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# Distinguishing Civil and Criminal Institutional Deprivations of Liberty: An Analysis of Expressive Functions

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DISTINGUISHING CIVIL AND CRIMINAL INSTITUTIONAL DEPRIVATIONS OF  
LIBERTY: AN ANALYSIS OF EXPRESSIVE FUNCTIONS

by

Marc W. Pearce

A DISSERTATION

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DISTINGUISHING CIVIL AND CRIMINAL INSTITUTIONAL DEPRIVATIONS OF  
LIBERTY: AN ANALYSIS OF EXPRESSIVE FUNCTIONS

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University of Nebraska, 2008

Advisor: Richard Wiener

A basic function of the criminal justice system is to impose legal punishment through deprivations of liberty. Because deprivations of liberty that flow from civil institutions are not punitive, the distinction between civil and criminal institutional deprivations of liberty arguably hinges on the concept of punishment. Punishment, in turn, may be distinguished from non-punitive sanctions based on its unique expressive function; that is, punishment is defined in part by the special feelings of resentment and judgments of disapproval that it expresses. These feelings and judgments have been labeled “condemnation.”

This dissertation explores whether condemnation can be translated into an empirical construct that may be assessed reliably and used to study judgments concerning an actor’s suitability for punishment. A condemnation scale was designed, and in the first of two studies the scale proved to be a reliable measure of condemnation expressed toward hypothetical criminal defendants who raised the insanity defense. Condemnation scores differed significantly depending on the mental impairments alleged by the defendants, such that higher average scores were associated with diagnoses that do not seem to diminish the defendants’ criminal responsibility. In addition, significantly higher condemnation scores were associated with defendants who committed more severe crimes. Condemnation scores were also predictive of mock jurors’ verdict decisions in some cases.

A revised version of the scale was also found to be a reliable measure of the

condemnation expressed by legal professionals toward hypothetical juveniles facing either delinquency adjudications or trials in criminal court. Although condemnation scores did not vary significantly based on the severity of the juvenile's offense or his premeditation, scores were predictive of the participants' charging decisions.

The findings suggest that juvenile court charging decisions and insanity case judgments may be associated with the intensity of the condemnation that decision-makers direct toward the accused. Although the findings do not (and cannot) confirm the normative argument that condemnation is a defining characteristic of punishment, they suggest that judgments generally track legal institutions' conceptual and justificatory foundations.

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## INTRODUCTION

Although the distinction between criminal and civil deprivations of liberty is of critical importance in American jurisprudence, it is difficult to explain and define. Feinberg (1995a) has argued that the *condemnation* expressed by just criminal punishment distinguishes criminal punishment from civil sanctions. This dissertation describes an attempt to translate Feinberg's normative concept of condemnation into an empirical construct that can be used 1) to predict decision-makers' judgments about an actor's eligibility for punishment through the criminal justice system; 2) to assess whether those judgments are consistent with the basic normative structure of a minimally-retributive criminal justice system, such as that of the United States; and 3) to identify indications of divergence between the actual functioning of legal institutions and the normative framework on which those institutions are based.

The dissertation includes two major sections, which are organized as follows. Section I opens with a basic discussion of the definition and justifications of legal punishment, with emphasis on the concept of condemnation. Next, the manner in which condemnation arguably serves to distinguish deprivations of liberty that flow from criminal and non-criminal institutions will be explained in detail. To help illustrate condemnation's discriminative function, two species of hard cases that highlight the difficulties that inhere in distinguishing institutional deprivations of liberty will be analyzed. More specifically, an analytical framework based on condemnation will be used to examine whether the application of the insanity defense in criminal trials and the jurisdiction decisions of juvenile courts cohere with the normative structure underlying minimally-retributive criminal justice systems. Section I concludes with a review of the psychological research literature addressing decision-making in insanity defense cases and



juvenile court jurisdiction determinations. This review includes a detailed description of a previous study wherein an empirical construct based on condemnation was used to analyze the expressive function of insanity defense judgments and sexually violent predator commitments.

Section II presents two separate empirical studies that stem from the legal background, normative framework, and empirical research described in Section I. In the first of these studies, an empirical condemnation construct will be used to examine mock jurors' decisions in criminal trials involving the insanity defense. The study explores whether the condemnation construct has predictive utility in cases that present 1) a wide range of psychological impairments, 2) crimes of varying severity, and 3) different verdict options that purport to guide judgments about the relationship between psychological impairment and criminal responsibility (i.e., "not guilty by reason of insanity" and "guilty but mentally ill"). In the second study, the condemnation construct will be applied to juvenile court jurisdiction decisions. This study examines the factors that decision-makers may use when determining whether a particular youth's case ought to proceed in criminal or juvenile court and explores the relationship between these factors and condemnation. Together, the studies suggest that condemnation *can* be translated into a predictive empirical construct; that this construct yields useful insights about the decision-making processes in insanity cases and juvenile court jurisdiction determinations; and that experimental psychological research can be used to investigate whether legal institutions function in a manner that is consistent with their justificatory foundations.

## **I. A LEGAL, NORMATIVE, AND EMPIRICAL FRAMEWORK FOR STUDYING THE DISTINCTION BETWEEN CIVIL AND CRIMINAL INSTITUTIONAL DEPRIVATIONS OF LIBERTY**

The empirical studies presented in this dissertation draw upon a broad base of scholarship, law, and empirical research. More specifically, the studies are founded on jurisprudential theories regarding the definition and justification of punishment; a normative framework that arguably describes the manner in which institutions of social control function coherently; a body of substantive law that includes the United States Supreme Court's decisions concerning the distinction between civil and criminal sanctions, the constitutional contours of police power civil commitments, and the rights of young offenders; empirical studies that explore decision-making in insanity cases and juvenile court jurisdiction determinations; and a prior experiment that applies the aforementioned jurisprudential theories to advance understanding of legal decision-making. The relevant legal scholarship, caselaw, and empirical research will be reviewed in this section.

### **A. Defining and Justifying Punishment**

Despite extensive study by scholars, a clear and complete description of the distinction between civil and criminal sanctions remains elusive. Generally speaking, however, the criminal law's concern with *punishment* distinguishes it from civil law (Feinberg & Gross, 1995). Therefore, an assessment of the features that distinguish criminal institutions from civil ones should focus on the concept of punishment. An analysis of punishment should, in turn, entail a study of both its definition and justifications (e.g., Singer & Gardner, 1989, pp. 46-132). To that end, the following subparts propose a definition of punishment that incorporates condemnation,

outline two broad theories of the justification of punishment, and briefly describe the analysis used by the United States Supreme Court to distinguish civil statutes from criminal statutes. This will provide a foundation for the legal and normative framework that will be described thereafter, which in turn forms the basis of the present studies.

### ***1. Condemnation and the Definition of Punishment***

“Legal punishment” has proven to be a difficult concept to define comprehensively. H. L. A. Hart (1968) and others favor an influential definition that often serves as an effective starting point for discussion (e.g., Feinberg & Gross, 1995; Singer & Gardner, 1989). This definition has been paraphrased as follows:

One party’s treatment of another can properly be called legal punishment only if (1) it is hard treatment (2) inflicted for a violation of legal rules (3) on the actual or supposed violator (4) imposed and administered by human beings other than the supposed violator himself (5) who have the authority to do so under the rules of the governing legal system. (Feinberg & Gross, 1995, p. 585)

Though it has received broad recognition, this definition is certainly not beyond criticism (e.g., Singer & Gardner, 1989, pp. 48-58). For example, Feinberg (1995a) argues that this definition is too broad because it includes sanctions that most people would not consider to be legal punishment—such as penalties in a football game. He proposes that the definition could be narrowed appropriately if a sixth element were added to account for the special “symbolic significance” of legal punishment (Feinberg, 1995a, p. 593). This symbolic significance flows from the expression of *condemnation* that, according to Feinberg, inheres in punishment.

The notion that punishment is defined partly by its “expressive function” is not new.

Indeed, Feinberg (1995a) acknowledges H. M. Hart's (1958) "eloquent" articulation of the point, which merits quotation:

What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies . . . its imposition. As Professor Gardner wrote not long ago, in a distinct but cognate connection:

"The essence of punishment for moral delinquency lies in the criminal conviction itself. One may lose more money on the stock market than in a courtroom; a prisoner of war camp may well provide a harsher environment than a state prison; death on the field of battle has the same physical characteristics as death by sentence of law. It is the expression of the community's hatred, fear, or contempt for the convict which alone characterizes physical hardship as punishment."

If this is what a "criminal" penalty is, then we can say readily enough what a "crime" is. . . . It is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community. . . . Indeed the condemnation plus the added [unpleasant physical] consequences may well be considered, compendiously, as constituting the punishment. (Feinberg, 1995a, p. 593; Hart, 1958, pp. 404-405)

Feinberg (1995a) argues, however, that condemnation and "unpleasant consequences" not only are essential elements of punishment, but also are usually not the "distinct and separate" elements of punishment that Hart describes (p. 593). Thus, in Feinberg's view, if convicted prisoners are

not formally condemned before their incarceration, it does not follow that condemnation is not expressed toward them. On the contrary, Feinberg suggests that formal pronouncements of condemnation are unnecessary because *incarceration itself* expresses condemnation. He states, “The very walls of [the prisoner’s] cell condemn him and his record becomes a stigma” because incarceration has—at least in this culture—“become the conventional symbol of public reprobation” (Feinberg, 1995a, p. 594). In short, Feinberg argues that condemnation is a defining characteristic of legal punishment that is expressed “automatically” in the United States whenever the particular punishment of incarceration is imposed—even if the judge, jury, or any other individual or group does not explicitly declare that the prisoner has been condemned by them.

Feinberg (1995a) describes condemnation as an “expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority himself or of those ‘in whose name’ the punishment is inflicted” (p. 593). “Resentment” refers to “the various vengeful attitudes” that “imprisonment is universally taken to express,” while “reprobation” refers to a “stern judgment of disapproval” distinct from the emotionally-rooted resentment (Feinberg, 1995a, p. 594).

An examination of the concepts of *revenge* and *retribution* may provide additional insight into the specific nature of condemnation (e.g., Pearce 2007). Generally—and as Feinberg’s definition implies—revenge is understood to be “emotionally rooted,” while retribution is understood to be a non-emotional, calculated response. In addition, retribution is arguably distinguishable from revenge because retribution occurs only in response to *wrongs*, whereas revenge may be undertaken in response to *harms* which might or might not be wrongs (Nozick,

1995). The difference between a “harm” and a “wrong,” as those terms relate to the concepts of revenge and retribution, may be illustrated by the following hypothetical: If a leader of a criminal organization, or “boss,” decides to hurt an individual who testified against him in a criminal trial, it might be said that the boss is seeking revenge for the harm caused by the witness’s testimony. Because, however, the witness’s act of testifying was not a wrong, one would not say that the boss is seeking retribution.

Retribution is also said to be distinguishable from revenge in that the extent of a retributive response to a wrong is limited by the seriousness of the wrong, while the limits of revenge are not intrinsically bounded (Nozick, 1995). Put differently, a retributive response is proportional to the wrong, while a revenger faces no such limits as he responds to a harm against him.

A third basis for distinguishing retribution from revenge stems from the idea that a special attachment must exist between a revenger and the victim of a harm. Arguably, vengeance requires a special and often personal connection between the revenger and the victim of a harm, while retribution may be carried out by an agent who lacks a special tie to the victim (Nozick, 1995).

Retribution and revenge may be distinguished on still other grounds (e.g., Nozick, 1995, p. 676). For present purposes, however, it is sufficient to note that a retributive response may be defined as a response that is triggered by a wrong, is proportional to that wrong, and may or may not involve a special connection between the retributive agent and the victim of the wrong. In contrast, a vengeful response may be defined as a response that is triggered by a harm that may or may not be a wrong, need not be proportional to the wrong, and involves a special connection

between the revenger and the victim of the harm. Note that a response may be characterized as retributive *and* vengeful if it is proportional to a wrong and a connection exists between the responder and the victim—and, presumably, the emotions underlying revenge are consistent with the non-emotionally driven judgments underlying retribution.

As explained above, condemnation has been defined as a “fusing of resentment and reprobation” (Feinberg, 1995a, p. 594). If, as Feinberg proposes, “resentment” is the emotional force that motivates revenge, and “reprobation” is the “disapproving judgment” that limits vengeful passions and legitimizes retributive responses, it could be said that condemnation is an expression of “retributive revenge,” which consists of those responses that share some of the characteristics of both retribution and revenge. This suggests that, according to Feinberg, an expression of vengefulness flows from criminal punishment (or, more specifically, from the act of criminal incarceration)—but only to the extent that this vengefulness is consistent with the limits of retribution.

In summary, Feinberg (1995a) and others (e.g., Hart, 1958) have argued that criminal punishments, and punitive deprivations of liberty in particular, are defined in part by the condemnation that they express. Feinberg describes this condemnation as an “expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation” (p. 593). If one accepts the premise that condemnation is a defining characteristic of punishment, as Feinberg (1995a) and Hart (1958) suggest, it follows that condemnation can be used to analyze the distinction between deprivations of liberty that flow from criminal and civil institutions.<sup>1</sup>

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<sup>1</sup>It should be noted that even if one rejects Feinberg’s conceptual analysis of the core definition of punishment, it does not follow that the empirical questions explored in this dissertation (i.e., whether decision-makers’ determinations that a hypothetical actor ought to be

In practice, however, courts typically consider two general *justifications* of punishment, as opposed to a *definition* of punishment, when distinguishing civil statutes from criminal ones (e.g., *Allen v. Illinois*, 1986; *Kansas v. Hendricks*, 1997). A brief discussion of the two primary justifications of punishment is therefore in order.

## **2. Two Primary Justifications of Punishment: Retribution and Social Utility**

“Because it entails the purposeful infliction of suffering, the imposition of punishment raises serious ethical problems. To be morally tolerable, punishment must be administered only for good reason” (Singer & Gardner, 1989, p. 82). There are two general categories of “good reasons,” or justifications, for imposing punishment. One category of justifications is based on a utilitarian theory, while the other is based on retributivism. Each of these theories will be summarized briefly below.

Broadly speaking, the utilitarian theory of punishment holds that punishment, though an evil, is necessary in some instances “in order to achieve desirable consequences, specifically to minimize criminal conduct” (Singer & Gardner, 1989, p. 82). The elements of a “pure” utilitarian theory of punishment may be described as follows:

1. Social utility (correction [or reform], prevention, deterrence, et cetera) is a necessary condition for justified punishment.
2. Social utility is a sufficient condition for justified punishment.

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subjected to a criminal institutional deprivation of liberty are associated with feelings of resentment and judgments of disapproval toward the actor) are unfounded. Indeed, the psychological research literature reviewed below suggests that the feelings and judgments that comprise condemnation are associated with decisions to punish. Nevertheless, the implications of the current research depend, in no small part, upon the soundness of Feinberg’s conceptual analysis. For this reason, the conceptual analysis and its relationship to the justificatory framework underlying the criminal justice system will be discussed in detail.



3. The proper amount of punishment to be inflicted upon the offender is that amount which will do the most good or the least harm to all those who will be affected by it. (Feinberg, 1995b, p. 616)

Each of these three elements is susceptible to criticism, however. For example, element 2 is controversial because it suggests that the punishment of a legally innocent person would be justified if the punishment would maximize social utility (Feinberg, 1995b). Similarly, the calculus of social utility required under element 3 could lead to punishments that “seem” to be excessive or insufficient in some cases (Feinberg, 1995b).

Retributivism, in contrast, is based upon the idea that “punishment is imposed to do justice, whether or not beneficial consequences are obtained” (Singer & Gardner, 1989, p. 82). There are several distinct varieties of retributivism. For example, “moralistic” retributivism holds that punishment is justifiably imposed for “wrongdoing,” while “legalistic” retributivism holds that “punishment is for lawbreaking, not (necessarily) for wrongdoing” (Feinberg, 1995b, p. 613). Although a comprehensive review of each variety of retributivism will not be presented here, a brief examination of one of the most popular versions—which Feinberg (1995b) labels “pure moralistic retributivism”—may help to illustrate some of the basic tenets of the retributive theory of punishment. The pure moralistic retributive theory of punishment is consistent with the following propositions:

1. Moral guilt is a necessary condition for justified punishment.
2. Moral guilt is a sufficient condition (“irrespective of consequences”) for justified punishment.
3. The proper amount of punishment to be inflicted upon the morally guilty

offender is that amount which fits, matches, or is proportionate to the moral gravity of the offense. (Feinberg, 1995b, p. 614)

Once again, however, each of these elements is challengeable. Indeed, one might expect a utilitarian theorist to protest element 2 because it provides that “the infliction of suffering on a person (albeit a guilty person) [would be justified] even when no good to the offender, the victim, or society at large is likely to result” (Feinberg, 1995b, p. 614). In addition, strong practical objections can be raised against element 3 because it “would require the abandonment of fixed penalties for various crimes and the substitution of individuated penalties in each case . . . to fit the offender’s uniquely personal guilt and vulnerability” (Feinberg, 1995b, p. 615).

The foregoing discussion of utilitarian and retributive theories of punishment is basic, but a more detailed review of the theories is unnecessary here. For present purposes, it is most important to note the following points. First, the utilitarian theory of punishment is based on a calculus of social utility that tends to focus on “advantages” that might be gained from punishment (Feinberg, 1995b, p. 613). Punishment is justified only when called for under this calculus. Second, retributive theories of punishment are based on the notion that guilt, which may be moral or legal depending upon the variety of retributivism one favors, is sufficient to justify punishment. Third, points one and two suggest that the utilitarian theory tends to be forward-looking, while retributive theories tend to “look backward in time to guilt” (Feinberg, 1995b, p. 613). Finally, “pure” versions of either theory are quite susceptible to criticism.

Feinberg (1995b) argues that a “mixed” theory can address the criticisms that weaken pure utilitarian and retributive theories of punishment—especially those criticisms directed at element 2 under each theory (as they are summarized above). Under the mixed theory, “(1)

moral guilt is necessary, but not alone sufficient [to justify punishment]; (2) social utility is necessary, but not alone sufficient [to justify punishment]; and (3) moral guilt and social utility are severally necessary and jointly sufficient [to justify punishment]” (Feinberg & Gross, 1995, p. 586). Put more simply (and shifting from moralistic retributivism to legalistic retributivism), the mixed theory holds that punishment is justified only when the person to be punished is “legally guilty” *and* “there is probably social utility in it” (Feinberg, 1995b, p. 616). Note that the mixed theory is not susceptible to the criticism that persons who are not legally guilty may, on occasion, be justifiably punished (which pure utilitarians must explain or defend); nor is it susceptible to the criticism that punishment must be imposed even when the punishment would result in no social utility whatsoever (which pure retributivists must explain or defend).

The mixed theory is not without flaws, however. Indeed, because “[u]tilitarian interests in deterrence or rehabilitation may pull towards one or several punitive dispositions, while the retributive demands of justice may pull towards still others,” tension inheres in the theory (Singer & Gardner, 1989, p. 82). Nevertheless, as Singer and Gardner (1989) note, “most actual systems of punishment are grounded in both types of justifications” (p. 82). For example, Revised Statutes of Nebraska section 28-102, which closely tracks the language of Model Penal Code section 1.02(1) (American Law Institute, 1962), states,

The general purposes of the provisions governing the definition of offenses are:

- (1) To forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;
- (2) To subject to public control persons whose conduct indicates that they are disposed to commit crimes;

(3) To safeguard conduct that is without fault and which is essentially victimless in its effect from condemnation as criminal;

(4) To give fair warning of the nature of the conduct declared to constitute an offense; and

(5) To differentiate on reasonable grounds between serious and minor offenses.

The first two “purposes” listed in this statute cite advantages that would factor into a utilitarian calculus of social utility—specifically, deterrence and incapacitation. The third and fifth seem to incorporate retributive concepts of justice and fairness (and it is interesting to note that item three specifies that one of the purposes of the criminal code is to ensure that expressions of condemnation are appropriately limited), while the fourth seems to embody both retributive and utilitarian concepts. Thus, it is clear that the Nebraska statute describes a criminal justice system predicated on a mixed theory of the justification of punishment.

Utilitarian and retributive concepts are jointly incorporated into sentencing schemes as well. For example, federal courts are to impose sentences that “provide just punishment for the offense,” “afford adequate deterrence to criminal conduct,” “protect the public from further crimes of the defendant,” and “provide the defendant with needed . . . correctional treatment in the most effective manner” (18 U.S.C. § 3553(a)(2)). In other words, when imposing a sentence, a federal court must consider not only the retributive function that the sentence would serve, but also the utilitarian functions—specifically, deterrence, incapacitation, and rehabilitation—that the sentence would serve.

It may be said that any criminal justice system that “condition[s] conviction and

punishment on retributive requirements of guilt, culpability, responsibility, or desert”—which would include systems based on a retributive or mixed theory of the justification of punishment—is *minimally-retributive* (Schopp, 1993, p. 1263). This term will be used throughout this dissertation to refer to systems that “establish criteria of accountability as necessary conditions for conviction and punishment” (Schopp, 1993, p. 1263), and as the foregoing discussion of the mixed theory suggests, the term applies to the criminal justice systems of much—if not all—of the world, including the United States (Arenella, 1992; Singer & Gardner, 1989).

In summary, theories of the justification of punishment may be classified into two general categories. The pure utilitarian theory of punishment holds that punishment is justified by social utility (e.g., deterrence, incapacitation, and rehabilitation). In contrast, pure retributive theories hold that punishment is justly imposed upon the guilty even if the punishment lacks social utility. A “mixed” theory of punishment has emerged, and although this theory addresses some of the criticisms that have been leveled against pure utilitarian and pure retributive theories, it does not account for the tension that may arise between the competing values of social utility and “just deserts.” Despite these tensions, the American criminal justice system is founded upon, and expressly incorporates, both utilitarian and retributive principles (Arenella, 1992; Singer & Gardner, 1989). Its incorporation of the “retributive requirements of guilt, culpability, responsibility, or desert” renders it minimally-retributive (Schopp, 1993, p. 1263). Note that to the extent that condemnation is defined as a subset of retributive responses that overlap with emotionally-rooted resentment, it seems that condemnation not only defines punishment (at least, according to Feinberg and others), but also bears a relationship with the justificatory foundation

of punishment.

Utilitarian and retributive theories have been used not only to justify punishment, but also to distinguish punitive statutes from nonpunitive statutes. Indeed, the fundamental holding of the mixed theory of the justification of punishment—specifically, the idea that guilt and social utility combine to form a strong justification for punishment—is incorporated into the analytical framework used by the Supreme Court to distinguish civil and criminal statutes (*United States v. Ward*, 1980). This framework will be outlined below.

### ***3. The Supreme Court's Test for Distinguishing Civil Sanctions from Criminal Sanctions***

In *United States v. Ward* (1980), the United States Supreme Court held that a proceeding for the assessment of a “civil penalty” under section 311(b)(6) of the Federal Water Pollution Control Act is not a “criminal case” for the purposes of the Fifth Amendment’s protection against compulsory self-incrimination. In reaching its decision, the Court noted first that “[t]he distinction between a civil penalty and a criminal penalty is some constitutional import” because certain constitutional protections (such as the Fifth Amendment privilege) are available only in criminal cases (*Ward*, 1980, p. 248). The Court then outlined a two-level inquiry that should be undertaken to determine “whether a particular statutorily defined penalty is civil or criminal” (p. 248). First, courts must consider whether the language of the statute and its legislative history indicate a preference for a civil or criminal label. If it appears that the legislature “has indicated an intention to establish a civil penalty,” courts must inquire further to determine “whether the statutory scheme was so punitive either in purpose or effect as to negate that intention” (pp. 248-249). To resolve this second inquiry, courts may consider the seven factors previously specified by the Supreme Court in *Kennedy v. Mendoza-Martinez* (1963). These factors are 1) “whether

the sanction involves an affirmative disability or restraint”; 2) “whether it has historically been regarded as punishment”; 3) “whether it comes into play only on a finding of scienter”; 4) “whether its operation will promote the traditional aims of punishment-retribution and deterrence”; 5) “whether the behavior to which it applies is already a crime”; 6) “whether an alternative purpose to which it may rationally be connected is assignable for it”; and 7) “whether it appears excessive in relation to the alternative purpose assigned” (*Mendoza-Martinez*, 1963, pp. 168-169).

Applying this analytical framework to the case before it, the Supreme Court found first that “Congress [clearly] intended to impose a civil penalty” under section 311(b)(6) (*Ward*, 1980, p. 249). The Court then proceeded to the second inquiry and concluded that only one factor—specifically, “whether the behavior to which [the sanction] applies is already a crime”—weighed in favor of a determination that the statute was so punitive in purpose or effect as to negate Congress’s intention to impose a civil penalty. The Court held that on balance, the *Mendoza-Martinez* factors were not “sufficient to render unconstitutional the congressional classification of the penalty established in § 311(b)(6) as civil” (*Ward*, 1980, pp. 250-251).

Note that in *Ward*, the Supreme Court was asked to determine whether a *monetary penalty* amounted to a civil or a criminal sanction. More recently, however, the *Ward* analysis has been used to determine whether a *deprivation of liberty* is civil or criminal in nature (e.g., *Allen v. Illinois*, 1986; *Kansas v. Hendricks*, 1997). The Court’s opinion in *Hendricks* will be discussed in greater detail below. For present purposes, it is noteworthy that the fourth *Mendoza-Martinez* factor—“whether [the sanction’s] operation will promote the traditional aims of punishment”—was central to the Court’s analysis in *Hendricks*. Therefore, this factor merits

closer examination.

The fourth *Mendoza-Martinez* factor is based upon the premise that the “traditional aims of punishment” are retribution and deterrence (*Mendoza-Martinez*, 1963, p. 168). These “traditional aims of punishment” seem to correspond closely with the primary justifications of punishment discussed above—i.e., retribution and social utility. Under the utilitarian and mixed theories of punishment, deterrence is one social benefit that may justify (or help justify) punishment. As noted previously, incapacitation and rehabilitation are other social benefits cited by utilitarian theorists (e.g., Feinberg, 1995b; Singer & Gardner, 1989). Incapacitation and rehabilitation cannot be used effectively to distinguish criminal deprivations of liberty from civil deprivations of liberty, however, because incapacitation and rehabilitation (or treatment) are legitimate aims of *both* civil *and* criminal deprivations of liberty (e.g., *Hendricks*, 1997 (Kennedy, J., concurring); *Jones v. United States*, 1983). The Supreme Court seems to suggest, however, that deterrence—unlike incapacitation and rehabilitation—is “reserved for the criminal system” (*Hendricks*, 1997, p. 373 (Kennedy, J., concurring); *Bell v. Wolfish*, 1979, p. 539 n.20). If this is true, then it is logical that deterrence may serve to distinguish criminal statutes from civil statutes, as the *Mendoza-Martinez* analysis presupposes. It is certainly not obvious, however, that “deterrence”—as the term is commonly understood in the law—can in fact perform this discriminating function.

Suppose, for example, that a person suffering from severe mental retardation and psychosis has been civilly committed on the ground that he has a mental disorder that makes him a danger to society. Assume that this person is confined in a psychiatric treatment facility, that he is placed in a therapeutic program that employs incentives and “punishments” to modify



behavior, and that this program is successful (i.e., it renders him no longer dangerous to the community). It appears, then, that this person is not only capable of being deterred, but that he has, in fact, been deterred from engaging in certain conduct through the treatment that he received during his *civil* commitment. In other words, the civil deprivation of liberty seems to have served a function akin to *special deterrence*, which has been defined as “discouraging individual convicted criminals from committing subsequent offenses by inflicting them with punishment” (Singer & Gardner, 1989, p. 85). It is doubtful that the Supreme Court would find that this sort of “therapeutic” deterrence renders the civil commitment “criminal” in nature, *Mendoza-Martinez* factor four notwithstanding. More to the point, if “deterrence” is to serve as a basis for distinguishing criminal deprivations of liberty from civil ones, the term must refer to something other than the sort of special deterrence that might legitimately flow through certain civil commitments.

In his concurring opinion in *Hendricks*, Justice Kennedy implies that the term “deterrence,” as it is used by the majority and in *Mendoza-Martinez* factor four, should be understood to mean *general deterrence* (*Hendricks*, 1997, (Kennedy, J., concurring)). General deterrence refers to the notion that “would-be criminals [are dissuaded] through the threat of punishment for criminal acts” (Singer & Gardner, 1989, p. 85). It might seem, at first blush, that to the extent general deterrence represents a disincentive to act resulting not from the actual suffering of adverse consequences (as in a therapeutic program of classical conditioning), but from the *threat* of adverse consequences, general deterrence may indeed be a benefit that flows only from the criminal justice system. If this were so, deterrence would serve to distinguish civil deprivations of liberty from criminal deprivations of liberty. However, the deterrent effects that

flow from the civil law of negligence, and especially products liability law, cast doubt upon the notion that only the criminal law can perform general deterrence (e.g., Gavin, 2008, p. 437). In short, the concept of general deterrence does not seem capable of distinguishing criminal statutes (or institutions) from civil ones.

The foregoing examples illustrate that deterrence functions in a variety of ways, and that it is difficult to argue that either special deterrence or general deterrence is “reserved for the criminal system” alone (*Hendricks*, 1997, p. 373 (Kennedy, J., concurring)). Therefore, if there is a sense in which deterrence is unique to the criminal law, “deterrence” must be understood to mean something narrower and more limited than either special deterrence or general deterrence. One might argue that if “deterrence” is taken to refer only to the sort of deterrence that occurs when *actors with the capacity for criminal responsibility* are dissuaded from acting in violation of institutional proscriptions, deterrence is unique to the criminal law. In other words, to the extent that *culpability* is necessary to promote general deterrence through punishment, deterrence arguably flows only from the criminal law, and it may therefore serve to distinguish criminal deprivations of liberty from civil ones. To afford due credit to the Supreme Court’s clear pronouncement that deterrence is “not [a] legitimate nonpunitive governmental objective[,]” (*Bell*, 1979, p. 539 n.20), it will be assumed for the purposes of the following analysis that deterrence can be used to distinguish civil deprivations of liberty from criminal ones. It is important to note, however, that 1) the term “deterrence” should be understood to refer to a narrowed definition of general deterrence such as the one suggested immediately above, and 2) the concept of retribution serves to distinguish civil and criminal sanctions much more effectively—at least from a theoretical perspective—than deterrence.

In summary, when courts are called upon to distinguish a civil deprivation of liberty from a criminal one, they employ an analysis that depends, in part, on an assessment of whether the deprivation of liberty serves retributive and deterrent aims. This analytical factor has roots in the traditional justifications of punishment—retribution and social utility—that have been incorporated (often expressly) into the American system of criminal justice. Thus, the use of the factor appears to be defensible—though “deterrence” must be understood to refer only to the deterrence of criminally responsible actors.

Interestingly, courts have neither developed nor employed a specific *definition* of punishment to aid their analyses of the nature of statutes. Nor have they expressly applied the concept of condemnation to distinguish civil deprivations of liberty from criminal ones (though, as noted above, the relationship between retribution and condemnation suggests that condemnation does factor into the *Ward* analysis, albeit in an unstated way). It is proposed below that condemnation can, in fact, be used to distinguish civil and criminal institutions that impose deprivations of liberty on persons. Moreover, it is argued that a theory based upon condemnation can provide a valuable framework for analyzing whether some of the most difficult cases that currently confront the law are more appropriately addressed through the criminal justice system as opposed to a noncriminal institution, such as civil commitment or the juvenile justice system.

## **B. Condemnation as a Means of Distinguishing Civil and Criminal Institutional Deprivations of Liberty**

Legal institutions in the United States strive to ensure that punishment is imposed only in appropriate cases. Nevertheless, these institutions sometimes struggle to resolve cases that raise

difficult questions about the appropriateness of punishment. Indeed, at times it is difficult to determine whether a given case is more appropriately addressed through a criminal or noncriminal institution. A framework based upon condemnation can be used to analyze these hard cases and evaluate the legal mechanisms that are currently used to address them. This framework will be outlined below. It will then be applied to analyze the difficult questions that arise in criminal trials involving the insanity defense and juvenile court jurisdiction determinations.

### ***1. Condemnation, Criminal Responsibility, and the Expressive Function of the Criminal Justice System***

The criminal justice system, which is administered by a state pursuant to its police powers, serves “as the primary legal institution of coercive social control over adult citizens who engage in culpable conduct that harms the legitimate interest of others” (Schopp, 2001, p, 17). In other words, the criminal justice system is the conventional institution for imposing legal punishment in the United States (Schopp, 1993). If punishment expresses condemnation, then it follows that the criminal justice system provides the institutional structure that determines whether condemnation will be expressed in most cases. Indeed, Schopp (1993) argues persuasively that, in fact, condemnation is expressed at four distinct stages within the institutional structure established by the criminal justice system.

First, condemnation is expressed when a social institution proscribes a certain category of conduct (Schopp, 1993). This commonly occurs when a legislature defines a particular crime and sets its punishment. For example, if a legislature criminalizes the act of sexual intercourse between unmarried persons, or “fornication,” a degree of condemnation is thereby expressed

toward the category of conduct that satisfies the statutory definition of fornication (Pearce, 2007).

This sort of condemnation will be labeled “institutional condemnation.”

A second expression of condemnation, which will be labeled “general act condemnation,” occurs when an institutional proscription is affirmed (Schopp, 1993). Typically, this sort of affirmation occurs whenever institutional proscriptions are enforced. For example, if “fornication” has been criminalized but the state’s fornication statute is never enforced by the police, there has been an expression of institutional condemnation—but not general act condemnation—toward the category of conduct that the legislature has defined as “fornication” (Pearce, 2007).

A third expression of condemnation, which will be labeled “specific act condemnation,” occurs when the proscription of an institutionally proscribed act is affirmed upon the consideration of the circumstances surrounding the act’s commission in a specific case (Schopp, 1993). As its label suggests, this sort of condemnation is fact-specific and indicates that the commission of a proscribed act was not justified in a particular case. If, for example, conduct defined as “the intentional killing of another person” has been criminalized, and if this criminal prohibition is generally enforced, then the category of conduct that falls within this definition is the subject of institutional condemnation and general act condemnation. If an intentional killing has been committed, and if this killing is determined to have been justified (perhaps on the ground that it occurred as a result of self defense), specific act condemnation would not be expressed toward this particular killing—even though institutional and general act condemnation are expressed toward intentional killings generally.

A fourth expression of condemnation, which will be labeled “actor condemnation,” is

directed toward fully accountable agents who have committed institutionally proscribed acts (Schopp, 1993). To illustrate, suppose that a category of conduct defined as “the intentional killing of another person” is institutionally proscribed, and that this proscription is enforced when intentional killings occur. In addition, suppose that an intentional killing has occurred, and that the killing was found to be unjustified. Under these circumstances, institutional condemnation and general act condemnation are expressed toward “intentional killings” generally, and specific act condemnation is expressed toward the specific intentional killing that has been committed by the accused. Actor condemnation will be expressed toward the accused if it is determined that the accused was a morally accountable actor at the time of the killing. If, however, it is determined that the accused lacked accountability for the act—perhaps due to a psychological impairment that rendered him legally insane—then actor condemnation will not be expressed toward him. Note that “institutional,” “general act,” and “specific act” condemnation are expressed toward a category of conduct or a specific act that falls within the relevant category of conduct, while actor condemnation extends, as its label indicates, to the actor himself.

As the foregoing discussion illustrates, each of the four expressions of condemnation corresponds to a key point in the framework established by the criminal justice system. Ordinarily, when a person commits a proscribed act and is apprehended by the authorities, charged, tried, convicted, and sentenced, all four types of condemnation are expressed. It should be noted, however, that general act condemnation and specific act condemnation are not necessarily expressed in *every* case where criminal punishment is imposed (Schopp, 1993). If, for example, a portion of the criminal code diverges from conventional notions of morality to such a degree that law enforcement officers or jurors do not wish to affirm the institutional

proscription of a category of conduct, but they nevertheless enforce the proscription for no other reason than to fulfill their respective oaths, a criminal conviction may follow even though there has been no expression of general act condemnation. Similarly, there would be no expression of specific act condemnation in cases where jurors affirm the general proscription of a category of conduct, deny that the proscription ought to be affirmed in the specific case before them, but convict the defendant to satisfy their oath to faithfully apply the law.

In contrast, in a minimally-retributive criminal justice system, Schopp's (1993) framework holds that institutional condemnation and actor condemnation are necessarily expressed in every case in which criminal punishment is justly imposed. First, institutional condemnation is expressed in all such cases because the *principle of legality*—that is, the notion that there can be no punishment without law—ensures that there can be no just punishment in the absence of an institutional proscription (e.g., Singer & Gardner, 1989). This principle is also reflected in Nebraska Revised Statute § 28-102(4), which has been quoted above. Second, actor condemnation is expressed whenever criminal punishment is justly imposed because in minimally-retributive criminal justice systems, actors who lack the capacity for criminal responsibility simply may not be justly punished (Morse 1997; Schopp, 1993; Arenella, 1992; Singer & Gardner, 1989). The “capacity for criminal responsibility,” as the term is used here, refers to the set of psychological capacities that are relevant to the determination that a given actor was “competent” to commit a crime (Schopp, 1998). Others refer to this concept as “accountability” or “moral agency,” and, generally speaking, all but the “very young” and the legally insane possess these capacities (e.g., Arenella, 1992, p. 1521; Morse, 1997). In other words, the threshold for criminal responsibility is quite low. Nevertheless, a determination that

the defendant was a morally accountable agent must precede the imposition of punishment in any minimally-retributive criminal justice system (Schopp, 1993, p. 1263). Therefore, if one accepts the notion that actor condemnation is expressed when actors are found to be morally accountable agents, it follows that actor condemnation is expressed whenever punishment is imposed.

Parenthetically, it may be interesting to note that in a purely utilitarian criminal justice system, punishment could be imposed without an expression of actor condemnation if, in order to maximize social utility, it would be acceptable to punish a person who was not responsible for a given criminal act—a possibility that underlies one of the most potent criticisms of the pure utilitarian theory of punishment (and which would not be tolerated in a minimally-retributive system).

In summary, the criminal justice system is the conventional institution for the imposition of punishment, and Schopp (1993) argues that condemnation is expressed by the criminal justice system generally and through its application in specific cases. However, the criminal justice system imposes punishment upon, and expresses condemnation toward, only those persons who are found to have performed institutionally proscribed acts while acting as criminally responsible, accountable actors. Conversely, without a determination that a person is an accountable agent, criminal punishment cannot follow, no retributive or deterrent aims would be legitimately served if the person were institutionally incapacitated (though it should be noted that for the reasons explained above, the term “deterrence,” here and hereinafter, is used in a narrow, specific sense), and no condemnation would be expressed toward him by such an incapacitation.

It is important to take note of the following point: Although Schopp’s theory suggests that actor condemnation is justly, ordinarily, and automatically expressed toward a person who has



been found to have committed an institutionally proscribed act while acting as a morally accountable agent, it is a separate, empirical question whether vengeful feelings and disapproving judgments (i.e., the components of condemnation) are actually expressed toward defendants who are found guilty of committing a crime. The experiments described below attempt to explore this empirical question. Although the empirical inquiry does not depend directly upon the validity of the condemnation framework (indeed, it can neither prove or refute the normative framework), the implications of the empirical findings for legal policymakers are more potent to the extent that the condemnation framework coheres with legal institutions. The foregoing discussion illustrates the convergence between the condemnation framework and the criminal justice system. In the following subparts, the condemnation framework will be applied first to the institution of civil commitment, and subsequently to the institution of juvenile justice, in order to explore whether the framework serves to illustrate the noncriminal nature of those institutions.

## 2. *The Expressive Function of Police Power Civil Commitments*

States may subject their citizens to non-punitive deprivations of liberty through their civil commitment procedures. Civil commitments stem from two general sources of state authority: *parens patriae* powers and police powers. Generally, *parens patriae* civil commitments are imposed to provide care for persons who lack the capacity to care for themselves (e.g., Schopp, 1998; *Addington v. Texas*, 1979). Police power civil commitments, in contrast, are imposed upon persons who suffer from psychological impairments that render them dangerous (Schopp, 1998, p. 332; see also, e.g., *Kansas v. Hendricks*, 1997; *Addington*, 1979). The uses and legal contours of *parens patriae* civil commitments are beyond the scope of the present analysis, and the term “civil commitment,” as it is used hereinafter, should be understood to refer only to

police power civil commitments.

As noted above, a state also exercises its police powers, or its “authority to wield coercive force in order to protect the community from harm,” when it punishes criminals (Schopp, 1998, p. 332). Thus, because criminal incarceration *and* civil commitment can be based on a state’s police powers, it follows that there is some overlap in the functions that these deprivations of liberty perform. For example, and as noted previously, criminal incarceration and civil commitment both may legitimately serve to incapacitate and rehabilitate (e.g., 18 U.S.C. § 3553(a)(2); *Jones v. United States*, 1983). This overlap makes distinguishing between these types of deprivations of liberty somewhat difficult.

Recall that courts apply the two-level analysis set forth in *United States v. Ward* (1980) to determine whether a civil commitment procedure is truly criminal in nature. The *Ward* analysis is deferential to the state’s legislature, but the legislature’s intent to create a civil procedure may be disregarded if “the statutory scheme was so punitive either in purpose or effect as to negate that intention” (pp. 248-249). Several factors may be used to assess the “purpose or effect” of a statute, but one factor seems to receive special emphasis when civil commitment statutes are reviewed. Specifically, the Supreme Court has suggested that if a civil commitment procedure serves retributive and deterrent purposes, it may be deemed criminal in nature (e.g., *Kansas v. Hendricks*, 1997). The Court, however, has not clearly articulated the reasons *why* civil commitments do not serve retributive or deterrent purposes. Arguably, the condemnation framework set forth above can, when considered along with the traditional justifications for police power civil commitments, clarify the noncriminal nature of these commitments.

Although civil commitments may be based on a state’s police powers, they are typically

imposed through institutions separate and distinct from the criminal justice system. These civil commitment institutions vary in their particulars from state to state, and it is not necessary to summarize, or even categorize, them here. It is important to note, however, that these institutions may differ from the criminal justice system in several key respects. First, certain rights that must be afforded in criminal proceedings—such as the protections offered by the Fifth Amendment’s Self-Incrimination Clause and Double Jeopardy Clause—need not be afforded when commitments stem from a state’s conventional civil commitment institution (e.g., *Allen v. Illinois*, 1986; see also *Ward*, 1980, p 248). In addition, civil commitment institutions may employ rules and procedures that are quite different from those that apply in criminal proceedings. For example, civil commitments under Nebraska’s Mental Health Commitment Act are based upon “clear and convincing” evidence (as opposed to proof “beyond a reasonable doubt”), and commitment decisions are reached by mental health boards rather than juries (Neb. Rev. Stat. § 71-925). Although the differences between criminal proceedings and civil commitment proceedings may be significant, they are not problematic because states’ civil commitment statutes are not meant to result in the imposition of criminal punishment (*Addington v. Texas*, 1979). Instead, the purpose of a civil commitment “is to treat [an] individual’s mental illness and protect him and society from his potential dangerousness” (*Jones v. United States*, 1983; see also Neb. Rev. Stat. § 71-902). To achieve this purpose while also protecting individuals’ core substantive due process interests in freedom from bodily restraint, civil commitments imposed under a state’s ordinary civil commitment statutes are generally held to be constitutionally valid when there has been an institutional determination—based upon at least clear and convincing evidence—that a person is both mentally ill and dangerous (*Kansas v. Crane*, 2002; *Foucha v. Louisiana*, 1992).

In Nebraska, this “mental illness” is defined as “a psychiatric disorder that involves a severe or substantial impairment of a person’s thought processes, sensory input, mood balance, memory, or ability to reason which substantially interferes with such person’s ability to meet the ordinary demands of living or interferes with the safety or well being of others,” and the “dangerousness” criterion is satisfied when a mental illness causes a person to present “a substantial risk of serious harm to another person or persons within the near future” (Neb. Rev. Stat. §§ 71-907, 71-908).

If these criteria are satisfied and a civil commitment is ordered, it may be said that the commitment bears a “reasonable relation” to the goals of treating psychological impairments while protecting society from danger (*Foucha v. Louisiana*, 1992, p. 79). In other words, the involuntary civil commitment is justified by 1) the presence of a qualifying psychological impairment, and 2) evidence of dangerousness. If either criterion ceases to apply, however, the justification for the commitment dissolves, and the person can no longer be held justly against his or her will.

It should be noted that the justification for civil commitments does not depend upon the commission of an institutionally proscribed act by an accountable agent. In other words, unlike criminal punishment, civil commitments may occur in the absence of institutional condemnation and actor condemnation. This is consistent with civil commitment’s nonpunitive purpose of protecting the public from the dangerous mentally ill; indeed, the absence of institutional and actor condemnation *requires* that civil commitments are not punitive, and it therefore follows that they do not, and cannot, serve retributive and uniquely “criminal” deterrent purposes.

Although civil commitments do not depend upon the commission of institutionally proscribed acts, it does not follow that civil commitments cannot occur when the subject of the

commitment has committed an institutionally proscribed act. On the contrary, civil commitments based on determinations that defendants are incompetent to proceed or are legally insane may flow from the criminal justice system; that is, they may be imposed in criminal proceedings as opposed to proceedings under a state's standard civil commitment statute (*Jones v. United States*, 1983; *Jackson v. Indiana*, 1972). Although these commitments have been held to be consistent with the "reasonable relationship" principle cited in *Foucha*—and they are therefore consistent with the principles of due process (e.g., *Jones*, 1983; *Jackson*, 1972)—their civil nature is also illustrated effectively by the four-level condemnation framework (e.g., Pearce, 2007).

For example, suppose that a person committed a sexual assault, but a court has determined that the person lacks competence to proceed to trial. Suppose also that, as a direct result of his incompetence to proceed, the person is civilly committed. This commitment would be constitutional, provided that its duration is limited to "the reasonable period of time necessary to determine whether there is a substantial probability that [the person] will attain [the] capacity [to proceed] in the foreseeable future" (*Jackson*, 1972, p. 738). If it is determined that there is no substantial probability that the person will obtain this capacity in the foreseeable future, the person's confinement can continue only if he is committed pursuant to "the customary civil commitment statute" (*Jackson*, 1972, p. 738). If, on the other hand, it is determined that the person soon may be competent to proceed to trial, "his continued confinement must be justified by progress toward that goal" (*Jackson*, 1973, p. 738; see also, e.g., Neb. Rev. Stat. § 29-1823(1)). If one were to question whether this sort of commitment were truly criminal, as opposed to civil, in nature, one might focus on the function performed by the commitment (i.e., to determine whether the person is, or may soon be, competent to proceed to trial) and conclude

that it is indeed “civil” (*Jackson, 1973*). Alternately, however, one might apply the condemnation framework, which illustrates that the commitment must be civil. In this example, an expression of institutional condemnation is associated with the general proscription of sexual assaults. Also, it may be assumed that the decision to prosecute the person reflects an affirmation of the institutional proscription of sexual assaults, which would result in an expression of general act condemnation. Due to the person’s incompetence to proceed in the criminal justice system, however, the procedures established by criminal justice system cannot be used to evaluate his particular sexual assault to determine whether it merits specific act condemnation. For the same reason, there can be no determination that the person committed his sexual assault as an accountable agent, which is prerequisite to an expression of actor condemnation towards the person himself. Thus, even though the person may have committed an institutionally proscribed act, and even though his commitment was imposed via the criminal justice system rather than the state’s ordinary civil commitment institution, the person’s commitment cannot express condemnation—and it therefore cannot be deemed “criminal” in nature (in accordance with the condemnation theory)—because there has not been a determination that the person committed an act of an institutionally proscribed type while acting as an accountable agent.

Similarly, suppose that a person committed a sexual assault, but he successfully raised an insanity defense during his criminal prosecution. Suppose also that the state has civilly committed him based solely on his legal insanity (see *Jones v. United States, 1983*). In this case, as in the example outlined above, there has been an expression of institutional condemnation and, it may be assumed, an expression of general act condemnation toward the category of

conduct defined as “sexual assault.” In addition, given the affirmative nature of the insanity defense, an insanity acquittal arguably results in at least an implicit determination that the specific sexual assault committed by the defendant merits specific act condemnation (e.g., *Jones*, 1983, p. 363). Nevertheless, the post-insanity acquittal commitment does not express condemnation toward *the person* because the commitment is not based on a determination that he committed the proscribed act while acting as an accountable agent. Instead, the commitment is based upon “the purposes of treatment and the protection of society,” as are ordinary civil commitments (*Jones v. United States*, 1983, p. 366). Indeed, the successful insanity defense precluded a determination that actor condemnation is appropriately expressed toward the person, even though the proscription of the defendant’s specific act may have been affirmed during the criminal proceedings.

In addition, it should be noted that a person may be convicted of a crime, punished, and subsequently civilly committed—with no distortion of the separate functions that the institutions of criminal justice and civil commitment perform—provided that the criteria set forth in the standard civil commitment statutes are satisfied at the time of the commitment (e.g., *Baxstrom v. Herold*, 1966). The condemnation framework can be used to illustrate that this result coheres with the criminal justice system’s justificatory foundation. Suppose, for example, that a person has been convicted of a sexual assault, that he was sentenced to a term of incarceration based upon that conviction, and that during his incarceration he developed a psychological impairment that satisfies the “mental illness” prong of the state’s civil commitment statute and renders him “dangerous” within the meaning of that statute. Suppose further that he is civilly committed at the expiration of his term of incarceration. This commitment *would not* express condemnation

toward the person, even though condemnation was appropriately expressed toward him through the criminal justice system previously. This is so because the civil commitment stemmed from a determination that the statutory commitment criteria were satisfied; the commitment was not based upon the fact that the person was found to be criminally responsible for a sexual assault. If, however, the standard civil commitment criteria were not satisfied, and the person were nevertheless civilly committed upon the expiration of his sentence, the commitment would be subject to challenge on the ground that the person was treated differently from those who are civilly committed pursuant to the statute. Moreover, the person's conviction would not provide a reasonable basis for such differential treatment (*Baxstrom*, 1966).

The examples used above to illustrate the relationship between condemnation, criminal punishment, and civil commitment do not account for all of the variations in state civil commitment law. In Nebraska, for example, insanity acquittals do not automatically result in civil commitments (*Tulloch v. State*, 1991; Neb. Rev. Stat. §§ 29-3701 to 3704). Nevertheless, the foregoing analysis is consistent with current Supreme Court caselaw concerning criminal procedure and civil commitment, and it is therefore *generally* consistent with the laws of the States.

In summary, although civil commitments may be based upon a state's police powers, they are not designed to impose punishment, and therefore they do not serve retributive or "deterrent" functions. Instead, states' civil commitment statutes establish institutions that are designed to confine dangerous persons with statutorily-defined psychological impairments (e.g., *Foucha*, 1992). Principles of due process "require[] that the nature and duration of [a] commitment bear some reasonable relation to the purpose for which the individual is committed," (*Jackson v.*



*Indiana*, 1972, p. 738), and these principles are satisfied in cases where individuals are committed following determinations that they are incompetent to proceed to trial or are not guilty by reason of insanity—even if proceedings under the standard civil commitment statute do not occur (e.g., *Jackson*, 1973; *Jones*, 1983). When the basic institution of civil commitment is examined using the condemnation framework, the framework illustrates that civil commitments are not punitive because they do not express actor condemnation. Moreover, the condemnation framework arguably clarifies the relationship between the institutions of criminal justice and civil commitment in the United States by demonstrating that civil commitments that flow directly from the criminal justice system are not punitive, because even though the proceedings may express condemnation toward a category of conduct (or even the defendant’s specific conduct), they do not express condemnation toward the actor himself.

The foregoing analysis illustrates that the condemnation framework can be used to show that criminal incarcerations can be distinguished from involuntary civil commitments of various types because the sort of condemnation that is unique to criminal punishment is expressed only toward actors who possess the capacity for criminal responsibility. It will be shown next that the four-level condemnation framework can also be used to explore the distinction between the criminal and juvenile justice systems and highlight the importance of juvenile court jurisdiction decisions.

### ***3. The Expressive Function of Juvenile Court Proceedings***

Juvenile courts were originally formed to provide a rehabilitation-focused alternative to the “punitive” adult criminal justice system—though jurisdiction waiver procedures allowed young offenders to be transferred to the adult system in certain cases (e.g., *Feld*, 1997; *Tomkins*

et al., 1996). Although juvenile court dispositions, like criminal convictions, could result in deprivations of liberty, these deprivations of liberty were predicated on the states' *parens patriae* powers, as opposed to their police powers (e.g., Fondacaro, Slobogin, & Cross, 2006). During the past forty years, however, the effectiveness of juvenile courts has been challenged, their rehabilitative ideals have been questioned, and their *parens patriae* foundations have been shaken. A series of Supreme Court decisions "criminalized" juvenile court procedure, and some states went so far as to establish institutions of juvenile justice that purport to hold juvenile offenders accountable for their violations of the law. In view of these trends, it is arguable that certain juvenile court dispositions are now punitive.

In this subsection, the four-level condemnation framework will be used to illustrate that juvenile court institutions based on the traditional "rehabilitative" model of juvenile justice are not punitive, but that contemporary "accountability-based" juvenile courts *are* punitive. It will also be shown that, given the wide varieties in the design and application of juvenile justice systems, one cannot reasonably expect that all institutions of juvenile justice will consistently reflect the traditional conceptual and justificatory distinctions between juvenile and criminal justice—including differences in the expression of condemnation. Nevertheless, it will be argued that the decision to transfer jurisdiction of a juvenile offender's case from the juvenile justice system to the criminal justice system can be framed as an assessment of whether a particular offender might be an appropriate subject of the "actor condemnation" that typically flows only from the criminal justice system.

First, a brief historical overview of youths' criminal liability at common law and the development of the modern juvenile court system will be presented. Next, judicial decisions and

legislative innovations that have arguably “criminalized” the formerly “rehabilitative” juvenile court system will be reviewed. Finally, the condemnation framework will be used to attempt to illustrate the “criminalization” of juvenile courts and the significance of juvenile court jurisdiction decisions.

**a. *The Early History of Juvenile Justice***

Juvenile courts did not exist at common law, and all offenders, regardless of age, were subject to the same system of criminal courts (e.g., Walkover, 1984). This does not mean, however, that the common law system of juvenile justice was based on an assumption that even the most youthful offenders possessed the capacities associated with criminal responsibility (e.g., Morse, 1997; Arenella, 1992). On the contrary, youths were assumed to have different capacities for moral reasoning and “understanding wrongfulness” than adults, and the common law infancy defense accounted for these differences by incorporating a set of age-based presumptions (Walkover, 1984, p. 510). Persons fourteen years and older were presumed to be morally responsible for their actions and were therefore subject to the same criminal procedures and punishments as adults (Gardner, 1997). Persons age seven and younger were conclusively presumed to lack the capacity for moral responsibility, and hence they could not be criminally punished. Persons between the ages of seven and fourteen were also presumed to lack the capacity for moral responsibility, but this presumption could be rebutted if the state could show that a particular youth knew the wrongfulness of his or her act. Non-punitive dispositions were not considered among the sentencing options for either excused or morally responsible youths, regardless of their ages (Gardner, 1997, pp. 181-182).

During the nineteenth century, an alternative to the common law model of juvenile justice

began to emerge. In 1825, the efforts of Quaker reformers led to the creation of New York's "House of Refuge," which not only separated young offenders from adult criminals, but also provided the youth with some educational instruction (Gardner, 1997, p. 182). In 1899, Illinois created the first modern juvenile court system, and by 1945 every state and federal jurisdiction in the United States had implemented some form of "juvenile justice alternative" for young offenders (p. 182). Nevertheless, procedures soon evolved to permit the criminal punishment of certain juvenile offenders. Indeed, "In 1903, only four years after its establishment, the Chicago juvenile court transferred fourteen children to the adult criminal system" (p. 182 n.18). Gardner (1997) notes that by the end of the 1970s, every jurisdiction had some means of criminally prosecuting juveniles in certain cases.

These changes ushered in the era of *parens patriae* juvenile justice, which, as noted above, was founded on the ideal of rehabilitating young offenders (Feld, 1997). As Gardner (1997) explains, adversarial hearings governed by the rules of criminal procedure were not held in *parens patriae* juvenile justice systems. Instead, juvenile proceedings were considered civil, and alternate terminology was employed so that juveniles could avoid the stigma associated with "criminal" labels: crimes became "acts of delinquency"; indictments were replaced by "petitions"; trials became "adjudications"; sentences were called "dispositions" and were sometimes derived from the recommendations of social scientists and physicians; and juveniles were confined in "schools" rather than jails or prisons (Gardner, 1997, pp. 183-184).

Beginning in the mid-1960s, however, a series of Supreme Court cases began to alter the original "non-punitive" form of juvenile justice, and the Court began to acknowledge the mounting frustration with the rehabilitative philosophy of juvenile courts. In addition, states

began to experiment with models of juvenile justice that specifically incorporated notions of criminal accountability. These developments, and the “criminalization” of juvenile justice that followed them, will be discussed next.

***b. The “Criminalization” of Juvenile Courts***

The criminalization of the *parens patriae* juvenile court system arguably began with the Supreme Court’s decision in *Kent v. United States* (1966). Morris Kent, then age sixteen and already on probation with the juvenile court, was arrested and charged with housebreaking, robbery and rape. Kent was subject to the exclusive jurisdiction of the District of Columbia Juvenile Court unless that court, after “full investigation,” decided to waive jurisdiction over him and transfer him to the United States District Court for the District of Columbia for trial as an adult. The juvenile court denied Kent’s requests for a hearing on the question of waiver and for access to the court’s “Social Service file” on Kent (p. 546). Instead, the juvenile court entered an order stating only that the required “full investigation” had been conducted and that jurisdiction had been waived. Thereafter, Kent was tried in the district court and convicted on six counts of housebreaking and robbery—though he was acquitted on two rape counts by reason of insanity. He was sentenced to a term of imprisonment of thirty to ninety years.

Ultimately, however, Supreme Court vacated the district court’s judgment and remanded the case for a waiver hearing. In reaching this decision, the Court held not only that the statutorily-required “full investigation” did not occur, but also that the juvenile court’s waiver of jurisdiction failed to comport with “the basic requirements of due process and fairness” (*Kent v. United States*, 1966, p. 553). The Court explained that although the juvenile court is afforded broad discretion to determine whether to waive jurisdiction over a juvenile, the governing statute

“does not confer upon the Juvenile Court a license for arbitrary procedure” (p. 553). The Court held that in order for the waiver of juvenile court jurisdiction to be valid, juveniles must be granted a hearing, along with access to counsel and the social service reports, and “a statement of reasons for the Juvenile Court’s decision” (p. 557).

The Court also criticized the *parens patriae* foundation of the juvenile court, noting that Kent’s case presented concerns about “the justifiability of affording a juvenile less protection than is accorded to adults suspected of criminal offenses” (*Kent v. United States*, 1966, p. 551-52). Though it did not have occasion to expand upon these concerns in its opinion, the Court commented that the rehabilitative ideals embodied in the District’s Juvenile Court Act may be unrealized in practice, and that juveniles may well “receive[] the worst of both worlds . . . [because the juvenile] gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children” (p. 556).

Because the Court’s holding in *Kent* was based, at least in part, on the juvenile court’s failure to satisfy the terms of the Juvenile Court Act governing the District of Columbia, its applicability to state juvenile courts was unclear (Gardner, 1997). In *In re Gault* (1967), however, the Supreme Court extended constitutional protections to the states’ juvenile justice systems. Gerald Gault, who was fifteen years old at the time of his adjudication, was committed to the custody of the Arizona State Industrial School for a maximum term of approximately six years (when he would reach the age of twenty-one). Gault’s offense was to place an “obscene” phone call while “subject to a six months’ probation order . . . as a result of his having been in the company of another boy who had stolen a wallet from a lady’s purse” (*In re Gault*, 1976, p. 4). Incidentally, the criminal punishment specified for such an offense, had Gault been an adult,

would have been a fine of \$5 to \$50 or imprisonment for not more than two months. More importantly, the petition which initiated Gault's adjudication was never served on him or his parents; Gault was not represented by counsel at either of the two hearings that preceded his commitment to the state school; the person complaining of the obscene call did not attend either of the hearings; and no record was made of the substance of the hearings.

The Supreme Court held that, in accordance with the Due Process Clause of the Fourteenth Amendment, the following rights must be afforded when juvenile delinquency proceedings "may result in commitment to an institution in which the juvenile's freedom is curtailed": 1) juveniles and their parents must be given written notice of the charges; 2) juveniles and their parents must be given notice of their right to the assistance of counsel at the adjudication hearing; 3) juveniles are entitled to confront and cross-examine witnesses at their adjudication hearings; and 4) juveniles are entitled to the protections of the privilege against self incrimination (*In re Gault*, 1967, pp. 31-57). As in *Kent*, the Court criticized the *parens patriae* underpinnings of the juvenile court system, stating,

[T]he highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context. The constitutional and theoretical basis for this peculiar system is—to say the least—debatable. And in practice, as we remarked in the *Kent* case . . . the results have not been entirely satisfactory. (*In re Gault*, 1967, pp. 17-18)

Nevertheless, the Court opined that its holding would not eliminate the "unique benefits" cited by proponents of the juvenile justice system (*In re Gault*, 1967, p. 22). Moreover, the Court based much of its holding on procedural fairness considerations with roots in the Due Process

Clause (as opposed to the Sixth Amendment, for example), and thereby avoided the complete criminalization of juvenile courts (Gardner, 1997). As Gardner (1997) notes, however, the Court's direct reliance on the Fifth Amendment in its analysis of the self-incrimination issue suggests that juvenile adjudications are "criminal" proceedings at least for the purposes of the Fifth Amendment privilege against self-incrimination. On this point, it should be recalled that in *United States v. Ward* (1980), the Supreme Court stated specifically that the "Self-Incrimination Clause of the Fifth Amendment . . . is expressly limited to 'any criminal case'" (p. 248). Generally speaking, though, the Court managed—or at least attempted to manage—the "constitutional domestication" of juvenile adjudications (*In re Gault*, 1967, p. 22), without holding that deprivations of liberty stemming from juvenile court adjudications amount to criminal punishment (Gardner, 1997).

In *In re Winship* (1970), the Supreme Court extended another important constitutional protection to persons adjudicated in the juvenile courts. Specifically, the Court held that juveniles charged with committing acts of delinquency are entitled to a reasonable doubt standard of proof (Gardner, 1997). Once again, however, the Court stopped short of fully criminalizing the juvenile justice system; indeed, the Court opined that the reasonable doubt standard of proof would not destroy the beneficial informality, flexibility, and speed of the system.

Following *In re Winship*, the Supreme Court announced an opinion which seemed to call to a halt the importation of criminal rights and procedures into the juvenile justice system. In *McKeiver v. Pennsylvania* (1971), a plurality of the Court determined that the Sixth Amendment right to a jury trial is inapplicable in juvenile adjudication hearings. The plurality dismissed arguments that juries would aid in accurate factfinding and that judges serving as factfinders



would be influenced by exposure to prejudicial material. Instead, it concluded that replacing the factfinding judge with a jury would end the informal intimacy, sympathy, and paternalism underlying the juvenile court process, and possibly replace that process with a public trial. In addition, the plurality perceived the juvenile justice system's rehabilitative goals to be less futile than had been suggested in *Kent* and *In re Gault*:

The juvenile concept held high promise. We are reluctant to say that, despite disappointments of grave dimensions, it still does not hold promise, and we are particularly reluctant to say . . . that the system cannot accomplish its rehabilitative goals. So much depends on the availability of resources, on the interest and commitment of the public, on willingness to learn, and on understanding as to cause and effect and cure. In this field, as in so many others, one perhaps learns best by doing. We are reluctant to disallow the States to experiment further and seek in new and different ways the elusive answers to the problems of the young, and we feel that we would be impeding that experimentation by imposing the jury trial. (*McKeiver v. Pennsylvania*, 1971, p. 547)

The Court returned to its “criminalization” of the juvenile justice system, however, in *Breed v. Jones* (1975). Jones, then age 17, committed acts of delinquency analogous to the “adult” crime of robbery. A petition was filed in juvenile court, and following an adjudicatory hearing, the juvenile court found that Jones had indeed committed the robbery. At the ensuing dispositional hearing, however, the juvenile court decided that Jones was unfit for treatment as a juvenile and ordered that he be prosecuted as an adult. Jones was then tried and convicted of

robbery. On review, the Court held that the Fifth Amendment's Double Jeopardy clause prohibited the state from subjecting Jones to a criminal trial after he had already been adjudicated delinquent in the juvenile justice system. According to the Court:

[I]n terms of potential consequences, there is little to distinguish an adjudicatory hearing such as was held in this case from a traditional criminal prosecution. For that reason, it engenders elements of "anxiety and insecurity" in a juvenile, and imposes a "heavy personal strain." And we can expect that, since our decisions implementing fundamental fairness in the juvenile court system, hearings have been prolonged, and some of the burdens incident to a juvenile's defense increased, as the system has assimilated the process thereby imposed.

We deal here, not with the "formalities of the criminal adjudicative process," but with an analysis of an aspect of the juvenile-court system in terms of the kind of risk to which jeopardy refers. Under our decisions we can find no persuasive distinction in that regard between the proceeding conducted in this case . . . and a criminal prosecution, each of which is designed "to vindicate [the] very vital interest in enforcement of criminal laws." (p. 530-31)

In other words, because of the consequences that may follow adjudicatory hearings—and at least partly because of the Court's prior decisions "criminalizing" the juvenile justice system—the Court has determined that juvenile delinquency proceedings are equivalent to criminal prosecutions for the purposes of double jeopardy analysis (Gardner, 1997).

Through these decisions, the Supreme Court ushered in the "modern era" of juvenile justice, wherein many of the rights that must be afforded to defendants in the criminal justice

system have been extended to juveniles. In addition, in most of these decisions the Court criticized the juvenile justice system's inability to achieve its rehabilitative ideals. Nevertheless, the Court avoided criminalizing the juvenile justice system completely, and in *McKiever* it encouraged states to experiment with different strategies for achieving rehabilitative goals.

Some states, however, have decided to experiment with "accountability-based" models of juvenile justice. For example, Washington has incorporated notions of accountability and punishment directly into its juvenile justice system. The Juvenile Justice Act of 1977, as amended, provides, in part, as follows:

(2) It is the intent of the legislature that a system capable of having primary responsibility for, being accountable for, and responding to the needs of youthful offenders, as defined by this chapter, be established. *It is the further intent of the legislature that youth, in turn, be held accountable for their offenses* [italics added] and that communities, families, and the juvenile courts carry out their functions consistent with this intent. To effectuate these policies, the legislature declares the following to be equally important purposes of this chapter:

(a) Protect the citizenry from criminal behavior;

....

(c) Make the juvenile offender *accountable* for his or her *criminal* behavior [italics added];

(d) *Provide for punishment* [italics added] commensurate with the age, crime, and criminal history of the juvenile offender;

....

(j) *Provide for a clear policy to determine what types of offenders shall*

*receive punishment*, [italics added] treatment, or both, and to determine the jurisdictional limitations of the courts, institutions, and community services . . . . Wash. Rev. Code Ann. § 13.40.010 (West 2006)

In addition, juvenile dispositions in Washington are based on a statutory schedule that resembles sentencing guidelines, and acceptable dispositions include “sentences” to confinement and fines of up to \$500 (Wash. Rev. Code Ann. §§ 13.40.020(2)(a), 13.40.0357). In other words, the Washington statutes establish a sentencing procedure for juveniles comparable to that of the adult criminal justice system. Although the rehabilitative ideals of the traditional model of juvenile justice are not completely eschewed in Washington, the Act states on its face that juveniles are to be held accountable for their criminal behavior and punished. Furthermore, to the extent that the sentencing schedule is afforded weight, it would seem to restrict the state’s ability to individually tailor therapeutic, rehabilitative dispositions.

The Supreme Court’s “criminalization” of the juvenile justice system and the adoption of “accountability” models in states such as Washington raise doubts about the civil nature of juvenile justice. In the following section, the condemnation framework will be used to analyze whether modern juvenile courts impose punishment.

***c. Condemnation and Juvenile Justice***

The four-level condemnation framework can provide useful insights into the relationship between criminal and juvenile justice systems. The framework will be applied to traditional and evolving models of juvenile justice to assess whether these various models represent civil or criminal institutions. In addition, it will be argued that in states that have not yet adopted accountability-based models of juvenile justice, the jurisdiction determination process (i.e., the

charging or waiver decision) serves a “gatekeeper” function insofar as expressions of actor condemnation are concerned, and that many of the criteria used to inform jurisdiction decisions are coherent with the criminal justice system’s normative structure only to the extent that those criteria are understood to relate to a juvenile’s capacity for criminal responsibility.

*i. The Expressive Function of Evolving Models of Juvenile Justice*

This subsection will demonstrate that the condemnation framework can be used to analyze whether the common law, *parens patriae*, “modern era,” and accountability-based models of juvenile justice are truly criminal in nature.

First, when the condemnation framework is applied to the common law model of juvenile justice—which, as noted above, is based on the infancy defense—it reveals that there may be inconsistencies between the infancy defense and the normative structure underlying the criminal justice system. Recall that under the infancy defense, children younger than age seven would not be subject to criminal punishment—or, in the language of the framework, actor condemnation—because the defense created an irrebuttable presumption that these children lacked the capacity for criminal responsibility. Suppose, for example, that a six-year-old child stole her neighbor’s bicycle. If theft is proscribed in the state’s criminal code, and if this proscription is enforced, institutional condemnation and general act condemnation would be expressed toward “theft” as a category of conduct. Depending on the procedures used to invoke the infancy defense, there may or may not be an expression of specific act condemnation toward the particular bicycle theft that was perpetrated by the child. In any case, however, it is clear that there would be no expression of actor condemnation toward the child herself because the infancy defense forecloses the possibility of an institutional determination that the child stole the bicycle

while acting as a criminally responsible agent. Assuming that no children under age seven possess the capacity for criminal responsibility, this result would cohere with the normative framework underlying the criminal justice system. If some of these youths do possess the capacity for criminal responsibility, however, the infancy defense would seem to interfere with the basic function of the criminal justice system. In essence, the common law model of juvenile justice would provide these criminally responsible youths with a complete defense to criminal liability based on an erroneous and uncorrectable assumption about their eligibility to participate in the criminal justice system.

Conversely, at common law persons over the age of fourteen were presumed to possess an adult's capacity for criminal responsibility. Because these youths were considered proper subjects for criminal punishment, all four types of condemnation might be expressed following the trial, conviction, and sentencing of a fourteen-year-old bicycle thief. If age fourteen is indeed the age at which most persons attain the maturity necessary to afford them the capacity for criminal responsibility, the defense functions in a manner consistent with minimally-retributive criminal justice systems' normative framework. On the other hand, if most persons do not acquire the basic capacity for criminal responsibility by this age, the defense's presumption is inconsistent with that framework and ought to be questioned. It should be noted, however, that despite his ineligibility for the infancy defense, a fourteen-year-old might be able to raise his diminished capacity as an affirmative defense to criminal liability in the "adult" criminal justice system.

The common law infancy defense also provided that a criminal actor between the ages of seven and fourteen might be punished if the state could show that the youth possessed the

capacity for criminal responsibility. In the language of the condemnation framework, one might say that in order to prosecute a youth between the ages of seven and fourteen, the state was required to show that the youth was eligible to be the subject of actor condemnation. If this showing is made, the youth may be tried as an adult and punished; moreover, his punishment would not offend the principle of accountability that inheres in a minimally-retributive criminal justice system. Conversely, if it cannot be shown that the youth possesses the capacity for criminal responsibility, the infancy defense would require that he not be punished—an outcome that is consistent with the criminal justice system’s normative framework.

In short, the common law infancy defense arguably functions in a manner consistent with the basic normative structure of the criminal justice system—but only to the extent that its conclusive presumptions about youths’ capacities for criminal responsibility are accurate.

The condemnation framework can also be used to analyze the *parens patriae* juvenile court structure that replaced the common law system. This analysis suggests that the *parens patriae* system of juvenile justice did not express condemnation toward juveniles, even though juveniles were sometimes subjected to terms of confinement substantially greater than they would face in the “adult” criminal justice system. Recall, for example, that Gerald Gault faced a deprivation of liberty of up to six years under the juvenile justice system, even though he would have faced a maximum of two months’ imprisonment had he been tried as an adult. One might suppose that, based on the relative severity of Gault’s juvenile court disposition, the juvenile court system then in effect was a punitive institution, despite its *parens patriae* foundation. The condemnation framework suggests, however, that this is not the case.

Assume that the act of placing an obscene phone call is an institutionally proscribed act

and that the institutional proscription of this act is enforced. Thus, there has been an expression of institutional condemnation and general act condemnation. Assume also that a juvenile places an obscene phone call, that he is adjudicated in a traditional, pre-*Gault parens patriae* juvenile court, that he is found to be delinquent, and that he is remanded to the custody of a juvenile detention facility for rehabilitation. It would seem that the delinquency finding entails a determination that the act committed by the juvenile fell within the prohibited category and was not justified; if so, there has been an expression of specific act condemnation. However, the juvenile's disposition is not punitive unless there has been an expression of actor condemnation, which occurs only when there has been a determination that the actor committed the proscribed act as a criminally responsible agent. If the juvenile's commitment to the detention facility was truly based on the state's *parens patriae* authority and not based on a determination that the juvenile committed the act as a criminally responsible agent, there would be no expression of actor condemnation. This remains true even if the juvenile is deprived of his liberty for much longer than the criminal justice system might have allowed—just as a civil commitment does not become punitive merely because it results in a lengthy deprivation of liberty, and civil damages awards do not amount to criminal punishment merely because they exceed any applicable criminal fine. In short, the condemnation framework suggests that traditional *parens patriae* juvenile court systems were not punitive, despite the fact that they might lead to relatively hard treatment.<sup>2</sup>

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<sup>2</sup>This analysis depends on an assumption that traditional, *parens patriae* juvenile justice systems were designed or applied based on the premise that youths are less responsible than adults, and therefore merit no punishment—or at least less punishment than adults (e.g., Gardner, 1997, p. 183). If this premise provides the conceptual and justificatory basis for treating juveniles differently than adult criminals, it follows that processing a criminally responsible



As discussed previously, during the “modern era” of juvenile justice, the Supreme Court afforded to juveniles many of the rights and procedural protections that apply in criminal proceedings while expressing doubts about the juvenile courts’ *parens patriae* foundation. These developments alter the foregoing analysis of the expressive function of *parens patriae* juvenile courts in two significant ways.

First, to the extent that the Court relied upon principles of due process and fundamental fairness when extending “criminal” rights and procedural protections to juveniles, the *parens patriae* foundation of the system is not eroded, and the foregoing analysis of *parens patriae* juvenile adjudications applies with equal force. In other words, the addition of procedural protections in the interest of “fairness” does not necessarily imply that the purpose of the proceeding has shifted to an assessment of whether the juvenile committed an institutionally proscribed act as a criminally responsible actor—just as it does not necessarily follow that civil

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youth through the juvenile justice system would raise significant conceptual and justificatory questions. It is possible, however, that juvenile justice systems can incorporate different premises. For example, a juvenile justice system might operate on the premise that juveniles are more likely to benefit from rehabilitation than adults, whether or not the juveniles possess the same capacity for criminal responsibility as adults. Indeed, the traditional *parens patriae* model of juvenile justice seems to have incorporated this premise (e.g., Gardner, 1997, p. 183). Thus, the traditional *parens patriae* juvenile justice system’s conceptual and justificatory foundation for treating juveniles differently than adults may include non-retributive considerations, and the system’s jurisdiction over criminally responsible youths no longer seems so offensive to the relationship between the institutions of juvenile and criminal justice. This note is intended to illustrate that the application of the condemnation framework to institutions of juvenile justice (of all eras) presented here is not meant to represent an all-encompassing, universal pronouncement about the proper functioning of juvenile justice institutions; however, to the extent that retributive considerations are relevant to the purposes and justifications of a given institution of juvenile justice, the condemnation framework is effective at highlighting discrepancies between the purposes and justifications of the institution and its functioning. This point should be borne in mind throughout the discussion presented in this subsection, as the discussion emphasizes retributive considerations.

commitment proceedings are rendered “criminal” in nature simply because a reasonable doubt standard of proof is applied. To the extent that the Court truly “criminalized” the juvenile justice system, however, the system’s *parens patriae* foundation has been undermined. As explained above, the Supreme Court has arguably criminalized juvenile court proceedings for the purposes of the privilege against self-incrimination and double jeopardy, though it relied on principles of due process and fairness when extending to juveniles the right to notice, counsel, and cross-examination. These holdings complicate the assessment of the expressive function of modern juvenile court systems. Second, and relatedly, the Court’s direct criticism of the *parens patriae* foundation of the juvenile courts casts doubt upon the courts’ civil nature. If the *parens patriae* underpinnings of the juvenile justice system are rejected, the juvenile courts arguably perform a function more akin to that of the criminal justice system. Despite these complications, it is at least arguable that enough of the *parens patriae* foundation of the juvenile justice system remains that the system has retained is traditional, “non-punitive” nature (Gardner, 1997, p. 183).

Any argument that modern era juvenile courts remain “civil” dissipates, however, in jurisdictions (such as Washington) that purport to hold juveniles accountable for their criminal acts. In these jurisdictions, the *parens patriae* foundation that was partly whittled away by the Supreme Court is replaced by a police power foundation that explicitly incorporates notions of criminal responsibility and accountability. If a juvenile commits an institutionally proscribed act and is adjudicated delinquent in such a jurisdiction, his disposition undoubtedly expresses both institutional and actor condemnation. Thus, the condemnation framework indicates that his disposition performs the expressive function of punishment—that is, the disposition is punitive, just as the accountability model intends. Parenthetically, it should be noted that even if the state

hopes to achieve rehabilitative goals through its juvenile court dispositions, this would not undo the disposition's expression of actor condemnation—just as rehabilitation efforts undertaken in a prison setting do not suffice to render inmates' convictions “civil” in nature. It should also be noted that unless a juvenile is afforded all of the rights and procedural protections normally afforded to criminal defendants—including the right to a trial by jury—a strong argument could be made that accountability-based juvenile justice systems are constitutionally infirm (see *In re L.M.*, 2008).

The foregoing discussion indicates that the condemnation framework provides a helpful tool for assessing the civil or criminal nature of various models of juvenile justice. It will be suggested next that the framework also illustrates that the mechanisms used to determine juvenile court jurisdiction perform a critical function that relates directly to the normative structure underlying the criminal justice system.

#### *ii. Condemnation and Juvenile Court Jurisdiction Decisions*

Recall that at common law, a criminal actor between the ages of seven and fourteen could be punished if the state could establish that the youth possessed the capacity for criminal responsibility. As suggested above, the state's burden might be reframed as follows: if the state shows that a youth is eligible to be the subject of actor condemnation, the youth may be tried as an adult and punished without offense to the principle of accountability inherent in minimally-retributive criminal justice systems. In “modern era” juvenile justice systems, decisions to try youths in criminal courts as opposed to juvenile courts can be reframed in a similar way—assuming that modern era juvenile justice systems retain some aspect of their traditional,

noncriminal nature.<sup>3</sup>

States use one of three mechanisms to determine whether a youth ought to be tried in criminal court or adjudicated as a juvenile: judicial waiver, concurrent jurisdiction, and legislative waiver (Gardner, 1997). Most common is the judicial waiver model, “wherein a juvenile court judge decides whether a particular youngster should remain in the juvenile system or be sent to adult court” (Gardner, 1997, p. 207). In these jurisdictions, hearings on the issue of transfer, or the waiver of juvenile court jurisdiction, might be viewed as preliminary evaluations of whether a juvenile is a suitable subject for condemnation. To the extent that waiver decisions are based on this determination, they cohere with the normative framework underlying the criminal justice system. This is so because under such circumstances, only those persons who might possess the capacity for criminal responsibility will be transferred to the criminal justice system for a final, institutional determination as to whether they performed an institutionally proscribed act as a criminally responsible actor. In practice, however, waiver decisions do not focus exclusively on a juvenile’s capacity for criminal responsibility.

At the time of the juvenile court’s decision to waive jurisdiction over Morris Kent, a policy memorandum then in effect outlined the “criteria to govern disposition of waiver requests” (*Kent v. United States*, 1966, p. 546 n.5). The factors listed in this memorandum were as follows:

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<sup>3</sup>Of course, if a juvenile justice system embraces the premise the youths are fully accountable moral agents indistinguishable from adults, the condemnation framework will not serve to distinguish effectively such a system from the criminal justice system. However, if juvenile justice systems—even accountability-based ones—operate on the premise that youths are in some sense less culpable than adults, condemnation serves as one factor (perhaps among many) that distinguishes the criminal justice system from juvenile systems.

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).
5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.
6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.
8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the

alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court. (p. 566-67)

The sixth factor appears to be directly relevant to the assessment of the juvenile's capacity for criminal responsibility, but others may be indirectly relevant. Consider factor one: "The seriousness of the alleged offense." On its face, this factor does not appear to relate directly to an assessment of the actor's capacity for criminal responsibility. One might argue, however, that the seriousness of an offense can provide some insight into the actor's accountability. For example, a youth's stealing of a piece of candy from a store might not call into doubt his understanding of moral accountability in the same way that his committing rape and murder would. Nevertheless, the consideration of factors that largely seem separate and distinct from the assessment of the juvenile's capacity for criminal responsibility can create confusion about the conceptual distinction between the juvenile and criminal justice systems.

Gardner noted, for example, that "[w]aiver is generally reserved for those youths whose highly visible, serious, or repetitive criminality raises legitimate concern for . . . community outrage" (1997, p. 182 n.18). This principle seems to be reflected in factors one, two, three, and seven of the memorandum, which reaffirms Gardner's observation that it may be of central importance to waiver decisions. A number of noteworthy implications flow from the centrality of this principle, however. Initially, one must question whether the community outrage is truly "legitimate" if it is expressed without regard to the culpability of the actor. Note that the principle articulated by Gardner implies that some acts, by their nature, may outweigh the youth of the offender, his rehabilitative potential, and, most importantly, his capacity for criminal responsibility (or, more precisely, his lack thereof), and justify findings that juvenile court

jurisdiction ought to be waived. But if juveniles who clearly lack the capacity for criminal responsibility are transferred to the criminal justice system for trial due to the seriousness, visibility, and repetitive nature of their acts, the waiver decision may conflict with the conceptual and justificatory foundations of both the criminal and juvenile institutions in at least two ways. First, though it is true that the waiver decision is not a final determination that the juvenile committed proscribed acts while acting as an accountable moral agent—indeed, the juvenile will be allowed to argue during his criminal trial that he lacks the capacity for criminal responsibility (perhaps by invoking the insanity defense, as Morris Kent did)—his youth and immaturity might not be appropriately accounted for during the “liability phase” of his criminal trial. Second—and perhaps more interestingly—the emphasis placed upon the “seriousness” of a juvenile’s act implies that general or specific act condemnation may be easily confused with actor condemnation during waiver decisions. In other words, the decision-maker may base her determination that juvenile court jurisdiction ought to be waived by focusing on judgments of disapproval and feelings of vengefulness toward the *act*, as opposed to assessing whether such feelings and judgments are appropriately expressed toward the *actor* under the circumstances. If this in fact occurs, a number of juveniles who lack the capacity for criminal responsibility may be transferred to the criminal justice system. Because it is not the primary function of the criminal courts to handle cases involving such persons, these transfers seem to interfere with the proper functioning of the criminal and juvenile justice systems. Moreover, if the transfers lead to the punishment of individuals who lack the capacity for criminal responsibility, the transfers (and the ensuing criminal convictions) are inconsistent with the basic normative structure of the criminal justice system.

As noted previously, the judicial waiver model is only one of three mechanisms that jurisdictions use to transfer juveniles to adult court. A second model of juvenile transfer, known as “legislative waiver,” is used in states with statutes that place “certain cases involving serious offenses within the exclusive jurisdiction of the criminal courts” (Gardner, 1997, p. 208). In these jurisdictions, if a youth commits an offense that places his case in the criminal justice system, he cannot be tried as a juvenile even if he lacks the capacity for criminal responsibility due to his developmental immaturity—unless a procedure for the “decertification” or “reverse transfer” of the youth back to juvenile court exists in the jurisdiction (e.g., Salekin, Rogers, & Ustad, 2001). In the absence of a “reverse transfer” procedure—and according to Salekin et al. (2001), less than half of the states have enacted such a procedure—it seems that the juvenile court system would be unable to function in a manner consistent with the normative framework underlying the criminal justice system whenever youths lacking the capacity for criminal responsibility are required by statute to be tried as adults. In such instances, the criminal justice system would take on a function traditionally performed by the juvenile justice system.

The third model of juvenile transfer is known as “concurrent jurisdiction.” In states that employ this model, “prosecutors have the authority to commence certain cases in either juvenile or criminal court” because the juvenile and criminal courts have concurrent jurisdiction over those cases (Gardner, 1997, p. 207; e.g., Neb. Rev. Stat. § 43-247). In Nebraska, for example, the prosecutor has discretion to charge certain offenders in criminal court or juvenile court, and his or her discretion will not be disturbed unless the charging decision was based on race, religion, or some other “arbitrary classification” (*State v. Grayer*, 1974, p. 860). Thus, in states such as Nebraska, prosecutors are not obligated to consider youths’ capacities for criminal



responsibility when making charging decisions. Moreover, although prosecutors might decide to charge youths in criminal court if they perceive the youths as possessing the capacity for criminal responsibility, the prosecutors would have no obligation to conduct a hearing or make any effort to gather evidence on this point to guide their decisions. In other words, although it is *possible* that a youthful offender's capacity for criminal responsibility will factor into the decision to try the youth in juvenile or criminal court, the prosecutor can, to a large extent, make whatever charging decision he or she prefers based on any facts he or she deems relevant. Without an empirical investigation of the factors that prosecutors use to make these charging decisions, it is impossible to say whether the charging decisions cohere with the normative framework underlying the criminal justice system. Nor can it be determined whether the charging decisions are consistent with the conceptual and justificatory foundations of the juvenile justice system, no matter what those foundations might be. An empirical investigation designed to explore these issues is presented in Section II below.

In summary, the condemnation framework can be used to analyze the expressive function of juvenile justice systems of various "eras." Specifically, it appears that the common law infancy defense functions in a manner consistent with the normative framework underlying the criminal justice system to the extent that its age-based presumptions accurately reflect juvenile's rate of moral development. Also, it appears that the traditional, *parens patriae* juvenile justice systems are nonpunitive—assuming that they are truly based on a State's *parens patriae* authority. The Supreme Court's "criminalization" of the traditional juvenile court structure complicates the assessment of the expressive function of modern era juvenile court dispositions. Nevertheless, because the Court did not fully criminalize the juvenile justice system, and because it was

unwilling to “disallow” the states’ efforts to experiment with *parens patriae* models of juvenile justice, juvenile adjudications in states that retain the *parens patriae* model arguably remain civil in nature. Some jurisdictions have jettisoned the traditional *parens patriae* model, however, in favor of “accountability-based” systems of juvenile justice. In these states, the dispositions of juvenile courts express actor condemnation toward young offenders; thus, the condemnation framework suggests that those dispositions are criminal in nature. These systems may not be functionally equivalent to the criminal justice system, however, if they are based on a premise that youths are less accountable than adults.

The condemnation framework can also be used to illustrate the importance of the juvenile court jurisdiction decision—not just for the juveniles involved, but for the effective functioning of the juvenile and criminal justice systems. The decision to try a youth in criminal court is, in a way, a preliminary determination that the youth is eligible to participate in the criminal justice system—that is, there is at least some chance that the youth may be found to be a fully accountable actor. If the jurisdiction decision focuses on the youth’s capacity for criminal responsibility, it can promote the effective functioning of both the criminal justice system and the juvenile justice system. To the extent that the decision is based on factors wholly unrelated to the youth’s capacity for criminal responsibility, however, close examination of the relationship between the decision criteria and the conceptual and justificatory foundations of the juvenile and criminal justice systems is in order.

The foregoing subsections illustrate that Feinberg’s (1995a) and Schopp’s (1993) conceptualization of condemnation not only forms a key component of a defensible definition of punishment, but also serves as a useful tool for 1) distinguishing deprivations of liberty that flow

from civil and criminal institutions, and 2) assessing whether institutions of civil commitment and juvenile justice function in a manner consistent with the normative framework that arguably underlies minimally-retributive criminal justice systems. It remains to be shown, however, that the concept of condemnation can be translated into a construct that can be used to study *empirically* questions about the civil/criminal distinction and the functioning of legal institutions.

The following subsection will illustrate that condemnation can play an important role in the empirical study of decision-making in insanity cases and juvenile court jurisdiction determinations. First, key empirical studies of decision-making in criminal trials involving the insanity defense and in juvenile court jurisdiction waiver proceedings will be reviewed in order to 1) establish the context for the present experiments, and 2) demonstrate that a program of research based on condemnation might contribute significantly to the literature. Thereafter, an empirical study that used a measure of condemnation to investigate decision-making in insanity defense cases and sexually violent predator commitment hearings will be described. It will be shown that condemnation can, in fact, provide the foundation for meaningful empirical research.

### **C. Psychological Research: Insanity Defense Verdict Decisions, Juvenile Court Jurisdiction Determinations, and the Empirical Study of Condemnation**

In criminal trials and civil commitment proceedings, legal decision-makers (often judges or jurors) are called upon to decide whether or not a state may justly exercise its police powers to deprive a person of his or her liberty. Generally, however, the decision-makers need not determine whether this deprivation of liberty is “civil” or “criminal” because the nature of the deprivation is usually established by the institutional framework surrounding the proceedings. In other words, it is usually clear that criminal trials can result in criminal deprivations of liberty

and that civil commitment hearings can result in civil—but not criminal—deprivations of liberty. When the insanity defense is raised during a criminal trial, however, decision-makers have at least three options: they may convict, and thereby authorize the state’s punishment of the defendant; they may acquit, which spares the defendant from any deprivation of liberty; or they may find the defendant not guilty by reason of insanity, which, according to the Supreme Court of the United States, can justify a civil commitment (*Jones v. United States*, 1983). Thus, the decision-maker may be confronted rather squarely with the question of whether a particular person ought to be subjected to a civil or criminal deprivation of liberty (or none at all). A similar question faces decision-makers in the juvenile justice system as well. Specifically, juvenile court judges—or prosecutors in certain jurisdictions—may be asked to determine whether a youthful offender ought to be tried in the “adult” criminal justice system, which might result in a prison sentence, or whether he ought to be adjudicated as a juvenile, which might result in a non-criminal deprivation of liberty. Thus, because verdicts in criminal cases involving the insanity defense and juvenile court jurisdiction decisions may lead to civil *or* criminal deprivations of liberty, these contexts provide fertile ground for empirical researchers seeking to study the factors that influence decisions about actors’ eligibility, or suitability, for civil or criminal deprivations of liberty.

The psychological research literature that addresses decision-making in insanity defense cases and juvenile court jurisdiction determinations will be reviewed below. This review will identify and summarize the valuable insights provided by the research, but it will also illustrate that the research conducted to date does not focus clearly upon the distinction between civil and criminal institutional deprivations of liberty. It will also be shown that the existing literature 1)

does not attempt to assess whether the decision-making processes employed in insanity cases and juvenile jurisdiction determinations are consistent with the criminal justice system's normative framework, and 2) does not attempt to identify a construct that might predict decisions in *both* contexts.

Following this review of the research literature, a study that applied an empirical measure of condemnation to analyze decisions in civil commitment proceedings—with an emphasis on sexually violent predator commitment proceedings—will be discussed. It will be shown that the normative concept of condemnation can be translated into an empirical construct, and that this construct may be used to study judgments that relate to the distinction between civil and criminal deprivations of liberty.

### *1. Decision-Making in Insanity Defense Cases*

Social scientists have long studied legal decision-making in cases involving the insanity defense (hereinafter “insanity cases”). Their research has identified a number of factors that influence jurors' decisions in these cases—along with a number of factors that, sometimes surprisingly, do not influence decisions. These findings will be summarized below.

Studies have shown consistently that jurors' attitudes<sup>4</sup> toward the insanity defense can influence their verdict decisions (e.g., Loudon & Skeem, 2007; Poulson, Braithwaite, Brondino, & Wuensch, 1997). In a seminal study, Hans (1986) conducted a survey to assess insanity defense attitudes approximately one year after John W. Hinckley, Jr., successfully used the defense following his attempt to assassinate President Ronald Reagan. In Hans' study, three

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<sup>4</sup>Attitudes are favorable or unfavorable evaluative reactions toward an object, person, or event which may manifest themselves affectively, behaviorally, and cognitively (e.g., Loudon & Skeem, 2007; Myers, 1993).

hundred and thirty respondents residing in New Castle County, Delaware, were contacted via telephone using random digit dialing. After agreeing to participate, each respondent heard the following statements: “As you probably know, the insanity defense can be used by defendants in criminal trials. They can plead Not Guilty by Reason of Insanity, arguing that because of their mental condition, they should not be held responsible for what they’ve done” (p. 398). The respondents then indicated whether they strongly agreed, agreed, disagreed, or strongly disagreed with 20 statements about legal insanity, such as “The insanity defense needs a lot of reform,” “The insanity defense is sometimes justified,” and “Even if people are insane, we should punish them if they break the law” (p. 414). They also answered five questions designed to assess their opinions about the frequency of the use of the insanity defense and their understanding of the consequences of a successful invocation of the defense.

Hans (1986) found that 94.7% of the respondents agreed with the notion that “the insanity defense needs a lot of reform” (pp. 400, 414). After analyzing the “overall pattern” of the respondents’ answers to the survey questions, she concluded “that people dislike the insanity defense for both retributive and utilitarian reasons” (p. 407). “Retributive” reasons, according to Hans, are reasons for dissatisfaction with the insanity defense that stem from 1) a respondent’s desire to see “insane lawbreakers punished just like other criminals” and 2) and his or her disagreement with the notion that “punishing the insane is morally wrong,” while “utilitarian” reasons are based on respondents’ beliefs “that procedures now in place are largely ineffective in protecting them from insane criminals” (p. 407).

It should be noted that the labels “retributive” and “utilitarian,” as used by Hans, do not correspond to the retributive and utilitarian justifications of punishment defined above. Indeed,

as explained previously, minimally-retributive criminal justice systems reject the premise that the legally insane can be justifiably punished, while Hans used the term “retributive” to refer to persons who accept that premise. This is not to say that Hans’ labels are invalid, but it is important to recognize that they refer to categories of actual opinions and judgments about the insanity defense as opposed to facets of the normative structure of the criminal justice system.

It should also be noted that there is no indication that Hans’ respondents understood the manner in which the insanity defense functions, the relationship between the defense and actors’ capacities for criminal responsibility, or even the legal definition of insanity. Indeed, there is evidence suggesting that the respondents were confused about the purpose of the defense. For example, although half of the respondents opined that the insanity defense should be abolished, 76.5% of them “maintain[ed] that the insanity defense is sometimes justified” (p. 400). Thus, at least a quarter of the respondents believed that the insanity defense should be abolished despite the fact that it is sometimes justified. It is unclear why these respondents held this view, but since there is no indication that they understood what the “insanity defense” was at the time that they offered these opinions, one should hesitate to interpret their opinions (including their “retributive” reasons for disliking the insanity defense) as evidence that they would reject the retributive requirement of accountability as a prerequisite to just punishment, especially if it were explained to them.

Hans (1986) suggested that the respondent’s general dissatisfaction with the insanity defense might “explain why juries are notoriously reluctant to grant insanity pleas” (p.410), but she acknowledged that her survey did not establish a link between attitudes and decision-making in insanity cases. In the years since Hans’ survey, however, a number of experimental studies

have been conducted to determine whether such a link exists. In one such study, Roberts and Golding (1991) presented participants with one of eight written vignettes describing the killing of a political figure and the ensuing criminal trial of the assassin. These vignettes “included facts about the circumstances of the killing, summary descriptions of expert testimony, legal arguments regarding responsibility articulated from the perspectives of the prosecution and defense, and judicial instructions about the insanity standard and burden of proof” (p. 354). In each vignette, the defendant was described as suffering from paranoid schizophrenia as defined in the DSM-III-R. However, the researchers manipulated the “delusional framework” of the defendant: In the first set of vignettes, the defendant suffered a delusion that the political figure (who was a mayor) intended to kill him and that he was in immediate danger. In the second set of vignettes, the defendant suffered a delusion that the mayor was “seriously interfering with his life,” but he was not concerned for his safety (p. 355). In other words, the presence of a “self-defense delusional belief” was manipulated. In addition, the researchers manipulated “planfulness” by introducing facts that indicated that the defendant committed the killing “in either a planful or non-planful fashion” (p. 356).

Roberts and Golding (1991) also varied the jury instructions that were presented to participants. All participants received an instruction based on the Model Penal Code definition of insanity, which stated,

A person is insane and not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law. (Roberts & Golding, 1991, p.



357)

In addition, however, one group of participants received an “alternative GBMI [guilty but mentally ill] instruction” based on Illinois law, which stated,

A person who, at the time of the commission of a criminal offense, was not insane but was suffering from a mental illness, is not relieved of criminal responsibility for his conduct and may be found guilty but mentally ill. (p. 357)

This verdict option, which was developed as a response to the Model Penal Code’s relatively broad definition of insanity, represents an “attempt to create a middle ground between guilty verdicts and insanity acquittals by recognizing the role mental illness played in the offense, yet insisting that the defendant is nonetheless criminally responsible for the offense and therefore subject to punishment” (Blume & Johnson, 2003, p. 100). From the perspective of a criminal defendant, there is little (if any) practical difference between a guilty verdict and a GBMI verdict (Morse & Hoffman, 2007, p. 1122).<sup>5</sup>

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<sup>5</sup>Morse and Hoffman (2007) describe the GBMI option in rather blunt, if not scathing, terms:

GBMI has nothing to do with responsibility. In fact, the convicted GBMI defendant is found fully culpable and there is no reduction in sentence. A GBMI capital murderer can be executed. Moreover, GBMI is not a treatment tool, since mental health evaluations and treatment are routine parts of health care in every prison system. Besides, when a GBMI convict is hospitalized and successfully treated, he is then returned to prison to complete his sentence, just like any other convict.

In short, GBMI is a politically expedient “third-way” fraud. It has nothing to do with responsibility and nothing to do with treatment. It is the equivalent of a verdict of “guilty with herpes,” with no guarantee that the herpes will be treated or even noticed once the defendant leaves the courtroom. Its only purpose is to give legislatures political cover and to lull jurors into mistakenly believing their GBMI verdicts might mean that defendants with mental disorder who receive this verdict

After reading their assigned instructions, participants provided their “predeliberation verdicts” and completed a number of dependent measures (Roberts & Golding, 1991, p. 357). The first of these dependent measures consisted of a set of “case construal” items. These items measured the extent to which the participants perceived the defendant 1) to be mentally disordered, 2) to evidence planful behavior, 3) to demonstrate “appreciation of the wrongfulness of his act,” 4) to be “capable of acting differently,” 5) to have “the capacity for logical reasoning,” 6) to have “the capacity to consider alternative courses of action,” 7) to have “the capacity for rational behavior,” 8) to have control over his beliefs, and 9) to merit blame and punishment. In addition, participants responded to twenty questions designed to assess their attitudes toward the insanity defense, which were modeled on Hans’ (1986) Insanity Defense Attitudes Scale and a thirteen-item scale developed by Roberts, Golding, & Fincham (1987). In contrast to Hans’ scale, however, Roberts’ and Golding’s (1991) scale included a number of items that focused on the blameworthiness of persons who raise the insanity defense, such as “I believe that persons are responsible for their actions no matter what the extenuating circumstances,” “People with mental illness, regardless of its severity, are equally blameworthy as non-mentally-ill persons as far as socially deviant behavior is concerned,” and “The issue of insanity is not relevant to the criminal responsibility of a person but it should be considered at the time of sentencing” (pp. 362-364). Participants were also asked to express their level of agreement or disagreement with the following statement: “I believe the phrase ‘guilty but mentally ill’ captures the relationship between mental illness and criminal responsibility that is

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will be given special treatment and attention, or otherwise dealt with more mercifully at sentencing or in prison. (pp. 1122-1123)

fair and moral” (p. 364). It is unclear, however, whether participants were meant to interpret this question as applying to the “relationship between mental illness and criminal responsibility” in all cases, in some subset of cases, or in the hypothetical case that the participant read. It should also be noted that some participants received an instruction that defined “guilty but mentally ill” before they answered this question, while others did not.

After collecting and analyzing their data, Roberts and Golding (1991) concluded that the participants’ attitudes towards the insanity defense and “case construals” were highly predictive of verdicts. To reach this conclusion, the researchers performed a principal components factor analysis, which yielded an interpretable five-component solution. One of these components, which was labeled the “Perceived Criminal Responsibility component,” included all of the “case construal” items and, according to the researchers, seemed to represent “variability among subjects regarding [their] perceptions” of the defendant’s capacities for criminal responsibility, blameworthiness, and “deservingness of punishment” (p. 367). It appears that the items assessing insanity defense attitudes loaded onto three of the remaining components, which the researchers labeled “Strict Liability Orientation,” “Detention Concerns,” and “Insanity Irrelevant to Guilt” (p. 367). It is noteworthy that the “Strict Liability Orientation component” concerned “attitudes and opinions regarding the relevance of mental state to the attribution of blame and the imposition of punishment,” and the component labeled “Insanity Irrelevant to Guilt” seemed “to involve degrees of belief regarding whether the concept of guilt is appropriately applied to severely mentally ill and/or ‘insane’ persons” (p. 367). The fifth component, which the researchers labeled “Death Penalty Attitude,” included “3 items concerning the death penalty” that were included among the dependent measures (p. 367). Roberts and Golding (1991) then

entered the independent variables and the five component scores into a stepwise discriminant analysis, which yielded the following final solution: Component scores on Perceived Criminal Responsibility accounted for 28% of the between-groups variance, with additional incremental variance accounted for by the Strict Liability component (16%), Insanity Irrelevant to Guilt component (7%), the jury instruction manipulation (5%), the Detention Concerns component (5%), and the Death Penalty Attitudes component (1%). Neither the planfulness nor “delusional content” manipulations accounted for any additional variance in verdicts. Note, however, that the three components that stemmed from items that purported to measure attitudes toward the insanity defense accounted for 28% of the variance. Thus, Roberts’ and Golding’s (1991) findings seem to confirm Hans’ (1986) hypothesis that insanity defense attitudes might relate to verdict decisions.

Bailis, Darley, Waxman, and Robinson (1995) also found evidence of a relationship between attitudes towards the insanity defense and verdicts. In the first of two reported experiments, twenty-one undergraduates read nine scenarios and answered fourteen questions designed to assess their judgments in insanity cases and the extent to which the Model Penal Code definition of insanity was satisfied in those cases (Bailis et al., 1995). Participants also completed Hans’ (1986) Insanity Defense Attitude Scale. Based on correlations between items on the scale and the frequency of participants’ guilty verdicts across the nine scenarios, the researchers concluded that participants’ willingness to impose criminal incarceration reflected, at least to some degree, their pre-existing beliefs regarding the insanity defense. For example, “the more frequently respondents chose criminal incarceration” in each of the nine scenarios, “the more strongly they endorsed each of the following claims: that the insanity defense should be

abolished ( $r = .52$ ) or greatly reformed ( $r = .50$ ); that it serves as a loophole allowing guilty people to go free ( $r = .50$ ); and that punishment is appropriate for even an insane defendant who has broken the law ( $r = .43$ )” (p. 434). Conversely, these same respondents “were less likely to endorse claims that the insanity defense is sometimes justified ( $r = -.59$ ), that the insanity defense affects the crime rate ( $r = -.50$ ), or that the insane should be treated rather than punished ( $r = -.52$ )” (p. 435).

Noting that only two multi-item measures of attitudes towards the insanity defense existed—specifically, those developed by Hans (1986) and Roberts and Golding (1991)—and that the psychometric properties of these scales “have not been systematically studied,” Skeem, Loudon, and Evans (2004) conducted a series of three studies to develop a more precise measure of insanity defense attitudes. In the first study, 178 jury eligible citizens of Utah were presented with the researchers’ initial version of an insanity defense attitudes scale, which included a total of 38 items. Three of the items were “general opinion items,” such as “the insanity defense needs a lot of reform” (p. 628). The remaining 35 items were selected from a large pool of items that were gleaned from the news media, prior studies measuring insanity defense attitudes (e.g., Hans, 1986; Roberts & Golding, 1991), and “subjective factors cited by mock jurors” in previous studies (e.g., Finkel & Handel, 1989) (Skeem et al., 2004, p. 628). These 35 items were designed to assess four broad categories of attitudes: 1) “opinions that mental disorder implies reduced capacity or that defendants are responsible for their crimes regardless of whether they are mentally disordered”; 2) “concerns about the detention and dangerousness of insanity acquittees”; 3) “perceptions that the insanity defense is unjust”; and 4) opinions that defendants should be held accountable for their crimes if responsible for their compromised mental state at

the time of the offense” (p. 628). Using the data obtained from the study participants, the researchers generated a modified version of the scale consisting of 26 items that appeared to organize into two dimensions: 1) “strict liability,” which, according to the researchers, “reflects the extent to which individuals believe that mental illness is associated with reduced capacity for rational decision making and control . . . and that reduced capacity is relevant to the issue of criminal responsibility,” and 2) “injustice and danger,” which “reflects the extent to which individuals perceive that the insanity defense is misused” (pp. 629, 630).

In their second study, Skeem et al. (2004) recruited a new set of jury-eligible participants and presented them with the revised insanity defense attitude scale (which was labeled the IDA-R), along with a set of measures to assess the scale’s convergent and divergent validity. Also, to test the scale’s predictive utility, participants read a case vignette, indicated the likelihood (as a percentage) that they would find the defendant insane, rated the nine case construal items employed by Roberts and Golding (1991), and rendered verdicts—though it should be noted that the participants were not given any instructions defining legal insanity. The researchers screened the data obtained from the participants and eliminated seven items before conducting a principal component analysis. Two factors, accounting for 55% of the total variance, were extracted, and the component structure was similar to that identified in study one. More specifically, the first component (“strict liability”) and the second component (“injustice and danger”) corresponded to the components identified in the first study, though this correspondence was not formally tested. Also, the researchers found that, as expected, the revised scale correlated “more highly with the convergent measure,” which was Hans’ (1986) Insanity Defense Attitudes Scale, than the “divergent measures,” which were a truncated version of the Community Attitudes Toward

Mental Illness Scale developed by Taylor and Dear (1981) and the Revised Legal Attitudes Questionnaire-23 (e.g., Kravitz, Cutler, & Brock, 1993). To assess the predictive utility of the scale, Skeem et al. (2004) calculated correlations between the attitude measures, the case construal components, and the “insanity likelihood” ratings. It was found that the “strict liability” component of the insanity defense attitudes scale was “highly correlated” ( $r = -.47$ ) with insanity likelihood ratings (pp. 636-637).

The third study conducted by Skeem et al. (2004) was similar to the second, except that participants were drawn from a different jurisdiction (i.e., Nevada), each participant received four case vignettes instead of one, and additional “case construal” items were used to assess participants’ perceptions of the specific “symptoms” presented by the defendants in the additional vignettes (p. 639). The researchers found that although the two-factor structure identified in the second study did not precisely fit the data collected for study three, the component structure extracted from the new data was “consistent with that of” study two (p. 640). Also, once again the “strict liability” component of the insanity defense attitudes scale (which, as noted previously, measures “views of the extent to which mental illness is relevant to criminal responsibility and punishment”) was “strongly predictive of venirepersons’ case judgments” across all of the vignettes, with correlations ranging from  $-.45$  to  $-.60$  (p. 642).

More recently, Loudon and Skeem (2007) sought to determine whether jurors’ prototypes<sup>6</sup> of insanity predict their verdicts in insanity cases more accurately than do their attitudes toward the insanity defense. Prior research indicated that juror’s prototypes of insanity—i.e., their

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<sup>6</sup>“A prototype is an ideal member of a category (e.g., ‘insane defendant’) that bears the most resemblance to the other members of the category, and least resemblance to members of neighboring categories (e.g., ‘guilty defendant’)” (Louden & Skeem, 2007, pp. 450-451).

conceptualizations of a typical persons who are not criminally responsible due to their psychological impairments—clustered into three types: 1) the “Severe Mental Disability” prototype, which is based on a defendant who is extremely mentally ill and developmentally disabled; 2) the “Moral Insanity” prototype, which is based on a defendant who is violent, manipulative, and lacking in conscience; and 3) the “Mental State Centered” prototype, which is based on a defendant who could not understand the consequences of his or her actions or distinguish right from wrong (Skeem & Golding, 2001). In addition, Skeem and Golding (2001) found that jurors who held various prototypes differed in their attitudes toward the insanity defense and in their judgments about a vignette involving a defendant who raised the insanity defense. More specifically, persons with Mental State Centered prototypes were more likely to find a defendant not guilty by reason of insanity than jurors with the other prototypes—even after differences in attitudes were controlled.

Hoping to inform jury selection efforts in insanity cases, Loudon and Skeem (2007) sought to build on Skeem’s and Golding’s (2001) findings by 1) assessing the relative influence of insanity prototypes and attitudes on verdict decisions, and 2) determining whether the three prototypes identified by Skeem and Golding (2001) generalize to a sample of jury-eligible participants from a different state. First, participants completed Skeem and Golding’s (2001) Feature Elicitation Instrument (FEI) and Conception Checklist (CC). The FEI instructed participants “to (a) form a mental image of the prototypical person who is not responsible for his or her crimes because of mental illness and then (b) provide a detailed written description of their prototype, perhaps including the person’s appearance, personality, thoughts, feelings, and actions” (Louden & Skeem, 2007, p. 455). The CC, which measures individual differences in



prototypes of insanity, asked participants “to rate 57 features (e.g., ‘Unable to discern right from wrong,’ ‘Suffers from schizophrenia or psychosis’) with regard to their relevancy to their personal prototype using a five-point Likert scale, where 1 is ‘not at all relevant’ and 5 is ‘extremely relevant’” (p. 456). Thereafter, participants completed the IDA-R developed by Skeem et al. (2004), read four vignettes based on those used by Skeem and Golding (2001), rendered judgments, and rated on a scale of 0-100 “how likely they were to find the defendant NGRI,” or not guilty by reason of insanity (p. 457). Participants did not receive any instructions regarding the legal definition of insanity, however.

Louden and Skeem (2007) found that the three prototypes identified by Skeem and Golding (2001) (i.e., “Moral Insanity,” “Mental State Centered,” and “Severe Mental Disability”) did not re-emerge in their new sample of participants. Indeed, Loudon and Skeem (2007) concluded that “no distinct groups of jurors with different prototypes of insanity could be identified” (p. 459). However, the participants did fall into three distinct groups (based on a cluster analysis of their CC scores), and although these groups did not seem to represent groups of participants with distinct prototypes of insanity, they did differ significantly in their case judgments. The researchers hypothesized that this unexpected result came about because either “(a) the CC inadequately represented the universe of prototype features for this new sample or (b) participants approached the CC as a measure of insanity defense attitudes” (p. 460). Hypothesis (a) was ruled out following a three-step analysis that, in essence, compared the participants responses to the FEI with the “features of insanity” covered in the CC (p. 460). To test hypothesis (b), the researchers performed hierarchical multiple regressions to assess whether “CC factor scores added incremental utility above the Insanity Defense Attitudes-Revised (IDA-R) in

predicting case judgments on the case vignettes” (pp 461-462). When IDA-R scores were entered first, it was found that although the addition of the participants’ CC factor scores significantly increased the explained variance, “the increase was so small as to have little practical utility” (p. 462). Conversely, when the CC scores were entered at the first step, the addition of the IDA-R scores resulted in large increases in explained variance. This led Loudon and Skeem (2007) to conclude “that the CC’s predictive utility for jurors’ case judgments is largely, but not fully redundant, with that of the IDA-R, but the IDA-R has predictive utility above and beyond that of the CC” (p. 462). In other words, “it seems that prototypes of insanity add little incremental utility to insanity defense attitudes in predicting case judgments” (p. 462).

The foregoing findings indicate that mock jurors’ preexisting attitudes toward the insanity defense ought to be assessed in any study of decision-making in insanity cases. These preexisting attitudes, however, are not the only factor that seems to have an effect on decision-making. For example, studies suggest that the type of mental illness afflicting a hypothetical defendant influences juror’s judgments. Roberts, Golding, & Fincham (1987) presented 181 undergraduate students with one of sixteen vignettes that manipulated the mental disorder of a hypothetical defendant raising the insanity defense (antisocial personality disorder, schizotypal personality disorder, paranoid schizophrenia with delusions untied to the crime, and paranoid schizophrenia with delusions tied to the crime); the “bizarreness” of the defendant’s crime; and the “planfulness” of the defendant’s crime. The mental disorder manipulation was achieved through the use of a descriptive paragraph with limited psychiatric jargon in an effort to ensure that the participants would grasp the effects of the illness presented in the assigned hypothetical. Participants were then asked whether they would find the hypothetical defendant guilty or NGRI

according to the Model Penal Code definition of insanity and whether, if the GBMI option were available, they would find the hypothetical defendant guilty, NGRI, or GBMI. It was found that the defendant's mental disorder was the primary determinant of verdicts under either a two-verdict-option scheme (NGRI vs. guilty) or three-verdict-option scheme (NGRI vs. guilty vs. GBMI). Greater frequencies of NGRI verdicts were found in cases involving defendants with schizophrenia as opposed to personality disorders.

Bailis et al. (1995) also found a relationship between a defendant's diagnosis and insanity decisions. The researchers presented fifty undergraduates with hypothetical cases that varied in terms of the charged offense (shoplifting or murder) and mental disorder (schizophrenia, multiple personality disorder, agoraphobia with panic attacks, chronic alcoholism, and post-traumatic stress disorder), and discovered that in the hypothetical cases involving murder, the descriptions of the defendant's "diagnostic categories and symptoms" had small but reliable effects on judgments "about whether an NGRI verdict is appropriate" (p. 440). Interestingly, Bailis et al. (1995) also found that "murderers" successfully invoked the insanity defense "much less often than did shoplifters who displayed identical symptoms," which suggests that in addition to the defendant's diagnosis, the severity of the charged offense may influence judgments in insanity cases (p. 440).

Finkel and Handel (1989) found evidence of still other factors that, in their view, may influence verdicts in insanity cases. In their study, 263 participants (122 students and 141 "nonstudent-adults") were asked to list and explain the reasons for their decisions in each of four hypothetical insanity cases that were "loosely modeled after actual cases" (p. 46). The cases involved defendants suffering from either epilepsy, chronic alcoholism, paranoid schizophrenia,

or a stress-induced disorder. The participants were not given instructions concerning the legal definition of insanity, but were instead asked to use their own best judgment in each case. Raters then categorized the reasons provided by the mock jurors using a seven-factor schema that had been developed in pilot research. Finkel and Handel (1989) explained,

Each rater received a categorizing schema that contained instructions for categorizing, a sheet labeled “Guilty Factors,” and a sheet labeled “Not Guilty by Reason of Insanity (NGRI) Factors.” The Factor sheets listed the factors by number, named them, gave a general explanation and an example or two for each. The guilty factors were as follows: capacity, unimpaired awareness and perceptions, clear thinking, could control her impulses and actions, culpable actions, premeditation or malice, and others not responsible. The NGRI factors were as follows: incapacity, impaired awareness and perceptions, distorted thinking, could not control her impulses and actions, nonculpable actions, no evil motive, and others at fault. The factors for the Guilty and NGRI categories [together] represent seven construct dimensions. (p. 47)

Although it is somewhat difficult to determine the particular nature of each of the seven construct dimensions, it appears that the “clear/distorted thinking” dimension is meant to correspond to the “cognitive element” of the Model Penal Code definition of insanity; the “could/could not control impulses and actions” dimension is meant to correspond to the volitional element of the same definition of insanity; the “unimpaired/impaired awareness and perceptions” dimension is meant to correspond to the “mens rea” concept that, according to the researchers, lies in the “wild beast”

definition<sup>7</sup> of insanity; and the “capacity/incapacity” dimension is meant to correspond to a definition of insanity that was developed for research purposes by Fingarette and Hasse (1979).

Finkel and Handel (1989) found that 88% of the reasons provided by respondents fit with the seven-factor schema, though it should be noted that the overall interrater reliability was a relatively modest 70.9% (p. 48). On average, participants who reached a verdict of NGRI invoked 2.5 schema factors in each case—a finding that the researchers interpreted as evidence that jurors do not take simplistic views of insanity cases. Moreover, results indicated that participants used different constructs to support their decisions in different cases:

For Case A (epilepsy), “nonculpable actions” (72.4%), “could not control impulses and actions” (48.1%), and no evil motive (45.5%) were the three most frequently cited factors. For Case B (chronic alcoholic), “incapacity” (68.1%), “impaired awareness and perceptions” (42.6%), and “could not control impulses and actions” (40.4%) were the three most frequently cited factors. For Case D (paranoid schizophrenic), it was “incapacity” (75.5%), “distorted thinking” (54.3%), and “impaired awareness and perceptions” (43.6%), and for Case E (stress-induced), it was “impaired awareness and perceptions” (53.9%), “nonculpable actions” (50.0%), and “distorted thinking” (45.6%). (p. 49-51)

Based on this variability, the researchers concluded that none of the legal definitions of insanity “alone is centrally relevant and determinative across these cases of insanity, according to the

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<sup>7</sup>The origin of the “wild beast” definition of insanity has been attributed to *Rex v. Arnold* (1723): “[A] man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute or a wild beast,” would be found not guilty by reason of insanity under this test. The foregoing language suggests that with this definition, a quite severe mental impairment is required to excuse criminal conduct.

mock jurors” (Finkel & Handel, 1989, p. 51). They also observed that when participants decided a given case differently from one another, the participants often used different constructs to evaluate the sanity of the actor. More specifically, participants who found the hypothetical defendants NGRI cited most often the “incapacity” construct when explaining the reason for their decision, while participants who found the defendant guilty cited most often the “culpable actions” construct (p. 53). This led the researchers to conclude that the participants’ verdicts were influenced by the constructs that they elected to employ when considering cases.

Note that in a number of the studies discussed above, participants were not provided with jury instructions—or any other definition of insanity—when asked to provide verdicts (e.g., Finkel & Handel, 1989; Loudon & Skeem, 2007; Skeem et al., 2004). In fact, research suggests that the version of the insanity defense available to defendants has very little effect on mock jurors’ judgments in insanity cases. For example, Finkel and Handel (1988) presented 263 participants with the same four hypothetical cases used by Finkel and Handel (1989)—which, as noted above, involved defendants suffering from either epilepsy, chronic alcoholism, paranoid schizophrenia, or a “stress-induced” impairment—and asked them to provide their verdict decisions without the benefit of any instruction on the meaning of legal insanity. Their “commonsense” verdicts were then compared to those returned by participants in an earlier study by Finkel, Shaw, Bercaw, and Koch (1985), wherein participants received the identical hypothetical cases along with instructions on one of six definitions of insanity: 1) the “wild beast” test; 2) the M’Naughten test<sup>8</sup>; 3) the M’Naughten test with an added “irresistible impulse” component<sup>9</sup>; 4) the *Durham* (or

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<sup>8</sup>The M’Naughten test, which was established after Daniel M’Naughten’s attempted assassination of the British Prime Minister in 1843, defines legal insanity as follows: “To establish a defense on the ground of insanity it must be clearly proved that, at the time of

“product”) test<sup>10</sup>; 5) the Model Penal Code test<sup>11</sup>; and 6) the “disability of mind” test<sup>12</sup> (p. 81).

Finkel and Handel (1988) found no significant differences between the verdict decisions of participants who were given instructions based on any of the foregoing insanity tests and those who received no instructions. This finding, coupled with the finding by Finkel et al. (1985) that the six instructions led to no significant differences in verdict decisions, led the researchers to conclude that insanity defense instructions do not influence verdicts—though it should be noted

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committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong” (Finkel, 1988, p. 21).

<sup>9</sup>The “irresistible impulse” component was meant to account for the idea that “an actor may be conscious of the nature of his act and able to distinguish right from wrong . . . yet his will, [that is,] the governing power of his mind, has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control” (*Davis v. United States*, 1897, p. 378). In other words, the “irresistible impulse” component expanded the definition of insanity to encompass those who can know the nature and quality of their acts, but are nevertheless unable to control themselves due to the destruction of “the governing power of their minds” (Finkel, 1988, p. 32). Note that the M’Naughten-plus-irresistible impulse test is similar to the two-pronged definition of insanity set forth in the Model Penal Code.

<sup>10</sup>The *Durham* or “product” test comes from Judge Bazelon’s opinion in *Durham v. United States* (1954). A “*Durham*” instruction might state as follows: “Unless you believe beyond a reasonable doubt either that [the defendant] was not suffering from a diseased or defective mental condition, or that the act was not a product of such mental abnormality, you must find the accused not guilty by reason of insanity” (Finkel, 1988, p. 35).

<sup>11</sup>The Model Penal Code test, which has been defined above, provides that a “person is insane and not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law” (e.g., Roberts & Golding, 1991, p. 357).

<sup>12</sup>The “disability of mind” test is not a “legal” test per se; rather, it is taken from the work of Fingarette and Hasse (1979), which was alluded to above. This test asks the jury first to determine whether the defendant suffers from full, partial, or no “disability of mind,” and then to determine whether the defendant is culpable.

that negative findings such as this might also be attributed to a lack of statistical power or experimental design limitations. For example, the experimental design involved only four vignettes (which certainly did not cover the universe of possible case scenarios), decisions were not the product of deliberations, and it is unclear whether the participants in the Finkel et al. (1985) study understood the insanity defense instruction that was provided to them.

Although altering the formulation of the insanity defense may have no effect on jurors' decisions in insanity cases, there is evidence that their decisions are affected significantly when additional verdict options are made available to them. The potential influence of alternate verdict options was recognized by Hans (1986), who, as noted above, discovered that her survey respondents' understanding of the basic function of the insanity defense seemed confused. Hans (1986) found that 96.1% of the survey respondents believed that "insane defendants are entitled to treatment," and 65.8% of them agreed "that the insane should be treated rather than punished if they commit crimes" (p. 402). At the same time, however, 55.4% of the respondents stated "that the insane should be punished just like everyone else when they break the law," and only 36.2% felt "that it is actually wrong to punish insane people who break the law" (p. 402). Hans commented that "a preference for treatment and punishment is . . . at odds with the premise of the legal system that defendants should either be treated if legally insane or punished if legally guilty," and she surmised that "the dual desire to treat and punish may explain the rising popularity of the Guilty But Mentally Ill verdict option in insanity cases" (p. 409). More specifically, she noted that because the GBMI option "provides for a combination of psychiatric treatment and incarceration," and because "there appears to be a public preference for both treatment and punishment," it may be that "juries will select Guilty But Mentally Ill as a



compromise verdict even when the facts of the case would support a Not Guilty By Reason of Insanity or Guilty verdict” (p. 409).

Hans’ (1986) comment that the “legal system” is based on a premise that defendants cannot be treated and punished is imprecise: as explained above, treatment and rehabilitation are legitimate purposes of both the criminal justice system and the institution of civil commitment (though it is true that legal punishment is a legitimate purpose only of the criminal justice system). In other words, if a person who suffers from a mental illness is convicted, she can be both punished and treated even if she was not found to be “guilty but mentally ill” by a jury. That aside, Hans’ (1986) observation that the GBMI option might be used as a “compromise verdict” may have been prescient (e.g., Roberts et al., 1987). McGraw, Farthing-Capowich, & Keilitz (1985) analyzed statistics obtained from the State of Michigan and found no clear evidence that the introduction of the GBMI option resulted in a reduction in successful invocations of the insanity defense (McGraw et al., 1985). However, Savitzky and Lindblom (1986) conducted a mock jury decision-making study and found that the availability of the GBMI option might not only reduce the number of NGRI verdicts, but also might “encourage jurors to convict innocent defendants” (p. 699). In Savitzky’s and Lindblom’s (1986) study, one-hundred and forty-five undergraduate students were assigned to six-person juries, sworn, and given a written copy of jury instructions to read while listening to a recording of a judge reciting the instructions to a “live” jury. All instructions described the charges against the hypothetical defendant, the presumption of innocence, the burden of proof, and the reasonable doubt standard. The instructions were manipulated between groups, however, to alter the verdict options available. One group of participants was informed that they would decide the guilt or innocence

of the defendant (two-choice condition); the second group received instructions on the Model Penal Code definition of insanity (three-choice condition); and the third group received the Model Penal Code insanity instruction along with a GBMI instruction (four-choice condition). The facts of the hypothetical case were also manipulated, such that one set of participants viewed a 90-minute videotaped trial that included eyewitness testimony that the defendant committed the charged offense (the “guilt version”), while the remaining participants viewed a videotaped trial of the same length wherein the eyewitness testified that he merely saw the defendant in the area when the crime occurred (the “innocent version”). After viewing the trials and receiving final jury instructions, the participants rendered an individual, pre-deliberation verdict and then deliberated until a unanimous verdict was reached. The researchers found no significant differences between the pre-deliberation verdicts reached in the two-, three-, and four-choice conditions when participants viewed the “guilt version” of the trial. When participants viewed the “innocent version,” however, there were significant differences in pre-deliberation verdicts, such that participants in the two- and three-choice conditions were more likely to find the defendant not guilty than those who were presented with the GBMI option. This same pattern of results was found when post-deliberation verdicts were analyzed. The researchers noted, “When the GBMI verdict was not available, the dominant view was that the defendant was innocent, but when the GBMI verdict did become available then the dominant view was that the defendant was guilty” (Savitsky & Lindblom, 1986, p.696). This finding—i.e., that the addition of the GBMI verdict option results in significantly fewer NGRI verdicts—has since been replicated in a number of studies (e.g., Roberts et al., 1987; Poulson, 1990).

The idea that the GBMI option represents a “compromise verdict” may find even greater

support in a more recent study. Poulson et al. (1997) presented a live, simulated trial to 140 undergraduate students. In the simulated trial, the defendant, who had a history of schizophrenia and suffered from delusions centering on the need to engage in the “religious persecution” of women, was charged with first degree murder after stabbing a woman to death (pp. 748-49). The participants viewed the trial, which was 90 minutes in length, in groups of 14 to 20. They then received an instruction based on the Model Penal Code definition of insanity and the Illinois pattern instruction defining GBMI. Dependant measures included the participants’ “prediction of verdict selection”; “attitudinal variables” measuring “attitude about lenient treatment of accused persons, attitude towards the insanity defense, attitude toward the death penalty, attitude toward the defense attorneys, and attitude toward the prosecuting attorneys”; and “evaluative variables” measuring “degree of belief in the expert testimony of the defense experts versus the prosecution experts, assessment of the defendant’s mental status, and belief regarding whether the defendant could be rehabilitated” (pp. 749-750). Using verdict choice as the predictor variable and the remaining dependent measures as the criterion variables, the researchers performed principal components and discriminant function analyses. Two significant discriminant functions emerged—the first of which distinguished between participants choosing any of the three verdict options, and the second of which distinguished between those who chose a GBMI verdict and those who chose an NGRI or guilty verdict. On the first function, NGRI verdicts were associated with beliefs that the defendant was mentally ill, the crediting of the defense’s expert testimony over the prosecution’s, “being receptive to the insanity defense,” opposing the death penalty, and “leniency,” while guilty verdicts were associated with the opposite orientation on each of these factors (p. 751). On the second function, GBMI verdicts were associated with distrust of the

attorneys (particularly the prosecutor), a belief that rehabilitation was likely, opposition to lenient treatment, resistance to the insanity defense, and favoring the death penalty. Overall, the “mental status” evaluative variable bore the strongest relationship with verdict choice—which is perhaps not surprising, as the variable is described as “six Likert-type items” which, when summed, “indicate that the participant believed the defendant to be insane” (p. 758). Of particular note: the mean ratings for the GBMI group on nearly every one of the eight dependant measures fell between the means of the ratings given by jurors who arrived at a guilty or NGRI verdict, though their ratings were, generally speaking, closer to those who arrived at guilty verdicts. The researchers concluded that “jurors who vote GBMI may best [be] described as middle-of-the-road jurors, particularly as they evaluate the defendant’s mental status in relation to the charged offense” (p. 752).

Finkel (1991) explored what might happen if jurors were given *several* additional verdict options. One hundred and seventy-nine undergraduate students received the four hypothetical insanity cases used by Finkel and Handel (1988) and Finkel and Handel (1989) (which, again, involved defendants suffering from epilepsy, chronic alcoholism, paranoid schizophrenia, or a “stress-induced” impairment). After reading the cases, the participants completed a set of measures that included a “Verdict Form” (Finkel, 1991, p. 542). This Verdict Form varied between groups: One group of participants received a “two-choice verdict schema,” which allowed them to find the hypothetical defendants guilty or NGRI based on the IDRA definition of insanity.<sup>13</sup> The second group of participants received a “three-choice-no instructions schema,”

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<sup>13</sup>The Insanity Defense Reform Act, or IDRA, instruction employed by Finkel (1991) stated,

To find the defendant “not guilty by reason of insanity” (NGRI), the

which allowed them to find the defendant NGRI, guilty, or of “diminished responsibility” (p. 543).<sup>14</sup> The third group received a “three-choice-instructions schema,” which provided the participants with the same instructions as those received by the first group, along with a GBMI instruction.<sup>15</sup> Finally, the fourth group was given instructions on Finkel’s (1988) “sequential verdict schema,” which spanned more than four pages. Finkel (1991) explains,

Using this sequential verdict schema, nine different verdicts are possible.

The first three verdicts—not guilty, guilty, or guilty to a lesser offense—do not involve a mental element traditionally associated with insanity. The other six possible verdicts, which do involve mental elements traditionally associated with insanity, are partial disability of mind—culpable, partial disability of mind—partially culpable, partial disability of mind—not culpable, total disability of mind—culpable, total disability of mind—partially culpable, and total disability of mind—not culpable. Only the last three of these verdicts (total disability of

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defendant must prove, by clear and convincing evidence, that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of her acts. Mental disease or defect does not otherwise constitute a defense. (pp. 542-543)

<sup>14</sup>No NGRI instruction was provided to the participants in this group; however, the term “diminished responsibility” was defined as “where guilt is lessened because of the defendant’s mental condition” (p. 543).

<sup>15</sup>The GBMI instruction stated,

To find the defendant “guilty but mentally ill” (GBMI), you must find that the defendant had a substantial disorder of thought or mood, which affected her at the time of the offense, and which significantly impaired her judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life. The effect of the mental illness, though, is such as to fall short of legal insanity (NGRI). (Finkel, 1991, p. 543)

mind–not culpable) is considered as a complete and true case of insanity, which exculpates. (p. 540 [footnote omitted])

It should be noted that Finkel (1991) uses the term “culpable” to refer to the defendant’s culpability “for bringing about her disability of mind,” as opposed to criminal responsibility.

Finkel (1991) found that overall, participants who had been given the sequential verdict schema concluded that the hypothetical defendants merited punishment 79.2% of the time; participants who had been given the “GBMI three choice schema” found that the defendants merited punishment 64% of the time (with 34% returning GBMI verdicts and 30% returning guilty verdicts); and participants who had been given the “traditional” two-option schema found that the defendants merited punishment 50% of the time.<sup>16</sup> Thus, Finkel (1991) concluded that altering the verdict options available might significantly alter mock jurors’ verdict decisions. Finkel (1991) goes further, however, and argues that the “array of verdicts” available to jurors under the sequential verdict schema not only allows for more frequent impositions of punishment in cases where mental disorder is at issue, but also appropriately matches the extent of the community’s condemnation to the culpability of the offender (pp. 552-553). Moreover, he suggests that the law ought to be modified in order to allow jurors to “register” their complex grades of the defendant’s culpability.

The studies summarized above indicate that several factors may influence jurors’—and, in some cases, juries’—decisions in insanity cases. Specifically, there is evidence that pre-existing attitudes about the insanity defense, the defendant’s diagnosis, the severity of the charged

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<sup>16</sup>Interestingly, Finkel’s (1991) two- and three-choice schemas did not permit findings that the hypothetical defendants were not guilty; it appears, however, that the nine-factor sequential verdict schema did permit judgments of acquittal (Finkel, 1991, p. 544).

offense, jurors' "commonsense" notions of insanity, and the availability of additional verdict options (e.g., Guilty but Mentally Ill) can affect judgments about legal insanity. Conversely, research suggests that insanity case judgments may not be influenced by the version of the insanity defense presented to the decision-maker, and it is unclear whether jurors' prototypes of insanity have a relationship with verdict decisions separate and distinct from their attitudes toward the insanity defense.

These studies provide a strong foundation from which additional research of decision-making in insanity cases may be launched. They also illustrate quite clearly that a program of research based on condemnation can add significantly to this foundation. As explained above, under Schopp's (1993) condemnation framework, punishment cannot be imposed in the absence of an expression of actor condemnation—which in turn flows from a determination that a person committed an institutionally proscribed act while acting as an accountable (i.e., responsible or blameworthy) agent. With this in mind, note that several of the foregoing studies incorporate measures that seem to assess this very concept—though these measures were not conceptualized as assessments of condemnation.

Recall that in each of the studies in which attitudes toward the insanity defense were assessed, researchers used items that probed the blameworthiness, culpability, or criminal responsibility of persons who commit crimes while suffering from some form of psychological impairment. For instance, Hans' (1986) survey, which was later used in the experiments conducted by Bailis et al. (1995) and others, included items asking participants to express their level of agreement (or disagreement) with such statements as, "Even if people are insane, we should punish them if they break the law," and "Insane people should be punished for their

crimes just like everyone else” (Hans, 1986, p. 414).<sup>17</sup> Roberts’ and Golding’s (1991) attitude measure went further, incorporating items that focused specifically on criminal responsibility (e.g., “People with mental illness, regardless of its severity, are equally blameworthy as non-mentally-ill persons as far as socially deviant behavior is concerned”; “The issue of insanity is not relevant to the criminal responsibility of a person but it should be considered at the time of sentencing”) (pp. 362-364). In addition, recall that Roberts and Golding (1991) found that insanity defense attitude items loading on the “Strict Liability Orientation” component, which assessed “the relevance of mental state to the attribution of blame and the imposition of punishment,” accounted for 16% of the unique variance in verdicts. The insanity defense attitudes scale developed by Skeem et al. (2004) also incorporated items meant to assess “opinions that mental disorder implies reduced capacity or that defendants are responsible for their crimes regardless of whether they are mentally disordered” (p. 628). Moreover, the primary factor extracted from their data, (i.e., “strict liability”), which reflected “the extent to which individuals believe that mental illness is associated with reduced capacity for rational decision making and control . . . and that *reduced capacity is relevant to the issue of criminal responsibility* [italics added],” was highly correlated with insanity “likelihood” ratings (Skeem et al., 2004, pp. 629-630).

Despite their incorporation of items that relate to criminal responsibility, it cannot be said that these attitude measures amount to assessments of actor condemnation. Chiefly, this is so because participants in each of these studies completed these attitude measures without

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<sup>17</sup>Recall that Bailis et al. (1995) found that participants’ responses to questions of this sort correlated positively with the frequency of guilty verdicts they returned across nine hypothetical scenarios ( $r = .43$ ) (p. 434).



context—even in those studies in which participants were also presented with hypothetical insanity cases. In other words, rather than asking participants whether a *particular person* committed an institutionally proscribed act as a criminally responsible actor, the attitude measures (in essence) ask participants whether they believe that *persons in general* who suffer from *unspecified* mental impairments (or who simply raise the insanity defense) are criminally responsible actors. This sort of questioning would seem to put a thoughtful respondent in a difficult position, particularly if he or she realizes that judgments about blameworthiness might vary depending upon the specific facts of a case, including the nature of the psychological impairment at issue. And it might be argued that participants who express agreement with statements such as, “Even if people are insane, we should punish them if they break the law,” and “Insane people should be punished for their crimes just like everyone else” (Hans, 1986, p. 414), reveal little more than a lack of understanding about the relationship between the insanity defense, criminal responsibility, and the justification of punishment. Nevertheless, the strong relationship between “attitudes” about criminal responsibility and verdict decisions in insanity cases is well-established, and it leads one to hypothesize that if assessments about the relationship between insanity and criminal responsibility were made in the context of a hypothetical case, these assessments would not only begin to approximate an assessment of actor condemnation, but they would also predict verdicts even more strongly.

Evidence supporting this hypothesis can be found in the study conducted by Roberts and Golding (1991). As noted above, the researchers found that insanity defense attitude items loading on the “Strict Liability Orientation” component, which assessed “the relevance of mental state to the attribution of blame and the imposition of punishment,” accounted for 16% of the

unique variance in verdicts. Recall, however, that a second component, which was labeled “Perceived Criminal Responsibility” and which consisted of case construal items assessing “variability among subjects regarding [their] perceptions” of the defendants’ capacities for criminal responsibility, blameworthiness, and “deservingness of punishment” (p. 367), accounted for 28% of the between-groups variance separate from the 16% of the variance accounted for by the Strict Liability (attitude) component. In other words, items assessing judgments about specific hypothetical defendants’ capacity for criminal responsibility, blameworthiness, etc.—which seem similar to the normative concept of actor condemnation—were strongly predictive of verdicts. Note too that, when these “Perceived Criminal Responsibility” case construal items are taken together with the Strict Liability items, a full 44% of the variability in verdicts was attributable to measures of criminal responsibility, blameworthiness, and desert. Although Roberts and Golding (1991) did not relate this finding to the normative framework underlying the criminal justice system generally, or to condemnation specifically, their results seem to indicate that an empirical assessment of condemnation might strongly predict verdicts in insanity cases.

The research summarized above not only provides reason to expect that an empirical measure of condemnation will relate to verdicts in insanity cases, but also illustrates—in at least two distinct ways—the importance of relating research findings to the normative framework underlying the criminal justice system. First, studies suggesting that mock jurors use the GBMI verdict option as a “compromise verdict” that reflects a lesser degree of “guilt” than a guilty verdict are not merely interesting from a psychological decision-making perspective: if jurors are using the verdict in this fashion, there may be reason to worry that they are using it to avoid

making the fundamental (and perhaps difficult) determination that the defendant is a fully criminally responsible actor, which is necessary to justify a verdict of guilty *or* GBMI. This, in turn, provides reason to question whether the GBMI option undermines the normative framework underlying the criminal justice system. Second, some researchers have argued that the law ought to be modified to match jurors' decision-making processes in insanity cases (e.g., Finkel, 1991). Such arguments, however, are empty in the absence of any explanation as to why it would be beneficial to jettison the justificatory framework underlying the criminal justice system in favor of a system adapted to the "commonsense" decisions of mock jurors. If, for example, a researcher found that a majority of the public would like to see people punished for committing institutionally proscribed acts even if they lack the capacity for criminal responsibility—a finding that, incidentally, seems consistent with Hans' (1986) finding that 55.4% of her respondents felt that "the insane should be punished just like everyone else when they break the law"—it does not necessarily follow that the United States ought to strike the retributive requirement of guilt from the justificatory foundation of the criminal justice system (and perhaps adopt a strictly utilitarian system of criminal justice).

Thus, the research literature concerning the insanity defense serves to identify variables for analysis, suggests hypotheses concerning the relationship between condemnation and verdict decisions in insanity cases, and illustrates the importance of accounting for the normative framework underlying the criminal justice system when discussing studies' implications. This well-developed body of research therefore provides useful guidance for the current project. The following subsection will illustrate, however, that the empirical literature addressing juvenile court jurisdiction decisions is not nearly so well-developed and provides much less helpful

guidance.

## 2. *Juvenile Court Jurisdiction Decisions*

Psychological research has provided two general insights relevant to juvenile court jurisdiction decisions. First, research suggests that the basic capacity for criminal responsibility does not develop consistently by a specific age. Second, researchers have investigated the factors that influence mental health professionals' recommendations to legal decision-makers on the issue of jurisdiction and have found that youths' accountability is generally not central to these recommendations. The research supporting these two insights is summarized below.

First, recent psychological research calls into doubt the notion that youths may develop the capacity for criminal responsibility at ages that match the assumptions underlying the common law infancy defense—or at any specific age. Cauffman and Steinberg (2000) investigated specifically “whether there are developmental changes during the adolescent years”—defined as the period from about age 13 to age 18—“in psychological characteristics relevant to determinations of culpability” (p. 742). Preliminarily, the researchers noted that adolescents may differ from adults both cognitively and psychosocially, and that a thorough assessment of “maturity of judgment” must take into account both of these dimensions (p. 743). Next, they observed that although there is no “strong evidence of cognitive differences between adolescents [of approximately age 16] and adults that might account for developmental differences in decision-making,” “there may well exist psychosocial factors that affect the sorts of decisions that individuals make, that follow a developmental progression between adolescence and adulthood, and that bear on the question of adolescent culpability” (p. 744). These psychosocial factors were grouped into three broad categories for study:

(1) *responsibility*, which encompasses such characteristics as self-reliance, clarity of identity, and independence; (2) *perspective*, which refers to one's likelihood of considering situations from different viewpoints and placing them in broader social and temporal contexts; and (3) *temperance*, which refers to tendencies to limit impulsivity and to evaluate situations before acting. (p. 745)

Cauffman and Steinberg (2000) then investigated youths' development of these factors and the factors' relationship to antisocial decision-making. The researchers presented self-report questionnaires to more than 1000 participants, including a total of approximately 800 eighth, tenth, and twelfth grade students and approximately 200 college students (who served as "adult" comparators). The questionnaires included the following: 1) questions to assess demographic information; 2) the personal responsibility scale from the Psychosocial Maturity Inventory, which measures "self-reliance (i.e., feelings of internal control and the ability to make decisions without extreme reliance on others)," "identity (i.e., self-esteem, clarity of the self, and consideration of life goals)," and "work orientation (i.e., pride in the successful completion of tasks)"; 3) measures of perspective that focused on "future orientation" (i.e., the Consideration of Future Consequences Scale) and "social perspective taking" (i.e., the Consideration of Others subscale of the Weinberger Adjustment Inventory); 4) a measure of temperance consisting of the "impulse control" and "suppression of aggression" subscales of the Weinberger Adjustment Inventory; and 5) the Youth Decision-Making Questionnaire, which assesses antisocial decision-making by presenting "participants with a set of hypothetical situations that involve choosing between antisocial and socially accepted courses of action" (pp. 747-749). The measures of responsibility, perspective, and temperance were combined to form a composite measure of

“psychosocial maturity” (p. 749).

The researchers did indeed find that both antisocial decision-making and psychosocial maturity differed by age among juveniles. Antisocial decision-making was more strongly influenced by psychosocial maturity than by age, however. In other words, an assessment of the psychosocial factors identified above (i.e., responsibility, perspective, and temperance) reveals more about a juvenile’s maturity of judgment than does his age (Cauffman & Steinberg, 2000, p. 756).<sup>18</sup> Results also indicated that “the period between [age] 16 and 19 marks an important transition point in psychosocial development that is potentially relevant to debates about the drawing of legal boundaries between adolescence and adulthood (p. 756). At the same time, however, “significant numbers of adolescents” exhibited “below average or above average levels of maturity of judgment, while among adults there were very few individuals in the most immature category” (p. 757). In describing the implications of their research for the questions of juvenile culpability and jurisdiction waiver, Cauffman and Steinberg (2000) noted that, although the age differences observed in their study “are *appreciable* enough to warrant drawing a legal distinction” between age groups, they do not seem to “be *consistent* enough, since significant numbers of adolescents exhibit high enough levels of maturity of judgment to outperform less mature adults” (p. 758). Although the Cauffman and Steinberg (2000) study did not reveal “any one age that politicians and practitioners should use in formulating transfer policies or practices,”

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<sup>18</sup>Age was modestly, though significantly, correlated with antisocial decision-making ( $r = .15$ ,  $p < .0001$ ). Responsibility ( $r = .31$ ), perspective ( $r = .41$ ), and temperance ( $r = .47$ ) were each more strongly correlated with antisocial decision-making.

it did suggest that waiver decisions ought to be “offender-based” rather than “offense-based.”<sup>19</sup>

A relatively new body of research has explored juveniles’ competence to proceed in criminal court.<sup>20</sup> Noting that generally, competence to proceed in criminal court (or “adjudicative competence”) depends on “a basic comprehension of the purpose and nature of the trial process (Understanding), the capacity to provide relevant information to counsel and to process information (Reasoning), and the ability to apply information to one’s own situation in a manner that is neither distorted nor irrational (Appreciation),” Grisso et al. (2003) sought to determine whether youths’ abilities relative to these tasks differ from those of young adults (p. 335). They also sought to determine whether adolescents’ lack of psychosocial maturity, or “maturity of judgment,” might affect their capacity to participate in the trial process.

Nine hundred and twenty-seven “youths” aged 11-17 (453 of whom were detained in juvenile detention facilities) and 466 “young adults” aged 18-24 (233 of whom were detained in “adult” jails) participated in the study. The participants provided demographic information; completed the Wechsler Abbreviated Scale of Intelligence (WASI), which “produces an estimate of general intellectual ability” that can be obtained in approximately 15 minutes; and the Massachusetts Youth Screening Instrument-Second Version, which is a “mental health screening inventory that provides indexes of degree of disturbance on six clinical scales (Alcohol/Drug Use, Angry-Irritable, Depressed-Anxious, Somatic Complaints, Suicide Ideation, Thought

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<sup>19</sup>Grisso (1996) reached a similar conclusion, though his was based on theoretical argument that, at the time, lacked empirical support.

<sup>20</sup>Because of the juvenile justice system’s civil nature, competence to proceed was not traditionally required in juvenile court; nevertheless, some juvenile courts now require that juveniles be competent to proceed to adjudication (Viljoen & Grisso, 2007).

Disturbance).” (Grisso et al., 2003, pp. 338-339). In addition, the participants completed two dependent measures. The first of these measures was the MacArthur Competence Assessment Tool-Criminal Adjudication (MacCAT-CA), which is “designed to assess criminal defendants’ abilities to participate in their defense,” or “adjudicative competence,” using three subscales labeled Understanding, Reasoning, and Appreciation (p. 339). The second dependent measure was the MacArthur Judgment Evaluation (MacJEN), which was developed specifically for this particular study in order to assess “age-related differences in choices and the psychosocial factors that might influence those choices” (p. 340). Scores on the MacJEN were “designed to identify three variables representing aspects of psychosocial maturity: risk appraisal . . . future orientation, and resistance to peer influence” (p. 341).

Based on differences in scores on the MacCAT-CA, Grisso and his colleagues found that “juveniles aged 15 and younger are significantly more likely than older adolescents and young adults to be impaired in ways that compromise their ability to serve as competent defendants in criminal proceedings” (p. 356). More specifically, it was found that approximately one third of 11- to 13-year-olds and one fifth of 14- to 15-year-olds participating in the study suffered from impairments to their capacities relevant to adjudicative competence comparable to those of adults who would likely be considered incompetent to stand trial, but the “competence-relevant capacities of 16- and 17-year-olds as a group do not differ significantly from those of young adults” (Grisso et al., 2003, p. 356). In addition, however, differences MacJEN scores suggested “that psychosocial immaturity may affect the performance of youths as defendants in ways that extend beyond the elements of understanding and reasoning that are explicitly relevant to competence to stand trial” (p. 357). More specifically,



Adolescents are more likely than young adults to make choices that reflect a propensity to comply with authority figures, such as confessing to the police rather than remaining silent or accepting a prosecutor's offer of a plea agreement. In addition, when being interrogated by the police, consulting with an attorney, or evaluating a plea agreement, younger adolescents are less likely, or perhaps less able, than others to recognize the risks inherent in the various choices they face or to consider the long-term, and not merely the immediate, consequences of their legal decisions. (p. 357)

In short, Grisso et al. (2003) found relationships between decisions and psychosocial maturity similar to those found by Cauffman and Steinberg (2000). Their results also suggest that a significant proportion of youths under the age of 16 lack the formal capacities relevant to competence to proceed to trial, which again seems to weigh in favor of "offender-based" decisions.

As noted above, studies conducted to date have also sought to identify factors that influence decisions to transfer juveniles to criminal court. Recognizing that psychologists are frequently consulted to help resolve questions related to the transfer of juveniles to criminal court—regardless of whether that transfer occurs via a waiver hearing, a prosecutorial filing decision, or some other procedure—Salekin, Rogers, and Ustad (2001) obtained ratings from two groups of psychologists in an effort to 1) clarify the constructs that those professionals use to guide their assessments, and 2) assess the characteristics of juveniles who were transferred to criminal court. The first sample of participants consisted of 244 psychologists who were members of the American Psychological Association's Clinical Child Psychology Division ("the

clinical child sample”). The second sample consisted of 75 psychologists “who were diplomates in forensic psychology accredited by the American Board of Professional Psychology” (“the forensic diplomates sample”) (p. 385). Each sample was sent one of two versions of a “prototypical analysis measure” designed by the researchers. These measures consisted of items designed to cover three constructs—dangerousness, sophistication-maturity, and amenability to treatment—which have long been recognized as the major evaluation criteria for waiver recommendations (e.g., Kruh & Brodsky, 1997). Participants in the clinical child sample “were asked to rate each item’s prototypicality within the relevant domain as it related to waiver to adult court” (Salekin et al, 2001, p. 387). More specifically, with regard to “dangerousness,” the participants were asked to “rate the importance” of the items “in determining the waiver of a juvenile to adult court because of dangerousness” (p. 387). “A parallel instruction was provided” for the “sophistication-maturity” construct, and for the “amenability to treatment” construct, the participants “were asked ‘to rate the importance of the characteristics [listed in each item] . . . for a juvenile who is amenable to treatment and should remain in juvenile court’” (p. 387). Participants in the forensic diplomates sample were given the second version of the measure, “were asked to think of the most typical case in the past 2 years in which they performed a juvenile waiver evaluation and recommended transfer,” and were asked to “rate the characteristics of the juvenile” evaluated in that case using the measure supplied by the researchers (p. 387).

Salekin et al. (2001) found that, according to clinical child psychologists, many of the items included in the measure were “highly prototypic,” which indicated that they were “central” to one of the three relevant constructs as they relate to juvenile waiver. For instance, 22 items

were found to be highly prototypic of dangerousness, and these items centered around four general themes that, “when present, . . . are suggestive of waiver to adult court: (a) extreme unprovoked violence; (b) severe, aggressive, antisocial personality; (c) lack of remorse/guilt and empathy; and (d) leadership role in the crime” (p. 397). Only four items were found to be highly prototypic of sophistication-maturity. These items focused on “(a) criminal sophistication, (b) [whether the youth was] capable of planned and premeditated crime, (c) understanding of behavioral norms, and (d) [the youth’s] ability to identify alternative actions” (p. 397). The researchers noted that these items point “to the importance of accountability in the sophistication-maturity construct” (p. 397). Finally, 22 items were found to be highly prototypic of amenability to treatment. The researchers concluded that the data indicate that “keeping juveniles in juvenile court should be considered when youth (a) are motivated for treatment, (b) are aware of their difficulties and want to change them, (c) expect that they will benefit from treatment, (d) demonstrate remorse/guilt and empathy, (e) have knowledge of right from wrong, and (f) have a family that is stable and supportive” (pp. 397-398).

When the data provided by the two samples of participants were compared, it was found that “in general, forensic diplomates rated juveniles waived to adult court in accordance with the core constructs identified by clinical child psychologists”—with one notable exception (Salekin et al., 2001, p. 399). Interestingly, the forensic diplomates rated the sophistication-maturity items as having “moderately low prototypicality” (p. 399). The researchers noted, “This finding is surprising in that this construct most likely aligns with whether a juvenile is adultlike either in criminal sophistication or emotional and intellectual maturity” (p. 399).

In summary, research indicates that adolescents possess wide ranges of maturity of

judgment, such that reliance upon a set of presumptions—especially conclusive age-based presumptions or offense-based statutory waivers—to make jurisdiction determinations may be difficult to justify. Although adolescents approaching the age of 16 may have similar cognitive capabilities as adults, there is evidence that they lack adult-like “psychosocial maturity,” which is said to consist of “responsibility,” “perspective,” and “temperance.” Despite evidence that adolescents lack the decision-making competence and psychosocial maturity of adults, forensic psychologists who make jurisdiction recommendations to courts have indicated that juveniles’ “sophistication-maturity” is not central to their recommendations.

To the extent that “psychosocial maturity” and “sophistication-maturity” relate to the concept of accountability, or the capacity for criminal responsibility, the literature suggests that a program of research based on condemnation—and actor condemnation in particular—may yield interesting findings. For example, although there is evidence that forensic psychologists who make transfer recommendations to courts may not weigh accountability heavily in their reports, it is not clear whether *legal* decision-makers (who are ultimately tasked with responsibility for the jurisdiction determination) will similarly de-emphasize accountability. After the factors that legal decision-makers use to make their determinations are discovered, they can be analyzed in light of the normative framework underlying the criminal justice system to determine whether the decisions are based on criteria that promote the harmonious functioning of the relevant legal institutions.

The foregoing subsections illustrate that the empirical research conducted to date has identified many factors that influence decision-making in insanity cases and juvenile court jurisdiction decisions, and these critical factors ought to be accounted for in most future studies.

Nevertheless, the existing research leaves a number of interesting questions unexplored. Among these are the chief questions that the present studies seek to address: Are decisions in insanity cases and juvenile court charging decisions actually made in a manner that coheres with the normative framework underlying minimally-retributive criminal justice systems? And, more fundamentally, can jurisprudential theories about the definition and justifications of punishment be integrated into an empirical model of decision-making—or, in other words, can a prescriptive concept such as condemnation be translated into a predictive experimental construct? Two experiments designed to address the former question will be described in the second section of this dissertation. First, however, prior research based on an empirical conceptualization of condemnation will be reviewed in order to illustrate that the latter question may be answered affirmatively.

### ***3. Condemnation and the Empirical Study of Post Insanity Acquittal and Sexually Violent Predator Commitments***

As noted previously, Feinberg (1995a) argues that just legal punishment is defined by the condemnation it expresses. He argues further that condemnation is an “expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority himself or of those ‘in whose name’ the punishment is inflicted” (p. 593). He adds that “resentment” refers to “the various vengeful attitudes” that “imprisonment is universally taken to express,” and “reprobation” refers to a “stern judgment of disapproval” distinct from the emotionally-rooted resentment (p. 594). Furthermore, Schopp (1993) submits that condemnation is in fact expressed towards categories of conduct, specific acts, and criminally responsible actors at various stages within the criminal justice system.

Feinberg's and Schopp's analysis of condemnation is normative; that is, it is based upon reasoned argument concerning the proper functioning of the criminal justice system, and it focuses on the manner in which punishment may be justly imposed through that system. Put another way, Feinberg (1995a) and Schopp (1993) describe the nature of condemnation that would, in their view, be *justifiably* expressed following defensible evaluations of the wrongfulness of an act and the culpability of the actor. Their analysis does not speak to the degree and form of condemnation that people *actually* experience and express, however. Whether people actually experience or express condemnation in various cases presents a set of empirical questions that are suitable for study using the research methods of social scientists. Indeed, one might use Feinberg's (1995a) definition of condemnation as an aid to develop questions, or scale items, that measure "vengeful attitudes" and "stern judgments of disapproval." These items might then be forged into a "condemnation scale" with psychometric properties that can be assessed in the same manner as any other scale. If this scale can be shown to measure what it purports to measure (i.e., decision-makers' actual expressions of condemnation), it might then be used to test a number of interesting hypotheses relating to the distinction between civil and criminal deprivations of liberty.

In fact, an empirical measure based on the normative concept of condemnation has been designed, tested, and applied in a previous study that sought to compare mock jurors' decisions in insanity cases and "sexually violent predator" (SVP) commitment proceedings (Pearce, 1999). This study will be reviewed below. To establish the context for Pearce's (1999) study, a brief description of SVP commitments, a review of courts' analyses of their civil/criminal nature, and an analysis of the relationship between SVP commitments, condemnation, and the normative

framework underlying the criminal justice system will be set forth first. Thereafter, the methods and results of the study will be summarized.

Historically, states have treated sex offenders as either criminals or “psychological deviants” depending on whether the prevailing philosophy of the era emphasized punitive or rehabilitative goals (Fabian, 2005; Weitzel, 2005; Brakel & Cavanaugh, 2000). This suggests that there exists an inherent flexibility, or ambiguity, in the way that social institutions might respond to sex offenders. In other words, due to the nature of their offenses, it seems appropriate to treat sex offenders either as accountable criminals or as unaccountable “deviants” driven by abnormal psychological urges. However, in the aftermath of heinous sex offenses committed in the State of Washington, a task force devised a new commitment procedure that, in essence, allowed certain sex offenders to be treated *both* as accountable criminals *and* psychological deviants. This “sexually violent predator” commitment procedure was designed to permit the state to continue the confinement of convicted sex offenders nearing the end of their prison terms by shifting the justification for their incapacitation from a criminal conviction to a civil commitment (e.g., Boerner, 1992; Community Protection Act, ch. 3, §§ 1001-1013, 1990 Wash. Sess. Laws 13, 97-102; Wash. Rev. Code Ann. § 71.09.020(16)). This commitment procedure, which has since been adopted in Kansas, Nebraska, and several other states (e.g., Parry, 2001; Pearce, 2007), is controversial in part because these SVPs typically lack the sort of psychological impairments that would render them eligible for standard civil commitments (e.g., Wash. Rev. Code Ann. § 71.09.010). Instead, their commitments are said to be based on “mental abnormalities or personality disorders” that make them likely to engage in “predatory acts of sexual violence” if they are not incapacitated (e.g., Wash. Rev. Code Ann. § 71.09.020(16)). By

way of example, the Washington Supreme Court has held that the “mental abnormality or personality disorder” criterion can be satisfied by evidence that the offender suffered from a “long-term pattern of irresponsible and anti-social behavior” or a “residual” mental disorder, such as “rape as paraphilia” (e.g., *In re Young*, 1993, pp. 1002-03).

Courts struggled to determine whether this “mental abnormality or personality disorder” commitment criterion is consistent with the substantive requirements of due process; indeed, courts that first considered the issue reached opposite conclusions (*In re Young*, 1993; *Young v. Weston*, 1995). The Supreme Court resolved this legal controversy in *Kansas v. Hendricks* (1997), holding that SVP commitments do not offend principles of substantive due process because the commitments require “a finding of future dangerousness, and then link that finding to the existence of a ‘mental abnormality’ or ‘personality disorder’ that makes it difficult, if not impossible, for the person to control his dangerous behavior” (p. 358). In a subsequent decision, the Court clarified that in order to “distinguish[] a dangerous sexual offender subject to civil commitment ‘from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings,’” “there must be proof of serious difficulty in controlling behavior” (*Kansas v. Crane*, 2002, pp. 412-13).

Courts also struggled to determine whether SVP commitments are civil or criminal in nature. To analyze this question, courts have applied the two-part test outlined in *United States v. Ward* (1980), and described above. In *Young v. Weston* (1995), the United States District Court for the Western District of Washington conducted a *Ward* analysis and found that SVP commitments “promote the traditional aims of punishment—retribution and deterrence,” and are therefore criminal. But the Washington Supreme Court had reached the opposite conclusion in



*In re Young* (1993). Ultimately, the United States Supreme Court determined that SVP commitment procedures were *not* criminal proceedings, stating that the commitments did “not implicate . . . retribution or deterrence” and that the conditions of sexual predators’ confinement did “not suggest a punitive purpose on the State’s part” (*Kansas v. Hendricks*, 1997, pp. 361-63).

Although the Supreme Court has resolved the legal controversies surrounding SVP commitments—at least insofar as the lower courts are concerned—its decisions do not adequately address the justificatory problems underlying the most controversial varieties of these commitments. These justificatory problems become salient when the difficult questions raised by SVP commitments are examined using the condemnation framework (e.g., Pearce, 2007). Specifically, the condemnation framework (and the concept of actor condemnation in particular) indicates that the Supreme Court failed to define sufficiently the sort of impairment that could justify an SVP commitment without undermining the prior determination that the alleged predator was criminally responsible for his offenses (which follows from his conviction). Because the type of impairment that could perform this function remains ambiguous, it is difficult to determine with certainty whether SVP commitments are punitive. The following points illustrate this difficulty.

First, if a person with prior convictions for sex offenses can be shown to have had (at all relevant times) a psychological impairment that truly renders him substantially unable to control his criminal conduct, his commitment as an SVP seems to serve the functions that are traditionally performed by the institution of civil commitment. In other words, the commitment would amount to an exercise of the state’s police power to provide treatment for a serious psychological impairment while protecting the public from danger, and it would be difficult to

argue that the commitment actually performs the expressive function of punishment. At the same time, however, it is difficult to explain how the findings of criminal accountability that accompanied the person's sex offense convictions could stand in the wake of a determination that those prior offenses were committed by a person who was suffering from a psychological disorder that seriously impaired his volitional control. This is particularly true in the jurisdictions that use the Model Penal Code's version of the insanity defense, which (as noted previously) provides, "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity . . . *to conform his conduct to the requirements of the law* [italics added]" (Model Penal Code § 4.01, American Law Institute (1962)).<sup>21</sup> Put succinctly, it does not seem likely that any known psychological impairment could satisfy the Supreme Court's "serious difficulty in controlling behavior" commitment standard without also establishing a compelling mens rea defense.

Alternately, if the psychological impairment that justifies the commitment is based upon diagnostic criteria that are satisfied whenever a person commits a sex offense or series of sex offenses—as in *Kansas v. Crane* (2002) (diagnoses of exhibitionism and antisocial personality disorder), *Kansas v. Hendricks* (1997) (diagnosis of pedophilia), and *In re Young* (1993) (diagnosis of "rape as paraphilia")—the commitment would not seem to call into doubt the person's criminal responsibility for his prior offenses. Indeed, the commitment would be based entirely on the person's prior criminal conduct (which happens to be "diagnosable"). Under these circumstances, however, the commitment would seem to perform the expressive function

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<sup>21</sup>It should be noted, however, that Washington, Kansas, and Nebraska are not among the fourteen jurisdictions that employ this version of the insanity defense (LeBlanc, 2007; Gundlach-Evans, 2006).

of punishment. In other words, it seems that the commitment is based on a determination that the person committed an institutionally proscribed act (or, more likely, a series of such acts) as a criminally responsible actor, which renders it punitive. Thus, to the extent that the Supreme Court's "serious difficulty in controlling behavior" standard is meant to authorize civil commitments based on "crime diagnoses," its holding that SVP commitments are nonpunitive appears to be infirm.

The ambiguous nature of the expressive function of SVP commitments indicates that the institutions of criminal justice and civil commitment—and the separate functions that they are meant to perform—have been blurred and distorted in order to ensure that the incapacitation of criminals may continue through civil commitments. Ordinarily, it is clear that the criminal justice system is the conventional institution for imposing punishment upon criminally responsible actors, and its dispositions typically serve the goals of retribution and deterrence. When a person suffering from a psychological impairment that seriously impairs his volitional control is punished, however, the expressive function of his punishment seems to be diluted. That is to say, the criminal punishment of a person suffering from a serious impairment of volition does not seem to express the same sort of resentment and reprobation toward the actor that would be expressed toward a person who lacks such an impairment. Thus, the basic function of the criminal justice system, which involves the expression of condemnation through the imposition of punishment, is distorted or weakened to the extent that the criminal justice system is used to "punish" persons who seem to lack accountability due to their severe volitional impairments. To put the matter more simply, the criminal justice system appears to take on a function more akin to that which is ordinarily performed by the institution of civil commitment

(i.e., the protection of society from dangerous mentally ill persons).

Conversely, it is ordinarily clear that civil commitment is the conventional mechanism for treating the psychologically impaired while protecting the public from danger, and deprivations of liberty that flow from civil commitment proceedings do not perform the retributive or deterrent functions of punishment (and are therefore not punitive). SVP commitments purport to perform the functions of civil commitment, but, as explained above, they may in fact perform the expressive, retributive, and deterrent functions of punishment. Indeed, there are indications that the public may believe that persons eligible for SVP commitments are not appropriate candidates for civil commitment, but instead merit only punishment. Evidence of this belief may be found in the comments made by the mother of a boy who suffered a brutal assault in the State of Washington, which in turn led to the formation of the task force that created the SVP procedure (Filler, 2004; Rideout, 1992; Maleng, 1992; Boerner, 1992). At the conclusion of her tour of the “ultra-secure Civil Commitment Center” designed to house persons committed under the state’s SVP law, the boy’s mother reportedly said, “I tried to envision [my son’s assailant] here and decided no, I’d rather have him behind bars . . . I don’t think he deserves this opportunity. It’s nicer than prison” (Harrell, 1990, p. B2). At the same time, however, there are indications that the public may have come to believe that because the criminal justice system is not performing its functions properly, civil commitments *should* be used to perform those functions. In fact, the Washington task force that proposed the original SVP procedure viewed its mission as “respond[ing] in a meaningful and responsible way to the public outrage over . . . cases in which violent sex offenders were released [from prison] to the community only to reoffend” (Maleng, 1992, p. 821). In either case, to the extent that SVP commitments perform the expressive

function of punishment, the proper function of the institution of civil commitment (which is structured to be non-punitive) has been distorted in order to incapacitate violent sex offenders who seem to merit punishment.

In light of the foregoing, Pearce (1999) hypothesized that if condemnation could be “translated into a psychometric construct capable of reliable measurement” (p. 15), this construct could be used 1) to show that SVP commitments perform the expressive function of punishment, and 2) to explain the dramatic difference between the commitment rates of SVPs (over 90%) and the frequency of insanity acquittals (less than 0.5%). More generally, Pearce also hypothesized that, to the extent that condemnation is a defining characteristic of criminal deprivations of liberty, it may prove to be a useful factor for identifying which actors are appropriately subjected to criminal punishment and which are not.

To test these hypotheses, Pearce provided ninety-four University of Nebraska-Lincoln undergraduates with a packet of materials that included an augmented version the Insanity Defense Attitudes Scale (Hans, 1986), three hypothetical cases, and a condemnation scale. The Insanity Defense Attitudes Scale was completed by all participants either before or after they completed the other components of the packet. The three hypothetical cases were “designed to vary in terms of the condemnation appropriately expressed towards the actors . . . while holding constant the specific nature of the harm caused by each actor” (Pearce, 1999, p. 44). In the first experimental condition, each of the three hypotheticals described a sexual assault perpetrated against a twelve-year-old boy. In hypothetical 1, the assault was committed by a priest who entered a cathedral and suffered a psychotic delusion that caused him to believe that demons were flying in and out of an altar boy’s body, centering around his genitals. The priest struck the

boy in the genitals with a silver cross that he removed from the altar, which knocked the boy to the ground. “The priest then removed some of the boy’s clothing, placed his hands on the boy’s genitals, and shouted for the demons to vacate the boy’s body, evidently believing that he was exorcising the demons he saw” (p. 45). This hypothetical “was designed to describe a relatively sympathetic character who suffered from a psychotic break” and who would be relatively “likely to be found ‘not guilty by reason of insanity’ in the context of a criminal trial” (p. 45). In hypothetical 2, a boy was sexually assaulted by a janitor at his school. The janitor had observed the boy’s route home from school, lied in wait along that route, and waited for the boy to pass by. He then struck the boy in the genitals, knocking him to the ground; removed some of the boy’s clothing; placed his hands on the boy’s genitals; and asked the boy if he was afraid before abruptly running away. This hypothetical was intended to represent the type of offense that might eventually lead to the offender’s commitment as an SVP. “In the third hypothetical, a member of the American Neo-Nazi Party arrived at a neighborhood block party to find his daughter dancing with a Jewish boy. The man struck the boy in the crotch, removed some of the boy’s clothing, grabbed the boy’s genitals, and told the youth that he would lose his genitals if he ever danced with the daughter again” (p. 45). This hypothetical “was designed to present an unsympathetic character without any clear impairment of psychological capacities” characteristic of insanity acquittees or SVPs, “although he might carry a diagnosis of antisocial personality disorder” (pp. 45-46).

For half of the participants, the hypotheticals represented the factual background of SVP commitment proceedings for persons nearing the end of their prison sentences. Participants in this condition received the following instruction, which was based on Washington’s statutory

definition of sexually violent predators:

A person is a sexually violent predator if he has a mental abnormality or personality disorder that makes him likely to engage in crimes of sexual violence.

Therefore, if you find beyond a reasonable doubt that:

- (1) The defendant had a mental abnormality or personality disorder; AND
- (2) This mental abnormality or personality disorder makes the defendant likely to engage in crimes of sexual violence;

then you must find that the defendant is a sexually violent predator. Otherwise, you must find that the defendant is not a sexually violent predator. (Pearce, 1999, Appendix E)

For the other half of the participants, the hypotheticals represented the factual background of criminal trials, and each hypothetical actor was portrayed as a criminal defendant attempting to prove that he was legally insane at the time of his actions. The participants in this condition received the following instruction, which was based on the volitional component of the Model Penal Code definition of insanity:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disorder he lacks substantial capacity to conform his conduct to the requirements of law. Therefore, if you find that it is more likely true than not true that:

- (1) The defendant had a mental disorder at the time of the acts charged; AND
- (2) As a result of the mental disorder, the defendant lacked substantial capacity to conform his conduct to the requirements of law;

then you must find the defendant not responsible by reason of insanity.

Otherwise, you must find him guilty. (Pearce, 1999, Appendix D)

Although no jurisdiction uses a “purely volitional” insanity defense, this instruction was selected for two important reasons. First—and chiefly—Pearce theorized that by selecting an insanity defense instruction that closely matched the Supreme Court’s interpretation of the SVP commitment criteria (i.e., “there must be proof of serious difficulty in controlling behavior”), the instructions provided in the criminal trial condition would be similar to those in the SVP condition. This, in turn, would strengthen the inference that the hypothesized difference between condemnation scores for the hypothetical actors who were found to be not guilty by reason of insanity and those who were committed as SVPs would provide some indication that SVP commitments actually perform the expressive function of punishment. In other words, given almost identical background facts and similar decision criteria (i.e., jury instructions), if persons found not guilty by reason of insanity on the basis of a volitional impairment were assigned significantly lower condemnation scores than persons who were committed as SVPs on the basis of a mental abnormality or personality disorder that impairs their volitional control, it could be argued that the decision-makers viewed the SVP commitments as punitive. Second, and as noted in a preceding subsection, prior research suggests that the particular instruction used in insanity defense cases has little, if any, effect on verdict decisions (e.g., Finkel & Handel, 1988). Thus, the insanity defense instruction’s lack of external validity is not particularly concerning.

In addition to the criminal trial/SVP commitment manipulation, one-half of the participants received hypotheticals involving sexual assaults (as described above), while the other half of the participants received hypotheticals involving physical, nonsexual assaults. The



participants in the SVP commitment condition involving a nonsexual assault made their decisions in the context of a “violent predator” commitment hearing, “which was identical to the sexual predator condition with the exception that all references to sexual conduct were replaced with references to ‘violent’ conduct” (Pearce, 1999, p. 47). “This manipulation was performed in order to help determine whether there is something unique about sex offenders that renders them particularly susceptible to high rates of post-sentence commitment, and also to allow for a comparison of condemnation levels between sexual and nonsexual offenders” (p. 47).

After reading each hypothetical, participants were asked to return a verdict and answer a number of questions about the defendant. They also completed a *condemnation scale* for each hypothetical. The scale included sixteen items measuring, on a seven-point Likert-type scale, the emotional (twelve items) and judgmental (four items) aspects of condemnation; two additional items (also based on a seven-point Likert scale) measuring the balancing of emotion and judgment; and a single item asking participants “whether they equated mental health commitment with punishment” (Pearce, 1999, p. 46). “The imbalance in the questions in favor of the emotional aspect of condemnation was not intentional,” but an item analysis revealed that the responses on several additional judgment items did not follow a normal distribution, “perhaps due to the consistent high judgments of disapproval towards each of the defendants presented in the hypotheticals” (p. 46). The scale scores were summed to form a total condemnation score ( $M = 76.29, \sigma = 13.83$ ), and “reliability analysis indicated an encouraging association among the items included in the scale (Cronbach’s  $\alpha = .88$ )” (p. 46).

Many, but not all, of Pearce’s hypotheses were supported by his research. First, the hypothesis that condemnation scores would be significantly higher for sex offenders than for

violent, “non-sex” offenders was confirmed.<sup>22</sup> Pearce had also hypothesized that condemnation scores would be lowest for the relatively “sympathetic” priest and significantly higher for the other two hypothetical actors, but this hypothesis was only partially confirmed. Although the expected pattern of scores was confirmed in some instances, it was not observed across all of the IV conditions. Pearce noted, “Of particular interest is that in the condition involving sexually violent predator commitment hearings . . . [where] there were no statistically significant mean differences in condemnation scores between any of the defendants” (p. 49). Pearce suggested that “one explanation for the failure of condemnation to distinguish between these defendants could be a generally high level of vengeful attitudes and judgments of disapproval appropriately expressed towards convicted sex offenders” (p. 54).

This “generally high level” of condemnation scores for hypothetical defendants in the SVP condition also interfered with the hypothesized predictive utility of the condemnation scale. In the SVP condition, there was no significant difference in condemnation scores assigned to those who were committed ( $M = 81.31$ ) and those who were not committed ( $M = 75.80$ ) ( $F(1,73) = 2.66, p = .107, MSE = 173.23$ ). Therefore, logistic regression analysis did not show that the condemnation score was a statistically reliable predictor of verdicts above and beyond a constant-only model ( $X^2(1, 75) = 2.77, p = .096$ ). The condemnation scores did correctly classify 100% of the commitment verdicts, but it “drastically overpredicted commitments when the actual verdict was release” (p. 52). Pearce observed,

The uniformly high condemnation scores in the sexually violent predator

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<sup>22</sup>For the “priest,” condemnation scores for sex offenses ( $M = 74.72$ ) differed from those for nonsexual offenses ( $M = 66.07$ ) ( $F(1, 92) = 11.56, p = .001$ ). The same pattern held true for the “janitor” ( $F(1, 92) = 6.83, p = .01$ ) and the “Neo-Nazi” ( $F(1, 92) = 3.94, p = .05$ ).

condition predict commitment in nearly every case. Interestingly, actual sexual predator commitment proceedings result in commitments virtually every time, much in keeping with what the condemnation model predicts[.] However, since the subjects in the present experiment decided to release the predators more often than expected, condemnation as measured by our scale did not prove to be a good predictor of verdicts. (pp. 54-55)

In the criminal trial/sexual assault condition, however, participants did assign significantly higher levels of condemnation to those defendants found guilty ( $M = 82.93$ ) than to those acquitted by reason of insanity ( $M = 69.35$ ) ( $F(1, 67) = 24.10, p = .0001, MSE = 111.84, \eta^2 = .265$ ), and logistic regression analysis revealed that the condemnation score was a statistically reliable predictor of verdicts above and beyond a constant only model,  $X^2(1, N = 69) = 21.61, p = .0001$ . The condemnation measure correctly classified 93.75% of the cases where a verdict of guilty was reached, and correctly classified 57.14% of the cases where the verdict reached was an insanity acquittal. Overall, the condemnation measure correctly classified 82.61% of the cases by verdict. Pearce (1999) opined that the results suggest that the decision-makers' judgments were consistent with the normative framework underlying the criminal justice system, which, as explained above, holds that the same sort of disapproval and resentment that is expressed toward convicted criminals ought not be expressed toward insanity acquittees (who lack the capacity for criminal responsibility).

Pearce (1999) also found that, as suggested by previous research, participants' attitudes toward the insanity defense were also associated with their verdict decisions. When all of the independent variable conditions were collapsed together, between-groups ANOVA revealed that

participants who returned verdicts of not guilty by reason of insanity or who determined that the predators should be released had more positive attitudes towards the insanity defense ( $M = 101.35$ ) than those who determined that the defendant should be convicted or committed as a predator ( $M = 106.04$ ) ( $F(1,278) = 9.27, p = .003, MSE = 135.37$ ). Again, “logistic regression analysis was performed to assess the prediction of verdicts based upon the attitude measure” (p. 48). Although “the attitude score was a statistically reliable predictor of verdicts above and beyond a constant only model,” the attitude measure “correctly classified only 2.5% of the cases” where the hypothetical defendant was acquitted by reason of insanity or determined not to be a predator (p. 49). “Overall, the attitude measure correctly classified 71.79% of the cases by verdict” (p. 49). Condemnation scores also correctly classified 71.70% of the cases by verdict when all experimental conditions were collapsed together; however, when attitudes and condemnation scores were both entered into a logistic regression model, “the attitude measure ceased to have any predictive value independent of the condemnation measure” (p. 50).

Though Pearce’s experiment has a number of important limitations, it provides encouraging preliminary evidence that the prescriptive concept of condemnation can be translated into an empirical construct that is predictive of verdicts in insanity defense cases. The condemnation construct’s predictive utility will be explored more fully in two new studies that seek to examine more thoroughly decision-making in insanity cases and juvenile court jurisdiction determinations. These studies are reported below.

## **II. INSANITY DEFENSE JUDGMENTS AND JUVENILE COURT JURISDICTION DECISIONS: AN EMPIRICAL ANALYSIS OF EXPRESSIVE FUNCTIONS**

It has been noted above that insanity cases and juvenile court jurisdiction determinations

may require decision-makers to consider whether a civil or criminal deprivation of liberty is appropriate for a particular individual, and the foregoing review of the existing psychological research literature indicates that although psychologists have studied decision-making in insanity cases and juvenile court jurisdiction determinations, much of their research touches only tangentially upon the criteria used to distinguish appropriate cases for punishment from cases that call for nonpunitive dispositions. A program of research based upon Feinberg's (1995a) concept of condemnation can bring these criteria directly into focus, and perhaps illustrate the need for "a resharpener of the criminal-civil distinction" (Robinson & Darley, 1997, p. 479).

The following studies investigate whether the condemnation construct developed by Pearce (1999) relates to verdicts in a wide variety of insanity defense cases and to juvenile court jurisdiction determinations. The studies also seek to examine the relationship between the condemnation construct and other factors that, according to prior empirical research or court decisions, influence (or should influence) decisions in insanity cases and juvenile court jurisdiction determinations. In addition, the results of these studies will be used to explore whether legal institutions are functioning in a manner consistent with the normative framework underlying the criminal justice system.

#### **A. Study One: Condemnation and Judgments in Insanity Cases**

##### ***1. Purpose***

Study One applies the condemnation construct to criminal trials involving the insanity defense in order to explore whether the construct maintains the predictive utility observed by Pearce (1999) when 1) a wider variety of psychological impairments are implicated, 2) a broader range of additional factors are included in a predictive model, and 3) the "guilty but mentally ill"

(GBMI) verdict option is made available.

First, it was hypothesized that the condemnation scale developed by Pearce (1999) would again prove to be a reliable measure of feelings of resentment and indignation, and judgments of disapproval and reprobation, directed toward hypothetical criminal defendants who commit institutionally proscribed acts. Note that because the scale measures condemnation expressed toward the defendants themselves, it is in fact a measure of actor condemnation.

Second, a set of three hypotheses were proposed concerning the relationship between condemnation scores and the manipulated variables. Specifically, it was hypothesized that condemnation scores would differ across cases when 1) hypothetical defendants' insanity defenses are based on different mental illnesses, such that diagnoses that reflect volitional and cognitive impairments would be associated with lower condemnation scores, while diagnoses that seem to merely reflect criminal conduct (e.g., antisocial personality disorder) would be associated with higher condemnation scores; and when 2) the severity of the hypothetical defendants' crimes are manipulated, such that higher condemnation scores would be associated with more severe crimes; but not when 3) the GBMI verdict option was made available. The first of these hypotheses stems from prior empirical research indicating that greater frequencies of NGRI verdicts are observed when defendants in insanity cases suffer from schizophrenia rather than personality disorders (Roberts et al., 1987), along with the fact that conceptually, NGRI verdicts should be associated with lower condemnation scores because actor condemnation is more appropriately expressed toward guilty defendants. The second of these hypotheses is based upon prior research suggesting that mock jurors return NGRI verdicts less frequently when the defendant is accused of a severe crime (Bailis et al., 1995). The third of these hypotheses (i.e.,

that there would be no significant main effect for the GBMI manipulation) runs counter to past research suggesting that the introduction of additional verdict options alters mock jurors' verdicts (e.g., Savitsky & Lindblom, 1986). However, condemnation scores were *not* expected to vary upon the introduction of the GBMI verdict option because there is simply no reason to expect that the presence or absence of the GBMI option would affect the condemnation expressed toward hypothetical defendants.

Next, it was expected that a significant relationship between condemnation scores and verdicts would emerge across all cases, regardless of the nature of the defendant's psychological impairment, such that lower condemnation scores would be associated with insanity acquittals (NGRI verdicts) and higher scores would be associated with convictions. This hypothesis stems from the normative theory that condemnation is a part of the core definition of punishment. If decision-makers' actual expressions of condemnation track with the conceptual analysis put forth by Feinberg (1995a), which holds that condemnation is expressed in all instances where punishment is imposed, higher condemnation scores should be associated with decisions to punish in all conditions.

Fourth, it was expected that measures of attitudes toward the insanity defense would not contribute independently to verdict classification models that also include condemnation. At first blush, this hypothesis seems to run counter to several prior studies that report powerful—and sometimes overwhelming—associations between insanity defense attitudes and verdicts. However, because the strength of these associations seems to stem from components of insanity defense attitudes measures that assess culpability and blameworthiness, it was hypothesized that the condemnation scale (which, again, focuses on the hypothetical actors specifically) will serve

as a much better predictor of verdicts than a more general attitude scale.

Finally, it was hypothesized that when condemnation scores associated with verdicts of guilty, NGRI, and GBMI are compared, condemnation scores associated with NGRI verdicts would be significantly lower than those associated with guilty verdicts, but condemnation scores associated with GBMI verdicts would not differ from those associated with guilty verdicts. This hypothesis is consistent with the conceptual basis of the GBMI verdict: GBMI verdicts are not intended to reflect diminished capacity, but instead are the practical equivalent of guilty verdicts (at least insofar as criminal responsibility is concerned). If in fact condemnation scores associated with GBMI verdicts *do* differ from condemnation scores associated with guilty verdicts, there may be reason to believe that the GBMI verdict option is applied in a manner inconsistent with the normative framework underlying the criminal justice system and that it blurs the justificatory principles relevant to determinations of criminal responsibility.

## **2. Method**

In order to assess the relationship between condemnation, verdicts, and other factors that previous research suggests may be associated with decisions in insanity cases, participants were given a packet of materials that included seven hypothetical case scenarios, a measure of attitudes toward the insanity defense, and seven sets of dependent measures (one for each of the hypothetical cases).

### **a. Participants**

Participants were one hundred and fifty University of Nebraska-Lincoln undergraduate students who received course credit for participating in the study. Most participants identified themselves as White/Caucasian (90%; 3.3% African American; 0.7% Hispanic; 1.3% Native



American; 1.3% Asian) and male (60.7%). Their mean age was 19.89 years.

**b. Procedure**

The participants appeared in a classroom at a designated time, completed an informed consent form,<sup>23</sup> and received the packet of experimental materials from a proctor. All of the participants completed the packet of materials in under ninety minutes; most were completed in approximately one hour. After completing the packet of experimental materials, participants received a debriefing form that described the experimental design and some of the hypotheses.

**c. Materials**

The materials provided to the participants included seven hypothetical case vignettes and a number of measures that captured demographic information, attitudes toward the insanity defense, and other information about the participants' insanity case judgments. These materials are described in detail below.

**i. Case Vignettes and Instructions**

All participants received seven hypothetical case vignettes that summarized insanity trials involving defendants suffering from different mental illnesses. Each vignette is reproduced in its entirety in Appendix A. Four of the vignettes loosely reflected the impairments suffered by the hypothetical defendants in the research conducted by Finkel (1991). These vignettes involved 1) a defendant with epilepsy who strikes his victim while suffering an epileptic seizure; 2) a defendant who commits an assault while intoxicated with alcohol; 3) a defendant suffering from paranoid schizophrenia who commits an assault while experiencing a delusion that the victim is

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<sup>23</sup>Participants who were under the age of nineteen were required to submit a signed parental consent form before participating in the study.

his enemy ; and 4) a defendant suffering from “battered child syndrome” and post traumatic stress disorder who commits an assault while seeming to relive a traumatic incident. The remaining three vignettes were based upon those used in Pearce’s (1999) study. In these vignettes, a priest suffering from paranoid schizophrenia experienced a hallucination and assaulted his altar boy; a Neo-Nazi Party member diagnosed with antisocial personality disorder assaulted a boy at a block party; and a “predator” diagnosed with intermittent explosive disorder<sup>24</sup> assaulted a victim on the street.

In each vignette, the defendants raised the insanity defense, and participants received an instruction based on the Insanity Defense Reform Act (IDRA) “definition” of insanity. Essentially, the IDRA version of the insanity defense provides that a defendant is not responsible for criminal conduct if at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. The IDRA insanity instruction is reproduced in Appendix B.

The hypothetical cases varied between groups in terms of the severity of the harm caused by the defendant, which allowed for testing of the relationship between severity and verdicts noted by Bailis, Darley, Waxman, and Robinson (1995). More specifically, half of the participants read cases in which the victim suffered minor injuries as a result of the defendant’s assault, while the other participants read about cases in which the victim was killed by the defendant. The vignettes appearing in Appendix A represent the “assault” condition. An

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<sup>24</sup>The DSM-IV states that intermittent explosive disorder “is characterized by discrete episodes of failure to resist aggressive impulses resulting in serious assaults or destruction of property” (p. 609).

example of a vignette taken from the “homicide” condition appears in Appendix C.

The hypothetical cases also varied between groups in terms of the verdict options available: half of the participants were presented with a GBMI verdict option, while the remainder received only the IDRA insanity defense instruction. The GBMI instruction provided that the participant may find the defendant “guilty but mentally ill” if he or she finds, beyond a reasonable doubt, that the defendant is guilty of the charged offense, the defendant was mentally ill at the time of the offense, and that the defendant was not legally insane at the time of the offense. The GBMI instruction is reproduced in its entirety in Appendix D.

Aside from the manipulations described above, each hypothetical case held constant such details as the nature of the offense, the characteristics of the defendant, the characteristics of the victim, and the nature and extent of the evidence provided to the participants. Also, the hypothetical cases were each approximately the same length.

In addition to returning verdicts for each vignette and providing demographic information, the participants completed a number of dependent measures. These measures are described next.

*ii. Insanity Defense Attitudes Scale*

All participants completed a modified version of the Hans (1986) Insanity Defense Attitudes Scale, which appears in its entirety in Appendix E. Each of the sixteen items presented the participants with statements about the insanity defense, such as “The insane should be treated rather than punished if they commit a crime,” and “Punishment just does not work on the insane,” which the participants were asked to rate on a seven-point Likert scale with labels ranging from “completely disagree” to “completely agree.” Ratings were recoded when

necessary so that higher scores on the scale reflect negative attitudes toward the insanity defense.

The reliability of the scale is good ( $\alpha = .794$ ).

### *iii. Condemnation Scale*

For each of the seven hypothetical cases, participants completed a condemnation scale.

The condemnation scale is reproduced in its entirety in Appendices F and G. Originally, twenty-nine items were intended to be included in the condemnation scale for analysis; however, separate reliability analyses were run on the condemnation scale for each of the seven hypothetical cases, and it was determined that several weakly-correlated items would be excluded. The final version of the condemnation scale (which was identical in all seven hypothetical cases) included twenty-three items (e.g., “I feel hatred toward [the defendant]”; “Sentencing [the defendant] to prison would balance society’s need to express any desire for revenge towards him with rational, disapproving judgment”) which the participants rated on a seven-point Likert scale with labels ranging from “completely disagree” to “completely agree.” Items were recoded when necessary so that higher scores reflect more intense expressions of condemnation. The reliability of the scale, as applied to each hypothetical case, is very good (epilepsy:  $\alpha = .936$ ; alcohol intoxication:  $\alpha = .950$ ; paranoid schizophrenia (delusion):  $\alpha = .944$ ; PTSD:  $\alpha = .950$ ; paranoid schizophrenia (hallucination):  $\alpha = .941$ ; antisocial personality:  $\alpha = .940$ ; intermittent explosive disorder:  $\alpha = .943$ ).

### *iv. Construct Dimensions*

For each hypothetical case, participants also completed a battery of questions designed to assess each of the seven construct dimensions identified by Finkel and Handel (1989): capacity, unimpaired awareness and perceptions, clear thinking, control of impulses and actions, culpable

actions, premeditation or malice, and others not responsible. Two to four items were associated with each construct dimension, and once again all of the items presented to the participants were based on seven-point Likert scales ranging from “completely disagree” to “completely agree.” When necessary, items were recoded such that higher scores reflect the “insanity” dimension of each construct, while lower scores reflect the “guilty” dimension of each construct. Appendix F reproduces these items in the same format that the participants received, and Appendix G organizes the measures by construct dimension.

Because the individual construct dimension scale scores were highly inter-correlated (and to facilitate subsequent analyses), the individual scores were summed to create seventeen-item combined construct scale scores. As noted above, higher scores on the combined construct scale reflect judgments that the hypothetical actor is not criminally responsible, while lower scores reflect judgments that the hypothetical actor is guilty. The reliability of the combined scale, as applied to each diagnosis, is good (epilepsy:  $\alpha = .852$ ; alcohol intoxication:  $\alpha = .830$ ; paranoid schizophrenia (delusion):  $\alpha = .918$ ; PTSD:  $\alpha = .931$ ; paranoid schizophrenia (hallucination):  $\alpha = .915$ ; antisocial personality:  $\alpha = .852$ ; intermittent explosive disorder:  $\alpha = .900$ ). Principle component (PC) analyses of the combined scales revealed, however, that for each diagnosis condition, a relatively small number of components explained significant percentages of the variance. More specifically, in the epilepsy condition, PC analysis yielded a four-component solution that explained a total of 64% of the variance; in the alcohol intoxication condition, PC analysis yielded a four-component solution that explained 57% of the variance; in the paranoid schizophrenia (delusion) condition, PC analysis yielded a three-component solution that explained 62.5% of the variance; in the PTSD condition, PC analysis yielded a three-component

solution that explained 64% of the variance; in the paranoid schizophrenia (hallucination) condition, PC analysis yielded a three-component solution that explained 61% of the variance; in the antisocial personality disorder condition, PC analysis yielded a five-component solution that explained 64% of the variance; and in the intermittent explosive disorder condition, PC analysis yielded a four-component solution that explained 67% of the variance. If each of the seven constructs truly measures a distinct dimension, factor analyses of the combined construct scales should have yielded seven-component solutions. The implications of the combined construct scales' characteristics will be discussed below.

### 3. Results

To examine the effects of crime severity, the availability of the GBMI verdict option, and diagnosis on condemnation scores, a mixed groups factorial ANOVA with follow-up analyses using the LSD procedure ( $p = .05$ ) was performed. Specifically, a 2 (high/low offense severity) by 2 (presence/absence of GBMI option) by 7 (diagnosis) design, with diagnosis as a repeated measure, was used. The mean condemnation scores for each cell of the design are set forth in Table 1. The four combinations of the between groups factors are represented in the headings appearing at the top of Table 1, and the seven levels of the repeated measure are represented inside the left margin of the Table. There were no significant two-way or three-way interactions among the manipulated variables, and there was no significant main effect for the GBMI manipulation ( $F(1, 146) = 1.22, p = .271$ ). There was a main effect for severity ( $F(1, 146) = 14.67, p < .001, MSE = 1487.22$ ), with significantly higher condemnation scores assigned to defendants in the homicide condition than in the assault condition across all diagnoses. This pattern maintained in both the "GBMI instruction available" and "GBMI instruction unavailable"

conditions. There was also a significant main effect for diagnosis ( $F(6, 876) = 135.35, p < .001, MSE = 212.93$ ), such that overall, defendants with antisocial personality disorder received the highest condemnation scores across all conditions; defendants suffering from epilepsy received the lowest condemnation scores across all conditions; there was no significant mean differences between the condemnation scores for defendants diagnosed with intermittent explosive disorder and alcohol intoxication across all conditions; the defendants diagnosed with intermittent explosive disorder and alcohol intoxication received significantly higher condemnation scores than the defendants with all other diagnoses except antisocial personality disorder; and the condemnation scores for defendants diagnosed with paranoid schizophrenia (based on either delusions or hallucinations) and post-traumatic stress disorder were similar, but they differed significantly from one another in some conditions. The mean differences in condemnation scores that are *not* significant from one another (based on a LSD minimum mean difference of 3.302) are marked in each column of Table 1. The relationship between condemnation scores and diagnosis, crime severity, and the availability of GBMI instructions is depicted in Figure 1.

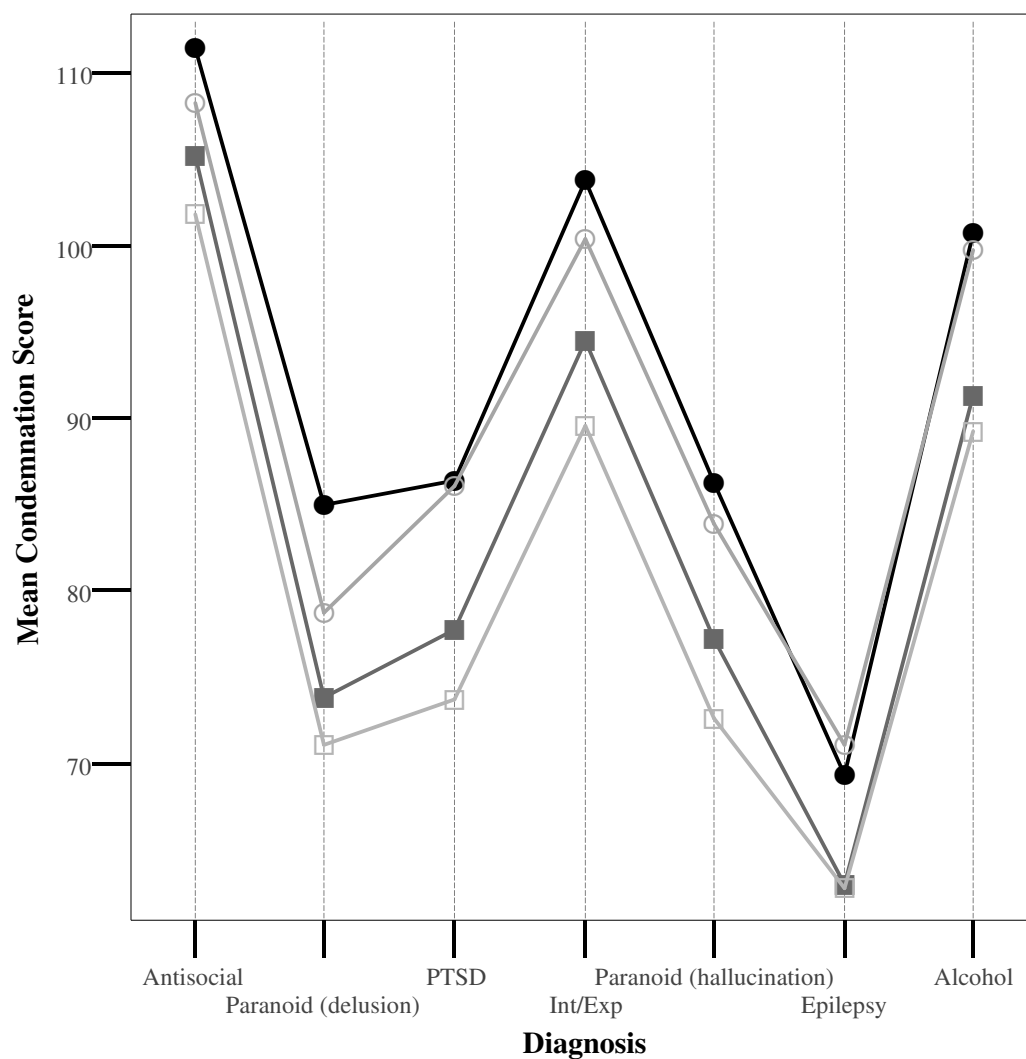
Table 1. Condemnation Score Means for Study One

Group	Homicide, GBMI Option	Homicide, No GBMI Option	Assault, GBMI Option	Assault, No GBMI Option	
Antisocial Personality Disorder	111.44	108.33	105.26	101.78	106.75
Paranoid Schiz. (delusion)	84.97 <sup>a</sup>	78.72	73.76	71.03 <sup>g</sup>	80.03 <sup>xy</sup>
PTSD	86.44 <sup>a</sup>	86.11 <sup>c</sup>	77.79 <sup>e</sup>	73.73 <sup>g</sup>	81.03 <sup>x</sup>
Intermittent/ Explosive	103.82 <sup>b</sup>	100.42 <sup>d</sup>	94.52 <sup>f</sup>	89.54 <sup>h</sup>	97.13 <sup>z</sup>
Paranoid Schiz. (hallucination)	86.28 <sup>a</sup>	83.86 <sup>c</sup>	77.18 <sup>e</sup>	72.65 <sup>g</sup>	77.19 <sup>y</sup>
Epilepsy	69.33	71.11	63.03	62.78	66.55
Alcohol Intoxication	100.69 <sup>b</sup>	99.75 <sup>d</sup>	91.34 <sup>f</sup>	89.19 <sup>h</sup>	95.26 <sup>z</sup>
	91.85	89.76	83.27	80.1	

Note: Means in each column marked with the same superscript are not significantly different (LSD minimum mean difference = 3.302,  $p = .05$ ).



Figure 1. Condemnation Score Means for Study 1



### Legend

Homicide, GBMI Option ●—●  
 Homicide, No GBMI Option ○—○

Assault, GBMI Option ■—■  
 Assault, No GBMI Option □—□

Before an attempt was made to determine whether condemnation scores relate to verdicts, the observed frequencies of each verdict choice for each diagnosis were compared to an equiprobability model using a goodness-of-fit  $\chi^2$ . The results of these  $\chi^2$  tests revealed the following patterns when only two verdict options (NGRI and guilty) were available: First, when the defendant was diagnosed with alcohol intoxication ( $\chi^2 = 54.37, p < .01$ ), intermittent explosive disorder ( $\chi^2 = 54.37, p < .01$ ), or antisocial personality disorder ( $\chi^2 = 65.22, p < .01$ ), participants returned guilty verdicts significantly more often than would be expected in an equiprobability model. Second, when the defendant was diagnosed with epilepsy ( $\chi^2 = 50.97, p < .01$ ), paranoid schizophrenia with delusions ( $\chi^2 = 14.97, p < .01$ ), or paranoid schizophrenia with hallucinations ( $\chi^2 = 16.78, p < .01$ ), participants returned NGRI verdicts significantly more often than would be expected in an equiprobability model. Finally, when the defendant was diagnosed with post traumatic stress disorder, the observed frequencies of NGRI verdicts and guilty verdicts did not differ significantly from an equiprobability model ( $\chi^2 = 2, p > .05$ ). The observed frequencies of each verdict option for each category of diagnosis are set forth in Table 2.

Table 2. Observed Frequencies of Verdict Choices (GBMI Option Not Available)

Group	NGRI	Guilty
Antisocial Personality Disorder	2	71
Paranoid Schiz. (delusion)	53	20
PTSD	30 <sup>a</sup>	42 <sup>a</sup>
Intermittent/ Explosive	5	68
Paranoid Schiz. (hallucination)	54	19
Epilepsy	67	6
Alcohol Intoxication	5	68

Note: Observed frequencies each row marked with the same superscript are not significantly different ( $X^2 < 3.84$ ,  $p = .05$ ).

When three verdict options (NGRI, GBMI, and guilty) were available, the observed frequencies of the participants' verdict selections differed from an equiprobability model in all cases, regardless of diagnosis. Pairwise comparisons revealed the following patterns, which are depicted in Table 3. First, when the defendant was diagnosed with either antisocial personality disorder or intermittent explosive disorder, participants selected the GBMI verdict option significantly more often than they selected the NGRI verdict option, and they selected the guilty verdict option significantly more often than they selected the GBMI verdict option. Second, when the defendant was diagnosed with alcohol intoxication, there was no difference between the frequency of NGRI and GBMI verdicts, but both NGRI verdicts and GBMI verdicts were selected significantly less often than guilty verdicts. Third, when the defendant was diagnosed with paranoid schizophrenia with delusions, there was no difference between the frequency of

NGRI and GBMI verdicts, but both NGRI verdicts and GBMI verdicts were selected significantly more often than guilty verdicts. Fourth, when the defendant was diagnosed with post traumatic stress disorder, there was no difference between the frequency of NGRI or guilty verdicts, but GBMI verdicts were selected significantly more often than either NGRI or guilty verdicts. Fifth, when the defendant was diagnosed with schizophrenia with hallucinations, participants selected the GBMI verdict option significantly more often than they selected the NGRI verdict option, and they selected the NGRI verdict option significantly more often than they selected the guilty verdict option. Finally, when the defendant was diagnosed with epilepsy, participants selected the GBMI option significantly more often than they selected the guilty option, and they selected the NGRI verdict option significantly more often than they selected the GBMI option.

Table 3. Observed Frequencies of Verdict Choices (GBMI Option Available)

Group	NGRI	GBMI	Guilty
Antisocial Personality Disorder	2	13	61
Paranoid Schiz. (delusion)	30 <sup>a</sup>	36 <sup>a</sup>	9
PTSD	15 <sup>b</sup>	38	20 <sup>b</sup>
Intermittent/ Explosive	3	17	56
Paranoid Schiz. (hallucination)	29	41	7
Epilepsy	55	19	1
Alcohol Intoxication	7 <sup>c</sup>	12 <sup>c</sup>	58

Note: Observed frequencies each row marked with the same superscript are not significantly different ( $X^2 < 3.84$ ,  $p = .05$ ).

Binary logistic regression analyses were conducted to determine whether changes in condemnation scores would influence the odds that a participant would return a verdict of guilty as opposed to NGRI, and multinomial logistic regression analyses were conducted to determine whether condemnation scores would influence the odds that a participant would return a verdict of guilty as opposed to NGRI and as opposed to GBMI. Due to the wide variety in the verdict frequency patterns across diagnoses (as described above), separate logistic regression analyses were conducted for each diagnosis.

When the defendant was diagnosed with antisocial personality disorder, condemnation scores did not predict verdicts better than a constant-only model. ( $X^2 = 0.834$ ,  $p = .361$ .) It should be noted, however, that 97.3% of the participants found this defendant to be guilty.<sup>25</sup> Thus, the constant-only model (that is, simply predicting a verdict of guilty for each participant) is accurate 97.3% of the time, and the condemnation measure was unable to improve upon that rate of accuracy. For the same reason, condemnation scores did not predict verdicts better than a constant-only model when defendants were diagnosed with alcohol intoxication ( $X^2 = 2.138$ ,  $p = .144$ ) or intermittent explosive disorder ( $X^2 = 0.920$ ,  $p = .338$ ). When the defendants were given either of these diagnoses, they were found to be guilty 93.2% of the time (as reflected in Table 2).

To determine whether a model could be devised that could predict verdicts in these cases better than the constant-only model, the logistic regression analyses were re-run with condemnation scores, the insanity defense attitudes scale score, and the combined construct

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<sup>25</sup>This is reflected in row 1 of Table 2.

dimension scale scores entered in a single block.<sup>26</sup>

When the defendant was diagnosed with antisocial personality disorder, the model including condemnation scores, attitude scores, and the combined construct score did not predict verdicts more effectively than the constant-only model ( $X^2 = 1.276$ ,  $p = .735$ ). However, when the defendant was diagnosed with alcohol intoxication, the three-variable model predicted verdicts more effectively than the constant-only model ( $X^2 = 25.01$ ,  $p < .001$ ). The classification table for the three-variable model appears in Table 4a, and the overall results of the analysis are depicted in Table 4b. Note that although the model was effective, none of the individual variables contributed uniquely to the fit of the model when all of the other variables were controlled.

Table 4a. Classification Table for Verdicts–Alcohol Intoxication (Full Model)

Observed Frequencies	Predicted Frequencies		
	NGRI	Guilty	Percentage Correct
NGRI	3	2	60
Guilty	1	67	98.5
Total Percentage Correct			95.9

<sup>26</sup>For all three “diagnosis” conditions, models that included the condemnation scale scores and insanity defense scale scores were not better predictors of verdicts than the constant-only models (antisocial personality disorder:  $X^2 = 1.142$ ,  $p = .565$ ; alcohol intoxication:  $X^2 = 4.263$ ,  $p = .119$ ; intermittent explosive disorder:  $X^2 = 0.928$ ,  $p = .629$ ).

Table 4b. Binary Logistic Regression Analysis–Alcohol Intoxication (Full Model)

Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
attitudes	-.101	.164	.382	1	.536	.904
constructs	-.645	.414	2.425	1	.119	.524
condemnation	.142	.093	2.307	1	.129	1.152
constant	43.364	30.251	2.055	1	.152	--
Cox and Snell $R^2 = .290$ ; Nagelkerke $R^2 = .738$						

When the defendant was diagnosed with intermittent explosive disorder, the three-variable model also predicted verdicts more effectively than the constant-only model ( $X^2 = 19.090, p < .001$ ). The classification table for the model is presented in Table 5a. Note that the observed and predicted frequencies of guilty and NGRI verdicts for defendants diagnosed with intermittent explosive disorder were identical to the frequencies for defendants diagnosed with alcohol intoxication (as set forth in Table 4a). The results of the logistic regression analysis are presented in Table 5b. Only the construct score was a uniquely-significant predictor: Scores on the construct scale were negatively related to the odds of obtaining a guilty verdict such that for each single-point increase on the construct scale, participants were only 81.4% as likely to return a guilty verdict when all other variables were controlled.<sup>27</sup>

<sup>27</sup>Recall that the construct scores were coded such that higher scores reflect judgments consistent with legal insanity; thus, the negative relationship between the combined construct score and the odds of obtaining guilty verdicts is not unexpected.

Table 5a. Classification Table for Verdicts–Intermittent Explosive Disorder (Full Model)

Observed Frequencies	Predicted Frequencies		
	NGRI	Guilty	Percentage Correct
NGRI	3	2	60
Guilty	1	67	98.5
Total Percentage Correct			95.9

Table 5b. Binary Logistic Regression Analysis–Intermittent Explosive Disorder (Full Model)

Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
attitudes	.072	.080	.808	1	.369	1.075
constructs	-.283	.109	6.779	1	.009	.754
condemnation	-.052	.058	.802	1	.371	.949
constant	18.423	8.329	4.892	1	.027	--
Cox and Snell $R^2 = .230$ ; Nagelkerke $R^2 = .585$						

When the defendant was diagnosed with epilepsy, participants returned verdicts of NGRI in 91.8% of the cases (see Table 2); thus, a constant-only prediction model is accurate 91.8% of the time. Nevertheless, condemnation scores predicted verdicts significantly better than the constant only model ( $X^2 = 15.022$ ,  $p < .001$ ). The classification table for the condemnation model is set forth in Table 6a, and the results of the logistic regression analysis are set forth in Table 6b. The model indicates that condemnation scores are positively related with the odds of obtaining a guilty verdict, such that for each point increase on the condemnation scale, the odds of obtaining a guilty verdict increase by 14%.



Table 6a. Classification Table for Verdicts–Epilepsy (Condemnation Only Model)

Observed Frequencies	Predicted Frequencies		
	NGRI	Guilty	Percentage Correct
NGRI	67	0	100
Guilty	4	2	33.3
Total Percentage Correct			94.5

Table 6b. Binary Logistic Regression Analysis–Epilepsy (Condemnation Only Model)

Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
condemnation	.131	.048	7.489	1	.006	1.140
constant	-12.748	4.073	9.796	1	.002	--
Cox and Snell $R^2 = .186$ ; Nagelkerke $R^2 = .429$						

A model including condemnation scores and insanity defense attitude scores also predicted verdicts in epilepsy cases significantly better than the constant-only model ( $X^2 = 19.494$ ,  $p < .001$ ). The classification table for the condemnation + attitudes model is presented in Table 6c, and the results of the analysis are presented in Table 6d. The model indicates that both condemnation and attitudes significantly predict verdicts when the other variables are controlled. It also indicates that both condemnation and attitudes are positively related with the odds of obtaining a guilty verdict: For each one-point increase on the condemnation scale, the odds of obtaining a guilty verdict increase by 16% when other variables are controlled. For each one-point increase on the attitudes scale (which reflects more negative attitudes toward the insanity defense), the odds of obtaining a guilty verdict increase by 14.9% when other variables are

controlled. Note, however, that the classification accuracy of the condemnation + attitudes model is not greater than that of the condemnation only model.

Table 6c. Classification Table for Verdicts–Epilepsy (Condemnation+Attitudes Model)

Observed Frequencies	Predicted Frequencies		
	NGRI	Guilty	Percentage Correct
NGRI	66	1	98.5
Guilty	4	2	33.3
Total Percentage Correct			93.2

Table 6d. Binary Logistic Regression Analysis–Epilepsy (Condemnation+Attitudes Model)

Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
condemnation	.148	.064	5.332	1	.021	1.160
attitudes	.139	.070	3.983	1	.046	1.149
constant	-24.007	8.450	8.072	1	.004	--
Cox and Snell $R^2 = .234$ ; Nagelkerke $R^2 = .541$						

The full three-variable model (condemnation + attitudes + constructs) was also a better fit to the data in “epilepsy” cases than the constant-only model ( $X^2 = 24.391$ ,  $p < .001$ ). The classification table for the full model appears in Table 6e, and the results of the analysis are summarized in Table 6f. Only the construct scale had a significant independent relationship with verdict odds. Scores on the construct scale were negatively related to the odds of obtaining a guilty verdict, such that for each unit increase on the construct scale, participants were only

81.4% as likely to return a guilty verdict when all other variables were controlled.

Table 6e. Classification Table for Verdicts–Epilepsy (Full Model)

Observed Frequencies	Predicted Frequencies		
	NGRI	Guilty	Percentage Correct
NGRI	67	0	100
Guilty	2	4	66.7
Total Percentage Correct			97.3

Table 6f. Binary Logistic Regression Analysis–Epilepsy (Full Model)

Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
condemnation	.121	.089	1.823	1	.177	1.128
attitudes	.170	.088	3.774	1	.052	1.186
constructs	-.206	.105	3.851	1	.050	.814
constant	-8.059	11.983	.452	1	.501	--
Cox and Snell $R^2 = .284$ ; Nagelkerke $R^2 = .655$						

When the defendant was diagnosed with paranoid schizophrenia with delusions, a constant-only model predicted verdicts with 72.6% accuracy. Condemnation scores predicted verdicts significantly better than the constant-only model ( $X^2 = 11.201$ ,  $p = .001$ ), as reflected in Table 7a. The results of the analysis are summarized in Table 7b. Condemnation scores were positively related to the odds of obtaining a guilty verdict, such that each unit increase on the condemnation scale increased the odds of obtaining a guilty verdict by 6.6%.

Table 7a. Classification Table for Verdicts–Paranoid Schizophrenia with Delusions  
(Condemnation Only Model)

Observed Frequencies	Predicted Frequencies		
	NGRI	Guilty	Percentage Correct
NGRI	51	2	96.2
Guilty	13	7	35
Total Percentage Correct			79.5

Table 7b. Binary Logistic Regression Analysis–Paranoid Schizophrenia with Delusions  
(Condemnation Only Model)

Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
condemnation	.064	.023	7.453	1	.006	1.066
constant	-6.234	2.022	9.5	1	.002	--
Cox and Snell $R^2 = .142$ ; Nagelkerke $R^2 = .206$						

A model included condemnation and insanity defense attitudes also performed more effectively than a constant-only model ( $X^2 = 15.462$ ,  $p < .001$ ) at predicting verdicts in paranoid schizophrenia-delusions cases. The classification table for this model appears in Table 7c, and the results of the analysis appear in Table 7d. According to the model, only condemnation had a significant independent relationship with verdict odds, such that for each unit increase on the condemnation scale increased the odds of obtaining a guilty verdict by 5.9%.

Table 7c. Classification Table for Verdicts–Paranoid Schizophrenia with Delusions  
(Condemnation+Attitudes Model)

Observed Frequencies	Predicted Frequencies		
	NGRI	Guilty	Percentage Correct
NGRI	50	3	94.3
Guilty	11	9	45
Total Percentage Correct			80.8

Table 7d. Binary Logistic Regression Analysis–Paranoid Schizophrenia with Delusions  
(Condemnation+Attitudes Model)

Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
condemnation	.058	.025	5.345	1	.021	1.059
attitudes	.076	.039	3.763	1	.052	1.079
constant	-10.877	3.395	10.264	1	.001	--
Cox and Snell $R^2 = .191$ ; Nagelkerke $R^2 = .276$						

The full three-variable model performed more effectively than the constant-only model as well ( $X^2 = 19.097$ ,  $p < .001$ ). Table 7e illustrates that the full model correctly classified 82.2% of the cases wherein the defendant suffered from paranoid schizophrenia with delusions. Table 7f shows, however, that none of the variables in the model independently and significantly affected the odds of obtaining guilty verdicts when the other variables were controlled.

Table 7e. Classification Table for Verdicts–Paranoid Schizophrenia with Delusions (Full Model)

Observed Frequencies	Predicted Frequencies		
	NGRI	Guilty	Percentage Correct
NGRI	51	2	96.2
Guilty	11	9	45.0
Total Percentage Correct			82.2

Table 7f. Binary Logistic Regression Analysis–Paranoid Schizophrenia with Delusions (Full Model)

Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
condemnation	.034	.027	1.578	1	.209	1.034
attitudes	.057	.042	1.777	1	.183	1.058
constructs	-.056	.032	3.180	1	.075	.945
constant	-3.50	5.095	.472	1	.492	--
Cox and Snell $R^2 = .230$ ; Nagelkerke $R^2 = .333$						

When the defendant was diagnosed with paranoid schizophrenia with hallucinations, the constant-only model was accurate in 74% of the cases. Condemnation scores predicted verdicts more accurately ( $X^2 = 8.264$ ,  $p = .004$ ), as reflected in Table 8a. According to the model, which is summarized in Table 8b, condemnation scores were positively related to the odds of obtaining a guilty verdict, such that for each point increase on the condemnation scale, the odds increased by 4.7%.

Table 8a. Classification Table for Verdicts–Paranoid Schizophrenia with Hallucinations  
(Condemnation Only Model)

Observed Frequencies	Predicted Frequencies		
	NGRI	Guilty	Percentage Correct
NGRI	53	1	98.1
Guilty	17	2	10.5
Total Percentage Correct			75.3

Table 8b. Binary Logistic Regression Analysis–Paranoid Schizophrenia with Hallucinations  
(Condemnation Only Model)

Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
condemnation	.046	.019	6.150	1	.013	1.047
constant	-4.707	1.571	8.983	1	.003	--
Cox and Snell $R^2 = .107$ ; Nagelkerke $R^2 = .157$						

A model containing condemnation and insanity defense attitudes also performed more effectively than the constant-only model ( $X^2 = 17.44$ ,  $p < .001$ ). The classification table appears in Table 8c, and the model is summarized in Table 8d. Both condemnation scores and insanity defense attitudes were positively related to the odds of obtaining guilty verdicts. Each point increase on the condemnation scale increases the odds of obtaining a guilty verdict by 4% when the other variables in the model are controlled, and each point increase on the attitude scale increases the odds of obtaining a guilty verdict by 12.4% when the other variables are controlled.

Table 8c. Classification Table for Verdicts–Paranoid Schizophrenia with Hallucinations  
(Condemnation+Attitudes Model)

Observed Frequencies	Predicted Frequencies		
	NGRI	Guilty	Percentage Correct
NGRI	51	3	94.3
Guilty	14	5	45
Total Percentage Correct			76.7

Table 8d. Binary Logistic Regression Analysis–Paranoid Schizophrenia with Hallucinations  
(Condemnation+Attitudes Model)

Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
condemnation	.039	.020	3.929	1	.047	1.040
attitudes	.177	.044	7.046	1	.008	1.124
constant	-12.177	3.510	12.037	1	.001	--
Cox and Snell $R^2 = .213$ ; Nagelkerke $R^2 = .311$						

The full three-variable model also predicted verdicts better than the constant only model when the defendant suffered from paranoid schizophrenia with hallucinations ( $X^2 = 43.754$ ,  $p < .001$ ). The classification table (Table 8e) illustrates that the full model correctly classified 89% of the verdicts, and the model summary (Table 8f) illustrates that only the insanity defense attitudes and construct scale scores had significant, independent relationships with the odds ratio: Insanity defense attitudes were positively related to the odds of obtaining a guilty verdict, such that for each point increase on the attitude scale (which reflects increasingly hostile attitudes toward the defense), the odds of obtaining a guilty verdict increased by 15.4% when the other



variables were controlled. The construct scores were negatively related to the odds of obtaining a guilty verdict, such that for each point increase on the combined construct scale (which reflects judgments more consistent with an insanity verdict), participants were only 84.8% as likely to return a guilty verdict when the other variables were controlled.<sup>28</sup>

Table 8e. Classification Table for Verdicts–Paranoid Schizophrenia with Hallucinations (Full Model)

Observed Frequencies	Predicted Frequencies		
	NGRI	Guilty	Percentage Correct
NGRI	51	3	94.4
Guilty	5	14	73.7
Total Percentage Correct			89.0

Table 8f. Binary Logistic Regression Analysis–Paranoid Schizophrenia with Hallucinations (Full Model)

Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
condemnation	.013	.022	.362	1	.548	1.013
attitudes	.143	.060	5.703	1	.017	1.154
constructs	-.165	.045	13.70	1	.001	.848
constant	-.923	4.255	.047	1	.828	--
Cox and Snell $R^2 = .451$ ; Nagelkerke $R^2 = .661$						

<sup>28</sup>Put differently, for each point increase on the construct scale, the odds of obtaining an NGRI verdict increased by 15.2% when the other variables in the model were controlled.

The final diagnosis condition involved a defendant who was diagnosed with battered child syndrome and post traumatic stress disorder (the PTSD condition). For these defendants, the constant-only model correctly classified only 58.3% of the cases. A model containing only condemnation scores fit the data better than the constant only model ( $X^2 = 7.926$ ,  $p = .005$ ), and correctly classified 61.1% of the cases (see Table 9a). Condemnation scores were positively related to the odds of obtaining a guilty verdict, such that a one-point increase on the condemnation scale increased the odds of obtaining a guilty verdict by 3.7% (see Table 9b).

Table 9a. Classification Table for Verdicts–PTSD (Condemnation Only Model)

Observed Frequencies	Predicted Frequencies		
	NGRI	Guilty	Percentage Correct
NGRI	10	20	33.3
Guilty	8	34	81.0
Total Percentage Correct			61.1

Table 9b. Binary Logistic Regression Analysis–PTSD (Condemnation Only Model)

Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
condemnation	.037	.014	6.803	1	.009	1.037
constant	-2.563	1.135	5.095	1	.024	--
Cox and Snell $R^2 = .104$ ; Nagelkerke $R^2 = .140$						

A model that includes condemnation and insanity defense attitudes scales also performed better than the constant-only model ( $X^2 = 8.321$ ,  $p = .016$ ) and also correctly classified 61.1% of

the cases (see Table 9c). The model summary set forth in Table 9d illustrates that only the condemnation score had a significant, independent relationship to the odds of obtaining a guilty verdict. More specifically, condemnation scores were once again positively related to the odds of obtaining a guilty verdict, such that each point increase on the condemnation scale increased the odds of obtaining a guilty verdict by 3.5% when the other variables were controlled.

Table 9c. Classification Table for Verdicts–PTSD (Condemnation+Attitudes Model)

Observed Frequencies	Predicted Frequencies		
	NGRI	Guilty	Percentage Correct
NGRI	10	20	33.3
Guilty	8	34	81.0
Total Percentage Correct			61.1

Table 9d. Binary Logistic Regression Analysis–PTSD (Condemnation+Attitudes Model)

Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
condemnation	.034	.015	5.604	1	.018	1.035
attitudes	.018	.029	.389	1	.533	1.018
constant	-3.575	2.013	3.152	1	.076	--
Cox and Snell $R^2 = .109$ ; Nagelkerke $R^2 = .147$						

Finally, the full three-variable model also outperformed the constant-only model ( $X^2 = 7.926$ ,  $p = .005$ ), and correctly classified 90.3% of the cases (see Table 9e). According to the model, which is summarized in Table 9f, only the construct scale score had a significant,

independent relationship with the odds of obtaining a guilty verdict. Construct scores were negatively related with the odds of obtaining a guilty verdict, such that for each point increase on the construct scale, the odds of obtaining a guilty verdict decreased by 23.3% when the other variables in the model were controlled.

Table 9e. Classification Table for Verdicts–PTSD (Full Model)

Observed Frequencies	Predicted Frequencies		
	NGRI	Guilty	Percentage Correct
NGRI	25	5	83.3
Guilty	2	40	95.2
Total Percentage Correct			90.3

Table 9f. Binary Logistic Regression Analysis–PTSD (Full Model)

Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
condemnation	-.009	.028	.102	1	.750	.991
attitudes	.036	.055	.443	1	.506	1.037
constructs	-.265	.067	15.636	1	.001	.767
constant	16.75	5.721	8.571	1	.003	--
Cox and Snell $R^2 = .557$ ; Nagelkerke $R^2 = .750$						

Additional logistic regression analyses were conducted to explore the relationship between condemnation scores and the odds that a participant would return a verdict of guilty as opposed to NGRI or GBMI. Once again, separate models were constructed for each level of the

“diagnosis” manipulation.

When the defendant was diagnosed with antisocial personality disorder, note that only two participants in the study returned a verdict of NGRI (see Table 3). Because so few NGRI verdicts were obtained, those two cases were excluded, and a binomial logistic regression was performed to determine whether condemnation scores were related to the odds that a participant would return a verdict of guilty as opposed to GBMI. A model containing only condemnation scores fit the data better than a constant-only model ( $X^2 = 6.48, p = .011$ ), though it should be noted that the classification table for the model matches that of a constant-only model (see Table 10a). The model is summarized in Table 10b. Condemnation scores were positively related to the odds that a participant would return a guilty verdict, such that for each point increase on the condemnation scale, the odds of obtaining a guilty verdict as opposed to a GBMI verdict increased by 4.9%.

Table 10a. Classification Table for Guilty vs. GBMI Verdicts–Antisocial Personality Disorder (Condemnation Only Model)

Observed Frequencies	Predicted Frequencies		Percentage Correct
	GBMI	Guilty	
GBMI	0	13	0
Guilty	0	61	100
Total Percentage Correct			82.4

Table 10b. Binary Logistic Regression Analysis–Antisocial Personality Disorder  
(Condemnation Only Model-GBMI vs. Guilty Verdicts)

Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
condemnation	.048	.022	4.771	1	.029	1.049
constant	-3.441	2.211	2.421	1	.120	--
Cox and Snell $R^2 = .084$ ; Nagelkerke $R^2 = .139$						

A model containing condemnation scores and the insanity defense attitudes scores also fit the data better than a constant-only model when defendants were diagnosed with antisocial personality disorder ( $X^2 = 8.318$ ,  $p = .016$ ). The classification table for the condemnation + attitudes model appears in Table 10c, and the summary of the model appears in Table 10d. Only condemnation scores were independently predictive of verdicts: Condemnation scores were positively associated with the odds of obtaining a guilty verdict, such that each point increase on the condemnation scale corresponded to a 5.4% increase in the odds that a guilty verdict would be obtained rather than a GBMI verdict, when all other variables were controlled.

Table 10c. Classification Table for Guilty vs. GBMI Verdicts–Antisocial Personality Disorder  
(Condemnation+Attitudes Model)

Predicted Frequencies			
Observed Frequencies	GBMI	Guilty	Percentage Correct
GBMI	1	12	7.7
Guilty	0	61	100
Total Percentage Correct			83.8

Table 10d. Binary Logistic Regression Analysis–Antisocial Personality Disorder  
(Condemnation+Attitudes Model-GBMI vs. Guilty Verdicts)

Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
condemnation	.053	.024	4.995	1	.025	1.054
attitudes	.056	.042	1.798	1	.180	1.058
constant	-7.616	4.03	3.572	1	.059	--
Cox and Snell $R^2 = .106$ ; Nagelkerke $R^2 = .176$						

The full three-variable model also provided a good fit when the defendant was diagnosed with antisocial personality disorder ( $X^2 = 15.548$ ,  $p = .001$ ). The classification table appears in Table 10e, and the model summary is set forth in Table 10f. Construct scores were negatively associated with the odds of obtaining a guilty verdict, such that for each point increase on the combined construct scale, the odds of obtaining a GBMI verdict (as opposed to a guilty verdict) increased by 10%, when all other variables were controlled. Neither the insanity defense attitudes measure nor the condemnation measure significantly affected the odds of obtaining a particular verdict once the other variables were controlled.

Table 10e. Classification Table for Guilty vs. GBMI Verdicts–Antisocial Personality Disorder  
(Full Model)

Observed Frequencies	Predicted Frequencies		
	GBMI	Guilty	Percentage Correct
GBMI	3	10	23.1
Guilty	1	60	98.4
Total Percentage Correct			85.1

Table 10f. Binary Logistic Regression Analysis–Antisocial Personality Disorder (Full Model-GBMI vs. Guilty Verdicts)

Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
condemnation	.035	.029	1.398	1	.237	1.035
attitudes	.044	.044	.991	1	.319	1.045
constructs	-.105	.047	5.065	1	.024	.900
constant	.294	5.104	.003	1	.954	--
Cox and Snell $R^2 = .190$ ; Nagelkerke $R^2 = .313$						

As shown in Table 3, only three participants in the study returned a verdict of NGRI when the defendant was diagnosed with intermittent explosive disorder. Once again, because so few NGRI verdicts were obtained, those three cases were excluded, and binomial logistic regression analyses were conducted to explore the relationship between condemnation scores and the odds of obtaining a guilty verdict as opposed to a GBMI verdict. A constant-only model correctly classified verdicts 76.7% of the time, and although a model containing only condemnation scores fit the data ( $X^2 = 17.274$ ,  $p < .001$ ), it did not classify verdicts more accurately than the constant-only model (see Table 11a). The model indicates that condemnation scores are positively associated with the odds of obtaining a guilty verdict over a GBMI verdict, such that each point increase on the condemnation scale increases the odds of obtaining a guilty verdict by 7.4% (see Table 11b).



Table 11a. Classification Table for Guilty vs. GBMI Verdicts–Intermittent Explosive Disorder (Condemnation Only Model)

Observed Frequencies	Predicted Frequencies		
	GBMI	Guilty	Percentage Correct
GBMI	4	13	23.5
Guilty	4	52	92.9
Total Percentage Correct			76.7

Table 11b. Binary Logistic Regression Analysis–Intermittent Explosive Disorder (Condemnation Only Model-GBMI vs. Guilty Verdicts)

Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
condemnation	.071	.022	10.566	1	.001	1.074
constant	-5.485	1.99	7.601	1	.006	--
Cox and Snell $R^2 = .211$ ; Nagelkerke $R^2 = .318$						

A model containing both condemnation and insanity defense attitude measures also fit the data well ( $X^2 = 18.458$ ,  $p < .001$ ) and correctly classified 78.1% of the verdicts when defendants were diagnosed with intermittent explosive disorder (see Table 11c). The model summary, which is set forth in Table 11d, indicates that only condemnation was independently related to the odds of obtaining a guilty verdict: For each point increase on the condemnation scale, the odds of obtaining a guilty verdict rather than a GBMI verdict increased by 8.2%, when the other variables in the model were controlled.

Table 11c. Classification Table for Guilty vs. GBMI Verdicts–Intermittent Explosive Disorder (Condemnation+Attitudes Model)

Observed Frequencies	Predicted Frequencies		
	GBMI	Guilty	Percentage Correct
GBMI	6	11	35.3
Guilty	5	51	91.1
Total Percentage Correct			78.1

Table 11d. Binary Logistic Regression Analysis–Intermittent Explosive Disorder (Condemnation+Attitudes Model-GBMI vs. Guilty Verdicts)

Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
condemnation	.078	.023	11.648	1	.001	1.082
attitudes	-.039	.036	1.152	1	.283	.962
constant	-3.537	2.564	1.904	1	.168	--
Cox and Snell $R^2 = .223$ ; Nagelkerke $R^2 = .337$						

A model containing condemnation scores, attitude scores, and the combined construct scores provided a good fit as well ( $X^2 = 23.903$ ,  $p < .001$ ), correctly classifying 87.7% of the verdicts when the defendants were diagnosed with intermittent explosive disorder (see Table 11e). Table 11f summarizes the model, which reveals that only condemnation scores and construct scores maintained independent relationships with verdict odds. More specifically, condemnation scores were positively related to the odds of obtaining a guilty verdict, such that single-point increases on the condemnation scale increased the odds of obtaining a guilty verdict by 8.1% when all other variables are controlled, and construct scores were negatively related to

the odds of obtaining a guilty verdict, such that each single-point increase on the construct scale increased the odds of obtaining a GBMI verdict by 6.4% when all other variables were controlled.

Table 11e. Classification Table for Guilty vs. GBMI Verdicts–Intermittent Explosive Disorder (Full Model)

Observed Frequencies	Predicted Frequencies		
	GBMI	Guilty	Percentage Correct
GBMI	9	8	52.9
Guilty	1	55	98.2
Total Percentage Correct			87.7

Table 11f. Binary Logistic Regression Analysis–Intermittent Explosive Disorder (Full Model–GBMI vs. Guilty Verdicts)

Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
condemnation	.078	.027	8.143	1	.004	1.081
attitudes	-.051	.041	1.574	1	.210	.950
constructs	-.067	.031	4.551	1	.033	.936
constant	.446	3.413	.017	1	.896	--
Cox and Snell $R^2 = .279$ ; Nagelkerke $R^2 = .422$						

When the defendant was diagnosed with epilepsy, only one guilty verdict was obtained (see Table 3). This case was excluded, and binomial logistic regression analyses were performed to explore the relationship between condemnation scores and the odds of obtaining a GBMI

verdict rather than an NGRI verdict. A constant-only model that predicts NGRI verdicts in all cases is accurate 74.3% of the time. A model containing only condemnation scores fit the data ( $X^2 = 5.795$ ,  $p = .016$ ), and correctly classified 75.7% of the cases (see Table 12a). According to the model, condemnation scores are positively associated with the odds of obtaining a GBMI verdict rather than an NGRI verdict, such that for each point increase on the condemnation scale, the odds of obtaining a GBMI verdict increased by 3.8% (see Table 12b).

Table 12a. Classification Table for NGRI vs. GBMI Verdicts–Epilepsy (Condemnation Only Model)

Observed Frequencies	Predicted Frequencies		Percentage Correct
	NGRI	GBMI	
NGRI	55	0	100
GBMI	18	1	5.3
Total Percentage Correct			75.7

Table 12b. Binary Logistic Regression Analysis–Epilepsy (Condemnation Only Model-NGRI vs. GBMI Verdicts)

Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
condemnation	.037	.017	4.915	1	.027	1.038
constant	-3.612	1.231	8.610	1	.003	--
Cox and Snell $R^2 = .075$ ; Nagelkerke $R^2 = .111$						

The model containing condemnation and insanity defense attitude scores also fit the data in the epilepsy condition ( $X^2 = 6.626$ ,  $p = .036$ ), though it did not classify verdicts more

accurately than the constant-only model (see Table 12c). According to the model, neither condemnation nor attitudes maintained a unique relationship to verdict odds when the other variables were controlled (see Table 12d).

Table 12c. Classification Table for NGRI vs. GBMI Verdicts–Epilepsy  
(Condemnation+Attitudes Model)

Observed Frequencies	Predicted Frequencies		Percentage Correct
	NGRI	GBMI	
NGRI	53	2	96.4
GBMI	17	2	10.5
Total Percentage Correct			74.3

Table 12d. Binary Logistic Regression Analysis–Epilepsy (Condemnation+Attitudes Model-  
NGRI vs. GBMI Verdicts)

Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
condemnation	.033	.017	3.59	1	.058	1.033
attitudes	.029	.033	.810	1	.368	1.030
constant	-5.310	2.308	5.294	1	.021	--
Cox and Snell $R^2 = .086$ ; Nagelkerke $R^2 = .126$						

The full three-variable model fit the data as well ( $X^2 = 10.546$ ,  $p = .014$ ); interestingly, however, the full model correctly classified verdicts only 73% of the time—which means that it was less accurate than the constant-only model (see Table 12e). None of the variables in the full model maintained a significant relationship to verdict odds when the other variables in the model

were controlled (see Table 12f).

Table 12e. Classification Table for NGRI vs. GBMI Verdicts–Epilepsy (Full Model)

Observed Frequencies	Predicted Frequencies		
	NGRI	GBMI	Percentage Correct
NGRI	50	5	90.9
GBMI	15	4	21.1
Total Percentage Correct			73.0

Table 12f. Binary Logistic Regression Analysis–Epilepsy (Full Model-NGRI vs. GBMI Verdicts)

Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
condemnation	.002	.023	.006	1	.940	1.002
attitudes	.031	.035	.782	1	.376	1.031
constructs	-.078	.041	3.552	1	.059	.925
constant	3.29	5.034	.427	1	.513	--
Cox and Snell $R^2 = .133$ ; Nagelkerke $R^2 = .195$						

For the remaining conditions of the diagnosis variable (i.e., alcohol intoxication, paranoid schizophrenia (delusions), paranoid schizophrenia (hallucinations), and post traumatic stress disorder), each of the three verdict options (i.e., NGRI, GBMI, and Guilty) were observed with sufficient frequency to permit multinomial logistic regression analyses of the relationship between condemnation scores and the odds that a participant would return a verdict of guilty rather than NGRI or GBMI. When the defendant was diagnosed with alcohol intoxication, the

observed frequencies of the various verdict options, which are set forth in Table 3, were as follows: NGRI = 7 (9.1% frequency); GBMI = 12 (15.6% frequency); and Guilty = 58 (73.5% frequency). Thus, by merely predicting guilty verdicts in each case, an accuracy rate of 73.5% can be achieved. A multinomial logistic regression model including condemnation as the sole independent variable fit the data (model  $\chi^2 = 6.627$ ,  $p = .036$ ) and predicted verdicts with 75.3% accuracy (see Table 13a). According to the model, which is summarized in Table 13b, in the comparison between participants who found the defendant to be NGRI and participants who found the defendant to be guilty, condemnation had a statistically significant, negative relationship with the odds of selecting an NGRI verdict, such that for each point increase in the condemnation score, the participants were 4.8% more likely to return a guilty verdict. However, condemnation did not have a statistically significant relationship with the odds that a participant would select a GBMI verdict over a guilty verdict.

Table 13a. Classification Table for NGRI vs. GBMI vs. Guilty Verdicts–Alcohol Intoxication (Condemnation Only Model)

Observed Frequencies	Predicted Frequencies			Percentage Correct
	NGRI	GBMI	Guilty	
NGRI	1	0	6	14.3
GBMI	0	0	12	0
Guilty	1	0	57	98.3
Total Percentage Correct				75.3

Table 13b. Multinomial Logistic Regression Analysis—Alcohol Intoxication (Condemnation Only Model-NGRI vs. Guilty and GBMI vs. Guilty Verdicts)

	Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
NGRI vs. Guilty	intercept	2.164	1.691	1.638	1	.201	--
	condemnation	-.049	.020	5.871	1	.015	.952
GBMI vs. Guilty	intercept	-.879	1.511	.338	1	.561	--
	condemnation	-.007	.015	.217	1	.641	.993
Pseudo $R^2$ : Cox and Snell = .082; Nagelkerke = .108							

For defendants diagnosed with alcohol intoxication, a model containing condemnation scores and insanity defense attitude scores did not fit the data (model  $X^2 = 7.357$ ,  $p = .118$ ). However, the existence of a significant relationship between condemnation, attitudes, constructs, and verdict selection emerged (model  $X^2 = 23.913$ ,  $p = .001$ ), and the full model correctly classified 79.2% of the verdicts (see Table 13c). Although the likelihood ratio tests indicated that neither condemnation ( $X^2 = 1.499$ ,  $p = .473$ ) nor attitudes ( $X^2 = .597$ ,  $p = .742$ ) maintained independent significant relationships with verdicts, a significant relationship between construct scores and verdicts was found ( $X^2 = 16.556$ ,  $p < .001$ ). According to the model (see Table 13d), in the comparison between participants who found the defendant to be NGRI as opposed to guilty, the construct score had a positive relationship with the odds of obtaining an NGRI verdict, such that for each point increase on the construct scale, participants were 36.6% more likely to return a verdict of NGRI. However, the construct scores did not have a significant relationship with the odds that a participant would select a GBMI verdict over a guilty verdict.



Table 13c. Classification Table for NGRI vs. GBMI vs. Guilty Verdicts–Alcohol Intoxication (Full Model)

Observed Frequencies	Predicted Frequencies			Percentage Correct
	NGRI	GBMI	Guilty	
NGRI	4	0	3	57.1
GBMI	1	0	11	0
Guilty	1	0	57	98.3
Total Percentage Correct				79.2

Table 13d. Multinomial Logistic Regression Analysis–Alcohol Intoxication (Full Model–NGRI vs. Guilty and GBMI vs. Guilty Verdicts)

	Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
NGRI vs. Guilty	intercept	-22.0	9.308	5.586	1	.018	--
	condemnation	-.037	.030	1.514	1	.219	.963
	attitudes	.035	.052	.468	1	.494	1.036
	constructs	.310	.108	8.158	1	.004	1.363
GBMI vs. Guilty	intercept	-4.981	4.458	1.248	1	.264	--
	condemnation	0	.017	0	1	.997	1.0
	attitudes	-.007	.036	.039	1	.843	.993
	constructs	.064	.044	2.077	1	.150	1.066
Pseudo $R^2$ : Cox and Snell = .267; Nagelkerke = .350							

When the defendant suffered from paranoid schizophrenia with delusions, the observed frequencies of the verdict options were as follows: NGRI = 30 (40% frequency); GBMI = 36 (48% frequency); and Guilty = 9 (12% frequency) (see Table 3). Thus, predicting GBMI verdicts

in all cases yields a 48% accuracy rate. A multinomial logistic regression model that included condemnation as the sole independent variable fit the data (model  $X^2 = 15.238$ ,  $p = .002$ ) and classified verdicts with a 49.3% accuracy rate (see Table 14a). The model is summarized in Table 14b. According to the model, in the comparison between participants who found the defendant to be NGRI and those who found the defendant to be guilty, condemnation had a statistically significant, negative relationship with the odds of selecting an NGRI verdict, such that for each point increase in the condemnation score, the participants were 8.8% more likely to return a guilty verdict. In the comparison between participants who found the defendant to be GBMI and those who found the defendant to be guilty, condemnation had a significant negative relationship with the odds of selecting a GBMI verdict, such that for each point increase in the condemnation score, participants were 6.2% more likely to return a guilty verdict.

Table 14a. Classification Table for NGRI vs. GBMI vs. Guilty Verdicts–Paranoid Schizophrenia (Delusions) (Condemnation Only Model)

Observed Frequencies	Predicted Frequencies			Percentage Correct
	NGRI	GBMI	Guilty	
NGRI	11	19	0	36.7
GBMI	9	25	2	69.4
Guilty	0	8	1	11.1
Total Percentage Correct				49.3

Table 14b. Multinomial Logistic Regression Analysis–Paranoid Schizophrenia (Delusions)  
(Condemnation Only Model-NGRI vs. Guilty and GBMI vs. Guilty Verdicts)

	Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
NGRI vs. Guilty	intercept	9.318	2.687	12.022	1	.001	--
	condemnation	-.092	.028	10.494	1	.001	.912
GBMI vs. Guilty	intercept	7.303	2.563	8.12	1	.004	--
	condemnation	-.064	.026	5.920	1	.015	.938
Pseudo $R^2$ : Cox and Snell = .184; Nagelkerke = .214							

A multinomial logistic regression model that included condemnation and attitudes toward the insanity defense also fit the data (model  $X^2 = 18.045$ ,  $p = .001$ ) and classified verdicts with 52.0% accuracy (see Table 14c). Likelihood ratio tests revealed that there was a significant relationship between condemnation and verdict selection ( $X^2 = 11.489$ ,  $p = .003$ ), but no significant relationship between attitudes and verdict selection ( $X^2 = 2.807$ ,  $p = .246$ ). According to the model, which is summarized in Table 14d, in the comparison between participants who found the defendant to be NGRI and those who found the defendant to be guilty, condemnation had a significant negative relationship with the odds of selecting an NGRI verdict, such that for each point increase on the condemnation scale, participants were 8.6% more likely to return a guilty verdict. In the comparison between participants who found the defendant to be GBMI and those who found the defendant to be guilty, condemnation had a significant negative relationship with the odds of selecting a GBMI verdict, such that for each point increase in condemnation, the odds of selecting a guilty verdict increased by 6.9%.

Table 14c. Classification Table for NGRI vs. GBMI vs. Guilty Verdicts–Paranoid Schizophrenia (Delusions) (Condemnation+Attitudes Model)

Observed Frequencies	Predicted Frequencies			Percentage Correct
	NGRI	GBMI	Guilty	
NGRI	13	17	0	43.3
GBMI	8	25	3	69.4
Guilty	0	8	1	11.1
Total Percentage Correct				52.0

Table 14d. Multinomial Logistic Regression Analysis–Paranoid Schizophrenia (Delusions) (Condemnation+Attitudes Model-NGRI vs. Guilty and GBMI vs. Guilty Verdicts)

	Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
NGRI vs. Guilty	intercept	10.517	3.788	7.710	1	.005	--
	condemnation	-.090	.030	8.783	1	.003	.914
	attitudes	-.021	.051	.168	1	.682	.979
GBMI vs. Guilty	intercept	5.640	3.482	2.624	1	.105	--
	condemnation	-.071	.028	6.211	1	.013	.931
	attitudes	.032	.048	.464	1	.496	1.033
Pseudo $R^2$ : Cox and Snell = .214; Nagelkerke = .249							

In addition, a multinomial logistic regression model that included all three predictor variables (condemnation, attitudes, and constructs) fit the data (model  $X^2 = 47.6$ ,  $p < .001$ ) and, as shown in Table 14e, correctly classified 65.3% of the verdicts when the defendant was diagnosed with paranoid schizophrenia with delusions. Likelihood ratio tests revealed that there was a significant relationship between constructs and verdict selection ( $X^2 = 29.015$ ,  $p < .001$ ),

but no significant relationship between attitudes and verdict selection ( $X^2 = 2.94$ ,  $p = .230$ ) or between condemnation and verdict selection ( $X^2 = 4.996$ ,  $p = .082$ ). The model summary, which is set forth in Table 14f, illustrates that in the comparison between participants who found the defendant to be NGRI and those who found the defendant to be guilty, the construct score had a significant positive relationship with the odds of selecting an NGRI verdict, such that for each point increase on the construct scale, the odds of selecting an NGRI verdict increased by 33.8%. In the comparison between participants who found the defendant to be GBMI and those who found the defendant to be guilty, the construct score had a significant positive relationship with the odds of selecting a GBMI verdict, such that for each point increase in the construct scale, the odds of selecting a GBMI verdict increased by 18.8%.

Table 14e. Classification Table for NGRI vs. GBMI vs. Guilty Verdicts–Paranoid Schizophrenia (Delusions) (Full Model)

Observed Frequencies	Predicted Frequencies			Percentage Correct
	NGRI	GBMI	Guilty	
NGRI	22	8	0	73.3
GBMI	8	23	5	63.9
Guilty	0	5	4	44.4
Total Percentage Correct				65.3

Table 14f. Multinomial Logistic Regression Analysis–Paranoid Schizophrenia (Delusions)  
(Full Model-NGRI vs. Guilty and GBMI vs. Guilty Verdicts)

	Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
NGRI vs. Guilty	intercept	-15.809	7.172	4.859	1	.028	--
	condemnation	-.054	.031	3.067	1	.080	.948
	attitudes	.030	.068	.190	1	.663	1.030
	constructs	.291	.078	14.085	1	.001	1.338
GBMI vs. Guilty	intercept	-10.025	6.259	2.566	1	.109	--
	condemnation	-.049	.024	4.152	1	.042	.952
	attitudes	.075	.060	1.592	1	.207	1.078
	constructs	.172	.068	6.44	1	.011	1.188
Pseudo R <sup>2</sup> : Cox and Snell = .466; Nagelkerke = .544							

When the defendant was diagnosed with paranoid schizophrenia with hallucinations, the observed frequencies of the verdicts were as follows: NGRI = 29 (37.7%); GBMI = 41 (53.2%); Guilty = 7 (9.1%). By predicting GBMI verdicts in all cases, 53.2% of the verdicts can be correctly classified. Multinomial logistic regression analysis revealed a significant relationship between condemnation and verdicts ( $X^2 = 13.376$ ,  $p = .001$ ), and a model that included condemnation as the sole predictor correctly classified 58.4% of the verdicts (see Table 15a). According to the model, in the comparison between participants who found the defendant to be NGRI and those who found the defendant to be guilty, there was a negative relationship between condemnation and the likelihood of obtaining an NGRI verdict, such that for each point increase on the condemnation scale, the odds of selecting a guilty verdict increased by 8.4%. Condemnation did not have a statistically significant relationship with the odds that a participant

would select a GBMI verdict over a guilty verdict (see Table 15b).

Table 15a. Classification Table for NGRI vs. GBMI vs. Guilty Verdicts–Paranoid Schizophrenia (Hallucinations) (Condemnation Only Model)

Observed Frequencies	Predicted Frequencies			Percentage Correct
	NGRI	GBMI	Guilty	
NGRI	10	19	0	34.5
GBMI	6	35	0	85.4
Guilty	0	7	0	0
Total Percentage Correct				58.4

Table 15b. Multinomial Logistic Regression Analysis–Paranoid Schizophrenia (Hallucinations) (Condemnation Only Model-NGRI vs. Guilty and GBMI vs. Guilty Verdicts)

	Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
NGRI vs. Guilty	intercept	8.769	2.995	8.573	1	.003	--
	condemnation	-.088	.033	7.132	1	.008	.916
GBMI vs. Guilty	intercept	5.987	2.885	4.308	1	.038	--
	condemnation	-.048	.031	2.357	1	.125	.953
Pseudo R <sup>2</sup> : Cox and Snell = .159; Nagelkerke = .189							

Multinomial logistic regression analysis also revealed a significant relationship between condemnation, insanity defense attitudes, and verdicts (model  $X^2 = 13.448$ ,  $p = .009$ ). However, likelihood ratio tests indicate that in the model containing condemnation and insanity defense attitudes, a significant relationship emerged between condemnation and verdicts ( $X^2 = 11.884$ ,  $p$

= .003), but not between insanity defense attitudes and verdicts ( $X^2 = .072$ ,  $p = .965$ ). The model, which correctly classified only 57.1% of the verdicts when the defendant was diagnosed with paranoid schizophrenia-delusions (see Table 15c), is summarized in Table 15d. In the comparison between participants who found the defendant to be NGRI and those who found the defendant to be guilty, there was a negative relationship between condemnation and the likelihood of obtaining an NGRI verdict, such that for each point increase on the condemnation scale, the odds of selecting a guilty verdict increased by 8.5%. Condemnation did not have a statistically significant relationship with the odds that a participant would select a GBMI verdict over a guilty verdict.

Table 15c. Classification Table for NGRI vs. GBMI vs. Guilty Verdicts–Paranoid Schizophrenia (Hallucinations) (Condemnation+Attitudes Model)

Observed Frequencies	Predicted Frequencies			Percentage Correct
	NGRI	GBMI	Guilty	
NGRI	9	20	0	31.0
GBMI	6	35	0	85.4
Guilty	0	7	0	0
Total Percentage Correct				57.1



Table 15d. Multinomial Logistic Regression Analysis–Paranoid Schizophrenia (Hallucinations) (Condemnation+Attitudes Model-NGRI vs. Guilty and GBMI vs. Guilty Verdicts)

	Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
NGRI vs. Guilty	intercept	8.738	3.936	4.929	1	.026	--
	condemnation	-.089	.035	6.531	1	.011	.915
	attitudes	.001	.051	.001	1	.980	1.001
GBMI vs. Guilty	intercept	5.593	3.706	2.278	1	.131	--
	condemnation	-.049	.033	2.255	1	.133	.952
	attitudes	.008	.047	.028	1	.867	1.008
Pseudo $R^2$ : Cox and Snell = .160; Nagelkerke = .190							

A model including all three predictor variables also fit the data in cases involving paranoid schizophrenia with delusions (model  $X^2 = 43.798$ ,  $p < .001$ ). The full model, which correctly classifies 70.1% of the cases (see Table 15e), is summarized in Table 15f. Likelihood ratio tests indicate that neither condemnation scores ( $X^2 = .199$ ,  $p = .905$ ) nor attitudes ( $X^2 = .589$ ,  $p = .745$ ) contributed significantly to the model. There was a relationship between construct scores and verdicts, however ( $X^2 = 30.351$ ,  $p < .001$ ). With respect to the comparison between participants who found the defendant to be NGRI and those who found the defendant to be guilty, there was a positive relationship between construct scores and the odds of obtaining an NGRI verdict, such that for each point increase on the construct scale, the odds of obtaining an NGRI verdict increased by 43%. With respect to the comparison between participants who found the defendant to be GBMI and those who found the defendant to be guilty, there was a positive relationship between construct scores and the odds of obtaining a GBMI verdict such

that for each point increase on the construct scale, the odds of obtaining a GBMI verdict increased by 23.8%.

Table 15e. Classification Table for NGRI vs. GBMI vs. Guilty Verdicts–Paranoid Schizophrenia (Hallucinations) (Full Model)

Observed Frequencies	Predicted Frequencies			Percentage Correct
	NGRI	GBMI	Guilty	
NGRI	18	11	0	62.1
GBMI	5	35	1	85.4
Guilty	0	6	1	14.3
Total Percentage Correct				70.1

Table 15f. Multinomial Logistic Regression Analysis–Paranoid Schizophrenia (Hallucinations) (Full Model-NGRI vs. Guilty and GBMI vs. Guilty Verdicts)

	Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
NGRI vs. Guilty	intercept	-27.436	10.222	7.204	1	.007	--
	condemnation	.019	.043	.199	1	.656	1.020
	attitudes	.044	.065	.469	1	.494	1.045
	constructs	.358	.099	13.052	1	.001	1.430
GBMI vs. Guilty	intercept	-16.022	9.299	2.969	1	.085	--
	condemnation	.016	.039	.166	1	.683	1.016
	attitudes	.044	.058	.576	1	.448	1.045
	constructs	.214	.090	5.642	1	.018	1.238
Pseudo R <sup>2</sup> : Cox and Snell = .434; Nagelkerke = .515							

In the post traumatic stress disorder condition, the observed verdict frequencies were:

NGRI = 15 (20.5%); GBMI = 38 (52.1%); and Guilty = 20 (27.4%). Thus, predicting GBMI verdicts in all cases correctly classifies 52.1% of the cases. Multinomial logistic regression analysis revealed a significant relationship between condemnation and verdicts (model  $X^2 = 27.484$ ,  $p < .001$ ), and the model containing condemnation as the sole predictor correctly classified 57.5% of the cases (see Table 16a). According to the model, in the comparison between participants who found the defendant NGRI and those who found the defendant guilty, there was a negative relationship between condemnation and the odds of obtaining an NGRI verdict, such that for each single point increase on the condemnation scale, the odds of obtaining a guilty verdict increased by 12.4%. With respect to the comparison between participants who found the defendant GBMI and those who found the defendant guilty, there was a negative relationship between condemnation and the likelihood of obtaining a GBMI verdict, such that for each point increase in condemnation, the odds of obtaining a guilty verdict increased by 4.5% (see Table 16b).

Table 16a. Classification Table for NGRI vs. GBMI vs. Guilty Verdicts–PTSD  
(Condemnation Only Model)

Observed Frequencies	Predicted Frequencies			Percentage Correct
	NGRI	GBMI	Guilty	
NGRI	7	8	0	46.7
GBMI	2	33	3	86.8
Guilty	1	17	2	10.0
Total Percentage Correct				57.5

Table 16b. Multinomial Logistic Regression Analysis--PTSD (Condemnation Only Model-NGRI vs. Guilty and GBMI vs. Guilty Verdicts)

	Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
NGRI vs. Guilty	intercept	10.324	2.745	14.144	1	.001	--
	condemnation	-.132	.034	15.197	1	.001	.876
GBMI vs. Guilty	intercept	4.727	1.989	5.647	1	.017	--
	condemnation	-.046	.022	4.378	1	.036	.955
Pseudo $R^2$ : Cox and Snell = .314; Nagelkerke = .361							

A model containing condemnation and attitudes toward the insanity defense also fit the data in the post traumatic stress disorder condition (model  $X^2 = 30.03$ ,  $p < .001$ ). Likelihood ratio tests revealed that there was a relationship between condemnation and verdicts ( $X^2 = 24.401$ ,  $p < .001$ ), but insanity defense attitudes did not contribute significantly to the model ( $X^2 = 2.546$ ,  $p = .280$ ). The classification table, which is presented in Table 16c, indicates that this model also correctly classified 57.5% of the verdicts. According to the model, in the comparison between study participants who found the defendant NGRI and those who found the defendant guilty, there was a negative relationship between condemnation and the odds of obtaining an NGRI verdict, such that for each point increase on the condemnation scale, the likelihood of obtaining a guilty verdict (as opposed to an NGRI verdict) increased by 12.4%. However, in this model, condemnation did not have a statistically significant relationship with the odds that a participant would return a GBMI verdict as opposed to a guilty verdict (see Table 16d).

Table 16c. Classification Table for NGRI vs. GBMI vs. Guilty Verdicts–PTSD  
(Condemnation+Attitudes Model)

Observed Frequencies	Predicted Frequencies			Percentage Correct
	NGRI	GBMI	Guilty	
NGRI	7	8	0	46.7
GBMI	3	32	3	84.2
Guilty	0	17	3	15.0
Total Percentage Correct				57.5

Table 16d. Multinomial Logistic Regression Analysis–PTSD (Condemnation+Attitudes  
Model-NGRI vs. Guilty and GBMI vs. Guilty Verdicts)

	Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
NGRI vs. Guilty	intercept	15.191	4.419	11.817	1	.001	--
	condemnation	-.132	.036	13.557	1	.001	.876
	attitudes	-.075	.049	2.313	1	.128	.928
GBMI vs. Guilty	intercept	5.761	2.730	4.452	1	.035	--
	condemnation	-.042	.022	3.555	1	.059	.959
	attitudes	-.021	.035	.337	1	.561	.980
Pseudo $R^2$ : Cox and Snell = .337; Nagelkerke = .388							

A model that included all three predictors also provided a good fit to the data (model  $X^2 = 76.123$ ,  $p < .001$ ) and correctly classified 72.6% of the cases in the post traumatic stress disorder condition (see Table 16e). Likelihood ratio tests indicate the existence of a relationship between condemnation and verdicts ( $X^2 = 10.123$ ,  $p = .006$ ) and between constructs and verdicts ( $X^2 = 46.093$ ,  $p < .001$ ), but not between attitudes and verdicts ( $X^2 = 4.086$ ,  $p = .130$ ). The model

indicates that for the comparison between participants who returned NGRI verdicts and those who returned guilty verdicts, there was a negative relationship between condemnation and the odds of obtaining an NGRI verdict, such that for each point increase on the condemnation scale, the odds of obtaining a guilty verdict increased by 10.4% (see Table 16f). There was also a positive relationship between construct scores and the odds of obtaining an NGRI verdict, such that for each point increase on the combined construct scale, the odds of obtaining an NGRI verdict increased by 40.6%. For the comparison between participants who returned GBMI verdicts and those who returned guilty verdicts, there was a positive relationship between construct scores and the odds of obtaining a GBMI verdict, such that for each point increase in the construct scale, the odds of returning a GBMI verdict increased by 32.1%. Condemnation did not have a significant relationship with the odds that a participant would return a GBMI verdict as opposed to a guilty verdict.

Table 16e. Classification Table for NGRI vs. GBMI vs. Guilty Verdicts–PTSD (Full Model)

Observed Frequencies	Predicted Frequencies			Percentage Correct
	NGRI	GBMI	Guilty	
NGRI	7	8	0	46.7
GBMI	5	30	3	78.9
Guilty	0	4	16	80.0
Total Percentage Correct				72.6

Table 16f. Multinomial Logistic Regression Analysis–PTSD (Full Model-NGRI vs. Guilty and GBMI vs. Guilty Verdicts)

	Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^{\beta}$ (odds ratio)
NGRI vs. Guilty	intercept	-16.627	8.984	3.425	1	.064	--
	condemnation	-.109	.047	5.419	1	.020	.896
	attitudes	.045	.073	.383	1	.536	1.046
	constructs	.341	.088	14.90	1	.001	1.406
GBMI vs. Guilty	intercept	-20.643	7.822	6.965	1	.008	--
	condemnation	-.024	.038	.403	1	.526	.976
	attitudes	.097	.061	2.563	1	.109	1.102
	constructs	.278	.082	11.537	1	.001	1.321
Pseudo R <sup>2</sup> : Cox and Snell = .648; Nagelkerke = .744							

#### 4. Discussion

As hypothesized, the condemnation scale is a reliable measure of feelings of resentment and judgments of disapproval directed toward actors who violate institutional proscriptions. Also as hypothesized, condemnation scores differed significantly across diagnoses. It is noteworthy that diagnoses that seem merely to reflect criminal behavior—i.e., antisocial personality disorder and intermittent explosive disorder—were associated with the highest condemnation scores, along with defendants diagnosed with voluntary alcohol intoxication. It is also noteworthy that the lowest condemnation scores were associated with defendants who committed their offenses involuntarily (i.e., during an epileptic seizure). The findings provide reason to believe that the condemnation scale scores correlate with judgments about actors' capacities for criminal responsibility, which would be expected given Schopp's (1993)

discussion of the interrelationship between actor condemnation and the capacity for criminal responsibility.

The hypothesis that higher condemnation scores would be associated with more severe institutionally proscribed acts was also confirmed, as was the hypothesis that the introduction of the GBMI verdict option would not significantly affect condemnation scores. A relationship between condemnation scores and GBMI verdicts did emerge in certain logistic regression models, and these findings will be discussed below.

It was hypothesized that a significant relationship between condemnation scores and verdicts would emerge across all cases regardless of the defendant's diagnosis, such that lower condemnation scores would be associated with NGRI verdicts and higher condemnation scores would be associated with guilty verdicts. This hypothesis was not fully supported. When condemnation was entered as a single predictor in binary and multinomial logistic regression models, a significant relationship between condemnation and NGRI vs. guilty decisions was found in all but three cases. Specifically, when participants were not given the GBMI verdict option, binary logistic regression models for defendants diagnoses with antisocial personality disorder, alcohol intoxication, and intermittent explosive disorder did not reveal a significant relationship between condemnation scores and verdict choices. There are at least two plausible explanations for this unexpected finding, however. First, as Table 2 reflects, these three conditions were associated with the least variability in verdicts. Because of the small number of NGRI verdicts in these conditions, it was difficult for any model to improve upon the classification accuracy of the constant only model. Second, it should be noted that these three conditions were associated with the highest condemnation scores (see Figure 1). The high



frequency of guilty verdicts observed in cases where the defendants were diagnosed with antisocial personality disorder, intermittent explosive disorder, and alcohol intoxication, coupled with the finding that defendants with these diagnoses were assigned condemnation scores that were significantly higher than those assigned to defendants with other diagnoses, suggests that the hypothesized relationship may in fact exist, though it is not registered in the logistic regression analyses.

The fourth main hypothesis was that the insanity defense attitude measure would not contribute independently to classification models that also include condemnation. As noted previously, this hypothesis was based on an observation that, although attitudes toward the insanity defense have been shown to be highly predictive of verdicts in previous studies—indeed, they were found to overwhelm prototypes in the study conducted by Loudon and Skeem (2007)—it appears that the most predictive factors incorporated into insanity defense attitude measures actually measure something akin to condemnation. This hypothesis was nearly, though not entirely, supported. Whenever condemnation and insanity defense attitudes were entered into logistic regression models together (without any additional variables), there were no instances where insanity defense attitudes maintained a unique association with verdicts while condemnation did not. Moreover, in all but two cases, whenever the two-variable models including condemnation and insanity defense attitudes related significantly to verdicts, the insanity defense measure ceased to maintain an independent relationship with verdicts. The two exceptions may be found in Tables 6d and 8d. Note that in these two instances, condemnation did not cease to maintain an independent relationship with verdicts; however, because the insanity defense attitude measure did maintain an independent predictive relationship with

verdicts in these two instances, the hypothesis was not fully supported. It is also important to recognize that the condemnation scale was found to be a considerably more reliable instrument than the attitudes scale. It is possible that a more reliable measure of insanity defense attitudes would maintain an independent predictive relationship with verdicts in a model that includes the condemnation scale. This seems unlikely, however, given that the condemnation measure assesses feelings of resentment and judgments of disapproval directed toward specific hypothetical defendants, while the attitude measure focuses on attitudes about the insanity defense generally, not about its application in each hypothetical defendant's specific case.

The final hypothesis was that in the three-verdict option condition, condemnation scores can be used to distinguish NGRI verdicts from guilty verdicts, but they would not serve to distinguish GBMI from guilty verdicts. The basis for this hypothesis is that defendants found to be GBMI are convicted; in other words, they do not lack criminal responsibility, and they are subject to punishment just as are defendants who are found to be guilty. Because the condemnation scale is designed to distinguish actors toward whom expressions of condemnation are directed from those who are not condemned, the scale should not be expected to distinguish between guilty and GBMI verdict selections. As noted above, however, this hypothesis conflicted with previous findings suggesting that jurors view the GBMI verdict option as a sort of "compromise verdict" that reflects some diminishment of criminal responsibility (e.g., Poulson et al., 1997).

The hypothesis was untestable in the three-verdict option/epilepsy diagnosis condition due to the extremely low frequency of guilty verdicts. In the remaining six diagnosis conditions, the hypothesis was supported in only two instances. In single-predictor models that included

only condemnation, condemnation maintained no statistically significant relationship with GBMI vs. Guilty verdict selections when the defendants were diagnosed with alcohol intoxication or paranoid schizophrenia with hallucinations (see Tables 13b & 15b). However, when the defendants were diagnosed with antisocial personality disorder, intermittent explosive disorder, paranoid schizophrenia with delusions, or post traumatic stress disorder, single-predictor models based on condemnation scores were predictive of verdict decisions when participants chose between GBMI or guilty verdicts. This finding suggests that participants may in fact use the GBMI verdict option to reflect “diminished guilt” in some way, which could call into question the participant’s understanding of the retributive requirement of accountability that, according to the normative framework, is a necessary precondition to just punishment. Alternately, however, it may be that the participants viewed the defendants’ mental illnesses in these conditions as affecting the defendants’ blameworthiness in general as opposed to their criminal responsibility, and it may be that the condemnation scale is sensitive to that judgment of blameworthiness. Put another way, the defendants’ mental illnesses might have been viewed as a factor that does not undermine criminal responsibility, but ought to be taken into account at sentencing. If this is so, the participants’ use of the GBMI verdict option is not necessarily in tension with the normative framework underlying the criminal justice system. Nevertheless, the current findings suggest that mock jurors’ use of the GBMI verdict option merits further study.

The predictive utility of the combined construct scale was unexpected, mainly because the seven individual construct scales were joined to form the combined scale out of necessity during the course of analysis. This scale, which has its roots in the work of Finkel and Handel (1989), seems to be quite predictive of verdicts in insanity cases. It is possible, however, that the

scale's power results merely from mathematical distortion. This possibility is suggested by the fact that in all diagnosis conditions, principle component analysis failed to yield a seven-factor solution. In other words, it does not seem that the combined scale truly measures seven independent constructs. In any event, the construct scales certainly merit further study.

## **B. Study Two: Condemnation and Juvenile Court Jurisdiction Decisions**

### *1. Purpose*

Study Two applied the condemnation construct developed by Pearce (1999) in the context of juvenile court jurisdiction decisions. The predictive utility of the scale was assessed in a range of cases; specifically, the severity of the juvenile's offense and the presence of premeditation was manipulated in order to vary the apparent dangerousness of hypothetical young offenders—which, according to previous research, is one of the most important evaluation criteria used by psychologists to develop jurisdiction recommendations (e.g., Kruh & Brodsky, 1997; Salekin et al., 2001). In addition, participants were asked to rate the importance of several factors that may have influenced their decision-making, such as their judgments about the offender's maturity, his rehabilitative potential, and the need to protect the public.

It was hypothesized that, once again, the construct developed by Pearce (1999) would prove to be a reliable measure of the condemnation that decision-makers assign to hypothetical juvenile offenders. Because research has shown that offense severity and premeditation are associated with recommendations to transfer juveniles to criminal court (e.g., Salekin et al., 2001), condemnation scores were expected to be significantly higher when the youth's offense was relatively severe and when the youth's offense was premeditated. Further, it was hypothesized that there would be a significant interaction between the severity and premeditation

manipulations. It was also hypothesized that a significant relationship between condemnation and charging decisions would emerge, such that higher condemnation scores would be associated with decisions to charge youths in criminal court. This hypothesis stems from Feinberg's (1995a) core theory that condemnation defines criminal punishment and from the basic jurisprudential notion (argued above) that the juvenile justice system is the appropriate institution to address cases involving youths who seem to be less responsible for their institutional violations than adults. Finally, analyses would be conducted to determine which factors are seen by decision-makers to be most important to their charging decisions.

## **2. Methods**

To assess the relationship between condemnation and charging decisions involving youthful offenders, participants received a small packet of materials that included a hypothetical case scenario, a condemnation scale, and a number of additional dependent measures.

### **a. Participants**

Participants were 235 attorneys who volunteered to participate in the study. The participants were each experienced with juvenile court jurisdiction cases (mean = 73 cases; median = 15 cases), and at the time of their participation in the study, they practiced law in one of fourteen states that used the concurrent jurisdiction model of juvenile justice (wherein the prosecuting attorney determines whether to charge a youth in juvenile or criminal court). Ninety of the participants described their profession as "defense attorney," 134 participants described their profession as "prosecuting attorney," five described their profession as "judge," and 6 failed to indicate their profession. The majority of the participants were male (65.5%).

### **b. Procedure**

Internet searches were conducted to generate a list of defense attorneys with juvenile court experience in the targeted jurisdictions. The experimental materials were mailed to approximately 560 defense attorneys and were followed by email or telephone contacts to encourage participation. The 90 defense attorneys who returned completed materials represented a 16.1% response rate.

The experimental materials were also mailed to approximately 440 prosecutors whose contact information appeared in the National Directory of Prosecuting Attorneys (National District Attorneys Association, 2000). The 134 prosecutors who returned completed materials represented a 30.5% response rate.

Although no special effort was made to solicit participation from judges, five of the participants indicated that they were currently on the bench. Overall, the response rate for participants who indicated their profession was 22.9%.

**c. *Materials***

Each participant received one of four hypothetical case vignettes describing an assault committed by a juvenile. The vignettes varied in terms of the seriousness of the assault perpetrated by the juvenile: In one condition, the juvenile struck his victim on the back of the neck and on the head with a pipe before taking his wallet, and the victim required six weeks of hospitalization and rehabilitation to recover from his injuries (Severe). In the other condition, the juvenile struck his victim once on the knees with a pipe before taking his wallet; participants were not told that the victim required any hospitalization for his injuries (Less Severe). The vignettes also varied in terms of the extent of the youth's premeditation: In one condition, the youth committed an opportunistic assault upon only a moment's reflection (No Premeditation),

while in the other condition, the juvenile had been searching for someone to rob at the time of the assault (Premeditation). The vignettes were designed such that all four hypothetical youths would be eligible to proceed to trial as an adult or for adjudication as a juvenile in each of the surveyed states. Each of the four hypothetical cases is reproduced in Appendix H.

The participants were asked to read the assigned vignette and decide whether the youth ought to be tried in juvenile court or criminal court. Participants also indicated whether the youth ought to be detained or returned to the community and responded to a number of questions about the youth and his offense. In addition, the participants were asked to weigh the importance of nine factors that might have influenced their “charging” decision. The factors, which are listed (along with all of the other dependent measures) in Appendix I, are based on the items that appeared in the policy memorandum cited in *Kent v. United States* (1966):

1. The fact that the offense was against a person or property
2. The seriousness of the offense committed by the juvenile
3. The severity of the harm caused by the juvenile
4. Whether the offense was premeditated or not
5. The number of prior offenses on the juvenile’s record
6. The aggressiveness of the juvenile’s offense
7. The violence of the juvenile’s offense
8. The maturity of the juvenile
9. The juvenile’s rehabilitation probability

Participants were asked to rate the influence that of each of the foregoing factors had on their jurisdiction determination using a seven-point Likert scale ranging from “Non-Influential” to

“Very Influential.”

Each participant also completed a condemnation scale. Originally, the scale included 27 items designed to measure the degree of resentment and disapproval that were directed toward the hypothetical juvenile by the participant.<sup>29</sup> After conducting a reliability analysis and principal components factor analysis of the items, however, it was determined that only 14 of the items would be included in the condemnation scale for purposes of the study. The included items were as follows:

1. I feel hatred towards the juvenile because of what he did
2. I feel contempt towards the juvenile
3. I feel anger towards the juvenile
4. I feel resentment towards the juvenile
5. I would like to see a vengeful response towards the juvenile because of what he did
6. It is important that the juvenile is not punished too severely
7. It does not seem appropriate to want revenge against this juvenile
8. Members of society or the public in general probably feels hatred towards this juvenile
9. The juvenile should be sent to prison because society needs to express its disapproval towards him

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<sup>29</sup>These items appear as the last twenty-seven items on the last two pages of Appendix I, beginning with the item, “I feel hatred toward the juvenile because of what he did,” and ending with the item, “It is more important that society’s disapproval towards the juvenile finds expression than it is for the juvenile to avoid the stigma of a criminal conviction.”



10. The law cannot punish the juvenile enough for what he did
11. The juvenile should be sent to prison because society needs to express its desire for revenge towards him (if any)
12. If society fails to punish the juvenile by sending him to prison, it would be as if society approves of what he did
13. Sending the juvenile to a state school is not really punishment
14. It is more important that society's disapproval towards the juvenile finds expression than it is for the juvenile to avoid the stigma of a criminal conviction

Each item was rated on a seven-point Likert scale with labels ranging from “completely disagree” to “completely agree.” The responses were recoded when necessary so that higher scores would reflect more intense expressions of condemnation. The reliability of the scale was good ( $\alpha = .794$ ).

### 3. Results

To explore the relationship between offense severity, premeditation, charging decisions, and condemnation, a 2 (high/low offense severity) by 2 (presence/absence of premeditation) between-groups design was used. Condemnation scores under the four conditions of the study are summarized in Table 17. Contrary to the hypothesis, there was no interaction between offense severity and premeditation as they relate to condemnation scores ( $F(1, 205) = 0.01, p = .984$ ). Nor was there a main effect for severity ( $F(1, 205) = 3.315, p = .078$ ) or for premeditation ( $F(1, 205) = 3.287, p = .071$ ). Checks of the severity manipulation revealed that although most participants found that the offense was relatively serious ( $M = 6.0, SD = 0.86$ ) and that the harm

caused by the youth was relatively severe ( $M = 5.4$ ,  $SD = 1.15$ ), participants in the Less Severe condition found that the offense was significantly less serious ( $M = 5.84$ ,  $SD = 0.93$ ) than did participants in the Severe condition ( $M = 6.17$ ,  $SD = 0.75$ ) ( $F(1, 231) = 8.681$ ,  $p = .004$ ,  $MSE = .716$ ). Similarly, participants in the Less Severe condition found that the harm caused by the youth was less severe ( $M = 4.88$ ,  $SD = 1.17$ ) than did participants in the Severe condition ( $M = 5.91$ ,  $SD = 0.86$ ) ( $F(1, 229) = 57.329$ ,  $p < .001$ ,  $MSE = 1.055$ ). However, while 99% of the respondents who received the “Premeditation” scenario reported that the offense was premeditated, 63.5% of the respondents who received the “No Premeditation” scenario reported that the offense was premeditated. Thus, there is reason to suspect that the failure to obtain a significant main effect for premeditation may be attributable to the weakness of the manipulation.

Table 17. Condemnation Score Means for Study Two

	No Premeditation	Premeditation
Less Severe	33.93	37.02
Severe	36.95	40.11

Note: No statistically significant differences appear among the means

A binary logistic regression analysis was performed to determine whether condemnation scores were predictive of charging decisions. When all participants and conditions were combined for analysis, 135 participants concluded that the youth should be tried in juvenile court, and 69 concluded that the youth should be tried in criminal court. Thus, a constant-only

model (i.e., predicting that the youth would be tried in juvenile court in all instances) correctly classifies 66.2% of the charging decisions. Condemnation scores fit the data better than the constant-only model ( $X^2 = 22.87$ ,  $p < .001$ ) and correctly classified 69.6% of the charging decisions (see Table 18a). Condemnation scores were positively related to the odds of a criminal court charging decision, such that for each single point increase on the condemnation scale, the odds that the juvenile would be tried as an adult increase by 6.1% (see Table 18b).

Table 18a. Classification Table for Charging Decisions (All Participants)-Condemnation Model

Observed Frequencies	Predicted Frequencies		Percentage Correct
	Juvenile	Criminal	
Juvenile	123	12	91.1
Criminal	50	19	27.5
Total Percentage Correct			69.6

Table 18b. Binary Logistic Regression Analysis—Charging Decisions (All Participants)

Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
condemnation	.059	.013	19.621	1	.001	1.061
constant	-2.924	.539	29.452	1	.001	--
Cox and Snell $R^2 = .106$ ; Nagelkerke $R^2 = .147$						

The analysis was repeated using the responses from prosecutors only. Fifty three of the prosecutors concluded that the youth should be tried in juvenile court, and 57 concluded that the

youth should be tried as an adult. Therefore, a constant-only model can correctly classify 51.8% of the charging decisions. Logistic regression analysis indicates that condemnation scores are predictive of prosecutors' charging decisions ( $X^2 = 9.115$ ,  $p = .003$ ) and can correctly classify 62.7% of the decisions (see Table 19a). According to the model, which is summarized in Table 19b, condemnation scores are positively related to the odds that a prosecutor would charge the youth in criminal court, such that for each point increase on the condemnation scale, the odds of obtaining a criminal court charging decision increase by 5.5%.

Table 19a. Classification Table for Charging Decisions (Prosecutors)-Condemnation Model

Observed Frequencies	Predicted Frequencies		Percentage Correct
	Juvenile	Criminal	
Juvenile	34	19	64.2
Criminal	22	35	61.4
Total Percentage Correct			62.7

Table 19b. Binary Logistic Regression Analysis—Charging Decisions (Prosecutors)

Predictor	$\beta$	S.E. $\beta$	Wald's $X^2$	df	p	$e^\beta$ (odds ratio)
condemnation	.054	.019	7.78	1	.005	1.055
constant	-1.986	.755	6.912	1	.009	--
Cox and Snell $R^2 = .080$ ; Nagelkerke $R^2 = .106$						

To determine whether participants found any of the nine “*Kent*” factors to be more influential to their decisions than others, a nine-factor dependent groups ANOVA was

performed. The mean influence ratings for each of the nine factors are set forth in Table 20.

Table 20. Kent Factor Means and Standard Deviations

Factor	Mean	Standard Deviation
Person vs. Property Offense	6.135 <sup>a,b</sup>	1.137
Seriousness of Offense	6.230 <sup>a</sup>	.9448
Severity of Harm	5.780 <sup>c</sup>	1.277
Premeditation	5.394	1.495
Prior Offense Record	4.890 <sup>d</sup>	1.878
Aggressiveness of Offense	5.910 <sup>b,c</sup>	1.060
Violence of Offense	6.140 <sup>a</sup>	1.017
Maturity of Juvenile	5.010 <sup>d</sup>	1.592
Rehabilitation Potential	4.894 <sup>d</sup>	7.737
Note: Means marked with the same superscript are not significantly different (LSD minimum mean difference = 0.243, p = .05).		

There was a significant difference among the influence ratings for the various factors ( $F(8, 1768) = 40.41, p < .001, MSE = 1.72$ ). Pairwise comparisons using LSD with a minimum mean difference of 0.243 revealed that in this particular study, the three most influential factors in charging decisions were the fact that the offense was against a person rather than property, the seriousness of the offense, and the violence of the offense. The aggressiveness of the offense and the severity of the harm were the next most influential factors. Premeditation was the sixth most influential factor. The maturity of the juvenile, the juvenile's rehabilitative potential, and prior offense record were rated as the least influential factors in the charging decision.

#### 4. Discussion

In Study Two, the condemnation scale was again found to be a reliable measure of feelings of retribution and judgments of disapproval expressed toward hypothetical actors. The lack of a statistically significant relationship between condemnation scores and offense severity and between condemnation scores and premeditation was unexpected; however, it may well be that the severity and premeditation manipulations were simply too weak to adequately test the hypothesis. The manipulation check for premeditation supports this notion, and although the manipulation checks for severity indicate that participants were sensitive to the manipulation, it is noteworthy that the “Less Severe” condition included no information about the victim’s need for treatment or rehabilitation due to his injuries, while the “Severe” condition included specific information on this point. This confound may have interfered with the intended manipulation by leaving participants in the “Less Severe” condition with less information upon which to base their judgments than participants in the other condition. It is also noteworthy that the main effects for severity and premeditation approached statistical significance, and were in the hypothesized direction. Further research is necessary before one can confidently claim that condemnation scores are not sensitive to manipulations of severity and premeditation in juvenile justice charging decisions.

The hypothesis that condemnation scores would relate positively to decisions to charge the hypothetical youths in criminal court was supported. In particular, a predictive model based on condemnation appears to significantly improve classification accuracy over a constant-only model when prosecutors’ charging decisions are analyzed.

Finally, it is noteworthy that assessments about the youth’s maturity were rated among the least influential factors when participants made charging decisions in this study, while offense

seriousness and offense violence, along with the fact that the offense was perpetrated against a person rather than property, were rated to be most influential. This finding is consistent with Gardner's observation that "[w]aiver [to criminal court] is generally reserved for those youths whose highly visible, serious, or repetitive criminality raises legitimate concern for . . . community outrage" (1997, p. 182 n.18). However, to the extent that "maturity" is understood to relate to the development of the capacity for criminal responsibility, its relative lack of influence in charging decisions suggests that further research should be conducted to determine whether charging decisions are made in a manner that frustrates the basic functions of the juvenile and criminal justice systems. As argued previously, the normative framework underlying the criminal justice system suggests that the development of the capacity for criminal responsibility should be a central factor in charging decisions. If it is not, charging decisions may lead to one of two undesirable results: First, criminally responsible actors may be adjudicated as juveniles when they are eligible for the benefits (including the right to a jury trial and, perhaps, less severe punishment) and burdens (including, perhaps, harder treatment and undesirable collateral consequences) that flow from the criminal justice system. Alternately, and actors who lack the capacity for criminal responsibility may be tried in the adversarial criminal justice system, which presumes accountability (and places upon the defendant the burden of establishing its absence). Although the present study does not establish that the participants' charging decisions conflict with the normative framework underlying the criminal justice system, the results do suggest that a more thorough inquiry may be in order.

### C. Conclusion

Condemnation is a key component of generally accepted jurisprudential theories about

the definition of punishment, and it arguably provides a useful normative framework for the study of the distinction between the deprivations of liberty that flow from criminal and civil institutions. Moreover, this condemnation framework enables one to consider whether legal institutions function in a manner that coheres with their justificatory foundations. This dissertation illustrates that the prescriptive concept of condemnation can be translated into a predictive concept that facilitates the empirical study of the distinction between sanctions that flow from criminal and civil institutions. In other words, a normative concept that provides a framework for analyzing whether punishment is *justly* imposed has been used to develop empirical constructs that appear to predict instances when punishment is *in fact* imposed.

It should be understood that the empirical condemnation scale developed in these studies does not purport to “measure” the normative concept of condemnation. Feinberg’s (1995a) and Schopp’s (1993) argument that condemnation is part of the core meaning of punishment is based on a conceptual analysis, and empirical findings that decision-makers judgments about the appropriateness of punishment are associated with expressions of “retributive revenge” do not insulate the conceptual analysis from criticism based on logical counterarguments or counterexamples. Conversely, if empirical research were to reveal that actual decisions to punish *are not* associated with expressions of condemnation, it would not necessarily follow that there *should not* be any such association. Nor would it necessarily follow that the conceptual analysis is lacking in merit.

Despite the fundamental distinction between the normative and empirical concepts of condemnation, the empirical concept has been designed to be as consistent as possible with the underlying normative framework. This correspondence provides at least two advantages that are



manifested in the present studies—assuming one accepts Feinberg’s (1995a) core condemnation theory. The first advantage is versatility. Because the normative concept of condemnation arguably helps to define just punishment in a broad, general sense, one would expect that an empirical measure of condemnation might predict actual impositions of punishment in a wide variety of contexts. The studies presented here illustrate that the empirical condemnation construct has predictive utility in two contexts, but future research might explore whether this refined condemnation instrument is predictive in still others. For example, studies could be designed to test whether the empirical condemnation construct can predict judgments involving the imposition of fines or decisions to refer a defendant to a pretrial diversion program in lieu of criminal proceedings. Also, because juvenile court dispositions may be punitive or nonpunitive, one might investigate whether condemnation can serve to distinguish various types of dispositions that flow from a single juvenile court.

Although the condemnation scales used in the reported studies focus on expressions of condemnation toward hypothetical defendants (i.e., actor condemnation), one might design new scales to assess expressions of institutional, general act, and specific act condemnation. Programs of research that expand into these areas might lead to interesting findings concerning the correspondence (or lack thereof) between conventional notions of justice, fairness, or criminal conduct on the one hand and the criminal justice system on the other. General and specific act condemnation might also provide a new framework for studying jury nullification. In addition, Schopp’s (1993) condemnation framework addresses a fifth type of condemnation that concerns actors’ blameworthiness—which might provide a starting point for extending condemnation to the study of sentencing decisions. In short, Feinberg’s (1995a) and Schopp’s

(1993) well-developed condemnation framework may provide conceptual fodder for a wide range of empirical studies addressing a variety of punishment-related judgments.

The second advantage that flows from the correspondence between the empirical condemnation construct and the conceptual condemnation theory relates to research implications and calls for reform. The present studies indicate that the empirical condemnation measure can be used not only to predict decisions to impose punishment, but can also help identify discrepancies between actual expressions of condemnation and justified expressions of condemnation. In this fashion, the condemnation measure can call attention to issues that require further study, or perhaps even frame well-founded arguments for changes in the law. For example, in Study One it was found that condemnation scores can, in some cases, distinguish guilty verdicts from “guilty but mentally ill” verdicts. This finding seems consistent with arguments that the GBMI verdict option is used inappropriately to punish persons who lack the capacity for criminal responsibility. Put differently, this particular aspect of Study One provides reason to believe that decision-makers might not expect that GBMI verdicts will lead to the same punitive dispositions that flow from ordinary “guilty” verdicts, which suggests in turn that new studies should be conducted to determine whether decision-makers are applying the GBMI option in a manner that departs from the justificatory framework of the criminal justice system.

Conversely, the results of the present studies largely indicate that actual decisions to punish are consistent with the justificatory and conceptual principles that underlie the criminal justice system, even in difficult cases that probe the areas of overlap between the criminal justice system and other social institutions (i.e., civil commitment and the juvenile justice system).

Legal policymakers may be interested to know that legal institutions seem to function as they are

intended.

The current studies have important implications not only for legal practitioners, but also psychological researchers. Most basically, the studies suggest that verdicts in insanity cases and charging decisions affecting juveniles are associated with feelings of vengefulness and rational, disapproving judgment that, when combined, may be defined as “condemnation” or “retributive revenge.” Moreover, expressions of this condemnation seem to increase in intensity when decision-makers decide that a particular defendant is appropriately dealt with through the criminal justice system. Even if one utterly rejects the normative condemnation framework as a means of distinguishing punishment from noncriminal sanctions, the empirical findings concerning the relationship between condemnation preferences for criminal treatment are consistent and relatively strong, and they represent a new factor that should be used to model judgments regarding punishment.

Study One suggests that previous findings concerning the relationship between insanity defense attitudes and verdicts in insanity cases may be attributable to researchers’ conflation of attitudes and culpability judgments. The implications of this finding are significant, particularly given insanity defense attitudes’ twenty-year reign as a powerful predictor of judgments in insanity cases. Study Two is significant not only insofar as it reaffirms the predictive utility of condemnation in a context wholly separate from insanity cases, but also insofar as it reports the factors that prosecutors view as most important to their charging decisions in juvenile cases. Future research might explore whether decision-makers prioritize different factors in different types of cases.

There are, of course, significant limitations in the studies presented here. Although

Studies One and Two show that condemnation can be measured reliably, and even though the condemnation scales used in these studies overlap considerably, no single, “universal” condemnation scale has yet been developed. Additional work must be performed to refine the scale and examine its psychometric properties so that the scale may be applied in various contexts with minimal adaptation. The effects of the combined “construct scales” in the logistic regression models reported in Study One call out for a detailed investigation. In addition, the variables of interest seem not to have been manipulated effectively in Study Two, which suggests that further research is needed to explore the relationship between condemnation and charging decisions involving juveniles. Also, more realistic stimulus materials and more sophisticated designs may lead to results that differ significantly from those obtained here. Nevertheless, these initial studies suggest that research based on condemnation may hold great promise.

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**APPENDIX A (Hypothetical Cases Involving Assaults)**

(Hypothetical 1 - Epilepsy)

You are a juror in a criminal trial. The defendant, Henry Grant, has been charged with assaulting a twelve year old boy. These are the facts that were presented to you during the criminal trial.

Henry Grant is an auto mechanic. One evening several months ago, Henry stopped at the local grocery store to pick up some hamburger buns and a mop. David, a twelve year old boy who was out shopping for groceries with his mother, as standing in line behind Henry. Suddenly, Henry began to shake violently. He appeared to be suffering from an epileptic seizure. Henry began to swing the mop around violently. Henry shouted something that no one could quite understand, just before he struck David in the head with the mop. He then pushed the boy to the ground. As he was restrained by the store's security officer, Henry settled down. He was arrested approximately half an hour later by police. David suffered only minor physical injuries as a result of the assault.

After the prosecuting attorney presented these facts, the defense argued that Henry should be found "not responsible by reason of insanity." The court appointed psychiatrist testified that Henry had a Personality Change due to epilepsy at the time of the incident, which is a mental disorder listed in the Diagnostic and Statistical Manual of Mental Disorders, Volume IV. The psychiatrist testified that, judging from the facts of the case, this mental disorder was related to Henry's assault upon the boy. The defense argued that due to this mental disorder, Henry could not appreciate the nature and quality or the wrongfulness of his acts at the time he assaulted David, and therefore Henry should be found "not responsible by reason of insanity."

In response to the defense's claim that Henry should be found "not responsible by reason of insanity," the prosecution argued that even if Henry has a mental disorder that is related to his

assault upon David, he was able to appreciate the nature of his actions when he committed the assault and he should therefore be found guilty.

(Hypothetical 2 - Alcohol Intoxication)

You are a juror in a criminal trial. The defendant, Gary Driver, has been charged with assaulting a twelve year old boy. These are the facts that were presented to you during the criminal trial.

Gary Driver is a groundskeeper at the university. One evening several months ago, Gary was at a bar having drinks. Gary lived close to the bar and decided to walk home, as he usually does. Meanwhile, Douglas, a twelve year old boy who lived a few blocks from Gary, was outside playing with a basketball in his front driveway. Gary staggered up to the driveway where Douglas was playing. Gary picked up a trashcan lid on a can near the driveway and walked over to where Douglas was standing. Gary struck Douglas in the head with the lid. He shouted, "Let's play frisbee for a while!" and pushed Douglas to the ground. Gary then continued home and quickly fell asleep. He was arrested at home a half hour later. Douglas suffered only minor physical injuries as a result of the assault.

After the prosecuting attorney presented these facts, the defense argued that Gary should be found "not responsible by reason of insanity." The court appointed psychiatrist testified that Gary had Alcohol Intoxication Delirium at the time of the incident, which is a mental disorder listed in the Diagnostic and Statistical Manual of Mental Disorders, Volume IV. The psychiatrist testified that, judging from the facts of the case, this mental disorder was related to Gary's assault upon the boy. The defense argued that due to this mental disorder, Gary could not appreciate the nature and quality or the wrongfulness of his acts at the time he assaulted Douglas, and therefore Gary should be found "not responsible by reason of insanity."

In response to the defense's claim that Gary should be found "not responsible by reason of insanity," the prosecution argued that even if Gary has a mental disorder that is related to his



assault upon Douglas, he was able to appreciate the nature of his actions when he committed the assault and he should therefore be found guilty.

(Hypothetical 3 - Paranoid Schizophrenia (delusion))

You are a juror in a criminal trial. The defendant, John Hanks, has been charged with assaulting a twelve year old boy. These are the facts that were presented to you during the criminal trial.

John Hanks is a taxi driver. One evening several months ago, John was driving through a residential neighborhood to pick up a fare. Meanwhile, Jimmy, a twelve year old boy who lived in that neighborhood, was walking home from a friend's house. John's cab passed Jimmy on the sidewalk. Suddenly John stopped the cab, jumped out, and ran over to where Jimmy was walking. John shouted, "I have got you now, Catwoman!" and punched Jimmy in the head. John then pushed Jimmy to the ground, shouted "to the Batmobile!" and ran back to the cab. John drove off, and was arrested at home after he got off work. Jimmy suffered only minor physical injuries as a result of the assault.

After the prosecuting attorney presented these facts, the defense argued that John should be found "not responsible by reason of insanity." The court appointed psychiatrist testified that John had Paranoid Schizophrenia at the time of the incident, which is a mental disorder listed in the Diagnostic and Statistical Manual of Mental Disorders, Volume IV. The psychiatrist testified that, judging from the facts of the case, this mental disorder was related to John's assault upon the boy. The defense argued that due to this mental disorder, John could not appreciate the nature and quality or the wrongfulness of his acts at the time he assaulted Jimmy, and therefore John should be found "not responsible by reason of insanity."

In response to the defense's claim that John should be found "not responsible by reason of insanity," the prosecution argued that even if John has a mental disorder that is related to his assault upon Jimmy, he was able to appreciate the nature of his actions when he committed the

assault and he should therefore be found guilty.

## (Hypothetical 4 - PTSD)

You are a juror in a criminal trial. The defendant, Joseph Kraft, has been charged with assaulting a twelve year old boy. These are the facts that were presented to you during the criminal trial.

Joseph Kraft is a young middle school teacher. One afternoon several months ago, Joseph was working after school grading his class's papers. Meanwhile, Thomas, a twelve year old boy who was a student in his class, returned to the classroom to retrieve a scarf he had left under his desk earlier that day. Joseph was facing away from the door, and Thomas walked up behind him, placing a hand on his shoulder to get his attention. Suddenly Joseph jumped up and swung around. He shouted, "Don't touch me you bastard!" and punched Thomas in the head. Joseph then pushed Thomas to the ground and ran out of the classroom. Thomas suffered only minor physical injuries as a result of the assault.

After the prosecuting attorney presented these facts, the defense argued that Joseph should be found "not responsible by reason of insanity." Joseph was allegedly physically abused by his father for his whole life. The court appointed psychiatrist testified that Joseph had Battered Child Syndrome and Post-traumatic Stress Disorder at the time of the incident, which is a mental disorder listed in the Diagnostic and Statistical Manual of Mental Disorders, Volume IV. The psychiatrist testified that, judging from the facts of the case, this mental disorder was related to Joseph's assault upon the boy. The defense argued that due to this mental disorder, Joseph could not appreciate the nature and quality or the wrongfulness of his acts at the time he assaulted Thomas, and therefore Joseph should be found "not responsible by reason of insanity." Joseph stated that he thought Thomas was his father.

In response to the defense's claim that Joseph should be found "not responsible by reason of insanity," the prosecution argued that even if Joseph has a mental disorder that is related to his

assault upon Thomas, he was able to appreciate the nature of his actions when he committed the assault and he should therefore be found guilty.

## (Hypothetical 5 - Paranoid Schizophrenia (hallucinations))

You are a juror in a criminal trial. The defendant, Father Morning, has been charged with assaulting a twelve year old boy. These are the facts that were presented to you during the criminal trial.

Father Morning is a priest at St. Paul's Catholic Church. One evening several months ago, Father Morning was working in his office, writing his sermon for the following Sunday. Meanwhile, Michael, a twelve year old altar boy at the church, was arranging hymnals in the cathedral. Father Morning came out of his office and saw Michael working in the cathedral. Father Morning suddenly grabbed a large, silver cross from the altar and rushed over to where Michael was standing. Father Morning believed that Michael was being "possessed" by demons, and he believed he saw demons flying in and out of Michael's body. Father Morning then shouted something in Latin, struck Michael in the head with the silver cross, and pushed the boy to the ground. Father Morning then placed his hands on the boy, and shouted, "Begone, evil spirits. I cast thee out, foul demons!" Two other altar boys restrained Father Morning until the police arrived and arrested him. Michael suffered only minor physical injuries as a result of the assault.

After the prosecuting attorney presented these facts, the defense argued that Father Morning should be found "not responsible by reason of insanity." The court appointed psychiatrist testified that Father Morning had Paranoid Schizophrenia at the time of the incident, which is a mental disorder listed in the Diagnostic and Statistical Manual of Mental Disorders, Volume IV. The psychiatrist testified that, judging from the facts of the case, this mental disorder was related to Father Morning's assault upon the boy. The defense argued that due to this mental disorder, Father Morning could not appreciate the nature and quality or the wrongfulness of his acts at the time he assaulted Michael, and therefore Father Morning should be found "not responsible by reason of insanity."

In response to the defense's claim that Father Morning should be found "not responsible by reason of insanity," the prosecution argued that even if Father Morning has a mental disorder

that is related to his assault upon Michael, he was able to appreciate the nature of his actions when he committed the assault and he should therefore be found guilty.

(Hypothetical 6 - Antisocial Personality Disorder)

You are a juror in a criminal trial. The defendant, Victor Schultz, has been charged with assaulting a twelve year old boy. These are the facts that were presented to you during the criminal trial.

Victor is active in the American Neo-Nazi Party, and he has strong anti-Jewish prejudices. Last fall, Victor's ten year old daughter, Anna, went to the neighborhood block party with some friends. Victor came to the block party sometime later. When Victor arrived at the party, he saw his daughter dancing with Jerry, a twelve year old boy whom Victor knew to be Jewish. Victor became extremely angry and rushed over to where his daughter and the boy were dancing. Victor pulled his daughter away from Jerry and told her to go home. Victor then turned back to Jerry and shouted at him to stay away from his daughter. At that moment, just as Jerry began to back away, Victor shouted some anti-Jewish insults and struck Jerry in the head. Victor then pushed Jerry to the ground and said, "Never come near my family again!" Victor then went home, where he was arrested half an hour later. Jerry suffered only minor injuries as a result of the attack.

After the prosecuting attorney presented these facts, the defense argued that Victor should be found "not responsible by reason of insanity." The court appointed psychiatrist testified that Victor had Antisocial Personality Disorder at the time of the incident, which is a mental disorder listed in the Diagnostic and Statistical Manual of Mental Disorders, Volume IV. The psychiatrist testified that, judging from the facts of the case, this mental disorder was related to Victor's assault upon the boy. The defense argued that due to this mental disorder, Victor could not appreciate the nature and quality or the wrongfulness of his acts at the time he assaulted Jerry, and therefore Victor should be found "not responsible by reason of insanity."

In response to the defense's claim that Victor should be found "not responsible by reason of insanity," the prosecution argued that even if Victor has a mental disorder that is related to his assault upon Jerry, he was able to appreciate the nature of his actions when he committed the



assault and he should therefore be found guilty.

## (Hypothetical 7 - Intermittent Explosive Disorder)

You are a juror in a criminal trial. The defendant, Leroy Jones, has been charged with assaulting a twelve year old boy. These are the facts that were presented to you during the criminal trial.

Leroy worked as a janitor at a local school. While working at the school, Leroy noticed that Brian, a twelve year old student, stayed late after school on Tuesdays. Leroy discovered that Brian had band practice on Tuesdays, and that Brian walked home from school alone on those days. Leroy also observed the route that Brian used when walking home. On Tuesday, November 3, 1998, Leroy took the afternoon off from work. He hid behind some bushes along the sidewalk where Brian walked every Tuesday, and waited for Brian to come along. When Brian passed by, Leroy jumped out from behind the bushes. Leroy struck Brian in the head and pushed him to the ground. Leroy shouted at Brian, "I've got you now!" and then ran away. Leroy was arrested at his home a half-hour later. Brian suffered only minor physical injuries as a result of the attack.

After the prosecuting attorney presented these facts, the defense argued that Leroy should be found "not responsible by reason of insanity." The court appointed psychiatrist testified that Leroy had Intermittent Explosive Disorder at the time of the incident, which is a mental disorder listed in the Diagnostic and Statistical Manual of Mental Disorders, Volume IV. The psychiatrist testified that, judging from the facts of the case, this mental disorder was related to Leroy's assault upon the boy. When Leroy gets stressed out, he feels like attacking people weaker than himself. The defense argued that due to this mental disorder, Leroy could not appreciate the nature and quality or the wrongfulness of his acts at the time he assaulted Brian, and therefore Leroy should be found "not responsible by reason of insanity."

In response to the defense's claim that Leroy should be found "not responsible by reason of insanity," the prosecution argued that even if Leroy has a mental disorder that is related to his

assault upon Brian, he was able to appreciate the nature of his actions when he committed the assault and he should therefore be found guilty.

**APPENDIX B (Insanity Instruction-No GBMI Option)**

**MARK YOUR VERDICT USING THE BUBBLES AT THE BOTTOM OF THIS PAGE.**

The Judge has provided you with the following instructions to help you decide this case.

A defendant is not responsible for criminal conduct if at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense. Therefore, of you find by clear and convincing evidence that:

(1) The defendant had a severe mental disease or defect at the time of the acts charged;

AND

(2) As a result of the severe mental disease or defect, the defendant was unable to appreciate the nature and quality or the wrongfulness of his acts;

then you must find the defendant not responsible by reason of insanity. Otherwise, you must find him guilty.

Please provide the following information by filling in the oval corresponding to your answer.

This is an example of a correct response: I live in Nebraska Yes ● No 0

**What is your verdict in this case?**

0 Not responsible by reason of insanity

0 Guilty

**APPENDIX C (Sample Hypothetical Case Involving Homicide)**

You are a juror in a criminal trial. The defendant, Henry Grant, has been charged with killing a twelve year old boy. These are the facts that were presented to you during the criminal trial.

Henry Grant is an auto mechanic. One evening several months ago, Henry stopped at the local grocery store to pick up some hamburger buns and a mop. David, a twelve year old boy who was out shopping for groceries with his mother, as standing in line behind Henry. Suddenly, Henry began to shake violently. He appeared to be suffering from an epileptic seizure. Henry began to swing the mop around violently. Henry shouted something that no one could quite understand, just before he struck David in the head with the mop. He then pushed the boy to the ground. As he was restrained by the store's security officer, Henry settled down. He was arrested approximately half an hour later by police. David suffered major physical injuries and died as a result of the attack.

After the prosecuting attorney presented these facts, the defense argued that Henry should be found "not responsible by reason of insanity." The court appointed psychiatrist testified that Henry had a Personality Change due to epilepsy at the time of the incident, which is a mental disorder listed in the Diagnostic and Statistical Manual of Mental Disorders, Volume IV. The psychiatrist testified that, judging from the facts of the case, this mental disorder was related to Henry's attack on the boy. The defense argued that due to this mental disorder, Henry could not appreciate the nature and quality or the wrongfulness of his acts at the time he killed David, and therefore Henry should be found "not responsible by reason of insanity."

In response to the defense's claim that Henry should be found "not responsible by reason of insanity," the prosecution argued that even if Henry has a mental disorder that is related to his attack on David, he was able to appreciate the nature of his actions when he committed the

murder and he should therefore be found guilty.



**APPENDIX D (Insanity Instruction with GBMI Option)**

**MARK YOUR VERDICT USING THE BUBBLES AT THE BOTTOM OF THIS PAGE.**

The Judge has provided you with the following instructions to help you decide this case.

A defendant is not responsible for criminal conduct if at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense. Therefore, of you find by clear and convincing evidence that:

(1) The defendant had a severe mental disease or defect at the time of the acts charged;

AND

(2) As a result of the severe mental disease or defect, the defendant was unable to appreciate the nature and quality or the wrongfulness of his acts;

then you must find the defendant not responsible by reason of insanity.

You may find the defendant “guilty but mentally ill” if you find the following beyond a reasonable doubt:

(1) The defendant is guilty of an offense; AND

(2) The defendant was mentally ill at the time of the commission of the offense; AND

(3) The defendant was not legally insane at the time of the commission of the offense.

If you do not find the defendant not responsible by reason of insanity and you do not find that he is guilty but mentally ill, then you must find him guilty.

Please provide the following information by filling in the oval corresponding to your answer.

This is an example of a correct response: I live in Nebraska Yes ● No 0

**What is your verdict in this case?**

0 Not responsible by reason of insanity

0 Guilty but mentally ill

0 Guilty

**APPENDIX E (Modified Insanity Defense Attitudes Scale)**

**\*Note: The materials presented in this appendix have been reformatted slightly for ease of reference, but are identical in substance to the materials submitted to participants**

Please provide the following information by filling in the oval corresponding to your answer. This is an example of a correct response: I live in Nebraska Yes ● No ○

Gender:

○ Female

Age: \_\_\_\_\_

○ Male

Ethnicity: \_\_\_\_\_

The following items use a rating scale. Please rate how much you agree or disagree with the statements:

Completely Disagree = 1, Strongly Disagree =2, Disagree =3, Neither Agree Nor Disagree =4, Agree =5, Strongly Agree =6, Completely Agree =7.

	1	2	3	4	5	6	7
1.The insanity defense should be abolished.	○	○	○	○	○	○	○
2.The insanity defense needs a lot of reform.	○	○	○	○	○	○	○
3.The insanity defense is sometimes justified.	○	○	○	○	○	○	○
4. The insane should be treated rather than punished if they commit a crime.	○	○	○	○	○	○	○
5. Punishment just does not work on the insane.	○	○	○	○	○	○	○
6. The insanity plea is a loophole that allows too many guilty people to go free.	○	○	○	○	○	○	○
7. Even if people are insane, we should punish them if they break the law.	○	○	○	○	○	○	○
8. The insanity defense sends a message to criminals that they can get away with crime.	○	○	○	○	○	○	○
9. Judges and juries have a hard time telling whether defendants are really sane or insane.	○	○	○	○	○	○	○
10. If psychiatrists are paid enough, they will say anything about a defendant's sanity.	○	○	○	○	○	○	○

11. The insanity plea is mainly a rich person's defense.	0	0	0	0	0	0	0
12. Insane people should be punished for their crimes just like everyone else.	0	0	0	0	0	0	0
13. The insanity defense allows dangerous people out on the streets.	0	0	0	0	0	0	0
14. The insanity defense is a necessary part of our legal system.	0	0	0	0	0	0	0
15. It is wrong to punish insane people who break the law.	0	0	0	0	0	0	0
16. Insane defendants are entitled to treatment.	0	0	0	0	0	0	0
17. I'm confident that people found Not Guilty By Reason of Insanity are only released when it is safe to do so.	0	0	0	0	0	0	0
18. Psychiatrists should testify about a defendant's mental condition in insanity trials.	0	0	0	0	0	0	0
19. The insanity defense doesn't affect the crime rate.	0	0	0	0	0	0	0
20. Mental health facilities can be helpful for patients with mental disorders.	0	0	0	0	0	0	0
21. Mental health facilities are a good place to house dangerous people to keep them out of society.	0	0	0	0	0	0	0
22. People who are sent to mental health facilities instead of prisons are still being punished.	0	0	0	0	0	0	0
23. People sent to mental health facilities should not be thought of as criminals.	0	0	0	0	0	0	0
24. Commitment to a mental health facility should not be viewed as punishment for doing something against the law.	0	0	0	0	0	0	0

25. Most people found Not Guilty By Reason of Insanity are really insane.

0 0 0 0 0 0 0

Please write in your answer to the following:

First of all, when defendants are charged with a crime, they can decide to plead Not Guilty By Reason of Insanity. Out of 100 defendants who are charged with crimes, how many do you think plead Not Guilty By Reason of Insanity?

When defendants plead Not Guilty By Reason of Insanity at their trials, a judge or jury has to decide whether or not the defendants are indeed Not Guilty By Reason of Insanity. Out of every 100 defendants who plead insanity, how many do you think are actually found Not Guilty By Reason of Insanity by judges or juries?

Out of every 100 defendants found Not Guilty By Reason of Insanity, how many do you think go free immediately?

How many do you think are sent to a mental hospital?

If defendants are sent to a mental hospital, how long do you think they stay there, on the average?

**APPENDIX F (Dependent Measures Presented to Participants)**

**\*Note: The materials presented in this appendix have been reformatted slightly for ease of reference, but are identical in substance to the materials submitted to participants**

[Note: Participants were asked to rate their agreement with the following statements using this scale: Completely Disagree = 1, Strongly Disagree =2, Disagree =3, Neither Agree Nor Disagree =4, Agree =5, Strongly Agree =6, Completely Agree =7.]

	1	2	3	4	5	6	7
Henry Grant could not make rational decisions at the time of the act	0	0	0	0	0	0	0
Henry Grant should not be held responsible for his actions	0	0	0	0	0	0	0
At the time of the act, Henry Grant had no awareness of what was going on	0	0	0	0	0	0	0
Henry Grant could not think clearly at the time of the act	0	0	0	0	0	0	0
Henry Grant did not have the ability to make responsible choices at the time of the act	0	0	0	0	0	0	0
It seems that Henry Grant may have planned his act ahead of time	0	0	0	0	0	0	0
Henry Grant does not seem blameworthy	0	0	0	0	0	0	0
At the time of the act, Henry Grant could perceive his surroundings accurately	0	0	0	0	0	0	0
Henry Grant could control himself at the time of the act	0	0	0	0	0	0	0
Henry Grant should have known that he was going to cause some harm	0	0	0	0	0	0	0
Henry Grant, and Henry Grant alone, is responsible for what happened	0	0	0	0	0	0	0
Henry Grant was completely out of touch with reality when he committed the act	0	0	0	0	0	0	0
Henry Grant did the act because of an irresistible impulse that he could not control	0	0	0	0	0	0	0
It is unlikely that Henry Grant really wanted to hurt anybody	0	0	0	0	0	0	0



Henry Grant knew what he was doing at the time of the act	0	0	0	0	0	0	0
Other people are partly responsible for what happened	0	0	0	0	0	0	0
Henry Grant's mental impairment influenced the verdict	0	0	0	0	0	0	0
Considering all of the facts in the case, Henry Grant's mental impairment was very important in choosing the right verdict	0	0	0	0	0	0	0
Henry Grant is less guilty because of his mental impairment	0	0	0	0	0	0	0
Henry Grant would definitely be guilty of committing the crime if he had no mental impairment	0	0	0	0	0	0	0
If the same crime were committed by someone without a mental impairment, that person should be found guilty	0	0	0	0	0	0	0
If Henry Grant was impaired at the time of the act, it was his own fault	0	0	0	0	0	0	0
Just because Henry Grant was mentally impaired does not mean that he is not guilty by reason of insanity	0	0	0	0	0	0	0
Henry Grant's mental impairment makes him not criminally responsible	0	0	0	0	0	0	0
Henry Grant is criminally responsible even though he has a mental impairment	0	0	0	0	0	0	0
Henry Grant deserves to be punished for what he did.	0	0	0	0	0	0	0

Henry Grant should receive some sort of psychological treatment in order to help him with his mental disorder.	0	0	0	0	0	0	0
Henry Grant should be sent to a mental health facility of some kind, not to prison.	0	0	0	0	0	0	0
Henry Grant deserves to go to prison for his actions.	0	0	0	0	0	0	0
If Henry Grant serves a prison sentence for his act, he will have paid his debt to society.	0	0	0	0	0	0	0
I disapprove of Henry Grant.	0	0	0	0	0	0	0
I feel hatred toward Henry Grant.	0	0	0	0	0	0	0
I would like to see a vengeful response towards Henry Grant.	0	0	0	0	0	0	0
It is important that Henry Grant is not punished too severely.	0	0	0	0	0	0	0
I would like to see Henry Grant get what he deserves.	0	0	0	0	0	0	0
I feel contempt towards Henry Grant.	0	0	0	0	0	0	0
I feel sympathy for Henry Grant.	0	0	0	0	0	0	0
I forgive Henry Grant for his actions.	0	0	0	0	0	0	0
I feel anger towards Henry Grant.	0	0	0	0	0	0	0
I feel resentment towards Henry Grant.	0	0	0	0	0	0	0
I would like revenge against Henry Grant	0	0	0	0	0	0	0
It doesn't seem right to want revenge against Henry Grant for what he did.	0	0	0	0	0	0	0
The law cannot punish Henry Grant enough for what he did to the boy.	0	0	0	0	0	0	0
Henry Grant's condition is treatable.	0	0	0	0	0	0	0

I am outraged at Henry Grant for his actions.	0	0	0	0	0	0	0
Henry Grant is dangerous to society.	0	0	0	0	0	0	0
Society should want revenge against Henry Grant for his actions against the boy.	0	0	0	0	0	0	0
Society in general probably feels hatred towards Henry Grant.	0	0	0	0	0	0	0
Society in general probably feels sympathy for Henry Grant.	0	0	0	0	0	0	0
Society should want to express its disapproval of Henry Grant for his actions against the boy.	0	0	0	0	0	0	0
Sentencing Henry Grant to prison would balance society's need to express any desire for revenge towards him with rational, disapproving judgment.	0	0	0	0	0	0	0
Sending Henry Grant to a mental health facility would be more like punishment for his actions than to help treat any mental disorder.	0	0	0	0	0	0	0
If Henry Grant were punished appropriately under the law by being sentenced to prison, it would satisfy any desire for revenge I might feel towards him.	0	0	0	0	0	0	0
If Henry Grant were punished appropriately under the law by being sentenced to prison, it would satisfy any disapproval I may have towards him.	0	0	0	0	0	0	0
Sending Henry Grant to a mental hospital for treatment instead of to prison would satisfy any desire for revenge I may have towards him.	0	0	0	0	0	0	0

Sending Henry Grant to a mental hospital for treatment instead of to prison would satisfy any disapproval I may have towards him.	0	0	0	0	0	0	0
Society should want to express its disapproval of Henry Grant for his actions.	0	0	0	0	0	0	0
Henry Grant should be sent to prison because society needs to express its disapproval towards him.	0	0	0	0	0	0	0
Henry Grant should be sent to prison because society needs to express its desire for revenge towards him.	0	0	0	0	0	0	0
A prison sentence would appropriately express society's disapproval towards Henry Grant.	0	0	0	0	0	0	0
It is more important that society's disapproval towards Henry Grant finds expression than it is for Henry Grant to go to a mental health facility instead of prison.	0	0	0	0	0	0	0

**APPENDIX G (Dependent Measures Organized by Category)**

I. “Capacity/incapacity” items  
[incapacity to make responsible choices]

X could not make rational decisions at the time of the act  
X did not have the ability to make responsible choices at the time of the act

II. “Unimpaired awareness and perceptions/impaired awareness and perceptions” items  
[wild beast test] [mens rea]

At the time of the act, X had no awareness of what was going on  
At the time of the act, X could perceive his surroundings accurately  
X was completely out of touch with reality when he committed the act

III. “Clear thinking/distorted thinking” items  
[M’Naughten] [cognitive]

X could not think clearly at the time of the act  
X knew what he was doing at the time of the act

IV. “Could control impulses and actions/could not control impulses and actions” items  
[volitional] [irresistible impulse]

X could control himself at the time of the act  
X did the act because of an irresistible impulse that he could not control

V. “Culpable actions/nonculpable actions” items  
[culpable for bringing about the impairment][defendant was either reckless or negligent in her actions and should be held responsible]

If X was impaired at the time of the act, it was his own fault  
X should not be held responsible for his actions  
X should have known that he was going to cause some harm  
X does not seem blameworthy

VI. “Premeditation or malice/no evil motive” items

It seems that X may have planned his act ahead of time  
It is unlikely that X really wanted to hurt anybody

VII. “Others not responsible/others at fault” items

X, and X alone, is responsible for what happened  
Other people are partly responsible for what happened

## VIII. Condemnation Scale Items

I disapprove of X.

I feel hatred toward X.

I would like to see a vengeful response towards X.

It is important that X is not punished too severely.

I would like to see X get what he deserves.

I feel contempt towards X.

I feel sympathy for X.

I forgive X for his actions.

I feel anger towards X.

I feel resentment towards X.

I would like revenge against X

It doesn't seem right to want revenge against X for what he did.

The law cannot punish X enough for what he did to the boy.

I am outraged at X for his actions.

Society should want revenge against X for his actions against the boy.

Society in general probably feels hatred towards X.

Society in general probably feels sympathy for X.

Society should want to express its disapproval of X for his actions against the boy.

Sentencing X to prison would balance society's need to express any desire for revenge towards him with rational, disapproving judgment.

Sending X to a mental health facility would be more like punishment for his actions than to help treat any mental disorder.

If X were punished appropriately under the law by being sentenced to prison, it would satisfy any desire for revenge I might feel towards him.

If X were punished appropriately under the law by being sentenced to prison, it would satisfy any disapproval I may have towards him.

Sending X to a mental hospital for treatment instead of to prison would satisfy any desire for revenge I may have towards him.

Sending X to a mental hospital for treatment instead of to prison would satisfy any disapproval I may have towards him.

Society should want to express its disapproval of X for his actions.

X should be sent to prison because society needs to express its disapproval towards him.

X should be sent to prison because society needs to express its desire for revenge towards him.

A prison sentence would appropriately express society's disapproval towards X.

It is more important that society's disapproval towards X finds expression than it is for X to go to a mental health facility instead of prison.

**APPENDIX H (Hypothetical Cases)**



### **Hypothetical 1: Severe Assault, No Premeditation**

Timothy B. is a sixteen-year-old male who was recently walking home from a friend's house when he noticed a piece of metal pipe. He began swinging it around and throwing it into the air. Timothy continued to swing the pipe pretending it was a baseball bat. A neighbor who saw him on that day indicated that he was running up the sidewalk yelling like he was an announcer for a baseball game. Timothy says that he continued walking toward his house playing with the pipe until he got to a bus stop near a convenience store that was on his way home. At this point, Timothy says that he saw a man who was struggling to get a large bag over to the stop. Timothy approached the man thinking he could help him with the bag. However, as Timothy got closer he noticed how nicely the man was dressed and decided that he would threaten the man and ask for his wallet. When the man resisted, Timothy hit the man on the back of his neck with the pipe he had found. As the man struggled to keep his wallet, Timothy hit the man's head with the pipe. The man recovered from his injuries after six weeks of hospitalization and rehabilitation. A woman saw the entire incident and called the police from a pay phone while it was occurring. An officer from inside the nearby convenience store apprehended Timothy as he ran away, still holding the pipe and the man's wallet in his hands.

Timothy's father describes Timothy as an independent child who usually keeps to himself. Timothy recently moved into a room over the family's garage. The room is much like an apartment. The room has a small kitchen that Timothy uses about half of the time, and he eats with his parents the other half. The garage is connected to the house so Timothy still must walk through the house to come and leave. Timothy still has a curfew, but once he is in his room, his parents say that he is able to do whatever he wants. Both of his parents are quite shocked that Timothy would ever hurt anyone.

Two years prior to the current incident, Timothy stole a car and took it for a high-speed ride on the interstate. The car was a 1978 Chevrolet Camaro that was recovered undamaged. As a result, Timothy was adjudicated in juvenile court and found to be delinquent. This was Timothy's only prior offense.

### **Hypothetical 2: Severe Assault with Premeditation**

Timothy B. is a sixteen year old male who took a piece of metal pipe from his house so that he could mug someone. He needed to get money for some clothes he wanted to buy. Walking toward a bus stop near a convenience store in town, he began swinging the pipe around and throwing into the air. Timothy continued to swing the pipe pretending it was a baseball bat. A neighbor who saw him on that day indicated that he was running up the sidewalk yelling like he was an announcer for a baseball game. Timothy says that he continued walking toward the bus stop playing with the pipe. At this point, Timothy says that he put the pipe down his pant leg and walked as though he had a brace on his leg. He approached a well-dressed man at the bus stop and asked if the man would help him bring a bag over to the stop because he was unable to carry it with his leg in the brace. Once they were away from the bus stop and convenience store, Timothy grabbed the pipe out of his pant leg and hit the man on the back of his neck. As the man struggled to keep his wallet, Timothy hit the man's head with the pipe. The man recovered from his injuries after six weeks of hospitalization and rehabilitation. A woman saw the entire incident and called the police from a pay phone while it was occurring. An officer from inside the nearby convenience store apprehended Timothy as he ran away still holding the pipe and the man's wallet in his hands.

Timothy's father describes Timothy as an independent child who usually keeps to himself. Timothy recently moved into a room over the family's garage. The room is much like an apartment. The room does have a small kitchen that Timothy uses about half of the time, and he eats with his parents the other half. The garage is connected to the house so Timothy still must walk through the house to come and leave. Timothy has a curfew, but once he is in his room, his parents say that he is able to do whatever he wants. Both of his parents are quite shocked that Timothy would ever hurt anyone.

Two years prior to the current incident, Timothy stole a car and took it for a high-speed ride on the interstate. The car was a 1978 Chevrolet Camaro that was recovered undamaged. As a result, Timothy was adjudicated in juvenile court and found to be delinquent. This was

Timothy's only prior offense.

### **Hypothetical 3: Less Severe Assault, No premeditation**

Timothy B. is a sixteen-year-old male who was walking home from a friend's house when he noticed a piece of metal pipe. He picked up the pipe and began swinging it around and throwing it into the air. Timothy continued to swing the pipe pretending it was a baseball bat. A neighbor who saw him on that day indicated that he was running up the sidewalk yelling like he was an announcer for a baseball game. Timothy says that he continued walking toward his house playing with the pipe until he got to a bus stop near a convenience store that was on his way home. At this point, Timothy says that he saw a man who was struggling to get a large bag over to the stop. Timothy approached the man thinking he could help him with the bag. However, as Timothy got closer he noticed how nicely the man was dressed and decided that he would threaten the man and ask for his wallet. When the man resisted, Timothy hit the man's knees with the pipe he had found causing the man to fall to the ground. The man gave Timothy his wallet when Timothy threatened to hit him again. A woman saw the entire incident and called the police from a pay phone while it was occurring. An officer from inside the nearby convenience store apprehended Timothy as he ran away still holding the pipe and the man's wallet in his hands.

Timothy's father describes Timothy as an independent child who usually keeps to himself. Timothy recently moved into a room over the family's garage. The room is much like an apartment. The room does have a small kitchen that Timothy uses about half of the time, and he eats with his parents the other half. The garage is connected to the house so Timothy still must walk through the house to come and leave. Timothy has a curfew, but once he is in his room, his parents say that he is able to do whatever he wants. Both of his parents are quite shocked that Timothy would ever hurt anyone.

Two years prior to the current incident, Timothy stole a car and took it for a high-speed ride on the interstate. The car was a 1978 Chevrolet Camaro that was recovered undamaged. As a result, Timothy was adjudicated in juvenile court and found to be delinquent. This was Timothy's only prior offense.

#### **Hypothetical 4: Less Severe Assault with Premeditation**

Timothy B. is a sixteen-year-old male who took a piece of metal pipe from his house so that he could mug someone. He needed to get money for some clothes he wanted to buy. Walking toward a bus stop near a convenience store in town, he began swinging the pipe around and throwing it into the air. Timothy continued to swing the pipe pretending it was a baseball bat. A neighbor who saw him that day indicated that he was running up the sidewalk yelling like he was an announcer for a baseball game. Timothy says that he continued walking toward the bus stop playing with the pipe. At this point, Timothy says that he put the pipe down his pant leg and walked as though he had a brace on his leg. He approached a well-dressed man at the bus stop and asked if the man would help him bring a bag over to the stop because he was unable to carry it with his leg in the brace. Once they were away from the bus stop and the convenience store, Timothy asked for the man's wallet. When the man resisted, Timothy grabbed the pipe out of his pants leg and hit the man's knees causing the man to fall to the ground. The man gave Timothy his wallet when Timothy threatened to hit him again. A woman saw the entire incident and called the police from a pay phone while it was occurring. An officer from inside the nearby convenience store apprehended Timothy as he ran away, still holding the pipe and the man's wallet in his hands.

Timothy's father describes Timothy as being an independent child who usually keeps to himself. Timothy recently moved into a room over the family's garage. The room is much like an apartment. The room does have a small kitchen that Timothy uses about half of the time, and he eats with his parents the other half. The garage is connected to the house so Timothy still must walk through the house to come and leave. Timothy has a curfew, but once he is in his room, his parents say that he is able to do whatever he wants. Both of his parents are quite shocked that Timothy would ever hurt anyone.

Two years prior to the current incident, Timothy stole a car and took it for a high-speed ride on the interstate. The car was a 1978 Chevrolet Camaro that was recovered undamaged. As a result, Timothy was adjudicated in juvenile court and found to be delinquent. This was

Timothy's only prior offense.

**APPENDIX I (Dependent Measures/Condemnation Scale)**

**\*Note: The materials presented in this appendix have been reformatted for ease of reference, but are identical in substance to the materials submitted to participants**

**Please answer the following questions carefully. Feel free to look back at the scenario at any time.**

1. In the case described, was the offense against a person or against property?  
*Person*                      *Property*
2. How serious was the offense committed by the juvenile?  
*Not serious*    1 2 3 4 5 6 7 *Extremely serious*
3. How severe was the harm caused by the juvenile?  
*Not severe*    1 2 3 4 5 6 7 *Extremely severe*
4. Was the offense premeditated?  
*Yes*                      *No*
5. How many prior offenses were on the juvenile's record?  
 \_\_\_\_\_
6. How strong is the need to protect the community from this juvenile?  
*Not strong*    1 2 3 4 5 6 7 *Very strong*
7. Can this juvenile be safely returned to the community at this time?  
*Yes*                      *No*
8. Does this juvenile require detention?  
*Yes*                      *No*
9. How aggressive was this juvenile's offense?  
*Not aggressive*    1 2 3 4 5 6 7 *Very aggressive*
10. How violent was this juvenile's offense?  
*Not violent*    1 2 3 4 5 6 7 *Very violent*
11. How mature was this juvenile?  
*Not mature*    1 2 3 4 5 6 7 *Very mature*
12. How much do you believe this juvenile could benefit from rehabilitative programs?  
*Very little*    1 2 3 4 5 6 7 *Very much*
13. In your opinion, how likely is it that this juvenile would cooperate with efforts to rehabilitate him?  
*Very unlikely*    1 2 3 4 5 6 7 *Very likely*
14. How successful do you believe rehabilitation would be for this juvenile?  
*Very unsuccessful*    1 2 3 4 5 6 7 *Very successful*
15. Should this person be tried in juvenile or criminal court?  
*Juvenile*                      *Criminal*
16. What aspects of the case were important for your decision?  
 \_\_\_\_\_  
 \_\_\_\_\_



Please rate the influence that the following characteristics had on your waiver decision using the scale below:

Non-Influential 1 2 3 4 5 6 7 Very Influential

Characteristics of the case	Rating
The fact that the offense was against a <u>person / property</u>	
The seriousness of the offense committed by the juvenile	
The severity of the harm caused by the juvenile	
Whether the offense was premeditated or not	
The number of prior offenses on the juvenile's record	
The aggressiveness of this juvenile's offense	
The violence of this juvenile's offense	
The maturity of this juvenile	
The juvenile's rehabilitation probability	

1. In general, what punishment(s) would be appropriate for parents of juveniles who commit crimes? (Circle all that apply)

*No punishment    Monetary Fine    Prison sentence    Victim restitution*

*Other(specify)\_\_\_\_\_*

2. Which punishment is most appropriate for Timothy's parents in the current case?

*No punishment    Monetary Fine    Prison sentence    Victim restitution*

*Other(specify)\_\_\_\_\_*

3. Does your jurisdiction allow parents to be criminally punished for the crimes that their child commits?    *Yes*            *No*

4. If no, would you approve of such a criminal liability law for parents in your jurisdiction?

*Yes    No    N/A*

5. Are you a(n)\_\_\_\_\_? (circle all that apply)

*biological parent    step parent    adoptive parent    foster parent    not a parent*

6. Please indicate your profession    *Defense Attorney*            *Prosecuting Attorney*            *Judge*

7. How many years have you been in your current profession? \_\_\_\_\_

8. Please indicate your gender            *Male*            *Female*

9. How many cases have you been the counsel of record or presiding judge on a juvenile waiver case? \_\_\_\_\_

10. What barriers do you face in your involvement with juvenile waiver cases?

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Please rate your agreement with the following statements using the scale below:

Completely disagree 1 2 3 4 5 6 7 Completely agree

	<b>Agreement 1-7</b>
Timothy's parents should have known that he was likely to commit the present crime.	
Timothy's parents are responsible for his criminal activity.	
Timothy's parents contributed to his delinquency.	
Timothy's parents be punished in some way for the crimes he committed.	
In my judgment, the juvenile needs to be appropriately punished.	
In my judgment, the juvenile needs to be supported and educated	
I feel hatred towards the juvenile because of what he did	
I feel sympathy for the juvenile	
I forgive the juvenile for his actions	
I feel contempt towards the juvenile	
I feel anger towards the juvenile	
I feel resentment towards the juvenile	
I would like to see a vengeful response towards the juvenile because of what he did	
It is important that the juvenile is not punished too severely	
It does not seem appropriate to want revenge against this juvenile	
Members of society or the public in general probably feels hatred towards this juvenile	
The public in general probably feels sympathy for this juvenile	
The juvenile should be sent to prison because society needs to express its disapproval towards him	
The law cannot punish the juvenile enough for what he did	
The juvenile should be sent to prison because society needs to express its desire for revenge towards him (if any)	

	<b>Agreement 1-7</b>
There is no need to send the juvenile to prison, because there should not be any desire for revenge towards him that need to be expressed on behalf of society	
Sending the juvenile to a state school would be more like punishment for his actions than to help rehabilitate him	
Sending the juvenile to a state school would appropriately express society's disapproval towards the juvenile	
Sending the juvenile to a state school would appropriately express society's desire for revenge towards the juvenile (if any)	
If society fails to punish the juvenile by sending him to prison, it would be as if society approves of what he did	
Ordering the juvenile to perform community service would appropriately express society's disapproval of the juvenile's actions	
Ordering the juvenile to perform community service would appropriately express society's desire for revenge of the juvenile's actions (if any)	
Ordering the juvenile to pay restitution would appropriately express society's disapproval of the juvenile's actions	
Ordering the juvenile to pay restitution would appropriately express society's desire for revenge of the juvenile's actions (if any)	
Ordering the juvenile to perform community service is not really punishment	
Ordering the juvenile to pay restitution is not really punishment	
Sending the juvenile to a state school is not really punishment	
It is more important that society's disapproval towards the juvenile finds expression than it is for the juvenile to avoid the stigma of a criminal conviction	