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# **“Half-Wracked Prejudice Leaped Forth”: Sanism, Pretextuality, and Why and How Mental Disability Law Developed as it Did**

MICHAEL L. PERLIN\*

## I. INTRODUCTION

If we are to come to grips with the roots of why and how mental disability law jurisprudence developed as it has, it is absolutely essential that we come to grips with two forces—sanism and pretextuality—that utterly dominate and drive this area of the law.<sup>1</sup> The papers in this symposium issue—about how we construct “craziness,”<sup>2</sup> the therapeutic potential of the civil commitment hearing,<sup>3</sup> the meaning of “dangerousness,”<sup>4</sup> how we construct competence,<sup>5</sup> the application of the Americans with Disabilities Act to persons with mental disabilities,<sup>6</sup> the

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1. See generally MICHAEL L. PERLIN, *THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL* (forthcoming 1999).

2. Stephen J. Morse, *Crazy Reasons*, 10 J. CONTEMP. LEGAL ISSUES 189 (1999).

3. Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37 (1999).

4. Grant H. Morris, *Defining Dangerousness: Risking a Dangerous Definition*, 10 J. CONTEMP. LEGAL ISSUES 61 (1999).

5. Elyn R. Saks & Stephen Behnke, *Competency to Decide on Treatment and Research: MacArthur and Beyond*, 10 J. CONTEMP. LEGAL ISSUES 103 (1999).

6. Susan Stefan, *The Americans with Disabilities Act and Mental Health Law: Issues for the Twenty-first Century*, 10 J. CONTEMP. LEGAL ISSUES 131 (1999).

ways in which mediation and alternative dispute resolution may offer a fresh approach to “the culture of argumentation,” and how that affects mental disability law,<sup>7</sup> deceptions in forensic testimony,<sup>8</sup> the transfer of juvenile cases to “adult court,”<sup>9</sup> the use of psychiatry as a tool of governmental oppression,<sup>10</sup> and the legal relationship between the diagnosis of antisocial personality disorder and the death penalty<sup>11</sup>—all reflect, in both explicit and implicit ways,<sup>12</sup> the pernicious effects of sanism and pretextuality on the full range of mental disability law issues. I believe it is impossible to truly understand the jurisprudence in any of these areas without first understanding sanism and pretextuality.<sup>13</sup>

What do I mean by these terms? Simply put, “sanism” is an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry.<sup>14</sup> It infects both our jurisprudence and our lawyering practices.<sup>15</sup> Sanism is largely invisible and largely socially acceptable. It is based predominantly upon stereotype, myth, superstition, and deindividualization, and is sustained and perpetuated by our use of alleged “ordinary common sense” (OCS) and heuristic reasoning in an unconscious response to events both in

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7. David B. Wexler, *Therapeutic Jurisprudence and the Culture of Critique*, 10 J. CONTEMP. LEGAL ISSUES 263 (1999).

8. Ansar Haroun & Grant H. Morris, *Weaving a Tangled Web: The Deceptions of Psychiatrists*, 10 J. CONTEMP. LEGAL ISSUES 227 (1999).

9. Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept*, 10 J. CONTEMP. LEGAL ISSUES 299 (1999).

10. Richard J. Bonnie & Svetlana V. Polubinskaya, *Unraveling Soviet Psychiatry*, 10 J. CONTEMP. LEGAL ISSUES 279 (1999).

11. Charles M. Sevilla, *Anti-Social Personality Disorder: Justification for the Death Penalty?*, 10 J. CONTEMP. LEGAL ISSUES 247 (1999).

12. See *infra* text accompanying notes 131-47.

13. See PERLIN, *supra* note 1, ch. 5.

14. The classic treatment is GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (1954). For an important new, and different, perspective, see ELISABETH YOUNG-BRUEHL, *THE ANATOMY OF PREJUDICES* (1996). See generally PERLIN, *supra* note 1, ch. 2 (discussing roots of sanism and the relationship between sanism and other “ismic” behavior, such as racism, sexism, and homophobia); Michael L. Perlin, *On “Sanism”*, 46 SMU L. REV. 373 (1992).

15. The phrase “sanism” was, to the best of my knowledge, coined by Dr. Morton Birnbaum. Morton Birnbaum, *The Right to Treatment: Some Comments on its Development*, in *MEDICAL, MORAL AND LEGAL ISSUES IN HEALTH CARE* 97, 106-07 (Frank J. Ayd ed., 1974) [hereinafter Birnbaum, *Comments*]. See *infra* text accompanying note 24; *Koe v. Califano*, 573 F.2d 761, 764 (2d Cir. 1978); Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63, 92-93 (1991) (discussing Birnbaum’s insights).

everyday life and in the legal process.<sup>16</sup>

“Pretextuality” means that courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (and frequently meretricious) decisionmaking, specifically where witnesses, especially *expert* witnesses, show a “high propensity to purposely distort their testimony in order to achieve desired ends.”<sup>17</sup> This pretextuality is poisonous; it infects all participants in the judicial system, breeds cynicism and disrespect for the law, demeans participants, and reinforces shoddy lawyering, blasé judging, and, at times, perjurious and/or corrupt testifying.

The title of my paper comes from Bob Dylan’s anthemic masterpiece, *My Back Pages* (best known by its chorus, “I was so much older then/I’m younger than that now”). I use the key lyric—“half-wracked prejudice leaped forth”—because I am convinced that sanism and pretextuality reflect a specific kind of corrosive prejudice that is at the roots of so much that is mental disability law.<sup>18</sup> The line is from the second verse of the song, which begins:

Half-wracked prejudice leaped forth  
“Rip down all hate,” I screamed  
Lies that life is black and white  
Spoke from my skull I dreamed . . . .<sup>19</sup>

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16. See, e.g., MICHAEL L. PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* (1994).

17. Michael L. Perlin, *Morality and Pretextuality, Psychiatry and Law: Of “Ordinary Common Sense,” Heuristic Reasoning, and Cognitive Dissonance*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 131, 133 (1991). See also Charles M. Sevilla, *The Exclusionary Rule and Police Perjury*, 11 SAN DIEGO L. REV. 839, 840 (1974) (discussing fabricated police testimony).

18. At a recent conference of the National Association of Rights, Protection and Advocacy (NARPA), in response to a paper I presented critiquing the quality of counsel in cases involving questions of mental disability law, Judi Chamberlin—a well-known advocate for the rights of persons perceived to be mentally disabled, see, e.g., JUDI CHAMBERLIN, *ON OUR OWN* (1978); Judi Chamberlin, *The Ex-Patient’s Movement*, 11 J. MIND & BEHAV. 324 (1990); Judi Chamberlin & Joseph A. Rogers, *Planning A Community-Based Mental Health System: Perspective of Service Recipients*, 45 AM. PSYCHOLOGIST 1241 (1990)—questioned why there is even a special body of law called “mental disability law,” noting that there is no such topic as “dermatology law.” (Comment from audience, Nov. 20, 1998). I have given Ms. Chamberlin’s question much serious thought, and am convinced that both sanism and pretextuality need to be understood if her question is to be legitimately answered.

19. BOB DYLAN, LYRICS, 1962-1985 (1985), at 139.

Typical of Dylan's lyrics, this verse is not without ambiguity. But it is clear to me that its main themes—that prejudice leads to hatred; that the world is *not* “black and white”; that our thoughts and our behaviors are largely driven by unconscious forces—are the same themes that explain sanist and pretextual behavior on the parts of courts, legislators, lawyers, expert witnesses, and all other players in the mental disability law arena.

This article will proceed in the following manner. First, I will explain the roots of my interest in these forces and explain how I came to apply them to mental disability law. Next, I will define the key principles and try to illuminate how they dominate this discourse. I will then examine the other papers in this special issue and try to show how these principles explain much of what would otherwise be incoherent in mental disability law. Finally, I will offer some modest suggestions and conclusions for future generations of mental disability law scholars to ponder.

## II. THE ROOTS

To a great extent, my interest in these phenomena began at two separate points in time, both in the 1970s. As a “rookie” Public Defender in Trenton, New Jersey, I often filed motions to suppress evidence on behalf of my clients in criminal cases, arguing that the police behavior in seizing contraband (usually small amounts of “street drugs”) violated the Fourth Amendment's ban on “unreasonable searches and seizures.” In almost all of these cases, the arresting officer's testimony was basically the same: he would testify that, when my client saw him coming, my client made a “furtive gesture,” and then reached into his pocket, took out a glassine envelope (filled with the illegal drug), and threw it on the ground, blurting out, “That's heroin [or whatever], and it's mine.” My client—not surprisingly—told a different story: that the policeman approached him, stuck his hands into my client's pockets, pulled out the glassine envelope, and then placed my client under arrest.

I had no doubt that my client was telling the truth. I suspected that the judge and the prosecutor had the same intuition. Yet, in such cases—they are called “drosy” cases to all familiar with the “real life” of criminal procedure—the judge invariably found the police officer to be more credible and would thus rule that the search came within the “plain view” exception of search and seizure law, upholding the search. It was no surprise to me years later when I read Myron Orfield's article (studying “drosy” cases in Chicago), reporting that eighty-six percent of judges, public defenders and prosecutors questioned (including

seventy-seven percent of judges) believed that police officers fabricate evidence in case reports at least “some of the time,” and that a staggering ninety-two percent (including ninety-one percent of judges) believe that police officers lie in court to avoid suppression of evidence at least “some of the time.”<sup>20</sup> Although I did not know it at the time, this was my first introduction to *pretextuality* in law.<sup>21</sup>

My second introduction followed soon after, and involved questions of mental disability law. Again, as the “rookie” Public Defender, I was assigned to represent individuals at the Vroom Building, New Jersey’s maximum security facility for the “criminally insane,” on their applications for writs of habeas corpus. The cases were—to be charitable—charades. The attorney-general asked the hospital doctor two questions: was the patient mentally ill, and did he need treatment? The answers always were “yes,” and the writs were denied.<sup>22</sup>

20. Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 100-07, nn.113 & 146 (1992). Some judges, including former Chief Justice Burger, have expressed doubt that police testimony in dropsy cases requires special scrutiny. See *Bush v. United States*, 375 F.2d 602, 604 (D.C. Cir. 1967) (“[I]t would be a dismal reflection on society to say that when the guardians of its security are called to testify in court under oath, their testimony must be viewed with suspicion.”). But see Judge Irving Younger’s opinion in *People v. McMurty*, 314 N.Y.S.2d 194, 197 (N.Y. Crim. Ct. 1970), disagreeing with Justice Burger’s point of view. *McMurty* is discussed in Comment, *Police Perjury in Narcotics “Dropsy” Cases: A New Credibility Gap*, 60 GEO. L. J. 507 (1971).

21. By this I mean simply that fact-finders accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (frequently meretricious) decisionmaking, specifically where witnesses, especially *expert* witnesses, show a “high propensity to purposely distort their testimony in order to achieve desired ends.” Perlin, *supra* note 17, at 133.

22. This changed radically (in New Jersey, at least) after the United States Supreme Court’s decision in *Jackson v. Indiana*, 406 U.S. 715 (1972) (applying substantive and procedural due process protections to incompetency-to-stand-trial process). See generally 3 MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* § 14.15, at 248-50 (1989) [*Editor’s note*: This three volume treatise was published in 1989 and has been updated annually. The first volume of the second edition was published in 1998, and the second volume of the second edition is scheduled to be published in 1999. When this treatise is cited in this article, we will indicate date of publication parenthetically to enable the reader to determine which volume is being cited.]. See, e.g., *Dixon v. Cahill*, Docket No. L.30977-71 P.W. (N.J. Super. Ct. Law Div. 1973) (consent order implementing *Jackson*), reprinted in 3 PERLIN, *supra*, § 14.17, at 256-59. But see Grant H. Morris & J. Reid Meloy, *Out of Mind? Out of Sight: The Uncivil Commitment of Permanently Incompetent Criminal Defendants*, 27 U.C. DAVIS L. REV. 1 (1993) (more than half the states never implemented *Jackson*).

Some years later, after I became Director of New Jersey's Division of Mental Health Advocacy, I read a story in the *New York Times* magazine section that summarized for me many of the frustrations of my job. The article dealt with an ex-patient, Gerald Kerrigan, who wandered the streets of the Upper West Side of Manhattan. Kerrigan never threatened or harmed anybody, but he was described as "different," "off," "not right," somehow. It made other residents of that neighborhood—traditionally home to one of the nation's most liberal voting blocs—nervous to have him in the vicinity, and the story focused on the response of a community block association to his presence. The story hinted darkly that the social "experimentation" of deinstitutionalization was somehow the villain. Soon after that, I read an excerpt from Elizabeth Ashley's autobiography in *New York* magazine (a magazine read by many of those same Upper West Siders). Ashley—a prominent (and not unimportantly) strikingly attractive actress—told of her institutionalization in one of New York City's most esteemed private psychiatric hospitals and of her subsequent release from that hospital to live with George Peppard, and to co-star with Robert Redford on Broadway in *Barefoot in the Park*.

Ashley was praised for her courage. Kerrigan was emblematic of a major "social problem." Both were persons who had been diagnosed with mental illness. Both of their mental illnesses were serious enough to require hospitalization. Both were subsequently released. Yet their stories are presented—and read—in entirely different ways.

Gerald Kerrigan's story reflected the failures of "deinstitutionalization" and demonstrated why the application of civil libertarian concepts to the involuntary civil commitment process was a failure. Elizabeth Ashley's story reflected the fortitude of a talented and gritty woman who had the courage to "come out" and share her battle with mental illness. No one discussed Gerald Kerrigan's autonomy values (or the quality of life in the institution from which he was released). No one (in discussing Ashley's case) characterized George Peppard's condo as a "deinstitutionalization facility" or labeled starring in a Broadway smash as participation in an "aftercare program."

Ashley was beautiful, talented and wealthy. And thus she was different. Kerrigan was "different," but in a troubling way. But the connection between Kerrigan and Ashley was never made.<sup>23</sup>

Again, at about the same time, I read a short article by Morton

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23. I discuss Kerrigan and Ashley's cases in Michael L. Perlin, *The Deinstitutionalization Myths: Old Wine in New Bottles*, in CONFERENCE REPORT: THE SECOND NATIONAL CONFERENCE ON THE LEGAL RIGHTS OF THE MENTALLY DISABLED 20 (Karl Menninger & Heather Watts eds. 1979).

Birnbaum<sup>24</sup> in which he discussed what he called “sanism,” how “sanism” was like racism, sexism and other stereotyping “isms,” and, mostly, how “sanism”—part of our social “pathology of oppression”<sup>25</sup>—controlled mental disability law policy.

I remember, over twenty years ago, the moment when I read Birnbaum’s essay, and how, immediately, something simply “clicked.” At that point in time, I had already spent several years providing individual and class action representation to institutionalized persons with mental disabilities, and I had grown accustomed to asides, snickers, and comments from judges, to “eyerolling” from my adversaries, to running monologue commentaries by bailiffs and court clerks (all about my clients’ “oddness”). But I had never before consciously identified what Birnbaum had been writing about: that this was all sanist behavior on the part of the other participants in the mental disability law system.

From that moment on, I began to think about mental disability law in different ways. I had already tried to come to grips with its pretexts (the charade of the Vroom Building hearings in the era before *Jackson v. Indiana*). But this explanation began to flesh out the picture in ways that, finally, enabled me to make sense of what was going on around me.

I became a full-time professor in 1984, and for the last fifteen years have taught a variety of mental disability law courses. I also speak about a full range of mental disability law topics at conferences and workshops on both a national and local basis. My audience is sometimes lawyers, sometimes judges, sometimes psychiatrists and psychologists, sometimes hospital staff, sometimes ex-patients and/or their families. No matter: I cannot escape confronting the sanist and pretextual bases of mental disability law.

Several years ago, I wrote a mental disability law treatise that I continue to update yearly. As part of these updates, I have read virtually every reported case involving mental disability law that has been published in the past decade. Again, I cannot escape the sanist and pretextual bases of mental disability law.

I write frequently for a variety of professional publications—for ones

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24. Birnbaum, *Comments*, *supra* note 15. Dr. Birnbaum is universally regarded as having first developed and articulated the constitutional basis of the right to treatment doctrine for institutionalized mental patients. See Morton Birnbaum, *The Right to Treatment*, 46 A.B.A. J. 499 (1960), discussed in 2 PERLIN, *supra* note 22, § 3A-2.1 at 8-12 (2d ed. forthcoming 1999).

25. Birnbaum, *Comments*, *supra* note 15, at 107 (quoting civil rights leader Florynce Kennedy).



read mostly by lawyers, for others read mostly by mental health professionals, and for so-called “crossover” journals (read in equal measure by both). And for the past several years, I have honed in my focus on the sanist and pretextual bases of mental disability law. Sadly, I now believe that sanism and pretextuality are the theoretical boundaries of an overarching explanation of the intellectual and moral corruption of mental disability law—theories that apply whether the subject is an involuntary civil commitment case,<sup>26</sup> a right to refuse treatment hearing,<sup>27</sup> an interpretation of the Americans with Disabilities Act’s ban on discrimination against persons with mental disabilities,<sup>28</sup> the competence of a criminal defendant to waive counsel,<sup>29</sup> or the aftermath of a “successful” insanity defense.<sup>30</sup> And again that theme, that theory, is the reality of the sanist and pretextual bases of mental disability law, a reality that is given depth, substance, and texture by the papers that are being presented at this conference.

### III. THE PRINCIPLES

*“Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated.”*<sup>31</sup>

So wrote Justice Harry Blackmun a quarter of a century ago in *Jackson v. Indiana*, the opinion that—for the first time at the U.S. Supreme Court level—applied due process principles to a case involving a litigant with a mental disability.<sup>32</sup> *Jackson*, a case nominally about the constitutional limitations on indefinite involuntary commitment following a finding of incompetency to stand trial, was truly revolutionary. It opened the courthouse doors to persons with mental

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26. Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625 (1993).

27. Michael L. Perlin, *Decoding Right to Refuse Treatment Law*, 16 INT’L J.L. & PSYCHIATRY 151 (1993).

28. Michael L. Perlin, “*Make Promises by the Hour*”: *Sex, Drugs, the ADA, and Psychiatric Hospitalization*, 46 DEPAUL L. REV. 947 (1997).

29. Michael L. Perlin, “*Dignity Was the First to Leave*”: *Godinez v. Moran, Colin Ferguson, and the Trial of Mentally Disabled Criminal Defendants*, 14 BEHAV. SCI. & L. 61 (1996).

30. PERLIN, *supra* note 16.

31. *Jackson v. Indiana*, 406 U.S. 715, 737 (1972) (footnotes omitted) (emphasis added).

32. *Id.* at 727-31. See generally 1 PERLIN, *supra* note 22, § 2A-4.4, at 122-25 (2d ed. 1998).

disabilities. For the first time, the Supreme Court acknowledged that the “nature and duration” of a court-ordered commitment was constitutionally bounded, and that issues involving personal freedom and liberty of mentally disabled persons subject to institutionalization were appropriate ones for court determination.<sup>33</sup>

The principles established in *Jackson* (and in *Lessard v. Schmidt*,<sup>34</sup> a contemporary federal district court case challenging the constitutionality of a state commitment code) quickly “caught hold,” and the next several years saw an explosion of litigation questioning all aspects of the processes by which persons with mental disabilities were committed to psychiatric institutions, kept and treated in such institutions, and released from institutional confinement. A cadre of public interest lawyers listened to Justice Blackmun’s observation in *Jackson*, and a dizzying proliferation of cases followed, eventually leading to the articulation of a constitutional right to treatment, the more-controversial right to refuse treatment (mostly in cases dealing with the unwanted imposition of psychotropic or antipsychotic medications), and a series of cases sketching out the substantive and procedural constitutional limitations on the involuntary civil commitment power.<sup>35</sup>

Trial judges hearing individual cases were not necessarily enthusiastic about these developments. Decisions such as *Jackson*, *Lessard*, and *O’Connor v. Donaldson*<sup>36</sup> (setting out a constitutional right to liberty) were never popular with trial judges or with court administrators for a variety of instrumental, functional, normative, and philosophical reasons. Nonetheless, the Supreme Court, the highest courts in state systems,<sup>37</sup> and certain other federal courts,<sup>38</sup> appeared to be taking seriously—for the first time—“how they [institutionalized mental

33. *Jackson*, 406 U.S. at 738.

34. 349 F. Supp. 1078 (E.D. Wis. 1972) (subsequent citations omitted). See generally 1 PERLIN, *supra* note 22, §§ 2A-4.4a, 2A-4.4c, at 126-32, 139-42 (2d ed. 1998).

35. See generally 1 PERLIN, *supra* note 22, chs. 2A, 2C-2D (2d ed. 1998); MICHAEL L. PERLIN, LAW AND MENTAL DISABILITY, ch. 1 (1994).

36. 422 U.S. 563 (1975).

37. E.g., *State v. Krol*, 344 A.2d 289 (N.J. 1975) (application of procedural due process to retention hearings following insanity acquittals); *Rivers v. Katz*, 495 N.E.2d 337 (N.Y. 1986) (state constitutional right to refuse treatment).

38. E.g., *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974) (prior and subsequent citations omitted) (constitutional right to treatment); *Rennie v. Klein*, 720 F.2d 266 (3d Cir. 1983) (prior citations omitted) (constitutional right to refuse treatment).

patients] are treated as human beings.”<sup>39</sup>

At the same time that these cases were unfolding, the relationship between mental disability and criminal law was undergoing a rapid recalibration, but under very different circumstances, and in very different ways. John Hinckley’s attempted assassination of Ronald Reagan dramatically ended years of quiet and thoughtful study of the future of the insanity defense, and led to strident political posturing, eventually resulting in the passage of the Insanity Defense Reform Act.<sup>40</sup> That legislation returned the federal courts to a more restrictive version of the English *M’Naghten* standard (the so-called “right from wrong” test), a formulation that had been seen as outmoded from the time of its first articulation in 1843.<sup>41</sup> Hinckley also placed the entire question of how mentally disabled defendants are dealt with in the criminal trial process under the legislative and judicial microscope.<sup>42</sup> Like the moth to the flame, the U.S. Supreme Court became fascinated—perhaps preoccupied—with the full range of questions involving this population, deciding, in the past fifteen years, a stream of cases dealing with such questions as competency to stand trial, competency to waive counsel and/or plead guilty, the relationship between mental disability and the death penalty, the impact of mental disability on confessions law, the application of the right to refuse treatment in the prison and pretrial setting, and the constitutional boundaries of the commitment and retention procedures that follow a successful insanity defense. And this stream shows no sign of abating.<sup>43</sup>

Finally, Congress was no longer dormant. After adopting a flurry of mostly-hortatory laws,<sup>44</sup> it enacted the Americans with Disabilities Act,<sup>45</sup> legislation characterized—perhaps a tad overambitiously—as “the

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39. *Falter v. Veterans Administration*, 502 F. Supp. 1178, 1185 (D.N.J. 1980).

40. See generally PERLIN, *supra* note 16.

41. PERLIN, *supra* note 22, § 15.04, at 286-94.

42. *Id.* §§ 15.35-15.40, at 389-404.

43. See generally Michael L. Perlin, “No Direction Home:” *The Law and Criminal Defendants with Mental Disabilities*, 20 MENTAL & PHYSICAL DISABILITY L. REP. 605 (1996).

44. See, e.g., Mental Health Systems Act (MHSA), 42 U.S.C. § 9501 (1994); Developmentally Disabled Bill of Rights Act (DD Bill of Rights Act), 42 U.S.C. § 6000 (1994 & Supp. 1996); Protection and Advocacy for the Mentally Ill Act (PAMI), 42 U.S.C. §§ 10801-10851. Case law construing the substantive portions of both the MHSA and the PAMI has been paltry. See, e.g., PERLIN, *supra* note 24, § 6.44, at 136 (1998 Cum. Supp.). The Supreme Court has held that sections of the DD Bill of Rights Act do not create substantive, privately enforceable rights. See *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 8 (1981). I discuss the dilemma raised by hortatory language in disability rights statutes in Perlin, *supra* note 28.

45. 42 U.S.C. §§ 12101-12213.

'Emancipation Proclamation for those with disabilities.'"<sup>46</sup> The ADA, which, on its face, bars disability-based discrimination in virtually every aspect of private and public life,<sup>47</sup> appears to offer great promise to persons with mental disabilities. However, the case law has been spotty,<sup>48</sup> and it is not at all clear that this promise will be fulfilled.<sup>49</sup> The Supreme Court's recent decision in *Olmstead v. L.C.*,<sup>50</sup> finding that "unjustified [institutional] isolation . . . is properly regarded as discrimination based on disability,"<sup>51</sup> and that patients had a qualified right to community-based treatment,<sup>52</sup> "implicitly acknowledges the corrosive impact of sanist behavior."<sup>53</sup> It is still, however, far too soon to comfortably speculate about the case's ultimate impact on the developments I have been discussing here, especially given the majority's willingness to defer to the judgments and assessments of institutional professionals.<sup>54</sup>

It is impossible, however, to understand mental disability law simply by reading the Supreme Court's cases, studying the courts' holdings and analyzing the doctrine, or by taking federal legislation at face value. For these cases—and other "great" cases that are subject to intense scrutiny and academic deconstruction and practitioner commentary<sup>55</sup> and

46. Kimberly A. Ackourey, Comment, *Insuring Americans with Disabilities: How Far Can Congress Go To Protect Traditional Practices?* 40 EMORY L.J. 1183, 1183 n.2 (1991) (quoting statement by bill's sponsors).

47. The accompanying Congressional report is clear: the purpose of the ADA is to "provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life." HOUSE COMM. ON THE JUDICIARY, AMERICANS WITH DISABILITIES ACT OF 1990, H.R. REP. NO. 485 (III), 101st Cong., 2d Sess., at 23 (1990).

48. See generally 2 PERLIN, *supra* note 22, § 6.44A, at 176-90 (1998 Cum. Supp.), and *id.* at nn.473.43-473.43z23 (citing cases).

49. Perlin, *supra* note 28, at 955-57, 984-85.

50. 119 S. Ct. 2176 (1999).

51. *Id.* at 2185.

52. *Id.* at 2185-88.

53. PERLIN, *supra* note 1, ch. 8.

54. *Olmstead*, 119 S. Ct. at 2188. See generally *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982). (establishing "substantial professional judgment" test in analyzing institutional liability in patients' rights cases).

55. See, e.g., *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974) (prior and subsequent citations omitted) (constitutional right to treatment). For a sampling of the literature on *Wyatt*, see, e.g., 2 PERLIN, *supra* note 22, § 3A-3.2c, at 54-56 (2d ed. forthcoming 1999).

hortatory federal statutes<sup>56</sup>—tell us virtually nothing about the related questions that are, in many ways, of far greater importance: *how* is mental disability law applied in “unknown” cases, and *why* is it applied that way?

In the more than a quarter of a century that I have worked, taught, thought and written about this area, two overarching issues dominate and overwhelm the subject matter: mental disability law is *sanist*,<sup>57</sup> and mental disability law is *pretextual*.<sup>58</sup> I am further convinced, beyond *any* doubt, that it is impossible to truly understand anything about mental disability law—the doctrine, the debate, the discourse, the decisions, the dissents—without first coming to grips with this reality. And I am equally convinced that the apparent contradictions, internal inconsistencies, and cognitive dissonances of mental disability law cannot be understood without understanding the power and pervasiveness of these concepts.

First, consider sanism and the judicial process. Judges are not immune from sanism. “[E]mbedded in the cultural presuppositions that engulf us all,”<sup>59</sup> judges express discomfort with social science<sup>60</sup> (or any other system that may appear to challenge law’s hegemony over society) and skepticism about new thinking; this discomfort and skepticism allows them to take deeper refuge in heuristic thinking and flawed, non-reflective “ordinary common sense,” both of which continue the myths and stereotypes of sanism.<sup>61</sup>

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56. Perlin, *supra* note 28, at 958-60.

57. See, e.g., Perlin, *supra* note 14; Michael L. Perlin & Deborah A. Dorfman, *Sanism, Social Science, and the Development of Mental Disability Law Jurisprudence*, 11 BEHAV. SCI. & L. 47 (1993); Michael L. Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of “Mitigating” Mental Disability Evidence*, 8 NOTRE DAME J.L. ETHICS & PUB. POL’Y 239 (1994) [hereinafter Perlin, *Sanist Lives*]; Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?* 8 J.L. & HEALTH 15 (1993-94).

58. See, e.g., Perlin, *supra* note 17; Perlin, *supra* note 26; Michael L. Perlin, *Therapeutic Jurisprudence: Understanding the Sanist and Pretextual Bases of Mental Disability Law*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 369 (1994).

59. Anthony D’Amato, *Harmful Speech and the Culture of Indeterminacy*, 32 WM. & MARY L. REV. 329, 332 (1991).

60. The discomfort that judges often feel in having to decide mental disability law cases is often palpable. See, e.g., Michael L. Perlin, *Are Courts Competent to Decide Competency Questions? Stripping the Facade From United States v. Charters*, 38 U. KAN. L. REV. 957, 991 (1990) (Court’s characterization in *Charters*, 863 F.2d 302, 310 (4th Cir. 1988) (en banc), *cert. denied*, 494 U.S. 1016 (1990), of judicial involvement in right to refuse antipsychotic medication cases as “‘already perilous’ . . . reflects the court’s almost palpable discomfort in having to confront the questions before it.”).

61. Michael L. Perlin, *Psychodynamics and the Insanity Defense: “Ordinary Common Sense” and Heuristic Reasoning*, 69 NEB. L. REV. 3 (1990) [hereinafter Perlin,

Judges reflect and project the conventional morality of the community, and judicial decisions in all areas of civil and criminal mental disability law continue to reflect and perpetuate sanist stereotypes.<sup>62</sup> Their language demonstrates bias against mentally disabled individuals<sup>63</sup> and contempt for the mental health professions.<sup>64</sup> Courts often appear *impatient* with mentally disabled litigants, ascribing their problems in the legal process to weak character or poor resolve. Thus, a popular sanist myth is that “[m]entally disabled individuals simply don’t try hard enough. They give in too easily to their basest instincts, and do not exercise appropriate self-restraint.”<sup>65</sup> We assume that “[m]entally ill individuals are presumptively incompetent to participate in ‘normal’ activities [and] to make autonomous decisions about their lives (especially in the area of medical care) . . . .”<sup>66</sup>

Sanist thinking allows judges to avoid difficult choices in mental

*Psychodynamics*]; Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 618-30 (1989-90) [hereinafter Perlin, *Myths*].

62. See Perlin, *supra* note 14, at 400-04.

63. See *Corn v. Zant*, 708 F.2d 549, 569 (11th Cir. 1983), *reh’g. denied*, 714 F.2d 159 (11th Cir. 1983), *cert. denied*, 467 U.S. 1220 (1984) (defendant referred to as a “lunatic”); *Sinclair v. Wainwright*, 814 F.2d 1516, 1522 (11th Cir., 1987) (quoting *Shuler v. Wainwright*, 491 F.2d 1213, 1223 (5th Cir. 1974) (using “lunatic”)); *Brown v. People*, 134 N.E.2d 760, 762 (Ill. 1956) (judge asked defendant, “You are not crazy at this time, are you?”); *Pyle v. Boles*, 250 F. Supp. 285, 289 n.3 (N.D. W. Va. 1966) (trial judge accused habeas petitioner of “being crazy”). *But cf.* *State v. Penner*, 772 P.2d 819 (Kan. 1989) (unpublished disposition), at \*3 (witnesses admonished *not* to refer to defendant as “crazy” or “nuts”).

64. See *Commonwealth v. Musolino*, 467 A.2d 605, 614 (Pa. Super. Ct. 1983) (reversible error for trial judge to refer to expert witnesses as “headshrinkers”). Compare *State v. Percy*, 507 A.2d 955, 957 n.1 (Vt. 1986), *appeal after remand*, 595 A.2d 248 (Vt. 1990), *cert. denied*, 502 U.S. 927 (1991) (reversing a conviction where prosecutor, in closing argument, referred to expert testimony as “psycho-babble”), with *Commonwealth v. Cosme*, 575 N.E.2d 726, 731 (Mass. 1991) (not error where prosecutor referred to defendant’s expert witnesses as “a little head specialist” and a “wizard”). See generally Douglas Mossman & Marshall Kapp, “Courtroom Whores”?—or Why Do Attorneys Call Us? *Findings from a Survey on Attorneys’ Use of Mental Health Experts*, 26 J. AM. ACAD. PSYCHIATRY & L. 27 (1998).

65. Perlin, *supra* note 14, at 396; see, e.g., J.M. Balkin, *The Rhetoric of Responsibility*, 76 VA. L. REV. 197, 238 (1990) (Hinckley prosecutor suggested to jurors, “if Hinckley had emotional problems, they were largely his own fault”); see also *State v. Duckworth*, 496 So. 2d 624, 635 (La. App. 1986) (juror who felt defendant would be responsible for actions as long as he “wanted to do them” not excused for cause) (no error).

66. Perlin, *supra* note 14, at 394.

disability law cases; their reliance on non-reflective, self-referential, alleged “ordinary common sense,” contributes further to the pretextuality that underlies much of this area of the law. Such reliance is likely to make it even less probable that judicial decisions<sup>67</sup> in right to refuse treatment cases reflect the sort of “dignity” values essential for a fair hearing.<sup>68</sup> Some judges simply “rubber stamp” hospital treatment recommendations in right to refuse cases.<sup>69</sup> Other judges are often punitive in cases involving mentally disabled litigants,<sup>70</sup> and their decisions frequently reflect “textbook” sanist attitudes.<sup>71</sup>

At its base, sanism is irrational. Any investigation of the roots or sources of mental disability jurisprudence must factor in society’s

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67. Where the fact-finder is a nonjudicial officer, the problems discussed here are probably accentuated further. See Donald N. Bersoff, *Judicial Deference to Nonlegal Decisionmakers: Imposing Simplistic Solutions on Problems of Cognitive Complexity in Mental Disability Law*, 46 SMU L. REV. 329, 331-32 (1992) (psychiatrists-as-factfinders more likely to take paternalistic positions in right to refuse cases).

68. See generally Perlin, *supra* note 29. Courts and commentators have regularly discussed “dignity” in a fair trial context both in cases involving mentally disabled criminal defendants and in other settings. See, e.g., *Marquez v. Collins*, 11 F.3d 1241, 1244 (5th Cir. 1994) (“Solemnity . . . and respect for individuals are components of a fair trial”); *Heffernan v. Norris*, 48 F.3d 331, 336 (8th Cir. 1995) (Bright, J., dissenting) (“the forced ingestion of mind-altering drugs not only jeopardizes an accused’s rights to a fair trial, it also tears away another layer of individual dignity . . .”); Keith D. Nicholson, *Would You Like Some More Salt in That Wound? Post-Sentence Victim Allocation in Texas*, 26 ST. MARY’S L.J. 1103, 1128 (1995) (for trial to be fair, “it must be conducted in an atmosphere of respect, order, decorum and dignity befitting its importance both to the prosecution and the defense” (quoting *In re Cohen*, 370 F. Supp. 1166, 1174 (S.D.N.Y. 1973))); see also Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 444-45 (1992) (significance of dignity values in involuntary civil commitment hearings); Deborah A. Dorfman, *Effectively Implementing Title I of the Americans With Disabilities Act for Mentally Disabled Persons: A Therapeutic Jurisprudence Analysis*, 8 J.L. & HEALTH 105, 116 (1993-94) (same).

69. See Bruce J. Winick, *Competency to Consent to Treatment: The Difference Between Assent and Objection*, 28 HOUS. L. REV. 15, 59 (1991), and *id.* at n.148 (citing studies).

70. Cf. Perlin, *supra* note 14, at 401 n.203:

None is perhaps as chilling as the following story: Sometime after the trial court’s decision in *Rennie* . . . , I had occasion to speak to a state court trial judge about the *Rennie* case. He asked me, “Michael, do you know what I would have done had you brought *Rennie* before me?” (The *Rennie* case was litigated by counsel in the N.J. Division of Mental Health Advocacy; I was director of the Division at that time). I replied, “No,” and he then answered, “I’d’ve taken the son-of-a-bitch behind the courthouse and had him shot.” *Id.* (citation omitted).

71. See, e.g., Perlin, *supra* note 27, at 174 (discussing the sanist nature of Justice Thomas’s dissent in *Riggins v. Nevada*, 504 U.S. 127 (1992)); Perlin & Dorfman, *supra* note 57, at 58-61 (same).

irrational mechanisms that govern our dealings with mentally disabled individuals.<sup>72</sup> The entire legal system makes assumptions about persons with mental disabilities—who they are, how they got that way, what makes them different, what there is about them that lets us treat them differently, and whether their conditions are immutable.<sup>73</sup> These assumptions reflect our fears and apprehensions about mental disability, persons with mental disability, and the possibility that *we* may become mentally disabled.<sup>74</sup> The most important question of all—why do we feel the way we do about these people?—is rarely asked.<sup>75</sup>

These conflicts compel an inquiry about the extent to which social science data does (or should) inform the development of mental disability law jurisprudence. After all, if we agree that mentally disabled individuals can be treated differently (because of their mental disability, or because of behavioral characteristics that flow from that disability),<sup>76</sup> it would appear logical that this difference in legal treatment is—or should be—founded on some sort of empirical data base that confirms both the *existence* and the *causal role* of such difference. Yet, we tend to ignore, subordinate, or trivialize behavioral research in this area, especially when acknowledging that such research would be cognitively dissonant with our intuitive (albeit empirically flawed) views.<sup>77</sup> The

72. See generally Perlin, *Myths*, *supra* note 61.

73. See generally MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990); SANDER GILMAN, *DIFFERENCE AND PATHOLOGY: STEREOTYPES OF SEXUALITY, RACE, AND MADNESS* (1985).

74. See, e.g., Joseph Goldstein & Jay Katz, *Abolish the "Insanity Defense"—Why Not?* 72 *YALE L.J.* 853, 868-69 (1963); Perlin, *supra* note 15, at 108 (on society's fears of mentally disabled persons), and *id.* at 93 n.174 (“[W]hile race and sex are immutable, we all *can* become mentally ill, homeless, or both. Perhaps this illuminates the level of virulence we experience here.”). On the way that public fears about the purported link between mental illness and dangerousness “drive the formal laws and policies” governing mental disability jurisprudence, see John Monahan, *Mental Disorder and Violent Behavior: Perceptions and Evidence*, 47 *AM. PSYCHOLOGIST* 511, 511 (1992).

75. See PERLIN, *supra* note 16, at 6-7 (asking this question). Cf. Carmel Rogers, *Proceedings Under the Mental Health Act 1992: The Legalisation of Psychiatry*, 1994 *N.Z. L.J.* 404, 408 (“Because the preserve of psychiatry is populated by ‘the mad’ and ‘the loonies,’ we do not really want to look at it too closely—it is too frightening and maybe contaminating.”).

76. On the Supreme Court’s confusion over the meaning of “mental disorder,” see I PERLIN, *supra* note 22, § 2A-3.3, at 75-92 (2d ed. 1998) (discussing *Kansas v. Hendricks*, 521 U.S. 346 (1997) (upholding Kansas’ Sexually Violent Predator Act)); Michael L. Perlin, “*There’s No Success like Failure/and Failure’s No Success at All*”: *Exposing the Pretextuality of Kansas v. Hendricks*, 92 *NW. U. L. REV.* 1247 (1998).

77. See generally J. Alexander Tanford, *The Limits of a Scientific Jurisprudence*:



steady stream of new, comprehensive research does not promise any change in society's attitudes.<sup>78</sup>

Now, what about pretextuality? The pretexts of the forensic mental health system are reflected both in the testimony of forensic experts and in the decisions of legislators and fact-finders.<sup>79</sup> Experts frequently testify in accordance with their own self-referential concepts of "morality"<sup>80</sup> and openly subvert statutory and caselaw criteria that impose rigorous behavioral standards as predicates for commitment<sup>81</sup> or that articulate functional standards as prerequisites for an incompetency to stand trial finding.<sup>82</sup> Often this testimony is further warped by a heuristic bias. Expert witnesses—like the rest of us—succumb to the seductive allure of simplifying cognitive devices in their thinking, and employ such heuristic gambits as the vividness effect or attribution theory in their testimony.<sup>83</sup>

This testimony is then weighed and evaluated by frequently-sanist fact-finders.<sup>84</sup> Judges and jurors, both consciously and unconsciously, often rely on reductionist, prejudice-driven stereotypes in their decisionmaking, thus subordinating statutory and caselaw standards as well as the legitimate interests of the mentally disabled persons who are the subject of the litigation. Judges' predispositions to employ the same sorts of heuristics as do expert witnesses further contaminate the process.<sup>85</sup>

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*The Supreme Court and Psychology*, 66 IND. L.J. 137 (1990).

78. For the most comprehensive research on predictions of violence, for example, see John Monahan, *The Scientific Status of Research on Clinical and Actuarial Predictions of Violence*, in MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY, §§ 7-2.0-7-2.4, at 300 (David L. Faigman et al. eds., 1997).

79. See, e.g., *Streicher v. Prescott*, 663 F. Supp. 335, 343 (D.D.C. 1987) (Although District of Columbia Code contained provision that patient could invoke to seek periodic review of commitment or independent psychiatric evaluation, in 22 years since passage of relevant statute, not a single patient exercised rights to statutory review.). The significance of *Streicher* is discussed in Arlene S. Kanter, *Abandoned but Not Forgotten: The Illegal Confinement of Elderly People in State Psychiatric Institutions*, 19 N.Y.U. REV. L. & SOC. CHANGE 273, 304-06 (1991-92).

80. See, e.g., Cassia Spohn & Julia Horney, "The Law's the Law, But Fair Is Fair": Rape Shield Laws and Officials' Assessments of Sexual History Evidence, 29 CRIMINOL. 137, 139 (1991) "[A legal] reform that contradicts deeply held beliefs may result either in open defiance of the law or in a surreptitious attempt to modify the law.)"

81. See, e.g., Perlin, *supra* note 17, at 135-36.

82. See, e.g., *People v. Doan*, 366 N.W.2d 593, 598 (Mich. Ct. App. 1985), *appeal denied*, (1985) (expert testified that defendant was "out in left field" and went "bananas").

83. See generally Perlin, *Psychodynamics*, *supra* note 61.

84. See generally Perlin, *supra* note 14; Perlin & Dorfman, *supra* note 57.

85. See generally Perlin, *supra* note 26; Perlin, *supra* note 60.

I believe that these two concepts have controlled—and *continue* to control—modern mental disability law. Just as importantly (perhaps, *more* importantly), they continue to exert this control invisibly. This invisibility means that the most important aspects of mental disability law—not just the law “on the books,” but, more importantly, the law in action and practice—remains hidden from the public discussions about mental disability law.

We must also ponder another reality: the fact that, in many ways, mental disability law is a giant *trompe d’oeil* illusion. From one perspective it is a topic of great interest to the Supreme Court and other appellate courts, and its “cutting-edge” issues sound very much like the “cutting-edge” issues of other areas of constitutional law: allocations of burdens of proof,<sup>86</sup> scope of the liberty clause,<sup>87</sup> and categorizations for “heightened scrutiny” purposes,<sup>88</sup> to name a few.

From another perspective, however, it is a topic dealt with on a daily basis by trial courts across the country in a series of unknown cases involving unknown litigants, where justice is often administered in assembly-line fashion. Sophisticated legal arguments are rarely made, expert witnesses are infrequently called to testify, and lawyers all too often provide barely-perfunctory representation.<sup>89</sup> From this perspective, mental disability law is often invisible, both to the general public and to the academy.

And there is more. Although Supreme Court doctrine and “high theory” give us needed building blocks, they do not—cannot—tell us what *really* happens in involuntary civil commitment cases, in

86. See, e.g., *Medina v. California*, 505 U.S. 437 (1992) (imposing burden of proof by preponderance of evidence on defendant claiming incompetence to stand trial not violative of due process clause); *Cooper v. Oklahoma*, 517 U.S. 348 (1996) (imposing burden of proof by clear and convincing evidence on defendant claiming incompetence to stand trial violative of due process clause).

87. See, e.g., *Washington v. Harper*, 494 U.S. 210 (1990) (right of prisoners to refuse antipsychotic medication).

88. See, e.g., *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (mental retardation neither suspect class nor quasi-suspect class for equal protection purposes); *Heller v. Doe*, 509 U.S. 312 (1993) (no equal protection violation where state statute allows commitment of persons with mental retardation on a lesser standard of proof than persons with mental illness).

89. See, e.g., JAMES A. HOLSTEIN, *COURT-ORDERED INSANITY: INTERPRETIVE PRACTICE AND INVOLUNTARY COMMITMENT* (1993); James A. Holstein, *Court Ordered Incompetence: Conversational Organization in Involuntary Commitment Hearings*, 35 *SOC. PROBS.* 459 (1988).

competency to stand trial determinations, in recommitment hearings for insanity acquittees, or in individual challenges to the imposition of unwanted antipsychotic medication. For us to truly understand what mental disability law is all about, it is vital that we think about these questions.

There is a wide gap between law-on-the-books and law-in-action. There is probably such a gap in every area of the law. But here, the omnipresence of sanism and pretextuality make the gap even more problematic.

Mental disability law suffers from both over-attention and under-attention. A handful of sensational criminal cases—Hinckley, Colin Ferguson, John DuPont, the Unabomber—are, by nature of the facts of the underlying crime or identity of the victim, subject to intense analysis and scrutiny. The mental disability law issues raised in these cases—the insanity defense, competence to stand trial, competence to waive counsel—are reported on as if they typify (1) *other* cases involving the same issue, and (2) cases involving *other* aspects of mental disability law.<sup>90</sup> Civil cases are rarely the focus of so much interest, but court decisions in a handful of cases involving potential professional liability—*Tarasoff v. Board of Regents*<sup>91</sup> is, by far, the most famous—are disseminated widely to professional audiences, and their holdings (and significance for practitioners) are regularly over-exaggerated and distorted.<sup>92</sup>

On the other hand, the overwhelming number of cases involving mental disability law issues are “litigated” (I use quotation marks here intentionally and provocatively) in pitch darkness. Involuntary civil commitment cases are routinely disposed of in a matter of minutes in closed courtrooms.<sup>93</sup> Right to refuse treatment hearings often honor the

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90. See generally PERLIN, *supra* note 16; Michael L. Perlin, *Myths, Realities, and the Political World: The Anthropology of Insanity Defense Attitudes*, 24 BULL. AM. ACAD. PSYCHIATRY & L. 5 (1996) [hereinafter Perlin, *Political World*]; Michael L. Perlin, “*The Borderline Which Separated You From Me*”: *The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375 (1997) [hereinafter Perlin, *The Borderline*].

91. 551 P.2d 334 (Cal. 1976).

92. For example, more than three-quarters of the clinicians surveyed reported that the issuance of warnings was the sole acceptable means of protecting potential victims and avoiding *Tarasoff* liability. See Daniel J. Givelber et al., *Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action*, 1984 WIS. L. REV. 443, 465 (1984) (discussed in Michael L. Perlin, *Tarasoff and the Dilemma of the Dangerous Patient: New Directions for the 1990's*, 16 LAW & PSYCHOL. REV. 29, 54 (1992)).

93. See, e.g., HOLSTEIN, *supra* note 89; Holstein, *supra* note 89. The Supreme Court previously noted that the average time for involuntary civil commitment hearings was 9.2 minutes. See *Parham v. J.R.*, 442 U.S. 584, 609 n.17 (1979).

letter and spirit of decisions such as *Rivers v. Katz*<sup>94</sup> with little more than lip service.<sup>95</sup> Nearly ninety percent of all insanity defense cases are “walkthroughs” (i.e., stipulated on the papers).<sup>96</sup> The complex textures of mental disability law are rarely raised in the garden variety tort case brought by a mentally disabled plaintiff.<sup>97</sup>

Often, constitutional doctrines articulated by the Supreme Court in mental disability law cases are ignored. The Supreme Court has held—on more than one occasion—that the right to refuse treatment is protected, at least in part, by the liberty clause of the Fourteenth Amendment.<sup>98</sup> Yet, in case after case, a patient’s apparent desire to enforce or vindicate this constitutional right is relied upon as evidence that supports the patient’s involuntary civil commitment.<sup>99</sup> The Supreme Court has held—on several occasions—that the possibility of side effects (especially irreversible neurological side effects such as tardive dyskinesia) is a factor to be considered in determining whether the Fourteenth Amendment has been violated in an individual case.<sup>100</sup> Yet, an examination of the universe of reported individual right to refuse treatment cases shows that side effects are rarely, if ever, mentioned.<sup>101</sup> The Supreme Court has stated, albeit in *dicta*, that “many psychiatric

94. 495 N.E.2d 337 (N.Y. 1986) (state constitutional right to refuse treatment).

95. See, e.g., cases discussed in 2 PERLIN, *supra* note 24, § 3B-7.2e, at 290-92 (2d ed. forthcoming 1999).

96. On the average, there is examiner agreement in 88% of all insanity cases. Jeffrey L. Rogers et al., *Insanity Defense: Contested or Conceded?* 141 AM. J. PSYCHIATRY 885, 885 (1984); Kenneth K. Fukunaga et al., *Insanity Plea: Interexaminer Agreement in Concordance of Psychiatric Opinion and Court Verdict*, 5 LAW & HUM. BEHAV. 325, 326 (1981). See Perlin, *Political World*, *supra* note 90, at 12.

97. For exceptions, see, for example, *Moore v. Wyoming Med. Ctr.*, 825 F. Supp. 1531 (D. Wyo. 1993) (improper involuntary civil commitment case); *Fair Oaks Hosp. v. Pocrass*, 628 A.2d 829 (N.J. Super. Ct. Law Div. 1993) (same).

98. See, e.g., *Mills v. Rogers*, 457 U.S. 291, 299 (1982); *Washington v. Harper*, 494 U.S. 210, 221 (1990).

99. See, e.g., Michael L. Perlin & Deborah A. Dorfman, *Is It More Than “Dodging Lions and Wastin’ Time”? Adequacy of Counsel, Questions of Competence, and the Judicial Process in Individual Right to Refuse Treatment Cases*, 2 PSYCHOL. PUB. POL’Y & L. 114, 133-34 (1996), and sources cited *id.* at n.181; Michael L. Perlin, *Reading the Supreme Court’s Tea Leaves: Predicting Judicial Behavior in Civil and Criminal Right to Refuse Treatment Cases*, 12 AM. J. FORENSIC PSYCHIATRY 37, 52-59 (1991).

100. *Riggins v. Nevada*, 504 U.S. 127, 133-35 (1992); *Harper*, 494 U.S. at 229-30.

101. See, e.g., 2 PERLIN, *supra* note 22, § 3B-7.2c, at 278-86, § 3B-7.2e, at 290-92 (2d ed. forthcoming 1999).

predictions of dangerousness *are* inaccurate.”<sup>102</sup> Yet, such predictions are offered—frequently in minimalist ways that are subject to no meaningful cross-examination or challenge—daily in civil commitment courts across the country.<sup>103</sup>

State legislatures craft elaborate commitment codes, often mandating the need for an “overt act” as a predicate to commitment.<sup>104</sup> Yet, the expression of wishes, desires or the recitation of fantasies has been relied upon as a basis for commitment in individual cases.<sup>105</sup> The right to counsel is provided for in virtually every state commitment statute.<sup>106</sup> That right is often honored only in the breach; lawyers representing patients—and, just as importantly, those representing mentally disabled criminal defendants—often reflect Judge Bazelon’s worst nightmare of “walking violations of the Sixth Amendment.”<sup>107</sup>

State legislatures pass broad-based “Patients’ Bills of Rights,” purporting to provide inpatients with the same bundle of civil and constitutional rights mandated in a series of federal class action/law reform cases litigated in the early 1970s.<sup>108</sup> Yet, there has been virtually

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102. *Heller v. Doe*, 509 U.S. 312, 323 (1993) (emphasis added). Remarkably, this language has remained virtually unnoticed to this day, the only reference in the literature being a law review article written by Joëlle Anne Moreno, “*Whoever Fights Monsters Should See To It That in the Process She Does Not Become a Monster*”: *Hunting The Sexual Predator With Silver Bullets—Federal Rules of Evidence 413-415—and a Stake Through the Heart—Kansas v. Hendricks*, 49 FLA. L. REV. 505 (1997):

The inability of psychiatric professionals to predict violence has been specifically recognized by the Supreme Court. *See, e.g., Heller v. Doe*, 509 U.S. 312, 323 (1993) (There are “difficulties inherent in diagnosis of mental illness. . . . It is thus no surprise that many psychiatric predictions of future violent behavior by the mentally ill are inaccurate.”).

*Id.* at 549-50 n.252.

103. *See, e.g.,* 1 PERLIN, *supra* note 22, § 2C-5.2, at 414-15 (2d ed. 1998).

104. *See id.*, § 2A-4.5, at 152-57 (citing cases).

105. *See, e.g.,* *People v. Stevens*, 761 P.2d 768, 775 n.12 (Colo. 1988) (relying on presumed sexually inappropriate dress and manner—posing “provocatively in front of a mirror in the [hospital] day room in a tight-fitting leotard”—as sufficient evidence of a patient’s danger to self to support his order of commitment); *State v. Hass*, 566 A.2d 1181, 1185 (N.J. Super. Ct. Law Div. 1988) (holding that a patient’s sexual fantasies can serve as confirmatory evidence supporting his need for treatment under the state Sexual Offenders Act).

106. *See* ROBERT M. LEVY & LEONARD S. RUBENSTEIN, *THE RIGHTS OF PEOPLE WITH MENTAL DISABILITIES* 74 (1996); *see generally* 1 PERLIN, *supra* note 22, § 2B-3.1, at 197-201 (2d ed. 1998) (citing cases).

107. David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2 (1973). For recent cases in the death penalty context, *see* Michael L. Perlin, “*The Executioner’s Face Is Always Well-Hidden*”: *The Role of Counsel and the Courts in Determining Who Dies*, 41 N.Y.L. SCH. L. REV. 201, 204-07 (1996).

108. *See generally* Michael L. Perlin et al., *Therapeutic Jurisprudence and the Civil*

no follow-up litigation seeking to give life to, implement, or construe these laws.<sup>109</sup> Moreover, trial courts regularly refuse to consider right to treatment issues in the context of individual commitment cases.<sup>110</sup> Congress has passed the Americans with Disabilities Act, and, in doing so, buttressed the substantive anti-discrimination provisions of the Act with findings that appear to provide—at the least—Equal Protection safeguards for covered individuals.<sup>111</sup> Yet, there has been literally only a handful of cases brought by institutionalized (or formerly-institutionalized) mentally disabled persons to effectuate these provisions, and even fewer that have granted relief.<sup>112</sup> Again, *Olmstead v. L.C.* may augur a bold new direction, but it is far too soon to determine whether its “potential promise will be fulfilled.”<sup>113</sup>

Supreme Court cases are also routinely ignored, sometimes for decades. In 1990, in *Zinermon v. Burch*, the Court ruled that there must be some sort of a due process hearing (albeit a modest one) before a patient’s voluntary application for hospitalization could be accepted.<sup>114</sup> Yet, only a few states have amended their court rules or voluntary admission statutes to comply with *Zinermon*’s mandate and, again, there has been virtually no follow-up litigation.<sup>115</sup> Even more astonishingly, in 1972—a full quarter-century ago—the Court ruled in *Jackson v. Indiana*<sup>116</sup> that an incompetent-to-stand-trial criminal defendant could not be housed indefinitely in a maximum security forensic facility because of that status unless it appeared likely that he or she would regain competence to stand trial within the “foreseeable future.”<sup>117</sup> Yet, twenty-five years later, nearly half the states had still not implemented

*Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?* 1 PSYCHOL. PUB. POL’Y & L. 80 (1995); 2 PERLIN, *supra* note 22, § 11.03, at 953-58 (1989) (citing statutes).

109. Note the paucity of subsequent developments in 2 PERLIN, *supra* note 22, § 11.03 at 283 (1998 Cum. Supp.).

110. See 1 Perlin, *supra* note 22, 2C-8.1, at 507-09 (2d ed. 1998) (citing cases).

111. Perlin, *supra* note 28, at 948-49. Cf. *Olmstead v. L.C.*, 119 S. Ct. 2176 (1999), discussed *supra* text accompanying notes 50-54.

112. See generally 2 PERLIN, *supra* note 22, § 6.44A, at 176-90 (1998 Cum. Supp.), and *id.* at nn. 473.43-473.43z23 (citing cases).

113. PERLIN, *supra* note 1, ch. 8 (forthcoming 1999) (manuscript at 54, on file with author).

114. 494 U.S. 113 (1990).

115. See 1 PERLIN, *supra* note 22, § 2C-7.2a, at 490 n.1373 (2d ed. 1998) (citing cases).

116. 406 U.S. 715 (1972).

117. *Id.* at 738.

*Jackson*.<sup>118</sup> It is probably *not* coincidental that the only four academics who have ever written about this scandal are among the contributors to the symposium that served as the precursor to this journal issue.<sup>119</sup>

Criminal court prosecutors compound the problems. “Find this man not guilty by reason of insanity,” they warn jurors, “and he will walk away a free man after a few weeks of ‘country club’ treatment.”<sup>120</sup> The reality, of course, is far different. Insanity acquittees spend almost double the amount of time in maximum security forensic settings that defendants convicted of like charges serve in prison.<sup>121</sup> In one study, California defendants found NGRI in cases involving nonviolent offenses were confined for periods *nine* times as long as individuals found guilty of similar offenses.<sup>122</sup> The Supreme Court decision in *Shannon v. United States*—holding that, as a matter of federal criminal procedure, the defendant had no right to have the jury informed about the possible consequences of an NGRI verdict<sup>123</sup>—will only increase the amount of pretextuality in decisionmaking in this area of the law.<sup>124</sup> And insanity defense matters are but a small fraction of criminal cases in which sanism and pretextuality flourish.<sup>125</sup>

This area of the law is further infected by an excess of finger-pointing and blame-attributing. Some clinicians and hospital administrators are quick to point their fingers at “the law” to explain many of the failures of

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118. See Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 LAW & HUM. BEHAV. 39, 48 (1992) (citing *inter alia*, Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921, 940 (1985)).

119. See Meloy & Morris, *supra* note 22; Perlin, *supra* note 118; Winick, *supra* note 118.

120. See, e.g., Perlin, *The Borderline*, *supra* note 90, at 1406 (discussing, *inter alia*, *People v. Aliwoli*, 606 N.E.2d 347, 352 (Ill. App. Ct. 1992)).

121. PERLIN, *supra* note 16, at 110 (citing, *inter alia*, Joseph H. Rodriguez, et al., *The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders*, 14 RUTGERS L.J. 397, 403-04 (1983)).

122. PERLIN, *supra* note 16, at 110-11 (citing HENRY STEADMAN ET AL., REFORMING THE INSANITY DEFENSE: AN ANALYSIS OF PRE-AND POST-HINCKLEY REFORMS 58-61 (1993)).

123. 512 U.S. 573 (1994).

124. For recent cases, see 3 PERLIN, *supra* note 22, § 15.16A, at 510-11 n.372.42 (1998 Cum. Supp.).

125. See, e.g., Michael L. Perlin & Keri K. Gould, *Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines*, 22 AM. J. CRIM. L. 431, 451 (1995) (“in each [reported Federal Sentencing Guidelines case in which mental disability was an issue], without exception, the U.S. Attorney’s Office opposed the use of mental disability as a mitigating factor”). On the ways that jurors process social science evidence (and mitigating mental disability evidence) in death penalty cases, see Perlin, *supra* note 107, at 216-21; Perlin, *Sanist Lives*, *supra* note 57, at 260-65.

institutional mental health care. Staff at major inpatient psychiatric hospitals tell the press that their “hands are tied,” and that they are unduly frustrated by laws that are overly-protective of patients’ civil liberties but that ignore (or are counter-productive to) patients’ clinical and medical needs. These allegations have become the “script” of much contemporary mental disability law policy. Yet, in addition to being inflammatory and confrontative, they are also largely baseless. A while ago, I received a phone call from the editorial desk of a major metropolitan newspaper, asking about a local cause celebre—an apparently randomly violent, former mental patient who was allegedly victimizing a block of a New York City neighborhood well known for its traditional adherence to liberal social causes.<sup>126</sup> My caller told me that, in answer to his question as to why this individual was not committable in a state psychiatric hospital, he had been told by hospital staff that such commitment required proof of a “recent overt act.”

I told him that that was the standard in several jurisdictions, but it was emphatically not a prerequisite for commitment in his state (and, in fact, that test had been specifically rejected by the state’s appellate courts).<sup>127</sup> Indeed, the New York courts had made it eminently clear that a recent overt act is not required, and a challenge to that standard had failed in the federal appellate courts over a decade earlier.<sup>128</sup> My caller was quite reasonably perplexed as to why he had been given this misinformation.<sup>129</sup>

So what explanation is there for all of this? There is, in short, often a huge gap between what mental disability law appears to be, and what it actually is. This gap is widened further by the reality that we—lawyers, professors, psychologists, psychiatrists, expert witnesses, clinicians,

126. See *Seltzer v. Hogue*, 594 N.Y.S.2d 781 (App. Div. 1993).

127. See, e.g., *In re Scopes*, 398 N.Y.S.2d 911, 913 (App. Div. 1977).

128. [W]e are of the opinion that such a requirement [of an overt act] is too restrictive and not necessitated by substantive due process. The lack of any evidence of a recent overt act, attempt or threat, especially in cases where the individual has been kept continuously on certain medications, does not necessarily diminish the likelihood that the individual poses a threat of substantial harm to himself or others.

*Id.* at 913. See also, *Project Release v. Prevost*, 722 F.2d 960, 973 (2d Cir. 1983).

129. I discuss the implications of this interchange extensively in Michael L. Perlin, *Back to the Past: Why Mental Disability Law “Reforms” Don’t Reform*, 4 CRIM. L.F. 403, 403-05 (1993) (book review of JOHN Q. LA FOND & MARY L. DURHAM, *BACK TO THE ASYLUM: THE FUTURE OF MENTAL HEALTH LAW AND POLICY IN THE UNITED STATES* (1992)).



jurors, the press, the public—know very little about what *really* happens in most mental disability law cases.

I have begun to write regularly—relentlessly, I might even say—about sanism and pretextuality, so as to seek to expose their pernicious power, the ways in which two factors infect judicial decisions, legislative enactments, administrative directives, jury behavior, and public attitudes, the ways that these factors undercut any efforts at creating a unified body of mental disability law jurisprudence, and the ways that these factors contaminate scholarly discourse and lawyering practices alike.<sup>130</sup> And I have written to argue that, unless and until we come to grips with these concepts—and their stranglehold on mental disability law development—any efforts at truly understanding this area of the law, or at understanding the relationship between law and psychology, are doomed to failure.

#### IV. THE SYMPOSIUM ARTICLES

The other articles in this symposium issue all sound variations on the same theme—again, some explicitly, some implicitly. Professor Morris’s thoughtful article on defining dangerousness asks specifically, “[W]hy ... is mental disorder the singular focus of our preventive detention decision making?”,<sup>131</sup> and then (graciously) answers, “It is difficult to deny Michael Perlin’s pronouncement that our irrational fear of the mentally disordered—our sanist attitude—incites us to dehumanize them, to use dangerousness as a pretext to exorcise ‘them’ from ‘our’ midst.”<sup>132</sup> Professor Winick carefully applies the therapeutic jurisprudence lens to the involuntary civil commitment hearing, and underscores that the “paternalistic role” of lawyers at such hearings represents sanism and pretextuality, “a deeply ingrained prejudice against those with mental illness, reinforced by stereotypes, and a basic dishonesty in the civil commitment process, shared by judges, lawyers, and clinicians,” turning the adversary process into a “farce and a mockery.”<sup>133</sup> Professor Stefan shows us how the Americans with Disabilities Act responded specifically to centuries of sanism—“the segregation and stigmatization of people with [mental] disabilities”<sup>134</sup>—but also points out how state mental health systems continue to be founded on pretexts (about the availability of treatment to persons

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130. See generally PERLIN *supra* note 1.

131. Morris, *supra* note 4, at 97.

132. *Id.* at 98.

133. Winick, *supra* note 3, at 41.

134. Stefan, *supra* note 6, at 136.

institutionalized because of mental illness), and how these pretexts and the concomitant “[t]otal separation and segregation” of persons with mental disabilities lead to an environment in which additional sanism festers.<sup>135</sup>

Professors Behnke and Saks carefully read the impressive body of literature produced by the MacArthur Network on Law and Mental Health and stress a finding that most of the public would find astonishing: that, in determining capacity to consent to treatment, half of all schizophrenic patients scored in the “non-impaired” range,<sup>136</sup> a figure that flies squarely in the face of the sanist “take” on the capacity (or, I should say, *incapacity*) of persons with mental disabilities to make important decisions, and which exposes the pretextuality of much of our law and practice in this area. Professor Wexler applies the therapeutic jurisprudence lens as a tool for exposing, among other pretexts, the “sham” that exists in many involuntary civil commitment systems,<sup>137</sup> and offers the “right brain” suggestion that our “culture of critique”<sup>138</sup> is at least *partially* to blame for the current dismal state of affairs. And finally, Professor Morse reminds us that sanist stereotyping—about the way “all” persons with mental disabilities act, about the way diagnosis frequently preordains case disposition, about the destructive impact of labeling<sup>139</sup>—leads to bad law (as well as, presumably, bad mental health).

Dr. Haroun’s and Professor Morris’s article is a blueprint for understanding the pretextual basis of much expert testimony. Their indictment of the seductive witness, the avenging witness and others—*deceptive* witnesses all<sup>140</sup>—forces us to rethink the allegedly-empirical bases of much important courtroom testimony in the full range of criminal cases before the courts. Charles Sevilla sets out the ways that the improper use of mental disorders as aggravating factors at the punishment phase of a death penalty case are both sanist and

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135. *Id.* at 145.

136. Saks & Behnke, *supra* note 5, at 111.

137. Wexler, *supra* note 7, at 274-75 (quoting David B. Wexler, *Justice, Mental Health, and Therapeutic Jurisprudence*, in *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* 718-19 (David B. Wexler & Bruce J. Winick eds. 1996)).

138. *Id.* at 264-67

139. Morse, *supra* note 2, at 203.

140. Haroun & Morris, *supra* note 8, 242-44.

pretextual,<sup>141</sup> looking specifically at the testimony of the infamous Dr. Grigson (the so-called “killer shrink”) as an example of pretextual testimony.<sup>142</sup> Professors Bonnie and Polubinskaya offer dramatic proof that politicized state psychiatry in the Soviet Union was “pathological[ly]” pretextual<sup>143</sup> in its misuse of the diagnostic power, its misuse of the commitment power, and its misuse of antipsychotic medications,<sup>144</sup> and then carefully examine more recent developments that offer a “ray of hope” that psychiatric judgments will better reflect “the integrity and independence of the Russian psychiatric profession” in the future.<sup>145</sup> Finally, Professor Slobogin demonstrates that the concept of “amenability to treatment” in juvenile delinquency proceedings is often a shibboleth for a mix of, mostly, incapacitative and retributive concerns,<sup>146</sup> and concludes: “[T]he courts’ application of the factors that are considered relevant to the amenability determination is often pretextual.”<sup>147</sup>

In short, each of the papers—all written from different perspectives about different aspects of the mental disability/institutional legal systems—demonstrate the sanist and pretextual bases of this jurisprudence.

## V. CONCLUSION

Mental disability law is not rational, neutral, or objective.<sup>148</sup> Rather, it is irrational and incoherent, and this irrationality and incoherence disables civil commitment law, institutional treatment law, civil rights law, and criminal procedure law. There are important exceptions—to be found in selected opinions by both United States Supreme Court justices and by other appellate and trial court judges in both the state and federal systems.<sup>149</sup> But they are rare.

Rather, mental disability law is premised on stereotype and prejudice, on typification and on fear. It distorts and it marginalizes, relying

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141. Sevilla, *supra* note 12, at 259-61.

142. *Id.* at 253 n.26.

143. Bonnie & Polubinskaya, *supra* note 10, at 286.

144. *Id.* at 280-83.

145. *Id.* at 298.

146. Slobogin, *supra* note 9, at 301-02.

147. *Id.* at 330.

148. I discuss irrationality and law in Michael L. Perlin, “Stepping Outside (The Box?): Viewing Your Client in a Whole New Light,” (paper presented at Faculty Development Workshop, California Western Law School, Mar. 15, 1999) (on file with author).

149. *See infra* text accompanying notes 160-63.

vividly on the heuristic of the statistically-exceptional but graphically-compelling case of the person with major mental disorder who is randomly violent,<sup>150</sup> and then using false “ordinary common sense” to justify this intellectual reductionism. These sanist distortions are sanitized by pretextual decisionmaking that encourages (at the least, condones) testimonial untruthfulness (often offered under the guise or rubric of a greater “morality”)<sup>151</sup> and that teleologically “cherry picks” social science evidence so as to justify such decisions.<sup>152</sup>

The articles in this symposium each focus on a different subject area, but there is little difference in the ways that courts—and the general public—treat the various substantive topics. Sanist involuntary civil commitment decisionmaking implicates pretextual right to refuse treatment decisionmaking.<sup>153</sup> Sanist assumptions about the relationship between deinstitutionalization and homelessness reflect the demand for pretextual recommitment testimony.<sup>154</sup> Sanist attitudes towards patient sex may lead to pretextual constructions of the Americans with Disabilities Act.<sup>155</sup> And sanism in each and every aspect of the criminal trial process leads to pretextuality at all stages of such litigation.<sup>156</sup>

I am convinced that what I have written about here is only the tip of a very large and ominous iceberg. Decisions as to whom to apprehend for commitment purposes, whom to arrest, whom to turn down for community placement are largely invisible.<sup>157</sup> Untrammelled discretion vested in police officers leads to inexplicable disjunctions in mental

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150. At least 90% of mentally disabled persons never exhibit any risk of violence. See Jeffrey Swanson et al., *Violence and Psychiatric Disorder in the Community: Evidence from the Epidemiologic Catchment Area*, 41 HOSP. & COMMUNITY PSYCHIATRY 761 (1990).

151. See, e.g., Paul Chodoff, *Involuntary Hospitalization of the Mentally Ill as a Moral Issue*, 141 AM. J. PSYCHIATRY 384, 388 (1984).

152. The Supreme Court’s choice of sources in *Youngberg v. Romeo*, 457 U.S. 307, 316-17 (1982) (limiting the scope of a constitutional right to treatment) is a glaring example of this phenomenon; see generally Perlin et al., *supra* note 108.

153. See, e.g., 1 PERLIN, *supra* note 22, § 2D-2.1, at 530-33 (2d ed. 1998).

154. See, e.g., Perlin, *supra* note 15, at 128-31.

155. See, e.g., Perlin, *supra* note 28; see generally Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?* 20 N.Y.U. REV. L. & SOC. CHANGE 302 (1993-94).

156. See, e.g., Perlin, *supra* note 26 (incompetence to stand trial); Perlin, *The Borderline*, *supra* note 90 (insanity defense); Perlin, *supra* note 107 (death penalty).

157. See, e.g., Linda Teplin, *The Criminality of the Mentally Ill: A Dangerous Misconception*, 142 AM. J. PSYCHIATRY 676 (1985) (persons with mental disability more likely to be arrested than persons without mental disability for similar behavior).

disability law developments.<sup>158</sup> And the general unavailability of competent, trained counsel assures that this invisibility will continue unabated.

Several years ago, I concluded my book on the insanity defense with a series of recommendations:

First, we must discuss the underlying issues openly. We must openly discuss sanism, identify it, and explain its pernicious impact on *all* aspects of the legal system. System decisionmakers must regularly engage in a series of “sanism checks” to ensure—to the greatest extent possible—a continuing conscious and self-reflective evaluation of their decisions to best avoid sanism’s power. As part of this strategy, we must educate judges and legislators and other policy makers as to the roots of sanism, the malignancy of stereotypes and the need to empathically consider alternative perspectives.

Sanism infects all aspects of the insanity defense process: legislators, judges, jurors, and counsel, as well as the media that reports on insanity defense cases. Each and every one of these participants bears some culpability in our current state of affairs, and all must bear the burden of eradicating sanist thought and behavior.

At the same time, courts employ pretextuality as a “cover” for sanist-driven decisionmaking. Judges must acknowledge the pretextual basis of much of the case law in this area and consciously seek to eliminate it from future decision making.

Second, it is essential that the issues discussed here be added to the research agendas of social scientists, behaviorists and legal scholars. . . . Researchers must carefully examine case law and statutes to determine the extent to which social science is being teleologically used for sanist ends in insanity defense decisionmaking. They must also study the empirical database that rebuts the empirical and behavioral sanist myths, and must confront this discontinuity in their writings. In addition, researchers must enter the public arena, and share their research findings with legislators, the media and the public.

These inquiries will help illuminate the ultimate impact of sanism on this area of the law, aid lawmakers and other policymakers in understanding the ways that social science data is manipulated to serve sanist ends, and assist in the formulation of both normative and instrumental strategies that can be used to rebut sanism in insanity defense decisions. . . .

[W]e need to consider carefully the burden of heuristic thinking. Judges, like

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158. Compare, e.g., the factual settings in *Addington v. Texas*, 441 U.S. 418 (1979), with *Jones v. United States*, 463 U.S. 354 (1983). *Addington*—whose case ultimately settled the question of the constitutional burden of proof quantum in *civil* cases—had originally been apprehended following an alleged “assault by threat” on his mother. *Addington*, 441 U.S. at 420. *Jones*—whose case ultimately gave constitutional sanction to providing *insanity acquittees* with fewer procedural due process protections in a retention hearing—had originally been apprehended after he allegedly attempted to shoplift a jacket in a downtown Washington, D.C. department store. *Jones*, 463 U.S. at 359. *Addington*’s acts appear to have been more serious (and more “dangerous”) than did *Jones*’s; yet, for undisclosed, and unarticulated extra-judicial reasons, *Addington* was brought into the mental health system while *Jones* was arrested and thus brought into the criminal justice system.

the rest of us, use simplifying cognitive heuristic devices in their thinking. . . . Recent scholarly literature has begun to carefully assess the impact of heuristics on Supreme Court decisionmaking; we need to apply this same thinking more comprehensively so as to assess behavior of expert witnesses, counsel, mental health professionals and jurors. . . .

Mental disability is no longer—if it ever was—an obscure subspecialty of legal practice and study. Each of its multiple strands forces us to make hard social policy choices about troubling social issues—psychiatry and social control, the use of institutions, informed consent, personal autonomy, the relationship between public perception and social reality, the many levels of “competency,” the role of free will in the criminal law system, the limits of confidentiality, the protection duty of mental health professionals, the role of power in forensic evaluations. These are all difficult and complex questions that are not susceptible to easy, formulaic answers. When sanist thinking distorts the judicial process, the resulting doctrinal incoherence should not be a surprise.<sup>159</sup>

To what extent are these prescriptions and proscriptions equally applicable to all mental disability law? It is essential that sanism and pretextuality be exposed—that they be articulated, discussed, debated, and weighed. Participants in the mental disability law system must acknowledge these concepts and must use the “bully pulpits” of the courtroom, the legislative chamber, the public forum, the bar association, the psychology or psychiatry conference, and the academic journals to identify and deconstruct sanist and pretextual behaviors whenever and wherever they occur. Courts have largely been silent in the face of institutionalized sanism and pretextuality in mental disability law cases, and lawyers have been lax in pressing courts on these questions.

That is not to say that courts have been entirely blind. A recent concurrence in a Connecticut Supreme Court insanity defense decision identifies the vividness effect as a factor in developments in that area of the law.<sup>160</sup> Our willful blindness toward new advances in medicine and psychology has been identified as a major culprit in jurisprudential incoherence in a Tenth Circuit case involving a defendant with multiple personality disorder, and the same case identified the sanist myth as to the alleged short stays that insanity acquittees serve following institutionalization.<sup>161</sup> In a case involving a tort committed by a mentally disabled person, the Minnesota Supreme Court noted our degree of skepticism about mental illness when a person “doesn’t look

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159. PERLIN, *supra* note 16, at 440-44 (footnotes omitted).

160. *State v. Wilson*, 700 A.2d 633, 649-50 (Conn. 1997) (Katz, J., concurring).

161. *United States v. Denny-Shaffer*, 2 F.3d 999, 1009, 1021 n.30 (10th Cir. 1993).

sick.”<sup>162</sup> And an Eleventh Circuit judge partially dissenting from an affirmance in a death penalty case pointed out that “a defendant’s unsuccessful attempt to raise an insanity defense positively correlates, with a death penalty verdict.”<sup>163</sup> But these cases are the exception; generally, sanism and pretextuality are as invisible in the courtroom as they are to the public at large.

Heuristics and ordinary common sense are the *lingua franca* of mental disability law.<sup>164</sup> They set the stage for a system in which sanism and pretextuality can fester. System participants must listen with a keen ear for the uses of these distortive devices, and must anticipate their use in appellate arguments, in legislative hearings, and in public fora.

It is equally essential that researchers begin to study the questions I have raised here in an effort to develop instruments and tools that can effectively measure sanism and root out pretextuality.<sup>165</sup> And it is essential that lawyers—both occasional counsel and regularly-appointed counsel—begin to confront sanism and attack pretextuality as part of their advocacy role. It is also essential that state-of-the-art research currently being published by the MacArthur Network be read carefully from this perspective in an effort to incorporate these insights into a new jurisprudence. And it is just as essential that scholars locating themselves in the school of therapeutic jurisprudence integrate sanism and pretextuality analyses into their work.<sup>166</sup>

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162. *State Farm Fire & Casualty Co. v. Wicks*, 474 N.W.2d 324, 327 (Minn. 1991).

163. *Waters v. Thomas*, 46 F.3d 1506, 1535 (11th Cir. 1995) (Clark, J., concurring in part and dissenting in part).

164. See Perlin, *supra* note 17; Perlin, *supra* note 60; Perlin, *Psychodynamics*, *supra* note 61.

165. The MacArthur Research Network has recently developed a variety of new empirical testing instruments to study, inter alia, questions of competence, consent, and coercion. See, e.g., *VIOLENCE AND MENTAL DISORDER: DEVELOPMENTS IN RISK ASSESSMENT* (John Monahan & Henry Steadman eds., 1994).

166. Perlin, *supra* note 58. “Therapeutic jurisprudence” studies the role of the law as a therapeutic agent, recognizing that substantive rules, legal procedures and lawyers’ roles may have either therapeutic or antitherapeutic consequences, and questioning whether such rules, procedures, and roles can or should be reshaped so as to enhance their therapeutic potential, while not subordinating due process principles. See, e.g., Michael L. Perlin, “Where the Winds Hit Heavy on the Borderline”: *Mental Disability Law, Theory and Practice*, “Us” and “Them,” 31 *LOY. L.A. L. REV.* 775, 782 (1998), (discussing, inter alia, *THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT* (David B. Wexler ed., 1990); *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (David B. Wexler & Bruce J. Winick eds., 1991); *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* (David B. Wexler & Bruce J. Winick eds., 1996); *THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW* (Bruce J. Winick ed., 1998); David B. Wexler, *Putting Mental Health Into Mental Health Law: Therapeutic Jurisprudence*, 16 *LAW & HUM. BEHAV.* 27 (1992); David B. Wexler,

My final recommendation in the insanity defense book was that “we need to integrate insanity defense insights into all aspects of mental disability law.”<sup>167</sup> I believe the same forces that motivate decision making in insanity defense law motivate decisionmaking in *all* of mental disability law. And the “hard policy choices” that must be made in *every* aspect of this area of law cannot be made rationally and coherently if our thinking is to be blunted by sanism and pretextuality.

The daily press illuminates these issues. An article in the *Philadelphia Inquirer*, for instance, promised a discussion of recent plans to close Haverford State Hospital and move some of its patients to nearby Norristown State Hospital.<sup>168</sup> The spin of the story was this: Norristown is “employment-starved,” and the transfer of patients would create about 270 mental-health jobs in an economically “beleaguered” town. Yet, “no one here,” according to the story, “wants this to happen.” Said the borough Planning Commission chairwoman:

“They defecate in the alleys. They’re shadow boxing . . . talking to themselves and fighting with that [imaginary person]. If they’re not taking their medication, they can be quite violent.”<sup>169</sup>

She continued: “I’m for NIMBYism this time (using the acronym for Not In My Back Yard). It’s terrible. I just want them to go right back to where they came from.”<sup>170</sup> And a local businesswoman added, “Sixty percent of my customers are whacked . . . and are either on some kind of medication or not taking it.”<sup>171</sup> I cringed, of course, but wasn’t particularly surprised.

Of course, had an interviewee used a common derogatory epithet to describe blacks or women or gays or Jews or lesbians, a conscientious copy editor would have caught it, and replaced it with some version of “[expletive deleted].” But “whacked” was alright, because, somehow, to speak of mental patients this way was not seen as offensive or troubling to the same copy editor. And there was no question as to the authority

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*Applying the Law Therapeutically*, 5 APPLIED & PREVENTIVE PSYCHOL. 179 (1996); David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL’Y & L. 220 (1995); 1 PERLIN, *supra* note 22, § 2D-3, at 534-41 (2d ed. 1998); *Bibliography of Therapeutic Jurisprudence*, 10 N.Y.L. SCH. J. HUM. RTS. 915 (1993).

167. PERLIN, *supra* note 16, at 443.

168. Scott Cech, *In Norristown, Lamenting the Plan for More State Patients*, PHILA. INQUIRER, Sept. 8, 1997, North ed., at B1. I read this article, for what it’s worth, waiting to pick my son up from his drum lesson at A-Z Music Studio, Morrisville, PA.

169. *Id.*

170. *Id.*

171. *Id.*



of the Planning Commission chairwoman to correlate failure (or refusal) to take medication with violence. It was simply accepted as a “given,” and the story continued in its predictable way. I have little doubt that a significant percentage of the members of the bar and the bench in the same town would endorse each of these assertions and attitudes.

A story in the *Ft. Lauderdale Sun-Sentinel*, headlined, *Mentally Ill Fall Through Cracks in Law*,<sup>172</sup> dealt with the frustration that Florida county judges felt because of their inability to order that certain mentally ill defendants charged with misdemeanors receive mental health treatment. In one case, the trial judge sentenced a defendant (arrested for being a disorderly person) to the county jail for a 179-day contempt term (the maximum allowed before the defendant’s right to a jury trial would apply) as a means of assuring that he receive some mental health treatment. According to the article: “[The trial judge] said the law left him no avenue to [order the defendant to a mental hospital for treatment] and [he thus] had no choice but to try to get [the defendant] treatment “through the back door,” the jail’s psychiatric unit.”<sup>173</sup>

Here, the contempt sentence was clearly pretextual; the defendant had cursed at the judge in court, but the story makes it clear that that fact simply gave the judge a “trigger” to impose a relatively-lengthy misdemeanor sentence *solely* as a means of mandating mental health treatment. No one interviewed in the story questioned the propriety of manipulating the criminal law in this way.

In mental disability law, sanist attitudes “trump” all efforts at the creation of a rational, coherent, structured jurisprudence. And pretextual decisions “trump” the application of constitutional principles and of constitutionally-inspired (or constitutionally-compelled) legislation.

I selected the specific lyric for my title because mental disability law has too long been based on “half-wracked prejudice;” prejudice based on “lies that life is black and white.” Mental disability law is still all-too-often treated by the academy as an abandoned stepchild of criminal law or family law or health law. Professor George Fletcher expressed his disbelief that there was *any* “important article that’s been published suggesting, clarifying, social science, psychoanalytic, or sociological perspectives on the criminal law . . . in a long time.”<sup>174</sup> Judge Harry

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172. SUN SENTINEL, Sept. 14, 1997, at 1B. I wish to thank my mother, Mrs. Sophie Perlin, for her constant vigilance in searching for—and sending me—newspaper clips about mental disability law cases.

173. *Id.* at 4B.

174. David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279, 279 (1993) (quoting Professor George Fletcher, “A Critical Appraisal of Criminal Law and Procedure,” Address at the Teaching Conference on Criminal Law and Criminal Procedure sponsored by the Association of American Law

Edwards argued that there are “too many ‘law and’ scholars,” a category that presumably includes those who write about mental disability law.<sup>175</sup> There is vast array of scholarship—from a dazzling variety of perspectives—upon which I have drawn, but that remains invisible to one of the nation’s most respected law professors and one of its finest appellate judges.

There are hundreds—thousands—of reported decisions each year in mental disability law.<sup>176</sup> The public press is crowded with stories about vivid examples of violent behavior by persons with mental disabilities.<sup>177</sup> And the Supreme Court, like the moth to the flame,<sup>178</sup> remains fleetingly fascinated with all aspects of mental disability law. In the end, though, as applied on a daily basis—in commitment courts, in institutional settings, and in criminal trial calendars—mental disability law remains the prisoner of sanism and of pretextuality.

*My Back Pages*—the source for my title—is a treasure-trove of imagery and lyricism. In the final verse, Dylan offers this perspective:

Yes, my guard stood hard when abstract threats  
Too noble to neglect  
Deceived me into thinking I had something to protect  
Good and bad, I define these terms  
Quite clear, no doubt, somehow.  
Ah, but I was so much older then, I’m younger than that now.<sup>179</sup>

The threat of sanism and pretextuality is not “abstract,” it is real. Mental disability law *is* “too noble to neglect.” Our reliance on prejudice

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Schools (May 16-21, 1987)).

175. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 50 (1992). *But see*, Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191 (1992):

For a discussion of practical interdisciplinary scholarship in the area of mental health law, see David B. Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship*, 11 BEHAV. SCI. & L. 17 (1993). Professor Wexler analyzes a number of articles—directed to judges, legislators, and other public decisionmakers—that address concrete problems in mental health law.

*Id.* at 2196 n.20.

176. Compare PERLIN, *supra* note 22 (1997 Cum. Supp.) with *id.* (1998 Cum. Supp.).

177. See, e.g., Perlin, *Political World*, *supra* note 90, at 14-15 (reporting on searches of NEXIS NEWS databases).

178. See Perlin, *supra* note 43, at 605.

179. DYLAN, *supra* note 19, at 139.

and stereotype deceives us into thinking that we *do* have “something to protect.” And we try, vainly, to define “good and bad” in terms that are “quite clear.” We fail at this task, and we fail miserably, because of the thrall in which we are held by sanism and pretextuality. If, and it is a *very* big “if,” we are ever able to loosen its grip on us and on our jurisprudence, then we all will truly be—in spirit at least—“younger than that now.”