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Michael L. Perlin

New York Law School, michael.perlin@nyls.edu

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The Insanity Defense: Nine Myths That Will Not Go Away

Michael L. Perlin

Writing about the insanity defense over a quarter of a century ago, I stated: “Until we ‘unpack’ the empirical and social myths that underlie our misconceptions about the insane and the insanity defense and hold us in a paralytic thrall, we cannot begin to move forward.”¹ Some five years later, I began a full-length book on the insanity defense by alleging that “our insanity defense jurisprudence is incoherent.”² Five years after that, I concluded that “we as a society remain fixated on the insanity defense as a symbol of all that is wrong with the criminal justice system and as a source of social and political anger.”³ Returning to this issue two years ago, I concluded that “nothing has happened in the intervening decade to lead me to change my mind.”⁴ The myths have stayed with us, and we willfully blind ourselves to the empirical and behavioral realities.

At the roots of this incoherence and fixation is our nation’s irrational belief system in a series of myths about the defense, each of which has been discredited, yet each of which continues to dominate political and social discourse. Multiple scholars have identified these myths, but their power still controls the debate.⁵ There is no disputing that Cynthia G. Hawkins-León was correct when she characterized the insanity defense literature and case law as based upon “epic myths.”⁶ Simply put, the valid and reliable

research on the insanity defense contradicts most of the “commonly-held beliefs” about the defense’s usage.⁷

There are multiple reasons for this disconnect between myth and reality. We cannot understand the insanity defense unless we look at it through the cognitive psychology construct of *heuristics*—that is, the way that we seek to simplify information-processing tasks by privileging the vivid, negative, accessible anecdote, and by subordinating the factual, the logical, the statistical, the rational.⁸ For these purposes, the most pernicious of the heuristics is the *vividness heuristic*: a cognitive simplifying device that teaches us that “when decisionmakers are in the thrall of a highly salient event, that event will so dominate their thinking that they will make aggregate decisions that are overdependent on the particular event and that overestimate the representativeness of that event within some larger array of events.”⁹ One single vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be made.¹⁰ Empirical studies reveal jurors’ susceptibility to the use of these devices.¹¹ Furthermore, we cannot understand the insanity defense unless we come to grips with the meretricious allure of a false “ordinary common sense”¹² that has long pervaded, and poisoned, our jurisprudence in this area.¹³ Ordinary common sense is self-referential and non-reflective: “I see it that way, therefore everyone sees it that way; I see it that way, therefore that’s the way it is.”¹⁴ We must also understand that there are socio-political myths “at play” in addition to empirical myths adding to this miasma of misinformation: by way of example, the (utterly unsupported) “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.”¹⁵

This chapter will consider the political/social myths that continue to dominate the insanity defense conversation; present the empirical realities that refute each and every one of these myths; briefly consider these issues through the lens of therapeutic jurisprudence; and offer some conclusions as to why these myths continue to so hold us in thrall.

1 Empirical Data and Myths¹⁶

Soon after John Hinckley was found not guilty by reason of insanity in the attempted murder of President Ronald Reagan,¹⁷ commentators began to examine carefully the “myths”¹⁸ that had developed about the insanity defense and insanity defense pleaders in an effort to determine the extent “to which this issue has been distorted in the public eye.”¹⁹ The empirical research²⁰ revealed that at least nine myths²¹ had arisen and been perpetuated,

but that all were “unequivocally disproven by the facts.”²² Valid and reliable research unanimously agrees that juror attitudes in insanity defense cases reflect bias,²³ and research has both validated the mythic nature of each of these erroneous beliefs²⁴ and has supported the findings of distortion and infection.²⁵ Valid and reliable research further demonstrates that jurors also often act quite independently from court instructions, based on their *a priori* “intuitive understanding of mental disease, responsibility, culpability, punishment, and treatment.”²⁶

Myth #1: *The insanity defense is overused.*²⁷

All empirical analyses have been consistent:²⁸ the public at large²⁹ and the legal profession in particular³⁰—especially legislators³¹—“dramatically”³² and “grossly”³³ overestimate both the frequency and the success rate of the insanity plea,³⁴ an error that is “undoubtedly . . . abetted”³⁵ by the media’s “bizarre depictions,”³⁶ “distortion[s],”³⁷ and inaccuracies³⁸ in portraying mentally ill individuals charged with crimes.³⁹ Not even expert witnesses are immune from these myths.⁴⁰

Myth #2: *Use of the insanity defense is limited to murder cases.*⁴¹

In one jurisdiction where the data has been closely studied,⁴² contrary to expectations,⁴³ 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.⁴⁴ 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.⁴⁵ Remarkably, in at least one state (Oregon), the insanity defense is used strategically as a *diversion* mechanism in the cases of defendants charged with misdemeanors.⁴⁶

Myth #3: *There is no risk to the defendant who pleads insanity.*⁴⁷

It has been found that 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.⁴⁸ The same ratio is found when only homicide cases are considered.⁴⁹

Myth #4: *NGRI acquittees are quickly released from custody.*⁵⁰

One of the prevailing insanity defense myths is that insanity acquittees “spend much less time in custody than do defendants convicted of the same offenses.”⁵¹ Contrary to this myth, NGRI acquittees actually spend almost double the amount of time that defendants convicted of similar charges spend in prison settings and often face a lifetime of post-release judicial oversight.⁵² Most important for the perspectives of this presentation, the less serious the offense, the longer the gap is between the amount of time that an insanity acquittee serves and the amount of time that a convicted defendant serves. A California study, by way of example, has revealed that

those found NGRI of non-violent crimes were confined for periods over nine times as long.⁵³ Thus, it makes progressively less sense for a defendant to raise the insanity defense.⁵⁴ Remarkably, a National Mental Health Association report has found that as many as 86 percent of insanity pleas occur in nonviolent felonies and misdemeanors.⁵⁵

Of the entire universe of individuals found NGRI over an eight year period in one jurisdiction, only 15 percent had been released from all restraints;⁵⁶ 35 percent remained in full custody, and 47 percent were under partial court restraint following conditional release.⁵⁷

*Myth #5: NGRI acquittees spend much less time in custody than do defendants convicted of the same offenses.*⁵⁸

Contrarily, NGRI acquittees spend almost *double* the amount of time that defendants convicted of similar charges spend in prison settings,⁵⁹ and often face a lifetime of post-release judicial oversight.⁶⁰ Importantly, insanity acquittees' rearrest rate has been found to be statistically significantly lower than rates of convicted felons or of mentally disordered prisoners transferred for hospital treatment.⁶¹

*Myth #6: Most insanity defense trials feature "battles of the experts."*⁶²

Dramatic, televised cases lead the public to assume that *all* insanity defense cases involve a "battle of the experts" who "will say whatever they are being paid to say," especially if they are experts testifying on behalf of the defense.⁶³ The empirical reality is quite different. In a Hawaii survey, there was congruence on the question of insanity in over 90 percent of all cases, and in Oregon, the prosecutor's expert agreed with the defense expert in 80 percent of such cases.⁶⁴ These findings have been consistent since the 1950s.⁶⁵ In short, the common perception here is another myth.

*Myth #7: Criminal defense attorneys overuse the insanity defense as a means of "beating the rap."*⁶⁶

This in no way comports with reality. First, the level of representation made available in many jurisdictions to the population in question is significantly substandard, and the case law is replete with examples of lawyers who have totally "missed" the evidence that an insanity defense would be the appropriate defense strategy; this has been clear for decades.⁶⁷ Second, there is significant empirical that *some* attorneys proffer an insanity defense for independent strategic reasons: as a plea-bargaining chip, as a vehicle by which they can obtain mental health treatment for their clients, and even as a pre-emptive maneuver to avoid feared malpractice litigation.⁶⁸ Third, the best evidence tells us that juror bias exists independently of what defense lawyers do, and is "not induced by attorneys."⁶⁹

Myth #8: The insanity defense is a "rich man's" defense.

At the Congressional hearings that led to the adoption of the Insanity Defense Reform Act of 1984—sharply limiting the substantive scope of the defense and tightening procedures employed when the defense is pled⁷⁰—prominent U.S. senators characterized the defense as a “rich man’s defense.”⁷¹ This allegation has always been a “textbook parody of empirical and behavioral reality.”⁷² The defense is, rather, disproportionately used in cases involving indigent defendants.⁷³ But this myth persists, in significant part, because of the vividness heuristic: most high-profile cases involving the insanity defense are cases that are the focus of exaggerated media attention, thus creating the illusion that these cases are reflective of the entire universe of insanity cases, or even the entire universe of all cases.⁷⁴

Myth #9: *Criminal defendants who plead insanity are usually faking.*⁷⁵

This is perhaps the oldest of the insanity defense myths, and is one that has bedeviled American jurisprudence since the mid-19th century.⁷⁶ It continues to be reflected contemporaneously on a regular basis in prosecutorial summations,⁷⁷ especially in cases in which the defendant’s appearance does not comport with “ordinary common sense” characterizations of insanity.⁷⁸ Courts profess their inability to determine whether pleas of insanity are real or feigned.⁷⁹

The empirical data is radically different. 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),⁸⁰ and in only three cases was the diagnostician unwilling or unable to specify the nature of the patient’s mental illness.⁸¹ The most comprehensive multi-state survey reveals that 84 percent of those acquitted by reason of insanity carried a diagnosis either of schizophrenia or other major mental disorder.⁸²

2 From the Perspective of Therapeutic Jurisprudence⁸³

Therapeutic jurisprudence “asks us to look at law as it actually impacts people’s lives”⁸⁴ and focuses on the law’s influence on emotional life and psychological well-being.⁸⁵ The ultimate aim of therapeutic jurisprudence is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential *while not subordinating due process principles*.⁸⁶ There is an inherent tension in this inquiry, but David Wexler clearly identifies how it must be resolved: The law’s use of “mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns.”⁸⁷ Again, it is vital to keep in mind that

“An inquiry into therapeutic outcomes does not mean that therapeutic concerns ‘trump’ civil rights and civil liberties.”⁸⁸ In its aim to use the law to empower individuals, enhance rights, and promote well-being, therapeutic jurisprudence has been described as “a sea-change in ethical thinking about the role of law . . . a movement towards a more distinctly relational approach to the practice of law . . . which emphasizes psychological well-being over adversarial triumphalism.”⁸⁹

In a series of earlier writings, I have concluded that, in the context of therapeutic jurisprudence, the insanity defense is therapeutic,⁹⁰ that the substantive standard and procedural rules actually do matter,⁹¹ that current post-acquittal rules that follow the U.S. Supreme Court’s dictates in *Jones v. United States* are anti-therapeutic,⁹² and that therapeutic jurisprudence principles must be more rigorously applied to issues involving post-acquittal institutionalization and community monitoring.⁹³ I believe that it is only through the use of therapeutic jurisprudence that we can seek to eradicate the “irrational prejudice based predominantly upon stereotype, myth, superstition and deindividualization” that is at the core of our insanity defense policies.⁹⁴

Some 20 years ago, in a book-length examination of the insanity defense, I concluded:

[W]e must rigorously apply therapeutic jurisprudence principles to each aspect of the insanity defense. We need to take what we learn from therapeutic jurisprudence to strip away sanist behavior,⁹⁵ pretextual reasoning⁹⁶ and teleological decision making⁹⁷ from the insanity defense process. This would enable us to confront the pretextual use of social science data in an open and meaningful way.⁹⁸

The myths discussed in this chapter are textbook examples of sanism, pretextuality and teleological thinking. It is only through the use of therapeutic jurisprudence that we can hope to “expose pretextuality and strip bare the law’s sanist facade”⁹⁹ by rebutting the myths that continue to dominate insanity defense jurisprudence.

3 Conclusion

Some years ago, in reviewing the evidence surrounding these myths, two colleagues and I suggested that:

Clearly, this data reflects the extent to which myths have permeated the debate [on] the insanity defense, and the extent to which much of the new

legislation represents “an unnecessary and extreme reaction to a group of serious misconceptions.” . . . What is clear is that “each and every one of the false premises” raised in support of abolition or evisceration of the defense is disproved by the evidence.¹⁰⁰

Nothing that has transpired in the intervening three decades has caused him to reconsider this conclusion.

Notes

1. Perlin, “Unpacking the Myths,” 603.
2. Perlin, *The Jurisprudence of the Insanity Defense*.
3. Perlin, *The Hidden Prejudice*, 224.
4. Perlin, “‘Wisdom Is Thrown into Jail,’” 357.
5. See, e.g., Shannon, “The Time Is Right to Revise the Texas Insanity Defense,” 81n119 (discussing how social science research has dispelled myths about the insanity defense); Ewing and McCann, *Minds on Trial*, 239 (same); Harris, “Rotten Social Background and the Temper of the Times,” 144 (discussing research reported in Perlin, “Unpacking the Myths,” and Perlin, “‘The Borderline Which Separated You from Me’”).
6. Hawkins-León, “‘Literature as Law,’” 405.
7. Borum and Fulero, “Empirical Research on the Insanity Defense and Attempted Reforms.”
8. “Heuristics” is a cognitive psychology construct that refers to the implicit thinking devices that individuals use to simplify complex, information-processing tasks. See, e.g., Perlin, “Psychodynamics and the Insanity Defense”; see generally Saks and Kidd, “Human Information Processing and Adjudication.” The use of heuristics frequently leads to distorted and systematically erroneous decisions and causes decision makers to “ignore or misuse items of rationally useful information” (Perlin, “Are Courts Competent to Decide Questions of Competency?,” 966n46, quoting Carroll and Payne, “The Psychology of the Parole Decision Process,” 21. For the most recent reconsideration of insanity defense myths through the heuristics filter, see Maryns, “The Interdiscursive Construction of Irresponsibility as a Defence Strategy in the Belgian Assize Court.”
9. Schauer, “Do Cases Make Bad Law?,” 895, as discussed in Perlin, “‘Everybody Is Making Love/Or Else Expecting Rain,’” 492.
10. Rosenhan, “Psychological Realities and Judicial Policy,” 13.
11. See, e.g., Koehler and Shaviro, *Veridical Verdicts*, 264–65; Perlin, “Psychodynamics and the Insanity Defense,” 39–53; Lieberman and Krauss, “The Effects of Labeling, Expert Testimony, and Information Processing Mode on Juror Decisions in SVP Civil Commitment Trials.” See also Roberts and Golding, “The Social Construction of Criminal Responsibility and Insanity,” 372 (jurors’ pre-existing attitudes toward insanity defense strongest predictor of individual verdicts).

12. Ordinary common sense regularly pervades the judiciary in deciding cases involving individuals with mental disabilities. See Perlin, “The Borderline Which Separated You from Me,” 1417.

13. *Ibid.*, 1377.

14. Perlin, “And I See Through Your Brain,” 8n84.

15. Perlin, “The Borderline Which Separated You from Me,” 1408.

16. See generally Perlin and Cucolo, *Mental Disability Law*, §14–3.2.

17. See generally Caplan, *The Insanity Defense and the Trial of John W. Hinckley, Jr.*

18. For an excellent consideration of all myths, see Bredemeier, “Hollow Verdict,” 730–45.

19. Rodriguez, LeWinn, and Perlin, “The Insanity Defense Under Siege,” 400. Among the most important empirical studies are Callahan et al., “The Volume and Characteristics of Insanity Defense Pleas,” and Steadman, “Before and After Hinckley.” For more recent studies, see e.g. Cirincione, Steadman, and McGreevy, “Rates of Insanity Acquittals and the Factors Associated with Successful Insanity Pleas”; Linhorst, “The Impact of System Design on the Characteristics of Missouri’s Insanity Acquittes”; Studebaker, “Evaluating the Insanity Defense”; Skeem and Golding, “Describing Jurors’ Personal Conceptions of Insanity and Their Relationship to Case Judgment.”

20. For early comprehensive overviews, see Steadman, “Empirical Research on the Insanity Defense”; Keilitz, “Researching and Reforming the Insanity Defense”; Steadman, “Mental Health Law and the Criminal Offender.”

21. See Morse, “Excusing the Crazy,” 795–801 (characterizing the arguments based on some of these myths as “insubstantial objections to the insanity defense”).

22. Perlin, “Whose Plea Is It Anyway?”, 6. See Faigman et al., *Modern Scientific Evidence*, § 9:1 n.8, citing Perlin, *Jurisprudence*, 108–14.

23. See, for example, Bloechl et al., “An Empirical Investigation of Insanity Defense Attitudes”; Tygart, “Public Acceptance/Rejection of Insanity”; Skeem et al., “Venirepersons’s Attitudes Toward the Insanity Defense”; Loudon and Skeem, “Constructing Insanity.”

24. See Daftary-Kapur et al., “Measuring Knowledge of the Insanity Defense.”

25. See e.g., *State v. Moore*, 525 So. 2d 870 (Fla. 1988) (reversible error where trial judge failed to excuse juror who said his beliefs about insanity defense would probably prevent him from following court’s instructions on issue); compare *Boblett v. Commonwealth*, 396 S.E.2d 131 (Va. Ct. App. 1990) (no abuse of discretion where trial court failed to strike for cause juror whose statements indicated he would “have difficulty” acquitting defendant in insanity defense case); *State v. Pierce*, 109 N.M. 596, 788 P.2d 352 (1990) (juror’s misrepresentations as to his own mental illness did not require new trial), but see at 365 (Montgomery, J., dissenting) (charging that juror bias tainted trial where he “displayed a willingness to translate [his] feelings [about mental illness] into a premature judgment about defendant’s guilt”); see also *People v. Seuffer*, 582 N.E.2d 71, 77–79 (Ill. 1991) (prospective jurors’ views that insanity defense was “overused” did not warrant

removal for cause); compare *Noe v. State*, 586 So. 2d 371, 374–79 (Fla. Dist. Ct. 1991) (reversible error where trial judge refused to grant defendant’s “for cause” challenge to jurors who indicated that they had “philosophical problems” with the insanity defense).

26. See Finkel et al., “Insanity Defenses,” 80, 92. See also, e.g., Finkel and Slobogin, “Insanity, Justification and Culpability”; Finkel, “Culpability and Commonsense Justice.”

27. Perlin and Cucolo, *Mental Disability Law*, §14–2.1; see also Perlin, *Jurisprudence*, 108–09.

28. For the most comprehensive studies, see Hans, “An Analysis of Public Attitudes Toward the Insanity Defense,” and Cirincione and Jacob, “Identifying Insanity Acquittals.” See also Cirincione et al., “Rates of Insanity Acquittals and the Factors Associated with Successful Insanity Pleas,” and Breheney et al., “Gender Matters in the Insanity Defense,” 97.

29. Pasewark et al, “The Insanity Plea in New York State, 1965–1976.” See also Jeffrey and Pasewark, “Altering Opinions about the Insanity Plea”; Pasewark and Seidenzahl, “Opinions Concerning the Insanity Plea and Criminality Among Mental Patients.”

30. Pasewark and Craig, “Insanity Plea,” 415, 436–40. See also McGinley and Blau, “The Success of the Insanity Plea.”

31. Pasewark and Pantle, “Insanity Plea” (1979) (in response to survey, one state’s legislators estimated that 4400 defendants pled insanity and that 1800 were found NGRI in a sample time period; in reality, 102 defendants asserted the defense, and only one was successful).

32. Pasewark et al, “The Insanity Plea in New York State,” 186.

33. Pasewark and Pantle, “Insanity Plea,” 223.

34. In New Jersey, for instance, in fiscal 1982, of the more than 32,500 cases handled by the state office of the public defender, NGRI pleas were entered only in 50 cases, and were successful 15 times (or about 120 of 1 percent of all cases). See Rodriguez, LeWinn, and Perlin, “The Insanity Defense Under Siege,” 401. A later study has suggested that, while plea incidence is fairly uniform in all jurisdictions, the plea’s success rate is “quite variable.” See Pasewark and McGinley, “Insanity Plea.” A comprehensive multi-state survey reveals a plea incidence of slightly less than one percent, and a success rate of 26 percent. See Callahan et al., “The Volume and Characteristics of Insanity Defense Pleas,” 336.

35. Rodriguez, LeWinn, and Perlin, “The Insanity Defense Under Siege,” 401.

36. Steadman and Coccozza, “Selective Reporting and the Public’s Misconceptions of the Criminally Insane,” 532. See also Nairn, Coverdale, and Claasen, “What Is the Role of Intertextuality in Media Depictions of Mental Illness?”

37. Steadman and Coccozza, “Selective Reporting and the Public’s Misconceptions of the Criminally Insane,” at 523.

38. *Ibid.*, 532.

39. On the significance of public misperceptions in this area generally, see Cavanaugh and Rogers, “Convergence of Mental Illness and Violence.” See generally

Perlin, “Unpacking the Myths,” 18–20, 108–14; Perlin, “After Hinckley”; Steadman, “Before and After Hinckley”; Silver, Cirincione, and Steadman, “Demythologizing Inaccurate Perceptions of the Insanity Defense”; Nevins-Saunders, “Not Guilty As Charged,” 1423n15 (citing statistics). For an important case that carefully examines the roots of the empirical and behavioral myths, see *United States v. Denny-Shaffer*, 2 F.3d 999 (10th Cir. 1993), discussed in this context in Perlin, “Half-Wracked Prejudice Leaped Forth.”

40. On the ways that expert witnesses misunderstand the relevant principles, see R. Rogers et al., “Forensic Psychiatrists’ and Psychologists’ Understanding of Insanity.” On the varying attitudes of public defenders and prosecutors, see Jordan and Myers, “Attorneys, Psychiatrists, and Psychologists.”

41. Perlin and Cucolo, *Mental Disability Law*, § 14–3.2.2; see also Perlin, *Jurisprudence*, 109.

42. For a survey of those jurisdictions where significant empirical data has been developed, see Boehnert, “Psychological and Demographic Factors Associated with Individuals Using the Insanity Defense,” 30n3. See also Petrila, “The Insanity Defense and Other Mental Health Dispositions in Missouri”; J. Rogers et al., “Women in Oregon’s Insanity Defense System.”

43. See generally *State v. Lucas*, 152 A.2d 50, 77 (N.J. 1959) (Weintraub, C.J., concurring).

44. Rodriguez, LeWinn, and Perlin, “The Insanity Defense Under Siege,” 402. Among the other underlying charges were writing false checks, carrying an unloaded starter’s pistol, and drug use (*ibid.*). See also *Jones v. United States*, 463 U.S. 354, 359 (1983) (attempted petit larceny).

For an earlier survey of the same jurisdiction, see Singer, “Insanity Acquittal in the Seventies.” A comprehensive multi-state survey reveals that 13.6 percent of those pleading insanity were charged with murder, while another 36 percent were charged with assault or other crimes of violence. See Callahan et al., “The Volume and Characteristics of Insanity Defense Pleas,” 336.

A more recent Missouri study found that only 13.3 percent of all NGRIs in that state had been charged with homicide. See Dirks-Linhorst and Kondrat, “Tough on Crime or Beating the System,” 134.

45. Steadman et al., “Factors Associated with a Successful Insanity Plea,” 402–03. See also Boehnert, “Psychological and Demographic Factors” (NGRI acquittees found to commit less heinous offenses than similar samples consisting of defendants who were unsuccessful in their reliance on defense and those who were evaluated for defense and ultimately chose to enter into plea bargain agreements). Cf. Packer, “Insanity Acquittals in Michigan 1969–1983” (since Michigan amended its insanity defense statutes to create a “guilty but mentally ill” verdict, while there has been little change in the total number of insanity acquittals, the number of such verdicts in homicide cases has decreased while the number in cases involving less serious offenses has increased).

46. Schaefer and Bloom, “The Use of the Insanity Defense as a Jail Diversion Mechanism for Mentally Ill Persons Charged with Misdemeanors.”

47. Perlin and Cucolo, *Mental Disability Law*, §14–3.2.3; see also Perlin, *Jurisprudence*, 109.

48. Rodriguez, LeWinn, and Perlin, “The Insanity Defense Under Siege,” 401–02. A possible explanation for this is discussed in Perlin, “The Supreme Court, the Mentally Disabled Criminal Defendant, and Symbolic Values”; see also Steadman, “Predicting Dangerousness among the Mentally Ill.”

49. Rodriguez, LeWinn, and Perlin, “The Insanity Defense Under Siege,” 402n32.

50. Perlin and Cucolo, *Mental Disability Law*, §14–3.2.4; see also Perlin, *Jurisprudence*, 109–10.

51. See generally Perlin, “The Borderline Which Separated You from Me.”

52. Perlin, “Unpacking the Myths,” 651 (citing empirical results reported in Rodriguez, LeWinn & Perlin, “The Insanity Defense Under Siege,” 403–04, and Pogrebin et al., “Not Guilty By Reason of Insanity,” 240).

53. Perlin, “‘The Borderline Which Separated You from Me,’” 1405 (discussing research reported in Steadman et al., *Before and After Hinckley*, 94).

54. See, e.g., Vitro, “Promoting Therapeutic Objectives Through LB 518,” 844 (1993) (“[A]n individual in need of treatment may fail to assert the insanity defense because a criminal sentence would be of definite and frequently shorter duration.”).

55. See Nevins-Saunders, “Not Guilty As Charged,” at 1454n72 (discussing National Commission on the Insanity Defense, “Myths & Realities”).

56. Rodriguez, LeWinn, and Perlin, “The Insanity Defense Under Siege,” 403

57. *Ibid.*

58. See Perlin and Cucolo, *Mental Disability Law*, §14–3.2.5; see also Perlin, *Jurisprudence*, 110–11.

59. Rodriguez, LeWinn, and Perlin, “The Insanity Defense Under Siege,” 403–04. See also Harris et al., “Length of Detention in Matched Groups of Insanity Acquittes and Convicted Offenders”; Breheny et al., “Gender Matters in the Insanity Defense,” 97; *Archuleta v. Hedrick*, 365 F.3d 344 (8th Cir. Mo. 2004), cert. denied, 543 U.S. 999 (2004) (prisoner was not entitled to habeas relief on grounds that his detention was longer than if he had been found guilty and completed his sentence).

60. Rodriguez, LeWinn, and Perlin, “The Insanity Defense Under Siege,” 403–04.

61. Silver et al., “Follow-Up after Release of Insanity Acquittes, Mentally Disordered Offenders, and Convicted Felons.” Compare Bieber et al., “Predicting Criminal Recidivism of Insanity Acquittes” (NGRI escapees have lower rearrest rate than NGRI acquittes who are released from hospitalization); see also Rice et al., “Recidivism Among Male Insanity Acquittes.”

62. See Perlin, *Jurisprudence*, 112–13.

63. Moore, “Learning about Forensics.”

64. J. Rogers et al., “Insanity Defense”; Fukunaga et al., “Insanity Plea,” 326.

65. Acheson, “*McDonald v. United States*,” 589.

66. See Perlin, *Jurisprudence*, 113–14.

67. See Perlin, “Fatal Assumption”; Perlin, *Mental Disability and the Death Penalty*, 123–34.

68. Pasewark and Craig, “Insanity Plea.”

69. Tanford and Tanford, “Better Trials Through Science,” 748–49.

70. See Perlin, *Jurisprudence*, 95–100.

71. *Ibid.*, 18 (citing Senate hearings).

72. *Ibid.*, 19.

73. See Hearings on Bills to Amend Title 18 to Limit the Insanity Defense Before the S. Judiciary Comm., 97th Cong., 2d Sess. 80 (testimony of Dr. Henry Steadman); see also National Commission on the Insanity Defense, “Myths & Realities,” at 14, 22–23 (criticizing as unfounded the proposition that the insanity defense is a “rich-man’s defense”).

74. Perlin, “His Brain Has Been Mismanaged with Great Skill,” 903. But see *ibid.*, speculating “that there may be some truth to this myth in the case of insanity pleaders who seek to use neuroimaging evidence in support of their plea, in large part because of the extra expenses that would be incurred in such cases.” There is no empirically reliable database on this cohort of cases at this time.

75. Perlin and Cucolo, *Mental Disability Law*, §14–3.2.6; see also Perlin, *Jurisprudence*, 111–12.

76. See Isaac Ray, *A Treatise on the Medical Jurisprudence of Insanity*, 243; Clinton, *Defense of Insanity in Criminal Cases*; and generally Perlin, “The Supreme Court, the Mentally Disabled Criminal Defendant, and Symbolic Values.” For a stark case example, see *State v. Inglis*, 698 A.2d 1296, 1298 (N.J. Law Div. 1997) (“the insanity defense has a high potential for serving as an instrument of pretext”) (citing to no authority).

77. For a case example, see *People v. Lundell*, 538 N.E.2d 186, appeal denied, 545 N.E.2d 122 (Ill. 1989) (prosecutor’s closing statement that defendant had fabricated insanity defense with aid of his counsel was reversible error); see also *Commonwealth v. Goulet*, 522 N.E.2d 417 (Mass. 1988); *Winiarz v. State*, 752 P.2d 761 (Nev. 1988), appeal after remand, 820 P.2d 1317 (Nevv. 1991); *Fulghum v. Ford*, 850 F.2d 1529 (11th Cir.), cert. denied, 488 U.S. 1014 (1989); *People v. Christopher*, 566 N.Y.S.2d 167 (A.D. 1991), appeal denied, 573 N.Y.S. 2d 473 (1991).

78. On the question of whether or not defendant’s insanity comports with “ordinary common sense,” see *People v. Tylkowski*, 524 N.E.2d 1112, appeal denied, 530 N.E.2d 260 (Ill. 1988); see generally Perlin, “Psychodynamics and the Insanity Defense”; Perlin, “‘The Borderline Which Separated You from Me.’”

79. See, e.g., *People v. Marshall*, 61 Cal.Rptr.2d 84, 100 (1997) (“[a]n appellate court is in no position to appraise a defendant’s conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer temper”).

80. Rodriguez, LeWinn, and Perlin, “The Insanity Defense Under Siege,” 404; see also Steadman, *supra* note 21.

81. Rodriguez, LeWinn, and Perlin, “The Insanity Defense Under Siege,” 404. For a relevant empirical inquiry, see Warren et al., “Criminal Offense, Psychiatric Diagnosis, and Psycholegal Opinion.” On the question of reliability of forensic evaluations, see Gowensmith, Murrie, and Boccaccini, “How Reliable Are Forensic Evaluations of Legal Sanity?” (reliability may be poorer than the field has tended to assume; when judges disagreed with the prevailing forensic opinion, it was more often to find defendants legally sane, rather than insane).

82. Callahan et al, “The Volume and Characteristics of Insanity Defense Pleas,” 336

83. This section is largely adapted from Perlin and Lynch, “‘Had to be Held Down by Big Police.’”

84. Winick, “Foreword,” 535.

85. See Wexler, “Practicing Therapeutic Jurisprudence.”

86. See Perlin, “‘And My Best Friend, My Doctor, Won’t Even Say What It Is I’ve Got,’” 751; Perlin, “‘Everybody Is Making Love/Or Else Expecting Rain,’” 510n139.

87. See Wexler, “Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship,” 21; see also Wexler, “Applying the Law Therapeutically.”

88. Perlin, “A Law of Healing,” 412; Perlin, “‘Where the Winds Hit Heavy on the Borderline,’” 782.

89. Brookbanks, “Therapeutic Jurisprudence,” 329–30; see also Winick, “Overcoming Psychological Barriers to Settlement,” and Winick and Wexler, “The Use of Therapeutic Jurisprudence in Law School Clinical Education,” 605–06.

90. Perlin, *Jurisprudence*, 289–95.

91. *Ibid.*, 295–97.

92. *Ibid.*, 297–99.

93. *Ibid.*, 299–300. See generally Perlin, “‘God Said to Abraham/Kill Me a Son,’” 6–62.

94. Perlin, “‘The Borderline Which Separated You from Me,’” 1378.

95. Sanism is an irrational prejudice based predominantly upon stereotype, myth, superstition, and deindividualization. See e.g., *ibid.*

96. This refers to the ways that courts often accept testimonial dishonesty and engage in dishonest decision making in cases involving criminal defendants with mental disabilities. See Perlin, *Jurisprudence*, 395–96.

97. On teleology and the insanity defense, see e.g. Perlin, “‘The Borderline Which Separated You from Me,’” 1414. See also Perlin, “‘Half-Wracked Prejudice Leaped Forth,’” 30: “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 decisionmaking.”

98. Perlin, *Jurisprudence*, 443.

99. Perlin, “‘And My Best Friend, My Doctor, Won’t Even Say What It Is I’ve Got,’” 751.

100. Rodriguez, LeWinn, and Perlin, “The Insanity Defense Under Siege,” 425.

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