



Stanford Law Review

CRIMINAL MADNESS: CULTURAL ICONOGRAPHY AND INSANITY

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INTRODUCTION

From Euripides to Shakespeare to Hitchcock, criminal madness has played a central role in the most popular and influential media of the day.¹ This is, perhaps, not surprising. Not only is criminal madness an intrinsically powerful melodramatic plot device, it touches upon fundamental social and psychological issues central to cultural conceptions of justice, proper social organization, and the self. Criminal madness also has posed a hard problem for law, evidenced by the timeless controversy over the boundaries of criminal responsibility, the basic meaning of the insanity defense, and the broader problem of what to do with people whose mental, intellectual, or psychological attributes diminish their ability to abide by the law.

There is a vast literature tracing, debating, and analyzing the legal tests brought to bear by judges and juries to determine if a criminal defendant is legally insane and hence not responsible for his or her criminal conduct. Far

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1. See, for example, EURIPIDES, *MEDEA* (John Harrison trans., Cambridge Univ. Press 1999), in which Medea murders her children to avenge a marital betrayal; WILLIAM SHAKESPEARE, *OTHELLO* act 4, sc. 1, in which an arguably psychopathic Iago induces Othello to kill his beloved Desdemona in a fit of jealous madness; and, of course, Hitchcock’s *PSYCHO* (Shamley Prods. 1960), discussed *infra*.

less has been written, however, about the cultural iconography of criminal madness—that is, the array of images, narratives, and symbols that popular culture deploys to enable it to tell stories about the kinds of disturbances to the social order that result from “madness” (however that concept is defined).² That omission deserves redress. One of the assumptions of this Article—and one shared by those working in the growing field of law and culture studies—is that the development and transformation of cultural iconography does not play out in a vacuum any more than the development and transformation of “law.” Obviously, neither popular culture nor law would make any sense understood as a purely autonomous phenomenon. What is perhaps less obvious is the possibility that important insights about the law—specifically, the law of criminal madness—can be gleaned from the evolution of its cultural iconography.³ What follows is an effort to trace the iconography of criminal madness by reference to popular cinema and an attempt to link it with the law’s development over the same span. Part I provides some prefatory observations about the relation of film and culture to law. Part II explores the depiction of criminal madness in the 1930s, primarily through the monster movies of the era. Part III describes the growing embrace of psychological and psychiatric theories in midcentury cinema, which occurred precisely during a period in which the insanity defense was liberalized and constitutional checks on the state’s power to institutionalize mad criminals were recognized. Finally, Part IV examines dramatic post-1970s changes in cinematic portrayals of criminals, the criminal justice system, and mad criminals, and explores ways in which the new iconography of criminal madness contributed to a dramatic shrinkage of the rights of mentally ill offenders.

I. CRIMINAL MADNESS AND CULTURAL ICONOGRAPHY

There are ample reasons to believe both that changes in law reflect changes in popular values, as well as beliefs, interests, ideas, stereotypes, attitudes, preconceptions, and fears, and that those changes, in turn, are reflected in, and shaped by what I refer to as “cultural iconography.” Before proceeding, let me

2. I use the term “madness” in this Article as a general, nontechnical reference to the numerous ways in which individuals may manifest some type of moral, emotional, cognitive, or volitional deviance. *See generally* NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* 1-2 (1982) (explaining that reference to “madness” is preferred to avoid more technically precise terminology).

3. That, however, is one of the strongest claims made by law and culture theorists. *See* Robert Post, *Introduction* to *LAW AND THE ORDER OF CULTURE*, at vii, vii (Robert Post ed., 1991) (explaining that “[t]he realization that social order requires the mediation of social meaning . . . has empowered legal scholars to proceed on the assumption that the creation of legal meaning—‘jurisgenesis’—takes place always through an essentially cultural medium” (internal quotation marks omitted)); Austin Sarat & Jonathan Simon, *Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, in *CULTURAL ANALYSIS, CULTURAL STUDIES, AND THE LAW* 1, 14 (Austin Sarat & Jonathan Simon eds., 2003).

first clarify what I mean by that phrase. If iconography is understood as “pictorial material relating to or illustrating a subject,” or “the traditional or conventional images or symbols associated with a subject,”⁴ then “cultural iconography” might be understood as the visual or symbolic representation of particular subjects through the main or popular cultural media.⁵ Taking an iconographic approach to the study of law and film means paying special attention to the physical aspects of actors and characters and to imagery depicting the milieu in which a narrative is situated.⁶ It assumes that a careful analysis of the pictorial or symbolic imagery associated with particular phenomena in popular cinema provides insight into the treatment of those same subjects when they become the subject of law.

Scholars working in the area of law and film, or law and culture more broadly, need not assume that law is in any direct sense the *product* of cinematic or cultural imagery. Certainly, few law and culture scholars would suggest that any neat causal arrows can be drawn, and I am not making such a claim here.⁷ Indeed, it may be that cultural iconography more often is a product rather than a producer of law. Perhaps the strongest and most accurate description of the causal relationship between culture and law is captured in the notion of the “feedback loop.”⁸ Cultural iconography is influenced by law, and law is influenced by cultural iconography in a kind of endless process of production and reproduction. Although the idea of feedback loops suggests causal bidirectionality, we can hypothesize a number of quite plausible

4. *Iconography*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 615 (11th ed. 2004).

5. The iconography of madness has received extended focused treatment. *See, e.g.*, MICHEL FOUCAULT, *MADNESS AND CIVILIZATION* (1965); SANDER L. GILMAN, *SEEING THE INSANE* (1982). Gilman describes five iconographical archetypes of social deviance visible as early as the Middle Ages—the maniac, the idiot, the melancholic, the wild man, and the possessed. *Id.* at 2.

6. For an example of work that employs an iconographic approach to the study of law and film, see Steve Greenfield, Guy Osborn & Peter Robson, *Genre, Iconography and British Legal Film*, 36 U. BALT. L. REV. 371, 385-86 (2007) (discussing iconographic approach to study of law films and contrasting with approaches that focus primarily on character, plot, and theme).

7. *See* Elayne Rapping, *Television, Melodrama, and the Rise of the Victims’ Rights Movement*, 43 N.Y.L. SCH. L. REV. 665, 685 (2000) (stating that “media . . . tend to both reflect and reinforce dominant views and agendas in ways which are quite complex”); Robert Reiner, *Media-Made Criminality: The Representation of Crime in the Mass Media*, in THE OXFORD HANDBOOK OF CRIMINOLOGY 302, 302 (Mike Maguire et al. eds., 4th ed. 2007) (noting difficulties of establishing causal relationships between media images and social or cultural effects).

8. *See, e.g.*, NICOLE RAFTER, *SHOTS IN THE MIRROR: CRIME FILMS AND SOCIETY*, at viii (2d ed. 2006) (describing crime films and society as “engaged in a feedback loop of endless, mirrorlike reflections”). As one scholar has observed, movies “are neither a direct cause nor an unmediated reflection of their audience’s attitudes and activities, although there is a sense in which they are simultaneously both, precisely because they are constituents of the process of producing and reproducing culture.” ANDREW TUDOR, *MONSTERS AND MAD SCIENTISTS: A CULTURAL HISTORY OF THE HORROR MOVIE* 212 (1989).

accounts in which culture does have a unidirectional causative impact on the shape of law in general, and of insanity law in particular.

For starters, popular culture is a source of information and competes with other informational sources—schools, churches, social groups, the “street,” parents, and, of course, viewers’ personal experiences—in influencing popular beliefs or conceptions. However, popular culture has an advantage over other informational sources in its universality and pervasiveness. All other informational sources are parochial and anecdotal. Popular culture, in contrast, is international in scope and, if not wholly systematic in its presentation, purports to present a coherent worldview.⁹ Because it implicitly purports to show the world “as it is”—indeed, the narrative conventions of dramatic fiction require a plausible construction of plot, character, and motive to enable the viewer to at least momentarily suspend her disbelief¹⁰—it likely has the greatest impact on the public’s understanding of unfamiliar topics, ones which most people don’t frequently encounter in their daily lives and about which they lack alternative information sources. Some topics, such as the criminal justice system, are pervasively the subject of popular media and constitute the primary source of information for the vast majority of people.¹¹ Most people have little exposure to criminals and even less to do with persons who are “mad” or “insane.” It would not be surprising, therefore, if media images of criminal madness—a popular and recurrent subject of film and television—have a particularly powerful impact on the public’s understanding of those subjects.¹²

The “public” or “popular” view of criminal madness is manifested in law in a variety of ways. First, popular views matter because law, or more precisely, *laws* are the product of a majoritarian political process. Informed or

9. See Ray Surette, *Prologue: Some Unpopular Thoughts About Popular Culture*, in POPULAR CULTURE, CRIME, AND JUSTICE, at xiv, xvii (Frankie Y. Bailey & Donna C. Hale eds., 1998) (explaining that popular culture is one of the main engines of social construction because it “contains a common, shared set of world knowledge that is pervasively distributed via the mass media”).

10. See, e.g., Diane Waldman, *A Case for Corrective Criticism: A Civil Action*, in LAW ON THE SCREEN 201, 202 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2005) (arguing that as result of Hollywood conventions “[f]ilm reception is obsessed with plausibility”).

11. See Kenneth D. Tunnell, *Reflections on Crime, Criminals, and Control in Newsmagazine Television Programs*, in POPULAR CULTURE, CRIME, AND JUSTICE, *supra* note 9, at 111, 111 (“[M]ost Americans learn of crime and criminals only through the media”); see also Katherine Bennett, W. Wesley Johnson & Ruth Triplett, *The Role of the Media in Reintegrative Shaming: A Content Analysis*, in POPULAR CULTURE, CRIME, AND JUSTICE, *supra* note 9, at 142, 142 (“The powerful influence of the media on the public’s beliefs, attitudes, and practices is generally acknowledged.”).

12. See Kevin Jon Heller, *The Cognitive Psychology of Mens Rea*, 99 J. CRIM. L. & CRIMINOLOGY (forthcoming 2009) (manuscript at 26-27, 54) (citing Jeffrey W. Sherman, *Development and Mental Representation of Stereotypes*, 70 J. PERS. & SOC. PSYCHOL. 1126, 1127 (1996)), available at <http://ssrn.com/abstracts=1155304>.

not, legislators draft and enact laws in response to expectations about how those laws will be perceived by voters. If voters' preferences and concerns are shaped by popular culture generally, and more specifically, by the media, then so will be the penal code.¹³ How the media depicts subjects of law ultimately shapes both the content of law and its reach; it draws—or at least impacts the drawing of—the most critical legal distinctions, including who is “normal,” what conduct is punishable, and where and for how long criminally irresponsible individuals are quarantined.

Equally important, application of those distinctions in particular cases requires individual jurors to infuse sterile legal rules with concrete meaning, and those jurors will be drawn from and be representative of that same public. Concerns that jurors are unduly influenced by culture, and especially by the popular media, are as old as popular culture itself, and the recent highly publicized concern with the so-called “CSI effect” is only the latest iteration of the theme.¹⁴ In being asked to figure out “what happened” in any given case, jurors necessarily use “cultural knowledge,” which itself is partially constructed by the media, “to orient and guide their narratives about what happened.”¹⁵ These concerns have been given special emphasis in the context of legal standards governing the treatment of mentally ill criminals. Countless scholars have observed that jurors' preconceptions about mental illness, criminality, and their interplay are almost entirely a product of popular media imagery.¹⁶ To the

13. Of course, who determines what “the media” shows is quite complicated. Politicians seek to control the media's agenda as much as respond to it. Richard Nixon's 1968 political campaign, which politicized the issue of crime, almost certainly had a major impact in the media's depiction of crime. With its use of the infamous “Willie Horton” TV commercials, the Bush campaign played on strong iconographic connections embedded in popular culture to help defeat Michael Dukakis in 1988.

14. See, e.g., Simon A. Cole & Rachel Dioso-Villa, *CSI and Its Effects: Media, Juries, and the Burden of Proof*, 41 NEW ENG. L. REV. 435 (2007) (discussing CSI effect and attempting to empirically measure its strength). In the 1960s, lawyers were concerned about a “Perry Mason syndrome.” See Michael Mann, Comment, *The “CSI Effect”: Better Jurors Through Television and Science?*, 24 BUFF. PUB. INT. L.J. 211, 220 n.36 (2006) (describing a case in which a juror's decision was based upon the criminal defense lawyer's failure to “measure up to the fictional Perry Mason” because he did not “get [the prosecution's key witness] to confess” upon cross-examination).

15. Kim Lane Scheppele, *Facing Facts in Legal Interpretation*, in LAW AND THE ORDER OF CULTURE, *supra* note 3, at 42, 63; see also *id.* at 62 (noting that “construction of ‘what happened’ is infused with implicit assumptions and detailed knowledge that ‘goes without saying’ all the way down”).

16. See, e.g., MICHAEL L. PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* 172 (1994) (“Media depictions rely on stereotypes and distort images of mental illness . . .”); *id.* at 65-66 (noting portrayal of mental illness in popular films is inconsistent with current state of knowledge regarding mental illness and contributes to stigmatization of psychiatric patients); COREY J. VITELLO & ERIC W. HICKEY, *THE MYTH OF A PSYCHIATRIC CRIME WAVE: PUBLIC PERCEPTION, JUROR RESEARCH, AND MENTAL ILLNESS* 61 (2006) (stating that “media are the primary source of information regarding mental illness”); Norman J. Finkel, *Achilles Fuming, Odysseus Stewing, and Hamlet Brooding: On the Story of the Murder/Manslaughter Distinction*, 74 NEB. L. REV. 742, 777 (1995) (stating that media is a

extent that those preconceptions are erroneous, and most agree that they often are, informed or reasonable handling of mental illness, the insanity defense, and the criminally insane becomes substantially more difficult.¹⁷ Even if legal rules are judiciously crafted, distorted popular preconceptions can significantly limit the effective implementation of formal legal rules.¹⁸

In at least some areas of law, cultural preconceptions not only influence the application of legal standards, they may supplant them altogether. This phenomenon has been documented by researchers who, after studying the impact of different insanity tests on jury decision making, have consistently concluded that the actual legal formulations do not make much of a difference.¹⁹ Jurors tend to decide cases consistently regardless of the specific legal standards that supposedly govern their decision making. If “official” legal formulations do not actually matter, jurors must draw upon some other set of rules. It may well be that legal rules in at least some contexts are functionally drafted and enacted not through the formal political or judicial process but rather through some sort of informal cultural consensus-building mechanism. If so, insanity law may in a very direct sense be a cultural artifact, a product of the collective, extralegal understanding of criminal responsibility.

In addition, perhaps to an extent not fully appreciated by lawyers and legal scholars, court decisions tend to follow popular opinion.²⁰ This is true for

primary source from which jurors acquire prototypes of crimes and criminals).

17. See Donald H.J. Hermann, *The Insanity Defense*, 44 OHIO ST. L.J. 987, 992 (1983) (book review) (noting that “researchers concluded that the false public perceptions [about prevalence and success of insanity defense] were a result of distorted media reporting, reasoning that the public’s awareness of the criminally insane was dependent on the media and that ‘[w]hen such dependence is coupled with selective reporting, and/or distorted dramatizations, false perceptions are developed’” (quoting Henry J. Steadman & Joseph J. Cocozza, *Selective Reporting and the Public’s Misconceptions of the Criminally Insane*, 41 PUB. OPINION Q. 523 (1978))).

18. See PERLIN, *supra* note 16, at 350 (“[P]ublic attitudes toward crime and mental illness ‘inevitably limit the impact of any legal rule’” (quoting ABRAHAM S. GOLDSTEIN, *THE INSANITY DEFENSE* 95 (1967))).

19. See *id.* at 563-64 (summarizing research and concluding that “despite recurrent, heated debate about the language of insanity defense standards, the test of insanity ultimately selected seems to make no difference to jurors”); Jennifer L. Skeem & Stephen L. Golding, *Describing Jurors’ Personal Conceptions of Insanity and Their Relationship to Case Judgments*, 7 PSYCHOL. PUB. POL’Y & L. 561, 604 (2001) (stating that “jurors construe case facts and render verdicts” on the basis of “complex, multifaceted prototypes of insanity that cannot be reduced to legal tests of insanity or to psychiatric diagnoses”).

20. Recent scholarship has exposed the myth that courts operate in any real “counter-majoritarian” way. See, e.g., David S. Law & David McGowan, *There Is Nothing Pragmatic About Originalism*, 102 NW. U. L. REV. 86, 100 (2007) (observing that empirical studies suggest that the Supreme Court’s actions “are more often in sync with the general public than those of the elected branches”); *id.* at 99 (citing Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2606 (2003)); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 91-95 (1993); see also PERLIN, *supra* note 16, at 201 (noting the Supreme Court’s reluctance to contradict popular

several reasons, including that public opinion is essential to the legitimacy and efficacy of courts, and that the composition of courts is strongly affected by electoral politics.²¹ If media imagery shapes popular opinion, then that imagery will also inevitably affect how courts decide cases.

Research into cognitive psychology also suggests that media imagery affects judges and jurors because people tend to believe facts that are consistent with their prior beliefs.²² Common cognitive constructs, including confirmation bias and the availability and representativeness heuristics, predispose people to beliefs that accord with, or are heavily influenced by, their prior experiences.²³ If both judges' and jurors' initial exposure to criminal madness is through popular media, their perceptions about the facts in individual cases are likely to be influenced by those earlier exposures.²⁴ Media imagery might subconsciously influence which facts seem important to a legal decision maker. It might even explain why some propositions strike a judge as implausible, while others simply seem like "common sense."

opinion); JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* 8, 14, 210 (2006) (same).

21. Majoritarian views are expressed in the selection of judges. Majority views obviously have an impact where judges are elected. *See* Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1275 (2008) (noting that "[r]ecent data appear to corroborate the assumption that elected judges are more likely to align their decision-making with popular preferences than appointed judges, and to that extent are less independent"). But judicial appointments are also driven by politics, and newly elected or appointed judges likely share the views of the electoral majority, especially those views the majority deems particularly important.

22. *See* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1594 (2006) (discussing research on confirmation bias demonstrating that "[w]hen testing a hypothesis's validity, people tend to favor information that confirms their theory over disconfirming information"); Joshua Klayman & Young-Won Ha, *Confirmation, Disconfirmation, and Information in Hypothesis Testing*, 94 PSYCHOL. REV. 211 (1987); *see also* RICHARD K. SHERWIN, *WHEN LAW GOES POP* 25 (2000) ("If we've seen or heard it before, it's easier to understand and believe when we see or hear it again in court.").

23. The availability heuristic describes the tendency of people to predict the likelihood or probability of events by using examples that readily come to mind. *See* Jeffrey O'Connell & Joseph R. Baldwin, *(In)Juries, (In)Justice, and (Il)Legal Blame: Tort Law as Melodrama—or Is It Farce?*, 50 UCLA L. REV. 425, 434 (2002). "Confirmation bias" refers to the tendency to give greater credibility to evidence that is consistent with preexisting beliefs and to discredit evidence that contradicts those beliefs. *See* Robert A. Prentice, *Chicago Man, K-T Man, and the Future of Behavioral Law and Economics*, 56 VAND. L. REV. 1663, 1729 n.352 (2003). The "representativeness heuristic" refers to the tendency to focus on the degree to which an item matches a stereotypic or representative image associated with a particular category. *Id.* at 1684 n.93.

24. *See* M. Gregg Bloche, *The Invention of Health Law*, 91 CAL. L. REV. 247, 278 n.107 (2003) (speculating that the popular view regarding schizophrenia can be explained by "availability" or "representativeness heuristic," in that "[f]or those without personal experience with schizophrenia, media and other popular stereotypes of homeless and other profoundly dysfunctional people with this disease probably play a large role in shaping impressions").

Finally, in less easily definable but more definitive ways, popular cultural attitudes and assumptions can translate into differences in the ways that legal problems are conceptualized, or even recognized. As Lawrence Friedman has observed:

In society, there are general ideas about right and wrong, about good and bad; these are templates out of which legal norms are cut, and they are also ingredients from which song- and script-writers craft their themes and plots. As general social norms shift over time, themes of the legal system shift with them; and so too of popular culture. Art, sub-art, and law move in parallel directions—more or less.²⁵

Over the course of the twentieth century, changes in public attitudes toward persons with mental illness in such areas as standards for institutionalization and the availability of the insanity defense mirrored larger changes in public attitudes toward the competency of behavioral scientists, the limits of social science more broadly, and the efficacy of social reform.²⁶ This larger narrative, which is the product of culture in the most expansive sense (indeed, it may ultimately *be* culture), strongly determines the general trajectory, if not the specific details, of the path of the law.²⁷

Although popular culture in this larger sense is obviously the product of a wide variety of influences, this Article focuses on one particularly potent source of cultural iconography: popular cinema. During the first half of the twentieth century, film was the only mass visual medium.²⁸ After 1950, film was forced to share that title with television, and beginning in the 1990s, with video games and the Internet. Nonetheless, even today, Hollywood exerts a powerful grip on the popular imagination. As one critic has noted, “[w]ith their bigger-than-life impact on rapt, passive spectators spellbound in the dark, movies are peculiarly well suited to translate social values into felt needs that seem as authentic as the memories of childhood. . . . [W]e tend to accept the frames of reference they supply.”²⁹ It makes sense to pay attention to popular culture’s treatment of legal subjects, because, as one scholar has argued, those

25. Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1589 (1989).

26. See Robert Burt, *Cruelty, Hypocrisy, and the Rehabilitative Ideal in Corrections*, 16 INT’L J. L. & PSYCHIATRY 359, 364 (1993).

27. This idea underlies Oliver Wendell Holmes’s famous claim that the path of the law is not logic, but experience. See also Sarat & Simon, *supra* note 3, at 2-3 (describing the historical “death of the social”—that is, a “general decline in confidence in virtually every institution and program of reform, or knowledge gathering, attached to the social” in contemporary culture).

28. Film was immensely influential during this period. As one scholar noted, in 1939 approximately 85 million Americans took in a film each week, making film audiences at least as important an influence on film style and content as “the artists and technicians in Hollywood.” Eric Smoodin, *“Everyone Went Wild over It”: Film Audiences, Political Cinema, and Mr. Smith Goes to Washington*, in *LAW ON THE SCREEN*, *supra* note 10, at 231, 237-38 (quoting Margaret Farrand Thorp).

29. PETER BISKIND, *SEEING IS BELIEVING* 2 (1983).

who influence the symbol-creating and symbol-defining engine of popular culture “create the social reality of that society.”³⁰ With that in mind, the Article recounts the historical evolution of the figure of the mad criminal in popular cinema parallel to the treatment of the mad criminal in the law.

The films discussed below were selected based on three criteria. First, I attempted to identify all feature films that were released in the United States during the period 1930-1990 in which criminals were depicted as irrational actors.³¹ Many crime films released during this period depict crime as economically rational conduct. The gangster films of the 1930s, for instance, depict gangsters as basically rational economic actors. Films about great bank and train robberies do the same. Although such films are an important source of cultural iconography about crime and criminals, they do not directly concern the topic of this study—mad criminals—and thus were largely excluded from consideration. Second, I attempted to choose films that were significant box-office successes.³² The point of the study is to elucidate the role of widely viewed cinematic imagery in shaping legal norms, and as such, films that may have been artistically significant but that reached few viewers were excluded. Finally, within this class of films, I placed special emphasis on films that pioneered new genres, subgenres, or recognizable film formulas, and less emphasis on films that fell within well-established preexisting genres or which, for whatever reason, failed to make a noticeable impact on cinematic fashion or to inspire others to adopt their formulas.³³ The main films discussed in this

30. Surette, *supra* note 9, at xxiii.

31. Although I canvassed as many sources as I could in attempting to identify the proper set of films to include, I relied particularly heavily on several works that purport to provide a comprehensive or encyclopedic review of various film genres. Particularly helpful were JOHN MCCARTY, *PSYCHOS: EIGHTY YEARS OF MAD MOVIES, MANIACS, AND MURDEROUS DEEDS* (1986); TOM MILNE & PAUL WILLEMEN, *THE ENCYCLOPEDIA OF HORROR MOVIES* (Phil Hardy ed., 1986); and *THE BFI COMPANION TO CRIME* (Phil Hardy ed., 1997). Other helpful sources included CARLOS CLARENS, *AN ILLUSTRATED HISTORY OF THE HORROR FILM* (1968); and EDDIE MULLER, *DARK CITY: THE LOST WORLD OF FILM NOIR* (1998). Some specialized works were also useful. Nicole Rafter's *Shots in the Mirror* was especially insightful. See RAFTER, *supra* note 8. Jacqueline Noll Zimmerman's *People Like Ourselves: Portrayals of Mental Illness in the Movies* and Michael Fleming and Roger Manvell's *Images of Madness: The Portrayal of Insanity in the Feature Film* also were helpful resources in identifying films that dealt with mental illness. See MICHAEL FLEMING & ROGER MANVELL, *IMAGES OF MADNESS: THE PORTRAYAL OF INSANITY IN THE FEATURE FILM* (1985); JACQUELINE NOLL ZIMMERMAN, *PEOPLE LIKE OURSELVES: PORTRAYALS OF MENTAL ILLNESS IN THE MOVIES* (2003). Undoubtedly, I have omitted some important films from consideration.

32. Historical box-office data is available at <http://www.the-numbers.com/movies>, and I relied on that data to narrow the film set.

33. As discussed below, *Frankenstein*, *Dracula*, and *Dr. Jekyll and Mr. Hyde* all sparked numerous sequels and spin-offs. Similarly, *PSYCHO*, *supra* note 1, pioneered a new genre of psycho-slasher picture that was much emulated in subsequent years. The same is true for the two genres considered in Part IV—the vigilante pictures inspired by DIRTY HARRY (The Malpaso Co. 1971), and the slasher genre popularized by HALLOWEEN (Compass Int'l Pictures 1978). Fritz Lang's *M* (Nero-Film AG 1931) is an example of a film

Article all, by and large, met these criteria, in that they featured transgressive villains or protagonists who were identifiably “mad” in some way, were very popular at the box office, and inspired sequels and spin-offs.

As the discussion below demonstrates, although criminal madness has provided a recurrently popular film narrative, the types of popular films in which criminal madness was explored or depicted have varied over time. “Excavation” of the history of this image in popular film is intended to elucidate changes in popular stereotypes regarding mad criminals and of the law’s capacity to protect society from them. In so doing, this exploration provides striking evidence that cultural iconography is a useful referent of legal understanding and likely plays a critical role in channeling the ultimate path of the law.

II. THE AGE OF EUGENICS: CRIMINAL DEGENERATES, SEX FIENDS, AND IRRESISTIBLE IMPULSES

My study begins in the 1930s, a period in which criminal madness was predominantly depicted metaphorically in the guise of movie monsters.³⁴ Those monster movies were extremely successful, and a relatively small cast of monsters, including Dracula, the personality-overloaded Dr. Jekyll/Mr. Hyde, and Dr. Frankenstein’s creature,³⁵ claimed a virtual monopoly on audiences’ attentions. Frankenstein and kin were featured in at least six major studio films released between 1931 and 1944;³⁶ Dracula and spawn also appeared in at least

that otherwise might have received more emphasis in my study, but did not because Lang’s picture, as a foreign language film, necessarily reached a more limited audience (although it was reasonably successful in its U.S. release) and, as one of the few films ever to deal directly and in a sophisticated way with the morality of the insanity defense, did not generate a recognizable genre or series of sequels, and seems to me to be something of an outlier in film history.

34. The choice to begin the study in the 1930s is, obviously, somewhat arbitrary. One could usefully examine cinematic representations in earlier films. The 1930s was chosen as a starting place because it marked the beginning of the “talking picture” era, and because earlier films are relatively harder to access.

35. The 1930s and early 1940s horror films were largely populated with monsters who were basically derivatives of Frankenstein and Dracula, but also introduced other monsters, most importantly, the werewolf, *see, e.g.*, *THE WOLF MAN* (Universal Pictures 1941); *WEREWOLF OF LONDON* (Universal Pictures 1935); the zombie, *see, e.g.*, *WHITE ZOMBIE* (Edward Halperin Prods. 1932); and the mummy, *see, e.g.*, *THE MUMMY’S CURSE* (Universal Pictures 1944); *THE MUMMY’S GHOST* (Universal Pictures 1944); *THE MUMMY’S TOMB* (Universal Pictures 1942). Later films from this era brought several of the stock monsters together. *See, e.g.*, *HOUSE OF FRANKENSTEIN* (Universal Pictures 1944) (featuring Dracula, Wolf Man, a mad scientist, and a hunchback, as well as Frankenstein).

36. In addition to Whale’s 1931 release, *FRANKENSTEIN* (Universal Pictures 1931), spin-offs included *BRIDE OF FRANKENSTEIN* (Universal Pictures 1935); *FRANKENSTEIN MEETS THE WOLF MAN* (Universal Pictures 1943); *HOUSE OF FRANKENSTEIN*, *supra* note 35; *SON OF FRANKENSTEIN* (Universal Pictures 1939); and *THE GHOST OF FRANKENSTEIN* (Universal Pictures 1942).

six.³⁷ *Dr. Jekyll and Mr. Hyde* was remade only ten years after its original release.³⁸ These three cinematic projects were similar in a variety of ways. All were adaptations of nineteenth-century novels. All had proved their dramatic potential in earlier theater stagings and film productions.³⁹ And all explored, in one way or another, the social upheaval wrought by the intermixing of tradition and modernity. In addition, and with remarkable precision, the villains of these three film franchises mapped the terrain of criminal madness and encoded the legal agenda confronting lawmakers and judges in their efforts to deal with it. During a decade which saw the nation rent by depression and on the verge of war, these films put a face to the great anxieties of the age and helped America to more clearly visualize its monsters.

Of the three, *Frankenstein's* monster was arguably the most paradigmatic.⁴⁰ Although originally conceived by Mary Shelley in 1818,⁴¹ the *Frankenstein* that captured America's imagination in James Whale's 1931 production was unquestionably of its time. Pieced together out of the body parts of the dead and brought to life through the electrical wonders of modern science, *Frankenstein's* monster was, like the depression and the wars, quite literally a "man-made" problem. It was also a criminal problem. Upon escape from captivity, *Frankenstein's* monster commences a crime spree that would have justified an indictment for murder, child murder, attempted rape, and child molestation.⁴² In Shelley's novel, *Frankenstein's* creature was not inherently

37. See *DRACULA* (Universal Pictures 1931); *DRACULA'S DAUGHTER* (Universal Pictures 1936); *HOUSE OF DRACULA* (Universal Pictures 1945); *MARK OF THE VAMPIRE* (Metro-Goldwin-Mayer 1935); *SON OF DRACULA* (Universal Pictures 1943); *THE RETURN OF THE VAMPIRE* (Columbia Pictures Corp. 1944) (giving Dracula a werewolf assistant). Dracula also was one of the several monsters appearing in *HOUSE OF FRANKENSTEIN*, *supra* note 35, and *Frankenstein and Dracula* also appeared in numerous other lesser spin-offs during the period. See CLARENS, *supra* note 31, at 98-103.

38. All three Victorian novels on which these movies were based gave birth to remarkably abundant progeny. One writer estimates that at least "sixty-nine films" are based on Robert Louis Stevenson's *The Strange Case of Dr. Jekyll and Mr. Hyde*. See Virginia Wright Wexman, *Horrors of the Body: Hollywood's Discourse on Beauty and Rouben Mamoulian's Dr. Jekyll and Mr. Hyde*, in *DR. JEKYLL AND MR. HYDE AFTER ONE HUNDRED YEARS* 283, 283 (William Veeder & Gordon Hirsch eds., 1988).

39. *Dracula* was featured in *NOSFERATU* (Jofa-Atelier Berlin-Johannisthal 1922). *Frankenstein* was the subject of an early short released by the Edison Manufacturing Company in 1910. *Dr. Jekyll and Mr. Hyde* was released in a short version in 1912, and again in 1920 in a popular production starring John Barrymore. See *DR. JEKYLL AND MR. HYDE* (Thanhouser Film Corp. 1912); *DR. JEKYLL AND MR. HYDE* (Famous Players-Lasky Corp. 1920).

40. I will generally refer to *Frankenstein* and *Frankenstein's* monster interchangeably, as has become the cultural norm, even though that usage is not technically accurate.

41. Or "Mrs. Percy B. Shelly," according to the film credits for James Whale's 1931 version.

42. In the film version of the story, the monster kills Dr. *Frankenstein's* hunchbacked lab assistant, attempts to rape Dr. *Frankenstein's* fiancée, murders a little girl, and attempts to murder his creator as well. Although child molestation was not explicitly depicted, it was suggested by the image of the monster "playing" with a little girl by a mountain lake. That

evil, but rather was driven to criminality only after being socially rejected by its creator.⁴³ In contrast, Whale's film attributed the monster's criminality to its biology—Dr. Frankenstein and his assistant construct the monster from body parts stolen not only from graves, but, ominously, from gallows. Most significant was the provenance of the creature's brain—a medical school specimen taken from a degenerate criminal and used to teach students the scientific differences between “normal” and “abnormal” brains.⁴⁴ The accidental choice of a degenerate brain—Frankenstein's assistant had initially grabbed a normal brain but dropped it, forcing him to take the only other specimen available—was the chance occurrence that sealed the experiment's grisly fate. As British film historian Sir Christopher Frayling notes in his commentary to the film,⁴⁵ the plot detail concerning Frankenstein's “degenerate brain” was newly devised. Not only was it not part of Shelley's original story, it dramatically changed the entire meaning of the Frankenstein parable. No longer was the story about the Promethean tragedy of man's hubris in attempting the God-like task of creating life; it instead provided a lesson in the importance of good eugenic hygiene.

In adopting the “degenerate brain” plot device, the film merged the mythical monster with the supposedly “scientific” degenerate criminal that had long been part of the criminological discourse. Although the father of the theory of the “born criminal,” Cesare Lombroso, was a nineteenth-century figure, his work continued to find important echoes among prominent criminologists of the 1930s.⁴⁶ Lombroso, who for many years served as a prison physician, developed his theories based on his studies of thousands of Italian prisoners in the course of seeking a method to quickly diagnose

suggestion was actually inadvertently enhanced by the censors. See DAVID J. SKAL, *THE MONSTER SHOW* 137 (1993) (explaining that although in the original version, Frankenstein is shown throwing a little girl (who had innocently invited him to pick flowers) into a lake and drowning her, at the behest of film censors, “the scene was cut for many engagements, ending with the monster reaching out for the child (and, ironically, leaving some viewers with the impression that they had been spared the spectacle of some shocking molestation)”).

43. See Eileen A. Simmons, *Frankenstein for the Twenty-First Century: An Exploration of Contemporary Issues*, 83 *ENG. J.* 30, 31 (1994) (explaining that in Shelley's novel, Victor cannot tolerate the monster's ugliness, and the monster's hate and violence is a reaction to his creator's rejection of him).

44. The biological differences between the normal brain and the abnormal brain are significant, readily visible, and—the film asserts—scientifically documented. Indeed, only a few scenes earlier, the film depicted a professor displaying those differences to his students.

45. See *FRANKENSTEIN*, *supra* note 36 (commentary accompanying DVD release).

46. See Mary Gibson & Nicole Hahn Rafter, *Editors' Introduction* to CESARE LOMBROSO, *CRIMINAL MAN* 30 (Mary Gibson & Nicole Hahn Rafter trans., 2006) (noting that the emphasis on heredity as the primary cause of crime “only grew stronger when the eugenics movement peaked in the interwar period”); see also SUSAN E. LEDERER, *FRANKENSTEIN: PENETRATING THE SECRETS OF NATURE* 44 (2002) (observing that biological determinism, as figured in the 1931 *Frankenstein* film, “was popular among Americans in the early decades of the twentieth century”).

“criminality.”⁴⁷ Although his views evolved markedly over time, the essence of Lombroso’s criminological theory contended that “born criminals” could be identified by careful study of the individuals’ physical features through the sciences of “anthropometry and physiognomy.”⁴⁸ Like many in the fields of medicine and anthropology, Lombroso believed that “physical traits constituted visible signs of interior psychological and moral states.”⁴⁹ Lombrosian theory certainly had a major impact among legal academics. Criminologists such as Harvard Law School Professor Sheldon Glueck continued to advance criminological theories based on eugenics in work published in the 1930s.⁵⁰ Indeed, Herbert Wechsler and Jerome Michael’s landmark article on homicide law—which would have a major impact on twentieth century criminal law reform⁵¹—incorporated an approach to punishment that was quite consistent with Lombroso’s theories. It especially embraced his abiding belief that punishment should “be tailored to individual criminals rather than to their crimes,” and that “the law should allow wide discretion to judges to assess the degree of dangerousness posed by each defendant as a basis for issuing the appropriate sentence.”⁵²

47. Jonathan Simon, *Positively Punitive: How the Inventor of Scientific Criminology Who Died at the Beginning of the Twentieth Century Continues to Haunt American Crime Control at the Beginning of the Twenty-First*, 84 TEX. L. REV. 2135, 2142 (2006).

48. See CESARE LOMBROSO, CRIMINAL MAN (1st ed. 1876), reprinted in LOMBROSO, *supra* note 46, at 39, 50. *Criminal Man* appeared in five different editions that varied significantly in their analysis of the causes and indications of criminality. Due to problems in translation, moreover, Lombroso’s views were frequently misinterpreted by his American readers. See Gibson & Rafter, *supra* note 46, at 3 (explaining that English language volumes published early in the twentieth century offered a “fragmentary and distorted view” of Lombroso’s work).

49. Gibson & Rafter, *supra* note 46, at 9.

50. See NICOLE HAHN RAFTER, CREATING BORN CRIMINALS 211 (1997) (describing a study authored by Sheldon and Eleanor T. Glueck and quoting the Gluecks’ conclusion that their delinquent female subjects were a “swarm of defective, diseased, antisocial misfits” appropriately subject to “wholly indefinite sentence[s]” and to release only upon determination “by experts like themselves”).

51. See Russell Dean Covey, *Exorcizing Wechsler’s Ghost: The Influence of the Model Penal Code on Death Penalty Sentencing Jurisprudence*, 31 HASTINGS CONST. L.Q. 189-92 (2004) (describing the influence of Wechsler and Michael’s article on the development of the American Law Institute’s Model Penal Code).

52. Gibson & Rafter, *supra* note 46, at 13; cf. Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1290 n.70 (1937) (noting that “[m]uch contemporary American literature, start[s] with the [Italian] Positivist premise that the character of the offender should be the primary consideration in the determination of treatment”). Even more explicit eugenic theories were advanced by Harvard anthropologist Ernest A. Hooton, who argued in *The American Criminal* that “the elimination of crime can be effected only by the extirpation of the physically, mentally, and morally unfit, or by their complete segregation in a socially aseptic environment.” RAFTER, *supra* note 50, at 211 (quoting ERNEST A. HOOTON, *THE AMERICAN CRIMINAL: AN ANTHROPOLOGICAL STUDY* 309 (1939)).

The movie's adoption of a Lombrosian etiology of crime was not accidental. Whale's Frankenstein—a big, lumbering, imbecilic killer, more “wild beast” than man—literally represented the ill effects of bad breeding. The film's makeup artist, Jack P. Pierce, explained that he studied criminology, among other subjects, to help him conceptualize the look of the character.⁵³ The physical appearance of Frankenstein's monster certainly conjured a quintessential Lombrosian image. The monster's protruding brow was intended to suggest “evolutionary regression,”⁵⁴ as were its large stature, oddly shaped cranium, and exposed forehead. Similarly, the monster's “work clothes and asphalt-spreader's boots” graphically represented the lower-class origins of the criminal degenerate class.⁵⁵

Director Rouben Mamoulian relied on similar imagery in his 1931 Hollywood adaptation of Robert Louis Stevenson's 1886 novella, *The Strange Case of Dr. Jekyll and Mr. Hyde*. Like Dr. Frankenstein, Dr. Jekyll was a man of science who, although warned of the dangers of overreaching, employed science (chemistry, in Dr. Jekyll's case) to create a monster.⁵⁶ As in *Frankenstein*, the monster created by the mad scientist turns out to harbor irrepressible criminal tendencies. Even more so than Frankenstein, Hyde was a sex fiend, a rapist, and a murderer who well illustrated Lombroso's idea that crime and madness are closely linked.⁵⁷

The physical depiction of Mr. Hyde echoed that of Frankenstein's monster. When Jekyll swallowed his potion, he underwent a mental and a physical change, like Frankenstein enacting the Lombrosian notion that criminality is not merely a state of mind or a disposition, but manifest in the physical body.⁵⁸ The physical changes that occur—Dr. Jekyll's high hairline creeps low on his forehead, the color of his skin darkens, his straight hair becomes curly, his straight and symmetrical teeth grow jagged and uneven, his brow flattens and his nose broadens—were clearly infused with racial (indeed, racist)

53. See SKAL, *supra* note 42, at 130.

54. *Id.* at 132.

55. *Id.* at 159.

56. Both films paint the laboratory in dark, gothic strokes that provides the “mad scientist” with frightening power. DR. JEKYLL AND MR. HYDE (Paramount Pictures 1931); FRANKENSTEIN, *supra* note 36.

57. See LOMBROSO, *supra* note 48, at 81 (“Few would doubt that crime is often caused by cerebral afflictions and, above all, madness.”).

58. The criminal degenerate was not only a horror film icon. Gangster films—the other major crime genre of the 1930s—portrayed criminals similarly. In SCARFACE (Caddo Co. 1932), an Al Capone-like gangster was portrayed “as a violent and lustful primitive, incapable of lawful behavior.” RAFTER, *supra* note 8, at 64. Like Frankenstein and Hyde, gangster Tony Comonte's makeup emphasized a sloping brow and heavy eyebrows to visually project the atavistic cause of his criminality. *Id.* Rafter also cites MURDER, MY SWEET (RKO Radio Pictures 1944) and BORN TO KILL (RKO Radio Pictures 1947) as similarly portraying criminals as physically apelike, “brutish” thugs and gangsters. *Id.* at 64-65.

overtones.⁵⁹ The new physiognomy followed Lombroso's description of criminals as "resembl[ing] savages and the colored races."⁶⁰ Although Dr. Jekyll initially controlled his physical transformations, he quickly lost that control, and became incapable of preventing the emergence of his baser "other" self, particularly in the face of sexual temptation. Both depiction and narrative in *Dr. Jekyll and Mr. Hyde* thus illustrated the basic Lombrosian claim that "the most horrendous and inhuman crimes have a biological, atavistic origin in those animalistic instincts that, although smoothed over by education, the family, and fear of punishment, resurface instantly under given circumstances."⁶¹

Indeed, Jekyll's transformation into Hyde unmistakably conjured the notion of criminal degeneracy. "Degeneracy," a concept which "tremendously influenced turn-of-the-century thinking about the nature of social problems," was widely understood as a biological degradation of the "germ plasm" or "blood."⁶² It manifested the "tendency to devolve to a lower, simpler, less civilized state," one that could be "brought on by immorality (e.g. drinking, gluttony, or sexual excess)."⁶³ Mamoulian defined Hyde's degeneracy through these sins—Hyde's transformation was triggered through drink and he is seen in several scenes eating gluttonously, including one scene in which he first devoured his victim's dinner and then proceeded to physically torment her. In addition, his physical regression was profoundly intertwined with his inability to contain his sexual impulses. Untethered from the controlling influence of moral restraint, Hyde was the "morally insane" sex fiend, a characterization with racial as well as criminological overtones.⁶⁴ As one commentator has observed, Hyde's monstrousness played upon popular antimiscegenationist sentiment and fear of the "black rapist"; his malevolence ultimately seems defined by his "determination to appropriate the sexuality of white

59. See Wexman, *supra* note 38, at 288 (noting that racial overtones in Mamoulian's adaptation were stronger than in previous and subsequent films, and figured in "reconstructing the prevailing ideology" of "white supremacy" of the period). But see MCCARTY, *supra* note 31, at 6 (noting, but disagreeing with, views of revisionist critics that depiction of Hyde was racist).

60. LOMBROSO, *supra* note 48, at 91. The physical transformations depicted in the film are even more consistent with late nineteenth century criminal anthropologists' descriptions of the "apelike born criminal, a monstrosity who manifested wickedness from coarse head hair to prehensile toe." RAFTER, *supra* note 50, at 7. Mamoulian explained that Hyde was intended to represent "the primitive, the animal in us," and that his make-up was designed to render Hyde as "the Neanderthal Man." MCCARTY, *supra* note 31, at 6. A *Time* reviewer described Hyde's visage as "a sabre-toothed baboon with pig eyes and a tassel of primeval hair." Wexman, *supra* note 38, at 284.

61. LOMBROSO, *supra* note 48, at 91.

62. RAFTER, *supra* note 50, at 36.

63. *Id.*

64. "Moral insanity" is a nineteenth-century notion describing "the condition of persons who lacked a 'moral sense, or rather, possessed only a warped one, despite their intellectual awareness of conventional moral values.'" PERLIN, *supra* note 16, at 42 (quoting Norman Dain & Eric Carlson, *Moral Insanity in the United States 1835-1866*, 117 AM. J. PSYCHIATRY 795, 795 (1960)).

womanhood.”⁶⁵ Hyde’s character thus represented the linkage between race, degeneracy, and immorality, particularly in respect to highly salient Prohibition-era cultural concerns regarding intemperance and hypersexuality that were popularly understood to be both causes and consequences of degeneration.⁶⁶

These same themes also appeared without much variation in the werewolf films, such as *Werewolf of London* and *The Wolf Man*,⁶⁷ which, like the other monster movies, were extremely popular during the decade.⁶⁸ If anything, the werewolf is an even more explicit metaphor for the mad criminal than Hyde. With his transformation into a murderous beast who prowls the streets to kill and devour his victims only when the moon is full, the werewolf is a literal instantiation of the “lunatic”—a word reflecting the traditional belief that temporary insanity might be caused by phases of the moon.⁶⁹ In both *Dr. Jekyll and Mr. Hyde* and *Werewolf of London*, the exaggerated physical changes that characterize the mad criminal: the protruding brow, hairy knuckles, and fanged teeth, for example, graphically illustrated a conception of the mad criminal as a readily identifiable biological primitive, and criminal madness itself as a physically innate inability to control one’s “uncivilized” impulses. The filmmakers efforts to exaggerate the physical deformity of the mad criminal ironically mirrored Lombroso’s own efforts to prepare engravings illustrating criminal physiognomies. As one scholar has noted, those engravings exaggerated the deformities and ugliness of their subjects, transforming photographs of rather “innocuous-looking” men through “a gradual process of deformation—and the formation of a monster.”⁷⁰

65. Wexman, *supra* note 38, at 289. The same imagery was at work in KING KONG (RKO Radio Pictures 1933), another major film of the period.

66. Immorality was thought by many to be a cause of degeneracy in that immoral conduct, such as drinking, masturbation, and promiscuousness caused physical damage to the “germ plasm” which was then inherited by the next generation. It was also a consequence of degeneracy, in that immoral and criminal conduct was thought to be caused by the degenerate’s lack of moral strength to refrain from vice. *See* RAFTER, *supra* note 50, at 36-37 (explaining the belief among late-nineteenth- and early-twentieth-century writers that degeneracy was “heritable but nonetheless susceptible to environmental influences”); *see also* PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* 8 (2008).

67. *THE WOLF MAN*, *supra* note 35; *WEREWOLF OF LONDON*, *supra* note 35; *see also* *FRANKENSTEIN MEETS THE WOLF MAN*, *supra* note 36; *SHE-WOLF OF LONDON* (Universal Pictures 1946).

68. *See, e.g.,* *WEREWOLF OF LONDON*, *supra* note 35, in which the protagonist once again is a scientist (a botanist) who, afflicted by the werewolf’s “bite,” undergoes a physical transformation akin to Hyde’s, in which hair and claws sprout on his hands, the hair on his forehead creeps closer to his eyes, his brow enlarges, and his teeth grow jagged (wolf-like, of course), after which he stalks London’s streets to prey on women.

69. *See* Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 ST. JOHN’S L. REV. 725, 782 (2004) (citing MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 33-34 (1736)).

70. Gibson & Rafter, *supra* note 46, at 23.

At least in his origins, Dracula, too, bore the physiognomy of the “born criminal.” As critics have noted, Bram Stoker’s Count Dracula “closely follows Lombroso’s description of the criminal face.”⁷¹ Indeed, the Dracula character may well have been influenced by Lombroso’s account of a criminal named “Verzeni, who liked to touch women’s necks, strangled them for sexual pleasure, eviscerated their bodies, and sucked their still-warm blood.”⁷² Notwithstanding the grotesqueness of vampirism, there is little hint of overt madness in Tod Browning’s 1931 film adaption.⁷³ With regal bearing, European diction, personal wealth, and Machiavellian planning, Dracula did not impulsively assault his victims, he seduced them. But a vampire has no remorse. To the contrary, Dracula took great pleasure in trapping his victims and robbing them of their vitality. His character presented an image of the stalking killer, his murder early in the film of a lone flower seller amidst the shadows and fog of London streets evokes images of such feared killers as Jack the Ripper.⁷⁴ Shorn of the supernatural gloss, these characteristics were clear markers of what was often referred to by nineteenth-century alienists as “moral insanity” or “moral imbecility.” A precursor to the concept of psychopathy,⁷⁵ moral insanity was understood as a “condition marked essentially by a lack of capacity for empathy and a lack of conscience.”⁷⁶ Although nineteenth-century criminology placed special emphasis on the link between “feble-mindedness” and criminality, it had long been recognized that not all types of “imbecility” or “feble-mindedness” were visible through physical stigmata. There was also a “particularly criminalistic subgroup of the feble-minded, moral imbeciles,

71. James A.W. Heffernan, *Looking at the Monster: Frankenstein and Film*, 24 CRITICAL INQUIRY 133, 147 (1997); *id.* at 147 n.51 (describing Dracula novels as expressing “a vision of the bio-medical degeneration of the race in general and the metropolitan population in particular” (quoting Daniel Pick, “*Terrors of the Night*”: Dracula and “*Degeneration*” in the Late Nineteenth Century, 30 CRITICAL Q. 75 (1988))).

72. LOMBROSO, *supra* note 48, at 83. Lombroso added that Verzeni “denied his guilt for years” and was “afflicted with cerebral atrophy and had relatives with pellagra and cretinism,” *id.*, illustrating not only the biological and hereditary causes of criminality but the close interrelationship between crime, physiognomy, and madness. *See id.* at 81.

73. DRACULA, *supra* note 37.

74. *See* STACEY ABBOTT, CELLULOID VAMPIRES: LIFE AFTER DEATH IN THE MODERN WORLD 62-63 (2007) (explaining that the Jack the Ripper allusion is reinforced by the subsequent scene of Dracula calmly walking away from the scene of attack while police whistles sound in the distance).

75. *See* Bailey Kuklin, *The Morality of Evolutionarily Self-Interested Rescues*, 40 ARIZ. ST. L.J. 453, 474-75 n.71 (2008) (explaining that psychopaths, defined as persons who understand “what it means to wrong people, to act immorally,” but for whom “this kind of judgment has . . . no motivational component at all,” was called “moral insanity” in the nineteenth century).

76. Stephen J. Morse, *Thoroughly Modern: Sir James Fitzjames Stephen on Criminal Responsibility*, 5 OHIO ST. J. CRIM. L. 505, 521 (2008). For an excellent discussion of moral insanity as it was understood in the nineteenth century, see Susanna L. Blumenthal, *The Mind of a Moral Agent: Scottish Common Sense and the Problem of Responsibility in Nineteenth-Century American Law*, 26 LAW & HIST. REV. 99 (2008).

whose intellectual defects can be discerned only by experts.”⁷⁷ This subgroup was especially threatening because of its ability to blend into society and remain undetected. While most moral imbeciles were thought to be “intellectually normal” or even “precocious,” they lacked the critical faculty of self-control over their impulses.⁷⁸ Some thus argued that moral imbecility was “much like insanity: a condition that should excuse offenders from standing trial.”⁷⁹

Lombroso described the morally insane as, among other things, “lack[ing] sentiments of affection and moral sense,” “born to savor evil and commit it,” excessively vain, and prone to “sexual perversion.”⁸⁰ Similar terms were later used to describe psychopathy, the modern heir of moral insanity. A landmark text in 1941 described the key characteristics of the psychopathic individual as including “superficial charm,” “an utter lack of remorse or shame,” the inability or refusal to accept responsibility for misfortunes inflicted on others, “pathological egocentrism,” “incapacity for love,” and a “general poverty of affect,”⁸¹ all of which could be readily ascribed to the Count. Like the morally insane generally, Dracula’s ability to control the outward signs of the compulsion that drives his criminal conduct—his literal thirst for his victim’s blood—is precisely what makes him threatening.⁸²

Sexual perversion, particularly homosexuality, is also a strong undercurrent in *Dracula* and its progeny.⁸³ With its imagery of fleshly assault, physical penetration, and fixation upon bodily fluid, vampirism quite obviously connotes sexual violation. As a type, Browning’s Dracula bears the thinly veiled profile of a sexual deviant.⁸⁴ In contrast to the bestial hypermasculinity

77. RAFTER, *supra* note 50, at 55-56.

78. *Id.* at 84.

79. *Id.* at 85 (discussing one of a series of papers published between 1879 and 1887 on moral imbecility).

80. CESARE LOMBROSO, CRIMINAL MAN (3d ed. 1884), reprinted in LOMBROSO, *supra* note 46, at 161, 215-16.

81. Paul Litton, *Responsibility Status of the Psychopath: On Moral Reasoning and Rational Self-Governance*, 39 RUTGERS L.J. 349, 369-70 (2008) (quoting HERVEY CLECKLEY, THE MASK OF SANITY: AN ATTEMPT TO CLARIFY SOME ISSUES ABOUT THE SO-CALLED PSYCHOPATHIC PERSONALITY (5th ed. 1988)).

82. The conflict between the vampire and the vampire hunters, moreover, anticipates (and metaphorically suggests) the conflict between serial killer and psychological profiler made familiar in modern police and horror genres. See, e.g., THE SILENCE OF THE LAMBS (Orion Pictures 1991). The dynamic would have been familiar to the public through press coverage of the hunt for Jack the Ripper, among other such stories.

83. See, e.g., FRANK CAWSON, THE MONSTERS IN THE MIND: THE FACE OF EVIL IN MYTH, LITERATURE AND CONTEMPORARY LIFE 98 (1995) (observing that “increasingly vampirism has been seen as a metaphor for sexuality”).

84. Nineteenth-century texts already had identified one who was morally insane as a person whose intellectual faculties appear normal but in which the “moral and active principles of the mind are strangely perverted and depraved,” rendering him incapable “of conducting himself with decency and propriety in the business of life.” J.C. PRICHARD, A TREATISE ON INSANITY AND OTHER DISORDERS AFFECTING THE MIND 4 (1835).

of Frankenstein, Hyde, and the Wolf Man, Dracula was rendered as an effeminate figure, with full red (lipsticked) lips, obsessive grooming, and an elegant diction and bearing. Indeed, Dracula's first victim—Renfield—was a man. Dracula as thinly veiled metaphor for sexual transgression thus coincided with what in the 1930s was a growing popular conflation of homosexuality and sexual deviance with psychopathy.⁸⁵

Taken together, Frankenstein, Hyde, and Dracula iconographically represented three of the most common faces of criminal madness: “imbecility” (mental retardation), psychosis, and “moral insanity” (psychopathy). Although the forms of “madness” varied, the threat posed by each was similarly rendered as a critical inability by the “monster” to master its impulses. In the language of hereditarian criminologists, their criminal violence was ultimately attributed to their “feeble inhibitions.”⁸⁶ The resulting disorder, and especially the threat of sexual transgression, demanded a communal response, one that invariably involved annihilation.

If these are the main common strands, several additional details provide further clues as to the kinds of racist, classist, and xenophobic associations that would likely have been triggered by the cultural iconography of the mad criminal during this period. Frankenstein's speechlessness (in Whale's 1931 film) or broken speech (he learns to talk in *Bride of Frankenstein*) must have resonated with anyone familiar with the broken English of Eastern European immigrants, while Dracula's origins in the Carpathian mountains further reinforced the perceived threat of corruption presented by East European immigrants.⁸⁷ The monsters' skin color (Frankenstein's green, Hyde and the Wolfman's brown) clearly reinforced the associations between race and criminal madness, while the monsters' sartorial choices evoke complex class associations (Frankenstein's work boots signifying the working class, Dracula and Hyde's capes signifying aristocratic origins).

85. See William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 IOWA L. REV. 1007, 1063-64 (1997) (explaining the popular view of the “predatory male homosexual” as the “quintessential psychopath”). See generally Susan R. Schmeiser, *The Ungovernable Citizen: Psychopathy, Sexuality, and the Rise of Medico-Legal Reasoning*, 20 YALE J.L. & HUMAN. 163 (2008) (discussing historical treatment of homosexuality as psychopathy). The linkage between sexual deviance and moral insanity, however, had a lengthy pedigree. Richard von Krafft-Ebing's highly influential book, *PSYCHOPATHIA SEXUALIS* (1886), for instance, took its title from “an 1843 work by a Russian physician, Heinrich Kaan, who envisioned sexual perversion as a variety of moral insanity.” Schmeiser, *supra*, at 192 n.104.

86. Charles B. Davenport's *THE FEEBLY INHIBITED: NOMADISM, OR THE WANDERING IMPULSE, WITH SPECIAL REFERENCE TO HEREDITY* (1915) posited that social problems were a product of inherited temperament. See LOMBARDO, *supra* note 66, at 52-53 (discussing Davenport).

87. *BRIDE OF FRANKENSTEIN*, *supra* note 36; *FRANKENSTEIN*, *supra* note 36. Indeed, the argument that Eastern European immigrants presented a threat of crime was a common part of the discourse in the popular press during the extensive debates on immigration quotas in the 1930s.

The image of the oversexed, uninhibited, and compulsive monster common to the 1930s monster movies ultimately found its way into law during a decade in which the push to eradicate the criminal degenerate class through eugenic policies achieved significant success. Advocates of eugenic policies had long argued that if “criminality is caused by an inherited biological defect,” the solution to crime is simple: impose reproductive controls on the criminal class.⁸⁸ Lombroso himself believed that long-term quarantine in “criminal insane asylums” was the “only solution” to the problem of born criminals and degenerates who could neither be cured nor reformed.⁸⁹ The foundation for the widespread adoption of such policies was laid down by the United States Supreme Court in its 1927 decision in *Buck v. Bell*.⁹⁰ In upholding the constitutionality of a Virginia statute authorizing state officials to sterilize “any patient afflicted with hereditary forms of insanity, imbecility, etc.,” Justice Holmes infamously proclaimed that “[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime . . . society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough.”⁹¹ Needless to say, *Buck v. Bell* significantly advanced the eugenic cause. As legal historian Paul Lombardo observes, “[t]he *Buck* decision was applauded in major newspapers throughout the United States; in its wake, opposition to sterilization seemed to melt away.”⁹² *Buck v. Bell* similarly cleared the path for more aggressive efforts to implement Lombroso’s proposal of warehousing criminals in asylums for the criminally insane. By the end of the 1930s, a majority of states had enacted statutes authorizing the institutionalization and sterilization of a variety of sexual psychopaths, habitual criminals, defective delinquents, and other deviant criminals or other “laws allowing operations designed to eradicate the unfit.”⁹³

Of particular note were the new so-called sexual psychopath laws. The first sexual psychopath laws were enacted in the wake of a “sex-crime panic” commencing in the late 1930s,⁹⁴ and were predicated on legislative and judicial beliefs that certain criminals could be diagnosed as “sexual psychopaths” and that it was both necessary and appropriate to indefinitely commit such persons to psychiatric institutions to protect society.⁹⁵ These statutes typically defined a

88. RAFTER, *supra* note 50, at 35.

89. LOMBROSO, *supra* note 48, at 84 (claiming that “criminal insane asylums . . . are the only solution to the eternal conflict between justice and public security”).

90. 274 U.S. 200 (1927).

91. *Id.* at 206-07.

92. LOMBARDO, *supra* note 66, at xii.

93. *Id.*

94. See Simon A. Cole, *From the Sexual Psychopath Statute to “Megan’s Law”*: *Psychiatric Knowledge in the Diagnosis, Treatment, and Adjudication of Sex Criminals in New Jersey, 1949-1999*, 55 J. HIST. MED. 292, 293 (2000) (explaining that the United States experienced a sex-crime panic beginning in 1937 and lasting, with interruption for the Second World War, until 1955).

95. Estelle B. Freedman, “*Uncontrolled Desires*”: *The Response to the Sexual*

sexual psychopath “as someone whose ‘utter lack of power to control his sexual impulses’ made him ‘likely to attack . . . the objects of his uncontrolled and uncontrollable desires.’”⁹⁶ The iconic monster from the movies of the 1930s and the iconic sexual psychopath seem here to converge on a single dominant image of the “monstrous” sex fiend;⁹⁷ it may not be coincidence that the 1930s saw the invention of the term “horror film”⁹⁸ and the beginning of a major sex-crime panic. After all, the most popular film genre repeatedly portrayed monsters as sex fiends who either lacked volitional control over their sexual impulses or who lacked moral concern. In 1937, FBI director J. Edgar Hoover declared a “war” on sex criminals and asserted that “the sex fiend . . . has become a sinister threat to the safety of American childhood and womanhood.”⁹⁹ The sexual psychopath laws were predicated on the link between biological degeneracy and sexual deviance, and followed earlier sterilization laws that appeared in the first decade of the twentieth century which, although not styled as sexual deviancy laws, all nonetheless focused primarily on sex criminals.¹⁰⁰ In mandating indefinite—and often permanent—detention for those supposedly lacking volitional control of their sexual impulses, the sexual-psychopath laws enacted the solution advocated by proponents of the “born criminal” theories, who believed that society needed to protect itself from the threat posed by mental and moral imbeciles and the criminally insane, that is, those whose criminality was innate and heritable or otherwise incurable.¹⁰¹ If the iconographic image of the sex fiend was in part constructed by its cinematic representation, one might also expect the individuals incarcerated pursuant to such laws to possess the same iconic traits as the imagined model. Empirical data does in fact confirm that the race, class, and intelligence of persons committed under these laws tended to be of the type associated with iconographic sex fiends.¹⁰²

Frankenstein in particular provided an iconic image of the “imbecilic” type of degenerate criminal, and may well have contributed to popular beliefs that the “feebleminded” were innately criminal and that eugenic policies would

Psychopath, 1920-1960, 74 J. AM. HIST. 83, 84 (1987).

96. *Id.* (quoting California, Massachusetts, Nebraska, and Vermont laws).

97. Demonstrating the power of imagery, the sex scare of the 1930s sparked a dramatic increase in arrest rates for sexual offenses even while base offense rates remained unchanged. *Id.*

98. See generally SKAL, *supra* note 42, at 161-63 (discussing the spread of the “horror film” genre during the 1930s).

99. Freedman, *supra* note 95, at 94 (quoting J. Edgar Hoover).

100. See LOMBARDO, *supra* note 66, at 23-29.

101. See, e.g., LOMBROSO, *supra* note 48, at 84 (advocating establishment of “criminal insane asylums” as “the only solution to the eternal conflict between justice and public security”).

102. See RAFTER, *supra* note 50, at 50, 218-19 (recounting the history of eugenic prisons designed to prevent “born criminals” from reproducing and finding that race, class, and intelligence influenced determinations of who qualified as a “born criminal”).

redress the problem they posed.¹⁰³ Of all the Frankenstein films, the eugenic theme was most pronounced in the wildly popular *Bride of Frankenstein*, which directly addressed the possibility of the breeding of degenerates, and which ended with the monster's suicide-murder upon its realization that the world was better off without it, its "bride," and its offspring.¹⁰⁴ The same basic iconography pervaded the 1939 adaptation of John Steinbeck's *Of Mice and Men*.¹⁰⁵ Although not a horror film, *Of Mice and Men* similarly explored what might be called, to use the language of *Buck v. Bell*, "imbecilic" criminality. The "imbecile" of the story is Lennie Small (played by Lon Chaney, Jr.),¹⁰⁶ a mentally retarded man watched over by friend/guardian George Milton. Like Frankenstein's monster, Lennie is large, unnaturally strong, and hopelessly dim-witted. George tries to keep Lennie out of trouble, but Lennie's inability to control his emotional and sexual impulses repeatedly frustrates George's efforts.¹⁰⁷ Unlike Frankenstein, however, Lennie's "essential" character was gentle and good.¹⁰⁸ Therefore, when Lennie mindlessly kills a ranch-hand's wife, Lennie's dilemma, and its resolution, is tragic rather than horrific. Still, the linkage between crime and mental retardation is assumed. The "feeble-minded" present a clear threat to civil society.¹⁰⁹

103. *Id.* at 55.

104. *BRIDE OF FRANKENSTEIN*, *supra* note 36.

105. *OF MICE AND MEN* (Hal Roach Studios 1939).

106. Interestingly, Lon Chaney, Jr., also plays the monster in several Frankenstein sequels, including *THE GHOST OF FRANKENSTEIN*, *supra* note 36, and he plays a werewolf in *THE WOLF MAN*, *supra* note 35, and *FRANKENSTEIN MEETS THE WOLF MAN*, *supra* note 36, which might further tend to underscore the audience's perception of Lennie's "monstrousness."

107. *OF MICE AND MEN*, *supra* note 105.

108. That is, unlike the early *Frankenstein* monster. In sequels, the monster becomes progressively less monstrous and more human. In *FRANKENSTEIN MEETS THE WOLF MAN*, *supra* note 36, the monster and the Wolfman both are clearly portrayed as victims of their "condition" rather than evil in themselves. Still, the *Frankenstein* sequels continued to resolve the monster's plight by killing it, even if the euthanasia was endorsed in the narrative with greater reluctance.

109. Of course, the portrayal of the "mad criminal" in *FRANKENSTEIN*, *supra* note 36, *DR. JEKYLL AND MR. HYDE*, *supra* note 56, and *DRACULA*, *supra* note 37, on the one hand, and *OF MICE AND MEN*, *supra* note 105, on the other, could not be more different in terms of the degree of empathy they engender. Frankenstein's monster is ugly and repulsive, scarred and stitched, with electrodes protruding from his neck and green-tinted skin; the monster viscerally embodies a kind of organic degeneracy. Lennie, in contrast, is portrayed as a big, goofy, simple-minded child. Unlike Frankenstein, Lennie has no innate malevolence. His criminal deeds—he kills a pet puppy and, ultimately, Curley's wife—all stem not from intentional violence but from excessively ardent petting. Yet Lennie, like Frankenstein's monster, lacks the capacity to restrain his impulses. The screams of Curley's wife frighten Lennie to lethal violence in exactly the same way that the screams of onlookers frighten Frankenstein's monster to violence. Both kill not for the sake of killing, but to quiet the screaming. The differences in their characters do not engender differences in their fates. Having killed defenseless girls, both Lennie and Frankenstein's monster are pursued by avenging mobs. In the end, both must, and indeed do, die.

In this sense, the film employs the same iconography of the “feeble-minded” monster as the monster films. *Of Mice and Men*, however, diverged in its interrogation of the appropriate societal response. To do so, the film picks up on an image common to virtually all the 1930s horror films: the transgressive criminal and the avenging mob. Figuring the monster as an intruder who destabilizes community repose, the film draws upon an arch-narrative which taught that justice can be secured only when the community bands together to exorcise the intruder from its midst. *Frankenstein* provides the clearest example of that arch-narrative, resolving the threat posed by the monster with the monster’s death in a conflagration kindled collectively by the entire town’s villagers.¹¹⁰ A similar collective response to the criminal threat provides the resolution in *Dr. Jekyll and Mr. Hyde*, which like *Frankenstein* relies upon strong visual parallels to Southern lynchings of black criminals,¹¹¹ and *Dracula*. Although *Of Mice and Men* acknowledges the righteousness of the mob’s anger, and recognizes the mob’s prerogative to respond to present danger, which takes precedence over more abstract notions of a legalistic justice, unlike its horror film precursors, it expressly questions the “justice” of mob justice. In the Western ranchlands where the film takes place, George can see no possibility for a happy outcome for Lennie. Lennie will either be rounded up by the angry, pursuing mob and lynched, or turned over to the law to spend the remainder of his days locked up “in a cage.” At least to George, the only possible response to Lennie’s predicament was the eugenic solution: euthanasia. Thus, like an old dog that was shot by a ranch hand to put it out of its misery, the film ends with an act of euthanasia: George shooting Lennie—who is oblivious both to his crime and its consequences—just before the mob can reach him.

In a sense, both *Frankenstein* and *Of Mice and Men* ask viewers to make a moral assessment of the role of volition in criminal responsibility. Were *Frankenstein*’s monster or Lennie tried in a court of law for their crimes, each might be able to successfully assert an insanity defense. It is unclear whether either character actually knew the nature or quality of his acts, or that what he was doing was wrong, as the typical *M’Naghten* standard for insanity requires. Both, similarly, might raise a claim of “irresistible impulse,” which some jurisdictions recognized as a supplement to *M’Naghten*’s “right-wrong” test where the defendant has mental disease or defect that makes him unable to control his criminal impulses.¹¹² Of course, the notion of trying *Frankenstein*’s monster seems somewhat absurd on its face. After all, monsters are not fit subjects of trial. Indeed, this is precisely the sentiment that makes the pre-*M’Naghten* “wild beast” test so intuitively appealing. The wild beast test,

110. *FRANKENSTEIN*, *supra* note 36.

111. See Wexman, *supra* note 38, at 289 (noting that the concluding sequence of *Dr. Jekyll and Mr. Hyde* “bears a sinister resemblance to a lynching”).

112. WAYNE R. LAFAVE, *CRIMINAL LAW* 375, 389 (4th ed. 2003).

articulated in the 1724 English case *Rex v. Arnold*, directed juries to acquit by reason of insanity where the defendant was “a mad man,” that is, “a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than a brute, or a wild beast, such a one is never the object of punishment.”¹¹³ Frankenstein’s monster is no more deserving of punishment than a wild beast—but those facts are unknown to the avenging mob. Lennie also, in his incapacity for self-control, is more the wild beast than the responsible man. Neither, in a legal sense, deserves to die for his crimes, but neither, the films lead us to understand, can be allowed to live—either for our sake or his.¹¹⁴

Steinbeck’s Lennie, arriving at the end of the decade of monsters, may have marked a profound change in the imagery of criminal madness. In painting a sympathetic portrait of the “feeble-minded” offender, *Of Mice and Men* suggested that the harsher solutions to the problem of criminal madness on display in *Frankenstein* and *Dr. Jekyll and Mr. Hyde* might be tempered.

That change in climate began to be felt at the Supreme Court with the commencement of a new decade. In *Skinner v. Oklahoma*, the Court essentially repudiated *Buck v. Bell*’s embrace of eugenic criminology, ruling that Oklahoma’s Habitual Criminal Sterilization Act was unconstitutional, at least as applied to Skinner, who had been convicted of stealing chickens.¹¹⁵ Although the Court predicated its ruling on equal protection concerns, it expressed unequivocal skepticism about eugenics laws, noting that “[m]arriage and procreation are fundamental to the very existence and survival of the race,” and, in an obvious nod to Nazi Germany, that “[t]he power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear.”¹¹⁶

Several of the Justices’ views in another case, *Fisher v. United States*, also signaled an increasing skepticism that death, rather than psychiatric treatment, was the appropriate communal response to the mad criminal.¹¹⁷ In many ways,

113. PERLIN, *supra* note 16, at 75 (quoting *Rex v. Arnold*, 16 How. St. Tr. 695 (1724)) (emphasis omitted). The wild-beast test has been criticized as excluding all but the most extremely dysfunctional from successfully interposing an insanity defense, even where there is substantial evidence that the defendant suffers from serious mental illness.

114. The parallel is made most explicit in *FRANKENSTEIN MEETS THE WOLF MAN*, *supra* note 36, in which actor Lon Chaney, Jr., who played Lennie in *OF MICE AND MEN*, *supra* note 105, plays the Wolf Man. In the film, Chaney befriends Frankenstein’s monster while seeking out the secrets of life and death discovered by Dr. Frankenstein, which he hopes will allow him to escape his condition by ensuring a permanent death. The town, meanwhile, seeks to find a way to kill Frankenstein’s monster—which keeps returning in sequel after sequel—for good. *FRANKENSTEIN MEETS THE WOLF MAN*, *supra* note 36.

115. *Skinner v. Oklahoma*, 316 U.S. 535 (1942). For an excellent discussion of the history of the Skinner case, see VICTORIA F. NOURSE, *IN RECKLESS HANDS: SKINNER V. OKLAHOMA AND THE NEAR TRIUMPH OF AMERICAN EUGENICS* (2008).

116. *Skinner*, 316 U.S. at 541.

117. 328 U.S. 463 (1946).

the *Fisher* case was a kind of real-life version of the criminal trial that might have been conducted had Lennie been tried rather than killed. Julius Fisher was convicted of first-degree murder for the choking and strangling death of Catherine Cooper Reardon. At trial, Fisher sought to present a diminished capacity defense, that is, that because of mental defect, he lacked capacity to premeditate and deliberate the killing. Because the District of Columbia did not recognize the defense of diminished capacity, the trial judge refused to instruct the jury that it could consider Fisher's psychiatric evidence, which concededly failed to establish criminal irresponsibility under the applicable "right-wrong" test. In affirming the conviction, a majority of the Supreme Court found no error.

The facts of the *Fisher* case are strangely similar to those in *Of Mice and Men*. Like Lennie, Fisher was a mentally handicapped man prone to fits of aggression. Psychiatrists testified at trial regarding his "psychopathic aggressive tendencies, low emotional response and borderline mental deficiency."¹¹⁸ Also like Lennie, Fisher worked a menial job—he was a church janitor. And again, like Lennie, Fisher killed a woman in an impulsive fit, employing lethal violence not with the apparent intention of killing his victim, but rather in a fit of panic triggered by his efforts to stop the victim's ceaseless screaming. As the Court recounted:

After slapping her impulsively, petitioner ran up a flight of steps to reach an exit on a higher level but turned back down, after seizing a convenient stick of firewood, to stop her screaming. He struck her with the stick and when it broke choked her to silence.¹¹⁹

At issue was the trial court's refusal to instruct jurors to consider the psychiatric evidence concerning Fisher's mental deficiencies in determining whether the homicide was deliberate and premeditated.¹²⁰ The majority was not convinced that Fisher's conviction was improper.¹²¹ Justice Frankfurter's dissent, however, foreshadowed the liberalization of mental health law that was to come.

Making arguments that could equally have been made on behalf of Lennie, Frankfurter argued that Fisher's death sentence should be vacated because, given Fisher's mental deficiencies, he could not have premeditated the killing. "Fisher was curiously unconnected with the deed, unaware of what he had

118. *Id.* at 464.

119. *Id.* at 465. Although the majority declined to overturn Fisher's conviction on grounds that such a ruling would require "a fundamental change in the common law theory of responsibility" appropriately left to the legislature or local courts, it acknowledged that "[n]o one doubts that there are more possible classifications of mentality than the sane and the insane," and speculated that "[i]t may be that psychiatry has now reached a position of certainty in its diagnosis and prognosis which will induce Congress to enact the rule of responsibility for crime for which petitioner contends." *Id.* at 475-76.

120. *Id.* at 464.

121. *Id.* at 476-77.

done. . . . His whole behavior seems that of a man of primitive emotions reacting to the sudden stimulus of insult and proceeding from that point without purpose or design.”¹²² In castigating the majority for its refusal to provide more direct supervisory guidance to the trial court, Frankfurter challenged the paradigm of “law as communal defense against the ‘monster.’” Writes Frankfurter: “A shocking crime puts law to its severest test. Law triumphs over natural impulses aroused by such a crime only if guilt be ascertained by due regard for those indispensable safeguards which our civilization has evolved for the ascertainment of guilt.”¹²³

To Frankfurter, the proper function of law was to impede the angry and untutored mob that seeks blindly to lash out against those whose deeds are “gruesome,” without attending to the specific moral circumstances that distinguish in terms of culpability some such deeds from others.¹²⁴ Frankfurter, in effect, urged both a rejection of an older iconography of criminal madness that demands atonement even by persons who, like Fisher (or Lennie, or even Frankenstein’s monster, or Mr. Hyde), are not responsible for their crimes. The law’s purpose is not to carry out the mob’s wishes, but rather to prevent the mob from doing what it wishes. Frankfurter argued that juries, like angry mobs, must be managed by law; the lynch mob must be replaced with the trial: “Constituted as juries are, it is frequently impossible for them to discharge their function wisely and well without” the court’s aid in “directing their attention to the most important facts.”¹²⁵

Frankfurter’s vision of law would, with cases like *Gideon* and *Miranda* on the horizon, soon become predominant. At the same time, post-war America embraced a sunny optimism that was deeply reflected in popular media, including the virtual disappearance of the old cinema monsters. By 1947, horror was a dead genre.¹²⁶ This is not to say that America lost its taste for scary movies. The 1950s saw the emergence of a new kind of monster: the “psycho.”¹²⁷

122. *Id.* at 481 (Frankfurter, J., dissenting).

123. *Id.* at 477.

124. *Id.* at 485 (“A deed may be gruesome and not be premeditated.”).

125. *Id.* at 487.

126. See MILNE & WILLEMAN, *supra* note 31, at x (stating that “[b]y the end of the forties, horror was virtually a dead genre”).

127. At the same time, spooked by Sputnik and with America’s attention turning to the Cold War, popular culture fed America’s imagination with images of space aliens and blobs throughout the 1950s. America’s fascination with, and fear of, science is plainly manifested in its infatuation with science fiction films, see TUDOR, *supra* note 8, at 39 (describing “boom” in 1950s in “horror films based around invasion from space”), and its exploration of the psychoanalytic causes of criminality.

III. THE AGE OF HITCHCOCK: THE RISE AND DEMISE OF THE FREUDIAN PSYCHOPATH

Over the course of the twentieth century, biological theories of criminology gradually gave way to psychological and psychiatric explanations. Hollywood, too, began to move away from the depiction of mad criminals as physically grotesque monsters in favor of more subtle, psychological portraits.¹²⁸ Although *Dracula* introduced filmgoers to the metaphoric image of the “psychopath,” the depiction of psychopathy as a mental rather than a hereditary or supernatural condition did not begin to dominate the cinematic representation of the mad criminal until the 1950s.¹²⁹ Ultimately, however, filmmakers enthusiastically embraced the idea that crime was “a type of abnormal conduct which expresses a failure of proper adjustment at the psychological level.”¹³⁰ To use language borrowed from Foucault, Hollywood increasingly depicted the criminal as a “pathologized subject,” less a figure of essential evil than a subject of “suitable correctional treatment.”¹³¹

This tendency was apparent in films beginning roughly in the mid-1940s and built steadily through the early 1960s in two particular respects. First, films of the period increasingly utilized cinematic technology to depict mental illness as a real and tangible phenomenon. Second, in portraying criminal madness as illness rather than biological defect, they naturally (if not necessarily) suggested that madness was a curable rather than punishable condition. These tendencies were apparent in a wide number of films, but nowhere did they receive more focused attention or popular success than in the films of Alfred Hitchcock.¹³²

128. This trend is apparent, for instance, if one compares the various remakes of *Dr. Jekyll and Mr. Hyde*. Whereas the murderous Mr. Hyde looks dramatically uglier than the dashing Dr. Jekyll in the 1932 version, in the 1941 version, starring Ingrid Bergman and Lana Turner, Hyde’s “physical features and Jekyll’s remain quite similar.” MCCARTY, *supra* note 31, at 13. In the 1960 Mike Hammer film, *THE TWO FACES OF DR. JEKYLL* (Hammer Film Prods. 1960), the inversion is completed when Dr. Jekyll is depicted as a drab and ugly man, while Hyde is “a dashing young libertine and sadist.” *Id.* Similarly, other period films based on the split-personality plot device, such as *A DOUBLE LIFE* (Garson Kanin Prods. 1947) (actor’s confusion of stage life with real life causes him to kill), and *THE BRIGHTON STRANGLER* (RKO Radio Pictures 1945) (head injury causes amnesia in the main character and a belief that he is a serial killer), straightforwardly portray the psychological and physiological causes of psychopathy. *Id.* at 19.

129. According to one writer, there was “an explosion of interest in psychiatry and mental illness following World War II” that “furnished material for numerous postwar Hollywood films.” Cynthia Erb, “Have You Ever Seen the Inside of One of Those Places?”: *Psycho*, *Foucault*, and the Postwar Context of Madness, 45 *CINEMA J.* 45, 47 (2006).

130. RAFTER, *supra* note 50, at 175 (quoting BERNARD GLUECK, *STUDIES IN FORENSIC PSYCHIATRY*, at vii (1916)).

131. Rapping, *supra* note 7, at 683.

132. Noteworthy examples of films with strong Freudian themes by a director other than Hitchcock include *WHITE HEAT* (Warner Bros. Pictures 1949), which, like *Psycho*, featured the Freudian unhealthy-relationship-with-mom explanation for psychopathy, and

From Hitchcock's earliest work, psychological drama, and especially Freudianism, played an important role.¹³³ Hitchcock's character studies frequently revolved around his characters' repressed traumas and unconscious desires. Earlier films, such as *Dr. Jekyll and Mr. Hyde* and *Dracula*, suggested that criminal madness might be a product of psychological illness. Indeed, *Dr. Jekyll and Mr. Hyde* narrated a story of a particular type of clinically recognizable insanity—what we might today call dissociative identity disorder.¹³⁴ The monster movies, however, tended to heavily emphasize the monster's manifest degeneracy, and mental illness was almost exclusively represented through physiognomy. That is, filmmakers identified morally depraved characters by virtue of visible physical features. In contrast, Hitchcock's characters were outwardly normal in appearance. Viewers learned of Hitchcock's characters' "madness" through firsthand experience. Hitchcock repeatedly relied on POV techniques¹³⁵ and other special effects to provide viewers with direct evidence of otherwise invisible mental illness. In *Vertigo*, for example, Jimmy Stewart played a police officer forced to retire because he suffers from vertigo brought on by fear of heights.¹³⁶ Whenever Stewart's character suffered a vertigo attack, Hitchcock painted the screen with swirl patterns and elongated the visual field so that the viewer's own perceptions became empathetically distorted.

A similar tactic was used in *Marnie*, a film concerning a sexually frigid and compulsive thief. As in *Vertigo*, Hitchcock cinematically depicted Marnie's mental illness by using visual techniques that allowed the viewer to directly

Fritz Lang's *WHILE THE CITY SLEEPS* (Bert E. Friedlob Prods. 1956), in which "psychosexual mama's boy Robert Manners . . . writes 'Ask Mother' in lipstick at the scene of one of his crimes." MCCARTY, *supra* note 31, at 54, 56, 70.

133. "More than most of his contemporaries, [Hitchcock] incorporated psychological aberration," RAFTER, *supra* note 8, at 37, and "made self-conscious, often ironic use of Freudian themes, ideas, and explanations of behavior" in his films. Steven Jay Schneider, *Introduction: Psychoanalysis in/and/of the Horror Film*, in *HORROR FILM AND PSYCHOANALYSIS: FREUD'S WORST NIGHTMARE* 1, 10 (Steven Jay Schneider ed., 2004); *see, e.g.*, RAFTER, *supra* note 8, at 37-38 (discussing *Spellbound*, which tells the story of a man whose criminal past is revealed during sessions with psychoanalyst, and *Strangers on a Train*, in which a psycho-killer's "violent rages" are attributed to his childhood rearing within a "dysfunctional family").

134. Dissociative identity disorder is the current term used in AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 526 (4th ed., text rev. 2000) [hereinafter *DSM*]. Previous versions of the manual referred to the condition as "multiple personality disorder." *Id.*

135. POV is screenwriting shorthand for "point of view," and refers to the camera's ability to control narrative perspective. *See* Donna Cox Wells, *Film Industry Terminology*, SG005 A.L.I.-A.B.A. 97, 107 (2002).

136. Stewart is hired by an old friend who seeks to do away with his wife. The friend tells Stewart that his wife is suffering from some strange mental/spiritual affliction. Stewart follows her, is seduced by her, falls in love, and then watches her commit apparent suicide. Throughout, Hitchcock portrays mental illness as a real and powerful force that is capable of inducing extreme conduct.

experience its effects, in this case by flooding the screen with red whenever a neurotic episode is triggered. Exploiting one of the medium's greatest strengths, Hitchcock's camera allowed the viewer not merely to see the world, but to see it through Marnie's neurosis. The effect was to convey to the viewer the reality of the psychological effects of mental illness.¹³⁷ If the "verbal arts can achieve the 'vivacity' of the material world by telling us how to imagine or construct an object of perception, how to imitate the act of perceiving it,"¹³⁸ Hitchcock's films demonstrated that cinema can provide direct and immediate access not only to perception, but to the thoughts and mental distortions of others. The effect of such film techniques may well have been to enhance the popular plausibility of mental illness-based claims. After all, to use Peter Biskind's phrase, "seeing is believing."¹³⁹

The phrase "cinematic vivacity" might also describe the tactics Hitchcock deployed in the final scene of *Psycho*.¹⁴⁰ *Psycho* featured Hitchcock's most notorious mad criminal, Norman Bates. By film's end, viewers learn that Bates is a cross-dressing and knife-wielding serial killer.¹⁴¹ Although Bates's conduct seems mad—and we are told by a reliable authority that he is mad—we do not truly understand the depth of that madness until the film's final scene, in which the camera fixes on Bates in a holding cell wrapped in a blanket "as if it were a cashmere shawl."¹⁴² By voiceover we "hear" the thoughts in his head.¹⁴³ And what we hear is his mother's voice, explaining why "she" felt motivated to tell "her" story to the psychiatrist.¹⁴⁴ Thus, as in *Vertigo* and *Marnie*, by making the viewer directly privy to the mad character's thoughts, the viewer obtains seemingly irrefutable evidence that madness is real.

Hitchcock's depiction of psycho-killer Norman Bates differed markedly from both earlier and later Hollywood psychopaths in two significant respects. First, Hitchcock dramatically refigured the iconography of the mad criminal. As one scholar notes, "[w]hereas Lombroso's born criminal had been a ferocious, masculine monster, the psychiatrists' psychopath was a puny,

137. After all, the viewer might subconsciously respond, how could they not be real if the viewer can see and feel them?

138. Heffernan, *supra* note 71, at 139 (citing Elaine Scarry, *On Vivacity: The Difference Between Daydreaming and Imagining-Under-Authorial-Instruction*, 52 REPRESENTATIONS 1 (1995)).

139. BISKIND, *supra* note 29.

140. PSYCHO, *supra* note 1.

141. In addition to killing Janet Leigh in the famous shower scene, Bates also kills investigator Milton Arbogast and, it is revealed, two other young women. See Joseph Stefano, *Psycho* (Dec. 1, 1959) (screenplay), available at http://www.dailyscript.com/scripts/psycho_revised.html.

142. *Id.*

143. *Id.*

144. *Id.* "She" explains: "They'll put him away now . . . as I should have . . . years ago. He was always . . . bad." *Id.*

homosexual boy, girlish and ineffectual.”¹⁴⁵ As a mad criminal, Bates differed from Frankenstein’s creature and Mr. Hyde in ways that precisely mirror the differences between Lombrosian and Freudian criminology. Norman Bates is a likeable, effeminate, sympathetic (or perhaps merely pathetic) character.¹⁴⁶ Abandoned is the idea that criminality is physically manifested in the body. Bates’s monstrosity is invisible (to all but the film viewer and the trained psychiatrist) because it is internal. He is a Freudian Dr. Jekyll, but one whose repressed Mr. Hyde (actually, Mrs. Hyde) lurks equally within.

The second prominent feature of the psychoanalytic criminology characteristic of Hitchcock’s films and others of the era is the proposition that criminal madness can be understood, and, therefore, treated.¹⁴⁷ In films such as *Frankenstein* and *Dr. Jekyll and Mr. Hyde*, and consistent with the notion of the degenerate criminal, the monster is not cured, only annihilated. Even where there is recognition of illness, as when Mamoulian’s Dr. Jekyll confesses his illness to his fiancée, clinical treatment or cure—by a psychiatrist or any other doctor—plays no role in the narrative. In Hitchcock’s films, in contrast, even the most monstrous evil is subject to psychiatric diagnosis. *Psycho* again provides a paradigmatic example of the era’s faith in the efficacy of legal and medical institutions to control criminal madness. At the film’s climax, Bates’s attack on Lila—who became the heroine after Janet Leigh was famously dispatched in the shower—is foiled by Sam, who wrestles with Bates and takes the death-dealing knife from his hand. Rather than killing the mad criminal—the conventional resolution of both the earlier mad criminal pictures and later horror films—Bates is apprehended and taken into custody. There is no hint here that, once finally captured, the law lacks the capability to safely neutralize or contain Bates.¹⁴⁸ In the film’s penultimate scene, a psychiatrist named Simon fresh from interviewing Bates explains to those gathered in the D.A.’s office that he “got the whole story . . . but not from Norman. I got it from . . . his mother.”

145. RAFTER, *supra* note 50, at 12.

146. See MCCARTY, *supra* note 31, at 65 (describing Norman Bates as “genuinely sincere, likable, and unassuming”); RAFTER, *supra* note 8, at 71 (stating that Bates’s character is “coded for effeminacy”).

147. The murder mystery as psychodrama theme characterized a great number of films released around the same period, including Orson Welles’s pre-*Psycho* retelling of the Leopold and Loeb murder trial in *COMPULSION* (Twentieth Century-Fox Film Corp. 1959), to post-*Psycho* psychological thrillers such as *PARANOID* (Hammer Film Prods. 1963), *NIGHTMARE* (Hammer Film Prods. 1964), *HYSTERIA* (Hammer Film Prods. 1965), and *THE PSYCHOPATH* (Amicus Prods. 1966).

148. Faith in legal institutions was at its pinnacle during this period. *CAPE FEAR* (Melville-Talbot Prods. 1962) and its 1991 remake, *CAPE FEAR* (Amblin Entm’t 1991), illustrate the decline of that idealism. In both versions, Max Cady is a psychopathic criminal who, upon his release from jail, terrorizes the family of a lawyer he blames for his incarceration. The original ends, however, when Gregory Peck subdues Cady (Robert Mitchum) and transports him to the police to spend the rest of his life in jail. In the remake, Nick Nolte kills Cady (Robert DeNiro).

SIMON

. . . That is, from the mother-half of Norman's mind, you have to go back ten years . . . to the time when Norman murdered his mother and her lover.

(A pause, then as no one interrupts)

He was already dangerously disturbed, had been ever since his father died. His mother was a clinging, demanding woman . . . and for years the two of them lived as if there was no one else in the world. Then she met a man and it seemed to Norman she "threw him over" for this man. That pushed him over the thin line . . . and he killed them both. Matricide is probably the most unbearable crime of all . . . and most unbearable to the son who commit [sic] it. So he had to erase the crime, at least in his own mind.

(A pause)

He stole her corpse . . . and a weighted coffin was buried. He hid the body in the fruit cellar, even "treated" it to keep it as well as it would keep. And that still wasn't enough. She was there, but she was a corpse. So he began to think and speak for her, gave her half his life, so to speak. At times he could be both personalities, carry on conversations . . . at other times, the mother-half took over completely. He was never all Norman, but he was often only mother. And because he was so pathologically jealous of her, he assumed she was as jealous of him. Therefore, if he felt a strong attraction to any other woman, the mother side of him would go wild.

(To Lila)

When Norman met your sister, he was touched by her . . . and aroused by her. He wanted her. And this set off his "jealous mother" and . . . "mother killed the girl." After the murder, Norman returned as if from a deep sleep . . . and like a dutiful son, covered up all traces of the crime he was convinced his mother had committed.

SAM

Why was he . . . dressed like that?

DISTRICT ATTORNEY

He's a transvestite!

SIMON

Not exactly. A man who dresses in woman's [sic] clothing in order to achieve a sexual change . . . or satisfaction . . . is a transvestite. But in Norman's case, he was simply doing everything possible to keep alive the illusion of his mother being alive. And whenever reality came too close, when danger or desire threatened that illusion, he'd dress up, even to a cheap wig he brought,

and he'd walk about the house, sit in her chair, speak in her voice. . . . He tried to be his mother.

(A sad smile)

And now he is.

. . . .

. . . Of course, she feels badly about it . . . but also somewhat relieved to be, as she put it, free of Norman, at last.

(A pause)

When the mind houses two personalities, there is always a battle. In Norman's case, the battle is over . . . and the dominant personality has won.¹⁴⁹

This psychiatric diagnosis neatly "explains" Bates's psychopathic conduct and thereby affirms the remarkable diagnostic powers of psychiatry—after all, Simon confidently and coherently was able to account for Bates's psyche and actions. The correspondence between what we know happened and what Simon's examination "revealed" corroborates its authenticity. In light of this demonstration of the psychiatrist's acumen, the notion that mad criminals are ill rather than evil is given enhanced plausibility. *Psycho*'s explanatory coda humanizes what otherwise would seem like pure atrocity.¹⁵⁰

The cinematic revelation of madness, moreover, creates conceptual space for the possibility of cure. Following the basic psychoanalytic script, the protagonists of *Vertigo* and *Marnie* "cure" their mental illnesses by either bringing themselves to confront and overcome their repressed fear, as Jimmy Stewart does in the climactic tower scene in *Vertigo*, or by being forced to confront the past traumas that lie buried in the unconscious, as Sean Connery forces Marnie to do.¹⁵¹ The theme of the triumphant psychiatrist recurs frequently throughout this period. For example, it is apparent in *The Snake*

149. Stefano, *supra* note 141.

150. Joseph S.M.J. Chang, M: *A Reconsideration*, 7 LITERATURE/FILM Q. 300, 300-01 (1979) (observing that although "it may have been horrified by Norman Bates's atrocities, because of the clinical analysis of his schizophrenia, the audience is permitted to view the killer with some detachment").

151. MARNIE (Universal Pictures 1964) is, essentially, a psychoanalytic mystery in which newlywed husband Mark Rutland (Sean Connery) assumes the role of amateur psychoanalyst. His "therapy" successfully reveals the cause of his wife's neuroses. The same spousal cure is featured in SECRET BEYOND THE DOOR . . . (Diana Prod. Co. 1948), a Fritz Lang film in which a husband's murderous impulses are cured "on the spot" by his wife and near-victim's amateur psychoanalysis. MCCARTY, *supra* note 31, at 70. Interestingly, a husband's discovery of his new wife's frigidity was a recurrent plot device that must have struck a resonant chord of horror among many. Cf. *infra* note 156 (discussing CAT PEOPLE (RKO Radio Pictures 1942)).

Pit,¹⁵² in which, despite enduring nightmarish conditions in the asylum, the heroine is fully cured by film's end by her "skilled and compassionate psychotherapist."¹⁵³ Similarly, in *The Three Faces of Eve* and *Lizzie*, "the main characters suffer from a total division of personality that is reflected not by any physical change but a purely psychological one rooted to a traumatic incident in their past."¹⁵⁴ In both films, the heroine's psychological dilemma is resolved by a psychiatrist who through therapy successfully cures his patient's psychic deformities.¹⁵⁵ And in *Psycho*, Simon's diagnosis of Norman Bates provides hope that institutionalization might eventually lead to cure.¹⁵⁶

That message—that criminals should be cured rather than punished—was quickly becoming the canonical legal one as well, and not just with respect to mad criminals, but as to all criminals. The *Skinner* and *Fisher* cases suggested that changed attitudes toward criminal madness might be coming. By the mid-

152. *THE SNAKE PIT* (Twentieth Century-Fox Film Corp. 1948).

153. See MCCARTY, *supra* note 31, at 182. Following its release in 1948, *The Snake Pit* helped trigger "legislation to improve conditions in mental hospitals in twenty-six states." *Id.* at 183.

154. *Id.* at 16.

155. *Id.* at 17.

156. In diagnosing Bates, *Psycho* again differs dramatically in its treatment of criminal madness from both the incurable degenerate monsters of the 1930s, and the mindless killing machines of the later slasher pictures. Certainly, the theme of treatment and cure for the dangerously mentally ill was an increasingly common trope in films beginning in the mid-to-late 1940s. CAT PEOPLE, *supra* note 151, provides an excellent example of a transitional work that juxtaposes modern psychiatry and the supernatural. *Cat People* tells the story of a frigid Serbian bride, whose loving but perplexed husband hires a psychiatrist to figure out why his bride refuses even to kiss him. She explains her belief to the doctor that she is afflicted with a supernatural condition that will turn her into a wild panther that will murderously devour her partner if she is sexually stimulated, but the doctor interprets her beliefs as signs of serious psychosis. Science and the supernatural lack any neutral territory. Finding the psychiatrist unable to understand her, she loses interest in further "treatment." Learning this, her husband comes to believe that she simply is "cold" and "aloof." Although throughout the film there is some ambiguity as to whether she is crazy or the supernatural is actually at work, brief glimpses of a black panther devouring the psychiatrist—who foolishly relies on his science rather than her stories of the black arts—confirm the reality of the supernatural and thus force the viewer to question her faith in modern science.

BEDLAM (RKO Radio Pictures 1946), presents a similar juxtaposition but with different results. Starring horror film star Boris Karloff and set in the St. Mary's of Bethlehem Asylum (Bedlam), *Bedlam* is a "historical" picture that tells the story of a young woman involuntarily and wrongfully committed to the infamous insane asylum "where lunatics were chained, naked, in rows of cages that flanked a promenade, and were wondered and jeered at through iron bars by London loungers." GILMAN, *supra* note 5, at 148 (internal quotation marks omitted). Although this quasi-horror film consciously exploits images of howling lunatics and madmen and madwomen (Karloff's presence triggers powerful "horror" associations) to create an aura of gothic horror, the film constructs those familiar images for the very purpose of shattering expectations. Locked involuntarily in the asylum, the young woman discovers that her situation is not horrific precisely because, it turns out, the other mad inmates are not monsters but decent, if ill, human beings. The film's moral is a classic liberal embrace of the possibilities for rehabilitation—the mentally ill can be treated and even seemingly violent and insane "beasts" can be tamed with kindness and compassion.

1940s, American criminal law reformers had largely succeeded in recasting the purposes of criminal law in terms of “treatment” and “cure” rather than punishment and desert. In 1949, the Supreme Court declared in *Williams v. New York* that “[r]etribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.”¹⁵⁷ Following the lead of its principal reporter, Herbert Wechsler, the American Law Institute’s Model Penal Code virtually excised references to “punishment” in favor of the more progressive term “treatment.”¹⁵⁸

It is in this context of optimism about the rehabilitative powers of progressive, rational science that Judge Bazelon penned his highly influential opinion in *Durham v. United States*, which announced the District of Columbia Circuit’s adoption of the so-called “product” test for legal insanity.¹⁵⁹ That test provided that “an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.”¹⁶⁰

The defendant in the case, Monte Durham, was a convicted housebreaker with equally long histories of criminal misbehavior and mental illness.¹⁶¹ After a conviction for passing bad checks, Durham was remanded to jail, but his conduct there quickly “led to a lunacy inquiry” which led to his commitment to St. Elizabeth’s, where “he was diagnosed as suffering from ‘psychosis with psychopathic personality.’”¹⁶² For the next several years, he continued to go in and out of treatment, at one point receiving “subshock insulin therapy.”¹⁶³ During one period of release, Durham committed the housebreaking for which he was convicted.¹⁶⁴ In the prosecutor’s estimate, Durham was a dangerous mad criminal.¹⁶⁵ The prosecutor proclaimed that if Durham were not convicted, “Saint Elizabeth’s would let him out on the street, and if that man committed a murder next week then it is my responsibility.”¹⁶⁶ Durham was convicted at trial and his insanity defense rejected, largely on grounds that Durham’s mental illness failed *M’Naghten*’s right-wrong test, which requires proof that because of mental disease or defect, he did not know his conduct was wrong or the nature or quality of the act he was doing.¹⁶⁷

157. 337 U.S. 241, 248 (1949).

158. See Covey, *supra* note 51, at 193-95.

159. 214 F.2d 862 (D.C. Cir. 1954).

160. *Id.* at 874-75. The test was borrowed from New Hampshire. *Id.* at 874 (citing *State v. Pike*, 49 N.H. 399, 402 (1870)).

161. *Id.* at 864.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 865.

166. *Id.*

167. *Id.*; see LAFAVE, *supra* note 112, at 392-93 (describing the *M’Naghten* test).

In reversing, Judge Bazelon emphasized three themes consistent with then-current iconography of madness. First, Judge Bazelon's opinion displayed a powerful faith in modern psychiatry; indeed, it reversed Durham's conviction because "the psychiatric testimony was unequivocal that Durham was of unsound mind at the time of the crime."¹⁶⁸ Second, Bazelon urged greater reliance on psychiatric evidence. In light of what he described as "the great advancement in medical science as an enlightening influence on this subject," Bazelon argued that *M'Naghten's* single-minded focus on cognitive capacity was no longer defensible: "The science of psychiatry now recognizes that a man is an integrated personality and that reason, which is only one element in that personality, is not the sole determinant of his conduct."¹⁶⁹ Even supplementation with the irresistible impulse test failed, in Bazelon's opinion, to properly account for modern scientific knowledge about mental illness.¹⁷⁰ Sometimes the criminal act:

may be the reverse of impulsive. It may be coolly and carefully prepared; yet it is still the act of a madman. . . . [S]imilar states of mind are likely to lie behind the criminal act when murders are committed by persons suffering from schizophrenia or paranoid psychoses due to disease of the brain.¹⁷¹

An expanded appreciation of the extent to which criminal conduct is the product of mental illness rather than evil should lead, Judge Bazelon believed, to more sympathetic responses to criminal madness and a disinclination to impose punishment.¹⁷² After all, if criminal "acts stem from and are the product of a mental disease or defect . . . moral blame shall not attach."¹⁷³ *Durham's* broader insanity test requiring fact finders to determine "simply whether the accused acted because of a mental disorder,"¹⁷⁴ naturally flowed from, and was predicated upon, a belief that modern science could reliably identify the causal mechanisms underlying human conduct. As a result, the *Durham* product test empowered psychiatric testimony to determine trial outcomes as never before.¹⁷⁵

Because of his status as one of the nation's most influential jurists and a committed critic of law's failure to modernize in light of advancing

168. *Durham*, 214 F.2d at 866.

169. *Id.* at 871.

170. *Id.* at 873.

171. *Id.* at 873-74 (quoting ROYAL COMM'N ON CAPITAL PUNISHMENT, 1949-1953 REPORT 110 (1953)).

172. *Id.* at 876.

173. *Id.*

174. *Id.*

175. Although it was plainly Judge Bazelon's intent to empower the jury to make sensible, progressive use of psychiatric testimony, the tendency of jurors to defer to experts was only exaggerated by the new test. See Jed S. Rakoff, *Science and the Law: Uncomfortable Bedfellows*, 38 SETON HALL L. REV. 1379, 1386 (2008) (observing that the *Durham* test was criticized by many legal experts because it "yield[ed] broad authority to psychiatrists to determine moral culpability").

psychological and psychiatric knowledge, Judge Bazelon's attempts to fashion a new and more effective test for legal insanity were closely watched.¹⁷⁶ Although only Maine ultimately would follow the D.C. Circuit's lead, *Durham's* impact was widely felt, stimulating widespread national debate and paving the way for many jurisdictions' adoption of the reform-oriented insanity standard proposed by the American Law Institute.¹⁷⁷

That reform was felt at the highest levels of the judiciary. A series of Supreme Court cases focused on the power of the state to detain those who are determined to be criminally mad and the procedures necessary to effect that designation. In *Lynch v. Overholser*,¹⁷⁸ for instance, the Court made it more difficult for the state to institutionalize mad criminals, holding that statutory automatic commitment provisions for persons acquitted on grounds of insanity did not apply to a defendant who was judicially determined to be not guilty by reason of insanity even though he did not raise an insanity defense at trial. In *Baxstrom v. Herold*,¹⁷⁹ the Court held that upon termination of his criminal sentence, an insane prisoner could not be transferred to a civil mental institution without compliance with otherwise applicable civil commitment procedures. To the Court, the fact of criminality was merely incidental and did not justify treating some mentally ill persons different than others: "[T]here is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments."¹⁸⁰ In *Jackson v. Indiana*,¹⁸¹ the Court held that the state could not indefinitely detain a criminal defendant found incompetent to stand trial. Such a person cannot be held more than the reasonable period of time necessary to determine whether he will likely regain competency.¹⁸² After that, the state must either release the defendant or initiate civil commitment proceedings.¹⁸³ As a result of these and other cases, the government's legal authority to detain mentally ill criminal defendants was sharply restricted even while the insanity defense grew more robust.¹⁸⁴

176. Those attempts included several efforts to amend or modify *Durham*, as for instance in *Washington v. United States*, in which Judge Bazelon pronounced a new prohibition on expert psychiatric testimony concerning whether crime was the "product" of mental illness, calling instead for "[d]escription and explanation of the origin, development and manifestations of the alleged disease." 390 F.2d 444, 451, 455-56 (D.C. Cir. 1967) (quoting *Carter v. United States*, 252 F.2d 608, 617 (D.C. Cir. 1956)).

177. See Arthur H. Sherry, *The Politics of Criminal Law Reform*, 21 AM. J. COMP. L. 201, 212 (1973) (discussing the impact of *Durham* and noting that the ALI standard was adopted "in all but one of the Federal Circuits and in about ten states").

178. 369 U.S. 705 (1962).

179. 383 U.S. 107 (1966).

180. *Id.* at 111-12; see also *Humphrey v. Cady*, 405 U.S. 504 (1972) (extending *Baxstrom* to commitment in lieu of sentence following conviction as sex offender).

181. 406 U.S. 715 (1972).

182. *Id.* at 738.

183. *Id.* at 733.

184. For a description of the development of mental health law during this period, see

Ultimately, the new cultural iconography of criminal madness seems most apparent in the shift in the conceptualization of the character or identity of the mad criminal. Earlier cinematic imagery equated madness with an innate inability to control impulses and tended to essentialize the condition. As products of their heredity or biology, the “feebly inhibited” were, at bottom, predatory social monsters or wild beasts. A conceptualization of the mad criminal as beast fit easily with criminological policies designed to approach criminality as a kind of public health problem that, like communicable disease, could be solved through quarantine and eradication of the carrier. In contrast, the mid-century iconography de-essentialized criminal madness. As a condition subject to cure, the mad criminal was pathologized and humanized. Treatment, rather than quarantine, was rendered not only as plausible, but as morally required. Legal reform of the law governing the criminally insane throughout this period reflects that understanding.

The reform era probably reached its high water mark in *Robinson v. California*,¹⁸⁵ which held that narcotics addicts could not be criminally punished for the “status” of being an addict. In so doing, the Court came closer in *Robinson* than it ever would again to constitutionalizing the insanity defense. Imagery invoked in some of the opinions is particularly interesting. Conceptualizing addiction as a kind of mental illness, Justice Douglas contrasted the historical response to madness in which “the violently insane went to the whipping post and into prison dungeons or, as sometimes happened, were burned at the stake or hanged” with the modern recognition that insanity is a disease properly treated not as a crime, but with medical or psychiatric care.¹⁸⁶

Indeed, Justice Douglas conjured a vivid contrast of images that well summarizes the differences between the new age and the old:

[T]he idea of basing treatment for disease on purgatorial acts and ordeals is an ancient one in medicine. It may trace back to the Old Testament belief that disease of any kind, whether mental or physical, represented punishment for sin; and thus relief could take the form of a final heroic act of atonement.¹⁸⁷

This “superstition,” Douglas quoted, encouraged treatment of mental illness with methods that appear to have been “planned as means of driving from the body some evil spirit or toxic vapor.”¹⁸⁸ Justice Douglas’s contrast of the old ways of responding to insanity with the new matches the contrast between old

John Q. La Fond & Mary L. Durham, *Cognitive Dissonance: Have Insanity Defense and Civil Commitment Reforms Made a Difference?*, 39 VILL. L. REV. 71, 79-81 (1994).

185. 370 U.S. 660 (1962).

186. *Id.* at 668-69 (Douglas, J., concurring) (quoting JOINT COMM’N ON MENTAL ILLNESS & HEALTH, ACTION FOR MENTAL HEALTH: FINAL REPORT OF THE JOINT COMMISSION ON MENTAL ILLNESS AND HEALTH 26 (1961)).

187. *Id.* at 669 (quoting JOINT COMM’N ON MENTAL ILLNESS & HEALTH, *supra* note 186, at 27-28).

188. *Id.*

and new cinematic formulas for dealing with the mad criminal. Frankenstein was burned to death in a windmill by the mob. Dracula was destroyed by driving a stake through the heart. The werewolf was terminated with a silver bullet. Norman Bates, in contrast, was diagnosed and sent to a mental hospital.¹⁸⁹

IV. THE NEW MONSTERS: THE RISE (AND RISE AGAIN) OF THE IMPLACABLE PSYCHOPATHIC KILLER

Needless to say, the 1960s was a decade unlike any other in American history, witnessing tremendous political upheaval and cultural transformation and the breaking of countless cultural taboos. Nowhere was this so evident as at the movies.¹⁹⁰ *Psycho*'s shower scene, for instance, is widely regarded as pioneering a new degree of realistic cinematic violence, and is credited with the dubious honor of inaugurating a series of psycho-sexual slasher films that would bring unadulterated gore and mayhem to mass audiences.¹⁹¹ Although the so-called "splatter movie" was decidedly not part of the mainstream 1960s cinema, its popularity in fringe cinema contributed (as undoubtedly did daily doses of atrocity and horror from the Vietnam War)¹⁹² to the evolution (some would say, devolution) of the horror film, and led to very different depictions of criminal madness in mainstream Hollywood films during the following

189. Similarly, in *CAPE FEAR* (Melville-Talbot Prods. 1962), Max Cady (Robert Mitchum), the psychopathic killer who upon release from prison stalks lawyer Sam Bowden and family to avenge his conviction, has his life spared by Bowden at film's end in preference of a return to prison. In *COMPULSION*, *supra* note 147, based on the 1924 Leopold and Loeb case, a reprieve from execution is won by Clarence Darrow on behalf of a pair of psychopathic law students who killed a boy simply for the thrill, after Darrow convinces the judge of the boys' seriously diseased minds.

190. That major taboos were broken in the 1960s is evidenced by the fact that the early 1970s witnessed the only period in American history in which X-rated films were released to wide commercial audiences. 1972 was an especially banner year. *See, e.g.*, *BEHIND THE GREEN DOOR* (Jartech 1972); *DEEP THROAT* (P.D. Inc. 1972); *LAST TANGO IN PARIS* (Produzioni Europee Associati 1972). *See also* blaxploitation pictures such as *SWEET SWEETBACK'S BAADASSSSS SONG* (Yeah 1971).

191. Although *Psycho* left an enormous imprint on the popular imagination and the genre, the birth of the slasher film (and similarly bloody subgenres) owes at least as much to a small budget, independent 1963 production called *BLOOD FEAST* (Friedman-Lewis Prods. 1963). Directed by Herschell Lewis, a director of low-budget soft-core sex films seeking to diversify, and graphically depicting women being decapitated and eviscerated to provide the organic materials needed to bring to life an Egyptian love goddess, *Blood Feast* was the first true "splatter movie." Lewis followed the success of *Blood Feast* with a series of increasingly gory trash films that exploit a kind of pornography of violence. Those films include *TWO THOUSAND MANIACS!* (Jacqueline Kay 1964), *THE WIZARD OF GORE* (Mayflower Pictures 1970), and *THE GORE GORE GIRLS* (Lewis Motion Picture Enters. 1972).

192. *See* SKAL, *supra* note 42, at 22 (speculating that "images of unprecedented frankness and brutality: napalmed children, street executions, the massacre at My Lai" may have influenced horror films to turn to increasingly gore-filled content).

decade. Moreover, depictions of criminal madness in the horror genre dovetailed with depictions of legal and social dysfunctionality in more mainstream releases to create a powerful new iconography of criminal madness carrying potent political content.

In mainstream cinema, images of social dysfunction became commonplace. Such imagery was on full display in *Dirty Harry*,¹⁹³ in which Inspector Harry Callahan's (Clint Eastwood) "dirty job" requires him to remove from society a "psycho hippie" who "rapes and buries alive a teenager, shoots innocent people at random, tries to blackmail the whole city and finally terrorizes a busload of children."¹⁹⁴ Stymied by spineless politicians and legal rules that thwart his efforts to stop the mad criminal, Callahan is compelled to break the law "on the books" in order to bring about a more morally satisfying law "on the ground."¹⁹⁵ The genre and its dystopian themes struck a chord with national film audiences. *Dirty Harry* spawned a vast army of sequels and other subsequent films that exploited the same basic themes, including *Magnum Force*, *McQ*, *The Enforcer*, *The Gauntlet*, *The First Deadly Sin*, *Sudden Impact*, *The Big Score*, *Code of Silence*, *Tightrope*, and *The Rookie*.¹⁹⁶

This new wave of vigilante police dramas painted a recurrent portrait of a dysfunctional legal system in which the notion that contemporary social institutions—the law, courts, schools, hospitals, or conventional political processes—were able to contain crime or criminal madness was called into question.¹⁹⁷ Unlike in previous decades, legal process after 1970 was almost never portrayed as a solution to social problems, and the depiction of law and lawyers "turned sharply negative."¹⁹⁸ In vigilante films such as *Death Wish*,

193. *DIRTY HARRY*, *supra* note 33.

194. *THE BFI COMPANION TO CRIME*, *supra* note 31, at 108.

195. An essential component of the *Dirty Harry* mythology was a rejection of liberal sentimentalism toward criminals. Justice demands retribution, not rehabilitation. When Callahan grinds his foot into the killer's injured leg to compel a potentially life-saving confession, Callahan is quite clearly breaking the formal law, but not so clearly the moral law. Certainly, the film seeks to engender sympathy for Callahan's lawlessness, including his extralegal "execution" of the villain, which is positively contrasted with the inherently dysfunctional legal process, and recalls the 1930s-era formulaic response to the criminal monster.

196. *CODE OF SILENCE* (Orion Pictures Corp. 1985); *MAGNUM FORCE* (The Malpaso Co. 1973); *MCQ* (Batjac Prods. 1974); *SUDDEN IMPACT* (Warner Bros. Pictures 1983); *THE BIG SCORE* (Po' Boy Prods. 1983); *THE ENFORCER* (Warner Bros. Pictures 1976); *THE FIRST DEADLY SIN* (Artanis Prods. Inc. 1980); *THE GAUNTLET* (Malpaso Prods. 1977); *THE ROOKIE* (Kazanjan/Siebert Prods. 1990); *TIGHTROPE* (The Malpaso Co. 1984); *see also* *THE BFI COMPANION TO CRIME*, *supra* note 31, at 108 (listing sequels and other films inspired by *Dirty Harry*).

197. *See* Jessica Allen et al., *True Lies: Changing Images of Crime in British Postwar Cinema*, 13 *EUR. J. COMM.* 53, 68 (1998) ("[O]ver half the post-1960s films represent the system as highly incompetent. . . . Conversely, before 1959 there were only two films where crimes were cleared up by the offender being killed by the cops, while after that, this becomes a common pattern.").

198. Michael Asimow, *Embodiment of Evil: Law Firms in the Movies*, 48 *UCLA L.*

the legal system is so inept that a private citizen (Charles Bronson) is compelled to take to the streets to remove criminals that the police and the courts are systematically unable to restrain.¹⁹⁹

At the same time, these films began to depict crime and criminals in a new and far more sinister light. Prior to the 1960s crime was represented as a rare intrusion into a stable order; after the 1960s, “[c]rime is represented as an all-pervasive threat.”²⁰⁰ Criminal violence also increasingly came to be portrayed as “sadistic and gratuitous[],”²⁰¹ and criminals as “predators” whose violent acts are “impulsive, unpredictable, without reason.”²⁰² This iconography of crime quickly spread beyond the cinema. As one scholar has noted, *Dirty Harry* and its sequels “influenced the evolution of TV cop shows,”²⁰³ which with increasing regularity portrayed run-of-the-mill criminals as crazy, maniacal, lustful villains whose only function is to inflict injury upon innocent and peace-loving citizens.²⁰⁴

The changing portrait of the mad criminal in both film and television accelerated with the emergence of the “splatter” or “slasher” movie as the dominant horror genre, featuring crazed psychopaths terrorizing sexually promiscuous young adults. Like the *Dirty Harry*-style vigilante films, the psycho-on-the-loose picture in the 1980s became as familiar a genre, and as dependable a revenue stream, as the *Frankenstein* and *Dracula* films of the 1930s.²⁰⁵ Beginning with *The Texas Chain Saw Massacre* in 1974, but

REV. 1339, 1371 (2001) (“Somewhere around the 1970s, film portrayals of lawyers turned sharply negative. During the last thirty years, most of the lawyers in film have been either bad human beings or bad lawyers or both.”).

199. DEATH WISH (Dino De Laurentiis Co. 1974). Elayne Rapping identifies *Death Wish*, along with *Dirty Harry*, as “the beginning of a slow but insidious trend in national consciousness and criminal justice policy away from the liberal policies of the Warren Court . . . toward a far more reactionary . . . often even bloodthirsty, concern for the ‘rights’ of ‘victims’ to revenge and punishment of the most extreme kind.” Rapping, *supra* note 7, at 665.

200. Reiner, *supra* note 7, at 312; *see also* Surette, *supra* note 9, at xxii (noting popular culture’s “myopic focus” on “predator criminality” where crime is presented “as caused by individual-based deficiencies” rather than social forces).

201. Allen et al., *supra* note 197, at 67.

202. SHERWIN, *supra* note 22, at 164 (commenting on television cop shows).

203. THE BFI COMPANION TO CRIME, *supra* note 31, at 108.

204. Indeed, this trend reached its comic-book culmination in recent decades with the wildly popular releases of the superhero sagas of Batman, Spiderman, and to a lesser extent, Superman, in which preternaturally powerful good guys combat cartoonishly evil villains for apocalyptic stakes. *See, e.g.*, BATMAN BEGINS (Warner Bros. Pictures 2005); SPIDERMAN (Columbia Pictures Corp. 2002); SUPERMAN RETURNS (Warner Bros. Pictures 2006).

205. *See, e.g.*, FRIDAY THE 13TH (Georgetown Prods. Inc. 1980); FRIDAY THE 13TH PART II (Georgetown Prods. Inc. 1981); FRIDAY THE 13TH PART III (Georgetown Prods. Inc. 1982); FRIDAY THE 13TH: THE FINAL CHAPTER (Georgetown Prods. Inc. 1984); HALLOWEEN II (De Laurentiis 1981); HALLOWEEN III: SEASON OF THE WITCH (Dino De Laurentiis Co. 1982); HALLOWEEN 4: THE RETURN OF MICHAEL MYERS (Trancas Int’l Films 1988); HALLOWEEN: RESURRECTION (Dimension Films 2002); HALLOWEEN: THE CURSE OF MICHAEL MYERS (Halloween VI Prods. 1995); HAPPY BIRTHDAY TO ME (Canadian Film Dev. Corp.

especially with the release of the much more commercially successful *Halloween* in 1978, the depiction of criminal madness took an unprecedented turn. Iconographically, the mad criminal assumed the form of a faceless instrument of death and mayhem. As if to emphasize its utter lack of humanity, virtually every slasher film adopted the convention of masking the psychotic killer. From “Leatherface” in *The Texas Chain Saw Massacre*, to the halloween-masked slasher in *Halloween*, to the hockey-masked killers of the *Friday the 13th* series, to the steel-caged face of Hannibal Lecter in *The Silence of the Lambs*, the killers’ evil is iconically represented as literally and figuratively inscrutable.²⁰⁶ If the face of the mad criminal in the 1930s was that of the atavistic, degenerate monster, and the face of the mad criminal in the 1950s the normal (“Norm-an”) guy-next-door, the mad criminal of the 1970s and 80s had no face at all. By obscuring the criminals’ human features, the films instead directed the viewer’s focus to the large, lethal weapons they carried, be they axes, chainsaws, or butcher knives.²⁰⁷

Narratively, the films overwhelmingly play upon the psycho-on-the-loose theme. John Carpenter’s *Halloween* provides a paradigmatic example. *Halloween*’s psycho-killer, Michael, got his start murdering family members at age six. Michael then spends the next fifteen years in an asylum under the care of clinical psychiatrist Sam Loomis. Explains Loomis:

I met his [sic] fifteen years ago. I was told there was nothing left, no conscience, no reason, no understanding, in even the most rudimentary sense, of life or death or right or wrong. I met this six-year-old boy with a blank, cold emotionless face and the blackest of eyes, the Devil’s eyes. I spent eight years trying to reach him and another seven trying to keep him locked away when I

1981); MY BLOODY VALENTINE (Canadian Film Dev. Corp. 1981). Adding to the escaped-loony-goes-on-killing-spree theme: HE KNOWS YOU’RE ALONE (Metro-Goldwyn-Mayer 1980) (according to MILNE & WILLEMANN, *supra* note 31, at 349, “[a] hamfisted addition to the psycho-on-the-loose cycle”); MANIAC (Magnum Motion Pictures Inc. 1980); THE SHINING (Hawk Films 1980); WHEN A STRANGER CALLS (Columbia Pictures Corp. 1979).

206. FRIDAY THE 13TH, *supra* note 205; HALLOWEEN, *supra* note 34; THE SILENCE OF THE LAMBS, *supra* note 82; THE TEXAS CHAIN SAW MASSACRE (Vortex 1974); *see also* CAROL J. CLOVER, MEN, WOMEN, AND CHAIN SAWS: GENDER IN THE MODERN HORROR FILM 30 (1992) (observing that killers in slasher films are “often masked,” a convention rendering them “only marginally visible,” and thus only marginally human). Stanley Kubrick’s THE SHINING, *supra* note 205, featuring Jack Nicholson’s famous performance as a psycho-killer intent on slaughtering his family with an axe, is one of the exceptions that proves the rule. The most famous scene of the film, in which Jack Nicholson glares maniacally through a broken door and exclaims, “Here’s Johnny,” depicts a mad killer whose madness is so clearly written on his face that there is no need for a mask.

207. This convention was also used in some less popular installments in the genre. *See, e.g.*, BLOOD AND LACE (Am. Int’l Pictures 1971) (psycho-killer with papier-mâché masked face/head); MOTEL HELL (Camp Hill 1980) (chainsaw-wielding killer wearing pig mask); TERROR TRAIN (Astral Bellevue Pathé 1980) (axe-wielding killer clad in rubber costume mask).

realized what was living behind that boy's eyes was purely and simply . . .
evil.²⁰⁸

Like other films of the genre, no effort is made to humanize the psycho-killer. Like the monsters from the 1930s, his violence is inexplicable and innate. He is, in terms of the persistent debate over the insanity defense, not mad but bad, not ill but evil. As such, he is beyond treatment. In contrast to the previous era, in the films of the post-1960s the basic capacity of social institutions, including psychiatry, to solve or even explain the problem of criminal madness is cast into doubt.²⁰⁹ Psychiatrists in these films do not, as in *Psycho*, play the role of the reassuring authority figure. Psychiatrists lack the power to treat or cure madness. Rather—in the same way that *Frankenstein's* Dr. Waldman authoritatively established that what was to become the monster's brain was abnormal and criminally degenerate—the sole function of the psychiatrist is to “scientifically” affirm the psycho-killer's utter untreatability:

LOOMIS

I watched him for fifteen years, sitting in a room staring at a wall, not seeing the wall, seeing past it, seeing THIS NIGHT. He's waited for it, inhumanly patient. Hour after hour, day after day, waiting for some silent, invisible alarm to trigger him. Death has arrived in your little town, sheriff. You can ignore it, or you can help me stop it.²¹⁰

Whereas mid-century cinema displayed strong faith in the competence of social institutions, post-1960s films raised serious questions not only about the ability of social institutions to cure madness, but about their capacity to even contain the violent and the insane.²¹¹ Like the *Dirty Harry* films, the psycho-on-the-loose genre pointed an accusatory finger at the failure of social institutions to protect society. For instance, in response to Loomis's warning, and reminiscent of *Dirty Harry's* shock that legal authorities would release the psychotic killer he had just arrested, the sheriff in *Halloween* warns: “I'll stay out with you tonight, Doctor, just on the chance that you're right. And if you are right, damn you for letting him out.”²¹²

Of course, the psycho-killer does return to slaughter. As with the *Dirty Harry* films, the mad criminal is on the loose because some “damned” judge or

208. John Carpenter & Debra Hill, *Halloween* 88B (Apr. 10, 1978) (screenplay), available at <http://home.online.no/~bhundlan/scripts/Halloween.txt>.

209. See Alison Young, *Murder in the Eyes of the Law*, 17 STUD. L. POL. & SOC'Y 31, 39 (1997) (comparing *Psycho* and *The Silence of the Lambs*, and noting that whereas *Psycho* confirmed “the nascent powers of psychiatry as a criminological tool,” in *Silence*, “the very abilities of criminal justice to explain and contain such a ‘psycho’ are called into question” and “[p]sychiatry is no longer the source of answers to fill the gaps in the law's detective work”).

210. Carpenter & Hill, *supra* note 208, at 139.

211. Young, *supra* note 209, at 39 (noting that in *The Silence of the Lambs*, “[t]he containment of killers is no longer to be taken for granted”).

212. Carpenter & Hill, *supra* note 208, at 139.

doctor “let him out.”²¹³ Similar blame is cast in the 1980s *Psycho* sequels upon the institutional psychiatrists who mistakenly diagnose Bates as of “sound mind” and release him to inevitably commence another round of insane violence.²¹⁴

The mad killer in the psycho-on-the-loose films represents a constant and pervasive threat. *Halloween*, for instance, ends with the following sequence: After Loomis shoots the psycho-killer Michael three times, Michael falls through the second story window and crashes into the ground. Loomis then

looks down at the spot where Michael should be, but there is nothing there,
just a TRAMPLED PATCH IN THE GRASS.

ANGLE ON LOOMIS

He stares down with growing fear, then looks out from the house.

LOOMIS' POV

The back yard, the neighboring yards, the street, all are empty, quiet, dark.
There is only the SOUND of the wind swelling in the trees.

Michael is gone.

FADE TO BLACK.²¹⁵

In short, the conventional rules of both the vigilante police genre and the horror genre reinforced a shared narrative regarding criminal madness.²¹⁶ That narrative was constructed around images of a generally crazy criminal class in

213. See also *ALONE IN THE DARK* (Masada Prods. 1982) (four psychopaths break out of asylum and terrorize their new psychiatrist); *FRIDAY THE 13TH: A NEW BEGINNING* (Georgetown Prods. Inc. 1985) (inmates at mental institution kill with axes while a troubled teenager appears to slip into murderous madness).

214. See *PSYCHO II* (Oak 1983); *PSYCHO III* (Universal Pictures 1986). Toying with our expectations, *Psycho II*'s plot twist is that Bates has not resumed his old killing ways but is instead the victim of a ruse. Nonetheless, the final scene confirms conventional expectations in that Bates's psychosis has quite clearly returned.

215. Carpenter & Hill, *supra* note 208, at 296-98. The same essential plot points can be found in a wide variety of films of this period, including *DRESSED TO KILL* (Cinema 77 Films 1980), *PSYCHO II*, *supra* note 214, and the box-office smash and Oscar-award-winning *THE SILENCE OF THE LAMBS*, *supra* note 82. In *Silence*, as in *Halloween*, a coldly psychotic killer (Hannibal Lecter) is institutionalized with no prospect of treatment (he is considered so dangerous that his head is enclosed in a steel cage, to prevent him—not always successfully—from biting his keepers); he lives solely for the sake of doing evil to others; and he cannot be kept locked away (like Myers, the film ends with Lecter's escape). See RAFTER, *supra* note 8, at 92 fig.3.1 (noting that “[u]nlike earlier psycho films, [contemporary] movies portray criminals as incomprehensible monsters” and “reinforce the lock-em-up rhetoric of contemporary crime control agencies”).

216. See, e.g., Allen et al., *supra* note 197, at 66 (noting that films generally show “a clear trend towards an increasingly graphic representation of violence in the portrayal of crime”).

which mad criminals are faceless, dehumanized, and heavily armed, and doctors and psychiatrists lack any power to treat them. Because they are incurable, the criminally mad are perpetually dangerous, and conventional legal processes are unable to stop or contain them. The narrative stresses that mad criminals will inevitably find their way out of captivity, and whether by release or escape, mad criminals will return to wreak more violence upon the innocent, and will remain at large, randomly encountered,²¹⁷ and “lurking in our midst.”²¹⁸ In the words of one writer, the films portray a “spectacle of limitless, terrifying, unstoppable violence, as criminality trumps criminal justice.”²¹⁹

This, then, was the pop media iconography of criminal madness in 1981. When John Hinckley attempted to assassinate the popular and fatherly President Reagan in an assault repeatedly replayed to a national television audience, the general public was primed to reject his insanity defense, and, given popular images of inefficacious treatment and asylums unable to contain their inmates, undoubtedly found little solace in the prospect that Hinckley would be sent to an asylum.²²⁰ The swift political attack on the insanity defense that followed Hinckley’s acquittal was, in a cultural context in which mad criminals were depicted as irrational, incurable, and dangerous, a *fait accompli*. Efforts to liberalize the insanity defense were almost entirely erased in the political and moral pandemonium that ensued after Hinckley’s acquittal, as the Reagan Administration pushed for abolition of the insanity defense,²²¹

217. See Young, *supra* note 209, at 33 (stating that in movies such as *Psycho* and *The Silence of the Lambs*, “serial killers are represented as selecting their victims according to an arbitrary and unpredictable index”).

218. RAFTER, *supra* note 8, at 91 (“The thrust of serial killer movies is to construct a stereotype of the violent predator: abnormal, incomprehensible, beyond the pale of humanity, bloodthirsty, sexually twisted, and lurking in our midst, a threat to us all.”); *id.* at 106 (“The very randomness of the threat intensifies the need for law.”); see also Young, *supra* note 209, at 33 (“The serial killer film locates criminality in any suburb, any neighborhood, dispersing the threat of victimization across all boundaries of crime control.”).

219. Young, *supra* note 209, at 37-38 (describing effect of Hannibal Lecter’s escape at end of *Silence*).

220. See, e.g., RICHARD J. BONNIE, JOHN C. JEFFRIES, JR. & PETER W. LOW, A CASE STUDY IN THE INSANITY DEFENSE: THE TRIAL OF JOHN W. HINCKLEY, JR. 121 (3d ed. 2008) (quoting a *New York Times* article describing national response to Hinckley’s acquittal as “stunned surprise” and a “cascade of public outrage” (internal quotation marks omitted)); Barrington D. Parker, *Foreword* to RITA J. SIMON & DAVID E. AARONSON, THE INSANITY DEFENSE: A CRITICAL ASSESSMENT OF LAW AND POLICY IN THE POST-HINCKLEY ERA, at vii, vii (1988) (recounting that “[a]s the presiding judge over Hinckley’s trial, within hours of the verdict and for weeks thereafter, I received a flood of mail, expressing outrage and shock that the would-be assassin had been ‘freed’ to an indefinite commitment to a mental hospital”).

221. The Administration eventually dropped its call for abolition in favor of a substantially scaled-back insanity defense. See Michael L. Perlin, “*The Borderline Which Separated You from Me*”: *The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1382 (1997) (noting that after the

Congress enacted the Insanity Defense Reform Act of 1984, which reverted federal insanity law from the ALI test to the *M'Naghten* test,²²² and scores of states passed similar legislation scaling back and, in some cases, abolishing the insanity defense.²²³

Although the Hinckley case focused the public's attention in a highly concentrated way, contrary to the conventional account, there is reason to doubt that Hinckley was single-handedly responsible for the widespread narrowing of the insanity defense. In fact, Montana had abolished its insanity defense in 1979, two years before the Hinckley shooting.²²⁴ Michigan adopted the "guilty but mentally ill" verdict in 1975.²²⁵ Indeed, abolition of the insanity defense was pressed by the Nixon Administration long before Hinckley and long before the Reagan Administration took up the cause.²²⁶ The pressure to scale back the insanity defense, therefore, antedated the Hinckley case, and may well have been triggered by growing public perceptions that dangerously mad criminals were escaping punishment and being released back into the public.²²⁷ Although such perceptions undoubtedly were fuelled by a wide variety of sources, including media coverage of several high-profile insanity defense acquittals,²²⁸ the iconic image of a dysfunctional legal system and the untreatable and unstoppable psycho-killer likely laid a foundation for the legal revolution by

Hinckley acquittal, "[t]he Reagan Administration originally called loudly for the abolition of the insanity defense" but later "quietly dropped its call for abolition and supported the [Insanity Defense Reform Act (IDRA)] as a reform compromise").

222. See Richard E. Redding, *The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-first Century*, 56 AM. U. L. REV. 51, 98-99 (2006) (describing substance and passage of the IDRA).

223. HENRY J. STEADMAN ET AL., BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM 35-39 (1993) (summarizing state and federal reform efforts following the Hinckley case).

224. *Id.* at 121; see also Lincoln Caplan, *Blaming Hinckley*, LEGAL AFF., Mar./Apr. 2004, at 1, 1 (arguing that after the Hinckley acquittal, the public transferred its outrage to the insanity defense, making "[t]he insanity defense . . . a target of demagoguery and vengeance").

225. STEADMAN ET AL., *supra* note 223, at 38.

226. See PERLIN, *supra* note 16, at 359 ("Officials of both the Nixon and Reagan Administrations regularly used the insanity defense as the whipping boy for a host of unrelated criminal justice and social problems.").

227. As a result of the extension of civil rights reforms to the mentally ill which began in the 1960s, by the early 1980s all but ten states barred "the automatic commitment of insanity acquittees without a hearing," often resulting in quick releases of such acquittees back into the community. STEADMAN ET AL., *supra* note 223, at 33-34; La Fond & Durham, *supra* note 184, at 74.

228. See STEADMAN ET AL., *supra* note 223, at 34. Interestingly, there are also a number of high-profile insanity acquittals which did not trigger any widespread dissent, and which, if anything, caused an outpouring of support for the defendant. The Francine Hughes case, which inspired the made-for-TV movie, *THE BURNING BED* (Tisch/Avnet Prods. Inc. 1984), for example, might have triggered a sympathetic public reaction because the defendant did not fit the iconographic image of the "mad criminal." For a detailed recounting of the case, see FAITH McNULTY, *THE BURNING BED* (1980).

fostering numerous widely held distortions and myths concerning the insanity defense.²²⁹ Certainly, the slasher pictures and the *Dirty Harry*-inspired vigilante revenge films showed “no sympathy whatever for the insanity defense, under any circumstances.”²³⁰ That these depictions influenced views about criminals seems incontrovertible; studies document widely held beliefs among film and TV viewers that all criminals are “psychological and social deviants.”²³¹ The furor over Hinckley might best be appreciated as the widespread expression of this popularly held image of the criminal.

If a widespread shrinkage of the insanity defense was a logical response to radically transformed popular beliefs about criminal madness, there were other implications as well, including a growing embrace of preventive detention²³² and development of a “new penology” that made management of criminal threats rather than an understanding or concern with criminals its top priority.²³³ We can see these implications play out in newly popular legislative responses to criminal madness that unmistakably recall the eugenics-driven sexual psychopath laws of the earlier part of the century. Kansas’s Sexually Violent Predator Act (SVPA), for example, was one of the first of many state statutes that sought to increase the state’s ability to indefinitely detain “sexually

229. See Perlin, *supra* note 221, at 1403 (noting commonly held beliefs often fostered by media include that “the allegedly ‘popular’ insanity defense” is “nothing more than a ‘legalistic slight [sic] of hand’ and a ‘common feature of murder defenses,’” and that it is viewed as a reward to mentally disabled defendants for “staying sick,” a “travesty,” a “loophole,” a “refuge,” a “technicality,” one of the “absurdities of state law,” perhaps a “monstrous fraud.” It is used—again, allegedly—in cases involving “mild disorders or a sudden disappointment or mounting frustrations . . . or a less-than-perfect childhood.” It is reflected in “pseudoscience [that] can only obfuscate the issues,” and is seen as responsible for “burying the traditional Judeo-Christian notion of moral responsibility under a tower of psychobabble.” (footnotes omitted)); see also Hermann, *supra* note 17, at 992 (stating that “researchers concluded that the false public perceptions [about the prevalence and success of the insanity defense] were a result of distorted media reporting, reasoning that the public’s awareness of the criminally insane was dependent on the media and that ‘[w]hen such dependence is coupled with selective reporting, and/or distorted dramatizations, false perceptions are developed’” (quoting Henry J. Steadman & Joseph J. Cocozza, *Selective Reporting and the Public’s Misconceptions of the Criminally Insane*, 41 PUB. OPINION Q. 523, 531 (1978))).

230. Rapping, *supra* note 7, at 667 n.13. The genre’s wholesale rejection of the insanity defense undoubtedly arises, as Professor Perlin perceptively explains, because it “is seen as ‘cheating’” the degradation rituals of punishment “and as dissipating the opportunity for expressing hatred,” PERLIN, *supra* note 16, at 172-73, features that constitute and define the genre.

231. Tunnell, *supra* note 11, at 112.

232. Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113, 114 (1996) (observing that “[p]reventive detention has expanded in recent years”).

233. See Cole, *supra* note 94, at 302 (noting that by 1976 “attitudes had already begun to turn away from understanding sex offenders and toward punishing them”); Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449 (1992).

violent predators.”²³⁴ The SVPA targets a type of mad criminal similar to the sex fiend of the 1930s. As the term “predator” suggests, the paradigmatic sex criminal is one who lacks sufficient volitional control to stop himself from committing violent sexual offenses.²³⁵ Of course, what is sufficiently “mad” for purposes of initiating civil detention under the Act bears no direct correlation to legal insanity, or even to clinically accepted definitions of mental illness. The Act does require a prosecutor to prove that a person has a “mental abnormality” or “personality disorder,”²³⁶ but those concepts, lacking any commonly accepted medical meaning, are legal rather than clinical determinations.²³⁷ Since a jury decides whether commitment is warranted under the Act,²³⁸ its finding of “predatory” conduct will almost certainly subsume the necessary finding of “mental abnormality” as well.²³⁹ The SVPA’s penological strategy, which focuses on the management of dangerous criminals through incapacitation unaccompanied by any real promise of effective treatment, thus directly responds to the main cinematic themes identified above. In making commitment depend on initiation by a public prosecutor and turn on jury findings that offenders are dangerous and likely to

234. See ERIC S. JANUS, *FAILURE TO PROTECT* 22 (2006); Jonathan Simon, *Managing the Monstrous: Sex Offenders and the New Penology*, 4 PSYCHOL. PUB. POL’Y & L. 452, 457 (1998).

235. The statute’s declared central focus on “predators” has rich cinematic evocations consistent with the post-1970s iconography of mad criminals, and belies its willingness to abandon science-based criteria in favor of a pure appeal to public emotion. See Simon, *supra* note 234, at 458 (stating that the Kansas Act “reflects the role of sexual offenders as the new monsters haunting the American public,” which is evidenced by the “centrality of the term *predator*, which has no foundation in either human science or criminal jurisprudence” and “indicates the implicit reference to popular emotions”). Two of the most prominent film treatments of sexually violent predators are Fritz Lang’s *M*, *supra* note 33 (concerning trial of child molester and murderer), and, more fantastically, Freddy Krueger from the *Nightmare on Elm Street* series (also a murderer and child molester). See, e.g., *A NIGHTMARE ON ELM STREET* (New Line Cinema 1984).

236. The SVPA requires proof that the person “suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.” *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997) (quoting KAN. STAT. ANN. § 59-29a02(a) (1994)).

237. *Id.* at 359 (rejecting Hendricks’s challenge to the statute’s use of term “mental abnormality” because “[l]egal definitions . . . need not mirror those advanced by the medical profession”); see also Cole, *supra* note 94, at 311 (quoting legal scholar Alexander Brooks regarding Washington state’s similar law asserting that “[t]he ‘mental abnormality’ language is not intended to be a psychiatric term. . . . It is a legal term, intended to convey a form of pathology that leads to violent sexual offenses”).

238. *Hendricks*, 521 U.S. at 380 (Breyer, J., dissenting).

239. See Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1045 (2002) (arguing that a sexual predator law requiring state to prove dangerousness caused by a mental abnormality is circular because “[t]he predisposing cause, sexual desire, and the legally relevant sexually violent conduct that satisfies the dangerousness criterion together also satisfy the requirements of abnormality and a causal link”).

reoffend as a result of a “mental abnormality” or “personality disorder,” the Act de-medicalizes the confinement decision and largely removes psychiatric experts from their traditional gatekeeping role, reflecting their diminished status.

As a result, the SVPA allows the state to detain some mad criminals without any need for proof that they are criminally irresponsible—the traditional criterion for civil commitment—and it allows virtually indefinite duration. Again, these strategies of containing mad criminals seem almost overdetermined by media imagery emphasizing the implacable and relentless danger of mad criminals should they manage to escape captivity. Such a statute undoubtedly would have been disfavored in an earlier era, but in 1997, a majority of the Supreme Court was untroubled by the SVPA and readily found Kansas’s legislative response to the threat posed by sexual predators constitutionally permissible.²⁴⁰ Tellingly, Justice Thomas cites a classic public-health case dealing with the state’s power to vaccinate to support the Court’s conclusion, suggesting a reconceptualization of criminal madness (at least of this sort) as a problem calling for containment rather than rehabilitation or even retribution.²⁴¹

The iconic facelessness of the mad criminal is also mirrored in the retreat from the individualization of the criminal threat, a phenomenon that Jonathan Simon has described as the predominant characteristic of a “new penology.”²⁴² That retreat is manifested in the abandonment of the goal of transforming aberrant criminals in favor of strategies intended merely to manage them, a move made possible (or necessary) by a refiguring of the offender as monstrous rather than diseased.²⁴³ That facelessness is well illustrated in Justice Thomas’s description of the defendant Leroy Hendricks not in terms of his personal traits or family background, but simply as the sum of a criminal record.²⁴⁴ With few other details to define his character, Hendricks’s “chilling history”²⁴⁵ of sexual violence constructs him in the same way that the modern, faceless, mad criminal is constructed—as a single-minded instrument of harm. Hendricks’s figurative absence eases the judicial task; it is far simpler to justify indefinite confinement of individuals if what lurks behind their eyes is, as Dr. Loomis says of Michael Myers, “purely and simply . . . evil.”²⁴⁶ It is also easier to indefinitely remove mad criminals from society if those mad criminals, as pop

240. *Hendricks*, 521 U.S. at 371.

241. *Id.* at 356-57 (citing *Jacobsen v. Massachusetts*, 197 U.S. 11, 26 (1905), for proposition that “[s]tates have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety”).

242. Simon, *supra* note 234, at 452-53.

243. *Id.* at 453-56.

244. *Hendricks*, 521 U.S. at 354.

245. *Id.*

246. Carpenter & Hill, *supra* note 208, at 88B.

iconography would have it, are faceless, unthinking, and incurable violent predators.²⁴⁷ As with Michael Myers in *Halloween*, or Hannibal Lector in *Silence of the Lambs*, the point of institutionalizing sexually violent predators is not to cure them, but simply to keep them locked away. Both the Kansas statute and the Court's opinion emphasized the incurable nature of the mental abnormalities at issue,²⁴⁸ an assumption that justifies quarantining violent sexual predators and that relieves the state of any duty to treat them, either during the initial duration of their criminal sentences or during their subsequent civil detention. Here too the potential effect of popular images of criminal madness is apparent; pervasive media iconography of impulsive criminal predators confirms, or constructs, common sense doubt about the efficacy of rehabilitation.²⁴⁹

If the sexual predator laws were predicated on the iconography of the mad criminal as faceless monster, two other archetypal features of the modern cinematic narrative are manifested in the rise of community-notification laws, or "Megan's laws," as they have come to be known.²⁵⁰ The animating image driving adoption of Megan's laws is that of the sexual predator silently lurking in the community's midst. That image was indelibly captured in the rape and murder of seven-year-old Megan Kanka, whose name became synonymous with the mandatory registration requirements for convicted sex offenders.²⁵¹ Megan Kanka's killer was a released sex offender who lived, unbeknownst to Megan's parents, across the street.²⁵² "Underlying the narrative" constructed in support of the adoption of Megan's laws "was the assumption that Megan's parents simply did not know of the lurking threat to their child."²⁵³ Community notification laws promise to fill in the information gap. As such, they respond to the iconic image of the psycho-on-the-loose. At the same time, informing the

247. See Burt, *supra* note 26, at 362 ("The underlying public and official attitude accompanying the rejection of the rehabilitative ideal has been to shift attention away from the individual characteristics of the convicted offender and instead to focus almost exclusively on the harmfulness of the criminal act . . .").

248. KAN. STAT. ANN. § 59-29a22(b)(6)(B)(vi) (2008) ("Individual patients who are referred by the court or correctional facilities for criminal evaluations may be placed in administrative confinement for security reasons and to maintain proper institutional management when treatment can not be addressed through routine psychiatric methods."); *Hendricks*, 521 U.S. at 366 ("[W]e have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others.").

249. See SHERWIN, *supra* note 22, at 164 ("[T]he criminal as social predator not only enhances the TV viewer's sense of fear in the face of what is perceived by many as pervasive social disorder, but it also makes the strictest punitive response the most desirable measure for coping with the threat. Surely one cannot expect to 'rehabilitate' such irrational beings.").

250. JANUS, *supra* note 234, at 3.

251. *Id.*

252. *Id.* at 15.

253. *Id.*

community about the presence of sexual predators in their midst is only useful to the extent that individuals within the community are prepared to make use of the information. Megan's laws assume that private citizens are prepared to take the necessary steps to protect themselves, and purport to put the tools of self-protection in citizen hands.²⁵⁴ In light of the crisis of doubt in the ability of social institutions to protect the citizenry from mad criminals, Megan's laws represent an alternative legal response: equip each parent to become his own Dirty Harry—an approach one writer has described as “an assault-my-neighbor ethic.”²⁵⁵

Consider, finally, the ways that iconic imagery can become infused in even the most high-minded law. Just one year after *Hinckley*, in *Jones v. United States*,²⁵⁶ the Court held that insanity acquittees could be committed to indefinite detention based on a lower standard of proof than their civil counterparts²⁵⁷ and that the duration of involuntary detention was not limited by the duration of the sentence they otherwise would have received.²⁵⁸ On its face, this case marks a clear break with the trend of cases before it that had expanded the rights of mentally ill criminals in civil commitment proceedings. But one need only pierce the surface to find echoes of the cultural imagery of criminal madness that by then had come to infuse popular media. Of particular note was Justice Powell's emphasis on the reasonableness of presuming that mad criminals are dangerous.²⁵⁹ In defense of this conclusion, Justice Powell relied on legislative assertions that indefinite detention of insanity acquittees was justified by the “fear that ‘dangerous criminals, particularly psychopaths, [may] win acquittals of serious criminal charges on grounds of insanity’ and yet ‘escape hospital commitment.’”²⁶⁰ According to Justice Powell, “common sense” taught that “someone whose mental illness was sufficient to lead him to commit a criminal act” is sufficiently disturbed to require continued treatment, both for the patient's sake and for “the protection of society.”²⁶¹

Of course, what fears “comport[] with common sense”²⁶² will, more than most legislative or judicial determinations, reflect deep, visceral, perhaps even unconscious ontological assumptions. Those assumptions, in turn, are highly likely to be shaped by the popular media, which more than any other influence

254. *Id.* at 66.

255. *Id.* at 92.

256. 463 U.S. 354 (1983).

257. *Id.* at 367-68.

258. *Id.* at 369.

259. *Id.* at 364 (holding that Congress's determination that a verdict of not guilty by reason of insanity “constitute[s] an adequate basis for hospitalizing the acquittee as a dangerous and mentally ill person” was not “unreasonable”).

260. *Id.* at 364 (quoting H.R. REP. NO. 91-907, at 74 (1970)).

261. *Id.* at 366.

262. *Id.*

has the power to demonstrate “just ‘the way things are.’”²⁶³ After all, which ideas (and images and associations) are common will strongly determine which ideas make common sense. Powell’s opinion permits us to imagine how cultural iconography might have a powerful influence on law by influencing basic assumptions about what is and isn’t reasonable. In *Jones*, assumptions about the risks posed by insanity acquittees served to justify a truncated legal process that makes it easier to detain mad criminals indefinitely.

The move in the cases and in state and federal legislation to systematically expand state authority to lock up mad criminals reflects a profound rejection of the diagnostic and curative power of behavioral medicine. The nation’s leading experts have found the trend puzzling. As Professor Robert Burt has written, “[t]he general repudiation of the rehabilitative ideal by the 1970s did not come from the emergence of a new genre of criticism nor the sudden appearance of newly damning data. Something in the tenor of the times gave a new salience to the old, but previously submerged, criticism.”²⁶⁴ Perhaps that “something” was a fundamental shift in the cultural iconography of criminal madness.²⁶⁵

CONCLUSION

Over the course of the twentieth century, at least three major transformations occurred in the iconography of criminal madness. In the 1930s, criminal madness was largely depicted in the metaphoric guise of monsters like Frankenstein and Dracula. Although mythic, those monsters were portrayed in ways that strongly resonated with popular eugenic criminological theories. These portrayals provided a reservoir of popular support for criminal sterilization laws in particular, and more generally for criminal justice mechanisms whose main purpose was to sort criminal offenders into their appropriate types, and enforce restrictions and confinements that were commensurate therewith. Certainly, the image of the criminal degenerate, as infamously referenced in Oliver Wendell Holmes’s opinion in *Buck v. Bell*,²⁶⁶ was an embedded legal icon of the era.

From the mid-1940s to the early 1960s, Hollywood’s depiction of criminal madness underwent a major transformation. Hollywood embraced the power of modern psychiatry to diagnose and perhaps even to cure criminal madness. The clinically diagnosable “psycho” thus took the place of the criminal degenerate “monster.” At the same time, the legal establishment embraced the power of modern psychiatric science and sought to incorporate its insights into a

263. SHERWIN, *supra* note 22, at 21.

264. Burt, *supra* note 26, at 365.

265. Indeed, without using precisely this language, Burt suggested as much when he observed that the abandonment of the rehabilitative ideal was accompanied by a “shift in underlying social imagery, away from an optimistic belief in the potentialities for harmony and toward a darker view of inevitable and irremediable conflict.” *Id.* at 366.

266. 274 U.S. 200, 207 (1927).

reformed criminal law. Those efforts were manifested in broad reform and liberalization of the legal tests for insanity, and in a series of decisions by the Supreme Court to expand civil rights protections to the mentally ill, including mentally ill criminals.

The political and cultural upheaval of the 1960s, however, brought about another transformation in the iconography of criminal madness. Images of dysfunctional courts, rampant crime, and ineffective police bureaucracy reflected and exacerbated popular anxiety over crime and a growing loss of faith in officials charged with protecting society. At the same time, mad criminals began to be portrayed in ways singularly likely to deepen popular anxiety, not only about crime in general, but also about the system's inability to ensure society's safety from predators and psychopaths in particular. The result of this growing anxiety and deepening distrust, it seems safe to say, was an inevitable abandonment of the reforms of the earlier era. What followed was a sharp narrowing of the insanity defense and an expansion of State power to incapacitate and indefinitely detain mad criminals.

The precise effects of the new iconography of criminal madness are admittedly difficult to pinpoint, but the overall picture strongly supports the conclusion that film and law interact in complex ways. The fact that the law's treatment of mad criminals and the cultural iconography of criminal madness grew harsher in tandem suggests a complex causal interdependence.²⁶⁷ Filmmakers consciously (or unconsciously) construct their villains using the cultural raw materials at hand. The 1930s monster movies drew upon theories of degenerate criminals, as well as iconography that conjured other specters, such as racist allusions to the black rapist or xenophobic images of the Eastern European immigrants, to construct an image of the paradigmatic "monster." The 1950s and 1960s psycho pictures relied upon psychoanalytic theory to construct a pathologized image of the criminal. The 1970s and 80s vigilante and horror films recast the mad criminal in far more ominous and far less clinical imagery. In each case, law can be understood as responsive to the then-current image of the mad criminal. In that way, cultural iconography can be seen to drive both the popular definition of the threat and to influence the choice of response. Degenerate criminality suggests eugenic solutions, psychoanalytic criminality suggests psychiatric solutions, and criminality as "pure evil" suggests abandoning solutions altogether in favor of simply managing potential harm.

Even if cultural iconography is not the direct cause of these legal shifts, at the least, it appears that filmmakers and judges are reading from the same script—one that currently continues to demonize the mad criminal. The

267. See Kevin M. Carlsmith et al., *The Function of Punishment in the "Civil" Commitment of Sexually Violent Predators*, 25 BEHAV. SCI. & L. 437 (2007) (presenting empirical research demonstrating that public support for civil commitment of sexually violent predators is primarily based on retributive goals).

Supreme Court's most recent insanity defense ruling, *Clark v. Arizona*,²⁶⁸ continues the shrinkage of the insanity defense. Whether, or when, those trends will change may depend on the way in which criminal madness is portrayed in the popular media. If history is any guide, such a change is both inevitable and heavily dependent upon broader cultural fashions that cinema itself is partially responsible for making current.

268. 548 U.S. 735 (2006) (affirming the conviction of a man diagnosed with paranoid schizophrenia and upholding the constitutionality of an Arizona insanity defense provision permitting conviction of defendants who do not know the nature and quality of their acts, as long as they could tell right from wrong).

