

(Dis)articulating Morality and Myth
An Ideological History of the Insanity Defense

by

Andrea Lisa Alden

A Dissertation Presented in Partial Fulfillment
of the Requirements for the Degree
Doctor of Philosophy

Approved October 2013 by the
Graduate Supervisory Committee:

Maureen Goggin, Chair
A. Cheree Carlson
Patricia Roberts-Miller

ARIZONA STATE UNIVERSITY

May 2014

ABSTRACT

Both law and medicine are interpretive practices, and both systems have historically worked in tandem, however ineffectively or tumultuously. The law is, by social mandate, imagined as a "fixed" system of social control, made up of rules and procedures grounded in a reality that is independent of language; although we know that law is both revised and interpreted every day in courtroom practice, to imagine the law, the system that keeps bad people behind bars and good people safe, as indeterminate or, worse, fallible, produces social anxieties that upend our cultural assumptions about fairness that predate our judicial system. This imaginary stability, then, is ultimately what prevents the legal system from evolving in consonance with developments in the mental health professions, as inadequate as that discursive system may be for describing and categorizing the infinite possibilities of mental illness, specifically where it is relevant to the commission of a crime. Ultimately, the insanity plea raises the specter of the endless interpretability of the law and mental illness and, therefore, the frailty of the justice system, which makes each insanity defense trial emblematic of larger social anxieties about social control, fairness, and susceptibility to mental illness or the actions of mentally ill people.

TABLE OF CONTENTS

CHAPTER	Page
1 CAN'T WE ALL JUST GET ALONG? THE DYSFUNCTIONAL COLLABORATION OF LAW AND PSYCHIATRY	1
2 FRAMING THE ISSUE: (DIS)ARTICULATING MORALITY AND MYTH.....	15
3 THE TRIAL OF DANIEL MCNAUGHTAN: "KNOWING" RIGHT FROM WRONG AND THE ORIGINS OF WESTERN INSANITY DEFENSE JURISPRUDENCE.....	30
4 LATE 19TH CENTURY INSANITY DEFENSE JURISPRUDENCE: THE PARSONS- DAVIS RULE, "CONTROL," AND THE "IRRESISTIBLE IMPULSE" TEST	56
5 MID 20TH CENTURY INSANITY DEFENSE JURISPRUDENCE: DURHAM V. UNITED STATES, THE "PRODUCT" TEST, AND THE AMERICAN LAW INSTITUTE MODEL PENAL CODE.....	74
6 HINCKLEY VS. UNITED STATES AND THE INSANITY DEFENSE REFORM ACT OF 1984	90
7 CONCLUSION.....	130
References	136

CHAPTER 1

CAN'T WE ALL JUST GET ALONG? THE DYSFUNCTIONAL COLLABORATION OF LAW AND PSYCHIATRY

Medicine and law are most likely to intersect in court cases involving mentally ill criminal defendants. These cases can include competency hearings: in a criminal trial, the capacity of a defendant to stand trial might be debated, or in a civil hearing, the ability of an individual to live independently might be argued. Nowhere is the conflict between these two systems of discourse more intense than in cases in which an insanity defense is raised, not because of the horrific nature of such cases, as they most often involve non-violent, rather mundane crimes, but because of the long-standing battle of both the discipline of law and the field of psychiatry to attain widespread public legitimacy, as well as the fear and loathing of the mentally ill that is as old as humankind.

The insanity plea is a rhetorical issue. A defendant who invokes an insanity plea is required to persuade a jury that the established criteria for a Not Guilty by Reason of Insanity verdict have been met, while the criteria for determining what constitutes legal insanity have been defined and revised throughout history rhetorically, that is, through language and arguments about that language; the major landmarks in the history of the argument over these criteria are the focal point of this dissertation. The law itself is a rhetorical construct that is applied rhetorically, as are the diagnostic criteria for mental illness; in other words, at every step of any legal or diagnostic decision, texts are being interpreted, whether they are people, actions, symptoms, laws, or precedents. When these two rhetorical processes must work together in the case of an insanity plea, multiple processes of interpretation and persuasion take place, in what proves to be a very complex social issue. This dissertation attempts to interpret this issue, which is itself a complicated entanglement of interpretations. The interaction⁴ of these two very different interpretive traditions creates a fissure in the facade of stability, which makes evident those anxieties over how to interpret human behavior as a text within two discursive systems, law and psychiatry, both of which themselves are open to interpretation.

It is well established that the practice of law is interpretive¹; in the reading, interpretation, and deployment of various, cases, statutes, and other documents in each new case that comes to a courtroom, lawyers, judges, and jurors engage in this rhetorical process. And yet that interpretation takes place within the constraints of a system, a community bound by rules, obfuscating to outsiders because of its complexity, and hindered by the perception by at least some that many of its practitioners are less than ethical. And yet, the system of law is perceived as necessary for the order of society because it is understood as the arbiter of justice, and as such, a stable entity that operates objectively. Furthermore, the basis of our legal system as we know it today retains its roots in principles determined sometimes centuries ago, some of which are adhered to and applied almost without alteration still today. It is this apparent rigidity that impedes the kind of rhetorical intervention that might allow for new definitions of mental illness for legal purposes. Law is a system of language; laws themselves are made up of words, and those words are interpreted, applied, and revised every day in courtroom practice to real-life situations involving accused criminals, victims of crimes, expert and lay witnesses, judges, lawyers, and jurors. To understand this process as rhetorical is to understand it as a process by which “community and culture are established, maintained, and transformed” (White, “Law as Rhetoric, Rhetoric as Law” 1).

It is also arguable that psychiatry, specifically the diagnosis of mental illness, is an interpretive practice. This interpretation takes place within the constraints of its own system, also a community bound by rules, complex to outsiders, and saddled with a centuries-old perception that it is not a ‘real’ science. For well over 200 years, medical professionals with an interest in ‘diseases of the mind’ have battled public perceptions that mental illness is not a real illness, rather an indication of moral failure, and that doctors who treat the mentally ill are ‘quacks’ peddling in voodoo and not legitimate practitioners of scientifically based medicine. The result of psychiatry’s fight to attain widespread public acceptance was the development of its ‘bible,’ the *Diagnostic and Statistical Manual of Mental Disorders*, which has gone through multiple revisions since its first edition was published in 1952. And, similarly to the law, medicine, as a discipline, is

¹ The extensive work of scholars like James Boyd White takes up this issue; Sarat and Kearne’s collection, *The Rhetoric of Law*, also explores this issue in depth.

seen as necessary to the health of society and is also presumed to be a stable entity whose standards can be applied objectively; even a psychiatrist should be able to, in theory, assess, diagnose, and treat a patient with symptoms of mental disease the same way a an oncologist would approach a patient with cancer or a family physician would approach an ear infection. The fact that the diagnostic manual has and continues to be revised is evidence of the unstable nature of the categories it has created, revised, and eliminated over the past several decades; that its categories are constructed and debated entirely on the basis of language is evidence of its rhetoricity.

These two unstable discursive systems usually encounter one another on the 'turf' of the law, namely the courtroom; in fact, 'insanity' is not an official psychiatric diagnosis (it has never appeared in any version of the Diagnostic and Statistical Manual), but rather, it is a legal term "with a definition that represents a moral conception of insanity and responsibility" (Erickson & Erickson 2). Even so, since the 18th century, 'medical' experts have been relied upon in trials to assess the mental capacity of defendants, either on behalf of the defense to claim that the defendant was 'insane' at the time of the crime and therefore not criminally responsible, or on behalf of the prosecution to assert the opposite. The battle over who gets to decide the diagnosis in the courtroom has existed since mental illness has been utilized as a defense against punishment by law. In our legal system and that of its forebears, the jury is the ultimate decider in all criminal trials for the purpose of allowing an accused 'due process' and preventing abuses of power by the corrupt. While jurors are typically exposed to the testimony of experts asserting radically different claims about a given defendant's mental state, they are also subjected to the testimony of many non-experts making their own claims about the behaviors they observed in the defendant. Can a jury of laypersons make a reasonable determination of the mental capacity of a defendant, particularly if their only sources of information with which to make that judgment are conflicting expert testimony and non-expert testimony?

One of the major problems in insanity defense jurisprudence is the fact that most people believe that they are, in fact, capable of making such a judgment accurately; this is what legal scholar and mental disability law reform advocate, Michael Perlin, calls the "Ordinary Common

Sense” (OCS) heuristic. According to Perlin, “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’” (*The Hidden Prejudice* 18), even though there is almost no consensus among the public, including legal and psychiatric professionals, as to what constitutes legal insanity. As expert psychiatric witnesses are typically called to testify in insanity defense trials, the embrace of and reliance on their expertise in determining legal insanity has shifted throughout history in direct correlation with the general public’s acceptance of their discipline as either quackery or legitimate science.

While Sigmund Freud, the father of psychoanalysis, has had the most widely known influence on modern thought about psychology and child development, it is his contemporary, Emil Kraepelin, whose “descriptive efforts are the basis for the current approach to the identification of mental disorders” in terms of providing systematic and formulaic diagnostic procedures that ultimately led to the Diagnostic and Statistical Manual of Mental Disorders as we know it today (Kirk & Kutchins 4-5). The development of the DSM-III in 1980 is viewed as one of the most significant milestones in modern American psychiatry, both in fulfilling the scientific aspirations of the field and providing previously lacking consensus in the diagnostic process (6). The DSM-III was widely adopted and acknowledged by mental health professionals worldwide and thus became the authoritative text on the diagnosis of mental illness, not necessarily because it was infallible as a scientific text, but because it was the only comprehensive guide of its kind available, and its proponents asserted its authority in opposition to Freudian psychoanalysis based on theory to the new “facts” derived from scientific experimentation (7). In fact, the DSM-III elaborated not a single new disorder, treatment, or explanation of mental illness, openly avoiding “etiological explanations for mental disorders that did not already have widely recognized, well-established organic causes” (7).

The motives for this so-called revolution, then, appear to be as much political as they were scientific, based on a desire to capitalize on the potential of the multibillion dollar industry of mental health and wrest control over that industry from other professions (7-8). Whereas prior to the 1970’s, most of the mental health industry was confined to state funded public institutions

seen as the 'last resort' for the poor, elderly, and mentally ill admitted via involuntary commission who endured lengthy commitment, Reagan-era deinstitutionalization combined with greater societal acceptance of mental health as a legitimate concern meant that the last three decades of the 20th century witnessed an explosion of services in multiple arenas funded by diverse sources for clients voluntarily seeking assistance for a variety of 'disorders' that didn't even exist prior to the DSM-III (8-9). According to Kirk and Kutichins, psychiatrists had two primary reasons for asserting their leadership in the development of an official language about mental disorders: first, the widespread acceptance of outpatient therapy that began in the mid-twentieth century led to fierce competition between psychiatrists and other mental health professionals, such as psychologists, social workers, and family counselors; as mental health practice became less rooted in medicine, the work of psychiatrists became indistinguishable from the work of their aforementioned counterparts, and second, psychiatry retained its marginal status within the medical profession as a whole because of its dubious roots in 'science'; the project of 'biopsychiatry' was to discern the "physiological, genetic, and chemical bases for mental disorders and the development and use of psychopharmacological agents for treatment" in order to "secure a more powerful base for psychiatry within the jurisdiction of both medicine and mental health" (9-10). The DSM-III became the "rubric for discourse about mental illness" (10) and thus made a claim for psychiatry's legitimacy within the broader community. For the purposes of this dissertation, the establishment of this legitimacy impacts the use of the DSM in the judicial system when psychiatrists are called upon to testify as to a defendant's mental capacity, specifically in criminal trials in which a plea of insanity is raised. As James Boyd White explains, law is "an inherently unstable structure of thought and expression...built upon a distinct set of dynamic and dialogic tensions," a primary example of which is the tension "between legal language and the specialized discourses of other fields" ("An Old Fashioned View" 1). The tension between legal language and the discourse of psychiatry is at its most dramatic in insanity defense cases.

The modern day iteration of the insanity defense in the American judicial system retains its roots in English Common Law. The earliest recorded insanity defense statute came to be

known as the “wild beast” test, which asked if the accused had “no more capacity for reason than a wild beast,” reflecting a particular cultural attitude about mentally ill people as little more than animals. From the trial of Daniel McNaughtan² emerged what has come to be referred to as the “M’Naghten Rule(s),” also commonly known as the “right from wrong” test. After Daniel McNaughtan attempted to assassinate the British Prime Minister, whom he believed was responsible for his personal misfortunes, but instead mistakenly shot the Prime Minister’s secretary who later died, the House of Lords established the formulation known generally as the “right from wrong” test for determining insanity as a criminal defense, which was adopted with almost no modification by the United States’ judiciary.

Following Aristotle’s tradition of rhetoric as a heuristic for discovery (rather than distortion) of truth, this dissertation will provide a rhetorical history of the insanity defense through each of the major shifts defined by attempts to clarify the standards and their application in legal practice, all of which hinged upon little more than a single word or concept, the ineffability of which ultimately eluded (or perhaps elided) the best efforts of those experts, judicial and medical alike. The catalytic events, in this case, the court cases and legal decisions, for these new iterations will be explained, along with the concurrent public response to the cases and decisions when available. Briefly, I outline each iteration of the defense, the order of which structures this dissertation.

Chapter two provides the theoretical frame for my analysis. Following the work of Ernesto Laclau and Chantal Mouffe and others who extend their theories in rhetorical scholarship, I rely primarily on articulation theory and its corresponding concept, antagonism, to explain law and psychiatry as discursive structures. Finally, Sharon Crowley’s concept of ideologic, which is also an extension of articulation theory, is used to frame my primary argument, that law is a hegemonic discourse that resists rhetorical intervention, and that cultural mythology, both about the judicial system and about mental illness and mentally ill criminal defendants, is what sustains that resistance.

² Spelling varies; commonly spelled “M’Naghten;” spelling for the purposes of this dissertation derived from Moran’s primary examination of the case which relies on McNaughtan’s only known signature on an extant document.

Chapter three explains, in brief, the history and origin of insanity as a cultural concept and how it came to be a central argument in Western law. The legal concept of *mens rea* (literally “evil mind”) refers to the mental component of a crime, in that in order to be held criminally responsible for one’s actions, a defendant must have intended the consequences of his behavior or at least known those consequences to be possible (Becker 41). In the trial of Daniel McNaughtan, the issue at stake, according to the court, was the cognitive capacity of the defendant. Without a minimum degree of cognitive capacity, in this case, the ability to know right from wrong (again, according to the court), it was decided that control, and therefore choice, was missing, and that in such a case, punishment would be unjust. From McNaughtan’s trial emerged what is still referred to as the ‘M’Naghten Rule(s),’ which has two components, either of which is considered a “complete” defense. The questions asked by the McNaughtan Rule are whether at the time the crime was committed, the defendant, as a result of mental disease or defect (these are important words also, and we will talk about them more later) was unable to know: 1) the nature and quality of the crime (the defendant is incapable of having *mens rea*), or 2) whether his actions were right or wrong (the defendant is incapable of knowing the moral basis of the law) (Becker 42). Both questions emphasize the defendant’s ability to “know” certain things and whether that knowledge, or lack thereof, was the result of a “mental disease or defect”; all of these determinations, from the very origin of the insanity defense, fall in the realm of the subjective and indeterminate, yet are deployed in legal discourse, which is (at least ideologically) assumed to be clear, fair, and equally applied to all citizens. It is easy to see how and why the defense has been fraught with conflict and controversy from its inception.

Chapter four discusses the next major evolution in the insanity defense, the Parsons-Davis rule, as McNaughtan became subject to criticism for its reductive tendencies because it failed to account for those persons who did indeed understand the nature of their criminal acts but were unable to control their actions. Here, the volitional rather than the cognitive capacity of the defendant was the issue, and as a result, many jurisdictions expanded McNaughtan to include what is commonly but misleadingly referred to as the “irresistible impulse” test (*Parsons v. State*, 1886; *Davis v. United States*,), which requires that: 1) a defendant have a serious mental illness,

2) the defendant's impulse resulted from that mental illness, and 3) there be no evidence of premeditation (Becker 43).

Chapter five reviews the evolution from Parsons-Davis, as the reductive tendencies of this new standard were also criticized. M'Naughtan required a complete lack of cognitive capacity, while the irresistible impulse test required a complete lack of volitional capacity. Advances in the mental health professions, even in the late 19th and early 20th centuries, demonstrated that the legal requirement of *total* incapacity of any kind did not conform to their understanding of mental illness. In the 1954 case of *Durham v. United States*, a new test was developed that asked 1) if the defendant had a mental disease or defect, and 2) if the unlawful act resulted from that disease or defect (Becker 43). This became known as the "product" test, with the operative assessment being whether the crime was a *product* of the mental disease.

The product test was then criticized because: 1) it gave too much control over the determination of insanity to mental health professionals (again, reflecting cultural attitudes towards the "soft" sciences of psychiatry and psychology, as well as the ongoing discursive conflict between the legal and medical communities), and 2) the linear determination of "causation" was seen as reductive. So in 1962, the American Law Institute (ALI) drafted the Model Penal Code in an attempt to address the problems with previous insanity defense standards. The ALI test determined that:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks *substantial capacity* either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. (Model Penal Code, qtd. in Becker 44)

The main difference between M'Naughtan and the Model Penal Code was the expansion of a *total lack* of capacity to a *substantial lack* of capacity; a volitional component was included, which asked about the defendant's understanding of his conduct and his ability to control his actions. The ALI test significantly broadened insanity defense standards, which at the time reflected an increasing compatibility between psychiatry and the law that was a direct result of an increasing social acceptance of psychiatry, the broader implications of the American Psychiatric

Association's fervent efforts to reinvent their field as legitimately scientific via the ongoing expansion of the Diagnostic and Statistical Manual of Mental Disorders (DSM).

This budding cooperation between psychiatry and law was brought to an abrupt and screeching halt after John Hinckley's successful insanity defense in his trial for attempting to assassinate then President Ronald Reagan, which is discussed in Chapter six. Public outrage over Hinckley's "acquittal" spurred Congress to pass the Insanity Defense Reform Act (1984), which essentially set insanity defense standards back over a century to the M'Naghten standards and even led some states to abolish the defense altogether (Becker 44).

Today, the controversy and inconsistency persists. No test has yet satisfied both the legal system and medical professionals. Each iteration of the standards has fundamentally been a debate about words, rhetorical at its core, but words defining concepts that are grounded in densely articulated ideologies and metaphors of morality, therefore fraught with sociopolitical conflict. Thus, the inability to find a point of stasis is the origin of and explanation for the ongoing debate. My hope in this dissertation is not to propose a solution to the problem, but to point to the rhetorical moments that best illustrate my argument, which identifies the particular ways of looking at the world that court opinions validate and the "qualities of law, in particular its linguistic indeterminacy, and the capacity of legal language to mystify and reify social relations" (Sarat & Kearn 10). Peter Goodrich argues that "it is constantly necessary to remember the compositional, stylistic and semantic mechanisms which allow legal discourse to deny its historical and social genesis" (qtd. in Sarat & Kearn 11). The goal then is to contribute to the ongoing scholarly conversation about the rhetoric of law and the question posed by Sarat and Kearn: "What historical forces and linguistic phenomena shape the way law speaks and is spoken to?" (14), in addition to bringing the powerful discursive system of law into conversation with the powerful discursive system of medicine, specifically the fields of psychology/psychiatry, both of which are inescapably rhetorical, grounded in history and language, and ultimately make possible specific ways of knowing and being that privilege some while silencing others.

Both law and medicine are interpretive practices, and both systems have historically worked in tandem, however ineffectively or tumultuously. The law is, by social mandate, imagined

as a “fixed” system of social control, made up of rules and procedures grounded in a reality that is independent of language; although we know that law is both revised and interpreted every day in courtroom practice, to imagine the law, the system that keeps bad people behind bars and good people safe, as indeterminate or, worse, fallible, produces social anxieties that upend our cultural assumptions about fairness that predate our judicial system. This imaginary stability, then, is ultimately what prevents the legal system from evolving in consonance with developments in the mental health professions, as inadequate as that discursive system may be for describing and categorizing the infinite possibilities of mental illness, specifically where it is relevant to the commission of a crime. Ultimately, the insanity plea raises the spectre of the endless interpretability of the law and mental illness and, therefore, the frailty of the justice system, which makes each insanity defense trial emblematic of larger social anxieties about social control, fairness, and susceptibility to mental illness or the actions of mentally ill people.

CHAPTER 2

FRAMING THE ISSUE: (DIS)ARTICULATING MORALITY AND MYTH

Nowhere is the fragility of the legal system made more evident than in insanity defense cases. Although the insanity defense standards have undergone multiple revisions, mostly in an effort to ‘clarify’ them, the actual definition and, more significantly, the application of those standards, continues to vary widely from court to court, from region to region, and from era to era, highlighting the contingency of the law. According to legal scholar and mental disability law reform advocate, Michael Perlin, insanity defense jurisprudence has evolved irrationally (I would argue that it has not really evolved at all), particularly in light of continual developments in our understanding of mental illness and the brain that emerge from psychology, psychiatry, and neuroscience. Insanity defense jurisprudence is arguably still fundamentally based on the ‘wild beast’ understanding of mental illness, the direct result of widespread aversion toward and fear of mentally ill people, what Perlin calls “sanism,” which can also be understood as an example of what Julia Kristeva refers to as “abjection”; according to Kristeva, “abjection [is] what disturbs identity, system, order. What does not respect borders, positions, rules... *Any crime*, because it draws attention to the fragility of the law, is abject” (4, emphasis mine). If any crime represents the abject, then crimes committed by mentally ill people serve as even more distinct markers of larger social anxieties.

Because the term ‘insanity’ itself is a legal and not a medical term, it is problematic to adjudicate its definition by courtroom practice, since the process of assessing the mental capacity of a criminal defendant requires the expertise of a medical professional to set the parameters of the definition. Thus, insanity defense jurisprudence represents a unique location where two powerful and normalizing discourses overlap and reveal a rupture in the narrative of the law. I argue that contemporary insanity defense jurisprudence has not evolved in consonance with developments in psychiatry because these competing discourses lack a point of *stasis*, for multiple reasons, but primarily due to the incompatibility of their ideological foundations. In other words, the insanity defense exposes ideological tensions between and among the judicial system, the discipline of psychiatry, and the larger public whose concerns over injustice in the justice

system and assumptions about mental illness and psychiatrists have a significant impact on courtroom practice.

Articulation, Antagonism, and Ideologic

In order to explain and analyze these ideological tensions, I find that articulation theory and its corresponding concept of antagonism provide the most useful frame. In *Hegemony and Socialist Strategy*, Ernesto Laclau and Chantal Mouffe explain that “[d]iscursive structures constitute and organize social relations and are the result of an articulatory practice” (DeLuca 335). Thus, articulation can be understood as “both a way of understanding how ideological elements come, under certain conditions, to cohere together within a discourse, and a way of asking how they do or do not become articulated, at specific conjunctures, to certain political subjects” (Grossberg 141-142). For rhetoricians, then, “articulation theory motivates scholars to examine, amidst conditions of social complexity, how ideologies and ideological elements are invoked, mobilized, combined, altered, rejected, or ignored” (Brouwer & Hess 70-71).

According to Sharon Crowley, some systems of belief have attained such a strong ideological hold that they become hegemonic, at which point they are resistant, if not impervious, to rhetorical intervention (78-79). The Gramscian concept of hegemony “refers to the way in which an oppressive ideology is perpetuated among a people or community without direct coercion or force, particularly in ways that seem like ‘common sense’” (Gunn & Treat 157). Using Laclau and Mouffe’s theory of articulation, Crowley posits what she calls *ideologic* to explain why, even in the face of incontrovertible evidence that is contrary to some systems of belief, people not only maintain those beliefs, but defend them at all costs, sometimes violently. Crowley coins the term *ideologic* to refer to the connections “among beliefs within a given ideology and/or across belief systems”; she claims that ideologies tend to cohere below our immediate consciousness and that *ideologic*, then, may not be affected by the exposure of weakness or deception in a given system of belief (75-7). Very simply put, the legal system is based on multiple, often conflicting systems of belief, but because it adheres in our collective consciousness as the pinnacle of rationality, fairness, and justice, it is what Crowley calls a “densely articulated” belief system, meaning that its disarticulation is extremely costly to a believer. Moreover, such densely

articulated belief systems resist rhetorical intervention (78-9), which might help to disarticulate them. The potential for disarticulation lies in what Laclau and Mouffe refer to as antagonisms, those points of rupture that expose the weakness of the dominant discourse: "Antagonisms make possible the investigation, disarticulation, and rearticulation of a hegemonic discourse. Antagonisms point to the limit of a discourse" (DeLuca 336).

Therefore, for the purposes of this analysis, the law is understood as a hegemonic discourse that is densely articulated. The insanity defense itself represents an antagonism, in that it exposes the fragility of a legal system that has never been able to determine, in any concrete way, *how* to deal with mentally ill criminal defendants. Another piece of this complicated puzzle is the discipline of psychiatry; I do not conceive of psychiatry as hegemonic, but it is a powerful, also densely articulated discourse. The antagonism within the articulation of psychiatry is evident in its revisionary practices, the constant, ongoing updates to the DSM and the debates among its experts and between its experts and the public about what constitutes a given mental disorder. But the discourse of psychiatry, while it is tightly articulated to the discourse of law through mental disability legal standards, also represents an antagonism to the discourse of law because it continually exposes the inadequacies of those standards. Each attempt to clarify the legal definition of the insanity defense can be read as an antagonism, as the limits and inadequacies of the previous test and standard were debated and a new formulation was crafted and taken up in the juridical sphere. Ultimately, however, these fissures did little to enact any meaningful change in insanity defense jurisprudence, which highlights the hegemonic nature and dense articulation of the law and, I argue, the cultural hegemony of sanism. It is important, then, to outline the ideological genealogy of both phenomena.

The Prison and the Asylum

Enlightenment ideology underscores contemporary medical and legal discourses, emphasizing objectivity and rationality. Foucault has provided a thorough history of both systems, so there is no need for me to reinvent that wheel. To that end, a brief summary of the relevant aspects of each discursive formation will suffice. Ultimately, what we see is the overtly moral

function of both law and medicine related to mental illness to discipline the social body and maintain order.

Foucault traces the evolution of punishment from the often times arbitrary public spectacle at the behest of a monarch to the more modern application of the law which provided “that the accused be regarded as innocent until proven guilty, that the judge be a just arbiter between them and society, that laws be ‘fixed, constant, determined in the most precise way’, so that subjects know ‘to what they are exposed’ and that magistrates be nothing more than the ‘organ of the law’” (“Discipline” 88), which sets up the mythology of the judicial system under which it continues to operate (this will be explained in greater detail below). The legal system, therefore, presumes a social contract between citizen and society, so the criminal becomes paradoxically a person who simultaneously violates that contract by committing a crime and abides by that contract by participating in the punishment it designates (89-90). The punishment of criminals has three primary functions: first is retribution, essentially a slightly evolved form of “an eye for an eye”; second, it is specific deterrence, discouraging the individual who committed a crime from committing crime in the future; third, and most importantly, it is general deterrence, making an example of the individual criminal to discourage others from committing crimes.

According to Foucault, crime inflicts disorder on the social body: “the scandal that it gives rise to, the example that it gives, the incitement to repeat it if it is not punished, the possibility of becoming widespread that it bears within it” (92). The most significant function of the law, then, is not to punish the individual criminal, but to deter other citizens from repeating the crime: “One must take into account not the past offense, but the future disorder” (93). In the modern system of punishment, it became necessary to consider two variables, ‘circumstances’ and ‘intention,’ “elements... that made it possible to qualify the act [of crime] itself” (99). We can locate anxieties about the insanity defense in the variable of intention, then, because an insanity defense, by definition, relies upon a claim of lack of intent due to mental disease or defect. If there is no intent, there can be no punishment; but if there is no punishment, there can be no deterrence.

At the same time that the modern system of punishment developed, so did the treatment of the mentally ill. Whereas ‘lunatics’ had previously been confined in less than hospitable

conditions along with poor, indigent, and criminal citizens, the late 18th and early 19th centuries saw the birth of the medical marvel known as the asylum. Foucault traces its evolution from the 'leprosarium' of the middle ages, explaining how the moral scapegoating of the leper was transferred to the 'madman' from whom society needed protection ("Madness"). The "ingenious benevolence" of the asylum imposed a "religious and moral milieu...in such a way that madness was controlled, not cured" (Foucault, "Madness" 242-244). We will see this narrative operating in the landmark insanity defense trials from the late 19th century. The new discourse of madness shifted the locus of insanity from a frightening fate bestowed upon the unfortunate to the morality of the afflicted himself. Foucault explains:

[T]he madman, as a human being originally endowed with reason, is no longer guilty of being mad; but the madman, as a madman, and in the interior of that disease of which he is no longer guilty, must feel morally responsible for everything within him that may disturb morality and society, and must hold no one but himself responsible for the punishment he receives. (246)

The function of the asylum, then, was no longer to punish, but rather to serve as "a therapeutic intervention in the madman's existence," the purported result of which was that from "the awareness of his guilt, the madman was to return to his awareness of himself as a free and responsible subject, and consequently to reason" (247). The moral work of the asylum exacted rigorous mental work from its patients; all "exercises of the imagination" were viewed as complicit "with the passions, the desires, or all desirous illusions," which were opposed to reason, underscoring the Enlightenment ideology that fueled these endeavors (248). The science of mental disease as it played out in the asylum, then, centered on observation and classification, which can be thought of in the broader terms of surveillance and judgment (250-251). The asylum set up a familial model in which the mentally ill were viewed as children and the 'men of reason' who treated them were the patriarchs charged with the maintenance of morality and order through segregating from larger society those whose madness was evidence of their "social failure" (252-259).

The asylum obviated the law, as it became a self-contained juridical form: “It judged immediately, and without appeal. It possessed its own instruments of punishment, and used them as it saw fit... [It] did not borrow its modes of repression from the other justice, but invented its own” (266). Foucault refers to “this conversion of medicine into justice, of therapeutics into repression” (266), after which ‘unreason,’ both inside and outside of the asylum would be “caught...in a perpetual judgment, which never ceases to pursue it and to apply sanctions, to proclaim its transgressions, to require honorable amends, *to exclude, finally, those whose transgressions risk compromising the social order*” (268-269, emphasis mine). Thus, the articulation of the asylum as the realm of diagnosis and treatment is exposed as more juridical than therapeutic, and it is within this juridical form that we see the establishment of the “medical personage,” or the elevation of the status of medicine within the asylum model. Foucault claims that it was this introduction of morality in the guise of science that defined the asylum and produced the notion of the physician as “the magic perpetrator of the cure” (273). As the practice of “medicine of the mind” assumed a status autonomous from the larger practice of medicine, in other words, as psychiatry emerged as a distinct entity in the medical realm, those who practiced it remained rooted in the moral tradition of the asylum; thus, the “Family-Child relations, centered on themes of paternal authority; Transgression-Punishment relations, centered on the theme of immediate justice; [and] Madness-Disorder relations, centered on the theme of social and moral order” (274) imbued the knowledge of the doctor of the mind with esoteric and magical qualities that lingered even after the positivist tradition “imposed myths of scientific objectivity” (276) on the burgeoning discipline of psychiatry. The introduction of psychoanalysis to the lexicon of mental disease in the late 19th and early 20th centuries complicated the asylum model, but as we will read in the following chapters, the dialectical tension that persists in psychiatry, both from within in the form of debates among practitioners and from without in the form of outsiders’ perceptions, that opposition between psychiatry-as-occult practice and psychiatry-as-science.

Judicial and Sanist Mythology

The issue of the insanity defense is further complicated by widely held cultural assumptions about the law, mental illness, and mentally ill criminal defendants, which I refer to

respectively as judicial mythology and sanist mythology. According to Crowley, “[m]yth is a special case of collective fantasy” (97), the function of which is to generalize specific and contingent events into universal rules. Cultural historian, Richard Slotkin explains that myth “renders ideology in the form of symbol, example, and fable, and poetically evokes fantasy, memory, and sentiment” (qtd. in Crowley 97). When “myths are...narrativized from historical events,” they depend on an intuitive acceptance of their meaning, “thus associating myth with commonplaces,” which are inherently rhetorical (Crowley 97-98). Drawing on Roland Barthes, Crowley argues that “the important thing about myth is that it naturalizes history. Its point is to amplify and sustain accounts of how things are, to render them so forcefully that challenge is literally unthinkable,” such that “once an event becomes mythologized, ideologic trumps narrative. It is the moral—the commonplace—that matters” (98). The operative myths in the insanity defense do not deal with specific people or events but rather discourses or institutions, but the same understanding applies, in that myths can be said to “encapsulate and intensify the persuasive force of commonly held beliefs” and “inspire belief and motivate action more powerfully than reason” (Crowley 99-101).

The myth of fairness that upholds our legal system is based on the notion that the law is not only objective and rational, but that the defined crimes and punishments are fairly and equally applied in all circumstances. Although we know that is not the case in practice, without that assumption, the system lacks the necessary credibility on which to maintain its appearance of validity. The judicial system is maintained on the assumption that courts apply the law objectively, independent of the personal values of judges or jurors; without this assumption, it would be impossible for people to accept the decisions of courts. The very notion that the law can be “applied” and that “charges of failing to heed the rule of law are hurled so readily by journalists and even legal scholars” (Rountree 2) highlights the Enlightenment mindset on which our judicial system was founded and continues to operate. The image of courts as “impartial decision makers bound down by the law” is one that has been carefully crafted and maintained.

According to Clark Rountree, the Supreme Court must be especially careful “to maintain the image of objectivity and infallibility that judicial mythology promotes” (3) due to the nature of

their lifetime appointments; however, lower court judges, too, take great pains to abide by the mythic narrative: that they are “interpreters rather than creators of law,” “that they are chained to judicial logic rather than free to craft arguments from a rich well of rhetorical resources,” that they are “above normal human biases,” and “that what they assert about the law *is* the law” (3).

Judicial mythology can be framed in psychoanalytic terms as a ‘libidinal investment,’ which refers to the influence of a given discourse that “touches on ego attachments that partly construct a subject’s sense of identity” (Crowley 95). To disarticulate judicial mythology, then, threatens the ideologic of legal discourse, which, at least in part, explains its resistance to change, even in the face of multiple antagonisms that expose its limits.

Perlin has identified what he refers to as myths about the mentally ill and about the insanity defense that he believes explain the vast disparity between what empirical evidence has revealed about mental illness and what people continue to believe about mental illness. He asks the pivotal question: “Why do we feel the way we feel about ‘these people,’ and how do those feelings control our legislative, judicial, and administrative policies?” (224). For Perlin, the answer to these questions is essential to understanding the incoherence of insanity defense jurisprudence.

The eight myths Perlin has identified—which I describe below—reveal the widespread cultural attitudes toward mental illness and mentally ill people. It seems that mentally ill criminal defendants are a convenient target for expressing these prejudices..

The first myth held by the public is that the insanity defense is overused. Yet in fact it is used in about 1% of all felony cases, and only successfully in about 25% of that 1% (228). The second myth holds that the insanity defense is used primarily in particularly heinous crimes. However, research shows that less than one-third of insanity pleas involved a victim’s death, and further, that insanity pleas in murder cases are not any more successful than in any other type of case (228). The third myth is that an insanity plea poses no significant risk to the defendant who asserts it at trial (where it is generally assumed to be used as a ruse to escape punishment), However, research has shown that defendants ultimately found guilty after pleading insanity (in other words, those whose insanity defenses proved unsuccessful) serve notably longer

sentences than those tried on similar charges who do not assert an insanity defense (228). The fourth myth is that Not Guilty by Reason of Insanity (NGRI) acquittees are quickly released from custody back into the public, and people fear that these 'madmen' are loose on the streets where they will terrorize innocent people. Yet studies show that most remain hospitalized (in California, for example, only 1% are released following their verdict, with 4% being placed on conditional release, and the remaining 95% in the custody of a mental health facility, often indefinitely) (228-9). The fifth myth is that NGRI acquittees spend much less time in custody than other defendants convicted of the same crimes. In fact, NGRI acquittees have been shown to spend nearly twice as long in custody as their counterparts in prison, and they often have a lifetime of post-release oversight by the courts (229). The sixth myth is that most defendants who plead insanity are faking their mental illness, which is "perhaps the oldest of the myths," going back to the mid-19th century. However, many studies have shown a great deal of concordance regarding the presence of mental illness in the defendant among mental health professionals whose opinions have been used in successful NGRI cases, meaning that experts for both the prosecution and the defense have concurred that the defendant is indeed mentally ill (229). The seventh myth deals with the public's false perception of insanity defense cases as circus-like "battles of experts," which tends to be reinforced by high-profile trials like those of John Hinckley and Andrea Yates and the latest headlining trial of the Aurora mass shooter, James Holmes. Research shows, however, that inter-examiner agreement in most NGRI cases is 88% (229). The eighth and final myth, according to Perlin, is that criminal defendants and their attorneys turn to the insanity defense inappropriately in order to avoid a deserved conviction. This myth, of course, hinges upon the facticity of some of the previous myths dealing with the insanity defense as a way to "get away with" a crime. The reality is that mentally ill criminal defendants frequently receive substandard legal representation due to the fact that they are disproportionately of low socioeconomic status, and those attorneys that do enter an insanity plea do so to ensure that their clients get mandatory mental health care. Further, research shows that jury biases are independent of lawyers, whether defense counsel is court appointed or bought and paid for (229-30).

Perlin traces the origins of these myths and their persistence in the face of incontrovertible evidence that disproves them, identifying four reasons for their tenacity. The first is the “fear of faking,” which goes back centuries. This fear has multiple layers; first, that psychiatrists are easily fooled by defendants feigning insanity to “beat the rap,” and second that unscrupulous defense attorneys are all too willing to use the insanity defense to facilitate a proverbial escape from punishment on behalf of their clients (230-5). The larger implication of the fear of faking is that if it is so easy to feign insanity and literally get away with murder, then the deterrent effect of our criminal justice system is significantly weakened. This fear connects to the even more significant fear the public holds regarding insanity defense acquittees being released onto the streets where they can cause harm to innocent citizens (231). The second reason for the persistence of the myths is the assumption by both the legal community and the general public that mental disability is not a “real” illness in the sense of organic or physiological disability and, therefore, not “legitimately exculpatory” (230). The third reason given by Perlin for the persistence of the myths is that our widely held cultural understanding of mental illness requires “that a defendant conform to popular images of extreme ‘craziness’” in order to be deemed insane (230). The fact that many mentally ill criminal defendants do not ‘look crazy’ works to their detriment in the criminal justice system. Police officers, jurors, prosecutors, and judges have been cited repeatedly assessing a defendant’s mental health based on superficial traits, supporting the Ordinary Common Sense heuristic explained in the introduction. As the cases presented in this dissertation will demonstrate, there are many examples in which testimony as to the defendant’s mental health by laypersons certainly not remotely qualified to make such assessments is not only permitted, but is far more persuasive to a jury of laypeople than the testimony of qualified experts. The final reason for the persistence of the myths, according to Perlin, relates to the ever-tenuous relationship between the legal system and the mental health professions.

This dissertation argues that there is a lack of stasis between the two discursive systems; the fear that the “soft” science of psychiatry, often still referred to as having some relation to the occult, will somehow undermine the functions of the legal system (punishment, deterrence) prevents mental disability law from evolving coherently. Insanity defense jurisprudence exposes

multiple ideological tensions that have very real, often tragic consequences, for example, long-term incarceration of mentally ill persons convicted of crimes with no treatment or, in the most severe cases, punishment by death. The symbolic significance of the insanity defense cannot be overstated; it is the most controversial, most debated aspect of our criminal justice system, and explaining it is a project for rhetoric. As I have already said, it is not an issue that can be solved, but it is an issue that can be at least partially explained by rhetoric. And the first step in attempting to unpack this very complex phenomenon is analyzing its history; thus, this dissertation attempts to provide a critical genealogy of the discourse of the insanity defense.

CHAPTER 3

THE TRIAL OF DANIEL MCNAUGHTAN: “KNOWING” RIGHT FROM WRONG AND THE ORIGINS OF WESTERN INSANITY DEFENSE JURISPRUDENCE

“For man, when perfected, is the best of animals, but, when separated from law and justice, he is the worst of all.” –Aristotle

McNaughtan’s trial was certainly not the first insanity defense case; it was not even the first high-profile trial involving a plea of Not Guilty by Reason of Insanity, as I outline below. However, it was a convergence of multiple issues, not insignificantly of which was a monarch, Queen Victoria, who had recently experienced an assassination attempt by a man who successfully used a defense of insanity, which led to the drafting of standards for determining legal insanity that came to be known as the McNaughtan Rules. This standard focused solely on the defendant’s capacity to “know” right from wrong or the nature of his actions, and it became the basis for the determination of legal insanity in England as well as the United States. In addition, both the topoi that make up the argument over legal insanity as well as the tropes that are commonly deployed in this debate emerged formally in this case, and these are evident throughout its history and still today.

On Friday, January 20, 1843, Daniel McNaughtan walked up behind Edward Drummond, private secretary to British Prime Minister, Sir Robert Peel, “in the open street, and in the broad face of day” and shot him in the back. Drummond succumbed to his injuries and died five days later. McNaughtan apparently intended to shoot the Prime Minister, claiming that the Tories had been persecuting him. His defense attorney successfully argued that he was not guilty by reason of insanity. The subsequent public outcry over McNaughtan’s acquittal led the House of Lords to address the issue of criminal responsibility in the case of mentally ill defendants in a more regimented way, thus codifying what are still today referred to as the McNaughtan Rules. This trial’s outcome is the basis for what remains, almost two centuries later, the single most significant trial in the history of the insanity defense because its outcome is the foundation from

which all debates about insanity defense jurisprudence begin, as well as the basis for contemporary insanity defense standards, inasmuch as any unified standard can be said to exist.

Prior to McNaughtan's trial, there was little in the way of legal precedent regarding the treatment of mentally ill criminal defendants. The "implicit logic" of most legal systems, from ancient Greece and Rome to today (which, not surprisingly, have a great deal in common), is the idea that the rule of law only applies to those who have the capacity "to comprehend its terms and abide by its prescriptions" (Robinson 20). Going back to the origins of Western culture in both ancient Greece and Rome, it is possible to see precursors to what we now refer to as the insanity defense.

For example, "the ancient Greeks, long before the classical period and before written law, recognized madness as exculpatory" (Robinson 9). In Homeric epics as well as the writings of Draco and Solon, there is clearly an understanding of the relationship between psychology and law, "between principles that are binding because of the psychological capacity of rational beings to be *bound by principle*" (16). Thus the distinction between wild beasts and humans is precisely that capacity, because it is the very condition of humanity, the significance of the epigraph from Aristotle above (9). Book IV of Plato's *Laws* even provides explicit recommendations for cases involving a mentally ill criminal defendant; he suggests that such persons should be exempt from most penalties except for having to pay the victim for the damages, but if the crime was murder, then the perpetrator should be banished from the country for one year (21). Plato's recommendations seem to suggest the still pervasive view that whatever level of sanity must be present in order to carry out a homicide is sufficient to hold the murderer responsible for the act (22). There exists a tendency to equate insanity with childlikeness or infancy, both in the ancient tradition and today. The Greek words, literally without change, are also still used to describe states of mental illness: *mania*¹ and *paranoia*².

In Roman law, the terms used were *non compos mentis*³, *fanaticus*⁴, *idiotus*⁵, and *furius*⁶ (Robinson 30). As rationality continued to be the hallmark of human nature, without

¹ madness, frenzy, enthusiasm, inspired frenzy, mad passion, fury

² mental derangement, madness

³ not master of one's mind

defining insanity per se, the existence of persons who lacked the capacity for rationality was accepted as a matter of fact (30-1). Since man's defining trait was rationality, those afflicted by disease or disturbed by the gods such that they were devoid of rationality were essentially excluded from public life, from citizenship, and from discourse (33). Again, with the understanding of insanity as something akin to infancy, the conclusion was drawn that, like the infant, the insane person was neither fit for citizenship nor likely to be improved by legal punishment (34-5). The rigidly stratified society of ancient Rome reveals the belief that all men carry the traits of the wild beast and that only through proper upbringing and suppression of the inferior elements of one's character could one reach the pinnacle of good citizenship (45), emphasizing as far back as this era the moral implications of mental illness. As the law was refined during Rome's reign, we begin to see the shift from the community to the individual in terms of responsibility for mental inferiority. This trend continued and is more prominent than ever in today's mental disability law.

The tension between maintenance of social order and the ethical obligation to protect mentally ill persons, even when they have broken the law, has been an ongoing societal struggle (Bartee & Bartee 83). The first Angles and Saxons to settle in England adopted the legal principle that the presence of both a wrongful act (*actus reus*) and the intent to commit that wrongful act (*mens rea*; literally 'guilty mind') were constitutive of a crime, allowing special consideration for those defendants who might experience a loss or lapse of their senses or wits (84). It was the canon law of Christianity that articulated and institutionalized mental illness as a personal moral failure, as it taught that people have free will and the ability to choose good or evil and also to be able to distinguish the difference (84). The tradition of convicting mentally ill persons for their crimes and then granting them royal pardons emerged over time, since their lack of ability to reason meant that they lacked the capacity for malicious intent (84-5). However, prior to that tradition, the Middle Ages were dismal times for those whom we would now recognize as mentally ill, as they were believed to be either possessed by or willingly in league with the Devil, and texts

⁴ mad, enthusiastic, inspired by a god, furious, mad

⁵ ordinary person, layman; outsider, in Late Latin, uneducated or ignorant person

⁶ full of rage, mad

like the *Malleus Maleficarum* dominated theory and practice regarding the proper treatment of such people. Long-term confinement, torture, and violent executions were not uncommon.

Even in these times, however, men of law were attempting to establish correct procedures for dealing with 'madmen' in the courtroom. The influential thirteenth century judge, Bracton, wrote about criminal insanity in his treatise on the common law, stating that a crime requires "the will to harm," and that children, animals, and madmen lack the capacity to have that will (Bartee & Bartee 85). This likening of mentally ill persons to animals and children continued to dominate English legal thought for centuries (85); arguably, it is still very much imbricated in the American legal system's understanding of mentally ill criminal defendants. Eventually, the criteria were narrowed to what is again still referred to as "the wild beast test," which essentially defines legal "insanity" as 'stark raving mania' or 'florid melancholia' (85). There was no consideration for varying degrees of insanity or for 'temporary' insanity (85). In Bracton's time, there was not yet an option to allow a "not guilty by reason of insanity" verdict, so the more common practice was to treat mentally ill criminal defendants as if they were children in the eyes of the court (85). Sir Matthew Hale was the first chief justice in England to attempt to apply theories of psychology to criminal law; his book published in 1736 continued to influence judges throughout the following two centuries (Bartee & Bartee 85). He attempted to distinguish between persons of low intelligence and persons with mental illness, which could be considered either permanent or lunacy, which was madness with lucid intervals, assumed by many to be caused by lunar phases (85). He skeptically acknowledged the possibility of partial insanity as a defense, and again suggested that the defendant must possess less understanding than a child in order for the mental illness to be exculpatory, and that the burden of proof must be on the defendant in such cases.

Even in the eighteenth century, criminal insanity cases were rare, but a few did garner a great deal of attention because of the social status of either the defendant or the victim. Because these cases were so well reported, they became the precedents on which evolving insanity defense statutes were determined. More significantly, these cases saw the increasingly influential

roles of both skillful defense attorneys and expert testimony in trials in which a defense of insanity was raised (Bartee & Bartee 86).

The first fully reported case took place in 1723 when “Mad Ned” Arnold unsuccessfully attempted to assassinate Lord Onslow, whom Arnold claimed was persecuting him (86). The judge’s two part instructions to the jury in this case were explicitly based on the “wild beast” understanding of insanity. The first question was whether the defendant completely lacked understanding and memory, knowing no more what he was doing “than an infant, a brute, or a wild beast” (qtd. in Bartee & Bartee 86); the second question was whether the defendant was able to distinguish between good and evil at the time of the crime. The jury found Arnold guilty, but he was later granted a royal pardon at the bequest of his victim, Lord Onslow (86). While the “wild beast” test dominated Arnold’s trial, the “right-wrong” test was beginning to make headway. The next and most famous insanity defense trial of the eighteenth century would use both tests.

In 1760, Earl Ferrers, an aristocrat, was charged with the murder of his former employee. Still not allowed defense counsel, Ferrers protested the injustice of “requiring a lunatic to prove himself insane without the assistance of counsel” (Bartee & Bartee 86). While the prosecution emphasized the evidence of premeditation as proof that Ferrers was sane enough to be held responsible, Ferrers continued to assert that he suffered from occasional insanity and was prone to be driven to a poor mental condition (86). The significance of this trial is the foreshadowing of the “irresistible impulse” test, which emerged in the nineteenth century. Even more significantly, Ferrers’s trial marked the onset of the use of expert witnesses in insanity defense cases. In Ferrers’s trial, Dr. Monro, superintendent of London’s Bethlehem Hospital for the insane, took the stand and attempted to define “lunacy” (87). He offered three common symptoms of lunacy: “‘uncommon fury’ not caused by liquor but raised by it; violence against others or the self; and...jealousy or suspicion without reasonable cause” (87). While Ferrers’s actions were consonant with Monro’s description, Monro was unable to state conclusively that lunatics did not understand their actions. Ferrers was convicted and subsequently hanged in front of a large crowd, “which seemed to regard the execution of a lord for the murder of a commoner as a noteworthy triumph of...justice” (87).

The next case of note is that of James Hadfield, a former soldier who had suffered traumatic head injuries during the Napoleonic Wars. He returned to civilian life but was known to behave irrationally from time to time. In 1800, he decided that he wanted to end his own life, and that in order to do so, he must kill the king and be executed for high treason. He failed at his attempt to assassinate the king at Drury Lane Theater, where he was captured. Because of the nature of his crime, he was afforded more privileges as a defendant than defendants in felony cases that did not involve an attack on the king, which meant he was allowed to have an attorney, call witnesses, and address the court. Thomas Erskine, the son of a lord, a Member of Parliament, and also the most sought after defense attorney in England at the time, agreed to represent Hadfield. Erskine eloquently argued that while Hadfield clearly did not meet the requirements for either the wild beast test or the right from wrong test, because he had clearly premeditated his act and understood the consequences, that both of those tests, strictly applied, would exclude almost anyone. Erskine expanded the use of medical expert testimony, producing several doctors who examined Hadfield after the shooting, all of whom agreed that his behavior was due to his brain injury⁷. Erskine still had twenty witnesses to go when the judge stopped the trial “and invited the jurors to consider a special verdict of not guilty ‘being under the influence of insanity at the time’” (Bartee & Bartee 88). This special acquittal was designed to allow for the continued detention of Hadfield where a regular “not guilty” verdict may have allowed him to go free. Parliament then quickly passed a statute regarding the provision of “safe custody” for mentally ill criminal defendants, avoiding the issue of crafting a precise definition of insanity for legal purposes. As for Mr. Hadfield, he spent the rest of his life institutionalized, and even killed a man while in the hospital (88-9). According to Bartee and Bartee, the primary significance of *Hadfield* is that it “showed how a persuasive defense attorney, utilizing expert witnesses, could sway judges and jury to accept a new test...for criminal insanity” (89).

The *Bellingham* case had a less favorable result for its defendant, John Bellingham, who, after becoming convinced that the British government owed him recompense for his failed

⁷ It is interesting to note that claiming a lack of capacity based on a “brain injury,” rather than simply “mental disease or defect,” seemed to carry more credence with the court; this reflects the ongoing suspicion of mental illness as not a “real” illness; somehow, a brain injury which, is organic in nature, is more tangible.

business fiascos and meeting with responses to the contrary, shot and killed the Prime Minister, Spencer Percival, in the lobby of the House of Commons. Bellingham was rushed to trial only four days after his crime, given court appointed defense counsel only one day prior to trial, with no time to prepare the case or secure expert witnesses. The prosecution relied on the precedent set by *Arnold* and *Ferrers*, and Lord Chief Justice Mansfield, openly upset about the loss of Percival, determined that the defendant's state of mind at the time of the crime was irrelevant. Bellingham was found guilty, not surprisingly, and was executed a mere eight days after his crime (Bartee & Bartee 89).

English common law was carried to colonial America, which for the most part, dealt with mentally ill criminals outside the legal system, as insanity pleas were rare in the Republic's early years. Dr. Benjamin Rush, a famous Philadelphia physician and signer of the Declaration of Independence, attempted to formulate more humane treatment of mentally ill people (i.e. that they should not be publically displayed or whipped), though he did not address the specific issue of mentally ill criminal defendants. Dr. Isaac Ray complained in his 1838 book about American courts' reliance on the antiquated precedents of English courts:

Criminal trials in which insanity is pleaded in defense are generally so little known beyond the place of their occurrence, that it is difficult to ascertain on what particular principles of the common law the decisions of the courts have been founded, though from all that can be gathered, their practice, like that of the British, has been diverse and fluctuating. (qtd. in Bartee & Bartee 90)

Ray critiqued existing legal practice and promoted a broader interpretation of insanity in criminal cases, believing that the 'wild beast' and 'right from wrong' tests were insufficient. Ray's most significant contribution to insanity defense jurisprudence was the insistence "that criminal responsibility be decided on the question: Was the act a product of mental disease or defect?" (Bartee & Bartee 90). This question became known as the 'product' test and was adopted by New Hampshire as the legal standard in 1869, though the older tests remained (and still remain) the primary standards in the American legal system.

It was also at this time in early American legal history that the idea of 'temporary insanity' began to gain traction. One case involved an Italian immigrant who assaulted his wife, biting off the tip of her nose. His attorney argued that he had become temporarily deranged and therefore unable to distinguish good from evil. While the jury found the defendant guilty, they recommended mercy, indicating a partial success for a defense of temporary insanity. Its full acceptance came in the case of a would-be presidential assassin, Richard Lawrence, who attempted to shoot President Andrew Jackson in the rotunda of the U.S. Capitol. Fortunately for Jackson, both of Lawrence's pistols misfired. The prosecutor in Lawrence's trial was none other than Francis Scott Key, but the defense successfully drew on the *Hadfield* verdict; the jury took only five minutes to conclude that Lawrence was "under the influence of insanity" at the time of his crime (Bartee & Bartee 90-1).

Meanwhile in Britain, the great divide between law and medicine appeared to be narrowing, as both legal and medical professionals questioned the validity of the old precedents. Another assassination attempt, this time on Queen Victoria, shows an increasing acceptance of mental illness as exculpatory. In 1840, Edward Oxford fired two pistols at the Queen, though she was not hit. His defense counsel argued that madness ran in Oxford's family and secured the testimony of no fewer than five medical experts who unanimously concurred that Oxford was indeed mentally ill. The jury found Oxford "not guilty, he being insane at the time" (qtd. in Bartee & Bartee 91). But the crime that would lead to the most significant decision regarding the insanity defense was still a few years away.

When Daniel McNaughtan mistakenly shot Prime Minister Peel's secretary, Edward Drummond, the definitions of insanity that emerged from his trial, the "McNaughtan Rules," were quickly adopted in both England and America and continue to be "the standard insanity test in about half of the...states and a major portion of tests in nearly all others" (Bartee & Bartee 91). Immediately following the shooting, McNaughtan was taken into custody where he refused to give any information about himself, though he maintained a polite demeanor. A reporter for the *Times* who was present at the questioning made sure to note that the prisoner appeared "cool and collected" and that there was no apparent evidence of insanity (qtd. in Moran 9). The fact that a

reporter, someone with no expertise in matters of psychological health, felt confident in noting his opinion regarding the prisoner's state of mind demonstrates the Ordinary Common Sense (OCS) heuristic mentioned earlier—the "I can tell by looking" school of thought—that draws upon the "wild beast" understanding of insanity, which continues to pervade modern day mental disability law.

The day after the shooting, McNaughtan was brought before Chief Magistrate Hall for an examination. Initially, McNaughtan declined to make a statement when invited after all the evidence had been presented. Upon reaching the waiting room, he asked to be returned to the court and at this time made his first and only public statement regarding the motive for his crime:

The Tories in my native city have compelled me to do this. They follow, persecute me wherever I go, and have entirely destroyed my peace of mind. They followed me to France, into Scotland, and all over England. In fact, they follow me wherever I go. I cannot sleep nor get rest from them in consequence of the course they pursue towards me. I believe they have driven me into a consumption. I am sure I shall never be the man I was. I used to have good health and strength but I have not now. They have accused me of crimes of which I am not guilty, they do everything in their power to harass and persecute me; in fact, they wish to murder me. It can be proved by evidence. That's all I have to say. (qtd. in Moran 10)

The statement was then read aloud and McNaughtan signed it. Though the issue of insanity had not yet made its way into the courtroom conversation about McNaughtan, it was being discussed by the public. Another reporter commented on the dissonance between the prisoner's statement, which made him seem mentally unsound, and his appearance, which the reporter called "extremely healthful" (qtd. in Moran 10). Some observers expressed the concern that McNaughtan was feigning insanity and "that his statement had been designed to lay the foundation for a plea of not guilty by reason of insanity" (Moran 10).

After Drummond died, McNaughtan was brought before a grand jury, at which time the recorder delivered the charge of murder and advised that the question of the defendant's sanity

not be addressed, as this determination could only be made in a proper trial: “It was the grand jury’s job to determine whether the act committed, if it were done by a person of sound mind, would have amounted to murder” (Moran 11). The recorder assured the jury that no undue hardship would befall the defendant if he was in fact insane since the law already provided for such cases; he then stated the legal definition of the crime of murder:

When a person of sound memory, and of the age of discretion, unlawfully killeth any reasonable creature in being, and under King’s peace, with malice aforethought, either express or implied, so as the party die of the wound within a year and a day after the same, it is murder; but the offence cannot be committed by an *idiot, lunatic, or infant*. (qtd. in Moran 11, emphasis mine)

The recorder went on to add that the defense must prove that the defendant was incapable of distinguishing right from wrong at the time of the crime. He also preempted any claim that because McNaughtan shot a man that he did not intend to kill, that this in any way mitigated his guilt by explaining that the law still “presumed malice aforethought” (Moran 12). And finally, in a radical departure from his duties as recorder, he offered his own opinions on an insanity defense: “If the fact of the commission of any great crime was in itself to be held or considered a proof of insanity, there would be no safety or security for the public” (qtd. in Moran 12), emphasizing the element of sanist mythology which holds that the insanity defense degrades the deterrent effect of the law. The grand jury returned with a charge of murder the following day.

Two days later, McNaughtan was arraigned, at which time he refused to answer the deputy clerk’s question, “How do you plead?” After some urging, McNaughtan replied, “I was driven to desperation by persecution,” and when pressed further to choose either guilty or not guilty, he stated, “I am guilty of firing” (qtd. in Moran 12). Lord Chief Abinger surmised that this amounted to a plea of not guilty, and Mr. Clarkson, attorney for the defense, asked for a postponement in order that a proper defense might be prepared, to which Abinger consented.

The London newspapers were by now abuzz with expressions of public sentiment regarding the murder of the Prime Minister’s secretary and McNaughtan’s case. The primary response was the desire for retribution and the fear that exempting anyone from punishment for

any reason deprived the law of its deterrent effect. An editorial in the *Times* expressed hope that minor incidents of odd behavior in McNaughtan's past would not be used by the "soft headed" to prove that he was insane and concluded, "those laws are the most merciful which deter men from the most atrocious crimes" (qtd. in Moran 13). Articles in the *Morning Herald* cautioned that it was a mistake to think that insane persons could not be deterred from crime, drawing on *Bellingham* and *Oxford* as proof that failure to punish mentally ill criminals leads to imitation crimes; since Bellingham was executed and Oxford was not, "the former remained without imitators while the latter had no fewer than four" (Moran 13). The *Manchester Courier's* reporters took the position that the political violence of the day was to blame, claiming that it was "the festering of anti-Tory rhetoric in an unsound mind that led to the murder of Edward Drummond" (qtd. in Moran 13). As McNaughtan was of Scottish heritage, Scotland's reporters took a slightly more sympathetic stance, claiming that substantial evidence as to the defendant's insanity was available and that he could not be held accountable for his actions: "The 'deprivation of reason' is one of the worst curses that can befall an individual, and to punish a person for being ill is 'to inflict death because of disease'" (Moran 14).

Six weeks after he shot Edward Drummond, Daniel McNaughtan's trial began. The highly publicized trial drew a large crowd, including "persons of high status who had obtained tickets," Charles Dickens among them (Moran 14). Solicitor general, Sir William Follett, presented the prosecution's case in his opening statement. He anticipated the defense's case and told the jury that their decision would depend on the defendant's state of mind at the time of the crime: "If you believe that when he fired the pistol, he was incapable of distinguishing between right and wrong...that he did not know he was violating the law both of God and man: then, undoubtedly, he is entitled to your acquittal" (qtd. in Moran 15). However, he explained that in the absence of a complete lack of understanding of the nature of the act, the defendant must be found guilty (15). Follett then delivered a legal history of the insanity plea, as was common practice for those in his role, quoting Hale, discussing Erskine's defense of Hadfield and the ruling in *Bellingham*, along with a brief history of McNaughtan's life, primarily for the purpose of establishing his sanity, as McNaughtan ran a business and resided in lodging houses with what was described as rational

and responsible conduct (15). The evidence presented for the prosecution reinforced Follett's opening statement: McNaughtan's landlady, one of his friends, and one of his former teachers were called to testify as to McNaughtan's mental health, and all three laypersons confirmed that in the time they had been acquainted with the defendant, that "he had never exhibited any evidence of mental aberration" (16). As this concluded the prosecution's case, Mr. Cockburn, counsel for the defense, requested that the trial be continued the following morning, to which Chief Justice Tindal agreed.

Cockburn opened the next day by suggesting that the public outrage over the assassination of a high ranking official might make it impossible for his client to get a fair trial, and then immediately stroked the jury's collective ego by telling them that he was confident in their ability to be fair and impartial, as they were good British subjects (Moran 16). Cockburn acknowledged that his client did indeed shoot Mr. Drummond and reasserted the prosecution's claim that the decision would rest on the defendant's state of mind at the time of the crime, at which time he supplied them with a different definition of insanity that was very much emblematic of Enlightenment ideology: "Madness is a disease of the body operating upon the mind" (qtd. in Moran 16). He went on to describe the mind as divided into two separate and distinct compartments, one housing intellect (perception, judgment, reasoning), and the other moral faculties (sentiments, affections, passions), claiming that modern science had determined that either compartment might be diseased with the other remaining perfectly intact, yet the diseased compartment able to cause "fearful delusions" (Moran 16-17). Cockburn chided the prosecution for relying on legal authorities to define what was clearly in the domain of medical science, reminding the jurors of the *Bowler* and *Bellingham* cases, in both of which the defendants were executed in the wake of public outrage, both of whom would likely, he claimed, have been considered legally insane by the standards of the day, urging the jury not to make the same barbaric mistake. When Cockburn recounted McNaughtan's life story, he portrayed a long history of precursors to insanity, closing his speech with a reminder to the jury that were they to find McNaughtan not guilty by reason of insanity, that he would be safely tucked away in an asylum where he could do no harm to himself or others (Moran 17). Cockburn's witnesses discussed

McNaughtan's lengthy affliction with delusions of persecution, and his medical experts' testimonies essentially sealed his case; Dr. Thomas Monro who had examined McNaughtan four weeks after his arrest "testified that he did not entertain the 'slightest doubt' that the defendant's moral faculties were impaired by his extraordinary delusion" (Moran 18). Six additional medical examiners supported Monro's testimony. After Mr. Forbes Winslow, author of *Plea of Insanity in Criminal Cases*, went on to state that McNaughtan's delusions led to his crime, Chief Justice Tindal asked Follett if he had any medical evidence to combat Cockburn's witnesses, to which Follett replied, "No, my Lord" (qtd. in Moran 19). At this time, Tindal literally stopped the trial.

Follett attempted to recover the prosecution's case in his closing argument by reminding the jury that "the 'attainment of public justice'" was the goal (Moran 19). But Tindal, in his instructions to the jury, "practically told [them] to find the defendant not guilty by reason of insanity" (Bonnie, Jeffries, & Low 10):

The whole of medical evidence is on one side...It seems almost unnecessary that I should go through the [other] evidence. If he was not sensible at the time he committed that act, that it was the violation of the law of God or man, undoubtedly he was not responsible for that act or liable to any punishment whatever flowing from that act...If...you think the prisoner capable of distinguishing between right and wrong, then he was a responsible agent and liable to take all the penalties the law imposes. (qtd. in Bonnie, Jeffries, & Low 10-11; qtd. in Moran 19)

The jury didn't even retire to chambers; they simply huddled in the jury box, and returned their verdict in less than two minutes: "Not guilty, on the grounds of insanity" (Moran 19).

The public was outraged, particularly the Queen after the recent attempt on her life by a "madman." Several newspapers published the following satirical poem by Thomas Campbell:

CONGRATULATIONS ON A LATE ACQUITTAL

*Ye people of England: exult and be glad,
For ye're now at the will of the merciless mad.
Why say ye that but three authorities reign—*

*Crown, Commons, and Lords!—You omit the insane!
They're a privileg'd class, whom no statute controls,
And their murderous charter exists in their souls.
Do they wish to spill blood—they have only to play
A few pranks—get asylum'd a month and a day—
The heigh! to escape from the mad-doctor's keys,
And to pistol or stab whomsoever they please.
No the dog has the human-like wit in creation
He resembles most nearly our own generation:
Then if madmen for murder escape with impunity,
Why deny a poor dog the same noble immunity?
So if dog or man bit you, beware being nettled,
For crime is no crime—when the mind is unsettled.*

(qtd. in Moran 19-20)

An article in the *Times* lamented the verdict, claiming that even if McNaughtan was really persecuted the way his delusions led him to believe he was, that he should still be held legally accountable for his crime. An article in the *Standard* claimed that “monomaniacs” (meaning people who are insane in one aspect) can ethically be punished because their mental defect is the result of their own indulgence in depraved habits. The *Illustrated London News* suggested that those who willingly mentally intoxicate themselves with “doctrines of socialism and infidelity” cannot claim to be entirely without legal or moral responsibility (Moran 20). The argument that mental illness is somehow linked to a personal moral failure on the part of the individual was common in the 19th century, and it continues to be so in contemporary popular and legal discourse about the mentally ill, particularly those accused of criminal acts.

Another common trope in insanity defense discourse emerged in the aftermath of McNaughtan—the tension between medicine and law and whose authority should be privileged in the case of a mentally ill criminal defendant. An article in the *Times* expressed concern “that the physicians had invaded the traditional province of the judiciary,” saying that “the judge in his

treatment of the madman yields to the decision of the physician, and the physician in his treatment becomes the judge' (qtd. in Moran 20). An article in the *Standard* decried the way that "mad doctors" were dictating the law and worse, that the court gave credence to their "absurd" dictums. An article in the *Examiner* questioned the reliability of the medical experts' diagnoses since none of them had examined him until after his crime when his life literally depended on his being insane (Moran 20). The *Weekly Chronicle* took a slightly more sympathetic stance in an article that argued that the insane could not be deterred by punishment because the insane were "not subject to the ordinary constraints on human behavior"; the proposed solution, however, was to immediately restrain all "monomaniacs" in order to protect the public (Moran 20).

When the House of Lords met after the McNaughtan verdict, there was a push to propose legislation to mitigate what they saw as a defect in the law that allowed "persons laboring under partial insanity to be relieved of all criminal responsibility," to which the lord chancellor responded affirmatively (Moran 21). All members agreed that this matter needed further attention, and a letter from Queen Victoria, herself recently the target of a would-be assassin who claimed mental disease as a defense, urged the Prime Minister to get the legislature to take action. On March 13, 1843, the House of Lords attempted to address the issue of criminal responsibility in the case of mentally ill defendants. The chancellor suggested that all of the Supreme Court judges be summoned so that they could weigh in on the administration of the insanity defense. Lord Brougham expressed his great displeasure with the proceedings and the outcome of McNaughtan's trial, remarking that the published accounts must certainly be erroneous "since they revealed so many improprieties," including inadmissible evidence and witness statements, the abrupt termination of the trial before the medical witnesses for the prosecution were called, and the fact that the prosecution was not allowed to rebut the defense's arguments (Moran 22). The debate continued, and the lords decided to follow the chancellor's suggestion and summon the judges. Lord Lyndhurst was asked to formulate a series of questions with McNaughtan's trial in mind.

The judges attended the House of Lords on June 19 where the following questions were posed to them:

1st What is the law respecting alleged crimes committed by persons affected with insane delusions, in respect of one or more particular subjects or persons: as, for instance, where at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?

2nd What are the proper questions to be submitted by the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence [*sic*]?

3rd In what terms ought the question to be left to the jury, as to the prisoner's state of mind at the time when the act was committed?

4th If a person under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?

5th Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any and what delusion at the time? (qtd. in Moran 22-3)

Chief Justice Tindal delivered the judges' opinion with the caveat that it is difficult to apply general principles to a particular case without having heard evidence in court. The judges answered the five questions that were put to them by the lords; here I provide summary portions of those answers as reported by Moran (23):

(1) If a person commits a criminal act 'under the influence of an insane delusion, with a view of redressing or revenging some supposed grievance or injury or of

producing some public benefit, he is nevertheless punishable if he knew at the time that he was acting contrary to the law.’

(2) and (3) A person is presumed sane unless it can be ‘clearly proven that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong... The mode of putting the latter part of the question to the jury...has generally been, whether the accused at the time of doing the act knew the difference between right and wrong [emphasis in Moran].”

(4) A person laboring under a “partial delusion only, and [who] is not in other respects insane, ...must be considered in the same situation, as to responsibility, as if the facts, in respect to which the delusion exists, were real.”

(5) A medical doctor, who never examined the accused, cannot be asked his opinion of the defendant’s state of mind at the time he committed the offense. Such a question involves a judgment on the truth of the facts, which is the province of the jury.

These opinions became known as the M’Naughtan Rules. The combined answer to questions two and three, that as a result of mental disease or defect the defendant did not know the ‘nature and quality of the act’ or, if he did know it, that he did not know it was wrong, has remained the most significant and widely used test of insanity, still today in both England and America.

Bonnie, Jeffries, and Low note three significant features of the formulation of the M’Naughtan Rules: “first, it is predicated on proof that the defendant was suffering from some form of mental disease or defect;” second, “once such a ‘disease’ is shown...the interest of the law under this test is in the ability of the defendant to ‘know’ certain things,” which is why this test is sometimes referred to as the ‘cognitive’ test; and finally, the M’Naughtan Rules define two things the defendant must be able to know in order to be guilty—one “is ‘the nature and quality of the act,’...the other is that the act ‘was wrong’...the question is whether the defendant was ‘capable’ of knowing these things, that is whether the mental illness had deprived the defendant

of the capacity to know what 'normal' people are able to know about their behavior" (11). The central ambiguity of the M'Naughtan Rules, specifically with regard to the meaning of the words "know" and "wrong" has plagued insanity defense law ever since they were formulated. The M'Naughtan standards were criticized by many who felt that they were too narrow in scope and did not account for those criminals who may have had the cognitive capacity to 'know right from wrong,' but lacked the volitional capacity to 'control' their actions. The next iteration of insanity defense standards reflects an effort to address this issue in what is known as the Parsons-Davis rule or, more commonly, the 'irresistible impulse' test, which is the subject of the next chapter.

CHAPTER 4

LATE 19TH CENTURY INSANITY DEFENSE JURISPRUDENCE:

THE PARSONS-DAVIS RULE, “CONTROL,”

AND THE “IRRESISTIBLE IMPULSE” TEST

The late 19th century gave rise to the next revision of insanity defense standards in the cases of *Parsons v. State* and *Davis v. United States*. When Abraham Goldstein wrote his comprehensive history of the insanity defense in 1967, he noted that “in eighteen states and in the federal system, juries considering the insanity defense [were] charged first in the words of M’Naghten [*sic*] and then in the words of a test which is generally described as the ‘irresistible impulse’ rule” (67). This rule, broadly construed, instructs the jury “to acquit by reason of insanity if they find the defendant had a mental disease which kept him from controlling his conduct,” and that “they are to do so even if they conclude he knew what he was doing and that it was wrong” (67). According to Goldstein, this rule traces back at least as far as *McNaughtan*, with which it had previously competed for acceptance; however, it came to be regarded as a supplement, rather than an alternative, to *McNaughtan*, resting on the following assumptions: first, that there are mental diseases which impair volition or self-control, even while cognition remains relatively unimpaired; second, that the use of *McNaughtan* alone results in findings that persons suffering from such diseases are not insane; third, that the law should make the insanity defense available to persons who are unable to control their actions, just as it does to those who fit the *McNaughtan* standards; and fourth, no matter how broadly *McNaughtan* is construed, there will remain areas of serious disorder which it will not reach (Goldstein 67).

In this chapter, I outline the two cases that set the legal precedents for what is known as the Parsons-Davis Rule or, more commonly, but misleadingly, the “irresistible impulse” test.

Parsons v. State

On January 31, 1885, Nancy Parsons and her daughter, Joe, killed Bennett Parsons, who was Nancy’s husband and Joe’s father, by shooting him with a gun. The defense presented evidence to show that:

Joe Parsons was, at the time of said killing, and always had been an idiot; and that... Nancy Parsons was, at the time of said killing, insane; that the act of Nancy, assisting in the killing...was the result of an insane delusion that [Bennett] possessed supernatural power to inflict her with disease, and power by means of a supernatural trick to take her life; that [he] by means of supernatural power had caused [her] to be sick and in bad health for a long time, and that her act, at the time of said killing, in assisting therein, was under the insane delusion that she was in great danger of the loss of her life...to be effected by a supernatural trick.

(Parsons v. State 1)

The defense went on to assert that insanity was present in two generations of the defendants' families, with testimony from a witness by the name of Mrs. James Nail, who had known Joe Parsons from her infancy, claiming that Joe had indeed been 'idiotic' all her life. The state objected to the admission of this evidence, and the court sustained this objection. The jury was charged to decide the case in the following language:

When insanity is relied on as a defense to crime, and such insanity consists of a delusion merely, and the defendant is not shown to be otherwise insane, then such delusion is no justification or excuse of homicide, unless the perpetrator was insanely deluded into the belief of the existence of a fact or state of facts which, if true, would justify or excuse the homicide under law applicable to sane persons. *(Parsons v. State 1)*

The jury for the city court of Birmingham returned a verdict finding both defendants guilty of murder in the second degree. The appeal was brought before the Supreme Court of Alabama and decided on July 28, 1887, in which the opinion reversed the lower court's decision by presenting the 'control' test that would come to define the next iteration of the insanity defense as opposed to the 'knowledge' test that defined the McNaughtan standards. Whereas use of the McNaughtan Rules required a determination of the defendant's ability to know right from wrong, Parsons added the dimension of 'freedom of will,' that is, the issue of whether mental disease could take

away one's capacity to choose between right and wrong even if he were able to 'know' the difference (Goldstein 68-9).

The author of the opinion, Judge J. Somerville, wrote that reopening the subject of the disease of insanity as it relates to issues of law was undertaken because of "an imperious sense of duty" and:

the conviction that the law of insanity as declared by the courts on many points, and especially the rule of criminal accountability, and the assumed tests of disease, to that extent which wafers [*sic*] legal irresponsibility, have not kept pace with the progress of thought and discovery in the present advanced stages of medical science. (*Parsons v. State* 4)

Somerville decried the unwillingness of the English House of Lords to follow the progress of science in their treatment of mentally ill criminal defendants, although he made a point to distinguish between "moral or emotional insanity" and "mental disease," a moment which reflects broader cultural understandings of mental illness at the time, lauding "the progress of Christian civilization" for "the establishment of the most beneficent of modern civilized charities,--the hospital and asylum for the insane" (*Parsons v. State* 5). Citing "modern medical authorities" who find the 'right and wrong' test to be "founded on an ignorant and imperfect view of the disease," he posited the court's task as deciding between adhering to an outdated rule of legal responsibility and acknowledging "that the old [test] is wrong, and tout there is no single test by which the existence of the disease, to that degree which exempts from punishment, can in every case be infallibly detected" (*Parsons v. State* 5). Somerville went on to assert that it was widely accepted that "an Idiot, lunatic, or other person of diseased mind" who is so affected by his mental defect as to lack the ability to know the difference between right and wrong cannot be punished for any act committed while in such a state, but asked whether this is or should be the only test of responsibility. Citing "a writer on psychological medicine" who described a state in which "reason" loses control over "actions," he suggested that a person may understand the difference between right and wrong, but be "so far *under the duress of such disease* as to destroy the power to choose between right and wrong" (*Parsons v. State* 5).

Somerville began the explanation of the court's decision by discussing the ongoing confusion about the proper roles of the jury and the court in a trial concerning "a case of this nature," stating that it is the jury's duty to determine the facts and the court's job to state the law (*Parsons v. State* 5). He addressed the recurring tension in insanity defense trials regarding the role of expert testimony and the problem of courts declaring matters of fact as law, citing *State v. Pike*:

If the tests of insanity are matters of law, the practice of allowing experts to testify what they are should be discontinued; if they are matters of fact, the judge should no longer testify without being sworn as witness, and showing himself to be qualified to testify as an expert. (6)

Recall that in the first *Parsons* trial, some of the "expert" testimony was a family friend who confirmed the 'idiocy' of Joe Parsons, and part of the appeal was based on the role of expert testimony.

The first consideration in any criminal trial, Somerville explained, is "the proper legal rule of responsibility in [a] criminal case," which must have two elements: "(1) Capacity of intellectual discrimination; and (2) freedom of will" (*Parsons v. State* 6). In other words, in the absence of either of these elements, there can be no criminal responsibility for the act in question. Somerville then moved to the consideration of "the probable existence of such a diseases [*sic*], and the test of its presence" (6). In this section of the opinion, he compared the fact of "the existence of such a cerebral disease" and the skepticism with which its existence tended to be met with other scientific discoveries such as:

the Copernican system of the universe, the efficacy of steam and electricity as a motive power, or the possibility of communication in a few moments...by magnetic telegraph, or that of the instantaneous transmission of the human voice...by use of the telephone. (6)

He suggested that years ago, the courts could have denied the existence of all of these things, that as with all scientific discoveries, such scientific facts must first be "discovered by experts before becoming matters of common knowledge," and that the kind of mental disease in question,

that which destroys the volitional power of the afflicted, “is earnestly alleged” by those “who constantly have experimental dealings with the insane,” such as “superintendents of insane hospitals, and other experts” (6). Extending the acceptance of the existence of such a disease, Somerville addressed the question of a proper test for it. In this section of the opinion, he cited experts in medical jurisprudence to claim that no such “invariable or infallible” test exists, because “the symptoms and causes of insanity are so variable, and its pathology so complex, that no two cases may be just alike” (6). This statement reflects what is arguably the most accurate understanding of the diagnosis of mental disease, even contemporarily; it seems that Judge Somerville was ahead of his time. Again, he touted the marvels of modern asylums as “peculiar opportunities, never before enjoyed in the history of our race” as a means of ascertaining the causes and symptoms of mental disease, “its exciting causes being moral, psychical, or physical,” and the domain of specialists’ study, whose expert testimony is the primary means of determination of insanity in the court (6-7). What Somerville also demonstrates here is a respect for the work of doctors specializing in mental disease, which is a departure from previous battles for superiority between the court and the experts, a battle that we will see reemerges in the next century.

In the next section of the opinion, Somerville addressed the inadequacies of the current insanity test, *McNaughtan*, saying, “The courts, in effect, charge juries, as a matter of law, that no such mental disease exists...which destroys the patient’s power of self control provided only he retains a mental consciousness of right and wrong” (*Parsons v. State* 7). Again, he referred to experts in the field of psychiatry, citing numerous statements as to the inaccuracy of the *McNaughtan* standards, concluding, “nowhere do we find the rule more emphatically condemned than by those who have the practical care and treatment of the insane in the various lunatic asylums of every civilized country” (7). He quoted a resolution passed by the British Association of Medical Officers of Asylums and Hospitals for the Insane 13 years prior to this decision in which 54 medical officers unanimously agreed upon the following statement:

Resolved, that so much of the legal test of the mental condition of an alleged criminal lunatic as renders him a responsible agent, because he [sic] knows the

difference between right and wrong, is inconsistent with the fact, well known to every member of this meeting, that the power of distinguishing between right and wrong exists very frequently in those who are undoubtedly insane, and is often associated with dangerous and uncontrollable delusions. (qtd. in *Parsons v. State 7*)

He then suggested that these testimonials of scientific fact cannot continue to be ignored by judges, as he expanded his claims beyond the proof from scientific experts to “modern law writers” who also disapproved of the outdated test, as if to suggest that if the doctors of these ‘soft’ sciences lacked the necessary credibility to persuade men of the law, then perhaps the claims of those within their discipline might perhaps be more efficacious in convincing them to accept a newer, broader standard.

Somerville cited no fewer than ten specific cases from both England and the United States supporting the consideration of a volitional component of mental disease that could prevent a person who knew what he was doing was wrong from being able to control his actions. In his poetic description of the challenges faced by courts dealing with insanity defense cases, he said:

The practical trouble is for the courts to determine in what particular cases the party on trial is to be transferred from the category of sane to that of insane criminals; where, in other words, the border line [*sic*] of punishability is adjudged to be passed. But, as has been said, in reference to an every day fact of nature, no one can say where twilight ends or begins, but there is ample distinction between *day* and *night*. We think we can safely rely in this matter upon the intelligence of our Juries, guided by the testimony of men who have practically made a study of the disease of insanity; and enlightened by a conscientious desire, on the one hand, to enforce the criminal laws of the land, and, on the other, not to deal harshly with any unfortunate victim of a diseased mind, acting without the light of reason or power of volition. (*Parsons v. State 10*)

What Judge Somerville expressed here was the then relatively recent acceptance of 1) psychiatry as a legitimate medical discipline, 2) mental disease as a 'real' illness and not a moral failure, and 3) compassion for people suffering from mental disease as reflected in broader sociocultural terms. The following, then, are the court's written recommendations for jury instructions in *all* future criminal trials in which an insanity defense is raised:

First. Was the defendant at the time of the commission of the alleged crime, as a matter of fact, afflicted with a *disease of the mind*, so as to be idiotic or otherwise insane? *Second*, If such be the case, did he [*sic*] know right from wrong, as applied to the act in question? If he did not have such knowledge, he [*sic*] is not legally responsible. *Third*, If he did have such knowledge, he may nevertheless not be legally responsible if the two following conditions occur: (1) If, by reason of the duress of such mental disease, he had so far lost the *power to choose* between the right and wrong, and to avoid doing the act in question; as that his free agency was at the time destroyed; (2) and if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it *solely*. (11-12)

With that, the lower court's judgment in *Parsons* was reversed, and a new insanity standard was put forth.

In the dissenting opinion for this appeal, Judge Stone reiterated the McNaughtan standards, suggesting that they were quite sufficient for determining insanity as it pertained to criminal responsibility and further addressed the issue of "moral" insanity as an unacceptable "defense against a criminal accusation." He worried that some of the "other authorities" on which Judge Somerville relied in his written majority opinion, specifically the medical rather than the legal authorities, "deal too much in the abstruse or metaphysical," and that legal principles must be presented to juries "so simply and clearly as to be easily understood by the class of men [*sic*] who generally perform that service" (*Parsons v. State* 13). We can interpret Judge Stone's skepticism to mean that he distrusts the 'mumbo-jumbo' of psychiatry, that he would prefer the determination of criminal insanity to remain in the hands of the jury, and that he does not support

the addition of a volitional component to an insanity test, based largely on an objection to 'moral' insanity, rather than 'physical' or 'emotional' insanity, as exculpatory.

In his own review of case law, Stone noted what he believed to be too many courts holding "moral insanity as a defense to a criminal prosecution," indicated by the use of such phrases as "sudden impulse" and "overpowering or subverting the will." This, Stone said, was incorrect, because "impulse is emotional rather than intellectual," and he launched into a Cartesian explanation of how the mind's executive faculty, 'the will,' cannot be subverted or it would cease to have purpose (*Parsons v. State* 18). He belabored the explanation of the difference between perversion of the will "by a disease of the brain or intellectual faculties," which he claimed *is* exculpatory, and perverted will that is "the offspring of moral depravity, debauched appetite, blunted sense of right, or other kindred prompting of a wicked heart," which was *not* sufficiently exculpatory. In a convoluted analysis of "delusion" and how it was not, in his opinion, within the purview of the law (remember that the Parsons' defense hinged upon the delusions suffered by the mother regarding her husband's supernatural powers), Stone stated the following:

I hold we should take our steps cautiously, in adopting theories of psychological enthusiasts, lest we disarm retributive justice of all its restraining energy... I...still fear, that the effect of [this] ruling will be to let in many of the evils which result from allowing the defense of emotional insanity...I think the line cannot be too clearly and sharply drawn which separates the pitiable, unfortunate victims of diseased mental faculties from the recklessly depraved, whose chief evidence of insanity is found in the causeless atrocity of their crimes...the lawless should be made to feel that the way of the transgressor is hard. The terror of the law may thus become a minister of peace. (20)

Judge Stone's dissenting opinion emphasized the recurring anxiety about the insanity defense weakening the deterrent function of the law, while foreshadowing the criticisms that the Parsons-Davis rule would eventually face, both in the century in which the ruling was issued and the next.

Davis v. United States

In *Davis v. United States*, the *Parsons v. State* definition was codified at the Federal level, eventually becoming what is commonly referred to as the Parsons-Davis rule or the 'irresistible impulse' test. In Western Arkansas in 1894, the defendant, Dennis Davis, shot and killed Sol Blackwell, a man from whom he was renting land to grow a sugar cane crop after a dispute with the landowner¹. The defendant immediately surrendered himself to police in the nearest town, detailing the circumstances of his criminal act (*Davis v. United States* 1). On October 13, 1894 the Circuit Court of the Western District of Arkansas found the defendant guilty of murder and sentenced him to death by hanging. The "judgment was reversed on the ground of error in the instructions of the court in respect to the matter of insanity." A second trial took place resulting in a similar verdict and sentencing, which led to an appeal to the United States Supreme Court. The high court's opinion, written by Justice Brewer, ultimately upheld the defendant's conviction for murder while addressing the larger issue in insanity defense jurisprudence of burden of proof.

In the Davis trial, "several lay witnesses...testified as to their acquaintance with the defendant and their opinion as to his sanity," along with "two medical witnesses...each of whom had seen him after his arrest and during his confinement in jail, and had observed his conduct, actions and demeanor," and Justice Brewer concluded that the testimony of these witnesses was permissible in stating "what [they] had seen or heard of the actions of [sic] sayings of [the] defendant," and to give their full opinions "as to the mental condition of the defendant, and [their] belief as to the latter's knowledge of right and wrong and his ability to distinguish between them" (*Davis v. United States* 3-4). Dr. Amis, one of the experts called to testify regarding the mental condition of the defendant, described his physical appearance and apparent lack of regard for his own well being rather than a diagnosis based on a psychiatric examination. He referred to the defendant's staring at the floor, unchanging facial expression, "dreamy, melancholy" gaze "with his mouth open and under jaw hanging down, having a vacant, meaningless stare," and that even

¹ The court opinion and the secondary sources I have found do not specify the race of either the victim or the defendant, which would add an interesting layer to the history. It was in 1894 in Arkansas, and clearly, the victim was a landowner and his killer was a sharecropper, so while it is not unlikely that the defendant was African American and the landowner was white, this is not confirmed; what is certain is that there was significant class disparity between the two, but that is the furthest I am able to speculate without additional information.

when he was “violently ill he was indifferent and unconcerned...never worried about his condition” (4). When the witness was asked by defense counsel what “medical science” says or teaches “as to that meaningless, vacant stare, and the lower jaw hanging down in a listless way,” an objection was raised by the prosecution and sustained by the judge with no grounds given for either.

The high court, however, addressed this particular objection, though they found “no ground for disturbing the judgment,” offering the following rationale:

The trial court must have some discretion as to the limit to be placed in any given case upon the extent to which the expert testimony may be carried, and when upon direct examination the opinion of the witness is fully disclosed, we think it cannot be said that the court erred in declining to permit on the same direct examination an inquiry into what is in some aspects both collateral and hearsay.

(Davis v. United States 4)

Assuming that overruling the objection would have allowed Dr. Amis to explain to the jury his medical opinion of Davis’s vacant stare and listless jaw would have, in turn, aided the defense in building a case for the defendant’s insanity, this particular moment in the original trial was part of the basis for the appeal.

During the first trial, the district attorney asked Dr. Wright, the other medical expert testifying in the trial, if he believed, based on his experience with the defendant, that the defendant killed his victim because he felt his life was being threatened, presumably to establish grounds for an insanity plea based on the delusions of the defendant that his life was in danger, similarly to the defense strategy in *Parsons*. An objection was raised by the defense but was overruled, so Dr. Wright was permitted to answer, responding, “Well, in part; and because he thought his own life was in danger, and because he thought he had a right to destroy this menace to his own life” (qtd. in *Davis v. United States 4*). Again, the high court upheld the judgment, based on their concurrence that the question “was clearly within the limits of proper cross-examination” (4).

The final issue at stake was the nature of the instructions provided to the jury regarding the determination of insanity. The high court deemed that the jury in the first appeal was, in fact,

instructed incorrectly when they were charged that every man is presumed to be sane, and that the burden of proof rests with the defendant to establish his insanity “to the reasonable satisfaction of the jury,” which was the phrase with which the high court took issue. However, they found no fault with the charge given to the jury in this trial. Justice Brewer wrote:

The court charged the law in accordance with the rule laid down by this court...and also defined what was meant by insanity in language which...was in no way prejudicial to the defendant as follows: The term ‘insanity’ as used in this defence [*sic*] means such a perverted and deranged condition of the moral and mental faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing, or where, though conscious of it and able to distinguish between right and wrong and know that the act is wrong, yet his will, by which here I mean the governing power of his mind, has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control. (*Davis v. United States* 4-5)

While upholding the essence of *Parsons* regarding the definition of insanity and criminal responsibility by retaining both a cognitive and a volitional component, the opinion authored by Justice Brewer reflects an attitude that is more particular in terms of what constitutes mental disease while less interested in the testimony of medical experts. Ultimately, the lower court’s decision was affirmed, which means that the defendant was again found guilty and sentenced to death by hanging.

After *Parsons* and *Davis*

Since *Davis*, countless variations of the rule or test have been presented. Some instructions address the issue of mental disease having taken the actions of a defendant beyond his own control; others added the word ‘impulse,’ asking whether the defendant’s mental disease rendered him incapable of resisting an impulse. While there is no monolith known as the ‘Irresistible Impulse Test,’ nor is the term ‘impulse’ even a requirement for the use of *Parsons-Davis*, the word became the point on which the subsequent debate hinged, the focal point of most

of its criticism, and the primary explanation for the inadequacies of the 'control' test (Goldstein 69). Seen as a group of rules inquiring broadly into the capacity of the accused to control his conduct, Parsons-Davis seemed to remedy the problems with the McNaughtan Rules, namely the reductive nature of the 'knowledge' test, but it was also ultimately deemed unsatisfactory (Goldstein 75).

Some of its critics claimed that "control" tests were unnecessary if McNaughtan is properly construed:

Starting from the premise that the human personality is integrated, [legal scholar, Professor Jerome Hall] concludes that any case of impaired volition which can satisfy the 'control' rule will also be marked by the failure of knowledge demanded by McNaughtan, provided the word 'know' is given a broad construction. (Goldstein 75)

Some of its critics claimed that 'control' tests did not broaden the insanity defense enough.

According to legal scholar, Professor Henry Weihofen:

Both tests fail to give due emphasis to the fundamental concept that the mental processes are interdependent and interrelated. Both fail particularly to provide adequate bases for judging severe psychoneurotics and others whose criminal acts seem to stem from unconscious motivation. Both fail to take account of the now-recognized fact that all persons--even the normal--are usually more influenced by their emotions than by reasoning. (Qtd. in Goldstein 76)

And some of its critics claimed that 'control' tests broadened the defense too much, potentially making it available to all people who commit crimes:

This is said to follow from the impossibility of determining which acts were uncontrollable, rather than merely uncontrolled, and the attendant suspicion that the former category does not really exist; from the fact that weaknesses in self-control are to be found in most men; and from the consequent ease of asserting an inability to control one's conduct. The result prophesied under a 'control' test

is a dramatic rise in successful insanity pleas and a marked reduction in the deterrent impact of the criminal law. (Goldstein 77)

This particular criticism hearkens back to Judge Stone's dissenting opinion in *Parsons v. State*, and ultimately brought about the next attempt to clarify the language of the test in *Durham v. United States*, the focus of the next chapter.

CHAPTER 5

MID 20TH CENTURY INSANITY DEFENSE JURISPRUDENCE: DURHAM V. UNITED STATES, THE “PRODUCT” TEST, AND THE AMERICAN LAW INSTITUTE MODEL PENAL CODE

The next rhetorical shift in insanity defense standards came on July 1, 1954 when the case of *Durham v. United States* was decided by the United States Court of Appeals for the District of Columbia Circuit. The appellant, Monte Durham, sought review of his conviction of ‘housebreaking’ (what we would now refer to as ‘breaking and entering’) by the Washington DC District Court, a trial in which he had plead insanity. The three circuit judges who heard his appeal on March 19 of the same year are listed in the written opinion as: Edgerton, Bazelon, and Washington. Judge Bazelon wrote the opinion in which the lower court’s conviction was reversed, “(1) because the trial court did not correctly apply existing rules governing the burden of proof on the defense of insanity, and (2) because existing tests of criminal responsibility are obsolete and should be superseded” (*Durham v. United States* 2). This determination that the existing tests were obsolete gave rise to a new conception of criminal behavior as a “product” of mental disease or defect and led to the next era of semantic debate among the legal and psychiatric communities.

The defendant in question, Monte Durham, had a long and well-documented history of mental illness, the beginning of which was being discharged from the Navy at age 17 “after a psychiatric examination had shown that he suffered ‘from a profound personality disorder’” (*Durham v. United States* 2). Subsequent events brought him into frequent contact with both the legal and medical systems, from being sentenced to probation for violating the National Motor Theft Act in 1947 to institutionalization for two months at St. Elizabeth’s Hospital after a suicide attempt soon after that criminal conviction. By 1948, his probation was revoked when he was convicted of passing bad checks, at which time he was ordered to serve jail time for the duration of the previous sentence for Motor Theft. Within a few days of being incarcerated, Durham’s conduct led to a lunacy inquiry in which “a jury found him to be of unsound mind,” at which time he was recommitted to St. Elizabeth’s, where “he was diagnosed as suffering from ‘psychosis with psychopathic personality’” (2-3). He was treated at St. Elizabeth’s for 15 months, discharged

as “recovered” in July of 1949, and sent back to jail to serve the balance of his sentence. Durham was conditionally released from jail in June of 1950; however, he left the District, which was a violation of his parole. According to the court, when he learned that there was a warrant out for his arrest, he fled to the South and Midwest, writing fraudulent checks in order to obtain funds. He was eventually found and returned to the District, at which time “the Parole Board referred him to the District Court for a lunacy inquisition” where he was again determined by a jury to be of unsound mind. Durham was subsequently readmitted to St. Elizabeth’s in February of 1951 where he was this time diagnosed as “without mental disorder, psychopathic personality” (3). On July 13, 1951, shortly following his discharge from the hospital in May, he committed the housebreaking offense on which his trial and appeal centered.

Both Durham’s mother and the psychiatrist who examined him in September of 1951 attested that “he suffered from hallucinations immediately after his May 1951 discharge from St. Elizabeths [sic]” (*Durham v. United States* 3). In October of 1951, two psychiatrists determined that Durham “suffered from ‘psychosis with psychopathic personality,’” and he was recommitted to St. Elizabeth’s and “given subshock insulin therapy” (3). After a six month stay, Durham was declared mentally competent to stand trial by Dr. Silk, the acting superintendent of St. Elizabeth’s, at which time Durham was brought to trial for the housebreaking offense.

In this trial, the prosecutor expressed to the court his awareness of the defendant’s history of mental illness while expressing his unwillingness to be responsible for any future crimes Mr. Durham might commit by dropping the charges against him, saying:

[I]f that man committed a murder next week then it is my responsibility. So we decided to go to trial on one case... and let him bring the defense, if he wants to, of unsound mind at the time the crime was committed, and then Your Honor will find him on that, and in your decision send him back to Saint Elizabeths [sic] Hospital, and then if they let him out on the street it is their responsibility.

(*Durham v. United States* 3)

The sufficiency of Dr. Silk’s singular statement as to Durham’s competence to stand trial was brought into question, at which time the court suggested to defense counsel that when a

defendant has previously been found of unsound mind, that an *ex parte* certificate “is not sufficient to set aside that finding,” and that another lunacy hearing could be ordered. He then offered the following option: “However, if you want to waive that you may do it, if you admit that he is now of sound mind” (3). According to the written record, defense counsel opted to waive the right to an additional lunacy hearing on behalf of Durham, although the court had been informed both by the prosecutor and defense counsel that Durham continued to assert, even that day, that he was in further need of hospitalization. The court responded, “Of course, if I hold he is not mentally competent to stand trial I send him back to Saint Elizabeths [*sic*] Hospital and they will send him back again in two or three months” (3), at which time, the appeal commenced.

What is perhaps most striking about *Durham*, a case that involves a nonviolent repeat offender (not the stereotypical mass-murdering-madman of the popular imagination), is the relationship between institutionalization and incarceration. Monte Durham was in perpetual limbo between the two, and his brief interludes of freedom resulted in further petty crimes, recidivism being quite common for mentally ill offenders released without any support structures to provide ongoing treatment, which brought him right back to bouncing between hospital and jail. Neither was the hospital ‘curing’ him, nor the jail ‘rehabilitating’ him; and no party in the courtroom could muster any sympathy for him or the sad trajectory of his endless loop of encounters with disciplinary institutions that could neither help him nor prevent him from committing additional criminal acts. The disdain with which the trial court and the prosecutor describe this very cycle, along with the fact that Durham’s own defense counsel wasn’t overly anxious to advocate for him, set the scene for a trial emblematic of the difficulties with insanity defense jurisprudence as it plays out in day to day courtroom practice.

Ultimately, the initial trial court convicted Durham of housebreaking based on its rejection of the defense of insanity, saying the following, which I have quoted at length as the wording of the trial court’s decision provides the grounds for appeal and ultimately the appellate court’s reversal of the conviction:

I don’t think it has been established that the defendant was of unsound mind as of July 13, 1951, in the sense that he didn’t know the difference between right

and wrong or that even if he did, he was subject to an irresistible impulse by reason of the derangement of the mind. While, of course, the burden of proof on the issue of mental capacity to commit a crime is upon the Government, just as it is on every other issue... There is no testimony concerning the mental state of the defendant as of July 13, 1951, and therefore the usual presumption of sanity governs... if there was some testimony as to his mental state as of that date, the burden of proof would be on the Government to overcome it. There has been no such testimony... Mr. Ahern [defense counsel], I think you have done very well by your client and defended him very ably... there is nothing that anybody could have done. (*Durham v. United States* 3-4)

According to the appellate court, "this [statement] reflects error requiring reversal" (4). Citing *Tatum v. United States*, Judge Bazelon suggested that the requirement of 'some evidence' as to the defendant's state of mind has previously been met by "considerably less than is present here," and that "the psychiatric testimony [in *Durham*] was unequivocal that Durham was of unsound mind at the time of the crime" (4). The only expert witness to testify in this trial, Dr. Gilbert, unwaveringly asserted so, and despite the efforts of the prosecution "to establish that Durham was a malingerer who feigned insanity whenever he was trapped for his misdeeds, it failed to present any expert testimony to support this theory" (4). Furthermore, testimony from Durham's mother as to his mental condition during the period of time between his release from the hospital and the crime in question supported Dr. Gilbert's assessment. Bazelon reasoned that "the trial judge regarded this psychiatric testimony as 'no testimony' on two grounds," that it did not sufficiently cover Durham's condition on the date of the offense and that it did not address Durham's ability to know right from wrong, but argued, "We are unable to agree that for either of these reasons the psychiatric testimony could properly be considered 'no testimony'" (4). Bazelon went on to assert that the trial court failed to uphold its mandate to consider 'the whole evidence' on the issue of the defendant's capacity in law to commit the crime by asserting that there was 'no evidence' presented in testimony as to Durham's mental state (5).

As a direct result of argument by defense counsel for Durham that the existing standards for assessing criminal responsibility, the right-wrong test supplemented by the irresistible impulse test, were inadequate, the appellate court judges took it upon themselves to formulate yet another new test to be applied in Durham's appeal and as a new precedent (*Durham v. United States* 6). Bazelon outlined the history of insanity defense standards in the District of Columbia, noting that the right-wrong test, also known as the M'Naughtan Rules, was approved in 1882 and used exclusively until 1929, when the irresistible impulse supplement, also known as the Parsons-Davis rule, was approved in *Smith v. United States* (6). He cited one of the founding members of the American Psychiatric Association, Isaac Ray, who, in 1838, judged the right-wrong test fallacious in determining criminal responsibility, saying that Ray's "view has long been substantiated by enormous developments in knowledge of mental life" (6).

In 1953, the British Royal Commission on Capital Punishment issued a report based on agreement among medical experts "that the mind functions as an integrated whole and that it is impossible to isolate the separate functions of cognition and control" (Goldstein 80). Still, many participating in the process of compiling this report felt that the M'Naughtan Rules should be retained, either because they felt no better rule could be found or that the rule was already being given sufficiently broad interpretation. The Commission ultimately decided that it was unwise to rely on 'interpretation' to address the problem, a moment in which the interpretive and, therefore, rhetorical practices of applying the law were denied, and instead issued two recommendations. First, "to abrogate the Rules and to leave the jury to determine whether at the time of the act the accused was suffering from disease of the mind (or mental deficiency) to such a degree that he ought not to be held responsible" (81). As an alternative, the following second recommendation was given:

The jury must be satisfied that, at the time of committing the act, the accused, as a result of disease of the mind (or mental deficiency) (a) did not know the nature and quality of the act or (b) did not know that it was wrong or was incapable of preventing himself from committing it. (81)

Goldstein explains this further:

They [the justices in Durham's appeal] insisted that a standard of responsibility was necessary to limit arbitrariness on the part of the jury, to promote uniformity of decision, and to aid the jury in deciding between the conflicting testimony of the experts... though the dissenters did not make the point, the overly general standard may place too great a burden on the jury. If the law provides no standard, members of the jury are placed in the difficult position of having to find a man responsible for no other reason than their personal feelings about him.

(81-82)

What we see here are both a desire to establish a more concrete way of approaching insanity defense standards, and a denial of how significant 'personal feelings' are in legal decision-making. Ultimately, neither of the Royal Commission's recommendations was adopted in England, but they proved to be profoundly influential in the development of insanity tests in the United States, as evidenced by Bazelon's reference to the Commission's findings in his written opinion in *Durham*. Both the Royal Commission's report and The Preliminary Report by the Committee on Forensic Psychiatry of the Group for Advancement of Psychiatry had by now "present[ed] convincing evidence that the right-wrong test is 'based on an entirely obsolete and misleading conception of the nature of insanity'" (*Durham v. United States* 6). Thus, Bazelon concluded that a test that considers only knowledge *or* reason, as the right-wrong test did, was insufficient in matters so complex as "mental responsibility for criminal behavior" (6).

This is the point at which we begin to see more emphasis on the idea of an 'integrated personality,' one in which 'reason' cannot be separated from other aspects of a person or his actions, as in the tradition of Enlightenment ideology, that a simple lack of knowledge of right and wrong is the only, or even the most, significant symptom of mental illness and that such knowledge is the most significant motivator of one's conduct. Bazelon refers to a past statement by the court that illustrates this shift:

Nine years ago we said: 'The modern science of psychology does not conceive that there is a separate little man in the top of one's head called reason whose

function it is to guide another unruly little man called instinct, emotion, or impulse in the way he should go. (*Durham v. United States* 6)

In other words, he says, the cognitive emphasis of the right-wrong test leaves the decision makers, court and jury, to rely upon what is scientifically demonstrated to be “inadequate, and most often, invalid and irrelevant testimony in determining criminal responsibility” (6).

Next, Bazelon tackled the ‘irresistible impulse’ (control) supplement to the ‘right-wrong’ (knowledge) test, saying that, while useful in its development, it “carries the misleading implication that ‘diseased mental condition(s)’ produce only sudden, momentary or spontaneous inclinations to commit unlawful acts” (*Durham v. United States* 7), substantiated by the Royal Commission’s findings that in certain varieties of mental disease, such as melancholia, schizophrenia, or paranoid psychosis, the change of mood alters the sufferer’s whole existence, and that his criminal act may in fact be the opposite of impulsive, thought out and planned over a long period of time, but still “the act of a madman” (7).

Thus, the appellate court determined that both existing tests fell short, the ‘right-wrong’ test because it was based solely upon one criteria, one which had already been proven by medical science to be insufficient in determining criminal responsibility, and the ‘irresistible impulse’ test because it failed to recognize “mental illnesses characterized by brooding and reflection” (*Durham v. United States* 7-8), therefore, a new test was needed. The new rule read as follows: “It is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or defect” (8). Bazelon further explained the court’s use of the terms ‘disease’ and ‘defect,’ the primary distinction being that a ‘disease’ should be considered a condition “capable of either improving or deteriorating,” and a ‘defect’ “a condition...not...capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease” (8).

As he elaborated the rationale for reformulating the insanity test, he expressed in plain language a sentiment regarding the difficulty with insanity defense jurisprudence since its codification: “We do not, and indeed could not, formulate an instruction which would be either appropriate or binding in all cases” (*Durham v. United States* 8). He then outlined proper jury

instructions under the new rule:

If you the jury believe beyond a reasonable doubt that the accused was not suffering from a diseased or defective mental condition at the time he committed the criminal act charged, you may find him guilty. If you believe he was suffering from a diseased or defective mental condition when he committed the act, but believe beyond a reasonable doubt that the act was not the product of such mental abnormality, you may find him guilty. Unless you believe beyond a reasonable doubt either that he was suffering from a diseased or defective mental condition, or that the act was not the product of such abnormality, you must find the accused not guilty by reason of insanity. (8)

These instructions, while crafted with the intention of clarifying the tests for the jury and eliminating the issue of personal bias, do little more than rearrange and rephrase previous versions of insanity defense jury instructions, leaving the case just as open for interpretation and personal feelings about mental illness and criminal responsibility as before. Bazelon likened the questions of fact for determination by the jury under the new formulation to the questions faced by juries in “a claim of total disability under a policy of insurance where the state of medical knowledge concerning the disease involved, and its effects, is obscure or in conflict,” in which they are not “required to depend on arbitrarily selected ‘symptoms, phases, or manifestations’ of the disease” to discern the questions of fact to assess the claim (8). He asserted that juries faced with a claim of criminal responsibility would now be able to consider “testimony as to such ‘symptoms, phases, or manifestations’ along with other relevant evidence” upon the final questions of fact with which it is charged (8). Clearly, the role of expert testimony, in contention during the whole of the existence of the insanity defense, was a major point this court wanted to address. Bazelon emphasized this challenge when he concluded his final elaboration of the new test:

Whatever the state of psychiatry, the psychiatrist will be permitted to carry out his principal court function which... ‘is to inform the jury of the character of (the accused’s [*sic*]) mental disease (or defect).’ The jury’s range of inquiry will not be

limited to, but may include, for example, whether an accused, who suffered from a mental disease or defect did not know the difference between right and wrong, acted under the compulsion of an irresistible impulse, or had 'been deprived of or lost the power of his will'... Finally, in leaving the determination of the ultimate question of fact to the jury, we permit it to perform its traditional function which...is to apply 'our inherited ideas of moral responsibility to individuals prosecuted for crime'. Juries will continue to make moral judgments, still operating under the fundamental precept that 'Our collective conscience does not allow punishment where it cannot impose blame'. But in making such judgments, they will be guided by wider horizons of knowledge concerning mental life. The question will be simply whether the accused acted because of a mental disorder, and not whether he displayed particular symptoms which medical science has long recognized do not necessarily, or even typically, accompany even the most serious mental disorder. (8-9)

The problem of a collective and universal morality is obviously not addressed; it is assumed that juries operate under the same 'neutral' and 'objective' precepts as the mythological judiciary. Following *Durham*, ultimately, only Maine and the Virgin Islands followed suit and formally adopted the new test, but it continued to impact the ongoing conversation about insanity defense standards in the U.S. legal system (Goldstein 83).

While nothing specific in previous standards necessarily inhibited the flow of expert testimony, it had unquestionably been hindered (Goldstein 83), largely due to skepticism regarding the validity of the mental health professions. For the District of Columbia, *Durham* directed "the attention to lawyers and psychiatrists to the charade which was too often being played in the trial of the insanity defense" (83). After *Durham*, Washington D.C. became somewhat of a laboratory for both the substantive and procedural ramifications of insanity tests (83). There was, in fact, a significant increase in Not Guilty by Reason of Insanity verdicts after *Durham*, but this is most likely attributable to the redirection of those previously deemed incompetent to stand trial into trials asserting an insanity defense (84). Of course, *Durham* faced

criticism, as with every insanity test thus far. The primary criticism of *Durham* was that it was too similar to the Royal Commission's first proposal which, critics argued, was really a 'non-rule,' providing no standard for the jury to judge the evidence, avoiding the pathological factors of concern to the law such as impairment of reason and control, leaving the jury wholly dependent upon the testimony of experts who would classify the behavior of the accused as the 'product' of mental disease (84). While *Durham* attempted to shift the focus away from the semantic debates about the particular legal language and toward the specifics of how the mental disease of individual defendants related to their cases, the sociocultural climate for psychiatry was becoming more hostile; indeed the very concept of mental disease was coming under attack. Goldstein says, "It was becoming apparent that 'mental disease' is as much a social concept as a psychiatric one, that its content is affected by the ends for which the diagnosis is being made" (85), which emphasizes the tension between the goal of law—punishing and deterring—and the goal of psychiatry—treating and curing.

The disputes about nomenclature similar to those which characterized trials, first under *McNaughtan*, and then under *Parsons-Davis*, continued to arise, and the nature of the questions that could be asked to determine whether a particular mental disease or defect would produce the crime in question were not altered from questions asked under previous tests, since the ultimate issue needed to be brought "within the common experience of the jury," which made issues of 'control' the most critical (Goldstein 85). In 1962, in *McDonald v. United States*, the court decided that an explanation of what was meant by 'mental disease' was necessary for jurors, judges, lawyers, and expert witnesses, saying:

neither the court nor the jury is bound by ad hoc definitions or conclusions as to what experts state is a disease or defect... The jury should be told that a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls. The jury would consider testimony concerning the development, adaptation and functioning of these processes and controls.
(Goldstein 86)

The ultimate outcome of *Durham* was the conclusion that juries needed guidance, that allowing terms like 'mental disease' and 'product' to speak for themselves was not sufficient, and that any standards would need to describe the effects of mental disease that impacted a defendant's capacity to comply with the law (86). As evidenced by the above reframing of 'mental disease or defect,' determining a clear and unambiguous definition of these fundamentally fluid concept proved, and continues to prove, to be no easy feat.

In 1962, the American Law Institute (ALI) attempted to 'solve' the problems with earlier insanity tests by drafting the Model Penal Code. However, the ALI rejected the advice of its psychiatric advisory committee, which endorsed *Durham*, and instead adopted a test very similar to the Royal Commission's second proposal. The ALI formulation reads as follows:

(I) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

(II) As used in this Article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

(Goldstein 87)

By substituting the word 'appreciate' for the word 'know,' this version of the test indicated awareness that emotional as well as intellectual awareness of the significance of one's conduct is required to establish criminal capacity. By substituting the word 'conform' for 'control,' this version avoided reference to the problematic notion of the 'irresistible impulse.' And by referring to 'substantial capacity,' this version distanced itself from previous iterations that insisted on the complete or total absence of the defendant's faculties (Goldstein 87). Still, were words like 'appreciate,' 'conform,' and 'substantial' any less vague than the previous 'know,' 'control,' or 'total'? Ultimately, they were not, and Goldstein concludes in his history of the insanity defense, which was written shortly after the ALI formulation was drafted, that:

a precise definition of insanity is impossible, that the effort to eliminate functional definitions deprives the jury of an essential concreteness of statement and that it

is entirely sensible to leave 'mental disease' undefined, at least so long as it is modified by a statement of minimal conditions for being held [accountable] under a system of criminal law. (87)

Of course, the ALI test was not without its critics. Some felt that it was an effort to prevent 'psychopaths' from using the insanity defense, while others argued that such an effort was necessary in order to "keep the defense from swallowing up the whole of criminal liability, as it might if all recidivists could qualify for the defense merely by being labeled psychopaths" (Goldstein 88). This criticism echoes sanist mythology which posits the defense as an easy out for all morally defective criminals that will ultimately negate the deterrent function of the law. Again, the debate about the use of specific words can be traced to one simple truth that explains the most fundamental ideological tension in the question of the insanity defense, and that is that "the insanity test is not really intended to raise medical questions" (Goldstein 89). In other words, the legal conception of insanity has yet to allow for any new definition of mental illness that emerges from the mental health professions to guide decision-making processes in cases involving mentally ill criminal defendants. All of the attempts to clarify the standards came to a head in the early 1980's when John Hinckley's very high-profile insanity defense trial dominated public discourse, which is the focus of the next chapter.

CHAPTER 6

HINCKLEY VS. UNITED STATES AND THE INSANITY DEFENSE REFORM ACT OF 1984

On March 30, 1981 John Hinckley, Jr. attempted to assassinate President Ronald Reagan. As Reagan was walking to his limousine after an appearance at the Hilton Hotel in Washington, D.C., Hinckley shot and wounded him. Three others were wounded in the attack. The events took place in the presence of a large crowd and were also televised. Uninjured, Hinckley was apprehended and taken into custody immediately afterwards (Bonnie et al. 1).

Hinckley's trial began on May 4, 1982, over a year after the incident, and lasted seven weeks. He was charged with 13 separate offenses. The 7,342 page trial transcript is devoted largely to Hinckley's primary defense, that he was not guilty by reason of insanity. After three days of deliberation on June 21, 1982, the jury returned a verdict affirming that Hinckley was legally insane at the time of the commission of the crime and, therefore, could not be held criminally responsible for all 13 crimes with which he was charged. He was committed to St. Elizabeth's Hospital in Washington D.C. where he remains to this day (Bonnie et al. 1).

The strong reaction by the public over Hinckley "getting away with" such an egregious crime led to a widespread movement in legislatures at the state and federal levels to reformulate the insanity defense by restricting its scope. The Hinckley case illustrates many of the myths about the insanity defense outlined by Perlin, most obviously in its notoriety and dramatic nature, but more subtly in the ways that the Prosecution's case was constructed and then in the public outcry following the verdict which led to legislation at the Congressional level. Ultimately, post-Hinckley, the Insanity Defense Reform Act of 1984 sent insanity defense jurisprudence back to the McNaughtan standards first codified in England in 1843.

Hinckley's defense team presented the testimony of four experts who evaluated him after the shooting along with his parents, other family members, and a psychiatrist who had been treating him prior to the shooting. The prosecution relied on the testimony of several lay witnesses who encountered Hinckley in the days immediately before and after the shooting along with two experts who evaluated him after the shooting (Bonnie et al. 23). Not surprisingly, the experts who testified had "conflicting opinions concerning the nature and severity of his mental

disorder” (23), and their conflict is emblematic of the larger debate over the scope of the insanity defense as it has played out in the judicial, legislative, and public domains since the 19th century.

Defining Hinckley’s Mental Disorder

The first point of disagreement during Hinckley’s trial was over how his behavior was defined, though the opinions of both the prosecution and defense regarding Hinckley’s behavior were based largely on the same sources of information: interviews with Hinckley himself, interviews with his parents, siblings, and others with whom he had interacted at some point, and Hinckley’s rather large collection of his own written materials (poems, stories, letters), along with books he had read¹ and movies he had seen² during the period of time preceding the shooting. Of course, the reliance on these sources of information was vastly different between the defense, which “relied heavily on Hinckley’s own accounts and on his writing, while the prosecution experts saw evidence of manipulation...tended to discount the clinical significance of his writings, and relied more heavily on physical evidence” (Bonnie et al. 24). Hinckley’s life story is a tale of a troubled young man whose disposition toward social withdrawal began in adolescence, evidenced by his difficulties establishing peer relationships. After dropping out of Texas Tech in the spring of 1976 in order to pursue a career as a songwriter in Hollywood, Hinckley became obsessed with the film *Taxi Driver*, specifically with the central character, Travis Bickle, played by Robert DeNiro.

Expert witness for the defense, Dr. William J. Carpenter, Jr., pointed out how Hinckley’s identification with the fictional Bickle led to his imitating many of Bickle’s attributes, such as wearing an army fatigue jacket, keeping a diary, and developing a fascination with guns (Bonnie et al. 25). Dr. Carpenter’s assessment was that Hinckley’s own poorly developed sense of self and emotional isolation “made him especially ‘vulnerable’ and ‘open to influences’” (25), while the prosecution experts downplayed the idea that Hinckley somehow “lost his own identity and absorbed Bickle’s” (25), though they did agree that he imitated Bickle to some degree, ultimately using the defense expert’s unwillingness to state that Hinckley actually believed he was Travis

¹ Hinckley’s collection included several books about famous assassinations.

² Hinckley’s apparent attachment to Martin Scorsese’s 1976 film *Taxi Driver*, specifically the main character played by Robert DeNiro, “Travis Bickle,” and his subsequent obsession with one of the actresses in the film, Jodie Foster, was a major focus of the debate.

Bickle as evidence that Hinckley was not delusional and, therefore, sane. It was during this time of his fixation with *Taxi Driver* and Travis Bickle that Hinckley's interest in actress Jodie Foster developed, which would later be characterized by defense experts as an obsession.

However, it is important to further explain the storyline of the film in order to understand Hinckley's behavior after developing his fixation with its main character and another of its real-life actors. In the film, a woman named Betsy, played by Cybill Shepherd, is the object of Travis Bickle's affection; she works for a presidential candidate, and after Bickle's advances toward her are unsuccessful, he first decides to assassinate the candidate, and second, turns his attention to saving a young prostitute named Iris, played by Jodie Foster; Foster ultimately became the object of Hinckley's real-life fixation. How or why Hinckley fixated on Foster is not clear. It was in 1976 while Hinckley was in Hollywood failing at his dream of a songwriting career that he made up a girlfriend named "Lynn" with striking similarities to Betsy. He wrote letters to his parents describing the fictional Lynn and their relationship, apparently to prove to them that he was doing well enough, as evidenced by his establishing a romantic relationship, for them to continue to financially support him during his songwriting endeavors. In the fall of the same year, he reported a "falling out" with Lynn, admitted that his career in the music industry was going nowhere, and returned to his parents' home in Colorado (Bonnie et al. 25).

After an unsuccessful attempt at living on his own in Colorado while working as a busboy, Hinckley returned to Hollywood in the spring of 1977, again failing at getting his songwriting career off the ground. He reenrolled at Texas Tech and remained in Lubbock until the winter of 1979-1980. A conflict with his parents over his poor performance in school and his lack of acceptable career goals led him into a period of severe depression during which he revived his imaginary 'relationship' with the fictional Lynn in letters to his parents, telling them that she visited him in Lubbock and supported his artistic endeavors in an apparent effort to revive their financial support for him. It was in August of 1979 that Hinckley purchased his first handgun and began target-shooting (Bonnie et al. 25). Hinckley reported to Dr. Carpenter that he spent the holidays alone in Lubbock in 1979 because he felt like he couldn't face his parents. There is a self-taken photograph from early 1980 that shows an overweight Hinckley holding a gun to his head;

according to Hinckley, the gun in the photograph was not loaded, though he did report to Dr. Carpenter that he had played 'Russian Roulette' at least twice during the holiday months of 1979.

In early 1980, Hinckley's parents arranged for medical evaluation after he complained "of sleeplessness, headaches, and physical weakness" (Bonnie et al. 25). Physicians determined that there was no physical origin of his symptoms and attributed them to anxiety or stress. Frustrated with their son's aimlessness, Hinckley's parents sent him to a psychologist employed by his father's firm. The result was a new declaration by Hinckley of his desire to pursue a career as a writer and a formal contract with his parents, signed on September 16, 1980, which stated that they would provide him with enough funds to take a writing course at Yale, that he would work productively in his course, and if his career did not work out, he would reenroll at Texas Tech. Hinckley, now with \$3600, left for New Haven the next day; however, he had no intention of taking the agreed upon course. Instead, he planned to establish contact with Jodie Foster, who was then enrolled at Yale. In pursuit of this goal, Hinckley wrote letters and poems that he placed in her mailbox in addition to calling her twice, recording the conversations. Foster did report this activity to the dean of her college, but no further action was taken.

After failing to establish a meaningful connection with Foster, Hinckley returned to Lubbock where he purchased two more handguns; his arsenal now consisted of three handguns and two rifles. At this time, Hinckley decided to pursue President Carter with the intention of assassinating him for the purpose of getting Foster's attention, and thus traveled to Washington, D.C., Columbus, Ohio, and Dayton, Ohio over a period of three days. On October 2, Hinckley actually went to a Carter campaign appearance but left his weapons in his hotel room, reporting to Dr. Carpenter that he was unable to get in the proper frame of mind for carrying out his plans at this time. Throughout the month of October, Hinckley remained busy as he made additional attempts to contact Foster by leaving notes for her; he also claimed to have set up a meeting in Lincoln, Nebraska with a leader of the American Nazi Party (though no such meeting is known to have taken place), and he continued his pursuit of President Carter, at which time the handguns and handcuffs detected in Hinckley's suitcase were confiscated at an airport (the narrative is unclear here, but it seems that it was on his return from Nashville, Tennessee where Carter had

made an appearance the day prior). Rather than attempting to reclaim his belongings, Hinckley paid a fine, headed back to New Haven, and then went to Dallas, where he purchased two new handguns. At this time, he returned to New Haven and then traveled to Washington, D.C., ostensibly to stalk President Carter (Bonnie et al. 26).

Eventually, Hinckley ran out of money, so he returned to his parents' home. Not surprisingly, his parents were disappointed at his failure to abide by the agreement they signed two months earlier, and they were also concerned about his mental health. While in his parents' home, Hinckley either took an overdose of medication or he led his parents to think that he had done so (the facts are unclear), at which time Hinckley's parents arranged for him to see a psychiatrist, Dr. John Hopper, who treated Hinckley for four months. Based on Dr. Hopper's testimony as well as Hinckley's own statements to the experts who examined him after the shooting, it seems that Hinckley remained "very guarded in his sessions with Dr. Hopper," making no mention of his guns, his plans to assassinate the president and the associated stalking activity, or his obsession with either *Taxi Driver* or Jodie Foster: "His only mention of Jodie Foster was apparently in an autobiographical sketch he had prepared at Dr. Hopper's request, in which he stated that all he cared about were a writing career and Jodie Foster" (Bonnie et al. 27).

Hinckley continued traveling all over the country during the course of his treatment with Dr. Hopper, going to Washington, D.C. where now President-elect Reagan was staying, and then to New York after the tragic death of John Lennon in December of 1980, which reportedly had a profound impact on Hinckley, according to Dr. Hopper. In December, Hinckley briefly returned to New Haven, leaving more notes and poems for Foster, then returned to his parents' Colorado home for the holidays. In a self-recorded drunken monologue on New Year's Eve, Hinckley mentioned that he was afraid he was 'on the road to insanity,' discussed his frustrations about his failed attempts to win Foster's affections, saying if he ultimately was unsuccessful in doing so, "it would be 'suicide city,'" and also that he didn't really want to hurt Foster (Bonnie et al. 27). In the time period between February 9 and 19, 1981, Hinckley went between New Haven, Washington, D.C., and New York, and spent some time in front of the John Lennon's apartment building where Lennon had been killed not long before. According to the experts who examined him, Hinckley

claimed he had contemplated killing himself in the spot where Lennon himself was shot, but again found himself unable to act on his thoughts.

Returning to Colorado on February 19, Hinckley had his final appointment with Dr. Hopper. Since he had failed to keep his promise of getting a job by the end of the month, Hinckley wanted to avoid a confrontation with his parents, so he left on March 1 before they returned from their vacation. He again went to New York and New Haven, again left love notes for Foster, one of which said, "Jodie, after tonight John Lennon and I will have a lot in common. It's all for you" (Bonnie et al. 28). Again, Hinckley ran out of money, so on March 5 he called his parents. His father paid for his trip home but, attempting to enforce the previous agreement, refused to let his son stay in the family home, although he still provided him with money and suggested that he stay at the local YMCA. Hinckley instead stayed at two Denver motels between March 7 and 25, sneaking a visit to the family home to see his mother and retrieve some of his things without his father's knowledge, and selling some of his possessions, including several guns, to get money. He then headed back to Hollywood in one last attempt to sell his songs; his mother knew about the plan, and in fact, drove him to the airport, but kept this information from his father. Hinckley spent only one day in Hollywood, then headed by bus to Washington, D.C., arriving on March 29. He checked into the Park Central Hotel, and the next day, he wrote a letter to Foster detailing his plan to assassinate President Reagan before heading out to the Hilton (Bonnie et al. 28).

All of this information concerning Hinckley's mental state was used in his trial, and although experts for the prosecution and defense disagreed about both the content and intensity of his thought processes in the months preceding the shooting, they at least agreed that he demonstrated some preoccupation with both Foster and assassinating the President, as evidenced by books he read at the time about famous assassinations, poems he wrote, and the notes he sent to Foster (Bonnie et al. 27). The second major point of disagreement in Hinckley's trial was the nature and severity of his mental disorder, the expert testimony on which is explained below.

While all of the experts who testified regarding their evaluations of Hinckley agreed that he showed signs of mental disturbance, radically different inferences were drawn by defense and prosecution witnesses as to exactly what his behavior indicated in terms of diagnostic criteria, as per the *Diagnostic and Statistical Manual* guidelines. Dr. Carpenter, expert witness for the defense, testified that Hinckley met the criteria for schizophrenia according to the DSM (at this time, the current version was the DSM-III). Dr. Thomas Goldman (defense) assessed Hinckley as meeting the criteria for simple schizophrenia under the previous manual, DSM-II, but felt he did not meet the DSM-III criteria for schizophrenia; rather, he asserted possible diagnoses of schizotypal personality disorder or borderline personality disorder, leaning toward the former when emphasizing that Hinckley was “in a psychotic state” at the time of the shooting, emphasizing the ongoing rearticulation of diagnostic categories and the difficulties that fluidity raised in the courtroom (Bonnie et al. 29).

Not surprisingly, all of the prosecution’s experts disagreed with the defense experts’ assessments, asserting that Hinckley did not meet the diagnostic criteria for any psychotic disorder including schizophrenia and, therefore, was not psychotic when he committed the crime. Dr. Park Elliott Dietz (who would later gain infamy by lying at the trial of Andrea Yates³) presented the opinions of a team of four experts and suggested that Hinckley met the diagnostic criteria for: “dysthymic disorder” (which he described as “sad mood disorder”), “narcissistic personality disorder” (which he described as “self-centered or self-absorbed personality disorder”), and “schizoid personality disorder” (which he said was characterized by lack of friends and emotional coldness or aloofness) (Bonnie et al. 29). Dietz emphasized the relative commonness of these disorders, as compared to psychotic disorders, and also their less serious nature. Dr. Sally Johnson, who conducted the court-ordered evaluation at the Federal Correctional Institute where Hinckley was committed following his arrest, diagnosed Hinckley with narcissistic personality disorder.

³ Dietz testified for the prosecution in the Yates trial and made a statement regarding an episode of Law and Order: Criminal Intent in which a mother who murdered her children by drowning them successfully used an insanity defense. Prior to the verdict being rendered, it was brought to the attention of the court and jurors that there had been no such episode. It is speculated that this piece of information swayed the jury away from the death penalty, instead leading Yates to be sentenced to life in prison. Her successful insanity defense was won on appeal.

The prosecution attempted to undermine the diagnoses that pointed to some sort of psychosis by emphasizing all of the ways in which Hinckley appeared to be functioning normally on a day-to-day basis, for example, his enrollment at Texas Tech (even though he rarely went to class and performed poorly), his cross-country travels (even though these were mainly for the purposes of stalking Jodie Foster and the Presidents he planned to assassinate), and his general dealings with others (even though he spent most of his time alone watching television, reading, or writing), and including his bizarre conversations with Jodie Foster, which he had recorded (even though this was clear evidence for the defense of Hinckley's delusional state). Lay witnesses, including a maid from a hotel where Hinckley stayed between March 8 and 23, a maid from the hotel where Hinckley stayed the night before he shot President Reagan, the secret service agent who apprehended Hinckley immediately after the shooting, the FBI agent who spent several hours with him after his arrest, and the surgeon who examined Hinckley the night of his arrest, described Hinckley as "calm," "unemotional," "not out of touch with reality," and "just a normal all-American boy" (Bonnie et al. 30). The prosecution relied on what Perlin calls the Ordinary Common Sense heuristic, which stems from the myths concerning the insanity defense and, simply stated, means that people believe that they know an insane or psychotic person when they see one and allows for no conception of mentally ill that does not conform to the image of the 'stark raving lunatic.' In addition, the prosecution relied on a concept of mental illness that had been deemed outdated in the 19th century in *Parsons v. State* and again in *Davis v. U.S.*, specifically that the mind functions as a unified whole and that any mental illness will be manifested in every aspect of the sufferer's existence, precluding his ability to engage in any 'normal' behavior.

The definitions at stake concerning the nature and severity of Hinckley's mental disease in his trial were the terms "delusion" and "ideas of reference," along with the differing clinical inferences and characterization of Hinckley's behavior, rather than observable data itself. Below, I will outline, in brief, the direct and cross-examinations of Dr. Carpenter, for the defense, and Dr. Dietz, for the prosecution.

On direct examination by attorney for the defense, Vincent Fuller, Dr. Carpenter explained the basis for his diagnosis of the defendant's "mental disease," saying:

Delusion is a technical term that refers to the development of a false belief, and a false belief that is not shared by others and is not readily shaken by evidence to the contrary... So I use the term "delusion" because it will be important to understand that as a technical judgment that I have made that relates to this withdrawal from reality and the development of the relationship...with Jodie Foster... So it was not that it only was a fantasy and a fantasy that became an obsession... So I did conclude that he had developed delusions. There is another term that is important in diagnosis...and that term is "ideas of reference." And this is a technical term that means that a person's mental state is such that they will interpret in a highly personal and idiosyncratic way...what may be common-place events... [something] as trivial like walking down a street and a newspaper blowing across his leg and his giving it some unusual significance. (Bonnie et al. 31).

Direct examination yielded Dr. Carpenter's interpretation of Hinckley's activities on the day before and the morning of the shooting, the basic facts of which are not disputed, leading Carpenter to conclude that Hinckley was insane by legal standards. Fuller inquired about the contents of the letter Hinckley wrote to Jodie Foster before he left his hotel the morning of the shooting, which Dr. Carpenter summarized:

He says to her that he is going to assassinate President Reagan, that there is a definite possibility that he will be killed in his attempt to do that. He describes to her how he has tried to gain her attention and affection...that time is running out on him. That he is not able to wait any longer to make her understand the importance of this and that he hopes in sacrificing his own life or his own freedom

in what he refers to as an “historic deed’ that he will finally gain her respect and love.⁴ (Bonnie et al. 32-33).

Dr. Carpenter further explained what he knew of Hinckley’s thought processes, as explained to him by Hinckley following the shooting. One significant event of the day, which would become a central point of disagreement in the trial, was when, Hinckley observed President Reagan arriving at the Hilton. Hinckley reported to Dr. Carpenter that as the President was on his way into the hotel, he looked at Hinckley, smiling and waving, and Hinckley’s interpretation of that moment was that it was highly personal, that the President was smiling and waving directly at him (Bonnie et al. 33). The last question addressed Hinckley’s mental state at the time of the crime, ultimately the pivotal determination in any insanity defense trial. Dr. Carpenter’s interpretation of Hinckley’s mental state at the time of the shooting was that he was experiencing “despair, depression, and a sense of the end of things,” and that “his primary purpose in all of this is to terminate his own experience, his own existence” (Bonnie et al. 34-35), laying the foundation for his conclusion that Hinckley was not criminally responsible for his actions.

U.S. Attorney Roger Adelman’s cross-examination of Dr. Carpenter was primarily an attempt to discredit Carpenter’s assertion that Hinckley was delusional. Adelman’s questions included, “What you are saying is that nobody, including you, has ever found any observable delusions in this person, Mr. Hinckley, right?” and, “You are telling us in that long response there that nobody observed active delusions in Mr. Hinckley, right? Or manifestations?” (Bonnie et al. 36). Dr. Carpenter responded by saying, “A delusion is a mental process and it is not possible to have direct access to observe it,” and, “So you can no more see a delusion than you can see whether or not someone believes in God” (36-37). Adelman’s line of questioning focuses on the Ordinary Common Sense heuristic, by which he suggests that delusional thinking must somehow be physically observable, again, the “I can tell by looking” school of thought that pervades insanity defense jurisprudence. The second line of questioning pertained to the moment Hinckley claimed that Reagan smiled and waved “at” him. Adelman attempted to tear apart Dr. Carpenter’s

⁴ Foster has only directly addressed her experience with Hinckley publicly on two occasions: first in an article published in *Esquire* magazine in December of 1982 entitled, “Why Me?” and later, in a 1999 interview with Charlie Rose.

assessment of this experience as an example of an “idea of reference” by using Hinckley’s statements to the prosecution’s experts, Drs. Dietz, Cavanaugh, and Rappeport. In their report, they noted that, according to Hinckley himself, “he did not feel any other message than ‘hello’ was being communicated,” adding, “I was probably the only one he could see, so that is probably why he picked me out” (37-38). Clearly, Hinckley told different stories to different experts, although what we are lacking here is the questions that were posed to him in these interviews; there is no doubt that the goals of interviews by experts for the defense differed considerably from those of experts for the prosecution and that the questioning strategies likely differed accordingly. Nevertheless, Adelman’s strategy centered on using these discrepancies to prove, based on Hinckley’s own statements, that there was no “idea of reference.” Dr. Carpenter defended his assessment, saying that it was clear that Hinckley still thought that the President had singled him out when there was no clear evidence that that was the case. Adelman continued, using Hinckley’s own words that he “was probably the only one he could see,” and again, Carpenter asserted that it was “unlikely, that of all the people there the only person he could see was John Hinckley, and in his description of the events to me, it was my inference that it was a highly personalized experience” (38). The debate over the interpretation of these events continued when Dr. Dietz took the stand for the prosecution.

U.S. Attorney Adelman began his direct examination of Dr. Dietz focusing on the same event: President Reagan’s alleged smile and wave to Hinckley, and whether Dietz would characterize Hinckley’s interpretation of this interaction as an “idea of reference.” Not surprisingly, Dr. Dietz did not believe, based on his own assessment of Hinckley, that this was an example of an idea of reference. Hinckley told the prosecution experts that he felt that the President only intended to communicate ‘hello,’ and that he was likely the only person the President could see; Dr. Dietz interpreted this to mean “that most of the other people there were cameramen who had cameras in front of their faces, so John Hinckley’s face would be one of the few visible at the time,” although this is not an explanation Hinckley himself explicitly offered (Bonnie et al. 39). Dietz noted another comment made by Hinckley regarding the same incident in which Hinckley did say that when the President waved, he felt “he was looking right at me, and I

waved back. I was kind of startled but maybe it was just my imagination” (39). When asked if that demonstrated an idea of reference, Dietz said that statement led him to inquire further, which is when he got Hinckley to say that it was nothing more than a ‘hello’ and that he was probably the only one visible. Here, we can see how easily the goals of the person asking the questions during an interview can lead to the answers being sought; it was Dietz’s job to prove that Hinckley was sane, just as it was Carpenter’s job to prove that he was insane, using the same events and information. To further bolster his claim, Dietz mentioned the notes of Dr. Johnson, the psychiatrist who examined Hinckley just a few days after the shooting. Dr. Johnson’s notes say simply, “President got out and waved. John waved back.” When Adelman asked Dietz’s opinion of the significance of Dr. Johnson’s notes, Dietz suggested that Hinckley only began to add any special significance to that event over two months later when trial experts began assessing him. In short, Adelman suggested that “manipulation” was one of the inferences that could (should) be made, and Dietz agreed. Here we see another key myth about the insanity defense as identified by Perlin—that feigning insanity for the purposes of avoiding punishment for crime is not only easy to do but occurs frequently. By invoking the suggestion of manipulation on the part of the defendant, the prosecution attempted to create reasonable doubt as to the veracity of the defense’s claims that Hinckley was legally insane at the time of the crime.

Direct examination of Dr. Dietz continued with questions about whether or not Hinckley suffered from delusions, specifically related to Jodie Foster. Dr. Dietz concluded that there neither are nor were any such delusions because Hinckley recognized that his affections were not reciprocated. The judge actually interjected at this point to ask, “Are you saying that in the absence of a return of interest that there was no delusional pattern as far as he was concerned?” Dietz responded by saying that in order to be considered a delusion, “there has to be a view that the other person somehow shares the relationship” (Bonnie et al. 41), though such a narrow interpretation of delusion would eliminate many unhealthy relational behaviors. Dr. Dietz elaborated on Hinckley’s “interest” in Jodie Foster, saying that it “took a perfectly natural course,” from seeing her in movies and on television and becoming attracted to her as a movie star whom he believed to be a good person, framing Hinckley’s fixation as normal behavior. According to

Dietz, when Hinckley explained his efforts to contact Foster, his acknowledgement that she was out of reach or unattainable to him demonstrated that his interest was not a delusion, because a “fixed false belief” would be required in order to render this particular belief system delusional (42). Dietz’s ultimate determination was that Hinckley did not have a fixed false belief; he had “unrealistic hopes.” Hinckley was not delusional; he was “a dreamer” (43). In fact, the very phone conversations between Hinckley and Foster, which Hinckley had recorded, along with the poems Hinckley wrote and left in her mailbox were used by Dietz to demonstrate that Hinckley was neither psychotic nor delusional, as he seemed to recognize the “social nuances” of the situation, rather than the sharp contrast of the defense’s claims that the very fact that Hinckley repeatedly attempted to contact Foster were indicative of his delusional mental state. Finally, when Dietz asked Hinckley if his intention in shooting the President was to impress Foster, Hinckley claimed that he wanted to “impress her, almost to traumatize her...to link myself with her for...the rest of history,” and that he felt that he ultimately accomplished his goals and should feel good about that. This, to Dietz, did not indicate that Hinckley suffered from schizophrenia or any other mental disorder, except for perhaps narcissistic personality disorder based on his preoccupation with fame and infamy (46-47).

The following day, the defense proceeded with cross-examination of Dr. Dietz. Fuller attempted to get Dietz to admit that his characterization of Hinckley’s symptoms as evidence of narcissistic personality disorder might also be interpreted as grandiose delusions, which are characteristic of schizophrenia. Dietz did admit that grandiose delusions are often found in schizophrenia, citing examples of people believing they are Christ or Napoleon, to which Fuller rebutted, “Well, there are other grandiose delusions short of thinking you are Napoleon, are there not?” Dietz admitted that there is indeed a vast array of delusions that might be considered delusions of grandiosity. Fuller moved back to the critical moment in question regarding ideas of reference, the President’s wave and smile. Fuller presented the People’s Exhibit 22, which was the only photograph taken around the time of the President’s arrival at the Hilton in which Hinckley is visible. Fuller asked Dietz, “Is Mr. Hinckley the only person that could be seen by one moving from the limousine to the entrance of the Hilton?” Dr. Dietz responded by saying that

because this photograph was taken before the President arrived, the cameramen did not have their cameras up in front of their faces and, therefore, many faces were visible, sticking firmly to his interpretation of the event in question and Hinckley's conflicting responses in his interviews with the experts (Bonnie et al. 47-49).

Capacity to Appreciate Wrongfulness

The next area of consideration in Hinckley's trial was his capacity to appreciate the wrongfulness of his act and his ability to conform his conduct to the law, per the Model Penal Code. It is important to note that a pretrial motion hearing took place to determine the way in which the word "appreciate" would be deployed during the trial. The prosecution argued that the drafters of the Model Penal Code intended to carry forward the McNaughtan standards of "knowing right from wrong" under the "appreciation" prong of their test, while the emotional and volitional capacities were to be considered under the "control" prong. The defense argued the opposite, that "appreciation" encompassed affective as well as cognitive factors. Ultimately, the prosecution won this pretrial motion when Judge Parker ruled that he would "approach the word appreciation...within the context of a cognitive definition" (Bonnie et al. 50).

Dr. Carpenter, for the defense, responded to Fuller's question as to his opinion about Hinckley's lack of substantial capacity to appreciate the wrongfulness of his conduct, saying that Hinckley "did have a lack, a substantial lack of capacity to appreciate the wrongfulness of his conduct" on the day of the shootings (Bonnie et al. 51). He began to elaborate about his interpretation of the word "appreciate," saying that he had thought about three elements relevant to the ability to appreciate wrongfulness; he made it through an explanation of the cognitive element, at which time the trial judge called counsel to the Bench, asking Mr. Fuller what Dr. Carpenter's answer was going to be.

Fuller replied that Dr. Carpenter was going to expand the explanation of Hinckley's reasoning abilities within the definition of "appreciate" from *Browner*⁵. U.S. Attorney Adelman immediately chimed in with the following jab at the defense expert:

⁵ *United States v. Browner* was the decision in which the Model Penal Code test was adopted in the District of Columbia. The prosecution characterized the decision in *Browner* as "silent on the meaning of 'appreciate,' and that the court therefore should consider the intentions of the drafters

Your Honor, our concern is that this man [Dr. Carpenter] is typically confused... Might I point out that [in] his report [he] indicated that ... “Mr. Hinckley retained an intellectual appreciation of wrongfulness,” and added, “In my judgment, the emotional component, as in so much of his life, was preeminent at the time of the crime.”... Elsewhere in his conclusions he indicates that though Mr. Hinckley had cognitive appreciation he lacked emotional appreciation. (Bonnie et al. 51)

Adelman went on to express that his “only concern here is that the doctor, who obviously doesn’t know the law like we do,” should be instructed to testify solely in terms of cognition, as it appeared from his reports and the way in which he started to answer this question on direct examination that he was going to discuss volition and emotion (Bonnie et al. 52). Fuller responded by saying that Carpenter’s testimony would reflect that the mind cannot be compartmentalized into cognition, will, and emotion, and that there is an element of cognition beyond the ability to verbalize the difference between right and wrong. At this time, Adelman stated that Dr. Carpenter “is an intelligent man” who is capable of following a simple instruction from the court to limit his answer to the area of cognition, “otherwise he is going to slip back into the area that Your Honor ruled out” (Bonnie et al. 52). This exchange is emblematic of the tension between the law and psychiatry that insanity defense trials, particularly high-profile cases, expose; more specifically, the disdain toward psychiatry as a legitimate discipline, at least the psychiatry practiced by the defense, is evident in the prosecution’s statements to the trial judge.

The judge explained that he did not want to ‘shackle’ the expert in his testimony and that what Dr. Carpenter says and what the jury is bound by “insofar as questions of the law and the instructions of law...are two different things” (Bonnie et al. 52). Fuller agreed, citing the jury instructions in *Washington*⁶. Adelman disagreed, claiming that allowing the expert to testify that appreciation is more than cognition while instructing the jury to constrain their decision to a narrower definition would be misleading and, worse, “to have him go on and talk about emotional

of the Model Penal Code” (Bonnie et al. 49), whereas the defense characterized the *Browner* court as attempting to broaden the narrow standards of *McNaughtan*.

⁶ In *Washington v. United States*, the problem of “conclusory” expert testimony was taken up, and the opinion was appended to include “guidelines for jury instructions designed to emphasize the proper scope of the witnesses’ expertise and the jury’s ultimate responsibility to find the facts and apply the law” (Bonnie et al. 53).

appreciation, which is his theory maybe, he then invades the province of the Court. He becomes the definer of the law” (52). In his statement, Adelman defines the crux of the issue, which is not so much the appropriate medical or legal boundaries of the term ‘appreciate’ but, rather, who holds the power in the courtroom, reflecting, again, the over-century-old struggle over how much influence psychiatric experts should be permitted to wield in the house of the law.

The judge went on to tell defense counsel that he was not yet ready to extend the definition of ‘appreciation’ from *Browner* without the Court of Appeals embracing such an action and that he would instruct the jury accordingly. Adelman continued to object, saying still that “the problem is we now have experts defining a legal standard” (Bonnie et al. 53), to which the judge explained that, just as in *Washington*, he would instruct the jury that they will have heard wide variations from psychiatric expert witness testimony and that they are to disregard any references to testimony that exceeds the boundaries of the law (53), which arguably mitigates the effect of expert testimony, on the one hand, and suggests that jurors can somehow ‘unhear’ certain information once they are provided with constraints, on the other. A small debate about whether those instructions should be given before or after Dr. Carpenter’s continued testimony occurred, at which time it was decided that the instructions would be given after, and Dr. Carpenter returned to the stand to resume his previous testimony.

He explained: “The ability to reason that is implied in appreciation” involves both intellectual and emotional processes (Bonnie et al. 55). He went on to describe how Hinckley’s reasoning processes in preparing for and carrying out his acts were focused predominantly on terminating his own existence and achieving a union with Jodie Foster, as opposed to the criminality of his actions (55-6). Further, Carpenter described Hinckley’s emotional impairment with regard to the appreciation of the wrongfulness of his acts, namely that “the emotional consequences of the acts...were in his experience solely in terms of the inner world he had constructed” (56).

Mr. Adelman’s cross-examination of Dr. Carpenter focused solely on “factual” evidence, never acknowledging that facts are also open to interpretation, in an attempt to show the logical reasoning evident in Hinckley’s actions in the months leading up to and the day of the shootings:

leaving the gun at the hotel in Dayton (because he knew it was wrong to carry a gun, especially in the presence of the President), getting himself to Nashville and into the airport complex to be closer to the President (showing that he could behave in an organized manner), hiding his weapons in his suitcase (because he appreciated the wrongfulness of his conduct), and destroying a diary after his detainment in Nashville (because it contained details of actions that he knew were wrong in terms of the law) (Bonnie et al. 57-9), failing to acknowledge that all of these actions were in service of a larger delusion that had Hinckley stalking the President for the purposes of gaining the attention of an actress whom he had never met. Adelman again utilized an understanding of mental disease or defect as a totalizing entity. In other words, his position was that if Hinckley was organized enough to follow the President across the country and attempt to hide evidence of his acts and plans, even when all of his acts and plans were intricately bound up in what Carpenter previously identified as delusions, that this was somehow evidence of his sanity. Dr. Carpenter continued to assert that Hinckley's intellectual knowledge of the law and his ability to appreciate the wrongfulness of his acts were distinct components that should not be conflated.

Direct examination of Dr. Dietz yielded assertions that each and every decision made by Hinckley, in the months preceding the act and on the day of the shooting, indicated an appreciation of the wrongfulness of his conduct. Dietz named and elaborated on the following conscious choices made by Hinckley as though any evidence of conscious choice obviated mental illness: his study of famous assassinations, replacing his arsenal with smaller, concealable handguns, hiding his plans from his family and psychiatrist, checking out the potential assassination sites in advance, writing a letter to Jodie Foster before leaving the hotel, loading his weapon with exploding ammunition, concealing his revolver in his right pocket because he was right-handed, waiting until he had a clear shot at Reagan before drawing his gun, drawing the gun at all, and finally, firing the gun. All of these choices, according to Dr. Dietz, indicated that Hinckley understood that what he was doing was wrong, and within a framework that identified mental disease or defect as totally incapacitating, a framework that was proven to be inaccurate and outdated before the 20th century, Dietz would be correct in the eyes of the law.

On cross examination, Mr. Fuller asked Dr. Dietz if “qualities of emotional coldness” would be significant in determining one’s ability to appreciate the wrongfulness of an act. Mr. Adelman raised an objection and upon approaching the Bench expressed concern that the question was attempting “to elicit data relative to emotional appreciation of conduct which has been ruled out” (66). The objection was overruled at which time Dr. Dietz answered definitively that no, emotional characteristics cannot “be translated into a legal concern with the appreciation of wrongfulness” (66).

The final area of consideration regarded Hinckley’s capacity to conform his actions to the requirements of the law. On direct examination, Dr. Carpenter testified that, in his opinion, by the day of the shootings, the development of Hinckley’s psychosis over a period of time led him to be so dominated by his inner state, that he could not conform his actions to the requirements of the law. On cross-examination, Mr. Adelman attempted to demonstrate, through the use of specific facts regarding Hinckley’s actions in the months preceding and on the day of the shootings, that prior to the actual act, Hinckley had conformed his actions to the law on a number of occasions. Adelman asked Dr. Carpenter if Hinckley was under the same compulsion or suffering from process schizophrenia at the time while still not going through with his plans to assassinate both President Carter and President Reagan. Dr. Carpenter argued that there were a number of occasions on which Hinckley found himself unable to take action, both in carrying out an assassination and his own suicide. Adelman rebutted that this was because Hinckley possessed the capacity to conform his actions to the law, while Carpenter asserted that this had nothing to do with consideration of the law or having control of his actions but, rather, that Hinckley simply could not “get himself to do it” (Bonnie et al. 70). This line of questioning continued for some time, culminating with the recounting of the events of the day of the shootings. Adelman asked if Hinckley was “under the compulsion of these inner forces” when he awoke that day, and when Carpenter affirmed this, Adelman argued that the fact that Hinckley “didn’t load his gun and go outside and shoot” at that time was evidence of capacity to conform his conduct. Carpenter attempted to explain that that was not necessarily how such a compulsion would affect a mentally ill person, and the judge gave him the opportunity to elaborate or define what he meant. Dr.

Carpenter described a process, a process that had been taking place over a long period of time, a process that had brought Hinckley to Washington in the first place, and that in such a process, major events or catastrophes would not be expected to occur constantly.

The questioning then turned to the time at which Hinckley went to the Hilton and the various decisions he made in the period of time immediately preceding the shootings, primarily whether the presence of a conscious decision-making process indicated an ability to conform his actions to the requirements of the law (and the conscious choice to not do so).

Capacity to Conform

On direct examination by Mr. Fuller, Dr. Carpenter restated his opinion regarding “the whole background of psychotic development in his illness,” and stated that in his opinion, at the particular moment in question—the commission of the crime—that Hinckley’s “actions and the requirement for actions were so extensively determined by [his] inner state,” and, therefore, that “he did have “substantial incapacity in his ability to conform his conduct to the requirements of the law” (Bonnie et al. 67).

On cross-examination by Mr. Adelman, the focus turned once again to Hinckley’s fixation with the fictional Travis Bickle. Adelman asked Carpenter repeatedly if Hinckley thought he was Travis Bickle, now referring to the date on which Hinckley was stalking President Carter in Dayton, Ohio. As Carpenter asserted that Hinckley never actually believed himself to be Travis Bickle, but rather that he strongly identified with traits of the character, the questioning persisted, from both the Prosecutor and the Judge: “Did he think he was Travis Bickle?” (68).

The cross examination proceeded with Adelman citing all of the agreed upon events in which Hinckley had stalked and encountered both Presidents Carter and Reagan, repeatedly asking Dr. Carpenter if Hinckley had, at any of those times, been under the influence of the “inner state” previously described. The goal was straightforward: Adelman aimed to prove that on many occasions during the months leading up to the shooting, Hinckley had been experiencing the same mental state, variously referred to as “delusional,” “process schizophrenia,” and “under compulsions,” but had not gone through with an assassination and, therefore, had been able to conform his conduct to the requirements of the law. This strategy was designed to prove that on

the day that he did act on his plans, that he did so fully consciously choosing not to conform to the law.

Adelman also focused intently on the precise moments of the crime and Hinckley's thought process: did he consider his options and "decide" to go through with it? The primary debate hinged on the word 'decision,' in which Dr. Carpenter attempted to problematize the prosecution's reductive rendering of Hinckley's having thought about whether or not to fire his gun and ultimately deciding to do so. Carpenter finally gave up on trying to explain and testified, "No, in those terms, I do not think that he made the decision and did it. I believe that he found himself in the impulse of that moment firing at President Reagan" (79).

As might be expected, on direct examination by the prosecution, Dr. Dietz rendered an entirely different interpretation of the same events, stating "That on March 30, 1981, as a result of mental disease or defect, Mr. Hinckley did not lack substantial capacity to conform his conduct to the requirements of the law" (83). For Dietz, every instance of previous restraint and every decision Hinckley made on the day of the shooting were indications of "conforming his conduct to his own wishes, that he had the ability to control, to think, to decide," and, therefore, of having the innate capacity to conform to the law and choosing not to do so (83-85).

On cross-examination, Mr. Fuller focused on eliciting testimony from Dr. Dietz which confirmed that Dietz and his team of experts had noted that Hinckley's behavior was indicative of some sort of mental disease or defect to which Dietz acquiesced, while affirming his further opinion that none of the evidence suggested that Hinckley "was so impaired that he could not appreciate the wrongfulness of his act or conform his conduct to the requirements of the law" (Bonnie et al. 85).

Closing Arguments

In his closing argument for the prosecution, Adelman again emphasized Hinckley's apparent ability to think, deliberate, and plan as evidence of his not being "out of control or in a frenzy" and, therefore, both appreciating the wrongfulness of his conduct and being able to conform his behavior to the requirements of the law, stating, "That is what I mean by common sense. That is what I mean by common sense" (Bonnie et al. 87). Apparently, saying it twice

made it clearer. Adelman did his best to draw attention to the fact that the defense focused primarily on establishing Hinckley's mental disorder and very little on the events of the actual day of the shooting, which answered, in Adelman's opinion, the question of whether Hinckley was able to appreciate wrongfulness and conform his conduct, saying, "The defense never bothered to deal with that question. Why? Because they can't. Because they can't. All these doctors' CAT scans, delusions, fantasies and everything else. Miles away from that question" (88).

Adelman went on to discredit the psychiatric testimony in general, saying, "All the doctors who testified...pointed out to you that the mere existence of a mental disorder doesn't mean that you are not criminally responsible" (Bonnie et al. 88). In a not-so-subtle jab at psychiatry, Adelman used the words of his own expert witness, Dr. Dietz, reminding the jury of Dietz's quip while testifying that "narcissistic personality even applies to some doctors" (88). Adelman joked, "We didn't count noses on that one, but I think we could all put it on some of the psychiatrists," and went on to clarify, "I don't mean to demean psychiatrists or doctors," and concluded that "the evidence supports...whatever disorders [Hinckley had] were certainly not severe ones" (88). Adelman went on to characterize Hinckley as the spoiled, lazy son of wealthy parents whom he was taking advantage of to pursue his whims, as someone who functioned like a normal person on a day-to-day basis. Adelman characterized Hinckley's interest in Jodie Foster as a normal fantasy and his personality disorders as common (89-91).

Adelman then turned to the letter Hinckley wrote to Foster immediately before the shooting, which he left in the hotel room. That Hinckley wrote a letter to Foster before leaving the hotel to carry out his plans was not a disputed fact. What Adelman sought to emphasize in this part of his closing statement was that the sitting down and writing of an apparently coherent and grammatically sound letter indicated that Hinckley was "perfectly rational, perfectly organized":

[T]he words are in order. There is nothing—run-on sentences, paragraphs very well, everything is logically written. Is this the letter of a man who is driven, who can't control his behavior, who has an inner rage...who is suffering from some problem in his inner world? Would a person who has that problem write a letter like this? (Bonnie et al. 92)

Aside from the quality of the writing itself, the fact that Hinckley hadn't mailed the letter indicated, according to Adelman, first, that at the time, Hinckley was still unsure if he was going to go through with his plans, which he wished for jurors to interpret as demonstrating "[p]lanning, consideration, reflection, appreciation of wrongfulness, conforming to the law" (92), and second, that the real motivation was Hinckley's desire for fame, which confirmed Dietz's diagnosis of narcissistic personality disorder (92).

Ultimately, the prosecution rested after recounting the hours and minutes leading up to the shooting, emphasizing once more that Hinckley was neither "out of control" nor "in a frenzy," that he was able to think and make decisions, that he chose to fire his gun six times and ended up hitting four people including the President, and that he was "criminally responsible for each and every one of these crimes" (Bonnie et al. 95-96).

In his closing argument for the defense, Mr. Fuller urged the jury not to "be misled" by the prosecution's "suggestion that only [the events of] March 30, 1981, should be considered," saying, "It took years and years of growth of the disease or disorder to lead to the state of mind on" that day, and that "the question is not only what he was like then [on the day of the shooting], but to show what he was like, we must look how he got there" (Bonnie et al. 96). In other words, Fuller sought to emphasize the 'process' of Hinckley's mental illness and his gradually deteriorating mental state and suggested that the expert witnesses for the prosecution "played that down" (96).

Fuller pointed to the charts provided by the Government to depict Hinckley's travel patterns in the months preceding the shooting, saying, "I think they [the psychiatrists for the Government] also trivialized the frenetic behavior of the defendant over the months preceding the tragedy... You look at the absolutely absurd travel patterns pursued by this man... On its face, it is irrational, purposeless, aimless" (Bonnie et al. 96). In this instance, evidence that the prosecution sought to portray as an indication of careful planning and deliberation, the defense sought to paint as frenzied and manic behavior. Fuller went on to summarize Hinckley's life in the seven years leading up to the shooting as anything but that of an "ordinary person like any other young man, and all American boy like any other fan" as per the prosecution's characterization; on

the contrary, the defense's version was as follows: "He lived a solitary life. He was a prisoner of himself for at least seven years before this tragedy... to call him an ordinary boy...is silly" (97).

As Fuller recounted the details of Hinckley's life as a 'prisoner of himself,' he was careful to characterize all of Hinckley's thought processes and actions as "bizarre," "a result of a serious mental illness in which [his] relation to reality...has been severed," "psychotic," and "delusional" (Bonnie et al. 99-102). He addressed the repeated claims by the prosecution that the absence of obviously bizarre and frenzied behavior by the defendant was evidence of his sanity, attempting to counter a major component of insanity defense mythology that requires a specific presentation of observable behaviors:

I think evidence is clear from both sides...that the ability of a schizophrenic to maintain a contact with common reality is not unusual...a severely ill psychotic schizophrenic inside may have a world of troubles unnoticed totally, unnoticed by us laymen, and bizarre conduct is not an indispensable ingredient to a diagnosis of schizophrenia... The kind of frenzy that we are talking about is an internal frenzy, and internal confusion, one that is going on in this man's inner world, all built upon false premises, false assumptions, false ideas... Mr. Adelman suggested psychiatric influences, thought delusions, fantasies are not evidence you should consider in this case. That is precisely the kind of evidence you should consider in this case. That is why we are here." (104)

Fuller asserted that it was impossible "to reconstruct, as the Government physicians have tried to do, the minute-by-minute progression of the defendant's thought processes" on the day of the shooting, but emphasized that the victims themselves were of little importance to Hinckley in his "delusional state," and that his primary motivation was "[t]o win the love and affection and establish the relationship with Jodie Foster" (105), ultimately returning to a statement made by prosecution expert, Dr. Dietz, who stated that Hinckley's actions "were not the reasonable acts of an entirely rational individual" (106). Fuller concluded his closing argument by asserting his claim that the prosecution had not fulfilled its requirement under the current insanity defense standards to prove that Hinckley should be held criminally responsible for his actions.

The prosecution opted for a rebuttal argument in which Adelman attempted once again to draw the jury's focus back to the events of the day of the shooting, saying:

How outrageous to say to you that nobody can reconstruct Mr. Hinckley's thoughts of [*sic*] March 30, 1981, like the Government doctors did. How did they do it? By talking to him and recording what he said. The doctors didn't make up these thoughts. John Hinckley told them, for goodness' sake. (Bonnie et al. 108).

Adelman went on to refer to the defense's arguments as "a parade of irrelevancies," suggesting that testimony regarding Hinckley's life in the months and years leading up to the shooting had nothing to do with his criminal act, that aspects of Hinckley's mental condition occurred in many people ("I think if we tried a lot of people's mental condition on New Year's Eve, it might be similar to John Hinckley on that date"), and that in spite of what the defense claimed, psychotic people would have demonstrably psychotic behavior. To this point, Adelman recalled the testimony of all the lay witnesses—the hotel maid, the Secret Service agent who apprehended Hinckley, the police officer and FBI agent who interacted with Hinckley after the shooting—to assert that based on their collective observations, there was no possibility that Hinckley was psychotic and that he most certainly did possess the ability to appreciate wrongfulness and conform his conduct to the law. Adelman again characterized Hinckley's erratic travel in the months preceding the shooting as "the behavior of a desperate, bored young man with a pocket full of money...who likes Jodie Foster," asking the jury, "Wouldn't we all like to be in this situation?" (111). Adelman concluded by emphasizing that whatever personality defects John Hinckley exhibited, that they were not indicative of a serious mental disorder, that he did appreciate the wrongfulness of his actions, that he had the ability to conform his conduct to the law, and that they (the jury) were obligated to hold Hinckley responsible for his actions in the name of justice (113-115).

Jury Instructions

Jury instructions in insanity defense trials have often been a source of controversy, so it is important to understand the framing of the decision presented to the jurors in the Hinckley trial. Judge Parker reminded the jury that the burden, as in all criminal trials, lay with the prosecution to prove the defendant guilty beyond a reasonable doubt. With specific attention to the issue of

insanity and criminal responsibility, Judge Parker explained the burden of proving the defendant criminally responsible beyond a reasonable doubt. He outlined the three possible verdicts for each of the thirteen counts of the indictment: guilty, not guilty, and not guilty by reason of insanity, explaining the parameters of the NGRI verdict in the language of the Model Penal Code:

The law provides that a jury shall bring in a verdict of not guilty by reason of insanity if at the time of the criminal conduct the defendant, as a result of mental disease or defect, either lacked substantial capacity to conform his conduct to the requirements of the law or lacked substantial capacity to appreciate the wrongfulness of his conduct. (Bonnie et al. 116)

There was, once again, debate regarding the use of the term ‘appreciate’ based on the pretrial motion hearing previously discussed in this chapter. The prosecution opposed the use of ‘appreciate’ because it presented the possibility for the jury to consider both cognitive and emotional aspects of understanding and preferred to leave the term undefined unless the court specified that ‘appreciate’ referred strictly to cognitive understanding; the defense, on the other hand, preferred that ‘appreciate’ be understood as emotional understanding or at least that such an interpretation of the word be emphasized. Ultimately, the court opted not to define ‘appreciate.’

The jury instructions regarding the definition of ‘mental disease or defect’ are obviously of substantial import in an insanity defense trial. In this case, Judge Parker clarified that while every defendant is presumed to be sane and responsible for his actions, when evidence of mental disease or defect is introduced, that presumption no longer controls. Parker explained that “‘insanity’ does not require a showing that the defendant was disoriented at the time or place” (Bonnie et al. 117), in a clear departure from the prosecution’s primary strategy of presenting Hinckley’s thinking clearly and behaving rationally on the day of the shooting as evidence of his sanity. He further defined ‘mental disease or defect’ as “any abnormal condition of the mind, regardless of its medical label, which substantially affects mental or emotional processes and...behavior controls,” and provided the distinction between ‘mental disease’ as a condition “capable of improving or deteriorating” and ‘mental defect’ as capable of neither (117). Parker instructed the jury that they may consider testimony regarding “the development, adaptation, and

functioning of these mental and emotional processes and behavior controls” in determining whether the defendant was suffering from a mental disease or defect at the time he committed the crime, and he permitted them to consider evidence regarding the defendant’s mental condition prior to and after the offense, in addition to the actual day of the shooting (117).

Judge Parker’s instructions regarding the testimony of both expert and lay witnesses is also significant to the Hinckley trial. Regarding the expert opinions, he explained that the jurors should not be “bound by medical labels, definitions, or conclusions as to what is or is not a mental disease or defect” because their definitions for the purpose of treatment may differ from legal definitions for the purpose of determining criminal responsibility and that such a determination is the jury’s alone to make. Regarding the opinions of lay witnesses, he explained that they may also consider such testimony but cautioned that they “bear in mind that an untrained person may not be readily able to detect mental disease or defect” and suggested that the testimony of witnesses without “prolonged and intimate contact with the defendant” who did not observe “abnormal acts” need not be of significance to their decision (Bonnie et al. 118).

Finally, Judge Parker explained to the jury that if they did find Hinckley not guilty by reason of insanity, that he would be committed to St. Elizabeth’s Hospital, where he would, within 50 days, be permitted a hearing to determine his eligibility for release; in this hearing, the defendant would have the burden of proof. Parker stated that the defendant would then remain in custody unless “the Court finds by a preponderance of evidence that he is not likely to injure himself or other persons due to a mental disease” (Bonnie et al. 119). The jury did find Hinckley not guilty by reason of insanity, and he was committed to St. Elizabeth’s where he remains to this day.

Public Reaction and Federal Reform

Not surprisingly, the Hinckley verdict shocked and angered the American public and provided a platform for public figures to express their moral outrage. Texas Senator Ray Farabee said that the insanity defense “undermines public confidence in our criminal justice system”; the same article cited an ABC News telephone poll following the Hinckley verdict in which 76 percent of those surveyed felt that “justice had not been done in the Hinckley case” (qtd. in AP). South

Carolina Senator Strom Thurmond, then chairman of the Judiciary Committee, said that he was troubled by the exoneration of “a defendant who obviously planned and knew exactly what he was doing” and that the Hinckley trial demonstrated that “there is something fundamentally wrong with the expanded modern insanity defense” (qtd. in Roberts). Utah Senator Orrin Hatch stated, “I don’t find fault with the jury, I find fault with the law” (qtd. in Roberts). Treasury Secretary Donald Regan echoed Thurmond’s sentiments when he said, “Frankly, I’m outraged. I think when a person stalks a leading citizen of this country, shoots him, three of the people surrounding him, and then goes off scot-free, I think that’s absolutely atrocious” (qtd. in Taylor). Calls for outright abolition of the insanity defense were common after the Hinckley verdict because, as one editorial writer in the *New York Times* put it, the defense itself “is a prostitution of justice”:

Since psychiatry has proven itself an abject failure in recognizing, treating and predicting criminal behavior...psychiatry should be removed from the decision-making process... The insanity defense has become an encouragement to crime, and so long as even one criminal can get away with murder by feigning insanity, the justice system will remain unable to protect citizens... The insanity defense needs to be abolished, along with the practice of allowing psychiatrists to prostitute themselves and justice by pretending to be experts in court and acting as hired guns for both sides in a psychiatric showdown - their diagnoses and prognoses determined by who is paying their fees. (Burns)

Every element of insanity defense mythology is represented in this editorialist’s statement: that psychiatry is not legitimate, that psychiatrists are charlatans who can be hired to make a diagnosis, that insanity defense trials are essentially circus-like ‘battles of experts,’ and, most importantly, that the very existence of the insanity defense weakens the deterrent effect of the criminal justice system.

In response to the Hinckley verdict and the subsequent public outcry, there was legislative activity toward reform throughout the country, including the federal Insanity Defense Reform Act (IDRA) passed by Congress in 1984:

Congress and nine states narrowed the substantive test of insanity; Congress and seven states shifted the burden of proof to the defendant; eight states supplemented the insanity verdict with a separate verdict of guilty but mentally ill; and one state (Utah) abolished the insanity defense altogether. (Bonnie et al. 127)

With the endorsements of both the American Bar Association (ABA) and the American Psychiatric Association (APA), the first major change to the insanity defense was that the 'substantive test' for insanity was modified to eliminate the volitional component or 'control' test that the Model Penal Code outlined. Attorney Richard Bonnie argued that the "fluid and imprecise" psychiatric definitions of insanity led to "an unacceptable risk of abuse and mistake" in insanity defense trials when he advocated for the elimination of the volitional prong of the existing insanity test (qtd. in Bonnie et al. 128). The APA ultimately demonstrated agreement with this position; their statement asserted that "[t]he line between an irresistible impulse and an impulse not resisted in probably no sharper than that between twilight and dusk," and that "psychiatric testimony (particularly that of a conclusory nature) about volition is more likely to cause confusion for jurors" than testimony strictly confined to a defendant's appreciation of the wrongfulness of his conduct (qtd. in Bonnie et al. 129). Thus, the IDRA altered the existing standards by requiring not just a 'mental disease or defect,' but a 'severe mental disease,' while eliminating the 'volitional' or 'control' component.

The second major aspect of the post-Hinckley reforms was the adoption of a Guilty But Mentally Ill (GBMI) verdict as an alternative to the Not Guilty by Reason of Insanity (NGRI) verdict. GBMI verdicts would result in a conviction and a criminal sentence with the option for the convicted criminal to then receive psychiatric treatment at the discretion of the correctional facility. Critics of this change argued that it did not guarantee treatment to mentally ill prisoners. Not surprisingly, the basis for jury instructions and post-conviction procedures in a GBMI verdict vary significantly from state to state. What is interesting is that the definition of mental illness for a GBMI verdict "is typically drawn from the state's civil commitment statute and is usually much broader than the 'mental disease' required for the insanity defense" (Bonnie et al. 131).

The third major change to the insanity defense concerned the burden of proof issue; at the time of the Hinckley trial, a slight majority of states placed the burden to disprove insanity on the prosecution, as was the procedure in the Hinckley trial. After the Hinckley verdict, however, this position was reconsidered. The IDRA officially reversed the procedure, requiring that a defendant prove insanity beyond a reasonable doubt.

Ultimately, four states—Idaho, Kansas, Montana, and Utah—abolished the insanity defense altogether. While they continue to allow evidence of a defendant's mental disorder, the scope is narrowed to the "purpose of proving that the defendant did not have any special knowledge or intent required for conviction" (Bonnie et al. 135), in which case intent, regardless of ability (or lack thereof) to appreciate the significance or control an impulse, is the prevailing factor. Had Hinckley been tried under these conditions, his intention to kill the President would have been enough to convict him.

While the insanity defense continues to be a hotly contested, constantly debated topic, no major changes to the standards have been enacted since the IDRA. The incompatible objectives, or ideological foundations, of criminal law and mental health as evidenced by the Hinckley trial, its predecessors, and those that have followed it, seem to preordain the difficulty of establishing coherence in mental disability law.

CHAPTER 7

CONCLUSION

Some form of an insanity defense has existed since formal systems of law were implemented. The idea that criminal responsibility requires a certain degree of mental competence is not in question. But because the law desires an unequivocal standard to be applied uniformly, or at least the illusion of such a standard, the questions in regard to legal insanity have been: How broadly should insanity for legal purposes be defined? Should legal insanity be determined solely on a cognitive basis, or should it include a volitional component? On whom should the burden of proof rest in a case in which an insanity plea is raised? And, finally, how much influence in trial proceedings should be afforded to expert witnesses and lay witnesses?

Debates about insanity defense standards have hinged on the use and understanding of specific words: “know,” “control,” “product,” “appreciate,” and “substantial,” all of which are arguably ineffable concepts. The history of the insanity defense as we know it today in the United States began in England with the M'Naghten Rules, which established a purely cognitive understanding of legal insanity: was the defendant unable, due to mental disease or defect, to *know* what he was doing was wrong? The second half of the 19th century brought a slew of developments in ‘medicine of the mind,’ appreciation for which is evidenced in the American court rulings in *Parsons* and *Davis*. The Parsons-Davis rule, or “irresistible impulse” test, expanded the definition of legal insanity to include a volitional component in addition to the cognitive test from M'Naghten: was the defendant, due to mental disease or defect, unable to either 1) know what he was doing was wrong, or 2) *control* his actions, even if he did know what he was doing was wrong. In *Durham*, we saw an attempt to clarify the standards with the addition of the ‘product’ test, which asked if the criminal act was a *product* of the defendant’s mental disease or defect. The Model Penal Code addressed criticism of the product test by changing the standard for legal insanity to require a defendant’s lack of *substantial* capacity to *appreciate* the wrongfulness of the act or to conform his conduct to the law. This is the standard under which John Hinckley, Jr. was tried, and this is the standard under which his insanity defense was successful. The public and

political backlash of that decision led to major widespread reforms that eliminated the volitional component of standards for legal insanity, narrowed the definition of mental disease, and shifted the burden of proof back to the defendant, which essentially brought the definition full circle back to the M'Naughtan Rules just under 150 years after they were first codified. No major changes to standards for legal insanity have been made since, although vast advances in understanding and treating mental illness have been made, specifically in the field of neuroscience.

The dismantling of the myth of fairness upon which our legal system is predicated would be catastrophic to the fiber of our social order, and that, at least in part, explains the resistance to both the insanity defense itself as well as to advocates for mentally ill criminal defendants and their efforts toward reform. Law is, at its core, a rhetorical endeavor that constantly battles with the “intricacies and imprecisions, as well as the promise and power of language itself” (Sarat & Kearns 1-2), and the same can be said of psychiatry. Significant reform to the insanity defense would require massive legislative efforts at multiple levels of government, and I can cynically but certainly say that this is unlikely for many reasons, including the ones discussed in this dissertation: the cultural hegemony of the law and sanist politics.

The insanity defense exposes key ideological tensions between the law and psychiatry. That fundamental conceptions of morality and social order underscore both discourses is clear, but they have different goals based on how we interpret the issue of mental illness:

When we interpret mental illness as a medical problem, confinement to a mental hospital serves the goal of treatment because of an underlying societal value of compassion for a person who has an illness. Alternatively, when we interpret mental illness as a criminal justice problem, confinement serves the goal of incapacitation because of the underlying value of keeping the community safe from someone who has committed a crime. (Erickson & Erickson 7)

In other words, the goal of treatment based on compassion is very different from the goal of incapacitation based on protecting the community (7). As I have shown, the criminal justice system has retained an ambivalent orientation toward the role of psychiatry because of their competing goals, and also because of cultural sanism that frames mental illness as the moral

failure of an individual rather than “an illness requiring a humane orientation and medical intervention” (8-9) and “people with mental illnesses...as culpably failing to conform to a core social norm: personal responsibility” (15), while the suspicion remains as to whether mental illness is even a ‘real’ disease, since its physiological or organic origins are, in many cases, indeterminable.

The judicial system’s resistance to rearticulation can be explained broadly by conceiving of it as a densely articulated hegemonic system. More specifically, judges must be understood as applying laws in a totally objective manner. For those higher court justices all the way up to the Supreme Court who deal with appeals of lower court decisions, their process of interpreting and deciding cases must also be understood as an entirely neutral endeavor. While rhetorical scholars point to the absurdity of this magical imaginary judiciary, the exposure of that limitation is incredibly costly, not only to the judicial system, but to the social body with whose protection it is charged. The ongoing debate about the insanity defense points to another limitation of the judicial system as it brings the competing goals of treatment and punishment into “our legal consciousness and create[s] strain when we recognize the problematic nature of our policies concerning the mentally ill” (Erickson & Erickson 179). The rupture created by this strain “arouses anxieties among the official guardians of law’s rhetoric and those who police its style” (Sarat & Kearns 24), along with larger social anxieties about injustice in the justice system.

This dissertation certainly has its limitations. I am neither a legal expert nor a psychiatrist, so my position as an outsider to both discourses limits how I am able to speak about either of them and how they interact. The cases I selected for analysis are just a few of an infinite possibility of insanity defense cases at all levels of the judicial system, and they are by no means representative of the entire scope of such cases; I selected them because they were the catalytic events in attempts to rearticulate the defense which served my primary aim of outlining its history. Another limitation within my selection of texts for analysis is that I did not have access to any of the complete trial transcripts, and secondary access to the transcripts of only two of the trials, *McNaughtan* and *Hinckley*. I relied primarily on the opinions written by the appeals court justices along with secondary sources that analyzed these cases in depth. I did not explicitly address

gender, race, class, or any other identity markers in my analysis, though there is no doubt that they impact any trial, including one in which an insanity plea is raised. Many of these limitations point to directions for future research, both to further develop this project and to extend it beyond the cases presented here.

Ultimately, the project for rhetoric in speaking to/about the law is to expose what the law works so tirelessly to deny: its rhetoricity, its contingency, its political and ethical commitments, all of which undeniably impact its ability to interact with other discourses, in this case, psychiatry, which is also rhetorical, contingent, and grounded in specific political and ethical commitments. There is no 'solution' to this problem that rhetoric can offer, just as neither psychiatry nor the law itself has been able to pose such a solution that satisfies all who are affected by a complex social issue like the insanity defense. The aim of this project and for rhetoric writ large, then, is to open up and extend conversations about "law's connection to the world of contingency" (Sarat & Kearns 6), which includes the locations of overlap between law and other discourses, such as psychiatry. If we understand language to be the heart of discourse, specifically the dependence of both law and psychiatry on words, or their "faith in the capacity of language to work in the world" (8), and their "capacity...to mystify and reify social relations" (10), then we see that such work is a project for rhetoric, particularly ideologically oriented critique, in order to understand the legitimating practices of discourses that reinforce the status quo, and demystify or map "discourses that animate or constrain individuals as social actors" (Gunn 53). This dissertation serves, then, as an opening up of a conversation in which rhetorical scholarship can engage in order to identify and understand such discourses as historically contingent, politically grounded, and socially significant beyond each specific trial. The unique location between law and medicine represented by the insanity defense exposes a rupture in these densely articulated discourses and contains the possibility, however remote, of the disarticulation of the hegemony of law and sanism.

REFERENCES

- Davis V. United States. Supreme Court of the United States 1897.
- Durham V. United States. United States Court of Appeals District of Columbia Circuit 1954.
- Parsons V. State. Supreme Court of Alabama 1887.
- Associated Press, "Hinckley Acquittal Brings Moves to Change Insanity Defense." *The New York Times*, (June 24, 1982).
- Bartee, Wayne C. and Alice Fleetwood Bartee. *Litigating Morality: American Legal Thought and Its English Roots*. New York: Praeger, 1992. Print.
- Bonnie, Richard J., John C. Jeffries, Jr., and Peter W. Low. *A Case Study in the Insanity Defense: The Trial of John W. Hinckley, Jr.* New York: Foundation Press, 1986. Print.
- Brouwer, Daniel C. and Aaron Hess. "Making Sense of 'God Hates Fags' and 'Thank God for 9/11': A Thematic Analysis of Milbloggers' Responses to Fred Phelps and the Westboro Baptist Church." *Western Journal of Communication* 71.1 (2007): 69-90. Print.
- Burns, Patrick. "If All Criminal Acts Were Judged Insane." *The New York Times*, (August 11, 1981).
- Crowley, Sharon. *Toward a Civil Discourse: Rhetoric and Fundamentalism*. Pittsburgh: University of Pittsburgh Press, 2006. Print.
- DeLuca, Kevin. "Articulation Theory: A Discursive Grounding for Rhetorical Practice." *Philosophy and Rhetoric* 32.4 (1999): 334-48. Print.
- Erickson, Patricia E. and Steven K. Erickson. *Crime, Punishment, and Mental Illness: Law and the Behavioral Sciences in Conflict*. New Brunswick, NJ: Rutgers University Press, 2008. Print.
- Foucault, Michel. *Discipline and Punish: The Birth of the Prison*. New York: Vintage Books, 1995. Print.
- . *Madness & Civilization: A History of Insanity in the Age of Reason*. New York: Random House, 1965. Print.
- Goldstein, Abraham S. *The Insanity Defense*. New Haven: Yale University Press, 1967. Print.
- Grossberg, Lawrence. "On Postmodernism and Articulation: An Interview with Stuart Hall." *Journal of Communication Inquiry* 10 (1986): 1-22. Print.
- Gunn, Joshua. "Refiguring Fantasy: Imagination and Its Decline in U.S. Rhetorical Studies." *Quarterly Journal of Speech* 89.1 (2003): 41-59. Print.
- Gunn, Joshua and Shaun Treat. "Zombie Trouble: A Propaedeutic on Ideological Subjectification and the Unconscious." *Quarterly Journal of Speech* 91.2 (2005): 144-74. Print.
- Sarat, Austin and Thomas R. Kearns, ed. *The Rhetoric of Law*. Ann Arbor: The University of Michigan Press, 1996. Print.

- Kristeva, Julia. *Powers of Horror: An Essay on Abjection*. New York: Columbia University Press, 1941. Print.
- Kirk, Stuart A. and Herb Kutchins. *The Selling of the Dsm: The Rhetoric of Science in Psychiatry*. New Brunswick: Transaction Publishers, 1992. Print.
- Moran, Richard. *Knowing Right from Wrong: The Insanity Defense of Daniel Mcnaughtan*. New York: The Free Press (Macmillan), 1981. Print.
- Perlin, Michael. *The Hidden Prejudice*. Washington D.C.: American Psychological Association, 2000. Print.
- Roberts, Steven V. "High U.S. Officials Express Outrage, Asking for New Laws on Insanity Plea." *The New York Times*, (June 23, 1982).
- Robinson, Daniel N. *Wild Beasts & Idle Humours: The Insanity Defense from Antiquity to the Present*. Cambridge, Massachusetts: Harvard University Press, 1996. Print.
- Taylor, Stuart. "Insanity Law Seen as Hurting Society." *The New York Times*, (July 1, 1982).
- White, James Boyd. "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life." *The University of Chicago Law Review* 52.3 (1985): 684-702. Print.
- . "An Old-Fashioned View of the Nature of Law." *Theoretical Inquiries in Law* 12.3: 381-402. Print.

