defense. In insanity defense research, ordinary citizens invoke more constructs for insanity, the law, different types of culpability, and gradations of culpability, than the law does. And in certain outlier cases involving euthanasia or infanticide, we frequently see a construing of the matter far differently than the law might want.

The final subtopic focuses on two long-disputed doctrines in black-letter law—felony-murder and accessorial liability. The felony-murder rule substitutes or transforms the intent to commit the underlying felony into the intent to commit murder, thereby turning a non-

140. See Finkel, Prototypes that are Common, supra note 3, at 467-68.
141. See Finkel, supra note 1, at 31.
142. See id.
144. See id. They widen serious threat, equal force, imminence, and the escape/retreat requisites in subjective ways. See id.
146. See, e.g., Finkel et al., Competency, and Other Constructs, in Right to Die Cases, 11 BEHAV. SCIENCES & L. 135, 135 (1993); Norman J. Finkel et al., Right to Die, Euthanasia, and Community Sentiment: Crossing the Public/Private Boundary, 17 LAW & HUM. BEHAV. 487, 487 (1993) [hereinafter Finkel et al., Right to Die].
147. See, e.g., Finkel et al., Commonsense Judgments of Infanticide: Murder, Manslaughter, Madness, or Miscellaneous?, PSYCHOL. PUB. POL'Y & L. (forthcoming Sept. 2000).
148. See Finkel, Capital Felony-Murder, supra note 68, at 819, 820 n.9.
premeditated killing into first degree murder. The accessorial liability rule makes all the accessories as equally guilty as the triggerman. Empirical tests demonstrate that CSJ rejects both rules. To illustrate, time and again, across numerous variations tested using hypothetical variants and those drawn from Supreme Court cases, participants reject the equalism proposition of accessorial liability; instead, they grade each defendant’s culpability based on that individual’s intent and degree of participation in the crime. Furthermore, participants see a large and significant difference between the felony-murder triggerman and the premeditated murder triggerman. Put another way, for CSJ, significant differences are registered rather than blurred, and proportional culpability judgments reign, rather than a one size fits all rule.

Perhaps the most dramatic evidence on this point comes from an experiment run with the youngest of participants, children in kindergarten. We created a non-frightening version of felony-murder and accessorial liability by paring them down to their essential principles in our scenarios. The basic script was this: four children decide to do something that they know is wrong (e.g., steal a copy of an upcoming math test), and then, during the commission of this crime, the ringleader (triggerman) does something worse (sees the teacher’s purse, and takes money from it, unbeknownst to the accessories), and thus a further harm (crime) results. The children participants, even those in kindergarten, make their culpability and punishment decisions proportionately.

IV. COMMONSENSE JUSTICE AND PUNISHMENT

In examining CSJ and the Law, particularly where evidence of disparities is sought, it makes good sense to go beyond culpability to punishment. Of the two, culpability assessment is the more familiar task for jurors, whereas punishment judgments, particularly when we exclude civil law cases (e.g., damage awards) and focus on those within criminal

149. See id. at 820 n.9.
150. See id.
151. See Finkel & Duff, Testing the Supreme Court’s Assertions, supra note 75, at 410-21.
152. See Finkel, Capital Felony-Murder, supra note 68, at 825, 876, 887.
153. See id.
154. See id. at 889.
156. See id.
157. See id. at 234-35.
158. See id. at 236-37, 239.
law, are seldom within the province of the jury, although the infrequently brought death penalty cases are the exceptions.

This familiar/unfamiliar difference is augmented by another factor: culpability considerations are far more circumscribed, specified, and defined (in both substance and procedure) than sentencing factors and guidelines. For example, the elements of the charge (i.e., the actus reus and mens rea) are specified, and the judge's instructions will define those specific elements, along with burden and standard of proof, reasonable doubt, and the rule for deciding (a unanimous decision versus something else). Moreover, the jury's culpability bandwidth is largely circumscribed to those moment of the act facts, such that past history (e.g., a defendant's prior crimes), ancillary harms (e.g., victim impact testimony), and future predictions (e.g., dangerousness) are likely to be excluded from consideration, or sharply limited. And finally, the judge will give the jury a verdict form, where the legal choices are laid out (e.g., murder versus manslaughter versus not guilty), and the key differentiations detailed in patterned instructions.

This is not how it works with sentencing considerations, and the death penalty is illustrative. The bandwidth under consideration now widens considerably. For example, highly emotional victim impact testimony may be heard, which widens the notion of harm the defendant's actions produced. Also, background facts from the defendant's past are likely to be heard, which would not be heard during the culpability phase. Questionable expert testimony may also be heard, which may predict future violence with far more certainty than the expert's science supports. But even as aggravating and mitigating factors come into play, clear definitions of what aggravating and mitigating actually mean are often missing or confusing. And even when the statutorily sanctioned aggravating factors are listed, imprecision and vagueness can lead to odd comprehension, whereas mitigating factors

159. See, e.g., Finkel & Smith, Principals and Accessories, supra note 73, at 143.
160. See BLACK'S LAW DICTIONARY 856 (6th ed. 1990) (defining jury instruction); FINKEL, supra note 1, at 76 (discussing actus reus and mens rea).
161. See generally FINKEL, supra note 1, at 319 (explaining how nullifying jurors tend to weigh more factors than the law provides).
162. See id. at 77-78.
164. See FINKEL, supra note 1, at 181-82.
165. See id. at 182.
166. See id.
167. See id. at 176-77 (examining a Georgia statute's 10 factor balancing test approach).
168. See id. at 177.
need not even be specified by statute. Moreover, the rule for weighing and balancing these factors, under these so-called guided discretionary schemes, actually provides little guidance. Unlike a judge, who makes sentencing determinations all the time and has the actual book of sentencing guidelines at hand (and an appellate court over his or her shoulder to question downward departures), the jury is less well armed, given little guidance, has neither familiarity nor stare decisis to draw on, and gets no appellate correction for the next time, as there is no next time.

From each of these factors, and when all are taken together, we would predict greater variance in the sentencing task. Yet variance, as a measure, can be most revealing, for from that variance we might find that CSJ’s sentencing departures (from what black-letter law might do or wish) to be even greater than in its culpability assessments, revealing some nuances that the latter do not.

Finally, and methodologically, in the sentencing situation where a qualitative death versus life decision is not made, but where quantitative years in prison is the typical dependent measure, this may reveal disparities that the qualitative culpability measure (guilty or not guilty) does not. To illustrate, three defendants, in three different cases, may all be found guilty of second degree murder, and thus the culpability judgments appear the same; but if one was a heat of passion case, another a mugging/shooting case, and the third an infanticide case, the sentences given may be significantly different, despite verdict agreement. To the researcher, this quantitative measure of sentencing length, particularly when we can examine it where the qualitative culpability measure is held constant (i.e., defendants are guilty of the same crime), may reveal differences that the qualitative verdict measure missed.

A. Qualitative Sentencing—The Life or Death Decision

In experimental tests of accessory felony-murder, we compared accessories labeled Getaway Driver ("A"), Lookout ("B"), and Sidekick ("C"), who differed from one another in their actions at the crime scene, their physical proximity to the death and thus their ability to intervene,

169. See, e.g., Lockett v. Ohio, 438 U.S. 586, 608 (1978); see also Gillers, supra note 68, at 23 (posing the question of whether aggravating factors can distinguish one murder from another).
170. For a discussion of these problems, see Finkel, supra note 1, at 177.
171. See Hastie & Viscusi, supra note 19, at 917; see also Finkel, supra note 1, at 323-24 (observing that while stare decisis plays a significant role for the law, it carries no significance for jurors).
172. See infra notes 200-12 and accompanying text.
their culpable intentions, and who differed on these dimensions from the Triggerman ("D").\textsuperscript{173} Our best comparative measure was the percentage of life or death decisions that mock jurors\textsuperscript{174} rendered—for only those defendants who were found guilty of felony-murder and were thus eligible for the death sentence—as this holds culpability constant.\textsuperscript{175} Over all the case variations we tested, we found that the percentage of death sentences for the Getaway Driver (A), Lookout (B), Sidekick (C), and Triggerman (D) were 0%, 15.4%, 12.5%, and 20.0% respectively, a highly significant difference.\textsuperscript{176} Moreover, when we compared the felony-murder triggerman to a case where the triggerman premeditates the murder unbeknownst to his felony-murder accomplices, the death percentage jumps to 66.7% for this premeditating-Triggerman, another significant differentiation.\textsuperscript{177} This pattern of proportional sentencing to perceived culpability recurs over many case variations, including the rationale taken by the Supreme Court in the \textit{Tison}\textsuperscript{178} case.

We also tested in a different way, using what was called the Ninth Justice paradigm.\textsuperscript{179} Here, the participants play the part of a Supreme Court Justice, having to make a “let stand” or “reverse and remand” decision on each of the defendants (A, B, C, and D), all of whom had been given the death sentence, and where the other justices were divided 4-4.\textsuperscript{180} This way of testing might pull for more let stand decisions, as participants know that a jury has already sentenced them to death. Despite this potential pull or biasing effect, the reverse and remand percentages were 97% (A), 83% (B), 69% (C), and 53% (D, who is a felony-murder triggerman) respectively.\textsuperscript{181}

\begin{itemize}
\item \textsuperscript{173} See Finkel & Duff, Testing the Supreme Court’s Assertions, supra note 75, at 409-10, 417.
\item \textsuperscript{174} See id. at 415, 417 n.7. All the participants were “death qualified” ("DQ") which was defined as “those [jurors] who were willing to consider voting to impose the death penalty in some cases, were not nullifiers, had attitudes that would not substantially impair their abilities, and would not automatically vote for the death penalty.” See Finkel & Smith, Principals and Accessories, supra note 73, at 136 n.6.
\item \textsuperscript{175} See Finkel & Duff, Testing the Supreme Court’s Assertions, supra note 75, at 417.
\item \textsuperscript{176} See id.
\item \textsuperscript{177} See id.
\item \textsuperscript{178} See Tison v. Arizona, 481 U.S. 137 (1987). In \textit{Tison}, the Court reviewed a death sentence given to three brothers convicted of felony-murder. See id. at 138-39. Although the brothers had “no intent to kill,” the Court determined that the requisite “intent to kill” necessary to support a death sentence under its prior holding in \textit{Enmund v. Florida}, 458 U.S. 782 (1982), included “participation in a violent felony under circumstances likely to result in the loss of innocent human life . . . even absent an ‘intent to kill.’” Id. at 154.
\item \textsuperscript{179} See Finkel & Duff, Testing the Supreme Court’s Assertions, supra note 75, at 410.
\item \textsuperscript{180} See id.
\item \textsuperscript{181} See id. at 418.
\end{itemize}
Finally, we asked these Ninth Justices to give their reasons for their decisions and we cluster analyzed them. For those who reached a reverse and remand decision, the three dominant reasons that emerged were: felony-murder per se is disproportionate for minor accessories; the death penalty is disproportionate for felony-murder; and the defendant's at issue lacked the intent needed for death.  

Four points emerge. First, the sentencing results show even wider departures from accessorial liability's and felony-murder's equalism proposition, as these sentencing departures are found after all defendants were found guilty of the same offense. Second, the disparities among these defendants were consistent—and proportional—across differing methods of testing the proposition (i.e., give a life or death sentence, or make a let stand versus reverse and remand decision, or examining reasons for the decision). Third, their reasons were not off-base. And fourth, within the legal literature, we find eminent judges and justices making similar points.

As stated above, these findings recur, where sentencing measures show even greater spread than culpability measures. This was also the case in an experiment cited earlier, using kindergarten, third grade, and fifth grade participants. Giving these kids free reign to set the punishments (e.g., grounding, no television, no visits from friends, no telephone, physical punishment) for the four defendants, they did so proportionately.

When we examine data on the juvenile death penalty, comparing different cases, comparing juveniles and adults of different ages, and comparing types of murderers, where the participants either render a sentence or make the let stand versus reverse and remand decision (and

182. See id. at 419-20.
183. See id. at 417.
184. See id. at 427.
185. These general findings of fine-grained discriminations, gradations of liability and punishment judgments, and rational reasons for them, were also found by Greene & Darley, supra note 105, at 445-50.
186. To cite but two examples, the nineteenth century Victorian judge, Sir James Fitzjames Stephen, held that the felony-murder doctrine had credence gained only from repetition, and he then went on to call the doctrine "astonishing" and "monstrous," with "little or no authority," see 3 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 38, 57, 65, 75 (William S. Hein & Co. ed.) (1883), while Justice Brennan, in Tison v. Arizona, 481 U.S. 137, 159 (1987), called it "a living fossil." Id.
187. See Finkel, supra note 155, at 239 tbl.4.
188. See id. at 236, 239. We found, as an arguable analogy to "death," that "no Nintendo" seemed closest to the death sentence and that this most severe penalty was typically restricted to the ringleader. See id. at 236.
give their reasons), discriminations and proportionality again recur.\(^9\)
We first compared three cases that the Supreme Court has decided: the
cases of a fifteen-year-old (Thompson v. Oklahoma),\(^9\) sixteen-year-old
(Wilkins v. Missouri),\(^9\) and seventeen-year-old (Stanford v. Ken-
tucky).\(^9\) The Court's comparisons were focused exclusively on the age
factor,\(^3\) but we found a case factor (i.e., differences in perceived hei-
nousness among the cases), that interacted with age, and this unexam-
ined factor by the Court may have confounded its read of their objective
indicia.\(^4\) Using our experimentally controlled method, where we could
test for the case effect and hold the case effect constant across the ages
of defendants.\(^4\) The cases produced significantly different death rate
percentages (Stanford = 22%, Thompson = 43%, and Wilkins = 57%).\(^4\)
The age effect was also significant, but not in the way the Court called it
in Stanford.\(^3\) And when we tested a principal versus accessory versus
felony-murder accessory, the latter's death rate was significantly lower
than the other two, and this type of murderer variable also interacted
with age.\(^3\) And once again, the participants' reasons for their decisions,
be it let stand or reverse and remand, were on point and consistent with
those offered by justices.\(^3\)

\section{Quantitative Sentencing in Recidivist Cases}

Politicians have been "rushing to enact harsher crime bills wherein
sentences grow steeper, higher minimum sentences are made manda-
tory, and the death sentence is applied in more and more cases."\(^2\) This
"steeper-firmer-deadlier"\(^2\) approach, as in "third strike" legislation, is
premised on the following sort of contention: the habitual offender, this
recidivist, is clearly not learning his or her lesson, for despite all the

\begin{quote}
189. See Finkel et al., Juvenile Death Penalty, supra note 75, at 5.
191. This case was condensed with Stanford v. Kentucky, 492 U.S. 361, 366 (1989).
192. See id. at 365.
193. See Finkel et al., Juvenile Death Penalty, supra note 75, at 12.
194. See id.
195. In our first experiment, we tested the juvenile ages of 15, 16, and 17, and the adult ages
of 18 and 25; in the second experiment, we added ages 13 and 14 to the above. See id. at 12-14.
196. See id. at 13.
Death Penalty, supra note 75, at 13.
198. See Finkel et al., Juvenile Death Penalty, supra note 75, at 15.
199. See id. at 18-19.
200. Finkel et al., Recidivism, Proportionalism, supra note 75, at 474.
201. Id.
\end{quote}
previous proportional punishments that have been administered, the criminal behavior continues; this seemingly unrepentant criminality calls for escalating, disproportionate, even exponentially-increasing punishment, now.\(^{202}\)

In *Rummel v. Estelle*\(^{203}\) and *Solem v. Helm*,\(^{204}\) the Supreme Court, in two five-to-four decisions that went in opposite directions, spoke to these exponential-like punishments, as to whether they were cruel and unusual. These sharply divided Court decisions are *prima facie* indications of doubt. The empirical question, set in the terms of experimental methods, was what would CSJ do when it came to sentencing?

We created two roughly parallel cases to *Solem* and *Rummel*, a no-account check case and a shop lifting case.\(^{205}\) In condition one, these were their first crimes, with no priors, and participants were asked to set a sentence, and they were given no sentencing guideline (1N—1 crime, no anchor).\(^{206}\) In the next variations, the six priors were added, making this their seventh crime.\(^{207}\) Condition two (7N—7 crimes, no anchor) tests the recidivist effect, which when compared to condition one and condition three (7A—7 crimes, anchor) tests whether a guideline exerts an effect, and how people use the anchor.\(^{208}\) For example, if an anchor of five years is given for the no-accounting checking case, will participants just give five years as the sentence, even though this is the seventh offense? Said another way, will they discount the priors entirely? Or will they count the priors? And if they count the priors, do they perform some additive, multiplicative, or exponential math, escalating the punishments dramatically?

\(^{202}\) See id. at 478.

\(^{203}\) 445 U.S. 263 (1980). Rummel’s third crime involved obtaining $120.75 by false pretenses, while his first two offenses involved fraudulent use of a credit card to obtain $80.00 worth of goods and services, and passing a forged check for $28.36. See id. at 265-66. He was convicted under Texas’ recidivist statute, and was sentenced to life imprisonment, though Rummel had the prospect of parole. See id. at 266-67. The Supreme Court upheld the sentence. See id. at 285.

\(^{204}\) 463 U.S. 277 (1983). Jerry Buckley Helm wrote a check for $100.00 on a nonexistent account. See id. at 281. He had six prior nonviolent felony convictions, three for third-degree burglary, one for obtaining money under false pretenses, one for grand larceny, and one for third-offense driving while intoxicated. See id. at 279-80. Tried under South Dakota’s recidivist statute, he was found guilty and sentenced to life imprisonment without the possibility of parole. See id. at 281-82. The Supreme Court found that this sentence was violative of the Eighth Amendment’s bar on disproportionate punishment. See id. at 303.

\(^{205}\) Finkel et al., *Recidivism, Proportionalism*, supra note 75, at 477-78.

\(^{206}\) See id. A guideline, such as the typical sentence range for the crime, might serve to anchor or influence their sentences. We wanted some case variations to test “no anchor” vs. “anchor.” See id. at 478.

\(^{207}\) See id.

\(^{208}\) See id.
Staying with the Solem case, the results for conditions 1N, 7N, and 7A were 10.4 months, 86 months, and 143 months, respectively—all of which are significantly distant from life imprisonment without the possibility of parole.\textsuperscript{209} The differences were even greater in our case that paralleled Rummel,\textsuperscript{210} even though we added four more priors to that case: the sentences under the 1N, 7N, and 7A conditions were approximately 75\% lower.\textsuperscript{211} Clearly, CSJ uses the priors in its calculations and it uses the anchor information when it is given, but nothing resembling the new exponential math results.\textsuperscript{212} Thus, where the Supreme Court was clearly divided in these cases, CSJ was not.

V. A SUMMARY JUDGMENT

Sometimes disparities occur right from the beginning, even before culpability and punishment assessments are undertaken. This was most evident in some of our right to die and euthanasia cases, where a minority of participants viewed these cases as "no[n] legal matter[s] at all."\textsuperscript{213} In the way they framed the case, it fell into a privacy zone, into which the Law should not enter; from such a framing, there was a fundamental disagreement over its status as a legal case right from the outset.\textsuperscript{214} This phenomenon also occurred in certain insanity case variations tested, where a minority of participants viewed the matter outside the parameters of the law; they saw it as a tragic accident, not as a crime requiring adjudication.\textsuperscript{215} If jurors have a question (e.g., "Why is this case being brought?"), which they have already transformed into a conclusion ("This case ought not to be brought!"), then the odds of an apparent wrongful verdict or an outright nullification rise appreciably.

But now let us assume that the Law and CSJ both frame the case as a matter for the Law and one in which a legal assessment is necessary. In doing an assessment, the Law and CSJ generally\textsuperscript{216} look to certain

\begin{itemize}
\item \textsuperscript{209} See id. at 480.
\item \textsuperscript{210} See id.
\item \textsuperscript{211} See id.
\item \textsuperscript{212} See id. at 481.
\item \textsuperscript{213} Finkel et al., Right to Die, supra note 146, at 502 (emphasis omitted).
\item \textsuperscript{214} See id.
\item \textsuperscript{215} See Finkel, A Comparison of Verdict Schemas, supra note 145, at 545. This phenomenon occurred when a female defendant, during an epileptic seizure, shot and killed the victim with a pistol. See id. at 541-42.
\item \textsuperscript{216} On the Law's side, there are exceptions to this rule. For "strict liability" offenses, it is the act, and not the intent, that matters, yet as Hart notes, these offenses are "generally viewed with great odium." H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 20 (1968). This sort of exception has also been found by many legal analysts of the fel-
\end{itemize}
factors, which can be dichotomized as either subjective or objective. In culpability determinations, the Law endorses a rule—that the subjective factor (mens rea) and the objective factor (actus reus) must conjoin—and the research findings reviewed in Part III reveal that CSJ generally endorses that rule. In punishment determinations, the Law endorses another rule—that more factors may and ought to be taken into consideration—and again, as the research findings reviewed in Part IV show, CSJ generally endorses that rule as well. Thus, these broadly-agreed-to-rules provide common coordinates for both the Law and CSJ, as each surveys culpability and punishing ground. But even though both begin with common coordinates, the ground we surveyed in Parts III and IV revealed that their respective analyses end in frequent disparities, where “different rules” reign for CSJ, a process and outcome that poses a significant threat to Law’s Empire.

A. Rules of Law, “Ruleless Law,” or Rhyme and Reason Beneath the Oxymoron?

The threat, of course, is to the rule of law, which the Law clearly wants to govern, rather than to have an oxymoron, ruleless law, reign. Upping the danger is the systemic fact that this threat can manifest at any moment, in any case—because the Law has put CSJ within its province—right in the jury box, with the power to decide; and the danger reaches red zone levels when CSJ and the Law view culpability and punishment matters quite disparately. If the negatives of sedition, nullification, or anarchy result with some frequency, or worse, at the level some critics of jurors maintain, then this is diagnostic evidence that the Law’s efforts to channel CSJ to comport with the rules of law are failing.

ony-murder rule and doctrine because the subjective intent to commit the murder is missing; whether intent just does not matter, as in strict liability, or whether transferred intent or constructive malice is the legal legerdemain used to pull the intent rabbit out of the empty hat, has been debated. See, e.g., Nelson E. Roth & Scott E. Sundby, The Felony-Murder Rule: A Doctrine at Constitutional Crossroads, 70 CORNELL L. REV. 446, 453-57 (1985). But these exceptions, along with the controversies within the Law about them, seem to prove the rule that both Law and CSJ require both the subjective and the objective.

217. See Finkel & Groscup, Crime Prototypes, supra note 23, at 211.
218. See RONALD DWORIN, LAW’S EMPIRE 43 (1986).
219. See generally Finkel & Groscup, Crime Prototypes, supra note 23, at 211 (discussing the experimental results of jury verdicts which are based on subjective notions of fair and just departures from the law).
But in fairness to another rule of law—that both sides get a hearing—220—we must ask whether these are solely negatives, or even negatives at all. If we assume that disparity is a symptom, then questions of etiology and treatment may help to focus the analysis: Is there pathology beneath the disparity, or is there some underlying rationality and sense? And if it is disorder of one sort or another, what is the treatment, and who is the patient?

Although subjectivity is the starting point of CSJ’s culpability analysis, there is nothing pathogenic about this. Such a starting point recurs in research involving story models—about how jurors construe facts and create a story—and these findings tell us that jurors typically begin with the subjective motives and intentions of the actor, that propel the action.221 This starting point is also the one lay readers adopt when tackling a novel or detective fiction, trying to find the motivational thread that weaves plot and story. And if we examine how prosecuting and defense attorneys tell their stories in opening and closing statements, we would probably find the subjective thread woven quite prominently throughout those stories as well.

Were we to find that subjectivity is also CSJ’s ending point, with no changes in between, that would be problematic, for that would leave objective reality out of the analysis entirely. But to the contrary, the cases reviewed in Parts III and IV show that no such psychotic-like process occurs, because objective reality is brought into these analyses at various points, for various purposes. So by conjoining objectivity and subjectivity in some balancing fashion, CSJ is doing what the Law expressly wants.

By contrast, when we turn the diagnostic eye to the Law’s side of the ledger, we see bipolar swings. The following four examples illustrate this. First, the Law’s take on impossible act cases represents an objective extreme, for if the act could not be a criminal act, then there is no guilt despite the actor’s culpable subjective intent.222 Second, the Law seems to require necessary and sufficient causality for the categorical judgment of murder, whereas necessary but not sufficient would land the defendant in the lower category of attempted murder. By contrast,

220. See U.S. Const. amend. XIV, § 1; see also 16B AM. JUR. 2D Constitutional Law § 960 (1998) (Interpreting the Due Process Clause of the Constitution as affording both sides the right to a hearing).


222. See Finkel & Groscup, When Mistakes Happen, supra note 92, at 70 (“If, as the legal maxim goes, the actus reus and the mens rea must conjoin for guilt, then there is no guilt [in an impossible act case].”).
CSJ draws a finer distinction, as ordinarily sufficient but not necessary would land the defendant in a category betwixt murder and attempted murder. Third, manslaughter's ontogeny begins with objective rules and ends with the Model Penal Code's "extreme . . . emotional disturbance" test, which swings to the subjective extreme. In contrast, CSJ's views on manslaughter reveal a complex mix of objective and subjective factors, leading to many discriminations between these two extremes. And fourth, in felony-murder and accessory felony-murder cases, the Law blurs or erases culpability distinctions among accessories, between accessories and the triggerman, and between the felony-murder triggerman and the premeditated-murder triggerman, ending up with equality. Although the Law appears blind to differences, CSJ is not, for it sees this odd equal treatment as neither individualized justice nor proportional justice.

B. Cooking Up Culpability

Using a cooking analogy, we can break the culpability assessment into a series of steps and questions. What ingredients go into the mix? How are they weighed and measured? And how are they flavored, combined, and cooked?

In answer to the first question, CSJ typically reaches for more ingredients than the Law, a finding that recurs over wide legal areas. To the second question, even when both the Law and CSJ agree about the ingredients, CSJ's approach to weights and measures is decidedly unformulaic: instead of using simple and invariant rules, CSJ's method is richly interactive and highly contextual. And to the third question, even if the Law and CSJ agree about the ingredients, and agree about their respective weights, jurors are likely to flavor, combine, and cook them in more subjective and psychological ways, throwing in past experiences, intuitions, sentiments, biases, heuristics, construals, and prototypes, as they wok and roll.

224. See Singer, supra note 130, at 291-92 ("The Code . . . jettisoned all of the object language and tests of the past 150 years . . . ").
225. See Finkel, supra note 1, at 317-18.
226. See id. at 170.
227. See Finkel, supra note 20, at 16.
228. See Finkel, supra note 1, at 2, 5-6, 170-71.
229. See id.
230. See id. at 63-78 (discussing the prior knowledge, experiences, and notions that jurors bring with them to court).
Admittedly, some of these flavorings, such as blatant biases and base sentiments, are extralegal, and ought to be struck from the mix. Yet the impermissible slips through, at times. It may slip through on occasion because the voir dire filter fails; more likely, it slips through because jury instructions are written in ways that allow for reconstrual, revision, multiplication, and division. Still, the ingredients, weights, and flavorings reviewed in Part III were, in the main, apt, though absent from the Law’s recipe.

That CSJ adds a new culpability ingredient to insanity (culpability for bringing about one’s mental deterioration) and finds a deeper culpability construct (capacity to make responsible choices) are not pathogenic signs; nor is it disordered to believe that a small provocation can ignite an old but undead larger provocation from the past, as in rekindler situations in manslaughter; nor is it breaking with reality to see serious threat, the escape option, and imminence in self-defense law from a subjective vantage point, or through the eyes of a subjective reasonable woman standard. These are, in fact, directions the Law has belatedly moved toward. While these belated moves may be instantiations 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,” there is something more instructive here than capitulating to what appears inevitable. Rather, the Law can draw insights from CSJ’s thinking, opening up its ways of thinking, to produce sounder and better justice.

C. Misfits, Creative Reconstructions, and Outright Nullifications

In developing the cooking analogy, I have omitted the presentation, the serving of the dish, which translates into how the culpability judgment is rendered. Here, jurors are restrained by and restricted to the verdict options the Law provides. But as we have seen in Part III and as I have argued above, CSJ makes more discriminations than black-letter law’s options typically provide. Such a systemic state of affairs is going

231. See id. at 72.
to produce misfits, and the appearance, at times, of wrongful verdicts,\textsuperscript{234} where the blame is laid, typically, at CSJ's doorstep. But shoehorning one's first choice—into one of the limited and ill-fitting remainders—is a valid problem, and if they attempt to solve it within the options given, misfits will be inevitable.

Still, from the jurors’ vantage point, they are not likely to understand why their first choice verdict option is not on the verdict form. Perhaps it is there, though not plainly evident nor in plain language. With a bit of creative reconstruing, they may make it fit, although this is not what the Law had in mind. For example, if a battered woman kills her spouse in a nonconfrontational situation, and the jury sees self-defense but the judge does not, and the latter does not give them that option, then the jury may reconstrue insanity (if not guilty by reason of insanity is an available option) to provide fit, or they may shoehorn into manslaughter, though serious threat, imminence, and escape preconditions do not seem to be met, or they might nullify with a straight not guilty.

D. Parsing the 'Imparsible'?

We saw one version of this problem in insanity jurisprudence, when jurors see two types of culpability—(at the moment of the act) for the act, and (prior to the act) for bringing about the disorder—but have to conflate the two because they have only one type (the former) to assess. Thus, their relevant and determinative discriminations come to naught. But instead of dropping their distinctions in favor of the Law’s more limited take, the research findings show that they will nestle their distinctions into the available categories, dilating the category and confounding the judgments.\textsuperscript{235} The opposite problem, amounting to the

\begin{quote}
\textsuperscript{234} A striking example of this occurred during the post-	extit{Hinckley} hearings, in the Senate Subcommittee on Criminal Law hearings, in the following colloquy that took place between Senator Heflin and the foreperson of the \textit{Hinckley} jury, Ms. Copelin, who pointed to the verdict form, and the lack of a third-choice option, which the jury was looking for.

\begin{enumerate}
\item Senator Heflin: In other words, if you had had another alternative choice—
\item Ms. Copelin: Correct.
\item Senator Heflin [continuing]. Then it could—
\item Ms. Copelin: ... If I had had another choice, in fact if we all had had another choice, it would have been different now. It would not have been this way.
\item Everyone knew beyond a shadow of a doubt that he was guilty for what he did. But we had that mental problem to deal with. We just could not shut that out.
\end{enumerate}
\end{quote}


\textsuperscript{235} \textit{See Finkel, supra} note 1, at 288-90.
same problem, results when the Law parses culpability and punishment, but where the jurors tend to fuse the two, or when leakage between the two occurs, as in the liability judgment and damages award judgment in certain civil law cases.236

E. Extracting CSJ’s Instructive Lessons

In summing up, CSJ’s views on justice and fairness, and on culpability and punishment, are far from simplistic—complex is the more apt designation. But is complexity worthy of attention, and to what should the Law attend? In short, what is the instructive message of this?

First, we see changes in what CSJ focuses on and how it frames the matter, with a more subjective, psychological, and wider perspective taken to both. Instead of the Law’s narrower focus on a particular defendant, at the moment of the act, CSJ sees the defendant in relationship to other actors who may provoke, make mistakes, or contribute to the overall culpability picture. In this wider frame, the causal nexus is more complicated, with interaction effects replacing a simple causality view. In addition, by adopting a more subjective, psychological perspective, the interior drama moves to the surface, not replacing the objective reality with some fiction, but giving the facts meaning. Moreover, CSJ sees the defendant and the alleged action as existing in time, in a context, with a history of prior actions and decisions, so a widening in time, person, and psychology results; regarding the psychology, it is both deeper at the intrapersonal, clinical level, and far richer at the social and community psychology levels. From this way of seeing, actions do not spring just from the immediate precipitator, but may have germinal

236. See, e.g., C. Cather et al., Plaintiff Injury and Defendant Reprehensibility: Implications for Compensatory and Punitive Damage Awards, 20 LAW & HUM. BEHAV. 189, 189 (1996); Neal Feigenson et al., Effect of Blameworthiness and Outcome Severity on Attributions of Responsibility and Damage Awards in Comparative Negligence Cases, 21 LAW & HUM. BEHAV. 597, 608 (1997); Reid Hastie et al., A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages, 22 LAW & HUM. BEHAV. 287, 307 (1998). When plaintiff and defendant negligence needs to be assessed, there is often a “double discounting” problem. See, e.g., Douglas J. Zickafoose & Brian H. Bornstein, Double Discounting: The Effects of Comparative Negligence on Mock Juror Decision Making, 23 LAW & HUM. BEHAV. 577, 591 (1999). Moreover, hindsight biases have been shown to effect judgments of liability and punitive damages as well. See, e.g., Reid Hastie et al., Juror Judgments in Civil Cases: Hindsight Effects on Judgments of Liability for Punitive Damages, 23 LAW & HUM. BEHAV. 597, 598-99 (1999). It has further been shown that the concepts of compensatory and punitive damages are often confused and leak into each other. See, e.g., Michelle Chernikoff Anderson & Robert J. MacCoun, Goal Conflict in Juror Assessments of Compensatory and Punitive Damages, 23 LAW & HUM. BEHAV. 313, 314-16 (1999); Roselle L. Wissler et al., Explaining “Pain and Suffering” Awards: The Role of Injury Characteristics and Fault Attributions, 21 LAW & HUM. BEHAV. 181, 184 (1997).
roots extending further back in time and deeper into the psyche, quite beyond the moment of the act or a momentary intention. Thus, from all of these changes, CSJ’s picture is likely to be quite different from the Law’s, at times; in fact, in certain cases, their perspective, focus, and framing may lead them to a contrary construction, where they do not see this case as a legal matter at all.

If CSJ widens the focus and frame, it also narrows and makes fine-grained discriminations. This is most evident regarding culpability, where the Law seems to wield a too blunt cleaver to separate the guilty from the not, while CSJ uses the scalpel to produce finer cuts; and even where the Law does carve a mitigating middle category, CSJ’s dissections grade the matter into thinner, discriminable slices, each worthy of a separate diagnosis and treatment. That CSJ registers gradations to culpability, in comparison to the Law’s more dichotomous cuts, is the prevailing finding across a wide swath of legal ground. A less frequent finding (though significant for outcome, process, and theory) is that CSJ registers different types of culpability, whereas the Law focuses more on some unitary, generic culpability judgment, which must conflate what CSJ parses. Overall, then, CSJ’s distinctions regarding both type and degree of culpability better track the nuances of mens rea than the Law’s approach.

Regarding CSJ’s distinctions, we can ask: What sort of justice does this lead to, and is this a direction the Law ought to consider? From our review, the outcome is clearly not anarchy, the Law’s worst nightmare. Rather, it is, above all else, proportional justice, where actions and intentions are graded and tuned to nuances worth making. It deals with the particulars of the case more psychologically, in a more sophisticated and fair manner, for it willingly enters the subjectivity of the defendant in order to try to fathom the thinking and motives that propel the acts. This psychology is neither naive, gullible, nor pop, for it anchors itself in objective reality, to what is reasonable. At the case level, individualized justice seems to rule, but across cases, at the higher level, the proportionality principle reigns. When put this way, black versus white, the Law versus CSJ disparities, so evident and particularized at the outset, now seem to fade to gray. If this is so, and the critical fears and night-

---

237. Many commentators within the law have made similar suggestions over the centuries. While some of the suggestions apply to a specific area, such as insanity, manslaughter, or felony-murder, others apply the suggestion in a much broader way. See, e.g., G. E. Dix, Psychological Abnormality as a Factor in Grading Criminal Liability: Diminished Capacity, Diminished Responsibility, and the Like, 62 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 313 (1971).

238. See FINKEL, supra note 1, at 326.
marsh visions evaporate as gossamer, then CSJ’s instructive messages are more likely to be heard.