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On the Edge: The Insanity Defense in America Today

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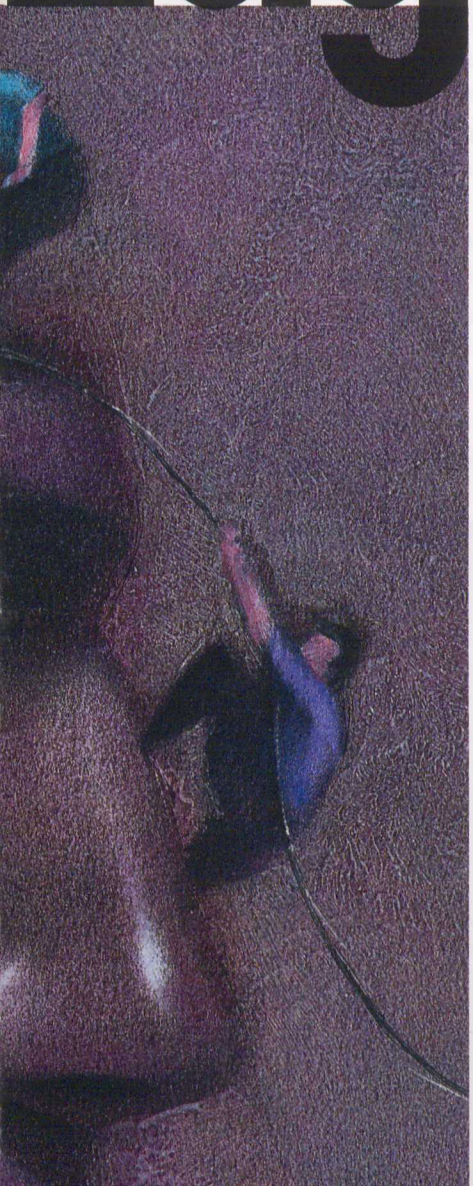
by Professor Michael Perlin



Ever since a jury found John Hinckley not guilty by reason of insanity on charges that he attempted to assassinate former President Ronald Reagan, it has seemed as if every high-profile, made-for-talk-show-TV case has somehow involved the insanity defense: Jeffrey Dahmer, Colin Ferguson, the Menendez brothers, John DuPont, and, as I write this, Theodore Kaczynski (the so-called Unabomber). This perception has led to the conclusion that there is something terribly wrong with the insanity defense. ➢

This is not so. None of these defendants were successful insanity defense pleaders. Ferguson, in fact, fired his attorneys because they wanted to impose such a plea on him, and Kaczynski (as of this writing) has also resisted its use; the Menendezes never raised the defense at all.

The public's assumptions about the use of the insanity defense and its consequences are wrong, and we've known for years that these assumptions are wrong. Yet, we blindly adhere to myths, repeat them, reify them, and base mental health and criminal justice policies on them.

This is incoherent and ensures that we will remain trapped in eternal intellectual gridlock in our efforts to come to grips with the most basic questions about why a small percentage of individuals commit seemingly inexplicable and "crazy" criminal acts, about how the legal system should respond to this set of cases, and, ultimately, about why we feel the way we do about "these people," surely, one of the most despised groups in all of society.

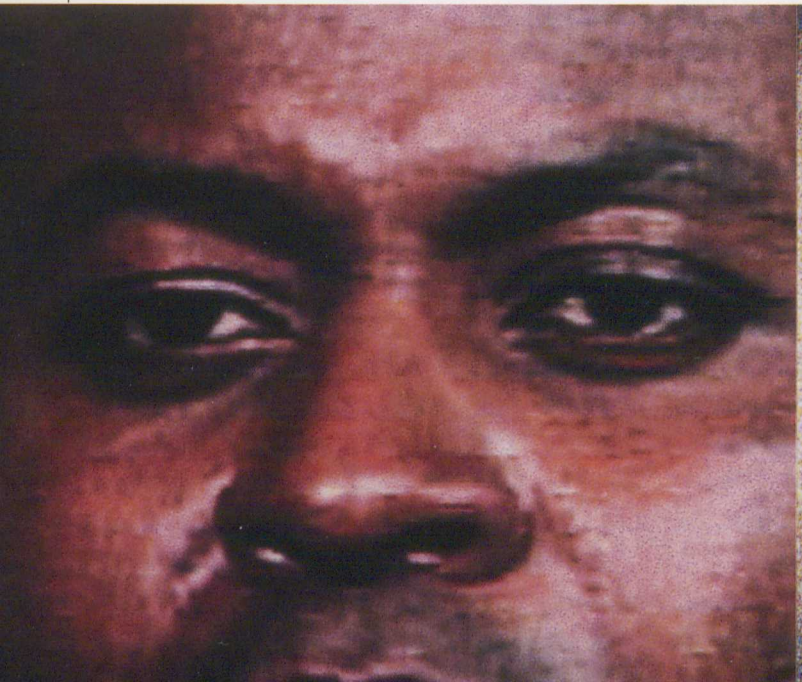
As I have studied the insanity defense, I have come to one gloomy conclusion. At the base of all the questions, all the myths, all the misstatements, all the misassumptions, there remains one basic truth: We simply don't care.

We don't care about the empirical realities, about the behavioral realities, about scientific tests, about philosophical advances, or about constitutional interpretations. And we don't care because there is something about the use of the insanity defense — about the persona of the insanity defense pleader and, by extension, his lawyer and the expert witness testifying on his behalf — that revolts the general public to the core. The use of the insanity defense seems to reflect, to so many Americans of every political stripe, all that is wrong with this country's legal system.

The Evolution of the Defense

When John Hinckley attempted to assassinate President Reagan, the path of the insanity defense was forever altered in this country. Hinckley's use — Hinckley's successful use — of the defense immediately shifted the entire playing field and altered the terms of the debate. The question became, Would the insanity defense — a defense whose roots were found in the Talmud, the Codes of Justinian, and the Dooms of Alfred — 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 center-



Misconceptions of the insanity defense: None of these four murderers pled not guilty by reason of insanity. *From left:* Colin Ferguson, Lyle Menendez, Jeffrey Dahmer, and Theodore Kaczynski.

piece of a major federal crime bill, legislation quickly mimicked in many states. After lengthy Congressional hearings, the fact that the defense was reduced from the ALI/Model Penal Code test to the M'Naghten rules of 1843 was seen as a major "victory" for insanity defense supporters.

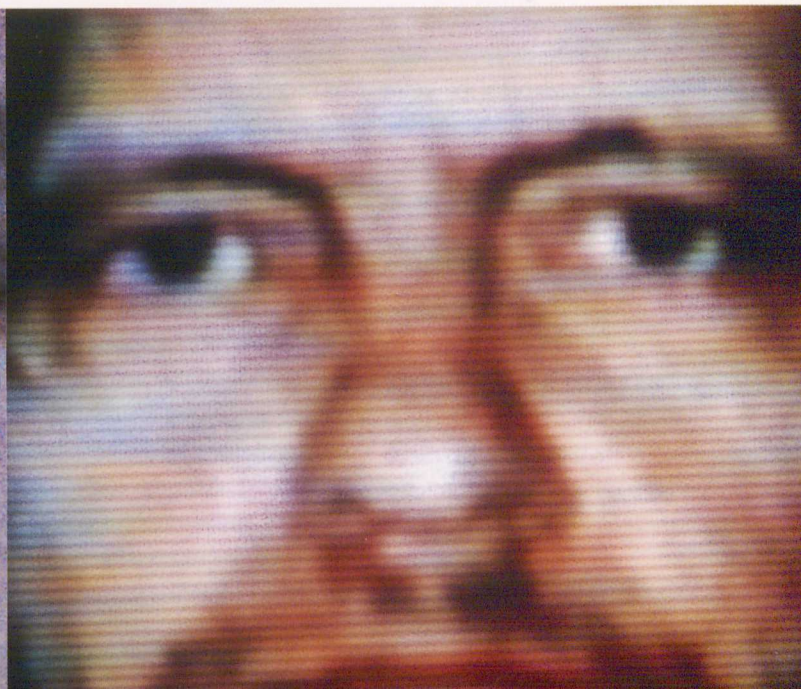
In short, since the passage of the Insanity Defense Reform Act of 1984, the insanity defense landscape has changed dramatically and irrevocably. Any politician or elected judge willing to support it as a matter of principle has to realize that it will serve as a convenient symbol for an "anticrime" opponent 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 willing to be identified as a supporter of the defense must realize that she is fighting a very lonely battle.

The insanity defense symbolizes the loss of social control in the eyes of the public. 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. These symbols are at play in the most charged context imaginable — the trial of a mentally disabled criminal defendant. Simply put by Professor Susan Herman of Brooklyn Law School, the insanity defense is — and always has been — "the acid test of our attitudes toward the insane and toward the criminal law itself."

The Myths

If we step back and consider the origins of our attitudes about mental illness, about crime, and about evil, there are some historical constants: For 5,000 years, conceptions of mental illness have been linked to concepts of sin. Mental illness was seen, more than 2,000 years ago, as a punishment sent by God. Through the Middle Ages, demonic possession remained the simplest, the most dramatic and, secretly, the most attractive of all explanations of insanity. 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. And it is thus no surprise that religious attitudes have always exerted great influence on the medical "treatment" of the mentally ill, and that, to a great extent, our characterizations of "sickness" track precisely what medieval theologians called "sin."

This conflation of mental illness and sin needs to be considered in the context of the role of punishment in our criminal justice system. 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. Although modern psychiatry and psychology illuminate many of the reasons why certain criminal defendants commit apparently incomprehensible "crazy" acts, we reject such explanations because they rob us of our need 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.

The public's false perception of the circuslike "battle of the experts" is one of the most telling reasons for the rejection of psychodynamic principles by the legal system.

What is there about the insanity defense that inspires such 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?

Our insanity defense jurisprudence is premised on a series of myths that research has revealed to be "unequivocally disproven by the facts."

Myth #1: The insanity defense is overused. All empirical analyses have been consistent: The public at large and the legal profession "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 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.

Myth #2: Use of the insanity defense is limited to murder cases. In one jurisdiction where the data has 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. Further, individuals who plead insanity in murder cases are no more successful in being found not guilty by reason of insanity (NGRI) than persons charged with other crimes.

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.

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, with the remaining 95% being hospitalized.

Myth #5: NGRI acquittees spend much less time in custody than do defendants convicted of the same offenses. Contrarily, NGRI acquittees spent almost double the

amount of time that defendants convicted of similar charges spent in prison settings, and often faced a lifetime of post-release judicial supervision. In California, those found NGRI of nonviolent crimes were confined for periods over nine times as long.

Myth #6: Criminal defendants who plead insanity are usually faking. This is perhaps the oldest of the insanity defense myths, and 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.

Myth #7: Most insanity defense trials feature "battles of the experts."

The public's false perception of the circuslike "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% of all insanity cases.

Sanism and Pretextuality

Why do these myths develop and why do they persist in the face of hard data? Why do cases such as Hinckley's have such a profound effect on the perpetuation of these myths? 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 is revealed?

These are questions that seem to be rarely asked and even more rarely answered. What is there about the way we think, reason, and react that makes us susceptible to these myths?

There are several constructs that may help explain what is going on. First is the concept of sanism. Sanism is an irrational prejudice similar to racism, sexism, homophobia, and ethnic bigotry.

Insanity defense decision-making is sanist. It is often irrational. It rejects empiricism, science, psychology, and philosophy, and substitutes myth, stereotype, bias, and distortion. 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."

The concept of sanism must be considered hand-in-glove with that of pretextuality, meaning that juries and judges accept testimonial dishonesty, specifically where witnesses (especially expert witnesses) show a "high propensity to purposely distort their testimony in order to achieve desired ends." Experts frequently testify according to their own personal concepts of "morality," openly subverting statutory and caselaw criteria for commitment or the determination of competency to stand trial. Pretextuality riddles the entire insanity defense decision-making process; it pervades decisions by forensic hospital administrators, police officers, expert witnesses, and judges. The inability of judges to disregard public opinion and inquire into whether defendants have had fair trials is both the root and the cause of pretextuality in insanity defense jurisprudence.

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.

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"; on the other, we recognize that in some narrow and carefully circumscribed circumstances, exculpation is — and historically has been — proper and necessary.

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. In spite of 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." 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 psyche. They reflect the extent of the gap between academic discourse and social values, and the "deeply rooted moral and religious tension" that surrounds responsibile decision making. They lead to sanism and to pretextuality. Ours is a culture of punishment, a culture that grows out of our authoritarian spirit. Only when we acknowledge these psychic and physical realities can we expect to make sense of the underlying jurisprudence.