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**“HE SPEAKS NOT, YET HE SAYS EVERYTHING; WHAT OF THAT?” TEXT,  
CONTEXT, AND PRETEXT IN *STATE V. JEFFREY DAHMER***

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**“He Speaks Not, Yet he Says Everything; What of That?” Text, Context, and Pretext in  
*State v. Jeffrey Dahmer.*  
Gregory J. O’Meara, S.J.\*<sup>1</sup>**

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[Dahmer] drille[ed] holes in his living victims’ heads, poured chemicals to ‘zombify’ them, ha[d] sex with the corpses’ viscera, and ke[pt] some body parts in his refrigerator, occasionally eating them.<sup>1</sup>

Of course, in some respects, Abraham does speak. He says a lot. But even if he says everything, he need only keep silent on one single thing for it to be concluded that he hasn’t spoken.<sup>2</sup>

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\*Assistant Professor, Marquette University Law School; BA: Notre Dame, JD: Wisconsin, LL.M.: New York University. When I was an Assistant District Attorney for Milwaukee County, I was part of the prosecution team in *State v. Dahmer*. Lead counsel for the prosecution was then Milwaukee County District Attorney E. Michael McCann assisted by both Assistant District Attorney Carol L. White and me. The defense was headed by Mr. Gerald Boyle, assisted by Ms. Wendy Patrikus and Ms. Ellen Ryan. The current District Attorney of Milwaukee County, John Chisolm, graciously gave me access to the office’s file in the Dahmer case. I am grateful to him and his assistant, Ms. Sheila Stanelle, for their generosity in the preparation of this article. I am grateful also to Professors Edward M. Gaffney, Bruce Berner, Scott Moss, Philip Chmielewski, S.J., Daniel Blinka, and Paul Secunda for their help on earlier drafts of this paper. Thanks also to Mr. Bryan Bayer for his research assistance.

<sup>1</sup> Stephen M. Glynn, *If Dahmer’s Not Crazy, Who Is?* NAT’L L.J. Mar 9, 1992, at 13.

<sup>2</sup> JACQUES DERRIDA, *THE GIFT OF DEATH AND LITERATURE IN SECRET* (2d Ed.) Tr. D. Wills (Chicago: University of Chicago Press, 2008) 60; *originally publ. as: DONNER LA MORT* (Paris: Editions Gallimard, 1999).

She speaks, yet she says nothing; what of that?<sup>3</sup>

In *State v. Dahmer*, the defense attempted to lead the jury through a series of inferences that would have them conclude the defendant was insane at the time he committed each of the fifteen murders charged by the State of Wisconsin. They portrayed a client who cooperated fully with the authorities and who was too disturbed to be responsible for his actions. To make this approach work, they needed narrative distance between Dahmer and the jury so he would not be interrogated about his prior inconsistent statements and meticulous planning of the killings. Though silence had worked as Dahmer's strategy previously, the weight of the evidence simply undermined that scheme one last time.

The job of a trial attorney is to tell a story, create a reality in the courtroom using the tools at hand: exhibits, testimony of witnesses, the rules of evidence, the substantive law at issue in the case.<sup>4</sup> In crafting this narrative, attorneys take a complex set of events and filter them into various causal chains which are necessarily selective and stripped-down representations of what occurred on some prior date or series of dates.<sup>5</sup> Sensitive attorneys understand that success before a jury requires apprehension not only of content, the "what" of the narrative, but also on

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<sup>3</sup> WILLIAM SHAKESPEARE, *THE TRAGEDY OF ROMEO AND JULIET*, II.ii.12.

<sup>4</sup> See e.g., ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW: HOW COURTS RELY ON STORYTELLING, AND HOW THEIR STORIES CHANGE THE WAYS WE UNDERSTAND THE LAW—AND OURSELVES*, (Harvard University Press 2000); See generally, JAMES B WHITE, *HERACLES BOW: ESSAYS ON THE RHETORIC & POETICS OF THE LAW* (Madison, WI: University of Wisconsin Press, 1989) and JAMES B WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND THE RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* (Chicago: University of Chicago Press, 1985).

<sup>5</sup> PAUL RICOEUR, *MEMORY, HISTORY, FORGETTING*, Tr. K Blamey and D Pellauer (Chicago: University of Chicago Press, 2004) 85.

It is, more precisely, the selective function of the narrative that opens to manipulation the opportunity and the means of a clever strategy, consisting from the outset in a strategy of forgetting as much as in a strategy of remembering. .

style, the “how” of the narrative.<sup>6</sup> This emphasis on style is key because the necessary incompleteness of information given to the jury requires it to fill in gaps in the reasoning.<sup>7</sup> Often attorneys exercise selectivity in the facts presented to a jury because there is too much material.<sup>8</sup> Attorneys may also be selective to imply causal inferences in the jury’s mind.<sup>9</sup> This paper maintains that, in the case of *State of Wisconsin v. Jeffrey Dahmer*, how the case was presented was as important as the content of that evidence. The text of the evidence needed a context; without it, the jury would not be persuaded.

In January, 1992, television cameras and newspaper reporters flocked to Milwaukee, Wisconsin, as the case pitting the State of Wisconsin against serial killer Jeffrey Lionel Dahmer unfolded.<sup>10</sup> The defendant pled not guilty by reason of mental disease or defect to fifteen counts

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<sup>6</sup> See e.g., AMSTERDAM & BRUNER, *MINDING THE LAW* at 165-193. Here the authors discuss how rhetorical style can imply a range of meetings without saying any of them explicitly.

<sup>7</sup> SEYMOUR CHATMAN, *STORY AND DISCOURSE, NARRATIVE STRUCTURE IN FICTION AND FILM* (Ithaca, NY: Cornell University Press, 1980) 28-29

Whether the narrative is experienced through a performance or through a text, the members of the audience must respond with an interpretation: they cannot avoid participating in the transaction. They must fill in gaps with essential or likely events, traits, and objects which for various reasons have gone unmentioned. If in one sentence we are told that John got dressed and in the next that he rushed to an airport ticket counter, we surmise that in the interval occurred a number of artistically inessential yet logically necessary events: grabbing his suitcase, walking from the bedroom to the living room and out the front door, then to his car or to a bus or to a taxi, opening the door of the car and getting in, and so on. The audience’s capacity to supply plausible details is virtually limitless, as is a geometer’s to conceive of an infinity of fractional spaces between two points.

<sup>8</sup> Indeed, trial courts demand that attorneys pare down facts to avoid repetition or waste of time. See e.g., *Brown v. Wainwright*, 785 F.2d 1457, 1466 (11<sup>th</sup> Cir.1986); accord, *International Minerals & Resources, S.A. v. Pappas*, 96 F.3d 586,596 (2d Cir. 1996) “In the normal evidentiary sense cumulative evidence is excluded because it is repetitious.”

<sup>9</sup> SEYMOUR CHATMAN, *STORY AND DISCOURSE, NARRATIVE STRUCTURE IN FICTION AND FILM* (Ithaca, NY: Cornell University Press, 1980) 28-29.

<sup>10</sup> Duane Dudek, *Dahmer’s Insanity Defense Brings Court TV Coverage*, MILW. SENT. Jan. 15, 1992 at 2. Court TV offered gavel to gavel coverage of the trial.

of first degree intentional homicide.<sup>11</sup> Although he admitted killing the fifteen victims identified in the information, he maintained he should not be held responsible for those deaths on the ground that he suffered from a mental disease, and, because of this disease, he was unable to conform his actions to the requirements of the law.<sup>12</sup> Essentially, Dahmer claimed he was a victim of his psychological disturbance and no more to be blamed for his actions than were the seventeen young men whom he killed.

From one perspective, the trial that followed should have been a model of simplicity. Because of the guilty plea, there was no need for the panoply of witnesses and physical evidence that normally attends a homicide prosecution; no need for coroner reports to determine cause of death; no need for specific details of each of the fifteen murders because the defendant conceded causing them. Because the affirmative defense carries the civil burden, the defendant did not need to prove his case beyond a reasonable doubt<sup>13</sup> nor win the assent of a unanimous jury.<sup>14</sup> Rather, the jury had simply to weigh the testimony of detectives, acquaintances of the defendant, and expert witnesses to determine the answer to two questions: at the time of each murder 1) “did the defendant suffer from a mental disease or defect?” and, if that question were answered in the affirmative, 2) “as a result of that mental disease or defect, was the defendant unable to

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<sup>11</sup> *Dahmer Changes Plea to Guilty but Insane*, NY TIMES January 14, 1992 at A19.

<sup>12</sup> *Id.*

<sup>13</sup> WIS. STAT. Sec. 971.15 (2006) “Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable certainty by the greater weight of the credible evidence.” The provisions of the Wisconsin Statutes dealing with the defense of mental disease or defect have not changed since the Dahmer case was tried.

<sup>14</sup> WIS. STAT. Sec. 971.165(2) “No verdict on the plea of not guilty by reason of mental disease or defect may be valid or received unless agreed to by at least five-sixths of the jurors.”

conform his actions to the requirements of the law?”<sup>15</sup> Sentencing was not going to be a major issue in this case; the defendant was going to be locked up for the rest of his life.<sup>16</sup> The sole question for sentencing was which sort of institution would house him: a prison or a hospital.<sup>17</sup>

A close examination of the evidence presented in this case subverts any assertion of simplicity. There are slippages in understanding in any insanity case between the mental health and the legal professions; those difficulties were present here as well. Further, in the case at bar, Dahmer’s volubility and his penchant for documenting his actions with photographs and mementos required his attorneys to walk a fine line in crafting a picture of him that was at once familiar enough to garner jury sympathy and odd enough to assure a finding that he suffered from a mental disease. While proclaiming a strategy of complete and open disclosure, the defense engaged in careful hiding of facts and circumstances that might derail the reality it attempted to construct for the jury.<sup>18</sup>

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<sup>15</sup> WIS JI-CRIMINAL 605: INSTRUCTIONS ON THE ISSUE OF THE DEFENDANT’S CRIMINAL RESPONSIBILITY –MENTAL DISEASE OR DEFECT 1 (2003).

The jury’s deliberation on this matter is directed by two questions on the verdict form. Question one: At the time the crime was committed, did the defendant have a mental disease or defect? Question two: As a result of the mental disease or defect, did the defendant lack substantial capacity either to appreciate the wrongfulness of the conduct or to conform that conduct to the requirements of the law? The jury is directed “to answer the second question only if you answer the first question ‘yes.’”

<sup>16</sup> Pursuant to WIS. STAT. sec. 971.165(2), the jury was instructed that should they grant the defense, Jeffrey Dahmer would not go free but he would be committed to the custody of the state and likely be confined to a state mental hospital “unless the court determines that the defendant would not pose a danger to himself or . . . to others if released under conditions ordered by the court.” *Id.* If the jury were not to find that the defense of not guilty by reason of mental disease or defect applied, the defendant would likely be sentenced to prison; specifically, in Wisconsin, he would be sentenced to life imprisonment. WIS. STAT. Sec. 939.50(3)(a). Realistically, the issue at trial was not if Jeffrey Dahmer would be locked up for life but where this incarceration took place.

<sup>17</sup> *Id.*

<sup>18</sup> This strategy of avoidance may also be attributed to the prosecution in this case. Although Mr. Dahmer confessed to a number of assaults in which he had sexual contact with people who were

This strategy of concealment is made manifest with a simple observation: Dahmer's guilty plea constitutes the bulk of the words he said in open court before sentencing.<sup>19</sup> Although Dahmer's statements to detectives and mental health professionals provided almost all the facts assumed as true in the case, he was never sworn as a witness; he never spoke at trial; all of his words were mediated by others who reported them.<sup>20</sup> Rather than permitting the jury to observe the flesh and blood defendant from the witness stand, the defense orchestrated his previous statements to fabricate the most appealing figure possible; never undermining this discursive image with the defendant's live testimony. The strategy not only focused the jury but also controlled the defendant, whose earlier statements reveal inconsistencies and admissions detrimental to his defense.

After a brief description of the facts, the substance of the testimony, I will trace the development of the insanity defense as it applies to the Dahmer case. I will then present challenges that confront any defendant who attempts to raise this argument in a criminal trial, coupled with challenges peculiar to defending Jeffrey Dahmer himself, given his actions before and after arrest. Next, I will turn to narrative theory to explain how the defense presented its case, demonstrating that its case in chief restricted the flow of information to the jury, and

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unconscious because he drugged them, the prosecution chose to focus solely on the murders in the complaint and information filed with the court. On the one hand, a number of murder charges surely outweigh incidental sexual crimes. On the other hand, it may be that the prosecution did not want to dilute the case's clean plot line by risking the jury's focus on the defendant's sexual desires and fantasies rather than on the tragic deaths of fifteen young men.

<sup>19</sup> Obviously the defendant has a guaranteed right not to testify in his own behalf. *Miranda v. Arizona*, 384 U.S. 436 (1966). Further, the prosecution cannot comment on the defendant's exercise of that right at trial. *See e.g., Doyle v. Ohio*, 426 U.S. 610, 617 (1976). I do not challenge that right. Still, from the viewpoint of trial tactics and narrative theory, one cannot pretend that the defendant's choice not to take the stand is inconsequential. Part of what this paper does is show how far-reaching the decision to shift the defendant's words into other mouths at trial can be.

<sup>20</sup> Rick Rommell and David Doege, *Boyle Says He Agonized Over Dahmer Testifying*, MILW. SENT. Feb 14, 1992 at 1.

painted a picture of the defendant at odds with his own statements. I will then sketch out how the prosecution countered this image the defense created.

### **I. The Verdict, and the Facts Upon Which it Was Based**

The trial itself lasted fewer than thirteen days from opening statements to final summation. The jury's deliberation was complete in less than twenty-four hours. On February 15, 1992, Judge Laurence Gram, Jr., received a special verdict in which the jury found, by a preponderance of the credible evidence, that Jeffrey Lionel Dahmer did not suffer from a mental disease or defect when he committed the fifteen murders to which he had pled guilty.<sup>21</sup> The jury's finding was at least paradoxical because most of the psychiatrists and psychologists who examined Dahmer thought that he may have suffered from some sort of mental disease.<sup>22</sup> This verdict was met with cognitive dissonance both within the legal community and by the public at large.<sup>23</sup> On the one hand, people appreciated that Jeffrey Dahmer was not "given a pass", that he was held accountable for his disturbing actions including murder, dismemberment, and

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<sup>21</sup> Special Verdict in *State of Wisconsin v. Jeffrey Lionel Dahmer*, Case number F-912542. Because the jury answered "no" to the first question about the presence of a mental disease, it did not consider the second question concerning the defendant's ability to conform his conduct to the requirements of the law. See, WIS JI-CRIMINAL 605: INSTRUCTIONS ON THE ISSUE OF THE DEFENDANT'S CRIMINAL RESPONSIBILITY –MENTAL DISEASE OR DEFECT 1 (2003).

<sup>22</sup> As a matter of law, the jury instructions make clear "The term "mental disease or defect" identifies a legal standard that may not exactly match the medical terms used by mental health professionals. You are not bound by medical labels, definitions, or conclusions as to what is or is not a mental disease or defect to which the witnesses may have referred." Wis JI-605 at 2. Still, even Dr Park Elliott Dietz, one mental health witness who did not find that Jeffrey Dahmer suffered from a mental disease, wrote that a diagnosis of "a mixed personality disorder with antisocial, schizoid, and schizotypal features would be defensible." See, Report of Park Elliott Dietz, M.D, M.P.H., Ph.D., Court file, *State of Wisconsin v. Jeffrey L. Dahmer*, F-912542, 1, 6. (Jan 10, 1992).

<sup>23</sup> My experience indicates that most people think Jeffrey Dahmer was successful in raising the disease of not guilty by reason of mental disease or defect. One may observe that the prosecution won where it counts— in court, but perhaps the defense did better than most thought in painting a picture of a troubled man, beset by a maelstrom of circumstances, rather than the somewhat cold and calculating killer that the prosecution argued was better supported by the evidence at trial. Despite winning the verdict, the prosecution's case seems not to have captured the popular imagination.



cannibalism that resulted in the deaths of at least seventeen young men between 1978 and 1991.<sup>24</sup> On the other hand, we feel uneasy with a finding that someone who kills seventeen people, collects the skulls and genitalia of some, eats parts of others, and drills holes in their skulls to “zombify” them is sane.<sup>25</sup> As one commentator asked, “If Dahmer’s not crazy, who is?”<sup>26</sup>

Beginning with the death of Steven Tuomi in late 1987 and continuing until his arrest in July, 1991, Jeffrey Dahmer refined his modus operandi for murdering men susceptible to his entreaties.<sup>27</sup> Dahmer would charm and seduce attractive young men, inviting them to come home with him, promising to pay them to pose for erotic photographs or watch videos.<sup>28</sup> The victims were mostly in their twenties, and none of them drove a car.<sup>29</sup> After taking a cab or bus

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<sup>24</sup> Theresa Smith, whose brother, Edward W. Smith was killed by Dahmer during the summer of 1990, noted that the verdict “brought back the faith I lost in the justice system.” Din J. Benedictis, *Sane Serial Killer: Experts Say Insanity Plea Alive and Well, Thanks Partly to Dahmer Trial*, ABA J., April 28, 1992 at 22.

<sup>25</sup> Stephen M. Glynn, *If Dahmer’s Not Crazy, Who Is?* NAT’L L.J. Mar 9, 1992, at 13.

<sup>26</sup> *Id.*

<sup>27</sup> Initially, Dahmer claimed all of his victims were gay or bisexual. “He stated the reason he killed these homosexuals and he stated they were all homosexuals, was because he wanted to be with them.” Dennis Murphy, Det., Statement of Jeffrey Dahmer, July 23, 1991, Case # 2472, sec. 5, at 15. (Unpublished police report, on file with the author). Later, he admitted that a number of his victims were not gay but came home with him to pose for photographs upon his promising them payment. Fred Fosdal, M.D., Interview Notes for Jeffrey Dahmer Examination, 25 (Nov. 13, 1991) (unpublished report, on file with author).

<sup>28</sup> Patrick Kennedy, Det., Statement of Jeffrey Dahmer, July 31, 1991, Case # 2472, sec. 5, at 88. (Unpublished police report, on file with the author).

As far as the sexual preference and/or race, religion, or education of the individuals that the suspect preferred, the suspect stated it was not a matter of race, religion, or education, it was just a matter of opportunity. He stated he offered each one of the individuals money to be photographed, to view videos, or to have sex, and after he persuaded them to come into his apartment, he would give them a sleeping potion, namely Halcion, and once they went to sleep, he would strangle them either manually or with a strap, photograph most of them after death, sometimes have sex with them after death, and then subsequently dismember them and on approximately eleven of the victims, kept the skulls, and approximately four torsos, the hands, a couple hearts, and other inner organs.

<sup>29</sup> Fred Fosdal, M.D., Interview Notes for Jeffrey Dahmer Examination, 59 (Jan. 10, 1992) (unpublished report, on file with author).

to a spot that was a few blocks from his residence,<sup>30</sup> Dahmer would walk to his dwelling with the victim, invite them in, and eventually offer them a drink laced with Halcion, a sleep aid for which Dahmer had obtained a prescription.<sup>31</sup> Once they were rendered unconscious, Dahmer would have sex with them, and then he would strangle them before they awoke.<sup>32</sup> Dahmer would often fondle their dead bodies and masturbate; eventually, he moved their bodies either to a drain spout or into a bathtub where he would cut them up to dispose of them, occasionally saving trophies such as their skulls or preserved genitalia.<sup>33</sup> On four occasions he engaged in cannibalism but later stated he found this unfulfilling.<sup>34</sup> He would either burn or throw out their

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<sup>30</sup> Patrick Kennedy, Det., Statement of Jeffrey Dahmer, July 31, 1991, Case # 2472, sec. 5, at 81. (Unpublished police report, on file with the author).

He stated the reason why he would have the taxi drop him off several blocks from his apartment was in order to keep the taxi driver from knowing exactly where he lived at and to see if anyone had been following him, as he did not want anyone to detect his activities.

<sup>31</sup> Dennis Murphy, Det., Statement of Jeffrey Dahmer, August 22, 1991, Case # 2472, sec. 5, at 149-150. (Unpublished police report, on file with the author).

We then asked if he was experiencing any withdrawals, not only from alcohol but from not using Halcion. He related that he has not experienced any withdrawals from alcohol nor from the use of Halcion, because he does not take the pills regularly. He related that he would take one pill about every six months and that was only when he could not sleep. He related that the main reason he had Halcion was to use on the people he brought to his apartment or the ones he met in the bathhouses. He related that he first started to experiment by using three pills on the people and then used as many as seven on some of them. He related that he would bluff the doctors into prescribing the pills for him because he would tell them that he could not sleep but never used them.

<sup>32</sup> Patrick Kennedy, Det., Statement of Jeffrey Dahmer, July 31, 1991, Case # 2472, sec. 5, at 88. (Unpublished police report, on file with the author).

<sup>33</sup> *Id.*

<sup>34</sup> Dennis Murphy, Det., Statement of Jeffrey Dahmer, August 16, 1991, Case # 2472, sec. 5, at 151-152. (Unpublished police report, on file with the author).

Jeff Dahmer went on to relate that he had originally told us that he had only eaten a bicep of one of his victims. He related that there were other times in which he had eaten part of the victim. The first time was the person he identified as Cash D (Raymond Smith- Victim #5). He related that he eat (sic) this victim's heart. He

clothing and destroy any identification they had on them.<sup>35</sup> When Dahmer was arrested, there were remains of eleven of his victims in his apartment.<sup>36</sup>

In addition to these facts recounted by the defendant to police detectives, additional claims emerged in Dahmer's discussions with clinicians. Dahmer reported he attempted to exhume a freshly dead corpse for sexual purposes,<sup>37</sup> he drank blood from a test tube while working as a phlebotomist,<sup>38</sup> and he drilled small holes into the skulls of five of his victims while they were drugged and injected them with a mixture of muriatic acid and water or boiling water

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related that it tasted kind of spongy. He indicated that the next victim was the person he met by the bookstore, (Victim #7- Ernest Miller). He related that this was a person he really liked. He indicated that he had fileted his heart and had kept it in the freezer and also kept his bicep. He indicated that he had eaten the thigh muscle of this subject, but it was so tough he could hardly chew it. He then purchased a meat tenderizer and used it on the bicep. He stated that it tasted like beef of filet mignon. The next person he was going to eat, and in fact tried, was victim # 15- Oliver Lacy. He stated that on this victim he ate his bicep. This also tasted like filet mignon. He stated that he would tenderize it first. He stated that he did keep this individual's heart and bicep. We asked him if he had eaten the body parts, just plain. He stated that he would use salt, pepper, and A-1 Steak sauce on them. He stated that the reason he ate these parts was because he was curious but then it was because he wanted to make them a part of him. He stated that this way he could keep these people with him. He stated that he only ate the people that he really liked and wanted them to be a part of him or with him all the time.

*See also*, Park Elliott Dietz, M.D., M.P.H., Ph.D., Report on Mental Status of Jeffrey L Dahmer filed in Case No. F-912542, 4 (Jan 10, 1992) (on file with author). "He had no enduring interest in cannibalism, but rather tried it out of curiosity and made use of the occasion to masturbate to fantasies of a victim he had consumed. Although he did so on as many as 10 occasions, this did not develop into an enduring sexual interest."

<sup>35</sup> *See e.g.*, Dahmer's discussion of destroying evidence following the Hicks homicide in Bath, Ohio. "Jeffrey L. Dahmer stated he took the victim's clothing to a location used to burn trash by his father where there he burned the clothing and identification." R.W. Munsey, Det. Lt., Statement of Jeffrey L. Dahmer, July 26, 1991 Case # 2472, sec. 12, at 195. (Unpublished police report, on file with the author).

<sup>36</sup> *See*, Jensen, Palermo, Johnson, Kang-Cheng Ho, Stormo & Tegatz, "Destructive Hostility: The Jeffrey Dahmer Case, A Psychiatric and Forensic Study of a Serial Killer," 15 AMERICAN JOURNAL OF FORENSIC MEDICINE AND PATHOLOGY 283, 292 (1994).

<sup>37</sup> Park Elliott Dietz, M.D., M.P.H., Ph.D., Report on Mental Status of Jeffrey L Dahmer filed in Case No. F-912542, 3 (Jan 10, 1992) (on file with author).

<sup>38</sup> *Id.* at 4.

alone in an attempt to make them sexual slaves.<sup>39</sup> He also claimed that he planned to build a “‘temple’ that featured his victims’ remains in hopes of ‘receiving special powers and energies.’”<sup>40</sup>

## II. The Underlying Anthropology of the Criminal Law

The above facts surely signal someone who is seriously disturbed. Indeed, if one asked someone on the street if a person who did these things were crazy, the answer would be a resounding “yes.”<sup>41</sup> This recognition gains significance in light of two seemingly contradictory positions held by the law. On the one hand, the criminal law prides itself on being a system that concerns itself with justice and not vengeance.<sup>42</sup> Judgments are not determined by categories used by persons in ordinary discourse; the law calls for analytical distinctions developed

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<sup>39</sup> Fred Fosdal, M.D., Interview Notes for Jeffrey Dahmer Examination, 26-27 (Nov. 13, 1991) (unpublished report, on file with author).

“I was trying to think of a way to not have to kill them.” He said he would drill a small hole through the top of their skull and into the brain. He did this on about four or five victims. He then used a baster. . . and injected diluted muriatic acid into the skull. . . . He said drilling the hole in the skull was “an experiment that never worked out.” He tried this technique on his last four or five victims. He put acid into the hole on four of the victims and boiling water in one of the victims. He said the five individuals did not get into a “zombie” state. . . . The purpose was that they would be alive, the bodies would be preserved, but their personality would be “zombied, so I wouldn’t have to go out looking for partners.”

<sup>40</sup> David Doege, *Dahmer Planned Shrine of Bones*, MILW. SENT. Feb. 5, 1992 at 1.

<sup>41</sup> See e.g., GEORGES CANGUILHEM, *THE NORMAL AND THE PATHOLOGICAL* (New York: Zone Books of the MIT Press, 1998) 117

When we call another man insane, we do so intuitively “as men, not as specialists” The madman is “out of his mind” not so much in relation to other men as to life: he is not so much deviant as different.

<sup>42</sup> PAUL RICOEUR, *CRITIQUE AND CONVICTION* TR K. Blamey (New York: Columbia University Press, 1998), *Originally publ. as: La Critique et la Conviction* (Paris: Calmann-Levy, 1995) 117.

[J]ustice encounters its contrary first in the thirst for vengeance, which is a powerful passion: justice consists in *not* seeking vengeance. Between the crime and the punishment, to return to well-known categories, lies justice and, consequently, the introduction of a third party.

throughout the course of the law's history.<sup>43</sup> On the other hand, juries determine if a defendant raises the insanity defense successfully, and the court's instructions advise the panel that it may disregard the expert witnesses' opinions and draw its own conclusion as to the mental state of the defendant.<sup>44</sup> These instructions invite jury members to give weight to their own reasoning and conclusions, even when those conclusions deviate from those recognized as experts in the field of mental health.<sup>45</sup> This recognition that the jury can disregard the findings of experts underscores the significance of precisely what information jurors receive.

The insanity defense rests upon the basic anthropological assumption underlying the criminal justice system; specifically, the law presumes that human beings are rational and make free and unconstrained choices in this world.<sup>46</sup> Aristotle maintained that the origin of our actions is internal, within ourselves, and thus voluntary.

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<sup>43</sup> See e.g., RONALD DWORKIN, *LAW'S EMPIRE* (Cambridge, MA: Belknap Harvard University Press, 1986) for one discussion of the development of precedent.

<sup>44</sup> WISCONSIN JI CRIMINAL 605 INSTRUCTION ON THE ISSUE OF THE DEFENDANT'S CRIMINAL RESPONSIBILITY (MENTAL DISEASE) (1990). "You are not bound by medical labels, definitions, or conclusions as to what is or is not a mental disease." In an explanatory footnote to this instruction, the Jury Instructions Committee explains:

The intent of this sentence is to emphasize that the jury is not bound by what is considered "mental disease" for medical purposes. The jury is bound by the legal definition of mental disease as explained in the instruction. In a proper case, the judge may wish to emphasize this distinction. (Cite omitted.). (Emphasis in the original).

<sup>45</sup> *Id.*

<sup>46</sup> ARISTOTLE, *THE NICHOMACHEAN ETHICS*, 1113b, Tr. M. Oswald (Indianapolis: Bobbs-Merrill, 1962) at 65.

For where it is in our power to act, it is also in our power not to act, and where we can say "no," we can also say "yes." Therefore, if we have the power to act where it is noble to act, we are also have the power not to act where not to act is base. But if we have the power to act nobly or basely, and likewise the power not to act, and if such action constitutes our being good and evil, we must conclude that it depends on us whether we are decent or worthless individuals.

See also, George Fletcher, *THE GRAMMAR OF CRIMINAL LAW, AMERICAN, COMPARATIVE, AND INTERNATIONAL VOLUME ONE: FOUNDATIONS* (New York: Oxford University Press, 2007) 9.

[I]t is manifest that a man is the author of his own actions, and if we are unable to trace our conduct back to any other origins than those within ourselves, then actions of which the origins are within us, themselves depend upon us, and are voluntary.<sup>47</sup>

Professor George Fletcher shows how this notion of the rational human being acting voluntarily is often formulated in terms of “free will.”<sup>48</sup> Criminal law presumes free will is operative in all situations unless we recognize extenuating circumstances giving rise to an excuse or justification.<sup>49</sup>

Despite the admonition that the law is addressed solely to rational actors choosing freely among alternative courses of action, the law has not always taken cognizance of an actor’s rationality.<sup>50</sup> Rather, law’s early focus was solely on consequences of the physical act itself. In early English law, if there were a quarrel and a dead body resulted, then the killer, regardless of

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<sup>47</sup> ARISTOTLE, THE NICHOMACHEAN ETHICS at 1113b.

<sup>48</sup> GEORGE FLETCHER, THE GRAMMAR OF CRIMINAL LAW, AMERICAN, COMPARATIVE, AND INTERNATIONAL VOLUME ONE: FOUNDATIONS (New York: Oxford University Press, 2007) 10 (Footnotes omitted.)

This problem of attributing agency has traditionally been addressed under the label of “free will.” In the Christian West, the discussion of free will took the place of Aristotle’s focus on the issue of voluntary action.

<sup>49</sup> *Id.*

<sup>50</sup> See e.g., GEORGE FLETCHER, A CRIME OF SELF DEFENSE, BERNHARD GOETZ AND THE LAW ON TRIAL (Chicago: University of Chicago Press, 1988) 30.

From roughly the 13<sup>th</sup> to the 16<sup>th</sup> century, the plea of self defense, called *se defendendo*, came into consideration whenever a fight broke out and one party retreated as far as he could before resorting to defensive force. His back had to be literally against the wall.

If he then killed the aggressor, *se defendendo* had the effect of saving the defendant from execution, but it left intact the other stigmatizing effects of the criminal law. The defendant forfeited his goods as expiation for having taken human life. The murder weapon was also forfeited to the Crown as a deodand, a tainted object. Killing *se defendendo* was called excusable homicide, for though the wrong of homicide had occurred, the circumstances generated a personal excuse that saved the manslayer from execution. (Italics in original.)

reasons for doing so, was liable to punishment.<sup>51</sup> As common law was influenced by canon (church) law following the Norman conquest, matters began to change; canonists assigned weight not only to the act itself but also to the intention that lay behind it.<sup>52</sup> By determining a penitent's intention in acting, the confessor could assign an appropriate penance in the confessional.<sup>53</sup> Professor Fletcher maintains that the criminal law was influenced by these pastoral attempts at grading the intention motivating an act.<sup>54</sup> For example, distinctions in self-defense can be traced back to distinctions made by canonists.<sup>55</sup>

The modern approach to the distinction between self defense and punishment finds its best expression in the work of Thomas Aquinas, who emphasizes the intention with which the defender harms the aggressor. If the intention is not to harm but merely to fend off the attack, then the action can properly be described as an act of self-defense, but if the intention is to make the aggressor suffer for his misdeed, then the act appears to be closer to punishment. . . . The basic principle is that a private individual may not intentionally kill another human being when the explicit object (rather than the side effect) of the action is to cause death.<sup>56</sup>

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<sup>51</sup> *Id.*

<sup>52</sup> JOHN MAHONEY, S.J., *THE MAKING OF MORAL THEOLOGY* (Oxford: Clarendon Press, 1987) 180. At least Aquinas considered both the act and the intention in determining the moral goodness of an action. His perspective was a corrective on the work of Peter Abelard which focused solely on the intention with which an act was done. Mahoney notes: .

[I]n his ethics, Abelard was equally individualistic, to the extent of concentrating the morality of good or bad action not in what was being done, but in the intention with which it was done.....Moral goodness or badness does not reside in any action considered in itself but derives only from the intention which produces the action.

*Id.* at 176.

<sup>53</sup> *Id.*

<sup>54</sup> GEORGE FLETCHER, *THE GRAMMAR OF CRIMINAL LAW, AMERICAN, COMPARATIVE, AND INTERNATIONAL VOLUME ONE: FOUNDATIONS* (New York: Oxford University Press, 2007) 14. Fletcher quotes Thomas Aquinas, *SUMMA THEOLOGIAE*, II-II, *Quaestio* 64, seventh article (“[W]hat one intends specifies moral actions, not what one does not intend, since the latter result is accidental....And so such acts of self-defense by them to preserve one’s life, do not have the character of being unlawful.”) (Internal footnotes omitted.)

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

Because the criminal law lacks ministers who interrogate the offender with the breadth and depth granted the confessor,<sup>57</sup> it modified the canonist's approach to intent or motive. Rather than focusing on a psychological reality underlying a given act, criminal law constructs an entity called the actor's intent. The best definition of intent in criminal law arises in the work of the nineteenth-century jurist James Fitzjames Stephen.<sup>58</sup> "[T]he only possible way of discovering a man's intention is by looking at what he actually did, . . . what must have appeared to him at the time the natural consequence of his conduct."<sup>59</sup> The understanding of a defendant's intent is not an inquiry into actual motives that stirred the defendant to action or deep desires of the heart; rather, it is an act of reconstruction based on the defendant's external actions.<sup>60</sup> The law looks at what an actor did and reasons backwards, presuming that the rational actor intended the ensuing consequences.<sup>61</sup>

By considering the actor's intent, the law went beyond its earlier consideration of external acts and focused on the actor's point of view. This concentration on the subject's motivation gave rise to two broad categories of defenses: justifications and excuses.<sup>62</sup> These defenses in turn imply the presence of an event conveyed to the jury by means of narrative.<sup>63</sup>

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<sup>57</sup> MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, AN INTRODUCTION VOL. ONE* Trans. R. Hurley (New York: Random House, 1978) 58-73.

<sup>58</sup> JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND*, (London: MacMillan & Co., 1883).

<sup>59</sup> *Id.* at Vol II, Chapter XVIII at 111.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Of course other defenses are possible, for example, those rooted in a failure to fulfill the elements of the crime or claims that the crime as written violates constitutional protections. Because this paper considers issues of defect in a defendant's intent, I am focusing on justification and excuse because these defenses are addressed particularly to the *mens rea* element.

<sup>63</sup> See e.g., Robert Cover, *Nomos and Narrative*, 97 HARV L.REV. 4-5 (1983).

No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law



They provide a context, a world that is subject to limitations, in which the defendant lives and in which she makes rational choices.<sup>64</sup>

### III. Justifications versus Excuses in Criminal Defense

Justifications take the following form: “When viewed in its entirety, the defendant’s act was neither wrong nor bad; indeed, the act was virtuous.”<sup>65</sup> An act such as the use of defensive force to repel an aggressor’s unlawful attack is an example of a justified action. We say that the actor is justified because we find self-defense or defense of others understandable, rational, and worthy of commendation.<sup>66</sup>

Excuse in criminal law is different. The law excuses criminal defendants from penal consequences for wrongful acts which arise either through no fault of their own or in situations where the law perceives the defendant was subject to a “maelstrom of circumstances.”<sup>67</sup> Excuse

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becomes not merely a system of rules to be observed, but a world in which we live. (Cites omitted.)

<sup>64</sup> *Id.*

<sup>65</sup> GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* (Boston: Little Brown & Co., 1978) 759.

Claims of justification concede that the definition of the offense is satisfied, but challenge whether the act wrongful; claims of excuse concede that the act is wrongful, but seek to avoid the attribution of the act to the actor. A justification speaks to the rightness of the act; an excuse, to whether the actor is accountable for a concededly wrongful act.

<sup>66</sup> To label a defense as a justification rather than an excuse is already to accept a set of values subject to the vagaries of history. As alluded to above, the Common Law, did not view as self-evident that killing another in self-defense freed the actor from punishment. *See, supra*, note 49. The underlying command “Thou shalt not kill” would have been seen as outweighing an assumption that self-preservation is an unmitigated good. Only when moral weight is given to preservation of life as a good in itself can the act of defensive force be seen as justified. It may be that the intuitive “rightness” that characterizes a particular defense as a justification rather than an excuse is as much a product of social mores as anything else.

<sup>67</sup> GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* (Boston: Little Brown & Co., 1978) 808.

Excuses are motivated by compassion for persons caught in a maelstrom of circumstance. The underlying sentiment is that if any one of us were forced to act at gunpoint or to steal in order to survive, we would do the same. If we recognize our essential equality with the accused and identify with his situation, then we cannot help but feel compassion and excuse his all too-human transgression.

is rooted in the sense that “What the actor did was wrong, but she had a good reason for doing it.”

Excuses in criminal law stem from reasons either external to the actor or internal ones. Duress is one example of an external force resulting in an excuse.<sup>68</sup> Assume defendant D shoots an innocent victim V, causing her bodily injury. Normally this action should result in a charge of battery. However, when D pulls the trigger and shoots V solely because actor A has a revolver cocked and pointed at D’s temple, threatening to kill him if he fails to fire the gun, the law may excuse D’s action. A’s training a gun on D impeded D’s ability to choose, and therefore, shooting the gun at V was not the product of D’s will. To put the matter differently, D does not evince a criminal character by acting as he does, and his act may therefore be excused.

Excuses also arise from internal forces understood as burdening an actor’s freedom of choice just as much as a gun held to his temple. Consider the excuse rationale underlying the mistaken use of defensive force. Imagine defendant E reasonably believes her life is threatened by actor F who has the purpose to take her life. Assume further that E believes her failure to take immediate action to thwart this deadly attack will result in her death. Assume finally that E’s belief is mistaken; she is not under attack at all. E’s act of violence directed at F injures an innocent person. In this situation, the law may excuse E’s action because, had the circumstances been as E reasonably believed them to be at the time of her act, E’s actions would have been justified.

Excuse defenses uphold the anthropology of the rational actor because actors who are excused when under duress or mistaken about surrounding facts still act rationally.<sup>69</sup> They choose among alternatives after weighing options they perceive, even if their assumptions are

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<sup>68</sup> See e.g., FLETCHER, *RETHINKING CRIMINAL LAW* at 829-833.

<sup>69</sup> *Id.* at 802-803.

later disproved. Another way the anthropology of the rational actor is upheld is by means of the plea of not guilty by reason of mental disease or defect because it excuses defendants who are unable to act rationally in a given situation through no fault of their own.<sup>70</sup> That said, the insanity defense remains filled with difficulties and seeming contradictions.<sup>71</sup>

#### IV. A Brief History of the Criminal Excuse of Insanity

##### A. *Vicious Wills and Reason.*

The first English lawyer to consider the mental element of the crime and propose relief for the insane was Henri de Bracton in his thirteenth century *On the Law and Customs of England*.<sup>72</sup> He maintained that one needs a “will to harm” before a crime can be committed.<sup>73</sup> Drawing on canon law, Bracton noted that just as the law does not hold infants or brute beasts responsible for the consequences of their behavior, there are some adult human beings who should likewise be excused because their ability to reason is impaired, and they are they are thus comparable to children or “brute animals.”<sup>74</sup>

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<sup>70</sup> *Id.* at 835.

The definition, administration and ramifications of the insanity defense express the deepest concerns of the Anglo-American legal culture. . . . In posing the question whether a particular person is responsible for a criminal act, we are forced to resolve our doubts about whether anyone is ever responsible for criminal conduct. And if some are responsible and some are not, how do we distinguish between them?

<sup>71</sup> *Id.*

<sup>72</sup> *De Legibus et Consuetudinibus Angliae* was completed around 1256; it is credited as “The first comprehensive legal treatise on the English system” A.M Platt and B.L. Diamond *The Origins and Development of the “Wild Beast” Concept of Mental Illness and its Relation to Theories of Criminal Responsibility* 1 J. HIST. OF THE BEHAVIORAL SCIENCES 355 (1965) 356. See also, JOEL PETER EIGEN, *MADNESS AND MAD-DOCTORS IN THE ENGLISH COURT* (New Haven: Yale University Press, 1995) 35.

Bracton. . . was the first English lawyer (he was also chancellor of Exeter Cathedral and chief justiciary of the highest court in the realm) to incorporate the mental element into legal writing: “For a crime is not committed unless the will to harm be present. . . . In misdeeds, we look to the will and not the outcome.” In essence, the law conceived of people as capable of free choice, a free exercise of the will. (Internal cite omitted.)

<sup>73</sup> EIGEN at 35.

<sup>74</sup> *Id.*

The focus on the will noted by Bracton was underscored later by Blackstone.<sup>75</sup> “So that to constitute a crime against human laws, there must be, first, a vitious will; and, secondly, an unlawful act consequent upon such vitious will.”<sup>76</sup> Although he agrees with Bracton on the necessity of the will in making legal determinations, Blackstone reframes the issue in terms of cognitive impairment.<sup>77</sup> Whereas Bracton excuses the insane who lack “corrupt intent,” “will to harm,” and “malice,” Blackstone addresses the actor’s inability to reason because, presumably, reason informs the will.

[I]f there be any doubt, whether a party be *compos* or not, this shall be tried by a jury. And if he be so found, a total idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses; but, if a lunatic hath lucid intervals of understanding, he shall answer for what he does in those intervals, as if he had no deficiency.<sup>78</sup>

In Blackstone, a defendant may be relieved of responsibility not only when he manifests a wholly deficient reason but also at sporadic points when his reason seems impaired;<sup>79</sup> further, during times when his reason seems unaffected, he should be held responsible for what he does.<sup>80</sup>

### *B. Reason and the M’Naghten Standard*

This recognition that partial impairment may support a defense of insanity occurs in the case of Daniel M’Naghten.<sup>81</sup> Here the test for insanity shifts from the defendant’s volitional

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<sup>75</sup> WILLIAM BLACKSTONE, ESQ., COMMENTARIES ON THE LAWS OF ENGLAND (Oxford: Clarendon Press, 1769).

<sup>76</sup> *Id.* at Book IV, Ch. 2, at 21.

<sup>77</sup> *Id.* at Book IV, Ch. 2, at 25.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Daniel M’Naghten’s Case* 8 Eng Rep. 718 (1843). *M’Naghten* was a politically celebrated case. EIGEN at 153. Drummond was the prime minister’s secretary. Most people think M’Naghten mistook Drummond for Prime Minister Peel, a fact which cuts both for and against his sanity. 8 Eng. Rep at 719. *See generally*, ROGER SMITH, TRIAL BY MEDICINE: INSANITY AND

impairment to his cognitive processes. M’Naghten shot Edward Drummond who eventually died because of the wound.<sup>82</sup> The defendant was charged with murder and pleaded not guilty by reason of insanity.<sup>83</sup> The case presented difficulties because M’Naghten fit neither of the two categories described by Blackstone. He was neither an “absolute lunatic” nor someone who seemed insane with occasional lucid intervals.<sup>84</sup> Rather, M’Naghten appeared otherwise sane and lucid except when dwelling upon a particular delusion that he was the victim of political persecution.<sup>85</sup> The physician Edward Thomas Munro testified in the trial court that this condition should be sufficient to relieve the defendant of responsibility.

[A] person may have a morbid delusion, and yet still know that thieving is a crime, or that murder is a crime, but his antecedent delusions lead him to one particular offense or another. . . . [I] think that delusion of this nature [political persecution] carries a man quite away— I mean that his mind was so absorbed in the contemplation of the fancied persecution, that he did not distinguish between right and wrong.<sup>86</sup>

In its recitation of the facts, the high court agreed as it observed,

[I]t was of the nature of the disease with which the prisoner was affected, to go on gradually until it had reached a climax, when it burst forth with irresistible intensity; that a man might go on for years quietly, though at the same time under its influence, but would all at once break out into the most extravagant and violent paroxysms.<sup>87</sup>

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RESPONSIBILITY IN VICTORIAN TRIALS (Edinburgh: Edinburgh University Press, 1981) for a good discussion of the development of the *M’Naghten* rules in light of competing professional claims by medicine and law.

<sup>82</sup> *Id.* at 719.

<sup>83</sup> *Id.*

<sup>84</sup> *See*, BLACKSTONE, COMMENTARIES at Book IV, Ch. 2, at 25.

<sup>85</sup> *Old Bailey Sessions Papers*, 1842-43, Case 874, 5<sup>th</sup> sess. 756-59; cited in EIGEN at 153.

<sup>86</sup> *Id.*

<sup>87</sup> 8 Eng. Rep. at 719.

M’Naghten’s case perplexed the Queen’s Bench because his customary appearance of sanity raised the possibility of the defendant’s lying.<sup>88</sup> The original jury returned a verdict of not guilty by reason of insanity.<sup>89</sup> This decision was appealed to the House of Lords, which, after debating the matter, referred the case for declaratory judgment to the High Court.<sup>90</sup>

The published decision consists of two opinions. In the initial opinion, Mr. Justice Maule rules that the insanity defense is available “when there is proof of the unsoundness of mind such as renders a defendant incapable of telling right from wrong.”<sup>91</sup> Lord Chief Justice Tindal, writing for the majority, takes Maule’s idea and develops it at greater length. Tindal notes the law presumes every defendant’s sanity; therefore, the defense has the burden of proving to the jury’s satisfaction that a party 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.<sup>92</sup>

The rule makes two distinctions. In the first instance, one fails “to know the nature and quality of the act he was doing” insofar as the actor is so deluded that he truly believes he is

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<sup>88</sup> In recognizing this possibility, the court touched upon a widely-held belief that still infects the public perception of the criminal justice system. See e.g., CHRISTOPHER CRONIN, FORENSIC PSYCHOLOGY (Dubuque, IA: Kendall Hunt, 2006) 93.

When asked, most students will estimate that the insanity plea is used anywhere from 25 to 50 percent of the time in criminal cases. Additionally, the public also feels that it is generally successful as a way to avoid incarceration. One study found that the public thought that the insanity plea was used as a ploy in nearly 50 percent of all criminal cases and that it was successful 20 percent of the time. Actually, the plea of not guilty by reason of insanity is used in less than 1 percent to 3 percent of all criminal cases. . . . It also has a much lower success rate than . . . people believe. Several studies have found that the plea is successful . . . approximately 25 percent of the time. . . . Approximately 70 percent of the insanity acquittals are the result of a plea bargain or similar arrangements rather than through a jury trial. This is not too surprising in light of the fact that juries tend to hold negative attitudes toward the insanity defense. (Cites and emphasis omitted.)

<sup>89</sup> 8 Eng. Rep. at 720.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 722.

performing one action when he is doing something wholly other.<sup>93</sup> Tindal also proposes a separate category of those who should not be held responsible: those who knew what they were doing but did not know that it was wrong.<sup>94</sup> Furthermore, Tindal indicates that the mere presence of a delusion in the mind of the defendant is insufficient for the granting of the defense.<sup>95</sup> Rather, Tindal directs trial courts to consider the nature of the delusion and how it affects the actions of the defendant.<sup>96</sup> A defendant may only be excused if, were his delusion correct, he would have had an excuse, such as that granted by a reasonable mistake of fact, under the law.<sup>97</sup>

The development of the law from Blackstone to *M'Naghten* parallels the emergence of psychiatry as a profession;<sup>98</sup> psychiatric experts change the quality of evidence sufficient for excusing criminal liability on the grounds of insanity.<sup>99</sup> Previously, the finding of insanity rested

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<sup>93</sup> See e.g., OLIVER SACKS, *THE MAN WHO MISTOOK HIS WIFE FOR A HAT: AND OTHER CLINICAL TALES* (New York: Summit, 1985). Sacks describes victims of neurological disorders so profound that they simply cannot distinguish among various objects and actions.

<sup>94</sup> *M'Naghten* at 8 Eng. Rep. at 722.

<sup>95</sup> *Id.* at 723.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> See e.g., ROGER SMITH, *TRIAL BY MEDICINE: INSANITY AND RESPONSIBILITY IN VICTORIAN TRIALS* (Edinburgh: Edinburgh University Press, 1981).

<sup>99</sup> See, ALAN NORRIE, *CRIME, REASON AND HISTORY, A CRITICAL INTRODUCTION TO CRIMINAL LAW* (London: Weidenfeld and Nicolson, 1993) 173.

The concept of insanity appears to fit neatly into an orthodox liberal framework. The insane person is morally, therefore legally, irresponsible for his acts, and thus unpunishable. At most, the criticism might be that the law's outmoded narrowness stems from a judicial over-sensitivity to the needs of social protection which should be corrected by reform in favour of the accused. But what cannot be recognized from this perspective is how the traditional views about insanity are ideologically entrenched within legal discourse, so that much more rides on the issue than a small measure of enlightened liberal reform. At stake is a particular way of seeing the social world and the human beings that populate it that is both powerful and odd. (Cites omitted.)

upon the ordinary observations of lay people;<sup>100</sup> after the rise of psychiatrists (or alienists) in the nineteenth century, the finding of insanity became problematic; mental illness was no longer something seen by ordinary people; rather, mental illness referred to something more occult, internal, observable only by those with special training.<sup>101</sup>

### *C. Reason, Mental Illness, and the Products Test*

The *M'Naghten* Rule seized the legal imagination and became the test to determine criminal insanity not only in England but also in the vast majority of United States jurisdictions until 1972 when the American Law Institute's Model Penal Code provided, with some variations, the standard test in the States (hereafter the ALI test.)<sup>102</sup> The ALI test continues the cognitive element of the *M'Naghten* Rule<sup>103</sup> and adds a volitional element, first introduced in

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<sup>100</sup> The ordinary observations of lay people still constitute valid evidence of a defendant's responsibility when he pleads not guilty by reason of insanity. *Duthey v. State*, 131 Wis. 178, 111 N.W.2d 222 (1907). Relying on *Duthey*, the prosecution in the Dahmer case repeatedly asked ordinary lay people about their observations of Jeffrey Dahmer and if they thought he was mentally ill on the basis of their experience.

<sup>101</sup> ALAN NORRIE, *CRIME, REASON AND HISTORY, A CRITICAL INTRODUCTION TO CRIMINAL LAW* (London: Weidenfeld and Nicolson, 1993) 176.

Insanity came increasingly to be seen as product of disease located in the brain which caused the mad behaviour. Following their methodology to its natural conclusion, psychiatrists then argued that the 'truth' of insanity lay not in its empirical manifestation, in conduct displaying an obvious lack of reason, but in the underlying causal mechanisms to be found in the brain. It was this move in thinking that caused the break with the law. If the ultimate locus of insanity was not in its psychological manifestation but in underlying organic causes, it became possible to conceive of forms of insanity which left the "surface" areas of the psyche, for example, the reasoning facility, relatively unaffected while attacking the "deeper" elements of the will or the emotions. A lack of reason became one, but only one, symptom of an underlying, causal, mental illness. A man could as a result appear quite rational but still be insane. . . . A man might know that he was doing wrong but be unable to stop himself (volitional insanity), or believe that he was not bound by the normal rules of society (emotional insanity).

<sup>102</sup> SMITH, *TRIAL BY MEDICINE* at 19.

<sup>103</sup> MODEL PENAL CODE SEC. 4.01(1). (1962).

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 the substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.



*Parsons v. State*<sup>104</sup> and then famously adopted and developed by Judge David Bazelon in *Durham v. United States*.<sup>105</sup>

The *Durham* decision reversed the criminal conviction of Monte Durham, finding the trial court erred in holding that the defendant failed to raise sufficient proof to consider the insanity defense.<sup>106</sup> The court rejected the *M’Naghten* test and adopted a volitional approach that underscored the defendant’s ability to choose to act in some way other than the way he did.<sup>107</sup> The test proposed reads: “[A]n accused is not criminally responsible if his unlawful act was the product of a mental disease or mental defect.”<sup>108</sup> There are two key elements in this test: the first is the soft definition of mental disease; the second is the hard determinism of the “products” test.

### 1. Soft Definition of Mental Disease

The *Durham* court made no attempt to define “mental disease,” save that it addresses a condition that was capable of change in a way that a mental defect would not be.<sup>109</sup> The distinction did not prove helpful either to the courts or to psychiatrists called to testify because “[p]sychiatrists and some judges believed it established medicine’s right to provide categories for classifying criminal deeds.”<sup>110</sup> The lack of clarity is underscored by the historical event where psychiatrists redefined the term.<sup>111</sup> Immediately following the *Durham* decision, court-appointed

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<sup>104</sup> 2 So. 854 (Ala. 1887). I am grateful to Professor Bruce Berner of Valparaiso University School of Law for calling my attention to the original decision in which the volitional test emerged.

<sup>105</sup> 214 F.2d 862 (D.C.Cir. 1954).

<sup>106</sup> *Id.* at 868.

<sup>107</sup> *Id.* at 874-875.

<sup>108</sup> *Id.*

<sup>109</sup> SMITH, TRIAL BY MEDICINE at 19.

<sup>110</sup> *Id.*

<sup>111</sup> See generally, Loftus E Becker, *Durham Revisited: Psychiatry and the Problem of Crime: Part II, Obstacles to the Presentation of Psychiatric Testimony* 4 PSYCHIATRIC ANNALS 12 (September, 1973).

psychiatric witnesses limited the definition of “mental disease” in insanity pleas to cases of psychosis because that was the standard for involuntary civil commitments at that time.<sup>112</sup> After a few years of this approach, mental health professionals changed the working definition of “mental disease” with no input from the courts. Professor Becker explains:

[I]n 1957, . . . the staff of St Elizabeths Hospital decided to change its policy. Nonpsychotic diagnoses— particularly, the diagnosis of “sociopathic personality disturbance”— would now be explicitly recorded . . . [as] a mental disease. . . . The change of policy at Saint Elizabeths had not been made as a result of any new psychological insights. . . .<sup>113</sup>

This seemingly capricious shift undermined medical authority in the courts; suddenly the accepted standard changed, and none of the involved parties could explain why.<sup>114</sup>

## 2. Hard Determinism of the Products Test

The difficulty rooted in the nebulous definition of mental disease was compounded by its being yoked with a fuzzy notion of causation in *Durham*’s “products test.” After rejecting the *M’Naghten* test as inadequate, the court held “an accused is not criminally responsible if his unlawful act was the product of mental disease or defect.”<sup>115</sup> This test drew battle-lines between lawyers committed to free will and psychiatrists who adopted a more determinist line.

Psychiatrists preferred the *Durham* products test to *M’Naghten*’s line of authority. Professor Norrie observes:

these tests. . . permitted a direct ‘scientific’ account of the accused’s conduct to be delivered in cause and effect terms in the courtroom, unencumbered by old-

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<sup>112</sup> *Id.* at 15.

<sup>113</sup> *Id.* at 16-17. Professor Becker notes later that psychiatrists proposed this shift because their previous interpretation of the term seemed a far too restrictive definition of mental disease. Becker sees this shift as a salutary maneuver because it permitted the psychiatrists to testify to other conditions which they had previously neglected to consider under the rubric of “mental disease” leading to more acquittals. That said the example described underscores the flimsiness of the definition and may add support to the legal profession’s mistrust of forensic psychiatry.

<sup>114</sup> See e.g., Alan A Stone, *The Insanity Defense on Trial*, 33 HOSPITAL & COMMUNITY PSYCHIATRY 636, 637 (1982).

<sup>115</sup> *Durham* at 214 F,2d. 874-875

fashioned and ultimately metaphysical tests of responsibility. *Durham* addressed the underlying causes of mentally disordered crime rather than dealing with what might only be certain symptoms of a disorder. It dealt concretely with the disordered subjectivity of the accused, and therefore was from the psychiatrist's viewpoint more just and understanding.<sup>116</sup>

In contrast to the view of psychiatrists, lawyers and judges in the criminal justice system clung to the "old-fashioned ....tests of responsibility."<sup>117</sup> Criminal lawyers labor daily to determine responsibility. Attorneys and judges wondered if the approach of psychiatry was simply at cross purposes with what they understood as the criminal law's primary function: assigning responsibility.<sup>118</sup>

For lawyers, however, *Durham* represented a threat to the very notion of individual justice according to the law. First, it took the decision out of the hands of both the law and the jury by making the question of insanity a matter for psychiatry alone. The law was side-lined and the jury left with no real decision in the accused's responsibility. . . . The psychiatrists' scientific operating assumption of a universal determinism threatened to engulf the law's assumptions of free will and responsibility. . . . Scientific determinism was not a theory about insanity: it was a general theory about human conduct. Psychiatry threatened the liberal conception of the responsible subject.<sup>119</sup>

#### *D. The Law in Dahmer*

Wisconsin adopted the ALI test that combines both cognitive elements from the *M'Naghten* test and the volitional stress from *Durham*.

A defendant is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law.<sup>120</sup>

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<sup>116</sup> NORRIE, CRIME REASON AND HISTORY at 183-184.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 184.

<sup>119</sup> *Id.* (Cites omitted.)

<sup>120</sup> WIS. STAT. Sec. 971.15(1)[2] (2006).

In Wisconsin, the defendant must establish this affirmative defense to a reasonable certainty by the greater weight of the credible evidence.<sup>121</sup> Whether the defendant has met this burden of proof is a question of fact for the jury.<sup>122</sup> Different jurisdictions may shift the burden of proof in different ways, but that consideration is beyond the scope of this paper's concerns.

## **V. Challenges Faced by the Dahmer Defense**

### *A. The Challenge of Proving Insanity in General*

As indicated above, the criminal law assumes that punishment is appropriate only where a person can be blamed for his actions. For this reason the law maintains that unless one's actions were the product of choice, we do not find guilt as a matter of law.<sup>123</sup> Because mental disease or defect can profoundly affect one's capacity to exercise rational choice, it seems that a defense ought be given in cases where a defendant's medical condition prevents its exercise.<sup>124</sup> But establishing that a medical or psychiatric condition exists can prove an elusive challenge. As the late Professor Georges Canguilhem of the Sorbonne pointed out, mental disease, and therefore the insanity defense, is often difficult to determine.<sup>125</sup> His student Michel Foucault observed

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<sup>121</sup> WIS. STAT. Sec. 971.15(3).

<sup>122</sup> *State v. Leach*, 124 Wis. 2d 648, 660, 370 N.W.2d 240 (1985).

<sup>123</sup> For example, courts have found that involuntary behavior due to psychomotor epilepsy may provide a defense to criminal liability. *People v. Grant*, 46 Ill. App. 3d 125, 360 N.W.2d 809 (1977).

<sup>124</sup> John J. McGrath, M.D., *The Insanity Defense: A Difficult Necessity* 36 HOSPITAL AND COMMUNITY PSYCHIATRY (Jan, 1985) 54-55.

[T]he sane should be judged and sentenced, but the insane are proven to be ill and thus should be treated. It is crucial to distinguish between sanity and insanity during both judgment and disposition. . . . A return to Bedlam cannot be risked simply because our science finds the definition and demonstration of insanity difficult and elusive.

<sup>125</sup> See e.g., GEORGES CANGUILHEM, *THE NORMAL AND THE PATHOLOGICAL* (New York: Zone Books of the MIT Press, 1998) 117

Minkowski also thinks that the fact of insanity cannot be reduced to just the one fact of disease, determined by its reference to one image or precise idea of the average or normal human being. When we call another man insane, we do so intuitively "as men, not as

[I]t is only by an artifice of language that the same meaning can be attributed to “illnesses of the body” and “illnesses of the mind.” A unitary pathology using the same methods and concepts in the psychological and physiological domains is now purely mythical...<sup>126</sup>

Psychiatric illnesses do not always have organic origins, and methods used in diagnosing and treating physical illnesses do not have clear parallels in psychiatry.<sup>127</sup> Conversely, it is also difficult to describe with precision what makes up a “normal” range of rational choice.<sup>128</sup> Thus, psychiatry lacks a clear standard that enunciates when a person ought to be held liable for choices made.<sup>129</sup> This apparent confusion stems from the uncertain organic basis for psychiatric maladies.<sup>130</sup> The causal factors linking body, mind, and behavior are still poorly understood.<sup>131</sup> The matter is further clouded by our positivist and empiricist bias which largely holds something

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specialists” The madman is “out of his mind” not so much in relation to other men as to life: he is not so much deviant as different.

<sup>126</sup> MICHEL FOUCAULT, *MENTAL ILLNESS AND PSYCHOLOGY* (Berkeley: University of California Press, 1987) 10; *originally publ. as: Madaldie Mentale et Psychologie* (Paris: Presses Universitaires de France, 1962).

<sup>127</sup> *Id.* at 10-11

[P]sychology has never been able to offer psychiatry what physiology gave to medicine: a tool of analysis that, in delimiting the disorder, makes it possible to envisage the functional relationship of this damage to the personality as a whole. The coherence of a psychological life seems, in effect, to be assured in some way other than the cohesion of an organism; . . . . One cannot, then, make abstractions in the same way in psychology and in physiology, and the delimitation of a pathological disorder requires different methods in organic and in mental pathology.

<sup>128</sup> *See e.g.*, GEORGES CANGUILHEM, *THE NORMAL AND THE PATHOLOGICAL* (New York: Zone Books of the MIT Press, 1998) 119

In the final analysis it is the patients who most often decide— and from very different points of view— whether they are no longer normal or whether they have returned to normality. For a man whose future is almost always imagined starting from past experience, becoming normal again means taking up uninterrupted activity.....

<sup>129</sup> Alan A Stone, *The Insanity Defense on Trial* 33 *HOSPITAL & COMMUNITY PSYCHIATRY* 636, 640 (1982).

<sup>130</sup> MICHEL FOUCAULT, *MENTAL ILLNESS AND PSYCHOLOGY* at 10-11.

<sup>131</sup> GEORGES CANGUILHEM, *THE NORMAL AND THE PATHOLOGICAL* at 118. “[S]omatic disease is capable of a superior empirical precision, of a better standardization...” (than is mental disease).

does not exist unless it can be measured.<sup>132</sup> Mental and emotional problems are frequently not subject to empirical validation, and psychiatrists observe that it is impossible to say if a patient is cured.<sup>133</sup>

The uncertain etiology of mental illness is seen by jurists and the public as undermining the criminal justice system when it is invoked as the basis for excusing behavior.<sup>134</sup> Lord Devlin remarked, “Everywhere the concept of sickness expands at the expense of the concept of moral responsibility.”<sup>135</sup> The public seems to believe that the insanity defense is successfully employed by large numbers of criminals who thereby avoid punishment.<sup>136</sup> Further, psychiatrists are mistrusted because they contradict each other on the stand.<sup>137</sup> Professor Alan Stone observed that the trial of John Hinckley, in which the defendant was acquitted because the prosecution failed to disprove mental illness beyond a reasonable doubt, “was a bleak experience for

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<sup>132</sup> See e.g., Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics* 64 U. CHI. L. REV. 1197, 1199 (1997). Nussbaum notes how certain forms of economic analysis presume that all things can be measured and compared.

A commitment to the commensurability of all an agent’s ends runs very deep in the law and Economics movement. Even when a plurality of distinct ends is originally recognized, the underlying view that agents are “maximizers of satisfactions,” and that satisfaction is something that varies in degree rather than in kind, leads the theorist rapidly back to the idea that distinctions among options should be understood in terms of the quantity of utility they afford, rather than in terms of any basic qualitative differences.

<sup>133</sup> Alan A Stone, *The Insanity Defense on Trial* 33 HOSPITAL & COMMUNITY PSYCHIATRY 636, 640 (1982)

Psychiatrists treat mental illness, often with great benefit to very sick patients, but that is not the same as curing them. . . . We can treat people and return them to the community.

They will function better, but we cannot guarantee that they are cured....

<sup>134</sup> See e.g., CHRISTOPHER CRONIN, *FORENSIC PSYCHOLOGY* (Dubuque, IA: Kendall Hunt, 2006) 93.

<sup>135</sup> P. DEVLIN, *THE ENFORCEMENT OF MORALS* (Oxford: Oxford University Press, 1959) 17.

<sup>136</sup> See e.g., Alan A Stone, *The Insanity Defense on Trial* 33 HOSPITAL & COMMUNITY PSYCHIATRY 636, 637 (1982), where Professor Stone quotes a lengthy statement by the Hon John Ashbrook of Ohio recorded in the CONGRESSIONAL RECORD of Tuesday, Nov. 17, 1981, at E5365.

<sup>137</sup> *Id.*

American psychiatry, and the verdict shook public confidence in the American criminal justice system.”<sup>138</sup>

The above considerations underscore how the law and the public at large misperceive how psychiatrists can and do contribute to the legal enterprise. Initially, the prevailing clinical understanding of mental health issues is not easily translated into conclusions that can be of use in a courtroom.<sup>139</sup> This confusion in definition emerges in part because psychiatrists and attorneys have vastly different objectives when they inquire into psychiatric pathology. Clinical study of the mind is a therapeutic discipline. Psychiatrists and psychologists attempt to heal the suffering of those beset by mental and emotional distress. By contrast, lawyers focus on questions of blame and responsibility; they strive to divide those who have the ability to choose freely from those who cannot.<sup>140</sup> In cases raising the insanity defense, therefore, the questions to be grappled with at trial, though familiar ground for attorneys, are concerns far removed from those of psychiatrists.<sup>141</sup> As a result, psychiatrists must be guarded in their testimony, and commentators worry that not all are.<sup>142</sup>

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<sup>138</sup> ALAN STONE, *LAW PSYCHIATRY, AND MORALITY, ESSAYS AND ANALYSIS* (Washington, D.C.: American Psychiatric Press, Inc, 1982) 77.

<sup>139</sup> CHRISTOPHER CRONIN, *FORENSIC PSYCHOLOGY* (Dubuque, IA: Kendall Hunt, 2006) 90.

The definition of insanity is a legal term, not a mental health term, and the defendant must meet the legal definition of being insane. The exact definition of insanity varies by jurisdiction. . . . Not everyone who suffers from a mental illness is judged by the courts to be insane. Indeed, many individuals who suffer from a psychosis and commit a crime do not meet the legal criteria for insanity.

<sup>140</sup> Alan A Stone, *The Insanity Defense on Trial* 33 *HOSPITAL & COMMUNITY PSYCHIATRY* 636, 640 (1982).

<sup>141</sup> See Loren Roth, et al., *American Psychiatric Association Statement on the Insanity Defense* *AM. J. PSYCHIATRY* 140:6 (June,1983) 686.

The American Psychiatric Association is not opposed to legislatures restricting psychiatric testimony. . . . We adopt this position because it is clear that psychiatrists are experts in medicine, not the law. As such, the psychiatrist’s first obligation and expertise in the courtroom is to “do psychiatry,” i.e., to present medical information and opinion about the defendant’s mental state and motivation and to explain in detail the reason for his medical-psychiatric conclusions. When, however, “ultimate issue” questions are

Not all challenges go against the defense; evidentiary rulings in insanity cases may cut both ways. Ordinarily, criminal cases are marked by strict limitations on admissible testimony. In the first instance, the evidence is restricted by the crime that has been charged.<sup>143</sup> The jury is directed to determine facts at a particular point in time.<sup>144</sup> Evidence of other actions or events are limited by constitutional claims<sup>145</sup> or the grounds of relevance.<sup>146</sup> Insanity trials broaden the

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formulated by the law and put to the expert witness. . . then the expert witness is required to make a leap in logic. He no longer addresses himself to medical concepts but instead must infer or intuit what is in fact unspeakable, namely, the *probable relationship* between medical concepts and legal or moral constructs such as free will. (Italics in original.)

<sup>142</sup> ALAN STONE, *LAW PSYCHIATRY, AND MORALITY, ESSAYS AND ANALYSIS* (Washington, D.C.: American Psychiatric Press, Inc, 1982) 96.

Psychiatry is held hostage by the psychiatrists who testify in courts whatever their standards and whatever the test of insanity may be. They undertake an enterprise which has hazards for us all. The reputation and credibility of our profession is in their hands. And, if I am correct, . . . they know not what they are doing.

<sup>143</sup> See e.g., FED. R. EVID. 402: RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

If evidence proposed does not make a fact in consequence as determined by the substantive law more or less likely, it is not relevant. FED. R. EVID. 401. Therefore, courts streamline trials by excluding matters that do not bear directly on the case at hand, even limiting relevant evidence in some situations. FED. R. EVID. 403.

<sup>144</sup> PAUL RICOEUR, *MEMORY, HISTORY, FORGETTING*, Tr. K Blamey and D Pellauer (Chicago: University of Chicago Press, 2004) 318.

Past acts are . . . represented solely in terms of the nature of the charges selected prior to the actual trial. They are represented in the present within the horizon of the future social effect of the verdict that will decide the case. The relation to time is particularly noteworthy here: representation in the present consists in a staging. . . and a measured discourse of conscious legitimation. . . .

<sup>145</sup> For example, under the Fifth Amendment to the Constitution, “No person. . . shall be compelled in any criminal case to be a witness against himself.” Relying in part on this provision, the U.S. Supreme Court held that defendants have a right to be informed of their rights to an attorney and to decline answering questions when subject to custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>146</sup> See e.g., FED. R. EVID. 403 EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME



frame of relevance; as the Wisconsin Supreme Court has noted, “no evidence should be excluded which reasonably tends to show the mental condition of the defendant at the time of the offense.”<sup>147</sup> By pleading insanity, the defendant directs the jury to a question more amorphous than determining specific facts at a given point in time. Professor Wigmore is clear in his discussion of insanity pleas under common law: “Any and all conduct of the person is admissible in evidence” as the jury attempts to determine if a defendant should be held accountable for his actions.<sup>148</sup> As Professor Goldstein observes,

The almost unvarying policy of the courts has been to admit *any* evidence of aberrational behavior so long as it is probative of the defendant’s mental condition. . . . Indeed, virtually never does one see any attempt to restrict the sort of lay evidence which is a staple of the insanity defense— that the defendant wept, or that he was given to violent rages, or that he threatened to throw his child out the window.<sup>149</sup>

By expanding the range of admissible evidence, the defendant pleading insanity has greater resources to mine than does the ordinary criminal defendant.<sup>150</sup> That said, when the defendant pleads guilty, the prosecution likewise can broaden the scope of the evidence it uses. Thus the defense must be wary when entering a plea which throws open the doors to evidence ordinarily barred at trial.

### *B. Challenges Specific to the Dahmer Defense*

The argument that anyone with the sexual attraction shared by Jeffrey Dahmer must have a mental disease has an undeniable appeal, but it faced specific difficulties in this case, both

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Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

<sup>147</sup> *State v. Carlson*, 5 Wis.2d 595, 93 N.W.2d 354, 360-361 (1958).

<sup>148</sup> I WIGMORE, EVIDENCE sec 228 (1940).

<sup>149</sup> ABRAHAM S GOLDSTEIN, THE INSANITY DEFENSE (New Haven: Yale University Press, 1967) 54.

<sup>150</sup> *Id.*

psychiatric and narrative. From the psychiatric perspective, no less an authority than Sigmund Freud doubted the claim that necrophiliacs suffer from a mental disease.

Nevertheless, in some of these perversions the quality of the new sexual aim is of a kind to demand special examination. Certain of them are so far removed from the normal in their content that we cannot avoid pronouncing them 'pathological'. This is especially so where (as, for instance, in cases of . . . intercourse with dead bodies) the sexual instinct goes to astonishing lengths in successfully overriding the resistances of shame, disgust, horror or pain. But even in such cases we should not be too ready to assume that people who act in this way will necessarily turn out to be insane or subject to grave abnormalities of other kinds.<sup>151</sup>

Freud was quoted neither by the prosecution nor the defense in the Dahmer case, but his reluctance to find disease in such cases directly undermines the theory of the defense by observing that necrophiliacs can "override" resistances to their sexual acts and remain sane.<sup>152</sup>

Freud's objection points more generally to a logical flaw in the proposed defense. The defense used circular logic to argue: 1) Jeffrey Dahmer's sexual predilections were so disturbing that no sane person could share them, and 2) even if they could share them, they would not act on them, therefore, 3) because Dahmer had these urges and acted on them repeatedly proves he could not control his actions; therefore, he is insane, and his actions should be excused. When examined carefully, the position implies a wide range of disturbing conclusions. Change the facts a little. Assume rather that the defendant is sexually aroused only when he engages in acts of violent rape. Consistent with this deviation, he lures unsuspecting victims back to his apartment where he rapes them brutally. In his defense, he claims that he cannot control these urges; they are the only way he can achieve sexual satisfaction. Such a stimulus for sexual arousal is in many ways as distasteful as Dahmer's desires, but I doubt that most people share an intuition that the law should excuse the expression of violent rape fantasies. Merely because

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<sup>151</sup> SIGMUND FREUD, *THREE ESSAYS ON THE THEORY OF SEXUALITY* Tr. J. Strachey (New York: Basic Books, 1962) 27.

<sup>152</sup> *Id.*

Dahmer had an unusual set of sexual triggers does not mean that he was less able to control himself than anyone else.<sup>153</sup> Indeed, Dahmer himself did not seem to subscribe to the “uncontrollable desire” argument.

I have one person to blame– the person sitting across from you– no one else– no one put a gun to my head– I had choices to make and I made the wrong choices. I could have made different choices in the past. It’s obvious to me. If I had more foresight, if I had more motivation to find a career and worthwhile acts to fill my time rather than drinking my problems away. I drank my emotions and problems away.<sup>154</sup>

The narrative difficulties faced by the defense are less direct and more complex. Initially, Dahmer provided an extraordinarily detailed and repeated set of interviews to detectives and experts investigating the case. His statement to the Milwaukee Police Department alone fills over 145 typewritten pages.<sup>155</sup> Normally the defense controls the flow of information from the defendant; that was not the case here. Dahmer repeatedly asked to speak with officers during this time, usually when his attorneys were present, but he sometimes insisted on speaking without counsel.<sup>156</sup> This extensive confession hampered his attorneys’ crafting of a defense

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<sup>153</sup> *Id.*

<sup>154</sup> Fred Fosdal, M.D., Interview Notes for Jeffrey Dahmer Examination, 9 (Oct. 16, 1991) (unpublished report, on file with author).

<sup>155</sup> Statement of Jeffrey Dahmer, Case # 2472, sec. 5. (Unpublished police report, on file with the author). Based on my experience as an assistant district attorney, this statement differs not only in quantity but also in kind. Before this case, I am hard pressed to recall a statement longer than perhaps ten typewritten pages. It is as though the psychic floodwaters came pouring out of the defendant once his dam of silence had been breached. In this way, it resembles the extensive narrative described with characteristic insight by Michel Foucault who saw the confession of the murderer Riviere and the dossier it engendered as expressing the battle among emerging professions trying to assert their power in evolving industrial society. This particular strand of thought is unfortunately beyond the scope of this paper. See, MICHEL FOUCAULT, Ed., *I PIERRE RIVIERE, HAVING SLAUGHTERED MY MOTHER, MY SISTER, AND MY BROTHER: A CASE OF PARRICIDE IN THE 19<sup>TH</sup> CENTURY*, (New York: Random House, 1975); *originally publ as: Moi, Pierre Riviere ayant egorge ma mere, ma soeur et mon frere....* (Paris: Editions Gallimard, 1973).

<sup>156</sup> See e.g., Dennis Murphy, Det., Statement of Jeffrey Dahmer, July 26, 1991, Case # 2472, sec. 5, at 47-48. (Unpublished police report, on file with the author).

because they could not proffer any argument that conflicted with Dahmer's self-reported narrative.

A further difficulty in the case rested on its particularly gruesome facts, not only as reported by the defendant but also as photographed and collected by him.<sup>157</sup> On the one hand, the spoken and visual evidence could strengthen the argument that the defendant was mentally unhinged. On the other hand, the defense attorneys needed to weigh proffering evidence that could alienate the jury and risk a verdict based on disgust. Further, because of the physical evidence, the attorneys could not simply claim that Dahmer was delusional and made everything up. The physical evidence tied him ineluctably to facts reported. The defense therefore elected to clothe the evidence in a veneer of respectability by enveloping it in the testimony of clinicians. Concrete details of the murders and the disposal of the evidence were broadly "psychologized" so that the jury would focus on the predicament of a young man haunted by his unorthodox sexual urges, rather than looking at his bloodstained hands.

## **VI. Meeting the Challenges: Narrative Theory and Trial Courts**

Trial attorneys are essentially storytellers, historians of brief moments in time who attempt to direct their audience to certain conclusions and not others.<sup>158</sup> Stories and historical

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I asked Mr. Dahmer if he had anything else to tell me, and why he did not request to have his attorney prior to talking with me, and he stated that he did not want his attorney there he just wanted to tell me about this other thing that he had forgotten and he didn't need his attorney present for that. I asked if he felt he needed the attorney for any other questioning, and he stated he felt he did not because he has been truthful with me the whole time and he does not feel he needs his attorney present when I'm there. I again informed him of his attorney's request, that he contact the attorney prior to contacting me, and he stated he understands and if he feels he has something important enough to tell me he will call me. I then informed him again that his attorney had requested his cooperation, and he stated he would consider it.

<sup>157</sup> The court ordered sealed a set of Polaroid photos taken by the defendant after sentencing. I don't believe anyone has examined them since the trial.

<sup>158</sup> See e.g., ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW: HOW COURTS RELY ON STORYTELLING, AND HOW THEIR STORIES CHANGE THE WAYS WE UNDERSTAND THE*

accounts are usually enclosed in texts, a fixed set of symbols that mediate meaning from the author to the reader.<sup>159</sup> Although the trial court's decision in *State v. Dahmer* was never appealed, and although no transcript was ever prepared, what occurred in the trial court can helpfully be understood as a text.<sup>160</sup> With attorneys in the authorial role and the jury cast as readers, witnesses spoke in front of the jurors but did not interact with them.<sup>161</sup> Jurors were not free to ask questions or for clarification; rather, they were asked to apply the facts as they found them to the law.<sup>162</sup>

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LAW—AND OURSELVES, (Harvard University Press 2000); *See generally*, JAMES B WHITE, HERACLES BOW: ESSAYS ON THE RHETORIC & POETICS OF THE LAW (Madison, WI: University of Wisconsin Press, 1989) and JAMES B WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND THE RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY (Chicago: University of Chicago Press, 1985).

<sup>159</sup> PAUL RICOEUR, HERMENEUTICS AND THE HUMAN SCIENCES, ESSAYS ON LANGUAGE, ACTION, AND INTERPRETATION, Ed & Tr.: J. Thomson (Cambridge: Cambridge University Press, 1981) simultaneously published (Paris: Editions de la Maisons des Sciences de l'Homme, 1981) 174.

[I]n the asymmetrical relation between the text and the reader, one of the partners speaks for both. Bringing a text to language is always something other than hearing someone and listening to his speech. . . . For the text is an autonomous space of meaning which is no longer animated by the intention of its author; the autonomy of the text, deprived of this essential support, hands writing over to the sole interpretation of the reader.

<sup>160</sup> I use the term “text” here broadly. Legal scholars are used to referring to textual analysis at the appellate level. This makes perfect sense. Through printed texts and oral argument, appellate lawyers appeal to the rational and the propositional. By contrast, trial attorneys convey meaning through a much more diverse set of signifiers. In addition to being wordsmiths, trial attorneys need to employ the craft of a stage director or camera operator. Trial attorneys appreciate that juries will be moved by logic, but they also understand that reason is tutored by emotion. A bloodstained shirt, a wedding photo of the victim, or a weapon actually used in a murder adds little to the propositions that make up steps in a chain of reasons. However, these mute objects may speak eloquently of the ebb and flow of a homicide victim's life, the terror of witnesses, the burden of sorrow carried by family members.

<sup>161</sup> PAUL RICOEUR, HERMENEUTICS AND THE HUMAN SCIENCES, 146-147.

It does not suffice to say that reading is a dialogue with the author through his work, for the relation of the reader to the book is of a completely different nature. Dialogue is an exchange of questions and answers; there is no exchange of this sort between the writer and the reader. The writer does not respond to the reader. . . . [Reading] thereby replaces the relation of dialogue, which directly connects the voice of one to the hearing of another.

<sup>162</sup> *See*, PAUL RICOEUR, THE JUST 121 (David Pellauer trans., University of Chicago Press 2000), originally published as LE JUSTE (1995).

At a slightly different level of abstraction, the jury was asked to construct a master narrative, a world, a context for the evidence that emerged at trial and somehow made sense of it.<sup>163</sup> The defense presented a series of events following in sequence that urged the jury to conclude that, because Jeffrey Dahmer's desires and actions were so bizarre, he must have been suffering from a mental disease. By contrast, the prosecution attempted to contextualize Dahmer's claimed madness by drawing a picture of Dahmer the man.<sup>164</sup> Ultimately, the jury had to reconcile these two approaches in terms of the law they were given. They had to decide which, if either, narrative corresponded with what they understood as the truth.<sup>165</sup>

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The application of a rule is in fact a very complex operation where the interpretation of the facts and the interpretation of the norm mutually condition each other, before ending in the qualification by which it is said that some allegedly criminal behavior falls under such and such a norm which is said to have been violated. If we begin with the interpretation of the facts, we cannot overemphasize the multitude of ways a set of interconnected facts can be considered and, let us say, recounted. . . . We never finish untangling the lines of the personal story of an accused with certainty, and even reading it in such a way is already oriented by the presumption that such an interconnectedness places the case under some rule. To say that a is a case of B is already to decide that the juridical syllogism holds for it.

<sup>163</sup> PAUL RICOEUR, *HERMENEUTICS AND THE HUMAN SCIENCES*, 178

What we make our own, what we appropriate for ourselves, is not an alien experience or a distant intention, but the horizon of a world towards which a work directs itself. The appropriation of the reference is no longer modelled on the fusion of consciousnesses, on empathy or sympathy. The emergence of the sense and reference of a text in language is the coming to language of a world and not the recognition of another person.

<sup>164</sup> *Id.*

It must be said that any narrative combines, in varying proportions, two dimensions: a chronological dimension and a non-chronological dimension. The first may be called the 'episodic dimension' of the narrative. Within the art of following a story, this dimension is expressed in the expectation of contingencies which affect the story's development; hence it gives rise to questions such as: and so? And then? What happened next? . . . . But the activity of narrating does not consist simply in adding episodes to one another; it also constructs meaningful totalities out of scattered events. This aspect of the art of narrating is reflected, on the side of following a story, in the attempt to 'grasp together' successive events. The art of narrating, as well as the corresponding art of following a story, therefore require that we are able to *extract a configuration from a succession*. (Emphasis in original.)

<sup>165</sup> PAUL RICOEUR, *MEMORY, HISTORY, FORGETTING*, Tr. K Blamey and D Pellauer (Chicago: University of Chicago Press, 2004) 178-179

As Ricoeur observes in his work on nonfiction narratives, historical truth as expressed in texts is always a constructed entity; even if it does not correspond with the historical events it purports to describe, it may well supplant the event itself in the community's imagination.<sup>166</sup>

Historians understand this distinction as a matter of course. Professor Tzvetan Todorov observes

The work of the historian, like every work on the past, never consists solely in establishing the facts but also in choosing certain among them as being more salient and more significant than others, then placing them in relation to one another...<sup>167</sup>

Just as the historian chooses among salient facts, attorneys select what evidence to put before the jury.<sup>168</sup> Thus, it matters greatly what evidence is brought before the jury, for that testimony is the only basis whereby the jury can construct its sense of "what really occurred."<sup>169</sup> Of course,

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A vigilant epistemology will guard here against the illusion of believing that what we call a fact coincides with what really happened, or with the living memory of eyewitnesses, as if the facts lay sleeping in the documents until the historians extracted them. This illusion. . . for a long time underlay the conviction that the historical fact does not differ fundamentally from the empirical fact in the experimental natural sciences. . . . [W]e need to resist this initial confusion between a historical fact and a really remembered event. The fact is not the event, itself given to the conscious life of a witness, but the contents of a statement meant to represent it. . . . So understood, the fact can be said to be constructed through the procedure that disengages it from a series of documents concerning which we may say in return that they establish it. This reciprocity between construction (through a complex documentary procedure) and the establishing of a fact (on the basis of the document) expresses the specific epistemological status of the historical fact. It is this propositional character of the historical fact (in the sense of "fact that...") that governs the mode of truth or falsity attached to the fact. The terms "true" and "false" can legitimately be taken at this level in the Popperian sense of "refutable" and "verifiable."

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 86.

<sup>168</sup> *Id.* at 318.

Past acts are . . . represented solely in terms of the nature of the charges selected prior to the actual trial. They are represented in the present within the horizon of the future social effect of the verdict that will decide the case. The relation to time is particularly noteworthy here: representation in the present consists in a staging, a theatricalization . . . . This living presence of the scenes replayed solely on the plane of discourse comes under the heading of visibility, which was shown. . . to be related to the expressibility on the plane of the literary representation of the past.

<sup>169</sup> SEYMOUR CHATMAN, *STORY AND DISCOURSE* at 45-46.

the jury's reconstruction, based on its limited information, may differ greatly from the historical event itself.<sup>170</sup> Despite this variance from the historical event, in our system of justice, the jury's verdict is the version of history which matters. Thus, the defense crafted an object of discourse, of words, to supplant the flesh and blood reality of Jeffrey Dahmer, leading the jury to focus on only parts of his story to persuade them to adopt a version of events at odds with the broader historical narrative. They did this by creating two claims of consistency that sublimated Dahmer's normality and attempted to hide his guilt.

The substance or subject matter of a narrative, or trial, cannot be separated from its medium, how the story is told, who tells the jury what it hears.<sup>171</sup> In Dahmer's case in chief, the

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[T]he interesting thing is that our minds inveterately seek structure, and they will provide it if necessary. Unless otherwise instructed, readers will tend to assume that even "The king died and the queen died" presents a causal link, that the king's death has something to do with the queen's. We do so in the same spirit in which we seek coherence in the visual field, that is, we are inherently disposed to turn raw sensation into perception. So one may argue that pure chronicle is difficult to achieve. "The king died and then the queen died" and "The king died and then the queen died of grief" differ narratively only in degrees of explicitness at the surface level; at the deeper structural level, the causal element is present in both. The reader "understands" or supplies it; he infers that the king's death is the cause of the queen's. "Because" is inferred through ordinary presumptions about the world, including the purposive character of speech.

<sup>170</sup> PAUL RICOEUR, *MEMORY, HISTORY, FORGETTING*, Tr. K Blamey and D Pellauer (Chicago: University of Chicago Press, 2004) 179.

What is one talking about when one says that something happened? . . . [I]t is to preserve this status of the reference of historical discourse that I distinguish the fact as "something said," the "what" of historical discourse, from the event as "what one talks about," the "subject of..." that makes up historical discourse. In this regard, that assertion of a historical fact indicates the distance between the said (the thing said) and the intended reference, which according to one of Benveniste's expressions turns discourse back toward the world. The world, in history, is past human life as it happened. . . . [What said: known as "standing for."] To get there, we need to leave underdetermined the question of the actual relation between fact and event, and tolerate a certain indiscriminination in the employment by the best historians of these terms as standing for each other.

<sup>171</sup> PAUL RICOEUR, *MEMORY, HISTORY, FORGETTING*, Tr. K Blamey and D Pellauer (Chicago: University of Chicago Press, 2004) 163-164.



jury saw his life primarily through the lens of detectives, clinical psychologists and psychiatrists. This narrative distance conferred a respectability upon the content which would have been absent had Dahmer been testifying on his own behalf.<sup>172</sup> If Dahmer were to recount the same events from the witness stand, the jurors would naturally regard his testimony as self-serving and discount its possible truthfulness.<sup>173</sup> By contrast, when that same testimony comes through the mouth of a psychiatrist or clinical psychologist, the jury attaches unwarranted credibility to the claims made.<sup>174</sup> This is not to say that the jury is necessarily persuaded by mental health

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The specificity of testimony consists in the fact that the assertion of reality is inseparable from its being paired with the self-designation of the testifying subject. The typical formation of testimony proceeds from this pairing: I was there. What is attested to is indivisibly the reality of the past thing and the presence of the narrator at the place of its occurrence. And it is the witness who first declares himself to be a witness. . . . These . . . assertions link point-like testimony to the whole history of a life. (Footnote omitted.)

<sup>172</sup> *Id.*

<sup>173</sup> Indeed, the jury instructions in Wisconsin would explicitly invite this sort of reasoning on the jury's part. *See e.g.*, WISCONSIN JI CRIMINAL 300 CREDIBILITY OF WITNESSES

It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judge of the credibility, that is, the believability, of the witnesses and the weight to be given to their testimony. In determining the credibility of each witness and the weight you give to the testimony of each witness, consider these factors:

- whether the witness has an interest or lack of interest in the result of this trial;
- the witness' conduct, appearance, and demeanor on the witness stand;
- the clearness or lack of clearness of the witness' recollection

....

- bias or prejudice if any has been shown
- possible motives for falsifying testimony;

- all other facts and circumstances during the trial which tend either to support or to discredit the testimony....

<sup>174</sup> RICOEUR, *MEMORY, HISTORY, FORGETTING*, at 164.

It is before someone that the witness testifies to the reality of some scene of which he was part of the audience, perhaps an actor or a victim, yet, in the moment of testifying, he is in the position of a third-person observer with regard to all the protagonists of the action. This dialogical structure immediately makes clear the dimension of trust involved: the witness asks to be believed. He does not limit himself to saying "I was there," he adds "believe me." Certification of the testimony then is not complete except through the echo response of the one who receives the testimony and accepts it. Then the testimony is not just certified, it is accredited. . . . In this case, the accreditation comes down to authenticating the

professionals or police officers; still, the defendant's words seem less self-interested when audible in their voices rather than his own.

The effects of the gap between Dahmer and those who recounted his statements is shown in cross examination. The prosecutors typically addressed not the internal consistency of Dahmer's statements but the prudential judgments made by the clinician in light of the evidence.<sup>175</sup> By encasing Dahmer's statements within sworn testimony of medical professionals, the defense largely insulated the substance of Dahmer's statements from challenge. Although the jury might question the clinical witness' conclusions, it did not consider directly the truthfulness of Dahmer's self-report.<sup>176</sup>

The failure to interrogate Dahmer's statements for truthfulness is not insubstantial. The defense repeatedly asserted it was being transparent when it was actually casting significant parts of the story into the shadows.<sup>177</sup> For example, woven into the testimony of the psychiatrists was

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witness on personal terms. The result is what we call his trustworthiness, whose evaluation can be assimilated to comparative orders of magnitude.

(Footnote omitted.)

<sup>175</sup> *Id.* at 164-165

The possibility of suspicion in turn opens a space of controversy within which several testimonies and several witnesses find themselves confronted with one another. . . . The witness anticipates these circumstances in a way by adding a third clause to his declaration: "I was there," he says "believe me," to which he adds, "If you don't believe me, ask someone else," said almost like a challenge. The witness is thus the one who accepts being questioned and expected to answer what may turn out to be a criticism of what he says.

<sup>176</sup> The testimony of the Court's own psychiatric expert, Dr George Palermo addresses this very issue. See, David Doege, *Anger at his Homosexuality Led Dahmer to Kill, Psychiatrist Says* MILW. SENT. (Feb. 7, 1992) 1.

"Dahmer has lied for years and still lies today. He lied to the judge in 1989 (when Dahmer was sentenced for sexual assault.)" Palermo said. "He lied to his lawyer. He lied to many doctors to get the (sleeping) pills. It is my feeling he has embellished a great deal in the things he has said he did."

<sup>177</sup> PAUL RICOEUR, *MEMORY, HISTORY, FORGETTING*, Tr. K Blamey and D Pellauer (Chicago: University of Chicago Press, 2004) 85.

an unstated assumption that Dahmer's statements were at all times internally consistent, that he should be believed because he unburdened himself completely and uniformly. The evidence does not support that assertion.<sup>178</sup>

Indeed, there are wide factual disparities, in matters both large and small, in his recounting of the murder of Stephen Hicks, the first murder Dahmer admitted committing.<sup>179</sup> In his initial statement, Dahmer relates that he and Hicks had sex at his home and later fought, and Hicks died, almost by accident, when Dahmer struck him in the head with a barbell.<sup>180</sup> The story develops over time. When next he describes the Hicks homicide, he states that Hicks was not a homosexual, and they did not have sex and does not mention a fight.<sup>181</sup> In a later statement, he

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It is, more precisely, the selective function of the narrative that opens to manipulation the opportunity and the means of a clever strategy, consisting from the outset in a strategy of forgetting as much as in a strategy of remembering. . . .

<sup>178</sup> *Id.* at 316-317.

To be sure, applying the criteria of concordance and relying upon independent verification of the confession provides perfect illustrations of the theses offered . . . on the "evidentiary paradigm": the same complementarity between the oral nature of testimony and the material nature of the evidence authenticated by expert testimony; the same relevance of "small errors," the probable sign of inauthenticity; the same primacy accorded to questioning, to playing with possibilities in imagination; the same perspicacity in uncovering contradictions, incoherencies, unlikelihoods; the same attention to silences, to voluntary or involuntary omissions; the same familiarity, finally, with the resources for falsifying language in terms of error, lying, self-delusion, deception

<sup>179</sup> Patrick Kennedy, Det., Statement of Jeffrey Dahmer, July 23, 1991, Case # 2472, sec. 5, at 9-10. (Unpublished police report, on file with the author).

Subject [Jeffrey Dahmer] states that when he was 18 years of age and living in Richfield, Ohio, he picked up a hitch-hiker whom he described as a white male about 19 years of age. He states he took him home and had homosexual sex with him and states they were drinking beer and became intoxicated. He states they got into a physical fight because the 19-year old individual tried to leave and that during the fight, he states he struck the hitchhiker with a barbel (sic). He states that the blow of the barbel (sic) caused the death of the hitchhiker, and at this time he took the body out to a wooded area by his house and left it there to decompose for about two weeks.

<sup>180</sup> *Id.*

<sup>181</sup> Dennis Murphy, Det., Statement of Jeffrey Dahmer, July 24, 1991, Case # 2472, sec. 5, at 23. (Unpublished police report, on file with the author).

underscores that he and Hicks did not engage in any homosexual activities before or after Hicks's death.<sup>182</sup> When talking with one of the examining psychiatrists, Dahmer related that he "had the idea to hit [Hicks] over the head for about a half an hour."<sup>183</sup> He then strangled him with a barbell, explaining "I didn't want to get caught so I went all the way and finished it (strangled him.)"<sup>184</sup> The day after the murder, Dahmer continued, he did masturbate in front of the body and touched the body in the chest and penis area, but did not have oral sex.<sup>185</sup> The following day he bought a hunting knife, masturbated again, cut him open to view his insides, and then dismembered the body "to make him light enough to carry."<sup>186</sup> In a later interview with a different psychiatrist, Dahmer claims he opened Hicks's belly and masturbated over that and later cut his head off, cleaned it off under the sink, and masturbated in front of that.<sup>187</sup>

Had Dahmer testified at trial, each of these inconsistencies would have been laid out in detail before the jury to cast doubt on his veracity. Because the evidence came in through clinicians and detectives, this line of cross examination was never developed. Therefore, the contradictions within Dahmer's statements were largely ignored, except for Dr. Palermo's

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He states his first homicide which occurred, he believes around October of 1978, was of a white male hitchhiker, whom he describes as 18-year-old, 5'10" tall, skinny build, maybe 150 lbs., having straight brown collar-length hair, not wearing glasses, clean shaven, and he believes he was not a homosexual. He states he didn't have sex with this individual, he just invited him in for a drink, and when the individual wanted to leave that's when he hit him with a "barbell" and subsequently disposed of the body behind his residence. He states he did burn his clothes and identification.

<sup>182</sup> R.W. Munsey, Det. Lt., Statement of Jeffrey L. Dahmer, August 8, 1991 Case # 2472, sec. 12, at 488. (Unpublished police report, on file with the author).

Jeffrey L. Dahmer was interviewed regarding whether he engaged in any homosexual activities with Steven M Hicks before or after his death. Jeffrey L. Dahmer stated there were "no" homosexual activities.

<sup>183</sup> Fred Fosdal, M.D., Interview Notes for Jeffrey Dahmer Examination, 13 (Oct. 23, 1991) (unpublished report, on file with author).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 14.

<sup>187</sup> Park Elliott Dietz, M.D., M.P.H., Ph.D., Interview Notes for Jeffrey Dahmer Examination, A81-A82 (Jan 5, 1992) (on file with author).

assertion that Dahmer “embellished” much of what he claimed to have done,<sup>188</sup> and the jury was given the impression of that Dahmer was basically truthful.

It is noteworthy that Jeffrey Dahmer’s statements describing the Hicks murder grow more bizarre and disturbing as the trial date approached. By this time, Dahmer had likely internalized a desire to be found psychologically ill rather than wicked. As the sole source of information concerning his actions at trial, his motives to testify falsely needed to be fully explored before the jury. In his varying renditions of the Hicks murder, Dahmer may have reflexively shaded the truth to appear more psychologically ill than he was.

The claimed internal consistency of Dahmer’s statements projected by the defense echoes a coordinated assertion that Dahmer’s actions in the fifteen charged murders were similar. Rather than breaking down each murder to explore its individual dynamic, the defense implied that Dahmer’s killings were locked in a repeating loop. Although the defense addressed the specifics of the uncharged Hicks and Tuomi murders, the fifteen charged offenses were grouped as an indistinguishable whole by Dahmer’s attorneys and expert witnesses.<sup>189</sup> For example, Dr Fred Berlin of the Johns Hopkins Medical School focused on the process of differential diagnosis in reaching his conclusion that the defendant suffered from a mental disease rather than highlighting facts of the crimes related by the defendant.<sup>190</sup> After describing Dahmer’s

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<sup>188</sup> See e.g., Jim Stingl, *Dahmer Needs Help But is Sane, Court Told*. MILW. JOUR. (Feb. 6, 1992) at 1. Dr. Palermo called Dahmer a manipulator and said he doubted Dahmer’s claim that he planned to build a temple out of the bones of his victims. He also doubted whether Dahmer actually ate the flesh of any of his victims. Dahmer “embellished the facts and made them more ugly than they already were” he said.

<sup>189</sup> Videotape of *State of Wisconsin v. Jeffrey Dahmer* Tape One: January 30, 1992 at 46:10. (Copy on file with the Marquette University Law Library.) In his opening statement, Dahmer’s attorney pointed out that, in the opinion of this three expert witnesses, after Dahmer’s killing of Steven Tuomi in the Ambassador Hotel in Milwaukee, “It was all over. Mr Dahmer would continue to do this until it was stopped.”

<sup>190</sup> Videotape of *State of Wisconsin v. Jeffrey Dahmer* Tape Three: February 3, 1992 at 2:59:45 (Copy on file with the Marquette University Law Library.) Dr Berlin described psychiatric

disappointment and hopelessness following the death of Steven Tuomi, Berlin concluded that “Mr Dahmer was out of control. . . . It wasn’t going to be he who was going to stop it. It was going to have to be an outside force.”<sup>191</sup> Dr Berlin barely mentioned the name of any other of Dahmer’s victims on direct examination.<sup>192</sup>

In like manner, Dr. Judith Becker developed a narrative regarding Dahmer’s developmental psychology. She brought out childhood memories and tried to tie them to his later actions.<sup>193</sup> She testified that Dahmer was eventually so “consumed” by the mental disease of necrophilia that his obsession led him to kill uncontrollably.<sup>194</sup> Becker’s testimony ventured some differences from Dahmer’s statement to the police; he stated to her that he did have sex with every victim’s body after death.<sup>195</sup> Becker also discussed specifics of the murders themselves, including a new revelation that he had intercourse with the internal organs of his

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illness as embodying a value judgment. There are a diversity of bodily conditions. In physical medicine, consider two different sorts of conditions or processes. One is called cancer, the other is called respiration or breathing. We don’t like cancer. It causes suffering; therefore, we call it a disease. Similarly, there are different sexual attractions. Some people are heterosexually attracted; others are attracted to persons of the same gender. At one point, psychiatry thought that homosexuality was a disease. It no longer does. Dahmer’s case is different. He has intense, recurrent sexual fantasies of dead bodies. “Testimony from the Dahmer Trial” MILW. JOUR. (Feb. 4, 1992) 6. “If this isn’t a mental illness, I don’t know what is.”

<sup>191</sup> David Doege, *Doctor: Dahmer ‘Out of Control’ Testifies on Killer’s Fantasies*, MILW. SENT. Feb. 4, 1992 at 1.

<sup>192</sup> *Id.* On cross examination, the prosecutor elicited that Dr Berlin spent only four hours and forty five minutes total with Dahmer in reaching his diagnosis, less than half the time spent by any other expert witness. *Id.* This information may have diminished Dr. Berlin’s effectiveness in the jury’s eyes.

<sup>193</sup> *Testimony from the Dahmer Trial* MILW. SENT. Feb 5. 1992 at 7.

At age 8 he recalled his father fished in the pond. . . . When he talked of cutting the fish open and seeing the inside of the fish, he became somewhat more animated, somewhat more alive in a sense. Knowing what he had done to his victims and cutting them open and knowing that he had appeared to be fascinated by the viscera, by the insides of his victims, I wonder if that early incident of the cutting open and the fascination with colors was not somehow related to what happened later on.

<sup>194</sup> David Doege, *Dahmer Planned Shrine of Bones* MILW. SENT. Feb. 5, 1992 at 1.

<sup>195</sup> *Id.*

victims.<sup>196</sup> She also discussed other gruesome aspects of the case such as the cannibalism of Ernest Miller and Errol Lindsey.<sup>197</sup> That said, Dahmer's careful planning and care to avoid capture were absent from her testimony.<sup>198</sup> Dr Becker's testimony was an interpretation of Dahmer's actions from a psychological model rather than a description of his actions; she wove a narrative of what might have been going on in Dahmer's mind rather than describing the whole of what he did.<sup>199</sup> Her failure to wrestle with Dahmer's actions led her to minimize quotidian aspects such as the need to dispose of bodies before they started rotting. Dr Becker also spent a great deal of time explaining Dahmer's current suicidal ideation and his plans for a bone shrine he never built.<sup>200</sup>

Dr Becker's fascination with the psychological narrative is demonstrated by her willingness to accept Dahmer's description of his proposed "temple of bones" which did not match up with the physical evidence in the case. Dahmer sketched for her a diagram of what the "temple" would look like.<sup>201</sup> It would be built around a black lacquered table that would have two skeletons on either side of a desk resting at hip height, and there would be the skulls he

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<sup>196</sup> Jim Stingl, *Several Disorders Played Role: Expert Dahmer was Psychotic, Witness Testifies*, MILW. JOUR. Feb. 5, 1992 at 1. There is no evidence that Dahmer mentioned this act of masturbating with internal organs to any other witness. Indeed, it is quite clear he did not say this to either Dr. Fosdal or Dr. Dietz. Both of them spoke with the defendant after Dr Becker's interview. I find it difficult to account for Dahmer's failure to mention this particular paraphilia to other witnesses when he had admitted so much already.

<sup>197</sup> *Testimony from the Dahmer Trial* MILW. SENT. Feb 5. 1992 at 7.

<sup>198</sup> *Id.*

<sup>199</sup> In trying to describe Dahmer's mental processes, Dr Becker acted as the excellent psychologist she is. However, that is not how the law looks at intent. As Fitzjames Stephens points out, "[T]he only possible way of discovering a man's intention is by looking at what he actually did, . . . what must have appeared to him at the time the natural consequence of his conduct." *Supra* at n.58. By foregrounding the psychological history, Dr Becker de-emphasized the physical facts of the case.

<sup>200</sup> David Doege, *Dahmer Planned Shrine of Bones* MILW. SENT. Feb. 5, 1992 at 1

<sup>201</sup> *Id.*

collected on the table looking back at him. He claimed he already had purchased the table.<sup>202</sup> The difficulty emerges when one considers the physical evidence. The only table Dahmer owned was a black coffee table about 15 to 18 inches tall and maybe four feet long; it appeared in some of the photos of his victims. None of the skeletons he collected could rest on it at hip height because it wasn't tall enough; further, the skulls could not be stacked in the ways he claimed because the surface was too small to hold them. Dr Becker failed to check Dahmer's claims against evidence on police inventory.<sup>203</sup> Similarly, the third clinician, Dr Wahlstrom, also focused on Dahmer's delusions regarding his possible temple of bones.<sup>204</sup> He also spent time interpreting tests given to Mr Dahmer.<sup>205</sup> He did not delve much into the particulars of the crimes themselves.<sup>206</sup>

Dahmer's failure to testify, his silence from the witness stand, impeded another possible line of questioning. Had Dahmer spoken under oath, the prosecution could have developed how he enticed men to come home with him. In the case in chief, Dahmer renders these encounters as

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<sup>202</sup> See, Jim Stingl, *Several Disorders Played Role: Expert Dahmer was Psychotic, Witness Testifies*, MILW. JOUR. Feb. 5, 1992 at 1. "Dahmer said the temple, to be built on a table in his West Side apartment, would be a 'power center.'"

<sup>203</sup> Indeed, the Court-appointed expert, Dr George Palermo, "doubted Dahmer's claim that he planned to build a temple out of the bones of his victims." Jim Stingl, *Dahmer Needs Help But is Sane, Court Told* MILW. JOUR. Feb. 6, 1992 at 1. Dr Palermo does not clearly state a reason for his skepticism. It may have stemmed from the failure of Dahmer's story to match up with the physical evidence, but the record does not address that point.

<sup>204</sup> Jim Stingl, *Several Disorders Played Role: Expert Dahmer was Psychotic, Witness Testifies*, MILW. JOUR. Feb. 5, 1992 at 1.

Carl M. Wahlstrom, Jr., who became a psychiatrist two years ago and works in Chicago, said he believed Dahmer was psychotic because of his plans to erect a temple where he would display the skulls and bones of his victims.

<sup>205</sup> See e.g., Carl M Wahlstrom, Jr., M.D., Report of Psychiatric Evaluation of Jeffrey Dahmer, Jan. 9, 1992, Case file *State of Wisconsin v. Jeffrey Lionel Dahmer*, Case number F-912542.

<sup>206</sup> *Id.* at 6-7. In an eleven page report, brief descriptions of the crimes themselves appear in only four paragraphs.



largely financial.<sup>207</sup> What if this report is another of Dahmer's manipulations? It may be that one of the most important ways Dahmer showed control was in his ability to appear attractive, friendly, a safe person with whom to go home. Because he did not discuss these matters with the detectives or expert witnesses, the jury could not reflect on this aspect of his personality. From one perspective, his silence in the courtroom may be that of a puppeteer. He provided the words to the witnesses he could not say himself. By insulating himself from questions that would shatter his claim of illness, he may have been manipulating the defense witnesses just as he manipulated his victims.

At the end of the defense case in chief, the jury had a description of a disturbed figure who did horrifying things. Surely that is one aspect of Jeffrey Dahmer. However, he was much more. The image crafted by the defense failed to account for how Dahmer could hold a job or persuade his victims to return to his apartment with him. The defense focused the jury on the bizarre and delusional, asking it to return a verdict based on these disjointed episodes in the life of the silent man surrounded by his attorneys at counsel table. It was not clear at the end of the defense case how someone as disturbed as the Jeffrey Dahmer they presented managed to function undetected for years.

## **VII. Meeting the Challenges: Reframing a Madman as a Consummate Planner**

To counter the discursive image of a madman suggested by the defense, the prosecution filled in the picture of the defendant, showing that he was at all times in control of his actions. As a segue into the prosecution's case in chief, the court's witness, Dr George Palermo, maintained that Jeffrey Dahmer was responsible for his actions under the law.<sup>208</sup> Palermo

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<sup>207</sup> See e.g., Patrick Kennedy, Det., Statement of Jeffrey Dahmer, July 31, 1991, Case # 2472, sec. 5, at 88. (Unpublished police report, on file with the author).

<sup>208</sup> Jim Stingl, *Dahmer Needs Help But is Sane, Court Told* MILW. JOUR. Feb. 6, 1992 at 1.

described Dahmer as making conscious choices “at the moment of the killings, in the preparation of the killing and afterwards.”<sup>209</sup> Palermo anticipated the prosecution’s strategy by stating “Jeffrey Dahmer is a human being. . . . To take that away from him by just saying he is a necrophile is wrong. . . . [H]e is much more.”<sup>210</sup> He continued, “Jeffrey Dahmer knew exactly what he was doing. He had taken precautions, very, very good ones. He knew the consequences of his action, but he did not want to stop.”<sup>211</sup>

The prosecution took as its theme Dahmer’s desire to control and his ability to choose, and it reframed earlier testimony in the case as indicating careful planning on Dahmer’s part.<sup>212</sup> Initially, the prosecution needed to normalize Jeffrey Dahmer, provide a context, by showing that his life fit together coherently; he struck others as friendly, unremarkable, sane.<sup>213</sup> Beginning

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Palermo said that like most people, he expected to come face to face with a “crazy” person the first time he met with Dahmer because of the number of people Dahmer had killed. “I was shocked when I met him,” Palermo said. “I knew after four hours that he was not psychotic.” Palermo said Dahmer’s speech was clear and his answers were coherent. He found Dahmer amiable and intelligent. . . “He’s a likable fellow....”

<sup>209</sup> *Id.*

<sup>210</sup> David Doege, *Anger at His Homosexuality Led Dahmer to Kill, Psychiatrist Says*, MILW. SENT. Feb. 7, 1992 at 1.

<sup>211</sup> *Testimony From the Dahmer Trial* MILW. SENT. Feb. 7, 1992 at 7

<sup>212</sup> See e.g., Jim Stingl *Urge to Kill Ruled: Expert* MILW. JOUR. Feb 3, 1992 at 1.

As Detective Murphy noted,

Dahmer felt a sense of power knowing his family, neighbors and even police officers couldn’t detect his secret world of killing. “He took pleasure in the fact of knowing that he had a private world of his own that no one else knew about,” Murphy said. He felt he had this ability to make people see a phase of him that only he wished them to see, and this encouraged him to continue on with his crimes, feeling that he would never be caught,” Murphy said.

<sup>213</sup> *Duthey v. State*, 131 Wis. 178, 111 N.W.2d 222 (1907). Under *Duthey*, the jury is permitted to rely on the opinions of lay persons who are familiar with the defendant about his sanity or lack thereof. The substance of this common law decision is encased in FED. R. EVID. 701 OPINION TESTIMONY BY LAY WITNESSES:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and

with the cross-examination of Detective Dennis Murphy, the prosecution asked every witness who had extensive contact with Jeffrey Dahmer the same set of questions. After establishing that the witness had spent an appreciable amount of time with Dahmer, the examiner would ask if Dahmer displayed hallucinations, delusions, unconnected thoughts, incoherent responses, appeared not to be tracking the conversation.<sup>214</sup> In this manner, the prosecution built up a weight of evidence from ordinary people who encountered the defendant in various times and places, who saw him as perfectly normal and unremarkable. For example, his former boss at the Ambrosia Chocolate Company testified that he had no problems with Dahmer whom he described as “polite.”<sup>215</sup> “He was quiet. He had no problems reacting with others.”<sup>216</sup> Further, his boss thought Dahmer did “a satisfactory job.”<sup>217</sup> One of the facts that came out at trial was that Dahmer was able to mix almost five hundred distinct chocolate recipes during his time there, indicating his ability to perform and be paid for complex tasks. Dahmer’s apartment manager thought Dahmer was “a very nice guy”, and he was willing to ask Dahmer to become his business partner.<sup>218</sup> His building manager further described Dahmer’s apartment as “probably

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(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

The witness has to have first-hand knowledge and this knowledge must be of the sort that will help the jury resolve a disputed fact. This was the foundation which the prosecution used in introducing testimony from Dahmer’s co-workers, apartment manager, police officers, and potential victims who testified as to Dahmer’s apparent sanity.

<sup>214</sup> See e.g., Videotape of *State of Wisconsin v. Jeffrey Dahmer* Tape Three: February 3, 1992 at 48:20 (Copy on file with the Marquette University Law Library.) Detective Dennis Murphy denied on cross examination that Dahmer displayed any evidence of mental illness during the approximately sixty hours of interviews he had with him. He further indicated that Dahmer was able to describe in detail the extent of his planning, the lengths he went to in eliminating the evidence, and that he felt he had the ability to make people see only what he wanted.

<sup>215</sup> David Doege, *Dahmer’s Work OK, Bosses Say* MILW. SENT. Feb. 11, 1992) at 1.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Testimony From the Dahmer Trial* MILW. SENT. Feb 12, 1992 at 8.

the neatest apartment I've seen."<sup>219</sup> This line of questioning helped the jury see Dahmer as he was seen by co-workers and other ordinary people. He did not strike acquaintances as out of touch with reality.

A second sort of lay witness helped the jury focus on Dahmer's mental state at or near the time of his attempted or completed murders. The prosecution called citizen witnesses and police officers who had observed Dahmer near these times to testify to his apparent rationality and control. A friend of Dahmer's fifth victim, Anthony Sears, explained he dropped Dahmer and Sears off near Dahmer's grandmother's home on the last night he saw his friend.<sup>220</sup> "I felt [Dahmer] was a very nice person. He seemed very kind."<sup>221</sup> Another witness, Ronald Flowers, encountered Dahmer when his car would not start, so Dahmer offered to take him to his grandmother's home to pick up jumper cables.<sup>222</sup> After the cab dropped them off near Dahmer's address, Flowers testified that he was suspicious and warned Dahmer he only wanted to get his car started.<sup>223</sup> Flowers came inside the home reluctantly, and Dahmer said that he was tired and needed some coffee; Flowers agreed and passed out soon after drinking the coffee mixed with Halcion Dahmer prepared for him.<sup>224</sup> The next thing Flowers remembered was awaking in a hospital room.<sup>225</sup> Flowers stated that he encountered Dahmer in a bar a year later; Dahmer said to him, "I really don't remember who you are. Maybe we can go have a cup of coffee."<sup>226</sup>

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<sup>219</sup> *Id.*

<sup>220</sup> Jim Stingl, *Dahmer is Sane, Psychiatrist Says* MILW. JOUR. Feb. 8, 1992 at 1.

<sup>221</sup> *Id.* This observation goes to Dahmer's ability to be manipulative. He could be charming and attractive to other men, a fact largely unexplored during trial.

<sup>222</sup> David Doege *Those who Got Away Recall Dahmer "Why is he Looking at me Like That?" Victim Asked* MILW. SENT. Feb. 8, 1992 at 1.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

On May 27, 1991, Jeffrey Dahmer lured a young Laotian man, Konerak Sinthasomphone, back to his apartment. He claimed to have drugged him, drilled a hole in his skull, and injected him with a dose of muriatic acid and water.<sup>227</sup> Before killing him, Dahmer decided he needed more beer before he could go through with killing and disposal, and he left the young man in his apartment.<sup>228</sup> As he returned to his apartment after having a drink, he saw Sinthasomphone sitting nude on the curb.<sup>229</sup> Dahmer was taking him back to his apartment when both the police and fire departments showed up.<sup>230</sup> Dahmer reports he told the police that his friend always acted like this when he got drunk and did not speak English.<sup>231</sup> The police officers who spoke with Dahmer in this incident testified that he “responded in a clear, calm voice.”<sup>232</sup> Dahmer related that the youth was his friend who had drunk too much and passed out on the couch.<sup>233</sup> Dahmer spoke coherently and did not appear to be drunk.<sup>234</sup> He spoke with the officers about how bad crime was in the neighborhood, and brought them into his apartment they described as “well-kept” and “neat.”<sup>235</sup> The officers found Polaroid photos of Sinthasomphone in the apartment, which they saw as confirming Dahmer’s story. They left Dahmer with what soon became his thirteenth victim. He stated later that after the police left, he gave Sinthasomphone another shot of muriatic acid and killed him.<sup>236</sup> Furthermore, Dahmer later told police that the

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<sup>227</sup> Fred Fosdal, M.D., Interview Notes for Jeffrey Dahmer Examination, 45 (Dec 20, 1991) (unpublished report, on file with author).

<sup>228</sup> Dennis Murphy, Det., Statement of Jeffrey Dahmer, August 2, 1991, Case # 2472, sec. 5, at 117. (Unpublished police report, on file with the author).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> David Doege, *Officers Recall Dahmer, Youth MILW. SENT.* Feb. 12, 1992 at 1.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> Fred Fosdal, M.D., Interview Notes for Jeffrey Dahmer Examination, 46 (Dec 20, 1991) (unpublished report, on file with author).

body of another victim, Tony Hughes, was on the floor of his bedroom at that time.<sup>237</sup> This evidence underscored Dahmer's control of an extraordinarily stressful situation within an hour of committing a murder. It undermines a claim that he was beset by unchecked passion.

The expert witnesses largely corroborated the impressions of the lay witnesses that Dahmer could control his actions at all times. Echoing Freud's observation above, Dr Frederick Fosdal testified that he had never seen a sexual disorder that rendered someone unable to follow the law.<sup>238</sup> Although Dahmer enjoyed the sex with a compliant partner, he did not enjoy the killing<sup>239</sup> and actually let some folks go because he didn't have the energy to kill when he had a hangover.<sup>240</sup> He found killing difficult unless he was "somewhat drunk." Under Fosdal's analysis, the desire for sex was separated from the unpleasant task of killing and the administrative details of disposing of the corpses.<sup>241</sup> Fosdal further undercut Dahmer's claim of uncontrollable passion by eliciting that Dahmer would only have approach men who did not have cars so they would not leave evidence outside his apartment.<sup>242</sup>

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<sup>237</sup> David Doege, *Officers Recall Dahmer, Youth* MILW. SENT. Feb. 12, 1992 at 1.

<sup>238</sup> Jim Stingl, *Disorder Alone is Nor Insanity, Expert Testifies*, MILW. JOUR. Feb. 10, 1992 at 1.

<sup>239</sup> *Testimony from the Dahmer Trial* MILW. SENT. Feb 11, 1992 at 8.

E. Michael McCann, district attorney: Did the defendant at any time say to you that he enjoyed the killing?

Fosdal: Repeatedly he denied that. I think that is established.

McCann, Did he say anything about taking pleasure from the killing?

Fosdal: He repeatedly denied that.

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McCann: So the pleasure was the sex before and after, but he did not have that powerful. . . motive, a desire for the killing?

Fosdal: That was an unwanted step.

<sup>240</sup> Fred Fosdal, M.D., Interview Notes for Jeffrey Dahmer Examination, 25 (Nov. 13, 1991) (unpublished report, on file with author).

<sup>241</sup> *Testimony from the Dahmer Trial* MILW. SENT. Feb 11, 1992 at 8.

<sup>242</sup> Fred Fosdal, M.D., Interview Notes for Jeffrey Dahmer Examination, 59 (Jan. 10, 1992) (unpublished report, on file with author).

Q: "You and a guy go home together in a car. He gives you a ride home and then he's done with and then his car is parked down the street."

A: "That wouldn't have worked."

The theme of the final prosecution witness, Dr Park Elliott Dietz, was that none of Dahmer's acts was impulsive; rather, each charged killing was "a planned, deliberate act."<sup>243</sup> Dahmer would grind sleeping pills so they would be ready to mix in a drink before he went out to find a victim.<sup>244</sup> He was able to be charming, seductive, and lure people back to his apartment. He would kill only on weekends so he could spend more time with the bodies and not have to go to work.<sup>245</sup> He only killed in his own apartment where he could control who could come in and not be bothered.<sup>246</sup> Dahmer also related to Dietz that he knew right from wrong every time he killed, and he could have stopped himself from killing had someone walked in on him just before he committed the act.<sup>247</sup> Dahmer also said that if he could have "obtained the company of these men and had sexual contact with them with less drastic means, he would have stopped" killing.<sup>248</sup>

Perhaps the most telling testimony was Dietz's report that Dahmer explained he always used a condom when engaging in sex with a corpse or unconscious person to avoid contracting AIDS or other diseases.<sup>249</sup> "The intensity of his sexual urge at that point was less than many

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Q: "Was that an issue?"

A: "Yeah- if they had a car, then I wouldn't ask them back."

Q: You meet a guy at the tavern, and he says I have a car..."

A: "Then I wouldn't have pursued it any further."

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A: "They would have parked the car near the house and that wouldn't have worked. They could have been traced."

<sup>243</sup> Jim Stingl, *Dahmer Knew What He Was Doing, Expert Says*, MILW. JOUR. Feb 12, 1992 at 1.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> Jim Stingl, *Prosecution Expert Does Not Budge* MILW. JOUR. Feb 13, 1992 at 1.

teenagers experience in the backseat with their girlfriend,” Dietz testified.<sup>250</sup> This observation destroyed Dahmer’s claim of unbridled passion that he could not control.

Dietz also drew out that necrophilia was not Dahmer’s primary attraction.<sup>251</sup> Dahmer’s first desire was for an attractive sexual partner who would be under his complete control and never leave him.<sup>252</sup> His preference would have been for an enduring relationship with an attractive living person, but he never found someone who fit this criterion, “so he . . . settle[d] for less attractive, paraphilic alternatives.”<sup>253</sup> His second choice would be a “zombie” sexual partner who would be alive indefinitely but would be lacking in will and therefore submit to his wishes.<sup>254</sup> Dietz observed that this fantasy is not uncommon and is played out in horror films with science fiction plots such as *The Stepford Wives*.<sup>255</sup> Dahmer’s next choice would be an unconscious sexual partner.<sup>256</sup> This sort of object also appears in Western cultures in the fairy tale “Sleeping Beauty.”<sup>257</sup> Only if these choices were unavailable would Dahmer begin to fantasize about a freeze-dried body or freshly dead corpse of an attractive man.<sup>258</sup> Despite these unorthodox sexual longings, Dietz concluded that Dahmer was able to function well in society and did not meet the criteria of any of the recognized patterns of personality disorder.<sup>259</sup>

## VIII Conclusion

Given the jury’s task of constructing a master narrative, weaving together the disparate strands of testimony to create a coherent picture, it is perhaps understandable that they rejected

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<sup>250</sup> *Id.*

<sup>251</sup> <sup>245</sup> Park Elliott Dietz, M.D., M.P.H., Ph.D., Report on Mental Status of Jeffrey L Dahmer filed in Case No. F-912542, 2 (Jan 10, 1992) (on file with author).

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 6.



Dahmer's claim of insanity.<sup>260</sup> There were too many logical gaps, a context too unfinished to account for all the evidence of his complex life. The defense did not give the jury a way of connecting up the uncontrollable necrophile they portrayed with a person who functioned rationally both at work and in his other human interactions. The defense's case seemed pretextual because the facts they elicited seemed incomplete in light of the broader context revealed by Dahmer's own statements and actions.

Ultimately, Dahmer's silence, which made his killings possible, may have led to his downfall in court. Soren Kierkegaard's *Fear and Trembling* begins with a series of meditations on the Biblical patriarch Abraham's failure to speak as he was taking his son Isaac up Mount Moriah.<sup>261</sup> By remaining silent, by not informing Isaac that he was told to sacrifice him, Kierkegaard maintains Abraham failed to act ethically.<sup>262</sup> Derrida observes in his commentary on Kierkegaard, "[Abraham] speaks and doesn't speak. . . . He speaks in order not to say anything about the essential thing he must keep a secret."<sup>263</sup> Isn't this what Dahmer does both on the street and in the courtroom? He does not tell those whom he is seducing that they are potential prey, that he is willing to kill them if they refuse to follow his every whim. By strangling them, he silences their voices so they cannot be witnesses against him. He does not respond to "missing" advertisements he sees in the papers. In the courtroom, he muffles his own voice so the jury cannot observe his self-interested and manipulative behavior first hand; rather, he is audible only in the voices to which he has chosen to describe his past, a narrative he may well have constructed for his own purposes. While clothing himself in the guise of a Romeo or

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<sup>260</sup> PAUL RICOEUR, *HERMENEUTICS AND THE HUMAN SCIENCES*, at 178.

<sup>261</sup> SOREN KIERKEGAARD, *FEAR AND TREMBLING AND THE SICKNESS UNTO DEATH* Tr. W Lowrie (Princeton: Princeton University Press, 1941) 26-77.

<sup>262</sup> *Id.* at 67; JACQUES DERRIDA, *THE GIFT OF DEATH AND LITERATURE IN SECRET* (2d Ed.) Tr. D. Wills (Chicago: University of Chicago Press, 2008) 60; *originally publ. as: DONNER LA MORT* (Paris: Editions Gallimard, 1999).

<sup>263</sup> DERRIDA at 60.

Juliet, a lover willing to give of self for the other, he in fact used the other for his own selfish purposes.<sup>264</sup>

Ultimately, the weight of the testimony, the text generated at trial, persuaded the jury that the silent defendant's proposed history of events did not hang together. The interpretation of the past he proffered was riddled with gaps and inconsistencies that could not be reconciled with his actions, his previous statements, and the observations of others. Unlike his trusting victims, the jury refused to be moved by the defendant's silence. They found the context proposed by the prosecution more compelling, and rather than accepting the defendant's muteness, they spoke in his place.

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<sup>264</sup> See e.g., Jim Stigl, *Urge to Kill Ruled: Expert* MILW. JOUR. Feb. 3, 1992 at 1. Per Detective Murphy, Dahmer claimed he killed "For his own warped selfish desire for self-gratification."