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NOVEL THEORIES OF CRIMINAL DEFENSE BASED UPON THE TOXICITY OF THE SOCIAL ENVIRONMENT: URBAN PSYCHOSIS, TELEVISION INTOXICATION, AND BLACK RAGE

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Criminal defendants increasingly claim that their criminal behavior was caused by social toxins that excuse or mitigate their guilt. In this Article, Professor Falk demonstrates that these claims are not aberrational doctrinal proposals, but rather are sophisticated extensions of existing criminal doctrine commensurate with scientific advancements. Unlike prevalent short-term causal explanations for criminal behavior, these novel extensions serve to elucidate long-term, diffuse effects of social toxins on the human psyche. In so doing, they provide otherwise unavailable insight into criminal behavior. Professor Falk urges the legal community to meaningfully consider these valuable new windows into the criminal mind, rather than fall prey to the common pitfall of reflexive "abuse excuse" rhetoric.

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INTRODUCTION

> *"Only by integrating scientific advancements with our ideals of justice can law remain a part of the living fiber of our civilization."*[1]

In recent years, defendants have proffered a multitude of novel theories of criminal defense in seeking to explain their criminal behavior in terms of internal and external influences beyond their control, including biological processes,[2] chemical reactions,[3] intrapsychic dynamics,[4] social conditions,[5] and cross-cultural stresses.[6]

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1. Fisher v. United States, 328 U.S. 463, 494 (1946) (Murphy, J., dissenting).

2. *See, e.g.*, Deborah W. Denno, *Human Biology and Criminal Responsibility: Free Will or Free Ride?*, 137 U. PA. L. REV. 615 (1988); Marcia Baran, Comment, *Postpartum Psychosis: A Psychiatric Illness, A Legal Defense to Murder, or Both?*, 10 HAMLINE J. PUB. L. & POL'Y 121 (1989); Anne D. Brusca, Note, *Postpartum Psychosis: A Way Out for Murderous Moms?*, 18 HOFSTRA L. REV. 1133 (1990); Marc C. Press, Note, *Premenstrual Stress Syndrome As a Defense in Criminal Cases*, 1983 DUKE L.J. 176; Mark Curriden, *Guilty By Heredity?: His Lawyer Says It's in the Killer's Genes*, NAT'L L.J., Nov. 7, 1994, at A12; Juan Williams, *Violence, Genes, and Prejudice*, DISCOVER, Nov. 1994, at 92.

3. *See, e.g.*, Martin J. Bidwill & David L. Katz, *Injecting New Life Into an Old Defense: Anabolic Steroid-Induced Psychosis as a Paradigm of Involuntary Intoxication*, 7 U. MIAMI ENT. & SPORTS L. REV. 1 (1989); Todd P. Myers, *Halcion Made Me Do It: New Liability and a New Defense—Fear and Loathing in the Halcion Paper Chase*, 62 U. CIN. L. REV. 603 (1993).

4. *See, e.g.*, Mary C. Bonnema, Comment, *"Trance on Trial": An Exegesis of Hypnotism and Criminal Responsibility*, 39 WAYNE L. REV. 1299 (1993); Michael J.

These novel defense theories have spawned a nationwide debate[7] in which rhetoric about the "abuse excuse"[8] and apocalyptic predictions

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Davidson, *"Aces Over Eights"—Pathological Gambling as a Criminal Defense*, ARMY LAW., Nov. 1989, at 11.

5. *See, e.g.*, Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. J. 9 (1985); Abbe Smith, *Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer*, 21 N.Y.U. REV. L. & SOC. CHANGE 433 (1994); Judd F. Snierson, Comment, *Black Rage and the Criminal Law: A Principled Approach to a Polarized Debate*, 143 U. PA. L. REV. 2251 (1995); Kimberly M. Copp, Note, *Black Rage: The Illegitimacy of a Criminal Defense*, 29 J. MARSHALL L. REV. 205 (1995); George Vuoso, Note, *Background, Responsibility, and Excuse*, 96 YALE L.J. 1661 (1987).

6. *See, e.g.*, Ann T. Lam, *Culture As a Defense: Preventing Judicial Bias Against Asians and Pacific Islanders*, 1 UCLA ASIAN AM. & PAC. ISLANDS L.J. 49 (1993); Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293 (1986); Julia P. Sams, Note, *The Availability of the "Cultural Defense" as an Excuse for Criminal Behavior*, 16 GA. J. INT'L & COMP. L. 335 (1986); Spencer Sherman, *Legal Clash of Cultures*, NAT'L L.J., Aug. 5, 1985, at 1.

7. The controversy surrounding these novel theories of defense is exemplified in dualistic notions regarding the need to curb crime and the need to understand better the genesis of criminal behavior. The American public, fed by the media, is more afraid of violent crime and its consequences than at any time in the past. Rorie Sherman, *Crime's Toll on the U.S.: Fear, Despair and Guns*, NAT'L L.J., Apr. 18, 1994, at A1. At the same time, the polled public says that it has some sympathy for those claiming their crimes resulted from forces beyond their control. For instance, a *National Law Journal* poll found that a majority of those surveyed believed that television violence encourages crime; 79% of women and 56% of men believed that pornography encourages violence against women; and 49% believed that the black rage defense would be compelling in a criminal prosecution (68% of blacks and 45% of whites). *Id.*; *see also Black Rage Defense Gets Backing in Poll*, RECORD (Northern N.J.), Apr. 11, 1994, at A05 (noting findings of a national survey of attitudes toward the black rage defense; nearly half of those polled considered it a "compelling" defense); Stephanie B. Goldberg, *Fault Lines*, A.B.A. J., June 1994, at 40 (stating that Americans are becoming more interested in the psychological makeup of the citizenry; talk shows abound regarding individuals' bizarre and unusual behavior).

8. Alan Dershowitz defines the "abuse excuse" as "the legal tactic by which criminal defendants claim a history of abuse as an excuse for violent retaliation." ALAN M. DERSHOWITZ, THE ABUSE EXCUSE 3 (1994); *see also* Goldberg, *supra* note 7, at 44 ("It's scary to think of a society in which anyone can raise some kind of plausible excuse for their behavior and the courts will take it seriously."); Niko Price, *The "Abuse Excuse": Threat to Justice?; More and More Lawyers Using Trauma as Defense to Crimes*, THE LEGAL INTELLIGENCER, May 31, 1994, at 3 (laying partial blame for the abuse excuse defense on "two decades of pop psychology and afternoon talk shows that have convinced society . . . that there is an explanation—and possibly a justification—for almost any act"); Margot Slade, *I am a Victim of (Fill in Blank) and Couldn't Help Myself: Legal Defenses Put Blame on Syndromes*, MINNEAPOLIS-ST. PAUL STAR TRIB., May 21, 1994, at 4A (arguing that the impact of the abuse excuse may be overstated—the insanity defense is invoked in less than 1% of all felony pleas and is successfully invoked in only 25% of those cases); *Nightline: Is Abuse an Excuse?* (ABC television broadcast, Feb. 4, 1994) (discussing various cases implicating the abuse excuse) [hereinafter *Nightline*] (transcript

of the demise of our criminal justice system[9] have overshadowed meaningful consideration and reasoned analysis. Instead of cavalierly rejecting these theories of criminal defense, we should examine with care the claims made by these defendants, especially since many of the implicated defendants are from minority groups and politically powerless segments of society. These defenses, and those which will surely follow, present a challenge to our system of justice. They are one avenue through which we must continually adjust the values of our nation to the current realities of our lives.

This Article focuses on one subset of this burgeoning class of defenses: those based upon the central premise that the defendant's criminal conduct was caused, or significantly influenced, by his exposure to social environmental factors or, if you will, toxins affecting his mental functioning.[10] While a wide panoply of toxins exist within the fabric of our social environment,[11] three of the most pervasive and damaging are: the daily reality of violence in our nation's homes, neighborhoods, and communities; the incessant barrage of graphic depictions of violence presented in the media; and the persistence, if not resurgence, of racism despite the guarantee of legal equality. It is not a coincidence, then, that defendants have raised defenses based upon these same three social conditions—urban psychosis, television intoxication, and black rage.

The notion that social conditions influence criminal behavior is certainly not new; these defenses are consonant with a broad literature documenting the effects of adverse social conditions on the

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on file with author).

9. *See, e.g.*, Julie Gannon Shoop, *Criminal Lawyers Develop 'Urban Psychosis' Defense*, TRIAL, Aug. 1993, at 12, 13 ("Critics caution that the urban psychosis defense could potentially exempt thousands of violent urban offenders from punishment.").

10. I borrow the term "toxin" from James Garbarino:

> When I use the term "socially toxic environment" I mean to suggest that the social context of children, the social world in which they live, has become poisonous to their development. I offer it as a parallel to the environmental movement's analysis of the *physical* toxicity as a threat to human well being.

James Garbarino, *Growing Up in a Socially Toxic Environment: Life for Children and Families in the '90s*, 42 NEB. SYMP. MOTIVATION 6 (1995) [hereinafter Garbarino, *Growing Up*]; *see also* JAMES GARBARINO, RAISING CHILDREN IN A SOCIALLY TOXIC ENVIRONMENT (1995) (discussing the theory of social toxicity in greater detail).

11. Garbarino, *Growing Up*, *supra* note 10, at 6. Garbarino elaborated:

> And what are the social equivalents of lead and smoke in the air, PCBs in the water, and pesticides in the food chain? I think they include violence, poverty and other economic pressures, depression, trauma, despair, nastiness, and alienation. These are the forces abroad in the land that contaminate children and youth. These are the elements of social toxicity.

Id. at 6-7.

incidence of crime.[12] However, these defenses are innovative because they transcend generalized theories of systemic influences and provide more sophisticated and specific articulations of the impact of discrete social toxins on mental health and criminality.

Scientific advances have laid the foundation for the articulation of these innovative defense theories by elucidating the effects of social toxins on some forms of mental functioning relevant to the criminal law. One of the most significant developments, in this respect, has been the mental health community's recognition that environmental stressors can cause mental illness. In 1980, the American Psychiatric Association included within its diagnostic lexicon a category of mental illness, post-traumatic stress disorder (PTSD), which results from exposure to traumatic environmental events such as war.[13] Social scientists have complemented the psychiatric literature by empirically documenting the effects of adverse social influences on psychological functioning, particularly developmental processes.

The defense theories of urban psychosis, television intoxication, and black rage engender a plethora of complex and thorny issues. The modest goal of this Article is to move beyond the "abuse excuse" rhetoric toward a more coherent understanding of these theories of defense. The Article begins that difficult process by collecting the relevant cases, reviewing briefly the corresponding social science literature, examining relevant criminal doctrine, and exploring preliminarily some of the policy implications of these theories for the evolution of criminal law.

Part I assesses the "state of the art" with respect to the legal system's reception of urban psychosis, television intoxication, and black rage as theories of defense.[14] It collects and analyzes the

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12. *See, e.g.*, NORVALL MORRIS, MADNESS AND THE CRIMINAL LAW (1982). Morris writes:

> Hence, at first blush, it seems a perfectly legitimate correlational and, I submit, causal inquiry, whether psychosis, or any particular type of psychosis, is more closely related to criminal behavior than, say, being born to a one-parent family living in welfare in a black inner-city area. And there is no doubt of the empirical answer. Social adversity is grossly more potent in its pressure toward criminality, certainly toward all forms of violence and street crime as distinct from white-collar crime, than is any psychotic condition. As a factual matter, the exogenous pressures are very much stronger than the endogenous.

Id. at 60-61.

13. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL 247-51 (3d ed. 1980) [hereinafter DSM-III]. "PTSD is among the few psychiatric disorders listed in the DSM-III that are defined in part by the environment." Ralph Slovenko, *Foreword* to D.B. SCRIGNAR, POST-TRAUMATIC STRESS DISORDER vii, viii (1984).

14. *See infra* notes 18-161 and accompanying text.

available case law implicating these defenses with special emphasis on both the social science proffered by the defendants and the variety of doctrinal niches into which these defense theories fit. This analysis of the cases demonstrates that defendants did not proffer these theories as independent, free-standing defenses, or new doctrinal appurtenances, but used them as causative explanations to support existing categories of defense and mitigation.

Part II provides an overview of the underlying scientific foundations of these defense theories by surveying the social science literature on the psychological effects of real-life violence, television violence, and racism.[15] While the degree of theoretical and empirical support for the three defenses varies, sufficient social science exists in each area to meet threshold evidentiary requirements.

Part III explores whether these defenses fit within the existing structure of criminal jurisprudence.[16] It concludes that urban psychosis, television intoxication, and black rage are merely modern variations on established doctrinal themes that have evolved throughout the history of criminal law. With little substantive innovation or expansion, these theories may be accommodated within the defense categories of insanity, diminished capacity, provocation, and self-defense, and may be used as mitigating factors in punishment determinations.

Finally, Part IV examines some of the policy implications of these theories of defense that derive from two aspects of the social science literature.[17] First, the social toxins of real-life violence, media violence, and racism, while pervasive in society, affect individuals differently such that only some persons are so gravely influenced that mental illness or psychological dysfunction results. Second, the effects of these social toxins require an examination of more long-term and diffuse developmental processes rather than immediate and discrete cause-and-effect relationships.

15. *See infra* notes 161-278 and accompanying text.
16. *See infra* notes 279-378 and accompanying text.
17. *See infra* notes 379-406 and accompanying text.

I. THE CASES: URBAN PSYCHOSIS, TELEVISION INTOXICATION, AND BLACK RAGE AS THEORIES OF CRIMINAL DEFENSE

A. Urban Psychosis

> *Why would one child kill another over a piece of clothing? Well, Felicia Morgan's attorney says it was the stress of growing up in the inner city.*[18]

Defendants in four cases, all unreported, have utilized urban psychosis or a variation thereof as a theory of defense. In two of these cases, the defendants employed urban psychosis per se, claiming that the experience of violence in their lives caused them to suffer from mental illness which, in turn, materially contributed to their subsequent criminal behavior. In the other two cases, involving a variation of urban psychosis called "urban survival syndrome," the defendants claimed that living in a violent, urban environment induced in them a mindset of heightened fear and danger.[19]

1. Urban Psychosis[20]

The first case utilizing the theory of urban psychosis as a defense concerned Felicia Morgan, a Milwaukee teenager, who shot and killed another teenager when the latter refused to surrender possession of a leather coat.[21] Morgan used urban psychosis to support an insanity defense. Robin Shellow, Morgan's attorney, argued that her client's "traumatic childhood in a violent inner-city home and neighborhood created in her the urban counterpart of the post-traumatic stress disorders that affected some Vietnam veterans."[22] At the sanity

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18. *20/20: An Excuse to Kill* (ABC television broadcast, July 16, 1993) [hereinafter *20/20*] (transcript on file with author).

19. *See* Price, *supra* note 8, at 3.

20. This term was coined by Robin Shellow, the attorney representing Felicia Morgan. Shoop, *supra* note 9, at 12.

21. For reports of this unpublished case, see Shoop, *supra* note 9, at 12; Junda Woo, *Urban Trauma Mitigates Guilt, Defenders Say*, WALL. ST. J., Apr. 27, 1993, at B1; Rogers Worthington, *'Urban Psychosis' Rejected as Slaying Defense*, CHI. TRIB., Nov. 5, 1992, at 8; *Sonya Live* (CNN television broadcast, Sept. 16, 1993) (transcript on file with author); *20/20*, *supra* note 18.

22. Worthington, *supra* note 21, at 8. According to one news report, Morgan had a nightmarish childhood:

> At home, her parents threatened each other with guns, and her mother once held her at knifepoint. Her mother and grandparents beat her regularly. Violence was everywhere in her urban Milwaukee neighborhood. At 12, she was raped by a landlord. By the time she was 17, several young relatives and friends had died

phase of the trial, two expert witnesses testified regarding Morgan's mental state.[23] Charles Ewing asserted that Morgan's condition was brought about by severe physical and mental abuse from her mother. James Garbarino testified about the deleterious effects of being the victim of and/or witness to violence on a daily basis.[24] Morgan was convicted[25] and sentenced to life in prison for armed homicide, armed robbery, and other charges. The judge ruled that Morgan would be eligible for parole in the minimum time—thirteen years and four months, rather than the sixty years requested by the prosecution.[26] On appeal, Morgan is challenging the judge's decision to admit evidence of urban psychosis only at the insanity stage rather than the guilt-determination phase of the trial.[27]

The second case raising a defense based on urban psychosis involved thirty-year-old Turhan Taylor.[28] Taylor grew up in a violent family in a tough neighborhood in Milwaukee. He had been abused as a child, sexually assaulted as a youth, and gang-raped in prison.[29] During a flashback to the gang-rape, Taylor stabbed a sexual partner to death.[30] In addition to urban psychosis, Taylor also claimed that he had rape-trauma syndrome.[31] After the judge ruled that evidence of Taylor's PTSD was admissible at the guilt phase of the trial,[32] the prosecutor reduced the charge and Taylor pleaded

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violently on the streets.
Shoop, *supra* note 9, at 12.

23. Under Wisconsin law, insanity defense trials are bifurcated. In the first phase, guilt is determined; in the second phase, the jury considers the issue of insanity. WIS. STAT. ANN. § 971.165 (West 1985 & Supp. 1994).

24. *20/20*, *supra* note 18.

25. The jury reached a verdict in less than three hours. Worthington, *supra* note 21, at 8. According to Shellow, two of the twelve jurors believed the argument regarding urban psychosis. Woo, *supra* note 21, at B7.

26. Shoop, *supra* note 9, at 12. Shellow credited the introduction of information about urban psychosis as being responsible for the relatively early parole date. *Id.*

27. *Id.*; Woo, *supra* note 21, at B7. Shellow claimed that Morgan did not have the intent to kill, thereby reducing the severity of the crime, and that expert testimony at the guilt phase would have assisted the jury in making that determination. Brief for Defendant-Appellant at 7, State v. Morgan (Wis. Ct. App. 1994) (No. 93-2611-CR) (on file with author).

28. For reports of this unpublished case, see Shoop, *supra* note 9, at 13; Woo, *supra* note 21, at B1.

29. Shoop, *supra* note 9, at 13; Woo, *supra* note 21, at B1.

30. Woo, *supra* note 21, at B1.

31. *Id.*

32. The judge analogized the introduction of information of PTSD in Taylor's case to the introduction of similar evidence in cases involving battered women or children. Shoop, *supra* note 9, at 13.

guilty to reckless homicide.[33] Thus, Taylor succeeded where Morgan failed, although Taylor used urban psychosis to mitigate his guilt rather than attempting to excuse it.[34]

2. Urban Survival Syndrome[35]

The first case utilizing urban survival syndrome involved an eighteen-year-old black youth, Daimion Osby, who shot and killed two young men during a confrontation in a parking lot after a long-running feud between them.[36] One week before the shooting, the two victims had threatened Osby with a shotgun. Osby used urban

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33. *Id.* Reckless homicide is Wisconsin's statutory equivalent to manslaughter. *Id.* "Whoever recklessly causes the death of another human being under circumstances which show utter disregard for human life is guilty of a Class B felony." WIS. STAT. ANN. § 940.02(1) (West Supp. 1994).

34. Urban psychosis was also publicized as the defense theory in a case involving Lisa Connelly and six other teenagers who lured a 20-year-old acquaintance to a rock quarry and killed him. *Lawyer mulls 'urban psychosis' as defense in Florida murder case*, HOUSTON POST, Sept. 3, 1993, at A28; *Suspect Plans Urban Psychosis Defense*, ORLANDO SENTINEL, Sept. 2, 1993, at B4 [hereinafter *Suspect Plans*]; April Witt, *Violence Cited as Defense in Murder*, MIAMI HERALD, Sept. 1, 1993, at 1BR ("Murder suspect Lisa Connelly, 19, might have been so numbed by rampant violence in South Florida and in her own life that she wasn't responsible for her actions when she allegedly helped kill Bobby Kent, her attorney argued Tuesday.").

Unfortunately, since little additional information exists regarding this case, it is unclear whether Connelly actually raised urban psychosis to support her defense at trial. One article reported that Connelly's attorney "lost his attempt to allow expert testimony at trial that Connelly suffers from a 'dependent personality disorder,' which diminished her ability to formulate the intent to commit murder." Charles E. Hecker, *Judge Confession Stands in Kent Case*, MIAMI HERALD, Apr. 26, 1994, at 2BR. Ellis Rubin, the attorney in several television-intoxication cases, is quoted as saying that he did not think that the defense would be successful in the Connelly case. *Suspect Plans*, *supra*, at B4.

35. David Bays, one defendant's court-appointed attorney, coined this term after consulting a race-relations expert he heard on talk radio. Lori Montgomery, *'Urban Survival Syndrome' Attorneys Say Client Shot Pair Because of Fear Blacks Have of Other Blacks*, MORNING NEWS TRIB. (Tacoma, Wash.), Oct. 24, 1994, at D5. Bays defined the syndrome as "the fear that black people have of other black people . . . ." *Mistrial Declared in 'Urban Survival Syndrome' Case*, AUSTIN AM.-STATESMAN, Apr. 21, 1994, at B2. According to another news report, the syndrome is "[n]ot a mental illness, but an intense fear, a heightened sense of danger created in urban areas where the cops don't come when you call and you better look out for yourself." Lori Montgomery, *Murder Defence to Rest on 'Urban Survival Syndrome'; Explosive Argument Claims Dangers Justify Gunning Down Neighbors*, EDMONTON J., Oct. 24, 1994, at A6.

36. Jeri Clausing, *Mistrial in 'Urban Survival' Case*, PHILA. INQUIRER, Apr. 21, 1994, at A13. For other news coverage of this unreported case, see Courtland Milloy, *Self-Defense Goes Insane in the City*, WASH. POST, May 18, 1994, at D01; Lori Montgomery, *Murder Defense Based on "Urban Survival,"* HOUSTON CHRON., Oct. 24, 1994, at A15; *Dateline: Profile: Urban Survival Defense Being Used in Controversial Murder Trial in Fort Worth, Texas* (NBC television broadcast, Oct. 19, 1994) [hereinafter *Dateline*] (transcript on file with author).

survival syndrome to furnish an underpinning for his claim of self-defense. During his first trial, Osby's counsel called an urban crime witness.[37] The first trial resulted in a hung jury; the black foreperson thought that Osby had killed in self-defense.[38] In a subseqent retrial in which "[t]he controversial defense was not used as prominently,"[39] Osby was convicted of murder.[40] Since the prosecutors had decided before trial not to seek the death penalty, Osby received an automatic life sentence.[41]

A second urban-survival-syndrome case involved Torino Roosevelt Boney, a nineteen-year-old who shot a twenty-year-old man in the head after they bumped into each other in a food court at Union Station in Washington, D.C.[42] Boney's attorney and a social worker attributed his violent reaction to this minor incident to urban survival syndrome, which they defined as a "defensive mind-set prevalent in tough, inner-city neighborhoods."[43] Boney's counsel asserted that "poor urban areas foster a 'cycle of violence and despair' among young black men, and 'a look, a bump or a glance leads to extreme violence.' "[44] Boney received a ten-year minimum sentence for the killing.[45] Due to the limited media reports, the precise function of urban survival syndrome in this case is unclear.

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37. Milloy, *supra* note 36, at D01. The expert witness, Jared Taylor, testified about black-on-black crime. *Id.*

38. Clausing, *supra* note 36, at A13.

39. *Urban Survival Defendant Convicted*, UPI, Nov. 11, 1994, *available in* LEXIS, Nexis Library, UPI File. *But see Dateline*, *supra* note 36 ("Damian Osby's defense has a new angle for the retrial. In addition to urban survival syndrome, his attorney will now argue that Osby suffered from something usually associated with war veterans, post-traumatic stress disorder.").

40. *Urban Survival Defendant Convicted*, *supra* note 39.

41. *Id.*

42. Greg Seigle, *Union Station Killer Gets 10-Year Minimum*, WASH. TIMES, June 10, 1994, at C10.

43. *Id.*

44. *Id.*

45. *Id.*

B. *Television Intoxication*[46]

Ronny Zamora was created by television. Win or lose, society was going to have to face it.[47]

Defendants in six criminal cases, three unpublished, have claimed that media violence, in one form or another,[48] affected their mental functioning and thereby played a causal role in their criminal behavior. In three of these cases, the defendants argued that their exposure to media violence caused them to become legally insane. Defendants in two cases asserted that the impact of media violence was relevant to the broader question of moral culpability vis-a-vis the imposition of the death penalty; one defendant made both arguments.

1. Television Violence

The first case utilizing television intoxication as a theory of defense is *Florida v. Zamora.*[49] In that case, fifteen-year-old Ronny Zamora and an accomplice broke into an elderly neighbor's house where they found some money and a gun.[50] The neighbor returned home while the two teenagers were in the house and immediately recognized Zamora; Zamora shot and killed her.[51] At trial,[52] Zamora was represented by Ellis Rubin,[53] who asserted an insanity

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46. Ellis Rubin coined this term in his defense of Ronny Zamora. ELLIS RUBIN & DARY MATERA, "GET ME ELLIS RUBIN!": THE LIFE, TIMES, AND CASES OF A MAVERICK LAWYER 39 (1989).

47. *Id.* at 40.

48. Three cases involved television violence, two pertained to violent pornography, and one concerned violent rock lyrics, specifically "gangsta rap." All six cases are examined in this section.

49. Florida v. Zamora (Dade County Cir. Ct. 1977), *aff'd*, 361 So. 2d 776 (Fla. Dist. Ct. App. 1978), *cert. denied*, 372 So. 2d 472 (Fla. 1979); *see also TV on Trial* (PBS television broadcast, Mar. 21, 1978) (tape on file with author) (covering the case in a two-hour television special). One news broadcast reported on an unidentified case that may have been *Zamora:* "One man even told a jury that he killed two people because T.V. made him do it. The jury found him guilty anyway, but some people think that he had a point." *Frontline: Does T.V. Kill?* (PBS television broadcast, Jan. 10, 1995) [hereinafter *Frontline*] (transcript on file with author).

50. Zamora v. Wainwright, 637 F. Supp. 439, 440 (S.D. Fla. 1986), *aff'd sub nom.* Zamora v. Dugger, 834 F.2d 956 (11th Cir. 1987).

51. *Id.* at 440-41.

52. Ironically, the *Zamora* case was the first televised trial in Florida during a one-year experimental period. The irony of televising a trial in which television was itself on trial was not lost on commentators. *See, e.g., TV on Trial, supra* note 49.

53. For a discussion of the case by Rubin, see RUBIN & MATERA, *supra* note 46, at 23-65.

defense. Rubin argued that Zamora had become involuntarily subliminally intoxicated by violent television programming.[54] To support the insanity defense, Rubin attempted to introduce two kinds of expert testimony. First, he called a psychiatrist who stated that Zamora was insane in the two or three seconds when he actually shot the victim.[55] Rubin also sought to introduce the testimony of a psychologist who was an expert on the effects of television violence upon children. The court refused to allow this testimony, stating that it did not support an insanity defense and was, therefore, irrelevant.[56] Zamora was convicted in record time[57] and sentenced to life imprisonment for the murder.[58]

Perhaps more than for the trial itself, *Zamora* is noteworthy for the considerable subsequent litigation it spawned. In state courts, Rubin appealed on the ground that the trial court erred in excluding the expert testimony on the negative effects of violent television on children, but the Florida Court of Appeals rejected the appeal.[59] Zamora thereafter retained new counsel and appealed, arguing ineffective assistance of counsel; this appeal was also denied.[60] After exhausting the appellate process in Florida, Zamora mounted a

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54. Zamora v. State, 361 So. 2d 776, 779 (Fla. Dist. Ct. App. 1978), *cert. denied*, 372 So. 2d 472 (Fla. 1979).

55. *Id.* at 780. For an account by the psychiatrist, Michael Gilbert, of his testimony in *Zamora*, see Donna Gehrke, *Trial Over But Ordeal Continues, TV Intoxication Murder Case Still Haunts Principals*, MIAMI HERALD, Dec. 3, 1989, at 1G. Gilbert claimed that Zamora acted as the result of a conditioned reflex. *Id.*

56. *Zamora*, 361 So. 2d at 779. For the portion of the trial transcript relating to the court's decision to disallow this testimony, see JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS 446-52 (1994). Rubin and Matera elaborate on the exclusion:

> He refused to consider their studies or hear their testimony concerning the damaging effects of television violence on children. Judge Baker's rationale was that the expert testimony had to be restricted to Ronny, and could not be extended to children in general. Such a decree would make most respected researchers of any topic insist that Judge Baker was legally insane. Imagine trying to prove that cigarettes cause cancer, and being restricted to one single smoker?

RUBIN & MATERA, *supra* note 46, at 51. The judge also refused to admit 78 scientific studies and published stories regarding the effect of television violence on children. *Id.*

57. The jury took less than two hours to return a guilty verdict. Gehrke, *supra* note 55.

58. *Zamora*, 361 So. 2d at 778. Zamora received additional sentences for burglary, robbery, and the possession of a firearm. *Id.*

59. *Id.* at 779.

60. Zamora v. State, 422 So. 2d 325 (Fla. Dist. Ct. App. 1982).

habeas corpus challenge in the federal courts,[61] again claiming, inter alia, that he had been denied effective assistance of counsel because Rubin had tried the unlikely defense of television intoxication.[62] The federal courts were not sympathetic to this argument; they noted that little defense was possible and concluded that Rubin had done the best he could.[63] These courts also noted that Rubin's use of a television intoxication defense had permitted the introduction of evidence of Zamora's unfortunate background, possibly engendering jury sympathy.[64]

The final piece of litigation resulting from this case was a civil suit[65] by Zamora and his parents against the three major television networks.[66] The federal district court dismissed the suit, relying on the importance of the First Amendment:

> One day, medical or other sciences with or without the cooperation of programmers may convince the F.C.C. or the Courts that the delicate balance of First Amendment rights should be altered to permit some additional limitations in programming. The complaint before the Court in no way justifies such a pursuit.[67]

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61. Zamora v. Wainwright, 610 F. Supp. 159 (S.D. Fla. 1985); Zamora v. Wainwright, 637 F. Supp. 439 (S.D. Fla. 1986), *aff'd sub nom.* Zamora v. Dugger, 834 F.2d 956 (11th Cir. 1987).

62. *Zamora*, 610 F. Supp. at 160.

63. *Zamora*, 834 F.2d at 959; *Zamora*, 637 F. Supp. at 442-43.

64. *Zamora*, 834 F.2d at 959; *Zamora*, 637 F. Supp. at 442.

65. Zamora v. Columbia Broadcasting Sys., 480 F. Supp. 199 (S.D. Fla. 1979).

66. In a number of other civil cases, plaintiffs sued media defendants for harm allegedly occasioned by violent television programming or movies; in none of these cases has recovery been permitted. *See, e.g.*, Bill v. Superior Court for City and County of San Francisco, 187 Cal. Rptr. 625 (Cal. Ct. App. 1982) (plaintiff sued movie's producers when she was shot following its showing); Olivia N. v. National Broadcasting Co., 141 Cal. Rptr. 511 (Cal. Ct. App. 1977), *cert. denied*, 435 U.S. 1000 (1978) (plaintiffs alleged the "artificial rape" of their daughter was caused in part by the broadcast of a television movie depicting a similar rape); Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067 (Mass. 1989) (plaintiff sued after decedent was fatally stabbed by a patron who had just seen a violent movie).

For additional discussion of civil litigation related to television or media violence, see E. Barret Prettyman, Jr. & Lisa A. Hook, *The Control of Media-Related Imitative Violence*, 38 FED. COMM. L.J. 317 (1987); Julia W. Schlegel, *The Television Violence Act of 1990: A New Program for Government Censorship?*, 46 FED. COMM. L.J. 187 (1993); Emily Campbell, Comment, *Television Violence: Social Science vs. The Law*, 10 LOY. L.A. ENT. L.J. 413 (1990); Stephen J. Kim, Comment, *"Viewer Discretion Is Advised": A Structural Approach to the Issue of Television Violence*, 142 U. PA. L. REV. 1383 (1994); Laura A. Lyon, Comment, *Subliminal Song Lyrics as Product Defects*, 96 DICK. L. REV. 125 (1991).

67. *Zamora*, 480 F. Supp. at 206-07.

In a second case, *State v. Molina*,[68] the defendant, also represented by Rubin, pleaded not guilty by reason of insanity based upon a theory of television intoxication. After twenty-one-year-old Molina watched a movie entitled "Love at First Bite," he held down a ten-year-old girl while her sixteen-year-old step-brother stabbed and shot her to death.[69] Rubin maintained that the social science basis of the defense had improved since the *Zamora* case,[70] but the jury rejected Molina's insanity defense,[71] and the judge sentenced him to life imprisonment.[72]

In a more recent case, *State v. Quillen*,[73] the seventeen-year-old defendant and an accomplice bludgeoned a man to death during a burglary. Quillen attempted to withdraw his guilty plea to first-degree murder, claiming that his attorneys had failed to apprise him fully of his defense options, including the possibility of an insanity defense based upon television intoxication.[74] Defense counsel had contacted an expert regarding this theory of defense, but that expert was "not comfortable"[75] with an insanity defense.[76] The trial court rejected

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68. State v. Molina, No. 84-2314B (11th Judicial Dist., Fla. 1984). For brief discussions of this case, see Juliet L. Dee, *Media Accountability for Real-Life Violence: A Case of Negligence or Free Speech?*, 37 J. COMM. 106, 111 (1987); Campbell, *supra* note 66, at 437 n.121; Lyon, *supra* note 66, at 134-35.

69. Dee, *supra* note 68, at 111.

70. *Id.* "Rubin said that since the Zamora trial, there had been 'thousands' of studies on television violence, including the 1982 National Institute of Mental Health report, which, according to Rubin asserts 'a causal connection between television violence and aggressive conduct of viewers, especially teenagers.' " *Id.* (citations omitted).

71. The jury was only out for several hours. *Id.* However, the prosecutor noted that "*Molina* came 100 giant steps closer to linking TV and murder than *Zamora* did in the sense that the 'TV intoxication' argument was not immediately thrown out by the judge." *Id.*

72. Lyon, *supra* note 66, at 135.

73. No. S87-08-0118, 1989 Del. Super. LEXIS 129, at *1 (Mar. 28, 1989).

74. *Id.* at *16.

75. *Id.* The expert was Dr. Robert M. Liebert, a Professor of Psychology at the State University of New York and a "recognized expert on the subject of the influence on children of graphic depictions of violence on television and in movies." *Id.* at *3-*4.

76. Several additional cases implicated the role of television in a less direct fashion. For instance, one author reported that John W. Hinckley, Jr. had "spent countless hours watching television, which he later said was a dangerous practice leading him to engage in violent fantasies. He believed that these fantasies led him to collect handguns and to shoot the President of the United States." Campbell, *supra* note 66, at 416. It is also commonly known that Hinckley was heavily influenced by the movie "Taxi Driver." *See, e.g.*, Elise M. Whitaker, *Pornographer Liability for Physical Harms Caused by Obscenity and Child Pornography: A Tort Analysis*, 27 GA. L. REV. 849, 880 (1993). In State v. Moore, 150 S.E.2d 47, 268 N.C. 124 (N.C. 1966), the defendant claimed to have been half-asleep in front of the television during a program depicting violent wildlife scenes. He was awakened suddenly and committed a violent act. *Id.*

Quillen's claims, holding that he had been fully apprised of all available defense options, and that the evidence did not support a plea of insanity.[77]

2. Violent Pornography

The defendants in two cases claimed that their viewing of violent pornography played some causal role in their commission of violent offenses against women. The first case involved Bobby Joe Long,[78] a convicted serial killer whom Rubin represented during his sentencing hearing in 1986. Rubin offered evidence concerning the effects of exposure to violent pornography at the sentencing phase to avoid imposition of the death penalty.[79] The jury rejected the argument and sentenced Long to death.[80]

In *Schiro v. Clark*,[81] the defendant utilized social science on the connection between violent pornography and subsequent criminal behavior at both the guilt-determination and sentencing phases of the case. At trial, he raised an insanity defense: "Schiro argued that he was a sexual sadist and that his extensive viewing of rape pornography and snuff films rendered him unable to distinguish right from wrong."[82] On appeal, seeking habeas corpus relief, Schiro claimed ineffective assistance of counsel because his attorney failed to present sufficient evidence of mitigation during the death penalty phase of the trial. In rejecting Schiro's claim, the court noted that his attorney had attempted to present expert testimony on the connection between violent pornography and criminal acts, but the trial court had rejected it.[83] The federal court upheld the trial court's exclusion of this

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77. No. S87-08-0118, LEXIS 129, at *16-*21.

78. For subsequent litigation in this case, see Long v. State, 517 So. 2d 664 (Fla. 1987), *cert. denied*, 486 U.S. 1017 (1988); Long v. State, 610 So. 2d 1276 (Fla. 1992); CBS, Inc. v. Cobb, 536 So. 2d 1067 (Fla. Dist. Ct. App. 1988).

79. *See* Ron Hayes, *Attorney Knows How to Represent Himself: Florida "Nympho Case" is the Latest to Keep Ellis Rubin in the News*, CHI. TRIB., Sept. 9, 1991, § 5, at 2. To support his argument, Rubin relied upon a recently-issued report by U.S. Attorney General Edwin Meese linking pornography and violence: " 'I said 'perhaps' a contributing factor to his activity was pornography,' . . . 'and you should take that into account. I didn't say that he murdered because of pornography.' " *Id.*

80. *Id.*

81. 963 F.2d 962 (7th Cir. 1992), *aff'd*, 114 S. Ct. 783 (1994).

82. *Id.* at 971.

83. *Id.* at 971-72. Schiro's counsel presented testimony by Edward Donnerstein, a preeminent expert on the connection between pornography and violence against women. *Id.* An additional expert, Frank Osanka, testified that Schiro's viewing of pornography from the age of six encouraged him to commit the violent acts at issue. *Id.* at 972. The court also cited a book by Catharine A. MacKinnon on the same issue. *Id.* at 972 n.9

testimony,[84] reasoning that it could not allow the First Amendment to prevent the state from banning pornography on the one hand and yet recognize exposure to pornography as a criminal defense or death-penalty mitigator on the other.[85]

3. Violent Rock Lyrics

Finally, in one case the defendant asserted that his behavior was affected by violent music lyrics. Ronald Ray Howard, a nineteen-year-old male, shot and killed a police officer[86] while listening to

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(citing CATHARINE A. MACKINNON, TOWARDS A FEMINIST THEORY OF THE STATE 195-214 (1989)). Defense counsel sought to introduce this testimony either as evidence of mental disease or, by analogy, intoxication, two mitigating factors under Indiana's death penalty statute, IND. CODE ANN. § 35-50-2-9 (Burns Supp. 1995).

84. *Schiro*, 963 F.2d at 971-72. The Seventh Circuit wrote:

> The troubling aspect of Schiro's defense is that his argument that pornography reduced his capacity to understand the criminality of his conduct, if successful, would not only excuse him from imposition of the death penalty but further excuse him for his criminal conduct altogether on the basis that he was not guilty by reason of insanity. Under Schiro's theory pornography would constitute a legal excuse to violence against women. . . . It would be impossible to hold both that pornography does not directly cause violence but criminal actors do, and that criminal actors do not cause violence, pornography does. The result would be to tell Indiana that it can neither ban pornography nor hold criminally responsible persons who are encouraged to commit violent acts because of pornography! The recognition in *Hudnut* that pornography leads to violence against women does not require Indiana to establish a defense of insanity by pornography. In *Hudnut* we said that pornographers may be liable for rape just as the instigator of a riot could be liable for inciting that riot. *Hudnut* does not suggest that the rioter or the rapist is not also culpable for his own conduct.

Id. at 972-73 (footnote and citations omitted).

85. While not raising a defense based on violent pornography, convicted serial killer Ted Bundy "traced his legacy of serial murder to the influence of sexual violence in the media." Janny Scott & John Dart, *Bundy's Tape Fuels Dispute on Porn, Antisocial Behavior*, L.A. TIMES, Jan. 30, 1989, at 1.

86. For discussions of this unpublished case, see Michele Munn, Note, *The Effects of Free Speech: Mass Communication Theory and the Criminal Punishment of Speech*, 21 AM. J. CRIM. L. 433, 476-78 (1994); Janet Elliott, *Slain Trooper's Family Seeks Damages From Rapper: Round 2 in Gangsta Rap Case*, LEGAL TIMES, July 26, 1993, at 10; Chuck Phillips, *Rap Defense Doesn't Stop Death Penalty*, L.A. TIMES, July 15, 1993, at F1; Pamela Ward, *Howard Gets Death Sentence*, AUSTIN AM.-STATESMAN, July 15, 1993, at B1.

For other treatments of sexually-explicit or violent rock lyrics, see Steven E. Butler, Note, *The Recent Assault on Sexually Explicit Music Lyrics*, 12 WHITTIER L. REV. 367 (1991); John W. Holt, Comment, *Protecting America's Youth: Can Rock Music Lyrics Be Constitutionally Regulated?*, 16 J. CONTEMP. L. 53 (1990); Wendy B. Kaufmann, Note, *Song Lyric Advisories: The Sound of Censorship*, 5 CARDOZO ARTS & ENT. L.J. 225 (1986); Jim McCormick, Comment, *Protecting Children From Music Lyrics: Sound Recordings and "Harmful to Minors" Statutes*, 23 GOLDEN GATE U. L. REV. 679 (1993); *see also* Harry Schiller, *First Amendment Dialogue and Subliminal Messages*, 11 REV. L. & SOC. CHANGE 331 (1982-83) (discussing subliminal messages); Lyon, *supra* note 66

"gangsta rap."[87] At the sentencing phase of the case, Howard introduced evidence regarding the influence of violent lyrics on his behavior as one form of mitigating evidence.[88] Howard's attorney characterized him as a "rap addict":[89] "Howard's background of family problems, poverty, and gang activity contributed to a total environment which, according to his attorney as well as modern theories about the effects of mass communication, made him a more vulnerable target for violent messages in the mass media."[90] After being deadlocked for five days and given an additional charge, the jury sentenced Howard to death.[91]

C. *Black Rage*[92]

> *He seems to be a man whose bitterness and racial hostility have turned into blasting powder which can be touched off by a spark.*[93]

The theory of black rage has been raised as a defense in a number[94] of cases, although only three cases employed that particular terminology. Black rage cases may be further subdivided depending upon the presence or absence of a precipitating event with identified racial overtones. In three cases, defendants simply claimed that racism caused them to suffer severe mental illness leading to their criminal behavior. In five other cases, the defendants' criminal

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(discussing subliminal song lyrics).

87. " 'Gangsta rap' is a subgenre of rap music that is characterized by descriptions of the harsh urban conditions many young black males face today." Munn, *supra* note 86, at 476.

88. *Id.* at 477.

89. *Id.*

90. *Id.* at 477-78.

91. *Id.* at 478-79. The victim's wife filed a civil suit against the rock group and its record company. *Id.* at 486.

92. This term comes from WILLIAM H. GRIER & PRICE M. COBBS, BLACK RAGE (1968).

93. United States v. Alexander, 471 F.2d 923, 962 (D.C. Cir. 1972) (Bazelon, J., dissenting), *cert. denied*, 409 U.S. 1044 (1972).

94. It is impossible to tell how many cases involve defendants damaged in some way by racism. I chose the following cases because they directly raised the issue of racism as a causative factor, the defendant's mental illness had significant racial overtones, or the event precipitating the defendant's criminal conduct was identified as related to racism. Notably, in each of these cases implicating a black rage defense, the victim was non-black. *See generally* Delgado, *supra* note 5, at 41 (discussing one attorney's use of black rage defense); Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and The Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 403-05 (1982-83) (same).

conduct was apparently triggered by a specific racial incident, such as the use of a racial epithet and/or an act of discriminatory conduct,[95] although the underlying premise was still that the defendants' mental state was affected by the experience of racism.

1. Racism Causing Mental Illness Simpliciter

The earliest reported case utilizing a black rage theory of defense was the 1846 case of *Freeman v. People*.[96] Freeman was accused of killing four members of a white family in a small town in upstate New York.[97] William Henry Seward defended Freeman[98] by arguing that mistreatment by a white society had rendered him insane:[99]

> "Such a life, so filled with neglect, injustice, and severity, with anxiety, pain, disappointment, solicitude, and grief, would have its fitting conclusion in a madhouse," Seward argued before the jury. "If it be true, as the wisest man of inspired writers hast said, 'Verily, oppression maketh a wise man mad,' what may we not expect it to do with a foolish, ignorant, illiterate man!"[100]

The jury rejected Freeman's insanity defense and convicted him.[101] On appeal, the New York Supreme Court reversed the conviction for various errors, including the trial court's inappropriate limitation of expert testimony, and ordered a new trial.[102] Freeman died in jail before retrial.[103]

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95. *See* Goldberg, *supra* note 7, at 43 ("The [black rage] theory, according to Cobbs . . . is that 'in certain individuals, the right stimuli will release an uncontrollable amount of rage.' The stimuli or 'rage button' is typically a devaluation or racial insult.").

96. Freeman v. People, 4 Denio 9 (N.Y. Sup. Ct. 1847); *see also* BENJAMIN F. HALL, THE TRIAL OF WILLIAM FREEMAN FOR THE MURDER OF JOHN G. VAN NEST (1848) (discussing the trial in detail).

97. Jonathan Tilove, *Racism and Rage: Is a Lifetime of Prejudice a Defense for a Moment of Murder?*, STAR TRIB., July 6, 1994, at 10A.

98. *Id.* Seward was a former governor and the future secretary of state under Lincoln; the prosecutor was the Attorney General of New York—John Van Buren, the former president's son. *Id.*

99. *Id.* Apparently Freeman had been falsely convicted of stealing a horse when he was 16 years old and sentenced to prison for five years. During that time, Freeman was beaten over the head causing him to become almost completely deaf. Freeman became obsessed with being repaid for his five years in prison. *Id.*

100. *Id.* Seward's argument was supported by John Austin, a Universalist minister, who testified that blacks were the subject of unworthy prejudices. *Id.*

101. Freeman v. People, 4 Denio 9, 11, 18 (N.Y. Sup. Ct. 1847).

102. *Id.* at 39-41.

103. Tilove, *supra* note 97, at 10A. Freeman's autopsy revealed that he had organic brain disease. *Id.*

A second case implicating a black rage theory of defense is *United States v. Robertson*.[104] After Robertson was found competent to stand trial, he explicitly refused to invoke the insanity defense, although considerable evidence demonstrated that he suffered from some form of mental illness.[105] Robertson was convicted of second-degree murder, among other crimes.[106] The case is of interest in this context for two reasons. First, Robertson's crime and mental illness had extensive racial overtones; he is quoted as saying:

> If a black man kills a white man, it is not a crime. It is getting the oppression off his neck. If a black man kills a black man, it is murder. I was under a lot of pressure on that day. The tension was due to the circumstances of my birth.[107]

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104. 507 F.2d 1148 (D.C. Cir. 1974), *supplemental op.*, 529 F.2d 879 (D.C. Cir. 1976) (per curiam), *appeal after remand*, 430 F. Supp. 444 (D.D.C. 1977).

105. *Id.* at 1149-52. Robertson believed that the insanity defense would "impugn the credibility of his racial and political views." *Id.* at 1158. " '[D]efendant's rejection of the insanity defense was essentially an assertion of manhood by an intelligent person and motivated by his rejection of the racial stereotype of "all angry Blacks are mentally ill." ' " *Robertson*, 529 F.2d at 880 (quoting District Court Memorandum, reprinted and attached as Appendix to Circuit opinion, 529 F.2d at 881).

106. *Robertson*, 507 F.2d at 1149.

107. *Id.* at 1154 (quoting from the report of one mental health professional). The court summarized some of the other evidence as follows:

> After shooting Aleshire [the white victim], Robertson raced down the middle of the street, brandishing his pistol and cursing the "white sons-of-bitches." Seeing a police officer, he shouted, "You are doing it; why can't I?" "Yes, I shot the white honkey son-of-a-bitch. What are you all going to do about it?" A witness who was taken to the police station with Robertson testified that he continued to make such statements throughout the trip, saying, for example: "[a]ll of the white sons of bitches need to be killed or shot. I had did [sic] my part and I can't do anymore. . . . All the sons of bitches should be shot, . . . and that is the problem there isn't enough of us doing this sort of thing."

Id. at 1150-51 (footnotes omitted) (alterations in original).

For another possible case of black rage based on the defendants' characterization of their crimes as part of a racial struggle, see Barclay v. Florida, 463 U.S. 939 (1983). In that case, the defendants left the following note at the scene of the crime:

> "Warning to the oppressive state. No longer will your atrocities and brutalizing of black people be unpunished. The black man is no longer asleep. The revolution has begun and the oppressed will be victorious. The revolution will end when we are free. The Black Revolutionary Army. All power to the people."

Id. at 943.

Second, the mental health experts could not agree on whether he was legally insane.[108] On appeal, the D.C. Circuit, in an opinion authored by Judge Bazelon, held that the trial judge[109] should have heard testimony both for and against the insanity defense and remanded the case for supplementation.[110] Thereafter, Robertson decided to assert the insanity defense, and the case was scheduled for retrial solely on the issue of criminal responsibility.[111] On the day of retrial, Robertson changed his mind, again declining to assert an insanity defense.[112] The trial court determined that it would not raise the defense *sua sponte* and articulated a number of factors in support of that decision.[113]

Finally, in the case of Colin Ferguson, who was convicted of killing six and wounding nineteen passengers on the Long Island Rail Road, attorneys William Kunstler and Ronald Kuby publicized their intention to use black rage as the basis for an insanity defense.[114] Kunstler and Kuby claimed that Ferguson, who had a host of mental problems, was pushed over the edge by the rampant racism which he encountered after emigrating to the United States from Jamaica.[115]

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108. *Robertson*, 507 F.2d at 1154. Judge Bazelon also noted the cultural and racial bias inherent in psychiatric practice, citing GRIER & COBBS, *supra* note 91. *Id.* at 1159 n.46.

109. The trial judge was black, a factor which figured in his decision not to raise the insanity defense *sua sponte*. *Id.* at 1155.

110. *Id.* at 1158-61.

111. United States v. Robertson, 430 F. Supp. 444, 445 (D.D.C. 1977).

112. *Id.*

113. *Id.* at 446-48.

114. For reports on this unpublished case, see Michael Alexander, *Black Rage*, NEWSDAY, May 9, 1994, at B4; Michael Alexander, *Kunstler Takes Over Defense in LIRR Shooting*, NEWSDAY, Mar. 16, 1994, at 26; Peter Marks, *L.I.R.R. Case Again Raises Sanity Issue*, N.Y. TIMES, Aug. 12, 1994, at B1; Clarence Page, *Plead "Black Rage" in a Forgiving Age*, ST. LOUIS DISPATCH, June 1, 1994, at 7B; Eric Pooley, *Capitalizing on a Killer: A Spurious "Black Rage" Defense*, N.Y. MAG., Apr. 18, 1994, at 38; Tilove, *supra* note 96, at 10A.

115. William Kunstler gave the following description of Ferguson:

> Ferguson's rage was a catalyst for violence resulting from a preexisting mental illness, most likely schizophrenia. It was a mental condition no different from the battered-wife syndrome, posttraumatic stress disorder, or the child-abuse-accommodation syndrome in that, in conjunction with mental illness, it gave rise to terrible acts of violence. Ferguson, from a wealthy Jamaican family, had attended private school, enjoyed many luxuries, and was never able to adjust to the white racism that he found when he came to this country. He never developed the defense mechanisms that American-born blacks are forced to learn.

WILLIAM M. KUNSTLER & SHEILA ISENBERG, MY LIFE AS A RADICAL LAWYER 386 (1994); *see also* Jeffrey Rosen, *The Trials of William Kunstler*, N.Y. TIMES BOOK REV., Sept. 18, 1994, at 16 (discussing Kunstler's history of representing "unpopular clients" and his assertion that "black rage" is a real mental condition).

Ferguson, who chose exclusively white, Asian or "Uncle Tom negro[]" victims, also reportedly made racial comments after the shooting.[116] Kunstler and Kuby were denied the chance to assert the defense, however: Ferguson fired his attorneys, represented himself,[117] and did not mount an insanity defense based upon black rage. Ferguson was convicted and sentenced to more than 200 years in prison.[118] He now plans to appeal the conviction on the insanity issue.[119]

2. Specific Acts of Racism as Precipitating Events

a. Racial Epithets

In *Fisher v. United States*,[120] the black defendant, who worked as a janitor at a library, learned that a white librarian had complained about his work habits.[121] When Fisher confronted the librarian about these statements, she called him "a black nigger."[122] "This made him angry—no white person, he claimed, had ever called him that—and he struck her."[123] The librarian screamed; Fisher killed her to stop her screaming.[124] At trial, counsel did not raise an insanity defense. Rather, he introduced evidence of Fisher's psychopathic personality and apathetic reaction to emotional situations and requested an instruction that the jury could consider the "entire personality of the defendant, his mental, nervous, emotional and physical characteristics"[125] to determine whether he had sufficient premeditation and deliberation for first-degree murder.[126] The trial court refused the requested instruction.[127] On

116. Tilove, *supra* note 96, at 10A.

117. John T. McQuiston, *L.I.R.R. Killer Plans Appeal Based on the Insanity Issue*, N.Y. TIMES, Feb. 19, 1995, § 1, at 1.

118. John T. McQuiston, *Rail Gunman to Spend Life Behind Bars*, N.Y. TIMES, Mar. 23, 1995, at B1.

119. McQuiston, *supra* note 113, at A46 (" 'He understands that black rage is no longer an issue in this case,' Mr. Kunstler said, 'but he understands he can no longer reject the issue of his sanity if he wants us to do the appeal.' ").

120. 328 U.S. 463 (1946), *affirming* 149 F.2d 28 (D.C. Cir. 1945).

121. *Id.* at 479.

122. *Id.*

123. *Id.*

124. *Id.* Fisher claimed to have little memory of the actual killing: "Fisher was curiously unconnected with the deed, unaware of what he had done." *Id.* at 481.

125. Fisher v. United States, 149 F.2d 28, 29 (D.C. Cir. 1945).

126. *Id.* "[T]he defense takes the position that the petitioner is fairly entitled to be judged as to deliberation and premeditation, not by a theoretical normality but by his own personal traits." *Fisher*, 328 U.S. at 466.

127. *Fisher*, 149 F.2d at 29.

appeal, the D.C. Circuit upheld the decision of the trial court, noting that the requested instruction conflated the issues of insanity and lack of premeditation.[128] In essence, the Court of Appeals rejected the diminished capacity or partial responsibility defense based on mental illness not amounting to insanity.[129]

The United States Supreme Court's opinion in *Fisher* is noteworthy for the variety of viewpoints it spawned. The majority held that since Fisher's mental state did not amount to insanity, the trial court correctly interpreted the law of the District of Columbia as precluding a partial responsibility defense.[130] Justice Frankfurter, in his dissent, argued that the jury had been improperly instructed on premeditation and provocation and, therefore, reversal was required.[131] As an evidentiary matter, Frankfurter asserted that he did "not believe that the facts warrant a finding of premeditation."[132] In a separate dissent, Justice Murphy contended that partial insanity was a viable psychiatric concept and that it should be recognized by the courts.[133] Since *Fisher* was decided in 1946, it is hardly surprising that the jurists had such a difficult time trying to decide the appropriate doctrinal niche—partial responsibility, lack of premeditation, or provocation—in which to place Fisher's claim.

Almost three decades after *Fisher*, another case from the District of Columbia arose that arguably falls under the rubric of black rage, although the actual defense theory used was "rotten social back-

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128. *Id.*
129. *Id.*
130. *Fisher*, 328 U.S. at 471.
131. *Id.* at 490 (Frankfurter, J., dissenting). He wrote:

> If their minds had been so focused, the jury might well have found that the successive steps that culminated in Miss Reardon's death could not properly be judged in isolation. They might well have found a sequence of events that constituted a single, unbroken response to a provocation in which no forethought, no reflection whatever, entered. A deed may be gruesome and not be premeditated. Concededly there was no motive for the killing prior to the inciting "you black nigger." The tone in which these words were uttered evidently pulled the trigger of Fisher's emotions, and under adequate instructions the jury might have found that what these words conveyed to Fisher's ears unhinged his self-control.

Id. at 485 (Frankfurter, J., dissenting). Later in his opinion, Frankfurter asserted: "[T]he jury ought not to have been left to founder and flounder within the dark emptiness of legal jargon. The instructions to the jury on the vital issue of premeditation consisted of threadbare generalities, a jumble of empty abstractions . . . ." *Id.* at 487 (Frankfurter, J., dissenting). Justice Rutledge, in his separate dissent, agreed with Justice Frankfurter that the jury instructions were inadequate. *Id.* at 495 (Rutledge, J., dissenting).
132. *Id.* at 486 (Frankfurter, J., dissenting).
133. *Id.* at 491-92 (Frankfurter, J., dissenting).

ground." In *United States v. Alexander*,[134] one black defendant, Benjamin Murdock, shot and killed two white individuals after one of them called him and his friends by a racial epithet.[135] Murdock presented an insanity defense, asserting that his overreaction to this racial insult was the result of his conditioning and upbringing—that is, his "rotten social background":[136]

> The thrust of Murdock's defense was that the environment in which he was raised—his "rotten social background"—conditioned him to respond to certain stimuli in a manner most of us would consider flagrantly inappropriate. Because of his early conditioning, he argued, he was denied any meaningful choice when the racial insult triggered the explosion in the restaurant.[137]

Murdock also requested an instruction on diminished responsibility.[138] The jury rejected Murdock's insanity defense and convicted him of second-degree murder.[139] On appeal, the D.C. Circuit upheld the conviction.[140] In his dissenting opinion, Judge Bazelon discussed the psychological and psychiatric underpinnings of Murdock's defense at considerable length. He commented:

> Murdock was strongly delusional, though not hallucinating or psychotic; he was greatly preoccupied with the unfair treatment of Negroes in this country, and the idea that racial war was inevitable. . . . Since his emotional difficulties were closely tied to his sense of racial oppression, it is probable that when the Marine in the Little Tavern called him a "black bastard" Murdock had an irresistible impulse to shoot.[141]

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134. 471 F.2d 923 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1044 (1972).

135. *Id.* at 928-29. "A racial epithet hurled at appellants by one of their victims touched off an explosion of violence and bloodshed, an explosion that reverberates the traumas of our entire society." *Id.* at 926. The defendant's real name was Murdock Benjamin. *Id.* at 926 n.1.

136. *Id.* at 959 (Bazelon, J., dissenting).

137. *Id.* at 960 (Bazelon, J., dissenting). Murdock grew up in the Watts section of Los Angeles, site of the notorious 1965 race riots. *Id.* at 957-58 (Bazelon, J., dissenting). For a discussion of this defense in light of modern social science, see Delgado, *supra* note 5. MONAHAN & WALKER, *supra* note 56, at 391, categorize this case as one involving the influence of subculture on the defendant's behavior.

138. *Alexander*, 471 F.2d at 948-49.

139. *Id.* at 927.

140. *Id.* at 926.

141. *Id.* at 957 (Bazelon, J., dissenting). Judge Bazelon noted that Murdock might continue to be dangerous given his racial hostility. *Id.* at 962 (Bazelon, J., dissenting). He proposed four possible alternatives for dealing with Murdock's case: (1) limit the responsibility defense to exclude Murdock and put him in jail; (2) allow the defense and

In a case with facts strikingly similar to those in *Fisher*, the black defendant in *State v. Hall* hit a white co-worker with a hammer after the latter made "racial remarks."[142] The remarks were the culmination of extensive and prolonged racially-motivated harassment.[143] At trial, Hall argued provocation to reduce the crime from attempted murder to aggravated assault, but he was convicted of the more serious offense.[144] Hall appealed, claiming that the trial court erred in failing to instruct on the lesser-included offense.[145] While the majority rejected Hall's claim for lack of sufficient provocation,[146] the dissenting judge asserted that the trial court should have given the instruction because the "evidence which was adduced at trial showed a history of provocations and remarks offensive to any person's sensitivity, the result of which when put together can cause violent rage in an individual."[147]

b. Racially-Discriminatory Conduct

In *State v. Lamar*, several young black men were tried on charges arising out of a high-school riot with substantial racial overtones; the riot culminated in an altercation with the police.[148] At trial, the young men raised a number of defenses, including self-defense, defense of others, duress, and mistake of fact.[149] To support these defenses, the defendants presented the expert testimony of two psychologists to the effect that they possessed a character trait known as black rage, which "apparently causes blacks to react in a certain way against white police officers because blacks judge the actions of a police officer in a manner different from others, thereby allegedly rendering reasonable their actions in this specific case."[150] Three of the five defendants were convicted of at least one charge. On appeal, the defendants claimed that the trial court had erred in its failure to

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release Murdock; (3) allow the defense but find a "vaguely therapeutic purpose" for hospitalizing him; or (4) confine him under a preventive detention rationale. *Id.* at 962-65 (Bazelon, J., dissenting).

142. No. 60898, 1992 WL 181709, at *1, *2 (Ohio App. 8 Dist. July 30, 1992), *constitutional appeal dismissed sua sponte*, 604 N.E.2d 167 (1992). The dissent reveals that the defendant's co-worker had called him "a nigger." *Id.* at *7 (Harper, J., dissenting).

143. *See id.* at *6 (Harper, J., dissenting).

144. *Id.* at *1.

145. *Id.*

146. *Id.* at *3.

147. *Id.* at *6 (Harper, J., dissenting).

148. 698 P.2d 735, 736-37 (Ariz. Ct. App. 1984).

149. *Id.* at 741-42.

150. *Id.* at 740.

instruct on duress and mistake of fact.[151] The appellate court affirmed the convictions, reasoning that there was no evidence of duress, and that mistake of fact was embodied in the general instruction on justification.[152]

In the 1989 case of Lonnie Gilchrist,[153] a black stockbroker who shot his white boss after being fired,[154] black rage was used to support an insanity defense.[155] Defense counsel argued that Gilchrist killed Cook "during a 'psychotic episode' that erupted from years of paranoia nursed by a sense of racial grievance."[156] Gilchrist's attorneys presented the testimony of two psychiatrists and

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151. *Id.* at 742.

152. *Id.* For a case raising a similar argument, see State v. Brown, 573 P.2d 675 (N.M. Ct. App. 1977), *cert. quashed*, 573 P.2d 1204 (N.M. 1977), *cert. denied*, 436 U.S. 928 (1978), *remanded and appealed on different grounds*, 599 P.2d 389 (N.M. Ct. App. 1979), *cert. quashed*, 598 P.2d 215 (N.M. 1979). Brown assaulted a police officer; at trial the defense presented the testimony of a social psychologist regarding the defendant's fear of the police as the result of being a black male. *Id.* at 678. On appeal, the court held that the exclusion of this testimony was erroneous: "[D]efendant's fear of the police was relevant to whether defendant believed he was in immediate danger of bodily harm—an element of self-defense." *Id.*

153. The case was heard in the Suffolk, Massachusets Superior Court. *See* Doris S. Wong, *Gilchrist Convicted of First-Degree Murder*, BOSTON GLOBE, Apr. 18, 1989, at 1 [hereinafter Wong, *Gilchrist Convicted*]; Doris S. Wong, *Doctor Says Gilchrist Knew Actions Wrong*, BOSTON GLOBE, Apr. 7, 1989, at 24 [hereinafter Wong, *Doctor Says*].

154. Gilchrist was fired for weak sales performance. *Fired Stockbroker's Bail Reduced*, UPI, May 11, 1988, *available in* LEXIS, News Library, UPSTAT File. Before the killing, Gilchrist had asked the local NAACP for help in suing his employer, Merrill Lynch, for racial discrimination. *Id.* Merrill Lynch had settled a previous class action in which the employees accused the firm of racial discrimination. Paul Langner, *Gilchrist Called 'Psychotic' by Defense*, BOSTON GLOBE, Mar. 31, 1989, at 17, 28. Gilchrist had made repeated complaints about racism at the firm. *Prosecution Rests Case in Gilchrist Trial*, UPI, Apr. 4, 1989, *available in* LEXIS, News Library, UPSTAT File. Gilchrist's firing was not the first time that he had been upset about encountering racism; Gilchrist had previously threatened a former employer and a car mechanic. Mike Barnicle, *Making Use of the System*, BOSTON GLOBE, Jan. 5, 1989, at 19.

155. Goldberg, *supra* note 7, at 43.

156. Paul Langner, *Co-worker Testifies of Threat by Gilchrist*, BOSTON GLOBE, Apr. 1, 1989, at 25. Gilchrist believed that he had been continually discriminated against because of his race. *See, e.g.*, Barnicle, *supra* note 154, at 19 (Gilchrist believed world conspired against him because he was black); *Defense: Gilchrist Felt "Exploited"*, UPI, Apr. 5, 1989, *available in* LEXIS, News Library, UPSTAT File (Gilchrist developed "militant view of racism" and attributed personal setbacks to racial prejudice); *Jury Selection to Start in Stockbroker Shoot Case*, UPI, Mar. 26, 1989, *available in* LEXIS, News Library, UPSTAT File (Gilchrist "blamed racism for his professional shortcomings"); *Opening Statements in Trial of Former Stockbroker*, UPI, Mar. 30, 1989, *available in* LEXIS, News Library, UPSTAT File (Gilchrist felt he was the victim of racial bias); *see also* Michael A. Tesner, *Racial Paranoia as a Defense to Crimes of Violence: An Emerging Theory of Self-Defense or Insanity?*, 11 B.C. THIRD WORLD L.J. 307, 329-31 (1991) (discussing Gilchrist case as one exemplifying racial paranoia-induced delusional disorders).

one psychologist who opined that Gilchrist was temporarily insane at the time of the killing.[157] The jury deliberated for five days, during which time they twice asked the judge to repeat the legal definition of insanity.[158] After reporting that they were deadlocked and being given an additional charge, the jury convicted Gilchrist of first-degree murder and unlawfully carrying a firearm.[159] The judge sentenced Gilchrist to a mandatory life term without parole for the murder;[160] the conviction was affirmed on appeal.[161]

D. Conclusion

The preceding overview of cases not only documents a growing body of case law implicating defense theories based on the social toxicity of the environment, but also demonstrates the diversity of legal questions to which this information was addressed. The theories of urban psychosis, television intoxication, and black rage served at least four distinct functions within the doctrinal framework of the criminal law: (1) to support an insanity defense; (2) to elucidate other relevant mental states such as diminished capacity and provocation; (3) to support a claim of self-defense; and (4) to play a mitigating role in sentencing, especially with respect to the death penalty. Part III explores these four doctrinal uses in greater detail.

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157. Dr. Jeffrey L. Speller, a psychiatrist, testified that Gilchrist could not control his actions. Wong, *Doctor Says*, *supra* note 152. Dr. Guy Seymour, a psychologist, testified that Gilchrist was legally insane. *Id.* Dr. Seymour also testified that Gilchrist was "overwhelmed by rage over what he believed was racial bias in his firing." *Defense: Gilchrist Felt "Exploited"*, *supra* note 156. Dr. Marc Whaley, a psychiatrist, stated that Gilchrist's abilities to control his actions were "substantially impaired." *Defense Rests Case in Gilchrist Trial*, UPI, Apr. 11, 1989, *available in* LEXIS, News Library, UPSTAT File. The prosecution presented the testimony of Dr. Martin Kelly, a psychiatrist, who asserted that Gilchrist was legally sane. *Id.* The testimony of these mental health experts took six of the total of nine days of testimony. Doris S. Wong, *No Verdict Yet in Trial of Gilchrist*, BOSTON GLOBE, Apr. 16, 1989, at 37.

158. Dateline: Boston, UPI, Apr. 17, 1989, *available in* LEXIS, News Library, UPSTAT File.

159. Wong, *Gilchrist Convicted*, *supra* note 153, at 1, 21; Doris S. Wong, *Gilchrist Lawyers ask Judge for New Trial in Murder Case*, BOSTON GLOBE, Apr. 21, 1989, at 21.

160. Wong, *Gilchrist Convicted*, *supra* note 153, at 21.

161. Commonwealth v. Gilchrist, 597 N.E.2d 32, 33-36 (Mass. 1992). According to one news report, Gilchrist's attorneys intended to raise the question of diminished capacity on appeal. Wong, *Gilchrist Convicted*, *supra* note 153, at 21.

II. THE SOCIAL SCIENCE: THE PSYCHOLOGICAL EFFECTS OF REAL-LIFE VIOLENCE, TELEVISION VIOLENCE, AND RACISM

This Part surveys the social science research on the psychological effects of real-life violence, television violence, and racism that provides the scientific foundations for the defense theories of urban psychosis, television intoxication, and black rage, respectively. Because the relevant social science literature is diverse, complex, and voluminous, the following presentation is necessarily limited in scope. The goal of this section is threefold: (1) to provide an overview of the types of information a defendant might present in any individual case to substantiate one of the three defense theories; (2) to identify, without an attempt to review exhaustively, major problem areas associated with the three facets of the social science literature; and (3) to explore preliminarily whether, as a threshold evidentiary matter, the social science supporting these defenses is sufficiently developed to merit consideration within the criminal law.

A. Urban Psychosis: The Effects of Real-Life Violence

> *For many adolescents coming of age in the 1990s, violence is a daily reality. They experience it in their homes and communities and witness the irresponsible portrayal of violence on prime time television and in movies.*[162]

The central social science premise underlying the urban-psychosis cases, once one gets past the provocative nomenclature, is that the defendant's mental state was significantly affected by his exposure to real-life violence. Considerable social science exists regarding the deleterious psychological consequences of experiencing and/or witnessing violence firsthand. This research, in the form of clinical accounts and empirical studies, covers a broad spectrum of contexts, including studies on the effects of combat or war,[163] battering or familial

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162. Robert H. DuRant et al., *Factors Associated with the Use of Violence Among Urban Black Adolescents*, 84 AM. J. PUB. HEALTH 612, 617 (1994).

163. *See, e.g.*, Salman Elbedour et al., *Ecological Integrated Model of Children of War: Individual and Social Psychology*, 17 CHILD ABUSE & NEGLECT 805 (1993); Javier I. Escobar et al., *Post-Traumatic Stress Disorder in Hispanic Vietnam Veterans: Clinical Phenomenology and Sociocultural Characteristics*, 171 J. NERVOUS & MENTAL DISEASE 585 (1983); Jane G. Schaller & Elena O. Nightingale, *Children and Childhoods: Hidden Casualties of War and Civil Unrest*, 268 JAMA 642 (1992).

abuse,[164] and criminal victimization, such as being raped.[165] The consistent results of this broad-ranging research are that real-life violence is traumatic to those exposed to it and can cause both full-blown mental illness and psychological damage.

1. The Psychiatric Consequences of Violence: Post-Traumatic Stress Disorder

Firsthand exposure to violence may result in full-blown psychiatric disorders. The most common psychiatric illness associated with the trauma of experiencing real-life violence is Post-Traumatic Stress Disorder (PTSD). Notably, three of the urban-psychosis defendants discussed above, Morgan, Taylor, and Osby, claimed that they suffered from PTSD.[166] While PTSD was originally recognized as a compromise when veterans' groups attempted to lobby for the inclusion of a category of psychiatric illness related to service in the Vietnam war,[167] over time, PTSD has been expanded to include the victims of battery and rape.[168]

The basic diagnostic criteria of PTSD are:

> The person has experienced an event that is outside the range of usual human experience and that would be markedly distressing to almost anyone, e.g., serious threat to one's life or physical integrity; serious threat or harm to one's children, spouse, or other close relatives and friends; sudden destruction of one's home or community; or seeing another person who has recently been, or is being seriously

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164. *See, e.g.*, LENORE E. WALKER, THE BATTERED WOMAN (1979); LENORE E. WALKER, THE BATTERED WOMAN SYNDROME (1984); LENORE WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS (1989); Mary A. Dutton & Lisa A. Goodman, *Posttraumatic Stress Disorder Among Battered Women: Analysis of Legal Implications*, 12 BEHAV. SCI. & L. 215 (1994); Richard Famularo et al., *Child Maltreatment and the Development of Posttraumatic Stress Disorder*, 147 AM. J. DISEASES CHILDREN 755 (1993); Louise Kiernan, *Complex Issues Trap Women in Abuse*, CHI. TRIB., Mar. 16, 1993, at 1.

165. *See, e.g.*, Fran H. Norris et al., *Use of Mental Health Services Among Victims of Crime: Frequency, Correlates, and Subsequent Recovery*, 58 J. CONSULTING & CLINICAL PSYCHOL. 538 (1990).

166. *See supra* notes 20-27 and accompanying text (discussing the Morgan case); notes 28-34 and accompanying text (discussing the Taylor case); notes 35-41 and accompanying text (discussing the Osby case).

167. Dutton & Goodman, *supra* note 164, at 215; John E. Helzer et al., *Post-Traumatic Stress Disorder in the General Population*, NEW ENG. J. MED., Dec. 24, 1987, at 1630; Thomas A. Moran, *Post-Traumatic Stress Disorder, Broken Marriages, and the Appropriate Grounds of Nullity*, 54 JURIST 183, 186 (1994); SCRIGNAR, *supra* note 13, at 139.

168. Dutton & Goodman, *supra* note 164, at 215.

injured or killed as the result of an accident or physical violence.[169]

The individual must also satisfy four additional requirements: (1) one of four possible intrusive symptoms, (2) three of seven possible avoidance symptoms, (3) two of six possible arousal symptoms, and (4) the disturbance must continue for at least one month.[170] In the latest version of the American Psychiatric Association's diagnostic manual, DSM-IV, a few of the diagnostic criteria of PTSD have been

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169. *Id.*

170. The American Psychiatric Association lists the requirements as follows:

B. The traumatic event is persistently reexperienced in at least one of the following ways:
   (1) recurrent and intrusive distressing recollections of the event (in young children, repetitive play in which themes or aspects of the trauma are expressed)
   (2) recurrent distressing dreams of the event
   (3) sudden acting or feelings as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative [flashback] episodes, even those that occur upon awakening or when intoxicated)
   (4) intense psychological distress at exposure to events that symbolize or resemble an aspect of the traumatic event, including anniversaries of the trauma [and]

C. Persistent avoidance of stimuli associated with the trauma or numbing of general responsiveness (not present before trauma), as indicated by at least three of the following:
   (1) efforts to avoid thoughts or feelings associated with the trauma
   (2) efforts to avoid activities or situations that arouse recollections of the trauma
   (3) inability to recall an important aspect of the trauma (psychogenic amnesia)
   (4) markedly diminished interest in significant activities (in young children, loss of recently acquired developmental skills such as toilet training or language skills)
   (5) feeling of detachment or estrangement from others
   (6) restricted range of affect, e.g., unable to have loving feelings
   (7) sense of foreshortened future, e.g., does not expect to have a career, marriage, or children, or a long life [and]

D. Persistent symptoms of increased arousal (not present before the trauma), as indicated by at least two of the following:
   (1) difficulty falling or staying asleep
   (2) irritability or outbursts of anger
   (3) difficulty concentrating
   (4) hypervigilance
   (5) exaggerated startle response
   (6) physiologic reactivity upon exposure to events that symbolize or resemble an aspect of the traumatic event . . . [and]

E. Duration of the disturbance (symptoms in B, C, and D) of at least one month.

DSM-III, *supra* note 13, at 250-51.

modified.[171] Also, the mental health community has discussed the possibility of recognizing a more chronic form of the disorder as well as a separate category related to depression.[172]

Although PTSD may be the most common response to the experience of violence,[173] a number of other psychiatric disorders may also result.[174] Research has also indicated that often PTSD is accompanied by other forms of mental illness—comorbidity, as it is sometimes called.[175]

Exposure to trauma or violence is a necessary, but not sufficient, condition for the development of PTSD, such that not all individuals who are exposed to violence develop PTSD. For example, not all Vietnam veterans, battered women, and rape victims have PTSD.[176] Considerable dispute exists regarding the role of personality or vulnerability factors in the development of PTSD.[177] One such factor may be ethnicity or race.[178] Also, some researchers have suggested that characteristics of the trauma itself may incline a person to develop PTSD.[179] Finally, violence or aggressive behavior,

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171. On these new criteria, Dutton and Goodman comment:

> The DSM-IV draft criteria eliminate the requirement that the event be outside the range of usual human experience and instead characterize a traumatic event as one in which "the person has experienced, witnessed, or been confronted with an event or events that involve actual or threatened death or serious injury, or a threat to the physical integrity of oneself or others" and where the person's response has been "intense fear, helplessness, or horror."

Dutton & Goodman, *supra* note 164, at 216 (citations omitted).

172. *Id.* at 217; Judith L. Herman, *Sequelae of Prolonged and Repeated Trauma: Evidence for a Complex Posttraumatic Syndrome (DESNOS), in* POSTTRAUMATIC STRESS DISORDER: DSM-IV AND BEYOND 213, 213 (Jonathan R. T. Davidson & Edna B. Foa eds., 1993) [hereinafter DSM-IV AND BEYOND].

173. Jonathan R. T. Davidson & John A. Fairbank, *The Epidemiology of Posttraumatic Stress Disorder, in* DSM-IV AND BEYOND, *supra* note 172, at 147, 166.

174. Dutton & Goodman, *supra* note 164, at 217; Escobar et al., *supra* note 163, at 594.

175. Davidson & Fairbank, *supra* note 173, at 155-58; Dutton & Goodman, *supra* note 164, at 217; Helzer et al., *supra* note 167, at 1633; Frederick S. Sierles et al., *Posttraumatic Stress Disorder and Concurrent Psychiatric Illness: A Preliminary Report*, 140 AM. J. PSYCHIATRY 1177, 1178 (1983).

176. Dutton & Goodman, *supra* note 164, at 218.

177. Davidson & Fairbank, *supra* note 173, at 158-59; Dutton & Goodman, *supra* note 164, at 218; Escobar et al., *supra* note 163, at 588; Helzer et al., *supra* note 167, at 1633; Walter E. Penk et al., *Ethnicity: Post-Traumatic Stress Disorder (PTSD) Differences Among Black, White, and Hispanic Veterans Who Differ in Degrees of Exposure to Combat in Vietnam*, 45 J. CLINICAL PSYCHOL. 729, 735 (1989); Heidi S. Resnick et al., *Vulnerability-Stress Factors in Development of Posttraumatic Stress Disorder*, 180 J. NERVOUS & MENTAL DISEASE 424, 424 (1992).

178. Escobar et al., *supra* note 163, at 588; Penk et al., *supra* note 177, at 729.

179. Resnick et al., *supra* note 177, at 424.

including violence directed towards others and oneself, such as suicide, is only one possible outcome of PTSD.[180]

Future research in the area is likely to examine the long-term or chronic consequences of PTSD.[181] Furthermore, some research exists on the fabrication of PTSD symptoms and the use of objective criteria in making the diagnoses without relying exclusively on clinical evaluations.[182]

2. The Psychological Consequences of Violence

In addition to causing psychiatric disorders, exposure to real-life violence can lead to a wide variety of psychological and physical consequences: emotional problems such as depression and anxiety;[183] cognitive and developmental impairment resulting in poor school performance and academic achievement;[184] physiological reactions such as cardiovascular disease and neurological maladies;[185] and behavioral outcomes including suicide and violence directed toward others.[186]

Four aspects of the research regarding the effects of violence are particularly noteworthy within this context. First, the effects of violence on children may be especially deleterious. Garbarino, one of the experts in the *Morgan* case,[187] and others have pointed out

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180. Escobar et al., *supra* note 163, at 589 (violence or suicide are possible outcomes of PTSD); Herman, *supra* note 172, at 223 (sufferers of PTSD often engage in harm-seeking behavior); Moran, *supra* note 167, at 198 (outbursts of rage and violence are possible sequelae).

181. Herman, *supra* note 172, at 224.

182. *E.g.*, John A. Fairbank et al., *Psychometric Detection of Fabricated Symptoms of Posttraumatic Stress Disorder*, 142 AM. J. PSYCHIATRY 501 (1985).

183. Cathy Spatz Widom, *Does Violence Beget Violence?: A Critical Examination of the Literature*, 106 PSYCHOL. BULL. 3, 24 (1989).

184. James Garbarino, *Children's Response to Community Violence: What Do We Know?*, 14 INFANT MENTAL HEALTH J. 103, 107 (1993); James Garbarino et al., *What Children Can Tell Us About Living in Danger*, 46 AM. PSYCHOLOGIST 376, 378 (1991); *see also* Dutton & Goodman, *supra* note 164, at 222 (discussing cognitive changes resulting from batterings); Moran, *supra* note 167, at 203-04 (discussing impairment of developmental process in forming an adult identity).

185. Jack Gladstein & Elisa J. Slater, *Inner City Teenagers' Exposure to Violence: A Prevalence Study*, 37 MD. MED. J. 951, 951 (1988); Jean Latz Griffin, *Pain, Trauma Linger for Kids in Urban War*, CHI. TRIB., July 23, 1993, at 1N; Martha Shirk, *'They Live in a World of Chronic Danger'; Children of Today May Be Most Fearful, Experts Say*, ST. LOUIS POST-DISPATCH, Dec. 26, 1993, at 1A.

186. Garbarino et al., *supra* note 184, at 382; Gladstein & Slater, *supra* note 185, at 951; Bambade H. Shakoor & Deborah Chalmers, *Co-Victimization of African-American Children Who Witness Violence:. Effects on Cognitive, Emotional, and Behavioral Development*, 83 J. NAT'L MED. ASS'N 233, 236-37 (1991).

187. *See supra* notes 20-27 and accompanying text.

that children are more vulnerable than their adult counterparts to the experience of violence.[188] For children, the trauma associated with experiencing violence may arrest or impair developmental processes with long-term consequences. Minority youth may be particularly affected by the experience of violence because of their social environment.[189]

Second, the phenomenon of chronic violence may be more psychologically devastating than discrete episodes of acute danger or trauma.[190] While an episode of acute danger may only necessitate situational adjustment,[191]

> Chronic danger imposes a requirement for developmental adjustment—accommodations that are likely to include persistent PTSD, alterations of personality, and major changes in patterns of behavior or articulations of ideological interpretations of the world that provide a framework for making sense of ongoing danger, particularly when that danger comes from the violent overthrow of day-to-day social reality, as is the case in war, communal violence, or chronic violent crime.[192]

Thus, children who are forced to cope with chronic danger may adapt in dysfunctional ways.[193]

Third, researchers have noted that one possible sequela of violence is violence itself—the so-called cycle-of-violence hypothesis.[194] One social scientist surveyed the extant literature regarding this hypothesis and concluded:

> How do we interpret existing research findings? Being abused as a child may increase one's risk for becoming an

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188. Garbarino comments:

> The concept of a "socially toxic" environment is particularly relevant to vulnerable children. This is easily understood if we first think about who is most vulnerable to a *physical* toxicity in the environment. When airborne pollution gets really bad who suffers first and most? It is the most vulnerable, the kids (and the elders) with asthma and other respiratory conditions who show the effects soonest and with greatest intensity.

Garbarino, *Growing Up*, *supra* note 10, at 7.

189. DuRant et al., *supra* note 162, at 612.

190. Norris et al., *supra* note 165, at 544 ("The need for assistance was most pronounced when the recent incident followed other victimization experiences. . . . More generally, this finding suggests that persons whose lives are chronically prone to violence (e.g., victims of spouse abuse) may be an important population for mental health services.").

191. Garbarino et al., *supra* note 184, at 377.

192. *Id.*

193. *Id.* at 378.

194. *E.g.*, Widom, *supra* note 183 (examining critically the cycle-of-violence hypothesis).

> abusive parent, a delinquent, or an adult violent criminal. However, on the basis of the findings from the existing literature, it cannot be said that the pathway is straight or certain.[195]

One possible causal explanation for violent behavior on the part of those exposed to violence is social learning theory, which suggests that children learn or model the behavior that they observe.[196] A second explanation is a variant of the frustration-aggression hypothesis.[197] Frustration when combined with highly salient aggression cues may result in violence. "Frustration, television violence, interpersonal violence in the home, or community violence provide the arousal and stimulation."[198]

Fourth, while most of the research on the effects of violence has focused on situation-specific examples such as combat, battering, or rape, some research exists on the effects of living in modern urban environments. "Several studies have focused on children who witness family violence, but very few studies have addressed the more encompassing problem of children who witness community violence in the inner city."[199] Several authors have commented that many modern cities resemble war zones;[200] violence is a daily occurrence

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195. *Id.* at 24.

196. Robert DuRant comments that:

> Within this social environment, cultural transmission theory proposes that crimes and delinquency are learned in interaction with other people, largely within intimate primary groups such as families, peer groups, or gangs. There is extensive evidence that many children and adolescents are continuously exposed to high levels of violence throughout their lives and that this socialization may have a significant effect on the increase in violent behavior observed over the last 40 years. This includes witnessing violence on television and in movies, in the community, and in the home; the proliferation of gun ownership by adolescents; and being a victim of violence, severe corporal punishment, and early physical abuse.

DuRant et al., *supra* note 162, at 612. *See also* Richard Dembo et al., *Psychosocial, Alcohol/Other Drug Use, and Delinquency Differences Between Urban Black and White Male High Risk Youth*, 29 INT'L J. ADDICTIONS 461, 465-66 (1994) (comparing the sociocultural view of delinquency among black youths to the disturbed personality explanation for white youths).

197. *See, e.g.*, Delgado, *supra* note 5 (discussing generally the need for open-minded consideration of a "rotten social background" defense in criminal law).

198. Shakoor & Chalmers, *supra* note 186, at 237; *see also* Widom, *supra* note 183, at 24 (discussing triggering mechanisms).

199. Shakoor & Chalmers, *supra* note 186, at 234.

200. Garbarino et al., *supra* note 184, at 382 (comparing high-crime neighborhoods of Chicago with Nicaragua, Mozambique, Cambodia, and Israel/Palestine); Shakoor & Chalmers, *supra* note 186, at 234 ("Recent media reports have been comparing the experiences of inner city children to those of children from war zones such as Belfast,

for many individuals, particularly children, in these milieux.[201] The experience of violence in the community is as psychologically devastating as in any other context.[202]

3. Discussion

The major criticism of the social science research on the effects of real-life violence is that only a few studies are specifically geared toward assessing the impact of living in a violent, urban environment; the greater portion of this research concerns the effects of other forms of violence, such as familial abuse, crime victimization, and combat. While additional research on the specific effects of urban living would be beneficial, it is critical to understand that these other forms of violence may be the constituent elements of urban dwelling. Individuals residing in modern, urban environments may experience discrete acts of violence within their homes, e.g., battering; within their neighborhoods, e.g., rape or crime victimization; or in their communities, e.g., dodging bullets like soldiers in war. Furthermore, the particular source of violence is largely irrelevant in terms of its psychological sequelae; for example, PTSD may result from any of these types of violence. Thus, because individuals exposed to various forms of violence associated with urban dwelling may be phenomenologically indistinguishable from battered women, rape victims, and Vietnam veterans, they should be treated similarly within the context of the criminal law. Alan Dershowitz, one of the major critics of the abuse excuse, carries this argument one step further, asserting that those who experience violence as part of their overall

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Ireland, or Israel."); Aileen M. Bigelow, Note, *In the Ghetto: The State's Duty to Protect Inner-City Children from Violence*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 533, 567 (1993) ("Children in our inner-city housing projects are growing-up in a war zone."); Delia O'Hara, *Violence Threatens to Turn Innocent Kids Into Killers*, CHI. SUN-TIMES, June 11, 1989, at 43 ("The fact is that the children of Chicago's high-rise slums live in an environment as dangerous as any of the world's war zones."); Shirk, *supra* note 185, at 1A ("Children in cities now have much in common with kids in war zones, Garbarino says."); *20/20, supra* note 18 ("[T]here's mounting evidence that chronic violence does have disturbing effects on children. [Garbarino] has been studying the impact of trauma on youth in war zones around the world, including the public housing project visible from his Chicago office.").

201. DuRant et al., *supra* note 162, at 617; Bigelow, *supra* note 200, at 538-39; James M. Lukas, *Urban Psychosis: License to Kill?*, (July 8, 1994) (unpublished manuscript, on file with author); *see also* Naomi Breslau et al., *Traumatic Events and Posttraumatic Stress Disorder in an Urban Population of Young Adults*, 48 ARCH. GEN. PSYCHIATRY 216, 221 (1991) (finding rates of exposure to PTSD events vary across populations).

202. *See* Bigelow, *supra* note 200, at 567 (equating the psychological devastation to the post-traumatic stress disorder suffered by war veterans).

environment may be more sympathetic than battered women, for instance, because they have no choice regarding their exposure.[203]

B. *Television Intoxication: The Effects of Television Violence*[204]

An important feature of the socially toxic environment is the culture communicated through television and the movies.[205]

In its simplest form, the defense theory of television intoxication rests on two corollary propositions. First, that a defendant's viewing of television violence materially contributed to her subsequent criminal behavior. Second, that although television viewing is usually considered a voluntary activity, it may become addictive and thus qualify as an involuntary form of behavior.

1. The Positive Correlation Between Television Violence and Aggressive Behavior

A considerable body of empirical research exists on the relationship between television violence and subsequent aggressive behavior. This research is noteworthy in three respects. First, the research spans more than forty years; the earliest research on television violence was conducted in the 1950s.[206] Second, the research on television violence is extensive and broad-ranging; some estimates place the number of studies conducted at between 2,000 and

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203. Milloy, *supra* note 36, at D1, D6, comments:

> Harvard law professor Alan Dershowitz said the claim of urban survival syndrome in the *Osby* case was actually more plausible than the post-traumatic stress disorder defense that was used successfully in the case of accused parent killers Eric and Lyle Menendez and in the case of Lorena Bobbitt. . . .
>
> "Those defendants had options," Dershowitz said. "They were middle class. They could leave."

Id.

204. This discussion focuses on the research with respect to television because it is the most well-developed. For research on the effects of pornography and music lyrics, see *supra* notes 78-91 and accompanying text.

205. Garbarino, *Growing Up*, *supra* note 10, at 8.

206. Candy J. Cooper, *Watching for Trouble/Violence on TV Increases Aggression, Researcher Finds After Decades of Study*, DETROIT FREE PRESS, Oct. 23, 1993, at 1A, 4A. *But cf.* Prettyman & Hook, *supra* note 66, at 320-22 (suggesting research on television violence is the latest in a long line of research on media-related violence that began with studies on the effects of violent movies and comic books).

3,000.[207] Third, legislative and executive governmental entities have actively participated in this research.[208]

The primary, and almost unanimous, finding common to this extensive body of research is that a positive correlation exists between viewing violent television programs and subsequent aggressive behavior. For example, in 1972, the Surgeon General's Committee concluded:

> Thus, there is a convergence of the fairly substantial experimental evidence for short-run causation of aggression among some children by viewing violence on the screen and the much less certain evidence from field studies that extensive violence viewing precedes long-run manifestations of aggressive behavior. This convergence of the two types of evidence constitutes some preliminary indication of a causal relationship, but a good deal of research remains to be done before one can have confidence in these conclusions.[209]

In 1982, the National Institute of Mental Health updated the Surgeon General's report and concluded:

> Most of the researchers look at the totality of the evidence and conclude, as did the Surgeon General's Advisory Committee, that the convergence of findings supports the conclusion of a causal relationship between televised violence and later aggressive behavior. The evidence now is drawn from a large body of literature. Adherents to this convergence approach agree that the conclusions reached in the Surgeon General's program have been significantly strengthened by more recent research.[210]

More recently, the American Psychological Association's Commission on Violence and Youth reported: "There is absolutely no doubt that higher levels of viewing violence on television are correlated with increased acceptance of aggressive attitudes and

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207. *See, e.g.*, Prettyman & Hook, *supra* note 66, at 326. *But see* Campbell, *supra* note 66, at 422 ("Studies on television violence realistically number no more than 200."). In the following section, I rely primarily on summaries or compilations of the voluminous research in this area rather than the primary studies themselves.

208. *See infra* notes 209-10.

209. SCIENTIFIC ADVISORY COMMITTEE ON TELEVISION AND SOCIAL BEHAVIOR, TELEVISION AND GROWING UP: THE IMPACT OF TELEVISED VIOLENCE (1972).

210. NATIONAL INSTITUTE OF MENTAL HEALTH, TELEVISION AND BEHAVIOR: TEN YEARS OF SCIENTIFIC PROGRESS AND IMPLICATIONS FOR THE EIGHTIES 37 (1982).

increased aggressive behavior."[211] Even critics acknowledge the near unanimity of this finding within the social science community.[212]

2. Causal Theories of Aggression

While a considerable consensus exists among social scientists that there is a positive correlation between viewing violent television programs and subsequent aggressive behavior, there is far less unanimity about the meaning of that correlation. Although problems inhere in the inference of a causal relationship based upon a correlation,[213] scientists sometimes feel justified in making such an inference.[214] This has been the case with regard to research on

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211. 1 COMMISSION ON VIOLENCE & YOUTH, AM. PSYCHOL. ASS'N, VIOLENCE & YOUTH: PSYCHOLOGY'S RESPONSE 33 (1993).

212. Campbell, *supra* note 66, at 421, and sources collected therein.

213. As a threshold matter, the old scientific aphorism that correlation does not imply causation must be considered. Two basic problems exist with inferring a causal relationship from a correlation. The first problem concerns directionality: which variable causes the other? In context, the issue is whether viewing television violence causes aggressive behavior or, alternatively, whether aggressive individuals tend to watch violent television. The second problem is the possible existence of a third variable that may be responsible for causing both events. Thus, the issue is whether "both viewing violent programs and aggression are products of a third condition or set of conditions. Other variables, such as socioeconomic status, age, and sex, have been found to interact with aggressive behavior. Other variables, such as pre-existing levels of aggression and personality factors, may be influential." Campbell, *supra* note 66, at 434-35 (footnotes omitted).

214. An excellent example of this phenomenon concerns the research on cigarette smoking and lung cancer. Although the precise mechanism through which smoking causes lung cancer is not well-understood, the consensus is that such a causal connection does exist. The Surgeon General's Report on smoking and health concluded as follows:

> The causal significance of an association is a matter of judgment which goes beyond any statement of statistical probability. To judge or evaluate the causal significance of the association between [cigarette smoking and lung cancer] . . . a number of criteria must be utilized, no one of which, [by itself], is pathognomonic or a sine qua non for judgment. These criteria include:
>
> (a) the consistency of the association
> (b) the strength of the association
> (c) the specificity of the association
> (d) the temporal relationship of the association
> (e) the coherence of the association.

SURGEON GENERAL'S ADVISORY COMMITTEE ON SMOKING AND HEALTH, U.S. DEPARTMENT OF HEALTH EDUCATION AND WELFARE, SMOKING AND HEALTH 20 (1964).

Garbarino, the expert in *Morgan*, has analogized the research on television violence to that on cigarette smoking:

> Understanding the consequences of television for childhood and youth is a bit like understanding the effects of smoking on health. It is difficult to see a simple

television violence. In this connection, social scientists have advanced at least four possible theories of causation: (1) social learning, (2) desensitization, (3) the "mean world" hypothesis, and (4) instigation.

According to the social learning theory, perhaps the most popular theory of causation, television violence causes real-life violence because children and adults learn violence by watching television.[215] The learning can be immediate, as shown in cases in which the viewer specifically imitates the actions of a television character.[216] However, the theory is better understood in more longitudinal terms. Television, like other sources of information about the world, allows children to learn or model behavior that they see, just as they might model the behavior of adults, peers, or teachers. " 'Because children learn from what they see, it should surprise no one that violence on television clearly provokes violent or aggressive behavior in children . . . .' "[217]

The second causal theory is that the exposure to violence in the media desensitizes the viewer to it and therefore makes it more likely

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and direct link between smoking and health. . . . And yet, the scientific proof that smoking—even being in the presence of smoking—is bad for your health is clear. . . . It's taken a generation of research and advocacy, but the message is now well established and has sunk in.

Garbarino, *Growing Up*, *supra* note 10, at 9.

Similarly, the movement toward treating violence as a public health problem resembles the approach taken with respect to cigarette smoking.

In one of today's JAMA articles, Washington state physician Brandon Centerwall cited studies suggesting that one major source of violence in society was violence in television. "Children's exposure to television and television violence should become part of the public health agenda, along with safety belts, bicycle helmets, immunizations and good nutrition," he said.

Jim Detjen & Susan Fitzgerald, *Experts See Epidemic of Violence Murders Reached an All-Time High Last Year. A Former Surgeon General Urged that a Public Health Campaign be Waged to Stem Gun-Related Deaths.*, PHILA. INQUIRER, June 10, 1992, at A02.

215. *See* Campbell, *supra* note 66, at 424-25, 430-31 (describing research on children's imitation); *see also* Prettyman & Hook, *supra* note 66, at 327-28 (discussing the modeling or instructional hypothesis).

216. Some convicted felons have also claimed that they learned new forms of committing crimes by watching television. Schlegel, *supra* note 66, at 199. A recent example of possible imitative violence was the firebombing of a New York subway token booth which closely resembled a scene from the movie "Money Train." Harold Schecter, *A Movie Made Me Do It*, N.Y. TIMES, Dec. 3, 1995, at 15.

217. Elizabeth Kolbert, *Television Gets Closer Look As a Factor in Real Violence*, N.Y. TIMES, Dec. 14, 1994, at D20 (quoting Dr. William Dietz, a pediatrician and an expert on children and violence); *see also* Brandon S. Centerwall, *Television Violence: The Scale of the Problem and Where to Go From Here*, 267 JAMA 3059, 3059-60 (1992) (discussing television in relation to child development).

that she will engage in that conduct at a later date. Dr. Benjamin Spock provides a good explanation of this causal theory:

> Recent psychological experiments have proved that watching violence has a desensitizing and brutalizing effect on people—children and adults alike. By 'desensitizing,' I mean that individuals brought up by kindly parents will at first be shocked and horrified when they see one person committing an act of violence against another. But if they continue to see violence regularly, they will gradually take it for granted as standard human behavior.[218]

Thus, under the desensitization theory, violence becomes more socially acceptable because of repeated exposure in the media. The glamorization of violence on television may make this effect even more pronounced.[219]

A third causal explanation, Gerbner's "mean world" hypothesis,[220] holds that watching television causes viewers to become more cynical about the world. "[T]elevision distorts viewers' perceptions of violence when it portrays disproportionate levels of violence and aggression compared to that in the real world. Violent programming cultivates fear and anxiety in its audience."[221]

Finally, some have suggested that viewing violence instigates subsequent violent behavior.[222] In other words, media violence is a catalyst for subsequent real-life violence. This theory, however, appears to be little more than a tautological explanation.

In addition to these causal theories of aggression, Garbarino has noted that "[a] second, much less well documented effect of television is in suppressing social interaction in the family and the community, while paradoxically increasing awareness of economic inequalities."[223] He adds: "It seems reasonable to expect that, *as time with adults declines the impact of what children see and hear from*

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218. Benjamin Spock, *How On-Screen Violence Hurts Your Kids*, REDBOOK, Nov. 1987, at 26. Other authors have noted this causal theory. *See, e.g.*, COMMISSION ON VIOLENCE AND YOUTH, *supra* note 211, at 33; Prettyman & Hook, *supra* note 66, at 328-29; Schlegel, *supra* note 66, at 202; Kim, *supra* note 66, at 1391; Kolbert, *supra* note 217, at A13.

219. *See, e.g.*, Centerwall, *supra* note 217, at 3059 (stating that children view television as factual information—viewing television desensitizes children to violence).

220. *See* Schlegel, *supra* note 66, at 201-02 (discussing Gerbner's theory); Kolbert, *supra* note 217, at D20 (same); *see also* Kim, *supra* note 66, at 1390-91 (discussing television's effect on the cultivation of American society).

221. Kim, *supra* note 66, at 1391.

222. *See* Prettyman & Hook, *supra* note 66, at 329-330 (discussing arousal or incitement hypothesis); Campbell, *supra* note 66, at 423-24, 428-430 (discussing television's instigation of violence).

223. Garbarino, *Growing Up*, *supra* note 10, at 11.

television increases. . . . These two features of social toxicity—violent messages and decreased adult influence—work in conspiratorial fashion. And today we reap the bitter fruits of that development."[224]

3. The Voluntariness of Television Viewing

Another problem associated with the television-intoxication cases concerns the voluntary nature of television viewing—a condition that distinguishes this defense from urban psychosis and black rage. Unfortunately, the available social science does not address the issue of voluntariness to any considerable degree. However, two possible avenues exist to address this issue. The first is to consider television as an addictive substance. Rubin characterized Zamora as a "true television addict"[225] and Howard's defense attorney called him a "rap addict."[226] Moreover, some research suggests that television does have addicting qualities.[227] Thus, the voluntariness of the activity might be dispelled by considering that the defendant's ability to choose has been heavily circumscribed along the way.

The second possible avenue for evaluating the voluntariness of television viewing is to consider the defendant's lack of knowledge about its toxic effects, i.e., psychological damage. Involuntary intoxication cases include instances in which the defendant voluntarily consumed a substance without knowledge of its intoxicating qualities.[228] Thus, if a defendant viewed television violence and was unaware that it might cause psychological damage, the voluntary nature of the viewing might be disputed. These two lines of thought fit together nicely in that the consumption of an addictive substance without awareness of its intoxicating and addictive qualities provides the quintessential example of involuntary intoxication.

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224. *Id.* at 12-13.

225. RUBIN & MATERA, *supra* note 46, at 32.

226. Munn, *supra* note 86, at 477.

227. *See, e.g.*, *Frontline*, *supra* note 49 (describing addictive qualities of television viewing).

228. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 394 (2d ed. 1986) ("One such case is when the intoxication has resulted from an innocent mistake by the defendant as to the character of the substance taken, as when another person has tricked him into the liquor or drugs."); *see also* MODEL PENAL CODE § 2.08(5)(b) (1962) (" 'Self-induced intoxication' means intoxication caused by substances which the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime.").

4. Discussion

The social science literature on the effects of television violence is arguably the most controversial of the three areas of research.[229] While strong empirical support exists for the proposition that violent television programming is correlated with subsequent aggressive behavior, the meaning of this association is not entirely clear. Researchers have suggested that television violence may be only one variable within a web of causative factors resulting in aggression and, furthermore, that it is difficult to isolate the effects of television violence from a host of other influences. Notably, this claim corresponds to that made by two defendants, Long and Howard, who asserted only that media violence was one of several factors leading to their criminal behavior.[230] In contrast, a third defendant, Zamora, argued that television was the predominant socializing influence in his life.[231] The empirical issue of what effect media violence has on a particular defendant might be solved by requiring that the defendant demonstrate the inordinate and idiosyncratic influence that television violence played in his life.

A second possible criticism of the social science literature on the effects of television violence is that, unlike the research on either real-life violence or racism, little evidence exists to demonstrate that television violence causes recognized categories of psychiatric illness, although one author reported that two children developed PTSD as

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229. The television-intoxication theory of defense is also controversial because of the First Amendment issues it engenders; these issues are beyond the scope of the present analysis. For treatment of the First Amendment issues associated with all forms of media violence see *supra* notes 46-91 and accompanying text.

230. *See supra* notes 78-80 and accompanying text (discussing the Long case); notes 86-91 and accompanying text (discussing the Howard case).

231. RUBIN & MATERA, *supra* note 46, at 51-60. Zamora's mother placed him before a television set at a very early age because she could not afford a baby-sitter:

> Her solution to the child-care dilemma was to purchase a television set, sit young Ronny down in front of it, and pray that it captured his attention enough to keep him safe while she was working and attending school. It did. The neighbors who looked in on him reported that Ronny was mesmerized by the images on the screen. Later, when the Zamoras were able to afford a baby-sitter, the woman they hired noted Ronny's fascination and continued to allow him to sit glued in front of the set eight hours a day, even feeding him while he watched . . . .
>
> Mrs. Zamora described how her son would pretend to go to sleep each night at 9:00 p.m., then sneak out of his room and turn the television back on. He would watch until the small hours of the morning, frequently falling asleep on the couch or on the rug in front of the set.

Id. at 31-32, 36-37.

the result of watching a television ghost story.[232] On one hand, the research on television violence is more powerful because it supports a closer connection between the social toxin of media violence and aggression, the resulting behavior of interest to the criminal justice system, without the mediating construct of a mental illness. On the other hand, the absence of an identifiable mental illness in television-intoxication cases may require resort to other doctrinal categories, such as intoxication, which explicate the loss of voluntary control in a more straightforward manner.

C. *Black Rage: The Effects of Racism*

> *It is the transformation of this quantum of grief into aggression of which we now speak. As a sapling bent low stores energy for a violent backswing, blacks bent double by oppression have stored energy which will be released in the form of rage—black rage, apocalyptic and final.*[233]

The underlying empirical assumption in the black-rage cases is that the environmental or cultural phenomenon of racism affects the mental functioning of individuals. In the following review of the social science research relevant to this defense, two facts should become apparent. First, a broad and diverse range of research exists on the question of racism's effect on mental and physical health. Information may be found in the psychiatric, psychological, sociological, and medical literatures as well as in popular non-fiction works. The second characteristic of the relevant research is its embryonic nature. Almost all writing in this area stresses the need for more specific and systematic empirical research on the effects of racism. For this reason, the following information must be viewed with some caution. Further, racism in the selection and funding of

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232. Chris Mihill, *TV Ghost Story Left 2 Boys with Post-Traumatic Stress Disorder*, THE GUARDIAN, Feb. 4, 1994, at 3.

233. GRIER & COBBS, *supra* note 92, at 210. For another analogy to trees, see Wong, *Doctor Says*, *supra* note 153, at 24, reporting on the Gilchrist case:

> The mental disorder, Speller testified, is not easily detected and could allow him to continue with everyday habits. Speller likened Gilchrist to a tree with a fungal disease. "The tree is still standing, has leaves and blooms every spring, but it's diseased inside. A hurricane comes along and it breaks, it snaps. A tree without disease inside would bend," Speller said.

See also JOE R. FEAGIN & MELVIN P. SIKES, LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE vii (1994) (" 'What is it like to be a black person in white America today? One step from suicide! . . . [I]t's really a mental health problem. It's a wonder we haven't all gone out and killed somebody or killed ourselves.' ").

research may play a role in its unavailability, a problem treated separately at the end of this section.

1. The Psychiatric, Psychological, and Medical Consequences

Consensus exists among social scientists that racism has a negative effect on the mental and physical health of black individuals. As one author noted, "[t]he major and overriding psychiatric problem of the black minority is the withering effect of racism."[234] Cash provides a good summary of the multidimensional effects of racism:

> Those Black Americans who have chosen to play the game of "follow the leader" could experience psychotic and neurotic depression, hostility, anger, and states of violence coupled with lowered self-esteem and ego destruction. Additionally, they may suffer physical symptoms of stressful living such as hypertension, obesity, and the many other serious physical problems that can result from these two, such as heart disease, diabetes, and arterial sclerosis.[235]

The multifaceted nature of psychological dysfunction engendered by racism, only one aspect of which is rage, is one reason that the sobriquet of "black rage" is not only unduly provocative, but also inaccurate. A better term might be the one suggested by Aggrey Burke—"racism-related disorders."[236]

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234. Chester M. Pierce, *Psychiatric Problems of the Black Minority, in* AMERICAN HANDBOOK OF PSYCHIATRY 512, 512 (Gerald Caplan ed., 2d ed. 1974); *see also* James H. Carter, *Racism's Impact on Mental Health*, 86 J. NAT'L MED. ASS'N 543, 546 (1994) ("Racism affects mental health in a most pernicious manner. This fact has been well documented and chronicled by historians, medical anthropologists, sociologists, and mental health professionals. . . . Epidemiological studies of mental illness invariably identify racism as a major contributor to psychopathology."); Harold W. Neighbors, *Clinical Care Update: Minorities/The Prevention of Psychopathology in African Americans: An Epidemiologic Perspective*, 26 COMMUNITY MENTAL HEALTH J. 167, 167 (1990) ("Many have argued that stressful social conditions are the major cause of mental disorder in blacks and thus psychopathology can be prevented by eliminating racism, oppression and poor economic conditions."); Ronnie Priest, *Racism and Prejudice as Negative Impacts on African American Clients in Therapy*, 70 J. COUNSELING & DEV. 213, 213 (1991) ("The existing literature also suggests that racism has negative impacts on African Americans in ways that may necessitate their seeking counseling.") (citations omitted).

235. Eugene Cash, Jr., *Extra-Dimensional Systemic Frustrations that Endanger the Mental Health of Black People, in* KEY MENTAL HEALTH ISSUES IN THE BLACK COMMUNITY 2 (Eugene Cash, Jr. et al. eds., 1976); *see also* Harold Rosen & Jerome D. Frank, *Negroes in Psychotherapy*, 119 AM. J. PSYCHIATRY 456, 458 (1962) ("Racial discrimination may contribute to the psychopathology of the individual Negro patient in a variety of ways.").

236. Aggrey W. Burke, *Is Racism a Causatory Factor in Mental Illness?*, 30 INT'L J. SOC. PSYCHIATRY 1, 1 (1984); *see also* Joe Ravetz, *Ethnicity, Race and Mental Health*, 8 SOC. WORK EDUC. 37, 38 (1989) (discussing Burke's views).

From the psychiatric and social psychiatric[237] literature, clinical accounts abound of individuals whose psychopathology was directly connected to the effects of racism.[238] Anecdotal accounts of the effects of racism on individuals are also detailed in two recent books: *The Rage of a Privileged Class*[239] and *Living with Racism.*[240]

In terms of psychiatric problems, research suggests that black individuals may suffer from serious psychiatric problems as the result of racism. One common symptom is paranoia; black individuals who suffer from mental illness are more commonly diagnosed with schizophrenia, rather than affective disorders.[241] Further, PTSD may result from specific acts of racial discrimination or

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237. Social psychiatry is "concerned with the effect of the sociocultural environment on the underlying conflict, the clinical syndromes, the distribution, frequency, treatment and management of psychiatric disorders among different populations and sub-groups within populations." Ari Kiev, *Psychiatric Disorders in Minority Groups, in* PSYCHOLOGY AND RACE 416, 416 (Peter Watson ed., 1973); *see also* Robert L. Bragg, *Discussion: Cultural Aspects of Mental Health Care for Black Americans, in* CROSS-CULTURAL PSYCHIATRY 179, 180 (Albert Gaw ed., 1982) ("These clinics emphasize a social psychiatry that focuses on external stressors on adaptive strengths in the respective communities and the intrapsychic processes of the clients/patients and/or families.").

238. For instance, one author reports on a patient who was harassed by his foreman and persecuted by his fellow workers because he was black: "There was evidence that Mr. A. was having problems in many areas. However, the main difficulty he presented was the issue of race. The racial overtones in the situation seemed to shake his defensive structure enough to cause intense anxiety and an irrational answer to a real situation." Thomas Brantley, *Racism and Its Impact on Psychotherapy*, 140 AM. J. PSYCHIATRY 1605, 1606 (1983). Mr. A. had decided to kill his foreman with a gun. *Id.*

Similarly, Grier and Cobbs's famous book BLACK RAGE refers to clients inordinately affected by racism:

> If the resources and imperfections of this young woman were unique to her, her story would not assume such importance. Familiar concepts could adequately describe her intrapsychic conflict. We would search her past for early trauma, distorted relationships, and infantile conflicts. The social milieu from which she came would be considered but would not be given much weight. Our youthful subject, however, is black and this one fact transcends all others.

GRIER & COBBS, *supra* note 92, at 36.

239. ELLIS COSE, THE RAGE OF A PRIVILEGED CLASS (1993).

240. FEAGIN & SIKES, *supra* note 233.

241. Bragg, *supra* note 237, at 182; Carter, *supra* note 234, at 456; Billy E. Jones & Beverly A. Gray, *Problems in Diagnosing Schizophrenia and Affective Disorders Among Blacks*, 37 HOSP. & COMMUNITY PSYCHIATRY 61, 62-63 (1986); Jeanne Spurlock, *Black Americans, in* CROSS-CULTURAL PSYCHIATRY, *supra* note 237, at 168; *see also* Charles A. Pinderhughes, *Understanding Black Power: Processes and Proposals*, 125 AM. J. PSYCHIATRY 106, 108 (1969) ("These group-related paranoid processes . . . are responsible for such extensive intrapsychic, interpersonal, and intergroup conflict, . . . acts of violence, and deaths on a massive scale that psychiatrists may come to identify them as the most serious pathogenic factors in our era.").

harassment.[242] Some authors question why more black individuals do not display signs of psychiatric disorder given the prevalence of racism within our society.[243]

In addition to psychiatric illness, research indicates that racism impairs overall psychological functioning. From generalized notions of emotional scarring[244] to more specific responses of self-contempt[245] and impaired intellectual and academic achievement,[246] the effects of racism are multidimensional. Clark and Clark's classic studies on the effect of institutionalized racism, in the form of school segregation, merit consideration in this context.[247] Their finding that black children had lower self-esteem that might result in lower school achievement was cited by the United States Supreme Court in *Brown v. Board of Education.*[248]

Third, the effects of racism may also have consequences for physical health. Evidence from the medical literature suggests that black individuals experience higher rates of high blood pressure and coronary heart disease than do their white counterparts.[249] Resear-

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242. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2336 (1989); Andrea L. Crowley, Note, R.A.V. v. City of St. Paul: *How the Supreme Court Missed the Writing on the Wall*, 34 B.C. L. REV. 771, 777 (1993) ("In addition to the psychological ramifications of hate speech, victims also experience physiological effects such as increased pulse rates, difficulty in breathing and post-traumatic stress disorder.") (citing Matsuda, *supra*, at 2336); *see also* Angela E. Oh, *Race Relations in Los Angeles: "Divide and Conquer" is Alive and Flourishing*, 66 S. CAL. L. REV. 1647, 1649 n.9 (1993) (noting that Korean-Americans suffered from PTSD following the Los Angeles riots).

243. Benjamin P. Bowser, *Racism and Mental Health: An Exploration of the Racist's Illness and the Victim's Health, in* INSTITUTIONAL RACISM AND COMMUNITY COMPETENCE 107, 107 (Barbarin et al. eds., 1981); *see generally* Bragg, *supra* note 237, at 183 (noting that it is surprising that rate of mental disorders is not higher); Spurlock, *supra* note 241, at 165 (noting that only some black individuals break down).

244. For an essay regarding the effects of racism on the black community, see ALVIN F. POUSSAINT, WHY BLACKS KILL BLACKS 69 (1972); *see also* Carter, *supra* note 234, at 543 (noting anecdotally that an incident of racism had left the author himself emotionally scarred).

245. *See* POUSSAINT, *supra* note 244, at 77; Matsuda, *supra* note 242, at 2337-40.

246. *See* Jeanne Spurlock, *Some Consequences of Racism for Children, in* RACISM AND MENTAL HEALTH: ESSAYS 147, 153-54 (Charles V. Willie et al. eds., 1973).

247. Kenneth B. Clark & Mamie P. Clark, *Racial Identification and Preference in Negro Children, in* READINGS IN SOCIAL PSYCHOLOGY 602-11 (Eleanor E. Maccoby et al. eds., 3d ed. 1958).

248. 347 U.S. 483, 494-95 n.11 (1954).

249. Richard Cooper, *Blacks and Hypertension*, 4 URB. HEALTH 9, 9 (1975); Ernest Harburg et al., *Socio-Ecological Stress, Suppressed Hostility, Skin Color, and Black-White Male Blood Pressure: Detroit*, 35 PSYCHOSOMATIC MED. 276, 276 (1973) (noting that blacks have higher blood pressure levels, higher morbidity and mortality from hypertension, hypertensive heart disease, and stroke than white counterparts); Christopher Sempos

chers have pointed to the role of racism and oppression as a possible causative factor in this finding.[250] The need to suppress frustration and anger about unjust treatment may cause black individuals to turn these feelings inward, possibly resulting in higher rates of hypertension and other medical conditions.

2. Causal Theories of the Effects of Racism

While some documentation supports the proposition that racism plays a pathogenic role in causing some mental illness or psychological impairment, it is not clear from the relevant research why this might occur. Researchers in the field have offered a number of hypotheses. Perhaps the simplest one is that racism is stressful for the persons subjected to it.[251] The stress for minority group members induced by racism is greater than that experienced by other members of society,[252] a phenomenon Cash terms "extra-dimensional systemic frustrations."[253] The results of stress are fairly well-known.[254] As one commentator opined, "In the case of Blacks, extrapsychic sources

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et al., *Divergence of the Recent Trends in Coronary Mortality for the Four Major Race-Sex Groups in the United States*, 78 AM. J. PUB. HEALTH 1422, 1423 (1988) (finding that the rapid decline in coronary heart disease has not slowed for white males, but has slowed for females of both races and, to a lesser extent, black males); Hazel M. Swann, *Guest Editorial: A Feminist Look at Hypertension*, 4 URB. HEALTH 10, 10 (1975).

250. Harburg et al., *supra* note 249, at 276-77 (hypothesizing that one possible explanation for their finding is restricted anger or suppressed hostility); *see also* Sempos et al., *supra* note 249, at 1425 ("Additionally, such factors as economic trends and socioeconomic status or social class may also play a substantial role in changes in [coronary heart disease] mortality trends.").

251. *See, e.g.*, Ravetz, *supra* note 236, at 38 (positing that racism is stress-inducing); Jan A. Buckner, Comment, *Help Wanted: An Expansive Definition of Constructive Discharge Under Title VII*, 136 U. PA. L. REV. 941, 964 (1988) (asserting that discrimination causes stress with both mental and psychological consequences).

252. Joe R. Feagin, *The Continuing Significance of Race: Antiblack Discrimination in Public Places*, 56 AM. SOC. REV. 101, 115 (1991) ("The individual cost of coping with racial discrimination is great and, as he says, you cannot accomplish as much as you could if you retained the energy wasted on discrimination."); Neighbors, *supra* note 234, at 173 (noting that it is commonly assumed that blacks experience more stress than whites because of discrimination and prejudice); Spurlock, *supra* note 241, at 169 (noting that Meers has discussed the "chronic external conflict and distress" experienced by black individuals, who experience a "flood of unpredictable stimuli" and find the culture a constant threat).

253. Cash, *supra* note 235, at 2 ("Because Black people have felt they must 'adjust' to the alien (white originated) systems, these Black people have suffered 'extra-dimensional systemic frustrations' *to a greater degree* than is true for the major (white group).").

254. For a summary of these consequences, see Buckner, *supra* note 251, at 961.

of stress often lead to intrapsychic maladaptive behavior, that is, poor self-concept, feelings of hopelessness, and rage."[255]

The stress induced by racism operates on at least two levels: (1) a system-wide derogation of members of the minority group, and (2) the personal experiences of the individual.[256] Often, it is the cumulative impact of both types of stresses that is so destructive and explains why one precipitating event may seem trivial yet causes the individual acute distress. The response to this stress is not the same for all black persons.[257] Individual differences in responsiveness to the stresses produced by racism have been explored only slightly. Some factors implicated in vulnerability to racism include degree of community support,[258] personality,[259] and attitudes.[260]

A second major mechanism through which racism may affect mental health, in addition to causing stress, is to compromise the self-esteem of individuals in the persecuted group. If racism is premised upon the notion of racial superiority, it is not surprising that one sequela is self-contempt on the part of minority-group members.[261] Patricia Williams calls this effect "spirit murder."[262] This self-hatred may lead to feelings of despair, depression, hopelessness,[263] and helplessness.[264]

A third possible result of racism is the engendering of feelings of frustration and rage that, in turn, may lead to aggressive or criminal behavior.[265] In discussing socially deviant and self-destructive behavior on the part of black individuals, Houston observes: "Most investigators, however, trace the problem to pent-up aggression

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255. Elsie J. Smith, *Cultural and Historical Perspectives in Counseling Blacks, in* COUNSELING THE CULTURALLY DIFFERENT: THEORY AND PRACTICE 141, 173 (Derald W. Sue ed., 1981).

256. *See* Feagin, *supra* note 252, at 114-15.

257. Bowser, *supra* note 243, at 111 ("Faced with the same oppressive conditions, some blacks cope successfully while other do not."); Spurlock, *supra* note 241, at 165 ("The foregoing accounts of psychological assaults daily mar the mental health of Black people. Some will 'weather the storm.' Some will break down.").

258. Bowser, *supra* note 243, at 111.

259. Anthony Bottoms, *Crime and Delinquency in Immigrant and Minority Groups, in* PSYCHOLOGY AND RACE 432, 449 (Peter Watson ed., 1973).

260. *Id.*

261. POUSSAINT, *supra* note 244, at 69; Matsuda, *supra* note 242, at 237-39; Crowley, *supra* note 242, at 776.

262. Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 129 (1987).

263. Crowley, *supra* note 242, at 776.

264. Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 136-38 (1982).

265. Spurlock, *supra* note 241, at 171.

caused by the frustration of being Black in White America."[266] One sociologist has even suggested that more subtle forms of racism within our society are more pernicious because black individuals are lulled into believing that the achievement of the American dream is at hand, although severe obstacles actually prevent its attainment.[267]

3. The Need for Additional Research and the Role of Racism

While these reports from the various social and medical sciences suggest an impact of racism on mental and physical health and psychological functioning, considerable additional systematic, empirical research is needed in this area. Some social scientists blame racism within the various professions as partially responsible for the lack of research.[268] These allegations of racism exist in the psychiatric,[269] psychological,[270] and medical[271] literature. Thus,

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266. LAWRENCE N. HOUSTON, PSYCHOLOGICAL PRINCIPLES AND THE BLACK EXPERIENCE 130 (1990).

267. FEAGIN & SIKES, *supra* note 233, at ix; *see also* HOUSTON, *supra* note 266, at 147 ("The frustrations, tensions, and conflicts involved in constantly attempting to meet one's needs and achieve one's goals in a limited opportunity structure seem to be taking their toll on Black Americans.").

268. *See* POUSSAINT, *supra* note 244, at 69 ("Regrettably, social scientists have cooperated with a system which defines blacks in negative terms but disguises them in academic jargon"); Smith, *supra* note 255, at 141 (noting that Martin Luther King once said that social scientists have played little or no role in disclosing the truth about the plight of minorities in this country).

269. With respect to psychiatry, one author comments:

> What impact this racism has had on the mind of man cannot yet be fully known, since research dealing with racism has been underrepresented as a proportion of the total work in the mental health field. Frequently, racial aspects of mental health have been either ignored or underplayed to the point of abandonment.

James R. Ralph, *Foreword* to INSTITUTIONAL RACISM AND COMMUNITY COMPETENCE at iii (Oscar A. Barbarin et al. eds., 1981); *see also* ALEXANDER THOMAS & SAMUEL SILLEN, RACISM AND PSYCHIATRY at v (1972) (noting racism in the mental health field); Carter, *supra* note 228, at 544 (noting racism in the mental health field and the American Psychiatric Association's response); Kenneth B. Clark, *Foreword* to THOMAS & SILLEN, *supra*, at xii (discussing the fact that social scientists "are no more immune by virtue of their values and training to the disease and superstitions of American racism than is the average man"); Ezra E. H. Griffith & Elwin J. Griffith, *Racism, Psychological Injury, and Compensatory Damages*, 37 HOSP. & COMMUNITY PSYCHIATRY 71, 71 (1986) (noting that "mental health professionals have not studied the psychological effects of racism in much detail"); Spurlock, *supra* note 241, at 164 (quoting from Kramer to the effect that mental health professionals are not immune to racism); Charles B. Wilkinson & Jeanne Spurlock, *The Mental Health of Black Americans: Psychiatric Diagnosis and Treatment, in* ETHNIC PSYCHIATRY 13, 15 (Charles B. Wilkinson ed., 1986) (positing that many of the inaccuracies in the diagnosis of black patients are related to racism).

270. Thomas O. Hilliard, *Applications of Psychology and the Criminal Justice System: A Black Perspective, in* BLACK PSYCHOLOGY 456, 456-57 (Reginald L. Jones ed., 2d ed.

racism in the research process itself may be partially responsible for the lack of a better-developed body of work on the effects of racism on mental and physical health.

4. Discussion

The major criticism of the social science literature on the effects of racism is the dearth of systematic, empirical studies. A considerable portion of the social science in this area is anecdotal, based on clinical accounts, or simply underdeveloped. While such information provides a valuable starting point for further investigation, it must be followed by more rigorous data collection and empirically-oriented techniques. To some extent, the embryonic nature of research on the effects of racism is reminiscent of early research on Vietnam veterans, battered women, and rape victims, which was later substantiated by more rigorous and systematic studies.

D. The Cumulative Impact of These Social Toxins

While this section has considered the social science research underlying the three theories of defense seriatim, one final note regarding their cumulative impact is necessary. However virulent the social toxins of real-life violence, television violence, and racism may be in and of themselves, in combination they provide an even more powerful causal explanation for psychological dysfunction, mental illness, and ultimately criminal behavior. For instance, Garbarino emphasizes individuals' heightened vulnerability to psychological damage when they must cope with multiple social toxins:

1980) ("[T]here are severe problems and limitations in theories, methodologies, and research conclusions of psychology as they pertain to black people. More specifically, the discipline of psychology's relationship to the black community is characterized by racism, insensitivity, gross distortion and inappropriate methodologies."); *see also* Peter Watson, *Psychologists and Race: The 'Actor Factor', Introduction* to PSYCHOLOGY AND RACE, *supra* note 259, at 13 (noting racism within psychology).

271. Writing about the medical profession, one physician observes:

> The pieces are all there. We are left, however, with "guilt by association," which is repeatedly denied by the academic community. The specific experiment to correlate the general, epidemiological findings with chronic psychological and physiological changes is missing. Most importantly, the cause should be eliminated in a control population. Unfortunately, neither of those experiments will be undertaken in a class society. The National Institute of Health is not likely to fund a grant to eliminate racism and class oppression from the south side of Chicago.

Cooper, *supra* note 249, at 39.

> As the social environment becomes more socially toxic it is the most vulnerable kids who show the effects first. . . . [It is] the children who have accumulated the most developmental risk factors . . . [such as having] a single parent, being poor, *being the victim of racism*, being burdened with drug addiction or alcoholism, and suffering problems that impair parenting. . . .
>
> Children become more vulnerable as risk factors accumulate . . . to the social toxicity that surrounds them. Where? *In the seductive world of television*, in the nastiness that results from declining public civility, in the stresses of the modern economy, and *in the violence that escalates in many communities.*[272]

More specifically, some social scientists have documented the interactive effects of real-life violence and television violence,[273] while others have linked the impact of racism and the experience of real-life violence.[274] In terms of criminal defenses, Delgado has constructed a new independent defense of "rotten social background" (RSB), borrowing Judge Bazelon's phrase from *Alexander*,[275] which subsumes a number of these social toxins under one theoretical rubric.[276]

E. Conclusion

The empirical and theoretical social science support for the three theories of defense varies to some degree. At one end of the spectrum, considerable empirical and psychiatric research exists for the notion that experiencing or witnessing real-life violence—the central claim of urban psychosis—can have deleterious psychological consequences. In the middle of the continuum, the social science regarding the effects of television violence—which underlies the television intoxication defense—is controversial but social scientists have achieved some measure of consensus on the central proposition

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272. Garbarino, *Growing Up*, *supra* note 10, at 7-8 (emphasis added).

273. DuRant et al., *supra* note 162, at 612; Widom, *supra* note 183, at 23 (reporting that Heath et al. found an interaction between large amounts of television viewing and exposure to parental abuse which resulted in violent crime); *see also* Shirk, *supra* note 185, at 1A (stating that television violence is one factor feeding children's fears, in addition to their more general fear that the world is becoming more dangerous).

274. DuRant et al., *supra* note 162, at 612 (noting that violence disproportionally involves minority youth); Shakoor & Chalmers, *supra* note 186, at 236.

275. United States v. Alexander, 471 F.2d 923, 960 (D.C. Cir. 1972) (Bazelon, J., dissenting), *cert. denied*, 409 U.S. 1044 (1972).

276. Delgado, *supra* note 5, at 23-37.

that violent television programming is correlated with aggressive behavior. The social science literature on the psychological sequelae of racism—the scientific premise of black rage—is on the far end of the spectrum with far too little systematic empirical research, although what is available supports the defense.

While these three areas of social science research are not developed to the same degree, in each area sufficient research exists to meet threshold evidentiary requirements under the federal court standard of Federal Rule of Evidence 702.[277] Thus, sufficient social science support exists for these three theories of defense so that they merit consideration within the context of the criminal law.[278]

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277. Rule 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702. Daubert v. Merrell Dow Pharmaceuticals, 113 S. Ct. 2786 (1993), interpreted Rule 702 and held that the rule supersedes the "general acceptance" standard of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), in the federal courts. *Daubert*, 113 S. Ct. at 2794. The *Frye* standard, which may still apply in jurisdictions not utilizing the federal rules, provides:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Frye, 293 F. at 1014.

278. The information which lies at the heart of the urban psychosis cases, that real-life violence significantly affects individuals' mental health, is not only widely accepted among social scientists, but has already been admitted into evidence in other types of cases. *See, e.g.*, State v. Janes, 822 P.2d 1238 (Wash. Ct. App. 1992) (battered child); State v. Kelly, 478 A.2d 364 (N.J. 1984) (battered woman); State v. Felde, 422 So. 2d 370 (La. 1982) (Vietnam veteran); State v. Marks, 647 P.2d 1292 (Kan. 1982) (rape victim).

Empirical research establishing a link between television violence and subsequent aggressive behavior, while controversial, is almost unanimously accepted in the scientific community as exemplified by recent government and social science reports. *See supra* notes 209-11. Thus, social science on television violence also meets threshold admissibility requirements in terms of degree of acceptance and development. The harder evidentiary question which arises concerning this research is relevance: Is the research relevant to a mental state of significance to the criminal law? Federal Rules of Evidence 401 defines relevant evidence as "any evidence having any tendency to make the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. Under this very liberal standard, research on television violence may be admitted to assist the jury by providing a broader context in which to evaluate the defendant's mental state.

The hardest question of admissibility concerns the social science on the negative effects of racism because it is the least developed of the three areas. General consensus, however, exists among social scientists that racism psychologically damages individuals exposed to it; no contrary empirical evidence detracts from this conclusion. Thus, while

III. URBAN PSYCHOSIS, TELEVISION INTOXICATION, AND BLACK RAGE FIT WITHIN THE EXISTING STRUCTURE OF CRIMINAL DOCTRINE

This Part addresses the question of whether urban psychosis, television intoxication, and black rage as theories of defense can be accommodated within the existing structure of the criminal law. The analysis of cases in Part I demonstrated that defendants did not proffer these theories as new and independent defenses but, rather, used them to support existing categories of defense, to avoid or alleviate guilt, or to mitigate punishment. While the underlying theoretical and empirical premises of these theories may be novel, based on the social science reviewed in Part II, these three defense theories are simply modern variations of doctrinal categories of defense that have evolved throughout the history of criminal law.

The following discussion focuses on the four most common uses, as exemplified in Part I, of the defense theories of urban psychosis, television intoxication, and black rage within the doctrinal framework of the criminal law: (1) to support an insanity defense; (2) to elucidate other mental states relevant to criminal responsibility such as diminished capacity and provocation; (3) to support a claim of self-defense; and (4) to play a mitigating role in sentencing, especially with respect to the death penalty. In each of these areas, the theories can be subsumed within the existing structure of the criminal law without major substantive innovation or expansion.

A caveat is necessary before proceeding. The legal literature pertaining to these four doctrinal categories and to the death penalty is extraordinarily immense, complex, and intellectually diverse; the following discussion is therefore necessarily general. The limited purpose of this inquiry is to consider the degree of correspondence between the social science literature reviewed in Part II and existing trends within criminal jurisprudence, and not to explore the nuances of these individual categories of defense and mitigation.

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underdeveloped, the social science is unidirectional in documenting psychiatric and psychological harm to the victims of racism. In addition, the United States Supreme Court has already incorporated some social science evidence on the negative effects of racism in its famous school desegregation opinion, Brown v. Board of Education, 347 U.S. 483, 494-95 n.11 (1954). The social science research on racism's impact is even better developed since *Brown*, although further empirical inquiry is still necessary.

A. Guilt Determination: Exculpation and Mitigation

1. The Insanity Defense: An Excuse Defense

The most common use of these three theories is to support an insanity defense. Defendants in ten of the eighteen studied cases argued that the social environmental toxins of real-life violence, media violence, and persistent racism had caused them to become legally insane. For instance, Morgan mounted an insanity defense based on urban psychosis,[279] Zamora claimed that his insanity resulted from excessive viewing of television violence,[280] and Gilchrist argued that he was driven insane by the persistent racism that he encountered.[281]

In his thoughtful, systematic analysis of criminal defenses, Robinson classifies the insanity defense as an excuse, which "admit[s] that the deed may be wrong, but excuse[s] the actor because conditions suggest that the actor is not responsible for his deed."[282] In the case of the insanity defense, the actor is considered not responsible due to mental illness. The insanity defense has two basic requirements. First, the defendant must have a mental disability,[283] generally characterized as a mental disease or defect. Second, that mental condition must have rendered the defendant incapable of certain cognitive awareness or volitional control at the time of the criminal conduct.[284] The two most common versions of the insanity defense are the M'Naghten test,[285] a purely cognitive standard, and

279. *See supra* notes 20-27 and accompanying text.

280. *See supra* notes 46-67 and accompanying text.

281. *See supra* notes 153-61 and accompanying text; *see also* Delgado, *supra* note 5, at 41 (reporting on one attorney's use of black rage to support an insanity defense by combining "(1) general psychological principles, (2) the client's upbringing, problems and strengths, and (3) the historical-sociological experience of a Black person in America").

282. Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 221 (1982).

283. *Id.*

284. Robinson, *supra* note 282, at 222.

285. The M'Naghten test is as follows:

> [T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.

M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843). A few jurisdictions using the M'Naghten rule supplement it with the irresistible impulse test, a volitional test. LAFAVE & SCOTT, *supra* note 228, at 310-11.

the Model Penal Code (MPC) test, which contains both cognitive and volitional prongs.[286]

With respect to the requirement of a mental disease or defect, the primary problem encountered in these cases was the failure of the courts to distinguish between the cause of insanity and the resulting mental state. The particular pathogenesis of a defendant's insanity is largely irrelevant if he can meet the requisite elements of the jurisdiction's insanity standard. As one of the attorneys in these cases put it: "[T]he urban psychosis defense is not a radical departure from the traditional insanity defense. 'The only difference is that I argued that the diseases Felicia suffered were caused environmentally' rather than by genetics, drugs, or other factors . . . ."[287] At least one appellate court recognized this distinction, however: "Zamora argues that Rubin made a mockery of his insanity defense by alleging that it was caused by 'television intoxication' *even though the cause of insanity is irrelevant to the defense itself.*"[288]

The social science literature reviewed in Part II substantiates that the social toxins of real-life violence and racism have been shown to cause a variety of mental illnesses in certain individuals. The most common mental illness associated with the experience of real-life violence is PTSD.[289] In the context of racism, clinical accounts and data exist to support the notion that some individuals are so gravely affected by the experience of racism that mental illness results.[290] In terms of the television research, the link between viewing violent television programming and causation of a particular mental illness is more attenuated, although one report exists of two children who developed PTSD after watching a frightening movie.[291] However, by analogy to involuntary intoxication cases, it could be argued that the intoxicating qualities of television violence rendered the defendant legally insane.[292]

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286. The Model Penal Code test provides: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01(1) (1962).

287. Shoop, *supra* note 9, at 13 (quoting Shellow, the attorney for Morgan).

288. Zamora v. Dugger, 834 F.2d 956, 959 (11th Cir. 1987) (emphasis added).

289. *See supra* notes 166-82 and accompanying text.

290. *See supra* notes 234-43 and accompanying text.

291. Mihill, *supra* note 232, at 3.

292. *See* LAFAVE & SCOTT, *supra* note 228, at 393-94. Involuntary intoxication is a defense if the actor meets the jurisdiction's insanity test. *Id.*

A second problem associated with the use of these three theories in support of an insanity defense is the question of what constitutes a mental disease or defect. Joshua Dressler notes a lack of specificity in the legal standard in this regard: "Perhaps because of the psychiatric community's inability or unwillingness to define the term 'mental disorder' as used in its scientific inquiry, courts and legislatures have been reluctant to define the phrase in the context of the insanity defense."[293] On one hand, this lack of specificity has led some courts to emphasize the need for a psychotic-like mental state,[294] although the requirement of psychosis[295] is not embodied in the legal standard. As Chief Judge Bazelon wrote in *Alexander:*

> [O]ur experience has made it clear that the terms we use—"mental disease or defect" and "abnormal condition of the mind"—carry a distinct flavor of pathology. And they deflect attention from the crucial, functional question—did the defendant lack the ability to make any meaningful choice of action—to an artificial and misleading excursion into a thicket of psychiatric diagnosis and nomenclature.[296]

On the other hand, courts often defer to the psychiatric community's assessment of whether a mental illness exists, particularly in the guise of its diagnostic schemata—the DSM-III.[297] Notably, many of the defendants involved in the studied cases displayed mental illness contained in the DSM-III; for instance, Ferguson was most likely schizophrenic[298] and Gilchrist was arguably in the throes of a psychotic episode.[299] Further, the recognition of PTSD as a category of mental illness may also lay the groundwork for an insanity defense premised upon one of these three defense theories[300] since

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293. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 298 (1987).

294. *See, e.g.*, United States v. Alexander, 471 F.2d 923, 958 (D.C. Cir. 1972) (Bazelon, J., dissenting), *cert. denied*, 409 U.S. 1044 (1973) (noting that, although psychosis is not literally required for a finding of mental illness, mental illness as a legal term of art includes "any abnormal condition of the mind that substantially affects mental or emotional processes and substantially impairs behavior controls").

295. Perhaps Shellow, Morgan's attorney, coined the term "urban psychosis," *see supra* note 20, because she recognized that this designation sounded more acceptable than PTSD.

296. *Alexander*, 471 F.2d at 960-61 (Bazelon, J., dissenting) (footnote omitted).

297. For a discussion of the DSM-III, see *supra* note 13 and accompanying text.

298. *See* KUNSTLER & ISENBERG, *supra* note 115, at 386.

299. Langner, *supra* note 156, at 25.

300. But at least one social scientist disagrees:

> There is no question that a clinical entity called post-traumatic stress disorder exists .... The question is what we will recognize as a stressor. Watching television or living in an urban environment are not likely to count. Being raped or battered by a spouse are much more circumscribed and definable events.

Vietnam veterans and battered women have already successfully mounted insanity defenses based upon an underlying mental illness of PTSD.

In addition to the requirement of a mental disease or defect, that mental condition must produce what Robinson terms an "excusing condition" that results in the criminal behavior.[301] Robinson describes four types of excusing conditions that will provide the basis for an excuse defense: (1) when the conduct is "not the product of the actor's voluntary effort or determination," (2) when the conduct is voluntary, but the defendant "does not accurately perceive the physical nature or consequences of the conduct," (3) when perception is not impaired, but the defendant "does not know that the conduct or its results are wrong or criminal," and (4) when perception and cognition are not impaired, but the defendant "lacks the ability to control his conduct."[302] The claims made by defendants in the studied cases easily fit within Robinson's four-part schema, requiring no additional innovation.[303]

Shoop, *supra* note 9, at 12-13 (quoting John Monahan, a psychologist and law professor at the University of Virginia); *see supra* section II.A.3.

301. According to Robinson:

> Having a recognized disability at the time of the offense will not alone qualify an actor for an excuse, for it is not the disability that is central to our reason for exculpating the defendant. An actor is not excused because he or she is intoxicated, but because the *effect* of the intoxication in this instance is to create a condition which renders the actor blameless for his conduct constituting the offense. The requirement of an *excusing condition*, then, is not an element independent of the actor's disability, but rather a requirement that the actor's disability cause a particular result, a particular exculpating mental condition in relation to the conduct constituting the offense.

Robinson, *supra* note 282, at 221-22 (footnote omitted).

302. *Id.* at 222. Robinson also notes that these four conditions are presented in decreasing order of severity. *Id.* at 225. It is easiest to make a case for a disability under the absence-of-volition criterion and hardest under the lack-of-control criterion. *Id.* at 225-26. This latter excuse is only accepted if "a clear, confirmable almost compelling disability" exists, and if the impairment is "of a certain degree . . . sufficiently serious that the actor has, at least temporarily, entered the realm of abnormality." *Id.* at 225-26.

303. Only one case might arguably fall under Robinson's first category, primarily reserved for reflex actions and convulsions. *See id.* at 223. In Zamora v. State, 361 So. 2d 776, 779 (Fla. Dist. Ct. App. 1978), *cert. denied*, 372 So. 2d 472 (Fla. 1979), the defendant's insanity defense was based upon "involuntary subliminal television intoxication," i.e., that his act in shooting his elderly neighbor was a conditioned reflex based upon his inordinate consumption of violent television programming. *See supra* notes 46-67.

The second category of Robinson's schema, perceptual impairment resulting typically from insanity or intoxication (and also covering the defenses of automatism and somnambulism), Robinson, *supra* note 282, at 223, might encompass at least two of the cases. The defendants in *Zamora*, 361 So. 2d 776, and *Fisher*, 149 F.2d 28 (D.C. Cir. 1945),

In summary, the use of these theories to support an insanity defense requires little substantive expansion with respect to established criminal law doctrine. While none of the ten defendants raising this defense was found not guilty by reason of insanity,[304] this fact relates to the respective jury's determination rather than any doctrinal obstacle. In other words, nothing in the legal doctrine precludes the recognition of an insanity defense based on any of these three possible causal agents.[305]

2. Diminished Capacity and Provocation: Failure-of-Proof Defenses

Defendants in the studied cases used the theories of urban psychosis, television intoxication, and black rage for a second major purpose: to elucidate mental states, short of insanity, relevant to the criminal law, such as diminished capacity and provocation. According to Robinson's schema of criminal defenses, both diminished capacity

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aff'd, 328 U.S. 463 (1946), had little conscious awareness of their death-producing acts. RUBIN & MATERA, *supra* note 46, at 56. In *Taylor*, *see supra* notes 28-34 and accompanying text, a case which did not implicate the insanity defense but seems to raise a similar decisional impairment, the defendant experienced a flashback at the time he killed the victim.

Robinson's third category, defects in knowledge or reason, includes insanity and intoxication as well as mistake. This might be another category in which to place the television-intoxication cases. Here, the defendant has difficulty separating the reality of the situation at hand from the fictionalized accounts of violence on television because of a defect "either in the perception of the nature of the act or in the intelligent evaluation of its wrongfulness or criminality." *Robinson*, *supra* note 282, at 223.

Several cases might fall in Robinson's fourth category, lack of volitional control, which can result from insanity, intoxication, or duress. For instance, in United States v. Alexander, 471 F.2d 923, 926 (D.C. Cir. 1973), one of the defendants claimed to have lost control when called by a racial epithet. Similar arguments might be made for Ferguson and Gilchrist. However, in order for this to be a relevant consideration, the jurisdiction must recognize either the MPC insanity test, which has a volitional prong, or the irresistible impulse test.

304. The case in which the insanity defense appeared to come closest to success was Gilchrist's, *see supra* notes 153-61, in which the jury was out for five days. *Ex-Stockbroker found Guilty of First-Degree Murder*, UPI, Apr. 17, 1989, *available in* LEXIS, News Library, Wires File.

305. The use of these three theories to support an insanity defense is also unremarkable in another respect: expert testimony regarding insanity is common and even traditional. *See* David McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 OR. L. REV. 19, 23 (1987) ("Lawyers have utilized psychological testimony on the sanity of defendants for decades with no serious challenges to the admissibility of the substance of the testimony.") (footnote omitted).

and provocation may be conceptualized as failure-of-proof defenses,[306] which "consist of instances in which, because of the conditions that are the basis for the 'defense,' all elements of the offense charged cannot be proven."[307] Diminished capacity and provocation negate the mental element of an offense. Theoretically, if an element of the offense is negated, then the defendant should be acquitted. However, as Robinson points out in discussing diminished capacity:

> [M]any offenses, especially homicide offenses, have lesser included offenses with less demanding culpability elements. Thus mental illness may negate the culpability element of the greater offense but not of the lesser offense. When this occurs, the net effect of the mental illness is to reduce the defendant's liability from the greater to the lesser. (This is also what occurs in the failure of proof defense of provocation, which is said to negate the required malice element of murder, and thereby reduces the defendant's liability to manslaughter.)[308]

Thus, diminished capacity and provocation function more commonly as theories of mitigation than as complete exculpatory defenses.[309]

a. Diminished Capacity

The one case discussed in Part I that directly raised the issue of diminished capacity was *United States v. Fisher*.[310] Fisher claimed that he suffered from a mental illness not amounting to insanity, which negated the premeditation or deliberation necessary for first-degree murder and that he should therefore be guilty of a lesser offense.[311] Similarly, Murdock, who raised an insanity defense, also requested a jury instruction on diminished capacity, but the court

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306. *See* Robinson, *supra* note 282, at 242. Robinson also believes that provocation can function as an offense modification. *Id.* at 233. Dressler discusses provocation as either a partial justification or partial excuse and concludes that the better classification is as a partial excuse. DRESSLER, *supra* note 293, at 474-75.

307. *Id.* at 204.

308. *Id.* at 206 (footnotes omitted).

309. Dressler points out that diminished capacity actually encompasses "two categories of circumstances in which a defendant's abnormal mental condition, short of insanity, will exonerate him, or more often, result in his conviction of a crime or degree of crime less serious than the original charge." DRESSLER, *supra* note 293, at 319. First, diminished capacity functions as an all-purpose mens rea defense and, second, some states recognize a separate "partial responsibility" defense, but only in murder cases.

310. 149 F.2d 28 (D.C. Cir. 1945), 328 U.S. 463 (1946); *see also* LAFAVE & SCOTT, *supra* note 228, at 370 (arguing that *Fisher* was wrongly decided and lacked current vitality in light of United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972)).

311. *Fisher*, 149 F.2d at 29.

refused it.[312] On appeal, Morgan claimed that due to urban psychosis she did not have the intent to kill and that expert testimony to that effect had been improperly excluded at the guilt phase of the trial.[313] Outside the courtroom, Morgan's attorney specifically advocated the use of urban psychosis to support a claim of diminished capacity, commenting that "the urban-psychosis defense could be particularly useful in states where defendants are allowed to plead 'diminished capacity,' a mental disturbance less severe than insanity."[314] Finally, attorneys in *Gilchrist* intimated that they might argue diminished capacity on appeal.[315]

In brief, diminished capacity or partial responsibility is based on the notion that the defendant has a mental illness or disturbance—falling short of the test for legal insanity—that renders her unable to form the intent necessary for the charged offense.[316] By definition, then, the degree of impairment of the defendant's mental state is less severe than in cases of insanity.

The three defense theories of urban psychosis, television intoxication, and black rage easily fit within the doctrinal category of diminished capacity. The social science in support of these theories, reviewed in Part II, indicates that the social toxins of real-life violence, television violence, and racism may cause psychological dysfunction short of full-blown mental illness or legal insanity, yet still have a significant effect on the individual's behavior. In his discussion of the new defense of rotten social background (RSB), Delgado emphasizes that diminished capacity is well-suited for some RSB cases:

> To the extent that the diminished capacity defense does not require a mental illness so severe as that required by the insanity pleas, it better accommodates emotional disability caused by RSB. It is easier to argue that temporary psychological disorders, such as transient situational disturbance, or post-traumatic stress syndrome, diminish one's capacity rather than render one insane.[317]

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312. United States v. Alexander & Murdock, 471 F.2d 923, 948 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1044 (1973).

313. Brief for Defendant-Appellant at 7, State v. Morgan (1994) (No. 93-2611-CR) (on file with the author).

314. Woo, *supra* note 21, at B1.

315. Wong, *Gilchrist Convicted, supra* note 153, at 1.

316. DRESSLER, *supra* note 293, at 319; LAFAVE & SCOTT, *supra* note 228, at 368.

317. Delgado, *supra* note 5, at 44 (footnotes omitted).

While "the logic of the partial responsibility doctrine would seem to be unassailable,"[318] it has not been widely accepted.[319] One common rationale for rejecting the doctrine is the lack of confidence in mental health experts' ability to determine degrees of insanity or disability.[320] However, as Dressler points out: "The fact that *D*'s lack-of-*mens-rea* claim is based on expert testimony that he suffered from a mental illness should not affect the legal analysis."[321] A second objection is that, "[p]sychiatric testimony aside, line-drawing concerns some: if this defense is recognized why are other forms of mitigation, such as economic adversity, not recognized?"[322]

As with the insanity defense, defendants attempting to utilize one of these three theories of defense to argue diminished capacity were not successful. However, part of this failure appears to relate to the questionable standing of this doctrinal category, rather than with the underlying empirical claims of these defendants. One possible benefit of a more careful consideration of these three theories of defense may be to reinvigorate discussion of diminished capacity as a distinct and viable category of defense.

b. Provocation

Three of the eighteen cases discussed in Part I addressed the issue of provocation. Justice Frankfurter, in his dissenting opinion in *Fisher*,[323] one of the cases also raising diminished capacity, asserted that Fisher's conduct could be understood as the result of the provocation engendered by the victim's use of a racial epithet.[324] Similarly, in *State v. Hall*, the dissenting judge reasoned that the defendant had made a sufficient showing of provocation, based on the victim's use of a racial epithet, that the trial judge should have

318. LAFAVE & SCOTT, *supra* note 228, at 374. The authors continue: "The reception of evidence of the defendant's abnormal mental condition, totally apart from the defense of insanity, is certainly appropriate whenever that evidence is relevant to the issue of whether he had the mental state which is a necessary element of the crime charged." *Id.* (footnotes omitted).

319. DRESSLER, *supra* note 293, at 319; LAFAVE & SCOTT, *supra* note 228, at 368-77.

320. DRESSLER, *supra* note 293, at 323-24, 327; LAFAVE & SCOTT, *supra* note 228, at 374-75.

321. DRESSLER, *supra* note 293, at 321.

322. *Id.* at 327.

323. Fisher v. United States, 328 U.S. 463, 490 (1946) (Frankfurter, J., dissenting); *see supra* notes 120-33 and accompanying text.

324. *Id.* at 480-81 (Frankfurter, J., dissenting).

instructed thereon.[325] In *Hall*, the theory of provocation could have mitigated the crime from attempted murder to aggravated assault.[326] Finally, provocation arguably played a role in *Taylor*,[327] one of the urban-psychosis cases, in which the defendant was permitted to plead guilty to a lesser degree of homicide after the trial judge ruled that evidence of PTSD would be admissible. Taylor claimed that the threatening conduct of a male sexual partner precipitated a flashback to a gang-rape in prison, during which he killed the victim. While these three cases addressed the issue of provocation directly, several other cases,[328] particularly in the black rage category, arguably fall into this doctrinal category because they demonstrate a connection between a mental state engendered by a strong external stimulus, such as racial epithets and discriminatory acts, and the defendant's subsequent behavior.

Provocation was designed as a concession to human frailty in general.[329] The defendant's claim is that he did not have complete volitional control because of some legally-sufficient form of provocation. That is, certain stimuli can be so powerful that an average individual would be so disturbed that he would temporarily lose control of his ability to behave within the confines of the criminal law. LaFave and Scott describe provocation in the context of voluntary manslaughter as "the intentional killing of another while under the influence of a reasonably-induced emotional disturbance (in earlier terminology, while in a 'heat of passion') causing a temporary loss of normal self-control."[330] In contrast to both the insanity defense and diminished capacity, which are based upon some form of mental illness, the assumption underlying provocation is that the defendant is mentally normal, not aberrational, and that the emotional disturbance is temporary rather than permanent. Rage is

325. *Hall*, No. 60898, 1992 WL 181709, at *7 (Ohio App. 8 Dist. July 30, 1992) (Harper, J., dissenting); *see supra* notes 142-47 and accompanying text.

326. *Id.* at *4 (Harper, J., dissenting).

327. *See supra* notes 28-34 and accompanying text.

328. Additionally, in the gangsta rap case, *Howard*, *see supra* notes 86-91, the defendant killed a police officer while listening to music advocating that very act. Munn, *supra* note 86, at 477. In *Boney*, the defendant may have received a fairly light sentence for his crime because of a provocation-like mitigating factor. *See supra* notes 42-45 and accompanying text.

329. The quintessential example of this is a homicide committed upon discovering one's spouse in bed with another person. LAFAVE & SCOTT, *supra* note 228, at 656.

330. *Id.* at 654.

the most common form of emotional disturbance under the rubric of provocation, although other intense emotions may qualify.[331]

The use of urban psychosis, television intoxication, and black rage to furnish the underlying basis for provocation raises a number of questions. The first question is what qualifies as adequate or legally-sufficient provocation. A second question is to what extent this standard should be determined subjectively. Third, the requirement that the defendant must not have "cooled off" merits exploration in the context of these defense theories.

Although the common law rule was that mere words were insufficient provocation, that rule has changed over time.[332] Inflammatory comments such as racial epithets may be sufficient.[333] Furthermore, several courts in other contexts have stated that racial epithets may constitute "fighting words" given their highly-charged, emotional content.[334] In the same way, acts of racial discrimination may qualify as sufficiently provocative to meet the threshold standard.[335]

The second issue is whether the provocation must be viewed from an objective, reasonable-person standard or whether the subjective characteristics of the defendant should be considered. LaFave and Scott suggest that courts have been increasingly willing to take more subjective criteria into account.[336] Similarly, Dressler notes: "The

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331. *Id.*; DRESSLER, *supra* note 293, at 476 ("Although anger may be the emotion most often experienced by a person who raises the provocation defense any 'violent, intense, high-wrought, or enthusiastic emotion' suffices." (quoting People v. Borchers, 325 P.2d 97, 102 (Cal. Sup. Ct. 1958) (citation omitted))).

332. LAFAVE & SCOTT, *supra* note 228, at 657.

333. *See, e.g.*, State v. Grugin, 47 S.W. 1058 (Mo. 1898) (discussing cases in which words were held to be legally sufficient provocation). "No sound distinction, can, it seems, be taken in principle between insult offered by acts and that offered by foul and opprobrious words." *Id.* at 1064. Delgado emphasizes the powerful impact of racial insults in arguing for a tort action based thereon: "Without question, mere words, whether racial or otherwise, case cause mental, emotional, or even physical harm to their target, especially if delivered in front of others or by a person in a position of authority." Delgado, *supra* note 264, at 143 (citations omitted).

334. *E.g.*, State v. Harrington, 680 P.2d 666, 669 (1984); Downs v. State, 351 A.2d 166 (Md. Ct. Spec. App. 1976), *rev'd on other grounds*, 366 A.2d 41 (Md. 1976). For a discussion of the nature of racial epithets, particularly the word "nigger," see Lee v. Ventura County Superior Court, 11 Cal. Rptr. 2d 763, 765 (Cal. Ct. App. 1992) ("Appellant [who wanted to legally change his name to Misteri Nigger] has no statutory right to court approval of a name that by his own theory is a racial epithet which provokes violence.").

335. *Cf.* Delgado, *supra* note 264, at 33-34 (discussing effects of discriminatory conduct).

336. The authors comment: "It has been persuasively argued that at least some individual peculiarities should be taken into account 'because they bear upon the inference

modern trend is to permit the jury to consider at least some of the characteristics of the defendant in its evaluation of the reasonableness of her conduct."[337] The importance of a subjective determination of provocation was underscored by the dissenting judge in one black-rage case:

> Racial insults should not be a topic of objective analysis, but a subjective determination, bearing in mind the surrounding circumstances and the individual's frame of mind. It is like analyzing a case of a battered woman syndrome, provocation is looked at from the totality of the circumstances including the history of abuse. A complete understanding of the situation can be made manifest only when there is an inquiry beyond the immediate incident.[338]

While the trend has been for courts to consider more subjective characteristics of the defendant under the rubric of provocation, it is not clear whether a personal history plagued by real-life violence, as in *Taylor;* heightened fear engendered by an urban environment, as in *Boney;*[339] or the "withering effect of racism,"[340] as in *Fisher* and *Hall*, are pertinent factors. In this regard, Dressler has noted a tendency for courts to incorporate gender as a viable characteristic;[341] he also raises the issue of cultural difference in the following hypothetical:

> [S]uppose that *D*, a recent immigrant to this country, becomes enraged when he observes *V*, as young male, hug his teenage daughter. It can be proved at trial that *V's* act was highly provocative to a person with *D's* cultural background; to the average American, however, it would not constitute adequate provocation. The level of *D's* criminal responsibility will depend, therefore, on whether we measure his homicidal response to *V*'s act by the standard of the ordinary American or by that of the ordinary person with his cultural background.[342]

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as to the actor's character that it is fair to draw upon the basis of his act.' " LAFAVE & SCOTT, *supra* note 228, at 660.

337. DRESSLER, *supra* note 293, at 481.

338. State v. Hall, No. 60898, 1992 WL 181709, at *7 (Ohio App. 8 Dist. July 30, 1992) (Harper, J., dissenting).

339. *See supra* notes 42-45 and accompanying text.

340. Pierce, *supra* note 234, at 512.

341. DRESSLER, *supra* note 293, at 481.

342. *Id.* at 480.

The Model Penal Code's "extreme mental or emotional disturbance" standard contains both objective and subjective elements.[343] Due to the more explicitly subjective nature of the MPC standard, the defendant may be better able to introduce evidence, such as that encapsulated in one of the three theories of defense, to explain her behavior at the time of the criminal act.[344] With respect to the RSB defense, Delgado argues that the MPC's formulation would permit the adequacy of the instigating circumstances to be judged from the defendant's perspective rather than that of a middle-class judge or juror.[345]

A final doctrinal obstacle under the provocation law regards the existence of a cooling-off period. If the defendant had the opportunity to cool off, then she may not avail herself of the mitigating effect of provocation.[346] "However, a more realistic appraisal of how human emotions work compels the conclusion—which some courts have reached—that a reasonable provocation can be produced by a series of events occurring over a considerable span of time."[347] Thus, a long history of racial discrimination or oppression might arguably qualify as provocation. As the court in *Hall* observed, it is necessary to understand the defendant's conduct as the result of a longer series of events rather than as the result of the events immediately preceding the criminal act.[348]

On one hand, defendants' use of urban psychosis, television intoxication, and black rage to support an argument of provocation may be less controversial than it is in the insanity context because provocation requires a lesser degree of mental disturbance and, also, usually mitigates guilt rather than completely exculpating the defendant. On the other hand, the use of these defense theories to

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343. The Model Penal Code has expanded this category of mitigation, providing that

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

MODEL PENAL CODE § 210.3(b) (1962).

344. Dressler also points out that diminished capacity claims may be subsumed under the MPC's extreme mental or emotional disturbance rubric. DRESSLER, *supra* note 293, at 325.

345. Delgado, *supra* note 5, at 51.

346. DRESSLER, *supra* note 293, at 481-82; LAFAVE & SCOTT, *supra* note 228, at 661-63.

347. LAFAVE & SCOTT, *supra* note 228, at 662.

348. State v. Hall, No. 60898, 1992 WL 181709, at *1, *6 (Ohio App. 8 Dist. July 30, 1992) (Harper, J., dissenting).

support provocation may be more controversial to the extent that the defendant's criminal conduct continues to be judged against an objective, reasonable-person standard which excludes the very information at the heart of these theories. However, if the doctrine of provocation continues to evolve in the direction of including more subjective considerations, such as the effects of social toxins, then these three theories of defense may enjoy greater success[349] in elucidating the mental state necessary for provocation.[350]

3. Self-Defense: A Justification Defense

Defendants' use of urban psychosis, television intoxication, or black rage to support a claim of self-defense is relatively rare; only two cases discussed in Part I implicated this defense. In *Osby*,[351] an urban-survival-syndrome case, the defendant claimed self-defense in his killing of two young men. In *Lamar*,[352] a black-rage case, the defendants asserted that they were acting in self-defense when they assaulted police officers called to the scene of a high-school riot.[353]

Under Robinson's schema of defenses, the self-defense justification exists when the "harm is outweighed by the need to avoid an even greater harm or to further a greater societal interest."[354] Thus, for instance, when an individual kills in self-defense, that killing is said to have been justified or correct conduct under the circumstances. A justification focuses on the act, while an excuse, such as the insanity defense, focuses on the actor: "Acts are justified; actors are excused."[355]

Without unpacking the entire self-defense doctrine, the major issue associated with the utilization of the three defense theories to support a claim of self-defense devolves upon the relevance of these

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349. Only the dissenting opinions in *Fisher* and *Hall* gave much credence to the provocation argument, although Taylor's offense may have been reduced on this theory.

350. Expert testimony may be useful in helping the jury to understand better the defendant's mental state in terms of provocation. Walker and Monahan would characterize this as social science used to provide context. Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987). McCord characterizes as traditional the use of social science (specifically psychology) to substantiate mental states not amounting to insanity. McCord, *supra* note 305, at 23-24.

351. *See supra* notes 35-41 and accompanying text.

352. State v. Lamar, 698 P.2d 735 (Ariz. Ct. App. 1984); *see supra* notes 148-52 and accompanying text.

353. Neither the defendants in *Osby* nor *Lamar* were acquitted based upon the defense of self-defense, but Osby's first trial resulted in a hung jury. *See supra* 35-41.

354. Robinson, *supra* note 282, at 213.

355. *Id.* at 229.

theories to the defendant's mental state at the time of the criminal act. The general rule is that "the defendant's belief in the necessity of using force to prevent harm to himself [must] be a reasonable one,"[356] and that reasonableness is judged by an objective standard.[357] However, "[i]ncreasingly, courts and statutes are 'subjectivizing' the 'reasonable man'—i.e., infusing characteristics of the defendant in the objective standard."[358]

A good example of the increasing subjectivization of the reasonable-person standard is *People v. Goetz*,[359] in which the court held that the jury must determine the defendant's belief from a reasonable person's perspective in light of the circumstances and characteristics of the defendant.[360] Goetz sought to explain his shooting of four black youths in light of his history of muggings and resultant mindset of heightened fear.[361] Goetz's claim is strikingly similar to that of Osby,[362] who maintained that he was acting under heightened fear because of his experiences in a violent, urban environment.[363] Similarly, cases in which battered women assert self-defense to justify their conduct often implicate the role of subjective standards of reasonableness—a trend that has sparked considerable criticism.

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356. LAFAVE & SCOTT, *supra* note 228, at 457. In the case of deadly force, the defendant must reasonably believe that she was in imminent danger of serious bodily injury or death when she killed the victim. *Id.* at 456.

357. "The traditional rule is that the 'reasonable person' is someone of ordinary intelligence, temperament, and physical and mental attributes." DRESSLER, *supra* note 293, at 202. In contrast, the Model Penal Code requires only that the belief be subjectively held by the defendant. The inquiry is simply whether "the actor believes that such force is necessary to protect himself against death or serious bodily harm." MODEL PENAL CODE § 3.04(2)(a)(ii)(3) (1962).

358. DRESSLER, *supra* note 293, at 202.

359. 497 N.E.2d 41 (N.Y. 1986).

360. *Id.* at 52.

361. *Id.* at 44. For discussions of *Goetz* in terms of its racial overtones, see Stephen L. Carter, *When Victims Happen To Be Black*, 97 YALE L.J. 420, 420-29 (1988); Tesner, *supra* note 156, at 307-09; *see also* DRESSLER, *supra* note 293, at 203 (discussing the relation between a defendant's "aberrational racial views" and the reasonable person test).

362. *See supra* notes 35-41 and accompanying text. *But cf.* Smith, *supra* note 5, at 484-85 (eschewing the comparison of Goetz to a battered woman).

363. Delgado comments on the use of RSB to support a self-defense argument: "The prevalence of violence in RSB neighborhoods, however, makes the possibility of having to defend oneself very real. Because the ghetto-dweller is more sensitized to danger than the average person, he or she is more likely to commit homicide or assault under mistaken circumstances." Delgado, *supra* note 5, at 46.

Defendants' use of the theories of urban psychosis, television intoxication, and black rage to support a defense of self-defense[364] is probably the most controversial application of these theories. As Delgado points out, "self-defense poses the same question as does provocation—what is reasonable?"[365] The trend toward an increasingly subjective standard of reasonableness, as exemplified in *Goetz* and cases of battered women, however, suggests that these defenses are not unique in explaining the defendant's behavior in terms of the effects of social environmental factors, such as crime victimization or physical abuse. These theories of defense fit within existing trends in the evolution of self-defense doctrine.

B. Mitigation of Punishment

In the studied cases, a fourth general use of these theories of defense was to determine the defendant's moral culpability at the time of sentencing. In non-capital cases, the information encapsulated in these theories may be used to determine the length of prison term, eligibility for parole, or availability of a pardon.[366] For example, in *Morgan*,[367] defense counsel credited the introduction of information about urban psychosis for the early parole date her client received. In capital cases, the information may be relevant to the question of whether the defendant's conduct merits the imposition of the death penalty. In three cases, *Long*, *Schiro*, and *Howard*, the defendants utilized information about the effects of media violence on their

364. In addition to the complete defense of self-defense, some states also recognize "imperfect self-defense" as a form of mitigation, usually in the context of criminal homicide. *See* DRESSLER, *supra* note 293, at 199 ("The partial defense is recognized if *D* honestly but unreasonably believes that factual circumstances justify his use of defensive deadly force."); LAFAVE & SCOTT, *supra* note 228, at 665-66. Thus, an individual like Osby might be able to mitigate his crime from murder to manslaughter via the imperfect self-defense doctrine. DRESSLER, *supra* note 293, at 199 and sources collected therein. The doctrine of imperfect self-defense also raises the issue of mistake as a possible defense in some of these cases, but is beyond the scope of the present analysis.

365. Delgado, *supra* note 5, at 46.

366. *See* Linda L. Ammons, *Discretionary Justice: A Legal and Policy Analysis of a Governor's Use of the Clemency Power in the Cases of Incarcerated Battered Women*, 3 J.L. & POL'Y 1, 53-78 (1994) (discussing battered woman's syndrome in the context of pardon decisions); David P. Bancroft, *Post Traumatic Stress Disorders, and Brainwashing as State of Mind Defense in Criminal, and Civil Fraud Cases*, *in* CRIMINAL LAW AND URBAN PROBLEMS 211 (1985) (PLI Litigation and Administrative Practice Course Handbook Series No. C4-4174, 1985) (discussing PTSD as a mitigating factor in sentencing); Vuoso, *supra* note 5, at 1661 (noting that severe environmental deprivation may be relevant to sentencing, parole, and pardon decisions).

367. *See supra* notes 20-27 and accompanying text.

criminal behavior to argue for mitigation instead of the death penalty.[368]

The use of these defense theories as mitigation at sentencing is the least controversial of the four general uses of this social science information, because courts have traditionally considered the very type of information that underlies these three defenses at that phase. Even commentators opposed to the use of these defense theories as complete defenses or as mitigation at the guilt phase have sanctioned their use at the punishment phase.[369]

1. Non-Capital Cases

Perhaps the biggest challenge to the use of this information at sentencing is the growing trend toward determinate sentencing and the circumscription of judges' sentencing discretion. According to Abbe Smith, director of the Criminal Justice Institute at Harvard Law School, the sentencing phase was the point in the criminal justice system at which the defendant could argue for compassion, but that has changed with the advent of sentencing guidelines.

> Extenuating circumstances—a history of abuse, a life-threatening illness, alcoholism—were traditionally argued to mitigate punishment, not guilt .... Later, that kind of evidence was more limited at trial but allowed at sentencing .... Nowadays ... judges are constricted by laws that demand minimum mandatory sentences or establish firm sentencing guidelines. As a result, most judges no longer have the power to show compassion by giving a lesser sentence. So ... arguments about terrible events in a defendant's background are being made to the jury—to mitigate guilt. You can't blame defense attorneys for trying ....[370]

368. *See supra* notes 78-91 and accompanying text.

369. *See, e.g.*, Bancroft, *supra* note 366, at 211 (discussing California's statute, which explicitly permits judges to consider Vietnam PTSD in sentencing); Elizabeth J. Delgado, *Vietnam Stress Syndrome and the Criminal Defendant*, 19 LOY. L.A. L. REV. 473, 508 (1985) (discussing middle-ground approach to veterans with PSTD "which lies somewhere between abandoning those for whom the help came too late and bending the laws of criminal responsibility beyond recognition."); Geraldine L. Brotherton, Note, *Post-Traumatic Stress Disorder—Opening Pandora's Box?*, 17 NEW ENG. L. REV. 91, 92 (1981) (arguing that PTSD should be considered in sentence mitigation); *see also* Debra D. Burke & Mary Anne Nixon, *Post-Traumatic Stress Disorder and the Death Penalty*, 38 HOW. L.J. 183, 198 (1994) (discussing PTSD as a death-penalty mitigator even if it fails to support an insanity defense).

370. Dianna Marder, *Defendants Test Limits in Making Excuses*, PHILA. INQUIRER, Feb. 13, 1994, at D1.

Similarly, a number of commentators have criticized the Federal Sentencing Guidelines because they eliminate the consideration of a number of factors in the sentencing decision, such as the race of the defendant. Placido Gomez argues that there are two classes of cases in which a judge should weigh the offender's race as a mitigating factor under the guidelines: (1) cases of cultural uniqueness, and (2) cases in which racial discrimination has tainted the criminal process.[371] Charles Ogletree similarly comments: "In addition, to help remedy the pervasive racial discrimination in our criminal justice system, judges should be given discretion to take into account an offender's race as a mitigating factor."[372]

2. The Death Penalty

In contrast to the trend in non-capital cases, current death penalty jurisprudence mandates the consideration of individualized circumstances of the defendant's life. In its plurality opinion in *Lockett v. Ohio*,[373] the United States Supreme Court held that "[T]he sentencer . . . [can] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense."[374] Later, in *Eddings v. Oklahoma*,[375] a majority of the Court reaffirmed its holding in *Lockett* and specifically emphasized the importance of mental state as a mitigating factor: "[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the

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371. Placido G. Gomez, *The Dilemma of Difference: Race as a Sentencing Factor*, 24 GOLDEN GATE U. L. REV. 357, 360 (1994). Gomez writes that:

> despite the laudable objective of limiting discretion and assuring neutral treatment, the federal sentencing guidelines may at times create unfairness. They destroy two traditional roles of sentencing judges—bridging cultural gaps and compensating for prior racial bias—leaving a vacuum where previously at least some judges were able to impose just and fair sentences.

Id. at 386.

372. Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1960 (1988); *see also* Samuel L. Myers, Jr., *Racial Disparities in Sentencing: Can Sentencing Reforms Reduce Discrimination in Punishment?*, 64 U. COLO. L. REV. 781 (1993) (discussing whether sentencing reforms have eliminated racial disparity).

373. 438 U.S. 586 (1978) (plurality opinion).

374. *Id.* at 604.

375. 455 U.S. 104 (1982). In *Eddings*, the defendant emphasized his rotten social background: " '[Eddings] also argues his mental state at the time of the murder. He stresses his family history in saying he was suffering from severe psychological and emotional disorders, and that the killing was in actuality an inevitable product of the way he was raised.' " *Id.* at 109 (citations omitted).

background and mental and emotional development of a youthful defendant be duly considered in sentencing."[376] Thus, ironically, the sentencer may be able to consider more information about the defendant when imposing the death penalty than when determining an appropriate jail term or parole date,[377] even if the ultimate decision is to sentence the defendant to death.[378]

C. Conclusion

The defense theories of urban psychosis, television intoxication, and black rage may be accommodated within existing categories of criminal defense and mitigation with little substantive innovation or expansion. In the context of insanity and diminished capacity, these theories of defense simply provide new causal explanations for mental illness of varying degrees. With respect to provocation and self-defense, the theories continue the trend toward the increasing subjectivization of the reasonableness standard in both these contexts. Finally, courts' use of the types of information upon which these theories are premised at the time of sentencing is not unique or unusual.

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376. *Id.* at 116; *see also* Penry v. Lynaugh, 492 U.S. 302, 322-28 (1989) (holding that mitigating evidence of mental retardation and childhood abuse should be introduced and heard by the sentencer in considering the death penalty); California v. Brown, 479 U.S. 538, 541 (1987) (holding that capital defendants generally must be allowed to introduce relevant mitigating evidence regarding their character). To the extent that mitigating evidence includes information about the defendant's mental state at the time she committed the crime, the same type of information used at the guilt phase is relevant here. To the extent that the mitigating evidence concerns the defendant's current mental status or predictions about the defendant's mental health in the future, such as future dangerousness, different issues arise.

377. In states in which mitigating evidence must fit within specific categories, such as insanity or intoxication, the same issues will arise as discussed above. But, even in those states, courts have considerable discretion to look at all evidence of mitigation. As the Supreme Court stated in Johnson v. Texas, 113 S. Ct. 2658 (1993), although the sentencing body cannot be prevented from considering all forms of mitigating factors, " 'States are free to structure and shape consideration of mitigating evidence in an effort to achieve a more rational and equitable administration of the death penalty.' " *Id.* at 2660 (quoting Franklin v. Synaugh, 108 S. Ct. 2320, 2331 (1988) (plurality opinion)).

378. All three defendants utilizing media violence as mitigation, Long, Schiro, and Howard, were sentenced to death, although the jury in *Howard* was out for five days. Munn, *supra* note 86, at 478; *see supra* notes 78-91 and accompanying text (discussing the three cases).

IV. SOME POLICY IMPLICATIONS OF THESE DEFENSES FOR THE EVOLUTION OF CRIMINAL LAW: DIFFERENTIAL IMPACT AND LONG-TERM, DEVELOPMENTAL EXPLANATIONS OF CRIMINALITY

This Part addresses briefly some of the multifarious policy implications engendered by the criminal defenses of urban psychosis, television intoxication, and black rage, and the social science literature upon which they are premised; these policy implications transcend issues related to either the defenses' scientific merits or their potential impact upon criminal doctrine. In addition to their common starting point of emphasizing the role of social toxins such as real-life violence, television violence, and racism, as causative factors in the development of psychological dysfunction, these theories of defense share two other characteristics with broad-ranging policy implications for the evolution of criminal law: (1) differential impact, such that only some individuals exposed to these social toxins are so adversely affected that criminal conduct results, and (2) reliance upon long-term, developmental explanations for the genesis of some criminal behavior.

A. The Social Toxins of Real-Life Violence, Television Violence, and Racism Differentially Affect Individuals

Although real-life violence, television violence, and racism are pervasive and potent influences in our society, contributing significantly to its overall social toxicity, these environmental factors affect individuals differently.[379] In the three areas of research summarized in Part II, social scientists concluded that not all persons exposed to these social toxins are damaged psychologically or develop full-blown mental illness.[380] Furthermore, even among those individuals who are so affected, only some smaller percentage actually commit criminal acts. Researchers have identified two sets of factors in explaining why these social toxins differentially affect persons: (1)

379. To some extent, the plausibility of these defenses is enhanced by the fact that these three social environmental factors are widespread, rather than trivial, influences in our society.

380. *See, e.g.*, Bowser, *supra* note 243, at 111 (noting that some blacks cope with racism while others do not); Garbarino et al., *supra* note 184, at 378 (noting that not everyone who is exposed to firsthand violence develops PTSD); Kolbert, *supra* note 217, at A13 (Gerbner's research on television violence suggests that there are differential levels of responsiveness); Resnick et al., *supra* note 177, at 429 (discussing vulnerability-stress factors in development of PTSD); Spurlock, *supra* note 241, at 165 (noting that some blacks cope with racism while others break down).

characteristics of the toxins, such as level of exposure, and (2) characteristics of the individual in terms of responsiveness.

While these three social toxins are pervasive, exposure to them is not evenly distributed across the entire population. In fact, these social toxins have an inordinate impact on some distinguishable segments of society. Two of the theories of defense, urban psychosis and black rage, are partially defined in terms of their application to specific subgroups of the general population—modern urban dwellers and racial minorities, respectively. In addition, some commentators have suggested that the toxin of television violence predominantly affects the poor. For instance, in her discussion of the impact of media violence on real-life violence, former Surgeon General Joycelyn Elders commented: "We may not be talking about middle-class children. We are talking about the poor children whom TV is raising, if you will. They feel violence is a way of life, that it has no consequence. They see they killed him today (on TV), but that he is back tomorrow."[381] Thus, although the social toxins of real-life violence, television violence, and racism negatively influence all members of society, their impact may be more highly concentrated, and thereby cause greater harm, in certain identifiable subgroups.[382]

Even within societal enclaves that are particularly inundated by real-life violence, media violence, and racism, individuals differ in their level of susceptibility or responsiveness to these toxic influences. Social scientists have begun to identify certain risk or vulnerability factors that offer some hope of sorting out who is most likely to be

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381. *"The President Doesn't Want a Rubber Stamp"*, NEWSDAY, Jan. 5, 1994, at 37; *see also Frontline*, *supra* note 49 (stating that television is raising poor children).

382. Harry H. Wright & Elizabeth A. Cole, *Black Children in Psychiatric Outpatient Treatment in the United States*, *in* MENTAL HEALTH IN AFRICA AND THE AMERICAS TODAY 275, 276 (Samuel O. Okpaku ed., 1991) ("Children growing up in stressful environments are at a greater risk of developing emotional, behavioral, developmental, and social problems than those in average environments. The poor and politically powerless are particularly affected and black children are disproportionately represented in both of those groups.") (citations omitted); *cf.* Delgado, *supra* note 5 (discussing the independent defense theory of "rotten social background" as it pertains to certain definable classes of society). I leave for another time the political implications of recognizing defenses involving minority groups and politically powerless segments of society. In this connection, some authors have suggested that defenses proffered by Vietnam veterans and battered women were recognized in some measure based upon society's communal guilt over their mistreatment—a politically-motivated response. *See, e.g.*, Michael J. Davidson, Note, *Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War*, 29 WM. & MARY L. REV. 415, 439 (1988); *Nightline*, *supra* note 8 (interviewing Professor Patricia King who argued that society has ignored battering and is just beginning to recognize it).

affected by various social toxins.[383] Unfortunately, the social science literature is less helpful in predicting who will be affected by these social toxins to the point of criminality. As a general matter, social scientists are notoriously poor at making predictions of future violence based on the types of factors involved in these cases.[384]

The policy implications derived from the empirical fact that the social toxins of real-life violence, television violence, and racism affect members of society differently are threefold. First, these theories of defense raise the question of some individuals' special vulnerability to the effects of these social toxins. If the vast majority of citizens who are exposed to the toxins in one form or another are not affected to the point of mental illness, does this preclude a defendant who was so affected from utilizing one of these three theories of defense?

Criminal law is premised upon the notion of assessing individual culpability on a case-by-case basis. In any given case, then, the inquiry is whether the particular defendant was damaged by the social toxin to an extent cognizable under one of the doctrinal categories of defense or mitigation discussed in Part III; the reaction of the majority of other individuals to that social toxin is simply immaterial to this inquiry. Thus, for example, the fact that a defendant was driven insane by watching thousands of hours of violent television, while most of us would not be, is irrelevant because we are only interested in assessing the individual defendant's criminal responsibility.

However, a deeply-embedded notion in the criminal law is that we must be able to sort out those whose culpability differs from the vast majority of citizens. This is the function performed by the doctrinal categories of defense and mitigation discussed in the previous section. For instance, in his discussion of excuse defenses, Robinson notes: "[T]he disability serves to distinguish the defendant from the general population. If the actor is perceived as clearly abnormal, he can be spared condemnation and punishment without undercutting the general condemnatory and deterrent functions of the

383. *See, e.g.*, Bowser, *supra* note 243, at 112 (discussing vulnerability to racism due to lack of community support); Centerwall, *supra* note 217, at 3059-60 (discussing correlation between age of initial television viewing and later violent activity); Garbarino, *Growing Up*, *supra* note 10, at 7-8 (discussing the accumulation of risk factors). Similarly, a growing body of research exists about the differential effects of PTSD. *See supra* notes 176-80 and accompanying text.

384. *See, e.g.*, Barefoot v. Estelle, 463 U.S. 880, 896-903 (1983) (discussing psychiatrists' inability to predict future dangerousness in the context of death penalty cases).

criminal law."[385] Robinson continues: "Society, as represented by the jury, must be convinced that the labelled disorder is severe enough to distinguish the defendant."[386] In the final analysis, this becomes a question of proof: can an individual defendant amass sufficient evidence that a particular social toxic affected his conduct to an extent not experienced by others?

A second policy implication deriving from the fact of differential impact concerns the accuracy of apocalyptic predictions of the demise of our criminal justice system because large segments of society will be able to obviate criminal liability, based upon the alleged negative effects of these social toxins. As a theoretical matter, these predictions are simply not borne out by the relevant research literature since only some individuals have a degree of mental impairment cognizable under the criminal law. In addition, both the dearth of extant cases in which defendants presented one of these defense theories and the defenses' general failure to shield defendants from criminal liability further underscore their limited impact on the criminal justice system.[387] In short, recognition of these theories of defenses will not open the floodgates to untold masses of defendants.

A third, and related, policy implication concerns the question of whether these theories of defense will be abused because large numbers of defendants will assert them without empirical merit. This issue concerns the jury's ability, aided by expert testimony from social scientists, to discern those who have been so adversely affected in their mental functioning by these social toxins that their criminal behavior is attributable to them.[388] Yet this is precisely the function of the criminal justice system. The possibility that these theories of criminal defense may be abused should not preclude them from consideration.

In summary, a fundamental tension exists between the notion of individual responsibility for criminal conduct, a foundational premise of criminal law, and the possibility that the defense theories of urban psychosis, television intoxication, and black rage may obviate criminal liability for large segments of our society. While the evolution of criminal law always carries with it a seed of instability, recognition of

385. Robinson, *supra* note 282, at 226 (footnote omitted).

386. *Id.* at 227 n.96.

387. *See supra* part I.

388. Smith argues that jurors "should hear evidence of a defendant's 'rotten social background' and decide for themselves whether it mitigates her culpability. They may reject the evidence or accept it. Either way, it will be the jury's decision." Smith, *supra* note 5, at 465 (citation omitted).

these theories of defense is unlikely to result in the destabilization of our criminal justice system. Only a discrete group of defendants will actually be able to avail themselves of these defense theories. Moreover, fundamental issues of fairness underlying the criminal justice system mandate that defendants, with supportable theories of defense, be allowed to "make their case" to a jury and receive individualized consideration of their culpability rather than dismissing, a priori, their claims.

B. The Need to Integrate Increasing Scientific Knowledge Regarding the Causes of Criminal Behavior: Long-Term, Developmental Explanations

Urban psychosis, television intoxication, and black rage as theories of criminal defense contribute to the evolution of criminal law by offering new and more sophisticated causal explanations—grounded in increasing scientific knowledge about the psychological consequences of a toxic social environment—of some criminal behavior via the mediating construct of mental illness or psychological dysfunction. These new causal explanations share two significant features: (1) reliance upon long-term, and sometimes diffuse, causal connections rather than more immediate ones, and (2) implications, in these long-term explanations, for the developmental processes of children.

First, the social toxins of real-life violence, television violence, and racism affect individuals over time, causing long-term changes in psychological functioning and behavior, just as air pollution or cigarette smoking take their toll over the years. As social scientists have pointed out, the consequences of these toxins require consideration of long-term, rather than immediate, effects resulting from exposure. For instance, Garbarino emphasizes the long-term mental health effects of chronic exposure to real-life violence.[389] Similarly, exposure to television violence, especially at young ages, can produce harmful lifelong problems.[390] Finally, in the area of racism, it is precisely the long-term effects of racism, and segregation, that concerned the Supreme Court in *Brown v. Board of Education*.[391]

Second, these three social toxins significantly impair child-developmental processes. As noted above, it is not a single exposure

389. Garbarino et al., *supra* note 184, at 378, also point to what they call "sleeper effects" which occur at a later date. *Id.*

390. COMMISSION ON VIOLENCE AND YOUTH, *supra* note 211, at 33.

391. 347 U.S. 483, 493-94 (1954).

to these toxins that impairs psychological functioning and may result in criminal behavior, but rather the repeated exposure to these toxins over a protracted period of time. However, it is also more than mere protracted exposure. These social toxins have deleterious consequences for children, who are especially vulnerable to them and who eventually grow up and commit crimes as adolescents and adults.

In each area of social science summarized in Part II, researchers have emphasized the inordinate impact of the social toxin on child-developmental processes. Garbarino found that children exposed to chronic real-life violence are developmentally impaired.[392] Bigelow similarly comments:

> The inner-city children are victims of the conditions surrounding them. They are not to blame, yet they are the ones suffering. Many of these children suffer from a disorder that has long-term consequences. Although they are children today, they will be the adult members of our society in ten to fifteen years. What type of person will a child in this environment grow to be?[393]

The majority of social science research on television violence has focused on its effects on children.[394] Researchers have concluded that the effects of television violence usually appear many years after initial exposure begins.[395]

> Given that homicide is primarily an adult activity, if television exerts its behavior-modifying effects primarily on children, the initial 'television generation' would have had to age 10 to 15 years before they would have been old enough to affect the homicide rate. If this were so, it would be expected that, as the initial television generation grew up, rates of serious violence would first begin to rise among children, then several years later it would begin to rise among adolescents, then still later among young adults, and so on. And that is what is observed.[396]

Social scientists have also discovered that while racism causes mental health problems for individuals of all ages, its most profound effects are on children.[397]

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392. Garbarino et al., *supra* note 184, at 378-80.
393. Bigelow, *supra* note 200, at 547-48.
394. *See supra* part II.B.
395. Centerwall, *supra* note 217, at 3061.
396. *Id.*
397. *See, e.g.*, Delgado, *supra* note 264, at 142 ("Finally, and perhaps most disturbingly, racism and racial labeling have an even greater impact on children than on adults.").

> [I]n terms of mental health, racism is a more pervasive and a far more serious threat than childhood schizophrenia, mental retardation, psychoneurosis, and any other emotional derangement. Its destructive effects severely cripple the growth and development of millions of our citizens, both young and old alike. Yearly, it directly and indirectly causes more fatalities, disabilities, and economic loss than any other single factor.[398]

The effects suggested by the social science literature are borne out by the cases. Many of the cases reviewed in Part I involved youthful offenders or implicated child-developmental processes. In the urban-psychosis cases, all but one of the defendants were between seventeen and nineteen years of age.[399] In the four cases involving violent television or rock lyrics, the defendants were between fifteen and nineteen years old.[400] Also, the defendant in one of the pornography cases reportedly began watching violent pornography at the age of six.[401] In the black rage context, the defendants were not all youthful, but developmental processes were implicated in several of the cases: Freeman was jailed at sixteen,[402] Murdock grew up in the depressed Watts section of Los Angeles,[403] and Gilchrist perceived racism throughout his educational and occupational career.[404]

What are the implications of this aspect of the social science literature? As currently framed, much of criminal doctrine is premised on a fairly tight connection between the cause of the behavior and the resulting criminal conduct. These three theories suggest that the causal window should be expanded to include more longitudinal views of criminality. For example, in order to understand the impact of television violence on criminal behavior, the question

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398. Spurlock, *supra* note 246, at 161 (quoting from The Joint Commission on the Mental Health of Children).

399. Morgan was seventeen, Taylor was thirty, Connelly was nineteen, Osby was eighteen, and Boney was nineteen. *See supra* 20-45 and accompanying text.

400. Zamora was fifteen, Molina was twenty-one and his accomplice was sixteen, Quillen was seventeen, and Howard was nineteen. *See supra* 46-77, 86-91 and accompanying text.

401. Schiro v. Clark, 963 F.2d 962 (7th Cir. 1992). Schiro's defense counsel argued that his client's " 'premature exposure to pornography and continual use with more violent forms created . . . a person who no longer distinguishes between violence and rape, or violence and sex.' " *Id.* at 972; *see supra* 81-85 and accompanying text.

402. Tilove, *supra* note 97, at 10A.

403. United States v. Alexander, 471 F.2d 923, 958 (D.C. Cir. 1972) (Bazelon, J., dissenting), *cert. denied*, 409 U.S. 1044 (1972).

404. *Defense: Gilchrist Felt "Exploited," supra* note 156; *see supra* 153-61 and accompanying text.

should not be whether viewing one television program caused the defendant to kill.[405] Rather, the inquiry should be whether the cumulative impact of watching ten years of violent television significantly contributed to the defendant's mental state and his criminal behavior. A more expansive perspective is necessary to understand better effects that are impossible to detect in the short-run.

In summary, if the criminal law restricts itself to the consideration of only short-term causal explanations for criminal behavior, it will miss the rich contribution these theories of defense can make by elucidating more diffuse and long-term pathogenic factors in criminal behavior. As Judge Bazelon observed:

> [W]e sacrifice a great deal by discouraging Murdock's responsibility defense. If we could remove the practical impediments to the free flow of information we might begin to learn something about the causes of crime. We might discover, for example, that there is a significant causal relationship between violent criminal behavior and a "rotten social background."[406]

Furthermore, only by integrating our increasing scientific knowledge about these long-term detrimental influences on psychological functioning can the criminal law keep pace with the realities of modern living.

C. *Conclusion*

On one hand, the costs to the criminal justice system of recognizing the defense theories of urban psychosis, television intoxication, and black rage are relatively minimal since only a small percentage of criminal defendants will be able to avail themselves of these new theories. On the other hand, the potential benefits of their recog-

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405. An example of this problem can be seen in *Zamora*. *See supra* notes 46-67 and accompanying text. On voir dire, the trial judge asked the expert the following question: "In any of your tests, in any scientific journal that you have read, have you ever conclusively linked any particular television program or amount of television violence directly to a homicide?" MONAHAN & WALKER, *supra* note 56, at 452. When the expert answered in the negative, her testimony was excluded. *Id.* Similarly, Campbell, in writing about tort actions based on the noxious quality of television violence, comments: "Social scientific studies often ask whether exposure leads to general aggressive tendencies. However, the relevant legal question is whether any specific incident viewed on television actually and proximately causes a criminal act." Campbell, *supra* note 66, at 430. Framed in this manner, the answer will always be in the negative, except perhaps in cases of imitative violence.

406. *Alexander*, 471 F.2d at 965 (Bazelon, J., dissenting) (footnote omitted).

nition are significant because these theories offer increasing knowledge about causes of some criminal behavior that have been not been elucidated to date.

CONCLUSION

> *We cannot rationally decry crime and brutality and racial animosity without at the same time struggling to enhance the fairness and integrity of the criminal justice system. That system has first-line responsibility for probing and coping with these complex problems.*[407]

Acid rain, ozone depletion, the greenhouse effect—environmentalists are warning us that our physical milieu is becoming increasingly polluted and toxic. But the physical environment is not the only one suffering from degradation. Social scientists are beginning to document that our social environment is also becoming increasingly toxic to members of our society. Three of the most pervasive and noxious components of this social toxicity are real-life violence, media violence, and racism.

The consequences of the increasing toxicity of our social environment are less noticeable than rivers on fire, the results of acid rain, or the clouds of smog hanging over major industrial cities. The effects of social toxins are reflected in the human component of our society, taking the form of developmental impairment and psychological, psychiatric, and medical damage to the citizenry. As one author wrote about the devastating effects of real-life violence but with equal applicability to other social toxins: "Chronic violence in the community permeates every aspect of these children's lives, affecting their families, their education and their sense of self, hence *also affecting what type of citizen they will mature into.*"[408]

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407. *Id.* at 926. In one attorney's words: " 'It is frequently the legal cases that cause people to move forward in their thinking.' " Shoop, *supra* note 9, at 13 (quoting Felicia Morgan's attorney, Robin Shellow). *But see Nightline, supra* note 8 (Professor King opined: "I think that the message we should draw is that we should not dump all of society's problems on the criminal justice system, which is where they end up if we don't tackle them in other places.").

408. Bigelow, *supra* note 200, at 567 (emphasis added); *see also* Smith, *supra* note 5, at 462 (noting that poor urban youth are "this nation's future"); Marilyn Garateix, *"We Share in Their Agony," Priest Says*, MIAMI HERALD, July 27, 1993, at 3BR ("Ewing [one of the experts in *Morgan*] believes current social and economic conditions are contributing factors to the rise of juvenile homicides. Among them: Increased divorce, child abuse, media violence and a breakdown in institutions that used to instill values.").

The criminal justice system, in the guise of defendants' presentation of new theories of defense such as urban psychosis, television intoxication, and black rage, and those that are sure to follow, will be asked to accommodate increasing knowledge about the toxicity of the social environment and its psychological sequelae within the context of established criminal law doctrine. These theories of defense demand thoughtful, reasoned consideration commensurate with the importance and complexity of the challenges which they pose for the evolution of criminal law.

Law is not a static entity, numbly frozen in time and divorced from the current realities of modern life. Law must continue to evolve in response to the changing world in which it functions. As Holmes commented, "The life of the law has not been logic: it has been experience."[409] Legal evolution requires the integration of information coming from other bodies of knowledge, including the social sciences. As Justice Murphy observed fifty years ago in *United States v. Fisher:* "[T]hese claims, whatever their merit, afford a rare opportunity to explore some of the frontiers of criminal law, frontiers that are slowly but undeniably expanding under the impact of our increasing knowledge of psychology and psychiatry."[410] The defense theories of urban psychosis, television intoxication, and black rage are on the current frontiers of the criminal law. Recognition of their importance and their fit within the existing doctrinal structure is recognition of a changing society and its sometimes deleterious effects on the human psyche.

409. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).
410. 328 U.S. at 491 (Murphy, J., dissenting).