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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

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>†</sup>

[Dahmer] drill[ed] holes in his living victims' heads, pour[ed] in 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>

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

INTRODUCTION

In *State of Wisconsin v. Dahmer*,<sup>4</sup> 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. This distance was created by Dahmer's silence in the courtroom. The jury heard his words only through others' voices. Though silence had worked as Dahmer's strategy outside the courtroom, the weight of the evidence undermined that approach at trial. His actions

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1. Stephen M. Glynn, *If Dahmer's Not Crazy, Who Is?*, NAT'L L.J., Mar. 9, 1992, at 13.  
2. JACQUES DERRIDA, *THE GIFT OF DEATH AND LITERATURE IN SECRET* 60 (David Wills trans., Univ. of Chi. Press 2d ed. 2008) (1999).  
3. WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 2.  
4. No. 1991CF912542 (Milwaukee County Cir. Ct. filed July 25, 1991).

spoke louder than his wordlessness, and the jury spoke in finding him responsible for what he did.

The job of a trial attorney is to tell a story and create a reality in the courtroom using the tools at hand: exhibits, testimony of witnesses, the rules of evidence, and the substantive law at issue in the case.<sup>5</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>6</sup> Sensitive attorneys understand that success before a jury requires apprehension not only of content, the “what” of the narrative, but also of style, the “how” of the narrative.<sup>7</sup> This emphasis on style is critical because the incompleteness of information given to the jury requires it to fill gaps in reasoning.<sup>8</sup> Often attorneys selectively choose which facts are presented to a jury because there is too much material.<sup>9</sup> Such selectivity may also imply causal inferences in the jury.<sup>10</sup> This Article maintains that, in the case of *State of Wisconsin v. Jeffrey Dahmer*, how the case was presented was just 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

5. See, e.g., ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 110–11 (2000); JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* 265 (1984) [hereinafter WHITE, *CONSTITUTIONS AND RECONSTITUTIONS*]; JAMES BOYD WHITE, *Rhetoric and Law: The Arts of Cultural and Communal Life, in HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 28, 34–35 (1985) [hereinafter WHITE, *HERACLES' BOW*].

6. See PAUL RICOEUR, *MEMORY, HISTORY, FORGETTING* 85 (Kathleen Blamey & David Pellauer trans., 2004) (“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.”).

7. See, e.g., AMSTERDAM & BRUNER, *supra* note 5, at 167, 175 (discussing how rhetorical style can imply a range of meanings without saying any of them explicitly).

8. See SEYMOUR CHATMAN, *STORY AND DISCOURSE: NARRATIVE STRUCTURE IN FICTION AND FILM* 28–29 (Cornell Paperbacks 1980) (1978):

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 the bus or to a taxi, opening the door of the car, 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.

9. 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 (11th Cir. 1986) (“In the normal evidentiary sense cumulative evidence is excluded because it is repetitious.”); *accord Int'l Minerals & Res., S.A. v. Pappas*, 96 F.3d 586, 596 (2d Cir. 1996).

10. See CHATMAN, *supra* note 8, at 28–29.

sin against serial killer Jeffrey Lionel Dahmer unfolded.<sup>11</sup> The defendant pled not guilty by reason of mental disease or defect to fifteen counts of first-degree intentional homicide.<sup>12</sup> Although he admitted killing the fifteen victims, 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>13</sup> Essentially, Dahmer claimed he was a victim of his psychological disturbance and was no more to be blamed for his actions than were the young men whom he killed.

From one perspective, the trial should have been simple. 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>14</sup> nor win the assent of a unanimous jury.<sup>15</sup> Rather, the jury had only to weigh the testimony of detectives, acquaintances of the defendant, and expert witnesses to determine the answers to two questions: at the time of each murder (1) “did the defendant have a mental disease or defect?” and, if that question were answered in the affirmative, (2) “[a]s a result of that 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?”<sup>16</sup> Sentencing was not expected to be a major issue in this case—the defendant was going to be locked up for the rest of his life.<sup>17</sup> The sole question for sentencing was which sort of institution would house him: a prison or a hospital.<sup>18</sup>

11. Duane Dudek, *Dahmer's Insanity Defense Brings Court TV Coverage*, MILWAUKEE SENTINEL, Jan. 15, 1992, at 2 (describing how Court TV offered “gavel-to-gavel coverage” of the trial).

12. *Dahmer Changes Plea to Guilty but Insane*, N.Y. TIMES, Jan. 14, 1992, at A19, available at 1992 WLNR 3335725.

13. *Id.*

14. WIS. STAT. ANN. § 971.15(3) (West 2009) (“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 substantively changed since the Dahmer case was tried. See, e.g., Act of May 27, 1994, 1993 Wis. Act 486, 1993 S.B. 826 (amendment to remove sexist language).

15. WIS. STAT. ANN. § 971.165(2) (West 2009) (“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.”).

16. WIS. JI—CRIMINAL § 605, at 1 (2003). The jury’s deliberation on this matter is directed by two questions on the verdict form. *Id.* at § 605B, at 1. The jury is directed “to answer the second question only if [they] answer the first question ‘yes.’” *Id.* at § 605, at 1.

17. Pursuant to § 971.165, the jury was instructed that Jeffrey Dahmer would not go free if they found him not guilty by reason of mental disease or defect. Rather, 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 herself or to others if released under conditions ordered by the court.” § 971.165(2). If the jury rejected the defense of not guilty by reason of

However, a close examination of the evidence presented in this case subverts any assertion of simplicity. In every insanity case, the legal and mental health professions understand mental disease differently; those difficulties were present here as well. Further, 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 carefully avoided facts that might have derailed the story it attempted to construct for the jury.<sup>19</sup>

This strategy of concealment is made manifest with a simple observation: Dahmer's guilty plea constituted the bulk of the words he said in open court before sentencing.<sup>20</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 in as a witness, he never spoke at trial, and all of his words were mediated by others who reported them.<sup>21</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 revealed inconsistencies and admissions detrimental to his defense.

After a brief description of the facts, and the substance of the testimony, this Article 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,

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mental disease or defect, then the defendant would likely be sentenced to prison; specifically, in Wisconsin, he would be sentenced to life imprisonment. See WIS. STAT. ANN. § 939.50(3) (West 2009). Realistically, the issue at trial was not whether Jeffrey Dahmer would be locked up for life, but *where* this incarceration would take place.

18. See § 939.50(3); WIS. JI-CRIMINAL § 605, at 3.

19. 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 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.

20. Obviously the defendant has a guaranteed right not to testify on his own behalf. *Miranda v. Arizona*, 384 U.S. 436, 442 (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, 617-18 (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 Article does is show how far-reaching the decision to shift the defendant's words into other mouths at trial can be.

21. See Rick Romell & David Doege, *Boyle Says He Agonized over Dahmer Testifying*, MILWAUKEE SENTINEL, Feb 14, 1992, at 1.

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

### 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 that, by a preponderance of the evidence, Jeffrey Dahmer did not suffer from a mental disease or defect when he committed the fifteen murders to which he had pled guilty.<sup>22</sup> The jury's finding was paradoxical because most of the psychiatrists and psychologists who examined Dahmer thought that he may have suffered from some sort of mental disease.<sup>23</sup> The verdict was met with cognitive dissonance both within the legal community and the public at large.<sup>24</sup> On the one hand, people appreciated that Jeffrey Dahmer was not "given a pass," and that he was held accountable for his disturbing actions which included murder, dismemberment, and cannibalism resulting in the deaths of at least seventeen young men in Ohio and Wisconsin between 1978 and 1991.<sup>25</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

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22. Jim Stingl, *Dahmer Sane: Families of Victims to Describe Their Pain at Sentencing Monday*, MILWAUKEE J., Feb. 16, 1992, at 1. Because ten of the twelve jurors found that the defendant did not suffer from a mental disease, the jury did not consider the second question concerning the defendant's ability to conform his conduct to the requirements of the law. *Id.*; see also WIS. JI-CRIMINAL § 605, at 1.

23. 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-CRIMINAL § 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 Park Elliott Dietz, Report on Mental Status of Jeffrey L. Dahmer 6 (Jan. 10, 1992) (unpublished court file, on file with author).

24. My experience indicates that most people think Jeffrey Dahmer was successful in raising the defense 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.

25. See Don J. DeBenedictis, *Sane Serial Killer: Experts Say Insanity Plea Alive and Well, Thanks Partly to Dahmer Jury*, A.B.A. J., April 1992, at 22. 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." Dirk Johnson, *Milwaukee Jury Says Dahmer Was Sane*, N.Y. TIMES, Feb. 16, 1992, at 24, available at 1992 WLNR 3304512 (internal quotation marks omitted).

their skulls to “zombify” them is sane.<sup>26</sup> As one commentator asked, “If Dahmer’s not crazy, who is?”<sup>27</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>28</sup> Dahmer would charm and seduce attractive young men, inviting them to come home with him and promising to pay them to pose for erotic photographs or to watch videos.<sup>29</sup> The victims were mostly in their twenties, and none of them drove a car.<sup>30</sup> After taking a cab or bus to a spot that was a few blocks from his residence,<sup>31</sup> Dahmer would walk to his dwelling with the victims, invite them in, and eventually offer them a drink laced with Halcion, a sleep aid for which Dahmer had a prescription.<sup>32</sup> Once the victims were unconscious, Dahmer would have sex with them, and then he would strangle them before they awoke.<sup>33</sup> Dahmer would often fondle their dead bodies and masturbate, and eventually he would move their bodies either to a drain spout or into a bathtub where he would cut them

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26. Glynn, *supra* note 1, at 13.

27. *Id.*

28. Initially, Dahmer claimed all of his victims were gay or bisexual. Dennis Murphy, Statement of Jeffrey Dahmer, Case No. 2472 § 5, at 15 (July 23, 1991) (unpublished police report, on file with author). (“He stated the reason that he killed these homosexuals and he stated they all were homosexuals, was because he wanted to be with them.”). Later, he admitted that a number of his victims were not gay but came home with him to be videotaped upon his promising them payment. Frederick A. Fosdal, Interview Notes for Jeffrey Dahmer Examination 23–25 (Nov. 13, 1991) (unpublished report, on file with author).

29. Dennis Murphy & Patrick Kennedy, Statement of Jeffrey Dahmer, Case No. 2472 § 5, at 88 (July 31, 1991) (unpublished police report, on file with 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.

30. Frederick A. Fosdal, Interview Notes for Jeffrey Dahmer Examination 59 (Jan. 10, 1992) (unpublished report, on file with author).

31. Murphy & Kennedy, *supra* note 29, at 81:

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.

32. Dennis Murphy, Statement of Jeffrey Dahmer, Case No. 2472 § 5, at 149–50 (Aug. 22, 1991) (unpublished police report, on file with 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 [it] 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.

33. Murphy & Kennedy, *supra* note 29, at 88.



up to dispose of them, occasionally saving trophies such as their skulls or preserved genitalia.<sup>34</sup> On four occasions he engaged in cannibalism but later stated he found this unfulfilling.<sup>35</sup> He would either burn or throw out their clothing and destroy any identification they had on them.<sup>36</sup> When Dahmer was arrested, there were remains of eleven of his victims in his apartment.<sup>37</sup>

In addition to these facts recounted by the defendant to police detectives, additional claims emerged from Dahmer's discussions with clinicians. Dahmer reported he attempted to exhume a freshly dead corpse for sexual purposes,<sup>38</sup> he drank blood from a test tube while working as a phlebotomist,<sup>39</sup> and he drilled small holes into the skulls of five of his victims while they were drugged and injected a mixture of muriatic acid and water, or boiling water alone, in an attempt to make them sexual slaves.<sup>40</sup> He also claimed that he planned to build a "'temple' that fea-

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34. Frederick A. Fosdal, Interview Notes for Jeffrey Dahmer Examination 37 (Dec. 20, 1991); Patrick Kennedy, Statement of Jeffrey Dahmer, Case No. 2472 § 5, at 123 (July 23, 1991) (unpublished police report, on file with author).

35. Murphy, *supra* note 32, at 151–52:

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 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 filleted 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 or a 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 ate only the people that he really liked and wanted them to be a part of him or with him all the time.

See also Dietz, *supra* note 23, at 4 ("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 or intense sexual interest.").

36. R.W. Munsey, Statement of Jeffrey Dahmer, Case No. 2472 § 12, at 195 (July 26, 1991) (unpublished police report, on file with author) ("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.") (describing Dahmer's destruction of evidence following the Hicks homicide in Bath, Ohio).

37. See Jeffrey Jentzen et al., *Destructive Hostility: The Jeffrey Dahmer Case: A Psychiatric and Forensic Study of a Serial Killer*, 15 AM. J. FORENSIC MED. PATHOLOGY 283, 292 (1994).

38. Dietz, *supra* note 23, at 3.

39. *Id.* at 4.

40. Fosdal, *supra* note 28, at 26–27:

"I was trying to think of a way to not have to kill them." . . . Said he would drill a small hole through the top of the skull and into the brain—on about four or five victims—used a baster . . . [and] injected diluted muriatic acid into the skull. . . . Said drilling the hole in the skull was "an experiment—it never worked out." Tried this technique on his last 4–5 victims—put acid into the hole on four of the victims and boiling water in one of the vic-

tured his victims' remains in hopes of 'receiving special powers and energies.'"<sup>41</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 whether a person who did these things were crazy, the answer would be a resounding "yes."<sup>42</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 rather than vengeance.<sup>43</sup> Judgments are not determined by categories used by persons in ordinary discourse; the law calls for analytical distinctions developed throughout the course of its history.<sup>44</sup> On the other hand, juries determine if a defendant raises the insanity defense successfully, and the courts' instructions advise the panel that it may disregard expert witnesses' opinions and draw its own conclusion as to the mental state of the defendant.<sup>45</sup> These instructions invite jury members to give weight to their own reasoning and conclusions, even when those conclusions deviate from the conclusions of those recognized as experts in the field of mental health.<sup>46</sup> Because it grants jurors the authority to disregard expert opinions, the court must control precisely what information it permits the jury to consider. The insanity defense rests upon the Aristotelian assumption about all human beings that underlies the criminal justice system; specifically, the law presumes that human beings are rational and make free and unconstrained choices in this world.<sup>47</sup> Aristotle maintained that

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tims. 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 "zombie—so I wouldn't have to go out looking for partners."

41. David Doege, *Dahmer Planned Shrine of Bones*, MILWAUKEE SENTINEL, Feb. 5, 1992, at 1.

42. See GEORGES CANGUILHEM, *THE NORMAL AND THE PATHOLOGICAL* 117 (Carolyn R. Fawcett trans., Zone Books 1989) (1966) ("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.").

43. See PAUL RICOEUR, *CRITIQUE AND CONVICTION* 117 (Lawrence D. Kritzman ed., Kathleen Blamey trans., Columbia Univ. Press 1998) (1995) ("[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.").

44. See RONALD DWORKIN, *LAW'S EMPIRE* 99 (1986) (discussing precedent and legislation in the conception of state power).

45. WIS. JI—CRIMINAL § 605, at 2 (2003) ("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 or defect" for medical purposes. The jury *is* bound by the legal definition of mental disease as explained in this instruction. In a proper case, the judge may wish to emphasize this distinction.

*Id.* at 7 n.7.

46. See *id.* at 2, 7 n.7.

47. See ARISTOTLE, *NICOMACHEAN ETHICS* 65 (Martin Ostwald trans., Bobbs-Merrill Educ. Publ'g 1962):

the origin of our actions is internal, within ourselves, and thus voluntary: "[I]f we cannot trace back our actions to starting points other than those within ourselves, then all actions in which the initiative lies in ourselves are in our power and are voluntary actions."<sup>48</sup> Professor George Fletcher shows how this notion of the rational human being acting voluntarily is often formulated in terms of "free will."<sup>49</sup> Criminal law presumes free will operates in all situations unless we recognize extenuating circumstances giving rise to an excuse or justification.<sup>50</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 recognized an actor's rationality.<sup>51</sup> Rather, the 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 reasons for doing so, was liable to punishment.<sup>52</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>53</sup> By determining a penitent's intention, the confessor could assign an appropriate pen-

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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 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 or inaction constitutes our being good and evil, we must conclude that it depends on us whether we are decent or worthless individuals.

See also GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL* 9–10 (2007) (discussing the history of Aristotle's view of involuntary actions by reason of mistake, duress, or insanity).

48. ARISTOTLE, *supra* note 47, at 65.

49. FLETCHER, *supra* note 47, at 10 ("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.").

50. See *id.*

51. See, e.g., GEORGE P. FLETCHER, *A CRIME OF SELF DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 30 (1988):

From roughly the 13th to the 16th 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.

52. See *id.*

53. JOHN MAHONEY, *THE MAKING OF MORAL THEOLOGY: A STUDY OF THE ROMAN CATHOLIC TRADITION* 180 (1987). 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.

ance in the confessional.<sup>54</sup> Professor Fletcher maintains that the criminal law was influenced by these pastoral attempts at grading the intention behind an act.<sup>55</sup> For example, distinctions in self-defense can be traced back to distinctions made by canonists<sup>56</sup>:

The modern approach to the distinction between self-defense and punishment finds its best exposition 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>57</sup>

Because the criminal law lacks ministers to interrogate the offender with the breadth and depth granted to the confessor,<sup>58</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 element 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: "The 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 the 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

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54. See *id.* at 179-80.

55. FLETCHER, *supra* note 47, at 14. ("[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" (alteration in original) (internal quotation marks omitted) (quoting St. Thomas Aquinas's *Summa Theologica*)).

56. See *id.*

57. *Id.* (footnote omitted).

58. See MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 58-73 (Robert Hurley trans., Pantheon Books 1978) (1976).

59. See 2 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 111 (1883).

60. See *id.*

61. See *id.*

62. 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. Be-

turn imply the presence of an event conveyed to the jury by means of narrative.<sup>63</sup> They provide a context, a world that is subject to limitations, in which the defendant lives and in which he makes rational choices.<sup>64</sup>

### III. JUSTIFICATIONS AND 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 arising either through no fault of their own or in situations where the law perceives that the defendant was subject to a "maelstrom of circumstance."<sup>67</sup> Excuse is rooted in the sense that "what the actor did was wrong, but she had a good reason for doing it."<sup>68</sup>

Excuses in criminal law stem from reasons either external or internal to the actor. Duress is one example of an external force resulting in an excuse.<sup>69</sup> Assume defendant D shoots an innocent victim V, causing bodily injury to her. Normally this action should result in a charge of

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cause 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.

63. See, e.g., Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 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 becomes not merely a system of rules to be observed, but a world in which we live.

(footnote omitted).

64. *Id.*

65. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 759 (1978):

Claims of justification concede that the definition of the offense is satisfied, but challenge whether the act is 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.

66. 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 ARISTOTLE, *supra* note 47, at 65. 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.

67. FLETCHER, *supra* note 65, at 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.

68. See *id.* at 802–03.

69. See, e.g., *id.* at 829–33.

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 that her life is threatened by actor F. 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>70</sup> They choose among alternatives after weighing options they perceive, even if their assumptions are later disproved. The plea of not guilty by reason of mental disease or defect likewise upholds the anthropology of the rational actor in criminal law because it excuses defendants who are unable to act rationally in a given situation through no fault of their own.<sup>71</sup> That said, the insanity defense remains filled with difficulties and seeming contradictions.<sup>72</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 treatise *On the Law and Customs of England*.<sup>73</sup> He maintained

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70. *Id.* at 802-03.

71. *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?

72. *See id.*

73. *De Legibus et Consuetudinibus Angliae* was completed around 1256; it is credited as "the first systematic treatise on English." Anthony Michael Platt & Bernard 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. BEHAV. SCI. 355, 356 (1965); *see also* JOEL PETER EIGEN, WITNESSING INSANITY: MADNESS AND MAD-DOCTORS IN THE ENGLISH COURT 35 (1995):

that one needs a “will to harm” before a crime can be committed.<sup>74</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 adults who should likewise be excused because their ability to reason is impaired, and they are thus comparable to children or “brutes.”<sup>75</sup>

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

[I]f there be any doubt, whether the 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>

According to 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, a defendant 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 impairment to his cognitive

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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.

(alteration in original).

74. EIGEN, *supra* note 73, at 35.

75. *Id.* (internal quotation marks omitted).

76. WILLIAM BLACKSTONE, 4 COMMENTARIES \*21.

77. *See id.* at \*25.

78. *Id.*

79. *Id.*

80. *Id.*

81. M’Naghten’s Case, 8 Eng. Rep. 718 (1843). *M’Naghten* was a politically celebrated case. *See* EIGEN, *supra* note 73, at 153.

processes. M’Naghten shot Edward Drummond who eventually died from the wound.<sup>82</sup> M’Naghten was charged with murder and pleaded not guilty by reason of insanity.<sup>83</sup> The case presented difficulties because M’Naghten fit into neither of the two categories described by Blackstone. He was neither a “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 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>

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 in-

82. *M’Naghten*, 8 Eng. Rep. at 718. 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. *Id.* See ROGER SMITH, TRIAL BY MEDICINE: INSANITY AND RESPONSIBILITY IN VICTORIAN TRIALS 124–25 (1981) (discussing the development of the *M’Naghten* rules in light of competing professional claims by medicine and law).

83. *M’Naghten*, 8 Eng. Rep. at 718.

84. See BLACKSTONE, *supra* note 76, at \*25.

85. See EIGEN, *supra* note 73, at 153–54 (citing Old Bailey Sessions Papers, Case 874, 5th Sess. 756–59 (1842–43)).

86. *Id.* at 153 (alteration in original) (internal quotation marks omitted) (quoting Old Bailey Sessions Papers, Case 874, 5th Sess. 756–59 (1842–43)).

87. *M’Naghten*, 8 Eng. Rep. at 718.

88. 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 93 (2006):

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% of all criminal cases. . . . It also has a much lower success rate than most 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



sanity.<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.<sup>91</sup> In the initial opinion, Mr. Justice Maule ruled that the insanity defense is available when there is proof of the unsoundness of mind “such as render[s] [a defendant] incapable of knowing right from wrong.”<sup>92</sup> Lord Chief Justice Tindal, writing for the majority, took Maule’s idea and developed it at greater length. Tindal noted that the law presumed every defendant’s sanity; therefore, the defense had 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>93</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 performing one action when he is doing something wholly other.<sup>94</sup> Tindal also proposed a separate category of defendants who should not be held responsible: those who knew what they were doing but did not know that it was wrong.<sup>95</sup> Furthermore, Tindal indicated that the mere presence of a delusion in the mind of the defendant is insufficient to grant the defense.<sup>96</sup> Rather, Tindal directed trial courts to consider the nature of the delusion and how it affects the actions of the defendant.<sup>97</sup> A defendant may only be excused if, were his delusion correct, he would have had an excuse under the law, such as that granted by a reasonable mistake of fact.<sup>98</sup>

The development of the law from Blackstone to *M’Naghten* parallels the emergence of psychiatry as a profession.<sup>99</sup> Psychiatric experts changed the quality of evidence sufficient for excusing criminal liability on the grounds of insanity.<sup>100</sup> Previously, the finding of insanity rested

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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.  
(citations omitted) (emphasis omitted).

89. *M’Naghten*, 8 Eng. Rep. at 718–19.

90. *Id.* at 719.

91. *See id.* at 719, 721.

92. *Id.* at 720.

93. *Id.* at 721.

94. *Id.* *See generally* OLIVER SACKS, *THE MAN WHO MISTOOK HIS WIFE FOR A HAT* (Touchstone 1998) (1985) (describing victims of neurological disorders so profound that they simply cannot distinguish among various objects and actions).

95. *See M’Naghten*, 8 Eng. Rep. at 721.

96. *See id.* at 721.

97. *See id.* at 722.

98. *Id.*

99. *See e.g.*, SMITH, *supra* note 82, at 90–91.

100. *See* ALAN NORRIE, *CRIME, REASON AND HISTORY: A CRITICAL INTRODUCTION TO CRIMINAL LAW* 173 (Robert Stevens et al. eds., 1993):

upon the ordinary observations of lay people.<sup>101</sup> After the rise of psychiatrists (or alienists, as they were called) 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, and observable only by those with special training.<sup>102</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. In 1972, the American Law Institute's Model Penal Code revised and added to the *M'Naghten* test, which resulted in "the ALI test".<sup>103</sup> The ALI test continues the cognitive element of the *M'Naghten* rule<sup>104</sup> and adds a volitional element, which

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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 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 recognised 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.

(citation omitted).

101. The ordinary observations of lay people still constitute valid evidence of a defendant's responsibility when he pleads not guilty by reason of insanity. See *Duthey v. State*, 111 N.W. 222, 225-26 (Wis. 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.

102. See, e.g., NORRIE, *supra* note 100, at 176:

Insanity came increasingly to be seen as a 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 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 faculty, 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).

103. SMITH, *supra* note 82, at 19.

104. See MODEL PENAL CODE § 4.01(1) (Proposed Official Draft 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 substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." (alteration in original)).

was first introduced in *Parsons v. State*<sup>105</sup> and then famously adopted and developed by Judge David Bazelon in *Durham v. United States*.<sup>106</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>107</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>108</sup> The proposed test read: "[A]n accused is not criminally responsible if his unlawful act was the product of a mental disease or mental defect."<sup>109</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 addressed a condition that was capable of change in a way that a mental defect would not be.<sup>110</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>111</sup> The lack of clarity is underscored by the historical event where psychiatrists redefined the term.<sup>112</sup> Immediately following the *Durham* decision, court-appointed 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>113</sup> After a few years with 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 Saint 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." . . .

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105. 2 So. 854, 859 (Ala. 1887). I am grateful to Professor Bruce G. Berner of Valparaiso University School of Law for calling my attention to the original decision in which the volitional test emerged.

106. 214 F.2d 862, 874–75 (D.C. Cir. 1954).

107. *Id.* at 868–69.

108. *Id.* at 874–75.

109. *Id.*

110. *See id.*

111. SMITH, *supra* note 82, at 19.

112. *See generally* Loftus E. Becker, Jr., *Durham Revisited: Psychiatry and the Problem of Crime* (pt. 2), *PSYCHIATRIC ANNALS*, Sept. 1973, at 12 (1973).

113. *Id.* at 15.

The change of policy at Saint Elizabeths had not been made as a result of any new psychological insights.<sup>114</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>115</sup>

## 2. Hard Determinism of the Products Test

The difficulty rooted in the nebulous definition of mental disease was compounded by its pairing with a fuzzy notion of causation in *Durham*'s "products test." After rejecting the *M'Naghten* test as inadequate, the court held that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."<sup>116</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:

[T]hese 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-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 psychiatrists' viewpoint more just and understanding.<sup>117</sup>

In contrast to the shifting views of psychiatrists, lawyers and judges in the criminal justice system clung to the "old-fashioned . . . tests of responsibility."<sup>118</sup> Criminal lawyers labored daily to determine responsibility. Attorneys and judges wondered if the approach of psychiatry was at cross purposes with what they understood as the criminal law's primary function: assigning responsibility<sup>119</sup>:

For lawyers, however, *Durham* represented a threat to the very notion of individual justice according to law. First, it took the decision out of the hands of both the law and the jury by making the question

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114. *Id.* at 16. 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. *Id.* at 16. 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. *Id.* at 16-17. That said, the example described underscores the flimsiness of the definition and may add support to the legal profession's mistrust of forensic psychiatry. *See id.* at 17.

115. *See e.g.*, Alan A. Stone, *The Insanity Defense on Trial*, 33 HOSP. & COMMUNITY PSYCHIATRY 636, 637 (1982).

116. *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954).

117. NORRIE, *supra* note 100, at 183-84.

118. *Id.* at 184.

119. *Id.*

of insanity a matter for psychiatry alone. The law was side-lined and the jury left with no real decision on 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>120</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>121</sup>

In Wisconsin, a defendant must establish this affirmative defense to a reasonable certainty by the greater weight of the credible evidence.<sup>122</sup> Whether the defendant has met this burden of proof is a question of fact for the jury.<sup>123</sup> Of course, different jurisdictions may assign burdens of proof for affirmative defenses 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, 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>124</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>125</sup> But establishing that a medical or psychiatric condition exists can prove an elusive challenge. As the late

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120. *Id.* (citation omitted).

121. *See* WIS. STAT. ANN. § 971.15(1) (West 2009).

122. *Id.* § 971.15(3).

123. *See* State v. Leach, 370 N.W.2d 240, 247 (Wis. 1985).

124. For example, courts have found that involuntary behavior due to psychomotor epilepsy may provide a defense to criminal liability. *People v. Grant*, 360 N.E.2d 809, 813 (Ill. App. Ct. 1977).

125. John J. McGrath, *The Insanity Defense: A Difficult Necessity*, 36 HOSP. & COMMUNITY PSYCHIATRY 54, 54–55 (1985):

[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.

Professor Georges Canguilhem of the Sorbonne pointed out, mental disease, and therefore the insanity defense, is often difficult to determine.<sup>126</sup> His student Michel Foucault observed:

[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>127</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>128</sup> Conversely, it is also difficult to describe with precision what makes up a "normal" range of rational choice.<sup>129</sup> Thus, psychiatry lacks a clear standard to enunciate when a person ought to be held liable for their choices.<sup>130</sup> This apparent confusion stems from the uncertain organic basis for psychiatric maladies.<sup>131</sup> The causal factors linking body, mind, and behavior are still poorly understood.<sup>132</sup> The matter is further clouded by our positivist and empiricist bias, which largely holds that something does not exist unless it can be measured.<sup>133</sup> Mental and emotional problems are frequently not subject to empirical valida-

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126. CANGUILHEM, *supra* note 42, at 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 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.

127. MICHEL FOUCAULT, *MENTAL ILLNESS AND PSYCHOLOGY* 10 (Alan Sheridan trans., Univ. of Cal. Press 2d ed. 2008) (1954).

128. *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.

129. See CANGUILHEM, *supra* note 42, at 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 an interrupted activity . . . .

130. See Stone, *supra* note 115, at 640.

131. FOUCAULT, *supra* note 127, at 10–13.

132. CANGUILHEM, *supra* note 42, at 118 (noting how "somatic disease is capable of a superior empirical precision, of a better-defined standardization" than is mental disease).

133. 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) (noting 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 initially 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.

tion, and psychiatrists observe that it is impossible to say if a patient is cured.<sup>134</sup>

The uncertain etiology of mental illness is often seen by jurists and the public as undermining the criminal justice system when it is invoked as the basis for excusing behavior.<sup>135</sup> Reflecting on the French experience, Foucault notes, "The essential issue therefore was to ascertain the reality and degree of the madness in question. The deeper the insanity, the more innocent the subject's will."<sup>136</sup> The public seems to believe that the insanity defense is successfully employed by large numbers of criminals who thereby avoid punishment.<sup>137</sup> Further, psychiatrists are mistrusted because they contradict each other on the stand.<sup>138</sup> Professor Alan Stone observed that the trial of John Hinckley, Jr., in which the defendant was acquitted because the prosecution failed to disprove mental illness beyond a reasonable doubt, "was a bleak experience for American psychiatry, and the verdict shook public confidence in the American criminal justice system."<sup>139</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>140</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>141</sup> In cases raising the insanity defense, therefore, the questions to be grappled with at trial, though familiar ground for attorneys, are concerns far re-

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134. Stone, *supra* note 115, at 640 ("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 . . .").

135. CRONIN, *supra* note 88, at 93.

136. MICHEL FOUCAULT, *HISTORY OF MADNESS* 137 (Jean Khalfa ed., Routledge trans., 2006) (1961).

137. See, e.g., Stone, *supra* note 115, at 637, where Professor Stone summarizes a lengthy statement by Hon. John Ashbrook of Ohio recorded in the 1981 Congressional Record.

138. *Id.*

139. ALAN STONE, *LAW, PSYCHIATRY, AND MORALITY* 77 (1984). John Hinckley, Jr. attempted to assassinate President Ronald Reagan in 1981. He was found not guilty by reason of insanity. See Stuart Taylor, Jr., *Hinckley Hails "Historical" Shooting to Win Love*, N.Y. TIMES, July 9, 1982, at A10, available at 1982 WLNR 315512.

140. CRONIN, *supra* note 88, at 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.

141. See Stone, *supra* note 115, at 640.

moved from those of psychiatrists.<sup>142</sup> As a result, psychiatrists must be guarded in their testimony, and commentators worry that not all are.<sup>143</sup>

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>144</sup> The jury is directed to determine facts at a particular point in time.<sup>145</sup> Evidence of other actions or events is limited either by constitutional claims<sup>146</sup> or on the grounds of relevance.<sup>147</sup> Insanity trials broaden the 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>148</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

142. See Insanity Def. Work Group, Am. Psychiatric Ass'n, *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681, 686 (1983):

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 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.

143. STONE, *supra* note 139, at 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.

144. FED. R. EVID. 402 ("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 the 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. See FED. R. EVID. 403.

145. RICOEUR, *supra* note 6, 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 . . . and a measured discourse of conscious legitimation . . . .

146. For example, under the Fifth Amendment, "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. 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, 444 (1966).

147. FED. R. EVID. 403 ("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.").

148. *State v. Carlson*, 93 N.W.2d 354, 361 (Wis. 1958).



person is admissible in evidence” as the jury attempts to determine if a defendant should be held accountable for his actions.<sup>149</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>150</sup>

By expanding the range of admissible evidence, the defendant pleading insanity has greater resources to mine than does the ordinary criminal defendant.<sup>151</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 that throws open the doors to evidence ordinarily barred at trial.

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

The argument that anyone sexually attracted to corpses must have a mental disease seems self-evident, but that assertion faced specific difficulties in this case, both 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>152</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>153</sup>

Freud’s objection points more generally to a logical flaw in the defense’s strategy. The defense used circular logic to argue: (1) Jeffrey

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149. 2 WIGMORE EVIDENCE § 228 (1979).

150. ABRAHAM S. GOLDSTEIN, *THE INSANITY DEFENSE* 54 (1967).

151. *Id.*

152. SIGMUND FREUD, *The Sexual Aberrations*, in *THREE ESSAYS ON THE THEORY OF SEXUALITY* I, 27 (James Strachey ed. & trans., 1962).

153. *Id.*

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 Dahmer had an unusual set of sexual triggers does not mean that he was less able to control himself than anyone else.<sup>154</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[.] [I]t'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>155</sup>

The narrative difficulties faced by the defense are less direct and more complex. Initially, Dahmer laid out his actions in an extraordinarily detailed set of interviews with detectives and experts investigating the case. His statement to the Milwaukee Police Department alone fills over 145 typewritten pages.<sup>156</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, usually when his attorneys were present, but he sometimes insisted on speaking without counsel.<sup>157</sup> This

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154. *See id.*

155. Frederick A. Fosdal, Interview Notes for Jeffrey Dahmer Examination 9 (Oct. 16, 1991) (unpublished report, on file with author).

156. *See* Statement of Jeffrey Dahmer, Case No. 2472 § 5 (unpublished police report, on file with 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 Rivière 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 generally* MICHEL FOUCAULT, I, PIERRE RIVIERE, HAVING SLAUGHTERED MY MOTHER, MY SISTER, AND MY BROTHER . . . : A CASE OF PARRICIDE IN THE 19TH CENTURY (Michel Foucault ed., Frank Jelinek trans., Pantheon Books 1975) (1973).

157. *See, e.g.,* Dennis Murphy, Statement of Jeffrey Dahmer, Case No. 2472 § 5, at 47–48 (July 27, 1991) (unpublished police report, on file with author):

extensive confession hampered his attorneys' ability to craft a defense because they could not proffer any argument that conflicted with Dahmer's self-reported narrative.

A further difficulty in the case arose from its particularly gruesome facts, not only as reported by the defendant but also as photographed and collected by him.<sup>158</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>159</sup> Stories and historical accounts are usually enclosed in texts, a fixed set of symbols that mediate meaning from the author to the reader.<sup>160</sup> Although the trial court's decision in *Dahmer* was never appealed, and although no transcript was ever prepared, what occurred in

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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 to 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.

158. 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.

159. See, e.g., AMSTERDAM & BRUNER, *supra* note 5, at 110. See generally WHITE, CONSTITUTIONS AND RECONSTITUTIONS, *supra* note 5, at 3 (discussing the narrative nature of codified law); JAMES BOYD WHITE, *Telling Stories in the Law and in Ordinary Life: The Oresteia and "Noon Wine," in HERACLES' BOW*, *supra* note 5, at 168 (demonstrating the legal process as a story development and narrative method).

160. PAUL RICOEUR, *HERMENEUTICS AND THE HUMAN SCIENCES: ESSAYS ON LANGUAGE, ACTION AND INTERPRETATION* 174 (John B. Thomson ed. & trans., 1981):

[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.

the trial court can helpfully be understood as a text.<sup>161</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>162</sup> Jurors were not free to ask questions or to ask for clarification; rather, they were asked to apply the facts, as they found them, to the law.<sup>163</sup>

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 that somehow made sense of it.<sup>164</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>165</sup> Ultimately, the members of

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161. 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, and the burden of sorrow carried by family members.

162. RICOEUR, *supra* note 160, at 146–47:

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 the other.

163. See PAUL RICOEUR, *THE JUST* 121 (David Pellauer trans., Univ. of Chi. Press 2000) (1995):

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.

164. RICOEUR, *supra* note 160, at 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.

165. *Id.* at 278:

[I]t 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

the jury had to reconcile these two approaches in terms of the law they were given. They had to decide which narrative, if either, corresponded with what they understood as the truth.<sup>166</sup>

As Paul 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>167</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>168</sup>

Just as the historian chooses among salient facts, attorneys select what evidence to put before the jury.<sup>169</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>170</sup> Of

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*.

166. RICOEUR, *supra* note 6, at 178–79:

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."

(third omission in original).

167. *Id.*

168. *Id.* at 86 (internal quotation marks omitted) (quoting TZVETAN TODOROV, *LES ABUS DE LA MÉMOIRE* 50 (1995)).

169. *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.

170. CHATMAN, *supra* note 8, at 45–46:

[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

course, the jury's reconstruction, based on its limited information, may differ greatly from the historical event itself.<sup>171</sup> Despite this variance from the historical event, in our system of justice, the jury's verdict is the version of history that 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, and who tells the jury what it hears.<sup>172</sup> In Dahmer's case in chief, the 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>173</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>174</sup> By contrast, when that same testi-

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.

171. RICOEUR, *supra* note 6, at 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 is said is 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 indiscrimination in the employment by the best historians of these terms as standing for each other.

172. *Id.* at 163-64:

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.

(citation omitted).

173. *See id.*

174. Indeed, the jury instructions in Wisconsin would explicitly invite this sort of reasoning on the jury's part. *See, e.g.,* WIS. JI-CRIMINAL § 300, at 1 (2003):

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 judges 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:

mony comes through the mouth of a psychiatrist or clinical psychologist, the jury attaches unwarranted credibility to the claims made.<sup>175</sup> This is not to say that the jury is necessarily persuaded by mental health professionals or police officers, but 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 are seen 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>176</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 have questioned the clinical witnesses' conclusions, it did not consider directly the truthfulness of Dahmer's self-report.<sup>177</sup>

The failure to interrogate Dahmer's statements for truthfulness is not insubstantial. The defense repeatedly asserted that it was being trans-

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- 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' recollections;
  - . . .
  - bias or prejudice, if any has been shown;
  - possible motives for falsifying testimony; and
  - all other facts and circumstances during the trial which tend either to support or to discredit the testimony.

175. RICOEUR, *supra* note 6, 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 as actor or 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 witness on personal terms. The result is what we call his trustworthiness, whose evaluation can be assimilated to comparative orders of magnitude.

(citation omitted).

176. *Id.* at 164–65:

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.

177. The testimony of the court's own psychiatric expert, Dr. George Palermo, addresses this very issue. See David Doege, *Anger in His Homosexuality Led Dahmer to Kill, Psychiatrist Says*, MILWAUKEE SENTINEL, Feb. 7, 1992, at 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."

parent, when it was actually casting significant parts of the story into the shadows.<sup>178</sup> For example, woven into the testimony of the psychiatrists was 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>179</sup>

Indeed, there are wide factual disparities, both large and small, in Dahmer's recounting of the murder of Stephen Hicks, the first murder he admitted committing. 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 he next 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 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 "[h]ad the idea to hit [Hicks] over the head for

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178. RICOEUR, *supra* note 6, at 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.").

179. *Id.* at 316-17:

To be sure, applying the criteria of concordance and relying upon independent verification of the confession provide 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.

180. Patrick Kennedy, Statement of Jeffrey Dahmer, Case No. 2472 § 5, at 9-10 (July 23, 1991) (unpublished police report, on file with author):

Subject [Jeffrey Dahmer] states that when he was 18 years of age and living in Richfield, Ohio, he picked up a hitchhiker 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 into a wooded area by his house and left it there to decompose for about two weeks.

181. Dennis Murphy, Statement of Jeffrey Dahmer, Case No. 2472 § 5, at 23 (July 24, 1991) (unpublished police report, on file with author):

He states his first homicide which occurred, he believes around October of 1978, was of a white male hitchhiker, whom he describes as 18-yoa., 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.

182. R.W. Munsey, Statement of Jeffrey L. Dahmer, Case No. 2472 § 12, at 488 (Aug. 8, 1991) (unpublished police report, on file with 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.").



about a half 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 masturbated 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 though, this line of cross examination was never developed. Therefore, the contradictions within Dahmer’s statements were largely ignored, except for Dr. Palermo’s assertion that Dahmer “embellished” much of what he claimed to have done,<sup>188</sup> and the jury was given the impression that Dahmer was basically truthful.

It is noteworthy that Jeffrey Dahmer’s statements describing the Hicks murder grew 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. Because Dahmer’s statements furnish the sole source of information given to the jury, his motives to testify falsely at trial needed to be fully explored. In his varying renditions of the Hicks murder, Dahmer may have reflexively shaded the truth to appear more psychologically ill than he was.

The ostensible 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 their unique circumstances, 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-

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183. Frederick A. Fosdal, Interview Notes for Jeffrey Dahmer Examination 13 (Oct. 23, 1991) (unpublished report, on file with author).

184. *Id.*

185. *Id.*

186. *Id.* at 14.

187. Park Elliott Dietz, Interview Notes for Jeffrey Dahmer Examination, at A81–A82 (Jan. 5, 1992) (unpublished report, on file with author).

188. See, e.g., Jim Stigl, *Dahmer Needs Help but Is Sane, Court Told*, MILWAUKEE J., Feb. 6, 1992, at 1 (internal quotation marks omitted):

[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.

ble 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 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 of Dahmer's other victims on direct examination.<sup>192</sup>

Similarly, 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 revealed some differences from Dahmer's statement to the police; he stated to her that he had sex with every victim's body after death.<sup>195</sup> Becker also discussed specifics of the murders themselves, including a new revelation

189. Videotape: *State of Wisconsin v. Jeffrey Dahmer Tape One*, at 46:10 (Jan. 30, 1992) (on file with the Marquette University Law Library). In his opening statement, Dahmer's attorney pointed out that, in the opinion of his 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." *Id.*

190. Videotape: *State of Wisconsin v. Jeffrey Dahmer Tape Three*, at 2:59:45 (Feb. 3, 1992) (on file with the Marquette University Law Library). Dr. Berlin described psychiatric illness as embodying a value judgment. *Id.* He stated that there is a diversity of bodily conditions and posed the following argument: 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. *Id.*; see also *Testimony from the Dahmer Trial*, MILWAUKEE SENTINEL, Feb. 4, 1992, at 6 ("If this isn't mental illness, from my point of view, I don't know what is.").

191. David Doege, *Doctor: Dahmer 'Out of Control' Testifies on Killer's Fantasies*, MILWAUKEE SENTINEL, Feb. 4, 1992, at 1 (internal quotation marks omitted).

192. See *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. See *id.* This information may have diminished Dr. Berlin's effectiveness in the jury's eyes.

193. *Testimony from the Dahmer Trial*, MILWAUKEE SENTINEL, 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.

(first and second omission in original).

194. Doege, *supra* note 41, at 1.

195. *Id.*

that he had intercourse with the internal organs of his 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 efforts 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 obvious 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 skulls he collected on the table looking back at him.<sup>202</sup> He claimed he had already purchased the table.<sup>203</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 approximately 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 was not 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 simply failed to check Dahmer's claims against evidence on police inventory.<sup>204</sup> Similarly, a third clinician, Dr. Wahlstrom, focused on Dah-

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196. Jim Stingl, *Several Disorders Played Role: Expert Dahmer Was Psychotic, Witness Testifies*, MILWAUKEE J., 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.

197. *Testimony from the Dahmer Trial*, *supra* note 193, at 7.

198. *Id.*

199. Dr. Becker acted as an excellent psychologist in trying to describe Dahmer's mental processes. However, her analysis is not how the law looks at intent. As James Fitzjames Stephen points out, "The only possible way of discovering a man's intention is by looking at what he actually did, and by considering what must have appeared to him at the time the natural consequence of his conduct." STEPHEN, *supra* note 59, at 111. By foregrounding the psychological history, Dr. Becker de-emphasized the physical facts of the case.

200. See Doege, *supra* note 41, at 1.

201. See *id.*

202. See Stingl, *supra* note 196, at 1.

203. See *id.* ("Dahmer said the temple, to be built on a black table in his West Side apartment, would be a 'power center.'").

204. 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." Stingl, *supra* note 188, at 1. It may have

mer's delusions regarding his possible temple of bones.<sup>205</sup> Wahlstrom's testimony in particular dwelt on Dahmer's performance on a battery of psychological tests.<sup>206</sup> However, his testimony, like that of Drs. Berlin and Becker, did not delve much into the particulars of the crimes themselves.<sup>207</sup> In the final analysis, his opinions seemed based largely on broad abstractions, and he therefore failed to provide the jury with concrete evidence to refute the state's case.

Dahmer's failure to testify 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 rendered these encounters as largely financial.<sup>208</sup> What if this report was 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, and 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 have been that of a puppeteer: he provided the words to the witnesses that 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's case how someone as disturbed as the Jeffrey Dahmer they had 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

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stemmed from the failure of Dahmer's story to match up with the physical evidence, but the record does not address that point.

205. Stingl, *supra* note 196, 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.").

206. See Carl M. Wahlstrom, Jr., Report of Psychiatric Evaluation of Jeffrey Dahmer 9-10 (Jan. 9, 1992) (unpublished court file, on file with author).

207. In an eleven-page report, brief descriptions of the crimes themselves appear in only four paragraphs. See *id.* at 6-7.

208. See, e.g., Murphy & Kennedy, *supra* note 29, at 88.

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>209</sup> Palermo described Dahmer as making conscious choices "at the moment of the killings, in the preparation of the killing and afterwards."<sup>210</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 . . . . He is much more."<sup>211</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>212</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>213</sup> Initially, the prosecution needed to normalize Jeffrey Dahmer, to provide a context, by showing that his life fit together coherently; he struck others as friendly, unremarkable, and sane.<sup>214</sup> Beginning with the cross-examination of Detective Dennis Murphy, the prosecution asked every witness who had exten-

209. Stingl, *supra* note 188, at 1:

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."

210. *Id.* (internal quotation marks omitted).

211. Doege, *supra* note 177, at 1 (internal quotation marks omitted).

212. *Testimony from the Dahmer Trial*, MILWAUKEE SENTINEL, Feb. 7, 1992, at 7 (alteration in original).

213. See, e.g., Jim Stingl, *Urge to Kill Ruled: Expert*, MILWAUKEE J., 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.

*Id.*

214. Under *Duthey v. State*, the jury is permitted to rely on the opinions of laypersons who are familiar with the defendant about his sanity or lack thereof. 111 N.W. 222, 226 (Wis. 1907). The substance of this common law decision is encased in the Federal Rules of Evidence on 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, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

FED. R. EVID. 701. 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 that 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.

sive 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, or appeared not to be tracking the conversation.<sup>215</sup> In this manner, the prosecution built up a weight of evidence from ordinary people who encountered the defendant in various times and places, and 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>216</sup> "He was quiet. He had no problems reacting with others."<sup>217</sup> Further, his boss thought Dahmer did "a satisfactory job."<sup>218</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>219</sup> His building manager further described Dahmer's apartment as "probably the neatest apartment I've seen."<sup>220</sup> This line of questioning helped the jury see Dahmer as he was seen by coworkers 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, whom 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>221</sup> "I felt that [Dahmer] was a very nice person. He seemed very kind."<sup>222</sup> Another witness, Ronald Flowers, had difficulties starting his car, so Dahmer offered to take him to his grand-

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215. See, e.g., Videotape: State of Wisconsin v. Jeffrey Dahmer Tape Three, at 48:20 (Feb. 3, 1992) (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. *Id.* 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. *Id.*

216. David Doege, *Dahmer's Work OK, Bosses Say*, MILWAUKEE SENTINEL, Feb. 11, 1992, at 1.

217. *Id.* (internal quotation marks omitted).

218. *Id.* (internal quotation marks omitted).

219. *Testimony from the Dahmer Trial*, MILWAUKEE SENTINEL, Feb. 12, 1992, at 8.

220. *Id.*

221. Jim Stingl, *Dahmer Is Sane, Psychiatrist Says*, MILWAUKEE J., Feb. 8, 1992, at 1.

222. *Id.* (internal quotation marks omitted). 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.

mother's home to pick up jumper cables.<sup>223</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>224</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 that Dahmer had prepared for him.<sup>225</sup> The next thing Flowers remembered was awaking in a hospital room.<sup>226</sup> Flowers stated that he encountered Dahmer a year later in a bar; Dahmer said to him, "I really don't remember who you are . . . maybe we can go have a cup of coffee."<sup>227</sup>

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>228</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>229</sup> As he returned to his apartment after having a drink, he saw Sinthasomphone sitting nude on the curb.<sup>230</sup> Dahmer was taking him back to his apartment when both the police and fire departments showed up.<sup>231</sup> Dahmer reports that he told the police that his friend always acted like this when he got drunk and did not speak English.<sup>232</sup> The police officers who spoke with Dahmer during this incident testified that he "responded in a calm, clear voice."<sup>233</sup> Dahmer related that the youth was his friend who had drunk too much and passed out on the couch.<sup>234</sup> Dahmer spoke coherently and did not appear to be drunk.<sup>235</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>236</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. Dahmer would later state that after the police left, he gave Sinthasomphone another shot of muriatic acid and killed him.<sup>237</sup> Furthermore,

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223. David Doege, *Those Who Got Away Recall Dahmer 'Why Is He Looking at Me Like That?'* Victim Asked, MILWAUKEE SENTINEL, Feb. 8, 1992, at 1.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* (alteration in original) (internal quotation marks omitted).

228. Fosdal, *supra* note 34, at 45.

229. See Dennis Murphy, Statement of Jeffrey Dahmer, Case No. 2472 § 5, at 117 (Aug. 2, 1991) (unpublished police report, on file with author).

230. *Id.*

231. *Id.*

232. *Id.*

233. David Doege, *Officers Recall Dahmer, Youth*, MILWAUKEE SENTINEL, Feb. 12, 1992, at 1 (internal quotation marks omitted).

234. *Id.*

235. *Id.*

236. *Id.* (internal quotation marks omitted).

237. Fosdal, *supra* note 34, at 46.

Dahmer later told police that the body of another victim, Tony Hughes, was on the floor of his bedroom at that time.<sup>238</sup> This evidence underscored Dahmer's control of an extraordinarily stressful situation within an hour of committing a murder. It undermines the defense's claim that he was beset by unchecked passion.

The prosecution's expert witnesses largely corroborated the impressions of the lay witnesses that Dahmer could control his actions at all times. Echoing Freud's observation quoted above, Dr. Frederick Fosdal testified that he had never seen a sexual disorder that rendered someone unable to follow the law.<sup>239</sup> Although Dahmer enjoyed the sex with a compliant partner, he did not enjoy the killing,<sup>240</sup> and actually let some folks go because he didn't have the energy to kill when he had a hangover.<sup>241</sup> He found killing difficult unless he was somewhat drunk.<sup>242</sup> 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>243</sup> Fosdal further undercut Dahmer's claim of uncontrollable passion by eliciting that Dahmer would only approach men who did not have cars so they would not leave evidence outside his apartment.<sup>244</sup>

The theme of the final prosecution witness, Dr. Park Elliott Dietz, was that none of Dahmer's acts were impulsive. Rather, each charged

238. See David E. Umhoefer, *Police Were in Dahmer Flat*, MILWAUKEE J., Aug. 1, 1991, at 1.

239. Jim Stingl, *Disorder Alone Is Not Insanity, Expert Testifies*, MILWAUKEE J., Feb. 10, 1992, at 1.

240. *Testimony from the Dahmer Trial*, MILWAUKEE SENTINEL, 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.

....

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.

(second alteration in original).

241. Fosdal, *supra* note 28, at 25.

242. *Testimony from the Dahmer Trial*, *supra* note 240, at 8.

243. *Id.*

244. Fosdal, *supra* note 30, at 59:

Q: You and a guy go home together in a car—[h]e gives you a ride home and then he's done with and then his car is parked down in the street.

A: That wouldn't have worked.

Q: Was that an issue?

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

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

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

....

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



killing was “a planned and deliberate act.”<sup>245</sup> Dahmer would grind sleeping pills before he went out to find a victim so they would be ready to mix in a drink.<sup>246</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>247</sup> He only killed in his own apartment where he could control who could come in so that he would not be bothered.<sup>248</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>249</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>250</sup>

Perhaps the most telling testimony was Dietz’s report that Dahmer explained he had always used a condom when engaging in sex with a corpse or unconscious person to avoid contracting AIDS or other diseases.<sup>251</sup> “The intensity of his sexual urge at that point was less than that many teenagers experience in the back seat with their girlfriend,” Dietz testified.<sup>252</sup> This observation destroyed Dahmer’s claim of unbridled and uncontrollable passion.

Dietz also drew out that necrophilia was not Dahmer’s primary attraction.<sup>253</sup> Dahmer’s first desire was for an attractive sexual partner who would be under his complete control and never leave him.<sup>254</sup> His preference would have been for an enduring relationship with an attractive living person, but he never found someone who fit these criteria, so he “settle[d] for less attractive, paraphilic alternatives.”<sup>255</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>256</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>257</sup> Dahmer’s next choice would be an unconscious sexual partner.<sup>258</sup> This sort of object also appears in Western cultures in the fairy tale *Sleeping Beauty*.<sup>259</sup> Only if these choices were unavailable would Dahmer begin to fantasize

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245. Jim Stingl, *Dahmer Knew What He Was Doing, Expert Says*, MILWAUKEE J., Feb. 12, 1992, at 1 (internal quotation marks omitted).

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* (internal quotation marks omitted).

251. Jim Stingl, *Prosecution Expert Doesn’t Budge*, MILWAUKEE J., Feb. 13, 1992, at 1.

252. *Id.* (internal quotation marks omitted).

253. Dietz, *supra* note 23, at 2.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

about a freeze-dried body or freshly dead corpse of an attractive man.<sup>260</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>261</sup>

### 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 the jury rejected Dahmer's claim of insanity.<sup>262</sup> There were too many logical gaps in 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 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 appeared 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. Søren 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>263</sup> By remaining silent, by not informing Isaac that he was told to sacrifice him, Kierkegaard maintains Abraham failed to act ethically.<sup>264</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 that he must keep secret."<sup>265</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. Then, in the courtroom, he mutes 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 that he may well have constructed for his own purposes. While clothing himself in the guise of a Romeo or Juliet,

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260. *Id.*

261. *Id.* at 6.

262. RICOEUR, *supra* note 163, at 178.

263. SØREN KIERKEGAARD, *FEAR AND TREMBLING AND THE SICKNESS UNTO DEATH* 26–77 (Walter Lowrie trans., Princeton Univ. Press 3d ed. 1968) (1843 & 1849).

264. *Id.* at 67; DERRIDA, *supra* note 2, at 60.

265. DERRIDA, *supra* note 2, at 60.

a lover willing to give of self for the other, he in fact used the other for his own selfish purposes.<sup>266</sup>

Ultimately, the weight of the testimony—the text generated at trial—persuaded the jury that the silent defendant’s proposed history of events was incomplete. 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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266. See Stigl, *supra* note 213, at 1 (according to Detective Murphy, Dahmer claimed he killed “[f]or his own warped selfish desire for self-gratification” (internal quotation marks omitted)).

