

# Myths, Realities, and the Political World\*: The Anthropology of Insanity Defense Attitudes

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The author presents the case that society's efforts to understand the insanity defense and insanity-pleading defendants are doomed to intellectual, moral, and political gridlock unless we are willing to take a fresh look at the doctrine through a series of filters—empirical research, scientific discovery, moral philosophy, cognitive and moral psychology, and sociology—in an effort to confront the single most important (but rarely asked) question: why do we feel the way we do about “these people” (insanity pleaders)? He examines this question finally through a model of structural anthropology and concludes that until we come to grips with the extent to which ours is a “culture of punishment,” we can make no headway in solving the insanity defense dilemma.

I wrote *The Jurisprudence of the Insanity Defense* for a combination of reasons. Primarily, I was concerned that we had

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\* Bob Dylan, “Political World” (*OH MERCY*, Special Rider Co., 1989):

We live in a political world  
Love don't have any place  
We're living in times where men commit crimes  
And crime don't have a face

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We live in a political world  
Where mercy walks the plank

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been frittering away our intellectual capital for decades in our approach to what we see as “the insanity defense problem.” We expended countless person-hours worrying about cognitive tests, affective tests, and nonexistent lemon squeezers. We spent thousands of court hours on briefs, test cases, appeals, and hearings contesting such questions as the quantum of proof in the insanity acquittal retention hearing. We looked to deeply flawed and basically meretricious alternatives such as the guilty but mentally ill verdict as a palliative to our consciences and as a means of conning ourselves that we were, in fact, “doing something” about the insanity defense “problem.”

Yet, I felt that all of this mattered per-

ilously little. Why did I say this? Because we continued to do precisely what we have done for decades, centuries, and perhaps millennia. We spout platitudes, we reify myths, we create straw men, we talk angrily about insanity defense “abuse,” we look longingly to insanity defense “abolition” or “reduction” as panaceas (not simply to the question at hand, but fantastically, as a means of solving all contemporary crime problems); we speak scornfully of slick lawyers and deceitful experts; we automatically assume that a defendant who raises the insanity defense must be faking (although, at least one court opinion and one voter survey reveals—somewhat remarkably, I thought—that it doesn’t matter if the plea is “real” or “faked”; our antipathy is almost identical); finally, we deride psychodynamic and behavioral explanations of “crazy” behavior when it appears “obvious” to one and all that the defendant, in fact, “did it.”

To do all this, we must be willing to jump through quite a set of hoops. We must be willing—in spite of unanimous evidence to the contrary—to adhere to a set of empirical and behavioral myths about the plea’s frequency and success rate, its dispositional outcomes, etc. We must be willing to close our eyes to a series of validated testing instruments; to ignore scientific evidence on brain biochemistry; to discredit philosophical reasoning—and we regularly do just that.

I thus decided to write this book, *The Jurisprudence of the Insanity Defense*, in an effort to answer the questions that I just raised. And when I actually started to write a book, I realized that all of these

questions were somehow subordinate to (and served to subtly obscure) the one overarching question that was never specifically asked or articulated, but which, it seemed to me, totally dominated the “deep structures” of our insanity defense discourse: why do we feel the way we do about “those people”?

The answer to that question, it seemed to me, would allow us to collapse all of the other questions into one that might actually be—at least in part—answerable and that might even give us some guidance as to what, if anything, we could do to resolve (or at least to clarify) the “insanity defense problem.” At the base of all of the questions, all the myths, all the misstatements, all the misassumptions, there remained—or so it seemed to me—one basic truth: that we simply didn’t care.

### The Roots of Our Apathy

We didn’t care about the empirical realities, about the behavioral realities, about scientific tests, about philosophical advances, about constitutional interpretations. We didn’t care for what now seemed to me to be a set of very obvious reasons: that there was something about the use of the insanity defense, and about the *persona* of the insanity defense pleader (and by extension, his lawyer and the expert witness testifying on his behalf), that revolted the general public to the core; that the successful insanity pleader truly was one of the most “despised” individuals in society; that the use of the insanity defense seemed to reflect, to so many Americans of *every* political stripe, all that was wrong with this coun-

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try and with its legal system; and that the continued existence of the insanity defense simply was dissonant with the political world that we had constructed.

It didn't matter whether we reified myths and ignored realities, because it was the myths that were consonant with the schema that we had painted of our criminal justice system. To a great extent, like all other myths, these myths have proven impervious to proofs of data and rational argument alike.

I had been thinking about these issues for a long time and had always been struck by the way that the "scholarly" debate and the "public" debate seemed to be taking place in two entirely different force fields. Scholars pondered the true doctrinal differences between the M'Naghten test, the Model Penal Code, and the "irresistible impulse" test, creating a set of obscure and implausible hypotheticals having nothing to do with the insanity defense in practice or in the lives of mentally disordered offenders in general. All of this was done in a vain effort to convince the public that changes in the substantive wording of the test really mattered. The public, on the other hand, appeared to be profoundly disinterested in the defense, unless and until one of two things happened: either a politician announced that abolition of the defense would solve the nation's crime problems, or a high-profile case involving a sympathetic victim captured media attention.

The first of these events happened in the early 1970s when President Nixon—without any empirical support, by the way—charged that the defense was subject to "unconscionable abuse."<sup>1</sup> There

was a flurry of activity at that time, but it seemed to dissipate fairly rapidly (and that dissipation was perhaps spurred on by a finding that, in the calendar year when the charge was made, there were only four insanity acquittals recorded in all federal jurisdictions).

The second, of course, did not dissipate. When John Hinckley shot and attempted to assassinate President Reagan, the path of the insanity defense was forever altered in this country. Hinckley's successful use of the defense immediately shifted the entire playing field and altered the terms of the debate. The entire debate now became dramatically flipped: would the insanity defense—a defense whose roots were found in the Talmud, the Codes of Justinian, and the Dooms of Alfred<sup>2</sup>—survive John Hinckley's expression of unrequited love for Jodie Foster? Insanity defense supporters found themselves frantically engaged in rear-guard actions. Abolition became the centerpiece of a major federal crime bill, legislation that was quickly mimicked in many states. And after lengthy congressional hearings, the fact that the defense was reduced from the American Law Institute (ALI)/Model Penal Code test to the M'Naghten rules of 1843 was seen as a major "victory" for insanity defense supporters.<sup>3, 4</sup>

States followed suit quickly, both limiting the substantive tests while tightening procedural rules. All of this meant that the use of the insanity defense—never a particularly attractive option to criminal defendants and never one that was used extensively—was going to be even rarer and certainly was going to be greeted

even more critically by judges, jurors, the media, and the general public.

In short, since the passage of the Insanity Defense Reform Act of 1984,<sup>5</sup> the insanity defense landscape has changed dramatically and irrevocably. Any politician or elected judge willing to support it as a matter of principle has to realize that it will serve as a convenient symbol for an "anti-crime" opponent to focus upon. Any lawyer representing a severely mentally disabled criminal defendant must recognize that, if she enters an insanity defense plea, the jurors will likely be suspicious, negative, and hostile. Any editorial writer or columnist suggesting that the defense remains a viable alternative needs to know that such a position will likely inspire a rash of angry letters to the editor denouncing the supporter as soft on crime, or worse. And any law professor (or forensic mental health professional) willing to be identified as a supporter of the defense must realize that she is fighting a very lonely battle.

### The Roots of Dissonance

What is it about the insanity defense that affects us this way? Why is the public's reaction so homogenous, and why is it so dissonant from that of many of the professionals who have spent their lives studying these questions?<sup>†</sup> Why is the insanity defense the screen upon which the community projects its "visions of criminal justice"? These are some of the

questions that must be addressed in this inquiry.

First, let us see what can be determined about attitudes from the defining congressional hearings that followed the Hinckley insanity acquittal. I start here because my sense is that, if we scrutinize these hearings, we can begin to understand how we, the general public, really do construct the insanity defense and why we continue to focus on it irrationally and obsessively as the root of all that is wrong with the American criminal justice system.

According to Representative Coughlin, insanity defense reform was a Maginot line of sorts: "nothing less than the credibility of our Federal justice system is at stake," he said in underscoring what he saw as the significance of the hearings.<sup>6</sup> This hyperbole was repeated continuously, in different contexts, by other members of both Houses of Congress during the debates. Thus, Attorney General Meese argued that insanity defense abolition would "rid . . . the streets of some of the most dangerous people that are out there, that are committing a disproportionate amount of crimes."<sup>7</sup> Senator Quayle asserted that the "decadent demoralizing court decisions . . . pampered criminals" and gave defendants the right to kill "innocent people with impunity."<sup>8</sup> Senator Symms added that a criminal justice system that included an insanity defense could "no longer represent . . . a civilized society."<sup>9</sup>

Next, look at what our legislators said about the use of the defense: "a safe harbor for criminals who bamboozle a jury"<sup>10</sup>; "a rich man's defense"<sup>11</sup>; a doctrine—this from former attorney General

<sup>†</sup> I make some exceptions here, of course: Dr. Abraham Halpern has been a principled opponent of the insanity defense for decades. We disagree on the merits, but I need to articulate my respect for Dr. Halpern and his position and emphasize that my criticism of insanity defense critics in no way goes to him or to his positions.

William French Smith—that allows “*so many persons* [italics added] to commit crimes of violence . . . and have the door opened to them to return to . . . society,”<sup>12</sup> in former U.S. Attorney Giuliani’s words, “roam[ing] the streets”<sup>13</sup>; a defense that includes “everything from alcoholism and drug addiction to heartburn and itching” (this latter observation, by the way, was characterized as a “thoughtful” one)<sup>14</sup>; and finally, and most probatively, again in Giuliani’s words, a defense that allows defendants to “get away with murder” in “many, many cases.”<sup>15</sup>

Each of these statements, of course, is a textbook parody of the empirical and behavioral data. The insanity defense is rarely used and is disproportionately used in cases involving indigent defendants; jurors are rarely deceived; not guilty by reason of insanity (NGRI) acquittees often spend *double* the amount of time institutionalized as defendants charged with the same crimes; two-thirds of insanity pleas are raised in cases not involving a victim’s death.<sup>16, 17</sup>

Of course, the fact that these statements were myths may not have mattered much: the House (of Representatives) Report accompanying the Insanity Defense Reform Act astonishingly conceded that the basic beliefs about the insanity defense were myths, but justified the new legislation nonetheless because these myths “undermined public faith in the criminal justice system.”<sup>18</sup> This little-noticed concession—that Congress must assuage sentiment that it *knows* to be false—reflects the lasting power of the insanity defense myths.

## Myths and Symbols

The myths speak to the symbol. The insanity defense, simply put, is and always has been “the acid test of our attitudes toward the insane and toward the criminal law itself.”<sup>19</sup> Judge Bazelon called it a “scapegoat for the entire criminal justice system.”<sup>20</sup> It symbolizes “the loss of social control in the eyes of the public.”<sup>21</sup>

The defense, in short, is simply dissonant with our perceptions of how a criminal justice system “should” operate. Its purported abuse symbolizes the alleged breakdown of law and order, the failure of the crime control model, the ascendancy of a “liberal,” exculpatory, excuse-ridden jurisprudence, and these symbols are at play in the most charged context imaginable—the trial of a mentally disabled criminal defendant.

## Historical Perspectives

These findings suggest that it is necessary to distance oneself by viewing the subject in its historical context. It was clear that there were parallels between the Hinckley trial and the trial of Daniel M’Naghten (and that public reactions were astonishingly similar to both verdicts), but the findings force us to further consider the origins of our attitudes about mental illness, about crime, and about “evil.” Perhaps this inquiry might shed some light on why we do the things we do when it comes to mentally disabled criminal defendants.

***Mental Illness and Sin*** This research illuminated some important historical constants: for 5,000 years, conceptions of

mental illness have been linked inextricably to concepts of sin. Mental illness was seen, more than 2,000 years ago, as "a punishment sent by God."<sup>22</sup> Through the Middle Ages, "demonic possession remain[ed] the simplest, the most dramatic and, secretly, the most attractive of all explanations of insanity."<sup>23</sup> Mental disease was God's punishment for sin, and mentally disabled persons were seen as agents of the devil.‡

It is no wonder that Michael Foucault suggested that this "face of madness" has "haunted" Western man's imagination for at least 5,000 years.<sup>25</sup> Thus it is no surprise that religious attitudes always exerted great influence on the medical "treatment" of the mentally ill, and to a great extent our characterizations of "sickness" track precisely what medieval theologians called "sin."<sup>26</sup>

This conflation of mental illness and sin needs to be considered in the context of the role of punishment in our criminal justice system. When President Reagan campaigned for Republican senators whom he could count on to appoint "tough" federal judges, he said pointedly: "We don't need a bunch of sociology majors on the bench"; and when Attorney General Thornburgh spoke at the National Crime Summit, he said: "We are not here . . . to discuss sociological theory,"<sup>27, 28</sup> what were they saying? On one level, at least, they were rejecting what society often sees as psychodynamic psychiatry's perceived "peculiar tolerant

attitudes toward criminal behavior,"<sup>29</sup> and its desire to undermine the powerful force of punishment in the criminal justice system.<sup>30</sup>

It is to this "culture of punishment" that I want to turn briefly, because I do not think we can begin to grasp underlying issues without giving this phenomenon some serious consideration.

***Culture of Punishment*** Punishment was originally a "ritualistic device" conveying "moral condemnation," "inflicting humiliation," and dramatizing evil through a public "degradation ceremony."<sup>31</sup> Punishment of criminals was seen as a means of both avoiding mob violence and furthering social solidarity by protecting "against the terrifying anxiety that the forces of good might not triumph against the forces of evil after all."<sup>32</sup>

None of this, however, addresses the question of why we need to punish. This is not an easy question, but I believe the best explanation is simply that our innate sense of justice is profoundly disturbed if we see another go unpunished for his antisocial behavior. In J. C. Flugel's<sup>33</sup> words:

By punishing the criminal, we are not only showing that he can't 'get away with it,' but holding him up as a terrifying example to our tempted and rebellious selves. . . . Connected with this is the danger with which our whole notion of justice is threatened when we observe that a criminal goes unpunished. . . .

‡ "In post-medieval times the retarded, together with . . . the insane, from whom they were not generally distinguished, were viewed as the progeny of the supernatural, and in the last several centuries as agents of the devil."<sup>24</sup>

§ R. Boldt<sup>31</sup> quoting Gordon Hawkins, Punishment and deterrence: the educative, moralizing, and habituating effects, *Wis L Rev*, 550-60, 1969; see also Hawkins, *supra* at 555: "Punishment is a ritualistic device designed to influence by intimating symbolically social disapproval and society's moral condemnation."

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In short, criminal punishment is society's antiaggression safety valve; we project our guilt, blame, shame, and fear, express our collective anger and hostility, and show the criminal that he cannot succumb to temptations (as *we* (the law abiding) do not succumb), and thus preserve the illusion of an even-handed justice system.<sup>34</sup>

Of course, the insanity defense flies in the face of all of this. For many reasons, the insanity defense serves as the perfect scapegoat for all that is perceived as inexplicable about our criminal justice system. It symbolizes "the most profound issues in social and criminal justice." It underscores the gap between the public's perceptions of how the criminal justice system should operate and the way that, in a handful of cases, a "factually guilty" person can be diverted from criminal punishment because of moral or legal nonresponsibility.

***Sin, Evil, and Madness*** Beyond this, the insanity defense flies in the face of the way that we have traditionally conflated sin, evil, and madness. Although modern psychiatry and psychology illuminate many of the reasons why certain criminal defendants commit apparently incomprehensible, "crazy" acts, we reject such psychodynamic explanations, both on personal and justice-system levels. We do this because such an explanation—indeed, the existence of the insanity defense itself—robs us of our need (our desire, our compulsion) to mete out punishment to the transgressor. Most strikingly, we do this even when we are faced with incontrovertible evidence that the "successful" use of an insanity defense can lead to significantly longer terms of punishment

in significantly more punitive facilities than the individual would have been subjected to had he pled guilty or been found guilty after a trial.<sup>36</sup>

## Insanity Defense Myths

What is there about the insanity defense that inspires such massive societal irrationality? Why do we adhere to these myths, ignore the reams of rational data that patiently rebut them, and willfully blind ourselves to the behavioral and empirical realities that are well known to all serious researchers in this area? It is to these questions that I now turn.

Our insanity defense jurisprudence is premised on a series of empirical and behavioral myths, myths that empirical research has revealed to be "unequivocally disproven by the facts."<sup>37</sup> There are at least eight separate empirical myths to be addressed briefly.

***Myth #1: The Insanity Defense Is Overused*** All empirical analyses have been consistent: the public at large and the legal profession (especially legislators) "dramatically" and "grossly" overestimate both the frequency and the success rate of the insanity plea, an error "undoubtedly . . . abetted" by media distortions. The most recent research reveals, for instance, that the insanity defense is used in only about one percent of all felony cases and is successful just about one-quarter of the time.<sup>38</sup>

***Myth #2: Use of the Insanity Defense Is Limited to Murder Cases*** In one jurisdiction where the data have been closely studied, contrary to expectations, slightly less than one-third of the successful insanity pleas entered over an eight-

year period were reached in cases involving a victim's death.<sup>39</sup> Furthermore, individuals who plead insanity in murder cases are no more successful in being found NGRI than persons charged with other crimes.<sup>40</sup>

**Myth #3: *There Is No Risk to the Defendant Who Pleads Insanity*** Defendants who asserted an insanity defense at trial, and who were ultimately found guilty of their charges, served significantly longer sentences than defendants tried on similar charges who did not assert the insanity defense. The same ratio is found when only homicide cases are considered.<sup>41</sup>

**Myth #4: *NGRI Acquittees Are Quickly Released from Custody*** A comprehensive study of California practice showed that only one percent of insanity acquittees were released following their NGRI verdict and that another four percent were placed on conditional release, the remaining 95 percent being hospitalized.<sup>42</sup>

**Myth #5: *NGRI Acquittees Spend Much Less Time in Custody Than Do Defendants Convicted of the Same Offenses*** Contrary to this perception, NGRI acquittees spend almost double the amount of time that defendants convicted of similar charges spend in prison settings and often face a lifetime of postrelease judicial oversight. In California, those found NGRI of nonviolent crimes were confined for periods over nine times as long.<sup>43-45</sup>

**Myth #6: *Criminal Defendants Who Plead Insanity Are Usually Faking*** This is perhaps the oldest of the insanity defense myths, one that has bedeviled

American jurisprudence since the mid-19th century. Of the 141 individuals found NGRI in one jurisdiction over an eight-year period, there was no dispute that 115 were schizophrenic (including 38 of the 46 cases involving a victim's death), and in only three cases was the diagnostician unwilling or unable to specify the nature of the patient's mental illness.<sup>46, 46a</sup>

**Myth #7: *Most Insanity Defense Trials Feature "Battles of the Experts"*** The public's false perception of the circus-like "battle of the experts" is one of the most telling reasons for the rejection of psychodynamic principles by the legal system. A dramatic case such as the Hinckley trial, of course, reinforced these perceptions. The empirical reality is quite different. On the average, there is examiner agreement in 88 percent of all insanity cases.<sup>47, 48</sup>

Noting the existence of these myths, however, is simply informational. It does not explain why the myths develop or why they persist in the face of unanimous, hard data to the contrary; or why only 3 or 4 of approximately 400 newspaper articles that I have read in the past year about the use of the insanity defense have even hinted at the empirical truths refuting these myths.

One of the first explanations must be the law's ongoing and generalized rejection of psychodynamic principles as a means of explaining human behavior. I see three aspects of this rejection as especially important: the roots of the legal system's profound ambivalence about psychiatry and toward psychiatrists; the importance of punishment in our system



of criminal justice, and the specific, obsessive fears that are regularly uncabined in response to any suggestion that psychodynamic principles can aid the law in disposing of cases involving mentally disabled criminal defendants.

### **The Law's Ambivalence Toward Psychiatry**

This ambivalence is not news. The law has always been—paradoxically—fascinated and repelled by, and overwhelmingly ambivalent about, psychiatry's role in the adjudicative process. On one hand, courts frantically desire to have mental health professionals testify as to long-term future dangerousness (an expertise that psychiatrists for the most part freely acknowledge they do not have) and “take the weight” on difficult commit/release decisions (especially in cases involving retention hearings of insanity acquittees), while at the same time characterizing psychiatry as “the ultimate wizardry” or psychiatrists as “medicine men” or “shamanistic wizards.”

This ambivalence permeates mental disability law. Psychiatric expertise is valued when it serves a social control function of the law (such as testifying in involuntary civil commitment proceedings in support of commitment applications), but is devalued when it appears to subvert that purpose (such as testifying in insanity defense cases in support of a defendant's nonresponsibility claim).<sup>49, 50</sup>

### **Anthropology and the Insanity Defense**

What does any of this have to do with anthropology? Anthropologists study cul-

ture; they study the form and structure of culture; they study the content of culture.<sup>51</sup> Anthropologists study attitudes—social attitudes, cultural attitudes and political attitudes.<sup>52</sup> And they study myths.<sup>53</sup>

The study of attitudes and myths is particularly relevant here. It is impossible to understand the politics of the insanity defense jurisprudence without understanding the social and cultural attitudes that drive legislative and judicial decisionmaking as well as public policy. And it is also impossible to understand this phenomenon without understanding the social and cultural myths that drive the behavioral and empirical myths. I use the word “myth” self-consciously, as social anthropologists do: “a sacred tale about past events which is used to justify social action in the present.”<sup>54</sup>

I have tried to demonstrate the roots of the insanity defense myths as well as their universality. What is as important as their existence, in addition, is the firmness of our beliefs in them as objective realities. Every civilization, according to Claude Lévi-Strauss, “tends to overestimate the objective orientation of its thought, and this tendency is never absent.”<sup>55</sup> So it is with the insanity defense.

Just as “madness” has specific cultural meanings<sup>56</sup> and just as cultural factors affect the course of major mental illness,<sup>57</sup> we can now say that attitudes toward the insanity defense have such meanings and affect the course of treatment (and the ultimate disposition) of the case of an insanity-pleading offender. Just as explanatory models of sickness are “sets of generalizations which enable the thinker to produce information about par-

ticular sickness episodes and events,"<sup>58</sup> so can we say that explanatory models of the insanity defense plea and pleaders do the same thing.

Let me try to "tease this out" a bit more specifically by narrowing my inquiry to what I understand is the school of structural anthropology. Structuralists agree that all culture consists of sets of concepts that are in psychological tension with each other (e.g., we cannot make sense of "black" without realizing that it contrasts with "white"; we can't understand "citizenship" without understanding that it contrasts with "alienage.")<sup>59</sup> Now consider how Richard Merelman<sup>60</sup> characterizes this:

Such narratives appear in myths, rituals, popular culture, ceremonies or even institutionalized behaviour in which exemplary persons (heroes, villains, etc.) . . . depict components of the sets themselves. In effect, such persons 'act out,' 'display,' or 'exercise' the culture.

Building on these insights in a recent manuscript, Douglas Mossman<sup>61</sup> looks at the way we construct mentally ill persons, specifically mentally ill homeless persons:

This . . . helps us appreciate how mentally ill persons . . . are ambiguous, perplexing, and troubling figures in the context of American political culture. They represent a set of contradictions to us because they fail to fit well into the set of structural oppositions that our culture gives us to organize our experience. American mythologized individualism ascribes to persons a high level of autonomy, personal responsibility, and rationality; these are the ingredients needed for persons to vindicate their natural goodness amidst corrupting social influences. *But left alone, the homeless mentally ill "seem" in some ways to be very natural and clearly rejecting society's norms, yet they make troubling choices.*

Think, in this context, about the insanity defense, about its roots and our attitudes. Think about how we structure good and evil, well and sick, lawful and unlawful, sane and insane. And think about the way that, on one hand, the existence of an insanity defense satisfies our needs for expressing such tensions (as the D.C. circuit court said in *United States v. Brawner*, "'free will' is the postulate of responsibility under our jurisprudence"),<sup>62</sup> but on the other hand creates a tension (where it appears to let a factually guilty person "get away with it") that may simply be "too much" for our legal system's "tensile strength."

This approach piqued my curiosity, so I decided to continue a bit further. For the past year, I have conducted a daily computer search for the words "insanity defense" in the NEWS library of the NEXIS database on the LEXIS system to show the extent to which the myths that I have been talking about persist and the way they seem to fit into this structural anthropological model.

**The New Research** The database reveals few surprises. According to the news media, the allegedly "popular" insanity defense<sup>63</sup>—nothing more than a "legalistic slight of hand"<sup>64</sup>—is a "reward" to mentally disabled defendants for "staying sick,"<sup>65</sup> a "travesty,"<sup>66</sup> a "loop-hole,"<sup>67</sup> a "refuge,"<sup>68</sup> a "technicality,"<sup>69</sup> one of the "absurdities of state law,"<sup>70</sup> perhaps a "monstrous fraud."<sup>71</sup> It is used—again, allegedly—in cases involving "mild disorders or a sudden disappointment or mounting frustrations . . . or a less-than-perfect childhood."<sup>72</sup> It is responsible for "burying the traditional

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Judeo-Christian notion of moral responsibility under a tower of psychobabble.”<sup>73</sup>

When it is pleaded, successful defendants are perceived either as spending a “short time” in mental hospitals (before being released to unsupervised freedom),<sup>74</sup> or as being simply “set free.”<sup>75</sup> Defendants’ criminal responsibility is still being assessed by visual frames of reference: if he didn’t “seem frenzied”<sup>76</sup> or appear insane, then “there’s no craziness here;”<sup>77</sup> and of course, the Dan White “Twinkie defense” continues to be seen as some kind of norm in insanity cases.<sup>78–80</sup>

The “default drive” of prosecutors is simply to argue that the defendant was faking or malingering.<sup>81–84</sup> Criminal defense lawyers may refer to their own insanity-pleading clients as “a monster, a Frankenstein.”<sup>85</sup> Potential jurors are sometimes excused because they appear too eager to sit on insanity defense cases (and certainly not because of their desire to enter an NGRI verdict).<sup>86</sup> Even a spokesperson for the American Psychiatric Association misinforms the press as to the appropriate test for assessing the need for continuing confinement of insanity acquittees.<sup>87</sup>

Additionally, of course, politicians focus on abolition of the insanity defense as a panacea for urban crime problems, calling it “one of the absurdities of state law,”<sup>88</sup> providing a hiding place for criminals “to avoid responsibility.”<sup>89</sup> Legislative candidates point to insanity defense support as an *indicium* of an opponent being soft on crime.<sup>90</sup> These positions are regularly endorsed in newspaper editorials.<sup>97–99</sup> Finally, the voice of the citi-

zenry—through letters to the editors—is virtually identical.<sup>100</sup> In the words of a 13-year-old writing about the O.J. trial to the *Fresno Bee*:

Of course, if he did do it, there’s always the good old temporary insanity defense, a sure-fire way to bail out of just about any heinous crime, especially murder.<sup>101</sup>

## The Roots of the Myths

Why do these myths persist? Why did they originally emerge? Why have they shown such remarkable longevity? Why do cases such as Hinckley’s have such a profound effect on the perpetuation of the myths? Why do they appear essential to the continued order of society? Why do they continue to capture a significant portion of the general public and the legal community? How do they reflect a “community consciousness”? Finally, why may their persistence doom any attempt to establish a rational insanity defense jurisprudence, no matter how much conflicting empirical data are revealed?

To answer these questions, it is necessary to look at the roots of these myths. An examination of the literature and the case law reveals at least four reasons for the myths’ persistence: (1) the (irrational) fear that defendants will “beat the rap” through fakery, a millennium-old fear that has its roots in a general disbelief in mental illness, and a deep-seated distrust of “manipulative” criminal defense lawyers invested with the ability to “con” jurors into accepting spurious expert testimony;<sup>102</sup> (2) the sense (among members of the legal community and the general public) that there is “something different” about mental illness and organic illness,

so that, while certain physiologic disabilities may be seen as legitimately exculpatory, "mere" emotional handicaps are not; (3) the demand that a defendant conform to popular images of extreme "craziness" in order to be "legitimately insane," a demand with which Chief Justice Rehnquist and other members of the current Supreme Court appear entirely comfortable; and (4) a fear that the "soft," exculpatory sciences of psychiatry and psychology, claiming expertise in almost all areas of behavior, will somehow overwhelm the criminal justice system by thwarting the system's crime control component.<sup>103</sup>

Why is this? Why do we feel this way?

### Explanations of the Myths

This is a question that seems to me to be rarely asked and even more rarely answered. I decided to approach it, though, because I thought that unless we look long and hard at this question—basically, what is there about the way we think, reason, and react that makes us susceptible to these myths—all of our study and time would be little more than academic.

I thus have focused on several overlapping constructs drawn from cognitive psychology, law, sociology, philosophy, and my own invention in an effort to answer the question. I will first explain briefly what I mean by each of these concepts and then turn to their relationship to the way we feel about the insanity defense.

First, the use of *heuristics* (a cognitive psychology construct that refers to the implicit thinking devices that individuals use to simplify complex, information-

processing tasks) leads to distorted and systematically erroneous decisions and causes decisionmakers to "ignore or misuse items of rationally useful information." One single vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be made.<sup>104</sup>

Thus, through the "availability" heuristic, we judge the probability or frequency of an event based on the ease with which we recall it.<sup>105</sup> Through the "typification" heuristic, we characterize a current experience via reference to past stereotypic behavior; through the "attribution" heuristic, we interpret a wide variety of additional information to reinforce preexisting stereotypes.<sup>106</sup>

Next is the concept of *ordinary common sense* (OCS). The positions frequently taken by Chief Justice Rehnquist and Justice Thomas in criminal procedure cases best highlight the power of OCS as an unconscious animator of legal decisionmaking. Such positions frequently demonstrate a total lack of awareness of the underlying psychological issues and focus on such superficial issues as whether a putatively mentally disabled criminal defendant bears a "normal appearance."<sup>107</sup>

These are not the first jurists to exhibit this sort of close-mindedness. Trial judges will typically say "he [the defendant] doesn't look sick to me," or, even more revealingly, "he is as healthy as you or me."<sup>108</sup> In short, where defendants do not conform to "popular images of 'craziness,'" the notion of a handicapping mental disability condition is flatly and unthinkingly rejected.<sup>109</sup> Views such as

these reflect a false kind of "ordinary common sense."<sup>110</sup> In criminal procedure, OCS presupposes two "self-evident" truths: "First, everyone knows how to assess an individual's behavior. Second, everyone knows when to blame someone for doing wrong."<sup>111</sup>

The next concept is what I call *sanism*, meaning an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry. It infects both our jurisprudence and our lawyering practices. Sanism is largely invisible, largely socially acceptable, and is based predominantly upon stereotype, myth, superstition, and deindividualization.<sup>112</sup>

Judges, legislators, attorneys, and laypersons all may exhibit sanist traits and profess sanist attitudes. It is no surprise that jurors reflect and project the conventional morality of the community, and judicial decisions in all areas of civil and criminal mental disability law continue to reflect and perpetuate sanist stereotypes.<sup>113</sup>

The concept of sanism must be considered hand-in-glove with that of *pretextuality*. Sanist attitudes often lead to pretextual decisions. By this I mean simply that fact-finders accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (frequently meretricious) decisionmaking, specifically where witnesses, especially "expert" witnesses, show a "high propensity to purposely distort their testimony in order to achieve desired ends." The pretexts of the forensic mental health system are

reflected in both the testimony of forensic experts and in the decisions of legislators and fact-finders. Experts frequently testify in accordance with their own self-referential concepts of morality and openly subvert statutory and case law criteria that impose rigorous behavioral standards as predicates for commitment or that articulate functional standards as prerequisites for an incompetency-to-stand-trial finding.<sup>114</sup>

Finally, we need to consider *teleology*. The legal system selectively (i.e., teleologically) either accepts or rejects social science evidence depending on whether or not the use of that data meets the *a priori* needs of the legal system. In cases where fact-finders are hostile to social science teachings, such data thus often meet with tremendous judicial resistance, and by the courts expressing their skepticism about, suspicions of, and hostilities toward such evidence.<sup>115-117</sup>

Courts are often threatened by the use of such data. Social science's "complexities [may] shake the judge's confidence in imposed solutions."<sup>118</sup> The courts' general dislike of social science is reflected in the self-articulated claims that judges are unable to understand the data and to apply it properly to a particular case.<sup>119</sup> Thus, social science literature and studies that enable courts to meet predetermined sanist ends are often privileged, while data that would require judges to question such ends are frequently rejected. Judges often select certain proffered data that adheres to their preexisting social and political attitudes and use heuristic reasoning in rationalizing such decisions. Social science data

are used pretextually in such cases and ignored in other cases to rationalize otherwise baseless judicial decisions.

How do these concepts "play out" in insanity defense cases? At the outset, consider that the insanity defense is a textbook example of the power of heuristic reasoning. Insanity defense defenders attempt to use statistics (to rebut empirical myths), scientific studies (to demonstrate that "responsibility" is a valid, externally verifiable term, and that certain insanity-pleading defendants are simply "different"), and principles of moral philosophy (to prove that responsibility and causation questions are legitimate ones for moral and legal inquiry). On the other hand, the vivid anecdote or the self-affirming attribution overwhelm all attempts at rational discourse. Insanity defense decisionmaking is a uniquely fertile field in which the distortive "vividness" effect can operate and in which the legal system's poor mechanisms of coping with "systematic errors in intuitive judgment" made by heuristic "information processors" become especially troubling. The chasm between perception and reality on the question of the frequency of use of the insanity defense, its success rate, and the "appropriateness" of its success rate all reflect this effect.

Also, reliance on OCS is one of the keys to understanding why and how our insanity defense jurisprudence has developed. Not only is it "prereflexive" and "self-evident," it is susceptible to precisely the type of idiosyncratic, reactive decisionmaking that has traditionally typified insanity defense legislation and litigation. Paradoxically, the insanity de-

fense is necessary precisely because it rebuts "common-sense everyday inferences about the meaning of conduct."<sup>120</sup>

Empirical investigations corroborate the inappropriate application of OCS to insanity defense decisionmaking. Judges "unconsciously express public feelings . . . reflect[ing] community attitudes and biases because they are 'close' to the community."<sup>121</sup> Virtually no members of the public can articulate what the substantive insanity defense test is. The public is seriously misinformed about both the "extensiveness and consequences" of an insanity defense plea,<sup>122</sup> and the public explicitly and consistently rejects any such defense substantively broader than the "wild beast" test.<sup>123</sup>

What about sanism? Insanity defense decisionmaking is often irrational. It rejects empiricism, science, psychology, and philosophy and substitutes myth, stereotype, bias, and distortion. In short, our insanity defense jurisprudence is the jurisprudence of sanism.

Like the rest of the criminal trial process, the insanity defense process is riddled by sanist stereotypes and myths such as: (1) reliance on a fixed vision of popular, concrete, visual images of "craziness"; (2) an obsessive fear of feigned mental states; (3) a presumed absolute linkage between mental illness and dangerousness; (4) sanctioning of the death penalty in the case of mentally retarded defendants, some defendants who are "substantially mentally impaired," or defendants who have been found guilty but mentally ill; (5) the incessant confusion and conflation of substantive mental status tests; and (6) the regularity of sanist

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appeals by prosecutors in insanity defense summations, arguing that insanity defenses are easily faked, that insanity acquittees are often immediately released, and that expert witnesses are readily duped.

Sanism, in short, regularly and relentlessly infects the courts in the same ways that it infects the public discourse. It synthesizes all of the irrational thinking about the insanity defense and helps create an environment in which groundless myths can shape the jurisprudence. As much as any other factor, it explains why we feel the way we do about "these people." As I will discuss next, it also provides a basis for courts to engage in pretextual reasoning in deciding insanity defense cases.

Pretextual decisionmaking riddles the entire insanity defense decisionmaking process; it pervades decisions by forensic hospital administrators, police officers, expert witnesses, and judges. Hospital decisionmaking is a good example. A Task Force of the National Institutes of Mental Health, convened in the wake of the Hinckley acquittal, underscored this point in its final report: "From the perspective of the Hospital, *in controversial cases such as Hinckley*, the U.S. Attorney's Office can be counted upon to oppose *any* conditional release recommendation [emphasis added]." <sup>124</sup> As John Parry has explained, "hospitals have been pressured by public outrage to bend over backwards to make sure that no insanity acquittee is released too soon, *even* if such pressure is contrary to the intent and spirit of being found not guilty by reason of insanity." <sup>125</sup>

Expert witnesses are often similarly

pretextual. In one case, a testifying doctor conceded that the may have "hedged" in earlier testimony (as to whether an insanity acquittee could be released) "because he did not want to be criticized should [the defendant] be released and then commit a criminal act." <sup>126</sup> Most importantly, all aspects of the judicial decisionmaking process embody pretextuality. To a significant extent, this fear that defendants will "fake" the insanity defense to escape punishment continues to paralyze the legal system, despite an impressive array of empirical evidence that reveals (1) the minuscule number of such cases, (2) the ease with which trained clinicians are usually able to "catch" malingering in such cases, (3) the inverse greater likelihood that defendants—even at grave peril to their life—will more likely try to convince examiners that they are "not crazy," (4) the high risk in pleading the insanity defense (leading to statistically significant greater prison terms meted out to unsuccessful insanity pleaders), and (5) the far greater length in stay that most successful insanity pleaders (a minute universe to begin with) remain in maximum security facilities than they would have served had they been convicted on the underlying criminal indictment. In short, pretextuality dominates insanity defense decisionmaking. The inability of judges to disregard public opinion and inquire whether defendants have had fair trials is both the root and the cause of pretextuality in insanity defense jurisprudence.

Finally, little attention has been paid in general to the role of social science data in insanity defense decisionmaking. The

law's suspicion of the psychological sciences is well documented. The issues before the courts in insanity defense cases raise such troubling issues for decision-makers that the courts' inherent suspicion of the social sciences will be further heightened. This, however, should not be surprising. Traditionally, social science has played a lesser role in the establishment of legal policy in areas "dominated by clear ideological division" or "political debate." The more social science contradicts "sentiments essential to other legal institutions," the less likely that it will influence legal policy.<sup>127, 128</sup>

I believe that much of the incoherence of insanity defense jurisprudence can be explained by these phenomena. Stereotyped thinking leads to sanist behavior. Sanist decisions are rationalized by pretextuality on the part of judges, legislators, and lawyers and are buttressed by the teleologic use of social science evidence and empirical data. This combination of sanism and pretextuality fits with traditional ways of thinking about (and acting toward) mentally disabled persons; it reifies centuries of myths and superstitions and is consonant with both the way we use heuristic cognitive devices and our own *faux*, nonreflective "ordinary common sense."

How, then can we (should we) try to order a reconstruction of insanity defense jurisprudence? There may be a certain measure of *hubris* in attempting to articulate a new vision of insanity defense jurisprudence, especially at this historical moment. Nonetheless, I offer these suggestions. I must begin with the rueful recognition that our societal track record

is not one to inspire much optimism. Thus, while I am not entirely sanguine about the future of this enterprise, I am offering a series of what I will call behavioral suggestions for insanity defense policymakers, scholars, and other citizens. I do this because I believe that, if there is to be any meaningful insanity defense reform, it is critical that each of us begin the process of changing the way we behave when confronted with the insanity defense and insanity defense pleaders.

### A Reconstruction

Such behavioral changes are an absolutely essential precondition to certain needed legal reforms. I believe, for instance, that the Insanity Defense Reform Act of 1984 was nothing more than a pandering charade, and that Congress should abandon its return to this restrictive form of the M'Naghten test. The combination of this cognitive-only test, coupled with the Act's placement of the burden of proof on defendants (by more than the preponderance standard), leads to an increase in the number of severely mentally disabled criminal defendants who will be inappropriately incarcerated in penal facilities. I also believe that the guilty but mentally ill verdict is nothing more than a meretricious sham, which should be abandoned.

However, even if all of these reforms were to be judicially and/or legislatively mandated, the incoherence of our insanity defense jurisprudence would continue, because none of these legal questions focuses on the single most important inquiry (which I identified earlier): why do



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we feel the way we do about “these people”?

The answer to that question, as I have tried to demonstrate, is to be found in the way that centuries of myths have led to sanist thoughts and practices on the part of all insanity defense decisionmakers. This sanism—abetted by heuristic reasoning and reliance on a false, alleged “ordinary common sense” and further contaminated by our authoritarian spirit—leads to pretextual judicial decisions supported by teleologic reasoning. I thus conclude that it is only through behavioral change that there can be any meaningful amelioration of this jurisprudential incoherence.

### Behavioral Recommendations

First, we must discuss the underlying issues openly. We must openly discuss sanism, identify it, and explain its pernicious impact on all aspects of the legal system. System decisionmakers must regularly engage in a series of “sanism checks” to insure, to the greatest extent possible, a continuing conscious and self-reflective evaluation of their decisions to best avoid sanism’s power. As part of this strategy, we must educate judges and legislators and other policy-makers as to the roots of sanism, the malignancy of stereotypes, and the need to empathically consider alternative perspectives.

Sanism infects all aspects of the insanity defense process: legislators, judges, jurors, and counsel, as well as the media that report on insanity defense cases. Each and every one of these participants bears some culpability in our current state of affairs, and all must bear the burden of eradicating sanist thought and behavior.

Second, it is essential that the issues discussed here be added to the research agendas of social scientists, behaviorists, and legal scholars. Researchers must carefully examine case law and statutes to determine the extent to which social science is being teleologically used for sanist ends in insanity defense decision-making. They must also study the empirical database that rebuts the empirical and behavioral sanist myths and must confront this discontinuity in their writings. In addition, researchers must enter the public arena and share their research findings with legislators, the media, and the public.

These inquiries will help illuminate the ultimate impact of sanism on this area of the law, aid lawmakers and other policy-makers in understanding the ways that social science data are manipulated to serve sanist ends, and assist in the formulation of both normative and instrumental strategies that can be used to rebut sanism in insanity defense decisions.

Third, we must find ways to attitudinally educate counsel for mentally disabled criminal defendants so that representation becomes more than the hollow shell it all too frequently is. We must restructure the provision of counsel to insure that mentally disabled individuals are no longer represented by, in Judge Bazelon’s famous phrase, “walking violations of the Sixth Amendment.”<sup>129</sup>

Fourth, we must create a new scholarship agenda that critically examines the questions I have raised here.

Fifth, we need to consider carefully the burden of heuristic thinking. Judges, like the rest of us, use simplifying cognitive

heuristic devices in their thinking. Recent scholarly literature has begun to assess carefully the impact of heuristics on Supreme Court decisionmaking; we need to apply this same thinking more comprehensively so as to assess behavior of expert witnesses, counsel, mental health professionals, and jurors.

Sixth, we must rigorously apply therapeutic jurisprudence principles to each aspect of the insanity defense.<sup>130-135</sup> We need to take what we learn from therapeutic jurisprudence to strip away sanist behavior, pretextual reasoning, and teleologic decisionmaking from the insanity defense process. This would enable us to confront the pretextual use of social science data in an open and meaningful way.

Seventh, we need to integrate insanity defense insights into all aspects of mental disability law. Mental disability is no longer—if it ever was—an obscure subspecialty of legal practice and study. Each of its multiple strands forces us to make hard social policy choices about troubling social issues: psychiatry and social control, the use of institutions, informed consent, personal autonomy, the relationship between public perception and social reality, the many levels of “competency,” the role of free will in the criminal law system, the limits of confidentiality, the protection duty of mental health professionals, and the role of power in forensic evaluations. These are all difficult and complex questions that are not susceptible to easy, formulistic answers. When sanist thinking distorts the judicial process, the resulting doctrinal incoherence should not be a surprise.

## Conclusion

The development of the insanity defense has tracked the tension between psychodynamics and punishment and reflects our most profound ambivalence about both. On one hand, we are especially punitive toward the mentally disabled, “the most despised and feared group in society”<sup>136</sup>; on the other, we recognize that in some narrow and carefully circumscribed circumstances, exculpation is—and historically has been—proper and necessary. This ambivalence infects a host of criminal justice policy issues involving mentally disabled criminal defendants beyond insanity defense decisionmaking: on issues of expert testimony, mental disability as a mitigating (or aggravating) factor at sentencing and in death penalty cases, and the creation of a “compromise” GBMI verdict.

The post-Hinckley debate revealed the fragility of our insanity defense policies and demonstrated that there was simply not enough “tensile strength” in the criminal justice system to withstand the public’s dysfunctionally heightened arousal that followed the jury verdict. Despite doctrinal changes and judicial glosses, the public remains wed to the “wild beast” test of 1724, a reflection of how we *truly* feel about “those people.”<sup>137</sup> It should thus be no surprise that, when Congress chose to replace the ALI/Model Penal Code insanity test with a stricter version of M’Naghten, that decision was seen as a victory by insanity defense supporters.

These dissonances, tensions, and ambivalences—again, rooted in medieval thought—continue to control the public’s

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psyche. They reflect the extent of the gap between academic discourse and social values and the "deeply rooted moral and religious tension" that surrounds responsibility decisionmaking.<sup>138</sup> They lead to sanism, to pretextuality, and to teleologic decisionmaking. They seek confirmation in "ordinary common sense" and in the use of heuristic cognitive devices. Ours is a culture of punishment, growing out of our authoritarian spirit. Only when we acknowledge these psychic and physical realities—and the anthropology of insanity defense attitudes—can we expect to make sense of the underlying jurisprudence.

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